MANIMALA DEVI

v.

INDU BALA DEBYA & ORS.

1963

December 3

(K. SUBBA RAO, M. HIDAYATULLAH AND J.C. SHAH, JJ.)

Limitation Act (IX of 1908), s. 20 and Art. 116—Person liable to pay debt if covers mortgagor after assignment of his interest--Transfer of Property Act (IV of 1882), s. 68—Nature of right conferred.

One Rajkumar Singh was the proprietor of three properties A, B and C. He borrowed a loan from Rabindra Nath and mortgaged properties A and B and by the deed of mortgage undertook personal liability to pay the dues and agreed that in default of payment by the due date the mortgagee do recover his dues by sale of properties A, B and C. He created a second mortgage to secure another sum borrowed from Sasindra Nath and Indra Nath stipulating that he would repay the loan on or before a fixed date, and further stipulating that the mortgagees may receive royalty from the terms of property C.

Five years later he assigned his interest in property A and about three months thereafter he assigned his interest in property B. Subsequent to this assignment an endorsement of part payment was recorded on the first mortgage deed. The mortgagor's rights title and interest in property C were sold at a court auction and the purchaser took possession of that property. But before this date the mortgagor had made another part payment and an endorsement was made to this effect on the mortgage bond. Sometime later the appellant obtained assignments of the rights of the mortgagees under the mortgage deeds and filed a suit for a decree for enforcement of the two mortgages by sale of the mortgage properties. This suit was filed more than twelve years after the date on which the mortgage amounts became payable.

The trial court rejecting the pleas of limitation raised by the defendants decreed the suit. On appeal by the fourth defendant the High Court reversed the decree and dismissed the suit.

Held: (*i*) The High Court was in error in holding that the mortgagor's interest in properties A & B only was mortgaged.

(*ii*) A mortgagor whose interest in the equity of redemption is transferred by assignment sale or otherwise to another person is not a "person liable to pay the debt" within the meaning of s. 20 of the Limitation Act. Part payment in the mortgagor after transfer or assignment of his interest in the mortgaged property will not therefore extend the period of limitation under s. 20 of the Limitation Act.

Pavai v. *Palanivela Goundan*,I.L.R. [1940] Mad. 872.

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(*iii*) The right conferred by s. 68 of the Transfer of Property Act is not a right to enforce the mortgage but a right to sue for the mortgage money on the personal covenant or to claim compensation when the mortgagee is deprived of his security. A suit for enforcement of the personal covenant in such a case is governed by Art. 116 of the Limitation Act, 1908 and a suit for enforcement of a claim for compensation is governed by art. 120 of the Act.

Unichaman v. *Ahmed, I.L.R. 21 Mad. 242.*

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 560 of 1960.

Appeal from the judgment and decree dated July 18, 1955, of the Patna High Court in Appeal from original decree No. 500 of 1947.

S.C. Agarwal and *D.P. Singh*, for the appellant.
P.K. Ghosh, for respondent No. 1.

December 3, 1963. The Judgment of the Court was delivered by

Shah J.

SHAH J.—Rajkumar Ran Bahadur Singh—hereinafter called 'the mortgagor' was the proprietor of a five annas share in *Tauzi* No. 16 of Mauza Bansjora, eight annas share in Mauza Simitanr and certain interest in Mauza Bahaldih all in District Manbhum. The mortgagor had leased 200 bighas of coal-bearing land out of his holding in Mauza Bahaldih to certain lessees for an annual royalty of Rs. 2,000 payable in two equal instalments, the first in the month of *Aswin* of the Vikram year and the second in the month of *Chaitra*. On June 14, 1922, the mortgagor borrowed Rs. 5,500 from one Rabindra Nath Chakravarty and executed a deed of mortgage whereby he agreed personally to repay the amount, and encumbered his share in Mauzas Bansjora and Simitanr for repayment of the amount borrowed with interest at the rate of Rs. 1/8/- per mensem, and further agreed that in default of payment, the mortgagee do recover the amount due by sale of his interest in Mauza Bansjora, Simitanr and Bahaldih. By the mortgage-deed the mortgagor also agreed that the mortgagee do receive the amount due as royalty from the tenants under mining leases in Mauza Bahaldih in the month

of *Aswin*. By another deed dated August 27, 1922, the mortgagor created a mortgage in favour of Sasindra Nath Chakravarty and Indra Nath Chakravarty to secure payment of Rs. 5,500 advanced to him and interest thereon. The covenants of this mortgage deed were substantially the same as the covenants of the earlier mortgage-deed dated June 14, 1922, and it was agreed that the mortgagees were to receive the instalment of royalty payable in *Chaitra* in respect of Mauza Bahaldih. Under these mortgage-deeds the due date for payment was April 14, 1925.

On May 17, 1927, the mortgagor assigned his interest in Mauza Bansjora to one Mahendra Nath Rai and on October 2, 1927 he assigned his interest in Mauza Simitanr to one Pushpa Moyee Devi. Thereafter in execution of a money decree obtained against the mortgagor, his right, title and interest in Mauza Bahaldih was sold on January 16, 1937, and after the sale was confirmed, possession of Mauza Bahaldih was taken by the auction-purchaser on April 7, 1937. By two deeds dated June 18, 1946, Manimala Devi-the plaintiff in the suit out of which this appeal arises obtained assignments of the rights of the mortgagees under the two deeds dated June 14, 1922, and August 27, 1922, and filed a suit on July 12, 1946, in the Court of the Subordinate Judge at Dhanbad for a decree for enforcement of the two mortgages by sale of the mortgaged properties. To the suit were impleaded as defendants the representatives of the original mortgagees, the heirs of the mortgagor and certain alienees of the mortgaged property.

The suit was filed more than twelve years after the date on which the mortgage amount became payable, and *prima facie*, it was barred by the law of limitation. But the plaintiff sought to bring the claim within limitation, relying upon certain part payments towards the mortgage dues made by the mortgagor. On the deed dated June 14, 1922, was recorded an endorsement dated April 1, 1937, relating to payment of Rs. 600 as interest which was signed by the mortgagor. On the mortgage-deed dated

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August 27, 1922, there was recorded an endorsement dated August 16, 1934, of payment of Rs. 100 which also was signed by the mortgagor. The plaintiff relied upon part payments evidenced by these endorsements to extend the period of limitation in respect of the two mortgage claims.

The trial Judge rejected the defence raised by the contesting defendants and held that the suit in respect of the first mortgage was not barred by the law of limitation because the mortgage "was partly simple and partly usufructuary" and even though the plaintiff could not rely upon part payment of principal or interest to extend the period of limitation for the suit, she could still maintain the suit relying upon the dispossession of the mortgagee on April 7, 1937, by the auction-purchaser who purchased the mortgagor's rights in Bahaldih lands at the Court auction and that the suit to enforce that mortgage was accordingly within limitation. In respect of the mortgage dated August 27, 1922, the Judge held that the claim was within limitation both on account of part payment of principal and interest and upon the cause of action furnished by the dispossession of the mortgagees in respect of the Bahaldih property.

In appeal by the fourth defendant—widow of Mehandra Nath Rai—the High Court of Patna reversed the decree passed by the trial Court and dismissed the plaintiff's suit. The High Court held that as the plaintiff had in her plaint not relied upon dispossession as a ground for extension of the period of limitation, that claim should not have been permitted to be made out by the trial Court. The High Court also held that Mauza Bahaldih was not given in mortgage to the mortgagees under either of the two mortgage-deeds and dispossession of the mortgagees from Mauza Bahaldih or part payments of principal or interest after the mortgagor had parted with his interest in the mortgaged properties Mauzas Bansjora and Simitanr could not operate to extend the period of limitation for the suit. The High Court further held that in any event even if Mauza Bahaldih was

one of the mortgaged properties, the mortgagor having lost his interest in Mauzas Bansjora, Simitanr and Bahaldih prior to the payment of Rs. 600 by the mortgagor on April 1, 1937, as evidenced by the endorsement on the first mortgage deed, the plaintiff's suit to enforce the mortgage dated August 27, 1922, was barred by limitation. The plaintiff has appealed to this Court with certificate granted by the High Court.

The first question which falls to be considered is whether Mauza Bahaldih was mortgaged under the two mortgage-deeds. The mortgagor had shortly after the two mortgage-deeds transfered his interest in Mauzas Bansjora and Simitanr, and for reasons which we will presently set out, the mortgagor cannot, by making part payments, seek to extend the period of limitation against his assignee after he has lost his interest in the property mortgaged. The two part payments dated August 16, 1934, and April 1, 1937, could operate to extend the period of limitation if the mortgagor continued to remain on those dates owner of the mortgaged property or part thereof. The plaintiff could therefore avail of the extension of the period of limitation by part payments only if the mortgagor's interest in Mauza Bahaldih stood mortgaged at the dates of those part payments, for the mortgagor's interest in Mauzas Bansjora and Simitanr was assigned to strangers many years before those part payments were made.

The terms of the two mortgage-deeds are substantially the same and such differences as there are in the covenants have no bearing on the questions to be decided in this appeal. We will therefore set out the material recitals and clauses in the mortgage-deed dated June 14, 1922. In the preamble clause it was recited that *Tauzi* No. 16 of collectorate and district Mandhum constitutes the *zamindari* interest and that on the death of his late father, the mortgagor acquire the said *zamindari* and that he was entitled to transfer, encumber or sell the whole property included within the said *Tauzi* No. 16 at his free will. By paragraph 4

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the mortgagor undertook to pay interest at the rate of Rs. 1/8/- (one rupee eight annas) per cent per mensem on the amount of Rs. 5,500 borrowed by him. In paragraph 5 it was stated that it was not possible for the mortgagor to pay interest every year on the amount borrowed by him and accordingly he had agreed that the tenants of the coal fields in Mauza Bahaldih with whom he had settled the coal mines in the *zamindari* shall continue to pay to the mortgagee Rs. 1,000 on account of one of the instalments for rent, minimum royalty and commission, due to the mortgagor according to the terms of the contracts. It was further stipulated by paragraph 7 that the mortgagor had assigned the amount due from certain tenants mentioned in the schedule under the instalments specified therein by way of interest for peaceful realisation of the annual interest of Rs. 1,000 every year, and the mortgagee was, in default of payment by the tenants, competent to realise the same. The mortgagor also undertook to issue notices to the tenants calling upon them to pay the amounts according to the assignment. By paragraph 9 it was agreed that in the event of the tenants failing to pay the amount, the mortgagor would compensate the mortgagee in respect of the amount remaining to be realised. Paragraph 12 provided that so long as all the amounts were not repaid in full, the mortgagor was not competent to gift, sell transfer or encumber, make *banami* or permanent settlement of the mortgaged property specified and described in Sch. (*kha*) *i.e.* Mauzas Bansjora and Simitanr with any one and that the alienations made by him would be null and void. He further declared that the said properties had not been encumbered to any person and that he was in peaceful possession of the mortgaged property described in Sch. (*ka*) *viz.*, Mauza Bahaldih and that he was peacefully realising the rents. By paragraph 14 the mortgagor agreed that the properties specified and described in Sch. (*kha*) shall always be treated as mortgaged and security for realising the interest and principal due to the mortgagee, the amount and interest due to the mortgagee having first charge on the same, that

"should any cause of action arise", the mortgagee "shall be competent to realise the full amount due to" him "together with interest and costs by selling the said properties in Sch. (*ka*) and (*kha*) by action", and that should the full amount be not realised the mortgagee will be competent to realise the amount from other moveable and immoveable properties belonging to the mortgagor. By paragraph 13 the mortgagor agreed to pay the principal and the interest due on or after April 14, 1925.

The mortgagor admitted receipt under each of the two deeds the amount of Rs. 5,500 advanced to him by the mortgagees and agreed to pay interest at the rate of Rs. 1/8/- per cent per mensem. He had also made an arrangement by which the mortgagee was to recover the interest on the mortgage debt out of the instalments of Rs. 1,000 as royalty in respect of Mauza Bahaldih. There was a covenant that in the event of the mortgagee being unable to recover royalty from the tenants the mortgagor would make good the same. Again by paragraph 13 in each of the two deeds there was a covenant for payment of the amount of the principal and interest personally on or after April 14, 1925. A distinction was made in paragraphs 12 and 14 between Mauzas Bansjora and Simitanr on the one hand and Mauza Bahaldih on the other. By paragraph 12 the mortgagor had undertaken not to transfer or assign Mauzas Bansjora and Simitanr to any person, and had merely assured the mortgagee that he had not assigned the rights in Mauza Bahaldih till the date of mortgage by way of any encumberance to any other person. But that distinction would, for the purpose of ascertaining the true nature of the document, be immaterial, for even in the absence of a covenant not to assign the mortgagor's interest, so long as the mortgage remained outstanding, the transfer made by the mortgagor of Mauzas Bansjora and Simitanr would be subject to the mortgage. In paragraph 14 it was stated that as security for the realisation of the principal and interest, Mauzas Bansjora and Simitanr were to

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stand mortgaged. That may *prima facie* suggest that those two Mauzas alone were mortgaged, but the mortgagor had in the same paragraph agreed that should "any cause of action arise", the mortgagee shall be competent to realise the full amount due to him together with interest and costs by selling Mauzas *Bansjora, Simitanr and Bahaldih.* The mortgagee could not sell the mortgagor's interest in Mauza Bahaldih in satisfaction on his mortgage claim, unless it was mortgaged to him. The intention appearing from this covenant is therefore clearly to encumber Mauzas Bansjora, Simitanr and Bahaldih.

The High Court, in our view, was in error in holding that the mortgagor's interest in Mauzas Bansjora and Simitanr only was mortgaged. The question of limitation may now be considered in the light of the finding that Mauza Bahaldih was mortgaged under the two mortgage-deeds. The later mortgage was executed on August 27, 1922, and the amount due thereunder was payable on April 14, 1925. On August 16, 1934, an amount of Rs. 100/- was paid by the mortgagor and an endorsement in that behalf was made on the mortgage-bond under his signature, and on that date the mortgagor's interest in Mauza Bahaldih was not extinguished. Under Art. 132 of the Limitation Act, Sch. I, a suit to enforce payment of money charged upon immoveable property may be filed within twelve years from the date when the money sued for becomes due. The suit filed by the plaintiff was for enforcement of payment of money charged upon immoveable property and money sued for on the later mortgage had become due on April 14, 1925. By s. 20 of the Limitation Act where payment on account of a debt or of interest on a legacy is made before the expiration of the prescribed period, by the person liable to pay the debt, or by his duly authorised agent, a fresh period of limitation will be computed from the time when the payment was made. The mortgagor had parted with his interest in Mauza Bansjora on May 17, 1927, and in Mauza Simitanr on October 2, 1927, and a

mortgagor whose interest in the equity of redemption is transferred by assignment, sale or otherwise to another person, is not a "person liable to pay the debt" within the meaning of s. 20 of the limitation Act. Part payment made by him towards principal or interest therefore does not extend the period of limitation for enforcement of the mortgage against the transferee of the equity of redemption. If by transfer or assignment of his interest the mortgagor has lost all his interest in the mortgaged property, part payment will not extend the period of limitation, for at the date of payment he is not "the person liable to pay" the mortgage debt. The High Court of Madras was right in holding in *Pavavi* v. *Palanivela Goudan* (1) that a mortgagor who has lost all interest in the mortgaged property cannot by payment of interest or principal within the meaning of s. 20 bind the person on whom the interest has devolved. But the mortgagor's interest in Mauza Bahaldih subsisted on the date of payment by him of Rs. 100 towards the principal and interest, and such payment having been made within twelve years from April 14, 1925, the plaintiff's claim to enforce the mortgage dated August 27, 1922, was at the date of the suit not barred by limitation.

The amount due under the mortgage dated June 14, 1922, was repayable on April 14, 1925, and on April 1, 1937, Rs. 600 were paid by the mortgagor to the mortgagee and the endorsement regarding payment was made on the mortgage-deed recording such payment, and on that date the period of twelve years commencing from April 14, 1925, under Art. 132 of the limitation Act, had not expired. But before that date the mortgagor had lost interest in all the properties mortgaged by him—in Mauza Bansjora on May 17, 1927, in Mauza Simitanr on October 2, 1927, and in Mauza Bahaldih by the auction sale which became affective from January 16, 1937. The period of limitation in respect of the first mortgage could not, for reasons already set out, be extended by part

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payment made after the mortgagor lost all his interest in the property mortgaged. The plaintiff has not relied upon any other part payment in respect of the first mortgage before the mortgagor's interest in the mortgaged properties was transferred, to extend the period of limitation for a suit to enforce the mortgage.

But the plaintiff relied upon the sale of the mortgagor's interest at a Court auction and his dispossession as furnishing a fresh cause of action for enforcement of the mortgage. It was urged that by the covenants in the mortgage-deed dated June 14, 1922, a usufructuary mortgage was created on the mortgagor's interest in Mauza Bahaldih, and by the attornment made pursuant to paragraph 7 of the mortgage, the mortgagor must be deemed to be in possession till the mortgagor's interest in that property was sold, and under s. 68(1) (b) of the Transfer of Property Act dispossession of the mortgagee from Mauza Bahaldih by virtue of the sale under the money decree passed against the mortgagor, a cause of action accrued to the mortgagee to enforce the mortgage and the plaintiff's suit filed within twelve years from the date of dispossession was within time. A suit to enforce a mortgage is governed by Art. 132 of the limitation Act and has to be filed within twelve years from the date on which the money sued for became due, unless the period of limitation so prescribed is extended in the manner provided by Part III of the limitation Act. Dispossession of the mortgagee is not one of the grounds prescribed by the Act for extension of the time prescribed for filing a suit.

Section 68 of the Transfer of Property Act confers a right upon the mortgagee to sue for the mortgage money in four different classes of cases and no others. These classes are—

(a) where the mortgagor binds himself to repay the mortgage money :

(b) where, by any cause other than the wrongful act or default of the mortgagor or mortgagee, the mortgaged property is wholly or partially

destroyed or the security is rendered insufficient within the meaning of section 66, and the mortgagee has given the mortgagor a reasonable opportunity of providing further security enough to render the whole security sufficient, and the mortgagor has failed to do so ;

(c) where the mortgagee is deprived of the whole or part of his security by or in consequence of the wrongful act or default of the mortgagor ;

(d) where the mortgagee being entitled to possession of the mortgaged property, the mortgagor fails to deliver the same to him, or to secure the possession thereof to him without disturbance by the mortgagor or any person claiming under a title superior to that of the mortgagor."

The section does not deal with the period of limitation for filing a suit, or extension of the period prescribed by the Limitation Act for filing a suit. The right conferred by s. 68 is again not a right to enforce the mortgage but a right to sue for the mortgage money on the personal covenant or to claim compensation when the mortgagee is deprived of his security. A suit for enforcement of the personal covenant to pay the mortgage money when the mortgagor has bound himself to repay the same is governed by Art. 116 of the Limitation Act. Similarly the right to sue where the mortgagee is deprived of the mortgage security or where he is not secured in his possession of the mortgaged property or where possession is not delivered to him as agreed, the claim maintainable by the mortgagee is one for compensation and the period of limitation for a suit to recover the mortgage money is governed by Art. 120 of the Limitation Act from the date of destruction or deprivation of the mortgage security or possession and not from the date when the mortgage money is repayable : *Unichaman* v. *Ahmed.*(1) Assuming therefore that

(1) I.L.R. 21 Mad. 242

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by the two deeds the mortgagees were placed in possession of the right to recover royalty in respect of Mauza Bahaldih, and that the sale of that property in enforcement of the decree of a Civil Court constituted deprivation of the security or disturbance of their possession by the creditors of the mortgagor, dispossession having taken place in 1937 the suit filed on July 12, 1946, regarded as one to enforce the claim to recover the mortgage money under s. 68 of the Transfer of Property Act was barred by the law of limitation.

This appeal will therefore be partially allowed. The decree passed by the High Court will be set aside and there will be a decree in favour of the plaintiff only in respect of the mortgage dated August 27, 1922. The trial Court will draw up an appropriate decree in that behalf. The plaintiff's appeal will fail in respect of the mortgage dated June 14, 1922. The plaintiff will pay the costs of the fourth defendant who alone has defended this appeal. The plaintiff will be entitled to her costs in respect of the mortgage dated August 27, 1922, from the original mortgagor's heirs and the transferees-in-interest of the property which was the subject-matter of the said mortgage.

Appeal partly allowed.