

Privy Council Appeal No. 24 of 1943
Allahabad Appeal No. 29 of 1937

Batey Krishna - - - - - *Appellant*

v.

Parsotam Das and others - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT ALLAHABAD

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 12TH JUNE, 1944

Present at the Hearing :

VISCOUNT SANKEY

LORD THANKERTON

SIR MADHAVAN NAIR

[Delivered by SIR MADHAVAN NAIR]

This is an appeal from a decree of the High Court of Judicature at Allahabad dated 1st April, 1937, which affirmed a decree of the Court of the Subordinate Judge of Cawnpore dated 5th September, 1932, dismissing the plaintiff's suit.

The plaintiff died during the pendency of the appeal in the High Court, and by an order of the Court, his son, the appellant before the Board, was brought on the record as the plaintiff-appellant in his place.

The suit, out of which the appeal arises, was brought by the plaintiff to recover a sum of Rs.45,765-6-3 as a charge against the properties specified in the plaint in the circumstances mentioned below.

The sole question for decision is whether the suit is barred by limitation. The provision of the Indian Limitation Act (Act IX of 1908) applicable, is Art. 132, which prescribes a period of "Twelve years" for a suit "to enforce payment of money charged upon immoveable property," and time begins to run "when the money sued for becomes due."

The facts necessary for the disposal of the appeal may be briefly stated:—The properties in the suit numbering seven villages, belonged to one Musammat Baktawar Begum. On the 11th February, 1909, she mortgaged them for Rs.5,000 to Syed Abid Husain. The money became payable to her on the 10th February, 1912.

On the 27th July, 1910, she sold an eight annas share in four of the seven villages to Indar Prasad, the brother of the plaintiff, Jagmohan Das. By a partition of the joint family property of the plaintiff's family, the plaintiff became the owner of a seven annas share in the said villages.

On the 12th March, 1915, Musammat Baktawar Begum executed a mortgage of the remaining eight annas share of the four villages mentioned above, and of the three entire villages in favour of Parsotam Das, defendant-respondent No. 1, and Jugal Kishore, the father of defendant-respondent No. 2.

Syed Abid Husain instituted a suit on his mortgage of the 11th February, 1909, and obtained on the 24th July, 1915, a decree for sale in respect of the properties mortgaged to him. In order to save them from being sold in execution of the decree, the plaintiff paid Abid Husain on the 19th June, 1917, the decretal sum of Rs.6,151-13-0.

On the 22nd June, 1915, Mussammat Baktawar Begum had executed a mortgage of the above properties in favour of Ganga Dhar and Gobardhan Das. The money under the bond became due on the 21st June, 1918. The plaintiff redeemed this mortgage by paying the mortgagees Rs.4,552 on the 3rd April, 1917. On that date Musammat Baktawar executed a further mortgage in favour of one Girdharilal who was a *benamidar* for the plaintiff.

The dispute between the parties to the suit now under appeal relates to the two sums paid by the plaintiff to Abid Husain, and Ganga Dhar and Gobardhan Das, respectively.

Jugal Kishore and Parsotam Das (father of defendant No. 2, and defendant No. 1) as subsequent mortgagees instituted in the Court of the Subordinate Judge of Mohanlalgang, Lucknow, suit No. 13/39 of 1927, for foreclosure on the basis of the mortgage dated 12th March, 1915, and three other deeds which had been executed by Musammat Baktawar Begum mortgaging the properties in the seven villages referred to above. Jagmohan Das, the plaintiff in the present suit and his brother Indar Prasad were defendants 3 and 4 in the said suit. Issue No. 3 in the suit was, "To what extent are defendants Nos. 3 and 4 entitled to priority against the deeds in suit?" The Subordinate Judge decided the suit in favour of the plaintiffs. The judgment concluded as follows:

"The foreclosure will be subject to a declaration of the following rights and charges of defendant No. 3 in respect of which he has a priority over the plaintiffs.

(A)

(B) A charge of Rs.6,151-13-0 or for such lesser amount if any as may be found due to defendant No. 3, in respect of the deed dated the 3rd April, 1917.

(C) A charge of Rs.4,542, or for such lesser amount if any as may be found due to defendant No. 3, in respect of the deed dated the 3rd April, 1917.

Charges (B) and (C) operate in respect of 16 annas share in three villages, 8 annas share in four villages and one house, the entire property covered by plaintiffs' first three deeds. Charge (C) has priority in respect of the 2nd and 3rd deeds of the plaintiffs, but not in respect of the first deed."

A decree in accordance with the judgment of the Subordinate Judge was passed on the 27th May, 1927. An appeal from the said decree was dismissed by the chief Court of Oudh on the 26th April, 1928. An appeal from the decree of the chief Court was dismissed by the Privy Council on the 20th April, 1931.

Having obtained his rights judicially determined and safeguarded, the plaintiff, as already mentioned, instituted on the 31st July, 1931, the suit out of which this appeal arises for the sums due to him which then amounted to Rs.45,775-2-3 by the sale of the mortgaged properties, impleading as defendant No. 1, Parsotam Das (decree holder No. 2 in the foreclosure suit), and defendant No. 2, Devandra Nath (the son of decree holder No. 1). The other defendants were the heirs of Musammat Baktawar Begum who had died and the subsequent transferees of some of the mortgaged properties.

In paragraph 12 of the plaint, the plaintiff stated that "the cause of action for the suit arose on the 20th April, 1931, the date of the Privy Council decision." The contesting defendants (respondents) raised various defences of which the only one with which the Board is now concerned was that the suit is time-barred. On this question, with respect to which issue 3 in the suit "Is the suit barred by limitation" was framed, the Courts in India held that the 12 years' period of limitation prescribed by law for the enforcement of a charge expired before the suit was filed on the 20th July, 1931, and that it is therefore barred by time. It is not necessary for the purposes of this appeal to examine the reasoning of the learned judges as to when exactly the time began to run, whether from the time when the money became due under the mortgage bonds, or from the dates of payments made by the plaintiff, as in either case the period had

expired; and further, the question in this particular form was not presented for their Lordships' consideration; nor does it arise in the view that they take of the ground on which their decision in this case should be based.

The position taken up by the plaintiff in the plaint, that the cause of action for the recovery of the amount by enforcement of the charge accrued to him on the date on which their Lordships of the Privy Council delivered their judgment in the appeal, i.e. 20th April, 1931, was not maintained by him before the High Court, where it was contended on his behalf, relying on cl. 2 of section 20 of the India Limitation Act, that the suit is within time "because of certain payments alleged to have been appropriated by the defendants during their possession." Section 20, cl. 2, of the Limitation Act is as follows: "Where mortgaged land is in possession of the mortgagee the receipts of rent or produce of such land shall be deemed to be payment for the purpose of sub-section (1)"—which deals with "the effect of payment of interest as such or part payment of principal" before the expiration of the period of limitation. The learned judges refused permission to the plaintiff to raise this ground as it was a new one raised for the first time in appeal, and required for its decision investigation of new facts. It may be stated that their Lordships have not been able to appreciate the significance of this new point raised by the plaintiff-appellant, but it is not necessary for them to consider it or the question whether or not the High Court was right in refusing him permission to raise it as Mr. Wallach his learned counsel does not now press it before the Board, his sole argument being that a charge was created in favour of the plaintiff by the decree passed by the Subordinate Judge of Mohanlalgang in suit No. 13/39 (the suit for foreclosure) on the 27th May, 1927, and the present suit having been instituted on the 31st July, 1931, is well within the 12 years' period of limitation. It was also contended before the High Court "that a charge had been created in favour of the plaintiff by virtue of the judgment passed by the learned Subordinate Judge of Lucknow," but the contention was rejected, the learned judges stating amongst other things that the effect of the decision of the Subordinate Judge was merely that "he declared that the plaintiff has a right to recover the amount due by enforcing his claim in a separate suit."

The short question for their Lordships to consider is whether the decree passed by the Subordinate Judge created a charge in favour of the plaintiff for, if it created a charge, it is not disputed that the suit is in time. Mr. Rewcastle, the learned counsel for the respondents, has argued that the decree only declared a charge which had existed before, but did not create one. Their Lordships are unable to accept this argument. Attention has already been drawn to the concluding portion of the Subordinate Judge's judgment in the foreclosure suit. Incorporating this portion in it (see para. 2), a preliminary decree for foreclosure in the usual form prescribed under Order xxxiv, rule 2, C.P.C., was passed and it stated "if the decretal amount with costs is not paid within six months, i.e. on or before the 27th day of November, 1927, the one anna share . . . will be sold and the defendants shall be debarred from all rights to redeem the property. . . ." This must have been followed subsequently by a final decree, though it has not been filed, for it is admitted that the respondents have been and are in possession of the properties. The plaintiff by making the two payments mentioned above had subrogated himself to the rights of the mortgagees whom he paid off, and the rights which he had thus obtained became merged in the decree passed by the Subordinate Judge in the foreclosure suit. In the circumstances, it is clear to their Lordships that the rights which the defendants have obtained can only be subject to the qualification of the rights of the plaintiff, i.e. a charge in favour of the plaintiff must be held to have been created by the final decree in Suit No. 13/39 of 1927. That this should be the normal construction of the final decree is not denied, and their Lordships think rightly, by the learned counsel for the respondents. Viewed in this light, it is not disputed that the present suit to enforce the charge is within time.

In the result their Lordships will humbly advise His Majesty that this appeal should be allowed and that the appellant should be given a decree as prayed for, with costs throughout.

In the Privy Council

BATEY KRISHNA

2.

PARSOTAM DAS AND OTHERS

DELIVERED BY SIR MADHAVAN NAIR

Printed by His Majesty's Stationery Office Press,
Drury Lane, W.C.2.

1944