

(1933) 09 PAT CK 0014
In the Patna High Court

Raghunath Bhagat and Others

APPELLANT

Vs

Meghu Mander and Others

RESPONDENT

Date of Decision : 12-09-1933

Acts Referred:

Limitation Act, 1963 — Section 9
Transfer of Property Act, 1882 — Section 66, 68

Citation : AIR 1933 Patna 693

Hon'ble Judges : Kulwant Sahay, J

Bench : Division Bench

Judgement

Kulwant Sahay, J.—This is the plaintiffs appeal in an action to enforce a mortgage. Both the Courts below have dismissed the suit on the ground that it was barred by limitation. The mortgage was dated 11th December 1914 and the due date for payment of the money was 11th December 1915. The suit was admittedly instituted more than twelve years after the due date. In the plaint the statute of limitation was sought to be avoided by pleading certain payments. Both the Courts below have found that the payments alleged by the plaintiffs had not been established and they did not save the suit from the bar of limitation. In this Court the learned advocate for the plaintiffs-appellants has taken a new point which was not taken in either of the Courts below.

2. The point is that the period of limitation was suspended during the time the mortgaged property was under water. This point as I have said was not taken in the Courts below and it was not stated in the plaint as a ground for avoiding the statute of limitation. There is no clear finding by the Courts below as to when the land actually went under water and when it came out of water. But it appears from the judgments of the Courts below that the land came out of water shortly before the institution of the suit.

The question is whether the fact of the land having diluviated can give rise to a suspension of the period of limitation. Section 9, Lim. Act, specifically provides that when once time commences to run no subsequent disability or inability

stops it.

3. It is however contended that on general principles the plaintiffs are entitled to a suspension as they could not effectually institute a suit for sale of the property when the property was not in existence. The fact that the mortgaged property went under water did not in any way affect the plaintiffs' right to bring a suit upon the mortgage. In fact Section 68, T.P. Act, gives the mortgagee the right to sue for the mortgage money where by any cause other than wrongful act or default of the mortgagor or mortgagee the mortgaged property is wholly or partially destroyed or the security is rendered insufficient within the meaning of Section 66 of the Act. It was therefore open to the plaintiffs to bring a suit in spite of the fact that the mortgaged property had gone under water. Several cases have been cited on both sides to show either that there is no suspension of the period of limitation apart from the provisions of the Limitation Act itself or that limitation has been held to be suspended under circumstances not contemplated by the Limitation Act.

4. Now amongst the latter class of cases, reference is made to the decision of the Calcutta High Court in *Lakhan Chander Sen v. Madhusudan Sen* (1908) 35 Cal 209. That was a case in which a decree had been made for possession in favour of the plaintiff as well as of defendant 2. On appeal by defendant 1 the decree in so far as it awarded possession to defendant 2 was set aside. Thereafter defendant 2 instituted a suit for possession.

5. It was held that this suit was not barred by limitation inasmuch as he could not institute the suit so long as the decree in the previous suit in his favour stood intact. This case went up to the Privy Council and the decision of the Privy Council is reported in *Nrityamoni Dassi v. Lakhan Chandra Sen* AIR 1916 PC 96. Their Lordships of the Judicial Committee affirmed the decision of the High Court and observed as follows:

But it (limitation) would equally without doubt remain in suspense whilst the plaintiffs were bona fide litigating for their rights in a Court of justice. They had in the suit of 1896 before Henderson, J., associated themselves with the plaintiffs in that action, and had asked for an adjudication in those proceedings of their rights. A distinct issue was framed in respect of their claim, to which no objection seems to have been made by the appellant *Nrityamoni*; and the learned Judge who decided the case pronounced, with reference to their prayer, the following order....

6. It is not necessary to quote the entire order; it is enough to say that by that order the defendants were held entitled to get possession of the share to which they had been declared entitled. Their Lordships then proceeded to observe:

It was an effective decree made by a competent Court, and was capable of being enforced until set aside. Admittedly, if the period during which the plaintiffs were litigating for their rights is deducted, their present suit is in time. Their Lordships are of opinion that the plea of limitation was rightly overruled by the High Court.

The Judicial Committee of the Privy Council there proceeded on the principle that so long as the decree in favour of defendant 2 stood, he could not possibly bring an action for possession and in fact the decision proceeded on the hypothesis that there was an accrual of fresh cause of action after the previous decree had been set aside.

7. The question of the suspension of the period of limitation was considered by the Calcutta High Court in *Sarat Kamini Dasi v. Nagendra Nath Pal* AIR 1926 Cal 65. This was an action for recovery of mesne profits by an auction-purchaser against the person whose interest he had purchased and for recovery of the sums realized as rents from the tenants of the land; and it was contended that the period between the actual sale and the confirmation of the sale should be suspended.

8. It was held that apart from the provisions of the Limitation Act itself, there is no principle which can legitimately be invoked to add to or supplement its provisions and there can be no suspension of the period of limitation. The same question was considered by the Allahabad High Court in the case of *Ram Charan Sahu and Another Vs. Goga and Others* and the same view was expressed in this case. In a Full Bench decision of this Court in *(Tikait) Mahabir Prosad Narayan Deo Vs. Bhupal Ram and Others*, the question came for consideration with reference to the provisions of the Chota Nagpur Encumbered Estates Act. The decisions of the Calcutta High Court as well as of some other High Courts relating to the question of the suspension of the period of limitation were there considered and Rowland, J., observed as follows:

I do not think that it is necessary or that it would be good law to invoke a theory of suspension of limitation in any case in which suspension is not expressly provided for either in the Limitation Act or in some special Act. I would be reluctant to whittle away the definite provisions of Section 9, Lim. Act,

9. With great respect I entirely agree with the view there expressed. In the present case no ground has been made out for suspension of rent within the meaning of the provisions of the Limitation Act. The fact that the property went under water is no ground for not bringing the suit within the period of limitation. There is therefore no substance in this appeal and it must be dismissed with costs.