

BOMBAY HIGH COURT

Virchand Vajekaran Shet

Vs

Kondu Kasam Atar

(B Scott, Kt., C.J. Shah, J.)

21.06.1915

JUDGMENT

Basil Scott, C.J.

1. This suit was brought by a mortgagee under a simple mortgage to recover the amount of his claim by sale of the mortgaged property.
2. The mortgage was effected on the 23rd of June 1899, the mortgage-debt becoming due on demand which was made on the 1st January 1900. The suit was instituted after the death of the mortgagor, a Mahomedan, against his only son, a minor, on the 23rd of June 1911. It was, therefore, within time if properly constituted.
3. The plaintiff alleged that the mortgagor was dead, that his only heir was the defendant and that the property of the deceased was in that defendant's possession.
4. The defendant's guardian having alleged that the deceased left other heirs, a widow and two daughters, the plaintiff applied, on the 29th of January 1912, to have them added as parties and they were so added on the 12th of February 1912.
5. It was then contended by the added defendants that the suit was barred as against them under Section 22 of the Indian Limitation Act. This plea found favour with the lower Courts and the suit for sale was dismissed so far as the shares of the added defendants were concerned.
6. In our opinion the judgments of the lower Courts cannot be supported.
7. The suit was properly brought by the plaintiff to enforce payment of money charged upon immoveable property within twelve years of the date when the money sued for became due. The money was specifically charged on the whole property and the property was liable to be sold in satisfaction of the mortgage in priority to the satisfaction of any interest derived from the mortgagor subsequent to the date of the mortgage.

8. A decree for sale obtained after contest in the suit as originally constituted would have been binding on the other heirs even though they had not been added: *Assamathem Nessa Bibee v. Roy Lutchmeeput Singh*¹ and *Davalava v. Bhimaji Dhondo*² The suit, therefore, was, as originally filed, one in which the plaintiff could have obtained the relief sought. It was not improperly constituted in the sense of being instituted only against one of several parties to a contract. Nor was it instituted to enforce claims against shares in the hands of heirs: it was to enforce a mortgage lien binding on the whole property in the hands of any heir of the mortgagor. As pointed out in *Guruvayya v. Dattatraya*³ the addition of parties after the expiry of the time for institution of the suit does not necessarily involve its dismissal under Section 22. We set aside the decree of the lower Court and decree the plaintiff's claim for sale against all the defendants with all costs to be added to the mortgage-debt.

Cases Referred.

1(1878) I.L.R. 4 Cal. 142 F.B

2(1895) I.L.R. 20 Bom. 338

(1903) 5 Bom. L.R. 618; I.L.R. 28 Bom. 11