BOMBAY HIGH COURT

Shahasaheb Sabduralli

Vs

Sadashiv Supde

(Heaton, C.J. Pratt, J.)

03.12.1918

JUDGMENT

Pratt, J.

1. In this suit the mortgagee, who is respondent in this appeal, sued to recover the mortgage debt by sale of properties mortgaged in 1896 by the deceased Sabdaralli. The suit was brought within the extended period of limitation allowed by Section 36 of the Indian Limitation Act, 1908, and the original mortgagor having died before the suit Ins wife and daughters--the appellants--were made defendants.

2. Objection was taken in the first Court that the suit was bad for non-joinder of other heirs of Sabdaralli--his brother and sister's children. But the mortgagee did not join them in spite of the objection as the period of limitation as against them had expired.

3. The Subordinate Judge held that the non-joinder of these heirs was not fatal to the suit and decreed the suit as against the interest of the wife and daughters. The lower appellate Court confirmed this decree and the wife and daughters in this appeal contend that the provisions of Order XXXIV, Rule 1, are imperative and that the non-joinder of the heirs admittedly interested in the equity of redemption necessitated the dismissal of the suit.

4. This is the only point raised in the appeal.

5. Now the mortgage security is of course indivisible and the mortgagee must sue to realize the whole of his debt out of the property mortgaged. This is the substantive law enacted in Section 67 of the Transfer of Property Act. Then Order XXXIV Rule 1, is a rule of procedure that all persons interested in the mortgage security or the right of redemption shall be made parties to the suit. The object of this rule is clearly to avoid multiplication of suits, but does a breach of this rule involve the consequence that the suit should be dismissed ? The answer to this question is, I think, supplied by Section 99 of the Code. That section refers to cases of mis-joinder of parties

but mis-joinder includes non-joinder : *Yakkanath Eacharaunni Valia Kaimal v. Manakkcat Vasunni Elaya Kaimal*[1] According to that section non-joinder of parties, though a breach of the procedure enjoined by the Code, is not a fatal defect unless it affects the merits of the case or the jurisdiction of the Court. Neither of these conditions is fulfilled in the present case. The right to enforce the mortgage charge against the part of the security represented by the shares of the excluded heirs is lost. The joinder of these heirs will not affect the merits of the case for it is only the right, title and interest of the defendants that can be sold. The, mortgagee, though he has lost part of the security, is entitled to enforce his charge against the rest and there is no bar on the jurisdiction of the Court to entertain such a suit.

6. The terms of Section 85 of the Transfer of Property Act (IV of 1882), which corresponded to Order XXXIV, Rule 1, were held by the Allahabad High Court in *MataDin Kasodhan v. Kazim Husain*[2] *and Ghulam Kadir Khan v. Mustakim Khan*[3] to be imperative so that failure to join the parties indicated involved dismissal of the suit. These cases proceeded on what was supposed to be the imperative character of the word "must" in Section 85. But this word is now dropped out and the section is incorporated in the Code of Civil Procedure showing that the matter is one of procedure and regulated by Section 99. The judgment in Matadin's case said that the imperative construction was necessary in order that "litigants should be made to know and feel the Statute Law." This can hardly be admitted as a valid argument and justifies the criticism of Mr. Ghose in his work on the Law of Mortgages in India that Courts exist not for the sake of discipline but for determining matters in controversy between the parties. I think the correct construction was that put upon the section in the dissentient judgment of Mahmood J. in Matadin's case. In the absence of words of prohibition the section is not to be read as if it began by saying that 'No suit shall be entertained unless all parties etc.' This view is supported by a dictum of the Privy Council in *Umes Chunder Sircar v. Zahur Fatima*[4] At page 179 of the report their Lordships say--

Persons who have taken transfers of property subject to a mortgage cannot be bound by proceedings in a subsequent suit between the prior mortgagee and the mortgagor to which they are never made parties.

7. Evidently their Lordships thought a suit on the mortgage would be competent although assignees of the equity of redemption had not been made parties.

8. We have next been confronted with cases on Section 22 of the Indian Limitation Act which decide that when necessary parties are not joined within the period of limitation the suit must be dismissed. In *Guruvayya v. Dattatraya*[5] it was said that "such a result must depend upon consideration of the question whether the joinder was necessary to enable the Court to award such relief as may be given in the suit as framed" for instance in a suit by one of several joint promises the other promises are necessary parties for no relief can be given to one of them. The

suit is not properly constituted unless all the co-promises join, for the plaintiff can only enforce his claim in conjunction with them: *Ramsebuk v. Ramlall*[6]. So also a partition suit cannot be constituted unless all the co-parceners are made parties. But on the other hand when the suit can be constituted without the other parties and their joinder is only desirable as in Guruvayya's case "for the purpose of safe-guarding the rights as subsisting between them and others claiming generally in the same interest" the suit should proceed and the Court should award such relief as may be given in the suit as framed. That necessary parties mean parties necessary to the constitution of the suit seems to have been the view taken by the Privy Council in the case of *Kishan Prasad v. Har Narain Singh*[7]. Their Lordships said:--

By this time the three years allowed by Act XV of 1877, Second Schedule, Article 64, had expired, and it became necessary to determine whether or not the additional plaintiffs were really necessary parties, because if not, the suit had always been properly constituted and the time under the statute stopped running on the 3rd June, 1904, (the date of the plaint) within the three years.

9. The distinction between necessary parties and proper parties is made in Order VII Rule 10(2) where necessary parties are parties "who ought to have been joined" and who are indispensable as without them no decree at all can be made and proper parties are those whose presence enables the Court to adjudicate more "effectually and completely." This is the distinction made in the passage quoted from Pomeroy on Remedies in *Keshavram v. Ranchhod*[8]

10. Now this suit was properly constituted when the plaint was filed for I have already shown that the Court could award relief against the interest of defendants. Section 22 of the Indian Limitation Act does not therefore necessitate the dismissal of the suit.

11. The test therefore both under Order XXXIV, Rule 1, and Section 22 of the Indian Limitation Act is the same--was the suit properly constituted at the date of the plaint so as to enable the Court to adjudicate as between the parties impleaded?

12. My conclusions both as to the effect of Order XXXIV Rule 1 and Section 22 of the Indian Limitation Act are supported by a recent decision of this Court in Virchand Vajikaranshet v. Kondu . I do not however express agreement with the decision in that suit that the mortgage decree would be binding on the Mahomedan co-heirs who were not parties. But this point does not arise for decision.

13. I, therefore, think the lower Courts were right and would confirm the decree and dismiss this appeal with costs.

Heaton, J.

14. I emphatically agree that the Courts below were right not to dismiss the suit. This is the only matter before us. We are not asked to decide what will be the effect of the decree that has been made; so on that point I say nothing.

15. A mortgagee's claim when it is put forward in the form taken in these proceedings is primarily a claim against property. The claim here, so far as it concerned the property was made in time, the persons cited as defendants were correcty made defendants but they did not comprise all who should be defendants. Possibly the correct procedure in the trial Court would have been to direct the plaintiff to add the other defendants. But the real attack on the decision of the lower Courts is not on that ground at all. In order to be able to appreciate the true legal position I will assume that the others were added as defendants and that the claim against ' them was time barred. I cannot see how in justice or in law it follows that the whole claim must be dismissed. It is not so provided by Order XXXIV, Rule 1, either expressly or as I think impliedly. The disadvantages of failing to join in time persons who ought to be defendants are quite serious enough without adding to them by dismissing a suit. There is certainly no other provision in the Procedure Code which supports the view that in such circumstances as these a suit should be wholly dismissed.

16. If that is the position reached after a study of the law of procedure, it remains unassailed by anything to be found in the law of mortgage, as I understand it.

17. In the case of Virchand Vajikaranshet v. Kondu this Court in circumstances almost identical with those now before us arrived at the same conclusion as that we propose to give effect to. It is true that my learned brother and myself have given reasons a good deal different from those given in that case. But where several different lines of reasoning lead to the same result, one is fortified in the belief that the result is correct.

Cases Referred.

1(1909) I.L.R. 33 Mad. 436
2(1891) I.L.R. 13 All. 432
3(1895)I.L.R. 18 All. 109
4(1890) I.L.R. 18 Cal. 164
5(1903) I.L.R. 28 Bom. 11
6(1881) I.L.R. 6 Cal. 815
7(1911) I.L.R. 33 All. 272, 276
8(1905) I.L.R. 30 Bom. 156, 161