

PRIVY COUNCIL

Mt. Bakhtawar Begam

Vs.

Husaini Khanum and another
(Lords Shaw, CJ, Moulton and Mr. Ameer Ali JJ)

6.2.1914

JUDGMENT

Mr. Ameer Ali J.

1. The suit which has given, rise to these consolidated appeals from a decree and judgment of the High Court of Allahabad was instituted by the plaintiff-respondent in the Court of the Subordinate Judge of Cawnpore for the redemption of a mortgage executed so long ago as the 6th of January, 1830. The suit was brought on the 6th of January, 1899, and the only and vital question presented at the Bar for determination in this is whether the claim is barred by the Statute of Limitation (Indian Act XV of 1877).

2. The plaintiff Husaini Khanum alleges that on the 6th of January, 1830, her father, Aga Fateh Ali, in conjunction with another relative named Aman Ali, executed a mortgage by way of conditional sale in respect of 12 villages lying within the district of Cawnpore in favour of one Ata-ullah Khan, since deceased. The other plaintiffs are persons who have acquired title from Husaini Khanum. The principle defendant in the action was one Ali Hussain Khan, who was the representative of Ata-ullah. He died since the decision by the High Court in the appeal from the decree of the Subordinate Judge, and he is now represented by his widow, Bakhtawar Begam, the appellant. The remaining defendants are assignees of interests created by the original mortgagee or his representatives in the mortgaged premises.

3. The mortgage-deed is not forthcoming, but both the Courts in India have found that the contract between the parties to the transaction is, for all material purposes, substantially set forth in the proceeding of the Collector's Court, dated the 18th of September, 1830, on an application for mutation of names in the Revenue Register.

4. The contract of mortgage by conditional sale is a form of security recognized throughout India, and its incidents have been embodied in Section 58 of Act IV of 1882 (the Transfer of Property Act). The form it usually takes is for the mortgagor to execute a deed of sale in respect of the mortgaged property in favour of the mortgagee, who on his side executes an agreement covenanting that on the liquidation of the debt, according to the terms of the contract, the sale would be cancelled, and he would reconvey the property to the mortgagor. On the breach of the condition relating to repayment the contract executes itself, and the transaction becomes one of absolute sale.

5. The proceeding which contains the contract in this case is set out in full in the judgment of the High Court. The only material part to which their Lordships need refer is the clause relating to repayment, which runs as follows:-

"On being asked, Sital Parshad, attorney of Atta-ullah Khan, stated that his client had executed and made over to Mirza Aman Ali and Fateb Ali an agreement to the effect that the sale would be cancelled on payment of the amount of consideration in nine years, and that, therefore, the sale was not an absolute but a conditional sale."

6. The period of limitation under the Indian Statute for suits for redemption or for recovery of possession of mortgaged property is sixty years from the date of the accrual of the right to redeem or to recover possession (Article 148, Schedule II, Act XV of 1877). The Subordinate Judge was of opinion that limitation began to run from the date of the contract, and accordingly held that the suit was barred. The High Court of Allahabad on appeal have taken a different view. The learned Judges considered inter alia that the right to redeem in respect of the seven villages which were in the possession of the mortgagee's representatives accrued only on the expiration of the period of nine years for which the contract was made, but that as regards the five villages which had been transferred by the mortgagee to third parties the claim was barred. They accordingly decreed the plaintiffs claim in respect of seven villages and dismissed it with regard to the rest.

7. The defendants have appealed from the first part of the High Court decree, against which there is a cross-appeal on the part of the plaintiffs.

8. The first question to determine is whether the plaintiffs' right to redeem is affected by 60 years' limitation, for in that case her claim must fail in toto. The learned Judges dealing with this point give expression to their opinion in the following passage in

their judgment:-

"If the meaning of this contemporaneous agreement was that the mortgagors might redeem at any time within the period of nine years, the plaintiffs' claim is barred by limitation. If, on the other hand the intention of the parties was that the debt should remain outstanding for a period of nine years certain then the right to redeem only accrued at the expiration of that period. Ordinarily, a mortgagor cannot before the time limited for payment to the mortgagee expires, take proceedings to redeem. The reason for this is, that it was the agreement of the parties that the mortgage should, during the intervening time, remain as security for the money advanced, and therefore it is not competent for either party to disturb that relation."

9. And they refer to a number of cases in support of their conclusion. Ordinarily, and in the absence of a special condition entitling the mortgagor to redeem during the term for which the mortgage is created, the right of redemption can only arise on the expiration of the specified period. But there is nothing in law to prevent the parties from making a provision that the mortgagor may discharge the debt within the specified period and take back the property. Such a provision is usually to the advantage of the mortgagor. In the present case, had the matter depended only on the construction of the contract as given in the proceeding of the Collector, much might be said in support of the High Court's conclusions. The expression that "the sale would be cancelled on payment of the consideration in nine years" is certainly ambiguous.

10. But here the plaintiffs' case is that the mortgagors were entitled to recover the property within the period of nine years on the liquidation of the debt with the usufruct of the property. In the second paragraph of the plaint the plaintiffs state as follows:-

"The terms of the mortgage as agreed were that the mortgagee should remain in possession of the said mortgaged villages.. that the amount of profits, if any, which shall remain after paying the Government revenue, interest, and pay of the persons making the collections, would be owned by the mortgagors and applied in the payment of the principal, and that whenever the mortgage-money would be satisfied (out of the usufruct, or paid (by the mortgagors) before or after the stipulated time the mortgaged property should be redeemed."

11. And the fact is emphasized in paragraph 8, which is in these terms:-

"The whole amount of the principal mortgage-money with interest mentioned in the mortgage deed was paid up at the end of the year 1245 *Fasli* according to

the account which is annexed to this plaint and forms part of it. No portion of the mortgage-money, interest or any other demand is now due: on the other hand, there is a surplus amount due to the plaintiffs."

12. In their Lordships' judgment this is not a case of a wrong construction of a clause or condition in the contract. It is a distinct allegation of fact on which the right to recover possession is founded. But the matter does not rest there. The plaintiffs produced with the plaint a statement of accounts in respect of the 12 villages based on the settlement, records to show the amounts realized by the mortgagee from 1830 to 1897. In this document it is clearly stated that the whole debt was satisfied in 1245 *Fasli*. (4th September, 1837 - 4th September, 1838). From that time the balance of the realizations by the mortgagee after deduction of the legitimate outgoings is treated by the plaintiffs as sums retained by him without any right.

13. If the fact be, as the plaintiffs allege, that the mortgage-debt became satisfied under the contract in 1838, the right to recover possession accrued then, and the suit is clearly barred.

14. Their Lordships are, therefore, of opinion that the decree of the High Court partly decreeing the plaintiffs' claim should be set aside, and the suit dismissed, which will involve the dismissal also of the cross-appeal.

15. With regard to the costs, their Lordships think that Jamna Narain, who represents the original assignee of the five villages in respect of which the plaintiffs' suit has been dismissed by both the Courts in India, is entitled to the costs decreed in the Court of the Subordinate Judge and in the High Court, and to the costs of these appeals to His Majesty in Council. As regards the other parties, their Lordships think that the plaintiffs should bear the costs decreed against them in the First Court, but that each of the parties should bear their respective costs of these appeals and of the appeals to the High Court, including the costs incurred in the proceedings on remand.

16. And their Lordships will humbly advise His Majesty accordingly.

17. Appeal allowed.

Cross-appeal dismissed.