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IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 5768 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.SHAH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? NO

JJJ

2. To be referred to the Reporter or not? NO

3. Whether Their Lordships wish to see the fair copy
of the judgement? NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

NO

5. Whether it is to be circulated to the Civil Judge?
NO

LATE CHATURBHUJ MULJI, THRO' HIS HEIRS

Versus

HEIRS AND LEGAL REP.OF DECD. PREMJI HARIRAM

Appearance:

MR SM SHAH WITH MR CH VORA for Petitioners

MR SB VAKIL WITH MR AS VAKIL for Opponents.

CORAM : MR.JUSTICE M.S.SHAH

Date of decision: 12/05/99

CAV JUDGEMENT

This appeal under section 96 of the Civil Procedure Code is directed against the judgement and order dated 16th September 1998 passed by the Civil Court at Bhuj in Civil Misc. Application No.10 of 1988 arising from Special Civil Suit No.7 of 1959.

2 The facts leading to filing of the present appeal, briefly stated, are as under:-

3 On 12th May 1953 a registered mortgage deed was executed by defendants nos.1 to 4 (respondents nos.1-4 in this appeal) (hereinafter to be referred to as mortgagors) in favour of one Ranchhoddas Meghji (hereinafter to be referred to as the mortgagee) mortgaging the suit properties for a sum of Rs.75,000. The firm Ranchhoddas Meghi owed the present appellants (hereinafter referred to as the original plaintiffs) certain debts for which mortgagee assigned their right, title and interest in the suit properties by a registered deed dated 23.4.1956. The documents of title of the properties accordingly came to be handed over to the plaintiffs. In the year 1959, the plaintiffs (firm of M/s Chatrabhuj Mulji & Co.) filed Civil Suit No.7 of 1959 in the Court of the learned Civil Judge (Senior Division), Bhuj, against defendants nos.1 to 4 for recovering an amount of Rs.89,950. Defendants nos. 5(a) to 5(f) were the partners of M/s Liladhar Parshotm, subsequent mortgagee. On 24.4.1960 a compromise decree came to be passed in the above suit. Since the fate of this appeal depends upon the construction of the said compromise decree, it is necessary to set out extensively the relevant portion of the decree:-

"Hence decree against the defendants nos.1, 2, 3 and 4 and in favour of the plaintiff as under:-

1. That the defendants nos.1, 2, 3 and 4 should pay to the plaintiffs an amount of Rs.60,000 (Rupees sixty thousand only) by 15.10.60 and if they do not pay the same, then the plaintiff is entitled to execute the decree by taking into possession for enjoyment the properties described in plaint vide four direction as usufructuary mortgagee for due amount.
2. If the defendants nos.1, 2, 3 and 4 herein pay to the plaintiff an amount of Rs.55,000 by 15.10.60 then, the plaintiffs will be bound to let go the remaining amount due.
3. Out of the premises mentioned in the plaint under four direction one premise inside the Deli/premises facing on eastern side has been handed over in possession of the plaintiffs by the defendants and if the defendants pay an amount of Rs.55,000 to the plaintiffs by 15.10.60 then,

they will be entitled to take back the possession and if they do not pay the said amount by 15.10.60, then along with other premises they will be entitled to enjoy for Rs.60,000 as usufructuary mortgagee.

4. That there is an amount of Rs.1,11,700

(Rupees one lakh eleven thousand and seven hundred only) due to be recovered by the plaintiffs herein from the defendants nos.1, 2, 3 and 4 till this date and the defendants nos.1, 2, 3 and 4 accept the same. That in view of the old relationship of the plaintiffs with the defendants nos.1, 2, 3 and 4, the plaintiffs have with a view to give relief and agreed to enjoy the suit property as mortgagee in possession (vatantar) for Rs.60,000. But in the event of auction in the "Second Mortgage" or the defendants nos.5 and 5 D/E/F in the event of auction of another debt of defendants nos.1, 2, 3 and 4 at that time, the plaintiffs will be entitled to recover the said full amount of Rs.1,11,700 (in words rupees one lac eleven thousand seven hundred mentioned in the decree and the person purchasing the suit properties during the auction or the said second mortgagees will only be entitled to take over possession of the suit properties only after paying the said amount.

5. That the defendants herein gives up all

their disputes with the plaintiffs and after hearing arguments of both the sides, following judgment is being delivered.

In respect of defendant no.5 herein,

following decree is made against the defendants nos.1, 2, 3, 4 herein who should pay an amount of Rs.20,000 (Rupees twenty thousand only) along with the costs of the present suit to the defendant no.5 who is second mortgagee within period of six months and if that is not happened then the defendant no.5 will be entitled to file an application for passing of the final decree. As regards costs to the other parties, no order is being made. In respect of the mortgage of the plaintiffs, the composite decree is passed as above and if no recovery is made, then, the defendant no.5 and its mortgagees in case it is felt legal, may file application for personal decree and such order is passed."

4 There is no dispute about the fact that the defendants nos.1 to 4 did not deposit in the court an amount of Rs.55,000 or any amount by 15.10.1960 and that therefore the simple mortgage in favour of the plaintiffs was converted into a usufructuary mortgage, as per para 3 of the consent decree. There is also no dispute about the fact that subsequent mortgagee i.e. defendant no.5 did not take any steps to recover any amount from the defendants nos.1 to 4 or from the plaintiffs. Ultimately, on 7.1.1988 defendant no.3 filed an application contending that on 29.4.1960 a preliminary decree was passed by the Court and that as per the said preliminary decree defendants nos.1 to 4 had to pay an amount of Rs.60,000 to the plaintiff and an amount of Rs.20,000 to defendant no.5 with costs of the suit. Whereupon, the defendants will be entitled to get the right to redeem the suit properties. Defendant no.3 further stated in the said application that defendants nos.1 to 4 were ready to repay the amount of Rs.60,000 to the plaintiff and Rs.20,000 to defendant no.5 but the plaintiffs have not agreed to redeem the mortgage and therefore the present application is filed for passing a final decree in the suit and to obtain the suit properties through the Court. It was further stated that defendant no.3 had deposited before the Court a sum of Rs.60,000 plus costs of the suit Rs.2838 for paying the same to the plaintiff and another amount of Rs.20,000 plus costs of Rs.560 to defendant no.5 and prayed before the Court to draw a final decree in the present suit by directing the payment of the aforesaid amounts deposited to the plaintiff and defendant no.5 respectively and to pass such orders as may be deemed fit.

5 The plaintiffs resisted the said application and raised various objections such as application for drawing up for final decree is not maintainable as there is no preliminary decree passed in favour of the defendants for redemption of mortgage and that the present application is time-barred.

6 The Civil Court negatived both the aforesaid objections and passed an order directing the plaintiff to deliver the documents of the suit properties and also deliver the possession of the suit property to defendant no.3 and that the parties handing over the possession are entitled to withdraw the amounts deposited by the defendants in the Court. It was further ordered that the decree be drawn accordingly with no order as to costs.

7 Aggrieved by the aforesaid judgement and order dated 16.9.1998 the original plaintiffs have filed the present appeal.

8 At the hearing of this appeal, Mr S.M. Shah with Mr C.H. Vora have reiterated the contentions urged on behalf of the plaintiffs before the trial court. Mr S.B.Vakil has appeared on caveat filed by defendant no.3.

With the consent of the learned counsel for the parties, the appeal has been heard for final disposal. Accordingly, the appeal is being finally disposed of by this judgement. During the pendency of this appeal, this Court passed an order dated 16.10.1998 directing the parties to maintain status quo.

9 Mr S.M. Shah, learned counsel for the appellant, has invited the attention of the Court to the decree dated 29.4.1960 and submitted that by the said consent decree what was earlier a simple mortgage was converted into usufructuary mortgage in view of the failure on the part of the defendants nos.1 to 4 to pay the amount of Rs.60,000 or even Rs.55,000 to the plaintiffs by 15.10.1960. Hence, the plaintiffs became usufructuary mortgagees with effect from 16.10.1960 and that possession of the properties was also accordingly handed over to the plaintiffs. Nothing more was required to be done in pursuance of the said decree dated 29th April 1960 and therefore the Civil Suit No.7 of 1959 came to an end upon the simple mortgage having been converted into usufructuary mortgagee in terms of the consent decree. Mr Shah vehemently submitted that the application dated 7.1.1998 was misconceived as it proceeded on the footing as if there was a preliminary decree passed on 29.4.1960 and that even after 16.10.1960 the decree conferred any right on the defendants nos.1 to 4 to move the Court for redemption of mortgage and return of the possession. But, nowhere did the decree provide for any such contingency. Of course, whatever rights defendants nos.1 to 4 have as a usufructuary mortgagors of the suit property, the only remedy available to defendants nos.1 to 4 would be to file a suit for redemption. In the suit filed in the year 1959 in which consent decree was passed on 29.4.1960 was a composite decree and once usufructuary mortgage came into existence in view of clause 3 in the consent decree dated 29.4.1960, nothing further was required to be done by the Court or by either of the parties and that there was no pending execution proceedings in which such an application as moved by defendant no.3 could be filed.

10 Mr Shah further submitted that Order 34 of the

CPC contains detailed rules for drawing preliminary decree and final decree in a suit filed by the mortgagee for foreclosure or for sale. Civil Suit No.7 of 1959 was filed by the plaintiffs - mortgagees for recovering the dues by selling the suit properties and the consent decree passed as far back as on 29.4.1960 did not purport to be a preliminary decree, it was a composite decree stating therein that if an amount of Rs.55,000 was paid by defendants nos.1 to 4 to the plaintiffs by 15.10.1960, the mortgage shall stand redeemed and if the amount was not so paid, the simple mortgage will be converted into usufructuary mortgage. That decree itself stipulated the date of payment and consequences of payment and consequences in case of failure of defendants nos.1 to 4 to make the payment to the plaintiffs. Hence, the present application filed by defendant no.3 in January 1988 for a final decree for redemption of the mortgage was not maintainable and was misconceived.

11 On the other hand Mr S.B.Vakil, learned counsel for respondent-defendant no.3, one of the mortgagors, submitted that the civil court had rightly passed the order under challenge and that the matter was squarely covered by the decision of a Division Bench of this Court in the case of DHAMI NAVNITBHAI V.BHAGWANLAL (1978) 19 GLR 420. Mr Vakil contended that in the aforesaid decision the Division Bench in terms held that in a suit filed by the mortgagee for recovering his dues, if decree is passed for sale of mortgaged property, provision must be made that in the event mortgagor pays up the decretal amount as to in which manner the property should be dealt with. But, if no such provision was made and that in case the mortgagor should pay up the amount within the time fixed by the Court, the obligation of the court to restore the possession would not come to an end. The Division Bench further held that in such a case provision of Order 34 Rule 5 of CPC would come into force and that if the decree has not completely discharged the rights and obligations of the transactions, possession can be returned in case of execution also. Mr Vakil vehemently submitted that in the aforesaid decision the Division Bench has clearly held that right to be put back into possession is a right of any mortgagor statutorily recognised and failure to provide in the consent decree that possession should be returned on payment would not mean that the decree is either defective or parties agreed that even if the defendant pays the amount the possession was not to be returned or that the only alternative left with the mortgagor was left to file another suit. Hence, the Division Bench held that return of possession can be provided even in the case of

execution at a later stage.

12 Having heard the learned counsel for the parties it appears to the Court that the consent decree dated 19.4.1960 was somewhat unusual to some extent inasmuch as even while providing for the conversion of the simple mortgage into usufructuary mortgage upon failure on the part of the mortgagor to repay the amount to the plaintiffs by 15.10.1960, the decree did not provide as to when and how the mortgagor could move the Court for redemption of the usufructuary mortgage in case such usufructuary mortgage came into existence after 15.10.1960 on account of non payment of Rs.55,000 or Rs.60,000 by the mortgagors to the mortgagee. At first blush, therefore, the argument of Mr Shah for the mortgagee appears to be prima facie attractive that the decree has to be treated as a document creating the transaction of usufructuary mortgage in favour of the plaintiffs and, therefore, the mortgagor would have to file a separate suit for redemption and then the question may arise whether such a suit to be filed herein after is within the period of limitation or whether the application filed by defendant no.3 on 7.1.1988 should be treated as a proceeding bona fide prosecuted so as to avail of the benefit of Section 14 of the Limitation Act for exclusion of period of limitation from 1988 till the disposal of this appeal.

13 Moreover, there is also prima facie substance in the argument of Mr Shah for the appellant that the Division Bench was concerned with a case where the preliminary decree provided for redemption of the mortgage upon payment of the amount by the mortgagor to the mortgagee but, the decree itself did not provide for return of possession. However, in the instant case, the decree did not provide for anything in connection with redemption of usufructuary mortgage which was created by the decree itself.

14. However, on closer analysis of the consent decree dated 19.4.1960 it appears that even though the consent decree did not purport to be a preliminary decree, it did not purport to be a final decree either. The decree contemplated that defendant no.5, second or subsequent mortgagee, could put the suit properties to auction sale for recovering his dues of Rs.20,000 from defendants nos.1 to 4, in case defendants 1 to 4 did not pay amount of Rs.20,000 along with costs of the suit to defendant no.5 within a period of six months from the date of consent decree i.e from 29.4.1960 and that in case such a payment is not made within the time limit defendant no.5

will be entitled to file an application for passing of the final decree. In the event of such a sale of the suit properties pursuant to the application which may be filed by defendant no.5 for passing a final decree, amount of Rs.1,11,700 was found to be due to be recovered by the plaintiffs from defendants nos.1 to 4 as on the date of the decree. Hence, in the event of the sale of the suit properties at the instance of defendant no.5, the auction purchaser or the second mortgagee will be entitled to take over the possession of the suit properties only after paying the full amount of Rs.1,11,700 to the plaintiffs. It is thus clear that the Court passing the decree was conscious of the fact that it was not passing any final decree and that some further steps were going to be taken so as to completely discharge the rights and obligations of the parties under the mortgage transaction. In the case of Dhami Navnitbhai (supra) the Division Bench was not concerned with merely the question of return of possession as the court examined the said issue in a wider perspective and held that it is the obligation of the Court while passing the final decree in a suit filed by the mortgagee for sale of the suit property or for recovery of the mortgage money to completely discharge the duties and obligations arising out of the mortgage transaction. The following principle laid down by the Court in para 14 of the judgement puts the issue beyond any doubt:-

"What then is the subject matter of the suit when a mortgagee brings an action for return of mortgage money by sale of mortgaged property? As hereinbefore discussed, in such a suit all the rights and obligations under the transaction of mortgage have to be adjudicated in the decree. Subject matter of a suit either for redemption or for foreclosure or sale of the mortgaged property would be entire mortgage transaction and all rights and obligations arising out of the transaction and they have to be adjudicated by a decree of the Court so as to leave parties to the transaction who would be parties to the suit to a situation in which they were anterior to the transaction before mutual rights and obligations were incurred and acquired."

The aforesaid principle clinches the issue in favour of the mortgagors. It has therefore to be held that the application filed by defendant no.3 on 7.1.1988 for redemption of the usufructuary mortgage was maintainable as in the said execution proceedings the final decree was not passed earlier and it was necessary

to finally adjudicate the rights of the parties to the transaction.

15 Merely because the consent decree did not in terms provide for exercise of right of mortgagors, the mortgagors did not lose their statutory right u/s 60 of the Transfer of Property Act which reads as under:-

"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 retransfer 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 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."

The said section confers an unfettered right which is not subject to any contract to the contrary and therefore, even if the decree dated 29.4.1960 was silent, the mortgagors were not deprived of their right to enforce the equity of redemption in the case of execution proceedings pursuant to consent decree dated 29.4.1960. The first contention of Mr Shah must, therefore, fail.

16 As far as the second contention about bar of limitation is concerned, in view of the provisions of Article 61(a) of the Limitation Act 1963, the mortgager can institute the proceedings for redemption within 30 years from the date the right to redeem accrues. Since the usufructuary mortgage was for the first time created with effect from 16.10.1960, the period of limitation would expire on 15.10.1990. Since the present application was filed on 7.1.1988, it was well within time. The civil court, therefore, rightly held that the application was not barred by law of limitation.

17 Mr Shah further submitted in the alternative that even if the Civil Court was right in rejecting the aforesaid contentions raised on behalf of the plaintiffs, the Civil Court committed a serious error in not considering that defendants nos.1 to 4 were not entitled to get the mortgage redeemed without paying the amounts as required to be paid by the consent decree dated 29th April, 1960 i.e. the amount of Rs.1,11,700 and the further amount for repairs of the suit properties and other charges and expenses as provided for in Rule 10 of Order 34 of CPC.

18 There is some substance in the argument of Mr Shah on the aforesaid score. The consent decree dated 29th April 1960 in terms provided that the dues of the plaintiff as on the date of decree were Rs.1,11,700 and that if the properties were to be sold at the instance of defendant no.5, the subsequent mortgagee, the plaintiff would be entitled to be paid the said amount. There is no reason why defendants nos.1 to 4 should not be held liable to pay the said amount to the plaintiffs even now, when the suit properties are to be redeemed to the mortgagors on their willingness to repay the amount to the mortgagee. It is also required to be noted that while the admitted dues of the plaintiff were Rs.1,11,700, the conversion of simple mortgage into usufructuary mortgage was only in respect of the amount of

Rs.60,000. Hence, the plaintiff would also be entitled to recover interest on the due amount of Rs. 51,700 (Rs.1,11,700 less Rs.60,000 which is already deposited) from the date of the decree dated 29.4.1960 which is considered to be a sort of preliminary decree till the date of deposit of the said amount of Rs.51,700 by defendant Nos. 1 to 4 before the trial Court. As far as the interest on the amount of Rs.60,000 at the rate of 6% per annum from the date of filing of application Exh. 20 (7.1.1988 when the amount of Rs.60,000 was deposited in the trial Court) till the date of payment to the plaintiffs is concerned, since defendant Nos. 1 to 4 had already deposited the amount before the Court, the question of defendant Nos. 1 to 4 being required to pay interest on the said amount of Rs.60,000 to the plaintiff would not arise. If at all the said amount of Rs.60,000 was invested by the trial court in a fixed deposit, the plaintiffs would be entitled to get interest accruing on such fixed deposit.

19. As far as the costs of mortgagee subsequent to the decree dated 29.4.1960 are concerned, the matter shall have to be looked into by the trial Court as earlier it had considered only the preliminary objections raised by the plaintiffs.

O R D E R

20 In view of the above discussion, subject to the following modifications regarding amounts to be deposited by defendants nos.1 to 4 for payment to the plaintiffs and the exercise to be undertaken by the trial court under the provisions of Rule 10 of Order 34 CPC, the order dated 16.9.1998 of the Civil Court below application exh.20 holding that the said application is maintainable and that the same is not time-barred is hereby confirmed.

The aforesaid order dated 16.9.1998 passed by the trial Court shall operate provided the mortgagors respondent Nos. 1 to 4 herein deposit the balance amount of difference between Rs.1,11,700 and Rs.60,000 (which is already deposited) i.e. Rs.51,700 alongwith interest at the rate of 6% per annum from the date of preliminary decree dated 29.4.1960 till the date of deposit of such balance amount before the trial Court. No interest is to be paid by defendants nos.1 to 4 on the amount of Rs.60,000 already deposited before the trial court between 7.1.1998 (the date of the application) and the date of payment to the plaintiff but, if the amount was

invested by the trial court in a fixed deposit, the interest accruing on the same shall be paid to the plaintiff.

21. The matter shall now proceed further before the Civil Court in light of the findings given - observations made in this judgement. The Civil Court at Bhuj shall accordingly hear and decide application at exh.20 as expeditiously as possible and in any case by December 31, 1999. There shall be no order as to costs.

(M.S. Shah, J.)

(mohd)