

Gulam Abbas and Others

Vs

Mulla Abdul Kadar (dead) through his Executors and Others

Civil Appeal No. 1562 of 1967

(J.M. Shelat, C.A. Vaidialingam JJ)

20.11.1969

JUDGMENT

SHELAT, J. -

1. This appeal, founded on a certificate granted by the High Court of Madhya Pradesh, involves a question of limitation in regard to suit for redemption filed by the respondents.

The relevant facts from which the said suit arose are as follows :

2. By a deed of mortgage, dated December 29, 1899 one Yusufali and his two brother mortgaged in favour of one Yarmohammad Khan their two shops at Jaora. The mortgage being usufructuary, the mortgagee was delivered possession of the two shops. The said Yarmohammad died in 1909, whereupon his rights in the mortgaged properties devolved upon his daughter. The daughter also died in 1918 and her interest devolved upon her husband, one Nawab Iftikharali. He was in possession of the shops till 1945 when he purported to sell them to appellants. On September 21, 1947 the respondents, claiming to be the successors- in-title of the mortgagors, filed the suit from which this appeal arises, against the said Nawab and the appellants, who claimed to be the purchasers of the said two shops from him.

3. The Trial Court decreed the suit and an appeal against that decree by the appellants was dismissed. The appellants thereupon filed a second appeal in the High Court which was allowed by a learned Single Judge who dismissed the respondents' suit as barred by the law of limitation applicable in the then State of Jaora. The respondents took out a review petition against the said decision on the ground that it suffered from in error apparent on the record in the sense that the learned Single Judge has failed to consider a provision of law embodied in Circular No. 25, dated May 1, 1910 which had the effect of amending the law of limitation then in force in the State and under which the respondents' suit was within time. The learned Single Judge who heard the second appeal being no longer on the Bench of the High Court, the review petition was heard by Division Bench. The Division Bench set aside the decision giving effect to the said circular and holding in the result that the respondents' suit was not barred by limitation and restored the decree passed by the Trial Court and confirmed by the first Appellate Court.

4. The Judgment in the second appeal, heard by the learned Single Judge, shows that besides the question as to limitation, the appellants had also raised the question of adverse possession by them. But, as the learned Single Judge has observed in clear terms, this was not pressed before him. The only question, therefore, he and the Division bench which heard the review petition were called upon to decided was on relating to limitation.

5. The said deed of mortgage provided that the two shops mortgaged thereunder were to be in possession of the mortgagee. It appears, however, that the shops at the time were let out because the deed itself provides that the interest on the mortgaged sum, which was settled at 12 annas per cent. was to be paid out of the rent fetched by the two shops. The shops fetched a rent of Rs. 40/15/- per month out of which the mortgagee was to appropriate Rs. 33/12/- per month in lieu of interest and the balance was to be paid by the mortgagee to the mortgagors. In the event of the rent falling short of that amount the mortgagors agreed to make good the shortage. The deed lastly provided : "The time of redemption of mortgage is settled to be that when we pay the entire mortgage money and other miscellaneous expenses in lump sum to the mortgagee and get out shops redeemed". No time for redemption having thus being provided in the deed, the mortgage amount, would be due and payable at once, i.e., from the date of the execution of the mortgage deed.

6. There is no doubt that the State of Jaora had its own law of limitation promulgated through various circulars and orders. This is clear from Section 12 of the Jaora State Limitation Act promulgated by the Ruler of the State on April 14, 1909. That section recites that prior to the enactment of the Act the period of limitation was uniformly 12 years for all suits whatever their nature. That being so, even if the time for limitation were to commence from the date of the execution of the mortgage, a suit for redemption by the mortgages was not barred when the Jaora State enacted the Limitation Act on April 14, 1909. The period of limitation being 12 years for every kind of suit, a suit for redemption by the mortgagors in the present case would not have been barred till December 29, 1911.

7. The Act of 1909 had a Schedule containing several articles laying down period of limitation for difference kinds of suits and proceedings. The Schedule, however, did not contain any specific article providing any period of limitation for redemption suits. Article 19 of the said Schedule provided a period of 12 years for a suit for recovered of mortgage amount by a mortgagee. But there was, as aforesaid, no corresponding article providing a period of limitation for suits for redemption. There was, however, Article 48, which was a residuary article, which prescribed 6 years' period for all suits not expressly provided for by the other article. The learned Single Judge was of the view that in the absence of any such specific article prescribing limitation for redemption suits it was the residuary article providing 6 years of limitation which applied, and therefore, the instant suit was barred. It seems that the Indian Limitation Act of 1908 was applied to Jaora State in 1945. But the application of the Act could not have the effect of extending the period of limitation to 1947 when the present suit was filed as by that time the respondents' right of filing the suit was already time-barred and the successors-in-title of the mortgagee had already acquired a right against such a suit being validly filed against them.

8. Unfortunately, as pointed out by the Division Bench, who heard the review petition, the learned Single Judge throughout his judgment did not take into consideration the said circular No. 25, dated May 1, 1910 though it was expressly relied upon by the respondents. The circular shows that it was published in the State Gazette under the signature of the Secretary to the Judicial Department of the State and as one sanctioned by the Ruler of the State. It recites that in cases where mortgage deeds did not specify and period for redemption or where such deeds were not clear confusion had resulted and even the Courts had expressed contradictory views. Accordingly, the circular recited that :

"It is necessary that a general rule regarding such doubtful and indistinct documents be made, and therefore, with the sanction of His Highness (may whose prosperity be everlasting) it is ordered that when there is no period mentioned in the mortgage

deed for demanding the mortgage money by the mortgagee from the mortgagor, the mortgagee will do well and giving a sufficient notice to the mortgagor and on expiration of the period (of notice), if necessary, seek the legal remedy according to law, in the competent Court. The limitation of such notice in any case should not be less than six months. The mortgagee is empowered to give a longer period, if he chooses to do so.

In the same way, if on account of doubtful and indistinct language it becomes necessary to the mortgagor to institute a suit against the mortgagee, the mortgagor should also give least six months notice to the mortgagee. Hence in such suits the date of cause of action shall be computed in the Court from the termination of the period of notice."

9. If this circular amounts to a provision having the force of law it follows that the cause of action for a suit for redemption would accrue only on a mortgagor giving 6 months' notice to redeem and on the expiry of such 6 months. If that were so, there would be question of the suit being time-barred either on the expiry of 12 years under the old law or 6 years under Article 48 of the 1909 Act, even if that article, as the residuary article, were to apply. The circular, if a provision having the force of law, would be amendment to the law of limitation as it existed then and would undoubtedly save the present suit from being barred until the mortgagors gave a notice to redeem and until the period of 6 months thereunder expired.

10. But the argument on behalf of the appellants was that the circular did not amount to a law or a provision having the force of law as there was inherent evidence in the circular itself to show that it was issued only as and by way of administrative instructions. The argument is, in our view, unacceptable. If the law of the State, as it then prevailed, was that the limitation for redemption suit not having been specifically provided for in the 1909 Act, the residuary Article 48 applied and the limitation thereunder would be 6 years, the Ruler could not have issued administrative instructions to the Courts contrary to or in violation of such of law to hold that despite the said provisions the limitation should be reckoned in such suits from the date of the expiry of the period of notice by the mortgagor to the mortgagee. The word 'instruction', appearing at the commencement of the circulars as translated, relied on in word aid, of the contention is not decisive, for, we are told that the 'hidayat' in the original can mean both instruction and direction and the translator has used the word 'instruction' and not direction while translating that word into English. But leaving aside this argument, there can be no doubt that the circular was issued by the Ruler in exercise of his legislative power and not as administrative instruction. That is clear if the circular were to be perused as a whole. So perused, it is clear that it was issued as "a general rule" on account of contradictory orders having been passed by the Courts of the State while dealing with documents of mortgages which did not specify or fix the period of redemption. That a Ruler of a State enjoyed unlimited sovereign powers including the power to legislate is well-settled. Therefore the Ruler of Jaora State had the power to amend or supplement by exercising his power of legislation the existing law within his territory. In our view the circular was such a legislative Act and saved the present claim from being time-barred. No point was taken at any time of the suit being premature on the ground that no notice, as envisaged by the circular, was given by the respondents. That point, therefore need not detain us.

11. Since an important amendment of the law of limitation was totally disregarded by the learned Single Judge, a review of his judgment and decision clearly lay as failure to consider an important provision of law materially affecting the result of the suit would be an error of law apparent on the

face of the record. The Division Bench, therefore, was right in entertaining the review petition and on the strength of the said circular reversing the decision of the learned Single Judge. The result, therefore, is that the suit was in time and the Trial Court was right in decreeing it.

12. In the result, the appeal fails and is dismissed with costs.

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