Abdur Rahim Jiwani Vs Vithaldas Ramdas and Others

Court: Bombay High Court

Date of Decision: Sept. 18, 1980

Acts Referred: Civil Procedure Code, 1908 (CPC) â€" Order 34 Rule 7
Limitation Act, 1908 â€" Article 134
Limitation Act, 1963 â€" Article 113, 61
Transfer of Property Act, 1882 â€" Section 60, 83, 84
Trusts Act, 1882 â€" Section 90

Citation: AIR 1981 Bom 58

Hon'ble Judges: Sujata V. Manohar, J

Bench: Single Bench

Advocate: D.B. Zaiwalla and D.H. Mehta, for the Appellant; S.A. Gandhi, A.T. Kadiani and G.R. Panthaky, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

1. This is a suit filed by the plaintiff for redemption of two properties, one at Chira Bazar and the other at Sleater Road, which are more particularly

described in Exts. A and B to the plaint. The property at Chira Bazar consists of ground and two floors and it is fully tenanted. There are four

residential premises and six shops in this property. The property at Sleater Road consists of ground and four floors. There arc six residential

premises in this property.

2. On or about 17th Nov. 1954, the plaintiff executed a mortgage in respect of his property at Chira Buzar in favour of Fatmabai Hasanbhai for a

sum of Rupee 25,000/- repayable with interest. On the same date, he created a mortgage of his property at Sleater Road in favour of Pratapchand

Kasturchand and others for a sum of Rupees 22,000/- repayable with interest. In or about 1956, Pratapchand Kasturchand and others filed a suit

for the sale of the mortgaged property. In order to prevent such a sale, it stems that the plaintiff tried to get the mortgages transferred. The plaintiff

approached a broker Khemchand for this purpose. Thereafter, by an indenture of transfer of mortgage dated 14th Dec. 1956, defendants Nos 1

and 2 obtained a transfer of the mortgage in respect of the Chira Bazar property for a sum of Rs. 35.000/-- By another indenture of transfer of

mortgage, also dated 14th of December 1956, defendants Nos. 1 and 2 obtained a transfer of the mortgage in respect of the Sleater Road

property for a sum of Rs. 30.000/-. On the same date, a second mortgage was created in respect of both these properties in favour of defendant

No. 3 for a sum of Rs. 10,000/-. From out of these amounts of Rs. 35,000/-, Rs. 30,000/-and Rs. 10,000/- advanced by defendant Nos. 1, 2

and 3 as aforesaid, the claims of the previous mortgages were fully satisfied, and disbursements of various amounts were made, particulars of

which are given in a letter addressed by the Attorneys of defendants Nos. 1, 2 and 3 to the Advocates of the plaintiff. This fetter is dated 29th

Dec., 1956, part of Ex. J collectively. It seems that municipal taxes in respect of these properties were in arrears at the date when the indentures of

transfer were executed. From out of the moneys advanced by defendants Nos. 1, 2 and 3, all arrears of municipal taxes up to date were paid.

Insurance premium in respect of these properties was also paid from out of the amounts so advanced. The Advocates of the plaintiff by their letter

dated 10th Jan., 1957 confirmed these disbursements. This letter also forms part of Ex. S collectively. Defendant No. 3, who was the second

mortgage , was put in possession of the mortgaged properties and he was in charge of the management of the suit-properties from I4th Dec. 1956.

He was thus required to collect the rents in respect of these properties, to pay municipal taxes and other outgoings, to carry out repairs if required,

to pay interest to the prior mortgages-defendants Nos. 1 and 2 as also to himself and to keep an account of all recoveries and expenditure. There

is a dispute as to whether there was any tripartite agreement between the plaintiff, defendant Not. 1 and 2, and defendant No. 3 under which

defendants Nos. 1 and 2 agreed that they would look to defendant No. 3 for the payment of interest under the transfers of mortgages to them. In

any event, there is evidence to show that there was an agreement at least between the plaintiff and defendant No. 3 that, from out of the rents and

profits of the two properties which were put in possession of defendant No. 3, defendant No. 3 would pay on behalf of the plaintiff interest due

and payable to defendants Nos. 1 and 2 under the indentures of transfers of mortgages. In fact, up to 14th May 1957, defendants Nos. 1 and 2

received interest amounts from defendant No. 3. Defendants Nos. 1 and 2 did not receive any interest under the two mortgages after 14lh May

1957. These defendants, therefore, sent ''a notice of demand dated 10th Sept. 1957 to the plaintiff. They sent another notice of demand dated

26th Oct. 1957 to the plaintiff. Since the plaintiff failed and neglected to pay any interest to these defendants pursuant to the notices of demand,

they advertised both the properties for auction sale in exercise of their powers under the two transfers of mortgages dated 14th Dec., 1956. They

were entitled to sell the suit-properties without the intervention of the Court in the event of there being defaults in the payment of three installments

of interest as provided in the indentures of transfers of mortgages. Accordingly, defendants Nos. 1 and 2 advertised the properties for auction sale.

The auctioneers of defendants Nos. 1 and 2 were Messrs Gandhi and Co. The auction sale of the Chira Bazar property was originally fixed for

27th Nov. 1957, while that of the Skater Road property was originally fixed for 29th of November 1957. In the meanwhile, the plaintiff filed a suit

in the High Court, being Suit No. 372 of 1957, in order to stop the auction sales. In a Notice of Motion taken out in this suit by the plaintiff, a

consent order was taken requiring the plaintiff to deposit in Court Rs. 1,500/-. The plaintiff, however, failed and neglected to deposit this amount in

Court. Thereafter, defendants Nos: 1 and 2 proceeded with the auction tales. The property at Chira Bazar was sold by public auction on 27th

Dec. 1957 for a sum of Rs. 41,000/- in favour of defendant No. 7 who was declared the highest bidder. Defendant No, 7 is the son-in-law of

defendant No. 3. Immediately thereafter, defendant No. 7 sold the Chira Bazar property to defendant No. 3 for a sum of Rs. 42.000/-. A

conveyance of the Chira Bazar property was executed directly in favour of defendant No. 3 Jamnadas on 15th Jan, 1958.

3. On 19th Jan. 1958, the plaintiff filed a suit in the City Civil Court at Bombay, being Suit No. 458 of 1958, to set aside the auction sale of the

property at Chira Bazar. The suit was ultimately withdrawn by the plaintiff on 29th Apr. 1960 with liberty to file a fresh suit.

4. The property at Sleater Road was sold by public auction on 5th of Feb. 1958 for a sum of Rs. 40,500/-. At this auction sale defendant No. 3

Jamnadas was declared the highest bidder. According to the defendants, the bid which was made by Jamnadas at this auction sale was made on

behalf of one Purshottam Mohanlal. Purshottam Mohan lal is the father-in-law of defendant No. 1. A conveyance in respect of the Sleater Road

property was made in favour of Purshottam Mohanlal on or about 26th of Feb. 1958. In the meanwhile, on 19th of Feb. 1958, the plaintiff filed a

suit in the City Civil Court at Bombay, being Suit No. 734 of 1958, in order to set aside the auction sale of the Sleater Road property. This suit

was also ultimately withdrawn by the plaintiff on 13tb Sept. 1960.

5. Some time prior to May 1958, the plaintiff"" also filed a criminal complaint against defendant No. 3 in the Girgaum Police Court, but this

complaint was dismissed on 1st of May 1958 as the plaintiff was absent.

6. Both the suit-properties have been subsequently transferred. After the death of Purshottam Mohanlal, his heirs, who arc defendants Nos. 9, 10

and 11 in the suit, decided to sell the Sleater Road properly. They entered info an agreement of sale dated 30th July 1962 with defendant No. 8

whereby defendant No. 8 agreed, to purchase from them the Sleater Road property for a sum of. Rs. 44,000/-. A notice of this sale was

published in the Bombay Samachar on 1st Aug. 1962. Incidentally, defendant No. 8 is the sister of defendant No. 1. Since some of the heirs of

Purshottam Mohanlal were minors, a miscellaneous petition was filed by defendant No. 9 in this High Court, being Miscellaneous Petition No. 330

of 1962, for sanction of the sale. An order dated 28th of Sept. 1962 was passed by this Court sanctioning the sale as being for the benefit of the

minors. Thereafter, defendants Nos. 9, 10 and 11 executed a conveyance of the Sleater Road property in favour of defendant No. 8 on 6th of

Oct. 1962.

7. The Chira Bazar property has been told by defendant No. 3 to defendant No. 12. In respect of this sale, an advertisement was published in the

Bombay Samachar of 9th Sept. 1969. A conveyance in favour of defendant No. 12 was executed on 22nd Oct. 1969. It was lodged for

registration immediately thereafter. The same, however, has not yet been registered. On 18th Dec. 1969, the plaintiff filed the present suit for

redemption of the two suit-properties and for accounts. After the filing of the suit, the plaintiff registered a lis pendens notice on 30th Dec. 1969.

At the time when the suit Was filed, the plaintiff had not joined defendant No. 12 as a party defendant. Defendant No. 12 has been brought on

record on or about 10th Apr. i972. After the filing of the suit, defendants Nos. 4 and 5 died and their heirs have been brought on record.

Thereafter, defendant No. 3 also died. Since the heirs of defendant No. 3 are already on the record of the suit, being defendants Nos. 4-A to 4-E,

defendants Nos. 5-B to 5-F and defendant No. 6, the plaintiff was given liberty to make formal amendments in the Plaint showing them as the heirs

of defendant No. 3.

8. Defendants Nos. 1 to 11 are related to one another. Defendant No. 1 Vithaldas is the son of defendant No. 2. Defendant No. 3 was the 2nd

defendant''s father''s sister''s husband, Defendants Nos. 4, 5 and 6 are the children of the original defendant No. 3. Defendant No. 7 is the son-in-

law of defendant No. 3 and the husband of defendant No. 6. Defendant No. 8 is the sister of defendant No. 1. Purshottam Mohanlal was the

father-in-law of defendant No. 1. Defendants Nos. 9, 10 and 11 are the widow and the two sons respectively of Purshottam Mohanlal. Defendant

No. 12 is not related to any of the defendants.

9. It is the case of the plaintiff that defendants Nos. 1, 2 and 3 entered into a conspiracy to defraud the plaintiff and to deprive him of the two suit-

properties. According to him, the conspiracy was entered into at the very outset when the two indentures of transfers of mortgages and the

indenture of the second mortgage were executed. He relies strongly upon the relationship, inter se, between the defendants, viz., defendants Nos.

1, 2 and 3, and submits that, as a result, they colluded with each other and sold the suit-properties fraudulently. The fraud which has been alleged

by the plaintiff appears to be in three different stages-- (a) at the stage of execution of the indentures of the transfers of mortgages and the indenture

of second mortgage, (b) at the stage when there was a default in the payment of interest to defendants Nos. 1 and 2 and (c) at the stage of the

auction sales of the two properties.

10. In support of his contention the plaintiff has examined himself. He has admitted that at the time when, he entered into the suit-transactions,

namely, the two transfers of mortgages and the second mortgage, he was in financial difficulties and he was in need of moneys to pay off the two

previous mortgagees. He has also admitted that from out of the moneys which were advanced by defendants Nos. 1, 2 and 3, the previous

mortgagees were paid off and other disbursements were made on his behalf. The plaintiff, therefore, does not challenge the execution of these three

documents which are Exs. C, D and E; nor does he challenge the payments which were made from out of the consideration moneys as recorded in

the letter of 29th Dec. 1956. His case seems to be that although three documents were executed -- two in favour of defendants Nos. 1 and 2 and

one in favour of defendant No. 2, -- in fact, it was one transaction. The plaintiff has pointed out that all the three transactions were effected through

a common attorney. The entire consideration amount was also kept with the same attorney. The amounts paid by defendants Nos. 1, 2 and 3

under the three transactions formed a common pool from which the attorney made various disbursements. These fads, however, by themselves, do

not establish that there was any conspiracy or common design between defendants Nos. 1, 2 and 3. The plaintiff, therefore, further alleges that the

entire consideration amount in respect of the three transactions came from defendant No. 3. The plaintiff, however, has not led any evidence in

support of this allegation. Defendant No. 1 who gave evidence, has produced memoranda from the Bank of India, Ex. 12 collectively, to show

that, in order to meet the advance of Rs. 65,000/- he had withdrawn from his bank a sum of Rs. 52,000/- and the balance amount was paid in

cash at his residence. In view of this evidence, the contention of the plaintiff that the entire consideration amount of Rs. 75,000/- came from

Jamnadas cannot be accepted. The plaintiff has also suggested that the moneys advanced under the three documents came from the family trust of

Jamnadas. Here again, no evidence is forthcoming in support of this allegation. Hence it would not be correct to say that the entire consideration

money came from Jamnadas alone and that the transfers of the mortgages were executed in favour of defendants Nos. 1 and 2 benami for

defendant No. 3 and this was done pursuant to a conspiracy hatched by defendants Nos. 1, 2 and 3. The three transactions appear to be

separate, though, undoubtedly, they were executed at the same time and for the same purpose, namely, to enable the plaintiff to secure sufficient

finances to pay off his previous liability on the security of the two properties. An attempt was made to throw doubt on the three transactions by

showing that defendants NOS 1 and 2 had sufficient amounts with them to make a further advance of Rs. 10,000/- and that there was no need to

go to Jamnadai for the additional amount of Rs. 10,000/-Why Jamnadas was required to advance Rs. 10,000/- to the plaintiff is in the realm of

pure speculation. Defendant No: 1 hat stated in his evidence that he might have had other financial commitments. Hence he refused to advance a

further amount of Rupees 10,000/- to the plaintiff. In the absence of any evidence to show that the second mortgage in favour of Jamnadas was

fraudulent, this transaction must be accepted as genuine. It should also be noted that at the time when these transactions were entered into,

defendant No. 1 was only 22 years old and defendant No. 2 was a widow. In these circumstances, there is nothing unnatural in defendants Nos. I

and 2 not objecting to defendant No. 3 being a mortgagee in possession of the suit-properties.

10-A. The plaintiff tried to cast a doubt on these transactions by suggesting that defendants Nos. 1, 2 and 3 were money-lenders. In the two City

Civil Court suits, the plaintiff had alleged that .defendants Nos. 1, 2 and 3 were money-lenders. The defendants had not denied this allegation. As

against this, defendant No. 1 had stated in his evidence that he is a chartered accountant. He was a student at the time of the execution of the

transfers of mortgages. He has denied that he or his mother was or is a moneylender. In view of this evidence, it is not possible to hold that

defendants Nos. 1, 2 and 3 were or are money-lenders.

11. The plaintiff has alleged that at the time of the auction sales of the .two properties, there was a fraud and both the properties were sold at an

undervalue. The plaintiff, however, has not succeeded in proving this contention by cogent evidence. The safes of both the properties were

advertised in the Bombay Samachar by defendants Nos-1 and 2. The auction sides were conducted through Messrs Gandhi and Co.,

Auctioneers. Defendant No. 1 has stated in his evidence that printed terms and conditions of sale were distributed to the bidders at the time of the

auction sales. ''According to the plaintiff, at the auction sate of the Chira Bazar property, defendant No. 3 made a statement that municipal -repair

notices were received in respect of the Chira Bazar property. It is the plaintiff''s case that, on account of this statement made by Jamnadas, the

other bidders went away and the property was sold at a very low price. The plaintiff, however, has admitted that, in fact, there were municipal

repair notices in respect of the Chira Bazar property. His contention is that these notices were got issued by defendant No. 3, Jamnadas. But apart

from the plaintiff''s bare statement there it no evidence to show that these repair notice were got issued by Jamnadas or that they were fraudulently

got issued or that the property, in fact, did not need any repairs. The property at Chira Bazar was 60 years old. If, therefore, there were, in fact,

municipal repair notices and these were disclosed at the time of the auction sale, it is not possible to infer from these circumstances that such a

disclosure was made fraudulently merely with a view lo depress the value of the bids. It is also relevant to note that, prior to the auction sales, the

plaintiff had approached this Court for stopping the auction sales. Pursuant to the consent order which was passed, the plaintiff could have stopped

the auction sales by depositing Rs. 1,500/- in Court. He, however, did not do so. Thereafter, these auction sales were held pursuant to the power

of sale contained in the indentures of the transfers of mortgagee, dated 14th Dec., 1956 in favour of defendants Nos. 1 and 2. The plaintiff has led

no evidence relating to the; value of the two properties at the relevant time. In the absence of such evidence, it ii not possible to hold that the sales

were at an undervalue. Hence these auction sales cannot be considered as fraudulent per se.

12. It is the plaintiff''s case that, at these auction Sales, both the properties were purchased by the mortgagees themselves. There is no doubt that

if, at the sale of the mortgaged property, the mortgagee himself purchases the property, without the permission of the Court or in the absence of

any agreement between the parties, the mortgagee retains the character of a mortgagee and he cannot set up a title as owner of the properties

against the mortgagor. This position is well brought out by the maxim -- once a mortgagee always a mortgagee. In the cast of Vallabhdas Mulji v.

Pranshankar Narbhe shankar 30 Bom LR 1519 : AIR 1929 Bom 24, this High Court has laid down that where a mortgagee puts up the

mortgaged property for sale under a power"" given to'' him by the mortgage deed, he cannot sell it to himself, either alone or with others, nor to a

trustee for himself. Such a purchase by the mortgagee is entirely inoperative and does not affect the relationship of the mortgagor and the

mortgagee which exists between the parties. This is because he cannot sell the property to himself. It is, however, important to note that this

principle does not apply to a case where the sale of the mortgaged property takes place at the instance of a prior mortgagee. In such a case, a

subsequent mortgagee, e. g., a second mortgagee, can purchase the mortgaged property. This it simply because in a case where there is more than

one mortgage and the property put up for sale by a prior mortgagee is purchased by a subsequent mortgagee, the mortgagee is not selling the

property to himself. The subsequent mortgagee or the second mortgagee, therefore, can always purchase a property which is being put tip for sale

by the prior mortgagee in the exercise of his right of sale. in Mulla''s Transfer of Property Act, Sixth Edition, p. 502, it has been stated as follows:--

The mortgagee may not buy the property either himself or with other or by an agent for a man cannot sell to himself ,. .. .. a puisne mortgagee may

purchase, for he is in the same position as a stranger.

In the case of Shaw v. Bunny reported in (1865) 2 De G J & Sm 468, the House of Lords has held that where a first mortgagee duty exercises a

power of sale, and a subsequent mortgagee becomes the purchaser, such subsequent mortgagee, in the absence of any-thing to impeach the bona

fides of the transaction, acquires the same irredeemable title as if he were stranger. Similarly, in the Case of Kirkwood v. Thompson reported in

(1865) 2 De G J & Sm 613, the Court of Appeal in England held that a second mortgagee may purchase from the first mortgagee, selling under his

power of sale; and with respect to the question of undervalue, he is in the same position as a stranger. It was further observed that it is not material

that the second mortgagee is in possession at the time of the sate.

13. ID view of these observations, we have to examine the facts in the present case. In respect of the Chira Bazar property, at the auction sale,

defendant No. 7 was declared the highest bidder. Immediately afterwards, defendant No. 7 sold the property to defendant No. 3 for an additional

amount of Rs. 1,000/-. Admittedly, the conveyance in respect of the Chira Bazar property was directly in favour of defendant No 3. Defendant

No. 7 is the son-in-law of defendant No. 1. It is the case of the plaintiff that defendant No. 7 purchased the property Benami for defendant No. 3.

The burden of proving that the purchase was a Benami purchase is, undoubtedly, on the plaintiff. This has been so held repeatedly by various

Courts, Thus, in the case of Gangadara Ayyer v. Subramania reported in AIR 1949 PC 88, the Federal Court observed that the onus of

establishing that a transaction is benami is on the person asserting benami nature of the transaction and it must be strictly made out. The Court

observed that the real test is the source whence the consideration came and when it is not possible to obtain evidence which conclusively

establishes or. rebuts the allegation, the case must be dealt with on reasonable probabilities and legal inferences arising from proved or admitted

facts. The Court also observed that where the defendants are guilty of suppression of evidence which it was their duty to place before the Court,

no conclusion in their favour should be arrived at merely on the ground of paucity of evidence which is of their own creation. The other authorities

cited in this connection before me were Jasoda Lal v. Balaram Poddar AIR 1922 Cal 488 , and Thakur Bhim Singh (Dead) by Lrs and Another

Vs. Thakur Kan Singh, . In the latter case, the Supreme Court has laid down various factors which have to be taken into account in considering

whether a transaction is to be treated as benami or not. The factors which are required to be taken into account are the source of the purchase

money, the intention of the parties and the intention of the person who contributed to the purchase money. The question of what the intention was,

will have to be decided on the basis of the surrounding circumstances, the relationship of the parties, the motive governing their action in bringing

about the tram-action and their subsequent conduct.

14. In the light of these criteria, if we examine the transaction relating to the sale by auction of the Chira Bazar property, one thing becomes clear,

namely that a close relative of defendant No. 3 purchased the suit-property and immediately thereafter transferred it to defendant No. 3 for an

additional amount of Rs. 1.000/-. The conveyance was executed in favour of defendant No. 3. There is also evidence to show that defendant No.

3 was present at the auction sale. In view of these circumstances, it does appear that defendant No. 7 purchased the property benami for

.defendant No. 3. In this connection, it should also be noted that defendant No. 7 is a party to the suit. The heirs of defendant No. 3 are also

parties to the suit. It was open to them to lead evidence to show that defendant No. 7 did have enough funds for the purpose of making this

purchase. They could also have shown that the purchase money in respect of the auction sale came from defendant No. 7. These are matters

within their special knowledge, but they have not led any evidence in this connection. There is no reason why any benefit should be given to them

of the absence of evidence on this count which is occasioned by their own default. Hence, it must be held that the Chira Bazar property was

purchased at the auction sale by defendant No. 7 as the benamidar of defendant No. 3. Ordinarily, such a transaction would have been

permissible, since defendant No. 3 was a second mortgagee in respect of the Chira Bazar property. The Chira Bazar properly had been put up for

sale by defendants Nos. 1 and 2 in the exercise of their power of sale under the two indentures of the transfers of mortgages. But in view of certain

allegations which have been made by the plaintiff, it remains to be seen whether such a purchase by a second mortgagee is open to challenge.

Before going to this question, it is necessary also to examine at this stage the second transaction of the auction sale of the property at Sleater Road.

I5. The property at Sleater Road was sold by auction on 6th Feb. 1958. Defendant No. 1 has given evidence to the effect that, at this auction sale,

a bid was made by Jamnadas on behalf of Purshottam Mohanlal who was the father-in-law of defendant No. 1. In fact, a conveyance was also

executed in favour of Purshottam Mohanlal for the amount of the bid, viz., Rs. 40,500/-. The plaintiff alleges that this purchase was also made

benami for defendant No. 3. He relies upon the making of the bid by Jumnadas in support of his contention that the property was purchased by

Jamnadas, defendant No. 3. Defendant No. 10, however, who is the son of Purshottam Mohanlal, has produced the relevant Income Tax and

wealth-tax assessment order of Purshottam Mohanlal which are exhibited at Ex. 16 colletlively, in order to show that the Sleater Road property

was shown in these assessment orders as of the ownership of Purshottam Mohanlal. Exhibit 16 also shows that the income from the Sleater Road

property was shown as the income of Purshottam Mohanlal. The fact that a conveyance for the amount which was bid was also executed directly

in favour of Purshottam Mohanlal also supports the view that the property was, in fact, purchased by Purshottam Mohanlal from out of his own

moneys and that the income from this property was also enjoyed by Purshottam Mohanlal. In view of these facts, it is not possible to say that the

property at Sleater Road was purchased at the auction sale by defendant No. 3 or that Purshottam Mohanlal was merely a benamidar for

defendant No. 3. It is true that Purshottam Mohanlal was the father-in-law of the mortgagee, defendant No. 1. But this fact, by itself, cannot lead

to the conclusion that Purshottam Mohanlal was a benamidar either for defendant No. 3 or for defendant No. 1 in the absence of any other

evidence. The plaintiff has alleged that, after the auction sale, the Sleater Road property was managed by Jamnadas. Both defendant No. 1 and

defendant No. 10 have denied this fact, and I am not inclined to accept the testimony of the plaintiff in this regard, especially because the plaintiff

has no personal knowledge about the management of the Sleater Road property after the auction sale. The Sleater Road property has been

purchased in 1962 by defendant No. 8, who is the sister of defendant No. 1. Defendant No. 1, in his evidence, has stated that, after the death of

Purshottam Mohanlal, his widow and two minor sons could not manage the Sleater Road property. They, therefore, decided to sell it. This part of

defendant No. 1''s testimony is corroborated by the testimony of defendant No. 10. The heirs of Purshottam Mohanlal sold the property to

defendant No. 8. Defendant No. I has stated that this property has been purchased by defendant No. 8 out of her own funds and she enjoys the

income of this property. There is no cross-examination of defendant No. 1 on this aspect of his testimony. Defendant No. 1 admits that, after the

purchase by defendant No. 8, he is managing the property on behalf of defendant No. 8, since she lives in Calcutta. For this purpose, he holds a

power of attorney on her behalf. This fact also, therefore, cannot assist the plaintiff. What is more, in respect of the sale in favour of defendant No.

8, the heirs of Purshottam Mohanlal had to obtain an order from this Court sanctioning the sale. The sale in favour of defendant No. 8 had also

been advertised, and it appears to be a genuine transaction. The Sleater Road property, therefore, cannot be said to have been purchased by any

of the mortgagees.

16. Serious objections have been raised regarding the circumstances in which the two properties were put up for sale. The reason for sale was

default in the payment of interest under .the mortgages to defendants Nos, 1 and 2. The plaintiff has stated in his evidence that the rent received

from the Chira Bazar property was Rupees 585/- per month and that the rent received from the Sleater Road property was Rupees 478/- per

month. The municipal taxes in respect of these properties were payable every six months. According to the plaintiff, the municipal taxes on both

these properties came to Rs. 265.50 per month. The interest which was payable to defendants Nos. 1 and 2 under the two indentures of the

transfers of mortgages was at the rate of 11 annas per cent per month, that is to say at the rate of about 8-Ã¯Â¿Â½ per cent per annum. .The interest

payable to defendant No. 3 under the second mortgage was 12 annas per cent per month. The interest payable under the mortgages in favour of

defendants Nos. 1 and 2 came to Rs. 446/-per month, while the interest payable to the second mortgagee came to Rs. 75/- per month, thus

amounting to Rs. 521/-. According to the plaintiff, after payment of the municipal taxes as well as the interest amount, a balance amount of Rs.

278/-would remain in the hands of the second mortgagee from out of the income recovered by him per month. He has, therefore, sub-milted that

there was no occasion for defendant No. 3 for committing any default in the payment of interest to defendants Nos. 1 and 2. He has submitted that

defendant No. 3 deliberately committed defaults in the payment of interest to defendants Nos. 1 and 2, so that defendants Nos. 1 and 2 may

exercise their power of sale. There is considerable force in what the plaintiff has sub-milted. According to defendant No. 1 also, both the

properties fetch a reasonable income. In his evidence, defendant No. 1 has stated that the monthly income from both. these properties was about

Rs. 1,050/-, while the municipal taxes would be approximately Rs. 265/- per month. From the correspondence exchanged between defendant No.

3 and the plaintiff, it appears that defendant No. 3 received some municipal repair notices and hence he stopped paying the interest to defendants

Nos. 1 and 2. There is, however, no evidence to show the extent of the repairs required to be carried out as also whether, in fact, any repairs were

carried out by defendant No. 3 and, if so, what was the cost of those repairs. These were matters which were within the exclusive knowledge of

defendant No. 3. His heirs are on the record of this suit. They have not chosen to lead any evidence to show that defendant No. 3 did not have in

his hands sufficient funds to pay interest to defendants Nos. 1 and 2 after paying off all the outgoings and after carrying out essential repairs, if any,

in respect of the suit properties. It is true that it was the plaintiff''s liability to pay interest to defendants Nos. 1 and 2, and defendants Nos 1 and 2

rightly called upon the plaintiff to pay to them the interest amount. But there is evidence to show that there was an arrangement at least between the

plaintiff and defendant No. 3 to the effect that since, as a mortgagee in possession, defendant No. 3 was in the management of the suit properties,

he would pay on behalf of the plaintiff interest to defendants Nos. 1 and 2 from out of the income of the two properties, provided, of course, that

there was sufficient amount available for this purpose. From the evidence on record, it does appear that the income from the two properties was

sufficient for the payment of the interest amount to defendants Nos. 1 and 2. The conclusion, therefore, is inescapable that defendant No. 3

committed a default in paying the interest to defendants Nos. 1 and 2 although he had funds available with him from out of the income of the two

mortgaged properties.

17. If this is so, can be benami purchase of the Chira Bazar property in favour of defendant No. 3 be upheld ? In this connection, Mr. Zaiwalla

who appears for the plaintiff relies upon Section 90 of the Indian Trusts Act, 1882. The section reads:

90. Where a tenant for life, co-owner, mortgagee or other qualified owner of any property, by availing himself of his position as such, gains an

advantage in derogation of the rights of the other persons interested in the property, or where any such owner, as representing all persons

interested in such property gains any advantage, he must hold, for the benefit of all persons so interested, the advantage so gained, but subject to

repayment by such persons of their due share of the expenses property incurred, and to an indemnity by the same persons against liabilities

properly contracted, in gaining such advantage.

Illustration (c) to Section 90 is as follows:

(c) A mortgages land to B, who enters into possession. B allows the Government revenue to fall into arrear with a view to the land being put up

for sale and his becoming himself the purchaser of it. The land is accordingly sold to B, Subject to the repayment of the amount due on the

mortgage and of his expenses properly incurred as mortgagee, B holds the land for the benefit of A.

In a case, therefore, where a property ii sold on account of a default committed by a mortgagee, and if the mortgagee himself purchases the

property, be holds it for the benefit of the mortgagor, that is to say, he continues to retain his character of a mortgage. In this connection, a

reference may be made to Mritunjoy Pani and Another Vs. Narmanda Bala Sasmal and Another, . The Supreme Court in that case observed:

... ... where a mortgagee in possession who is bound to pay rent under the terms of the mortgage commits default and purchases the lands in a

sale in execution of a decree for arrears of rent obtained by the landlord, the sale being the result of manifest dereliction of the duty imposed upon

the mortgagee by the very terms of the transaction, the provisions of Section 90 of the Trusts Act are attracted to the case and the mortgagor''s

right to redeem is not extinguished.

The Supreme Court has summarised the legal position in the following terms:

The legal position may be state thus:

(1) The governing principle in ''once a mortgage always a mortgage'' till the mortgage is terminated by the act of the parties themselves, by merger

or by order of the court

(2) Where a mortgagee purchases the equity of redemption in execution of his mortgage decree with the leave of court or in executing of a

mortgage or money decree obtained by a third party, the equity of redemption may be extinguished; and, in that event, the mortgagor cannot sue

for redemption without getting the sale set aside. (3) Where a mortgagee purchases the mortgaged property by reason of a default committed by

him the mortgage is not extinguished and the relationship of mortgagor and mortgagee continues to subsist even thereafter, for his purchase of the

equity of redemption is only in trust for the mortgagor.

In this .connection, a reference may also be made to the case of Sidhakamal Nayan Ramanuj Das Vs. Bira Naik and Others,

In the present case, under the terms of the second mortgage, no duty is cast on the second mortgagee to pay interest to the first mortgagee.

However, there was an agreement between the plaintiff and the second mortgagee, who was the mortgagee in possession, that the second

mortgagee would pay interest to the prior mortgagee from out of the income of the mortgaged properties provided, of course, that the second

mortgagee had in his hands sufficient income left after defraying all outgoings to pay the amount of interest. In fact, for a period of five months, that

is to say, up to 14th May, 1957, interest was paid by the second mortgagee to the prior mortgagee. In these circumstances, if the second

mortgagee has committed defaults in the payment of interest to the prior mortgagee and has not produced any accounts in respect of his

management of the suit properties to establish that the defaults were occasioned on account of there being inadequate funds in his hands for

payment of such interest, he must be held to have committed the defaults. It was on account of these defaults that defendants Nos. 1 and 2 were

required to put up the property for sale in the exercise of their power of sale under the mortgage deed. In such a sale, if the defaulting party, viz.,

the second mortgagee, purchases the property, the provisions of Section 90 of the Indian Trusts Act are attracted. The second mortgage in the

present case, that is to say, defendant No. 3, therefore, continued to retain the character of a mortgagee in respect of the Chira Bazar property.

From out of the sale proceeds, defendant No. 3 has paid off the mortgage on this property in favour of defendants Nos. 1 and 2. Thus, he

becomes a mortgagee in respect of the Chira Bazar property for recovery of the amounts advanced both by defendants Nos. 1 and 2 as well as

defendant No. 3 The plaintiff therefore, is entitled to redeem the Chira Bazar property.

18. Defendant No. 12 claims to be a bona fide transferee for value in respect of the Chira Bazar property. He claims to have purchased the suit

property for a sum of Rs. 60,000/-. If defendant No. 3 has not acquired ownership rights in respect of the Chira Bazar property, he cannot

transfer such rights to defendant No. 12. The sale in favour of defendant No. 3 is void. Hence defendant No. 3 cannot transfer to defendant No.

12 any title to the Chira Bazar property. Secondly, the sale in favour of defendant No. 12 has not yet been registered. Hence the transaction of

sale in favour of defendant No. 12 is not yet complete. Such a transaction, therefore, cannot extinguish the plaintiff''s right to redeem the Chira

Bazar property.

19. Mr. Gandhi, who appears for defendants Nos. I, 2, 6 and 12,. also urged that the present suit is not governed either by Article 61 (a) or by

Article 61(b) of the Limitation Act of 1963. He has submitted that the suit is governed by the residuary Article 113 and hence it is barred by the

law of limitation. Article 61 (a) and (b) is as follows:

61, By a mortgagor-

(a) to redeem or re- Thirty When the right

cover possession years. to redeem or to

of immovable recover posses-

property mort- sion accrues;

gaged;

(b) to recover pos- Twelve When the

session of im- years. transfer be-

too immovable pro- comes known

property mortgaged to the plain-

find afterwards tiff,

transferred by

the mortgagee

for a valuable

consideration;

Under Article 61 (b), the mortgagor can file a suit to recover possession of immovable property mortgaged and afterwards transferred by the

mortgagee for a valuable consideration. Such a suit must be filed within twelve years, since (hereafter the transferee will acquire title by adverse

possession. Mr. Gandhi has argued that, in the present suit, there is no prayer for setting aside the sales of the two suit properties. It is not a suit to

recover possession, and hence it is not governed by Art. 61 (b). This contention must be examined. Article 61 (b) is similar in terms to old Art.

134 of the Limitation Act of 1908. In the case of Nanni Bai and Others Vs. Gita Bai, the Supreme Court construed the old Art. 134 of the

Limitation Act of 1908 and observed:

In order to attract the operation of Article 134 the defendant has got affirmatively to prove that die mortgagee or his successor-in-title has

transferred a larger interest than justified by the mortgage. If there is DO such proof, the shorter period under Article 134 is not available to the

defendant in a suit for possession after redemption.

In this connection, a reference may also be made to R. Dhanalakshmi Ammal Vs. G. Anthuraj and Others, where also the Madras High Court

held:

When a mortgagee, purporting to be the absolute owner, transfers the property covered by the mortgage, the mortgagor"s remedy is to institute a

suit for recovery of possession under Article 61 (b) and the period of limitation is 12 years and the time from which the period begins to run is

"when the transfer becomes .known to the plaintiff.

It should be noted that Article 61 (b) restricts the period of limitation. While for an ordinary suit for redemption the period of limitation prescribed

under Art 61 (a) is 30 years, in a case where the mortgagee has purported to transfer the property as an absolute owner, the period of limitation is

12 years because, thereafter, the third party who has obtained possession would acquire title by adverse possession. In the present case, the first

auction sale took place on 27th Dec. 1957. The suit has been filed on 18th Dec., 1969, that is to say, within a period of 12 years, and hence either

under Article 61 (a) or under Article 61 (b), the suit would be in time. The submission made is that neither of these two articles applies. This

submission cannot be accepted. In the present case, as far as the auction sales are concerned, they have been impugned on the ground that ma

sales are null and void and are of no effect because they are the sales by the mortgagee in favour of himself. The suit is, therefore, a suit for

redemption on the basis that there are no valid and binding sales of these properties in favour of the mortgagee who has, in turn, purported to sell

the properties to third parties. ID such a suit, it is not necessary to ask for setting aside the sales since the sales are invalid. It, therefore, remains a

suit for redemption which is governed by Article 61 (a). The residuary Article 113 of the Limitation Act cannot, therefore, be attracted to the cause

of action in this suit The suit, therefore, is in time.

20. It has also been argued by Mr. Panthaky, who appears for defendants Nos. 8, 9, 10 and 11, that the mortgagor has not made a proper tender

of the amount due under the mortgage and hence his suit for redemption cannot be decreed. This submission also cannot be accepted. The

mortgagor is not required to make a tender of the amounts due under the mortgage before filing a suit for redemption. If he makes such a tender,

then the mortgagor gets entitled to certain benefits under the provision of Sections 83 and 84 of the Transfer of Property Act. But there is nothing

in law which compels a mortgagor to tender the amounts due under the mortgage before tiling a suit In these circumstances, there is a subsisting

mortgage in respect of the Chira Bazar property for the sums of Rs. 35,000/- and Rs. 10,000/- repayable together with interest as provided in

Exs. C and D, of which property defendant No. 3 was the mortgagee.

21. There will, therefore, be a usual preliminary decree for redemption in respect of the Chira Bazar property on repayment of the above amounts

together with interest and costs, charges and expenses under the provisions of Order 34, R. 7, Civil P. C. The period of redemption is fixed at six

months from the date of ascertainment of the amount due and payable. Defendants Nos. 4-A to 4-E, 5-B to 5-F as also defendant No. 6, who are

the heirs and legal representatives of defendant No. 3, to render true and complete accounts ha respect of the Chira Bazar property from 14th

Dec. 1956 as the mortgagees in possession under the provisions of Order 34, Rule 7 of the Civil P. C.

The suit against the rest of defendants is dismissed.

Directions regarding costs reserved.

22. Order accordingly.