Supreme Court of India
Bibijan vs Murlidhar on 15 November, 1994
Equivalent citations: 1995 SCC (1) 187, JT 1995 (1) 141
Author: K Ramaswamy
Bench: Ramaswamy, K.

PETITIONER:
BIBIJAN

Vs.

RESPONDENT:
MURLIDHAR

DATE OF JUDGMENT15/11/1994

BENCH:
RAMASWAMY, K.
BENCH:
RAMASWAMY, K.
VENKATACHALA N. (J)

CITATION:
1995 SCC (1) 187 JT 1995 (1) 141
1994 SCALE (4)1043

ACT:

HEADNOTE:

JUDGMENT:

ORDER

1.This appeal arises from the judgment of the High Court of Bombay at Aurangabad in SA No. 719 of 1970 dated 21-2- 1979. The respondent had filed the suit for redemption of usufructuary mortgage dated 15th Awarded 1321 Fasli, 1912 A.D., hypothecated for a sum of Rs 9200 O.S. by their predecessors-in-interest. The trial court dismissed the suit as being barred by limitation. On appeal, it was confirmed. The High Court in second appeal, held that the mortgagee acknowledged the mortgage and that, therefore, limitation starts running from the date of the acknowledgement by the respondents' predecessors-in-interest which would give fresh cause of action for filing a suit for redemption and possession. Indisputably, the gift deed executed by the donor in favour of the respondent-donee clearly mentioned the mortgage and made a part of the deed of gift. Thus, the finding of the High Court that the recitals in the gift deed constitute acknowledgement is perfectly legal. Accordingly, the finding that the suit was within limitation, is unassailable. Thereby, a

preliminary decree for redemption was granted giving appropriate time to the mortgagor to deposit the amount in the Court by decree dated 29-4-1979. Thus this appeal by special leave.

2.Pending the appeal, appellant 1 died in July 1984 and appellant 5 died in the year 1987. It is also reported that respondent 1 died in the year 1983 and application for substitution was pending. Substitution is allowed.

3.Admittedly, no steps have been taken to bring the legal representatives of appellants 1 and 5 on record. By operation of Order XXII, Rule 4 read with Rule II of Civil Procedure Code, when one of two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit. Rule II postulates the applicability of this order to appeals. As far as may be the word 'plaintiff' should be held to include an appellant, the word 'defendant' a respondent, and the word 'suit' an appeal. Thus at the appellate stage also the legal representatives of the deceased respective appellants and the respondents should be substituted as the legal representatives of the respective appellants/respondents. Article 120 of the third division of the Schedule to the Limitation Act, 1963 provides 90 days from the date of death as the period of limitation to have the legal representatives of the plaintiff-appellant, defendant-respondent, as the case may be, to be brought on record. After the expiry of 90 days, the appeal stands abated unless the appeal survives against the surviving appellants. Within 60 days after the expiry of 90 days, under Article 121, the abatement needs to be set aside. Since, admittedly, no applications had been made to bring on record the legal representatives of the deceased appellants 1 and 5 from the respective dates, before the expiry of 90 days, their appeal stood abated. The question is whether the appeal of other appellants also abates. It is the joint and inseverable decree of redemption granted in favour of respondents, which was questioned in the appeal. When that decree of redemption against appellants 1 and 5 had come to stand because of abatement of their appeal, that decree of redemption against appellants 2 to 4 alone cannot be set aside, for in that event decree of redemption made against appellants 1 and 5 questioned in the appeal would stand while the decree against appellants 2 to 4 alone calls to be set aside. Since the decree for redemption being joint and inseverable, the appeal cannot be continued. In this view of the matter, the entire appeal stands abated. The appeal is accordingly dismissed. No costs.