

(1984) 11 KL CK 0020
In the High Court Of Kerala
Case No : A.S. No. 310 of 1978

N.T. Varkey

APPELLANT

Vs

State Bank of Travancore

RESPONDENT

Date of Decision : 07-11-1984

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 2 Rule 2, 11, 12
Limitation Act, 1963 — Section 18

Citation : (1987) 61 CompCas 346

Hon'ble Judges : K. Bhaskaran, Acting C.J.; P.C. Balakrishna Menon, J

Bench : Division Bench

Advocate : S. Venkatarajan and M.G. Suseela, for the Appellant; K.C. John and George Varghese, for the Respondent

Final Decision : Dismissed

Judgement

Bhaskaran, Actg., C.J.—The first defendant in O.S. No. 60 of 1974 on the file of the Additional Sub-Court, Ernakulam, is the appellant. The suit was one for recovery of the sum of Rs. 7,000 with interest thereon due under the hypothecation bond dated January 11, 1951, exhibit A-1, executed by the first defendant charging the plaint schedule property in favour of the Kottayam Orient Central Bank Limited which subsequently amalgamated with the plaintiff-bank (State Bank of Travancore). It is averred in the plaint, inter alia, as follows: The appellant first defendant acknowledged his liability to the said bank in respect of the amount of Rs. 9,977.70 due under exhibit A-1, mortgage deed, as on March 31, 1962, by a deed of acknowledgment dated May 19, 1962. The plaintiff-bank filed a suit, O.S. No. 104 of 1962 on the file of the Subordinate Judge of Ernakulam on the original bond, and obtained a preliminary decree dated February 25, 1964. The execution application filed by the bank thereafter was dismissed on the ground that what was sought to be executed was only a preliminary decree. The appeal filed against the said order, A. S. No. 404 of 1969, was also dismissed by this court; hence the suit which has given rise to this appeal. The first defendant, who alone had filed a written statement,

contended that the plaintiff had no right to bring a fresh suit based on the hypothecation bond on the basis of which the previous suit, O. S. No. 104 of 1962, was filed. The point raised was that by virtue of the provisions contained in Sections 11 and 12 and Order 2, Rule 2 of the Code of Civil Procedure, a second suit would not lie. The further contention raised in the written statement was that as the hypothecation bond (exhibit A-1) had got itself merged with the decree in O. S. No. 104 of 1962, the second suit would not lie. It was also contended that there was no valid acknowledgment of the debt by the first defendant. The following issues were framed by the trial court:

" Has the plaintiff no cause of action ? Has it merged in the decree in O. S. No. 104 of 1962?

1. Is the suit barred by virtue of Sections 11 and 12 and Order 2, Rule 2 and Order 23, Rule 1(3) of the CPC ?

3. Is the suit barred by limitation ?

4. Whether the suit is maintainable ?

5. Is the defendant entitled to the benefit of Act 11 of 1970 ?

6. Reliefs and costs."

2. The trial court found on all the issues against the defendants, and decreed the suit as prayed for.

3. Aggrieved by the judgment and decree passed by the court below, this appeal has been preferred by the first defendant. Shri S. Venkatarajan, counsel for the appellant-first defendant, contended before us that the suit was not maintainable as it was barred by limitation. Inasmuch as there is a valid acknowledgment evidenced by exhibit A-2, dated May 19, 1962, by virtue of the provisions contained in Section 18 of the Limitation Act, this contention deserves no serious consideration. The court below has also considered this aspect of the matter and found that in view of the acknowledgment, the suit was not barred by limitation. We find no reason to differ from the conclusion reached by the court below on this point.

4. One other point raised by counsel for the appellant is that as the hypothecation bond got itself merged with the decree in O. S. No. 104 of 1962, the plaintiff was not entitled to sue a second time on the basis of the same hypothecation deed. We do not agree with this contention. The true position in law, as settled by a series of decisions of the Federal Court and various High Courts, including this court, is that where the liability under the mortgage deed has not been discharged, the fact that an earlier decree was obtained would not preclude the mortgagee/mortgagor from instituting a second suit for the relief. The decisions cited before the court below by the plaintiff are mostly those relating to the decision in regard to redemption suits. The position, nevertheless, could not be any the different where the suit is for the recovery of the mortgage

amount inasmuch as the larger question is whether the cause of action survives in a case where a decree on the basis of the same hypothecation deed was obtained by the mortgagor/mortgagee, but the fruit of the decree had not been realised by him (the plaintiff-decree holder). He would only mention the citations of the cases which have already been referred to and relied on by the court below, Ammenumma Vs. Chelampiriyarath Beeviamma and Others, , AIR 1934 205 (Privy Council) , Rajappan Pillai v. Ramachandran Pillai [1966] KLT 376, Somanath Pradhan and Others Vs. Sanno Govindo Misra and Others, Subba Rao v. Raju AIR 1950 FC 1 and Kunhi Amma v. Narayana. Pillai [1951] KLT 530. We, therefore, reject the contention put forward by the appellant that the second suit based on the same hypothecation bond as the earlier suit for recovery of the amount thereunder would not be maintainable on account of the merger of the hypothecation bond with the decree in O. S. No. 104 of 1962.

5. The last of the arguments advanced by the appellant relates to the benefits under Act 11 of 1970. The period of the instalments allowed under the Act having expired, there is no reason for considering the question whether the first defendant would not have been entitled to discharge the liability in instalments. Counsel for the respondent-plaintiff also submitted that the interest actually claimed by the plaintiff and decreed by the court below was much less than what the plaintiff-bank was entitled to under the law.

6. The result, therefore, is, we find that the appellant-first defendant is not entitled to succeed on any of the grounds raised in the memorandum of appeal, as urged before us. The appeal is dismissed with costs.

7. Immediately after the judgment was pronounced, counsel for the appellant made an oral request for leave to appeal to the Supreme Court, We do not find any substantial question of law of general importance which requires to be decided by the Supreme Court involved in this case ; hence the leave requested for is declined.