BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
DATED: 13.09.2021
CORAM
THE HON'BLE MR.JUSTICE **A.D.JAGADISH CHANDIRA**
C.R.P(MD) No.2324 of 2012
and
M.P.(MD) Nos.1 & 2 of 2012

1.Mercy
2.Swarna Bai ... Petitioners/Petitioners /Proposed Plaintiffs

Vs.

Desan ... Respondent/Respondent/Defendant

PRAYER: Civil Revision Petition filed under Section 115 of the Code of Civil Procedure, to set aside the fair and decreetal order dated 19.07.2012 made in I.A.No.239 of 2011 in O.S.No.172 of 1973 on the file of the I Additional District Munsif Court, Kuzhithurai, by allowing this Civil Revision Petition.

For Petitioners : Mr.P.Thiagarajan
For Respondent : Mr.M.Saravanakumar

O R D E R

The Civil Revision Petition has been filed to set aside the fair and decreetal order, dated 19.07.2012, in I.A.No.239 of 2011 in O.S.No.172 of 1973 passed by the I Additional District Munsif Court, Kuzhithurai.

2. The brief facts of the case are as follows:

One K.Chellaiyan Nadar had entered into usufructury mortgage and handed over possession of his property to the mortgagees/defendants SamuelAsari and his brothers. Since the defendants committed acts of waste the mortgagor/ plaintiff filed O.S. No. 172 of 1973 on the file of the I Additional District Munsif Court, Kuzhithurai for redemption and recovery of possession and the Court had passed a preliminary decree dated 15.07.1976 directing the plaintiff to deposit the mortgage amount of Rs.50/- on or before 15.09.1976. Against the judgment and decree the mortgagees/defendants filed A.S.No.103 of 1997 on the file of the Sub Court, Kuzhithurai and the said appeal was dismissed on 10.08.1977. After dismissal of the appeal, the plaintiff K.Chellaiyan Nadar assigned the decree in favour of the revision petitioners by a registered deed of assignment registered at the office of the Sub Registrar, Kollankode on 08.11.1976. The plaintiff along with the petitioners made the deposit of Rs.50/- on 18.03.2011 vide challan No. 146 and the final decree application was numbered as I.A.No. 328 of 2011 in O.S.No.172 of 1973 on the file of the I Additional District Munsif Court, Kuzhithurai along with the final decree application, I.A.No. 239 of 2011 was filed to condone the delay in depositing the amount. The petition to condone delay was dismissed on 19.07.2012 on the ground that the huge delay was not explained.

3.The learned counsel for the petitioners would submit that the petitioners are the assignees of the decree in O.S.No.172 of 1973 from the original plaintiff K.Chellayyan Nadar. The said K.Chellayan Nadar, had entered into an usufructuary mortgage with the predecessors of the respondent on 19.12.1961 and had handed over the possession of the property to the mortgagees. The plaintiff K.Chellayyan Nadar, had filed a suit for redemption in O.S.No.172 of 1973, on the file of the I Additional District Munsif Court, Kuzhithurai and the suit came to be decreed in his favour on 15.07.1976. Against the judgment and decree in O.S.No.172 of 1973, the predecessors of the respondent/defendant filed appeal in A.S.No.103 of 1977, on the file of the Subordinate Court, Kuzhithurai. The said appeal was dismissed on 10.08.1977. After the dismissal of the appeal, the original plaintiff K.Chellayan Nadar assigned the judgment and decree in favour of the Revision Petitioners, by a registered deed of assignment, registered at the office of the Sub Registrar, Kollankode on 08.11.1976.

4.Thereafter, the original plaintiff along with the petitioners filed a petition in I.A.No.328 of 2011 for passing a final decree. Though no time limit is prescribed by any statute for making deposit pursuant to the preliminary decree for redemption of usufructuary mortgage / final decree application as per Order 34 Rule 8 of the Code of Civil Procedure, The petitioners had due to misconception filed a petition to condone the delay which was not at all necessary.

5.The learned counsel for the petitioners would further submit that as per law no time limit is prescribed for filing a suit for redemption of usufructuary mortgage and no such time is prescribed under any statute for the mortgagor. The period of limitation starts to run only from the date on which deposit is made and not from the expiry of the period prescribed in the preliminary decree. The trial Court had infact fixed the period of two months granting time for the respondent to file appeal and as per law, no time limit is prescribed for deposit of mortgage amount.

6.The learned counsel for the petitioners would further submit that Order 34 Rules 7 and 8 do not confer any right upon the usufructuary mortgagee to apply for a final decree like in other mortgages. By reason of sub-rule (1) of Rule 8 of Order 34 of the Code of Civil Procedure only a mortgagor is entitled to make an Application for final decree for redemption in a usufructuary mortgage. 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 recovery of possession is conferred upon the mortgagor of a usufructuary mortgage and the only right conferred on the usufructuary mortgage is to have possession till the final decree of the redemption is passed.

7.The learned counsel for the petitioner would further submit that such a provision has been made evidently having regard to the right of redemption of a usufructuary mortgagor in terms of Section 62 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.

8.The learned counsel for the petitioner would reiterate that though in ordinary mortgages, the right of redemption of a mortgagor being a statutory right can be taken away only in terms of proviso appended to Section 60 of the Transfer of Property Act, which is extinguished either by a decree or by act of parties and it is not so in respect of usufructuary mortgage.

9.The learned counsel for the petitioner would further submit that sub-rule (2) of Rule 7 of Order 34 does not apply to the usufructuary mortgage. Sub-rule(2) of Rule 7 is applicable only in case of mortgages other than usufructuary mortgages and although the Court may in a preliminary decree in a suit for redemption of usufructuary mortgage fix time for deposit of amount into Court, delay in depositing the amount will not debar the mortgagor's right to redeem, when the right of redemption is available to the petitioner without there being any time limit to file application for redemption/ final decree, the Trial Court without considering the non requirement of such an application to condone the delay had dismissed the petition, thereby, he would seek to set aside the order of the Trial Court.

10.In support of his contention,the learned counsel for the petitioner relied on the following judgments of the Hon'ble Apex Court

i) **Achaldas Durgaji Oswal (dead) through Legal Representatives Vs. Ramvilas Gangabisan heda (dead) through Legal Representatives and others** reported in **(2003) 3 Supreme Court Cases 614.**

2. Sarojibi Prabhu and Others Vs. Pappikutty Adiesiar and Others reported in **AIR 2007 (Kerala) 44.**

11.Mr.M.Saravanakumar, learned counsel for the respondent would submit that the usufructuary mortgage is dated 19.12.1961. The original plaintiff filed the suit in O.S.No.172 of 1973 on 07.03.1973 and the suit was decreed on 15.07.1976. Thereafter, the defendants / respondent filed the first appeal in A.S.No.103 of 1977, on the file of the Subordinate Court, Kuzhithurai and it was dismissed on 10.08.1977. However, after a period of about 34 years, the mortgage money was deposited into Court on 18.03.2011 along with an application under Section 5 of the Limitation Act to condone the delay. He would also submit that the petitioners are the third parties to the suit and that they are not the legal heirs of the said Chellayan Nadar. He would further submit that the Trial Court, had rightly dismissed the petition finding that the petition is scrupulously barred by limitation and there is no infirmity in the order passed by the trial court and hence, prayed for dismissal of the Civil Revision Petition.

12.In reply, the learned counsel for the petitioners would submit that it is an admitted case that the original plaintiff Chellayan Nadar had assigned the decree in favour of the petitioners by way of a valid deed of assignment registered at the Office of Sub Registrar, Kollankode, dated 18.11.1976 and the petition for redemption was initially filed by all of them and subsequently the said Chellayan Nadar had passed away.

13.Heard, Mr.P.Thiagarajan, learned counsel appearing for the petitioners and Mr.M.Saravanakumar, learned counsel for appearing the respondent. I have perused the entire records.

14.Admittedly, it is a case of usufructuary mortgage. The suit for redemption has been filed in O.S.No.172 of 1973 on 07.03.1973 and the suit came to be decreed in favour of the plaintiff on 15.07.1976. In the preliminary decree, the trial Court has stated that the plaintiff has to pay the amount into the Court on or before 15.09.1976. The defendants have filed first appeal and the first appeal also came to be dismissed on 10.08.1977. Thereafter, the plaintiff assigned the decree in favour of the petitioners, by a registered deed prior to his death. Thereafter, the plaintiff along with the petitioners have filed a petition in I.A.No.328 of 2011 under Order 34 rule 8 of the Code of Civil Procedure, praying for final decree for redemption in favour of the petitioners to enable them to get recovery of the plaint schedule property with costs. As stated above, it is the case for redemption of property under a usufructuary mortgage and the mortgagor's right to recover possession is covered under Section 62 of the Transfer of Property Act, and the right to redeem has been held to continue till the mortgage money is paid for which there is no time limit while in other caes right to redeem has been held to accrue on the date of mortgage resulting in the extinguishment of the right of redemption after 30 years.

15.The Hon'ble Apex Court in **Achaldas Durgaji Oswal (dead) through Legal Representatives Vs. Ramvilas Gangabisan heda (dead) through Legal Representatives and others** reported in **(2003) 3 Supreme Court Cases 614**, has held that usufructuary mortgagees do not have the right to apply for a final decree under Order 34 Rule 7 and 8 as do the mortgagees or other types of mortgagees and the

Apex Court has further held that though the Court may fix time for payment of amount declared due, but default in depositing such payment, would not debar the plaintiff from a right to redeem the mortgaged property. The relevant paragraphs in the judgement referred supra are extracted hereunder:

"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 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 year 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 mortgage 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 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's Laws of England, 4th edition Volume 32 page 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 his 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 Thumbuswami v. Hossain 21A 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 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 a 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 the mortgagor either to re-transfer the mortgaged property to him or to such third person as he may direct, or to execute and (where the mortgage has been effected by a registered instrument) to have registered an acknowledgement in writing that any right in derogation of his interest transferred to the mortgagee has been extinguished:

Provided that the right conferred by this section has not been extinguished by 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 mortgage *shall be entitled to reasonable notice 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 that said right so long as the same is not extinguished by act of the parties or by decree of court.

13.In the Law of Mortgage by Dr. Rashbehary Ghose at page 231-232 under heading 'Once a mortgage, always, a mortgage' it is noticed.

"In 1681 Lord Nottigham in the leading case of Harris v. Harris firmly laid down the principle: Once a mortgage, always a mortgage'. This is a doctrine to protect the mortgagor's right of redemption: It renders all agreements in a mortgage for forfeiture of the right to redeem and also incumbrances 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 Noakes v. Rice, 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. Shankarlal.

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 mortgage 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 round 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 co- extensive with the mortgage itself. The right subsists until it is appropriately and effectively extinguished either by the acts of the parties concerned or by a proper decree of the competent court.*

14. In 'The Law of Mortgages' by Edward F. Cousins at Page 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, mortgages 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 terms "clogs" on the equity of redemption. Greene M.R. in Knightsbridge Estates v. Byrne, 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's 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 should direct (a). This is still the practice in the case of a mortgage effected by an assignment of the mortgagor's 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 to the mortgagor and the mortgagee, a proviso is inserted expressly stating that the term will ceased 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 137which is a residuary provision provides for limitation of three years in a case where no period of limitation is provided.*

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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 mortgage, (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 is discharged by rents or profits received (d) there is no remedy by scale of 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 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 right 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 ofSection 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 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. Admittedly, in the instant case, no decree has been *passed extinguishing the right of the mortgagor nor such right has 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 not also entitled to receive any payment under the preliminary decree nor the mortgagor is required to make an application to recover before paying the same.

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

25.A bare perusal of the provisions of Order 34 Rule 7 & 8 would show that despite failure to pay the amount found or declared due by the preliminary decree on or before the date fixed by the Court, the mortgagee-defendant shall be entitled to apply for a final decree under clause c(ii) of rule 7 of Order 34. In a case of a mortgage by conditional sale or anomalous mortgage, the mortgagee can pray for passing of a final decree debaring the mortgagor from claiming his right to redeem the properly. In a case of a usufructuary mortgage, however, the mortgagee is not entitled to apply for a final decree. The right of mortgagee to apply for a final decree is provided in sub-clause (3) of rule 8 of Order XXXIV. His application for a final decree must be confined to for declaration that the plaintiff and all persons claiming under him are debarred from all right to redeem the property in the case of a mortgage by a conditional sale or of an anomalous mortgage the terms whereof provide for foreclosure only and not for sale. In the case of the mortgage other than usufructuary mortgage, the mortgagee can file an application to pass a final decree that the mortgaged property or a sufficient part thereof be sold, and the proceeds thereof be paid into Court and applied in payment of what is found due to the defendant, and the balance, if any, be paid to the plaintiff or other persons entitled to receive the same. Sub-rule (1) of Rule 8 shows that only a mortgagor can apply to the Court to pass a final decree on payment of the amount found or declared due under the preliminary decree on making this deposit and upon filing the application as provided for in sub-rule (1) of Rule 8 the mortgagor can request the Court to order the mortgagee to *put him in possession of the properties which were the subject matter of the mortgage. The amount determined by the Court which the mortgagor is liable to pay to the mortgagee can be deposited before the right of redeem is lost. It may be noticed that even sub-rule (2) of Rule 7 of Order XXXIV does not apply to the usufructuary mortgage. It may be noticed that by reason of the amendment introduced in 1929 the right conferred earlier on a usufructuary mortgage to bring the property to sale in case of the mortgagor not making the payment within the time fixed in the decree was taken away; As sub-rule (2) of Rule 7 is applicable only in a case of mortgages other than the usufructuary mortgages, a usufructuary mortgagor is not entitled to seek extension of time and in that view of the matter the fact that such an application made by the First Respondent herein was rejected becomes irrelevant.*

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36.We are, therefore, of the opinion that although by reason of preliminary decree in the suit for redemption of usufructuary mortgage, the Court may fix the time for payment of the amount declared due but default in depositing such payment would not debar him from a right to redeem the mortgaged property

16.The above view has been followed by the Kerala High Court in ***Sarojibi Prabhu and Others Vs. Pappikutty Adiesiar and Others*** reported in ***AIR 2007 Kerala-44***. The relevant portion of the order is extracted hereunder :

"18. The legal position can be summarised as follows. In the case of usufructuary mortgage, a plaintiff need not make any application for extension of time fixed in the preliminary decree for deposit of the amount found due. The mortgagee has no right to make an application for passing a final decree to foreclose the right of the plaintiff or sale of the mortgaged property declaring that plaintiff has been debarred from making payment in Court or proceeding further. Plaintiff usufructuary mortgagor has a right to make payment of the redemption money due under the preliminary decree and subsequent liability at any time before passing the final decree. So long as the right subsists, the right of redemption of the mortgagor is not lost even if, he defaults to deposit

the redemption money. In the case of preliminary decree for redemption of usufructuary mortgage no limitation starts to run until the deposit is made. Even if plaintiff fails to deposit the amount as fixed by the preliminary decree, the period of limitation will not start to run from the date of the default or period fixed under the preliminary decree and such failure will not debar him from exercising the right to file the final decree application. In view of these findings the order of the trial court that the final decree application is barred by time is unsustainable. The revision is allowed. The impugned order in I.A. 3139/95 in O.S. 9/67 is set aside. The learned Sub Judge is directed to proceed with the final decree application and dispose of the same expeditiously without any further delay."

17.At this juncture this Court deems it apposite to refer to a later decision of a three Judges Bench of the Apex Court in ***Singh Ram(Dead) Through legal representatives .vs. Sheo Ram and others*** reported in ***(2014)9 SCC 185,*** wherein the Apex Court tested the correctness of the view taken by the Full Bench of the High Court of Punjab and Haryana at Chandigarh in ***Ram Kishan .vs. Sheo Ram*** reported in ***AIR 2008 Punjab and Hariyana 77.*** In ***Ram Kishan .vs. Sheo Ram,*** the Full Bench of the High Court of Punjab and Haryana had considered the question " Whether there is any time limit for Usufructuary Mortgagor to seek redemption? and decided the said question in negative, in favour of the 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".

18.The Hon'ble Apex Court referring to its various other earlier judgments and also in **Achaldas Durgaji Oswal (dead) through Legal Representatives** referred supra ultimately held as hereunder:

" 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 21A 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 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 a 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 the mortgagor either to re-transfer the mortgaged property to him or to such third person as he may direct, or to execute and (where the mortgage has been effected by a registered instrument) to have registered an acknowledgement in writing that any right in derogation of his interest transferred to the mortgagee has been extinguished:

Provided that the right conferred by this section has not been extinguished by 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 mortgage shall be entitled to reasonable notice 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 that said right so long as the same is not extinguished by act of the parties or by decree of court.

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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 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 right 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 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. Admittedly, in the instant case, no decree has been passed extinguishing the right of the mortgagor nor such right has come to an end by act of the parties.

19.In this case as stated above the revision petitioners being usufructuary mortgagors, no time limit is fixed to seek redemption and possession of immovable property mortgaged. The petitioner had deposited the decree amount vide challan No.146 on 18.03.2011 and the final decree application had been numbered as I.A.No. 328 of 2011 in O.S.No.173 of 1973. However, though the petitioner was not required to file an application to condone the delay under Law, he had on wrong premises filed I.A.No. 239 of 2011 and the Trial Court without considering the non requirement of such application under law had dismissed the same by impugned order dated 19.07.2012.

20.In view of the above, the revision stands allowed and the impugned order dated 19.07.2012 in I.A.No.239 of 2011 in O.S.No.173 of 1993 on the file of the I Additional District Munsif, Kuzhithurai stands set aside. The I Additional District Munsif, Kuzhithurai shall take I.A.No.328 of 2011 in O.S.No.172 of 1973 on file and hear the parties and decide the matter in accordance with law as expeditiously as possible preferably within a period of two months from the date of receipt of a copy of this order. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar (T & P)

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

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Note: In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate/litigant concerned.

To

1.The I Additional District Munsif Court,
Kuzhithurai.

+1 CC to M/s.P.THIYAGARAJAN, Advocate (SR-29052[F] dated 14/09/2021)

C.R.P(MD)No.2324 of 2012
13.09.2021

SRK(CO)
RS/SKN (18.11.2021) 16P 3C