

A

BIBIJAN AND ORS.

v.

MURLIDHAR AND ORS.

NOVEMBER 15, 1994

B

[K. RAMASWAMY AND N. VENKATACHALA, JJ.]

C

Civil Procedure Code, 1908—Order XXII, Rule 4 r/w Rule 11/Limitation Act, 1963—Articles 120 and 121—Appeal—Joint and inseverable decree of redemption—Death of appellants No. 1 and 5 during pendency of appeal—No application made to bring on record legal representatives of deceased appellants—Abatement of their appeal—Whether appeal of other appellants also abates—Held, Yes—Entire appeal stands abated.

D

The respondent had filed a suit for redemption of usufructuary mortgage. The trial court dismissed the suit as being barred by limitation. On appeal, it was confirmed. The High Court in second appeal granted a preliminary decree for redemption holding that the mortgage acknowledged the mortgage and that, therefore, limitation starts running from the date of the acknowledgement which would give fresh cause of action for filing a suit for redemption and possession.

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This appeal by special leave has been filed against the judgment of the High Court.

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During the pendency of the appeal, appellant No. 1 and appellant No. 5 died. No step had been taken to bring the legal representatives of appellant Nos. 1 and 5 on record. Their appeal stood abated. The question that arose was whether the appeal of other appellants also abates.

Dismissing the appeal, this Court

G

HELD : Admittedly as no applications had been made to bring on record the legal representatives of the deceased appellants Nos. 1 and 5 from the respective dates, before the expiry of 90 days, this appeal stood abated. The question is whether the appeal of other appellants also abates. It was the joint and inseverable decree of redemption granted in favour of respondents, which was questioned in the appeal. When that decree of redemption against appellants 1 and 5 had come to

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stand because of abatement of their appeal, that decree of redemption

against appellants 2 to 4 alone cannot be set aside, for in that event decree of redemption made against appellants 1 to 5 questioned in the appeal would stand while the decree against appellants 2 to 4 alone calls be set aside. Since the decree for redemption being joint and inseverable, the appeal cannot be continued. In this view of the matter the entire appeal stands abated. (498-D-F) A

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2737/80. B

From the Judgment and Order dated 12.2.79 of the High Court of Bombay in Second Appeal No. 719/70.

S. Uday Kr. Sagar, for P.H. Parekh, Uma Datta for the Respondents. C

The following Order of this Court was delivered:

This appeal arises from the judgment of the High Court of Bombay at Aurangabad in S.A. No. 719 of 1970 dated February 21, 1979. The respondent had filed the suit for redemption of usufructuary mortgage dated 15th Awarded 1321 Fasli, 1912 A.D., hypothecated for a sum of Rs. 9200—O.S. by their predecessors-in-interest. The trial court dismissed the suit as being barred by limitation. On appeal, it was confirmed. The High Court in second appeal, held that the mortgagee acknowledged the mortgage and that, therefore, limitation starts running from the date of the acknowledgement by the respondents predecessors-in-interest which would give fresh cause of action for filing a suit for redemption and possession. Indisputably, the gift deed executed by the donor in favour of the respondent-donee clearly mentioned the mortgage and made a part of the deed of gift. Thus, the finding of the High Court that the recitals in the gift deed constitute acknowledgement is perfectly legal. Accordingly the finding that the suit was within limitation, is unassailable. Thereby, a preliminary decree for redemption was granted giving appropriate time to the mortgagor to deposit the amount in the Court by decree dated April 29, 1979. Thus this appeal by special leave. D E F

Pending the appeal, the appellant No. 1 died in July, 1984 and the appellant No. 5 died in the year 1987. It is also reported that respondent No. 1 died in the year 1983 and application for substitution was pending. Substitution is allowed. G

Admittedly, no steps have been taken to bring the legal representatives of appellant Nos. 1 and 5 on record. By operation of Order XXII, Rule 4 read with Rule 11 of Civil Procedure Code, when one of two or more H

- A defendants died and the right to sue does not survive against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit. Rule 11 postulates the applicability of this Order to appeals. As far as may be the
- B word 'plaintiff' should be held to include an appellant, the word 'defendant' a respondent, and the word 'suit' an appeal. Thus at the appellate stage also the legal representatives of the deceased respective appellants and the respondents should be substituted as the L.Rs. of the respective appellants/ respondents. Article 120 of the Third division of the Schedule to the Limitation Act, 1963 provides 90 days from the date of
- C death as the period of limitation to have the Legal Representatives of the plaintiff appellant, defendant-respondent, as the case may be, to be brought on record. After the expiry of 90 days, the appeal stands abated unless the appeal survives against the surviving appellants. Within 60 days after the expiry of 90 days, under Art. 121, the abatement needs to be set aside. Since, admittedly, no applications had been made to bring on record the
- D legal representatives of the deceased appellant No. 1 and 5 from the respective dates, before the expiry of 90 days, their appeal stood abated. The question is whether the appeal of other appellants also abates. If the joint and inseverable decree of redemption granted in favour of respondents, which was questioned in the appeal. When that decree of redemption against appellants No. 1 and 5 had come to stand because of
- E abatement of their appeal, that decree of redemption against appellants 2 to 4 alone cannot be set aside, for in that event decree of redemption made against appellants 1 and 5 questioned in the appeal would stand while the decree against appellants 2 to 4 alone calls to be set aside. Since the decree for redemption being joint and inseverable, the appeal cannot be continued.
- F In this view of the matter, the entire appeal stands abated. The appeal is accordingly dismissed. No costs.

A.G.

Appeal dismissed.