
(1921) 01 BOM CK 0023
In the Bombay High Court

Vithoba Mahipati Dhabade and Others	APPELLANT
Vs	
Balkrishna Sakharam Kulkarni minor by his Guardian Khando Govind Kulkarni	RESPONDENT

Date of Decision : 20-01-1921

Acts Referred:

Limitation Act, 1908 — Section 20

Citation : AIR 1921 Bom 437 : (1921) ILR (Bom) 1206

Hon'ble Judges : Shah, J; Norman Macleod, J

Bench : Division Bench

Judgement

Norman Macleod, Kt., C.J.—The plaintiffs sued to recover Rs. 625-9-0 from the property of the deceased father of the defendant, and from the defendant personally, alleging that the defendant's father Sakharam mortgaged to the plaintiffs" deceased father Mahipati Kulkarni-Watan land for Rs. 460 on the 21st August 1897; and that the plaintiffs" father, and after his death the plaintiffs, had been in possession of the land until 1914 when the defendant dispossessed them through the Revenue authorities under the Watan Act.

2. The suit was dismissed by the trial Court on the ground that it was barred by limitation. But it is admitted now that the trial Judge had not the materials before him for ascertaining the real date of the death of the defendant's father. He considered that the defendant's father had died in 1908, and as the suit was filed in 1917, it was clearly barred. In appeal it was admitted after the production of further evidence that the defendant's father died on the 24th February 1912. The reason, therefore, for the judgment of the trial" Court failed. But the learned appellate Judge dismissed the appeal on another ground, namely, that the agreement in the plaint mortgage was void u/s 5 of the Watan Act. There, I think, with due respect, the learned Judge was wrong. There is nothing to prevent a Watandar when mortgaging vatan property, although the mortgage admittedly would not be effective beyond the life-time of the Watandar-mortgagor in ordinary circumstances, from personally covenanting to pay the

mortgage amount. In the plaint mortgage, which was a mortgage with possession in lieu of interest for a period of ten years, the mortgagor covenanted to pay the principal at the stipulated time and get the land released. He further covenanted that if the aforesaid land before the expiry of the stipulated period, or any time thereafter, passed out of the mortgagee's possession on one cause or another the mortgagor should be personally liable to pay the principal together with the interest at twelve per cent, per annum from the date the mortgagee was deprived of the possession.

3. Really the only question is, from what date limitation runs against the mortgagee on that covenant. He has been dispossessed because the mortgagor-Watandar died. I think in the first instance limitation would run from the expiry of the mortgage period. But for the first time the appellants have claimed that the period of limitation was extended u/s 20 of the Indian Limitation Act, because, the mortgagee being in possession of the property and, according to the terms of the mortgage, receiving the produce of the mortgaged land in lieu of interest, such receipt of produce in lieu of interest must be deemed to be payment for the purpose of Sub-section (2) of Section 20 of the Indian Limitation Act, and that being the case, there can be no doubt limitation would only begin to run from the date of last payment, which certainly was not earlier than the 24th February 1912 when the Watandar-mortgagor died, and the contract being registered, under Article 116 the plaintiff would have six years within which to sue for the debt from that date. In my opinion the suit is not barred by limitation, and the agreement is not void u/s 5 of the Watan Act. Therefore, the decree dismissing the suit must be set aside and the case remanded to the trial Court to continue the hearing. The costs in the trial Court will be costs in the cause. Each party will bear his own costs in the first appeal Court and in this Court.

Shah, J.

4. It is clear from the arguments before us, as also from the memorandum of appeal, that the plaintiffs principally relied upon a covenant in the mortgage bond as to dispossession. I have grave doubts as to the application of this covenant to dispossession in consequence of the mortgage coming to an end on the death of the mortgagor in virtue of the provisions of the Bombay Hereditary Offices Act. That contention is opposed to the decision in *Krishnaji Sakharam v. Kashim* (1919) 44 Bom. 500 in which there was a similar covenant to be construed; and if the decision of this case depended upon the construction of this covenant, I should have found it difficult to accept the contention. It is clear, however, from the terms of the mortgage bond that the mortgagor covenanted personally to repay the amount, and that the amount of the mortgage became payable under the terms of the mortgage bond in 1907. Since 1907, in virtue of the provision of Section 20, Sub-section (2) of the Indian Limitation Act, there was a fresh starting point for the period of limitation each time the mortgagee received the produce of the mortgaged land in lieu of interest up to February

1912, when the mortgagor died. It is clear that up to that time the mortgage was valid, and that during the continuance of the mortgage the provisions of Section 20, Sub-section (2), would apply." That being so, it follows that as regards the personal liability of the mortgagor to repay the debt the period of limitation, under Article 116, which would apply to this case, would be six years from the date when the mortgagee as such last received the profits in lieu of interest before his death, that is, in this case practically from the date of his death. The plaintiffs' claim to recover the mortgage amount from the heir of the mortgagor is in time on that basis. I, therefore, concur in the order proposed by the Chief Justice.