
(1977) 12 PAT CK 0002
In the Patna High Court
Case No : C.W.J.C. No. 193 of 1976

Ram Rup Kuer and Others

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 23-12-1977

Acts Referred:

Limitation Act, 1963 — Section 27, 3, 30

Citation : (1978) 26 BLJR 696

Hon'ble Judges : Nagendra Prasad Singh, J;B.S. Sinha, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Nagendra Prasad Singh, J.—The petitioners in this writ application have questioned the authority of the respondent Deputy Collector Land Reforms to direct the petitioners to deliver possession of the land, which had been in their possession as mortgage thereof, to respondent No. 3 who claims that he is entitled to recover possession of the same as mortgagor thereof, in accordance with the provisions of Section 12 of the Bihar Money-Lenders Act, 1974 (hereinafter to be referred to as the Money-Lenders Act).

2. It appears that one Dahu Kanu executed a usufructuary mortgage on 31.5.1920 in favour of petitioner No. 1 and father of petitioner Nos. 2 and 3 mortgaging 15 lathas 5 dhurs of land for an advance of Rs. 900/. The period for which the land was to remain under mortgage was 9 years, i.e., Dahu Kanu after paying the mortgage money could have redeemed the said mortgage sometime in the year 1929. A copy of that mortgage deed is Annexure-1 to the writ application. However, neither the mortgage money was paid for any step for redemption was taken by said Dahu Kanu. On 14.11.1975, respondent No. 3, claiming to be an heir of the aforesaid mortgagor, filed an application u/s 12 of the Money-Lenders Act read with Rule 10(2) of the Rules framed under the aforesaid Act before the respondent Deputy Collector saying that the statutory period of 7 years having expired since the date of the execution of the mortgage

bond, he was entitled to recover possession of the mortgaged land in accordance with the provisions of the aforesaid Money-Lenders Act and the Rules framed there Under. Notice was issued to the petitioners asking them to show cause as to why in accordance with the provisions of Section 12, possession over the mortgaged land should not be delivered to respondent No. 3. Ultimately, by an order dated 30.12.1975, the respondent Deputy Collector directed the petitioners to deliver possession of the land to respondent No. 3 by 22.1.1976 failing which possession would be delivered to him through court. A copy of that order is Annexure-3 the writ application.

3. The petitioner in the writ application had also challenged the vires of Section 12 of the Money-Lenders Act. However, at the time of the hearing in view of a Full Bench Decision of this Court in the case of Madho Singh v. State of Bihar and Ors. 1977 C.W.J.C. 670 decided on 7-11-1977, Learned Counsel appearing on behalf of the petitioners has not pressed that point. He, however, submitted that question of redemption will arise only if it is found that the mortgage bond, which is executed on 31-5-1920, still subsists. If, however, according to the Learned Counsel, it is held that the right to redeem the said mortgage was extinguished prior to coming into force of the provisions of the Money-Lenders Act, there is no question of statutory redemption under the provisions of the said Act.

4. For purpose of considering this question certain sections and articles of the Limitation Act of 1908 (hereinafter to be referred to as the old Limitation Act) and of the Limitation Act, 1963 (hereinafter to be referred to as the new Limitation Act) are relevant. Article 148 of the old Limitation Act provided a period of 60 years for mortgagor to redeem or to recover possession of the property mortgaged. This period of 60 years was to be calculated with respect to the date when the right to redeem or to recover possession accrued to the mortgagor. Section 28 of the old Limitation Act provided that at the determination of the period limited by the provisions of that Act to any person for instituting a suit for possession of any property, his right to such property was to be extinguished. This also applied, on its plain reading, even to the right of a mortgagor to recover possession of the property which he was mortgaged. The mortgage bond in question was executed when this old Limitation Act was in force. But, the right of redemption has to be examined in the light of the new Limitation Act, because admittedly, the period of 60 years, which is to be calculated with effect from 31-5-1929, the date when the period of 9 years stipulated in the bond expired, was not over when the new Limitation Act came in force on 1-1-1964. Under Article 61 of the new Limitation Act, the period of 60 years was reduced to a period of 30 years. However, for such a Contingency new Limitation Act has made a special provision u/s 30 which provides that any suit for which the period of limitation is shorter than the period of limitation prescribed by the old Limitation Act, if may be instituted within a period of 5 years next after the commencement of the new Limitation Act or within the period prescribed for such suit by the old Limitation Act, whichever period

expires earlier. This period of 5 years was later amended to a period of 7 years. The effect of this Section 30 read with Article 61 of the new Limitation Act will be that a suit for redemption could have been filed within 7 years from 1-1-1964 when the new Limitation Act came in force. This period of 7 years, however, expired on 1-1-1971 and no suit for redemption was filed by respondent No. 3.

5. Now the question is as to whether after the expiry of the said period not only his remedy to recover possession of the mortgaged property was extinguished, his right and interest in the said property was also extinguished. In view of Section 3 of the new Limitation Act, there cannot be any controversy that the remedy of the mortgagor to recover possession of the mortgaged property was barred and no court could have entertained suit for that purpose filed on behalf of respondent No. 3. But, in case it is held that in spite of the remedy being barred the mortgage subsisted in eye of law, then respondent No. 3 can avail the remedy provided u/s 12 of the Money Lenders Act, which is a Special Act, the sole object thereof being to regulate money-lending transactions and to grant relief to the debtors in the State of Bihar. This aspect of the matter was indirectly considered in a Bench decision of this Court in the case of Kailash Pati Singh v. State of Bihar and Ors. 1976 B.B.C.J. 101. Shambhu Prasad Singh, J., raised a question as to what will happen in cases where the right of the mortgagor to redeem and recover possession has already been extinguished on account of the provisions of the Limitation Act ; can he in such case avail of the right conferred upon him u/s 12 of the Money Lenders Act. Having posed that question, however, the learned Judge did not consider it necessary to decide because in facts and circumstances of that particular case, the right of the mortgagor to redeem and recover possession of the mortgaged property had not been extinguished under the provisions of the Limitation Act.

6. In the instant case, there is no dispute that the right of respondent No. 3 to recover possession of the mortgaged property had already been barred under the provisions of the Limitation Act when he filed an application u/s 12 of the Money Lenders Act. That is the effect, when right of time mortgagor to recover possession is barred by the Limitation Act has been considered on different occasions by different courts and on that question Section 28 of the old Limitation Act and Section 27 of the new Limitation Act, has a direct bearing. Section 27 of the new Limitation Act is a reproduction of Section 28 of the old Limitation Act, and is as follows:

At the determination of the period hereby limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished." One of the earliest case of the Privy Council, which has construed the scope of a provision similar to Section 28 of the old Limitation Act or Section 27 of the new Limitation Act is Ganga Gobind Mandal and Ors. v. The Collector of Twenty Four Pergunnahs and Ors. XI moore"s I.A. 345, where it was observed that where a law prescribes a limitation for recovering possession of a property "after that time, it declares not simply that the remedy is barred, but that the

"title is extinct in favour of the possession.

In the case of *Fatimatunnissa Begam and Ors. v. Soonder Das and Ors.* 27 I.A. 103, a question arose as to whether a mortgagor's suit for possession under a usufructuary mortgage was barred as it had been filed after the expiry of the period of limitation. The Court below had held that at the expiration of the period fixed by the Act in question for any person for instituting a suit for the possession of any land, his right to such land shall be deemed to have been extinguished. While affirming that finding, the Privy Council observed that the parties to the mortgage deed may not be conscious about the same but nonetheless by operation of law the right of the mortgagor to sue became extinct. A Full Bench of the Allahabad High Court had to consider a similar question in the case of *Anup Singh and Others Vs. Fateh Chand and Others*, where it was held as follows:

In my opinion where a mortgagor has acknowledged a mortgage, that acknowledgement is prima facie evidence that there is a subsisting mortgage which he acknowledges. If the mortgage had become extinguished by reason of lapse of time there was no occasion for him to acknowledge such a mortgage; the mortgage had to all intents and purpose, ceased to exist and there is nothing which had to be acknowledged.

Again, in the case of *Sukhdeo Vs. Emperor*, in connection with a mortgage suit *Sulaiman, C.J.*, for the same Court observed as follows:

Where a suit relates to possession of immovable property and limitation has expired, it is not only that the remedy is barred, but the right also extinguished u/s 28, Limitation Act. If, therefore, 60 years have expired the plaintiffs' rights have been extinguished.

In the case of *Shah Gur Saran and Another Vs. Shib Singh and Others*, a Full Bench of Allahabad High Court had to again consider a question in respect of right of a mortgagor and it was held:

It may be taken as generally correct that the law of limitation applicable to a redemption suit of a usufructuary mortgage is the law of limitation which is in force on the date when the action is raised and not the law of limitation which was in force when the mortgage was made or when the acknowledgment was made. But this rule is subject to one well established exception that if before coming into force of any particular law of limitation, any right or title to the property had been extinguished, the subsequent passing of any Limitation Act would not revive the extinguished right or title unless the new Act expressly does so.

Similar view has been expressed in the case of *Indurai Bhaurai Desai Vs. Shivalal Nabhubhal*, AIR 1940 49 (Nagpur) and *Neelakantan Parameshwaran Namburi v. Krishnan Narayan Pillai* AIR 1955 S.C. 145 A Full Bench of Madras High Court, while considering this very question in the case of *Valliamma Champaka Vs. Sivathanu Pillai and Others*, , after referring to Section 28 of the old Limitation

Act, observed as follows:

This is an exception to the well accepted rule that limitation bars only the remedy and does not extinguish the title. It lays down a rule of substantive law by declaring that after the lapse of the period the title ceases to exist and not merely the remedy. A suit for redemption of usufructuary mortgage and for recovery of possession of the hypo theca would obviously fall within Section 28. A mortgagor who allows his right of redemption to be barred by not instituting the suit as prescribed under Article 148 of the Limitation Act, loses his title to the property.

There is a judgment of the Punjab High Court, the facts of which are very similar to that of the present case, in the case of *Ram Rekha Mal v. Roda and Ors.* AIR 1951 P&H 125 In that case certain lands had been mortgaged later, the right to redeem was extinguished u/s 28 read with Article 148 of the old Limitation Act. Later Punjab Restitution of Mortgaged Lands Act, 1938 was passed which provided that if a mortgage was subsisting on the date when that Act came into force, an application could be made u/s 4 of that Act for recovery of possession of the mortgaged land. The said claim was rejected holding that once the right of the mortgagor to recover possession has been extinguished by lapse of time, there was no question of entertaining an application u/s 4 of the Act, because the mortgage was no longer subsisting.

7. The relevant portion of Section 12 of the Money Lenders Act is as follows:-

Notwithstanding anything to the contrary contained in any law or anything having the force of law or in any agreement, the principal amount and all dues in respect of a usufructuary mortgage relating to any agricultural land, whether executed before or after the commencement of this Act, shall be deemed to have been fully satisfied and the mortgage shall be deemed to have been wholly redeemed on expiry of a period of seven years from the date of the executing of the mortgage bond in respect of such land and the mortgagor shall be entitled to recover possession of the mortgaged land in the manner prescribed under the rules.

It is in two parts. The first part statutorily redeems a mortgage in respect of any agricultural land after expiry of a period of seven years. The second part enables the mortgagor to recover possession in the manner prescribed under the Rules. On its plain reading, before Section 12 can operate, a mortgage must subsist so as to enable the mortgagor to recover possession of the land in question after statutory redemption. If due to lapse of time or by conduct of the parties the right, title and interest of the mortgagor in the property to question has been extinguished prior to coming into force of the provisions of the Money Lenders Act, in my view, there is no question of redemption of such a mortgage and recovery of possession of the land once mortgaged. The right of redemption having become barred under the Limitation Act, the right, title and interest of the mortgagor in the property, itself will be deemed to have been extinguished. In

such a situation, in my opinion, the mortgage itself does not subsist, so as to attract the provision of Section 12 of the Money Lenders Act.

8. None appeared at the time of hearing of this application on behalf of respondent No. 3. However, learned Advocate-General assisted the Court at our instance. He frankly conceded that Section 12 of the Money-Lenders Act could have application only on mortgages which are subsisting on the relevant date and under that provision, the rights which are extinguished, cannot be revived. In view of the fact that the period prescribed under the Limitation Act for redemption of the mortgage in question and recovery of possession of the land was barred on 1-1-1971, the applicant respondent No. 3 could not have filed an application on 14-11-1975 for recovery of the land in question ; the respondent Deputy Collector could not have allowed the said application while purporting to exercise the power conferred on him by Section 12 of the Money Lenders Act. The order directing the petitioners to deliver possession of the land to respondent No. 3, is as such, wholly without jurisdiction and liable to be quashed by this Court.

9. In the result, the writ application is allowed and the impugned order, Annexure-3 is quashed. In the circumstances of the case, however, there will be no order as to costs.