

NARAYAN DEORAO JAVLE (DECEASED) THROUGH LRS. A

v.

KRISHNA & ORS.

(Civil Appeal No. 4726 of 2021)

AUGUST 17, 2021 B

[HEMANT GUPTA AND A. S. BOPANNA, JJ.]

Transfer of Property Act, 1882: ss. 60, 59A – Redemption of the mortgaged property – Right of – On facts, non-payment of the mortgage amount by the original mortgagors to the mortgagee – Suit for recovery of the mortgage amount by mortgagee against original mortgagors – Appellant had purchased a mortgaged property from original mortgagor, however, not impleaded as party in the suit – Due to the non-payment of the mortgage amount, appellant's right of redemption was foreclosed and after the execution of the decree, mortgagee took possession of the property from the appellant – Appellant then filed suit against original mortgagors and mortgagee seeking right of redemption of the mortgaged property – Trial court dismissed the suit, however the first appellate court allowed the same – In appeal, the High Court dismissed the suit for redemption of the mortgage land – On appeal, held: Equity of redemption is a right subsidiary to the right of ownership – Appellant was a necessary party in a suit for foreclosure filed by the mortgagee after the purchase and was required to be impleaded – Since the appellant was not impleaded as a party, appellant is not bound by the decree passed in the suit for foreclosure – More so, decree in a suit for foreclosure was a result of collusion between the original mortgagors and the mortgagee so as to frustrate rights of a purchaser from the mortgagor – Thus, the decree passed in the suit for foreclosure was void and non-est – Such decree of foreclosure would not extinguish the right of the mortgagor to redeem land in view of the fact that he was not impleaded as a party in the suit though he has purchased part of the mortgaged property by virtue of registered sale deed – Thus, the judgment of the High Court is set aside and that of the first appellate court is restored.

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- A *Redemption – Equity of Redemption – Meaning of – Held:*
Equity of redemption means a right to redeem the property based upon equitable principles – Right of redemption recognised under the Act is a statutory and legal right which cannot be extinguished – Equity of redemption is a right which is subsidiary to the right of ownership.
- B **Allowing the appeal, the Court**
- HELD: 1.1 The plaintiff has purchased property vide registered sale deed on 18.05.1964, much before the filing of the suit for foreclosure in the year 1965. The possession of the plaintiff was recorded in the revenue record after the purchase of the property, but still, the mortgagee chose not to implead the subsequent purchaser. The original mortgagor who has mortgaged the property had no subsisting title, interest or right in the property conveyed, therefore, the factum of compromise between the mortgagor and the mortgagee is ineffective and not enforceable against the purchaser i.e., the plaintiff. Once the plaintiff has purchased property, the equity of redemption is part of the title and as an owner, he could seek redemption of the suit land. [Para 11][491-F-H; 492-A]
- 1.2 No provision of law shows that the subsequent purchaser has to give notice to the mortgagee signifying purchase of the property, by a mortgagor. The factum of purchase coupled with the delivery of possession completes the title of the plaintiff over the land in question. Therefore, the decree obtained in such a suit at the back of the purchaser is void. The plaintiff rightly claimed that he was required to be impleaded, as he was a necessary party in a suit for foreclosure filed by the mortgagee after the purchase of part of the mortgaged land. The possession was taken from the appellant consequent to the decree of foreclosure granted in favour of the mortgagee. The findings recorded by the trial court that the plaintiff has purchased the property and not equity of redemption is clearly without any basis. In view of the fact that the possession was delivered and the fact that the parties are residents of the same village, there is ‘constructive notice’ of purchase of land by the appellant. [Paras 12, 13][492-A-B-C, D, E-F]
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1.3 In terms of Section 91 of the Act, the plaintiff having stepped into the shoes of the mortgagor in respect of land purchased by him, has a right to redeem the land mortgaged. In addition, the Order XXXIV Rule 1 of the Code provides that all persons having an interest either in the mortgage- security or in the right of redemption shall be joined as parties to any suit relating to the mortgage including suit for foreclosure. The original mortgagors i.e., defendant Nos. 1 and 2 denied the plaintiff's right to redeem the property though admitting they have borrowed Rs.1,000/- from the plaintiff. It was pleaded that the plaintiff was put in possession of the suit property for ten years and, therefore, plaintiff was required to resell the property to defendant Nos. 1 and 2. But the said defendant has not supported such plea in evidence. The defendant Nos. 1 and 2 entered into compromise with the mortgagee to pay the mortgage amount. The said mortgage amount was not paid which led to passing of the final decree. Thus, it is a case of collusion between the original mortgagors and the mortgagee so as to defeat the right of the plaintiff. [Para 15][493-E-H; 494-A]

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1.4 The Equity of redemption means a right to redeem the property based upon equitable principles. Right of redemption recognised under the Act is a statutory and legal right which cannot be extinguished. The equity of redemption is a right which is subsidiary to the right of ownership. Such right is not over and above the right of ownership purchased by the plaintiff. The expression equity of redemption is a convenient maxim but an owner, who has stepped into the shoes of the mortgagor, after the purchase from the mortgagor but before filing a suit for foreclosure is entitled to redeem the property in terms of Section 60 of the Act. [Para 16, 19][494-A-C; 495-C-D]

*Allokam Peddabbayya & Anr. v. Allahabad Bank & Ors.
(2017) 8 SCC 272 : [2017] 8 SCR 121 – distinguished.*

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*Dr. Govinddas & Anr. v. Shrimati Shantibai & Ors.
(1973) 3 SCC 418; Achaldas Durgaji Oswal (Dead)
through LRs v. Ramvilas Gangabisan Heda (Dead)
through LRs & Ors. (2003) 3 SCC 614 : [2003] 1 SCR
340; Thumbasawmy Mudelly v. Mohd. Hossain Rowthen
ILR (1875) 1 Mad 1; Jamila Begum (Dead) through*

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- A *Legal Representatives v. Shami Mohd. (Dead) through Legal Representatives & Anr.* (2019) 2 SCC 727 : [2018] 13 SCR 1253 – referred to.
- 2.1 The only effect of filing of an application for stay of the execution would be that the appellant can be said to be aware of the fact that there is a decree for foreclosure passed against him which has not been stayed by virtue of the order of the Court. There is no determination of the claim as is contemplated in terms of Order XXI Rule 97 or Rule 99 of the Code having force of decree. The declining of stay of execution will not operate as *res judicata* only because Section 11 Explanation VII of the Code is applicable to the execution as well. [Para 22][496-C-D]
- 2.2 The findings recorded by the High Court that the appellant is bound by the decree passed in the suit for foreclosure is not tenable *inter alia* because the appellant was not impleaded as a party, though mandated under Section 91 of the Act and Order XXXIV Rule 1 of the Code. The mortgagee was aware of the transaction of purchase as well as for the reason that the possession of the appellant was recorded in the revenue record. The subsequent conduct of mortgagee who has taken possession from the appellant also corroborates the fact that the mortgagee was aware of the factum of sale and possession of the appellant but still have chosen not to implead him as a necessary party. Still further, it is apparent from the pleadings itself that the original mortgagor had colluded with the mortgagee. Therefore, the right conferred by Section 60 of the Act does not stand extinguished by decree of the Court which is to be binding and had to be passed in the presence of the necessary parties and should not be collusive. [Para 23][496-D-G]
- 2.3 The decree passed in the suit for foreclosure is a decree which is void and non-est. The decree is a result of collusion between defendants 1 & 2 and Defendant No. 3 so as to frustrate rights of a purchaser from the mortgagor. [Para 27][498-F-G]

Samarendra Nath Sinha & Anr. v. Krishna Kumar Nag
AIR 1967 SC 1440 : [1967] SCR 18; *Mrutunjay Pani*

& Anr. v. Narmada Bala Sasmal & Anr. AIR 1961 SC 1353 : [1962] SCR 290 – referred to. A

3.1 The appellant has a right to redeem land provided the right is not extinguished by decree of the Court. The decree passed at the back of the transferee mortgagor prior to the filing of the suit for foreclosure cannot be said to be a valid decree. B [Para 28][499-A-B]

3.2 The appellant has purchased the land for a sum of Rs.1,000/- . No part of the sale consideration was paid to the owners or was kept by the appellant for payment to the mortgagee. Thus, it was unequivocal sale of complete rights in the land. Section 60 of the Act provides that a person interested in a share of the mortgaged property will not entitle him to redeem his own share on payment of a proportionate part of the amount remaining due on mortgage. Therefore, conversely, a purchaser from the mortgagor is entitled to redeem the share of the land purchased by him but on payment of the entire mortgage amount. Therefore, the decree of foreclosure passed in the suit filed by the mortgagee will not extinguish the right of the mortgagor to redeem land in view of the fact that he was not impleaded as a party in the suit though he has purchased part of the mortgaged property by virtue of registered sale deed. [Paras 29, 30][499-B-D, G] C D E

3.3 The judgment of the High Court is set aside and that of the First Appellate Court is restored. The appellant is given three months' time to deposit the mortgage amount and when the amount is deposited, he would be entitled to seek restoration of possession which was taken from him in execution of a decree of foreclosure. [Para 31][499-H; 500-A] F

Shivdev Singh & Anr. v. Sucha Singh & Anr. (2000) 4 SCC 326 : [2000] 2 SCR 878; Bank of Poona v. Navrajasthan Cooperative Housing Society Ltd. AIR 1968 Bom 106; Banamali Tripathy v. Biswanath Pattanaik AIR 1984 Orissa 145 – referred to. G

A	<u>Case Law References</u>	
	AIR 1968 BOM 106	referred to
	AIR 1984 Orissa 145	referred to
	[2017] 8 SCR 121	distinguished
B	(1973) 3 SCC 418	referred to
	[2000] 2 SCR 878	referred to
	[2003] 1 SCR 340	referred to
	ILR (1875) 1 Mad 1	referred to
C	[2018] 13 SCR 1253	referred to
	[1967] SCR 18	referred to
	[1962] SCR 290	referred to

D CIVIL APPELLATE JURISDICTION: Civil Appeal No.4726 of 2021.

From the Judgment and Order dated 21.01.2015 of the High Court of Judicature at Bombay bench at Nagpur in Second Appeal No.441 of 1995.

E Satyajit A. Desai, Satya Kam Sharma, Ms. Anagha S. Desai, Advs. for the Appellants.

Nitin Bhardwaj, Adv. for the Respondents.

The Judgment of the Court was delivered by

HEMANT GUPTA, J.

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1. The plaintiff is in appeal aggrieved against the judgment of the High Court of Judicature at Bombay dated 21.1.2015 whereby the suit for redemption of mortgage land was dismissed, setting aside the judgment of the First Appellate Court and restoring that of the Trial Court.

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2. Brief facts leading to the present appeal are that defendant Nos. 1 and 2 were owners of the land comprising in Survey Nos. 67/3 and 65/1 in Village Veni, Taluka Lonar. The said defendants mortgaged the land in favour of defendant No. 3 on 30.4.1954 (Ex.81) to secure a sum of Rs.700/-. Defendant Nos. 1 and 2 sold the mortgaged land comprising in Survey No. 67/3 admeasuring 1 acre 32 gunthas to the

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plaintiff vide registered sale deed for consideration of Rs.1000/. Thus, A
the plaintiff stepped in the shoes of the mortgagor on account of the sale
transaction.

3. The original mortgagee (defendant No. 3) filed a Regular Civil B
Suit No. 237 of 1965 for recovery of mortgage amount of Rs.700/- along
with the interest accrued against the original mortgagors (defendant Nos. C
1 and 2). The plaintiff was not impleaded as a party in the said suit,
though the sale in his favour was before the filing of the suit. A preliminary
decree was drawn based on a compromise whereby the defendant Nos. D
1 and 2 agreed to pay the mortgage amount on or before 27.3.1967.
Since defendant Nos. 1 and 2 failed to pay the said amount, the preliminary
decree was converted into a final decree on 4.6.1969 which led to
foreclosing the rights of the mortgagor to redeem the property. In
execution of such decree, the mortgagee had taken possession from the
plaintiff, the present appellant on 5.12.1980. It is thereafter the plaintiff
filed Regular Civil Suit No. 7 of 1984 against the original mortgagors and
the mortgagee seeking redemption of the mortgaged property.

4. The Trial Court though dismissed the suit but returned a finding E
that the suit is within the period of limitation as the statutory period of
redemption is of 30 years. The suit was filed on 23.1.1984 though the
period of 30 years was to expire on 30.4.1984. It was also held that the
plaintiff has purchased the property and not the equity of redemption. It F
was also held that the plaintiff filed an application before the Executing
Court for a stay on the execution of the decree. However, such an order
(Ex.124) will not operate as *res judicata* as the application was only to
stay the execution and the appeal against the said order was dismissed
(Ex.90). In respect of Issue No. 7(A), the Court held that the partial G
redemption is permissible in view of the judgment of the High Court
reported as ***Bank of Poona v. Navrajasthan Cooperative Housing***
Society Ltd.¹, since the plaintiff has not purchased the equity of
redemption, therefore, the plaintiff is not entitled to redeem part of the
property though plaintiff was ready to pay the entire mortgage amount.
Since the right of redemption and the right of foreclosure are coextensive,
therefore, no sooner than a decree for foreclosure is passed, the right to
redeem extinguishes.

5. In appeal, the First Appellate Court held that the revenue record
shows that the plaintiff was in possession of the suit land after the sale

¹ AIR 1968 BOM 106

- A deed was executed in his favour on 18.5.1964. The plaintiff is an attesting witness to the mortgage deed (Ex.81) but that will only lead to an inference that the title of the plaintiff is subject to the rights of defendant No.3 as mortgagee in respect of land purchased by him. He is, thus, a mortgagor within the meaning of Section 59A of the Transfer of Property Act, 1882². Therefore, in terms of Section 60 of the Act, he had a right to redeem the property provided it is not extinguished by the act of the parties or by decree of the Court. Examining as to whether the decree of foreclosure has extinguished the right of redemption available to the plaintiff, for that reliance was placed upon the judgment of the learned High Court in *Bank of Pune* wherein, the purchaser instituted a suit for redemption which was decreed. The first appellate court relied upon *Banamali Tripathy v. Biswanath Pattanaik*³. It was further held that since the plaintiff has purchased the land before the institution of the suit, therefore, the mortgagee ought to have made him a party in view of the provisions of Sections 59A and 91 of the Act. Therefore, the decree of foreclosure was set aside by the High Court.
 - D 6. The High Court held that the suit of the plaintiff for redemption was not maintainable. A preliminary decree was passed in the suit filed by the mortgagee for foreclosure based on a compromise in which the original mortgagors were required to pay the amount by 27.3.1967. Since the amount was not paid, the final decree was drawn up on 4.11.1969.
 - E Such decree was not challenged and became final. Thus, Plaintiff cannot seek redemption of the mortgage.
 - F 7. Learned counsel for the appellant relies upon Sections 59A, 60 and 91 of the Act to contend that the plaintiff was required to be impleaded as a party in the suit for foreclosure as also the provisions of Order XXXIV Rule 1 of the Code of Civil Procedure, 1908⁴. Such provisions read as under:
 - G “**59-A. References to mortgagors and mortgagees to include persons deriving title from them.** —Unless otherwise expressly provided, references in this Chapter to mortgagors and mortgagees shall be deemed to include references to persons deriving title from them respectively.
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- ² For short, the ‘Act’
- ³ AIR 1984 Orissa 145
- H ⁴ For short, ‘the Code’.

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 acknowledgment 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 act of the parties or by decree of a Court.

The right conferred by this section is called a right to redeem and a suit to enforce it is called a suit for redemption.

Nothing in this section shall be deemed to render invalid any provision to the effect that, if the time fixed for payment of the principal money has been allowed to pass or no such time has been fixed, the mortgagee shall be entitled to reasonable notice before payment or tender of such money.

Redemption of portion of mortgaged property.—Nothing in this section shall entitle a person interested in a share only of the mortgaged property to redeem his own share only, on payment of a proportionate part of the amount remaining due on the mortgage, except only where a mortgagee, or, if there are more mortgagees than one, all such mortgagees, has or have acquired, in whole or in part, the share of a mortgagor.

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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

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- A property mortgaged or in or upon the right to redeem the same;
- (b) any surety for the payment of the mortgage-debt or any part thereof; or
- (c) any creditor of the mortgagor who has in a suit for the administration of his estate obtained a decree for sale of the mortgaged property.”
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Order XXXIV, Rule 1-

- C **Parties to suits for foreclosure sale and redemption.** - Subject to the provisions of this Code, all persons having an interest either in the mortgage-security or in the right of redemption shall be joined as parties to any suit relating to the mortgage.

- D **Explanation.** -A puisne mortgagee may sue for foreclosure or for sale without making the prior mortgagee a party to the suit; and a prior mortgage need not be joined in a suit to redeem a subsequent mortgage
- E 8. It is argued that the extinguishment of the right of redemption contemplated by Section 60 of the Act is by decree of the Court. Such decree means a valid decree and not a decree passed against the mortgagor who has lost the title in the part of the suit property after suit land was conveyed to the appellant on 18.5.1964. It is also argued that the plaintiff was in possession, which is apparent from the revenue record and the fact that the possession was taken from the plaintiff in the execution of the decree for foreclosure. Since the plaintiff was in possession on the strength of the sale executed in his favour before filing suit for foreclosure, the plaintiff was not only a proper but a necessary party as the impleaded defendant had lost the title in the suit property on the date of filing of the suit.
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- G 9. On the other hand, learned counsel for the respondent relies upon an order passed by this Court in a judgment reported as *Allokam Peddabbayya & Anr. v. Allahabad Bank & Ors.*⁵, to contend that a purchaser from a mortgagor has no better right than the mortgagor himself. It is argued that the mortgagee was not served with a notice of transfer of purchase on 18.5.1964, therefore, the mortgagee could not implead the subsequent purchaser in the suit for foreclosure. The reliance is placed upon the following paras of the judgment, which read as under:

H ⁵(2017) 8 SCC 272

“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.”

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10. We have heard learned counsel for the parties. The issues arising in the present appeal are examined hereinafter.

(i) Whether the plaintiff was a necessary party in a suit for foreclosure filed by the mortgagee after the purchase?

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11. The plaintiff has purchased property vide registered sale deed on 18.5.1964, much before the filing of the suit for foreclosure in the year 1965. The possession of the plaintiff was recorded in the revenue record after the purchase of the property, but still, the mortgagee chose not to implead the subsequent purchaser. The original mortgagor who has mortgaged the property had no subsisting title, interest or right in the property conveyed, therefore, the factum of compromise between the mortgagor and the mortgagee is ineffective and not enforceable against the purchaser i.e., the plaintiff. Once the plaintiff has purchased property,

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- A the equity of redemption is part of the title and as an owner, he could seek redemption of the suit land.
12. The learned counsel for the mortgagee could not point out any provision of law that can prove that the subsequent purchaser has to give notice to the mortgagee signifying purchase of the property, by a
- B mortgagor. The factum of purchase coupled with the delivery of possession completes the title of the plaintiff over the land in question. Therefore, the decree obtained in such a suit is void.
13. The plaintiff rightly claimed that he was required to be impleaded, as he was a necessary party in a suit for foreclosure filed by
- C the mortgagee after the purchase of part of the mortgaged land. The appellant also placed reliance on a judgment of this Court reported as *Dr. Govinddas & Anr. v. Shrimati Shantibai & Ors.*⁶, to contend that the mortgagee, the original mortgagor and the appellant are residents of the same village. Therefore, the factum of sale is deemed to be in the notice of the mortgagee in addition to the delivery of possession by the mortgagors supported by the revenue record and also the fact that the possession was taken from the appellant. Therefore, non-impleadment of the appellant renders the decree for foreclosure as *non-est* and void. It is also argued that it was a case of a simple mortgage without delivery of possession. The possession was taken from the appellant consequent
- E to the decree of foreclosure granted in favour of the mortgagee. The findings recorded by the Trial Court that the plaintiff has purchased the property and not equity of redemption is clearly without any basis. In view of the fact that the possession was delivered and the fact that the parties are residents of the same village, there is ‘constructive notice’ of purchase of land by the appellant.
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14. In *Allokam Peddabbayya*, the purchaser filed a suit for injunction. The suit was dismissed. The appeal against the judgment and decree of the trial court was also dismissed. It is thereafter, a suit for redemption of mortgage was filed impleading the bank as the defendant. The sale certificate was issued to the purchaser on 2.7.1997 after filing
- G of the suit for injunction and after the objections of the plaintiff in execution were dismissed, so is the appeal against an order of dismissal of objections was dismissed. It was in these circumstances, this Court held as under:

H ⁶(1973) 3 SCC 418

“12. The sale certificate was issued to Defendant 2 on 2-7-1997 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 OS No. 96 of 1999 for redemption of the mortgage under Order 34 Rule 1 CPC contending that they were willing to deposit the mortgage dues and that the decree in OS 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.

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14. No challenge was laid out in OS No. 96 of 1999, either to the auction-sale or to set aside the sale certificate issued to Defendant 2. The reliance upon Order 34 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.”

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In view of the said fact, the judgment referred to by the learned counsel for the respondent is not applicable to the facts of the present case.

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15. Still further, in terms of Section 91 of the Act, the plaintiff having stepped into the shoes of the mortgagor in respect of land purchased by him has a right to redeem the land mortgaged. In addition, the Order XXXIV Rule 1 of the Code provides that all persons having an interest either in the mortgage-security or in the right of redemption shall be joined as parties to any suit relating to the mortgage including suit for foreclosure. The original mortgagors i.e., defendant Nos. 1 and 2 denied the plaintiff’s right to redeem the property though admitting they have borrowed Rs.1,000/- from the plaintiff. It was pleaded that the plaintiff was put in possession of the suit property for ten years and, therefore, plaintiff was required to resell the property to defendant Nos. 1 and 2. But the said defendant has not supported such plea in evidence. The defendant Nos. 1 and 2 entered into compromise with the mortgagee to pay the mortgage amount. The said mortgage amount was not paid

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- A which led to passing of the final decree. Thus, it is a case of collusion between the original mortgagors and the mortgagee so as to defeat the right of the plaintiff.
16. The Equity of redemption means a right to redeem the property based upon equitable principles. This Court in a judgment reported as **B *Shivdev Singh & Anr. v. Sucha Singh & Anr.*⁷**, held that the right of redemption recognised under the Act is a statutory and legal right which cannot be extinguished. This Court held as under:
- C “8. ...The right of redemption recognised under the Transfer of Property Act is thus a statutory and legal right which cannot be extinguished by any agreement made at the time of mortgage as part of the mortgage transaction.”
17. In ***Achaldas Durgaji Oswal (Dead) through LRs v. Ramvilas Gangabisan Heda (Dead) through LRs & Ors.*⁸**, this Court held that the right of redemption is statutorily recognised right provided under Section 60 of the Act and after the judgment of Privy Council in ***Thumbasawmy Mudelly v. Mohd. Hossain Rowthen*⁹**, called upon the legislature to make suitable amendments, this Court held as under:
- E “11. The doctrine of redemption of mortgaged property was not recognised by the Indian Courts as the essence of the doctrine of equity of redemption was unknown to the ancient law of India. The Privy Council in Thumbuswami v. Hossain, (2 IA 241 : ILR (1875) 1 Mad 1) called upon the legislature to make a suitable amendment which was given a statutory recognition by reason of Section 60 of the Transfer of Property Act...”
- F 18. In a recent judgment of this Court reported as ***Jamila Begum (Dead) through Legal Representatives v. Shami Mohd. (Dead) through Legal Representatives & Anr.*¹⁰**, it was held that by virtue of purchase of the property, the purchaser has purchased the entire equity of redemption. This Court held as under:
- G “*Whether decree for redemption of mortgage is correct?*
- H 32. Section 60 of the Transfer of Property Act, 1882 provides that at any time after the money becomes due, the mortgagor has a

⁷(2000) 4 SCC 326

⁸(2003) 3 SCC 614

⁹ILR (1875) 1 Mad 1

H ¹⁰(2019) 2 SCC 727

right, on payment or tender, at a proper time and place, of the mortgage-money to require the mortgagee to deliver the mortgage deed and all documents relating to the mortgaged property, and where the mortgagee is in possession of the mortgaged property, to deliver possession thereof to the mortgagor. In *Shivdev Singh v. Sucha Singh* [*Shivdev Singh v. Sucha Singh*, (2000) 4 SCC 326] , it was held as under: (SCC p. 330, para 8)

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“8. . . The right of redemption recognised under the Transfer of Property Act is thus a statutory and legal right which cannot be extinguished by any agreement made at the time of mortgage as part of the mortgage transaction.”

19. The equity of redemption is a right which is subsidiary to the right of ownership. Such right is not over and above the right of ownership purchased by the plaintiff. The expression equity of redemption is a convenient maxim but an owner, who has stepped into the shoes of the mortgagor, after the purchase from the mortgagor but before filing a suit for foreclosure is entitled to redeem the property in terms of Section 60 of the Act.

The second issue which needs to be addressed is,

(ii) Whether the decree obtained in a suit for foreclosure operates as res judicata and the right of redemption stands extinguished by the decree of the Court?

20. The High Court has held that the decree for foreclosure will operate as *res judicata* on account of the fact that the appellant filed an application for stay of the execution proceedings. The Executing Court has dismissed such an application. Such dismissal of the application in execution proceedings would operate as *res judicata*. It was also held that the appellant has lost right of redemption which is coextensive with the right of foreclosure.

21. An application for stay of execution does not have any trapping of a decree as is contained in Order XXI Rules 101 & 103 of the Code. The said provision reads as under:

“101. Question to be determined.-All questions (including questions relating to right, title or interest in the property) arising between the parties to a proceeding on an application under rule 97 or rule 99 or their representatives, and relevant to the adjudication of the

- A application, shall be determined by the Court dealing with the application, and not by a separate suit and for this purpose, the Court shall, notwithstanding anything to the contrary contained in any other law for the time being in force, be deemed to have jurisdiction to decide such questions.
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- 103. Orders to be treated as decrees.** – Where any application has been adjudicated upon under rule 98 or rule 100, the order made thereon shall have the same force and be subject to the same conditions as to an appeal or otherwise as if it were a decree.”
- C 22. The only effect of filing of an application for stay of the execution would be that the appellant can be said to be aware of the fact that there is a decree for foreclosure passed against him which has not been stayed by virtue of the order of the Court. There is no determination of the claim as is contemplated in terms of Order XXI Rule 97 or Rule D 99 of the Code having force of decree. The declining of stay of execution will not operate as *res judicata* only because Section 11 Explanation VII of the Code is applicable to the execution as well.
- E 23. Therefore, the findings recorded by the High Court that the appellant is bound by the decree passed in the suit for foreclosure is not tenable *inter alia* because the appellant was not impleaded as a party, though mandated under Section 91 of the Act and Order XXXIV Rule 1 of the Code. The mortgagee was aware of the transaction of purchase in view of the judgment of this Court in **Dr. Govinddas** as well as for the reason that the possession of the appellant was recorded in the revenue record. The subsequent conduct of mortgagee who has taken F possession from the appellant also corroborates the fact that the mortgagee was aware of the factum of sale and possession of the appellant but still have chosen not to implead him as a necessary party. Still further, it is apparent from the pleadings itself that the original mortgagor had colluded with the mortgagee. Therefore, the right G conferred by Section 60 of the Act does not stand extinguished by decree of the Court which is to be binding and had to be passed in the presence of the necessary parties and should not be collusive.
- H 24. The High Court has referred to the judgment reported as **Samarendra Nath Sinha & Anr. v. Krishna Kumar Nag¹¹**, to non-

¹¹ AIR 1967 SC 1440

suit the appellant. However, in the aforesaid judgment, the mortgagor was non-suited on the ground that he was a purchaser pending lis. In the said case, one Hazra was a purchaser from the original mortgagor but he failed to make payment of the mortgage amount. The mortgagee-initiated proceedings for foreclosure on 17.7.1945 in which a preliminary decree was passed on 23.12.1946. The respondent purchased part of the equity of redemption from his judgment-debtor, Hazra, after the preliminary decree was passed. The Court found that the decree was not in the form of a foreclosure decree but of a mortgage decree for sale. The final decree was passed after notice to the mortgagors and the said Hazra. It was held as under:

“16. ... Section 91 of the Transfer of Property Act provides that besides the mortgagor any person other than the mortgagee who has any interest in or charge upon the property mortgaged or in or upon the right to redeem the same may redeem or institute a suit for redemption of such mortgaged property. An execution purchaser therefore of the whole or part of the equity of redemption has the right to redeem the mortgaged property. Such a right is based on the principle that he steps in the shoes of his predecessor-in-title and has therefore the same rights which his predecessor-in-title had before the purchase. Under Section 59-A of the Act also all persons who derive title from the mortgagor are included in the term “mortgagor” and therefore entitled to redeem..... It follows that the respondent having purchased from the said Hazra while the appeal by the said Hazra against the said preliminary decree was pending in the High Court, the doctrine of lis pendens must apply to his purchase and as aforesaid he was bound by the result of that suit. In the view we have taken that the final foreclosure decree was competently passed by the trial court, his right to equity of redemption was extinguished by that decree and he had therefore no longer any right to redeem the said mortgage. His appeal against the said final decree was misconceived and the High Court was in error in allowing it and in passing the said order of remand directing the trial court to reopen the question of redemption and to allow the respondent to participate in proceedings to amend the said preliminary decree.”

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A 25. Thus, we find that the High Court has misread the judgment of this Court in ***Samarendra Nath Sinha***. It is not a case of transfer from mortgage prior to the decree of foreclosure but a case of purchaser pending *lis*.

B 26. Another judgment referred to by the High Court is ***Mrutunjay Pani & Anr. v. Narmada Bala Sasmal & Anr.***¹² It was an appeal filed by the mortgagee who claimed to have purchased the equity of redemption. The argument of the appellant was that the mortgagee has failed to pay rent which was the responsibility of the mortgagor in terms of the mortgage deed. For the default of payment of arrears of rent, the property was put to sale and was purchased by the mortgagee. Therefore, the remedy of the mortgagor is to seek setting aside of sale. It was held as under:

C “7. The legal position may be stated thus: (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 of his mortgage decree with the leave of court or in execution of a mortgage or money decree obtained 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. (3) Where a mortgagor purchases the mortgaged property by reason of a default committed by him the mortgage is not extinguished and the relationship of mortgagor and mortgagee continues to subsist even thereafter, for his purchase of the equity of redemption is only in trust for the mortgagor.”

D E F G H

F The said judgment does not advance the case of the mortgagee.

G 27. Thus, the decree passed in the suit for foreclosure is a decree which is void and non-est. The decree is a result of collusion between defendants 1 & 2 and Defendant No. 3 so as to frustrate rights of a purchaser from the mortgagor.

H (iii) Whether the plaintiff is entitled to redeem the share of the property purchased by him on the payment of the entire mortgage amount?

28. This Court in ***Shivdev Singh; Achaldas Durgaji Oswal and Jamila Begum*** has held that right to redemption is not an equitable relief, it is a statutory right. Therefore, the appellant has a right to redeem land provided the right is not extinguished by decree of the Court. As discussed above, the decree passed at the back of the transferee mortgagor prior to the filing of the suit for foreclosure cannot be said to be a valid decree.

29. The appellant has purchased the land measuring 1 acre 32 gunthas comprising in Survey No. 67/3 for a sum of Rs.1,000/-. No part of the sale consideration was paid to the owners or was kept by the appellant for payment to the mortgagee. Thus, it was unequivocal sale of complete rights in the land comprising in Survey No. 67/3. Section 60 of the Act provides that a person interested in a share of the mortgaged property will not entitle him to redeem his own share on payment of a proportionate part of the amount remaining due on mortgage. Therefore, conversely, a purchaser from the mortgagor is entitled to redeem the share of the land purchased by him but on payment of the entire mortgage amount. The First Appellate Court has returned such finding in favour of the appellant in Point No. 3 wherein it was held as under:

"POINT NO. 3:- The answer to this point is a decision in Bank of ***Bank of Poona v. Navrajasthan Cooperative Housing Society Ltd.***, reported in 1967 Mh.L.J. 774 (AIR 1968 Bom 106), in which the Plaintiff had purchased a portion of the mortgaged property and it was held that he had a right to redeem only a portion which he had purchased by making payment of the proportionate mortgage amount. Second part of Section 60 cannot be made applicable to the present case, as only in respect of the property purchased by the Plaintiff a right to redeem is inexistence, while in respect of the other part, of which Defendant Nos.1 & 2 are the owners, right to redeem is extinguished, therefore even if the Plaintiff redeems the suit land it will not be a redemption in part."

30. Therefore, the decree of foreclosure passed in the suit filed by the mortgagee will not extinguish the right of the mortgagor to redeem land in view of the fact that he was not impleaded as a party in the suit though he has purchased part of the mortgaged property by virtue of registered sale deed.

31. Consequently, the appeal is allowed. The judgment of the High Court is set aside and that of the First Appellate Court is restored. The

- A appellant is given three months' time to deposit the mortgage amount and when the amount is deposited, he shall be entitled to seek restoration of possession which was taken from him in execution of a decree of foreclosure. The Executing Court shall ensure that the delivery of possession be given to the appellant in an expeditious manner.

Nidhi Jain

Appeal allowed.