

(1950) 10 BOM CK 0006

In the Bombay High Court

Case No : Cross First Appeal No. 361 of 1948 and F.A. No's. 360, 361 and 362 and Civil Application No's. 1410 and 1227 of 1948

Motilal Fulchand Marwadi

APPELLANT

Vs

Gita Rama Gunge

RESPONDENT

Date of Decision : 09-10-1950

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 4
Limitation Act, 1908 — Article 12, 134, 148
Registration Act, 1908 — Section 49
Transfer of Property Act, 1882 — Section 59A

Citation : AIR 1952 Bom 217 : (1951) 53 BOMLR 299

Hon'ble Judges : Dixit, J; Bhagwati, J

Bench : Division Bench

Advocate : G.R. Madbhavi, for the Appellant; B.N. Gokhale, for the Respondent

Judgement

Bhagwati, J.—These two sets of appeals arise out of the judgments of the learned Special Judge of the Special Tribunal Court at Mangalwodha. Suits Nos. 1894 of 1937 and 1822 of 1938 were filed by one Bai Gita, the daughter of Gundi, against the firm of Jaynarayan Jagannath Marwadi, the partners of that firm and the alienees from the firm of certain properties and lands situate at Mangalwedha. One Appa had three sons, Gundi, Rama and Sada. There was a severance of joint status between the members of the joint family in year 1892 and certain documents were executed by and between the parties. Gundi thereafter in years 1898, 1900 and 1901 executed mortgages in favour of defendant 1 to secure repayment of certain monies due and owing by him to the firm. He thus mortgaged seven lands to defendant 1 on three several dates in the years 1898.1900 and 1901 and his two brothers Rama and Sada were parties to these documents in their capacity as-sureties. Gundi also executed a possessory mortgage of a house at Mangalwedha in favour of defendant I for the consideration of Rs. 25 in the year 1901. Gundi, it appears, was indebted to several parties, and in execution of a money decree obtained against him by a

creditor of his an auction sale was held of the house as well as the seven lands in darkhast No. 347 of 1905. Defendant 1 purchased the house and the seven lands at the said auction sale. What had happened, however, in these execution proceedings was that Gundi having died in year 1904 the decree-holder had brought in Sada as the heir and legal, representative of Gundi in the execution proceedings and it was after issuing notice to Sada that the auction sale was held. Gundi had left him surviving two daughters, Bai Gita, the plaintiff and one Tanu, who was defendant 6 and defendant 13 respectively in the above suits. But neither of them was brought on the record as the heir and legal representative of the deceased Gundi. This was the state of the record when the auction sale was held and defendant 1 purchased this house and the seven lands at Mangalwedha at the court sale. Defendant 1 entered into possession of the properties thus purchased by it. The house at Mangalwedha was sold by defendant 1 to defendants 2 to 6 in Suit No. 1894 of 1937 by a conveyance dated 19-4-1912. Five lands out of the seven lands at Mangalwedha were sold by defendant 1 to defendants 5, 6, 7, 8 and 9 in Suit No. 1322 of 1938 by several conveyances dating from 11-4-1919 to 26-4-1923. The remaining two lands continued in the possession of defendant 1 and defendant 3 who was the partner in defendant 1. The two suits above named were filed by the plaintiff Bai Gita, the daughter of Gundi, who was the common plaintiff in both these suits against defendant 1 the firm, its partners and the respective purchasers of the house and the lands at Mangalwedha in the first instance for accounts of the several mortgage transactions but subsequently under the order of the Appeal Court for redemption of the property and the lands,

2. The first Defendant who was the common defendant in both these suits contested the suits, con-tending inter alia that the auction sale was validly held and that it acquired a good title to the property as well as the lands which it purchased at the court sale, and that in any event the plaintiff's suits were barred under Article 12, Limitation Act or under Article 134, Limitation Act.

3. The learned trial Judge hold in Suit No. 1894 of 1937 that so far as defendant 1 was concerned the suit property was free from the mortgage in favour of defendant 1 but the plaintiff was not entitled to get possession of the property from defendants 2 to 5 inasmuch as her claim against them was barred by the law of limitation under Article 134, Limitation Act. He, however, allowed so the plaintiff compensation in the sum of Rs. 25 against defendant 1, for loss of the mortgaged property. Defendant 1 filed an appeal being F.A. No. 360 of 1948 against this decision of the learned trial Judge demurring against the award of compensation in the sum of Rs. 25. The plaintiff in her turn filed F. a. No. 362 of 1948 claiming as. 1000 as and by way of compensation for loss of the mortgaged property. These are the two first appeals from the decision of the learned Judge in Suit No. 1894 of 1937.

4. In suit No. 1322 of 1833 the learned Judge held that the plaintiff's claim against defendants 5, 6, 7, 8 and 9 was barred by the law of limitation under

Article 134, Limitation Act, and the plaintiff's suit in that behalf was dismissed. In regard to defendants 1 and 3, the learned Judge held that the mortgages in suit had been satisfied and that the plaintiff and her sister Tanu were entitled to take possession of the two properties which had remained with defendant 1 and passed a decree accordingly in favour of the plaintiff. Defendants 1 and 3 filed F.A. no. 361 of 1948 in regard to the decree passed by the learned Judge against them in respect of the two properties which had remained with defendant 1. The plaintiff in her turn filed F.A. No. 363 of 1948, contending that she was entitled to a decree also against defendants 5, 6, 7, 8 and 9 in regard to the lands which had been conveyed to them by defendant 1 as aforementioned.

5. All these four appeals have come before us for hearing and final disposal. As they are capable of being disposed of by one judgment, they have been heard together and this judgment will cover all the said appeals.

6. The two points which have been urged before us by the learned advocates for the plaintiff as well as defendant 1 are : (1) Whether Gundi, Rama and Sada were separated co-parceners or were undivided in interest and (2) whether the suit is barred by the law of limitation.

7. In regard to the first point, there are two receipts which have been produced in the Court below evidencing partition as of 1-9-1892. These receipts are not registered, but the non registration thereof would be a bar if the terms of the partition were sought to be proved by the parties. These receipts, however, have been relied upon for the purpose of proving the collateral fact of partition itself and. they would certainly be admissible for that purpose even though they have not been registered. These receipts clearly show that there was a severance of joint status between the members of the joint family then existing and that in any event there was a severance of joint status between the three brothers Gundi, Rama and Sada. There is the further fact that in the three mortgage deeds which were executed by Gundi in favour of defendant 1 in the years 1898, 1900 and 1901 his two brothers Rama and Sada stood as sureties for repayment of the debts by him. This would not then be the case if Gundi, Rama and Sada were members of a joint and undivided Hindu family having no separate property of their own. This fact also goes to support the position that there was a severance of joint status between the three brothers and that Gundi when he died was a separated member of the family and was not joint with the other brothers of his, Rama and Sada.

8. The next point which has been urged is whether the suit is barred by the law of limitation. Before we go to the respective articles which have been discussed in this behalf, it is necessary to point out that if Gundi died as a separated member of the family, there would be no question of survivorship as between him and his brothers Rama and Sada, but whatever his estate was would devolve on his daughters Bai Gita and Tanu as his heirs. If any decree which was passed against Gundi had to be executed after his death, Sada would not be the heir and legal representative of Gundi but Bai Gita and Tanu would be the heirs and legal

representatives of his. That being so, the execution proceedings taken by the decree-holder in darkhast No. 347 of 1905 were vitiated in so far as Sada was brought on the record as the heir and legal representative of Gundi and not Bai Gita and Tanu or either of them. The execution proceedings were, therefore, bad, the auction sale which was held in the said execution proceeding was void and not merely voidable, and, therefore, there was no question of the application of Article 12, Limitation Act which prescribes one year's period of limitation to set aside a sale in execution of a decree of a civil Court the starting period for the purpose of limitation being when the sale is confirmed. It is not necessary to adopt any proceedings to set aside a sale in execution of a decree of a civil Court which is void. It is only in these cases where a sale is voidable that it would be necessary for a party to avoid the sale by adopting proper proceedings in that behalf. The auction sale which was held in Darkest No. 347 of 1905 was, as we have stated before, void, and therefore, Article 12, Limitation Act, would not be a bar to the suits which were ultimately filed by the plaintiff in the Special Tribunal Court at Mangalwedha.

9. The question, however, remains as to whether Article 134, Limitation Act, has any application to the facts of the cases before us. It was urged by Mr. B. N. Docile for the plaintiff that these being suits for redemption the proper article to apply would be Article 148, Limitation Act, which prescribes sixty years' period of limitation for suits against mortgagees to redeem or to recover possession of Immovable property mortgaged, the period of limitation to commence from the date when the right; to redeem or to recover possession accrues. It was urged that these being suits for redemption of the mortgaged property and lands against defendant 1 who was the mortgagee and against the several other defendants in both these suits who were the transferees from the mortgagee deriving as such no better title than the mortgagee itself, the suits were within time under Article 148, Limitation Act. It was, however, contended on the other side that so far as there had been alienations made by the mortgagee (defendant 1) of the suit house and five of the suit lands in favour of the several defendants in both these suits, the suits fell within the purview of Article 134, Limitation Act, which prescribes a period of twelve years for suits to recover possession of Immovable property conveyed, mortgaged and afterwards transferred by the mortgagee for a valuable consideration, the period of limitation commencing, so far as the law applicable to the Sangli State then stood, from the date of the transfer. These are the two rival contentions which have been urged before us. Normally speaking a suit for redemption of a mortgaged property would be governed by Article 148, Limitation Act, and a mortgagee or a transferee from the mortgagee of his (mortgagee's) rights would not be able to contend that any lesser period of limitation than sixty years would apply to a suit for redemption. Section 59A, T.P. Act, includes within the description of "mortgagees" also persons deriving title from the mortgagees and the transferees of the mortgagee's rights would be in no better position than the mortgagees themselves. The complication, however, arises in those cases where the

mortgagees transfer or convey not merely their mortgagees' interest in the mortgaged property but purport to convey to transferees a larger interest than what they have got under their mortgage deeds. In those cases it falls to be considered what article of the Limitation Act would apply when a mortgagor files a suit for redemption of the mortgaged property against the mortgagee impleading the transferee or transferees as party defendants to such a suit for redemption. Would the transferee then be able to contend that he being a transferee for consideration without notice of the mortgage should be protected as against the mortgagor or would the mortgagor in that event be able to contend successfully that whatever might have been done by the mortgagee qua the transferee, the transferee could not get any better title than the mortgagee himself and would, therefore, be liable to have a decree for redemption passed against him in regard to the property which was transferred to him by the mortgagee? This is the moot point on which several cases were cited before us and which we shall now proceed to consider.

10. In *Tairamiya v Shibelisaheb*, 44 Bom. 614, the appeal Court consisting of Sir Norman Macleod and Heaton J. had before them a case where certain lands had been mortgaged with possession by the plaintiff's father. In 1883 the mortgagees had mortgaged the lands to the predecessor in title of the defendants representing himself as absolute owner. The plaintiffs sued for redemption in the year 1916 and the defendants contended that the suit was barred under Article 134, Limitation Act. The appeal Court held that the suit was not barred as on the facts the proper article applicable to the case was Article 148 and not Article 131, Limitation Act. The learned Chief Justice in the course of his judgment observed that a suit to recover possession was not the same thing as a suit to redeem, and a mortgagor's right to redeem, the period of limitation for which was 60 years under Article 148, would not be defeated merely because his mortgagee transferred the mortgage to another person. The learned Chief Justice there drew the distinction between a suit for possession under Article 131 and a suit for redemption under Article 148 and observed that merely because the mortgagee had transferred the mortgage bond to another person a suit for redemption did not cease to be one for redemption and governed by Article 148, Limitation Act.

11. The next case cited before us was *Keshav Raghunath v. Gafurkhan* 46 Bom 903, where it was held that when a mortgagee sold the mortgaged property as an ostensible owner and there was valuable consideration for the sale, the right of the purchaser became unassailable by the mortgagor by the lapse of twelve years from the date of the purchase under Article 134, Limitation Act. In this case the property had been mortgaged with possession in 1891 by one Ganpat for himself and as guardian of his minor nephew Krishna to defendant 1's father Martand. The equity of redemption eventually came to two girls Kondi and Niri from whom the plaintiff purchased in 1918, Martand had sold the property in 1802 So defendant 2 purporting to be the owner thereof and defendant 2 had since been in possession. Defendant 2 had in fact within a few months of the transfer acquired the knowledge that Martland had been a mortgagee and not an

owner. Ha stated that he asked Martand why ha sold the property if he was only a mortgagee and Martand said that he had become the owner in pursuance of an agreement, which the promised to give to defendant 2 later on. The learned Judges came to the conclusion that the mortgagee had sold the mortgaged property as an ostensible owner, that there was valuable consideration for the sale and that, therefore, the right of the purchaser became unassailable by the mortgagor by the lapse of twelve years from the date of the purchase. The mortgagee might be dishonest, the purchaser might not make any enquiry of his vendor's title, the mortgagor might be ignorant of the sale of the property by the mortgagee but. it was held that these facts no longer affected the rights of the purchaser who had given valuable consideration and that the plaintiff's suit must, therefore, fail, The ratio of this decision was that the mortgages purported to convey the whole of the mortgaged property as the ostensible owner thereof for valuable consideration and this was held to bring the case within Article 134, Limitation Act, which in terms applies to suits for recovery of possession of Immovable property mortgaged and afterwards transferred by the mortgagee for a valuable consideration .It would not be a mere transfer by the mortgagee of his interest in the mortgaged property, but it would be a case of transfer of the whole of the mortgaged property by the mortgagee purporting to do so as the absolute owner thereof, the concept of ownership embracing not merely his (mortgagee's) rights but also the equity of redemption of the mortgagor.

12. Our attention was further drawn to a case reported in Vishvanath v. Tukaram 27 Bom. L.R. 661, where it was held that Article 134, Limitation Act, does not apply to a suit by a mortgagee to recover possession of the mortgaged property from an alienee of the mortgagee who has taken with notice of the mortgage and that such a suit is governed by Article 148 of the Act. The ratio of this case is quite clear and it lays down that if the alienee from the mortgagee takes the mortgaged property with notice of the mortgage the transaction would not be one of alienation or transfer of the whole of the property by the mortgagee to the alienee, even though it might ostensibly purport to be a transfer of the whole interest in the property. The fact of the notice would make all the difference in the case and it would be open to the Court to come to the conclusion that the real nature of the transaction is that of the transfer of the mortgagee's interest in the property and no more. This case emphasizes the point of view that it is a bona fide transferee without notice and for valuable consideration who would be protected against the mortgagor who seeks to redeem the mortgaged property. In that case it would not be a question of a more transfer of his (mortgagee's) rights by the mortgagee in the property. It would be a question of the mortgagee as the ostensible owner of the property conveying or transferring to the alienee the whole of the interest in the property inclusive not only of the mortgagee's rights but also of the equity of redemption. It would be a complete title passing to the alienee who of course takes it for a valuable consideration and without notice of the property being liable to be redeemed by the mortgagor.

13. The position which has been enunciated above has been clarified in the

decision of their Lordships of the Privy Council reported in *Skinner v. Naunihal Singh*, 31 Bom. L.R. 854. It is not necessary to go into the detailed facts of the case, but it would suffice to quote the observations which have been made by their Lordships of the Privy Council and which have been summarised in the head note:

The transfer of property mortgaged contemplated by Article 134, Limitation Act, 1908, is admittedly something other than express transfer of the original mortgage. The article contemplates a transfer by a mortgagee purporting to transfer a larger interest than that given by the mortgage or at any rate an interest unencumbered by a mortgage. The article is not, however, limited in its application to cases where the mortgagee, transfers the property mortgaged while still ostensibly a mortgagee, nor to cases where the mortgagee transfers possession which he had obtained qua mortgagee. It is immaterial, for the purpose of Article 134, that this mortgagee should have thought he was absolute owner if in fact he was mortgagee and immaterial whether he got possession before, under or after the mortgage if in fact he purported to transfer the property to the transferee. Article 134 does not protect the transferee of a mortgage by express transfer, nor does it protect a person who has taken a transfer only of a mortgage but has taken it without his knowledge, mistaking supposing that he was getting something better.

14. The true principle, therefore, is that if an alienee or a transferee from the mortgagee is in a position to establish that he took the mortgaged property for valuable consideration and without notice of the fact that what the mortgagee was conveying to him was merely the mortgagee's right, title and interest therein, but that the transfer or conveyance to him of the property was under circumstances which would lead to the conclusion that the mortgagee was transferring to him not merely the mortgagee's rights but a larger interest than that given by the mortgage or at any rate an interest unencumbered by the mortgage he (the transferee or alienee) would be protected, and he would be entitled to the benefit of Article 134 Limitation Act.

15. Applying these principles to the facts of the cases before us it appears that so far as the suit property at Mangalwedha, the subject-matter of suit No. 1894 of 1937, is concerned, the mortgagee purported to transfer not merely the mortgagee's rights therein but an interest larger than that given by the mortgage or at any rate an interest unencumbered by the mortgage. It was described in the conveyance itself that the right, title and interest of the mortgagee, viz, the : malaka and the vahivat both were being transferred to the purchasers defendants 2 to 5 in that suit and, therefore, defendants 2 to 5 were entitled to the benefit of Article 134, Limitation Act. The learned Judge's decision in that behalf was, in our opinion, perfectly right and the plaintiff's suit against defendants 2 to 5 in respect of the house at Mangalwedha was barred by the law of limitation.

16. We, however, do not see how the learned Judge ever came to the conclusion

that the that the plaintiff was entitled to any compensation in respect of the suit property. There is no justification whatever for holding that the plaintiff was entitled to any compensation for the loss of the mortgaged property. The property was declared by the learned Judge to be free from defendant 1's mortgage of Rs. 25 of the year 1901, and if under the circumstances obtaining in the case the plaintiff's claim against the alienees was barred by the law of limitation, that was certainly no circumstance which could be laid at the door of defendant 1 so as to entitle the plaintiff to any compensation against him. Similarly there is no justification for the plaintiff's appeal where she has claimed that she is entitled to Rs. 1,000 by way of such compensation. If there was no basis for the award of compensation in the paltry Bum of Rs. 25, there was certainly no justification whatever for the claim which the plaintiff made for compensation for any larger amount. In our opinion, therefore, both the award of Rs. 25 as and by way of compensation to the plaintiff and the plaintiff's claim in the appeal for higher compensation in the sum of Rs. 1,000 are unjustified, and the decree of the Court below so far as Suit No. 1894 of 1937 is concerned will be confirmed subject to this modification that the award of compensation of Rs. 25 to the plaintiff and defendant 6, since dead, from defendant 1 for the loss of the mortgaged property will be deleted therefrom. F.A. No. 360 of 1948 will be dismissed and there will be no order as to the costs of that appeal. F. A no. 362 of 1948 will, of course, be dismissed with costs.

17. Turning now to the other set of appeals and the lands which have been alienated by the mortgagee in favour of defendants 5 to 9 in Suit No. 1322 of 1938 the position is that none of these parties appeared in the Court below to contest the plaintiff's claim. The sale deeds in their favour were also not produced, nor was there any attempt on their part to bring before the Court the circumstances under which the alienations came to be made by the mortgagee in their favour. Having regard to the principles which we have enunciated above, there is nothing to show that so far as the plaintiff's claim for redemption of the properties alienated in their favour is concerned, the case is taken out of the operation of Article 148, Limitation Act, which would normally apply to suit for redemption of the mortgaged property. If these defendants or any of them wanted to prove the circumstances which would bring the plaintiff's suit within the purview of Article 134, Limitation Act, it was incumbent on them to aver these facts and circumstances, to bring them into issue and to properly prove the same. Nothing of the sort was, however, done by them, with the result that the plaintiff would be entitled to a decree for redemption as against defendants 5, 6, 7, 8 and 9 in regard to the properties alienated by defendant 1 in their favour under the various conveyances between 11-4-1919 and 26.4.1922. Mr. Sukbtankar appearing for respondent 8 (e, f and g) drew our attention to the fact that defendant 7 had transferred his interest in the property alienated in his favour to defendant 8 that defendant 8 had died and defendants 8 (a, b, c, d, e, f and g) had been brought on the record as heirs and legal representatives of defendant 8, that only defendants 8 (e, f and g) were served and not defendants

8 (a, b, c and d), that there could not be a decree for redemption against only a few of the heirs and legal representatives of the deceased defendant 8 and that, therefore, the plaintiff was not entitled to any decree for redemption in regard to the property which had been alienated in favour of defendant 7 and defendants by the mortgagee. The answer given by Mr. B.N. Gokhale to this argument of Mr. Sukhtankar is contained in the observations of B.J. Wadia J. in *Mulchand and v. Jaramdas*, 37 Bom. L.R.B. 288, where the learned Judge held that under Order 29, Rule 4, Civil P. O., 1908, it was sufficient if only one out of several legal representatives of a deceased party was brought on the record and that it was not necessary that all of them should be impleaded. Since defendants 8 (a, b, c, d, e, f and g) were brought on the record as representing the estate of the deceased defendant 8 the liability under the decree which would be passed against defendants 8 (e, f and g) who have been served and who appeared before us would be only a liability in their representative character as representing the estate of the deceased defendant 8 and it, therefore, does not matter if defendants 8 (a, b, c and d) have not been served and may have to be struck off from the record of the appeal. Under the circumstances, therefore, the appeal filed by the plaintiff against these defendants viz., F. A. No. 363 of 1948, will be allowed and there will be a decree in favour of the plaintiff against defendants 5, 6, 7, 9 and e (e, f and g) as representing the estate of the deceased defendant 8 for handing over possession of the properties which were the subject matters of the alienations by the mortgagee in favour of defendants 5, 6, 7, 8 and 9 on the various dates above mentioned with costs throughout so far as the plaintiff's claim against them is concerned.

18. In regard to F.A. No. 361 of 1948 the appeal will have to be dismissed with costs.

19. Civil Applicants Nos. 1440 of 1948 and 1287 of 1950 will also be dismissed with costs.

20. Tanu, defendant 13 in Suit No. 1894 of 1937 and defendant G in suit No. 1323 of 1938 has since died leaving Bai Gita as her heir and legal representative. The decrees passed by the lower Court will, therefore, be modified in so far as they will now be in favour of Bai Gita, the plaintiff, alone.