**(1998) 2 ALD 662 : (1998) 3 ALT 61 : (1998) 1 APLJ 482**

**Andhra Pradesh High Court**

**Case No:** S.A. No. 134 of 1989

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| Ch. Sambaiah | | APPELLANT |
| | Vs | |
| Marupaka Parijatham and Others | | RESPONDENT |

**Date of Decision:** Dec. 29, 1997

**Acts Referred:**

- Transfer of Property Act, 1882 - Section 60

**Citation:** (1998) 2 ALD 662 : (1998) 3 ALT 61 : (1998) 1 APLJ 482

**Hon'ble Judges:** B.V. Ranga Raju, J

**Bench:** Single Bench

**Advocate:** Mr. T. Veerabhadrayya, for the Appellant; Mr. Philkhana Rama Rao and Dismissed for default, for the Respondent

**Judgement**

1. The appellant is one of the sons of the sole defendant in a suit for redemption of mortgage.

2. The material averments in the plaint are as follows : The plaintiffs who are brothers are the joint owners of a tiled house bearing Municipal No. 1545 (old) and 9/432 new as it is their ancestral property. They mortgaged the said house in favour of the defendant by means of a registered mortgage deed dated 27-03-1948 for a sum of Rs. 1,500/-O.S. and delivered possession of the same. The conditions in the mortgage deed are that the amount lent should carry interest at 9 per cent per annum, that the mortgage should be released within ten years from the date of mortgage and in case of default it would be treated as sale and that the rents received by the mortgagee would be first appropriated towards the interest and the balance would be appropriated towards the principal amount The defendant has been in possession of the said house since 27-3-1948. He filed O.S.No.101/1 of 1358-F in the Sub-Court, Warangal, for delivery of possession and the same was dismissed. On 26-4-1968, the plaintiffs issued a notice for redemption. However, as a copy of the mortgage deed was not with them, the conditions laid down in

the mortgage were not mentioned in it. The plaintiffs 1 and 2 having migrated to different places seeking their livelihood, but the third plaintiff who was in Government service was not residing in Warangal. The plaintiffs have met the defendant for accounts and to deliver the possession if the total amount of mortgage was cleared on account of appropriation of the rents towards interest and principal. In view of the rents received by the defendant, the plaintiffs need not pay anything to the defendant for redemption. As such they are demanding the defendant for accounts. In spite of a clause if the mortgage is not redeemed within ten years it may be turned into sale, the same being a clog on mortgage is not enforceable in law as the limitation for redemption of mortgage is thirty years.

3. The averments in the written statement are as follows : Even though the mortgage deed mentions interest at 9 per cent, the understanding was to pay at 13 per cent per annum. Inspite of the dismissal of the earlier suit, the fact remains that the suit house was in a dilapidated condition. The plaintiffs are having only 0-6-0 share in the mortgaged properly and the remaining 0-10-0 share" would be of the defendant. The portion purchased by the defendant is bigger and in good condition. The plaintiffs who are badly in need of money persuaded the defendant to lend Rs,1500/- on the security of truncated portion of the house by way of usufrucuary mortgage. The defendant could not use the house for himself nor let out for others. When the defendant demanded the plaintiffs several times to pay the interest which was accumulated to Rs. 1800/- and the expenses for repairs and charges amount to Rs.5,396-43 paise, the plaintiffs gave a notice dated 26-04-1968 offering to pay Rs. 1500/-and asking for redemption for which a detailed reply was given on 20-06-1968 demanding a sum of Rs.8696-43 paise in case the plaintiffs have right to redeem the property. The plaintiffs after finding that the liability was more than the property even according to the increased market value as prevailing at that time agreed to relinquish their right of redemption in consideration of full adjustment of debt account. However, formal release deed could not be executed due to unavoidable circumstances. On the faith of the said agreement and the bonafide belief that he is the owner of the property, he renovated the suit house at a cost of Rs. 15,000/- and after improvement and sufficient increase of value, the plaintiffs have filed the suit with dishonest intention after a period of six years from the date of last notice. The plaintiffs cannot redeem the property unless and until they pay the amounts due to the defendant totalling to Rs. 27,746-43 paise being the principal, interest, repairs and Municipal taxes paid for over eighteen and half years.

4. On the above pleadings, the following issues have been framed by the trial Court:

(1) Whether the plaintiffs are not entitled to redeem the mortgage?

(2) Whether the defendant is not liable to render accounts to the plaintiffs in respect of the suit properly?

(3) To what relief?

5. The trial Court came to the conclusion that the conduct of the plaintiffs virtually amounts to their release of the suit hypotheca under the agreement and as such the right of redemption has been extinguished. Basing on the said finding, it dismissed the suit However, on appeal, the learned District Judge did not accept the plea of the defendant that there was a settlement and as such held that the plaintiffs are entitled to seek redemption. While doing so, it held that the estate of defendant has to account for the rent or rental value of the mortgaged property and that the said estate is entitled to the credit of the municipal taxes if paid and the amounts spent towards repairs and if they are entitled to the same as per the provisions of Transfer of Property Act and on such determination if it is found that the plaintiffs have to pay any amount towards principal and interest and estate of the defendant has to deliver possession of the mortgaged property to the plaintiffs on payment of that amount. It also held that if it is found that the estate of the defendant has to pay the amounts to the plaintiffs, a decree has to be passed in regard to the same and the estate of the defendant has to deliver possession of the mortgaged property to the plaintiffs.

6. The point that arises for determination in this appeal is, whether the plaintiffs lost the equity of redemption?

7. The mortgage deed (Ex.A-1) was executed on 27-03-1948 for a sum of Rs.1,500.00 O.S. (Osmania Sicka). Admittedly possession was delivered on that date. Inspite of a recital in the bond that the same could be redeemed within ten years from the date of mortgage and that in case of default, it should be treated as sale, the defendant cannot contend that the right of equity of redemption was lost even though the period of limitation is 30 years. It was the defendant''s stand that at the lime of mortgage the suit house was in a dilapidated condition and that the defendant could not use the house for himself or let out the same to others and as such was compelled to keep the same vacant. It is also averred in the written statement that a sum of Rs.800 O.S.(Osmania Sicka) for about ten years amounting to Rs. 1,500 O.S. (Osmania Sicka) was incurred for the repairs and charges and demanded a sum of Rs.5,396.43 and when the defendant demanded for the money, the plaintiffs voluntarily accepted to give up their right to redemption and released their rights and promised to execute a formal document in his favour. Ex.B-10 is the notice dated 26-04-1968 issued on behalf of the plaintiffs. It was stated therein that when the plaintiffs offered to pay the mortgaged amount of Rs. 1,500 O.S. towards principal mortgage amount and sought redelivery of possession of the house, the defendant has kept silent and was claiming rights in the said house.

8. In reply to the above notice, a reply notice dated 20-6-1968 (Ex.B-11) was sent. It was specifically demanded in the said notice that a sum of Rs.8,696-43 paise being the principal and interest was due and as such the right of redemption was lost. Apart from the same it was stated therein that a sum of Rs.5,3%-43 paise was spent towards repairs and payment of water and property taxes for the last twenty years and as such a sum of Rs.8,696-43 paise was due. Another recital in the said notice is that a major portion of the house being vacant and was in a dilapidated condition and in order to save the house

from complete collapse, the defendant has spent money. The most important recital in the said notice is that when the defendant insisted on payment of the mortgage amount, the plaintiffs agreed to give up their right of redemption and also stated to give it in writing which they did not comply. So, the defendant stated that if the plaintiffs have got a right to take back their house by redeeming the mortgage, they have to pay the amount referred to above. It was further stated in the notice sent to them that the amount due was not even tendered. The plaintiffs kept silent for six years and filed the suit on 7-12-1974. The second plaintiff who was examined as P. W. 1 has admitted in the cross-examination that he has not specifically instructed his advocate at the time of drafting the plaint that the reply notice given by Sri J. Laxminarayana, Advocate, contains false statements. Even though there is specific recital in the plaint about the issuance of notice for seeking redemption to the defendant on 26-3-1968, nothing was specifically stated as to the receipt of reply notice under Ex.B-11 where a definite stand was taken that the plaintiffs agreed to give up their right of redemption. The first defendant who examined himself as D.W.I has stated that in the presence of elders also he had demanded the amount and that the plaintiffs stated that they had no money and they requested that the house should be taken as sold in satisfaction of the debt and that they have also agreed that they would execute a sale deed at their expense. In this context it was contended by the learned Counsel for the respondents/plaintifls that there is no explanation as to why the names of D.Ws.3 and 4 who claim to have acted as mediators are not referred to in the written statement D.W.3 stated that plaintiffs 1 and 2 have agreed and that they wanted to settle the mortgage amount due with the defendant. He further stated that the due amount might be Rs.6,000/- to Rs.8,000/- and that when the defendant demanded, the plaintiffs have expressed their inability to pay the same arid requested the defendant to make it as a sale. He further stated that the plaintiffs wanted to execute a sale deed on the stamp paper and that the first plaintiff was not available on that day. D.W.4 has also stated that he was present at the time of demand for payment by the defendant to pay the amount in cash and That finally on their mediation the defendant agreed to take the suit house as a sale towards the balance amount under mortgage after the settlement of accounts.

9. The trial Court on appreciation of the above evidence came to a conclusion that the plaintiffs were least interested in exercising their right of redemption till D.W.2, by investing thousands of rupees, raised new constructions in the suit hypotheca which was settled on him by the defendant under a registered settlement deed dated 6-1-1965 (Ex.B-17). So far as the conduct of the plaintiffs is concerned, it was pointed out that the plaintiffs'' right of equity of redemption was lost. The learned District Judge while referring to the conduct of the defendant has pointed out that the defendant would have informed the plaintiffs about the incurring of expenses for the repairs of the house and if the mortgaged properly was not occupied, the municipal taxes would not have been paid as vacancy remission could be claimed. So far as the financial position of the plaintiffs was concerned, he has pointed out that there is no material that the plaintiffs were in any panic to request even strangers to come and act as elders. Regarding the evidence of D.Ws.3 and 4, the learned District Judge has pointed out that it cannot be inferred that a

settlement as alleged by the defendant has taken place and that the plaintiffs have not preferred the suit immediately on receipt of notice under Ex.B-10. However, the learned District Judge has not taken into consideration certain undisputed facts while deciding the conduct of both the parties. Ex,B-4 is the certified copy of the inspection report prepared by the learned Subordinate Judge, Warangal, when he inspected the mortgaged property in O.S.No.l01/l/I358 fasli filed earlier seeking possession ,,wherein it was specifically mentioned that the house was in a dilapidated condition.

10. It may be so ten years was fixed for seeking redemption and that the same cannot be taken advantage by the defendant. However, no attempt was made by the plaintiffs to pay the mortgaged money. Thus, the plaintiffs kept silent for about 26 years for seeking redemption. Another circumstance against the case of the plaintiffs is that an entirely new construction came up on the suit hypolheca in the year 1973 and as per the report of the Commissioner in I. A.No.634/74 the same was in existence by the date of his inspection. If the alleged settlement, as pleaded by the defendants, is false the plaintiffs would not have permitted an entirely new construction to come up in the property that was hypothecated. I am, therefore, of the opinion that it is only because of the inability of the plaintiffs to pay the amount due and redeem the mortgage, the defendant spent huge money towards new construction, maintenance, payment of taxes etc. It may be so that a formal sale deed was not executed pursuant to the mediation by D. Ws. 3 and 4. However, if the conduct of the plaintiffs is taken into consideration, it can be concluded that they have lost the right of equity of redemption.

11. Section 60 of the Transfer of Property Act, 1882, visualises the right to redeem by act of the parties or by decree of a Court. It is the endeavour of the learned Counsel for the respondents/plaintiffs that such act should not be inferred by the conduct of the Parties. However, as per the observations made by the Apex Court in the case of Jayasingh Dnyanu Mhoprekar and Another Vs. Krishna Babaji Patil and Another, , it was held that the right of redemption under a mortgage deed can come to an end only in a manner known to law and such extinguishment of the 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. In the instant case, the specific plea in the reply notice under Ex.B-11 was not controverted by any notice much less referred to in the plaint. Admittedly, constructions took place in the property which was hypothecated and the plaintiffs had to tender the amount due which includes the principal and interest thereon and the amounts incurred towards payment of taxes and maintenance. It may be so that the names of D.Ws.3 and 4 were not recited in the notice. However, it cannot be said that the above witnesses were brought into picture only for the purpose of evidence in this case. I have already pointed out that the plaintiffs have shown utter indifference in the matter. Thus, this is a case where the defendant has established that the plaintiffs have lost the right to redeem the mortgage. Thus, I am of the opinion that the evidence of D.Ws.3 and 4 will establish that there was an agreement between the parties leading to hypotheca to the defendant because of the utter disability to pay the amount due to the

defendant, and therefore no formal deed releasing the property by the plaintiffs is necessary if once the above agreement appears to be true. Consequently, the plaintiffs would loose the right to redeem the property. The lower appellate Court did not therefore address itself to this aspect and went on dealing with other extraneous matters like the failure to implead the persons in whose favour the property was ultimately settled. I am, therefore, of the opinion that a substantial question of law has arisen because of the failure of the lower appellate Court to deal with the legal effect of the understanding between the parties about ten years prior to the filing of the suit. If once the understanding is held to be true, the plaintiffs would loose the equity of redemption and as such cannot maintain the suit.

12. In view of the foregoing discussion, the Second Appeal is allowed and the suit filed by the plaintiffs is dismissed. The appellant is entitled to costs throughout.