

(1957) 07 RAJ CK 0009

In the Rajasthan High Court

Case No : Letters Patent Appeal No. 3 of 1954

Ambalal Jasraj

APPELLANT

Vs

Ambalal Badarmal and Others

RESPONDENT

Date of Decision : 12-07-1957

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11
Transfer of Property Act, 1882 — Section 60

Citation : AIR 1957 Raj 321 : (1958) RLW 30

Hon'ble Judges : Wanchoo, C.J;Modi, J

Bench : Division Bench

Advocate : Hastimal, for the Appellant; Chandmal, for the Respondent

Final Decision : Dismissed

Judgement

Modi, J.—This is a Letters Patent Appeal by the defendant Ambalal against the judgment of a learned. single Judge dated the 16th February, 1954, affirming a decree of the District Judge, Udaipur, for redemption of a mortgage.

2. The facts leading up to this appeal may be shortly stated as follows. The plaintiff-respondent Ambalal's grand-father gave a possessory mortgage of the suit shop to the defendant-appellant for Rs. 569/- on Asad Vadi 10, Smt. 1975. The original mortgagor took a further loan of Rs. 55/ against the security of this very property. On the death of the latter, his son Badarmal, brought a suit to redeem this property, and obtained a decree which was upheld by the highest court in the former Udaipur State, namely, Mehdrai Sabha, on the 28th February, 1933.

By this decree it was declared on the strength of an award by an arbitrator to whom the matter was referred by common consent of the parties that Badarmal do obtain possession of the suit shop on payment of a sum of Rs. 1375/-. It should be noted that no time was fixed for the payment of the decretal amount nor was it mentioned in the decree that the plaintiff mortgagor would be

debarred from his right to redeem the mortgage in case he failed to pay the decretal amount. It appears that Badarmal died after the decree was passed leaving a minor son.

Anyhow, no execution was taken of this decree, in March, 1947, the plaintiff respondent Ambalal deposited the decretal amount in Court and prayed that a final decree be passed in his favour. This prayer was repelled by the High Court of the former State of Rajasthan by its judgment dated the 1st July, 1948, wherein it was held that the decree passed by the Mehdraj Sabha in 1933 was itself final, and that as a period of more than 3 years had since passed, that decree was not capable of execution.

Thereupon the said respondent sold his rights with respect to the suit property in favour of the other two plaintiffs respondents by a registered document dated the 13th March, 1947, wherein the plaintiff respondent Ambalal had still taken upon himself the responsibility to secure possession of the suit shop to the vendees. Eventually all the plaintiffs respondents instituted the present suit on the 4th May, 1949, claiming to redeem possession of the suit shop on the ground that the defendant Ambalal was still in possession of it as a mortgagee and that the plaintiffs" were entitled in law to bring a second suit for redemption.

The defendant resisted the suit and raised a number of pleas; but the only plea which is relevant for the purposes of the present appeal and to which it is necessary to refer was and is that the suit of the plaintiffs was barred inasmuch as an earlier suit for redemption had been decreed but the decree had been allowed to become time barred and so a second suit was not maintainable. The trial Court repelled the aforesaid plea and decreed the plaintiffs" suit and allowed the plaintiffs to redeem the shop within six months of the date of the decree, failing which the defendant appellant was directed to pray for a final decree that the plaintiffs be debarred for ever from redeeming the property.

3. Appeals from the above decree were taken in due course to the District Judge and a learned single Judge of this Court, and were dismissed, and the judgment of the trial Court was affirmed. The judgment of the learned single Judge was announced on the 16th February, 1954. Learned counsel for the appellant made an oral prayer at the very time the judgment was announced that leave be granted for a special appeal.

It appears that he also made a written application on the same day. This application, however, came to be disposed of on the 13th August, 1954, and leave was granted. The appeal was actually filed in this Court On the 25th August, 1954, and an application u/s 5 of the Limitation Act was also filed for condonation of the delay " in filing this appeal from the 14th August, 1954 to the 25th August, 1954.

4. A preliminary objection was raised in these circumstances on behalf of the respondents that the present appeal was barred by time by virtue of Rule 134 of the Rules Of this Court which provides that a person desiring to prefer a Special

Appeal from the judgment of a Single Judge shall present a duly stamped memorandum of appeal within sixty days from the date of such Judgment. The rule further provides, however, that where such appeal is presented after the period mentioned above, it shall be accompanied by an application supported by an affidavit explaining the cause of delay and it shall be rejected unless the appellant satisfies the Court that he had sufficient cause for not preferring the appeal within the aforesaid time.

We might in this connection also invite attention to Rule 97 which lays down that an application for filing a special appeal may be made orally before or at the time when the judgment is delivered by the Single Judge. The rule further provides that no application shall be entertained later, and the Court shall thereupon record an order granting or refusing to grant the leave prayed for. According to this rule, when special leave is prayed for against the judgment of a learned Single Judge, such leave should be granted or refused by him then and there, and that indeed is the usual practice of this Court.

In this particular case, however, when leave was prayed for orally at the proper time, the matter was posted for hearing after notice to the opposite side, and leave was eventually granted on the 13th August, 1954. It appears from the affidavit filed by the defendant appellant that 15th and 16th August, 1954, were holidays, and learned counsel for the appellant applied for a copy of the judgment of the learned Single Judge sought to be appealed from on the 17th August, 1954, and he obtained it on the 25th August, 1954.

A part of this time from 13th August, 1954, was also taken by learned counsel in getting into contact with the appellant who was required to come to Jodhpur from his home town Sardargarh, and go back to arrange for the money required to file the appeal. Thus altogether a period of 12 days was allowed to elapse between the date the leave was granted and the actual filing of the appeal. We are of opinion that the entire time taken from the 16th February, 1954, to the 13th August, 1954, could not be attributed to any default on the part of the appellant, and further that the time which was taken from the 14th August to the 25th August, 1954, to arrange for the filing of the appeal could not "be said to be unreasonable under the circumstances of the case.

In this view of the matter, we are clearly of opinion that the defendant appellant has shown sufficient cause for his being not able to file his appeal before the 25th August, 1954, and we condone the delay in filing this appeal. Consequently, we over-rule the preliminary objection as to limitation, and hold that the appeal was filed within time.

5. We next turn to the main question which arises for determination in this appeal. The question is whether the second suit for redemption filed by the plaintiffs respondents was and is maintainable notwithstanding the circumstance that the earlier suit filed by the mortgagor had resulted in a decree in 1933, which decree had not been executed and any execution thereof had been held to

be barred by time. We must also point out here that the Transfer of Property Act was not in force in the former. State of Mewar at the time the first decree for redemption was passed and the said Act was brought into force there some time in December, 1948.

6. The main contentions raised on behalf of the defendant appellant are that the second suit for redemption is barred (1) by the principle of *res judicata* and (2) inasmuch as the original cause of action, namely, the mortgage, had become merged in a decree and that decree had not been executed, and having become barred by time had resulted in a complete extinguishment thereof and that being so no right to bring a second suit for redemption could be sustained, and lastly, that the rulings relied upon by the Courts below in holding the second suit to be maintainable were based on the proviso to Section 60 of the Transfer of Property Act, and no assistance could be derived from that proviso because the Transfer of Property Act was not in force at the time the earlier decree in 1933 was passed and when it was held by the High Court of the former State of Rajasthan in 1948 that execution of the said decree had become barred by time.

7. Now, before we deal with the objections raised above, we wish to point out that the question which falls for determination before us was answered differently by the different High Courts in British India as it then was, and gave rise to a divergence of judicial opinion sometimes in the same High Court. Thus the trend of the earlier decisions, of the Bombay High Court was to hold that a decree for redemption which does not provide for payment of the mortgage money within a fixed time or for foreclosure in the event of default operates by itself as a decree of foreclosure if it is not executed within the period allowed by the law of limitation, that is, three years, and that once such a decree was passed, it was not open to the mortgagor to bring a second suit to redeem the same property, as such a suit would be barred by the principle of *res judicata*.

See *Gan Savant Bal Savant v. Narayan Dhond Savant*. ILR 7 Bom 467 (A) and *Maloji v. Sagaji*, ILR 13 Bom 567 (B). The trend, however, changed in the subsequent decisions of that Court. See the Pull Bench decision of the Bombay High Court in *Ramji Bapuji Patil Vs. Pandharinath Ravji*, where the majority of the Judges held that a mortgagor, who had obtained a decree nisi, which neither the mortgagor nor the mortgagee had applied to be made absolute, could alter the execution of that decree was time barred, bring a fresh suit for redemption. The decision in *Kushabu Ramji v. Budhaji Sakharam*, AIR 1922 Bom. 127 (D) is easily distinguishable on the ground that the decree in that case clearly provided that on plaintiff's default to pay the decretal amount by a period fixed therein, his right to redeem would be for ever barred, and as the decree was not executed, the second suit was correctly held to be barred by time.

In *Shridhar Sadba Powar Vs. Ganu Mahadu Kavade*, it was held that where a redemption suit was brought in 1894 and was dismissed for defaults in 1897, a subsequent redemption suit instituted in 1911 for the redemption of the same mortgage was not barred on the ground that the earlier suit had been dismissed

for default Order IX Rule 9 C. p. C. notwithstanding. Reliance was placed in arriving at this conclusion on the provision contained in Section 60 of the Transfer of Property Act, which after defining the right of a mortgagor to redeem provides that his right to redeem subsists provided that the right conferred by that section has not been extinguished by the act of the parties or by the decree of a court.

Strong reliance was placed in that case on the side of the defendant on the decision, of the Privy Council in *Shanker Baksh v. Daya Shah* ILR 15 Cal 422 (F). There the facts were that a redemption suit filed in 1868 was dismissed for default and then another suit was brought in 1883 and it was held to be barred by time. The learned Judge of the Bombay High Court however, held that it would be stretching the operation of Order IX Rule 9 too far to make it over-ride Section 60 of the Transfer of Property Act, and that such a dismissal could not properly amount to the extinguishment of the right of the mortgagor to redeem, and so a second suit for redemption was held not to be barred. It would thus appear that the trend of the later Bombay decisions is in favour of the maintainability of a second suit for redemption where the right to redeem has not been barred by act of the parties or by the terms of the very decree in the first suit.

8. In Madras there is a strong current of authority in favour of the maintainability of a second suit for redemption even where the first one has culminated in a decree, and the decree has been allowed to remain unexecuted and become barred by time provided of course the earlier decree did not declare that the mortgagor would be debarred from his right to redeem in the event of his failure to exercise the right of redemption.

Thus in *Sami v. Somasundram*, ILR 6 Mad 119 (G) it was held that the decree passed in the earlier suit should be regarded as a declaratory decree in so far as it related to redemption, and inasmuch as it did not declare that the mortgagor would be foreclosed if he did not exercise his right of redemption, his right to redeem was not lost simply because he omitted to make the payment which was declared to be the condition of his recovering possession in the former suit. This was a case in which the earlier decree for redemption had been obtained before the Transfer of Property Act had come into force in July, 1882.

This case was followed in *Karuthasami v. Jaganatha*, ILR 8 Mad 478 (CH) and the decision of the Bombay High Court in ILR 7 Bom 467 (A) was dissented from. The learned Judges observed that the relationship of mortgagor and mortgagee which formerly subsisted between the parties was not terminated by the decree and that what the decree intended was that that relation would be terminated only on the happening of a certain event which event had however not occurred.

They further proceeded to observe that the right to redeem was inseparable from that relationship, and pointed out in support of the view which they took that an unexecuted decree for partition would not alter the relation of the members of a

joint family, and that no matter that a decree for partition had become barred by time, the estate would still be joint, and the right to obtain a fresh partition could not be resisted whenever a fresh demand for partition was made and refused.

The same view appears to have been affirmed in *Ramunni v. Brahma Dattan* ILR 15 Mad 388 CD. In *Vedapuratti v. Vallabha Valiya Raja* ILR 25 Mad 300 (PB) (J), however, a Full Bench of the Madras High Court came to hold that where a suit for redemption had been instituted and a decree passed therein but not executed, a subsequent suit was not maintainable for the redemption of the same mortgage irrespective of the consideration whether the terms of the first decree operated to foreclose the mortgage or not.

A subsequent Full Bench decision of the same High Court in *Viroopakshan v. Pulipre Turwad* AIR 1937 Mad 214 (K) disagreed with the view taken in the earlier Full Bench case on the ground that the decision of the Privy Council in AIR 1934 205 (Privy Council) had made the reasoning of the earlier Full Bench decision untenable. We shall come to the decision in the Privy Council case referred to above presently.

9. A similar conflict of opinion appears to have prevailed in the Allahabad High Court. This conflict was, however, resolved by the Full Bench decision of that Court in *Sita Ram v. Madho Lal* HJE1 24 All 44 (M) which over-ruled the earlier decision in *pavil Hay v. Razi-ud-Din* ILR 19 All 202 (N) which had taken a contrary view from that adopted in *Muhammad Sami-Uddin Khan v. Mannu Lal* ILR 11 All 386 (O).

The facts of the case before the Full Bench were that the plaintiffs brought a suit for redemption of a usufructuary mortgage in 1869 and obtained a decree in the same year for redemption, conditioned on their paying a certain sum within a time specified in the decree. The decree further directed that if payment was not made within the time fixed, the judgment should be considered as con-existent. The plaintiffs did not pay the decretal amount within the time fixed but brought a fresh suit for redemption in 1896.

In these circumstances it was held by the Full Bench that the second suit was not barred either by reason of anything contained in the Transfer of Property Act, 1883, or by anything contained in the Code of Civil Procedure. This view has prevailed in the Allahabad High Court since then. See *Hari Ram v. Indraj* AIR 1922 All 377 (p) and *Raghunath Singh v. Sheo Partap Singh* AIR 1929 All 409 (Q).

10. We now turn to the decision of their Lordships of the Privy Council in AIR 1934 205 (Privy Council). In that case "the mortgagor instituted a redemption suit in 1892 on the allegation that nothing was due to the mortgagees from him under the mortgages made to them and claiming to be put back into possession of the properties mortgaged, or if the court found that any sum was due, then, subject to the payment of such sum.

The trial court held that there was no right of redemption left over with respect to a part of the mortgaged property, and that the plaintiff could redeem the remaining property on payment of a certain sum, and proceeded to pass a decree by which it directed that the plaintiff was entitled to a decree for possession by redemption of mortgage in the following terms, namely, that

"he should pay Rs. 4208/6/- by 15-11-1896, that if he will pay the said sum he will get all the costs except the pleader's fee incurred by him in the court and that in case of default his case will stand dismissed and the costs incurred by the defendants will be charged against him."

An appeal from the above decree was dismissed. The mortgagor did not make payment of the decretal amount with the result that the mortgagees remained in possession. Thereafter the plaintiff being a "representative and heir of the original mortgagor brought a fresh suit for redemption in 1924 against the legal representative of the original mortgagee being in possession. The main question which fell for determination was whether this second redemption suit was maintainable. The courts in India held that it was. An appeal was then taken to the Privy Council. Among the contentions raised before their Lordships may be mentioned (1) that the decision in the former suit operated as *res judicata* and that Section 11 of the CPC prohibited the courts from trying the present suit, and, secondly, that no payment having been made under the old decree, the former suit stood dismissed with the inevitable consequence that the mortgagors right to redeem became extinguished. Their Lordships repelled these contentions, what they said with respect to the plea of *res judicata* was as follows:

"..... no relevant question of *res judicata* arises. The issues decided in the former suit were (1) whether the mortgagors were then entitled to redeem: and (2) the amount then to be paid if redemption then took place. The issues in the present suit are (i) whether the right to redeem now exists, and (ii) the amount now to be paid if redemption now takes place."

Their Lordships then further proceeded to observe that if it could be said that the old decree involved a decision that the mortgagor's right to redeem was extinguished, that matter would indeed be *res judicata*, but this depended upon the meaning and effect of the decree passed in the first suit. Their Lordships further held that the wording of the decree that "in case of default by the plaintiff in payment his case will stand "dismissed" " did not and could not mean that the plaintiff was to be debarred from all right to redeem and that the old decree was, therefore, not something which extinguished his right to redeem within the meaning of the proviso to Section 60. The decision of the Allahabad High Court in the Full Bench case of ILR 24 All 44 (M) was apparently referred to with approval (which, let it be noted was a case in which the first decree was obtained before the Transfer of property Act came into force in 1882) and it was held that the right to redeem, was not extinguished and the second suit for redemption was maintainable.

11. We may state at once that this decision of their Lordships of the Privy Council finally set at rest the rather acute controversy which prevailed among the British Indian High Courts with respect to the maintainability of a second suit for redemption where the mortgage was not actually redeemed under the first decree but the mortgagor's right to redeem had not been extinguished either by act of parties or by a decree of court under the Transfer of Property Act. It is worthy of note that the plea of *res judicata* which has been the principal reason for taking a contrary view in some of the decisions referred to above was definitely repelled by the Privy Council, the reasoning, to our mind, being briefly this that if a second suit can be brought according to law, and in their Lordships' judgment it could be so brought unless the right to redeem has been effectually extinguished either by the form of the decree or the provisions of the Transfer of Property Act, no question of "*res judicata*" can arise. It is remarkable that no reference is to be found in their Lordships' judgment to their previous decision in ILR 15 Cal 422 (P) referred to above, and if we may say so with respect, we find it difficult to accept that their earlier judgment should not have been brought to the notice of their Lordships when they were deciding AIR 1934 205 (Privy Council) in 1934. We are consequently unable to hold it as more authoritative than the decision in *Raguhnath Singh's case* (L), and the principles clearly deducible from it.

The above decision was followed by the Federal Court in *Subba Rao v. Mattapalli Raju*, AIR 1950 FC I (R). The brief facts of this case were these. The mortgagees brought a suit against the lessees of the mortgagor to recover possession and arrears of rent in 1926. The mortgagor was added as a party to this suit later. A preliminary decree for sale was passed. As a counterblast, the mortgagor filed a suit to redeem in 1929. This suit was dropped after some time as the parties had apparently come to a compromise on the basis of certain agreements. In 1938 the mortgagor instituted another suit for redemption. The High Court dismissed the latter suit on the ground that it was barred under Order XXIII Rule 1 C. P. C. because the earlier suit had been abandoned without leave having been obtained to file a fresh suit in respect of the same subject matter.

The Madras High Court distinguished the Privy Council case of *Raghnath Singh v. Mt. Hansraj Kunwar* (L) referred to above, and hold that the right to redeem could be extinguished by other provisions of law like Order XXIII, Rule I, C.P.C., Section 60 of the Transfer of Property Act being not exhaustive on the subject. On appeal, the learned Judges or "the Federal Court reversed the decision of the High Court and held that the second redemption suit was competent because the earlier suit: did not and could not have the effect of extinguishing the mortgage. As regards the Plea of *res judicata*, the learned Judges, following the decision of the Privy Council in *Raghnath Singh's case* (L) observed as follows:--

"The structure of the issues noticed by the Board shows clearly that in each redemption action, the cause of action will be different because the claim will be (1) whether the mortgagor had the right to redeem "when he claimed to do so";

and (2) what amount was due by him "when he made that claim". Both the contentions will be different when advanced at different times¹".

The learned Judges went on to observe as follows:

"The right of redemption is an incident of a subsisting mortgage and it subsists so long as the mortgage itself subsists. As held by the Privy Council in Raghunath Singh's case (L) the right of redemption can be extinguished as provided in Section 60, T. P. Act, "and when it is alleged to have been extinguished by a decree, the decree should run strictly in accordance with the form prescribed for the purpose.

Unless the equity of redemption is so extinguished a second suit for redemption by the mortgagor, if filed within the period of "limitation, is not therefore, barred. The Board expressly held that if the appellants failed to establish that the old decree extinguished the right to redeem^ there was no ground for saying that the old- decree operated as res judicata and the Courts were prevented from trying the second suit under S, 11. Civil P. C."

12. It has been strongly contended before us that this conclusion would be correctly applicable to the present case if it were to be governed by Section 60 of the Transfer of Property Act and its proviso; but it is pointed out that the said Act was not in force at all in the former Stats of Mewar in 1933 when the decree in the first redemption suit was made in the present case, and it is, therefore, strongly contended that we should hold the second suit to be barred. In, the absence of such a statutory provision.

13. We have given this aspect of the cass-out most careful and anxious consideration, and do not feel disposed of accept it. As we have pointed out above, there was a conflict of judicial opinion on this point in cases which are in British India even before the Transfer of Pro, . perty Act came into force there, some courts taking the view that a second suit for redemption was maintainable depending upon "the meaning and effect of the decree passed in the first suit and other courts holding that the second suit was completely barred once the mortgage had as it were, merged in a decree which alone could ,be made the basis of further action as regards the satisfaction of the claim.

As we look at the matter, we are inclined to think that Section 60 and its proviso contain a general principle of law applicable to mortgages in this country and they are not technical provisions which should be held to be applicable as a matter of statute only. That principle is this. The right to redeem is an incident of a subsisting mortgage and is inseparable from it so, that the right is co-extensive with the mortgage itself Again, this right subsists until it is properly and effectively extinguished and the extinguishment of the right of redemption can only take place either by act of the parties concerned or by a proper decree of the court.

But unless such extinguishment does, take place, the right of redemption Is not

exhausted It follows that such a right may then be established by another suit provided of course it is filed within sixty years limitation prescribed by the Limitation Act, though a decree of redemption may have been obtained in an earlier suit, and might have remained unexecuted, or become barred by lapse of time. If this principle is accepted as correctly applicable to redemption in this country, as we think it should be, then the same result follows as was drawn by their Lordships in the Privy Council in Raghunath Singh's case (L) even in those places where the Transfer of Property Act may not be in force as such, but where its principles may be in force. Now we should like to mention at this stage that even though the Transfer of Property Act as such was not in force in the former State of Mewar, it has not been controverted before us, nor indeed could it be, that its principles were being applied by the courts in the former State of Mewar to cases which called for the application of such principles. So much so that it has been brought to our notice that in Rughunath v. Hiralal Civil Appeal No. 106 of 1975 (S) a case which arose on analogous facts as in the case before us, a Division Bench of the former High Court of Mewar from which part of Rajasthan this case comes took the view in their judgment dated the 4th April 1941 that a second suit for redemption by a mortgagor was not barred by the principle of res judicata merely on the ground that a previous suit for redemption by the mortgagor had been finally decided and culminated in a decree, in- this state of law we have no hesitation in holding that the true principle, in our opinion, to deter-, mine in a case like the present whether a second suit for redemption where a mortgage remains unredeemed lies or not is to see whether the right to redeem was effectively extinguished by the earlier decree.

If it has been, there is no question of a second suit. If it has not been, a second suit for redemption cannot and should not be allowed to be resisted by procedural considerations embodied in the Code" of Civil Procedure, or elsewhere. On this view of the whole matter which has the weight of considerable judicial authority behind it, it appears to us that decrees in redemption suits fall, as it were, in a class by themselves and the ordinary considerations which apply to decrees in other suits are not applicable to them.

As has been sometimes said the nearest analogy to such suits is provided by decrees in partition suits where no matter that a previous decree has been obtained but has remained unexecuted so long as actual partition does not take place and possession continues to remain joint, a second suit for partition does lie and cannot be prevented on the more ground that the second suit is res judicata by reason of the earlier suit having resulted in a decree, or that the original cause of action has become merged in a decree and is no longer available, or that the execution of the earlier decree has become barred by time.

So long as the status of jointness of possession remains, a fresh cause of action for a suit for partition by metes and bounds would remain alive and available if such partition is demanded and refused. In the same manner, in a case of redemption, a fresh cause of action comes into play so long as the right to

redeem (which is a matter of substantive right) remains intact and has not been extinguished though it might have resulted in a decree in an earlier suit which for some reason or another remained unsatisfied. When once we hold that a second suit may under such circumstances be lawfully brought according to the weight of judicial authority in India, we cannot but hold that the comparatively subordinate considerations of procedural law namely, that a second suit is barred by the principle of *res judicata* or that the mortgage has become merged in a decree and is, therefore, not available as the foundation of a second suit must necessarily give way to the paramount consideration that so long as the right to redeem is not extinguished effectively either by act of parties or by an order of the court, the right to redeem must receive its natural and full play.

14. Let us apply the above test to the present case. It is nobody's case before us that the mortgage in the present case became extinguished by any act of the parties. Then we have to see whether it was so extinguished by the order or decree of the court in his former suit. We have already set forth the terms of the decree above. That decree did not fix any precise point of time by which the payment was to be made by the mortgagor nor did it make any declaration that in case he failed so to pay, his right to redeem would stand foreclosed.

It is difficult to hold in these circumstances on the principles of law formulated above that such a decree was capable of extinguishing the right of redemption which was inherent in a mortgage. A decree like this cannot be given the effect of foreclosing the right of the mortgagor to redeem for ever. The present suit was, therefore, competent and We hold accordingly.

15. In this view of the matter, this appeal fails and we hereby dismiss it. Having regard to the debatable nature of the matter in controversy", we would leave both parties to bear their own costs of this appeal.