

K. PARAMESWARAN PILLAI (DEAD)

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v.

K. SUMATHI @ JESIS JESSIE JACQUILINE & ANR.

SEPTEMBER 7, 1993

[KULDIP SINGH AND K. RAMASWAMY, JJ.]

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Civil Procedure Code 1908—Order XXXIV, Rules 7 and 8, 2(2), 4(2), 3, 5(1)—Redemption of Usufructuary Mortgage—Final decree for redemption not passed—Held, Mortgagor may redeem mortgage at any time before final decree is passed or sale made in furtherance thereof is confirmed—Mortgagor may seek redemption even by way of separate suit—Rules 2(2), 4(2), 3, 5(1).

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Limitation Act, 1963—Article 137 of Schedule I—Laches—Held, Court has power and jurisdiction to entertain application for final decree till passing of the final decree and its execution or till remedy is barred by limitation.

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A usufructuary mortgage was created by one 'K' in favour of appellant's is predecessor in interest in respect of a house. In 1966, the mortgagor created a second mortgage in favour of the appellant with a direction to redeem the first mortgage and to remain in possession for 10 years. In the redemption suit filed by the appellant, a preliminary decree was passed directing him to deposit Rs. 13,467.15 in the Court on or before May 6, 1970. On appeal, the appellant's liability was increased. On January 11, 1972 he filed an interlocutory application to pass final decree depositing only the amount quantified in the preliminary decree. On second appeal by the mortgagor, the decree was modified enhancing the liability. In the meantime, a suit for title filed by one T. impleading the mortgagor, the appellant and others was decreed by the Trial Court but this was set aside by the High Court. In the meanwhile, the appellant got interlocutory application filed by him dismissed and withdrew the deposited amount, while the respondent initially purchased the equity of redemption of mortgage from the mortgagor, and later the hypotheca (the house property) by a registered sale deed dated February 1, 1979, and thus became the mortgagor.

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The appellant filed an interlocutory application on February 5, 1979 to pass final decree in the redemption suit O.S. 400 of 1966, depositing a sum of Rs. 14,957.85. Which the respondent resisted mainly on the grounds

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A of bar of limitation and non-maintainability. She also filed an independent suit for redemption of the mortgages or alternatively for foreclosure of the appellants' redemption suit.

B The trial court granted final decree which was affirmed on appeal. The High Court set aside the final decree as the appellant had withdrawn the interlocutory application unconditionally and without leave of the Court. It also held that the redemption suit filed by the respondent operated as a bar to the maintainability of the application for final decree. Hence the appeal by the mortgagee.

C Dismissing the appeal, this Court

D HELD : 1. By a reading of Order XXXIV, Rules 7 and 8, the legislative intent is clear that the plaintiff has been empowered to make an application either for foreclosure or sale of a hypotheca or redemption of any other mortgage *except usufructuary mortgage*. The plaintiff need not make any application for extension of time fixed in the preliminary decree. The outer limit for an usufructuary mortgagor for making payment of the amount due under the preliminary decree is passing of the final decree or the date of confirmation of the sale. At any time before passing the final decree or confirmation of the sale held in pursuance of the final decree the plaintiff usufructuary mortgagor has been given right to make payment of the redemption money due under preliminary decree and the subsequent liability incurred thereon. [180-C-F]

F *Badapuratti v. Valiyaraja*, ILR 25 Mad 300 at 307 and *Motilal v. Thakur Ujagar Singh*, A.I.R. (1928) PC 137, referred to.

G 2. In the case of preliminary decree for redemption of usufructuary mortgage no limitation begins to run until deposit is made though there is a conditional preliminary decree and default was committed by the mortgagor for compliance thereof. Order XXXIV Rule 8(3)(b) expressly excludes the right to the mortgagee to apply for foreclosure or sale or redemption in the case of usufructuary mortgage. Necessary consequence is that so long as the right subsists, though there is delay in compliance of the condition imposed in the preliminary decree, the right of redemption to the mortgagor is not lost. It will be barred only on expiry of the period of limitation prescribed under the Limitation Act. [pp. 182-D-E; 183-A]

3. The right to redemption of the first mortgage enured to the respondent mortgagor. So long as the final decree for redemption is not passed, at any time before final decree is passed or its sale made in furtherance thereof is confirmed, it is open to the respondent mortgagor to redeem it. So long as the remedy for redemption is not lost the mortgagor would avail of and seek redemption of the mortgage, even by separate suit. [183-D-E] A
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4. The mere dismissal of the first application for non-prosecution and withdrawal of the redemption money deposited thereunder *per se* creates no bar to entertain second application. Till date of passing the final decree and execution or till its remedy is barred by limitation under Article 137 of the Schedule to the Limitation Act, 1963 the Court has power and jurisdiction to entertain the application to pass the final decree. At any time before the remedy is barred, it is open to the plaintiff to deposit the redemption money under the preliminary decree. [183-H; 184-A-B] C

5. In the instant case, the preliminary decree fixed the outer limit for deposit of the redemption money as on May 6, 1970 and the same was not extended by an order of the Court and the interlocutory application was filed for passing the final decree on April 5, 1979 by which time the remedy to pass final decree has been barred by limitation. [183-F-G] D

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 8 of 1986. E

From the Judgment and Order dated 4.10.85 of the Madras High Court in S.A. No. 1851 of 1982.

G. Viswanatha Iyer, S. Balakrishnan, Mrs. Revathy Raghavan and S. Prasad for the appellant. F

A.T.M. Sampath, P. Kesava Pillai and M.K.D. Namboodri for the Respondents.

The Judgment of the Court was delivered by G

K. RAMASWAMY, J. This appeal by special leave arises against the judgment of the Madras High Court in Second Appeal No. 1851 of 1982 dated October 4, 1985. The appellant-plaintiff now becomes puisne mortgagee. The respondent-5th defendant transposes as mortgagor. The facts are may; proceedings are countless and orders are numerous creating H

- A bundle of confusions. To clear the cloud and to have clarity, it is necessary, after weeding out the irrelevant, to state the material facts as under:

The hypothica belongs to a house known as T.K.M. One Krishnan, the eldest male member of that house, created on October 29, 1947 an usufructuary mortgage in favour of one Laxminarain Pillai and appellant is one of the successors in interest. Krishnan created a second mortgage on Feb. 12, 1966 in favour of the appellant with a direction to redeem the first mortgage and to remain in possession for 10 years. On its footing the appellant laid O.S. No. 400 of 1966 for redemption of the mortgage. The trial court while granting preliminary decree directed to deposit into the court on or before May 6, 1970 a sum of Rs. 13,467.15 Paise. The mortgagor and the mortgagee filed first appeals and the appeal of the mortgagor was allowed increasing the appellant's liability and dismissed the appellant's appeal. On January 11, 1972 the appellant filed I.A. No. 58 of 1972 to pass final decree depositing only the amount quantified in the preliminary decree. On second Appeal by the mortgagor, the decree was modified enhancing the liability. In the meanwhile one T. filed a suit impleading Krishnan, the appellant and all others claiming title to the property. Though the trial court decreed the suit, the High Court allowed the appeals of the appellant, Krishnan and others and set aside the trial court's decree on Feb. 17, 1978. In the meanwhile the appellant got dismissed his I.A. No. 58/72 and withdrew the amount deposited, while the respondent purchased initially the equity of redemption of the mortgages from Krishnan and later on purchased the hypothica by a registered sale deed dated Feb. 1, 1979. Thus she became mortgagor. The appellant filed I.A. No. 549 of 1979 on Feb 5, 1979 to pass final decree in O.S. No. 400 of 1966 depositing a sum of Rs. 14,957.85 which the respondent resisted *inter alia* on two main grounds, namely, bar of limitation and non-maintainability. The respondent also filed an independent suit for redemption of the mortgages or alternatively for foreclosure of appellants' redemption suit. The trial court granted final decree which was affirmed on appeal. The High Court without going into the question of limitation, accepted the respondent's contention that appellant is not entitled to file the Second application as he had withdrawn I.A. No. 58/72 unconditionally and without leave of the court and set aside the final decree. It also found that the redemption suit filed by the respondent operates as a bar to the maintainability of the application for final decree.

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Sri Vishwanatha Iyer, appellant's learned senior counsel contended that the approach of the High Court is clearly illegal. Till final decree is passed, the appellant is entitled to deposit the redemption money. No limitation is prescribed to file an application for redemption of usufructuary mortgage. The application is in time from the date of the second appeal. The withdrawal of earlier application is neither a bar for the second application nor of the redemption suit of the respondent. Sri Sampath, the learned counsel for the respondent contended that the trial court fixed the time for depositing the quantified redemption amount; the appellant could file an application for passing the final decree within three years from May 7, 1970. The appellant neither sought time for extension, nor filed it within three years from that date. The appellant, also having withdrawn the first application and the amount unconditionally, without leave of the court, is not entitled to file a second application. The High Court, therefore, is right in dismissing the application. In any event the application is barred by limitation. To resolve the legal tangle, it is necessary to set out the relevant provisions of Order 34 Rule 7 & 8 C.P.C., 1908, which provides thus :

7. "(1) In a suit for redemption, if the plaintiff succeeds, the Court shall pass a preliminary decree -

(a) ordering that an account be taken of what was due to the defendant at the date of such decree for -

(i) principal and interest on the mortgage,

(ii) the costs of suit, if any, awarded to him, and

(iii) other costs, charges and expenses properly incurred by him upto that date, in respect of his mortgage-security; together with interest thereon; or

(b) declaring the amount so due at that date; and

(c) directing -

(i) if the plaintiff pays into the court the amount so found or declared due on or before such date as the Court may fix within six months from the date on which the court confirms and countersigns the account

- A (2) The court may, on good cause shown and upon terms to be fixed by the court, from time to time, at any time before the passing of a final decree for foreclosure or sale, as the case may be, extend the time fixed for the payment of the amount found or declared due under sub-rule (1) or of the amount adjudged due in respect of subsequent cost, charges, expenses and interest.
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Under Rule 8 Sub-rule (1) procedure has been provided for passing final decree thus :

- C "(1) Where, before a final decree debarring the plaintiff from all rights to redeem the mortgaged property has been passed or before the confirmation of a sale held in pursuance of a final decree passed under sub-rule (3) of this rule, the plaintiff makes payment into Court of all amounts due from him under sub-rule (1) of rule 7, the court shall, on application made by the plaintiff in this behalf, pass a final decree, or, if such decree has been passed, an order -
- D (a) ordering the defendant to deliver up the documents referred to in the preliminary decree, and, if necessary -
- (b) ordering him to re-transfer at the cost of the plaintiff the mortgaged property as directed in the said decree, and also if necessary -
- E (c) ordering him to put the plaintiff in possession of the property.

Sub-rule (2) is not relevant, hence omitted.

- F Sub-rule (3) provides thus :

"(3) Where payment in accordance with sub-rule (1) has not been made, the court shall, on application made by the defendant in this behalf -

- G (a) in the case of a mortgage by conditional sale or of such an anomalous mortgage as is hereinbefore referred to in rule 7, pass a final decree declaring that the plaintiff and all persons claiming under him are debarred from all rights to redeem the mortgaged property and also if necessary, ordering the plaintiff to put the defendant in possession of the mortgaged property; or
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(b) in the case of any other mortgage, not being a usufructuary mortgage, pass a final decree that the mortgaged property or a sufficient part thereof be sold, and the proceeds of the sale (after deduction therefrom of the expenses of the sale) be paid into court and applied in payment of what is found due to the defendant, and the balance, if any, be paid to the plaintiff or other persons entitled to receive the same." A B

Order 34 Rule 2(2), in a suit for foreclosure; Rule 4(2), in a suit for sale and Rule 7(2); in a suit for redemption; provides that the court may on showing good cause, extend time fixed in the preliminary decree, from time to time, upon such terms to be fixed, at any time before the final decree is passed under Order 34 Rule 3; Rule 5(1) and Rule 8(3) respectively for the payment of the amount found or declared due. The outer limit fixed by these rules for payment of redemption money is the extended time by order of the court in the interregnum or passing the final decree. In *Badapuratti v. Valiyaraja*, ILR 25 Madras 300 at 307, a full bench of five judges held that the right of redemption granted in the preliminary decree subsists till the final decree is made. The right of redemption is only extinguished when an order is made in that behalf (within sec. 93 of Transfer of Property Act) under the relevant clauses in Order 34. In *Motilal v. Thakur Ujagar Singh*, AIR (1928) P.C. 137, the Judicial Committee held that under Order 34 Rule 3(2) suit for foreclosure, the plaintiff has to show sufficient cause for extension of time. In its absence the final decree would follow. In that case neither an application for extension of time fixed in the preliminary decree was sought for nor payment was made. He offered to pay, if the time was extended. Rejecting the request, final decree was passed. In execution an objection was raised and the High Court while holding that no good cause was shown for extension, allowed time for making payment on the prevailing notions of belief by the mortgagors that time could be extended automatically. It was negatived by the Privy Council and the appeal was allowed. D E F

Under Order 34 Rule 7(2), the court may on good cause shown and upon terms, to be fixed by the court, from time to time at any time before passing of a final decree for *foreclosure or sale*, as the case may be, extend time fixed for the payment of the amount found or declared due under sub-rule (1), or of the amount adjudged due in respect of subsequent cost, G H

- A charges, expenses and interest. Sub-rule (3) of Rule 8 postulates that on the default committed by the plaintiff, the defendant has been invested with a right to make an application to pass final decree. Clause (a) of sub-rule (3) of Rule 8 covers the field of passing final decree of a mortgage by conditional sale or of such an anomalous mortgage declaring that the plaintiff and all persons claiming under him are debarred from all rights to redeem the mortgaged property. Clause (b) covers cases of *"any other mortgage" but not being usufructuary mortgage* to pass a final decree that the mortgage property or a sufficient part thereof be sold and the sale proceeds, after deducting therefrom the expenses of sale, be paid into court and the sale proceeds be applied to discharge the mortgaged debt, etc. The legislative intent, thereby, is clear that the plaintiff has been empowered to make an application either for foreclosure or sale of a hypotheca or redemption of any other mortgage except usufructuary mortgage. By operation of sub-rule (1) of Rule 8 where before a final decree debarring the plaintiff from all rights to redeem the mortgaged property has been
- D passed or before the confirmation of a sale held in pursuance of a final decree passed under sub-rule (3) of Rule 8, the plaintiff makes payment into court of all amounts due from him, the final decree is discharged. The resultant operation of the law would be that in the case of usufructuary mortgage, the plaintiff need not make any application for extension of time
- E fixed in the preliminary decree. The mortgagee/defendant has no right to make an application to foreclose the right of the plaintiff or sale of hypotheca declaring that the plaintiff has been debarred from making payment in court or to proceed further. At any time before passing the final decree or confirmation of the sale held in pursuance of the final
- F decree the plaintiff usufructuary mortgagor has been given right to make payment of the redemption money due under preliminary decree and the subsequent liability incurred thereon. The outer limit for making such payment is passing of the final decree or confirmation of the sale made in furtherance thereof. The final decree for foreclosure or sale or redemption in relation to other mortgages, the right to payment has been hedged with
- G the duty to deposit the money declared or quantified in the preliminary decree within the time specified under the preliminary decree or extended period from time to time till final decree debarring the plaintiff from redemption etc. is passed. The outer limit for an usufructuary mortgagor for making payment of the amount due under the preliminary decree,
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thereby, is passing of the final decree or the date of confirmation of the sale. A

The appellant is one of the successors in interest of the mortgages of the usufructuary mortgagee. Consequent to subrogation, the appellant became a mere puisne mortgagee and the respondent, after the preliminary decree, transposed herself to be mortgagor. The preliminary decree declared thus: "Clause 2:. And it is hereby ordered and decreed as follows:- B

(1) That the plaintiff do pay into court on or before the 6th day of May, 1970 or any latter date upto which time for payment may be extended by the court, the said of sum Rs. 13,467.15. C

(2) That, on such payment and on payment thereafter before such date as the court may fix, of such amount as the court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable under Rule 10, together with such subsequent interest as may be payable under Rule 11 of Order 34, of the First Schedule to the C.P.C. the defendants shall bring into court all documents in his possession or power relating to the mortgaged property in the plaint mentioned and all such documents shall be delivered over to the plaintiffs or to such person as he appoints and the defendants shall, if so required, recovery or retransfer the said property free from the mortgage and clear of and from all incumbrances created by the defendants or any person claiming under him or any person under whom he claims and shall if so required, deliver up to the plaintiff acquire and peaceful possession of the said property. D E

(3) And it hereby further ordered and decreed that, in default of payment as aforesaid, the defendants may apply to the court for a final decree for the *sale of the mortgaged property; and on such application being made, the mortgaged property or a sufficient part thereof shall be directed to be sold;* and for the purpose of such sale the defendant shall produce before the court or such officer as it appoints all documents in his possession if power relating to the mortgaged property. F G

(4) And it is hereby further ordered and decreed that the money realised by such sale shall be paid into court and shall be duly applied (after deduction therefrom of the expenses of the sale) in payment of the amount payable to the defendants under this decree and under any further orders that may be passed in this suit and in payment of any amount which H

A the court may adjudge due to the defendant in respect of such costs of the suit, and such costs, charges and expenses as may be payable under Rule 10, together with such subsequent interest as may be payable under rule 11 of Order 34 of the First Schedule to the C.P.C. and that balance, if any, shall be paid to the plaintiffs or other persons entitled to receive the same.

B (5) And it is hereby further ordered and decreed and that if the money realised by such sale shall not be sufficient for payment in full of the amount payable to the defendants aforesaid, the defendants shall be at liberty (where such remedy is open to him under the terms of his mortgage and is not barred by any law for the time being in force) to apply for a
C personal decree against plaintiffs or the amount of the balance; and that the parties are at liberty to apply to the court from time to time as they may have occasion and on such application or otherwise the court may give such directions as it thinks fit."

D In the case of usufructuary mortgage sub-rule (b) of rule (3) of Rule 8 expressly excludes the right to the mortgages to apply for foreclosure or sale or redemption. Necessary consequence is that so long as the right subsists, though there is delay in compliance of the condition imposed in the preliminary decree, the right of redemption to the mortgagor is not lost. It will be barred only on expiry of the period of limitation prescribed
E under the Limitation Act. The reasons are obvious. Order 34 rule 8(3) does not give any right to the mortgagee but the right is given only to the mortgagor, to seek redemption of the usufructuary mortgage in a decree under rule 8(3) of order 34. The mortgagee, having been in possession and enjoyment of the hypotheca is not disabled by the preliminary decree. On
F the other hand the liability continues to subsist against the mortgagor. Therefore, it is upto the mortgagor to redeem the mortgage. Till then his liability under mortgage continues to run on the estate. It is, therefore, clear that the limitation to file an application under Order 34 Rule 8(1) to pass a final decree for redemption, other than the preliminary decree for redemption of usufructuary mortgage, starts running and continues to run
G its course from the date of expiry of the period fixed in the preliminary decree, unless it is stayed or suspended or the time prescribed in the preliminary decree is extended by an order of the court. In its absence on expiry of the limitation of three years from the date fixed in the preliminary decree is expired under Art. 137 of the Schedule to Limitation Act 1963
H (Act 181 of Schedule 2 of Old Act), the plaintiff is debarred to enforce the

right to pass the final decree. But in the case of preliminary decree for redemption of usufructuary mortgage no limitation begins to run until deposit is made though there is a conditional preliminary decree and default was committed by the mortgagor for compliance thereof. A

The question, therefore, is whether the application filed by the appellant is barred by limitation. As seen, the appellant is only puisne mortgagee for redemption of the first usufructuary mortgage with a view to secure his right to remain in possession for 10 years in terms of the conditions in the second mortgage. The preliminary decree extracted above does show the real legal character of the appellant as mortgagee and it is one of simple decree for redemption and in default for sale of the hypotheca. As already held in a suit for redemption of usufructuary mortgage the mortgagee has no right to bring the hypotheca to sale or to foreclose the mortgagor debarring the mortgagor from redemption of usufructuary mortgage. On the other hand the right to redemption of the first mortgage enured to the respondent mortgagor. So long as the final decree for redemption is not passed, at any time before final decree is passed or sale made in furtherance thereof is confirmed, it is open to the respondent mortgagor to redeem it. Instead of availing the remedy under Order 34 Rule 8(1) the appellant filed a separate suit. So long as the remedy for redemption is not lost the mortgagor would avail of and seek redemption of the mortgage, even by separate suit. B C D E

Under Art. 137 of the Schedule to the Limitation Act 1963 (Act 181 of Schedule II of Old Act) three years period began to run when the right to apply accrued which began on May 7, 1970. The preliminary decree was drafted in Form No. 7-C (preliminary for redemption where on default of payment by mortgagor a decree for sale is passed). The preliminary decree since fixed the outer limit for deposit of the redemption money as on May 6, 1970 and the same was not extended by an order of the court and I.A. No. 549 of 1979 was filed for passing the final decree on April 5, 1979 by which time the remedy to pass final decree has been barred by limitation. F G

The proceeding in the preliminary decree does not get terminated by dismissal of I.A. No. 58 of 1972, on June 26, 1975 or for non-prosecution. Till date of passing the final decree and executed or till its remedy is barred by limitation under Art. 137 of the schedule to the Limitation Act, 1963 the court has power and jurisdiction to entertain the application to H

- A pass the final decree. At any time before the remedy is barred, it is open to the plaintiff to deposit the redemption money under the preliminary decree. The dismissal of the earlier application or non-prosecution, therefore, does not *per se* bars the right of the plaintiff. But if remedy to enforce preliminary decree for the redemption is barred by the limitation, there-
- B after the right remains unenforceable. The deposit, therefore, is nonest and the court cannot proceed to pass final decree as the remedy is lost. Therefore, the mere dismissal of the first application for non-prosecution and withdrawal of the redemption money deposited thereunder *per se* creates no bar to entertain second application. Equally instead of availing the remedy of depositing the redemption amount in the pending proceedings under Rule 8(1) of Order 34, the respondent instituted an independent suit for redemption. Per force, though it does not operate as bar to maintain the application to pass final decree, court cannot proceed further with the application. Otherwise conflicting decisions would arise giving rise to multiplicity of proceedings. The court would stop to proceed further in the matter. In view of finding that the application to pass final decree is
- D barred by limitation, the trial court has no jurisdiction to proceed with the application under Rule 8(3) of Order 34 and to pass final decree. Accordingly, though for different reasons, the decree of the High Court, in the Second Appeal, is legal and does not warrant interference. The appeal is dismissed but without costs.

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U.R.

Appeal dismissed.