(2014) 03 BOM CK 0041

In the Bombay High Court

Case No : Second Appeal No. 182 of 2012

Milagres Sales Coutinho APPELLANT

Vs

Maria Angelica da Costa RESPONDENT

Date of Decision : 05-03-2014

Acts Referred:
Transfer of Property Act, 1882 — Section 67

Citation : (2014) 4 BomCR 393

Hon'ble Judges : S.B. Shukre, J

Bench : Single Bench

Advocate : C. Padgaonkar, Advocate for the Appellant; C. Fernandes and J. Godinho, Advocate for the Respondent

Final Decision : Dismissed

Judgement

S.B. Shukre, J.—By this appeal, the appellant has challenged the judgment and order dated 22.6.2012, passed by the Ad hoc District Judge-1, Margao in Regular Civil Appeal No. 34 of 2011, dismissing the appeal filed by the appellant against the judgment and decree dated 6.12.2010 passed in-Special Civil Suit No. 125/2007 by Civil Judge, Junior Division, Margao thereby, dismissing the suit of the appellant brought for recovery of money due under a mortgage. Briefly stated facts of the case are as under:-

The suit was filed by the appellant against the respondents for recovery of money, which was based upon the right acquired by him in a transfer of mortgage, by the original mortgagee, Dr. Francisco da Piedade Abranches. It is the case of the appellant that he was entitled to recover the money due in this mortgage from the respondents. The trial Court framed four issues and answered three issues in favour of the appellant and dismissed the suit by recording a negative finding on the fourth issue. The fourth issue related to bar of suit by law of limitation. The Appellate Court found that the suit was based upon a simple mortgage and therefore not Article 63(a) but Article 62 of the Limitation Act applied. The trial Court also rejected the contention of the appellant that in the instant matter, the law of limitation prescribed under Article 535 of the Portuguese Civil Code applied and the period of limitation for filing the suit of instant nature under said Article was of 30 years. The trial Court held that cause of action in filing of suit did not arise out of a special statute i.e. Portuguese Civil Code and the same arose out of the law enacted by the Indian Parliament.

Aggrieved by the dismissal of the suit by the trial Court, the appellant preferred a first appeal before the Ad hoc District Judge-1, South Goa, Margao. The appeal was dismissed by the learned Ad-hoc District Judge-1, South Goa, Margao and the learned Ad-hoc District Judge confirmed the finding so recorded by the trial Court on the point of application of Article 62 of the Limitation Act which barred the suit. The learned Ad hoc District Judge extensively relied upon the law laid down by the Hon''ble Apex Court in the case of Syndicate Bank Vs. Mr. Prabha D. Naik and Another etc., in drawing the aforesaid conclusion and accordingly, dismissed the appeals.

2. I have heard learned Counsel for the appellant, learned Counsel for respondents 1, 7 and 8 and learned Counsel for respondents 2, 3, 4 and 6. None for respondent No. 5, though duly served. With their assistance, I have carefully gone through the paper-book including impugned judgments and decrees.

3. The learned Counsel for the appellant has submitted that both the Courts below have misconceived the law laid by the Hon''ble Apex Court in the case of Syndicate Bank (supra). The Hon''ble Apex Court, according to him, has laid down that period of limitation, as prescribed in the Portuguese law, will not be applicable to a case where the cause of action arises outside the Portuguese law. He has submitted that in the instant case, the Instrument of Credit Amount (Transfer of Mortgage) between the appellant and original mortgagee clearly contained a reference to provisions under Articles 785, 793 and 794 of the Portuguese Civil Code. He has invited my attention to the relevant clauses appearing on page 4 of the said document, which is taken on record and marked as ''X'' for the purpose of identification. The learned Counsel emphasized that the period of limitation of 30 years as prescribed under Portuguese law is applicable to the instant suit, because the cause of action arose within Portuguese law, as can be seen from the clauses on page 4 of document DC. He has also invited my attention to the judgment of the learned Single Judge of this Court, rendered in First Appeal No. 129/1999 decided on 21.12.2004, in the case of Communidade of Morombi O Grande Vs. Jose Autonio Rodoilo Acuaviva Braganza and Others, and submitted that the law laid down by the Hon''ble Apex Court in the case of Syndicate Bank (supra) has also been followed in this judgment. Learned Counsel also submitted that since the suit was filed for satisfaction of mortgage-money by sale of mortgaged property, the period of limitation was of 30 years.

4. The learned Counsel for respondents No. 1, 7 and 8 has submitted that as the suit was based upon simple mortgage, the question of foreclosure of the mortgage so as to attract Article 63(a) of Limitation Act, 1963 would not arise in this case. He has submitted that the trial Court in para 41 of the judgment dated

6.12.2010 has dealt with the aspect of this case in extenso. He has submitted that since the ingredients of the Mortgage by Conditional sale or Anomalous Mortgage or Usufructuary Mortgage, having not been fulfilled in this case by the appellant and that the Deed of Loan, vide Exhibit 34 colly as well as Deed of Transfer at Exhibit 35 colly clearly indicated that the mortgage was a simple mortgage, the learned Judge of the trial Court has rightly held that the limitation period for filing of the suit arising out of such a mortgage, shall be governed by Article 62 and not Article 63(a) of the Limitation Act, 1963. He has further submitted that since the suit was based on a right arising out of a mortgage, the cause of action arose from Transfer of Property Act, an Indian Law taking it outside the purview of Portuguese law. Therefore, the ratio of Syndicate Bank (supra) was squarely applicable to this case and the same has been rightly applied by both the Courts below, so submits the learned Counsel.

5. The learned Counsel for respondents No. 2, 3, 4 and 6 supporting the appellant has submitted that in the prayer clause of the plaint it was clearly mentioned by the appellant that the limitation period for filing the instant suit was covered under Limitation Act and when it was so stated, by implication, it indicated that suit was for foreclosure of the mortgage and this has not been considered by the Courts below. He further submitted that this aspect is not dealt with proper care and the period of filing the suit should not have been held to be of three years and should have been held to be of 30 years as prescribed under Article 63(a) of the Limitation Act.

6. Upon perusal of the impugned judgments and decrees, it is seen that both the Courts below after considering the documents at Exhibit 34 and Exhibit 35 on which the suit is based, have concurrently held that the suit is barred by limitation, as it has been filed after expiry of period of 12 years as prescribed under Article 62 of Limitation Act. They have also found that law laid down by Hon''ble Apex Court in the case of Syndicate Bank (supra) was squarely applicable to the facts of this case. If one goes through the afore-stated documents on which the suit is founded, it cannot be said these findings are illegal and perverse. It must be noted that the suit that was filed was for recovery of money due under a mortgage, which was undisputedly a simple mortgage. Even the document ''X'' now placed on record refers to the mortgage dated 10th September, 1975 as simple mortgage. Reciprocal rights and liabilities of mortgager and mortgagee are governed by the Transfer of Property Act, 1882, which is an Indian law. They would not be governed by Portuguese Civil Code. No doubt, in the Instrument of Credit Amount (Transfer of Mortgage), document ''X'', there is reference to some articles of the Portuguese Civil Code. But, this reference is for the purpose of non-transfer of solvency of the debtors, in terms of the provisions in the said Civil Code, and not for the purpose of transfer of rights of original mortgagee under a simple mortgage to the appellant. The suit has been filed for enforcing what is transferred and not for any direction in respect of what is not transferred. So, the cause of action for a suit of instant nature would arise and has arisen from the transfer of original mortgagee''s

rights and the appellant''s stepping into the shoes of original mortgagee entitling him to all his rights under a simple mortgage. As stated earlier, these rights are determined by an Indian law, and, therefore, limitation period would also be as stipulated in Indian law, which is Limitation Act, 1963.

7. Once it is found that cause of action to file the present suit arose outside the Portuguese Civil Code and within the Indian law viz. the Transfer of Property Act, 1882, the ratio of Syndicate Bank (supra) would be squarely applicable to the instant case and it has to be held that for ascertaining limitation period, one has to look into the provisions of Limitation Act, 1963, and not elsewhere. I am therefore, of the view that both the Courts below have rightly held that the cause of action in filing the suit having arisen outside the Portuguese Civil Code, limitation period would have to be determined by referring to the relevant article of the Limitation Act, 1963.

8. Both the Courts below, have found and correctly so, that the relevant article of Limitation Act is 62, which stipulates period of 12 years to enforce payment of money secured by a mortgage. It has been submitted by learned Counsel for appellant and respondents 2, 3, 4 and 6 that the suit was basically for foreclosure of the mortgage and therefore, Article 63(a) controls limitation period for filing of the suit, which is of 30 years. I must say that there is no dispute about the fact that the suit has been filed after expiry of 12 years from the date the money became due and judgment of the trial Court shows that learned Judge has extensively dealt with this aspect of the matter in the judgment. Para 41 of the judgment shows that the trial Court has found that as per section 67 of the Transfer of the Property Act, 1882, foreclosure can be claimed only in three kinds of mortgages viz., (1) Mortgage by Conditional Sale (2) Anomalous Mortgage reserving a right to foreclose and (3) Usufructuary Mortgage, and the instant suit being based on simple mortgage, the limitation period would be of 12 years as prescribed under Article 62. I have already found that the evidence on record clearly indicates that the suit has been based on simple mortgage. u/s 67 of the Transfer of Property Act, 1882, right of foreclosure is not available to a simple mortgagee. Therefore, I find no error of law in the finding so recorded by the trial Court. If this is so, no fault can be found with the concurring finding given by the first Appellate Court. In the circumstances, I find that no substantial question of law arises in the present appeal and the appeal deserves to be dismissed summarily at this stage. Accordingly, the appeal stands dismissed. Parties to bear their own costs.