(2007) 04 KAR CK 0022

In the Karnataka High Court

Case No : Regular Second Appeal 576 of 2001

Sri M.K. Shekarappa (since deceased by his LRs. Smt. Parvathamma and Others), M.K. Eshwarappa, M. Malleshappa and K. Nagarajappa — APPELLANT

Vs

Smt. Shivagangamma and Others — RESPONDENT

Date of Decision : 16-04-2007

Acts Referred:
Limitation Act, 1963 — Section 61 (a), 61 (b)

Citation : (2007) ILR (Kar) 2473 : (2007) 5 KarLJ 93 : (2007) 4 KCCR 227 SN

Hon'ble Judges : H.V.G. Ramesh, J

Bench : Single Bench

Advocate : G. Lakshmeesh Rao and R. Gopal, for the Appellant; K.G. Nayak, for the Respondent

Judgement

H.V.G. Ramesh, J.—In this second appeal, appellants have challenged the order of the Civil Judge (Sr.Dvn), Shimoga in RA 88/1994 confirming the order of the Prl. Munsiff, Shimoga in OS 315/1988.

2. The appellants are plaintiffs who filed a suit for redemption of mortgage and for possession of the suit schedule property and for future mesne profits. The trial court has dismissed the suit of the plaintiffs as time barred against which, appeal was preferred by the appellants before the Civil Judge (Sr.Dvn), Shimoga. The appellate court while confirming the judgment and decree passed by the Munsiff, dismissed the appeal. Hence, this second appeal.

3. At the time of admission, the following substantial question of law was raised for consideration on 26.11.2001.

4. Whether the appellant plaintiff filed the suit within the time as prescribed under Article 16(b) of the Limitation Act, 1963 when admittedly the mortgaged property has been sold by the mortgagee before it could be redeemed and in the said circumstance, whether the appellant could be barred from seeking

possession of the property without redeeming the mortgage.

5. During arguments, appellants'' counsel has filed a memo seeking for raising further substantial question of law by way of recasting and reformatting the substantial questions of law which is as under:

a. Having regard to rajikabuli and other transactions, whether the courts below were right in law in applying Article 61(b) of Limitation Act and holding that the suit is barred by time?

b. Whether the courts below have properly considered the legal implications of optional clause in Ex.P2 providing for the mortgagor to exercise right of redemption by end of March of any year subsequent to March 1930 and whether instant suit instituted in 1988 by exercising such right by issuing notices for redemption, vide Ex.P10 dated 12.10.1987 and Ex.P11 dated 9.2.1988 is within the limitation period provided under Article 61(a) of Limitation Act?

6. Heard the Sr. Counsel representing the respondents and the counsel representing the appellants.

7. It is the argument of the appellants'' counsel that way back in the year 1927, the suit property in question was mortgaged in favour of Basavalingappa the father of the 1st defendant and the said Basavalingappa only has transferred the katha by Rajikabul in favour of his son-in-law the 2nd defendant and thereafter, the 2nd defendant has gifted the property in favour of the 3rd defendant and the 3rd defendant sold the property in favour of the 4th defendant & 8th defendant. Basavalingappa who is the mortgagee has not sold the property and that assignment made in favour of the son-in-law does not amount to sale nor the gift made by the son-in-law in favour of the 3rd defendant amounts to sale so as to attract the limitation of twelve years as per Article 61(b) of the Limitation Act and only in the event if the sale has taken place at the hands of the mortgagee then only the question of application of Article 61(b) arises and either the assignment made by the mortgagee in favor of the son in law or the gift made by the son-in-law to a third person and in turn that third person selling the property in favour of the 4th defendant does not amount to sale by the mortgagee and rather, Article 61(a) operates and limitation of thirty years would be there and further submitted that the date of knowledge has to be reckoned for the purpose of filing suit seeking for redemption of possession of the mortgaged property. The plaintiffs being the successors in interest of the property in question of the original mortgagor, they are entitled to recover possession and both the courts below applying the wrong provision, have dismissed the suit and appeal respectively which is against the decision of the Supreme Court on the point and also without appreciating the legal position as to whether Article 61(b) or 61(a) of the Act applies.

8. Further according to the appellants'' counsel, question of claiming property by way of adverse possession does not arise since it is not the case of the defendants that they are in possession adverse to the interest of the plaintiffs

claiming right and title. Rather, there is no plea to that effect and only in the event of such effective pleading and proof thereof, they would be entitled to contend claiming adverse possession and not otherwise.

9. Per contra, learned Sr. Counsel submitted that the date of registration should be the date of knowledge so far as the transaction is concerned. From that date limitation has to be calculated and as such, the suit is barred beyond period of limitation. Further, it is a case of sale by the mortgagee as such, with all due diligence, the plaintiffs ought to have filed a suit within the limitation period of twelve years from the date of sale of the property and as such, both the courts below have rightly held that the case of the plaintiffs falls within Article 61(b) of the Limitation Act, 1963 and not under Article 61(a). It is also submitted that the respondents are also entitled to claim right by way of adverse possession, the plaintiff have no case at all and the suit is barred by limitation.

10. Counsel representing both the parties have relied upon the decisions of the various High Courts and also that of the Apex Court in this regard.

11. In the decision in T. Anjanappa and Ors. v. Somalingappa and Anr. ILR 2006 KAR 4147, relied upon by the appellants'' counsel to claim right by way of adverse possession, the Apex Court has held that possession will not be hostile if there is non-denial either express or implied of the title of the real owner. For that it is essential that possessor should clearly know who the actual owner of the property is then only, the situation of being in hostile possession and question of denying title of the true owner could arise.

12. In the Full Bench decision of the Allahabad High Court in Mt. Chunai Vs. Ram Prasad and Others, the Apex Court referring to the provisions of the Limitation Act, 1908 i.e., Article 134 and 148, has held that Article 148 applies to suit for possession or for redemption against a mortgagee, against the heirs of the mortgagee, against persons to whom the mortgagee''s interest only has been transferred, against persons who have purported to have purchased the property but without paying valuable consideration therefore and against persons who have purchased the property with notice of the mortgage and thus are estopped from denying the title of the mortgagor.

13. In the decision in the case of Era Mallappa Vs. Sriram Venkatanarasiah, , while dealing with Article 134 of the Limitation Act, 1904, the Division Bench of the Andhra Pradesh High Court has held that Article 134 applies irrespective of whether the transfer of mortgaged property is in good faith and without notice of that mortgage. It is also held therein, if consideration is absent, then Article 134 cannot apply and it will be governed by Article 148 of the Limitation Act.

14. In the case of Nanni Bai and Others Vs. Gita Bai, , the Apex Court has held that in order to attract the operation of Article 134, the defendant has got affirmatively to prove that the mortgagee or his successor in interest has transferred a larger interest than justified by the mortgage. If there is no such proof, the shorter period under Article 134 is not available to the defendant in a

suit for possession after redemption.

15. In the decision in Smt. Dilboo (Dead) by Lrs. and Others Vs. Smt. Dhanraji (Dead) and Others, , the Apex Court has held that whenever a document is registered, the date of registration acts as the date of deemed knowledge. In other cases, when a fact could be discovered by due diligence, then deemed knowledge could be attributed to the plaintiff because a party cannot be allowed to extend period of limitation by merely claiming that he had no knowledge. This decision is also relied upon by the counsel for the respondent. It is further held in the said decision that a suit for redemption of mortgage could be filed within sixty years but, if the mortgagee had created an interest in excess of the right enjoyed by him, then to recover possession against third party, suit had to be filed within twelve years of the transfer becoming known to the plaintiff. However, when a interest in excess of the interest of the mortgagee is created then the third party is not claiming under the mortgagee. The possession of such person cannot be worse than that of a rank trespasser who was in open and hostile possession. As the title of the rank trespasser gets perfected by adverse possession on expiry of twelve years so also the title of such transferee would get perfected after twelve years. The period of twelve years has to run from the date of knowledge by the plaintiff of such transfer.

16. In another decision in the case of Balwant Singh and another etc. Vs. Daulat Singh (dead) by L.Rs. and others, , the Apex Court has held that the mutation entries do not convey or extinguish any title and those entries are relevant only for the purpose of calculation of land revenue.

17. In the case of Ramalakshmi Ammal Vs. Seeniya Pillai, relied upon by the respondents'' counsel, the Madras High Court has held that Article 61(b) applies to a case where the mortgagor sues for possession of the property mortgaged which was otherwise transferred by the mortgagee for valuable consideration and the period of limitation is twelve years from the date when the transfer became known to the plaintiff.

18. In the case of Abdur Rahim Jiwani Vs. Vithaldas Ramdas and Others, , the Bombay High Court has held that Article 61(b) of the Limitation Act, 1963 restricts the period of limitation. In a suit for redemption as per Article 61(a) the period of limitation is thirty years, in a case where the mortgagee has purported to transfer the property as an absolute owner, the period of limitation is twelve years because thereafter, the third party who has obtained possession would acquire title by adverse possession.

19. In the instant case, it appears the predecessor in title of the plaintiffs has mortgaged the property in favour of one K. Basavalingappa on 29.10.1927 as per Ex.P2. Thereafter, this Basavalingappa changed the mutation entries in the name of his son-in-law in 1938 as at Ex.P6. Thereafter, it appears the son-in-law of Basavalingappa has gifted the property in favour of the 3rd defendant on 6.11.1958 under Ex.P3. The 3rd defendant is said to be the mortgagee''s

brother''s wife i.e., sister in law of Basavalingappa. The 3rd defendant is said to have sold the property to the 4th defendant on 6.11.1964 as at Ex.P4. It appears two items were sold - one in 1964 and another in 1968. The suit is filed in the year 1988 i.e., on 5.7.1988.

20. The trial court as well as the appellate court dismissed the case of the plaintiffs on the ground of limitation stating that Article 61(b) applies to the case on hand. In the light of the substantial question of law raised, it has to be seen whether the case falls under Article 61(a) or (b) of the Limitation Act.

21. In this context, it would be relevant here to extract the provisions of Article 61(a) & (b) b1 which reads thus:

61: By mortgagor a. to redeem or recover possession of 30 years when the right to redeem immovable property mortgaged or to recover possession accrues

b. to recover possession of immovable 12 years when the transfer becomes property mortgaged and afterwards known to the plaintiff transferred by the mortgagee for a valuable consideration.

22. A clear reading of Article 61(b) indicates that there should be a transfer of the property by the mortgagee and the larger interest than what is being mortgaged. As per the decision of the Apex Court, change of entry in the revenue records by way of mutation or katha does not necessarily amount to transfer. Here in the present case, any such change of entries in the name of the sister in law by Basavalingappa viz., the mortgagee does not amount to sale much less the gift made by the Sister-in-law of the mortgagee in favour of the 3rd defendant also cannot be considered as a sale as it is a case of gift and also there is no question of valuable consideration in the case of gift except the acceptance of the property which is the subject matter of gift. The transfer by way of sale made by the sister in law of the mortgagee in turn cannot be transferred as transfer by the mortgagee himself. In the circumstance, question of applying Article 61(b) to the case on hand does not arise.

23. Now it has to be examined as to whether limitation applies to the case of the plaintiffs as per Article 61(a) of the Act.

24. In the instant case, it is a usufructuary mortgage. It has to be reminded that once a mortgage it is always a mortgage. As per the terms and conditions of the mortgage, when the plaintiffs make any attempt to redeem the mortgage by issuance of legal notice, fixing the particular date as arising of cause of action and such denial of delivery of possession by accepting the mortgage amount, then that particular point of time could be the point of time which actually begins and within thirty years thereafter, the suit for recovery of possession has to be filed by way of redemption of mortgage by paying the mortgaged amount. In the present case, it appears the mortgage is said to be during 1927. Despite several transactions taking place i.e., by way of change of entry in the revenue records in the name of the sister in law of the mortgagee in the year 1938 and thereafter

she gifting the property in favour of the 3rd defendant and in turn the 3rd defendant selling the property during 1964 and 1968 in favour of the 4th defendant and 8th defendant. As per the factual position, there was no attempt being made by the original mortgagors to redeem the property. More over, in the case on hand, plaintiffs are said to be the successors of the original mortgagor and they are said to have pleaded their knowledge only during 1987. The factual position as held above is, any such entry of the name of the sister in law of the mortgagee in respect of the property in question does not amount to transfer for valid consideration. Further more, a gift does not amount to transfer for valuable consideration. More over, it is not a direct transfer by way of sale in favour of the 4th and 8th defendants. In the circumstances, such a transfer being made in favour of 4th and 8th defendants is nonest in law and the question of application of Article 61(b) does not arise as it is not a direct transfer by the mortgagee in favour of 4th and 8th defendants on whom the larger interest than the mortgagee is conferred by the 3rd defendant who is not the mortgagee. By applying the principle ''once a mortgage is always a mortgage'' especially in case of usufructuary mortgage, as noted above, from the date on which the plaintiffs made an attempt to redeem the mortgage and take back possession by paying the mortgage amount, or ready to pay the mortgage (sic) then on such refusal after issuance of legal notice, limitation commences. In the case on hand, in the year 1987 or so, notice is said to have been issued by the plaintiffs and it appears the possession of 4th and 8th defendants is without the knowledge of the plaintiffs. More over, it is for defendants 4 and 8 to establish that they were in hostile possession for more than twelve years to the knowledge of the plaintiffs on such transfer being made by the 3rd defendant. On record, the defendants have not discharged their duty to establish their hostile possession and their possession cannot be treated as adverse possession in the absence of any such proof of fact that they continued in possession of the property openly to the knowledge of the plaintiffs.

25. Of course though as per the legal position the date of registration constitutes the date for the purpose of knowledge, the decision of the Apex Court in the context as noted in para 20 of the judgment reported in Smt Dilboo''s case cited supra is:

Thus a suit for redemption of mortgage could be filed within 60 years. But if the mortgagee had created an interest in excess of the right enjoyed by him, then to recover possession against the third party the suit had to be filed within 12 years of the transfer becoming known to the plaintiff. The rationale in cutting down the period of 60 years to 12 years is clear. The 60 years period is granted as a mortgagee always remains a mortgagee and thus the rights remain the same. However, when an interest in excess of the interest of the mortgagee is created then the third party is not claiming under the mortgagee. The position of such a person could not be worse than that of a rank trespasser who was in open and hostile possession. As the title of the rank trespasser would get perfected by adverse possession on expiry of 12 years so also the title of such transferee would get perfected after 12 years. The period of 12 years has to run from the date of knowledge by the plaintiff of such transfer. It is always for the party who files the suit to show that the suit is within time. Thus in cases where the suit is filed beyond the period of 12 years, the plaintiff would have to aver and then prove that the suit is within 12 years of his/her knowledge. In the absence of any averment or proof, to show that the suit is within time, it is the plaintiff, who would fail. Whenever a document is registered the date of registration becomes the date of deemed knowledge. In other cases where a fact could be discovered by due diligence then deemed knowledge would be attributed to the plaintiff because a party cannot be allowed to extend period of limitation by merely claiming that he had no knowledge.

26. A reading of the above paragraph makes it clear that in the case of sale by the mortgagee of a larger interest then, as per Section 61(b), twelve years limitation applies. In appears in the instant case, possession of 4th and 8th defendants respectively cannot be considered as possession hostile to the interest of the plaintiffs from the date of registration but rather, it has to be from the date of knowledge to the plaintiffs. Even if the 4th and 8th defendants admit to claim their right by way of adverse possession, still it is a case which is to be discovered by due diligence than deemed knowledge could be attributed to the plaintiffs. So it is for defendants 4 and 8 to establish this fact. It appears neither the 4th defendant nor the 8th defendant claim possession by pleading adverse possession or much less prove the knowledge of the plaintiffs of the sale of property during 1964 and 1968 respectively in their favour. Thus, plaintiffs have a right to redeem the mortgage by paying the mortgage amount as, pleading their knowledge during the year 1987 thereafter have filed a suit in the year 1988. Such being the case, it is not a case of either adverse possession or a case for application of Section 61(b) of the Limitation Act. In the circumstances, as held by the Apex Court in Nani Bai''s case cited supra, it is for the defendant to prove that the mortgagee has transferred his interest larger then it was. More over, no such burden was discharged by the mortgagee.

27. In the decision in Seth Ganga Dhar Vs. Shankar Lal and Others, , the Apex Court has held that the rule against clogs on the equity of redemption is that, a mortgage shall always be redeemable and mortgagor''s right to redeem shall neither be taken away nor be limited by any contract between the parties. The courts will ignore any contract the effect of which is to deprive the mortgagor of his right to redeem the mortgage. As such, the right of redemption cannot be taken away that too in a case of usufructuary mortgage.

28. As discussed above, it is for the mortgagor to exercise his right and the cause of action arises and the limitation commences in case of usufructuary mortgage from the date of demand and refusal to redeem the mortgage.

29. It appears the plaintiffs who have filed the suit for redemption are said to have deposited the mortgage amount. It has to be held that it is not a case where Article 61(b) of the limitation Act applies to the case on hand but it is

Article 61(a) which applies and the question of twelve years limitation applying to the case does not arise as it is not a case of transfer by way of sale for consideration the mortgagee in favour of the transferees viz., defendants 4 and 8 of the larger interest than the mortgagee''s interest within the definition of Article 61(b) of the Act. The right of the mortgagee does not arise in this case except that to accept the mortgage amount and to redeem the mortgage. The transfer in favour of defendants 4 and 8 by the 3rd defendant would be nonest in the eye of law as the transaction that has taken place in respect of the property subsequent to the mortgage is without the sanctity of law and such transactions are held to be void transactions and, even in the suit since defendants 4 and 8 have not set up their title by way of adverse possession and in the absence of any such pleadings and proof thereof, they are not entitled to claim the right by way of adverse possession.

30. Hence, the suit of the plaintiffs is decreed. The plaintiffs are entitled to redeem/recover possession and possession be handed over to them by the respondents or else it is for the plaintiffs to go for execution since they have already said to have deposited the mortgage amount. Accordingly, the appeal is allowed in part. Having regard to the facts and circumstances of the case, there shall be no order as to mesne profits. No costs.

