

PETITIONER:
PATEL BHUDARBHAI MAGANBHAI & ANR.

Vs.

RESPONDENT:
PATEL KHEMABHAI AMBARAM & ORS.

DATE OF JUDGMENT: 11/12/1996

BENCH:
K. RAMASWAMY, G.T. NANAVATI

ACT:

HEADNOTE:

JUDGMENT:

O R D E R

This appeal by special leave arises from the judgment of the learned single Judge of the Gujarat High Court, made on 24.2.1986 in Second Appeal No.294/78. The first appellant is the son of Maganbhai. Bai Jivi, widow of Gala mortgaged the property in 1911 to Kana for 31 years. Bai Jivi died in the year 1955. The property was succeeded by Hati, daughter of the respondent predecessor in title in 1965. The respondents filed the suit for redemption of the mortgage. The trial Court dismissed the suit but on appeal, the Additional District Judge, Mehsana decreed the suit holding thus:

"On the plaintiff depositing Rs.112.50 p. on or before 31st July, 1978 in the Trial Court, all documents in possession or power relating to mortgaged property and all such documents shall be delivered over to the plaintiff and defendant No.2 shall if so required recovery or retransfer the said mortgaged property free from the said mortgage and clear of and free from all encumbrances created by defendant No.2 or by any person claiming under him or any person through whom he claims and also free from all liability whatsoever arising from the mortgage, and, shall, if so required, deliver up to the plaintiff quiet and peaceful possession of the said property."

In the second appeal it was confirmed. Thus, this appeal by special leave.

Shri Dholakia, learned senior counsel for the appellant, contends that in view of the pedigree of the parties, the appellant is grand-son of Amichand while Hati is a distant relation represented through Dansang who were sons of Rupsang. Gali is the grand-son of Jekaran. One of the sons of Rupsang being nearer in relation within seven

degrees the appellant is entitled to a preferential right for succession than the respondents-predecessor-in-title. There is a controversy as to when the widow of Joitaram died. In that behalf, the appellate Court having considered the entire evidence had concluded thus:

"Hence Joitaram was entitled to inherit properties of Gala in preference to defendant Bhudarbhai Magandas and even his father and grand-father who will come in the category of Samandaks. Looking to the provisions of Baroda Hindu Naibandh, widow of Joitaram Kashidas, i.e., mother of Bai Jivi was entitled to inherit the properties of Gala as if her husband was alive at the time of death of Bai Jivi. That way Bai Hati's mother was entitled to inherit the properties of Gala on the death of Bai Jivi as a widow Sagotra Sapindas and that way we can say that Bai Hati's mother became the owner of the suit property and on the death of Bai Jivi Hati's mother died some time in the year 1965. We can take it that she must have died after 1.8.1965 and that way she was the absolute owner of the properties when she died. Bai Hati, thus, be entitled to inherit those properties either under Baroda Hindu Nibandh or even under the Hindu Succession Act, 1956"

In view of the above finding, we do not find any force in the contention of Shri Dholakia that the appellant is an preferential heir to the respondent predecessor in title.

He further contends that by operation of Article 61(b) of the Schedule to the Limitation Act, 1963, the appellants-predecessor-in-interest also became the owner of the property and the right to recover possession from them was barred by limitation since the suit came to be filed beyond 12 years from the date of the second redemption of the mortgage. In this behalf, it is necessary to note a few relevant facts. As stated earlier, Bai Jivi mortgaged the property to Kana who is a mortgagee. His wife, Shivi appears to have executed a mortgage on 13.5.1935 in favour of one Kuber. Subsequently, in 1965, Bai Shivi filed a suit O.S. No. No.69/1956 for redemption of the mortgage executed by her on 31.5.1935 and she became the owner of the property. It is stated that in assertion of her right as an owner, Shivi executed the mortgage in favour of Kuber. Her assertion was to the knowledge of predecessor in title of the respondent and, therefore, the suit or redemption should have been filed within 12 years from the date of the execution of the second mortgage. Clause (b) of Article 61 provides that a suit by a mortgagor to recover possession of immovable property mortgaged and afterwards transferred by the mortgagee for a valuable consideration, has to be filed within 12 years from the date of which transfer becomes known to the plaintiff. It is settled legal position that once a mortgage is always a mortgage until it is duly redeemed within the period of limitation. It is seen that Bai Jivi or her successor-in interest were not made parties either to the second mortgage executed on 31.5.1975 or to

the suit for redemption nor any acknowledgement in that behalf has been pleaded or established. It is also seen that in the plaint the only pleading was that Hati became aware of the execution of the mortgaged in favor of the second mortgagee in 1935. It is true that Bai Jivi had knowledge of assertion of any hostile title either as an owner or of any other title detrimental to her interest and acquiesced to it; perhaps the contention bears relevance. Bai Jivi had knowledge of such execution of mortgage though Shivi. On redemption, Shivi became mortgagee. Obviously, therefore, this contention was not pressed. On the other hand, the contention in the High Court was that the suit was not filed within the period of limitation of 30 years, after the Act had come into force. Relying upon Section 30 of the Act, since it extended the period by seven years, the High Court held that under the Act after the expiry of 60 years provided under the old Limitation Act, 1908 and within 30 years and seven years' extended period, the suit came to be filed on 18th June, 1970. The Act had come into force on January 1, 1964. Tagging the period of limitation provided under the Act, namely, 30 years and seven years, the suit was within limitation. The High Court has held that the suit was not barred by limitation. In the appellate Court also, two more contentions on limitation which were not argued before the High Court, were addressed and they were negatived. Since they have not been repeated here, it is necessary for us to go into these questions. Considered from this perspective, we think that the High Court was right in dismissing the second appeal.

The appeal is accordingly dismissed but without costs.