

A.F.R.

Neutral Citation No. - 2023:AHC-LKO:85765

Court No. - 19

Case :- SECOND APPEAL No. - 132 of 1988

Appellant :- Bhawani Prasad

Respondent :- Sheo Kumar And Others

Counsel for Appellant :- H.S.Sahai,A.S. Chaudhary,P.V. Chaudhary,U.S.Sahai

Counsel for Respondent :- S.K.Mehrotra,Arun Prakash Shukla,Ishwar Dutt Shukla,Vijai Bahadur Verma

Hon'ble Jaspreet Singh,J.

1. This is the defendant's second appeal challenging the judgment and decree dated 02.02.1988 passed by Civil Judge, Faizabad in Civil Appeal No.233/1984 arising out of the Regular Suit No.355/1981, decided by the 7th Additional Munsif, Faizabad by means of the its judgment and decree dated 18.07.1984, as a result, the suit filed by the plaintiff-respondents for redemption of mortgage was decreed by the trial Court and the same has also been affirmed by the lower Appellate Court.

2. The instant second appeal was admitted by this Court on 15.02.1988, however, at the relevant time, the substantial question of law was not formulated. Later, this Court on 20.03.2023, after hearing the parties, formulated three substantial questions of law involved in the instant second appeal, which read as under:-

"(A) Whether the two courts have committed an error in decreeing the suit which was partially modified by the Lower Appellate Court while affirming the decree of the Trial Court ignoring the issue of limitation, inasmuch as, a specific defence was raised by the defendants that the suit for redemption of mortgage would not be maintainable in light of the Sections 18, 22 and 27 of the Limitation Act?

(B) Whether the two courts have committed an error in treating an oral contract to have an overriding effect on the mortgage deed and its terms in light of Sections 91 and 92 of the Evidence Act?

(C) Whether in absence of any pleadings or evidence, the findings returned by the two courts regarding the conduct of the defendant and taking it to be against the defendant was justified?"

3. The issue involved in the instant second appeal is regarding the interplay and applicability of the Limitation Act as well as the Evidence Act as applicable to a suit for redemption of mortgage.

4. Insofar as the facts are concerned, there is not much dispute between the parties. However, to better appreciate the contentions as well as for answering the questions of law, the facts giving rise to the instant appeal are being noticed hereinafter.

5. The original plaintiff namely Shiv Kumar Mishra filed a suit in the Court of Munsif, Faizabad against Bhawani Prasad, Smt. Yashoda Devi, Ram Shankar, Smt. Ramrati, Devi Prasad, Jagdamba Prasad, Mata Prasad, Anil Kumar, Gayatri Devi, Smt. Devki, Smt. Pushpa and Smt. Sushila Devi seeking a decree of redemption of mortgage. It was pleaded that the property in question comprising of a house and ahata initially belonged to Ayodhya Prasad Singh and he had agreed to sell the said house and ahata in favour of the plaintiff Shiv Kumar Mishra by executing a registered agreement to sell dated 23.06.1975. However, before executing the sale-

deed, Ayodhya Prasad Singh expired and thereafter it took time for obtaining the permission from the District Magistrate and also to persuade the legal heirs of Ayodhya Prasad Singh and it is then the sale-deed was executed in favour of the plaintiff on 20.08.1981, therefore, the plaintiff filed a suit seeking to redeem the mortgage.

6. The plaintiff also indicated a pedigree in Paragraph-3 of the plaint indicating that Salik Ram Sahu the common ancestors and he was survived by his three sons Baijnath, Bhawani Prasad and Shriram. From the branch of Baijnath, his widow Smt. Yoshoda Devi was impleaded as defendant No.2; Bhawani Prasad was impleaded as defendant No.1 and the defendants No.3 and 4 were the sons of the third son namely Shriram and the defendants No.5, 6, 7, 8, 9 and 10 were also the children of Shriram from his branch.

7. It was further pleaded that on 24.03.1931, a registered mortgaged-deed was executed by Ayodhya Prasad Singh in favour of Salik Ram Sahu, the predecessor-in-interest of Defendants No.1, 2, 5 and 15 for a sum of Rs.400/-. It was further pleaded that the mortgage money was Rs.400/- which was to be repaid with interest @ 1.5 per month. The time prescribed for repayment of the mortgaged money was seven years and since the same was not repaid, consequently, the defendants were claiming rights over the mortgaged property.

8. It is in the aforesaid backdrop that the plaintiff had filed a suit seeking redemption after having obtained an agreement to sell dated 23.06.1975 from Ayodhya Prasad Singh and, therefore, the sale-deed was executed only in the year 1981, hence, the suit was filed on 19.05.1981.

9. The suit was primarily contested by Bhawani Prasad and while raising different pleas it was specifically pleaded that the suit for redemption was barred by limitation as all rights of Ayodhya Prasad Singh had already been extinguished and on the date of execution of the registered agreement to sell by Ayodhya Prasad Singh or at the time of execution of the sale-deed in the year 1981, nothing remained with either Ayodhya Prasad Singh or his legal heirs and as such the alleged sale-deed upon which the plaintiff is claiming rights to seek redemption of the mortgaged was bad and no rights were conferred on the plaintiff, hence, the suit was liable to be dismissed.

10. Later, the plaintiff amended the plaint and also took a plea that since Ayodhya Prasad Singh had agreed to sell the property and this fact was also known to the defendants who consented that the property may be sold only in respect of some part and it is in lieu thereof that the plaintiff had got the agreement to sell executed and later got the sale-deed executed. It was also pleaded that this understanding between the parties was first arrived at in the year 1967 which was further reiterated in the second week of June, 1975 and in furtherance of the said understanding, the plaintiff had left the western portion and only got the agreement to see and then sale-deed of the eastern portion of the property.

11. Upon exchange of the pleadings, the trial Court framed six issues, however, the relevant issues upon which the suit was contested was (i) whether the plaintiff is the owner of the property, (ii) whether the plaintiff has a right to get the mortgaged redeemed, (iii) whether the rate of interest in the mortgaged deed was usurious, if so, its effect and (iv) whether the

suit was time barred.

12. The parties led evidence and thereafter the trial Court while dealing with the issue No.5 relating to limitation held that since there was an understanding between the parties in terms whereof the contesting defendants agreed that they were ready for allowing the eastern portion to be sold by Ayodhya Prasad Singh and after having got the sale-deed executed in their favour, the plaintiff filed the suit in the year 1981, hence, it was within the limitation. The trial Court also recorded a finding that the plaintiff was the owner of the property in dispute and by means of its judgment and decree dated 18.07.1984, the 7th Additional Munsif, Faizabad decreed the suit.

13. The defendant Bhawani Prasad alone filed a regular civil appeal under Section 96 CPC which also came to be dismissed by means of the judgment and decree dated 02.02.1988 by Civil Judge, Faizabad and in the aforesaid backdrop Bhawani Prasad took the matter forward by filing the second appeal.

14. Shri P.V. Chaudhary, learned counsel for the appellant has primarily urged that insofar as the execution of the registered mortgaged-deed dated 24.03.1931 is concerned, the same is admitted to the parties. It is further submitted that time for repayment of the mortgaged amount was seven and a half years as indicated in the mortgaged-deed itself. It is also urged that seven and a half years time for repayment from the date of mortgage would expire sometime in the year 1939. The limitation for seeking a redemption as per the Limitation Act, 1963 was 30 years which also came to an end in the year 1969. The suit came to be filed in the year 1981 and admittedly the

agreement to sell as claimed by the plaintiff-respondents Shiv Kumar Mishra was dated 23.06.1975, which was way beyond the period of limitation, hence, in light of the provisions contained under Section 27 of the Limitation Act, 1963, the rights of Ayodhya Prasad Singh already stood extinguished and he had no right for which he could have executed the agreement to sell on 23.06.1975 and moreover upon his death, no rights in the property in dispute would devolve on the legal heirs of Ayodhya Prasad Singh which could be transferred to the plaintiff by means of the alleged sale-deed dated 20.08.1981 and thus, it would be seen that the institution of the suit in the year 1981 was per-se time barred.

15. Shri Chaudhary has further urged that even otherwise there is nothing on record to indicate that there was any understanding in terms whereof Bhawani Prasad had agreed to the arrangement permitting Ayodhya Prasad Singh to sell part of the property to Shiv Kumar Mishra. Since, this is merely an oral statement and nothing is in writing, consequently, the same would be hit by Sections 91 and 92 of the Evidence Act. Apart from the fact that as per the Limitation Act such acknowledgment must be in writing and in absence thereof the plaintiff could not have taken the plea nor it was permissible for the Courts to have granted the benefit of limitation ignoring the statutory provisions, hence, the judgment and decree passed by the two Courts are bad in law and as such deserves to be set aside after allowing the appeal and the suit be dismissed.

16. Shri Vijai Bahadur Verma, learned counsel for the plaintiff-respondents has submitted that original defendant No.1 Bhawani Prasad alone did not have a right to file an appeal. It is submitted by him that the

mortgaged-deed was in favour of Salik Ram Sahu, who had three sons namely Baijnath, Bhawani Prasad and Shriram. It is further submitted that it is only Bhawani Prasad who contested the suit whereas the defendants from the branch of Baijnath and Shriram did not contest the suit which in itself is indicative of the fact that the plea taken by the plaintiff that there was an arrangement between Salik Ram Sahu and the plaintiff and Ayodhya Prasad Singh, which was first arrived at in the year 1967 and also later in 1975 June and it is for the aforesaid reason that they did not contest nor after the decree was passed by the trial Court, they filed or joined Bhawani Prasad in filing the first appeal. Once the parties by their own conduct arrived at an arrangement in pursuance whereof the plaintiff was persuaded to get the agreement to sell executed and later the sale-deed and that too only of part of the property lying on the eastern side and for the said reason the plaintiff after getting the sale-deed, the plaintiff filed the instant suit seeking redemption and this aspect has been considered by the two Court concurrently and are pure findings of fact have been recorded, which does not require any interference by this Court.

17. Shri Verma while taking his submission forward has also drawn attention of the Court to the fact that Narsingh Pandey, who was examined as PW-4 clearly deposed that the arrangement which was arrived at between the parties was in his presence in the year 1975. He had stated that the said talks were held between Ayodhya Prasad Singh, Shiv Kumar Mishra, Bhawani Prasad, Shriram, Smt. Yashoda Devi. His statement also corroborated the fact that the sale-deed of 1981 was executed in his presence and his statement remained intact and nothing adverse could be

elicited from his cross-examination which clearly fortified the contention of the plaintiff, hence, in light thereof, the findings returned by the trial Court and affirmed by the first appellate Court requires no interference and the appeal deserves to be dismissed.

18. The Court has heard learned counsel for the parties and also perused the material on record.

19. At the outset, it first needs to be adjudicated as to whether the suit of the plaintiff seeking redemption of mortgage was within the prescribed period of limitation. In this context, it will be relevant to refer to Schedule annexed with the Limitation Act, 1963, Part-V which deals with suit relating to an immovable property. Articles 61 to 63 are relevant for the present controversy and are being reproduced hereinafter for ready reference:-

61. By a mortgagor -		
(a) to redeem or recover possession of immovable property mortgaged;	Thirty years	When the right to redeem or to recover possession accrues.
(b) to recover possession of immovable property mortgaged and afterwards transferred by the mortgagee for a valuable consideration;	Twelve years	When the transfer becomes known to the plaintiff.
(c) to recover surplus collections received by the mortgagee after the mortgage has been satisfied.	Three years	When the mortgagor re-enters on the mortgaged property.
62. To enforce payment of money secured by a mortgage or otherwise charged upon immovable property;	Twelve years	When the money sued for becomes due.
63. By a mortgagee -		
(a) for foreclosure;	Thirty years	When the money secured by the mortgage becomes due.
(b) for possession of immovable property mortgaged.	Twelve years	When the mortgagee becomes entitled to possession.

20. From the perusal of the aforesaid provisions, it would be seen that a

mortgagor can file a suit seeking redemption or to recover the possession of immovable property mortgaged within 30 years from the date the right to redeem or to recover possession accrues. In Clause (b) of Article 61, a 12 years period of limitation is provided in case where the possession is sought to be recovered of the property mortgaged which afterwards has been transferred by the mortgagee for a valuable consideration and this period of 12 years is reckoned from the date when the transfer becomes known to the plaintiff. Clause (c) provides for a period of 3 years limitation to recover the surplus collection received by the mortgagee after the mortgaged has been satisfied.

21. Apparently in the instant case, it is Clause (a) of Article 61 which is applicable. So far as the rights of a mortgagee is concerned, he too has 30 years to foreclose the mortgage from the date when the money secured by the mortgage becomes due and in a case for recovery of possession of immovable property which is mortgaged then a mortgagee has 12 years from the date of the mortgagee becomes entitled to possession.

22. In the instant case, the plaintiff Shiv Kumar Mishra was claiming through Ayodhya Prasad Singh, who was the original mortgagor seeking to redeem the mortgaged property and it would be covered squarely by Article 61(a) and the period of limitation would be 30 years when the right to redeem or to recover possession accrues.

23. Apparently in the instant case, the mortgaged was of the year 1931 and the period to repay the mortgaged amount was seven and a half years. Thus, from 1931, the time of seven and a half years would expire in the year 1939 and the mortgagor had 30 years thereafter to get the property

redeemed which would end in the year 1969.

24. At this juncture, it will also be relevant to notice that at the time when the mortgaged-deed was executed in the year 1931, at the relevant time the Indian Limitation Act, 1908 was in prevalence and in the appendix to Part-X, a period of 60 years was provided as limitation which was to be reckoned, from the time money secured by the mortgage become due and in a suit for redemption of mortgage again the period of 60 years was provided when the right to redeem accrued.

25. It has also to be seen that no proceedings were initiated at the time and when Ayodhya Prasad Singh executed the agreement to sell in favour of the plaintiff Shiv Kumar Mishra in the year 1975 at that point of time the Limitation Act, 1908 had been repealed and the Limitation Act, 1963 had been enacted. Thus, all the rights of the parties would be governed by the Limitation Act, 1963 and not by the Limitation Act, 1908.

26. Section 31 of the Limitation Act, 1963 says only such proceedings which were either pending as a suit or appeal or an application and further the said Section did not enable any suit or appeal or application to be instituted for which the period of limitation prescribed by the Indian Limitation Act, 1908 had expired before the commencement of this Act.

27. At this juncture, it will be relevant to note Section 30 of the Limitation Act, 1963 which reads as under:-

"30. Provision for suits, etc., for which the prescribed period is shorter than the period prescribed by the Indian Limitation Act, 1908.—Notwithstanding anything contained in this Act,—

(a) any suit for which the period of limitation is shorter than the period of limitation prescribed by the Indian Limitation Act, 1908, may be instituted within a period of [seven years] next after the

commencement of this Act or within the period prescribed for such suit by the Indian Limitation Act, 1908, whichever period expires earlier:

[Provided that if in respect of any such suit, the said period of seven years expires earlier than the period of limitation prescribed therefor under the Indian Limitation Act, 1908 and the said period of seven years together with so much of the period of limitation in respect of such suit under the Indian Limitation Act, 1908, as has already expired before the commencement of this Act is shorter than the period prescribed for such suit under this Act, then, the suit may be instituted within the period of limitation prescribed therefor under this Act.]

(b) any appeal or application for which the period of limitation is shorter than the period of limitation prescribed by the Indian Limitation Act, 1908, may be preferred or made within a period of ninety days next after the commencement of this Act or within the period prescribed for such appeal or application by the Indian Limitation Act, 1908, whichever period expires earlier."

28. Even assuming that the Limitation Act, 1908 was applicable since the mortgaged was of the year 1931 and seven and a half years was provided for repayment and the limitation as prescribed under the Limitation Act, 1908 i.e. of 60 years if taken would lead to a situation where the limitation would be until 1999. However, what is more important is to be see that once there was a mortgage and the mortgagor i.e. Ayodhya Prasad Singh or his legal heirs did not get the property mortgaged redeemed then merely by executing an agreement to sell would not confer any rights of Shiv Kumar Mishra. The mortgage is treated to be the transfer as per the Transfer of Property Act and unless and until the rights could be redeemed, the mortgagor may not have a enforceable right to execute an agreement to sell. Moreover, heirs of Ayodhya Prasad Singh also could not have executed a sale-deed without first getting the property redeemed.

29. Another way of looking at the entire controversy is in light of the provisions contained in Section 18 and 27 of the Limitation Act, 1963.

Section 18 of the Limitation Act speaks of effect of acknowledgment in writing. This can only be seen if some acknowledgment regarding the dues and its payment was acknowledged in writing which could extend the period of limitation.

30. In the instant case, though it is stated that in presence of Narsingh Pandey, the parties arrived at an agreement/arrangement that Ayodhya Prasad Singh may transfer his rights in respect of part of the property by way of an agreement to sell and later in the year 1981, the heirs of Ayodhya Prasad Singh had executed the sale-deed. It is merely an oral statement of Narsingh Pandey, who was examined on behalf of the plaintiff as a witness but admittedly there was no such acknowledgment or arrangement arrived at between in writing.

31. At this juncture, it will also be relevant to notice that Sections 91 and 92 of the Evidence Act which excludes the oral evidence in respect of terms of a contract which may be reduced in writing in form and document. Thus, once there was a registered mortgage-deed which clearly provided for a period of seven and a half years for repayment and in light of the testimony which have been given by a witness and by his oral testimony, he admits to modify the term of a written contract, such testimony cannot be relied upon nor be taken as admissible evidence. Subject only to the proviso and the exceptions which are mentioned in Sections 91 and 92 of the Indian Evidence Act and needless to say that such exceptions and the proviso are not made out. Accordingly, the testimony of Narsingh Pandey on this point is to be excluded.

32. It will also worthwhile to take note of the fact that if at all any such

arrangement had been arrived at between the parties as stated by Shiv Kumar Mishra and his witness Narsingh Pandey in the year 1967 and then later in the second week of June, 1975, but the fact remained that the alleged agreement to sell was executed on 23.06.1975 and there is no mention of such arrangement in the said agreement to sell. It was open for the parties to incorporate the said in the agreement to sell in the year 1975 and even if the defendants were agreeable, they could have been made as witness of the said agreement or the sale-deed, but no such event transpired.

33. Section 27 of the Limitation Act which is an exception to the rule and provides that as the determination of the period of limitation provided for instituting a suit for possession of any property, the right to such property shall stand extinguished. The law of limitation is a statute of a repose. It ordinarily bars a remedy but does not extinguish a right, however, the exception to the said rule is enshrined in Section 27 which state that at the determination of the period hereby limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished [See: **Prem Singh and others v. Birbal and others, (2006) 5 SCC 353**].

34. Thus, taking overall view of the matter especially in light of the provisions contained in the Limitation Act, Indian Evidence Act as well as the Transfer of Property act, it would be found that the period of limitation as provided in the Limitation Act, 1908 which was larger then the period as prescribed in the Limitation Act, 1963.

35. In the aforesaid circumstances, the date of mortgage being 1931 for

which seven and a half years was provided which ended in September, 1939, the period of limitation would commence. In terms of Limitation Act, 1908, 60 years was available but the moment of the Limitation Act, 1963 came into force on 5 October 1963 and by then the proceedings had not commenced. Accordingly, the benefit of Section 31(a) would not be available as no proceedings were pending. In such situation, Section 30 would apply and on the date of enforcement of the Limitation Act, 1963, seven years was available from 1963 to institute a suit which again would expire in the year 1970. This period of seven years as provided in Section 30 of the Limitation Act, 1963 was reduced to five years retrospectively by means of the Amending Act of 1969.

36. Be that as it may, in any case by any stretch, the limitation expired on 1970. Thereafter, by virtue of Section 27 of the Limitation Act, 1963, the rights of legal heirs stood extinguished. Any attempt by Ayodhya Prasad Singh to execute any registered agreement to sell in the year 1975 or the sale-deed in the year 1981 was without any authority as rights of Ayodhya Prasad Singh had extinguished and nothing remained which could be made the subject matter of transfer by virtue of the agreement to sell or the sale-deed of 1981.

37. In this light Shiv Kumar Mishra, the plaintiff could not get any better rights than his vendor i.e. Ayodhya Prasad Singh or his legal heirs. The attempt to cover up by relying upon the arrangement arrived at between the parties allegedly in the year 1967 and again in second week of June, 1975 also had to be ignored. Since, there was no statement to prove that the arrangement was first arrived at in the year 1967 then the only statement is

relating to Narsingh Pandey where he states that such arrangement was arrived at in the second week of June, 1975, but his testimony on this point would be hit by Section 91 and 92 of the Evidence Act. Apart from the fact that such arrangement which as stated by the learned counsel for the respondents may be treated an acknowledgment for extending period of limitation also has no legs to stand as no such acknowledgment was in writing, hence, it could not be taken note of and as already stated above, it was neither incorporated in the agreement to sell which was executed few weeks after the alleged arrangement was arrived at in second week of June, 1975, hence, the same was not proved. Moreover, once a registered mortgage-deed had already been executed without redeeming the same, Ayodhya Prasad Singh or his legal heirs could not transfer his property to a third party who could claim right. Thus, for all the aforesaid reasons, this Court finds that the reasoning of the two Courts while dealing with the issue of limitation is not in consonance with law nor the legal provisions have been considered and is per-se bad and erroneous on the face of the record.

38. This Court is satisfied that the judgment and decree passed by the two Courts suffer from substantial error as neither the provisions of law have been considered and the findings returned are based on improper reception of evidence, ignoring the provisions of law, hence, the judgment and decree passed in Civil Appeal No.233/1984 dated 02.02.1988 is set aside so also the judgment and decree dated 18.07.1984 passed by the 7th Additional Munsif, Faizabad in Regular Suit No.355/1981 is also set aside. Consequently, the suit filed by the original plaintiff Shiv Kumar Mishra

bearing No.355/1981 shall stand dismissed consequences to follow.

Accordingly, this appeal is allowed. In facts and circumstances, there shall be no order as to costs. The record of the trial Court shall be returned forthwith.

Order Date :- 16.12.2023

Rakesh/-