
(1939) 09 PAT CK 0012

In the Patna High Court

Singheshwar Singh and Others

APPELLANT

Vs

Medni Prasad Singh and Others

RESPONDENT

Date of Decision : 19-09-1939

Acts Referred:

Bihar Money Lenders Act, 1938 — Section 7
Limitation Act, 1963 — Section 20

Citation : AIR 1940 Patna 65

Hon'ble Judges : Varma, J;Manohar Lall, J;Manohar Lal, J

Bench : Full Bench

Judgement

Manohar, Lall J.

1. This is an appeal by defendants 1, 2, 3, 4, 5 and 6 who are the mortgagors and are appellants 1, 2, 4, 5, 6 and 7 in this Court, as well as by defendant 27, who is a subsequent mortgagee, against the decision of the learned Sub-ordinate Judge of Monghyr dated 26th February 1936, decreeing the suit which was instituted by the plaintiffs-respondents to enforce a mortgage bond dated 31st August 1922 in the following circumstances: On 27th April 1906, the father of the principal appellants, who will be hereinafter referred to as the mortgagors, executed a mortgage bond in favour of the plaintiff and his sons to secure a sum of Rs. 800. A sum of Rs. 200 was paid back later on by the mortgagor to reduce his liability but the major part remained unpaid.

2. On 11th October 1912 the mortgagors executed another mortgage bond in favour of the same mortgagees to secure a sum of Rs. 1391 stipulating to pay compound interest at Rs. 1-2-0 per cent, per mensem. The amount due under the earlier bond had come up to Rs. 1241 and a sum of Rs. 150 was taken in cash by the mortgagors. On 29th May 1916 the mortgagors executed another mortgage--a usufructuary mortgage--for a sum of Rs. 900 in favour of defendant 27, an appellant before us. The property covered by this usufructuary bond is included in the properties given in the mortgage, of the earlier bond of 1912. The mortgagee of 1916 paid the sum of Rs. 900 to the earlier mortgagee as

stipulated in the mortgage of 1916. On 5th August 1920, the mortgagors gave a sudhbarna to the plaintiffs for a sum of Rs. 1500, some property which was also given in security in the earlier bond of 1912. This bond is Ex. 3, and by it the mortgagor stipulated to pay the whole amount of Rs. 1500 in one lump sum in Baisakh 1334; the possession of the mortgaged properties was for a fixed period of seven years.

3. The amount of Rs. 1500 was arrived at by calculating the dues of the mortgagee of this bond under another bond of Rs. 888 and the balance of Rs. 612 was paid in part payment of the liability under the bond of 1912 which is Ex. 2 in the case. On 31st August 1922 the mortgagors again executed! a mortgage bond, the bond in suit, for Rs. 2000 stipulating to pay interest at 13 annas per cent per mensem to be compounded. The whole of the amount secured by this document was the balance then due under the bond of 1912. In this bond, which is Ex. 2(a) in the case, it is stated that the amount of Rs. 2000 is the balance of the principal and interest after deduction of the payment towards the bond of 11th October 1912, that the bond is being executed on account of previous dues and the amount will be paid on 30th Baisakh, 1330 fasli.

4. It is also stated in the bond that the mortgaged properties under this document are not subject to any other encumbrance than that under the bond of 1912 and another usufructuary bond of 1905. The properties given in security consist of all the properties which were given under the bond of 1912, but there are additional properties also. The present suit was instituted on 27th April 1935, that is to say within 12 years of the due date of payment of the bond of 1922, but beyond 12 years of the due date of the payment of the bond of 1912 which was renewed as aforesaid by giving additional security in 1922 and with a stipulation to pay a lower rate of interest. It is unnecessary to state the different defences taken in the Court below as the matter in controversy before us has resolved itself into two questions of law: one concerning the application of the provisions of the Bihar Money-lenders Act, 1939 and the other concerning the priority of defendant 27.

5. The learned Subordinate Judge held that the bond in suit was a valid document, that the plaintiffs never agreed to release the property given in security to defendant 27, that the bond of 1912 was not fully satisfied by the payment by defendant 27 in 1916 and therefore his claim for subrogation was negatived. He also held that the usufructuary mortgage bond of the year 1920 in favour of the respondents, which covers the properties included in the bond of 1912, was executed with the full knowledge and consent of the mortgagors. He also negatived the contention of the defendant that the stipulation to pay compound interest at 13 annas per cent, was excessive. The plea of limitation was not pressed and was overruled by the learned Subordinate Judge. In appeal it is argued that having regard to Section 7, Bihar Moneylenders Act, this Court should not pass any decree for a sum larger than Rs. 1391, the amount stated in the bond of October 1912, and that from the interest due on this amount, a

deduction should be made of the sum of Rs. 1512 which was admitted or proved to have been paid towards the bond of 1912 from time to time in lieu of interest. In other words, the contention is that a decree for mortgage amount should be passed not exceeding Rs. 1391 if there are no other obstacles in the way of the plaintiffs.

6. I do not agree with this contention. The wording of Section 7 is clear. A Court has to find out in each case where the loan is based upon a document what is the exact amount of the loan stated in the document. The word "loan" has been defined in the Act to include a transaction on a bond bearing interest executed in respect of past liability.

Applying these tests, I am satisfied that the amount of loan advanced in the present case for the purposes of the Bihar Moneylenders Act, is the amount stated in the document of 1922; "the loan" is based upon that document. That amount, I find is Rs. 2000.

7. The plaintiffs are therefore entitled to a decree for this amount and to a decree for interest for a sum not larger than Rs. 2000 as no payment has been proved to have been made after the execution of this bond. But it was argued by counsel appearing on behalf of the appellants that the wording of Section 7, Bihar Moneylenders Act, justified him in" urging that although the amount of Rs. 2000 is mentioned in the document upon which the loan is based, nevertheless the document evidenced the loan of Rs. 1391 originally advanced in 1912 which swelled up to Rs. 2000 in 1922. The argument is based upon the last few words of Section 7 which run as follows: "If the loan is based on a document, the amount of loan mentioned in, or evidenced by such document."

8. As the matter was of first impression, we had the assistance of the learned Advocate-General who, very kindly, came to assist us at our request. The learned Advocate-General submitted that the words "evidenced by such document" can only apply to a case where the loan is evidenced by bahi khata and the loan is based upon it and that in such cases the Court must find out from the bahi khata the amount evidenced thereby. On a careful consideration of the argument advanced, I am of opinion that the meaning of this clause (though somewhat obscurely worded) is that the Court should, in every case, look to the document on which the loan is based in order to find out the loan advanced. If the loan is based upon a single document, then the Court will ascertain from that document what is the amount of loan mentioned in it, always bearing in mind the definition of the word "loan" already pointed out, which covers an engagement to fulfil a. previous obligation; where the loan is evidenced by a series of letters or other documents like bahi khata or based on as evidenced by the handnote which for some purposes may be inadmissible in evidence, nevertheless, a Court must refer to them for the purpose of Section 7 to find out what the loan was in order to apply the rule of damdupat adopted by our Legislature with the limitations provided by the Act.

9. When I apply this construction to the present case, I am of opinion that the loan in the present case should be taken to be Rs. 2000. Learned Counsel for the appellants tried to argue that the finding of the learned Subordinate Judge disallowing the plea of the payment of two items of Rs. 492-7-0 and Rs. 282 was erroneous. But he could not advance any convincing argument which would justify us in differing from the findings of the learned Subordinate Judge on Issue 6. That finding is based upon good and cogent reasons. I agree with the learned Subordinate Judge that the story of the panchait and the adjustment of accounts in 1342 Fs. cannot be successfully established.

10. Defendant 27 who, as I have stated above, is the mortgagee of some of the properties covered by the bond of 1912 and who is a mortgagee of the year 1916, contended that by the execution of the bond of 1922, the prior bond of 1912 was fully paid off in the eye of the law, with the result that his client became the prior encumbrancer and that the mortgaged properties should not be allowed to be sold free from the encumbrances of his bond of 1916. He argued in the alternative that if it was held that the bond of 1912 was alive to sustain the mortgage charge prior to that of his charge of 1916, then the suit must be held to be barred by limitation as having been instituted beyond 12 years of the due date stated in the bond of 1912; and repelled the contention that any acknowledgment subsequent to 1916 by the mortgagor, would operate in law to keep alive the bond of 1912 against him, the mortgagee of 1916.

11. In my opinion, these contentions are fully answered by the decision of the Madras High Court reported in *Velauda Reddi v. Narasimha Reddi* AIR (1918) Mad 1327. The facts of that case were that in 1882 a certain Rajah and his son executed a mortgage to one Subbamma of four villages to secure the advance of a sum of Rs. 25,000 and interest thereon (the amount was payable on demand). In 1888, the son, who had become the Rajah on his father's death, mortgaged the same four villages and two others in addition to the same mortgagee to secure the sum of Rs. 39,791 which had then become due on the earlier mortgage of 1882, agreeing to pay interest at a reduced rate and covenanted to pay the principal on 30th December 1893. The plaintiff was the assignee of the mortgage of 1888. In the meantime, in 1887, the same mortgagor had given in mortgage three of the four villages comprised in the first mortgage of 1882 to the ancestor of certain defendants who in due course instituted a suit on their mortgage, obtained a decree and purchased the three villages in Court sale, but the mortgagee Subbamma was not a party to these proceedings.

12. In these circumstances, it was argued that the mortgage of 1888 extinguished the mortgage of 1882 thereby giving priority to the mortgage of 1887 which had become earlier in date. The contention was repelled by Srinivasa Aiyangar J. with whom Ayling J. agreed in these words:

It is now well settled that a mere change in the form of indebtedness, in the mode or time for payment, a variation of the rate of interest, or the giving of additional security, is not enough to rebut the presumed intention to retain the

mortgage security when it is to the interest of the person who is entitled either to extinguish the security or keep it alive, so to keep it alive : a quotation from Section 924 of the well-known book of Jones on Mortgages.

13. The learned Judges also pointed out that the effect of the second bond of 1888 was merely to substitute a covenant to pay the mortgage amount on 30th December 1893 for the covenant to pay on demand in the bond of 1882 and to lower the rate of interest payable thereafter, without in any way affecting the security for the payment of the mortgage amount. It was also held that an agreement between the mortgagor and the first mortgagee extending the time for payment of the mortgage amount in no way impairs the security even as against the subsequent incumbrancer, for the junior encumbrancer is not a surety for the mortgagor. The learned Judges repelled the argument that even if it be assumed that the mortgage of 1882 was in full force when the third mortgage of 1888 was executed, any right to enforce that mortgage at the time when the action was brought on 2nd October 1913 was barred by the law of limitation or that the mortgagee lost his priority against the appellants because they held that the mortgage money did not become due till 30th December 1893, that payments were made by the mortgagor within 12 years of the second bond of 1888 though beyond 12 years of the due date of the first bond of 1882 and these kept the two bonds alive because

this is not a case where there are two covenants to secure the payment of a debt, one under the mortgage of 1882, and another under the mortgage of 1888, but only one, viz. that under the latter document which superseded the former, and so long as the latter covenant remained unbroken, the mortgagee cannot demand or recover the mortgage amount. The mortgagee is not suing on the mortgage of 1882 as it stood when it was executed as is assumed in the argument, but on that mortgage as varied by the subsequent agreement, which agreement, I have already held, in no way impaired the security as against the second mortgagee.

14. In my view, the decision in this case exactly applies to the facts of the present case. By the mortgage of 1922, the mortgagee never gave up his security under the bond of 1912 and the effect of the mortgage of 1922 was merely to substitute the covenant to pay the mortgage amount on the due date stated in this bond in place of the covenant to pay as stated in the bond of 1912; the mortgagee never intended to give up his security under the bond of 1912; he refers to it expressly in the later document. The suit is therefore a suit on the bond of 1922 and the right of the mortgagee, so far as the property stood charged in the bond of 1912, has never been given up; that charge can still be enforced and is always enforceable so long as the full amount secured is not repaid, and the suit is brought within 12 years of the due date of the 1922 bond. I do not see what equity there is in favour of defendant 27 who took the mortgage in 1916 with his eyes open, subject to a mortgage of 1912. That mortgage has not been paid off as yet and still subsists; the mortgagee merely

made and accepted another arrangement with additional security for the payment of his valid and existing debt, and this in no way was prejudicial to defendant 27.

15. I now come to consider some cases which were cited on behalf of the appellants. The question in these cases was whether an acknowledgment by a mortgagor after he has transferred the equity of redemption in whole or in part is a valid acknowledgment against the puisne encumbrancer who was in existence before the acknowledgment. The Madras case which I have just been considering is also an authority for the proposition that an acknowledgment of a mortgage debt in the form it took in that case was valid not only as against the person acknowledging it but also as against those deriving title under him even prior to the date of the acknowledgment and subsequent to the debt acknowledged. The learned advocate for the appellants cited the case in *Yagnanarayana v. Venkata Krishna Rao* AIR (1925) Mad 1108.

16. But that case is against his contention. In that case it was held that where after the sale of a part of the mortgaged property a fresh deed is executed by the mortgagor in renewal of the original mortgage, there is a new promise to pay by the mortgagor and the question is not whether it operates as acknowledgment to save the bar of limitation as against the intermediate alienee because it is a new covenant substituted for the old covenant and not a mere acknowledgment for the old one--the period of limitation even as against the alienee is to be calculated from the date mentioned in the later mortgage and not from that in the original one--the effect of such a new covenant is more analogous to a part payment u/s 20, Limitation Act, and not merely to that of an acknowledgment u/s 19.

17. It is unnecessary to consider in the present case the correctness of the view taken in some cases that the acknowledgment by a mortgagor of the liability to his mortgagee even after he has parted entirely with the equity of redemption extends the period of limitation so as to bind an earlier encumbrancer though subsequent to the date acknowledged. The present case is not a case where the mortgagors transferred their equity of redemption in full and then gave a mere acknowledgment but is a case where the mortgagors have dealt with the equity of redemption only to the extent of giving successive mortgages of 1912, 1916 and 1920 and renewing the earliest bond. Their liability always remained, as pointed out above in August 1922 when they renewed the mortgage of 1912 for the amount then validly due; they gave merely an additional security and covenanted to pay the amount on a different date with the stipulation to pay a lower rate of interest; this was in no way detrimental to the puisne encumbrancer.

18. I now deal with some of the cases which are strongly relied on by the learned advocate for the appellants. The first case cited by him was the case in *Surjiram Marwari v. Barhamdeo Persad* (1905) 1 CLJ 337. That case contains an elaborate exposition of the law by that distinguished Judge, Mookerjee J. Harington J., did not endorse the opinion of his learned colleague because he said at p. 340 that

the question of limitation raised a question of some difficulty but he was inclined to think that the admission in the ekrarnamah was sufficient to bar the statutory limitation. Mookerjee J. held that an acknowledgment by the mortgagor in favour of a prior mortgagee does not preclude a puisne mortgagee whose title accrued before the acknowledgment was given from relying on the statute of limitation as a bar. In my opinion as I said already it is unnecessary to consider the correctness of this decision as the present case is not a case of a mere acknowledgment by a mortgagor. I may point out that Srinivas Aiyangar J. at p. 242 sought to draw a distinction at the right hand column of *Velauda Reddi v. Narasimha Reddi* AIR (1918) Mad 1327 between the case he was dealing with and the case in *Surjiram Marwari v. Barhamdeo Persad* (1905) 1 CLJ 337. In *Krishna Chandra Saha v. Bairab Chandr Saha* (1905) 32 Cal 1077 the facts were that A mortgaged several properties to the plaintiffs and then sold one of them, property No. 3, to B who again mortgaged the property to G who brought the property to sale in execution of a decree obtained in a suit to enforce his mortgage, the property was sold and purchased by D. The mortgagor afterwards paid part of the principal as well as of the interest under the earlier mortgage and made an acknowledgment of his liability under it. In a suit brought by the plaintiff to enforce the first mortgage, D contended that the acknowledgment by A, would not prevent the statute of limitation from running against the first mortgagee.

19. But the Court held that the acknowledgment as well as the payments were sufficient to keep alive the debt against the property No. 3. The case in 1 CLJ 3773 was referred to in the argument by the learned advocate for the respondents. This case does not support the appellant in the least. Reliance was next placed upon the decision of the Privy Council in *Mohamad Ibrahim Hossain Khan v. Ambika Pershad Singh* (1912) 39 Cal 527, but the facts of that case are entirely different as pointed out in *Velauda Reddi v. Narasimha Reddi* AIR (1918) Mad 1327 . Attention was next drawn to the case in *Ram Sarup v. Bhagwati Prasad* (1936) 23 AIR All 636 where it was held that an acknowledgment by a mortgagor cannot bind a mortgagee who derived title prior to the acknowledgment. The learned Judges pointed out the distinction between the plain languages of Sections 19 and 20, Limitation Act. This case does not assist the appellant because as pointed out in the Madras case cited above, the present case is rather a case within the terms of Section 20 than within the terms of Section 19.

20. The renewal of the bond in 1922 by giving an additional security lowering the rate of interest was a transaction which partook of the nature of part payment and therefore within the terms of Section 20. The next case cited was the case in *Mohammad Taqi Khan Vs. Raja Ram and Others*, . That case dealt with an acknowledgment of liability by some of the heirs of a mortgagor against whom a decree for sale on the basis of a mortgage had been passed and it was held that this did not operate to save limitation as against the other heirs of the mortgagors. This question does not arise for consideration in the present case,

and in any case we are bound by the decision of this Court in 12 Pat 938 where Rowland J. has reviewed the case law on the subject exhaustively, Agarwala J. giving a concurring judgment.

21. On a careful consideration of all the cases placed before us, I am of opinion that the suit on the bond of 1922 was not barred by limitation, the mortgage bond of 1912 was kept alive, and that the claim of priority by defendant 27 must fail. It was finally argued that the execution of the bond of 1922 will in any event operate as a novation of contract so that no suit can be instituted on the mortgage bond of 1912 unless, as was done in *Badri Das v. Pasupati Banarji* AIR (1933) Pat 1, the mortgage bond of 1922 became inoperative in law and then only within twelve years of the due date fixed in the bond of 1912. It is enough to say that the considerations which weighed with their Lordships in *Har Chandi Lal v. Sheoraj Singh* AIR (1916) PC 68, do not arise in the case before us. In the present case it was to the interest of the mortgagee to keep alive the security under the bond of 1912, which had never been given up; he took an additional security, as pointed out above, by the bond of 1922; on that date the liability under the bond of 1912 was kept alive both by statute and by the intention of the parties as evidenced by the new arrangement.

22. This is not a case of novation of contract within the meaning of Section 62, Contract Act.

The learned advocate faintly argued that the amount of Rs. 150 which was paid in cash on the bond of 1912 has not been proved to be advanced for legal necessity. Apart from the fact that the question was never raised either in the pleading's or in the evidence and that the defendants are the father, his sons and grandsons, the amount of Rs. 150 has been proved to have been paid off in 1916 and no part of the claim in the present suit consists of this item. It was also argued that the suit to enforce the mortgage bond of 1922 is not maintainable when the plaintiff has omitted to include in the suit his claims under the usufructuary bond of 1920 which after the period stated therein, namely after 1334, would operate as a simple mortgage bond. It is enough to state that the provisions of Section 67-A, T.P. Act, which are not retrospective do not apply to this mortgage bond.

23. Furthermore the respondents have conceded that any mortgage decree which may be passed in this case should declare that the property which will be sold to repay the amount due, namely Rs. 4000 including the property covered by the bond of 1912, will be sold free from any liability for the amount due under the simple and usufructuary bond of 6th August 1920. To make it clear the property will be sold free from any encumbrances other than that of the bond of 1912 except any earlier encumbrances that may be left outstanding.

Defendant 27 prayed as a last resort that his property in the circumstances of this case should be sold last, namely the property covered by his mortgage bond of 1916, i.e. Ex. A(2) may be sold only in the event of the other properties

covered by the bond of 1912 and the bond of 1922 are not sufficient to discharge the liability of Rs. 4000. The respondents have agreed that this should be done but even if they had not conceded this we ourselves in our discretion would have passed a similar order in the circumstances of the case.

24. The result is that there will be a decree in favour of the plaintiffs for a sum of Rs. 4000 only. The office will draw up the usual mortgage decree in the light of my observations above fixing the period of grace for two months from this date. The amount of Rs. 4000 will carry interest at 6 per cent, from the date of decree of the trial Court. In the circumstances each party will bear his own costs in this appeal which is allowed in part. The plaintiff is entitled to proportionate costs in the trial Court for the amount now decreed by this Court.

Varma, J.

25. I agree. In view of the argument advanced by Mr. Kamla Sahay, appearing on behalf of the defendants first party, I should like to add a few words on the interpretation of Section 7, Bihar Money-lenders (Regulation of Transactions) Act, 1939. The contention is that although the bond was for Rs. 2000 it mentioned a loan of Rs. 1391 only and, therefore, the principle of damdupat should be applied to the sum of Rs. 1391 and not with regard to the sum of 2000. He urges that the bond of 1922 mentions the sum of Rs. 1391 and therefore the interest should not exceed that amount. If this argument were to be accepted, then the Courts will have to choose between two different sums one, the amount for which the bond has been executed and the other, the amount mentioned in it which has swelled up to the amount for which the bond was executed. But this does not seem to be the object of the Legislature from the wordings of the Section itself. The Section runs as follows:

Notwithstanding anything to the contrary contained in any other law or in anything having the force of law or in any agreement, no Court shall, in any suit brought by a money-lender before or after the commencement of this Act in respect of a loan advanced before or after the commencement of this Act or in any appeal or proceedings in revision arising out of such suit, pass a decree for an amount of interest for the period preceding the institution of the suit, which together with any amount already realized as interest through the Court or otherwise is greater; than the amount of loan advanced, or, if the loan is based on a document, the amount of loan mentioned in, or evidenced by such document.

26. Looking at the Section it seems that it is dealing with two kinds of loan, a loan advanced and a loan based on a document. Under the second heading it takes into consideration two kinds of documents on which loan may be based, one kind may evidence the loan and the other which may not evidence the loan, but may be utilized to find out the amount mentioned in it. "Loan" has been defined in Clause (f) of Section 2. It says:

"Loan" means an advance whether of money or in kind on interest made by a

money-lender, and shall include a transaction on a bond bearing interest executed in respect of past liability and any transaction which, in substance, is a loan?etc

It is clear that the definition includes cases of loans based on a document. Section 7 is a bit loosely worded, and we had to take the assistance of the learned Advocate-General who gave us two instances to illustrate the difference between two kinds of transactions one where the bond itself creates the loan, and the other that of a loan of bahikhata account. From a reading of the Section, I am of opinion, that the document in the expression "based on a document" can be used in such two different ways, in one case evidencing a loan and in another case simply mentioning a loan. The Section cannot be interpreted to contemplate, as argued by Mr. Kamla Sahay, that the same document may relate to two different amounts. The argument of Mr. Kamala Sahay, therefore, fails.