

APPELLATE CIVIL. *

Before Das and Allanson, JJ.

BAJRANGI PRASAD SINGH

v

KESHO SINGH.*

1927.
June, 1.

Limitation Act, 1908 (Act IX of 1908), section 20—mortgage—part payment—endorsement by karta of joint family—fresh period of limitation.

An endorsement of part payment by the karta of a Hindu joint family, on a mortgage bond, provides a fresh period of limitation for a suit against the family on the bond.

Sarada Charan Chakravarti v. Durgaram De Sinha (1), *Har Prasad Das v. Bakshi Harihar Prasad Singh* (2) and *Chandra Kanta Bhattacharjee v. Behari Lal Bhattacharjee* (3), followed.

Narayana Ayyar v. Venkataramana Ayyar (4), distinguished.

Appeal by the plaintiffs.

This appeal arose out of a suit instituted by the appellants to enforce two mortgage bonds executed by Baldeo Singh, Kesho Singh, Musst. Deva Kuer and Murli Singh. Baldeo Singh who was dead was represented in the action by his son Ram Swarup Singh, the only contesting defendant. Kesho Singh was the brother of Baldeo Singh and he did not contest the claim of the plaintiffs. Musst. Deva Kuer was the mother of Baldeo Singh and Kesho Singh and Murli Singh was the cousin of Baldeo Singh and Kesho Singh and joined in the mortgage transactions as having an interest in the mortgaged properties. The earlier of the mortgage bonds was executed on the 3rd March, 1902, and was for Rs. 1,000 with interest at 18 per cent. per annum with yearly rest. The second of the mortgage bonds in suit was dated the

* Appeal from Original Decree no. 225 of 1923, from a decision of Babu Ram Chandra Chaudhuri, Subordinate Judge of Monghyr, dated the 30th April, 1923.

(1) (1910) I. L. R. 37 Cal. 461. (2) (1913-14) 19 Cal. W. N. 860.
(3) (1920) 51 Cal. L. J. 7. (4) (1902) I. L. R. 25 Mad. 220.

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23rd June, 1902, and was for Rs. 1,500 with interest at 18 per cent. per annum with yearly rest. The Subordinate Judge found that the bonds in suit were executed in accordance with law and were for consideration and for valid joint family necessities. He, however, dismissed the suit on the ground that it was barred by limitation.

The plaintiffs relied on various part payments made by the defendants from time to time as saving limitation. The bonds in suit supported the contention of the plaintiffs in so far as there were endorsements of part payments in the handwriting of Kesho Singh duly entered on the bonds.

It was not disputed that the endorsements were in the handwriting of Kesho Singh. Kesho Singh, who, after the death of Baldeo Singh, was the karta of the joint family, did not dispute the genuineness of the endorsements; nor did he deny the part payments alleged to have been made by him from time to time. The Subordinate Judge however, took the view that Kesho Singh was in collusion in this matter with the plaintiffs so as to injure Ram Swarup, the son of Baldeo Singh. In addition to the endorsements of part payments on the back of these bonds, there were also two adjustments of accounts in each case signed by Kesho Singh. The Subordinate Judge came to the conclusion that no part payments were made as alleged and that these endorsements were made by Kesho Singh with a view to enable the plaintiffs to sue upon the mortgages after their claim had become barred by limitation. He referred to the fact that no payment was made towards the earlier bond till six years from the date of its execution and that no payment was made towards the second bond till the eleventh year of its execution and the comment which he made on the circumstance of the payments was :

" The mortgagors who for full eleven years kept quiet allowing the interest with compound interest to swell became so suspiciously regular in payment as to continue paying tolerably large amounts every year without fail till 1928. From 1921 to 1928 payment was also made every

year excepting 1923 towards the other bond too. At any rate some explanation should have been offered by plaintiffs for this apparently strange and unusual conduct on the part of Kesho Singh. But it was not done."

He dismissed the suit.

Pugh (with him *S. N. Roy* and *J. P. Singh*), for the appellants.

S. P. Sen (for *S. M. Mullick*), for the respondents.

Das, J. (after stating the facts set out above proceeded as follows): In my opinion the argument which found favour with the learned Subordinate Judge is far too speculative to deserve any serious consideration. It is within the bounds of possibility that a money-lender may become anxious to save his claim from being barred by limitation and therefore demand part payment before the claims are about to be barred by limitation. The learned Subordinate Judge says that there is quarrel between Kesho Singh and Ram Swarup Singh and he refers to a case between them eight years ago. What happened was this: Kesho Singh purchased some property in the name of his son who applied for mutation of his name in the land-registration department. Ram Swarup claimed that the property was acquired out of joint family funds and that the name of the son of Kesho Singh should not be recorded in the land registration department. The objection of Ram Swarup was dismissed by the land registration officer; and we do not know whether Ram Swarup instituted any suit to enforce his claim in regard to the property purchased; but the learned Subordinate Judge fastens upon this circumstance to found a case of enmity between Kesho Singh and Ram Swarup and his conclusion is that this enmity is sufficient in itself to induce Kesho Singh to enter into a conspiracy with the plaintiffs in this action as against Ram Swarup; but it seems to me that Kesho Singh could not possibly injure Ram Swarup without injuring himself. The properties are the properties of the joint family and

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Kesho Singh as the karta of the joint family is as much interested in these properties as Ram Swarup. It seems to me idle to contend that Kesho Singh should enter into a conspiracy with the plaintiffs in order to injure himself.

The learned Subordinate Judge next regards the attitude of Kesho Singh in this case with suspicion. He says as follows :

" Both parties, i.e., plaintiffs and defendant no. 2 accuse each other of being in collusion with Kesho Singh. One has merely to peruse the written statement of Kesho Singh filed in this case to find out which of the two aforesaid versions is correct. This written statement was filed not only by Kesho alone but also on behalf of all his minor sons including the minor son of Murli Singh also who was an executant of the two disputed bonds. What is the defence of these defendants? A practical admission of the whole case of the plaintiffs. It is therefore absurd on the part of the plaintiffs to contend that Kesho Singh is in collusion with Ram Swarup, the only defendant, who in spite of odds presented a bold front to these plaintiffs and contested their claim keenly. It is therefore needless for me to labour this point. Suffice to say that Kesho Singh is proved to have been completely on the side of the plaintiffs. This is another important circumstance in favour of Ram Swarup and forms another link in the chain of his defence regarding limitation."

I am wholly unable to understand the argument of the learned Subordinate Judge. If Kesho Singh did make the part payments as alleged by the plaintiffs, it would not only be idle but dishonest on his part to defend the suit on behalf of the joint family. But apparently the learned Subordinate judge is under the impression that every suit should be contested whether there be a defence or not. With this view I do not agree.

Lastly the learned Subordinate Judge is suspicious of the adjustment of accounts in 1324 and 1328. He says as follows :

" Next we come to the alleged adjustment of hisabs in 1324 and 1328. Payments used to be made according to plaintiffs' case towards interest regularly from 1316 in the first bond and from 1320 in the second bond. These payments used to be duly entered on the back of the bonds and signed on every occasion by Kesho Singh. Admittedly Kesho did not want to make full payment of the dues of the two bonds on the dates on which the hisabs are said to have been written and signed by him in 1324 and 1328. It is therefore inexplicable why on those dates there was any adjustment of the entire dues of these two bonds."

For myself I have no difficulty in understanding the position. The parties wanted to have the liability of the mortgagors ascertained and that is the reason why the accounts were adjusted on two occasions—once in 1324 and once in 1328. They admittedly bear the signature of Kesho Singh and I can find no explanation why Kesho Singh should enter into a conspiracy with the plaintiffs to injure himself. In my opinion the decision of the learned Subordinate Judge on this point is entirely speculative and should carry no weight with us.

The learned Subordinate Judge next says that the part payments even if made by Kesho Singh will not save limitation so far as Ram Swarup and his sons are concerned and he relies upon the decision of the Madras High Court in *Narayana Ayyar v Venkataramana Ayyar* (1). That was a case of an acknowledgment under section 19 of the Limitation Act and not of part payment under section 20 of the Limitation Act. That case was moreover decided on its own facts and they are not applicable to the facts of the present case. For myself I prefer to follow the decisions of the Calcutta High Court in *Sarada Charan Chakravarti v. Durgaram De Sinha* (2), *Har Prosad Das v Bakshi Harihar Prosad Singh* (3) and *Chandra Kanta Bhattacharjee v Behari Lal Bhattacharjee* (4). In my opinion the karta of a joint family is the agent of the entire family duly authorised to make part payments on behalf of the family. I hold that the suit is not barred by limitation and that the plaintiffs are entitled to a decree as claimed.

On the question of estoppel the learned Subordinate Judge has come to the conclusion that so far as Ram Swarup is concerned, the defence is not available to him; but so far as the defendants second party, namely, the subsequent purchasers, are concerned,

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the defence is available to them. The point arises in this way. The defendants first party took a ticca of some properties belonging to the plaintiffs and as a security for the ticca rent payable by them they gave a mortgage of certain properties to the plaintiffs. The mortgage included certain jote lands which had already been mortgaged by them to the plaintiffs under the bond of the 23rd June 1902. The ticca rent was not paid and the plaintiffs sued upon their mortgage. They obtained a decree in due course and proceeded to sell the mortgaged properties. Now it appears that they did not disclose the fact that the jote lands were already the subject of a prior incumbrance. The defendants second party have purchased these lands and they claim that the plaintiffs not having disclosed their incumbrance in the proceedings to which I have already referred are estopped from enforcing the security so far as the jote lands are concerned in this suit as against them. The answer to the argument is that the defendants second party did not purchase the jote lands at the sale held in execution of the decree obtained by the plaintiffs as against the defendants first party. In my opinion no question of estoppel arises in this suit.

I would allow the appeal, set aside the judgment and the decree passed by the Court below and give the plaintiffs the usual mortgage decree on the foot of the mortgage bonds of the 3rd March, 1902, and the 23rd June, 1902. The interest, however, is excessive and it has not been shown that there was any necessity to borrow money at the high rate of interest charged. We reduce the interest to 12 per cent. per annum with yearly rest. We fix the date of payment six months from the date of this judgment. Interest at 12 per cent. per annum with yearly rest must be calculated up to the date fixed for payment, and thereafter at six per cent. per year. The plaintiffs are entitled to their costs throughout.

ALLANSON, J.—I agree.