

Bai Kanku Vs. Bai Jadav

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Court : Mumbai

Decided On : Apr-10-1919

Reported in : (1919)21BOMLR837

Judge : Basil Scott, Kt., C.J. and ;Hayward, J.

Appeal No. : Second Appeal No. 1129 of 1915

Appellant : Bai Kanku

Respondent : Bai Jadav

Disposition : Appeal dismissed

Judgement :

Basil Scott, C.J.

1. This is a suit by a reversioner to redeem a mortgage created by a Hindu widow Bai Bonji.

2. The original mortgage was in 1854. It was for the debts of the husband of Bonji. It was renewed in 1857 for the existing debts and certain further debts contracted by this widow. The latter mortgage is that in question in this suit. It contained among other provisions a Gahan Lahan clause that if the money was not paid within a year the mortgagee should become the owner.

3. In 1865 a suit was filed by the widow Bonji to redeem the mortgage. It was dismissed by the Munsiff on the ground that the plaintiff had admitted in 1859 in a deposition given in a suit filed by the mortgagee against a tenant that the mortgagee had become owner of the property by the operation of the Gahan Lahan clause. For this reason the Munsiff did not apply to the case the decision in *Rarnji v. Ghinto*(1864) 1 B.H.C.R. 199, decided in the previous year by the Bombay High Court to the effect that notwithstanding a Gahan Lahan clause the doctrine 'once a mortgage always a mortgage' prevails in this Presidency.

4. Against the Munsiff's decision an appeal was filed, but it was not heard, as before the hearing it was recorded as 'adjusted'. Bonji died in the year 1902. The reversioner sued within twelve years of her death for redemption. The defendant-mortgagee contends that the right of redemption is gone, and relies on the decree in the suit of 1865 in support of the plea of *res judicata*.

5. That a decree against a widow in relation to her husband's property may bind reversioners is well established provided certain conditions exist. The leading case is *Katama Natchiar v. The Rajah of Shivagunga* (1863) 9 M.I.A. 531 The doctrine applicable to the present suit is to be found at p. 603 of that volume in the following passage : 'It seems, however, to be necessary, in order to determine the mode in which this appeal ought to be disposed of, to consider the question whether the decree of 1847, if it had become final in Anga Mootoo Natchiar's life time, would have bound those claiming the Zemindary in succession to her. And their Lordships are of opinion that, unless it could be shown that there had not been a fair trial of the right in that suit-or, in other words, unless that decree could have been successfully impeached on some special ground, it would have been an effectual bar to any new suit in the Zillah Court by any person claiming in succession to Anga Mootoo Natchiar. For assuming her to be entitled to the Zemindary at all, the whole estate would for the time be vested in her, absolutely for some purposes, though, in some respects, for a qualified interest; and until her death it could not be ascertained who would be entitled to succeed. The same principle which has prevailed in the Courts of this country as to tenants in tail representing the inheritance, would seem to apply to the case of a Hindoo widow ; and it is obvious that there would be the greatest possible inconvenience in '

holding that the succeeding heirs were not bound by a decree fairly and properly obtained against the widow'. It would appear from these remarks that the onus is on a reversioner challenging the conclusive nature of the decree against the widow on whose death he claims to prove that there has not been a fair trial of the right in suit. The question arises owing to the appeal filed by the widow whether the termination of the suit in the manner in which it was disposed of can operate to bind the plaintiff. It is argued that the widow appealed relying upon the decision of the Bombay High Court in the case of *Ramji v. Chinto* (1804) 1 B.H.C.R. 199; and the inconclusive nature of her previous admission, and that, then, without apparent cause she abandoned the appeal. It is contended, as was found by the learned Judge in the trial Court, that Bonji cannot reasonably be said to have fairly and honestly contested the right and taken the steps necessary to protect the estate of which she was in charge for the time being as a Hindu widow. The learned Judge of the lower appellate Court has however considered the effect of the withdrawal of the appeal, and his finding is expressed in the following paragraph:-'There was no allegation in the pleadings that the withdrawal of the appeal was due to fraud, collusion, or compromise, and there is no legal proof either. It would be profitless to speculate as to the cause of the withdrawal. It was suggested that the first Court having in its judgment stated that Bonji had perjured herself, she must have got frightened lest the Court of appeal should sanction her prosecution, if it came to hear the appeal. But this is mere conjecture and conjecture, however well founded, cannot be accepted as legal proof. It was also suggested that as the property was worth considerably more than the amount raised on it, and as the Munsiff's decision was manifestly wrong, Bonjee was unlikely to have withdrawn the appeal unless it was made worth her while to do so. But this, again, is mere suspicion which, though it may be well founded, cannot be acted upon. I therefore find that it is not shown that the withdrawal of the appeal was due to fraud, collusion, or compromise.' He therefore held that the withdrawal of the appeal had the effect of making the decree of the first Court final, and as that decree was fairly and properly obtained in a suit contested up to decree it fulfilled the conditions of the rule laid down in the *Shivagunga* case as amplified in the later cases. The later cases material to this point are *Hurrinath Chatterji v. Mohunt Mothoor Mohun Gosuami* (1893) L.R. 20 I.A. 183 in which the daughter who represented the estate

in a litigation had been negligent in applying for leave to appeal in forma pauperis against a decree which had been passed against her, and it was held that the dismissal of her application, with the result that she was unable to appeal at all for want of funds, was binding upon the reversioners. The case can only be put on the ground that the negligence of the person representing the estate may be relied upon by the opposite party for the purpose of barring the right of a reversioner subsequently to agitate the point which it was in the power of the negligent party to have had tried out in appeal. Other and later cases are *Ghelabhai v. Bai Javer* : (1912)14BOMLR1142 very similar to the present case, and *Chaudhri Risal Singh v. Balwant Singh* (1918) L.R. 45 I.A. 168, the passage chiefly in point being at page 179.

6. Being bound in second appeal to accept the finding of fact of the learned Judge of the lower appellate Court, which has been above set forth, I am of opinion that on that basis the learned Judge was right in holding that the withdrawal of appeal has the effect of making the decree of the first Court final. The learned Judge, however, did not decide the case against the plaintiff, for he held that the decree in the Munsiff 'a Court was given against the widow on a ground personal to herself inasmuch as the Munsiff would not have so decided but for her admission, and that her admission in the litigation could be no more binding upon the reversioner than an alienation by her of her equity of redemption otherwise than for necessity. The question is whether the learned Judge is right in this conclusion.

7. In my opinion he is right. The suit was decided by the Munsiff on the ground that notwithstanding the decree in *Ramji v. Chinto*, which had established for Gahan Lahan mortgages the principle of 'once a mortgage always a mortgage', the widow Bonji was concluded by an admission in a previous deposition to the effect that the mortgagee had become the full owner by operation of the Gahan Lahan clause. Such a decision cannot be rested on the doctrine of estoppel for the mere admission of the widow in a deposition raised no estoppel although the Munsiff seems to have treated Bonji as estopped from pleading that the equity of redemption remained in her. It was not an estoppel binding on Bonji's representatives assuming that the reversioners of her husband can in the circumstances be treated as her representatives. The suit was dismissed in

consequence of an unguarded statement by Bonji which could affect no one but herself. The plaintiff's case can therefore be put at least as high as that of the reversioner in *Braja Lal Sen v. Jiban Krishna Boy* (1898) I.L.R. 26 Cal. 285, where a suit by a widow to set aside a sale had been dismissed mainly on the ground that the sale had been confirmed with the consent of the widow given upon receipt of Rs. 2,040 by her and the learned Judges Maclean C. J. and Banerjee J. said that having regard to the ground of dismissal it would not be right to hold it a bar to the reversioners' claim. The only remaining question therefore is whether the suit is barred by limitation. Here again I think the learned Judge is right, for if the equity of redemption was only suspended during Bonji's life-time the reversioner being within sixty years would, even according to the Limitation Act of 1850, Clause. 15, be within time.

8. The decree of the lower Court must be affirmed and the appeal dismissed with costs.

Hayward, J.

9. The plaintiff's sued defendants to redeem a possessory mortgage dated 22nd December 1857. It was executed by the widow of the last male holder and contained a 'Gahan Lahan' clause providing that the mortgagee should in default of due payment of the loan become owner of the property. It was admitted by the widow on 21st October 1859 in proceedings between the mortgagee and the tenants that the mortgagee had under the 'Gahan Lahan' provision become owner of the property. She nevertheless sought some years later to repay the loan Rs. 2,300 and redeem the property valued at Rs. 13,000 but her suit was on the strength of her previous admission dismissed on 31st October 1865. It was however conceded in the judgment that otherwise the 'Gahan Lahan' provision would not have had the effect of making the mortgagee the owner of the property in view of the decision in *Ramji v. Chinto*(1864) 1 B.H.C.R. 199 The widow appealed on the grounds that she was not bound by her admission in other proceedings and that the decision was directly opposed to the ruling in *Ramji v. Chinto*. The appeal was filed on 30th November 1865 but was withdrawn on payment of costs on 23rd January 1866. It was endorsed 'adjusted' on 3rd

February 1866. No further proceedings were taken and the widow died in 1902. The representatives of the reversioners brought the present proceedings for redemption against the representatives of the mortgagee in 1911. There was no question as to the propriety of the mortgage nor on the other side was it disputed that the debt had long been liquidated out of the profits of the property. The substantial questions were whether the reversioners were bound by the decree against the widow and whether they were barred by limitation.

10. The Subordinate Judge came to the conclusion that the reversioners were not bound as there had not been a fair trial of the right of the reversioners within the ruling in the Shivagunga's case (1863) 9 M.I.A. 539, in that the widow had compromised the appeal. He thought the widow could not 'under the circumstances be reasonably said to have fairly and honestly contested the right and taken the steps necessary to protect the estate of which she was in charge for the time being as a Hindu widow.' The District Judge came to the same conclusion but by a more direct route. He considered that 'the ground on which Bonji's (the widow's) suit was dismissed was her admission that the breach of the 'Gahan Lahan' clause had made the mortgagee owner' and that it was thus 'dismissed on a ground personal to herself' and did not bar the reversioners. He considered that it was 'not shown that the withdrawal of the appeal was due to fraud, collusion or compromise' and that 'the case must be dealt with as if no appeal had been preferred.' He thought that the ruling in Shivagunga's case did not support the proposition that 'where the decree appears to be manifestly wrong, it is the widow's duty to appeal from it, and if she fails to do so, or having appealed fails to press the appeal to a decision, she shall be considered to have failed in her duty to protect the estate and the decree in that case will not bind the reversioners.' It would seem therefore that he held that there had not been a fair trial of the right of the reversioners quite apart from what happened to the appeal. Both the Subordinate Judge and the District Judge held the reversioners were not barred 'by limitation.

11. We have therefore these established facts. The loan of Rs. 2,300 on mortgage of property worth Rs. 13,000 was permitted by the widow on an admission extracted from her in other proceedings in direct opposition to the equitable rule

'once a mortgage always a mortgage' recognised in *Ramji v. Chinto* (1664) 1 B.H.C.R. 199 to result in the enlargement of the mortgagee's interest into full ownership without dispute in appeal. It seems to me impossible for us to say on these established facts that there was no justification for the view that there had been no fair trial of the right of the reversioners within the ruling in the *Shivagunga's* case-the view held notwithstanding some difference of opinion as to what happened to the appeal by both the lower Courts. It seems to me that this case and indeed every other of this nature must be decided on its own particular merits. The admission of the widow here was apparently without consideration and without legal necessity. It was inconclusive and it would seem to have been insufficient even to bind her own limited interest in the equity of redemption. It was obviously ineffectual to transfer the important interest therein of the reversioners. The behaviour of the widow and the widow's interest were the subjects mentioned in the judgment. There was no reference whatever to the important interest of the reversioners. There was in effect a trial only of the right of the widow. There was not a fair trial, indeed there was no trial of the right of the reversioners. It seems to me that would be sufficient to exclude the trial from the rule in *Shivagunga's* case without going further and establishing fraud in the withdrawal of the appeal. It has somewhat similarly been held that suits against the widow for arrears of rent or maintenance chargeable to the estate were personally against the widow and did not involve the rights of the reversioners. There was no necessity therefore in those suits to establish fraud. They were *Nugenderchunder Ghose v. Sreemutty Kaminee Dossee* (1867) 11 M.I.A. 241 and *Baijun Doobey v. Brij Bhookun Lall Awusti* (1875) L.R. 2 I.. It has also somewhat similarly been held that suits in which arbitration awards or compromises have been accepted by the widow would, quite apart from fraud, not bind the reversioners. These have been detailed at pages 92 to 94 of *Khunni Lal v. Gobind Krishna Narain*. These rulings were there held inapplicable (at p. 103) but were not disapproved by their Lordships of the Privy Council. It would seem, therefore, that if there should be no real trial of the rights of the reversioners, it would be unnecessary to establish fraud to exclude the trial from the rule in the *Shivagunga's* case. If there should be a real trial of the rights of the reversioners, the effect would of course be nullified by proof of fraud. But there must be a real trial of the rights of the reversioners and there must also be

freedom from fraud in order to provoke the rule in the Shivagunga's case. Such was not the case here. There was no practical trial of the rights of the reversioners and there was no necessity to establish fraud. This case was therefore distinguishable from those of *Jugol Kishore v. Maharajah Jotindro Mohun. Tagore* (1584) L.R. 11 IndAp 66, *Hurrinath Chatterji v. Mothoor Mohun Goswami* . , and *Chaudhri Risal Singh v. Balwant Singh* . It has moreover to be remembered that, as pointed out in the last mentioned decision, the rule is a special rule applicable to the peculiar position of limited holders under Hindu law, and not the general and strict rule of *res judicata* prescribed by Section 11 of the Civil Procedure Code of 1908. This special rule has to be applied with due regard to the peculiar precautions necessary in this country to prevent the exercise of pressure over limited female holders to the prejudice of the rights of reversioners. The rule has therefore not to be interpreted with reference to the strict rules regarding fraud and irregularities required to invalidate decrees otherwise binding under the general Law of Procedure.

12. It seems to me that the question of limitation has also been decided rightly by the lower Courts. The suit by the widow affected only her own right to redeem, and did not, in view of what has been said, affect the right of the reversioners. They had sixty years to redeem under Section 15 of Act XIV of 1859, and their right would not have become barred in any case either under that Act or Act IX of 1871 by reason of Section 2 of Act XY of 1877. But as a matter of fact they brought their suit within. tweve years of the death of the widow and within sixty years-of the mortgage, and their right to redeem would not therefore be barred either by Article 141 or 148 of the Schedule to the Limitation Act, 1908.