

Narain Ram Kalwar vs Ram Lalla Prasad And Ors. on 17 August, 1950

Equivalent citations: AIR1951ALL433, AIR 1951 ALLAHABAD 433

JUDGMENT

Agarwala, J.

1. This is a plaintiff's appeal arising out of a suit for possession after redemption of a mortgage. The facts are as follows : On 7-2-1898, Mt. Pachni and Hansula executed a usufructuary mortgage of the house in suit in favour of one Sarju Prasad. It was provided in the mortgage that the mortgagor shall be entitled to make the payment within sixty years from the date of the mortgage. Mt. Pachni and Hansula, mortgagors, died and Munnu, their successor-in interest sold the equity of redemption to the plaintiff by sale-deed dated 15-1-1945. Sarju Prasad, the mortgagee, also died leaving several heirs. Kamta, one of the heirs of Sarju Prasad, obtained the mortgagee rights in a partition between the heirs. The mortgagee rights were put up for sale at an auction in execution of a decree against Kamta and were purchased by Mt. Saraswati. On 5-1-1932, Mt. Saraswati mortgaged the house to Deokinandan alleging herself to be the owner of the house and not merely the mortgagee. On 19-12-1938, Mt. Saraswati sold the house to Deokinandan in her capacity as owner of the house. The plaintiff filed the suit which has given rise to this appeal on 1-2-1945.

2. The case for the plaintiff was that he had come to know of the transfer in favour of Deokinandan only a few days before the institution of the suit. The trial Court held that the suit was either premature or barred by limitation under Article 134, Limitation Act. The lower appellate Court held that Article 134, Limitation Act, did not apply to the case as, there being a condition for the payment of the mortgage money within sixty years, the cause of action for redemption did not arise before the expiry of sixty years and Article 134 could not apply to a case in which cause of action for redemption had not arisen to the mortgagor. He held that if Article 134 applied, the suit was not barred by limitation because the plaintiff had come to know of the sale in favour of Deokinandan shortly before the institution of the suit. He, therefore, held that the suit was premature and dismissed the appeal. Against this decree the plaintiff has come up in second appeal to this Court.

3. It has been urged on behalf of the plaintiff that the suit fell within the purview of Article 134 and was neither premature nor barred by limitation.

4. Under Article 134, Limitation Act, for a suit, "to recover possession of immoveable property conveyed or bequeathed in trust or mortgage and afterwards transferred by the" trustee or mortgagee for valuable consideration,"

period of limitation is twelve years from the date on which "the transfer becomes known to the plaintiff."

5. Now when a property is usufructuarily mortgaged the mortgagor is entitled to redeem the property under Article 148 and to recover possession of the same as against the mortgagee or his successor-in-interest within sixty years of the date when the right to redeem or to recover possession accrues. As in the present mortgage a period of sixty years was fixed for the payment which has not yet expired, the mortgagor could not redeem the property mortgaged or recover possession of the property and the suit would be premature. But in order to protect transferees of the property from mortgagees for valuable consideration when the transfer is not of the mortgagee rights merely, but of the property itself, the legislature has provided for a fresh period of limitation for suits against them under Article 134. As the article originally stood, a suit for recovery of possession against a transferee from a mortgagee could be instituted within twelve years of "the date of the transfer." After the expiry of twelve years from the date of the transfer, the transferee for value was secured in the possession of the property and the mortgagor could neither redeem the property nor recover possession of it from the transferee. The starting point of limitation being the date of the transfer it was likely to cause hardship to mortgagors who did not come to know of the transfer at all before the expiry of twelve years. The Legislature, therefore, removed this difficulty by amending Article 134. Act 1 [1] of 1929 substituted the words "when the transfer becomes known to the plaintiff" in place of the words "The date of the transfer" in Col. 3 of Article 134. The position, therefore, now is that where a mortgagee has transferred his property alleging himself to be the owner of the property and not merely the mortgagee thereof and the transfer comes to the knowledge of the mortgagor, the mortgagor is bound to sue within twelve years of the date of the knowledge to recover possession from the transferee or else he loses his title to the property. It is immaterial in such a case whether the mortgagor was entitled to redeem the property as against the original mortgagee on the date of the transfer or before the institution of the suit because the whole object of Article 134 is to give security to transferees for value.

6. Learned counsel for the respondent has relied upon a decision of the Madras High Court in Krishnaswami Ayyar v. Sabarathnam Chetti, A. I. R. (25) 1938 Mad. 394; (180 I. C. 468). The facts of that case were quite different. A certain property was usufructuarily mortgaged on 19-9-1890. The period fixed for the payment of the mortgage money was upto 11-4-1901. Prior to 11-4-1901, the mortgagee died and his heirs transferred the property first by simple mortgage and then by a usufructuary mortgage dated 4-11-1900, dated 17-10-1899; but as the property was in possession of a Receiver the mortgagee under the mortgage of 4-11-1900 could not get possession and, therefore, the mortgagee entered into agreement that interest shall be paid at a certain rate to the mortgagee. Then a suit for redemption and possession was filed in 1928 and the Court had to consider whether Art. 134 as it stood before its amendment by Act I [1] of 1929 barred the suit. Abdul Rahman J., who decided the case, held that Article 134 did not apply, for two reasons; one was that under the mortgage though usufructuary, the mortgagee did not obtain possession and so the case fell within the ruling of the Full Bench in Seeti Kutli v. Kunhi Pathumma, 40 Mad. 1040 : (A. I. R. (6) 1919 Mad. 972 F. B) in which it was held by a majority of the Judges that Article 184 as it stood before the amendment of 1929 referred to a transfer with possession and not to a transfer without possession. He also gave one other reason in support of his view, and it is that reason with which we

are concerned in the present appeal. He observed:

"There is another aspect of the case which is also quite important. The original mortgage of 1890 could not have been redeemed under the terms of the deed before 11-4-1901. It was transferred by Lakshminarayana's widow first under a simple mortgage on 7-10-1899 and later on by means of what has been described, as a usufructuary mortgage on 4-11-1900. Can it be reasonably held that the limitation against the original mortgagor or his alienee began to run even before the date when a cause of action for redemption accrued to them ? In spite of what has been said by one of the Judges in the minority, I am afraid, I must, with great respect, agree with what was so lucidly observed by the learned Judge, Srinavasa Ayyangar at p. 1062 of that judgment."

7. In the Full Bench case in the order of reference one of the questions referred was:

"Whether where the mortgage is usufructuary anal the mortgagor has no right to obtain possession from the mortgagee at the time of the transfer, does time run against the mortgagor under Article 134, from the time of the transfer or from the time when the mortgagor's right to sue for possession accrues, under the original mortgage."

Srinivasa Ayyangar J. was of opinion that on general principles he would hold that Article 134 would not come into operation so long as the cause of action for redemption had not accrued: to the mortgagor under the mortgage. This was what His Lordship observed:

"As on principle no period of limitation can begin to run till there is a cause of action (Col. 3 of the elaborate Schedules in the Limitation Act of 1871 and onwards is based on this principle and the terminus a quo as far as possible is made to coincide with the earliest time at which an action could be brought) we ought not to construe the Article, if the language admits of it, in such a way as to bar the action before the cause of action arose or even, to out short the period so as to give varying periods of time for the same suit, varying according to the time which elapsed-between the date of the transfer and the accrual of the cause of action. In construing these Articles of the Limitation Act, we should not lay undue stress on Col. 1 of the Article which describes the nature of the suits, and bold that all suits of that class must be governed by that Article, though this starting point fixed in Col. 3 cannot be applied at all or cannot be applied without working injustice."

On the other hand, Wallis C.J. observed:

"When the case is covered by the language of the Article, it is not permissible to depart from the Article itself or from the starting point prescribed therein on grounds of real or fancied hardship"

and held that the limitation was not postponed merely because the defendant got into possession after the date of the transfer.

8. Coutts Trotter, J. observed:

"It is very tempting to hold that the Article cannot apply to a plaintiff whose cause of action did not exist at the time when limitation is said to begin to run. Such a general principle would be intelligible and very likely salutary; but I do not find it in the statute or in any decision that is binding upon this Court, and I do not see how I can import a general principle into a codifying statute. It is no doubt a startling result to say that a man's cause of action can be barred before it has accrued; but if the plain words of the enactment involve that, we cannot rewrite it."

9. To my mind there is no question of the cause of action not accruing in a suit for recovery of possession against a transferee of the mortgagee. If a mortgagee transfers the property not in his capacity as a mortgagee but as an owner of the property the law gives a right to the mortgagor to recover possession of the mortgaged property against the mortgagee's transferee irrespective of the contract in the mortgage. The transferee cannot take shelter behind the contract of the mortgage because he has himself been a party to its violation when he got a transfer not of the mortgagee's rights but of the absolute rights in the property. In a case of this kind, if the mortgagor is allowed by law to recover possession of the property within twelve years of the date of transfer or, as Article 134 now stands, within twelve years of the date of knowledge, then it cannot be said that a suit by a mortgagor has been filed before the accrual of a cause of action. It is true that by reason of the clause in the mortgage which postponed payment after a certain number of years, the mortgagor could not redeem the property before the expiry of that period, but a suit against a transferee of the mortgagee such as is contemplated by Article 134 is really not a suit upon the mortgage at all. It is a suit upon the title of the mortgagor which he could enforce against a person who holds adversely to him claiming to hold it as an absolute owner himself. I, therefore, hold that in spite of the fact that there was a condition by which cause of action for redemption could accrue in favour of a mortgagor after the expiry of sixty years from the execution of the mortgage, the mortgagor could file a suit for possession against the transferee of the mortgagee. The suit was, therefore, not premature. The suit was also not barred by limitation as found by the Court below.

10. I, therefore, allow this appeal set aside the decree passed by the Court below and remand the case to that Court for decision on the remaining points in the case.

11. The appellant is entitled to his costs of this appeal. Costs incurred hitherto shall abide the result. Leave to appeal under the Letters Patent is granted.