

(1953) 12 CAL CK 0019

In the Calcutta High Court

Case No : Appeal from Appellate Decree No. 1153 of 1948

Satis Chandra Purkait

APPELLANT

Vs

Nilratan Purkait

RESPONDENT

Date of Decision : 10-12-1953

Acts Referred:

Bengal Money Lenders Act, 1940 — Section 36, 36(2)
Limitation Act, 1963 — Section 10, 20, 9

Citation : 59 CWN 642 : (1955) 2 ILR (Cal) 239

Hon'ble Judges : P.N. Mookerjee, J

Bench : Single Bench

Advocate : Bon Behari Mukherjee, for the Appellant; Sarat Chandra Janah and Arun Kumar Janah, for the Respondent

Final Decision : Allowed

Judgement

P.N. Mookerjee, J.—This is the Plaintiff's appeal arising out of a mortgage suit. The suit has been dismissed by the two Courts below but on different grounds. According to the learned Munsif, the suit was premature. According to the learned District Judge, who heard the appeal from the learned Munsif's decision, the suit was time-barred. In the result, therefore, the suit was dismissed by both the Courts below. Against this decree of dismissal, the present appeal has been preferred by the Plaintiff.

2. The facts are a little complicated but they may be briefly stated as follows. On August 12, 1926, the Defendant mortgaged the properties described in schs. ka and kha of the present plaint to the Plaintiff by two mortgages for Rs. 200 and Rs. 100, respectively. The due date for the payment of the mortgage money under each bond was March 14, 1927. The payment, however, was not made and on October 15, 1927, the Defendant mortgaged some of his other properties to the Plaintiff for Rs. 50. On this last mortgage, a suit was brought in which on April 24, 1933, a preliminary decree was obtained by the mortgagee. This decree was made final on May 20, 1933 and in execution of this decree the mortgaged

properties covered by the third mortgage bond were sold and purchased by the mortgagee decree-holder on September 15, 1934. Thereafter, the mortgagee decree-holder obtained a personal decree against the mortgagor judgment-debtor and in execution of this personal decree the present properties of ka and kha schs. which were the subject-matter of the first two mortgages were also sold and purchased by him. On July 30, 1941, the mortgagor judgment-debtor filed an application u/s 36 of the Bengal Money Lenders Act for re-opening the decrees and the said application was granted by the trial Court and also by the lower appellate Court with some modification, the learned Judge eventually passing a new decree towards the end of 1944 directing payment of the amount of this new decree in eight, annual instalments beginning from December, 1944. There was also an order for restoration of possession to the judgment-debtor in terms of Section 36(2)(e) of the Bengal Money Lenders Act with the usual condition that in default of payment of any of the instalments the possession would be restored back to the decree-holder.

3. In this state of things, on January 2, 1946, the present suit was instituted by the mortgagee for recovery of his dues under the first two mortgages, dated August 12, 1926. Naturally, the mortgagor objected that the suit was barred by limitation. It was also taken as a defence that the suit was not maintainable presumably on the view that it would be premature until the mortgagor had got back title to the properties. The learned Munsif, on a consideration of the law, came to the conclusion that, in the facts which had been stated above, it was a case of what is usually known as suspension of limitation and, in that view of the matter, he held that the suit was not time-barred. He was, however, of the opinion that, as, until the last payment under the instalment decree had been duly made by the mortgagor judgment-debtor, the title would remain with the mortgagee decree-holder auction-purchaser, at the date of the present suit that title had remained with the mortgagee and that, accordingly, the suit for recovery of the present mortgage dues against the mortgagor was premature and was not maintainable. In the above view of the matter, the learned Munsif dismissed the Plaintiff's suit.

4. On appeal, this decision was affirmed but on a different ground which went to the root of the mortgagee's claim. The learned District Judge did not agree that the suit was premature but he felt that it was time-barred. He categorically expressed the view that there could be, in law, no case of suspension of limitation apart from Sections 9 and 10 of the Limitation Act which did not apply to the present case, and that, as the suit here was not brought within twelve years of the due date under the relevant mortgage bonds, viz., March 14, 1927, it was barred by limitation. He, accordingly, dismissed the Plaintiff's suit on the ground that his claim was time-barred and in that connection he also overruled the Plaintiff's contention that limitation was saved at least u/s 20 of the Limitation Act as the Plaintiff who was the mortgagee had been in possession of the mortgaged properties till about the year 1945 and he had received rents and profits from the same during the period of his possession. Against this decision of

the learned District Judge, the present appeal has been preferred by the Plaintiff mortgagee.

5. The two points which thus arise for my consideration are whether the suit is time-barred and, if not, whether it is premature. In my opinion, in the circumstances of this case, the view of the learned District Judge that the suit is barred by limitation cannot be sustained, although, quite clearly, Section 20 of the Limitation Act would not protect it, the possession pleaded by the Plaintiff to attract its aid not being in his capacity as mortgagee.

6. It is clear from the facts which I have stated before that the mortgaged properties which are the subject-matter of the present suit were purchased by the mortgagee decree-holder on April 18, 1936. The title under the sale was still with the decree-holder at the date of institution of the present suit as until payment of the last instalment under the new decree made u/s 36 of the Bengal Money Lenders Act, it cannot be said that the title has gone back to the mortgagor judgment-debtor [vide the case of *Jadu Nath Roy and Ors. v. Kshitish Chandra Acharji Choudhury and Anr.* (1944) 49 C.W.N. 30]. On and from April 13, 1936, therefore, the mortgagee was also the owner of the properties, now in suit, and the equity of redemption vested in him. A suit by him, under these circumstances, could not have been brought for recovery of the present mortgage dues. Clearly enough, it was a case where the original cause of action had become discharged, cancelled and extinguished and the debt had become satisfied by reason of the sale. Thereafter, if the mortgagor duly complied with the conditions under the new decree, the title would certainly go back to him but until that had happened, there could be no cause of action for a suit for recovery of the present mortgage dues which, as I have already said, had become satisfied and the cause of action in respect whereof had become extinguished or cancelled and had plainly disappeared on the purchase of the mortgaged properties by the mortgagee. On the happening of the contingency, stated above, that is, on return of the title to the mortgagor, the mortgagee's right to sue for the mortgage debts, covered by the disputed bonds, dated August 12, 1926, would immediately revive and there would arise again an enforceable cause of action for recovery of the same. It would be wrong, therefore, to dismiss the present suit on the ground of limitation and that view cannot be supported in law.

7. In holding that the suit was not time-barred the learned Munsif applied what is usually known as the principle of suspension of limitation. According to the learned District Judge that principle could not be extended beyond Sections 9 and 10 of the Limitation Act and, as neither of those two sections could be attracted to this case, the learned Judge held that limitation could not be saved on the application of that principle. In a sense, both the learned Judges in the Courts below were right. There can be no question that neither Section 9 nor Section 10 would apply to the present case and, accordingly no suspension of limitation under any of the above two sections-assuming, as the learned District

Judge evidently thought, though that is not strictly correct that Section 10 also deals with suspension of limitation,-can be pleaded to protect this suit from the bar of limitation. At the same time a plea of suspension of limitation, as it is usually understood, clearly exists apart from the sections quoted. That plea or the principle underlying it has been held to be of much wider application and although judicial decisions on this point are not uniform, so far as this Court is concerned, the position has been considerably clarified in the case of Midnapore Zemindary Co. Ltd. Vs. Naba Kumar Singh Dudhuria and Others, . In dealing with this question of suspension of limitation material for our present purpose, their Lordships in that case laid down the law in these terms:

The period of limitation can be extended... in three classes of cases, viz., (1) where injustice has been caused by an act of Court, (2) where the cause of action was satisfied and (3) where the cause of action was cancelled (vide p. 299 of the Report).

8. The argument that the whole law of suspension of limitation was contained in Section 9 of the Limitation Act was repelled by their Lordships and the above three classes of cases were cited as recognised exceptions to the general rule embodied in the section that there would be no suspension of limitation except under its proviso.

9. A similar view was expressed by this Court in the earlier case of Jamini Mohan Sarker v. Nagendra Nath Pal (1925) 43 C.L.J. 155, 170, and it was also substantially recognised, even earlier, in Dwijendra Narain Roy v. Jogesh Chandra De (1923) 39 C.L.J. 40, 54, and, later on, again in Jatindra Chandra Bandopadhyay and Ors. v. Rebatee, Mohan Das and Ors. ILR (1934) Cal 66. A similar principle also underlies the decision of the Bombay High Court in Shri Sharada Peeth Math Vs. Shri Rajrajeshvarashram, , and in the Madras Full Bench case of Mathu Kerakki Chetty and Ors. v. Mohemad Madar Ansal and Ors. ILR (1919) Mad. 185 : AIR [1920] (Mad.) 1 (F.B.), the opinion of Sadasiva Aiyar, J., at pp. 11-12 of the AIR report is decidedly in favour of this view. The Allahabad High Court too, in one of its latest decisions, had expressed a similar opinion [Sri Niwas Tewari Vs. Baleshwar Prasad Bhagat and Another,].

10. The statement of the law as appearing in the extract quoted above in Midnapur Zemindary Co., Ltd. v. Naba Kumar Singh Dhudhuria (Supra), is largely founded on the three leading cases on the subject, viz., Mussammat Ranee Surnomoyee v. Sashee Mookhee Burmonia (1868) 12 M.I.A. 244; (1888) L.R. 15 I.A. 211 (Privy Council) and Nrityamoni Dasi v. Lakshan Chandra Sen ILR (1916) Cal. 660 (P.C.): 24 C.L.J. 1, which approved generally the decision of the Court in Lakhan Chandra Sen v. Madhusudan Sen ILR (1907) Cal. 209. It is unnecessary for me to go beyond that statement for the purposes of the present case but I may respectfully point out that although class (1) may well be a case of extension or suspension of limitation strictly so-called, classes (2) and (3) would strictly be cases of fresh cause of action or new period of limitation, [Mussamat Ranee Surnamayee v. Sashee Mookhee Burmonia (1868) 12 M.I.A. 244.] It is,

however, unnecessary for me to pursue the matter further as even taking the principle as one of extension or suspension of limitation, strictly so-called, the present suit would be amply protected from the bar of time.

11. In support of his contention that the present suit was barred by limitation Mr. Janah relied strongly upon the decision of the Judicial Committee in the case of 17 CWN 605 (Privy Council) . That case has undoubtedly some similarity with the present case, but there is one important difference. The mortgagee's interest which was acquired by the mortgagor in Lala Saniram's case was only of a limited character or, to quote from the judgment at p. 83, "only the "limited interest of a Hindu lady" and there was clearly no satisfaction or extinguishment of the mortgage debt. The fusion of the interests pleaded in the case was insufficient to extinguish the mortgage or cause satisfaction or discharge of the debt, and there was accordingly, in the case cited, no question of annulment or any satisfaction or discharge of the debt or cancellation or discharge of any cause of action or revival of any debt or cause of action on such annulment or cancellation and no such plea appears to have been urged before the Judicial Committee. Suspension of limitation was claimed only on the ground that during the period of the alleged fusion of interests of the mortgagor and the mortgagee in the Appellant and his father they were incapable of suing for redemption. In these circumstances their Lordships disallowed the protection claimed and dismissed the suit as time-barred.

12. In the above view of the matter I am unable to hold that Soni Ram's case is of any real assistance to the Respondents or that it compels me to find particularly in the face of the other authorities cited above-that the present suit is time-barred. That decision is clearly distinguishable and, in my opinion, there is nothing in that Privy Council judgment which is really opposed to the view of the law which I have expressed above. Their Lordships were dealing with a fundamentally different set of facts and their observations at p. 85 of the Report were, on the language used by them, clearly confined to those facts.

13. As to the two other Privy Council cases in (1882) L.R. 9 I.A. 82 (Privy Council) and (1919) ILR 46 670 (Privy Council) , it is enough to say that they are also plainly distinguishable and do not affect the statement of the law, as made above and the same remarks apply to Mullanudi Satyanarayana Braham v. Maganti Suthaya ILR (1926) Mad. 417 which also was cited by Mr. Janah on the Respondents' behalf. I may also point that in (1882) L.R. 9 I.A. 82 (Privy Council) Surnomoyee's case (Supra) was accepted but distinguished as inapplicable on the facts before their Lordships.

14. In the above state of the authorities and as, in my opinion, the view, taken by me, reconciles law with justice and vice versa, I am not inclined to hold that the suit in the present case was barred by limitation. I, accordingly, set aside the finding of the learned District Judge on that point.

15. On the further question, too, viz., as to the maintainability of the suit on the

date of its institution, viz., January 2, 1946, when admittedly all the instalments under the re-opened decree had not fallen due and had not been paid, the learned Munsif was, in my opinion, right in holding that the suit was premature. In the light of the decision of this Court in the case of *Jadu Nath Roy and Ors. v. Kshitish Chandra Acharji Choudhury and Anr.* (Supra) to which reference has been made above and the principle whereof was re-affirmed in the subsequent case of *Upendra Narayan Chatterjee v. Sudhir Chandra Jana* (1946) C.W.N. 17, 21 at page 21 of this latter report, the position is clear that the title would remain with mortgagee decree-holder auction-purchaser until payment of the last instalment under the re-opened decree by the mortgagor judgment-debtor. That being so, until such payment no suit for recovery of the mortgage dues against the mortgagor would be maintainable. I hold, therefore, that the present suit, though not time-barred, was premature and it must, accordingly, fail.

16. In the result, therefore, this appeal is allowed to this extent that the decision of the learned District Judge holding that the suit is time-barred is set aside and that of the learned Munsif holding that it is not time-barred but that it is premature is restored, the result being that the Plaintiff's suit is dismissed only on the ground that it is premature. There will be no order for costs either in this Court or in any of the Courts below.