

(2012) 10 GUJ CK 0031
In the Gujarat High Court
Case No : Second Appeal No. 5 of 1993

Becharji Bapuji Thakor and Others	Vs	APPELLANT
Arjanji Saluji Thakor and Others		RESPONDENT

Date of Decision : 18-10-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100
Contract Act, 1872 — Section 69
Transfer of Property Act, 1882 — Section 92

Citation : AIR 2013 Guj 37

Hon'ble Judges : C.L. Soni, J

Bench : Single Bench

Advocate : K.B. Pujara, for the Appellant; K.H. Baxi, for the Respondent

Final Decision : Allowed

Judgement

C.L. Soni, J.—This second appeal under S. 100 of the Code of Civil Procedure, 1908 is at the instance of the plaintiffs, who had preferred

Regular Civil Suit No. 3 of 1980 in the Court of the learned Civil Judge (Junior Division), Kalol (N.G.) praying for partition of the suit property,

which was in possession of the defendants/co-mortgagors, who redeemed the mortgage of the property, and for passing necessary order for one

half share in the property with possession. The case of the plaintiffs in the suit is that the suit property was ancestral property and was mortgaged

with one Shri Shah Kacharadas Sakalchand on 27.09.1902 by taking Rs. 981.00 and thereafter, by accepting further amount of Rs. 362.00, one

more deed of mortgage was executed on 15.6.1934, that the plaintiffs have 1/2 share in the suit land and the defendants without informing the

plaintiffs redeemed the mortgaged property, that when on 1.7.1978 the plaintiffs requested the defendants to also get their names entered into the

revenue records, the defendants did not give any heed to the request of the plaintiff and, therefore, the plaintiffs had to make an application to the

Talati of the village on 7.7.1978 and on such application, when the Talati issued notice to the defendants, the defendants resisted the application of

the plaintiffs denying that the suit property was mortgaged, that the dispute as regards entry was taken before the Deputy Collector and the Deputy

Collector held that the dispute between the parties was of civil nature and the parties should get the dispute resolved through Civil Court. The

plaintiffs have therefore filed suit to get their 1/2 share in the suit property.

2. The suit of the plaintiff was resisted by the defendants by filing written statement at Exh. 12 stating that it was not correct that the mortgage was

redeemed without informing the plaintiffs, that at no point of time, the suit property was mortgaged with Shah Sakalchand, that the defendants had

no knowledge about the execution of deed dated 15.6.1934, that after the death of common ancestor Shri Godadji, the suit property had come to

the share of the defendants and thus, the defendants had become absolute owner of the suit property, that the defendants had then continued to be

in possession of the suit property, that the suit property was then divided into different blocks, that the suit property was earlier running in the name

of the forefathers of the parties but when the suit property came in the share of the defendants, the entry in revenue record came to be mutated in

their names, that the suit of the plaintiffs was time barred, that even if the suit property was mortgaged as alleged, the suit for redemption of

mortgage would be time barred, that no cause of action has arisen for the plaintiffs to file the suit for the relief claimed in the suit.

3. On the basis of the pleadings, learned trial Judge framed issues at Exh. 27 and the main issues were to the effect that whether the suit property

was ancestral property and whether the suit property was mortgaged with Shah Kacharadas Sakalchand being the guardian of Mafatlal

Tarbhovandas for an amount of Rs. 981.00 and as to whether there was further execution of mortgage deed dated 15.6.1934 with the said person

by taking more amount of Rs. 362.00.

4. On the basis of the evidence available, the learned trial Judge came to the conclusion that the suit property was ancestral property, and

mortgaged by the forefathers of the parties. The mortgage was then redeemed

and the suit property came in the possession of the defendants as co-mortgagors and co-owners of the property. Learned trial Judge found that the suit for partition was within the time limit and thus, allowed the suit and ordered the defendants to give one half share with possession to the plaintiffs on plaintiffs paying their contribution of the mortgage amount to the defendants.

5. The defendants challenged the above judgment and decree by filing Regular Civil Appeal No. 50 of 1992 in the Court of the learned District

Judge, Mehsana. Before the learned appellate Judge, the only issue focused and argued by both the parties was whether the suit filed by the

plaintiffs was time barred or not. The learned appellate Judge came to the conclusion that since the co-mortgagor redeemed the mortgaged

property, he stepped into the shoes of mortgagee and for non-redeeming co-mortgagor, such redeeming co-mortgagor was mortgagee for all

purposes and, therefore, limitation for the purpose of filing the suit by non-redeeming mortgagor to get back his share in the property would be

reckoned from the date of mortgage. The learned appellate Judge, for this purpose, relied on the decision of Division Bench of this Court in the

case of Saiyed Abdul Raheman Saiyed Noormohmad (Decd.) through his Heirs Saiyed Mohyddin Saiyed Abdul Rehman and Others Vs.

Nizamuddj N. Sarfuddin and Others, and held that the period of limitation for redemption of mortgage by non-redeeming mortgagor having been

expired, the learned trial Judge has committed error in allowing the suit. Thus, only on the ground of suit being time barred, learned appellate Judge

allowed the appeal and quashed and set aside the judgment and decree passed by the learned trial Judge and consequently dismissed the suit of

the plaintiff by judgment and decree dated 12.10.1992. It is this judgment and decree which is under challenge before this Court in this appeal.

6. This appeal was admitted by order dated 16.3.1993 on the following substantial questions of law:--

(1) Whether in the facts and circumstances of the case, the Lower Appellate Court has substantially erred in law in holding that the plaintiffs had to

file the suit within the limitation prescribed for a suit for redemption of original mortgage and not from the date of redemption by redeeming co-

mortgagors (defendants)?

(2) Whether in the facts and circumstances of the case, the Lower Appellate Court has substantially erred in law in holding that for the mortgagor

whose share had been redeemed by other co-mortgagor redeeming co-mortgagor is a mortgagee for all purposes?

(3) Whether in the facts and circumstances of the case, the Lower Appellate Court has substantially erred in law in holding that the suit is barred by limitation?

7. I have heard learned advocates for the parties. Mr. Kaushik B. Pujara, learned advocate for the appellant has submitted that the judgment of the

Division Bench of this Court relied on by the learned appellate Judge does not hold good any longer in view of the subsequent declaration of law

as regards filing of the suit for partition by co-mortgagor after another co-mortgagor redeemed the mortgaged property. He submitted that the suit

by the co-mortgagor against another co-mortgagor who redeemed mortgage could only be a suit for partition and for such suit, limitation would be

reckoned from the date on which the non-redeeming co-mortgagor is denied his right of partition in the suit property by the redeeming co-

mortgagor. He submitted that the learned appellate Judge has committed serious error in holding that the right of the non-redeeming co-mortgagor

would be to get the redemption of his part of the mortgaged property and, therefore, even if the redeeming co-mortgagor has got entire property

by paying full amount of mortgage, still, redeeming co-mortgagor would be, for all purposes, a mortgagee. He submitted that such view cannot

stand scrutiny of law in view of the decision of Hon''ble the Supreme Court in the case of Krishna Pillai Rajasekharan Nair (D) by Lrs. Vs.

Padmanabha Pillai (D) by Lrs. and Others, . He submitted that since the issue as regards the limitation for the suit for partition by non-redeeming

co-mortgagor is answered by the above said decision, such issue is now no longer res-integra. He submitted that as per the said decision of the

Hon''ble Supreme Court, limitation for suit for partition would be reckoned from the date the cause of action arising for such non-redeeming co-

mortgagor and such cause of action could be from the date when right of such non-redeeming co-mortgagor was denied by redeeming mortgagor.

He pointed out that in the facts of this case, as established by the plaintiffs by evidence, right of the plaintiffs for partition was denied on 1.7.1978

when the defendants refused the request of the plaintiff to get their names included in the revenue record as co-sharer in the ancestral property.

Learned advocate Mr. Pujara submitted that if the limitation is reckoned for the purpose of suit for partition at the instance of the plaintiffs from the

said date and since the suit was filed within the period of three years from the said date, the suit of the plaintiffs was within the time limit. He thus

urged that learned appellate Judge having committed serious error in holding that the suit of the plaintiff was time barred, this appeal is required to

be allowed and the judgment and decree passed by the learned appellate Judge is required to be quashed and set aside and consequently the

judgment and decree passed by the learned trial Judge is required to be restored.

8. In reply, learned advocate Mr. K.H. Baxi for the respondents submitted that in fact, the plaintiffs have miserably failed to prove that the suit

property continued to be ancestral property. He submitted that in fact, after the redemption of the mortgage, the plaintiffs have never come forward

to claim their rights in the suit property. He submitted that the forefathers of the defendants and thereafter the defendants have continued to be in

possession of the suit property as could be seen and found from the entries made in the revenue record. He submitted that because of such long

possession, inference could be drawn that the rights of the plaintiffs were extinguished and the suit which was filed in the year 1980 was clearly

time barred even for the purpose of partition of the suit property. He further submitted that in fact, the learned appellate Judge has rightly come to

the conclusion that the suit of the plaintiff was time barred because at the relevant time when the appeal was decided, the view of the Division

Bench of this Court in the case of Saiyad Abdulrehman Saiyed Noormohmad (supra) held good and therefore the learned appellate Judge has not

committed any error in relying upon such decision of the Division Bench of this Court. He therefore submitted that no error could be found with the

decision of the learned appellate Judge and the learned appellate Judge has rightly allowed the appeal on the ground that the suit of the plaintiff was

clearly time barred. He therefore urged to dismiss the appeal.

9. Having heard the learned advocates for the parties and having perused the judgment and decree passed by the Courts below as also the records

and proceedings, it appears that the learned trial Judge has, on appreciation of

the evidence, found that the suit property was ancestral property and as regards this finding of fact, there is no dispute.

10. It is required to be noted that the parties had in fact presented their case before the courts below that the common ancestor was one Shri

Godadji and after the demise of Godadji, the suit property had gone to the forefathers of the parties who had at the relevant time mortgaged the

suit property. In the context of the above said fact situation and on the basis of the evidence, the learned trial Judge has come to the conclusion that

the mortgage having been redeemed by the forefathers of the defendants even though the suit property continued to be in possession of the

defendants, they would be in the possession as co-sharer of the property. The learned trial Judge therefore, found that in such property held by the

defendants, the plaintiffs had equal share. On the basis of such finding, the learned trial Judge passed the judgment and decree for giving one half

share from the suit property in favour of the plaintiffs.

11. The learned trial Judge has also examined the issue of limitation and has recorded that in respect of redeemed property in the hands of

defendants, when the request of the plaintiffs to give one half share in the property was denied in 1978, limitation would start from the year 1978

and, therefore, the suit filed by the plaintiff in the year 1980 was within the time limit. The learned appellate Judge however came to the conclusion

that for all purposes, co-mortgagor who redeemed property would be mortgagee against the non-redeeming co-mortgagor and if the non-

redeeming co-mortgagor wanted to get his right in the suit property, it was for him to pay up the amount of his contribution of share of mortgage

amount by filing the suit for redemption of mortgage within the time limit provided under the law for redemption of mortgage. Such view of the

learned Appellate Judge was based on the decision of Division Bench of this Court.

12. The above view of the learned appellate Judge runs counter to well settled law that even if one of the co-sharer of property who is co-

mortgagor redeems entire mortgaged property by paying full amount of mortgage money, then also, right of non-redeeming co-mortgagor remains

for partition of the suit property to get his share in the suit property. Once the property is free from clutches of mortgagee at the instance of one of

the mortgagors, it does not remain to be mortgaged property. In view of this position, right available to the non-redeeming co-mortgagor is for

partition of the property and the limitation for filing of suit for partition would be on the basis of cause of action arising for filing such suit for

partition. In the case on hand, plaintiffs have clearly established on admitted evidence that the plaintiffs right of partition was denied by the

defendants in the year 1978. Learned trial Judge has recorded that the plaintiffs' right of partition was denied in the year 1978. Learned trial Judge

has arrived at such finding of fact on the basis of evidence of plaintiff coupled with the evidence of the witnesses in support of the plaintiffs.

Therefore, in my view, learned appellate Judge ought not to have disturbed such finding of fact reached by the learned trial Judge. In fact, very

wisely the plaintiffs have prayed for partition of the suit property and not for redemption. It appears that the plaintiffs were aware about their right

from the very beginning to ask for partition only and not for redemption of the suit property.

13. In the case of Krishna Pillai Rajasekharan Nair (D) by Lrs. Vs. Padmanabha Pillai (D) by Lrs. and Others, , relied on by learned advocate Mr.

Kaushik B. Pujara, Hon''ble Supreme Court has held and observed in paragraphs 21 and 22 as under:--

21. The present one is a case of subrogation by the operation of law and hence governed by the first para of Section 92 of the Transfer of

Property Act. The provision recognizes the same equity of reimbursement as underlies Section 69 of the Indian Contract Act that ""a person who is

interested in the payment of money, which another is bound by law to pay, and who therefore pays it, is entitled to be reimbursed by the other"".

Such a payment made, carries with it, at times, an equitable charge. Section 92 of the Transfer of Property Act does not have the effect of a

substitute becoming a mortgagee. The provision confers certain rights on the redeeming co-mortgagor and also provides for the remedies of

redemption, foreclosure and sale being available to the substitute as they were available to be substituted. These rights the subrogee exercises not

as a mortgagee reincarnate but by way of rights akin to those vesting in the mortgagee. The co-mortgagor can be a co-owner too. A property

subject to mortgage is available as between co-mortgagors for partition, of course, subject to adjustment for the burden on the property. One of

the co-mortgagors, by redeeming the mortgage in its entirety, cannot claim a right higher than what he otherwise had, faced with a claim for

partition by the other co-owner. He cannot defeat the legal claim for partition though he can insist on the exercise of such legal right claimed by the

other co-owner-cum-mortgagor being made subject to the exercise of the equitable right vesting in him by subrogation.

22. In our opinion, the suit filed in the present case being a suit for partition primarily and predominantly and the relief of redemption having been

sought for only pursuant to the direction made by the High Court in its order of remand, the limitation for the suit would be governed by Article

120 of Limitation Act, 1908. For a suit for partition the starting point of limitation is - when the right to sue accrues, that is, when the plaintiff has

notice of his entitlement to partition being denied. In such a suit, the right of the redeeming co-mortgagor would be to resist the claim of non-

redeeming co-mortgagor by pleading his right of contribution and not to part with the property unless the non-redeeming co-mortgagor had

discharged his duty to make contribution. This equitable defence taken by the redeeming co-mortgagor in the written statement would not convert

the suit into a suit for contribution filed by the non-redeeming co-mortgagor.

14. In light of the above, the judgment and decree passed by the learned appellate Judge is required to be quashed and set aside.

15. In ordinary circumstances, when regular appeal is filed against the judgment and decree passed by the learned trial Judge, the same is always

decided on all issues. However, in this case, the respondents took conscious decision to press their appeal to assail the judgment and decree of the

trial court only on the point of limitation. Such conscious decision appears to be because there was no dispute as regards status of the property

being ancestral property, therefore, there could not have been denial about share of the plaintiffs in the suit property. Therefore, if the suit was

otherwise within the time limit, the plaintiffs would have been entitled to decree for partition. Therefore, the respondents intentionally did not take

up any issue or argument before the learned appellate Judge other than the issue of limitation. Such conscious decision of the respondents is found

recorded by the learned appellate Judge in his judgment itself. Following observations made by learned appellate Judge are reproduced as under:

At the outset, it may be stated that the learned advocates for the parties have concentrated their arguments exclusively on the point that whether the

suit as filed is within the time prescribed by law or not and according to the contention of the defendants, the first mortgage deed took place on

27.9.1902 and another mortgage deed by accepting additional amount of Rs. 362.00 took place on 15.6.34 and, therefore, according to the

defendants considering both the dates as it is, it cannot be said that the suit is filed within the time prescribed by law and it has been contended by

the learned advocate Shri RD Shah for the plaintiffs that time for redemption should be reckoned from the date when it has come to the knowledge

of the plaintiffs that the defendants have redeemed the suit property and, therefore, the period of 30 days should be computed or should be

reckoned from that date and not from the date of original mortgage deed,...

16. If above was not the situation before the learned appellate Judge, in ordinary circumstances, the court would have remanded the matter to the

learned appellate Judge to decide other issues on merits on the basis of the evidence available on record. But as stated above, the respondents

have voluntarily accepted the decision of the learned trial Judge on other issues and chosen to get only the issue of limitation decided by the learned

appellate Judge. Learned advocate Mr. Pujara has also submitted that the respondents have accepted decision of learned appellate Judge of not

adverting to other issues by not filing Cross Objection or separate Second Appeal. Under these circumstances, there is no need to remand the

matter to the learned appellate Judge to decide on merits of the other issues. In result, this appeal is allowed. Judgment and decree dated

12.10.1992 passed by the learned appellate Judge in Regular Civil Appeal No. 50 of 1992 is quashed and set aside and the judgment and decree

passed by the learned trial Judge in Regular Civil Suit No. 3 of 1980 dated 21.3.1992 is ordered to be restored. R&P to be sent forthwith.