

Niranjan Lal and anr. Vs. Badri Lal

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Court : Rajasthan

Decided On : Nov-29-1988

Reported in : 1989WLN(UC)457

Judge : Navin Chandra Sharma, J.

Appeal No. : S.B. Civil Second Appeal No. 127 of 1976

Appellant : Niranjan Lal and anr.

Respondent : Badri Lal

Advocate for Def. : Mr. M.C. Bhandari

Disposition : Appeal allowed

Judgement :

Navin Chandra Sharma, J.

1. This is a second appeal by the defendants against the appellate decree of the District Judge, Pratapgarh dated January 30, 1976 affirming the preliminary decree of the Additional Civil Judge, Pratapgarh dated May 1, 1971 whereby the latter had decreed Civil Suit No. 64 of 1966 instituted by the plaintiffs for possession of their portion in a 'haveli' and shop situated in Sadar Bazar, Mochi Para, Chhittorgarh after taking accounts of the income derived by the appellants from the share of the plaintiffs' property.

2. Facts leading to the filing of this second appeal are that on April 4, 1966, the plaintiffs-respondents instituted Civil Suit No 64 of 1966 against Chhaganlal and his son Niranjana Lal. Chhaganlal died during the pendency of the suit. His son Niranjana Lal was already on record and his widow Smt. Alil Bai was also substituted as his legal representative. The plaintiffs-respondents alleged in the plaint that the parties alongwith Udailal and Bhanwar Lal jointly owned a 'haveli' and shops situated in Sadar Bazar, Mochi Para, Chhittorgarh in which all these four parties had equal shares as the same was their ancestral property. This property had been usufructually mortgaged by the ancestors of the present owners in favour of Seth Sumermal Bapna. The mortgage properties were got redeemed on Miti Mangsar Sudi 10 Samvat 1994 and the entire mortgage amount of Rs. 701/- was paid by the defendants-appellants. After the redemption of the mortgage, expenditure was incurred by all the co-sharers in the repair and maintenance of the haveli, and shops. On Miti Ashadh Sudi 5 Samvat 1998, there was a partition of the said properties between four sets of co-owners and the portion of the 'haveli' and shop detailed and described in para 6 of the plaint came to the share of the plaintiffs while property specified in para 7 of the plaint was kept joint. The plaintiffs were not given possession of the portion allotted to them in partition because they were not in a position to pay their share of the mortgaged money as well as their share in the joint expenditure made by the appellants in the repairs and improvements in the 'haveli' and shop. Thus the portion of the property which had fallen to the share of the plaintiffs remained in possession of the appellants and it was agreed that when the plaintiffs would pay their share of the mortgage money and the repairs and improvements with interest at 8% per annum, they would be entitled to get the possession of the property. It was agreed that the plaintiffs' share in the property will remain mortgaged with the appellants till the former paid the entire dues. It was alleged that on Miti Savan Sudi 15 Samvat 2004 accounts were gone into and a sum of Rs. 1570/- was found due against the plaintiffs. The plaintiffs further borrowed a sum of Rs. 1631/- from the defendants and the share of the plaintiffs in the suit property remained with the defendants with the stipulation that the defendants will take the amount of Rs. 3201/- from the plaintiffs with interest at 9 annas per cent per month and further that the defendant will credit the amount of receive in the account of the plaintiffs.

It was further alleged that all the four sets of co-shares had sold joint shop situated in Juna Bazar, Chittorgarh for an amount of Rs. 500/- to Ganesh Dhohi and the plaintiffs share of the sale price amounting to Rs. 125/- was allowed to remain with the defendants. Apart from that, the plaintiffs gave two iron gieders valuing Rs. 102/- after giving credit to both these amounts, only an amount of Rs. 2900/- remained payable by the plaintiffs to the defendants. In August, 1965, plaintiffs called upon the defendants to render accounts of the income of 'haveli' and shop derived by them and to deliver the possession of the property allotted to them in partition but with no avil. The plaintiffs, there-fore, instituted the above suit for rendition of accounts and for decree of possession over the suit property on payment by them to the defendants of the amount which may be found due against them.

3. The suit was contested by the defendants and they denied the case of the plaintiffs. In the alternative it was pleaded by the defendants that they were in possession of the portion of the 'haveli' and the shop in suit since Miti Mangsar Sudi 10 S.Y. 1994 when the said property was redeemed by them and plaintiffs' suit was barred by limitation. It was denied that the plaintiffs had 1/4th share in the 'haveli' and the shops. Some other pleas were also raised.

4. The trial court framed as many as 16 issue in the suit and after trial decreed the suit in favour of the plaintiffs. Aggrieved by the decree of the trial court, the defendants filed Civil First Appeal No. 77 of 1971 before the District Judge Pratapgarh. Before the District Judge, the sole argument advanced on behalf of the defendants was that the plaintiffs' suit was in substance a suit for redemption of their share in the 'haveli' and the shops which had been redeemed by the defendants by paying the entire mortgage money of Rs. 70i/- to the original mortgagees Seth Sumermal Bapna. It was urged that as a result of the redemption of the 'Haveli' and the shops by the defendants by paying the mortgage amount, they were subjugated to the rights of the original mortgagees. It was submitted that the plaintiffs had failed to prove the date of the original mortgage and that the suit had not been brought within 60 years of the original mortgage. It was argued that Article 132 of the Limitation Act applied and the suit of the plaintiffs was barred by limitation. The learned District Judge held that the suit of the plaintiffs was

squarely covered by Article 2 and not be Article 7 of Kanoon Miyad Mewar. According to him, Article 7 applied only to such suits which had been filed between mortgagor and mortgage. Article 2 was wider in scope and would cover suits for recovery of possession in respect of property which is subject matter of mortgage. He, therefore, observed that the plaintiffs had clear 60 years within which they could institute the suit. The District Judge found that when the Limitation Act of 1908 became applicable to the former Part B States, the cause of action was alive and Article 148 of the Limitation Act of 1908 provided limitation of 50 years. In the mean while, Indian Limitation Act, 1963 had come into force. On that c`ate also, the cause of action was alive. Section 30 of the Limitation Act of 1963 provided for a grace period of five years from 1st January, 1964 for such suits for which the period of limitation had been shortened. Article 61(a) of the Limitation Act of 1963 had reduced the period of such suits to 30 years and as the suit had been instituted within the grace period of five years from 1st January, 1964, it was within limitation. On the basis of these findings, the District Judge, Pratapgarh dismissed the appeal filed by the defendants. The defendants have come in second appeal before this Court.

5. Mr. M.C. Bhandari appearing for the defendants appellants urged that on redemption of mortgage with Seth Sumermal Bapna by the defendants by paying the entire mortgage amount of Rs. 701/-, they were subrogated to the possession of the mortgages qua the plaintiffs. The suit was neither brought within 60 years of the original mortgage with Seth Sumermal Bapna and nor within 12 years from the date of the redemption of the mortgage by the defendants co-mortgagors and, therefore, the suit was barred by limitation. It was also argued that the District Judge was wrong in holding that Article 2 of Kanoon Miyad Mewar applied to the present case. According to him, at best the suit could be brought by the plaintiffs within eight years from the date of redemption of the mortgage by the defendants under Kanoon Miyad Mewar which was then applicable.

6. It is not in dispute that the 'haveli and the shops were ancestral property of the plaintiffs, defendants, Udailal and Bhanwar Lal and each of them had 1 /4th share in them. It was also not in dispute that these properties were usufructuarily mortgaged by the ancestors of these four sets of persons with Seth Sumermal

Bapna. Further it was also not in dispute that the defendants co-mortgagors redeemed this mortgage by themselves paying the entire mortgage money to the original mortgagee on Miti Mangsar Sudi 10 Samvat 1994 which comes to 1937 A.D. The mortgage deed under which this property had been mortgaged with Seth Sumermal Bapna was not produced in the case. The date on which the 'haveli' and the shops were mortgaged by the ancestors of the parties with Seth Sumermal Bapna has also not come on record. All that has been established is that the defendant had redeemed the mortgaged properties by paying the entire mortgage amount of Rs. 701/- from Seth Sumermal Bapna on Miti Mangsar Sudi 10 Samvat 1994 corresponding to the year 1937. It was not at all established that the original mortgage in favour of Seth Sumermal Bapna was a registered mortgage. So far as the trial court is concerned, while dealing with the question of limitation, it observed that an account was gone into between the parties in Samvat 2004 and an amount of Rs. 3127/- as found due against the defendants for which amount the suit property was mortgaged with the defendants by the plaintiffs. He held that the mortgage was unregistered. Since after this mortgage, the defendants remained in possession for more than 12 years, they became mortgagees on the expiry of 12 years from Samvat 2004 when the accounts were settled between the parties and the defendants were allowed to remain in possession of the property which had been allotted to the plaintiffs. The defendants prescribed for mortgagee rights and acquired the same in Samvat 2016 and the suit had been filed within 15 years of samvat 2016 as provided in entry No. 7 of Kanoon Miyad Mawar of Samvat 1988. So far as the District Judge, Pratapgarh is concerned, he had given a different reasoning for holding the suit as within limitation. The reasoning given by the District Judge was that it was Article 2 of Kanoon Miyad Mewar which applied and not Article 7. According to him, the period of limitation was 60 years and the plaintiffs' right to acquire possession arose when the defendants had redeemed the mortgage in Samvat 1994 corresponding to year 1937 A.D. According to him, the cause of action was alive when the Limitation Act of 1963 came into force and the suit could be instituted by the plaintiffs within a grace period of five years from 1st January, 1964 as provided in Section 30 of the Limitation Act of 1963.

7. It would be useful to refer to a decision of their Lordships of the Supreme Court in Valliama Champaka Pillai v. Sivathanu Pillai and Ors. : [1980]1SCR354 . Facts in Valliama Champaka Pillai's case were that between the years 1881-1884, two brothers Madhavan and Sivathanu had mortgaged the properties in suit by way of usufructuary mortgages, which were redeemed by Padmanabhan son of Sivathanu, who was father of defendants Nos. 1 to 3, between the years 1913 and 1918 by paying the entire redemption money and he alone obtained possession thereof. Thus, Padmanabhan was the redeeming co-mortgagor. The plaintiff was the grand-daughter of non-redeeming co-mortgagor Madhavan. She instituted a suit on July 15, 1946 for partition and possession of her 1/2 share of the suit property. The suit was contested by defendants Nos. 1 to 3 inter-alia on the ground that even if the courts come to the conclusion that the division of the joint family status asserted by the plaintiff was true, the plaintiff would not be entitled to recover her 1/2 share because the period of limitation for redemption of these mortgages under the Travancore Limitation Act was 50 years which had expired long before the filing of the suit. The trial court passed a preliminary decree in favour of the plaintiff. By the same judgment, the question regarding limitation was left for decision at the time of final decree. Against the preliminary decree defendants Nos. 1 to 3 filed a first appeal in the Travancore Cochin High Court. The High Court dismissed the appeal and affirmed the preliminary decree passed by the trial court. At the time of dealing with the final decree matter, the subordinate Judge held that the right of the plaintiff to recover her 1/2 share of the property was not barred by limitation. The trial court was of the view that the period of limitation for a suit by a non-redeeming co-mortgagor against the redeeming co-mortgagor was fifty years under Article 136 of the Travancore Limitation Regulation (corresponding to Article 148 of the Limitation Act, 1908) and that, the starting point of limitation is the date of redemption by redeeming co-mortgagor. Since the suit had been instituted within 50 years of that date, it was within time. An appeal was filed against the final decree before the Madras High Court. A learned Single Judge of Madras High Court held that the suit was barred by limitation. The learned Single Judge was of the view that the plaintiff, who was in the position of a non-redeeming co-mortgagor, would have only a period of 12 years limitation under Article 144 of the Limitation Act, 1908 and that Article 148 of

that Act (Corresponding to Article 136 of the Travancore Limitation Act) was not a v. proper Article to be applied to such a suit where Transfer of the Property Act as amended by the amending Act of 1929 was not in force A Letter's patent appeal was filed against the judgment of the Single Judge of the High Court. The majority of the Judges held that the plaintiffs' suit for recovery of possession in respect of all the items of properties except one was barred by limitation. The matter came before the supreme Court. His Lordship Sarkaria, J., speaking for the Supreme Court, first examined the true position of a co-mortgagor redeeming the whole hypotheca by discharging the entire mortgaged debt. At the time of making the mortgages and their redemption by one of she co-mortgagors, the Transfer of Property Act or any like statute was not in force in the State of Travancore, wherein these properties were situated. The question was, therefore, to be answered in accordance with the principles justice, equity and good conscience. His Lordship observed as under:

From what has been said above it is clear that where the Transfer of the Property Act is not in force and a mortgage with possession is made by two persons, one of whom only redeems discharging the whole of the common mortgage deed, be will, in equity, have two distinct rights: firstly, to be subrogated to the rights of the mortgagees discharged, vis-a-vis-the non-redeeming co-mortgagors, including the right to get into the possession of the letter's portion of share of the hypotheca. Secondly, to recover contribution towards the excess paid b him on the security of that portion or share of hypotheca which belonged not to him but to the other co-mortgagor. It follows that where one co-mortgagor gets the right to contribution against the other co-mortgagor by paying off the entire mortgage debt, a co-related right also accrues to the latter to redeem his share of the property and get its possession on payment of a share of the liability to the former. This corresponding right of the 'non-redeeming' co-mortgagor, to pay his share of liability and get possession of his property from the redeeming co-mortgagor, subsists. This right of the 'non-redeeming co-mortgagor, as rightly pointed out by the learned Chief Justice of the High Court in his leading judgment, is purely an equitable right, which exists irrespective of whether the right of contribution which the redeeming co-mortgagor has as against the other co-mortgagor amounts to a mortgage or not.

The suit of the plaintiff was held in substance to be a claim for redemption of the properties which had been under mortgage and had been redeemed in entirety by one of the co-mortgagors. It was held that since subrogation of the redeeming co-mortgagor would give him the right under the original mortgage to hold the non-redeeming co-mortgagor's property as security to get himself reimbursed for the amount paid by him in excess of his share of the liability, it follows that a suit for possession of his share or portion of the property by a non-redeeming co-mortgagor on payment of the proportionate amount of the mortgage debt, may be filed either within the limitation prescribed for a suit for redemption of the original mortgage or within the period prescribed for a suit for contribution by the redeeming co-mortgagor against the other co-mortgagor. The original mortgages in that case were made during the years 1881 to 1884. The plaintiff had filed (be suit in 1946. The suit was (but filed more than 12 years after the expiry of (be 50 years` limitation prescribed for a suit for redemption under Article 136 of the Travancore Limitation Regulation and more than 28 years after the redemption of 1918 of the last mortgage by redeeming co-mortgagor. Accordingly it was held that non-redeeming mortgagor's suit for his share of the property on payment of his proportionate share of the mortgage money would be barred by limitation irrespective of whether the limitation is governed by the provisions of Travancore Limitation Regulation corresponding to Article 132 or 144 or any other Article of the Indian Limitation Act, 1908. The suit was held to be barred by limitation even if the limitation started running in 1913 or 1918,

8. As already stated, the date of the original mortgage which Seth Sumermal Bapna has not been proved in the case. It had also not been proved that the original mortgage was a registered document. At the time the mortgage was redeemed, Kanoon Miyad Mewar was in force. As in the present case, it had not been proved that the original mortgage was under a registered document, the period of limitation provided in item No. 7 of the Schedule appended to the Kanoon Miyad Mewar would apply and the period of limitation under that Article was 15 years to commence from the date when the cause of action arose. It has been held by a Division Bench of the Court in *Blotra v. Rameshwar Lal* 1971; WIN 684 that Article 2 in the Schedule appended to Kanoon Miyad Mewar applies only to the suits for redemption based on registered mortgages and in relation to

unregistered mortgages, Article 7, which provided for a period of limitation of 15 years, was applicable. Admittedly, the original mortgage had been made in favour of Seth Sumermal Bapna much before Mangsar Sudi 10 Samvat 1994 because the mortgage was made by ancestors of the parties. The period of 15 years had long back expired before the institution of the present suit. Even if the residuary Article 19 of Kanoon Miyad Mewar applied, suit could be instituted within eight years of the redemption by the redeeming co-mortgagors. The co-mortgagors had redeemed the suit 'haveli' and the shops from mortgage on miti Mangsar Sudi 10 Samvat 1994 corresponding to the year 1937, but the suit was not instituted by the plaintiffs-respondents within eight years. It was instituted on April 4, 1966. The plaintiffs had alleged that accounts were gone into on miti Sawan Sudi 15 Samvat 2004 and it was agreed that if the plaintiffs would pay the amount of Rs. 3201/- found to be due along with interest at 9% per annum, they would be entitled to get back their share in the suit property from the defendants, if this agreement entered into on Miti Sawan Sudi 15 Samvat 2004 corresponding to August 1, 1947 is taken into consideration as an acknowledgement, then even the suit was not instituted within eight years of the said date. Again the period of limitation provided by the residuary Article 120 of the Limitation Act of 1903 was shorter than provided by Article 19 of Kanoon Miyad Mewar and, therefore, by virtue of Section 30 of the Indian Limitation Act of 1908, the suit could only be instituted within a period of two years next after the coming into force of the Indian Limitation Act, 1908 in Part B states or within the period prescribed for such suit by Article 19 of Kanoon Miyad Mewar whichever period expires first. Therefore, whether the period of limitation started from the date of original mortgage in favour of Seth Sumermal Bapna (which date is not known) under Article 7 of Kanoon Miyad Mewar or from the date of redemption of the original mortgage by redeeming co-mortgagors in Samvat 1994 under Article 19 of the said Kanoon or even from the acknowledgement made on miti Savan Sudi 15 Samvat 2004, the suit of the plaintiffs was barred by limitation in accordance with the law laid down by their Lordships of the Supreme Court in Valliama Champaka Pillai v. Shivathanu Pillai (supra) Since the original mortgage in favour of Seth Sumermal Bapna was not a registered mortgage, Article 7 of Kanoon Miyad Mewar applied for redemption of the mortgage as laid down by the Division Bench of this Court in the case of Bhaira v. Rameshwar Lal

(supra). In my view, therefore the suit instituted by the plaintiffs was barred by limitation and the finding of the courts below on the point was not correct.

9. I, therefore, allow this second appeal set aside the decree of the District Judge Pratapgarh dated January 30, 1976 affirming the decree of the Additional Civil Judge, Pratapgarh dated May 1, 1971 and dismiss the Civil Suit No. 64 of 1966 instituted by the plaintiffs-respondent against the appellants. Having regard to all the facts and circumstances of the case, the parties will bear their own costs throughout.

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