Kuran Chandra Singha Vs Mohan Lal Singh and Others

Court: Calcutta High Court

Date of Decision: March 28, 1955

Acts Referred: Transfer of Property Act, 1882 â€" Section 74, 75, 91, 92, 94

Citation: 59 CWN 947

Hon'ble Judges: P.N. Mookerjee, J

Bench: Single Bench

Advocate: Rabindra Nath Choudhury, for the Appellant; Muktipada Chatterjee, Ranjit Kumar Banerjee and Bimal Kumar Banerjee, for the Respondent

Final Decision: Allowed

Judgement

P.N. Mookerjee, J.
This appeal raises an important and interesting question, on which judicial opinion is not uniform Broadly speaking, in

the reported cases two lines of approach have been indicated and two types of reasoning are to be found and either has the support of eminent

judges, Indeed, the point is not free from difficulty and one should be cautious in dealing with it. Courts have had frequently to deal with problems,

arising between prior and puisne mortgagees, when either has purchased the mortgaged property without Impleading the other These disputes have

taken various forms and. in deciding them, even where they have raised identical questions, a single clear-cut principle has not always been

followed. This has led to diversity of views on different processes of reasoning and the question, now before me, provided an apt illustration of the

case.

2. I shall turn now directly to the facts before me and I shall state them, so far as they are relevant for my present purpose.

3. On April 29, 1915, the predecessor-in-interest of the proforma defendants, who was the owner of the suit properties, mortgaged some of them

to the present (principal) defendant for Rs. 49. On January 26, 1921, the remaining suit properties were similarly mortgaged to the same person,

the defendant herein, for Rs. 199. Later on, on September 3, 1921, all those properties were mortgaged to the plaintiff.

4. In 1925, the defendant brought Title Suit No 163 of 1925 on his above mortgage of Rs. 49. In that suit, the plaintiff, who was the puisne

mortgagee, was not made a party. The suit ended in a decree and, in execution thereof, the defendant purchased the mortgaged properties on

October 31, 1927. The sale was confirmed on November 13, 1927, and it appears that the defendant obtained delivery of possession sometime

prior to March 1930, the actual date being February 4, 1928.

5. In the same year 1925, the defendant had also sued upon his other mort gage of Rs. 199 in Title Suit No 252 11 of 1925 and, in execution of

the decree, passed in this suit, he auction-purchased the said mortgaged properties on June 19, 1929, and took delivery of possession through

Court on September 29, 1929. In this suit the present plaintiff who was the puisne mortgagee appears to have been made a party, at any rate at

the execution stage; and the sale and delivery of possession to the defendant took place with him (the present plaintiff) on the record.

6. In the meantime on December 20, 1927, the plaintiff had brought his mortgage suit (Title Suit No. 1428 of 1927) on his bond of 1921, but, in

that suit, the defendant who had already auction-purchased all the properties of his (defendant''s) 1915 mortgage bond of Rs. 49 [which are some

of the present suit properties and which were also the subject-matter of the plaintiff''s mortgage suit (T.S. No. 1428 of 1927) as some of the

mortgaged properties included therein], was not impleaded. In this suit, the plaintiff got a decree on January 28, 1929, and in execution of that

decree, he became the auction- purchaser of the suit properties on July 20, 1929. On March 17, 1930, the plaintiff took delivery of possession

through Court and, apparently, dispossessed the defendant who was then in possession as the auction-purchaser in execution of the decree,

obtained in. Title Suit Nos. 163 and 252 of 1925, as above mentioned.

7. The defendant, however, brought a suit against the plaintiff u/s 9 of the Specific Relief Act and, having recovered a decree therein, he wrested

possession from the plaintiff on the strength of that decree, sometime in 1931-32.

8. In 1941, the present plaintiff brought a Title Suit for recovery of possession of the suit properties on eviction of the defendant there from That

suit, however, was dismissed on July 7, 1942, and the plaintiff''s appeal there from was also dismissed on September 17, 1943.

9. Therefore, on January 11,1947, the present suit was filed by the plaintiff for redemption of the defendant''s mortgages of 1915 and 1921 and

consequential recovery of possession of the suit properties from him (the defendant). The suit was resisted by the defendant. The Courts below

have, however decreed the plaintiff''s suit in part, that is, with regard to the properties, covered by the mortgage bond of Rs. 49, which form some

of the items in suit and, in this appeal by the defendant, the point that requires consideration is whether their said decree is right and can and ought

to be maintained. As regards the remaining suit properties, namely, those covered by the defendant''s other mortgage bond of Rs. 199, the

plaintiff''s suit has been dismissed and he has filed a cross-objection against this dismissal.

10. Before me, two pleas have been put forward by the defendant appellant in support of his appeal. It is first contended that the plaintiff''s present

suit is barred by constructive res judicata by reason of the dismissal of his prior suit for possession. This contention has not been accepted by either

the learned Munsif or the learned Subordinate Judge and, in my opinion, their decision on this point is right.

11. The second contention purports to raise a question of limitation. It is urged broadly on the authority of the decision of this court in the case of

Nidhiram Bandopadhya v. Sarbesswar Biswas (1) 14 C.W.N. 439, that the present suit for redemption having been brought by the puisne

mortgagee long after the statutory period of 12 years, as prescribed in Art. 132 of the Indian Limitation Act, it was not maintainable in law, Art.

148 of the Indian Limitation Act having no application to cases of the present type.

12. In my opinion, the appellant''s first contention is utterly untenable, but the second, if its substance be looked at and not its form, ought to

succeed and the decision of the courts below on this point ought to be set aside and their decree reversed on that ground and the plaintiff''s suit

ought to be dismissed in toto.

13. The plaintiff''s earlier suit for possession was an ejectment suit in denial of the defendant''s title, acquired on the stregnth of his (defendant''s)

mortgages. His present suit for possession on redemption is upon an acknowledgment of the defendant''s said title, subject to the plaintiff''s right to

get possession on redemption. The two suits are, therefore, clearly based on different and distinct causes of action and, indeed, the cause of action

of the present suit is partly-- and I may even say, primarily--based on the dismissal of the said earlier suit. The two suits are also based on different

and distinct,--and, indeed, inconsistent--allegations and the claims in the two suits--and the issues, are basically different. No question, therefore,

of res judicata, whether actual or constructive, or of any bar under Order 11, rule 2 of the CPC also, can arise and the appellant''s first plea must

fail.

14. The law on this point appears to be practically well-settled and, if precedent or authority is needed in support of the underlying principle,

reference may be made to the decisions in the cases of Sridhar Vinayak v. Narayan Valad Balaji (2) (1874) 11 Bom. H.C.R. 224, 230; Amanat

Bibi v. Imdad Hussain (3) (1888) L.K. 15 I.A. 106, 111-2; Naro Balvant v. Ram Chandra Tukdev (4) ILR 13 Bom. 326; Veerana Pillai v.

Muthukumara Asary, (5) ILR 27 Mad. 102; Mahomed Ibrahim Valad Abdul Rahiman v. Sheik Hamja Valad Mahomedalli (6) ILR 35 Bom. 507;

Dola Khetoji Vahivaldas v. Balya Kanoo Patel (7) A. I. R. 1922 Bom. 29 and Kali Nath Saha and Another Vs. Manindra Nath Das and Others, ,

which support the view which I have taken above. Further discussion of this part of the case, is therefore unnecessary.

15. The second question is not really one of limitation for the exercise of the right of redemption. It is more fundamental in character. It concerns

the very existence or subsistence of this right of redemption as an enforceable right and depends on the peculiar nature and extent of the puisne

mortgagee''s right to redeem a prior mortgagee. This right of the puisne mortgagee rests on his mortgage and it does not and cannot exist apart

from or independently of the same. Secs. 91 and 92 of the Transfer of Property Act, of which the former is the basic and the more relevant section

on this point, do not, in my opinion, confer on the puisne mortgagee any independent right of redemption, apart from his character as puisne

mortgagee. It is only a statutory recognition of his right of redemption under the general law and this right remains with him only so long as he

retains his character of a puisne mortgagee. Once that character is lost, his right to reedem the prior mortgage, or his claim to any right in respect of

the mortgaged property, accruing immediately from his mesne or puisne mortgage and directly acquired by him (the puisne mortgagee) by virtue of

or because of such puisne mortgage and solely dependent upon his character as such mortgagee, also lapses and can no langer be claimed or

exercised by him. A necessary corollary would be that, if the puisne mortgagee''s right to enforce his mortgage is lost, or, in other words, if the

puisne mortgagee loses his remedy in the matter of enforcement of his mortgage, he becomes disentitled also to claim or enforce redemption on the

footing thereof.

16. It is well recognised in the law of mortgage that the puisne mortgagee''s right of redemption differs in character from that of the mortgagor or

his representatives. His right in this respect ""is not an absolute"" or independent right. It is dependent upon his character as a puisne mortgage) ""and,

if it has to be asserted in an action it is only ancillary to his right or claim to work out his remedy against the mortgaged estate"". This is undoubtedly

the law in England. [Vide Fisher''s Law of Mortgage, 6th Edition, Para., 1448; 7th Edition (1931), page 597, citing Teevan v. Smith (9) (1882) 20

Ch. D. 724, 729; see also Dr. Sir Rash Behari Ghose''s Law of Mortgage in British India, Vol. I, 4th Edition, page 241; 5th Edition, pages 258-9,

citing Seton, 6th Edition, pages 1937 and 1982. The same also appears to be the law in this country. (Vide the discussion at page 241, 4th

Edition, and page 258-9, 5th Edition, of Ghose on Mortgage, referred to above). The 5th Edition of Dr. Ghose"s Law of Mortgage which I have

cited, was edited by B. B. Ghose, J., who delivered the judgment of the Full Bench in the case of Sayamali Molla v. Anisuddin Molla (10) I.L.R

57 Cal. 704 : 33 C. W. N. 1067. That case, in my opinion, sufficiently supports the above proposition and I am not prepared to read either the

Full Bench judgment or the order of reference of Rankin, C.J. and Ghose, J., as laying down or countenancing any contrary proposition.

17. Pages 1070 and 1075-6 of the Full Bench Report (10) (33C.W N. 1067) do not, in my opinion, suggest any difference between the English

and the Indian Law on this point. On the other hand, they seem to indicate substantial acceptance of the underlying principle and the reasons of the

relevant rule as stated in Fisher and the several English cases cited by the learned author while pointing out the true bearing of this rule on cases

where the puisne mortgagee has already foreclosed and emphasising the distinction, arising from this added or additional circumstance. To quote

Rankin. C.J., from the Order of Reference:

The learned Judge who tried this case in Second Appeal lays stress upon the principle that the right of a mortgagee to redeem is only ancillary to

his right "to work out his remedy against the mortgaged estate by foreclosure". He has not, however, considered the bearing of this principle on a

case where the puisne mortgagee has already foreclosed so that his debt has been discharged and his charge no longer exists (C.P.C. Order

XXXIV, rule 3).

A reference to the passage noted by the learned Judge from Fisher on Mortgages (para 1448) and to the cases cited therein will show that the

reason why to a suit by a puisne mortgagee to redeem a prior mortgage, the mortgagor is a necessary party is that the form of decree in such a

case is that the second mortgagee redeems the first and that thereupon the mortgagor must redeem the second or stand foreclosed: the mortgagor

on this footing is interested not only in any account Which may be taken but otherwise, namely, to preserve his property. In a simple case, in which

the second mortgagee has already foreclosed and cut off his mortgagor"s equity of redemption, it would seem, however, that he redeems the first

mortgage as owner"". (Vide pages 1069-70 of the Report). And similar observations were made by the Full Bench (per B. B. Ghose, J.) at pages

1075-70:

I have now only to refer to Fisher on Mortgages (para. 1448), cited by the learned Judge who first tried the case in second appeal. The learned

Chief Justice has pointed out the reason why in England the mortgagor is a necessary party to a suit by a puisne mortgagee to redeem the prior

mortgagee. The cases cited in Fisher show that the reason of the rule that if a puisne mortgagee seeks to redeem, he must foreclose all subordinate

rights including the ultimate equity of redemption, is that the right to redeem of those persons would otherwise remain open, thus exposing the prior

mortgagee to another suit. Where, as in this case, the puisne mortgagee has already obtained a decree on his mortgage, he is entitled to redeem a

prior mortgagee in a subsequent suit. The law in England is thus stated in Fisher on Mortgages (para 1693) : The second or other puisne

mortgagee may foreclose those subsequent without joining those prior to themselves, for the latter can suffer no damage. The subsequent

mortgagees, it is true, are left without the opportunity of redeeming all prior to them in the same suit".

18. On a careful examination of the passages, I am inclined to think that their Lordships, while approving of the relevant English principles. were

only seeking to emphasise the special position of a puisne mortgagee who had already foreclosed or obtained a proper or sufficiently effective

decree on his mortgage in accordance with law or had not disentitled himself from so doing.

19. If, according to their Lordships, the law on this point was different in this country nothing would have been easier or more natural for them than

in to put it categorically in a simple sentence, rejecting once for all the contrary indications appearing in Dr. Ghose"s book (4th Edition, page 241;

5th Edition pages 258-9) and their Lordships would have certainly done so, had they perceived any distinction; between the English and the Indian

Law on the point, instead of harping on the special position, already adverted to by me, which the claimant for redemption, as their Lordships took

great pains to point out, occupied in that case and stress on this aspect would have been wholly unnecessary.

20. In that above context, I prefer to hold that Fisher"s statement as to the "peculiar nature of the puisne mortgagee"s right of redemption, re-

iterated in Dr. Ghose"s book, is as much true of this country as of England.

21. It follows, therefore, that if the puisne mortgagee"s right of redemption has to be enforced or asserted in action, his mortgage must be a

subsisting and enforceable one. or in other words, the right to enforce it and the remedy in law in respect of the mortgage must not be lost. The

reason, indeed, is clear, ""The mortgagee (who is sought to be redeemed) has a right to account once and for all which entails the presence of all

persons who are entitled to an account"" and, thus, in a puisne mort gagee"s action for redemption of a prior mortgage,--and, indeed, in all action

for redemption, -- all persons interested in the equity of redemption or in the mortgage security are necessary parties. This obviously includes the

mortgagor and all subsequent incumbrances. Obviously also the plaintiff mortgagee''s remedy against these persons (the mortgagor and the

subsequent incumbrancers) is by way of enforcement of his mortgage, and if that remedy be not available, whether by reason of lapse of time or

otherwise, he cannot be permitted to bring them before the Court and no relief can be granted to him as against them or in their presence and,

against a necessary party or parties or because of their absence, the action must fail, which, in either case, means failure of the action as a whole.

(Vide Fisher''s Law of Mortgage, 7th Edition (1931), pages 597 and 698, (Paras. 1448 and 1654, 6th Edition) citing inter alia, Fell v. Brown (11)

(1787) 2 Bro C.C. 276; Palk v. Clinton (12) (1806) 12 Ves 48, 58; M'' Donough v. Shewridge (13) (1814) 2 Ba and Be 555; Farmer v. Curtis

(14) (1829) 2 Sim 466; Teevan v. Smith (9) Supra, and Ramsbottam v. Wallis, (15) (1835) 5 L. J. (N.S.) Ch. 92; and Rhodes v. Buckland, (16)

(1852) 16 Beav. 212; and Jones on Mortgage, 7th Edition, Vol. II, Art. 1102, pages 719-20, also citing inter alia Ramsbottam''s case (15) and

Rhode''s case, (16) supra. Vide also Dr. Ghose''s Law of Mortgage in British India, 4th Edition, Vol. I, pages 241 and 608; 5th Edition, pages

258 and 664, citing Teevan v. Smith, (9) Ramsbottam v. Wallis (15) and some of the other English cases, supra, and also Vithal v. Karson (17)

(1868). 5 Bom. High Court Reports (O.C.J.) 76, See p. 10(a). See also the same book (Dr. Ghose''s Law of Mortgage in British India, Vol. I)

pp 609-10 (4th Edition) and pp. 645-6 (5th Edition), citing several other English and Indian decisions).

22. A very helpful discussion of this aspect of the matter is to be found in Prof. Waldock''s very recent treaties on the Law of Mortgages, Second

Edition, (1950), at pp. 336-8 and the several pages cited above from Dr. Ghose''s Law of Mortgage in British India, show that the law is the same

in this country. Order XXXIV, rule 1 of the CPC also sufficiently confirms this position and the provisions of Order XXXIV, rule 7(1) (C) (ii) (a)

and rule 8(3) (b), providing for sale of the mortgaged property in case of default on the part of the claimant for redemption, reveal a similar

outlook. In the forms of decrees again, provided in Appendix D of the Code, only Form No. 10 deals with redemption by a puisne mortgagee and

that Form provides for ''''redemption of prior mortgage and foreclosure or sale on subsequent mortgage,'''' thus emphasising the essentially

comprehensive character of such proceedings and satisfying also the formal test laid down by Rankin, C. J., in his Order of Reference (33 C.W.N.

1067 at p. 1070)

23. It is, however, necessary to add one word of caution. The application of principle, so long discussed, should not be extended to cases where

the puisne mortgagee has acquired any other capacity, relevant for redemption of the prior mortgage. This may happen when the puisne mortgagee

has foreclosed or obtained a sufficiently effective decree on his mortgage or has acquired the outstanding equity of redemption either in whole or in

part. It is obvious that, in such cases, the right of redemption will exist apart from and independently of the puisne mortgage, and, therefore, the fact

that that mortgage has become unenforceable in law will have no effect on it. Divergence of judicial opinion, to which re ference has been made

earlier in this judgment, is largely due to the fact that this distinction has not always been kept in mind in many of the decided cases. It is

undoubtedly true to say that, for redemption actions, the period of limitation is prescribed by Art. 148 of the Indian Limitation Act and the puisne

mortgagee''s suit for redemption, so far as time limit for actions is concerned, normally comes within that Art. It may, however, be a matter for

enquiry in a particular case, even when the redemption action is brought well within the period of limitation, prescribed for such actions in Art. 148,

whether the right of redemption is itself subsisting. If it is not subsisting, no action can be brought upon it and no question of the law of limitation for

redemption actions will strictly arise. The action will fail not because of the law of limitation governing redemption action but because of want of

subsisting cause of action. The extinction of the right of redemption may be due to various causes; to these causes, lapse of time or some provision

of the Limitation Act may have largely contributed; but, even then, the action will fail, not because the action qua redemption action is time-barred,

but because the basic right, that is, the right of redemption has itself been extinguished and the foundation for the action is gone. The question is not

one of limitation or time-limit for an action of redemption but of a subsisting right of redemption and the dismissal of the action, to put it in the

language of the Full Bench in Sayamalt''s case (10) (33 C.W.N. 1067 at p. 1075 : I.L.R.. 57 Cal. 704, cited'' above,), would be, not because of

a rule of limitation for an action to redeem"" but because ""the plaintiff had no subsisting right to redeem"". The distinction is between the subsistence

or existence of the ""right to redeem"" and the law of limitation, regulating the exercise of this right by action or laying down the time-limit for

redemption actions. The failure to observe this distinction is, as I have already said, mainly responsible for the divergence of judicial opinion and,

possibly also accounts for some of the sweeping expressions, used in some of the decided cases.

24. For redemption actions, whether at the instance of a puisne mortgagee or any other person interested in the equity of redemption Art. 148

prescribes the period of limitation. The action, however, cannot be brought by a person not entitled to redeem. That is why the Full Bench in

Sayamali''s case (10) (33 C.W.N. 1067) while considering the true scope and applicability of Art. 148 and affirming that that was the only article

applicable to a suit for redemption, took particular care to speak of a suit for redemption brought by a person entitled to redeem (Vide p. 1075).

To be entitled to redeem, however, and to sue for redemption the person must have a subsisting or enforceable right to redeem. Unless he has

such a right he cannot sue for redemption and no question of any period of limitation for redemption action--or for, the matter of that, of Art. 148--

would arise. That, in my view, is the logical effect of the Full Bench''s affirmance of Nidhiram''s case (1) (14 C.W.N. 439) and to my mind, it

represents also the true legal position.

25. The above discussion and statement of the law does not really conflict with the idea that the puisne mortgagee''s right of redemption and his

right of foreclosure or sale are distinct rights. They are certainly distinct. Their difference in nature and incidents are well-known and is well

illustrated by the phrase ""redeem up and foreclose down"" and they are also distinct or independent in that the puisne mortgagee''s right of

foreclosure or sale may be enforced without exercise of the right of redemption. This latter right however, cannot be enforced without the former

and, if the puisne mortgagee''s remedy for enforcing the right of foreclosure is lost, his right of redemption also ceases to be enforceable. Order 34,

rule 1, of the CPC and its Explanation sufficiently recognise this distinction.

26. Clearly also my statement of the law on the puisne mortgagee''s right of redemption does not militate against the use of a time-barred mortgage

as a shield or weapon of defence, as recognised in some of the decided cases on the strength of the well-known doctrine that limitation bars the

remedy but not the right If the puisne mortgage is time-barred, it cannot be enforced, that is. enforced by way of action. That is enough to make

the puisne mortgagee''s right of redemption also unenforceable in an action at law and that clearly suffices for my present purpose.

27. I am not concerned here with any passive right of redemption, that is, the right apart from its enforceability in action. The active element alone

of the puisne mortgagee''s right of redemption, that is, its enforcement and enforceability in action, is my present concern and for that it is essential

that the mortgage itself which is the fount or foundation of the right must be enforceable in action. This is inherent throughout my discussion and I

can see no conceivable basis for any other conclusion.

28. How far and for what purpose the puisne mortgagee''s right to redeem a prior mortgage may remain available--apart from its enforceability in

action,-after his own mortgage had become time-barred and unenforceable is a matter which does not arise for consideration in this case and I

would not here undertake any examination of that question beyond what I may have stated in a general form in the course of this judgment. I turn

now to the cases cited.

29. The appellant relied on the decisions in the cases of Nidhiram Bandopadhaya v. Sarbeswar Biswas, (1) (14 C.W.N. 430); Lakshmanan

Chettiar (dead) and Others Vs. Sella Muthu Naicker and Others, ; R. Appayya Vs. A. Venkatramayya and Others, ; and Nil Madhab Mahapatra

and Others Vs. Joy Gopal Mahanti and Others, . The appellant''s learned Advocate also explained the Full Bench case of Sayamali Molla v.

Anisuddin Molla, (10) (ILR 57 Cal. 704 : 33 C. W. N. 1067), and laid particular stress on the Full Bench''s affirmance or approval of the

decision in Nidhiram''s case, (1) 14 C.W.N. 439.

30. The respondent (plaintiff), on the other hand, cited a number of cases from the different High Courts and the learned Advocate, Mr.

Muktipada Chatterjee, placed particular reliance on the decisions in the cases of Priya Lal v. Bohra Champa Ram, (21) (IL.R. 45 All. 268;

Narotam Das Vs. Sanwal Dass and Others, ; Ramjhari Koer Vs. Kashi Nath Sahai and Others, ; AIR 1937 205 (Nagpur) ; Budha v. Mul Raj

(26) (48 I.C. 916) and Basanta v. Indra Singh, (27) (A.I.R. 1920 Lah. 504). He also cited the case of Nagu Tukaram Ghatule Vs. Gopal Ganesh

Gadgil, , which purported to approve the Patna case, (29) (ILR 5 Pat. 513 : A. I. R. 1926 Pat. 33), as an authority in his favour and, towards the

close of his argument, he drew my attention to the decision of the Judicial Committee in the case of Syed Mahomed Ibrahim H. Khan v. Ambica

Prosad Singh, (30) (L.R. 39 Indian Appeals, 68), as supporting his client''s contention.

31. I have examined the authorities cited before me. I have looked up further the latest Madras case (31) A.M.A. Firm by Managing Partner

Murugappa Chettiar in the place of A.M.A. Palaniappa Chettiar Vs. Marudachalam Chettiar (died) and Others, and the Lahore case (32) Sundar

Das v. Beli Ram, AIR 1933 Lah. 503), as also the Patna case (33) (Abdul Gafoor Vs. Sagun Choudhary and Others,), of which reference was

given to me after 1 had reserved judgment. As pointed out by me at the very outset, there is certainly a conflict of judicial opinion, although most of

the cases may be explained or distinguished. I have also indicated above the reason of this conflict, namely, the failure to observe the distinction

between the subsistence of the right to redeem and the time-limit for its exercise or the period of limitation for an action for redemption.

32. In the light of my discussion, there can be little doubt as to the correctness of the decision in Nidhiram''s case, (1) 14 C.W.N. 439, and its

underlying principle, although the language, used by the learned Judges at some places in the judgment may not be quite happy or accurate. In that

case, the first mortgagee having failed to implead the second mortgagee in the suit on his (first mortgagee''s) mortgage, his decree could not affect

the second mortgagee, but, as his sale was held prior to the institution of the second mortgagee''s suit and as the mortgagor was a party to the first

mortgagee''s suit, decree and sale, there can be little doubt that, by that sale, the first mortgagee acquired, inter alia, the mortgagor''s equity of

redemption. In the second mortgagee''s suit, however, which was subsequently brought upon his mortgage the first mortgagee who had, in the

meantime, acquired the mortgagor''s right of redemption was not made a party and, accordingly, the equity of redemption was wholly

unrepresented and this mortgage suit was imperfectly constituted and it could not affect the equity of redemption of the first mortgagee or his

assignee as the holder of the same. The result was that, in the sale, which was held in execution of his decree, the second mortgagee acquired only

his interest as such puisne mortgagee and he or his assignee could ask for redemption of the first mortgage only in the capacity of the puisne

mortgagee, and, as the said mortgage was admittedly time barred on the date of the relevant suit for redemption the plaintiff was entitled to no relief

on principles which'' I have discussed earlier in this judgment.

33. In the Full Bench case of Sayamali Mollah v. Anisuddin Molla (10) (33 C.W.N. 1067), the facts were materially different in that the sale in

execution of the first mortgagee''s decree had not taken place when the second mortgagee sued upon his mortgage and accordingly, the latter''s suit

was properly constituted, as the mortgagor, in whom admittedly, the equity of redemption was vested at the date of the suit, was duly impleaded

therein. The first mortgagee''s subsequent sale was, therefore, subject to this decree and, when in execution, the second mortgagee made his

purchase, he acquired the mortgagor''s equity of redemption, notwithstanding the sale, held, in the meantime, in execution of the first mortgagee''s

decree which was imperfect and ineffective against the second mortgagee, he, though a necessary party, not having been joined or impleaded

therein. The second mortgagee, when he brought his suit for redemption, had, therefore, in him the entire equity of redemption,--nay, the entire

mortgaged property or title to the whole of the physical property which formed the subject-matter of the mortgage, subject only to the first

mortgage--and thus his suit for redemption was primarily,--and, strictly speaking, only (vide p. 1074, Col. 2, of the Report),--in his capacity as the

owner of the property and, to such an action, the sixty years'' rule, laid down in Art. 148, obviously applied. This is pointed out in very clear terms

by the Full Bench at page 1074 (Col. 2) of the C.W.N, report, (10) already noted, and it is on this distinction that they applied Art. 148 to the

facts of the case while expressly affirming the decision in Nidhiram''s case (1) 14 C. W. N. 439.

34. Reference ought to be made here to two other passages in this 33 C. W. N. Report. At p. 1071, in the Order of Reference of Rankin, C. J.,

and Ghose, J., the general observation-

The question is what is the period during which under the law, a mortgagee can sue to enforce his right of redemption. In my opinion that is stated

prima facie by Art. 148"". is followed immediately by the significant passage-

No doubt if a mortgagee does not within 12 years of the due date sue to enforce his mortgage he ceases to be a mortgagee and in that event the

foundation of his right to redeem will be gone."" And to this the Full Bench accorded its approval at p. 1075 where B. B. Ghose, J., delivering the

judgment of the Court, referred to the law laid down by the learned Judges in Nidhiram''s case (1) (14 C.W.N. 439) in the following terms :

''I think what they meant was, as the right to enforce the puisne mortgage was barred by limitation the transferee from the mortgagee had no right in

the property to enable him to redeem the prior mortgage.

35. And then went on to add,

The same observation was made by the learned Chief Justice in his Order of Reference, with which I fully agree.

36. I do not think that the reference to ""the transferee from the mortgagee"" has any special significance as will be evident from the indiscriminate

use of the terms ""the second mortgagee"" and his ""transferee"" in the Full Bench judgment in describing the plaintiff of the redemption action and the

reference to the said plaintiff as ""the second mortgagee"" in the Order of Reference, and in law also the position of the second mortgagee and his

transferee in this matter would not be different. Nor do I think that the superseded observations of the learned Chief Justice (Vide pp- 1076-7 per

Rankin, C. J.), have referred to anything else than his view that Nidhiram''s case was probably wrongly decided which view was over-ruled by the

Full Bench.

37. The facts of the two Madras cases, cited above Lakshmanan Chettiar (dead) and Others Vs. Sella Muthu Naicker and Others, ; R. Appayya

Vs. A. Venkatramayya and Others, , do not appear quite; clearly from the respective Reports and the correctness or otherwise of those decisions

cannot, therefore, be safely pronounced,--and the same remarks also apply to the Calcutta case (20) already cited, namely, Nil Madhab

Mahapatra and Others Vs. Joy Gopal Mahanti and Others, ,-- although it seems to me that, at least in the first of the above two Madras cases,

reported in A. I. R. 1925 Mad. 76, the prior mortgagee''s purchase in execution of his decree was anterior to the second mortgagee''s suit (vide

bottom of page 77 column 2) and, if that was so, the decision was undoubtedly correct.

38. Of the cases, cited by the plaintiff respondent, none of decisions except (29) (I.L.R. 5 Pat. 513), appears to'' present any real difficulty.

Barring the said Patna case, the actual decision in all the other cases appears to be correct and they do not strictly speaking, conflict with the

principles which I have stated above, although their statement of the law and, particularly, their treatment of Nidhiram''s case and the comment

made on it in some of them are certainly open to legitimate exceptions. Thus, in the case reported in (21) ILR 45 All. 268, at the date of the

second mortgagee''s suit, the entire equity of redemption was in the mortgagor and, he having been impleaded, the mortgage suit was properly

constituted and, by his auction-purchase, the mortgagee decree-holder acquired the entire mortgaged property including the mortgagor''s equity of

redemption, as in the Calcutta Full Bench case (10). Art. 148, was, therefore, rightly applied.

39. The actual decision in the Oudh case, (24) (AIR 1936 139 (Oudh)). dismissing the plaintiff puisne mortgagee''s claim for redemption, was

also clearly right and it really supports Nidhiram''s case, (1) 14 C.W.N. 439, although this latter case was, not quite logically, adversely

commented upon by the learned Judges.

40. I may point out here that, in the Oudh case, cited (24) (AIR 1936 139 (Oudh)), Fisher''s statement of the English Law on the point which

undoubtedly supports Nidhiram''s case, (1) (14 C.W.N. 439), was accepted as the law in this country too and the entire discussion at pp. 141

(Col. 2) and 142 (Col. 1) of the Report unmistakably supports the said decision (1) (14 C.W.N. 439) and the point of view which I have affirmed

above. In this connection particular attention may he drawn to the following passage at pp. 141-142 which runs as follows :

We must therefore hold that the plaintiff''s right to enforce their mortgage having long since become barred by time they had no subsisting interest in

or charge upon the mortgaged property within the meaning of section 91 of the T. P. Act at the time of the institution of the present suit (for

redemption). The suit has therefore, been rightly dismissed.

41. In the case, reported in (25) (AIR 1937 205 (Nagpur)), the facts are not quite fully or clearly stated and the reasons given for not accepting

Nidhi-ram''s case (1) (14 C.W.N. 439), do not appear to be sound or convincing. The criticism of the learned Judge (Gruer, J.) that ""there has

been a confusion of thought in Nidhiram''s case and an obscurity of expressions"" is unjust, if not actually misconceived and somewhat misleading,

and, if I may say so with respect, that criticism applies with much greater force to the learned Judge''s own judgment. It seems to me--and this also

I say with the greatest respect--that the learned Judge missed the true significance and the full implication of the passage in Fisher on Mortgage (p.

595, appears to be wrongly quoted in the Report--it would probably he p. 597), to which he himself made a reference (vide p. 207) and his entire

approach to the question before him was itiated by this error. The ultimate decision of the learned Judge applying Art. 148 to the case may,

however, be supported on the ground that, in the second mortgagee''s mortgage suit, the equity of redemption was not wholly unrepresented as on

the date of its institution the mortgagor Darbarilal who was apparently a party to that suit appears to have acquired back at least a portion of the

mortgaged property under his intervening purchase from the first mortgagee auction-purchaser''s legal representative Nandkishore (vide p. 206 of

the Report). In these circumstances the final decree in the second mortgagee''s mortgage suit was not wholly ineffective against the equity of

redemption and, to the extent that the same was affected, the second mortgagee decree-holder might have claimed a sufficient independent right to

redeem the first mortgage which would not be affected by the subsequent extinction of her right to sue on her mortgage under Art. 132 of the

Limitation Act, but which would certainly entitle her to come under Art. 148 for purposes of such redemption. It is not clear again from the

judgment as to who were the parties to Chitra Bai''s (second mortgagee''s) mortgage suit and decree. All that we get is that the prior mortgagee

Ramdoyal--or, it may be also his nephew Nandkishore, who later got the mortgaged property on partition, was not a party, but it is not clear

whether the transferees from Nandkishore, namely, the original mortgagor Darbarilal and the other person Chotelal, were at any state impleaded in

the suit. It is almost certain that the mortgagor or his legal representative was a party to the suit and notwithstanding the statement that the prior

mortgagee was not a party, I am not quite sure that the other transferee Chhotelal was not a party to the final decree. There was thus ample scope

for applying Art. 148 to the case without the obsession of Art. 132 and this Nagpur case, (25) (AIR 1937 205 (Nagpur)), would then be clearly

distinguishable from Nidkiram''s case, (1) which, as I have said above, was correctly decided on its own facts. Further comments on the Nagpur

case are unnecessary and I shall proceed at once to the Patna decision, (29) (I. L. R. 5 Pat. 513), which is definitely opposed to Nidkiram''s

case, (1) and which is plainly irreconcilable with, the principles, approvingly quoted by me earlier in this judgment.

42. In this Patna case the first mortgagee had the mortgaged property sold in execution of his decree against the mortgagor and himself became the

auction-purchaser. He thus acquired the interest of the mortgagor and, although the second mortgagee was not a party to his suit and, therefore,

hid right as such mortgagee could not be affected by the sale, it was at least clear that, at the date of the subsequent mortgage suit by the second

mortgagee, the first mortgagee, as the auction-purchaser as aforesaid, was the holder of the equity of redemption and, as he was not impleaded in

the second mortgagee''s suit, the equity of redemption was not at all represented and the suit was not properly constituted. The decree in such a

suit was. therefore, imperfect and the second mortgagee''s purchase at the auction sale, held in execution thereof, did not clothe him with any rights

other than the puisne mortgagee''s and, when that mortgage became unenforceable on account of the law of limitation, the right of redemption,

flowing from the same and of which that mortgage was the only source, also became incapable of enforcement. It is difficult to see how, in these

circumstances, the second mortgagee could be given a decree for redemption but that was what was done by the Patna High Court. With all

respect to the learned Judges, who decided this case, I am unable to agree with their actual decision, or with their statement of the relevant

principles of law, or their dissent from (1) 14 C.W.N. 439. The Patna case was completely covered by Nidhiram''s case, which, as held by the

Full Bench in (10) 33 C.W.N. 1067 had been rightly decided and, having expressed complete agreement with the exposition of law, as made by

the Full Bench (10) (33 C.W.N. 1067), the learned Judges of the Patna High Court, in the light of the distinction, made by the learned Judges of

this Court in the said Full Bench case (10) ought to have applied Nidhiram''s case (1) and dismissed the plaintiff''s suit. The question, as I have

already said. was not really a question of limitation for the redemption action, but a question of subsistence of the right itself, namely, ""the right to

redeem"", or the existence of a subsisting cause of action and this distinction and the distinction between the two cases of this Court, reported in (1)

14 C.W.N. 439 and (10) 33 C.W.N. 1067 (F.B) appear to have been overlooked in the Patna decision.

43. In the case, (22) reported in A. I. R 1934 All. 946. it is not clear whether the puisne mortgagee''s suit to enforce his mortgage was filed before

the sale in execution of the prior mortgagee''s decree had been held, although indications are to that effect. If the puisne mortgagee''s suit was

earlier than the prior mortagaee''s sale, the case was certainly correctly decided, notwithstanding the fact that the relevant principles of law were

not adverted to, or at any rate, were not correctly stated. If, however, the sale earlier, the decision cannot be supported and I am unable to agree

with it.

44. I do not think that the Full Bench cases of the Allahabad High Court, reported in Narotam Das Vs. Sanwal Dass and Others, and Ram Sanehi

Lal and Another Vs. Janki Prasad and Others , on which Nisamatullah, J., purported to rely to some extent, really affect this question. The

proposition, for which reliance was placed on these two cases by the learned Judge, may be unexceptionable but it does not necessarily lead to the

conclusion which was ultimately reached in the Narotam Das Vs. Sanwal Dass and Others, , case (22). It rather supports the opposite view. If the

prior mortgagee, as held in the Full Bench cases, had acquired the rights of the mortgagor as a result of the sale, then the subsequent suit of the

second mortgagee without impleading him was improperly constituted, and coud not, in the event of a sale in execution of the decree, based

thereon, clothe the puisne mortgagee, if he happened to be the purchaser at such sale, with any right other than as such second mortgagee and, if

his said mortgage was unenforceable due to the time-bar, he could not claim the right to redeem the prior mortgage.

45. The Madras case (31) in A.I R. 1948 Mad. 412 is easily distinguishable, for there the second mortgagee''s suit was earlier and, at the date of

the said suit the equity of redemption had not passed away from the mortgagor. The second mortgagee''s suit was, therefore, properly constituted

and, in execution of the decree, obtained against the mortgagor, the second mortgagee duly acquired his equity of redemption, not with standing

the sale, held meanwhile at the instance of the prior charge holder, the Tirupur Municipality, which did not implead the second mortgagee in its suit.

This follows from the principle, laid down in the Full Bench case (10) in 33 C.W.N. 1067, and, in the light of that decision, the Madras case,

rightly decided on its own facts, must be held not to affect Nidhiram''s case (1). The law, however, does not appear to have been correctly laid

down by Satyanarayan Rao, J., and his sweeping dissent, from the earlier Madras cases, reported in Lakshmanan Chettiar (dead) and Others Vs.

Sella Muthu Naicker and Others, and R. Appayya Vs. A. Venkatramayya and Others, , and Nidhiram''s case, 14 C.W.N. 439, was plainly

unjustified.

46. In this A.M.A. Firm by Managing Partner Murugappa Chettiar in the place of A.M.A. Palaniappa Chettiar Vs. Marudachalam Chettiar (died)

and Others, the earlier decision in Second Appeal No. 304 of 1926 of that Court (which has been reported in 57 Madras Law Journal, Notes

portion, page 59) was relied on, but this. report shows that, in the puisne mortgagee''s suit, the prior mortgagee who had also acquired the

mortgagor''s equity of redemption was impleaded but was discharged or exonerated on his setting up a paramount title. In such circumstances, the

second mortgagee''s mortgage suit might be held to have been properly constituted in the light of the decision (36) in 12 Indian Appeals 171 and,

accordingly, by his purchase in execution of his decree, the second mortgagee in that case obtained the mortgagor''s equity of redemption as well

and thus acquired the double capacity to redeem the prior mortgage and his suit for redemption which was well within time under Art. 148 of the

Limitation Act could not be defeated by reason of the fact that his mortgage had meanwhile become time barred under Art. 132 of the Act.

47. The case (33) in A.M.A. Firm by Managing Partner Murugappa Chettiar in the place of A.M.A. Palaniappa Chettiar Vs. Marudachalam

Chettiar (died) and Others, is hardly relevant for our present purpose. There, in the second mortgagee''s suit, the first mortgagee who had already

sued upon his mortgage without impleading the second mortgagee and had himself purchased at the auction sale, held in execution of the decree,

obtained against the mortgagor, claimed to redeem the second mortgagee and this claim was allowed on the ground that, by his auction-purchase,

he had acquired the mortgagors''s equity of redemption and had thus the two relevant capacities of the first mortgagee as well as the owner of the

equity of redemption and was, as such, entitled to redeem the second mortgagee in this latter capacity. On the death of the second mortgagee''s

suit, the equity of redemption was clearly in the first mortgagee as auction-purchaser in execution of his decree and there can be little doubt, that,

as holder of this equity, the first mortgagee was entitled to redeem the second. This Patna decision was, therefore, correct on its own facts. I do

not see how this decision can help the respondent or can be at all relevant to the present case when it is remembered that, in this Patna case, the

first mortgagee as auction-purchaser in his mortgage suit sought to redeem the second mortgagee. If the decision be of any help in the present case,

its underlying principle would rather aid the appellant as it indicates, to some extent, the distinction between cases of single capacity of mortgagee

and double capacity of mortgagee and owner of the equity of redemption in the matter of a claim to redeem.

48. The three Lahore cases Budha v. Mul Raj, (26) 48 Indian Cases 916; Basanta v. Indar Singh, (27) (A. I. R. 1920 Lah. 504; and Sundar Das

v. Beli Ram., (32) (A.I.R. 1933 Lah. 503), do not really touch the present question, although there are some observations in the last two cases

which support the respondent. The first two of the above three cases related to usufructuary mortgages and claims of possession as such

mortgagees. They were concerned really with Art. 135 of Indian Limitation Act and were not. strictly speaking, redemption actions. Further, in the

second of them, redemption of the prior mortgage had already been made. In the third case (33) (AIR 1933 503 (Lahore)), there was special

contractual authority from the mortgagor to redeem the prior mortgagee which may be held to amount to some sort of assignment or representation

of the mortgagor''s equity of redemption, thus bringing in Art. 148 in the matter of redemption.

49. The Privy Council case, (30) of 39 Indian Appeals 68 also presents no real difficulty. On proper analysis, it shows that the claimant there was

in the position of a prior mortgagee and also of a subsequent mortgagee to the mortgagee whose mortgage was sought to be affected and/or

redeemed. Priority was claimed for the Zarpeshgi lease and redemption was sought on the footing of the subsequent mortgage. The time for

enforcement of the lease had expired, but the same does not appear to have been the position with regard to the subsequent mortgage which, at no

stage, appears to have been challenged on the ground of limitation. The Judicial Committee refused the priority claim as the lease had ceased to be

enforceable by reason of Art. 132 of the Indian Limitation Act, but redemption was allowed on the basis of the subsequent mortgage, the time for

enforcing which does not appear to have expired under the said Article. I do not think, therefore, that the Privy Council case is of any help to the

respondent plaintiff.

50. Only the Bombay view now remains to be considered. For this purpose it is sufficient to refer to the two cases, reported in (37) (Nathmal

Motiram Marwadi Vs. Nilkanth Vishnu Kavishwar,) and (28) Nagu Tukaram Ghatule Vs. Gopal Ganesh Gadgil, . In the first of these two cases

there are certain observations which may favour the respondents, but, as Beaumont, C. J., who delivered the judgment of the Court on that

occasion, himself remarked that ""the point"" (which is now before me) was ""really of purely academic interest"" in that case, where the redemption

claim was eventually dismissed on other grounds. I do not, therefore, attach much importance to the contrary observations in this case,

notwithstanding the fact that, in the subsequent Nagu Tukaram Ghatule Vs. Gopal Ganesh Gadgil, , they are taken as approval of the view which

the respondent before me is seeking to support. This last mentioned case is a curious blend of contradictions, and with all respect to the learned

Judges who decided this Nagu Tukaram Ghatule Vs. Gopal Ganesh Gadgil, , I am bound to say that their observations and expressions of opinion

in the different parts of the judgment cannot be reconciled. The actual decision is open to no objection as Art. 148 was rightly applied to the puisne

mortgagee''s claim for redemption, when, in her mortgage suit, which was earlier than the prior mortgagee''s she had got a decree against the

mortgagor and herself auction-purchased in execution, thus becoming owner also of the mortgagor''s equity of redemption, in which capacity she

was certainly entitled to redeem the prior mortgage within the period, prescribed in Art. 148, no matter that a suit for enforcement of her own

puisne mortgage would have been barred under Art, 132 at the date of the redemption action. This case was very similar to the Full Bench case,

(10) of this Court in 33 C.W.N. 1067, and it was rightly decided in the same manner as the said Full Bench Case. The learned Judges also rightly

held that Nidhiram''s case, (1) (14 C.W.N. 439), was correct on its own facts and was distinguishable from the case before them (vide page 407).

Curiously, however, they seem to have approved also the Ramjhari Koer Vs. Kashi Nath Sahai and Others, , B.C. : T.L.R. 5 Pat. 513), which

definitely lays down a contrary proposition and this again they did with particular reference to (37) (Nathmal Motiram Marwadi Vs. Nilkanth

Vishnu Kavishwar,), where, as also in the Patna case, (29) the puisne mortgagee had, apart from his position as such mortgagee, no other

capacity or character for purposes of redemption and where, therefore, in view of the principles, enunciated and affirmed by the learned Judges

themselves at page 407, of the report, while explaining with approval Nidhiram''s case, (1) in the light of the Full Bench decision, (10) in (33

C.W.N. 1067), namely, ""if the puisne mortgagee''s right to enforce his mortgage was barred, different considerations would arise"", the claim for

redemption would not be saved by the application of Art. 148.

51. I have already dissented from the Patna view as expressed in Mussam-mat Ramjhari Koer''s case, (29) (I. L. R. 5 Pat. 513), and, to my mind,

Beaumont, C. J.''s obiter dictum in (37), (Nathmal Motiram Marwadi Vs. Nilkanth Vishnu Kavishwar,), does not also represent the true view of

this branch of the law. The obiter, to say the least, is based upon too broad a view of the old section 75 of the Transfer of Property Act and upon

a misapprehension of the true nature of a puisne mortgagee''s right of redemption.

52. To the extent, therefore, that the 1953 Nagu Tukaram Ghatule Vs. Gopal Ganesh Gadgil, , purports to accept the statement of the law as

appearing in the said two cases ILR 5 Pat. 513. (29) and (Nathmal Motiram Marwadi Vs. Nilkanth Vishnu Kavishwar,), (37) I am unable to

agree with it, or affirm its correctness. The case, however, as I have already said, was correctly decided on its own facts. No further observation

on Nagu Tukaram Ghatule Vs. Gopal Ganesh Gadgil, (28), is necessary and, with this remark, I would end my discussion of the case law.

53. The substance of the matter seems to be as follows: Where the puisne mortgagee, who claims to redeem the prior mortgage, has no other

relevant capacity save that of a puisne mortgagee and has not foreclosed or obtained a proper and effective decree on his mortgage or has

disabled or disentitled himself from so doing, his claim must fail if a suit on his mortgage would be barred under Art. 132 of the Indian Limitation

Act at the date of his claim for redemption. If, however, he is also, at that date the holder of the mortgagor''s ultimate equity of redemption either in

whole or in part, or if he has foreclosed or obtained a proper or sufficiently effective decree on his mortgage or has not disabled or disentitled

himself from so doing his claim for redemption would succeed, if made within the time, prescribed in Art. 148, and would not fail on account of

lapse of time except under that Article. In the one case the question is of a subsisting right to redeem and, for that purpose, Art. 132 will be

relevant, as explained above; in the other case, the question is one of limitation for an action for redemption, for which the appropriate Article is

Art. 148; and the enquiry should be directed keeping in view this distinction and these two different points of view.

54. It is undoubtedly true that, for redemption actions, the period of limitation is prescribed in Art. 148 of the Limitation Act and, strictly speaking,

it will not be correct to say that Art 132 will govern the time-limit of (sic) actions even if a puisne mortgagee happens to be the plaintiff. Indeed, this

latter Article as its language shows, does not profess to lay down the period of limitation for any redemption action but prescribes only the period

for enforcement of mortgages. It is, however, important to bear in mind, as stressed by the Full Bench in (10) (33 C.W.N. 1067 at p. 1075), that

in order to attract Art. 148 the plaintiff must be ""a person entitled to redeem"" which means that he must have a subsisting right to redeem or a

subsisting cause of action and, for this purpose, Article 132 may well be relevant when a puisne mortgagee claims to redeem a prior mortgage. The

period of limitation for redemption action even by a puisne mortgagee is stated prima facie in Art. 148 '' but, in order to see whether he is a person

entitled to redeem'' so as to come under that Article, Art. 132 may have to be considered in a particular case. In this latter case, as I have already

stated more than once, the question is not whether the suit is barred by limitation, but whether the plaintiff (puisne mortgagee) has a subsisting right

to redeem or a subsisting cause of action. In the ultimate analysis this question may, in a particular case, depend upon some provision of the

Limitation Act (e.g., Art. 132), but it will not be quite accurate to state the enquiry as one into the question whether the suit is time-barred. This I

believe is the cardinal distinction which explains the true position.

55. I have only to add that the phraseology of the old sections 74 and 75 of the Transfer of Property Act does not really affect Nidhiram''s case.

At any time"" in section 74 cannot certainly mean ""without limitation or bar of limitation"" and the phrase ""same rights against the prior mortgagee as

his mortgagor"" in section 75 does not really obliterate the very important distinction, in nature and character, between the right of redemption of the

puisne mortgagee and that of the mortgagor, which I have tried to set out above. That distinction is too fundamental to be affected by the language

of section 75 which, though expressed in very general terms, seems to have been intended only to embody an application of the well-known. rule

redeem up and foreclose down"" and should not be more widely read. This is supported by the discussion in Dr. Ghose''s Mortgage, to which

reference has already been made. In any event, sections 91, 92 and 94 of the present Transfer of Property Act, which are the nearest approach in

the new Act to the old repealed sections 74 and 75, do not present any such complication. I may add further that, in my view, the old sections 74

and 75 of the Transfer of Property Act--and so also the new sections 91, 92 and 94-- dealt only with the nature and extent of the rights without

reference to the time-limit for enforcing them and were not relevant for such purposes.

56. In the light of the foregoing discussion, this appeal must succeed. At the date of the present suit, the plaintiff puisne mortgagee''s right to enforce

his mortgage was clearly time-barred under Art. 132 of the Indian Limitation Act, and, as on the admitted facts., his mortgage suit was improperly

constituted, he not having impleaded the first mortgagee, who had already acquired the mortgagor''s equity of redemption in execution of his own

decree, and the equity of redemption being thus totally unrepresented in the second mortgagee''s suit, he (the plaintiff) cannot set up any other

relevant capacity for purposes of redemption, his claim to redeem the defendant''s prior mortgage must fail. In this view of the matter, it is

unnecessary to discuss the further argument of the appellant''s learned Advocate that, in any event, his client as the holder of the ultimate equity of

redemption by virtue of his purchase of the mortgagor''s right, title and interest at the sale, held on October 31, 1927, was entitled to redeem the

plaintiff in his turn even if the plaintiff''s claim to redeem his (defendant''s) prior mortgage be held tenable in law.

57. I have held above that, at the date of the plaintiff''s mortgage suit (Title Suit No. 1428 of 1927), the equity of redemption had passed in its

entirety to the defendant by reason of his (defendant''s) prior purchase at the auction sale, held in execuiton of his own mortgage decree in Title

Suit No. 163 of 1925. It has been argued before me by the plaintiff-respondent''s learned Advocate that that conclusion would not be justified as,

although at that date, the defendant had made his auction-purchase and the sale had been confirmed, he had not taken delivery of possession and,

without delivery of possession, the sale would not be complete and he has cited the Full Bench case of Kailosh Chandra Tarafdar v. Gopal

Chandra Poddar, (38) (30 C. W. N. 649, at page 658), of this Court in his support. The argument, however, appears to be misconceived and it is

not supported either by principles or by any authority or precedent. On the confirmation of the sale, the title passes to the purchaser and, for that,

delivery of possession is not necessary. The purchaser really gets delivery of possession by virtue of his title, acquired by the purchase, and such

title is complete on confirmation of the sale This is clearly recognised even in the very passage at page 658 of the Report cited which is relied on by

the learned Advocate himself and, if the title to the mortgaged property has passed to the purchaser, the equity of redemption has also passed, as

title to the mortgaged property includes the equity of redemption. I, therefore, reject the respondent''s argument.

58. The plaintiff-respondent filed a cross-objection in regard to his claim to redeem the defendant-appellant''s 1921 mortgage of Rs. 199 which

claim has been dismissed by the two Courts below. In support of this cross-objection it has been very strenuously urged that the plaintiff-

respondent, as second mortgagee, not having received any notice of the first mortgagee''s (defendant-appellant''s) final decree, his right of

redemption was subsisting. I am, however, not satisfied on the evidence before me that this plea of nonservice of notice has been sufficiently made

out by the plaintiff-respondent. In any event, this plea is utterly irrelevant for purposes of the present suit for redemption. The plaintiff''s omnibus

allegation that he was not made a party to the relevant mortgage suit or execution proceeding is contradicted by the materials before me and, on

the present state of the records, I am inclined to hold that the plaintiff had ample notice of the said suit and proceedings and was fully aware of the

same at all material times and that the said mortgage sale extinguished inter alia, his entire interest in the present suit properties, so far as they are

covered by the mortgage bond of Rs. 199. It is also significant to note that the plaintiff did not press his cross-objection on this point before the

lower Appellate Court which dismissed it on that ground and his allegation to the contrary in his memoranda of cross-objection in this Court is

rather belated and half-hearted too. I am not prepared to accept the said allegation. On all these grounds, the cross-objection must fail and I

decide accordingly.

59. In the result, the appeal is allowed and the cross-objection is dismissed. The judgments and decrees of the two Courts below, decreeing the

plaintiff''s suit in regard to the properties, covered by the mortgage bond of Rs. 49, are set aside, but their dismissal of the plaintiff''s claim in regard

to the properties of the mortgage bond of Rs. 199 is upheld, the net result being that the plaintiff''s present suit is dismissed in toto. In the

circumstances of this case. I direct the parties to bear their own costs throughout.