

# **SUPREME COURT OF INDIA**

Singh Ram (D) Thr.Lrs.

Vs.

Sheo Ram

C.A.No.5198 of 2008

(T.S.Thakur, C.Nagappan and Adarsh Kumar Goel JJ.)

21.08.2014

## **JUDGMENT**

**ADARSH KUMAR GOEL, J.**

1. Leave granted in SLPs.

2. These matters have been put up before this Bench in pursuance of the order passed by a Bench of two Judges on 18.08.2008, as under:- As it appears that observations made by this Court in Prabhakaran & Ors. vs. M. Azhagiri Pillai & Ors., reported in 2006 (4) SCC 484, in regard to the interpretation and/or application of Article 61 of the Schedule appended to the Limitation Act, 1963 are contrary to the principles laid down by this Court in a large number of decisions, including Jayasingh Dhyanu Mhoprekar & Anr. vs. Krishna Babaji Patil & Anr., [1985 (4) SCC 162] as also various decisions referred to by the Full Bench of the High Court, we are of the opinion that the matter should be heard by a larger Bench.

Before advertng to the question of reconciling conflicting opinions in various decisions, including the two decisions referred to above, we consider it appropriate to mention that by the impugned judgment, the Full Bench of the High Court of Punjab and Haryana at Chandigarh, considered the question "whether there is any time limit for usufructuary mortgagor to seek redemption? and decided the said question in the negative, in favour of the respondent-

mortgagor as follows:-

Therefore, we answer the questions framed to hold that in case of usufructuary mortgage, where no time limit is fixed to seek redemption, the right to seek redemption would not arise on the date of mortgage but will arise on the date when the mortgagor pays or tenders to the mortgagee or deposits in Court, the mortgage money or the balance thereof. Thus, it is held that once a mortgage always a mortgage and is always redeemable.

The correctness of the above view is the subject matter of consideration before this Court.

3. The predecessor of the respondents mortgaged the suit property on 11.08.1903 to the predecessor of the appellants for a sum of Rs.80/-. The appellant-plaintiffs filed a suit for declaration that the suit land having not been redeemed for a period of more than 60 years, the defendants lost all rights, title and interest therein and the appellants became the owners by prescription.

4. The trial Court considered the matter under Issue No.2 and held that limitation starts running from the date when the mortgagee demands the money and the mortgagor refused the same. Discussion on the said issue is as follows:-

There is merit in the second contention made on behalf of the defendants. It is case of usufructuary mortgage and in case of usufructuary mortgage and no period for the payment of mortgage amount was fixed. It is not the case of the plaintiffs that the plaintiffs ever made demand for the mortgage amount and they refused. In this situation, no cause of action could accrue to the plaintiffs, which could only accrue on demand of the mortgage amount from the defendants and refusal of same by the defendants. This view also finds support from the decision in the case of Nilkanth Balwant Natu & Ors. vs. Vidya Narasinh Bharathi Swami & Ors. AIR 1930 PC 188).

The law laid down in several cases referred to by the learned counsel for the plaintiffs relating to the interpretation of provisions of Section 28 and Article 148 of the Limitation Act, does not apply on the facts of the instant case at all as the periods of limitation is to run from the date on which the cause of action

arises. In the result, I hold that the plaintiffs have not become owners of the suit land on the expiry of period of more than 60 years. Issue No.1 is thus decided in favour of the plaintiffs and against the defendants, and Issue No.2 is decided against the plaintiffs and in favour of defendants.

The above view was affirmed by the appellate Court as follows:-

I find force in the contention of the learned counsel for the respondents. The present one is a case of usufructuary mortgage and in case of such a mortgage no period of payment is fixed. A reading of the mortgage deed would show that no time had been fixed. The plaintiffs had nowhere pleaded that they ever made demand for the mortgage amount and it was refused. In such a situation, the trial Court was right in coming to the conclusion that no cause of action could accrue to the plaintiffs which could only accrue on demand of the mortgage amount from the defendants and the refusal of the same by them. Reliance was rightly placed by the trial court on Nilkanth Balwant Natu & Ors. vs. Vidya Narasingh Borathiswami & Ors., AIR 1930 PC 188. No contrary view law has been cited to persuade me to take a contrary view.

5. On second appeal by the plaintiffs before the High Court, the matter was directed to be placed before the Full Bench to consider the following questions:-

1. Whether the right to seek redemption would arise on the date of mortgage itself in case of usufructuary mortgage when no time limit is fixed to seek redemption?

2. Whether there is any time limit in the case of a usufructuary mortgagor to get his property redeemed?

6. The Full Bench held that in case of usufructuary mortgage, limitation for recovery of possession under Article 61 of the Limitation Act starts on payment of mortgage money as provided under Section 62 of the Transfer of Property Act (for short ~the T.P. Act) and not from the date of mortgage. Relevant observations are:-

After considering the aforesaid judgments, we respectfully agree with the view of the Full Bench of this Court in Lachhman Singh case (supra) and that of

Patna High Court in *Jadubans Sahai* case (Supra). The provisions of Sections 60, 62 and 67 of the Transfer of Property Act are not applicable within the jurisdiction of this Court. Therefore, these provisions are required to be interpreted keeping in view the principles of equity and good conscience. Since the mortgage is essentially and basically a conveyance in law or an assignment of chattels as a security for the payment of debt or for discharge of some other obligations for which it is given, the security must, therefore, be redeemable on the payment or discharge of such debt or obligation. That is the view of the Honble Supreme Court in *Pomal Kanji Govindji* case (supra) wherein it has also been held that poverty should not be unduly permitted to curtail one right to borrow money. Since at one point of time the mortgagor for one or the other reason mortgaged his property to avail financial assistance on account of necessities of life, the mortgagor right cannot be permitted to be defeated only on account of passage of time. The interpretation sought to be raised by the mortgagee is to defeat the right of the mortgagor and is wholly inequitable and unjust. The mortgagee remains in possession of the mortgaged property; enjoys the usufruct thereof and, therefore, not to lose anything by returning the security on receipt of mortgage debt.

Section 60 of the Act is general in nature applicable to all kinds of mortgages including usufructuary mortgage which is evident from clause (b) of Section 60 of the Act, where the mortgagee in possession of the mortgaged property is required to deliver possession to the mortgagor. But Section 62 of the Act is a special provision dealing only with the rights of usufructuary mortgagor. In terms of clause(a) of Section 62 of the Act, the suit is for possession after the mortgage comes to an end by self redeeming process as the mortgagee is authorised to pay himself the mortgage money from the rents and profits of the property. The mortgagee has to look to the rents and profits only to repay himself and when his entire charge is so liquidated he must re-deliver possession of the mortgaged property to the mortgagor. However, in terms of clause(b) of Section 62 of the Act, the right of the mortgagor will arise only after rents and profits derived by the mortgagee out of the usufruct of the mortgaged property are adjusted towards the interest or the principal and on mortgagor paying the balance in the manner prescribed. In such mortgages, rents and profits are to be set off against interest and the mortgagee is entitled to retain possession until such time as the mortgagor chooses to redeem on

payment of the principal sum secured. Such right for possession will accrue after the mortgage money is paid off.

The limitation of 30 years under Article 61(a) begins to run when the right to redeem or the possession accrues. The right to redemption or recover possession accrues to the mortgagor on payment of sum secured in case of usufructuary mortgage, where rents and profits are to be set off against interest on the mortgage debt, on payment or tender to the mortgagee, the mortgage money or balance thereof or deposit in the court. The right to seek foreclosure is co-extensive with the right to seek redemption. Since right to seek redemption accrues only on payment of the mortgage money or the balance thereof after adjustment of rents and profits from the interest thereof, therefore, right of foreclosure will not accrue to the mortgagee till such time the mortgagee remains in possession of the mortgaged security and is appropriating usufruct of the mortgaged land towards the interest on the mortgaged debt. Thus, the period of redemption or possession would not start till such time usufruct of the land the profits are being adjusted towards interest on the mortgage amount. In view of the said interpretation, the principle that once a mortgage, always a mortgage and, therefore always redeemable would be applicable.

The argument that after the expiry of period of limitation to sue for foreclosure, the mortgagees have a right to seek declaration in respect of their title over the suit property is not correct. From the aforesaid discussion, it is apparent that the mortgage cannot be extinguished by any unilateral act of the mortgagee. Since the mortgage cannot be unilaterally terminated, therefore, the declaration claimed is nothing but a suit for foreclosure. It is equally well settled that it is not title of the suit, which determines the nature of the suit. The nature of the suit is required to be determined by reading all the averments in the plaint. Such declaration cannot be claimed by an usufructuary mortgagee.

Thus, we prefer to follow the dictum of law laid down by the larger Bench in Seth Ganga Dhar case(supra) as well as judgments of Honble Supreme Court in Jaysingh Dnyanu Mhoprekar case(supra), Pomal Kanji Govindji case(supra), Panchannan Sharma case(supra) and Harbans case(supra) in preference to the judgments relied upon by the mortgagees in Prabhakaran case(supra) and Sampuran Singh case (supra).

7. We have heard learned counsel for the parties.

8. The main contention urged on behalf of the appellants is that the right of mortgagor to redeem is governed by Article 61 of the Schedule to the Limitation Act and the right to redeem or recover possession accrues on the date of the mortgage itself, unless a different time is agreed between the parties. Since the mortgagor has right to redeem on payment of the mortgage money and there can be no restriction on the mortgagor to exercise his right on the date of mortgage itself, period of limitation starts on the date of mortgage and on expiry thereof, right to recover possession comes to an end. The expiry of limitation not only bars the remedy but also the right to seek possession as provided under Section 27 of the Limitation Act. It is submitted that this Court has dealt with the issue in *Sampuran Singh & Ors. vs. Niranjana Kaur (smt.) & Ors.*, (1999) 2 SCC 679. There is no occasion to reconsider the said view. Reliance is also placed on a Full Bench decision of the High Court of Himachal Pradesh in *Bhandaru Ram (D) Thr. L.R. Ratan Lal vs. Sukh Ram*, AIR 2012 (H.P.) 1 (FB) wherein the impugned judgment of the Full Bench of the Punjab and Haryana High Court has been expressly dissented from and it has been concluded that the period of limitation for filing a suit for recovery of possession of immovable property or redemption of usufructuary mortgage, which have not fixed any time for repayment of mortgage money, is 30 years from the date of mortgage, as prescribed under Article 61 of the Schedule to the Limitation Act, 1963 (60 years under Article 148 as per Indian Limitation Act, 1908).

9. Learned counsel for the respondents support the view taken by the High Court and submit that the usufructuary mortgage was different from any other mortgage and the person, who parts with possession of his property from rents and profits of which the mortgagee was entitled to recover the mortgage money, could not be placed at par with a mortgagor who had not given possession of the property to mortgagee and allowed the usufruct of the property to be used for payment of mortgage money. In such cases, limitation could not run from the date of mortgage but from the date mortgage money is paid out of rents and profits of the property to the knowledge of the mortgagor or from the date of payment or deposit by the mortgagor. Mere expiry of time from the date of mortgage could not extinguish the right of redemption and to recover possession.

10. We have given our anxious consideration to the question of law arising in the cases.

11. We are in agreement with the view taken in the impugned judgment that in a usufructuary mortgage, right to recover possession continues till the money is paid from the rents and profits or where it is partly paid out of rents and profits when the balance is paid by the mortgagor or deposited in Court as provided under Section 62 of the T.P. Act.

12. It will be appropriate to refer to the statutory provisions of the T.P. Act and the Limitation Act:-

#### T.P. Act

58. "Mortgage", "mortgagor", "mortgagee", "mortgage-money" and "mortgaged" defined.

(a) A mortgage is the transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability.

The transferor is called a mortgagor, the transferee a mortgagee; the principal money and interest of which payment is secured for the time being are called the mortgage-money, and the instrument (if any) by which the transfer is effected is called a mortgage-deed.

(b) Simple mortgage-Where, without delivering possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgage-money, and agrees, expressly or impliedly, that, in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage-money, the transaction is called a simple mortgage and the mortgagee a simple mortgagee.

(c) Mortgage by conditional sale-Where, the mortgagor ostensibly sells the

mortgaged property on condition that on default of payment of the mortgage-money on a certain date the sale shall become absolute, or on condition that on such payment being made the sale shall become void, or on condition that on such payment being made the buyer shall transfer the property to the seller, the transaction is called a mortgage by conditional sale and the mortgagee a mortgagee by conditional sale:

PROVIDED that no such transaction shall be deemed to be a mortgage, unless the condition is embodied in the document which effects or purports to effect the sale.

(d) Usufructuary mortgage-Where the mortgagor delivers possession or expressly or by implication binds himself to deliver possession of the mortgaged property to the mortgagee, and authorizes him to retain such possession until payment of the mortgage-money, and to receive the rents and profits accruing from the property or any part of such rents and profits and to appropriate the same in lieu of interest or in payment of the mortgage-money, or partly in lieu of interest or partly in payment of the mortgage-money, the transaction is called a usufructuary mortgage and the mortgagee a usufructuary mortgagee.

(e) English mortgage-Where the mortgagor binds himself to repay the mortgage-money on a certain date, and transfers the mortgaged property absolutely to the mortgagee, but subject to a proviso that he will re-transfer it to the mortgagor upon payment of the mortgage-money as agreed, the transaction is called an English mortgage.

(f) Mortgage by deposit of title-deeds-Where a person in any of the following towns, namely, the towns of Calcutta, Madras, and Bombay, and in any other town which the State Government concerned may, by notification in the Official Gazette, specify in this behalf, delivers to a creditor or his agent documents of title to immovable property, with intent to create a security thereon, the transaction is called a mortgage by deposit of title- deeds.

(g) Anomalous mortgage-A mortgage which is not a simple mortgage, a mortgage by conditional sale, a usufructuary mortgage, an English mortgage or

a mortgage by deposit of title-deeds within the meaning of this section is called an anomalous mortgage.

#### 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 the act of the parties or by decree of a court.

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#### 62. Right of usufructuary mortgagor to recover possession

In the case of a usufructuary mortgage, the mortgagor has a right to recover possession of the property together with the mortgage-deed and all documents relating to the mortgaged property which are in the possession or power of the mortgagee,-

(a) where the mortgagee is authorised to pay himself the mortgage-money from the rents and profits of the property,-when such money is paid;

(b) where the mortgagee is authorised to pay himself from such rents and profits or any part thereof a part only of the mortgage-money, when the term (if any) prescribed for the payment of the mortgage-money has expired and the mortgagor pays or tenders to the mortgagee the mortgage money or the balance

thereof or deposits it in court hereinafter provided.

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Limitation Act:-

Art. 61 By a mortgagor

(a) To redeem or to recover immovable property mortgaged by him when the right to recover possession of such property accrues thirty years from the date when the right to redeem or to recover possession of such property accrues. (b) xxxxxxxx | xxxxxxxx | | | | xxxxxxx | |

(emphasis supplied)

A perusal of above provisions shows that Article 61 refers to right to redeem or recover possession. While right of mortgagor to redeem is dealt with under Section 60 of the T.P. Act, the right of usufructuary mortgagor to recover possession is specially dealt with under Section 62. Section 62 is applicable only to usufructuary mortgages and not to any other mortgage. The said right of usufructuary mortgagor though styled as ~right to recover possession is for all purposes, right to redeem and to recover possession. Thus, while in case of any other mortgage, right to redeem is covered under Section 60, in case of usufructuary mortgage, right to recover possession is dealt with under Section 62 and commences on payment of mortgage money out of the usufructs or partly out of the usufructs and partly on payment or deposit by the mortgagor. This distinction in a usufructuary mortgage and any other mortgage is clearly borne out from provisions of Sections 58, 60 and 62 of the T.P. Act read with Article 61 of the Schedule to the Limitation Act. Usufructuary mortgage cannot be treated at par with any other mortgage, as doing so will defeat the scheme of Section 62 of the T.P. Act and the equity. This right of the usufructuary mortgagor is not only an equitable right, it has statutory recognition under Section 62 of the T.P. Act. There is no principle of law on which this right can be defeated. Any contrary view, which does not take into account the special right of usufructuary mortgagor under Section 62 of the T.P. Act, has to be held to be erroneous on this ground or has to be limited to a mortgage other than a usufructuary mortgage. Accordingly, we uphold the view taken by the Full

Bench that in case of usufructuary mortgage, mere expiry of a period of 30 years from the date of creation of the mortgage does not extinguish the right of the mortgagor under Section 62 of the T.P. Act.

13. We may now refer to decisions of this Court.

(i) In *Prabhakaran & Ors. vs. M. Azhagiri Pillai & Ors.*, (2006) 4 SCC 484, suit of mortgagor for redemption was held to be within limitation. However, in para 13, it was observed:-

13. Article 148 of the Limitation Act, 1908 (referred to as the old Act) provided a limitation of 60 years for a suit against a mortgagee to redeem or to recover possession of immovable property mortgaged. The corresponding provision in the Limitation Act, 1963 (the new Act or the Limitation Act for short), is Article 61(a) which provides that the period of limitation for a suit by a mortgagor to redeem or recover possession of the immovable property mortgaged is 30 years. The period of limitation begins to run when the right to redeem or to recover possession accrues. In the case of a usufructuary mortgage which does not fix any date for repayment of the mortgage money, but merely stipulates that the mortgagee is entitled to be in possession till redemption, the right to redeem would accrue immediately on execution of the mortgage deed and the mortgagor has to file a suit for redemption within 30 years from the date of the mortgage. Section 27 of the Limitation Act provides that at the determination of the period hereby limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished. This would mean that on the expiry of the period of limitation prescribed under the Act, the mortgagor would lose his right to redeem and the mortgagee would become entitled to continue in possession as the full owner.

The above observations do not take into account the special right of usufructuary mortgagor under Section 62 of the T.P. Act to recover possession which commences after mortgage money is paid out of rents and profits or partly out of rents and profits and partly paid or deposited by mortgagor. Thus, we are unable to accept the same as correct view in law. (ii) In *Jayasingh Dhyanu Mhoprekar & Anr. vs. Krishna Babaji Patil & Anr.*, 1985 (4) SCC 162, the question of limitation for redemption was not involved. Question was whether mortgagor right of redemption was affected when mortgaged land was

allotted to mortgagees by way of grant under the provisions of the Bombay Paragana and Kulkarni Watans (Abolition) Act, 1950, it was observed:-

6. The only question which arises for decision in this case is whether by reason of the grant made in favour of the defendants the right to redeem the mortgage can be treated as having become extinguished. It is well settled that the right of redemption under a mortgage deed can come to an end only in a manner known to law. Such extinguishment of right can take place by a contract between the parties, by a merger or by a statutory provision which debars the mortgagor from redeeming the mortgage. A mortgagee who has entered into possession of the mortgaged property under a mortgage will have to give up possession of the property when the suit for redemption is filed unless he is able to show that the right of redemption has come to an end or that the suit is liable to be dismissed on some other valid ground. This flows from the legal principle which is applicable to all mortgages, namely Once a mortgage, always a mortgage. It is no doubt true that the father of the first defendant and the second defendant have been granted occupancy right by the Prant Officer by his order dated February 5, 1964 along with Pandu, the uncle of Defendant 1. But it is not disputed that the defendants would not have been able to secure the said grant in their favour but for the fact that they were in actual possession of the lands. They were able to be in possession of the one-half share of the plaintiffs in the lands in question only by reason of the mortgage deed. If the mortgagors had been in possession of the lands on the relevant date, the lands would have automatically been granted in their favour, since the rights of the tenants in the watan lands were allowed to subsist even after the coming into force of the Act and the consequent abolition of the watans by virtue of Section 8 of the Act. The question is whether the position would be different because they had mortgaged land with possession on the relevant date.

Apart from judgments mentioned in reference order, reference may be made to some other judgments dealing with the issue.

(iii) In *Harbans vs. Om Prakash*, (2006) 1 SCC 129, this Court upheld the view that limitation for redemption does not start from date of mortgage in a usufructuary mortgage and held that view in *State of Punjab & Ors. vs. Ram Rakha & Ors.*, (1997) 10 SCC 172 was contrary to earlier view in *Seth*

Gangadhar vs. Shankar Lal, 1959 SCR 509. It was observed:- 7. Reference may be made to certain paragraphs in Seth Ganga Dhar v. Shankar Lal, 1959 SCR 509 which read as follows:

[4.] It is admitted that the case is governed by the Transfer of Property Act. Under Section 60 of that Act, at any time after the principal money has become due, the mortgagor has a right on payment or tender of the mortgage money to require the mortgagee to reconvey the mortgaged property to him. The right conferred by this section has been called the right to redeem and the appellant sought to enforce this right by his suit. Under this section, however, that right can be exercised only after the mortgage money has become due. In Bakhtawar Begam v. [pic]Husaini Khanam,ILR (1914) 36 All 195 (IA at p. 89) also the same view was expressed in these words:

~Ordinarily, and in the absence of a special condition entitling the mortgagor to redeem during the term for which the mortgage is created, the right of redemption can only arise on the expiration of the specified period.

Now, in the present case the term of the mortgage is eighty-five years and there is no stipulation entitling the mortgagor to redeem during that term. That term has not yet expired. The respondents, therefore, contend that the suit is premature and liable to be dismissed.

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[6.] The rule against clogs on the equity of redemption is that, a mortgage shall always be redeemable and a mortgagor right to redeem shall neither be taken away nor be limited by any contract between the parties. The principle behind the rule was expressed by Lindley, M.R. In Santley v. Wilde, (1899) 2 Ch. 474 in these words:

~The principle is this: a mortgage is a conveyance of land or an assignment of chattels as a security for the payment of a debt or the discharge of some other obligation for which it is given. This is the idea of a mortgage: and the security is redeemable on the payment or discharge of such debt or obligation, any provision to the contrary notwithstanding. That, in my opinion, is the law. Any

provision inserted to prevent redemption on payment or performance of the debt or obligation for which the security was given is what is meant by a clog or fetter on the equity of redemption and is therefore void. It follows from this, that once a mortgage always a mortgage.

[7.] The right of redemption, therefore, cannot be taken away. The courts will ignore any contract the effect of which is to deprive the mortgagor of his right to redeem the mortgage. One thing, therefore, is clear, namely, that the term in the mortgage contract, that on the failure of the mortgagor to redeem the mortgage within the specified period of six months the mortgagor will have no claim over the mortgaged property, and the mortgage deed will be deemed to be a deed of sale in favour of the mortgagee, cannot be sustained. It plainly takes away altogether, the mortgagor right to redeem the mortgage after the specified period. This is not permissible, for ~once a mortgage always a mortgage and therefore always redeemable. The same result also follows from Section 60 of the Transfer of Property Act. So it was said in *Mohd. Sher Khan v. Seth Swami Dayal*, AIR 1922 PC 17:

~An anomalous mortgage enabling a mortgagee after a lapse of time and in the absence of redemption to enter and take the rents in [pic]satisfaction of the interest would be perfectly valid if it did not also hinder an existing right to redeem. But it is this that the present mortgage undoubtedly purports to effect. It is expressly stated to be for five years, and after that period the principal money became payable. This, under Section 60 of the Transfer of Property Act, is the event on which the mortgagor had a right on payment of the mortgage money to redeem.

[14.] In comparatively recent times Viscount Haldane, L.C. repeated the same view when he said in *G. and C. Kreglinger v. New Patagonia Meat and Cold Storage Co. Ltd*, 1914 AC 25 (AC at pp. 35-36):

~This jurisdiction was merely a special application of a more general power to relieve against penalties and to mould them into mere securities. The case of the common law mortgage of land was indeed a gross one. The land was conveyed to the creditor upon the condition that if the money he had advanced to the feoffor was repaid on a date and at a place named, the fee simple would revert

in the latter, but that if the condition was not strictly and literally fulfilled he should lose the land forever. What made the hardship on the debtor a glaring one was that the debt still remained unpaid and could be recovered from the feoffor notwithstanding that he had actually forfeited the land to the mortgagee. Equity therefore, at an early date began to relieve against what was virtually a penalty by compelling the creditor to use his legal title as a security.

My Lords, this was the origin of the jurisdiction which we are now considering, and it is important to bear that origin in mind. For the end to accomplish which the jurisdiction has been evolved ought to govern and limit its exercise by equity judges. That end has always been to ascertain, by parol evidence if need be, the real nature and substance of the transaction, and if it turned out to be in truth one of mortgage simply, to place it on that footing. It was, in ordinary cases, only where there was conduct which the Court of Chancery regarded as unconscientious that it interfered with freedom of contract. The lending money, on mortgage or otherwise, was looked on with suspicion, and the court was on the alert to discover want of conscience in the terms imposed by lenders.

[15.] The reason then justifying the Court power to relieve a mortgagor from the effects of his bargain is its want of conscience. [pic]Putting it in more familiar language the Court jurisdiction to relieve a mortgagor from his bargain depends on whether it was obtained by taking advantage of any difficulty or embarrassment that he might have been in when he borrowed the moneys on the mortgage. Was the mortgagor oppressed? Was he imposed upon? If he was, then he may be entitled to relief.

[16.] We then have to see if there was anything unconscionable in the agreement that the mortgage would not be redeemed for eighty-five years. Is it oppressive? Was he forced to agree to it because of his difficulties? Now this question is essentially one of fact and has to be decided on the circumstances of each case. It would be wholly unprofitable in enquiring into this question to examine the large number of reported cases on the subject, for each turns on its own facts.

The section is unqualified in its terms, and contains no saving provision as other sections do in favour of contracts to the contrary. Their Lordships therefore see

no sufficient reason for withholding from the words of the section their full force and effect.

[17.] First then, does the length of the term ” and in this case it is long enough being eighty-five years itself lead to the conclusion that it was an oppressive term? In our view, it does not do so. It is not necessary for us to go so far as to say that the length of the term of the mortgage can never by itself show that the bargain was oppressive. We do not desire to say anything on that question in this case. We think it enough to say that we have nothing here to show that the length of the term was in any way disadvantageous to the mortgagor. It is quite conceivable that it was to his advantage. The suit for redemption was brought over forty-seven years after the date of the mortgage. It seems to us impossible that if the term was oppressive, that was not realised much earlier and the suit brought within a short time of the mortgage. The learned Judicial Commissioner felt that the respondents contention that the suit had been brought as the price of landed property had gone up after the war, was justified. We are not prepared to say that he was wrong in this view. We cannot also ignore, as appears from a large number of reported decisions, that it is not uncommon in various parts of India to have long-term mortgages. Then we find that the property was subject to a prior mortgage. We are not aware what the term of that mortgage was. But we find that that mortgage included another property which became free from it as a result of the mortgage in suit. This would show that the mortgagee under this mortgage was not putting any pressure on the mortgagor. That conclusion also receives support from the fact that the mortgage money under the present mortgage was more than that under the earlier mortgage but the mortgagee in the present case was satisfied with a smaller security. Again, no complaint is made that the interest charged, which was to be measured by the rent of the property, was in any manner high. All these, to our mind, indicate that the mortgagee had not taken any unfair advantage of his position as the lender, nor that the mortgagor was under any financial embarrassment.

[18.] It is said that the mortgage instrument itself indicates that the bargain is hard, for, while the mortgagor cannot redeem for eighty-five years, the mortgagee is free to demand payment of his dues at any time [pic]he likes. This contention is plainly fallacious. There is nothing in the mortgage instrument permitting the mortgagee to demand any money, and it is well settled that the

mortgagee right to enforce the mortgage and the mortgagor right to redeem are coextensive.

8. On the contrary, learned counsel for the respondent submitted that in *Panchanan Sharma v. Basudeo Prasad Jaganani*, 1995 Supp (2) SCC 574 it was clearly held that when there is no stipulation regarding period of limitation it can be redeemed at any time. It was, inter alia, held as follows: (SCC p. 576, para 3)

The sale certificate, Ext. C-II does not bind the appellant and, therefore, the mortgage does not stand extinguished by reason of the sale. It is inoperative as against the appellant.

9. Though the decision in *State of Punjab* case prima facie supports the stand of the appellant, the decision rendered by a three-Judge Bench of this Court in *Ganga Dhar* case according to us had dealt with the legal position deliberately and stated the same succinctly.

(iv) In *Parichhan Mistry (Dead) by L.Rs. & Anr. vs. Acchiabar Mistry & Ors.*, (1996) 5 SCC 526, it was observed:-

2. The High Court came to the conclusion that the mortgagors having failed to pay a portion of the rent for realisation of which the landlord had filed a suit and obtained a decree and that said decree being put to execution and the mortgagee having paid up the decretal dues, the mortgagor loses his right of redemption and, therefore the suit for redemption must fail. The [pic]learned Judge came to the conclusion that the equity of redemption, in the facts and circumstances of the case was extinguished and, therefore, the mortgagor is not entitled to redeem. The short question that arises for consideration is whether in the facts and circumstances of the case the High Court was right in coming to a conclusion that right of redemption got extinguished and the mortgagor had no right of redemption. It is true that a right of redemption under a mortgage deed can come to an end, but only in a manner known to law. Such extinguishment of right can take place by contract between the parties or by a decree of the court or by a statutory provision which debars the mortgagors from redeeming the mortgage. The mortgagor right of redemption is exercised by the payment or

tender to the mortgagee at the proper time and at the proper place, of the mortgage money. When it is extinguished by the act of the parties the act must take the shape and observe the formalities which the law prescribes. The expression act of parties refers to some transaction subsequent to the mortgage and standing apart from the mortgage transaction. A usufructuary mortgagee cannot by mere assertion of his own or by a unilateral act on his part, convert his position on moiety of the property as mortgagee into that of an absolute owner. It is no doubt true that the mortgagee would be entitled to purchase the entire equity of redemption from the mortgagor. The mortgagee occupies a peculiar position and, therefore, the question as to what he purchases at a court sale is a vexed question, but being in an advantageous position where the mortgagee availing himself of his position gains an advantage he holds, such advantage is for the benefit of the mortgagor. It has been so held by this Court in the case of Sidhakamal Nayan Ramanuj Das v. Bira Nayak, AIR 1954 SC 336 and Mritunjoy Pani v. Narmanda Bala Sasmal, (1962) 1 SCR 290. This being the position of law if for some default in payment of rent a rent decree is obtained and the mortgagee pays off the same even then the mortgage in question is liable to be redeemed at the option of the mortgagor. The mortgagee cannot escape from his obligation by bringing the equity of redemption to sale in execution of a decree on the personal covenant. By virtue of purchase of the property by the mortgagee in court sale, no merger takes place between the two rights nor the mortgage stands extinguished.

(v) In Achaldas Durgaji Oswal (Dead) Thr. L.Rs. vs. Ramvilas Gangabisan Heda (Dead) Thr. L.Rs. & Ors., (2003) 3 SCC 614, this Court upheld the view that right of redemption was not lost despite failure of a mortgagor in a usufructuary mortgage to make deposit in terms of a preliminary decree for redemption. It was observed:-

7. Mr Mohta, learned Senior Counsel appearing on behalf of the respondents on the other hand, would submit that whereas Order 34 Rule 7 would apply both in respect of the suit for foreclosure and redemption of mortgage, Order 34 Rule 8 thereof refers to final decree in redemption suit only. The learned counsel would contend that having regard to the well-established rule once a mortgage always a mortgage, the right of a mortgagor to redeem the mortgage would continue unless the same is extinguished either by reason of a decree passed by a court of

law or by an agreement of parties. The learned counsel pointed out that in this case the application for drawing up of a final decree was filed within a period of three years from the date of making the deposit and thus the same was not barred by limitation.

## Findings

8. Usufructuary mortgage is defined in Section 58(d) of the Transfer of Property Act in the following terms:

58. (d) Where the mortgagor delivers possession or expressly or by implication binds himself to deliver possession of the mortgaged property to the mortgagee, and authorises him to retain such possession until payment of the mortgage-money, and to receive the rents and profits accruing from the property or any part of such rents and profits and to appropriate the same in [pic]lieu of interest, or in payment of the mortgage-money, or partly in lieu of interest or partly in payment of the mortgage-money, the transaction is called an usufructuary mortgage and the mortgagee an usufructuary mortgagee.

9. Mortgagor, despite having mortgaged the property might still deal with it in any way consistent with the rights of the mortgagee. He has an equitable right to redeem the property after the day fixed for payment has gone by but his right or equity of redemption is no longer strictly an equitable estate or interest although it is still in the nature of an equitable interest. (See Halsbury Laws of England, 4th Edn., Vol. 32, p.264.)

10. The right of the mortgagor, it is now well settled, to deal with the mortgaged property as well as the limitation to which it is subject depends upon the nature of this ownership which is not absolute, but qualified by reason of the right of the mortgagee to recover his money out of the proceedings. The right to redeem the mortgage is a very valuable right possessed by the mortgagor. Such a right to redeem the mortgage can be exercised before it is foreclosed or the estate is sold. The equitable right of redemption is dependent on the mortgagor giving the mortgagee reasonable notice of his intention to redeem and on his fully performing his obligations under the mortgage.

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 *Thumbarasamy Mudelly v. Mohd. Hossain Rowthen* 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 which reads thus:

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 [pic]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.

12. A right of redemption, thus, was statutorily recognized as a right of a mortgagor as an incident of mortgage which subsists so long as the mortgage itself subsists. The proviso appended to Section 60, as noticed hereinbefore, however, confines the said right so long as the same is not extinguished by an act of the parties or by a decree of court.

13. In the Law of Mortgage by Dr Rashbehary Ghose at pp. 231-32 under the heading Once a mortgage, always a mortgage, it is noticed:

In 1681 Lord Nottingham in the leading case of *Howard v. Harris*<sup>4</sup> firmly laid down the principle: "Once a mortgage, always a mortgage. This is a doctrine to protect the mortgagor right of redemption: it renders all agreements in a mortgage for forfeiture of the right to redeem and also encumbrances of or dealings with the property by the mortgagee as against a mortgagor coming to redeem. In 1902 the well-known maxim, "once a mortgage, always a mortgage, was supplemented by the words "and nothing but a mortgage added by Lord Davey in the leading case of *Noakes v. Rice*<sup>5</sup> in which the maxim was explained to mean "that a mortgage cannot be made irredeemable and a provision to that effect is void. The maxim has been supplemented in the Indian context by the words "and therefore always redeemable, added by Justice Sarkar of the Supreme Court in the case of *Seth Ganga Dhar v. Shankar Lal*.

It is thus evident that the very conception of mortgage involves three principles. First, there is the maxim: "once a mortgage, always a mortgage. That is to say, a mortgage is always redeemable and if a contrary provision is made, it is invalid. And this is an exception to the aphorism, *modus et conventio vincunt legem* (custom and agreement overrule law). Secondly, the mortgagee cannot reserve to himself any collateral advantage outside the mortgage agreement. Thirdly, as a corollary from the first another principle may be deduced, namely, "once a mortgage, always a mortgage, and nothing but a mortgage. In other words, any stipulation which prevents a mortgagor from getting back the property mortgaged is void. That is, a mortgage is always redeemable.

The maxim "once a mortgage always a mortgage may be said to be a logical corollary from the doctrine, which is the very foundation of the law of mortgages, that time is not of the essence of the contract in such transactions; for the protection which the law throws around the mortgagor might be rendered wholly illusory, if the right to redeem could be limited by contract between the parties. Right to redeem is an incident of a subsisting mortgage and is inseparable from it so that the right is coextensive with the mortgage itself. The right subsists until it is [pic]appropriately and effectively extinguished either by the acts of the parties concerned or by a proper decree of the competent court.

4. In *The Law of Mortgages* by Edward F. Cousins at p. 294, in relation to protection of the right to redeem, it is stated:

But the protection of embarrassed mortgagors could not be achieved by the mere creation of the equitable right of redemption. As soon as the practice in equity to allow redemption after the contract date became known, mortgagees sought to defeat the intervention of equity by special provisions in the mortgage-deed. These provisions were designed either to render the legal right to redeem illusory, and thus prevent the equity of redemption from arising at all, or to defeat or clog the equity of redemption after it had arisen. For example, the mortgage contract might provide for an option for the mortgagee to purchase the mortgaged property, thus defeating both the legal and equitable right to redeem, or might allow redemption after the contract date only upon payment of an additional sum or upon performance of some additional obligation. Consequently, the Chancellor began to relieve mortgagors against such restrictions and fetters on the legal and equitable rights to redeem imposed by special covenants in the mortgage.

The protection of a mortgagor against all attempts to defeat or clog his right of redemption involved the creation of subsidiary rules of equity, invalidating the various contrivances which ingenious conveyancers devised. These rules are sometimes summed up in a maxim of equity ~once a mortgage always a mortgage. This means that once a contract is seen to be a mortgage no provision in the contract will be valid if it is inconsistent with the right of the mortgagor to recover his security on discharging his obligations. Provisions offending against the maxim may either touch the contractual terms of redemption, rendering the right to redeem illusory, or they may touch only the equitable right to redeem after the passing of the contract date, hampering the exercise of the right. Provisions of the latter kind are termed ~clogs on the equity of redemption. Greene, M.R. in *Knightsbridge Estates v. Byrne*<sup>7</sup> emphasized that provisions touching the contractual right to redeem are not properly to be classed as clogs on the equity of redemption. But it is evident that such provisions are in substance clogs on the equity of redemption, since they tend to defeat it altogether.

15. In Fisher and Lightwood Law of Mortgage, the nature of the right of redemption is stated thus:

The rights of redemption.” The right to redeem a mortgage was formerly conferred on the mortgagor by a proviso or condition in the mortgage to the effect that, if the mortgagor or his representative should pay to the mortgagee the principal sum, with interest at the rate fixed, on a certain day, the mortgagee, or the person in whom the estate was vested, would, at the cost of the person redeeming, reconvey to him or as [pic]he should direct (a). This is still the practice in the case of a mortgage effected by an assignment of the mortgagor interest (b). A proviso for reconveyance was no longer appropriate after 1925 for a legal mortgage of land [which has to be made by demise (c)], and it is not necessary to have a proviso for surrender of the term in such a mortgage, since the term ceases on repayment (d). Nevertheless, in order to define the rights of the mortgagor and the mortgagee, a proviso is inserted expressly stating that the term will cease at the date fixed (e).

It has been seen (f) that, at law, whatever form the mortgage took, upon non-payment by the appointed time, the estate of the mortgagee became absolute and irredeemable, but that equity intervened to enable the mortgagor to redeem after the date of repayment.

There are, therefore, two distinct rights of redemption ” the legal or contractual right to redeem on the appointed day and the equitable right to redeem thereafter (g). The equitable right to redeem, which only arises after the contractual date of redemption has passed, must be distinguished from the equity of redemption, which arises when the mortgage is made (g).

16. The question which falls for consideration in this appeal must be considered keeping in view the statutory right of the mortgagor in terms of Section 60 of the Transfer of Property Act. By reason of Article 61 of the Limitation Act, 1963, the limitation provided for a suit to redeem or recover the possession of immovable property mortgaged by a mortgagor is thirty years from the date of accrual of right to redeem or recover possession. Article 137 which is a residuary provision provides for limitation of three years in a case where no period of limitation is provided.

20. The statutory provisions, as noticed hereinbefore, are required to be construed having regard to the redeeming features of usufructuary mortgage, namely, (a) there is a delivery of possession to the mortgagee, (b) he is to retain possession until repayment of money and to receive rents and profits or part thereof in lieu of interest, or in payment of mortgage- money, or partly in lieu of interest and partly in payment of mortgage- money, (c) there is redemption when the amount due is personally paid or is discharged by rents or profits received, and (d) there is no remedy by sale or foreclosure.

21. Order 34 Rules 7 and 8 do not confer any right upon the usufructuary mortgagee to apply for final decree which is conferred on the mortgagee on other types of mortgages. By reason of sub-rule (1) of Rule 8 of Order 34, a mortgagor is entitled to make an application for final decree at any time 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. No such application is again contemplated at the instance of the usufructuary mortgagee. By reason of sub-rule (1) of Rule 8 of Order 34, a right of redemption is conferred upon the mortgagor of a usufructuary mortgage. Such a provision has been made evidently having regard to the right of redemption of a mortgagor in terms of Section 60 of the Transfer of Property Act and further, having regard to the fact that a usufructuary mortgagee would be entitled to possess the property in question till a final decree of redemption is passed.

22. The right of redemption of a mortgagor being a statutory right, the same can be taken away only in terms of the proviso appended to Section 60 of the Act which is extinguished either by a decree or by act of parties. [pic]Admittedly, in the instant case, no decree has been passed extinguishing the right of the mortgagor nor has such right come to an end by act of the parties.

23. A right for obtaining a final decree for sale or foreclosure can be exercised only on payment of such money. Such a right can be exercised at any time even before the sale is confirmed although the final decree might have been passed in the meanwhile. The mortgagee is also not entitled to receive any payment under the preliminary decree nor is the mortgagor required to make an application to

recover before paying the same.

24. Even, indisputably, despite expiry of the time for deposit of the mortgaged money in terms of the preliminary decree, a second suit for redemption would be maintainable.

(vi) In *Prithi Nath Singh vs. Suraj Ahir*, (1963) 3 SCR 302, this Court approved the observations of Allahabad High Court in *Rama Prasad vs. Bishambhar Singh*, AIR 1946 All 400, that Sections 60 and 62 of T.P. Act make distinction in right of a usufructuary mortgagor and other mortgagor as follows:-

11. In *Ramprasad v. Bishambhar Singh*, AIR 1946 All 400, the question formulated for determination was whether the suit being a suit to recover possession of the mortgaged property after the mortgage money had been paid-off was a suit against the mortgagee to redeem or to recover possession of immovable property mortgaged. Braund, J., said, at p. 402: Now, it is quite obvious that that section (Section 60 of the Transfer of Property Act) can only refer to a case in which a mortgagor under a subsisting mortgage approaches the Court to establish his right to redeem and to have that redemption carried out by the process of the various declarations and orders of the Court by which it effects redemption. In other words, Section 60 contemplates a case in which the mortgage is still subsisting and the mortgagor goes to the Court to obtain the return of his property on repayment of what is still due. Section 62, on the other hand, is in marked contrast to Section 60. Section 62 says that in the case of a usufructuary mortgage the mortgagor has a right to recover possession of the property when (in a case in which the mortgagee is authorised to pay himself the mortgage money out of the rents and profits of the property) the principal money is paid-off. As we see it, that is not a case of redemption at all. At the moment when the rents and profits of the mortgaged property sufficed to discharge the principal secured by the mortgage, the mortgage came to an end and the correlative right arose in the mortgagor to recover possession of the property. The framers of the Transfer of Property Act have clearly recognised the distinction between the procedure which follows a mortgagor's desire to redeem a subsisting mortgage and the procedure which follows the arising of a usufructuary mortgagor's right to get his property back after the principal has been paid-off. (vii) In *Hamzabi & Ors. vs. Syed Karimuddin & Ors.*, (2001) 1

SCC 414, it was observed:-

2. The right of the mortgagor to redeem had its origin as an equitable principle for giving relief against forfeiture even after the mortgagor defaulted in making payment under the mortgage deed. It is a right which has been jealously guarded over the years by courts. The maxim of once a mortgage always a mortgage and the avoidance of provisions obstructing redemption as clogs on redemption are expressions of this judicial protection. (See: *Pomal Kanji Govindji v. Vrajlal Karsandas Purohit* (1989) 1 SCC 458 in this context.) As far as this country is concerned, the right is statutorily recognised in Section 60 of the Transfer of Property Act. The section gives [pic]the mortgagor right to redeem the property at any time after the principal money has become due by tendering the mortgage money and claiming possession of the mortgaged property from the mortgagee. The only limit to this right is contained in the proviso to the section which reads:

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

3. While the expression decree of court is explicit enough, the phrase act of parties has given rise to controversy. One such act may be when the mortgagor sells the equity of redemption to the mortgagee. This Court in *Narandas Karsondas v. S.A. Kamtam*, (1977) 3 SCC 247 has said that: (SCC p. 254, para 34)

(viii) Contrary view has been expressed in *Sampuran Singh & Ors. vs. Smt. Niranjana Kaur(smt.) & Ors.*, (1999) 2 SCC 679 as follows:- 14. Submission was, as aforesaid, that right to redeem only accrues when either the mortgagors tender the amount of mortgage or the mortgagees communicate satisfaction of the mortgage amount through the usufruct from the land. This submission is misconceived, as aforesaid, if this interpretation is accepted, then till this happens the period of limitation never start running and it could go on for an infinite period. We have no hesitation to reject this submission. The language recorded above makes it clear that right of redemption accrues from the very first day unless restricted under the mortgage deed. When there is no restriction the mortgagors have a right to redeem the mortgage from that very date when

the mortgage was executed. Right accruing means, right either existing or coming into play thereafter. Where no period in the mortgage is specified, there exists a right to a mortgagor to redeem the mortgage by paying the amount that very day in case he receives the desired money for which he has mortgaged his land or any day thereafter. This right could only be restricted through law or in terms of a valid mortgage deed. There is no such restriction shown or pointed out. Hence, in our considered opinion the period of limitation would start from the very date the valid mortgage is said to have been executed and hence the period of limitation of 60 years would start from the very date of oral mortgage, that would be from March 1893. In [pic]view of this, we do not find any error in the decision of the first appellate court or the High Court holding that the suit of the present appellants is time-barred.

However, facts mentioned in para 3 show that possession remained with mortgagor and it was not a case of usufructuary mortgage.

14. We need not multiply reference to other judgments. Reference to above judgments clearly spell out the reasons for conflicting views. In cases where distinction in usufructuary mortgagor right under Section 62 of the T.P. Act has been noted, right to redeem has been held to continue till the mortgage money is paid for which there is no time limit while in other cases right to redeem has been held to accrue on the date of mortgage resulting in extinguishment of right of redemption after 30 years.

15. We, thus, hold that special right of usufructuary mortgagor under Section 62 of the T.P. Act to recover possession commences in the manner specified therein, i.e., when mortgage money is paid out of rents and profits or partly out of rents and profits and partly by payment or deposit by mortgagor. Until then, limitation does not start for purposes of Article 61 of the Schedule to the Limitation Act. A usufructuary mortgagee is not entitled to file a suit for declaration that he had become an owner merely on the expiry of 30 years from the date of the mortgage. We answer the question accordingly.

16. On this conclusion, the view taken by the Punjab and Haryana High Court will stand affirmed and contrary view taken by the Himachal Pradesh High Court in *Bhandaru Ram (D) Thr. L.R. Ratan Lal vs. Sukh Ram (supra)* will stand over-ruled.

17. The appeals are dismissed.