

BOMBAY HIGH COURT

Somshikharswami Shidlingswami

Vs.

Shivappa Mallappa Hosmani

Second Appeal No. 392 of 1922

(Lallubhai Shah, Kt., Ag. C.J. and Crump, J.)

20.06.1923

JUDGMENT

Lallubhai Shah, Kt., Ag. C.J.

1. The plaintiff in this case obtained a mortgage from one Tipava in 1904, and in a suit on that mortgage, a decree was passed in favor of the plaintiff. In execution of that decree he purchased the property in suit with the leave of the Court. When he tried to get possession, he was obstructed by the present defendants, to whom apparently Tipava had transferred the property while the litigation was pending. As a result the plaintiff filed Suit No. 344 of 1911 against the defendants to obtain possession. He obtained a decree on February 15, 1913. There was an appeal first to the District Court and then to the High Court, which ultimately confirmed the decree on December 10, 1915. He filed his application for execution of this decree on June 28, 1920.

2. During the interval, however, the defendants filed Suit No. 42 of 1916 for a declaration that the plaintiff's decree had been obtained by fraud. That litigation lasted till July 31, 1920, when the suit was ultimately dismissed. In that litigation the matter came up to the High Court in Second Appeal No. 328 of 1917. The nature of the suit was described in the judgment of this Court in these terms : "This is not a case of fraud, but on allegation that the sale under the decree by reason of its being made without notice to the judgment-debtor was either so irregular or so absolutely illegal that the sale cannot be upheld and that the present plaintiffs have a right to disregard the sale". By that judgment the suit was remanded and ultimately decided against the then plaintiffs. This litigation of 1916 lasted up to July 31, 1920, and the plaintiff made the present application for execution on June 28, 1920. The application for execution, even taking the time to run from the date of the final decree in appeal, is time-barred, unless the plaintiff can claim a deduction of the period taken up in the litigation of 1916. The lower Courts have come to the conclusion that the plaintiff is not entitled to deduct the time under any of the provisions of

the Indian Limitation Act, and have accordingly rejected the application for execution.

3. The only point in second appeal is whether the deduction of time claimed is allowable under the provisions of the Indian Limitation Act. The two sections upon which reliance is placed are Sections 14 and 15 of the Indian Limitation Act. This case is not covered by the terms of Section 15, because there was no order obtained by the present defendant staying execution of the decree passed in Suit No. 344 of 1911. No injunction was claimed by the defendants in Suit No. 42 of 1916, and none was granted at any stage. It is clear, therefore, that the provisions of Section 15 of the Indian Limitation Act cannot apply to the facts of this case. If there had been any such order or injunction as provided in that section, the plaintiff would have been entitled to deduct the time covered by such injunction or order. Reliance was also placed upon Sub-section (2) of Section 14. That sub-section applies to a case where the applicant has been prosecuting with due diligence another civil proceeding, whether in a Court of first instance or in a Court of appeal, against the same party or for the same relief, and where such proceeding is prosecuted in good faith in a Court, which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

4. The first difficulty in applying that sub-section to the present case is that the applicant was not prosecuting the litigation of 1916, but the suit was filed by the present defendants, and the applicant was defending the suit. It is quite true that under Explanation 2 where the plaintiff or applicant has to resist the appeal in the same suit, he is within the scope of the section. But where the suit is started, not by the applicant, but by his opponents, it is difficult to say that Section 14, Sub-section (2), of the Indian Limitation Act would apply. Under certain conceivable circumstances the applicant may be said to be prosecuting with due diligence a proceeding in which he is contesting the proceeding initiated by his opponents within the meaning of the section. Assuming that the present applicant was prosecuting a proceeding while defending the suit of 1916 within the meaning of Section 14(2), it is difficult to say in the present case that the Court was unable to entertain the proceeding from defect of jurisdiction or other cause of a like nature. It was really a suit filed by the defendants to show, if possible, that the decree obtained by the plaintiff in Suit No. 341 of 1911 was ineffective. That suit was ultimately decided on the merits against the defendants and in favor of the present plaintiff. It may be natural for a layman in the position of the plaintiff to think that while Suit No. 42 of 1916 was pending, there would be no meaning in his proceeding with the execution of the decree in Suit No. 344 of 1911, and there is no doubt that shortly before that litigation ended he made the present application for execution. He may have been, we think probably he was, under a mistaken impression that he was entitled to deduct this time. The application was made a few days before the termination of the litigation of 1916, and it cannot be said that he has been guilty of any delay in waiting after the termination of the litigation of 1916. It is not unlikely under the circumstances that he may have been under an honest but mistaken impression that during all this time it would be futile for him to prosecute the application for execution of the decree which was challenged by the suit of 1916.

5. We agree, however, with the view of the District Judge that it is not possible to bring this case within the scope either of Section 14 or of Section 15 of the Indian Limitation Act, and to help the plaintiff in any way. It is no doubt unfortunate that the plaintiff finds his remedy thus barred in a matter in which he has been asserting his right to this property for the last ten years and more. It was perfectly open to the plaintiff to make an application for execution at any time after the decree in Suit No. 344 of 1911 was passed and finally affirmed by the High Court. The suit of 1916 did not in any sense prevent him from proceeding with the execution of the decree obtained by him ; and that being the legal position, he is not entitled to deduct the time. In a case of this kind it may be desirable that the plaintiff ought to be in a position to deduct the time taken up in defending a litigation of the nature such as we have in the present case. But as we are unable to bring the case within the provisions of the Indian Limitation Act, the plaintiff's appeal must fail. We dismiss the appeal with costs.
Appeal dismissed.