

BOMBAY HIGH COURT

Dhondi Shivaji Rajivade

Vs

Lakshman Mhaskuji Khaire

(Patkar and Wild, J.J.)

16.08.1929

JUDGMENT

Patkar, J.

1. In this case plaintiffs sued to redeem and recover possession of plaintiff property alleged to have been mortgaged by their ancestor in 1799. The plaintiffs, relying on an acknowledgment of 1865, have brought the present suit on August 12, 1924. The learned Subordinate Judge held that the acknowledgment was not valid and binding, and therefore the suit was barred by limitation. On appeal the learned Assistant Judge did not go into the question as to whether the acknowledgment was valid, but held that the plaintiffs' suit was barred by limitation as the right to redeem was lost on account of the Acts of 1859 and 1861.

2. It is urged on behalf of the appellants that the mortgage deed of 1799 provided a period of seven years for payment of the mortgage amount, and the cause of action arose in 1806 and the acknowledgment of 1865 before the expiry of sixty years gave a fresh starting point of limitation, and therefore the present suit was within time.

3. According to Regulation V of 1827, oh. 1, s. VIII, Clause 1, suits for redeeming a mortgage were not governed by any limitation. But by Act XIV of 1859 such suits were made subject to a period of limitation for the first time. Under Section 1, Clause (15), of Act XIV of 1859 a suit against a mortgagee of immovable property had to be brought within sixty years from the time of the mortgage, that is from the date of the mortgage, unless an acknowledgment of the title of the mortgagor was made in writing in the meantime, By the combined operation of Section 18 of Act XIV of 1859 and Section 1 of Act XI of 1861, the time to bring such a suit was extended up to January 1, 1862, After that date the provisions of Act XIV of 1859 came into force. The acknowledgment on which reliance is placed on behalf of the appellants is dated September 8, 1865, long after the plaintiffs' suit to redeem was barred under Act XIV of 1859. Under Act XIV of 1859 the suit had to be brought within sixty years from the date of the mortgage and the

acknowledgment in order to give a fresh starting point of limitation had to be made in the meanwhile, i. e. before the efflux of the period of sixty years from the date of the mortgage. Under Section 29 of Act IX of 1871 "at the determination of the period hereby limited to any person for instituting a suit for possession of any land or hereditary office, his right to such land or office shall be extinguished." Under Article 148 of Act IX of 1871 the limitation to redeem the mortgage began from the date of the mortgage and the suit to redeem had to be brought within sixty years from the date of the mortgage unless acknowledgment had been made in writing before the expiration of the prescribed period. It would, therefore, follow that not only the remedy but the right was extinguished by virtue of Section 29 of Act IX of 1871. Under Article 148 of the Indian Limitation Act XV of 1877 limitation of sixty years runs from the time when the right to redeem accrued, but b. 2 of Act XV of 1877 enacted that "nothing herein or in that Act (i. e. Limitation Act of 1871) contained shall be deemed to affect any title acquired or to revive any right to sue already barred." Under Section 6 of the General Clauses Act X of 1897 "when any Act made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not revive anything not in force or existing at the time at which the repeal takes effect; or affect the previous operation of any enactment so repealed".

4. It would, therefore, follow that the right to redeem the mortgage of 1799 was barred on January 1, 1862, and the acknowledgment of 1865 was ineffectual to extend the period of limitation, and that nothing contained in the Act of 1877 and the later Limitation Acts would revive the right to redeem which was barred under the previous Limitation Acts.

5. In *Fatimatulnissa Begum v. Sundar Das*¹ where a mortgage was effected on October 17, 1788, and the representative of the mortgagor brought a suit for redemption in 1893 against the heirs of the mortgagee alleging payment of the mortgage in 1881, it was held that in the absence of an acknowledgment made within sixty years satisfying the requirements of the law of limitation for extension of that period, the suit was barred on October 17, 1862, by the effect of Act XIV of 1859, Section 1, Clause (15), which barred the suit after January 1, 1862, and afterwards by the effect of Act IX of 1871, Section 29, the right of the mortgagor in the property was extinguished. Their Lordships of Privy Council observed (p. 1010): The Act of 1871 provided the same limits of time for suits of this kind, and it added the provision (Section 29) that at the expiration of the period thereby limited to any person for instituting a suit for the possession of any land his right to such land shall be extinguished. The period thereby limited in the case of this mortgage was the 17th October 1818 and the title of the mortgagors was extinguished on that day unless they can show a previous acknowledgment in writing.

6. In *Muhammad AKbar Husain Khan v. Isszat-wn-nissa*² where the plaintiff instituted, on June

7, 1899, a suit for redemption of an alleged mortgage executed on August 14, 1781, which provided for a period of seventy years for payment, it was held that the suit was barred by limitation after sixty years from the date of the mortgage under Section 1(15) and Section 18 of Act XIV of 1859, and that the provision in the mortgage deed for the period of redemption of seventy years did not extend the period of limitation. Stanley C.J. observed in that case (p. 335): We find then in the Statute under consideration that it is prescribed that in suits against mortgagees the suit must be instituted within 60 years from the 'time,' that is, from the date of the mortgage, There is no ambiguity whatsoever in the language of the Statute. We farther find that, to prevent any hardship which might result from the interference of the Legislature in limiting the right to sue, two years were given during which the Statute was to remain in abeyance, so that during that period any party who might be entitled to institute a suit in respect of a mortgage might do so. Of this right, the appellant and his predecessors in title failed to avail themselves within the two years allowed by the Statute.

7. The same view was taken by this Court in *Narayan v. Govind*³ where the case in *Fatimatunnissa Begum v. Sundar Das* was followed. The case relied on, on behalf of the appellants in *Soni Ram v. Kanhaiya Lal*⁴ has been distinguished by Crump J. as follows (p. 1568) :The case was heard ex parte, and though (their Lordships took that view they hold in effect that the acknowledgment on which reliance was placed was not an effectual acknowledgment, and that therefore the suit was time-barred. They did not consider, nor was it necessary for them to consider, whether the light had been extinguished by the failure of the mortgagees to sue within sixty years from the date of the mortgage or sixty years from the date of the acknowledgment. The grounds on which they base their judgment were sufficient for the decision of the appeal before them, and, therefore, that case cannot be cited as an authority with reference to the operation of Section 29 of the Act of 1871 on the rights of these mortgagors.

8. A right to sue once lost by limitation could not be revived by subsequent Act of Limitation but was held in the cases of *Fatimatunnissa, Begum v. Sundar Das*⁵ *P.C. and Mohesh Narain Moonshi v. Taruck Nath Moitra*⁶ The same view was taken in the case of *Indurai v. Shivlal*⁷ We think, therefore, that the plaintiffs' right to sue for redemption of the mortgage was barred on January 1, 1862, and the acknowledgment dated September 8, 1865, would not extend the period of limitation, as according to Act XIV of 1859, Section 1(15), the acknowledgment ought to have been made in writing within sixty years from the date of the mortgage. The remedy and the right of the plaintiffs having been extinguished by the operation of Section 29 of Act IX of 1871 and Section 2 of Act XV of 1877 and Section 6 of the General Clauses Act X of 1897, nothing contained in the subsequent Limitation Act would affect the operation of the previous enactments.

9. We think, therefore, that the view taken by the lower Court is correct. It is, therefore, not necessary to go into the question as to whether the acknowledgment on which the plaintiffs rely is a valid acknowledgment within Section 19 of the Indian Limitation Act. We would, therefore, dismiss the appeal with costs.

Cases Referred.

- 1(1800) I, L.R. 27 Cal. 1004, f.o. R. 162
- 2(1906) I. L.R. 28 All. 333
- 3(1927) 2& Bom. h. R. 1563
- 4(1813) I.L.R. 35 All 227,s. c 15 Bom. L.B. 489
- 5(1900) I.L.R. 27 Cal. 1004
- 6(1892) L. R. 20 I.A. 30, 38
- 7(1936) 27 Bom. L.B. 467