ALLAHABAD HIGH COURT

Sham Devi

Vs.

Bhagwat Dayal

(Mukerji, J.)

14.11.1924

JUDGMENT

Mukerji, J.

1. The plaintiff of the Court of first instance is the appellant in this Court. She brought, as a purchaser of the equity of redemption, a suit for redemption of a mortgage alleged to have been executed in 1843. The suit succeeded in the Court of first instance but the learned District Judge on appeal dismissed it. He came to two conclusions, viz., the appellant had failed to prove that she had any subsisting title to the property at the date of the suit and that the suit was barred by time. In appeal, it is contended that both the findings are incorrect. The learned Counsel for the respondent urged that the finding as to title was a finding of fact and was binding on this Court. On the question whether the finding of the learned Judge was a finding of fact, the argument of the learned Counsel for the appellant was that the facts were all admitted, the interpretation of the documents was all admitted, but the argument of the learned Judge was faulty and it was open to this Court to see where the fallacy of the argument of the learned Judge lay and then it was further open to this Court to consider the case on the merits. In order to appreciate this argument it was necessary to go into the evidence which was practically entirely documentary. I have examined the entire evidence and that evidence stands as follows : It appears that there were two brothers Asalat Khan and Karim Bakhsh, each of the brothers owning a 10 biswas share in a certain village. This was in 1806. As I have said the mortgage was executed in 1843. It appears that the factum of the mortgage was found established by the Court of first instance and the question was not raised again before the learned District Judge. Then we find that by 1855 the property of the brothers had been alienated. Karim Bakhsh had mortgaged 5 biswas to one Chittar Mal and 5 biswas to one Abdullah. Out of the share of Asalat Khan 71/2% biswas had been purchased by Abdullah and Abdullah had taken a mortgage of the remaining 21/2 biswas. It is this mortgage of 21/2 biswas that is sought to be redeemed. Then we find that Abdullah's son Abdul Latif joined the mutineers and his property was confiscated. In 1861 his property was sold and was purchased by the respondent's ancestor. This property was described as 8 biswas proprietary rights and 6 biswas mortgagee rights. It will be noticed that a certain change had

taken place between. 1855 and 1861 when the auction sale was held. In 1855 Abdullah had proprietary rights in 71/2 biswas and mortgagee rights in 71/2 biswas. In 1861 he had only 14 biswas in all, viz., 8 biswas in proprietary rights and 6 biswas as a mortgagee. Then it appears that in the khewat of 1861 which is to be found in the wajib-ul-arz of that year dated the 10th of October, 1861, the property was recorded as follows : Descendants of Karim Bakhsh's mortgagors of 41/2 biswas, the same property being held by Harsukh Rai (the ancestor of the respondent) as mortgagee. Harsukh Rai proprietor of 91/2 biswas. It was stated that out of these 9J biswas he had purchased 8 biswas belonging to Abdul Latif and he had purchased 1J biswas from Karim Bakhgh's descendants, Chittar Mal was shown as the mortgagee of 6 biswas being the property of Karim Bakhsh's descendants. It will be noticed that no names of descendants of Asalat Khan ever appeared in the wajib-ul-arz and khewat of the 10th of October, 1861. Further, we find that Fatehyab, son of Asalat, protested against this entry and made an application for correction of the khewat. His contention was that his name should have been recorded as a mortgagor of 21/2 biswas. His application was dismissed, we do not know for what reasons, on the 20th of January, 1862. Fatehyab lived up to the year 1921, but it does not appear that he ever stirred himself to obtain a correction of the khewat. It was on his death that his descendants sold the property to the appellant. On all this evidence the learned Judge came to the conclusion that the appellant had failed to prove that she or her predecessor had any title in the 21/2 biswas left in them.

2. The learned Counsel for the appellant has contended that the mortgagee was put in possession of property and the mortgagee, was bound to hand over that property to the descendants of the mortgagor and it was for him, viz., for the mortgagee to account for the loss of title in the mortgagor. There can be no doubt that there is a good deal of force in this argument. Abstractly speaking this argument is sound. But we have to look at the argument in the light of the circumstances of the case. We see that between 1855 and 1861, vis., within the space of six years, a decided change had taken place in the entry in the khewat and that change was to the detriment of Fatehyab a descendant of Asalat Khan. Fatehyab became aware of that change and he took steps to have an alleged error remedied. He failed. But he never took steps by way of a suit in the civil Court or elsewhere to have the error corrected. The question then is whether under the circumstances the Court below was justified in saying that after the lapse of 60 years, that is after the entry of 1861 had been allowed to stand for over 60 years, the plaintiff can say that her or her predecessor's title still subsists. Many things may have happened between 1855 and 1861 to justify the entries made in the later year. In my opinion the inference to be drawn is an inference of fact from admitted entries in documents and it cannot be said that that inference is perverse or illegitimate. It is not necessary for me to express my own opinion on the point. I do think that the Judge's finding as to want of title in the appellant is a finding of fact and that finding is binding on this Court.

3. As I am deciding this second appeal as a single Judge and there is every likelihood of there being a Letters Patent Appeal I would like to decide the second question, viz., that of limitation

as well.

4. Undoubtedly the suit would be time-barred except for an alleged acknowledgment made in 1861. It appears that after his purchase Harsukh Rai made an application to the Collector tendering the purchase money and asking for a delivery of property to him. In this application he said that he was paying so much for the proprietary rights purchased by him and so much for the mortgagee rights purchased by him. It is argued that this statement of Harsukh Rai that he was paying so much money for the mortgagee rights was an acknowledgment of the fact that he was liable to be redeemed. Reliance has been
placed on the case of *Mani Ram Seth v. Seth Rup Chand*[1] On the other hand the learned Counsel for the respondent relied on the same case on which the Court below relied viz., *Khiali Ram v. Taik Ram*[2]

5. The Privy Council case relied upon by the appellant has been distinguished in a much later case by the Madras High Court, vis., *Kandasami Reddi v. Suppammal*[3], It has been pointed out in the Madras case that the facts before the Privy Council were entirely peculiar and that case was no authority for the proposition that a mere statement, that a certain person was a mortgagee amounted to a statement that that mortgage subsisted as an enforceable transaction. In the case before the Madras High Court the suit was on foot of a mortgage which would be time-barred except for a certain statement in a plaint once filed by the defendants. In that plaint the defendants as plaintiffs of the suit had stated that they had executed on a certain date a certain hypothecation deed for a certain amount of money and they had received the consideration in a certain way. The learned Judges of the Madras High Court were of opinion that mere statement of a fact that a certain mortgage had been executed did not amount to an acknowledgment of an existing liability under it.

6. There can be no doubt the question of law discussed in Allahabad case 14 A.L.J. 834 did not arise after the finding that the mortgage sought to be redeemed had not been established. But the case before this Court was a first appeal and it was probably necessary for the learned Judges to decide all the questions raised before them. In the Allahabad case the question raised was very similar to the question raised in this Court. Indeed, the alleged acknowledgment in the Allahabad case was in much stronger language. The learned Judges following the case of *Dharma Bhital v. Gobind*[4] were of opinion that an acknowledgment must be conscious acknowledgment and. must show that the person who was acknowledging understood that he was by the statement acknowledging a liability. Their Lordships quoted in extenso from the Bombay case and came to the conclusion that the document before them did not amount to an acknowledgment.

7. Apart from authority, on the language of Section 19 of the Limitation Act, it appears clear to me that for a statement to amount to an acknowledgment there should be an acknowledgment of liability. When a man says that he purchased a certain mortgagee right he only means that he purchased certain property which came into the possession of the vendor as a mortgagee. All that

he admits is that the vendor came into possession of the property on foot of mortgage. No question arises in his mind as to whether the mortgage subsists or has become time barred. The statement by itself does not signify to the mind of the person making the statement or to anybody else that the maker of the statement thinks and believes that he is liable to be redeemed at the date of making the statement. As I have said apart from authority, I am of opinion that an acknowledgment of liability must be a conscious acknowledgment of the same.

8. Now, the question is whether the Privy Council in 33 Calcutta has in any way so explained Section 19 of the Limitation Act as to lay down that any acknowledgment of the original transaction would amount to an acknowledgment that the liability which

[1](1906) 33 Cal. 1047 [3] AIR 1922 Mad 104 : (1922) ILR 45 Mad 443 : (1922) 42 MLJ 268 : 1922-15-LW 325.
[2](1916) 38 All. 540. [4] (1884) 8 Bom. 99

would follow from the original transaction subsists at the date of the statement. As pointed out by the learned Judges of the Madras High Court, the defendant in the Privy Council case, beyond stating that he had a current account with the estate of a deceased person, also stated that any such liability that he might be under would not disqualify him to be appointed an, executor of the estate. This latter statement clearly signified that the man said not only that ho had an account with the estate of the deceased but also that he might be a debtor to the estate on the date of making the statement, The Privy Council case therefore is in no way an authority for the case now before me. I therefore agree with the Court below that the suit is time barred.

9. The result is that the appeal fails and it is hereby dismissed with costs which will include Counsel's fees in this Court on the higher scale.

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