(2019) 07 MP CK 0073

In the Madhya Pradesh High Court

Case No : Second Appeal No. 568 Of 1998

Harishchandra S/O Gopaldas Vaishnav APPELLANT

Vs

Vijaykumar S/O Vitthaldas & Others RESPONDENT

Date of Decision : 04-07-2019

Acts Referred:

Limitation Act, 1963 — Article 61(a), 63, 148
Limitation Act, 1963 — Section 16, 17, 30
Transfer Of Property Act, 1882 — Section 58(d), 62, 62(b)

Citation : (2019) 07 MP CK 0073

Hon'ble Judges : Vivek Rusia, J

Bench : Single Bench

Advocate : G.M.Agrawal, Akshay Bhonde

Final Decision : Allowed

Judgement

1. Plaintiff/appellant has filed the present appeal being aggrieved by the judgment and decree dated 11.09.1996 passed in Civil Suit No.2A/94 by IInd

Civil Judge, Class-II, Dhar and judgment and decree dated 15.09.1998 passed by IIIrd Additional District Judge, Dhar in Civil Appeal No.50A/97,

whereby the suit as well as first appeal both have been dismissed on the ground of limitation.

Facts of the case in short are as under.

2. Plaintiff filed a suit for redemption of ground floor of house bearing Municipal No.219 (old No.119), Sadar Bazar, M.G.Road, Dhar (for short 'the

suit house'). The suit house is situated in ground floor of House No.219 & upper floor is in possession of plaintiff. The defendant is using suit house as

a shop. According to the plaintiff, late Kaushalyabai w/o Haridasji was the owner of the suit house which she mortgaged with defendant on

27.06.1953 for a loan of Rs.1,600/-. The aforesaid mortgage was Usufructuary Mortgage. He further pleaded that later on Kaushalyabai executed a

Will dated 15.03.1980 in his favour bequeathing the suit property as he is the son of daughter of Kaushalyabai. Thereafter, she expired on 09.06.1980.

By virtue of the Will dated 15.03.1980, the plaintiff has got right to redeem the suit property. He demanded the documents in respect of the mortgage

deed from the defendant but he did not provide it. Thereafter, he obtained the certified copy of the deed from the Office of Assistant Registrar, Dhar

on 03.09.1987. After getting the certified copy of deed, he served a notice dated 04.09.1987 through his counsel to the defendant for repayment of

loan amount and release of suit house. The defendant submitted a reply on 14.09.1987 denying the entitlement of the plaintiff to redeem the suit

property. Thereafter, the plaintiff filed the suit for redemption on 25.01.1988.

3. After receipt of summons, defendant appeared and filed written statement by submitting that Kaushalyabai took a loan of Rs.1,000/- from his father

and mortgaged the suit house on 02.01.1948 and since then he is in possession of the suit house. In the year 1953, at the time of marriage of her

second daughter, she again took a loan of Rs.600/- and executed the mortgage deed dated 27.06.1953 in his favour for the entire loan of Rs.1,600/-.

He further pleaded that he had spent Rs.4,000/- during the life time of Kaushalyabai for renovation of the suit property. The defendant has further

raised a plea of limitation by submitting that the period of redemption had already been expired during life time of Kaushalyabai and the suit is not

maintainable and liable to be dismissed.

4. On the basis of the pleadings, learned trial Court framed eight issues for adjudication. After appreciating the evidence came on record, learned Civil

Judge has held that the defendant is in possession of the suit house since 02.01.1948. The plaintiff is in possession over the first floor of the suit house

after the death of Kaushalyabai. The trial Court has also found proved that the plaintiff is the owner of the suit house by virtue of WILL of Kaushalya

Bai and entitled to redeem the suit house. However, while answering issue No.6, learned Civil Judge has held that the suit is time barred by virtue of

Article 63 of the Limitation Act. The plaintiff was required to file the suit within a period of 30 years from the date of mortgage on 02.01.1948, hence

vide judgment and decree dated 11.09.1996 the suit has been dismissed.

5. Being aggrieved by the dismissal of the suit, plaintiff preferred civil appeal No.50A/97 and vide judgment dated 15.09.1998 learned A.D.J has also

dismissed the appeal with the finding that the period of 30 years had expired on 01.01.1971. Even the right of Kaushalyabai to claim redemption during

her life time had extinguished. After the death of Kaushalyabai the plaintiff is not entitled for the benefit under section 16 & 17 of the Limitation Act.

6. Being aggrieved by the aforesaid dismissal of the suit, plaintiff filed the present second appeal. Vide order dated 19.11.1999 the appeal has been

admitted for final hearing on the following substantial question of law:

â??Whether the Courts below are justified in holding that the period of limitation for the present suit for redemption would be counted from 2-1-48

and not from 27-6-53 and the grace period of 7 years as provided by Section 30 of the Indian Limitation Act, 1963 would not be available to the

appellant?

7. Shri Agrawal, learned counsel for the appellant submits that the mortgage deed dated 02.01.1948 is not available on record. The terms of the said

deed are not known to the parties. It is also not known whether the said mortgage deed was registered or not. The said mortgage deed was executed

in favour of father of the defendants. The mortgage deed dated 27.06.1953 (Ex.P/5) is a new transaction and the earlier mortgage was merged in the

same, therefore, learned Courts below have wrongly counted the period of limitation started from 02.01.1948. Earlier under the repealed Limitation

Act of 1908 the period of limitation for redemption was provided by Article 148 to be 60 years and now under the new Limitation Act of 1963 the

period as provided by Article 61(a) is 30 years and as per section of the Limitation Act the period of 7 years would be a grace period. The plaintiff

filed the suit on 25.01.1988 and from the date of mortgage deed dated 27.06.1953 the suit was within limitation, hence the suit be decreed in favour of

plaintiff.

CONCLUSION

8. The mortgage deed dated 27.06.1953 (Ex.P/5) was executed for a loan of Rs.1,600/-. Earlier Kaushalyabai took a loan of Rs.1,000/- on 02.01.1948

and executed a mortgage deed in favour of Champalalji, father of the defendants. Thereafter, at the time of marriage of her second daughter she took

another loan of Rs.600/-and executed a registered deed dated 27.06.1953. As per the terms and conditions of the deed the defendant No.1 was not

required to pay rent to Kaushalyabai and she was not required to pay interest to the defendant. The right of redemption has been given to

Kaushalyabai after repayment of the entire loan amount for which no period was prescribed. It is true that earlier the mortgage deed executed in

favour of Champalalji by Kaushalyabai is not on record. The terms and conditions are also not known to the plaintiff as well as the defendant both.

The earlier deed had been merged into the present deed i.e Ex.P/5 dated 27.06.1953 and the loan became Rs.1,600/- for which a fresh mortgage deed

was executed on 27.06.1953 in favour of the defendant. The defendant agreed to return the possession on receipt of the loan amount for which no

period was prescribed in the deed. According to the plaintiff, he has become owner of the suit house by virtue of Will dated 15.03.1980. Learned trial

Court has held that plaintiff has become the owner of the suit property by virtue of the Will and he is entitled to redeem the property. The said findings

have not been challenged by the defendants by filing appeal, therefore, learned trial Court as well as the appellate Court have wrongly held that the

limitation for filing the suit for redemption would start from 02.10.1948 because neither the mortgage deed is available on record nor the terms and

conditions of the deed are available. The earlier loan of Rs.1,000/- had been merged with the subsequent loan of Rs.600/- and for the entire loan of

Rs.1,600/- a fresh deed has been executed between Kaushalyabai and the defendant. The plaintiff filed the suit against the defendant who is the

mortgagee in the deed. The defendant has succeeded the status of mortgagee after the death of Champalalji.

9. Even otherwise, as per section 58(d) of the Transfer of Property Act, the mortgage deed Ex.P/5 is a usufructuary mortgage because mortgagor

delivered the possession of the mortgaged property to the mortgagee and authorized him to retain possession until payment of mortgaged loan amount

and to receive the rent and profit acquiring from the property in lieu of interest. Section 62 gives right of usufructuary to the mortgagor and as per sub-

section (b) of section 62 the mortgagor is entitled to recover the possession when he pays or tenders to the mortgagee the mortgaged money or the

balance or deposits it in the Court. Under Article 61(a) of the Limitation Act, 1963 the suit relating to immovable property by mortgagor to redeem or for recovery of possession of immovable property mortgaged is 30 years from the date when the right to redeem or to recover possession accrues.

The plaintiff tendered repayment of money to the defendant on 04.09.1987 by sending a notice, therefore, the limitation of 30 years would start from

the said date. A similar issue came up for consideration before the Full Bench of Punjab & Haryana High Court in the case of Ram Kishan & others

vs. Sheo Ram & others AIR 2008 Punjab and Haryana 77. The Full Bench has answered the question by holding that in case of usufructuary

mortgage where no time limit is fixed to seek redemption would not arise from the date of mortgage but arise on the date when the mortgagor pays or

tenders to the mortgagee. Para-48 of the said judgment is reproduced below:

48. Therefore, we answer the questions framed to hold that in case of usufructuary mortgage, where no time limit is fixed to seek redemption, the

right to seek redemption would not arise on the date of mortgage but will arise on the date when the mortgagor pays or tenders to the mortgagee or

deposits in Court, the mortgage money or the balance thereof. Thus, it is held that once a mortgage always a mortgage and is always redeemable.

10. The aforesaid judgment of the Full Bench came up for consideration before the Apex Court in the case of Singh Ram vs. Sheo Ram and others

(2014) 9 SCC 185 in which the view taken by the Punjab & Haryana High Court has been affirmed and the contrary view taken by the Full Bench of

Himachal Pradesh High Court has been overruled.

11. In view of the above, the question of law is answered in favour of the plaintiff. The limitation for filing the suit would start from 04.09.1987 i.e. the

date on which the plaintiff tendered repayment of money to the defendant, therefore, the suit filed by the plaintiff is within limitation. Since the issues

No.1 & 2 have already been answered in favour of plaintiff and the suit was dismissed only on the issue of limitation, hence the suit is liable to be

decreed in favour of plaintiff in following terms:-

(i) the plaintiff is the owner of the suit house as described in para 1 of the plaint.

(ii) the plaintiff is entitled to redeem the suit house from defendant.

(iii) the defendant is directed to hand over the vacant possession of suit house to plaintiff within three months from payment of an amount of Rs.1600/-

.

(iv) If defendant does not accept the amount, the plaintiff is directed to deposit the amount of Rs.1,600/- in executing Court and obtain the possession.

(v) Plaintiff and defendant shall bear their own cost.

12. In the result, the appeal is allowed. Decree be drawn.

