

SUPREME COURT OF INDIA

*Before: Justice Ranjan Gogoi and Justice Navin Sinha, JJ.*

ALLOKAM PEDDABBAYYA and another – Appellant,

*versus*

ALLAHABAD BANK and others – Respondent.

Civil Appeal No. 2763-2764 of 2008

June 19, 2017

**CPC O.34 R.1 - Transfer of Property Act, S. 59, S. 60, S. 91**

**Mortgage - Redemption - Mortgagor has a right of redemption even after sale has taken place pursuant to the final decree, but before the confirmation of sale - Plaintiffs lost the right to sue for redemption of the mortgaged property by virtue of the proviso to Section 60 of the Act, no sooner that the mortgaged property was put to auction sale in a suit for foreclosure and sale certificate was issued in favour of Defendant No.2. - There remained no property mortgaged to be redeemed - The right to redemption could not be claimed in the abstract.**

*Held,*

9. The right to enforce a claim for equity of redemption is a statutory right under the Act. It necessarily presupposes the existence of a mortgage. The right to redeem can stand extinguished either by the act of the parties or by operation of the law in the form of a decree of the court under the proviso to Section 60 of the Act. The appellants being purchasers of the equity of redemption can have or claim no better rights under Section 91, than what their predecessor-in-interest had under Section 60 of the Act.

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13. The decree for foreclosure in OS No. 68 of 1987, and the subsequent auction-sale followed by issuance of sale certificate, extinguished the right to redemption by reason of the proviso to Section 60. The plaintiffs having interest in the mortgaged property through their predecessor-in-interest and in the right to redeem the same were competent to do so under Section 91 of the Act, but subject to the limitation under the proviso to Section 60. Their rights could not be any superior or separate from that of their predecessor-in-interest. If the right to redeem stood extinguished by operation of the law under the proviso to Section 60 of the Act prior to the period of limitation, it cannot be contended that the right could nonetheless be enforced any time before the expiry of limitation of 30 years. If there remained no subsisting mortgage, it is difficult to fathom what was to be redeemed.”

JUDGMENT

**NAVIN SINHA, J.**

The Appellants’ Suit O.S. No.96 of 1999, for redemption of mortgage was decreed by the Principal Junior Civil Judge, Guntur. The decree was reversed in AS No.65 of 2002, appeal preferred by the auction purchaser, Defendant No.2, by the VIII Additional District Judge (FTC), Guntur. The Second Appeal by the Appellants against the reversal of decree has been dismissed. The parties shall be referred to by their respective positions in the Suit.

2. Defendant Nos.3 and 4 created an equitable mortgage of their property at D.No.80 of Gorantala village, Guntur, measuring Ac 1-34 cents (2000 sq.yds.) for a loan of Rs.10,000/- in favour of the Bank, Defendant No.1, by deposit of title deeds on 15.03.1979. The Bank instituted O.S. No. 68 of 1987 Signature Not Verified Digitally signed by for recovery of the

loan by sale of the mortgaged property. The property was auction sold on 05.09.1993. Defendant No.2 being the highest bidder at Rs.50,000/-, sale certificate was issued and he was put in possession on 02.07.1997 in Execution Petition No. 203 of 1997.

3. The Plaintiffs were stated to have purchased the mortgaged property by different sale deeds dated 12.08.1985, 20.08.1985 and 30.09.1985. Asserting possession, they preferred O.S. No.165 of 1994, seeking permanent injunction restraining Defendant Nos. 2 to 4 only from interfering with their peaceful possession. The Suit and the Appeal A.S. No.67 of 1997, against the same were dismissed. Execution Appeal No.996 of 1997 preferred by the Plaintiffs in Execution Petition No. 203 of 1997 was also dismissed. The Plaintiffs thereafter preferred O.S. No.96 of 1999 for redemption of mortgage under Order XXXIV Rule 1 of the Code of Civil Procedure (hereinafter referred to as 'the CPC'), now impleading the Bank as Defendant also. The Suit was decreed on 27.02.2002, but reversed in appeal by the auction purchaser, Defendant No.2 holding that consequent to the auction sale and issuance of sale certificate along with possession delivered, Defendant Nos.3 and 4 were no more the owners of the property, and there stood no debt to be redeemed on the date of filing of the Suit. The Plaintiffs were thus not purchasers of the equity of redemption, dismissing the Suit. The High Court in Second Appeal held that the right to redemption in the Plaintiffs, by stepping into the shoes of the Mortgagor under Section 59A of the Transfer of Property Act, 1882 (hereinafter referred to as 'the Act') stood extinguished in view of the final decree for foreclosure in O.S. No.68 of 1987 filed by the Bank, Defendant No.1, and the consequent sale certificate issued in favour of the auction purchaser, Defendant No.2.

4. Sri B. Adinarayana Rao, Learned Senior Counsel appearing for the Appellants, contended that a purchaser of a mortgaged property had the right to redeem the same either in whole or in part. The purchaser stepped into the shoes of his predecessors-in-title, and therefore, had the same rights which his predecessor had in title before the purchase. The Plaintiffs having purchased the property and come in possession of the same, before institution of the Suit for foreclosure by the Bank or sale of the mortgaged property, had necessarily to be impleaded as party defendants under Order XXXIV Rule 1, CPC in such Suit. In absence of the same, any decree passed in such a Suit was not binding on the Plaintiffs and does not affect their right to redemption. Once a mortgage is created, it remains a mortgage till such time that it is not redeemed. Under Section 91 of the Act, besides the mortgagor, any person who has interest in the property mortgaged or in the right to redeem the same can also sue for redemption. The Plaintiffs were, therefore, competent to maintain the Suit. Reliance was placed on Nagubai Ammal & Ors. v. B. Shama Rao & Ors., AIR 1956 SC 593, Mangru Mahto v. Shri Tahkur Taraknathji, (1967) 3 SCR 125 and Mhadagonda Ramgonda Patil & Ors. v. Shripal Balwant Rainade & Ors., AIR 1988 SC 1200.

5. It was further submitted that notwithstanding the Suit of the Bank having been decreed against Defendants 3 and 4, the rights of the Plaintiffs as purchasers of the equity of redemption remained unfettered under Section 60 and Section 91 of the Act till the expiry of the limitation period of 30 years. The Suit for redemption having been filed within limitation, no questions of equity arise in favour of the auction purchaser. There could be no clog on the equity of redemption and neither could waiver be inferred to defeat the right to redemption. Reliance was placed on Mademsetty Satyanarayana v. G. Yelloji Rao, (1965) 2

SCR 221 and Shivdev Singh v. Sucha Singh, (2000) 4 SCC 326. The fact that earlier a Suit may have been filed seeking permanent injunction only was no bar to a subsequent Suit for redemption, as even a second Suit for redemption was not barred, relying on Bhaiya Raghunath Singh & Others v. Musammat Hansraj Kunwar & ors., AIR 1934 PC 36.

6. Sri Kailash Vasudev, Learned Senior Counsel appearing for the auction purchaser, Defendant No.2, submitted that the sale in its favour stood concluded, sale certificate issued along with possession delivered, long before the Suit for redemption was filed. There existed no mortgage to be redeemed on the date of institution of the Suit. Referring to the proviso to Section 60, it was submitted that the right of redemption stood extinguished by reason of the Decree in O.S. No.68 of 1987 and the consequent sale certificate. Reliance was placed on Mrutunjay Pani & Anr. v. Narmada Bala Sasmal & Anr., AIR 1961 SC 1353, Mhadagonda Ramgonda Patil (supra) and B. Arvind Kumar v. Government of India & Ors., (2007) 5 SCC 745. Despite being aware of the mortgage and auction sale, the Plaintiffs did not take steps for redemption of the mortgage and offer to deposit the mortgage money at the first instance. O.S. No.165 of 1994 was filed seeking permanent injunction only, without even impleading the Bank as Defendant or questioning the auction sale much less the sale certificate. The Suit was not filed bonafide. The sale deed of the Plaintiffs did not mention the existing mortgage, despite their being aware of the same. Under Order XXXIV CPC, the mortgagor can offer to pay at any time but before confirmation of sale. The sale having been confirmed before institution of the Suit for redemption, no right of redemption of the mortgage survived. Reliance upon Order XXXIV CPC or Section 60 read with Section 91 of the Act, in the facts of the case, is misconceived. Reliance was placed on Pawan Kumar v. Jagdeo, AIR 1947 Nagpur 210. The auction purchaser has been in physical possession of the Suit property since 02.07.1997. The concurrent findings of two Courts, therefore, call for no interference.

7. Learned Counsel for the Bank, Defendant No.1, adopting the arguments of Shri Vasudev, additionally submitted that it had not been impleaded as a party in the Suit filed in 1994, and neither had the Plaintiffs at any time offered to deposit the money before confirmation of sale despite claiming to be in possession. The sale certificate was never challenged. It is not possible that they were unaware of the mortgage at the time of purchase.

8. We have considered the submissions on behalf of the parties. Sections 60 and 91 of the Act, in their relevant extract, read as follows:-

“60. Right of mortgagor to redeem:-

At any time after the principal money has become due, the mortgagor has a right, on payment or tender, at a proper time and place, of the mortgage-money, to require the mortgagee (a) to deliver to the mortgagor the mortgage-deed and all documents relating to the mortgaged property which are in the possession or power of the mortgagee, (b) where the mortgagee is in possession of the mortgaged property, to deliver possession thereof to the mortgagor, and (c) at the cost of the mortgagor either to re-transfer the mortgaged property to him or to such third person as he may direct, or to execute and (where the mortgage has been effected by a registered instrument) to have registered an

acknowledgement in writing that any right in derogation of his interest transferred to the mortgagee has been extinguished:

PROVIDED that the right conferred by this section has not been extinguished by the act of the parties or by decree of a court.

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91. Persons who may sue for redemption Besides the mortgagor, any of the following persons may redeem, or institute a suit for redemption of, the mortgaged property, namely,-

(a) any person (other than the mortgagee of the interest sought to be redeemed) who has any interest in, or charge upon, the property mortgaged or in or upon the right to redeem the same;"

9. The right to enforce a claim for equity of redemption is a statutory right under the Act. It necessarily presupposes the existence of a mortgage. The right to redeem can stand extinguished either by the act of the parties or by operation of the law in the form of a Decree of the Court under the proviso to Section 60 of the Act. The Appellants being purchasers of the equity of redemption can have or claim no better rights under Section 91, than what their predecessor-in-interest had under Section 60 of the Act.

10. O.S. No. 68 of 1987 preferred by the Bank for foreclosure of the mortgage, on failure of Defendants 3 and 4 to repay the loan, was Decreed on 28.02.1991. The property was put to auction in Execution Case No.197 of 1991. Auction sale was held on 05.09.1993. Defendant No. 2, was the highest bidder.

11. The Plaintiffs then preferred O.S. No.165 of 1994 claiming possession of the Suit lands, seeking permanent injunction against any interference by the Defendant No. 2 to 4 acting in collusion. The Bank was not impleaded as a party defendant. In his written statement, Defendant No.2 made full disclosure about the mortgage, the Suit filed by the Bank, and the consequent auction sale. At this stage, sale certificate had not been issued in favour of Defendant No.2. The Plaintiffs, despite the aforesaid, did not take any steps to either amend the relief sought in the Suit, much less seek redemption of the mortgaged property by offering to deposit the mortgage dues or even to set aside the auction sale under Order XXXIV Rule 1, CPC. The Suit was dismissed holding that the Plaintiffs had failed to establish possession, and in view of the order in the Suit for foreclosure filed by the Bank culminating in the auction sale. The appeal, A.S. No. 67 of 1997 arising from the same was also dismissed. The behaviour of the Plaintiffs thereafter necessarily raises issues of waiver by conduct with regard to their right to redemption as claimed notwithstanding the subsistence of the period of limitation to seek redemption. In Madamsetty Satyanarayan (supra), on the issue of waiver it was observed as follows:-

"....But they must be such that the representation by or the conduct or neglect of the plaintiffs is directly responsible in inducing the defendant to change his position to his prejudice or such as to bring about a situation when it would be inequitable to give him

such relief.”

12. Sale certificate was issued to Defendant No.2 on 02.07.1997 followed by delivery of possession in Execution Petition No. 203 of 1997. The objection of the Plaintiffs in Execution Appeal No. 996 of 1997 was also rejected. Only thereafter the Plaintiffs instituted O.S. No. 96 of 1999 for redemption of the mortgage under Order XXXIV Rule 1, CPC contending that they were willing to deposit the mortgage dues and that the Decree in O.S. No. 68 of 1987 was not binding on them because they had not been impleaded as party in the same. In cross examination, the Plaintiffs acknowledged having been informed by their lawyer at the time of purchase, of the mortgage created by deposit of title deeds, by Defendants 3 and 4.

13. The Decree for foreclosure in O.S. 68 of 1987, and the subsequent auction sale followed by issuance of sale certificate, extinguished the right to redemption by reason of the proviso to Section 60. The Plaintiffs having interest in the mortgaged property through their predecessor-in-interest and in the right to redeem the same were competent to do so under Section 91 of the Act, but subject to the limitation under the proviso to Section 60. Their rights could not be any superior or separate from that of their predecessor-in-interest. If the right to redeem stood extinguished by operation of the law under the proviso to Section 60 of the Act prior to the period of limitation, it cannot be contended that the right could nonetheless be enforced anytime before the expiry of limitation of 30 years. If there remained no subsisting mortgage, it is difficult to fathom what was to be redeemed.

14. No challenge was laid out in O.S. No.96 of 1999, either to the auction sale or to set aside the sale certificate issued to Defendant No.2. The reliance upon Order XXXIV Rule 1, CPC is completely misconceived as under Rule 8 the right to redemption survived only till confirmation of the sale and not thereafter. The Suit was instituted only after issuance of the sale certificate and the question for redemption had become irrelevant.

15. The issues regarding maintainability of a second suit for redemption or clog on the equity of redemption are not relevant to the present controversy and need not be deliberated upon. Shivdev Singh (supra), therefore, has no relevance in the present context.

16. The extinguishment of the right to redeem by virtue of the proviso to Section 60 of the Act fell for consideration in L.K. Trust v. EDC Ltd., (2011) 6 SCC 780, observing as follows :-

“55. Rejecting the appeal, this Court in Narandas Karsondas case has held that the right of redemption which is embodied in Section 60 of the Transfer of Property Act is available to the mortgagor unless it has been extinguished by the act of the parties or by the decree of a court. What is held by this Court is that, in India it is only on execution of the conveyance and registration of transfer of the mortgagor’s interest by registered instrument that the mortgagor’s right of redemption will be extinguished but the conferment of power to sell the mortgaged property without intervention of the court, in a mortgage deed, in itself, will not deprive the mortgagor of his right of redemption.....”

17. The effect of the proviso to Section 60 again fell for consideration in Rukmini Amma & Ors. v. Rajeswary [dead] through LRs., (2013) 9 SCC 121, wherein it was held:-

“29. In the above said background the factum of the filing of the suit nearly after 30 years of the mortgage was very relevant. If really the respondents were serious about the consequences which flowed from the public auction-sale or were really aggrieved of the sale effected under Ext. B-5, the respondents should have been prompt in taking any steps for redressal of their grievance in order to save the property mortgaged. Having failed to evince any such keen interest in protecting their property, it is too late in the day for the respondents to have approached the Court at their own sweet will i.e. after nearly 30 long years of the mortgage and file a simple suit for redemption without taking any steps to question a sale which was effected by way of public auction....”

18. The extinguishment of the right to redeem under the proviso to Section 60 of the Act was again considered in *Embassy Hotels Pvt. Ltd. v. Gajaraj & Co. & ors.*, (2015) 14 SCC 316 observing as follows:

“15.... In such circumstances, in our considered view, the only option was to directly challenge the court auction of the suit property and the issuance of sale certificate. The learned counsel for the appellant has correctly submitted that as a result of judgment of this Court dated 20-2-1990 (*P.K. Unni v. Nirmala Industries*, 1990 (2) SCC 378) the order of the executing court dated 7-5-1983 got confirmed and the sale certificate obtained finality. As a sequel, the ownership of the suit property or at least a major part of it got transferred from the first defendant to the auction-purchaser the appellant. In such a situation, it is not possible to accept the contention on behalf of the plaintiff that the first defendant being a mortgagor will continue to have a right of redemption although the sale of mortgaged property to a third party through a court auction became final.”

19. In *Mrutunjay Pani (supra)*, it was observed as follows :-

“(1) The governing principle is “once a mortgage always a mortgage” till the mortgage is terminated by the act of the parties themselves, by merger or by order of the court.

(2) Where a mortgagee purchases the equity of redemption in execution his mortgage decree with the leave of court or in execution of a mortgage or money decree contained by a third party, the equity of redemption may be extinguished; and, in that event, the mortgagor cannot sue for redemption without getting the sale set aside...”

20. In *B. Arvind Kumar (supra)*, the proviso to Section 60 of the Act fell for consideration and it was observed:

“...The proviso specifically says that the right of redemption conferred on the mortgagor under Section 60 could be extinguished by the act of parties or by decree of the court.

The sale deed was executed in favour of the auction-purchaser on 10-11-1981 and the appellants in their suit for redemption had not obtained any interim order staying the operation of the auction-sale or the execution of any sale deed and in the absence of (Sic thereof) such right of redemption would be extinguished.”

21. In *Nagubai (supra)*, the proviso to Section 60 of the Act did not fall for consideration.

Likewise, Mangru Mahto (supra) dealt with Order XXXIV, CPC and Section 52A of the Act with regard to a purchase pendente lite which is again distinguishable.

22. In Mhadagonda Ramgonda Patil (supra), it was observed that the mortgagor has a right of redemption even after sale has taken place pursuant to the final decree, but before the confirmation of sale.

23. The aforesaid discussion leads to the conclusion that the Plaintiffs lost the right to sue for redemption of the mortgaged property by virtue of the proviso to Section 60 of the Act, no sooner that the mortgaged property was put to auction sale in a suit for foreclosure and sale certificate was issued in favour of Defendant No.2. There remained no property mortgaged to be redeemed. The right to redemption could not be claimed in the abstract.

24. We find no reason to interfere with the order of the High Court. The appeals thus stand dismissed.

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(2017) 8 SCC 272