

(1932) 06 CAL CK 0001
In the Calcutta High Court

Rajani Kanta Ghosh and Others

APPELLANT

Vs

Sourendra Nath Mitter and Others

RESPONDENT

Date of Decision : 17-06-1932

Acts Referred:

Limitation Act, 1963 — Section 5
Transfer of Property Act, 1882 — Section 82

Citation : AIR 1934 Cal 421

Hon'ble Judges : Rankin, C.J.; Mitter, J

Bench : Full Bench

Judgement

Rankin, C.J.—This appeal is brought by certain defendants in a suit for enforcement of a mortgage dated 10th August 1908. The mortgage was for a small sum of Rs. 3,800. It would appear that it contained a provision for interest at two per cent, per mensem compound interest with monthly rests. The suit was brought on 15th March 1920 by which time notwithstanding that a small sum of Rs. 2,045 had been paid to the mortgagee no less than Rs. 45,819 was due according to the mortgage-bond. It appears that the suit was decreed ex parte in September 1920. The defendants however appear to have established that service upon them was not correct and after no less than six-years, namely on 16th August 1926, the ex parte decree was set aside and the suit was restored. On 27th February 1929 the learned Subordinate Judge passed a preliminary decree. He passed a preliminary decree for six-sevenths only of the amount due on the bond but the amount notwithstanding had by this time grown to the extraordinary figure of Rs. 3,31,699. A great many defences were taken by the mortgagors which have since been abandoned as to the validity of the mortgage, as to whether the mortgage was obtained by undue influence and questions of like character. In the present appeal Mr. Pugh, the learned counsel for the appellants has taken four definite points and to those points I shall confine myself.

2. The first point is this: When the mortgage was executed it was executed in favour of one Bepin, but it turns out that two other persons were joint with him.

When the suit was brought it was brought by Bepin's sons, by plaintiff 3 Khoka and by the administratrix to the estate of one Charu. Khoka it seems died on 7th April 1928 and the first point taken is that the suit abated within ninety days of that date and the plaintiffs had 60 days thereafter in which to set aside the abatement; that brings us to the month of September in the year 1928. An application on behalf of two persons was made on 4th February 1929 saying that there had been an order (apparently on 6th November 1925) appointing them receivers to the estate of the mortgagees and it said that the Receivers after their ap-poiotment had been acting in the suit, had made an application for amendment of the plaint and had been making other applications and that that being so the Receivers ought to be formally made parties. Objection was taken to this contention on the ground that Khoka had died about a year before and that the Receivers could not be made parties because the suit had abated. The view taken by the learned Judge was that the order making the Receivers parties was a purely formal order, that in fact they had been prosecuting the suit, that the defendants had treated the Receivers as proper persons to have notice of the application for restoration, that the Receivers had been allowed to make an application to get defendants 11 to 14 on to the record and so forth.

3. That being so he made an order appointing these two persons to represent the plaintiffs in the suit. Mr. Pugh points out that strictly speaking if the suit had become defective and had abated as regards Khoka it was not satisfactory to make the Receivers parties to the suit, and he criticized the view adopted by the learned Subordinate Judge upon technical grounds. He says that Order 22, Rule 10, Civil P. C , does not really cover the substitution that was made in the present case. In my judgment there is much to be said for the view urged by Mr. Pugh. Speaking generally it is a wrong thing to make Receivers parties in a case unless there are special reasons and if the suit had abated against Khoka then that was a formidable difficulty which the learned Judge ought to have tackled in a more technical way. But actually the position is to-day that we have the right u/s 5, Lim. Act, to do justice in the matter. If at the time this application was allowed by the order of 5th February 1929 the learned Judge had been asked in the alternative to overlook the fact that substitution of Khoka had not been made a few months before and to over, look that in view of the excuse that the Receivers had been allowed to act on the part of the plaintiffs I do not think that the learned Judge would have met with any difficulty in extending the time u/s 5, Lim. Act. In my view, that is the proper and correct course to be adopted and if it were necessary I should be prepared to make any order upon that basis. It is not necessary that the plaintiffs' suit should fail on this ground. Moreover, in a suit upon this mortgage only Bepin's representatives are necessary plaintiffs.

4. The next point taken by Mr. Pugh is that the language of the judgment is not properly carried out by the language of the formal decree. He says that the ordering portion of the judgment directed that the suit should be decreed to the extent of six sevenths share of the claim with interest on the principal at the bond rate from the date of suit till the expiry of the period of grace but that the

decree gives the figure of Rs. 3,31,699 and that that amount is really arrived at by carrying forward the figure of Rs. 45,819 which was due for principal and compound interest at the date of the suit. Mr. Pugh's contention is that in addition to the figure of Rs. 45,819 all that should have been allowed is simple interest at two per cent, on Rs. 3,800. In my judgment, the language of the learned Judge in the judgment is correctly carried out by the terms of the decree. In any case, even if we have any doubt upon that matter, *prima facie* it is the right of the plaintiff to get his contractual dues and to get them not only up to the date of the suit but up to the expiry of the period of grace. We have put it to Mr. Pugh whether or not there is any case which he can make why the ordinary rights of the mortgagees as regards the period pending suit should not be given to them, Mr. Pugh does not make any such case before us but only says that the order made by the learned Judge at the end of his judgment does not mean the same thing as the formal decree that has been afterwards drawn up. In my judgment, the order of the learned Judge does mean exactly what has been drawn up in the decree and that disposes of the contention.

5. The third contention put forward by Mr. Pugh is this: One of the seven mortgagors, namely Ashutosh had incurred a previous debt to the mortgagee Bepin and for that debt he had given a first mortgage of his one-seventh share. Shortly before the present suit was brought the mortgagee had brought another suit on the first mortgage against Ashutosh and he brought his one-seventh interest to sale and purchased that himself. Mr. Pugh contends that for some reason that circumstance is fatal altogether to the present suit. I have been entirely unable to see why it should be fatal to the present suit. In my judgment, these are two entirely different debts. In one case there was a first mortgage of Ashutosh's one-seventh share, in the other case there was a mortgage of the shares of seven people including Ashutosh, although in Ashutosh's case it was a second mortgage. I see no reason why separate suits should not be brought for these two different claims. It does not appear to me that the circumstance that the first mortgagee got a decree in the suit against Ashutosh has any effect at all to discharge the cause of action when he brings a suit against Ashutosh and the other mortgagors on an entirely different transaction. I do not think it can be at all successfully contended that the case of *Sri Gopal v. Pirthi Singh* (1902) 24 All 429, is any authority for the proposition advanced by Mr. Pugh.

6. The fourth point taken by Mr. Pugh is this: It seems that two of the mortgagors, Ashutosh and Arun, got into difficulty with the result that their shares in the property which they had mortgaged in 1908 to these mortgagees were sold in January 1916 and September 1916 to certain people whom I may call the Paikpara defendants. When the plaintiffs brought their suit in March 1920 there is no reason to suppose that they were aware of the fact that the interest in the equity of redemption had as regards Ashutosh and Arun passed to the Paikpara defendants. No written statement was filed at that time. Indeed it does not appear that there was any written statement filed until January 1927 after the suit had been restored and the *ex parte* decree set aside. When the written

statement was filed setting out these transactions the plaintiffs moved the Court and had these Paikpara defendants added as defendants 11 to 14. Thereupon these defendants came in and stated that they had acquired the shares of Ashutosh and Arun. Apart from the objection taken by the main defendants that the suit was not properly constituted in the absence of the Paikpara defendants, no issue arising out of these purchases by the Paikpara defendants was taken before the learned Judge. It was not suggested that to the extent of the interest acquired by the Paikpara defendants, the mortgage debt was unenforceable. No proof was given as to the plaintiffs' knowledge of the transactions by which the Paikpara defendants took any interest in the equity of redemption in 1916. The learned Judge finding that the mortgage was of 1908 had no difficulty in saying that the plaintiff had sued their original mortgagors in good time when they sued them in 1920, but he took the view that the statute of limitation must be applied—as at 1927—to the Paikpara defendants and that therefore the Paikpara defendants had a complete defence so far as the suit was concerned on the plea of limitation, the mortgage being , more than 12 years before that date and there being no payment by anybody within 12 years of 1927. Mr. Pugh contends that the learned Judge was quite right in dismissing the Paikpara defendants from the suit; but the effect of that is, he says, that not only must the plaintiffs give up one-seventh belonging to Ashutosh in view of the plaintiffs' suit as first mortgagees and sale there, under, but that they must also give up two more sevenths by reason that the Paikpara defendants cannot be sued and they are interested in two more sevenths. The facts as to the interest of the Paikpara defendants were not properly examined or disclosed. It appears that Ashu and Arun had two-sevenths share in certain properties, but it is not at all certain that the Paikpara defendants had acquired the whole of the share of Ashu and Arun. Still less can I find how the share of Ashu can be omitted twice so as to make three-sevenths to be given up. The question therefore before this Court is this:

The mortgagees within 12 years of their mortgage bring their suit against the mortgagors to enforce their mortgage. They cannot be presumed to know what the mortgagors have been doing in the meantime with their equity of redemption. They may have assigned it a hundred times or they may not. The mortgagees bring their suit against the mortgagors. Seven years afterwards, by which time it is much later than 12 years from the date of the mortgage, the mortgagors announce that a long time before two of them had assigned their interests in the equity of redemption; and it turns out that the assignees cannot by reason of the statute of limitation be impleaded in the suit. What is the effect of that? Does that mean that the other mortgagors are only answerable for their proportion of the mortgage debt, or can the mortgagee recover his total debt out of all or any of the properties of the mortgagors who had been properly made the defendants? I do not think that there is any authority for saying that a mortgagee in circumstances such as the present is debarred from realizing the whole of his debt from all or any of the mortgaged properties belonging to the defendants in the suit. There is a certain amount of doctrine, particularly in the

case of *Imam Ali v. Baij Nath Ram Sahu* (1906) 33 Cal 613 and *Budhmal Kevalchand v. Bamavalad Yesu* (1906) 33 Cal 613, to the effect that a mortgagee with the knowledge that different fragments of the equity of redemption have gone to different purchasers cannot by his own conduct, e. g., by realising one of the properties mortgaged, increase the burden upon others of the properties.

7. It seems to me however that the present case is well outside these decisions. It seems to me that it is fundamentally erroneous to talk of a mortgagee who is out of time in discovering that the equity of redemption has been assigned as a person who has been guilty of negligence or laches. As far as I know it is no part of the duty of a mortgagee to keep an account of what the mortgagor himself was doing with his equity of redemption. If he does not come to know of the assignment till it is too late to sue the assignee that is not a question of negligence or laches. Where a mortgagee is guilty of laches or negligence in the sense of a breach of a real duty the matter possibly may come within the decisions of the cases cited above. In the same way where a mortgagee having notice of the rights of other persons deliberately releases certain portions of the property, it may or may not be that in order to prevent him from increasing the burden upon any portion of the property he would be treated as though he had himself acquired the property which has been released. The mortgage in such circumstances, it may be, is split up by reason of the mortgagee's own conduct. I do not propose to discuss cases of this character but I may observe that cases in the Madras Court and in this Court are not in consonance. For the present purpose it is enough to say that that is not the case before us. There is no proof of negligence. All that had happened was that the plaintiffs had not found out that the equity had been assigned as regards certain fragments of it until a time when they were unable to implead the assignees.

8. In these circumstances it is impossible to accede to the argument advanced before us by Mr. Pugh unless we are prepared to agree with him upon the interpretation of Section 82, T. P. Act, whether in its present form or in the form, that is important for our purpose, which obtained between 1882 and 1929, is not in my judgment to be construed as meaning that any mortgage by seven persons of their shares in different properties is to be treated as seven entirely separate mortgages. The very contrary is implied by it. In my judgment it is open to a mortgagee to recover the whole of his money from any one of these properties. He is entitled, unless he has done something to disentitle himself, to treat the mortgage as one mortgage. This is not a case, in my judgment, where the mortgagors can compel the mortgagees to apportion their debt and proceed against each property exclusively for the satisfaction of a particular portion. I have no doubt that for certain purposes a mortgagor may claim that his property is only liable pro rata. That is the position between one mortgagor and another, and in certain circumstances it may be that the mortgagee must have regard to it.

9. But I know of no authority for the proposition that where without any default

of his own it turns out that a mortgagee is unable to have recourse to a part of the mortgaged property by reason of it having been assigned by the mortgagor, the mortgagee cannot recover the whole of his debt out of one or all the properties which he is able to reach. I do not admit that the mortgagee owes a duty to each mortgagor to sue all the other mortgagors or their assignees in good time. It is open to a mortgagor to pay of his mortgagee whenever he likes. If he wants to do that to protect him-self he can do it even if it is not his duty to do it. Some of the dicta in *Imam Alt's case* (1906) 33 Cal 613 may require further consideration, but in any event they must be taken together with what was said in *Mir Eusuff v. Panchanan* (1911) 6 I C 842. On the facts of the present case I am satisfied that there is no sound proposition of law which entitles us to hold that because the Paikpara defendants did not come to the plaintiffs' knowledge till after 12 years from the date of the mortgage the plaintiffs must forgo the proportion of the mortgage debt represented by their interest. That being so, this appeal fails and must be dismissed with costs. The cross-objection not being pressed is dismissed without costs.

Mitter, J.

10. I agree.