

IN THE SUPREME COURT OF PAKISTAN
(APPELLATE JURISDICTION)

MR. JUSTICE MUSHIR ALAM
MR. JUSTICE FAISAL ARAB
MR. JUSTICE MUNIB AKHTAR

CIVIL APPEAL NO. 401 OF 2011.

(On appeal from judgment dated 2.11.2010
passed by the Lahore High Court,
Bahawalpur Bench, Bahawalpur in
C.R.No.24 of 1993.)

Muhammad Sadiq and others

...Appellant (s)

VERSUS

Muhammad Mansha and others

...Respondent (s)

For the Appellant (s)

Syed Wusat-ul-Hassan Taqvi, ASC.
Syed Rifaqat Hussain Shah, AOR.

Respondents No.5,8-11,
13 & 14.

Mr.Ishtiaq Ahmad Raja, ASC.

Respondents No.6,7
(vi) (vii),12,15-21.

N.R.

Date of hearing

24.5.2018.

ORDER

Munib Akhtar, J.- In this matter leave to appeal was granted on 13.4.2011 against an order of the Lahore High Court dated 2.11.2010 made on a revision petition filed by the present contesting respondents.

2. Briefly stated the facts are that the predecessor-in-interest of the respondents No.1 to 15, one Mr. Muhammad Ali, filed a suit against the predecessor-in-interest of the respondents No.16 to 21, one Mr. Noor Muhammad, seeking specific performance of a written agreement to sell dated 02.05.1983 in respect of a certain property the particulars of which it is not necessary to set out for present purposes. (For convenience, reference in this judgment shall be made to the predecessors-in-interest of the parties as aforesaid.) The case of Mr. Muhammad Ali was that by means of the aforesaid agreement to sell he had agreed to purchase the subject property from Mr.

Noor Muhammad for Rs.35,000/- and had paid Rs.10,000/- as earnest money on the same day. It was stated that the subject property was mortgaged with Habib Bank Ltd. and was not redeemed until 28.11.1988, and it was only thereafter that the agreement to sell could be performed. However, it was stated that instead of completing the transaction as per the agreement between the parties, Mr. Noor Muhammad had instead sold the subject property to the present appellants and had mutated the same in their favor on or about 02.12.1988. The present appellants were also joined as defendants in the suit. The defendants resisted the suit and took a number of defences, of which only one is relevant for present purposes namely that the suit was barred by limitation. The basis of this objection was that the agreement to sell dated 02.05.1983 had specifically set out in it a date fixed for its performance, being 28.05.1983, and that therefore Mr. Muhammad Ali ought to have brought his suit within three years from the said date, i.e., by or before 28.05.1986. However, the suit was filed on 06.12.1988 and was therefore hopelessly time barred. The defence taken by Mr. Muhammad Ali to this objection was that the subject property had been mortgaged by Mr. Noor Muhammad with Habib Bank Ltd (a fact that according to the former only came to light after the agreement to sell was executed) and that the property was only redeemed on or about 28.11.1988. It was contended that limitation should be counted from this date and that on such basis the suit was well within time. The parties led their evidence and the learned trial Court decreed the suit in favor of Mr. Muhammad Ali. There was an appeal by the present appellants to the District Court, and the learned Additional District Judge to whom the matter was marked allowed the appeal with the result that the suit stood dismissed. It was against this dismissal that Mr. Muhammad Ali filed a revision petition before the learned High Court which allowed the same and restored the judgment and decree of the learned trial Court. It is in such circumstances that the appellants have come before this Court.

3. Insofar as the issue of limitation is concerned, the learned High Court was pleased to accept the case put forward by Mr. Muhammad Ali that the suit was within time. The learned High Court dealt with this issue in the following terms:

“7. The main contention of learned counsel for the respondents No.2 to 4 was that the suit of the petitioners was barred by time. The claim of the said respondents was that the disputed agreement to sell Ex.P.1 was brought into witting on 02.05.1983 and in it the date fixed for the performance of the contract was 28.05.1983, therefore, the limitation for a suit for specific performance of the contract had to be started from 28.05.1983 and the same had to be ended on 28.5.1986 but the petitioners filed the suit on 06.12.1988, therefore, the same is badly barred by time. But from the perusal of record it reveals that the property in dispute was mortgaged with the Habib Bank Limited and the same was redeemed on 28.11.1988, therefore, the limitation should had to be started from the date of redemption of the disputed land i.e. 28.11.1988 and the learned trial court has rightly observed that the suit of the

petitioners was within time but the learned appellate court has ignored this important aspect of the case, I am of the considered view that the suit of the petitioners was within time and the observation of learned appellate court in this regard is unfounded and baseless. The learned appellate court has committed illegality and material irregularity while passed the impugned judgment and decree which has no bearing in the eyes of law.”

4. Learned counsel for the appellants challenged the impugned decision of the learned High Court on various grounds focusing primarily on the issue of limitation as well as the fact that the agreement to sell between the appellants and Mr. Noor Muhammad was a registered document whereas this was not the case as regards the agreement between the latter and Mr. Muhammad Ali. Learned counsel submitted that the learned appellate Court below had rightly dismissed the suit and that the learned High Court had erred materially in reaching the opposite conclusion. On the other hand the learned counsel for the contesting respondents (being the successors-in-interest of Mr. Mohammad Ali) defended the decision of the learned High Court and submitted that it had correctly allowed the revision and restored the decision of the learned trial Court.

5. We have heard the learned counsel as above and considered the record placed before us. As noted, we focus only on the issue of limitation, on which the learned High Court has held that the suit was within time. With respect, we are unable to agree. In our view the suit was barred by limitation and ought to have been dismissed as such. There is no dispute that there was a written agreement to sell between Mr. Muhammad Ali and Mr. Noor Muhammad with regard to the subject property, and that the agreement was entered into on 02.05.1983 and did have a specific date for its performance namely 28.5.1983. Therefore in the ordinary course it is the first limb of Article 113 of the First Schedule to the Limitation Act, 1908 that would have applied and the suit would have become barred by limitation after 28.5.1986. However, the learned High Court took the view that since the property was mortgaged limitation did not begin to run till such time as it was redeemed which came about around 28.11.1988. On such basis it was held that the suit was within time. In our view, with respect, the reasoning and the conclusion of the learned High Court proceeded on a fundamental misconception of the law. As is well known, when a property is mortgaged by one person to another the interest that is left in the hands of the mortgager is called the equity of redemption. Now, the equity of redemption is itself immovable property which can be dealt with as such by the mortgager, whether by way of sale, subsequent mortgage, gift or transfer but subject always to the rights and interests of the mortgagee. In other words the existence of a mortgage on immoveable property does not in or itself constitute a bar to subsequent dealing by the mortgager as regards the equity of redemption. This position was regarded as settled law as long

ago as 1895, as is attested by the decision of the Calcutta High Court in *Kanti Ram and others v. Kutubuddin Mohamed and others* (1895) 22 Cal 33. As regards the equity of redemption, the Court held as follows (pp 41-2; emphasis supplied):

It was strongly contended before us that the words "specific immoveable property," as mentioned in Section 58, denote the property itself as distinguished from any equity of redemption which the mortgagor might at the time possess in the said property. The words "immoveable property" have been defined in the General Clauses Act, I of 1868. Section 2, Clause (5) says: "Immoveable property shall include land, benefits to arise out of land, and things attached to the earth or permanently fastened to anything attached to the earth." [See now, s. 3(25) of the General Clauses Act, 1897] *Regard being had to this definition, it seems to us that the words "immoveable property" include the rights of the mortgagor in the property mortgaged at the time of the second mortgage, or, in other words, his equity of redemption in that property, and when the Legislature in Section 58, in defining what a mortgage is, speaks of the transfer of an interest in specific immoveable property, we are unable to say that, when a property, subject to a prior mortgage, is mortgaged a second time, or, in other words, when the mortgagor's equity of redemption in that property is mortgaged to another person, it is not a mortgage of specific immoveable property within the meaning of that section."*

As to the nature of the equity of redemption, the High Court observed that it was "the specific immoveable property of the mortgagor, burdened as it is with the prior incumbrance, i.e., the property of the mortgagor *minus* the interest which he had already transferred to the ... mortgagee" (pg. 37; emphasis in original). Finally, it was also observed as follows (pg. 42):

"It is, we think, now settled law that a mortgagor may either absolutely sell or mortgage his remaining interest in the property which he has already mortgaged, notwithstanding there may be a covenant in the earlier mortgage prohibiting such a sale or subsequent mortgage. The purchaser, or the second mortgagee, in that event stands in the place of the mortgagor and takes the property subject to the prior lien."

6. In our view, law that was regarded as settled 125 years ago can hardly be disturbed today. As will be seen from the foregoing passages, the equity of redemption is simply the interest in the property that remains with the mortgager minus the interest created thereon in favor of the mortgagee, and it is in this interest that can be dealt with by the mortgager in accordance with law. It follows from this that if the mortgager enters into an agreement to sell subsequent to the creation of the mortgage, he can do so. He is then selling his property burdened as it is with the mortgage in favor of the mortgagee, i.e., he is disposing off the equity of redemption. As this is permissible under law, it follows that if the mortgager having entered into such an agreement to sell does not abide by the same, then the buyer of the property is entitled to bring a suit for specific performance. Of course, the rights and interests of the mortgagee will not be defeated, since the buyer will step into the shoes of the

mortgager as seller. If the factum of the mortgage is known to the buyer then he can simply join the mortgagee as a defendant in the suit so that if he succeeds in obtaining a decree for specific performance the rights of the various parties can be appropriately dealt with. However, even if the factum of mortgage is unknown to the buyer and does not come to light during the course of the suit, any decree obtained by the buyer would still, and nonetheless, remain subject to the rights and interests of the mortgagee.

7. As is clear from the above, the existence of the mortgage has no bearing on the question of limitation for the specific enforcement of the agreement to sell. That proceeds independently and on its own footing, and as presently relevant is covered by Article 113 of the Limitation Act. Therefore, in our view, with respect, the learned High Court erred materially in concluding that limitation did not begin to run till the property was redeemed. Limitation in cases similar to the one at hand begins to run from the date of performance as given in the agreement, as stipulated by the first limb of Article 113. In the present case therefore the suit ought to have been brought by or before 28.05.1986. Since it was admittedly instituted on a much later date, it was hopelessly time barred and liable to be dismissed as such. Accordingly, we hold that the learned appellate Court below came to the right conclusion in dismissing the suit filed by Mr. Muhammad Ali and that the contrary decision of the learned High Court cannot be sustained. That decision is therefore set aside and it is declared that the suit stands dismissed.

8. It was for the foregoing reasons that we allowed the present appeal by means of a short order on 24.5.2018.

JUDGE

JUDGE

JUDGE

Islamabad, the
24th May, 2018
Saeed Aslam/*

APPROVED FOR REPORTING