Mohammad Khan vs Mohammad Salim Khan on 23 August, 1950

Equivalent citations: AIR1951ALL392, AIR 1951 ALLAHABAD 392

JUDGMENT

Agarwala, J.

1. This is an application in revision under Section 115, Civil P. C.

2. The applicant applied under Section 12, U. P. Agriculturists' Relief Act, for the redemption of a usufructuary mortgage, dated 1-8-1878, which was executed by Fateh Afzal Khan, grandfather of the plaintiff, in favour of the defendants opposite-parties for a sum of Rs. 259. After the death of Fateh Afzal Khan, his son, Ashraf Khan, executed another mortgage on 30-8-1900 for Rs. 167 in favour of the same mortgagees reciting the existence of the previous mortgage. The plaintiff alleged that limitation for redemption was saved by the acknowledgment about the prior mortgage made in the second mortgage by Fateh Afzal Khan. The defence inter alia was that the suit was barred by limitation.

3. The trial Court held that the suit was not barred by limitation and that the entire amount has been paid-up by the usufruct of the property. It, therefore, decreed the suit for redemption without payment of any mortgage money. The lower appellate Court held that the suit was barred by limitation and without going into the merits of the case dismissed the application for redemption. Against this decree the applicant has come up in revision to this Court.

4. A preliminary objection has been raised by the opposite party that no revision lies against the decree of the Court below on the ground that no question of jurisdiction is involved in the case, and even if the decision of the Court below be wrong, it was an error of law and cannot be corrected in the exercise of the revisional jurisdiction of this Court, and reference has been made in this connection to two cases of their Lordships of the Privy Council, namely, Amir Hasan Khan v. Sheo Baksh Singh, 11 Cal. 6 : (11 I. A. 237 P. C.) and Venkatagiri Ayyangar v. Hindu Religious Endowments Board, Madras, A. I. R. (36) 1949 P. C. 158 : (76 I. A. 67).

5. On behalf of the applicant, reliance has been placed upon a recent decision of their Lordships of the Privy Council in Joy Chand Lal v. Kamalaksha Chaudhary, A. I. R. (36) 1949 P. C. 239 : (76 I. A. 131).

6. On behalf of the opposite party, it has been contended that the decision in Joy Chand Lal Babu's case, (A. I. R. (36) 1949 P. C. 239 : 76 I. A. 131) is inconsistent with the decision of the Privy Council in the case of Amir Hasan Khan v. Sheo Baksh Singh, 11 Cal. 6 : (11 I. A. 237 P. C.) and it has been urged that Amir Hasan's case, 11 Cal. 6 : (11 I. A. 237 P. C.) related to a question of res judicata and in reference to that question their Lordships of the Judicial Committee had held that it did not

involve a question of jurisdiction, whereas in Joy Chand Lal Babu's case, A. I. R. (36) 1949 P. C. 239 : (76 I. A. 131) their Lordships definitely ruled that a decision on a question of Limitatation or res judicata involved a question of jurisdiction.

7. The facts in Amir Hasan Khan's case, 11 Cal. 6: (11 I. A. 237 P.C.) were these: A suit was commenced in the Court of the Extra Assistant Commissioner having jurisdiction under Act XXXII [32] of 1871 in the Sitapur district of Oudh. Amir Hasan Khan sued Sheo Baksh Singh to obtain possession by redemption of a mortgage of a certain property. The property was mortgaged in 1849 by 8 cosharers and the right to redeem had been contested prior to the suit both in the settlement and in the civil Courts. The defence to the suit was that it was barred under Section 13 (present Section 11 Civil P. C.) and Section 43 (present C. A Rule 2, Civil P. C.) of Act X [10] of 1877 and further that the plaintiff had no title to claim redemption of the mortgaged property. The suit was decreed by the Extra Assistant Commissioner and this decree was confirmed by the District Judge of Sitapur. A petition was, however, presented to the Judicial Commissioner under Section 622 (corresponding to Section 115 of the present Civil P. C.) of Act X [10] of 1877, as amended by Section 92 of Act XII [12] of 1879, alleging that the first Court had no jurisdiction to try the case and asking that the record might be sent for and the decree be reversed. The Judicial Commissioner did not find thereon that the first Court had no jurisdiction, but held that the Courts below had "exercised their jurisdiction illegally and with the material prejudice of the appellant" and reversed the decrees of the Courts below. There is nothing to indicate in the reports of the case either in 11 Cal. 6 or 11 I. A. 237 that the Judicial Commissioner set aside the decrees of the Courts below on the ground that the suit was barred by Section 13 or 43 of Act X [10] of 1877.

8. Sir B. Peacock, delivering the judgment of the Judicial Committee observed:

> "The question than is, did the Judges of the lower Courts in this case, in the exercise of their jurisdiction' act illegally or with material irregularity? It appears that they had perfect jurisdiction to decide the question which was before them and they did decide it. Whether they decide it rightly or wrongly, they had jurisdiction to decide the case; and, even if they decided wrongly, they did not exercise their jurisdiction illegally or with material irregularity."

It was, therefore, held that the Judicial Commissioner had no jurisdiction in the case under Section 622 of Act X [10] of 1877. The observations of their Lordships have been quoted in numerous cases; but they should be understood as having been made with reference to the facts of that particular case. The observations of their Lordships must be taken to apply to a case in which a question of jurisdiction is not involved. This was made clear by their Lordships in a subsequent case of Balakrishna Udayar v. Vasudeva Ayyar, 40 Mad. 793: (A. I. R. (4) 1917 P. C. 71), where their Lordships observed that Section 115, Civil P.C. "applies to jurisdiction alone, the irregular exercise, or non-exercise of it, or the illegal assumption of it. The section is not directed against conclusions of law or fact in which the question of jurisdiction is not involved."

9. Their Lordships further clarified the matter in Joy Chand Lal Babu's case, (A. I. R. (36) 1949 P. C. 239 : 76 I. A. 131) :

10. In that case an application was made by a debtor for a relief under Sections 30 and 36, Bengal Money-lenders Act, X [10] of 1940, in respect of a loan. The relief could not be granted if the loan was a commercial loan as defined in Section 2(4) of the Act. The Subordinate Judge refused the application because, in his opinion, the loan was a commercial loan. From this order there was an application in revision to the High Court. The High Court disagreeing with the Subordinate Judge held that the loan was not a commercial loan and remanded the case to that Court for retrial. Before their Lordships, it was urged that this was a question of law which the Subordinate Judge had jurisdiction to decide and the High Court had no power to interfere with it in revision, Sir John Beaumont, delivering the judgment of the Board, observed, "the learned Subordinate Judge, having held that this was a commercial loan, was bound to go on to consider what effect that decision had upon the respondents' application, and, since the Act in terms does not apply to commercial loans, the learned Judge wag bound, upon his finding, to dismiss the application without determining whether or no the respondents brought themselves within Sections 30 and 36 of the Act as they claimed to do. In so doing, on the assumption that his decision that the loan was a commercial loan was erroneous, be refused to exercise a jurisdiction vested in him by law, and it was open to the High Court to act in revision under Sub-section (b) of Section 115."

Then his Lordship went on to observe "there have been a very large number o! decisions of Indian High Courts on Section 115, to many of which their Lordships have referred. Some of such decisions prompt the observation that High Courts have not always appreciated that although error in a decision of a subordinate Court does not by itself involve that the subordinate Court has acted illegally or with material irregularity so as to justify interference in revision under Sub-section (c), nevertheless, ii the erroneous decision results in the subordinate Court exercising a jurisdiction not vested in it by law, or failing to exercise a jurisdiction so vested, a case for revision arises under Sub-section (a) or Sub-section (b), and Sub-section (c) can be ignored. The cases of Babu Ram v. Munna Lal, 49 All. 454 : (A. I. R. (14) 1927 All. 358) and Hari Bhikaji v. Naro Vishvanath, 9 Bom. 432, may be mentioned as cases in which a subordinate Court by its own erroneous decision (erroneous that is in the view of the High Court), in the one case on a point of limitation and in the other on a question of res judicata invested itself with a jurisdiction which in law it did not possess, and the High Court held, wrongly their Lordships think, that it had no power to interfere in revision to prevent such a result."

11. The Privy Council decision in Venkatagiri Ayyanggar v. Hindu Religious Endowments Board, Madras, A. I. R. (36) 1949 P. C. 166 : (76 I. A. 67), is clearly distinguishable. That was a case under the Madras Hindu Endowments Act, Act II [2] of 1927. The Act authorised the creation of a Hindu Religious Endowment Board and empowered it to take over control of temples dedicated to the use of the public. Section 84 of the Act laid down :

> "(1) If any dispute arises as to whether an institution is a math or temple as defined in this Act or whether a temple is an excepted temple, such dispute shall be decided by the Board.
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> (2) Any person affected by a decision under Sub-section (1) may, within one year, apply to the Court to modify or set aside such decision; but, subject to the result of

such application, the order of the Board shall be final."

The Board constituted under the Act held that the endowment created by Narayanan his will was a public endowment. This was disputed by the heir of the testator. He, therefore, filed a suit under Section 84 of the Act for a decision of the dispute. The District Judge held that the temple was a private one and that, therefore, the order of the Endowment Board was not binding on the heir of the testator. In revision it was held by the High Court that the District Judge had gone entirely wrong upon the construction of the will and the order of the District Judge was set aside. Sir John Beaumont, who delivered the judgment of the Board in Joy Chand Lal Babu's case, (A. I. R. (36) 1949 P. C. 239 : 76 I A. 131), observed, that no question of jurisdiction arose in the case and that the order of the High Court was without justification. This case is not at all in conflict with Joy Chand Lal Babu's case, (A. I. R. (36) 1949 P. C. 239 : 76 I. A. 131), The question involved in the case was purely on the merits of the case and was not in respect of the jurisdiction of the Court, nor did it result in the illegal assumption of jurisdiction or illegal refusal to exercise jurisdiction or the illegal exercise of jurisdiction by the Court.

12. In what matters is there illegal assumption of jurisdiction or illegal refusal to exercise jurisdiction? The question was considered by the Privy Council in the case of the Colonial Bank of Australasia v. Willian, (1874) 43 L. J. P. C. 39 : (L E. 5 P. c. 417). Their Lord-ships observed :

> "There must, of course, be certain conditions on which the right of every tribunal of limited jurisdiction to exercise that jurisdiction depends. But those conditions may be founded either on the character and constitution of the tribunal, or upon the nature of the subject-matter of the inquiry, or upon certain proceedings which have been made essential preliminaries to the inquiry, or upon facts or a fact to be adjudicated upon in the course of the inquiry. It is obvious that conditions of the last differ materially from those of the three other classes. Objections founded on the personal incompeteney of the Judge, or on the nature of the subject-matter, or on the absence of some essential preliminary, must obviously, in most cases, depend upon matters which, whether apparent on the face of the proceedings or brought before the Superior Court by affidavit, are extrinsic to the adjudication impeached. But an objection that the Judge has erroneously found a fact which, though essential to the validity of his order, he was competent to try, assumes that, having general jurisdiction over the subject-matter, he properly entered upon the enquiry, but miscarried in the course of it. The Superior Court cannot quash an adjudication upon such an objection without assuming the functions of a Court of Appeal, and the power to re-try a question which the Judge was competent to decide."

13. Thus there are three classes of cases in which the question of what of jurisdiction or refusal to exercise jurisdiction is concerned (a) the personal competency of the Judge, (b) nature of the subject-matter, including territorial and pecuniary jurisdiction and jurisdiction over the person of the defendant and (c) some essential preliminary conditions to the exercise of jurisdiction. All these three classes of matters are extrinsic or collateral to the merits of the Case.

14. There is, however, a fourth class of cases in which the question of jurisdiction is said to fee involved and that is, matters which fall under Clause (c) of Section 115, Civil P. C. (vide Balakrishna Aldayar's case, 40 Mad. 793 : (A. I. R. (4) 1917 P. C. 71). Matters falling within this class assume the existence of all conditions which give jurisdiction to the Judge having regard to the conditions involved in the first three classes of cases, but the jurisdiction so found to exist, has been exercised in an illegal manner. This class of cases refers to a material defect in the process of the exercise of jurisdiction in deciding a case.

15. It is true that even upon matters falling within the first three classes, the Judge hearing a case must pronounce a judgment upon them in the first instance. But unless the law has made a decision final even upon these preliminary matters, the Judge is not entitled to invest himself with jurisdiction by deciding them wrongly and a superior Court is empowered to go into those matters and correct the decision of the Judge upon them.

16. Their Lordships made this point clear later on in their judgment in the above case when they quoted with approval the following passage from the judgment of the Exchequer Chamber in H.E. Banbury v. P. Fuller, (1853) 9 EX. 111 : (156 E. R. 47) :

> "It is a general rule that no Court of limited jurisdiction can give itself jurisdiction by a wrong decision on a point collateral to the merits of the case upon which the limit to its jurisdiction depends, and however its decision may be final on all particulars, making up together that subject-matter which, if true, is within its jurisdiction, and however necessary in many cases it may be for it to make such a preliminary enquiry, whether some collateral matter be or be not within the limits, yet upon this preliminary question its decision must always be open to enquiry in the superior Court."

17. Therefore, whenever it is said that "the lower Courts had perfect jurisdiction to decide the question which was before them and they could decide it rightly or wrongly", the reference is to questions that raise on the merits of a case and not to questions which fall within the above-mentioned classes of cases, because in respect of them, even though a Judge may have jurisdiction to decide them, his decision is not final and can be revised by a Court of revisional jurisdiction.

18. What is the nature of questions of limitation and res judicata? Do they fall under the category of essential preliminary conditions to the exercise of jurisdiction? It is doubtful whether they fall under that head. Perhaps it would be better to confine Clauses (a) and (b) of Section 115, Civil P. C. to the first three classes of cases mentioned above and, in that case, questions of limitation, res judicata and the like would fall under Clause (c) of Section 115 the illegal exercise of jurisdiction. By a wrong decision upon a question of limitation or a question of res judicata, the Court commits an illegality in the exercise of its jurisdiction with the result that it either fails to consider the case upon its merits or considers it upon its merits when it ought not to have done so. It will be observed that the questions of limitation and res judicata are questions of procedure. In deciding wrongly upon these questions the Court adopts a wrong procedure for the decision of a case and thereby acts illegally in

the exercise of its jurisdiction with the result that one of the parties is severely prejudiced. But Sir John Beaumont, in Joychand Lal Babu's case, A. I. R. (36) 1949 P. C. 239 : (76 I. C. 131) has placed the resulting exercise or non-exercise of jurisdiction by a wrong decision upon these points, as falling under Clauses (a) (b) of Section 115. However, that may be, whether the question falls under Clauses (a) and (b) of Section 115 or under Clauses (c) of that section, the result is the same, namely, that the Court of revision can correct the error and set the matter right.

19. The present case is directly covered by the decision of the Privy Council in Joy chand Lal Babu's case : (A. I. R. (36) 1919 P. C. 239 : 76 I. C. 131). It must, therefore, be held that this Court has jurisdiction to entertain the revision.

20. The next question for consideration is whether there was any error in the decision of the Count below. The mortgage which was sought to be redeemed is dated 1-8-1878. There was a term in the mortgage, that if the money was not paid within 4 years, the mortgagee could enter into possession of the mortgaged property and would pay the land revenue. The money was not paid within the period fixed and, according to the finding of the trial Court, the mortgagee would have taken over possession of the land on 1-8-1882. The period of limitation, therefore, started from 1-8-1882. The application for redemption was made on 21-8-1946 clearly beyond 60 years, Article 148, Limitation Act, therefore, barred the suit.

21. Learned counsel for the applicant, however, relies upon Section 7, Debt Redemption Act, and upon a decision of this Court in Ram Prasad v. Bishambhar Singh, A. I. R. (33) 1946 ALL. 400 : (227 I. C. 541).

22. Section 7, Debt Redemption Act, runs as follows :

> "Notwithstanding the terms of any contract regarding the date or dates on which a loan shall become due, a suit to which this Act applies for the redemption of a mortgage or for accounts may be instituted at any time after the commencement of this Act."
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> It is urged that this section has done away with the period of limitation prescribed for suits for redemption of mortgages or for accounts and that such suits may be instituted at any time after the commencement of the Act, or, at any rate, within 60 years of the commencement of the Act. We do not think that this is the meaning of the section. The intention of the legislature is to do away with a condition in a mortgage restraining redemption for a certain period or up to a certain date, and so the section provides that the mortgage may be redeemed at any time after the commencement of the Act. It does not do away with the period of limitation altogether. The effect of the section is that from the commencement of this Act all mortgages, which had not become due on the date of commencement, become due on that date. The section does not do away with the law embodied in the Limitation Act. Whenever the legislature intends to override a rule of law, it says so specifically. For instance, the provisions of Section 8, Debt Redemption Act, provide :

"Notwithstanding the provisions of any decree or any law for the time being in force . . ."

23. In Ram Prasad's case, (A. I. R. (33) 1946 ALL. 400 : 227 I. C. 641) the suit wag for possession of a certain property and not for redemption. The learned Judges, who decided that case, referred to the distinction between a suit for redemption under Section 60 and a suit for possession under Section 62, T. P. Act, and pointed out that the suit before them was under Section 62, T. P. Act.

24. The present case is that of an application under Section 12 for the redemption of a mortgage to which Section 60, T. P. Act applies. The fast that possession of the property is also claimed is immaterial because a suit for redemption implies a relief for possession also on redemption. Further the fact that the mortgagor alleges that nothing is due on the mortgage is also immaterial because in a suit for redemption, the Court can come to a finding that nothing is due on the mortgage. If the suit is for redemption, limitation begins to run under Article 148 from the date when the right to redeem accrues. If the suit is for possession under Section 62, T. P. Act, the period of limitation (again under Article 148) starts from the date on which the right to recover accrues, and that will be after the mortgage money has been paid off in the circumstances mentioned in Section 62. The ruling in Ram Prasad's case. (A. I. R. (33) 1916 ALL. 400 : 227 I.C. 541) therefore, is distinguishable.

25. In this connection, reference may be made to a Full Bench decision of this Court in Khun Khun Chaube v. Mahabir Chaube, 1948 A. L. J. 90 : (A. I. R. (35) 1948 ALL 261 F. B.) to which one of the Judges, who decided Ram Prasad's case : (A. I. R. (33) 1946 ALL. 400 : 227 I. C. 541) was a party. That was a case for redemption under Section 12, Agriculturists Relief Act, and the period of limitation held to apply to the case was 60 years from the date when the right to redeem accrued.

26. Another ground on which it was urged that the suit was not barred by limitation was that there was an acknowledgment of a mortgagee in the subsequent mortgage of 1900. Am acknowledgment of a liability under Section 19. Limitation Act, that gives a fresh start for the, period of limitation must be by the person, against whom the liability is sought to be enforced. In other words, in a suit for redemption of a mortgage, the acknowledgment must be by the mortgagee. The acknowledgment is the second mortgage of 1900 was by the mortgagor, which cannot give a fresh start for the period of limitation. The application under Section 12 was, therefore, barred by time. The decision of the Court below was perfectly correct.

27. There is no force in this application is revision and it is hereby dismissed with costs.