(1971) 06 GUJ CK 0003

In the Gujarat High Court

Case No : Second Appeal No. 512 of 1970

Pandya Vinodrai Ramrai APPELLANT

Vs

Lavar Prabhudas Nathuram and Others RESPONDENT

Date of Decision : 16-06-1971

Acts Referred:

Limitation Act, 1908 — Article 144, 28
Transfer of Property Act, 1882 — Section 59

Citation : AIR 1972 Guj 204

Hon'ble Judges : B.K. Mehta, J

Bench : Single Bench

Advocate : C.V. Jani, for the Appellant; N.H. Bhatt and M.A. Trivedi, for N.V. Karlekar, for the Respondent

Judgement

1. This second appeal is directed against the judgment and decree of the District Judge Judge, Mehsana, in Regular Civil Appeal No. 173 of 1969, confirming the judgment and decree of the Civil Judge (J. D.) Visnagar in Regular Civil Suit No. 142 of 1968 dismissing the said suit on the preliminary ground that the suit for redemption of mortgage under an alleged unregistered mortgage deed was not maintainable. The facts leading to this appeal are, shortly, as under:-

2. The appellant Pandya Vinodrai Ramraj filed a suit against the respondents Nos. 1/1 to 1/4 who were the heirs and legal representatives of one Lavar Prabhudas Nathuram for redemption of mortgage of a house situated at Visnagar and alleged to have been created by the predecessors-in-title of the appellant and respondents Nos. 2 to 7 on January 19, 1910 for securing the repayment of the amount of Rs. 75/- lent by one Nathuram Dalchha who happened to be the grandfather of respondents Nos. 1/1 to 1/4. The appellant herein before filing the suit, being Regular Civil Suit No. 142 of 1968, in the Court of Civil Judge (J.D.). Visnagar, served a notice through his advocate by registered - post on 5.12.1968 to the deceased - father of respondents Nos. 1/1 to 1/4. The said notice returned unserved and, therefore, the appellant filed a suit for redemption of the

mortgage said to have been executed by his ancestors in 1910 against the respondents Nos. 1/1 to 1/4 who were joined as defendants Nos. 1/1 to 1/4 before the learned trial Judge. The other respondents, namely. Respondents Nos. 2 to 7 who were joined is defendants Nos. 2 to 7 before the learned trial Judge being the heirs of other co-owners of the property in question. The respondents Nos. 1/1 to 1/4 resisted the suit on various grounds and contended, inter alia, that there was no mortgage of the suit property executed by the ancestors of the appellant and respondents Nos. 2 to 7 in favour of their grand father Nathuram Dalchha in the year 1910, nor had he entered into possession of the said property in pursuance of the alleged mortgage transaction. It was further contended that the redemption suit on an alleged unregistered mortgage deed was also not tenable. The respondents Nos. 1/1 to 1/4 claimed that their predecessors-in-title were in possession of the said properly since more than 85 years as owners of the property. The said respondents Nos. 1/1 to 1/4 also denied that there was any written instrument evidencing the alleged mortgage transaction, nor they were in possession of such an instrument as alleged by the appellant. The said respondents have also contended about the insufficiency of Court-fees stamp. It was, therefore, prayed by the said respondents that the suit was liable to be dismissed ex facie.

3. In view of these pleadings, the learned trial Judge raised a number of issues. However, he decided to hear the issues Nos. 4 and 5 as preliminary issues. After hearing the advocates of the parties., he held that at the relevant time the mortgage deed, even for the amount for less that Rs. 100/-, in the old State of Baroda, required registration and, therefore, a suit for redemption of such a mortgage on the basis of an unregistered mortgage deed was not competent. In that view of the matter he dismissed the suit. The appellant herein being aggrieved with the said judgment and decree of the learned Civil Judge (J.D.). Visnagar, went in appeal before the learned District Judge at Mehsana by way of Regular Civil Appeal No. 173 of 1969. The learned District Judge also held after reviewing the various authorities cited before him by the advocates of the parties that suit for redemption of a mortgage on an unregistered mortgage deed was not maintainable and, therefore, he confirmed the judgment and decree of the learned Civil Judge (J.D.) and dismissed the appeal.

4. The appellant herein, therefore, being aggrieved with the said judgment and decree of the learned District Judge, has come to this Court by way of Second Appeal.

5. At the time of hearing of this appeal Mr. V. V. Jani, the learned Advocate appearing for the appellant contended that the learned District Judge was clearly wrong in holding in the facts and circumstances of the case that the redemption suit on an unregistered mortgage deed would not be maintainable. It was contended by Mr. Jani that the mortgage transaction in question was effected on January 19. 1910 as shown from the various documents produced alongwith the plaint marked Ext. 4/1 to 4/4. Mr. Jani also pointed out to me that it was

contended in terms in the plaint of the suit by the appellant that the mortgage transaction was reduced into writing and the mortgage deed was handed over the predecessors-in-title of respondents Nos. 1/1 to 1/4 and was in the custody and possession of the said respondents. It was also stated in terms in the plaint that the mortgage deed was not registered according to law in force in the erstwhile State of Baroda. It was submitted by Mr. Jani that the documents marked Exs. 4/1 and 4/2 clearly show that the grandfather of the respondents Nos. 1/1 to 1/4 admitted before the Survey Officers that such a mortgage transaction was effected between the parties. Exs. 4/1 and 4/2 were prepared in about the year 1916-17 according to Mr. Jani as is apparent from the said two documents. It was, therefore, urged that the grandfather of respondents Nos. 1/1 to 1/4 acquired limited interest as a mortgagee by prescription u/s 28 read with Article 144 of the Indian Limitation Act. 1908 and, therefore, even though the mortgage deed was not registered according to law in force at that time, the suit for redemption of such a mortgage was competent after the expiry of the prescriptive period of 12 years u/s 28 of the said Limitation Act. Mr. Jani in support of his contention relied mainly on the ruling of Rajasthan High Court in Lachhmi Narain and Another Vs. Kalyan and Another, Raj 1 (SB) and on the decision of the Division Bench of this High Court consisting of S. H. Sheth. J., and D. P. Desai. J., in Letters Patent Appeal No. 88 of 1966 decided on 22.6.1970 (Guj) MR. Jani also relied on the decision of Supreme Court in Collector of Bombay Vs. Municipal Corporation of The City of Bombay and Others, and Raja Rameshwar Rao and Another Vs. Raja Govind Rao, in support of his contention that a person can acquire a limited right on the expiry period of prescription as prescribed under the Limitation Act by way of adverse possession.

6. The short question, therefore, which arises in this appeal for my consideration is : whether a suit for redemption of a mortgage said to have been evidenced by a written instrument though not registered according to law in force for the time being in the area in which such a transaction is effected, is competent or not.

7. It is no doubt true that as far as the respondents Nos. 1/1 to 1/4 are concerned, they have in their written statement denied the execution of such a mortgage transaction or existence of any written instrument evidencing the transaction. However, the question nonetheless remains; whether a suit for redemption of a mortgage not effected according to the provisions of law as in force for the time being would or would not lie. In my opinion, it is not correct to say as has been said by the learned District Judge confirming the judgment and decree of the learned trial Judge in the present suit that such a suit is not maintainable at all. The question, whether such a suit is maintainable or not shall depend on the facts which may be ultimately established in the suit, whether a person alleged to be mortgagee has entered into possession of property as a mortgagee and held the same as a mortgagee throughout the period without claiming any higher right as an owner and without claiming any title by way of adverse possession for others. In my opinion. Mr. Jani was right when he contended that a limited right can be acquired by prescription. The decision of

the Supreme Court in Collector of Bombay Vs. Municipal Corporation of The City of Bombay and Others, is sufficient to dispel any doubt as to this proposition. The relevant paragraph on which Mr. Jani relied from that decision reads as under:-

"The sole question for out consideration is whether . on the facts of this case, the respondent Corporation has succeeded in establishing in itself a right in limitation of the right of the Government to assess the land in consequence of a specific limit to assessment having been established and preserved. There is no dispute that by reason of the noncompliance with the statutory formalities the Government Resolution of 1865 is not an effectual grant passing title in the land to the respondent Corporation and is not also an enforceable contract. On the other hand. There is no doubt as to the existence of an intention on the part of the Government to make and on the part of the Corporation to take a grant of the land in terms of the Resolution of 1865 including an undertaking by the Government not to charge any rent. Both parties acted on the basis of that Resolution and the predecessor in title of the respondent Corporation went into possession of the land in question pursuant to the Government Resolution of 1865 and, acting upon the said Resolution and the terms contained therein, the respondent Corporation and its predecessor in title spent considerable sums of money in levelling the site and erecting and maintaining the market buildings and have been in possession of the land for over 70 years. What, in the circumstances was the legal position of the respondent Corporation and its predecessor in title in relation to the land in question? They were in possession of the land to which they had no legal title at all. Therefore, the position of the respondent Corporation and its predecessor in title was that of a person having no legal title but nevertheless holding possession of the land under colour of an invalid grant of the land in perpetuity and free from rent for the purpose of a market. Such possession not being referable to any legal title, it was prima facie adverse to the legal title of the Government as owner of the land from the very moment the predecessor in title of the respondent Corporation took possession of the land under the invalid grant. This possession has continued openly, as of right and uninterruptedly for over 70 years and the respondent Corporation has acquired the limited title to it and its predecessor in title had been prescribing for during all this period, that is to say, the right to hold the land in perpetuity free from rent but only for the purposes of a market in terms of the Government Resolution of 1865. The immunity from the liability to pay rent is just as much an integral part or an inseverable incident of the title so acquired as is the obligation to hold the land for the purposes of a market and for no other purpose. There is no question of acquisition by adverse possession of the Government''s prerogative to levy assessment. What the respondent Corporation has acquired is the legal right to hold the land in perpetuity free of rent for the specific purpose of erecting and maintaining a market upon the terms of the Government Resolution as if a legal grant had been made to it."

8. The principle has been also referred to and considered as a settled position of

law in another decision of Supreme Court in Raja Rameshwar Rao and Another Vs. Raja Govind Rao, . It therefore, follows that if a person claiming as a mortgagor sues for redemption of such mortgage under an unregistered mortgage deed and is able to establish that such a mortgage transaction was effected and the person alleged to be mortgagee is entered into possession of such property as a mortgagee and has held the property as a mortgagee. Having a limited interest, for a period of more than 12 years without claiming any higher right or interest in the said property, a suit for redemption is, maintainable. The decision of Rajasthan High Court in Lachhmi Narain and Another Vs. Kalyan and Another, is that by virtue of Section 28 of the Limitation Act the limited right of the mortgagee can be acquired by advers possession and that such a right can be acquired even if a mortgagee had obtained possession under a void or inoperative mortgagee deed, the provisions of Transfer of Property act (Section 59) are not, at all, affected nor rendered nugatory by recongnising such a right which arises under the operation of law. Mr. Jani has relied on the following paragraph form the decision of Rajasthan High Court in AIR 1960 Raj 8 (SB) which reads as under:-

We have taken notice of all the arguments that have been advanced in Hansia''s case and we may say with utmost respect that we do not agree with the view taken in that case. We may, however, emphasise that in the foregoing discussion, we have considered S. 28 with reference to Art. 144 of the Limitation Act. It is on account of Art. 144 that the question of adverse possession comes in and the person in possession acquires only a limited right in spite of the fact that he is in physical possession of the property. Section 28 when considered with other Articles, may confer the full right of ownership u/s 28 if the period of limitation for instituting a suit for possession has expired even in case of person who had claimed only a limited right."

9. The decision of Division Bench of our own High Court in Letters Patent Appeal No.28 of 1966 also affirms this position of law. In that case a suit was field in the Court of Civil Judge (J.D.) at Mandvi for redemption of mortgage executed in 1943 A.D. in respect of suit lands by an unregistered mortgage deed. The suit was resisted mainly on the ground that such a suit was not maintainable. The trial Judge in that suit passed a preliminary decree in favour of the plaintiff granting the redemption of the suit lands. The mortgagee appealed to the District Court which summarily dismissed the same. The matter was then taken by way of Second Appeal to this Court and the said appeal was also dismissed. A Letters Patent Appeal under clause (15) of the Letters Patent on the strength of certificate granted by the Single Judge of this Court came for hearing before the Division Bench. A number of contentions were raised but the contention with which I am concerned is the contentions regarding the maintainability of redemption suit on an unregistered mortgage deed. Dealing with this contention Justice S.H. Sheth speaking for the Court held as under:--

"So far as the first contention raised by Mr. Y.S.Mankad is concerned. It is not in dispute before us that the mortgage transaction in question took place on 27th April 1943 and that it is evidenced by an unregistered mortgage document though it was compulsorily registrable under the Kutch Registration Act then in force in Kutch area. The unregistered mortgage document which is otherwise compulsorily registrable cannot lay the foundation for a decree for redemption and, therefore, if that was the only evidence for passing the decree for redemption we would have upheld the contention raised by Mr. Y.S.Mankad. but in this case the defendant has admitted in his evidence that he entered into possession of the suit lands as mortgagee. In other words, according to him, they had been mortgaged to him at the time when the unregistered mortgage document was executed. Having admittedly entered into possession of the lands in question as mortgagee it is not open to the defendant to raise the plea of ownership of adverse possession. His admission that he entered into possession as mortgagee, though the mortgage transaction is not evidenced by a registered document, means that he entered into possession of the suit lands with the consent and permission of the plaintiffs. Therefore, having entered into possession of the lands in question with the consent and permission of the plaintiffs it is not open to him to plead acquisition of ownership by adverse possession. Therefore, the question of prescribing title to the suit property as owner by adverse possession does not arise in this case."

10. After discussing the question of limitation the Division Bench referred to the decision of Patna High Court in the matter of Rupa Nonia Vs. Ram Brich Pathak and Others, , and observed as under:--

"... ... ... a Division Bench of the Patna High Court has taken the view that where a person enters into possession of immovable property not on the assertion of any absolute title but on the basis of an unregistered rehan bond in his favour and remains in possession for more than twelve years, he acquires the status of a mortgagee by the doctrine of prescription and so even though the rehan bond is not a valid transaction for want of registration, the mortgagor is entitled to redeem the property. In the present case the defendant on his own admission, attained the status of a mortgagee at the end of 12 years from the first date on which he entered into possession of the lands as a mortgagee, that is to say, within 12 years from 27th April 1943. He has, therefore, acquired the status of a mortgagee. Support is lend to this view of the Patna High Court by the observations made by their Lordships in the case of Padma Vithoba Chakkayya v. Multani. AIR 1963 SC 70 (vide para.7 of the report). We are, therefore, of the opinion that on his own admission at the end of 12 years from 27th April, 1943 the defendant attained the status of a mortgagee. The suit for redemption field by the plaintiffs, therefore, is perfectly maintainable against him. We, therefore, see no reason to differ from the finding recorded in that behalf by the court of Second Appeal."

11. It has been contended by Mr. Karlekar appearing on behalf of the respondents Nos.1/1 to 1/4 that in present case before me it is not an admitted

position that the predecessor in title of the aforesaid respondent entered into possession of a property as a mortgagee and continued accordingly for a period of more than 12 years and that they did not claim any higher right or interest in the said property. It was therefore, urged by Mr. Karlekar that in that state of the pleadings, the decisions cited on behalf of the appellant are not applicable and the learned District Judge was right in confirming the judgment and decree of the learned trial Judge dismissing the suit on the ground that such a suit was not maintainable.

12. I am of opinion that the contention of Mr. Karlekar is not well founded. It is not doubt true that it is always a question of intention, whether the person in possession of property is claiming a limited interest or a full interest and whether he has acquired a limit interest or a full interest by adverse possession or not. No doubt, the respondents Nos.1/1 to 1/4 in their written statement have averred that their predecessors in title were in possession and enjoyment of the property since more than 85 years as the owners and that they have denied the execution of the alleged mortgage transaction or existence of any written instrument evidencing such transaction. They have, however, in alternative claimed the ownership of the suit property by way of adverse possession also. It has been also contended by them that assuming that there was a written instrument evidencing the alleged mortgage transaction, it was compulsorily registrable under the law in force in the State of Baroda, even though the amount was less than Rupees 100/-, and therefore, a suit for redemption of such a mortgage on the basis of an unregistered instrument was not competent. The real question, therefore, whether there was a mortgage transaction as alleged by the appellant-plaintiff under an unregistered mortgage deed and a further question, whether the predecessor in interest of respondents Nos.1/1 to 1/4 entered into the possession of property as a mortgagee and held that property as a mortgagee with a limited interest and that they did not claim any higher right or interest in the property either during the period of prescription or on completion of the period of prescription u/s 28 read with Article 144 are the questions of intention of parties and that intention is to be gathered and established by the evidence which may be adduced by the respective parties in support of the various contentions, and unless these questions are gone into and evidence led and appreciated in order to find out which contention of the respective parties is right, it is not open to the Court to say that such a suit is or is not maintainable. In that view of the matter, therefore, the learned District Judge was not right in confirming the judgment and decree of the learned Civil Judge (J.D.) Visnagar, dismissing the suit on the short ground of the maintainability at the preliminary stage without hearing the evidence of the parties and appreciating the same in support of the rival contentions thereof. The result is, therefore, that this appeal should be allow and the matter should be remanded back to the Court of learned civil Judge (J.D.). Visnagar, for recording evidence on the various issues that may be led by the parties and after considering the documentary as well as oral evidence produced in the suit to dispose of the suit and on the issues before him

in light of the principles enunciated and established in the decisions referred herein above. In the circumstances of the case, there should be no order as to costs.

13. Order accordingly.

