

Rahmat Karim Vs. Abdul Karim

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Court : Kolkata

Decided On : May-09-1907

Reported in : (1907)ILR34Cal672

Judge : Francis W. Maclean, C.J. and ;Holmwood, J.

Appellant : Rahmat Karim

Respondent : Abdul Karim

Judgement :

Francis W. Maclean, C.J.

1. This appeal arises out of a mortgage suit. The mortgage was created on the 22nd of April 1897 and contained a covenant to pay the mortgage money. The due date was the 6th of May 1898. The suit was instituted on the 19th of April 1900, and a decree was made in that suit on the 19th of July 1900. It was a decree in effect ordering the property mortgaged to be sold to realise the judgment-debt. Some property was sold on the 17th of November 1902, and the sale was confirmed on the 19th of March 1902. On the 28th of March 1905, the mortgagee made an application under Section 90 of the Transfer of Property Act, asking the Court upon the footing that the proceeds of the sale were insufficient to pay what was due to him, to pass a decree for the balance. The Court declined to pass any such decree, on the ground that the application was barred by limitation. The only question we have to consider on this appeal is whether it is so barred.

2. The view of the District Judge was confirmed by Mr. Justice Geidt from whom this appeal lies. Both the District Judge and Mr. Justice Geidt held that Article 178 of the Second Schedule of the Limitation Act applied to the case. Article 178 runs as follows:--For 'applications for which no period of limitation is provided elsewhere in this Schedule, or by the Code of Civil Procedure, Section 230, the period of limitation is three years to run from the date when the right to apply accrued.' It has, however, been held by a Division Bench of this Court in the case of Tiluck Singh v. Parsotein Proshad (1895) I.L.R. 22 Calc. 924 in which decision was given some twelve years ago, and I am not aware that it has been dissented from-that that Article is limited applications under the Code of Civil Procedure. That case followed upon a Bombay case, Bai Manekbai v. Manekji Kavasji (1880) I.L.R. 7 Bom. 213. These cases have not been noticed by Mr. Justice Geidt at least I find no reference to them in his judgment. The case of Tiluck Singh v. Parsotein Proshad (1895) I.L.R. 22 Calc. 924 was noticed by the learned District Judge. He practically declined to follow it. Whatever his individual opinion might have been, he was bound to follow it and should have left it to this Court to say whether the ruling was right or not. I think that the ruling is right and that the article does not apply. Then what is the position? The plaintiff in the ordinary way would have, under Article 116, six years to bring his suit on the covenant. The mortgage was registered. His suit was instituted on the 19th of April 1900, the due date of payment being the 6th May 1898. So far then, as the original claim went, the suit was well within time. Has he lost his right to a supplemental decree under Section 90 of the Transfer of Property Act? At the time the decree was passed, the Court, whether at the request of the mortgagor or not, only passed a decree for the sale of the mortgaged property, cognizant that under Section 90 of the Transfer of Property Act it could make a supplemental decree if such supplemental decree became necessary.

3. This subject has been dealt with in a recent case of Purna Chandra Mandal v. Radha Nath Dass (1906) I.L.R. 33 Calc. 867 ; 4 C.L.J. 141 by a Division Bench of this Court and these Articles of the Limitation Act considered: and, one of the learned Judges at page 873 says this: 'The Court in the first instance gives a decree for sale and then determines, if necessary, at a subsequent stage whether the plaintiff should have also a personal decree. In making this supplemental

decree the Court has to consider, if any question of limitation arises, whether the personal remedy was barred at the date of the institution of the suit, and not whether it would be barred at the date of the application under Section 90.' I think that is right. That being so, it seems to me that the view taken that the application is barred is not well-founded. But it has not been decided whether the balance is legally recoverable from the defendant otherwise than out of the property sold. The appellant concedes that the case must go back to have that issue decided. We order accordingly.

4. The appellant must have his costs in all the Courts including the costs of this appeal and of the proceedings before Mr. Justice Geidt.

Holmwood, J.

5. I agree.

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