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set aside the award which was dismissed on the 6th February 1948 by the Lahore High Court in default the time will begin to run from that date and that the Privy Council judgment and the decision of the Supreme Court would apply to such cases; and

(2) the decision of the appeal need not necessarily be on merits, but even if it is dismissed in default, Article 182 (2) will be applicable.

I would therefore allow this appeal, set aside the order of the executing Court and order that the execution application should be proceeded with in accordance with law.

The parties will bear their own costs.

The parties have been directed to appear in the Executing Court on the 28th February 1955.

APPELLATE CIVIL

*Before Falshaw, J.*

MISRI LAL AND ANOTHER,—*Appellants*

*versus*

HARI PARSHAD AND VED PARKASH,—*Respondents*

**Regular Second Appeal No. 324 of 1952**

1955

March, 2nd

*Bengal Regulation (XVII of 1806)—Sections 7 and 8—Methods of redemption provided in Section 7 not properly enumerated in the notice under Section 8—Notice, whether invalid—Absence of direct evidence of demand after 50 years before notice under section 8—Whether renders the notice a nullity—Whether it is necessary for the mortgagee who has taken foreclosure proceedings to complete his title thereafter by bringing a suit for possession or declaration.*

*Held*, that the incomplete description of the method of redemption in the notice did not affect the validity of the notice.

*Held further*, that application for foreclosure contains the allegation that demands for the payment of mortgage debt had been made and refused and this allegation was not contested by the mortgagor. Moreover, direct evidence of any such demands could hardly be expected to be produced after a lapse of more than fifty years.

*Held also*, that the proprietary title of the mortgagee or conditional vendee is called into existence at the moment when the right of redemption is extinguished, and that extinction occurs as soon as foreclosure has been effected in accordance with the requirements of the Regulation, and it is immaterial whether a regular suit is instituted subsequently either by the vendor or by the vendee.

*Ali Abbas and another* v. *Kalka Prasad* (1), *Atar Singh* v. *Ralla Ram* (2), *Dhum Chand* v. *Kishan Chand and others* (3), followed; *Behari Lal* v. *Balmokand and others* (4), *Ahsan Elahi* v. *Alla-ud-Din* (5), and *Tara Chand* v. *Chiman and another* (6), considered.

*Second appeal from the decree of Shri J. S. Bedi, District Judge, Ambala, dated the 11th day of February, 1952, affirming that of Shri Jasmer Singh, Sub-Judge, 1st Class, Jagadhri, dated the 15th May, 1947, dismissing the suit with costs throughout.*

C. L. AGGARWAL, for Appellants.

F. C. MITAL, for Respondents.

JUDGMENT

Falshaw, J.

FALSHAW, J.—This second appeal has arisen in the following circumstances. By a registered deed dated the 4th of February 1887 Chhaju Mal, the grandfather of the plaintiffs and one of the defendants, mortgaged four shops and a *haveli* for Rs. 1,500 in favour of the predecessor-in-interest of defendants Nos. 1 and 2, one condition

(1) I.L.R. 14 All. 405
(2) 103 P.R. 1901
(3) A.I.R. 1934 Lah. 436
(4) A.I.R. 1926 Lah. 112
(5) A.I.R. 1932 Lah. 209
(6) 3 P.L.R. 1912

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of the mortgage being that the mortgagor was to redeem the mortgaged property within five years and in case of his failure to do so the mortgage was to be treated as a sale deed. On the 30th of June 1893, after the expiry of the period of five years specified in the mortgage deed, the mortgagee made an application to the District Judge at Ambala under sections 7 and 8 of Regulation 17 of 1806, for the issue of a notice of foreclosure to the mortgagor. Such a notice, which was accompanied by a copy of the application and a copy of the mortgage deed, was duly served on the mortgagor on the 13th of July, 1893, and on the report of this service the District Judge on the 14th of October 1893 passed an order that the notice had been served and consigned the file to the Record Room. The present suit was instituted by the plaintiffs for the redemption of the mortgage in January 1945. Naturally they were met with the plea raised by the successors of the mortgagee that according to the terms of Regulation 17 of 1806, on the failure of the mortgagor to pay or tender the amount due on the mortgage or to deposit it in Court within one year of the service of the notice in 1893, the conditional mortgage had become a sale in favour of the mortgagee and therefore the mortgage was no longer open to redemption. In their replication the plaintiffs denied that foreclosure proceedings had been taken and the only issue framed by the trial Court was—

> Did the mortgagee give a notice of foreclosure to the mortgagor in accordance with the terms of the mortgage as alleged and so the relationship of mortgagor and mortgagee has ceased to exist?

The facts relating to the service of the foreclosure notice were fully proved and the various

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objections raised by the plaintiffs to the validity of the notice were overruled by the trial Court which accordingly dismissed the suit. In a somewhat perfunctory judgment in which the points in dispute have hardly even been mentioned much less discussed the learned District Judge dismissed the plaintiffs' first appeal.

The three chief grounds on which the finding of the Courts below in the defendants' favour is attacked are that the notice served in 1893 was defective, that it was not proved that any demand had been made before the notice was served and that the mere carrying out of the formalities required by the Regulation of 1806 did not automatically transfer ownership.

The first of these objections is that in section 7 of the Regulation reference is made in connection with redemption of a mortgage of this kind to payment, tender or deposit in Court, and in section 8, which deals with the procedure in the Court of the District Judge, it is provided that on receiving an application from the mortgagee the Judge should send the mortgagor a notice that if he shall not redeem the property mortgaged in the manner provided for by the foregoing section within one year from the date of the notification, the mortgage will be finally foreclosed, and the conditional sale will become conclusive. In the notice issued in the present case it appears that the mortgagor was told that he should either pay the amount due on the mortgage to the mortgagee or deposit it in Court within one year, and tendering was not mentioned. At the same time the notice was accompanied by a copy of the application which clearly refers to the terms of section 7 as well as by a copy of the mortgage deed. Reliance on this point was placed on the

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decision of Chevis J. in *Tara Chand* v. *Chiman and another* (1) in which the notice called on the mortgagor either to pay the whole debt with interest to the mortgagee or his representative, as provided in section 7 of Regulation 17 of 1806, so that the payment be perfectly proved, or deposit the debt in the Court of the District Judge. The learned Judge held that this was a defective notice as it did not specifically mention the method of tender and therefore it vitiated the foreclosure proceedings. This decision was considered by Tek Chand and Coldstream, JJ., in *Dhum Chand* v. *Kishan Chand and others* (2), along with other cases. In that case also it appears that the methods of redemption provided in section 7 were not properly enumerated in the notice issued under section 8 of the Regulation. There reference was made to section 7 and it was held that the incomplete description of the method of redemption in the notice did not affect the validity of the notice. On the whole I am of the opinion that the provisions of the Regulation were sufficiently complied with in this respect in the present case.

The next point relates to the absence of any direct evidence, which could hardly be expected to be available when the present suit was pending, regarding any demand made before the notice was covered under section 8. On this point reliance is placed on the decisions in *Behari Lal* v. *Balmukand and others* (3), and *Ahsan Elahi* v. *Alla-ud-Din* (4). In the first of these cases Campbell, J., held that the party who relies on foreclosure proceedings, having effected forfeiture of the estate of the mortgagor, has to prove

(1) 3 P.L.R. 1912
(2) A.I.R. 1934 Lah. 436
(3) A.I.R. 1926 Lah. 112
(4) A.I.R. 1932 Lah. 209

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affirmatively the due performance of every condition necessary to establish under the Regulation, and unless the party who sets up due service of the notice under Regulation 17 proves affirmatively that actual demand of payment was made from the mortgagor before application was made for the foreclosure the notice was held to be nullity. It is, however, worthy of note in this case that the suit was brought in 1919 for redemption of a mortgage of a house effected in 1901, but the foreclosure proceedings were only alleged to have taken place thirteen months before the suit, and notice being said to have been served on the 9th of February 1918, and therefore if the defendant who relied on the foreclosure proceedings suffered for his negligence in failing to lead any evidence on this point, he had only himself to blame. I would certainly have no hesitation in agreeing with the learned Judge that such evidence must be led where it is available. In the other case cited Din Mohammad J. followed the same principle, but there again it appears that the foreclosure proceedings had only taken place in the year preceding the institution of the suit, which in that case was brought by a transferee from the original mortgagee in order to enforce the foreclosure. As against this there is the view of Wazir Hasan and Gokaran Nath Misra, JJ., in *Khanna Singh and others* v. *Gulzar Singh and others* (1), to the effect that although the making of a demand for repayment of the mortgage-money previous to the filing of an application for foreclosure is an act to be performed by the mortgagee, and there can be no presumption from the fact of the application having been made and the consequent proceedings taken thereon that such a demand was made by the mortgagee, where a mortgage was executed in 1868 and foreclosure proceedings

(1) A.I.R. 1927 Oudh 502

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taken in 1879, direct evidence as to the demand cannot be reasonably expected so late as in 1924. The application filed in the present case in connection with foreclosure proceedings clearly contains the allegation that demands for payment of the mortgage debt had been made and refused, and if this allegation had been untrue I should have expected the mortgagor to come forward and contest the proceedings on this ground, but he did not do so, and on the whole I am inclined to share the view of the learned Judges of the Oudh High Court on this point that direct evidence of any such demands could hardly be expected to be produced by the defendants after a lapse of more than fifty years.

The next point raised was that in spite of the apparently clear terms in which the concluding portion of section 8 of the Regulation is couched, it is nevertheless necessary for a mortgagee who has taken foreclosure proceedings to complete his title thereafter either by bringing a suit for possession or for a declaration according to whether he is in possession or not of the property. This argument is based entirely on the decision of the Privy Council in *Forbes* v. *Ammeroonissa Begum* (1) to the effect that the general effect of these Regulations (i.e. 1 of 1798 and 17 of 1806) is that if anything be due on the mortgage and the mortgagor make no deposit or an insufficient one, the right of redemption is gone at the expiration of the year of grace, but the title of the mortgagee is not completed and he must bring a suit to recover possession if he is out of possession or obtain a declaration by the Court of his title if he is in possession. This decision would at first sight appear to settle the matter, but as a matter of fact it appears that the point is not

(1) 10 Moore's Indian Appeals 340

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so simple and this decision has been considered and explained by later decisions of the Indian High Courts. Five Judges of the Allahabad High Court had it under consideration in *Ali Abbas and another* v. *Kalka Prasad* (1) when the question arose in connection with the starting point of limitation in a suit for pre-emption, and it was held that in a suit for pre-emption of the mortgaged property the title of the conditional vendee became absolute on the expiration of the year of grace and that the plaintiff's right of pre-emption accrued and limitation began to run against him from the expiration of such year of grace. For the explanation of the Courts not following the rule in *Forbes* v. *Ammeroonissa Begum* (2), reference was made to an earlier decision of the Allahabad Court in *Jeorakkun Singh* v. *Hookam Singh,* particulars of which have not been set out, nor is it available, but the explanation can be found set out in the decision of a Full Bench of the Chief Court in *Atar Singh* v. *Ralla Ram* (3). In this decision Clark C.J. and Reid and Maude JJ. followed the view of the Allahabad Court and held that the right of pre-emption accrues and limitation begins to run against a pre-emptor in the case of foreclosure of a mortgage by conditional sale from the date of the expiration of the year of grace allowed to the mortgagor under Regulation 17 of 1806. Reference was made to the judgment of the Privy Council which was apparently based on what was described as Circular Order No. 37 of the 22nd July 1813. The matter is dealt with in the following passage—

> "A reference to the Circular Order alluded to by their Lordships shows that the

(1) I.L.R. 14 All. 405
(2) 10 Moore's Indian Appeals 340
(3) 103 P.R. 1901

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> Sudder Court at Calcutta had found it necessary to disabuse the Bengal Zillah and City Judges of an idea which had taken root that the Regulation of 1806 conferred upon them the power of summarily putting a vendee into "possession of lands conditionally sold; and the Sudder Court laid down that the Regulation did not vest the Judge with authority to dispossess the seller and give up the lands to the purchaser. The judgment of the Privy Council affirms that view, stating that the functions of a Judge under the Regulation are purely ministerial, and adds, what I understand as meaning that if a mortgagee, after having complied with the requirements of the Regulation, wishes to obtain possession, he must bring a regular suit, and similarly if, while in possession, he wishes to acquire a formal declaration of title, he can only do so through the medium of the regular tribunals. This is the interpretation which the Allahabad High Court has put upon the decision of the Privy Council—*Jeorakhun Singh* v. *Hookam Singh* and it appears to me to be the only interpretation which will harmonize with the concluding words of section 8 of the Regulation that if certain conditions are not fulfilled, 'the mortgage will be finally foreclosed and the conditional sale will become conclusive'."

It was therefore held that the proprietary title of the mortgagee or conditional vendee is called into existence at the moment when the right of redemption is extinguished, and that extinction

occurs as soon as foreclosure has been effected in accordance with the requirements of the Regulation, and it is immaterial whether a regular suit is instituted subsequently either by the vendor or by the vendee. This appears to furnish a full answer to the objection of the appellants on this point.

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One other point which was dealt with by the trial Court but is not referred to by the learned District Judge needs discussion. In their replication to the written statement of the defendants raising the plea that redemption was no longer possible in consequence of the foreclosure proceedings the plaintiffs simply denied that foreclosure proceedings had in fact taken place. When the defendant appeared as a witness no question was put to him in cross-examination regarding any previous litigation between the parties, and after the close of the defendants' evidence the plaintiffs said that they did not wish to lead any evidence. Thereafter, however, an application was put in and the plaintiffs were allowed to file certified copies of an order by Mr. A Seymour, Sub-Judge, Ambala, dated the 18th of March 1913 and of a statement made on the same day by Mr. Tulsa Singh, Pleader. The order and the statement certainly seem to refer to execution proceedings between the present parties or their predecessors regarding a decree obtained in 1899 by the original mortgagee against the original mortgagor, and the house in dispute seems to be part of the mortgaged property. There is no doubt that the pleader representing the present defendants made a statement in which *inter alia* he said that the mortgage had become a simple mortgage and the mortgagee had lost the right to enforce the term regarding conditional sale by not taking legal steps within twelve years

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of the foreclosure proceedings. On the strength of these copies it seems to have been argued that the defendants were estopped from setting up the foreclosure proceedings as a defence in the present suit for redemption.

In the first place it is difficult to see how this point was allowed to be raised without the plaintiffs being made to alter their pleadings and without framing an issue on the point and in the second place it is difficult to hold that the defendants are in any way estopped. The order of the Sub-Judge leaves in obscurity the exact nature of the dispute between the parties since, although the point before him seems to have been whether the house should be permitted to be sold or not in execution, the first part of the judgment clearly refers to the decree being executed as one for possession of the house in dispute, and the latter part of the judgment refers to the decree as being not a simple money decree but one "to enforce the mortgage of 1887," which I find incomprehensible. Moreover the statement of the law given by the Pleader representing the defendants appears to be wrong in view of my discussion above on the effects of foreclosure proceedings and no party can be estopped by a wrong statement by counsel on a point of law. The result is that I dismiss the appeal, but in the circumstances leave the parties to bear their own costs in this Court.

CRIMINAL REVISION

*Before Kapur, J.*

PALA SINGH,—*Petitioner*

*versus*

SHRIMATI RAM KAUR,—*Repondent*

**Criminal Revision No. 982 of 1954**

1955

March, 11th

*Code of Criminal Procedure (Act V of 1898)—Section 488—Application for arrest in execution of an order under section 488—Defence inability to pay—Whether plea sufficient to bar the application for arrest.*