

(2011) 08 SHI CK 0016

In the High Court Of Himachal Pradesh

Case No : Regular Second Appeal No. 24 of 2000

Bhandaru Ram (deceased) through his L.R. Rattan Lal

APPELLANT

Vs

Sukh Ram and Others

RESPONDENT

Date of Decision : 30-08-2011

Acts Referred:

Constitution of India, 1950 — Article 141
Limitation Act, 1908 — Article 148, 61, 63
Limitation Act, 1963 — Section 1(15), 10, 10, 11, 12
Transfer of Property Act, 1882 — Section 27, 58, 60, 62

Citation : AIR 2012 HP 1 : (2012) 2 CTC 257 : (2012) 3 JCR 672

Hon'ble Judges : Kurian Joseph, C.J;V.K. Sharma, J;V.K. Ahuja, J

Bench : Full Bench

Judgement

This Judgment has been overruled by : Singh Ram Vs. Sheo Ram, (2014) AIRSCW 4854 : (2014) 9 SCALE 411

Kurian Joseph, C. J.

1. Once a mortgage always a mortgage" is a principle based on equity, justice and good conscience evolved for the first time in 1681 by Lord Nottingham. The reference to that effect is available in "Law of "Mortgage" by Dr. Rashbehary Ghose, 8th Edition at page 281, which reads as follows :

In 1681 Lord Nottingham in the leading case of Harris v. Harris, (1681) 1 Vern 33 firmly laid down the principle: "Once a mortgage, always a mortgage." This is a doctrine to protect the mortgagor's right of redemption : It renders all agreements in a mortgage for forfeiture of the right to redeem and also encumbrances of or dealings with the property by the mortgagee as against a mortgagor coming to redeem. In 1902, the well known maxim, "once a mortgage, always a mortgage" was supplemented by the words "and nothing but a mortgage" added by Lord Davey in the leading case of Noakes v. Rice, 1902 AC 24 (HL) : 1900 3 All ER Rep 34, in which the maxim was explained to mean "that a mortgage cannot be made irredeemable and a provision to that effect is void".

The maxim has been supplemented in the Indian context by the words "and therefore always redeemable", added by Justice Sarkar of the Supreme Court in the case of Seth Ganga Dhar Vs. Shankar Lal and Others,

2. The principle is essentially meant to state the position that once a mortgage is made, it retains the basis characteristic in the mortgage though it may subsequently undergo any other mode of conveyance. It has to be seen that originally there was no prescribed period of limitation for recovery of possession or redemption of a mortgage. For the first time, the period of limitation for recovery of possession or redemption of mortgage was prescribed in 1859, as 60 years and presently under the 1963 Act, it is 30 years. It appears the above principle has been interpreted in few decisions to hold that there is no limitation for redeeming a mortgage, without taking note of the prescribed period of limitation for recovery of possession or redemption of a mortgage. That essentially is the genesis of the reference in this case, which reads as follows :

Whether any period of limitation is prescribed for filing a suit for possession of immovable property by redemption of a usufructuary mortgage which does not fix any time for re-payment of mortgage money?

3. In all the unreported decisions of the learned single Judges and the reported decision of the Division Bench of this Court in Jaimal and Others Vs. State of H.P. and Others, , the view taken is that there is no period of limitation for redemption of usufructuary mortgage which has not fixed a particular period. The Division Bench decision, referred to above, mainly placed reliance on the Full Bench decision of the Punjab and Haryana High Court in Ram Kishan and Others Vs. Sheo Ram and Others, . The Full Bench of the Punjab and Haryana High Court has referred to various Supreme Court decisions including the latest in Prabhakaran and Others Vs. M. Azhagiri Pillai (Dead) by LRs. and Others, But the Punjab and Haryana High Court has made an attempt to distinguish the decision observing that the principle laid down in the said decision is only obiter. Prabhakaran's case (supra) had not been brought to the notice of the Division Bench of this Court while deciding Jaimal's case and had it been referred, the judgment might have been different. Subsequently, when Prabhakaran's case was relied at the time of hearing of RSA No. 24, of 2000, the learned single Judge, having taken note of the fact that Prabhakaran's case was not considered in the Bench decision or any other earlier decisions of this Court, thought that the matter requires consideration by a larger Bench and thus, the reference.

4. At the outset, we may point out that there are conflicting views on this aspect in the Apex Court. However, if the decisions are closely studied in the history and background of the Limitation Act and Transfer of Property Act, it is crystal clear that there is a prescribed period of limitation for filing a suit for recovery of possession of immovable property by redemption of usufructuary mortgage, which has not fixed any time for re-payment of mortgage money and that the time would run from the date of execution of the deed.

5. The object of the law of limitation is to prevent disturbance or deprivation of what may have been acquired in equity and justice by a long enjoyment or what may have been lost by party's own inaction, negligence or laches, as explained and held by the Apex Court in *Rajender Singh and Others Vs. Santa Singh and Others*, . The law of limitation is founded on public policy fixing a lifespan for the legal remedy for the general welfare and is enshrined in the Latin maxim, "interest reipublicae ut sit finis litium" (it is for the general welfare that a period be put to litigation). This principle has also been explained by the Apex Court in *N. Balakrishnan Vs. M. Krishnamurthy*, Section 3 of the Limitation Act, 1963 (in the instant case the suit instituted in the year 1990), provides that every suit instituted after the prescribed period of limitation shall be dismissed even if the limitation has not been set up as a defence. The exceptions are contained in Sections 4 to 24, pertaining to vacation, legal disability, continuous running of time, suits on trustees etc. Section 27 of the Act provides for extinguishment of right to property, which reads as follows :

27. Extinguishment of right to property:-At the determination of the period hereby limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished.

6. The "period of limitation" in terms of Section 2(j) read with Section 3 is prescribed in the Schedule to the Act. Part V of the Schedule deals with suits relating to immovable property, to the extent relevant, we may reproduce the same.

Description of suit

Period of limitation

Time from which period begins to run

Part V - Suits Relating To Immovable Property

(a) to redeem or recover possession of immovable property

Thirty years

When the right to redeem or to recover possession accrues

(b) to recover possession of immovable property mortgaged and afterwards transferred by the mortgagee for a valuable consideration;

Twelve years

When the transfer becomes known to the plaintiff.

(c) to recover surplus collection received by the mortgagee after the mortgage has been satisfied.

Three years

When the mortgagor re-enters on the mortgaged property .

62. to enforce payment of money secured by a mortgage or otherwise charged upon immovable property.

Twelve years

When the money sued for becomes due.

63. By a mortgagee -

(a) for foreclosure:

Thirty years

When the money secured by the mortgage becomes due

(b) for possession of immovable property mortgaged.

Twelve years

When the mortgagee becomes entitled to possession.

7. Chapter IV of the Transfer of Property Act, 1882, deals with the mortgages of immovable property and charges. Section 58(d) deals with usufructuary mortgage, which reads as follows :

(d) Usufructuary mortgage.-- Where the mortgagor delivers possession [or expressly or by implication binds himself to deliver possession] of the mortgaged property to the mortgagee, and authorises him to retain such possession until payment of the mortgage-money, and to receive the rents and profits accruing from the property [or any part of such rents and profits and to appropriate the same] in lieu of interest, or in payment of the mortgage-money, or partly in lieu of interest [or] partly in payment of the mortgage-money, the transaction is called an usufructuary mortgage and the mortgagee an usufructuary mortgagee.

8. Section 60 of the Act deals with the right of a mortgagor to redeem the mortgaged property. It reads as follows :

60. Right of mortgagor to redeem.-- At any time after the principal money has become (due), the mortgagor has a right, on payment or tender, at a proper time and place, of the mortgage-money, to require the mortgagee (a) to deliver (to the mortgagor the mortgage-deed and all documents relating to the mortgaged property which are in the possession or power of the mortgagee), (b) where the mortgagee is in possession of the mortgaged property, to deliver possession thereof to the mortgagor, and (c) at the cost of the mortgagor either to re-transfer the mortgaged property to him or to such third person as he may direct, or to execute and (where the mortgage has been effected by a registered instrument) to have registered an acknowledgment in writing that any right in derogation of his interest transferred to the mortgagee has been extinguished :

Provided that the right conferred by this section has not been extinguished by act of the parties or by decree of a Court.

The right conferred, by this section is called a right to redeem and a suit to enforce it is called a suit for redemption.

Nothing in this section shall be deemed to render invalid any provision to the effect that, if the time fixed for payment of the principal money has been allowed to pass or no such time has been fixed, the mortgagee shall be entitled to reasonable notice before payment or tender of such money.

9. Section 62 of the Act deals with the specific right of the usufructuary mortgagor to recover the possession, which reads as follows :

62. Right of usufructuary mortgagor to recover possession.-- In the case of a usufructuary mortgage, the mortgagor has a right to recover possession of the property (together with the mortgage-deed and all documents relating to the mortgaged property which are in the possession or power of the mortgagee),--

(a) where the mortgagee is authorised to pay himself the mortgage-money from the rents and profits of the property,-- when such money is paid:

(b) where the mortgagee is authorised to pay himself from such rents and profits (or any part thereof a part only of the mortgage-money), when the term (if any) prescribed for the payment of the mortgage-money has expired and the mortgagor pays or tenders to the mortgagee (the mortgage-money or the balance thereof) or deposits it in Court as hereinafter provided.

10. We are concerned with the right of the usufructuary mortgagor to recover possession when the mortgagor pays or tenders to the mortgagee the mortgage money or the balance thereof or deposits it in Court as provided under the Act. The short and simple question to be posed at the outset is :

When no period is fixed for payment, does the law contemplate infinity either for redemption or recovery of possession of a usufructuary mortgage by the mortgagor or for foreclosure by the mortgagee?

11. On general principles of equity, justice and good conscience, originally no time limit was prescribed under the law of limitation either for redemption or for foreclosure of mortgage. A time limit of 60 years for the first time was prescribed in the year 1859, by Act No. XIV of 1859. The Preamble to the Act itself provides as follows :

An act to provide for the limitation of suits.

A reference to the effect that there was no limitation prior to 1859 is also available in one of the contemporaneous decisions, in *Data Chand & Ors. v. Sarfraz Ali & Ors.* , reported in ILR (1877) 1 All 425, wherein, it is stated as follows :

Before the enactment of CI. 15, S. I, Act XIV of 1859, there was no limitation to suits for the redemption of mortgage of landed property.

Section 1 along with sub-section (15), read as follows :

1. No suit shall be maintained in any Court of Judicature within any part of the British territories in India in which this Act shall be in force unless the same is instituted within the period of limitation hereinafter made applicable to a suit of that nature, any Law or Regulation to the contrary notwithstanding; and the periods of limitation, and the suits to which the same respectively shall be applicable, shall be the following, that is to say:--

1(15). To suit against a depositary, pawnee, or mortgagee of any property moveable or immoveable for the recovery of the same-a period of thirty years if the property be moveable and sixty years if it be immoveable, from the time of the deposit, pawn, or mortgage: or if in the meantime an acknowledgment of the title of the depositor, pawnor, or mortgagor, or of his right of redemption, shall have been given in writing signed by the depositary, pawnee, or mortgagee or some person claiming under him, from the date of such acknowledgment in writing.

The said period of 60 years was repeated in the Act IX of 1871 and Act XV of 1877. The same period of limitation of 60 years continued in the predecessor to the present Act, namely, The Indian Limitation Act, 1908. However, the period of limitation has been reduced to 30 years, both for redemption or recovery of possession and for foreclosure of a usufructuary mortgage in the 1963 Act.

12. The crucial dispute is on the interpretation --"time from which period begins to run". Article 61 provides that the time would begin to run when the right to redeem or to recover possession accrues. Article 63 provides that the time for foreclosure by a mortgagee would run to begin when the money secured by the mortgagee becomes due. There cannot be any dispute that when a period is fixed in the deed of usufructuary mortgage, both in the case of mortgagor and mortgagee, the same would run on the date of expiry of the period fixed in the deed unless it is held by a competent Court that the period thus fixed in the deed is a clog on the equity of redemption. There cannot also be any dispute that when any period is fixed in the mortgage deed for notice, the same has to be adhered to. We are concerned with the case of usufructuary mortgage which has not fixed any such period.

13. In this context, it is significant to note that the opening words of Section 60 of the Transfer of Property Act, were amended in the year 1929 and the word "payable" was substituted by "due". In other words, prior to 1929, the right of mortgagor to redeem the mortgage was available only after the principal amount had become payable. But after the amendment in 1929, the mortgagor has right to redeem the mortgage or recover the possession after the money has become due. Article 61 of the Limitation Act has provided that, for a mortgagor the time would start running when the right to redeem or to recover the possession accrues and to the mortgagee for foreclosure, when the money secured by the mortgage becomes due. The impact of the amendment by substitution of the word "due" in place of "payable" has been considered by the Supreme Court in the *Raymond Synthetics Ltd. and others Vs. Union of India and others*, wherein it

has been held as follows :

58. As a matter of fact, these words assumed great significance u/s 60 of Transfer of Property Act. The section was amended by Act 20 of 1929. The word "due" in the section has been substituted for the word "payable" in order to make it clear that a mortgagor cannot redeem within the term of the mortgage. The right of redemption arises when the principal money secured by the mortgage has become due and may be exercised at any time thereafter, subject of course to the law of limitation...

14. In *Morvi Industries Ltd. Vs. Commissioner of Income Tax (Central) Calcutta*, at paragraph 11, the Supreme Court has interpreted the expression "accrue" to mean to "fall due". To quote:

...The dictionary meaning of the word "accrue" is "to come as an accession, increment, or produce: to fall to one by way of advantage: to fall due". The income can thus be said to accrue when it becomes due. The postponement of the date of payment has a bearing only insofar as the time of payment is concerned, but it does not affect the accrual of income. The moment the income accrues, the assessee gets vested with the right to claim that amount even though it may not be immediately. There also arises a corresponding liability of the other party from whom the income becomes due to pay that amount. The further fact that the amount of income is not subsequently received by the assessee would also not detract from or efface the accrual of the income, although the non-receipt may, in appropriate cases, be a valid ground for claiming deductions. The accrual of an income is not to be equated with the receipt of the income."

15. Referring to the dictionary meaning of the word "due", in *State of Kerala and Ors Vs. V.R. Kalliyankutty and Anr*, it has been held that....."An amount "due" normally refers to an amount which the creditor has a right to recover."..... In case no period as such is prescribed in a usufructuary mortgage, the mortgagee is under obligation to put back the mortgagor in possession of the mortgaged property, the moment the mortgage money has been paid back or it has otherwise been settled. If the mortgagee refuses to do so, the only option left to the mortgagor is to institute a suit for redemption and recovery of possession. Conversely, if the mortgagee wants to institute a suit for foreclosure, he has to do so within 30 years of the money secured by the mortgage becoming due. It needs no elaborate discussion to hold that as far as a mortgagee is concerned, in the case of usufructuary mortgage which has not fixed any period, the money secured by the mortgage becomes due the moment it has been paid by the mortgagor., As far as the mortgagor is concerned, in the absence of any period fixed in the usufructuary mortgage, he has every right to redeem or recover the possession the moment he executes the deed or the moment parties are in the jural relationship of mortgagor and mortgagee otherwise. On the first principles of civil law, there is no civil right establishment of which is not circumscribed or governed by law of limitation. That is the principle behind Section 3, read with

Section 27 of the Limitation Act. Section 27 is unambiguously clear that at the determination of the period limited to any person for instituting a suit for possession of any property, his right to such property is extinguished. The said provision is founded on public policy providing for a lifespan for the legal remedy. It is intended to prevent disturbance or deprivation of what has been acquired in equity and justice by long enjoyment or what may have been lost by one's own inaction, negligence or laches. Thus, in view of the prescription of 30 years, under Article 61 of the Schedule to the Limitation Act, read with Section 60 of the Transfer of Property Act, a mortgagor has to institute a suit for redemption or recovery of possession within 30 years of the mortgage, since his right to redeem or recover the possession accrues to him the moment the parties are in the jural relationship of mortgagor and mortgagee.

16. The expression "act of parties" as appearing in the proviso to Section 60 of the Transfer of Property Act on the extinguishment of the mortgagor's right to redeem the mortgage has to be understood in law as the act of inaction on the part of the mortgagor to institute the suit for redemption or recovery of possession within the prescribed period of 30 years of accrual of the right to redeem or recover the possession.

17. Though virtually we have answered the reference by analyzing the pristine law on first principles, in the background of the decisions referred to in the order of Reference, particularly the Full Bench decision of the Punjab and Haryana High Court in *Ram Kishan and Others Vs. Sheo Ram and Others*, we shall also refer to the various decisions in this regard and also on the principle as to and how the law has to be understood as settled that way. *Murarilal (since deceased through his Lrs. Umedi Lal & Ors.) v. Devkaran (since deceased through his Lrs. Jagan Prasad & Ors.)* is a constitution Bench decision of the Apex Court reported in *Murarilal Vs. Dev Karan*, At paragraph 20, while dealing with the situation of clog on equity of redemption, it has been held that the Court has a duty to apply the equitable principles of justice, equity and good conscience in dealing with mortgages "...if a mortgage deed contains a stipulation which unreasonably restrains or restricts the mortgagors equity of redemption. Courts were empowered to ignore that stipulation and enforce the mortgagor's right to redeem, subject, of course, to the general law of limitation prescribed in that behalf".

18. Clog on redemption is distinct and different from limitation. A clog on redemption is a provision inserted in a deed of mortgage to prevent, evade or hamper redemption and it is settled law that such a provision preventing, evading or hampering redemption of a mortgage is void.

19. In *Seth Ganga Dhar Vs. Shankar Lal and Others*, the Supreme Court considered the question as to whether a usufructuary mortgage for a period of 85 years is a clog on redemption and the further question as to whether a provision in the said deed that in case the said usufructuary mortgage is not redeemed within six months after the expiry of 85 years, it would be treated as

sale, would also be a clog on redemption. Having analyzed the facts and circumstances of the case, it was held by the Apex Court that the fixation of period of 85 years was not a clog on redemption but the provision to make the mortgage irredeemable after the period of six months of the expiry of the period of 85 years was a clog on redemption. What is and what not a clog on redemption is a question of fact depending on the facts and circumstances in each case. But the underlying principle is whether the provision has made the mortgage irredeemable or has made redemption illusory. The principle has been summarized in the said decision as follows :--

(6) The rule against clogs on the equity of redemption is that, a mortgage shall always be redeemable and a mortgagor's right to redeem shall neither be taken away nor be limited by any contract between the parties.

20. The Courts will ignore any contract, the effect of which is to deprive the mortgagor of his right to redeem the mortgage. It need not be explained in detail that the rule of limitation is not a contract between the parties so as to make the mortgage irredeemable. It is the law founded on the public policy, prescribing a lifespan for the legal remedy and that is intended for the general welfare. Court of law is bound to apply the said law of limitation. Court can look into the mortgage as to whether in the transaction, mortgagee had an unjust bargain exploiting the weak or dis-advantageous position of the mortgagor for dire need of money and whether any oppressive clause has been inserted in that regard in the mortgage deed so as to make the mortgage itself irredeemable or illusory. That would depend on the facts of each case and finding it so on evidence, the Court has to ignore such clogs on redemption. But the Court cannot and shall not ignore the law of limitation. Thus, limitation for instituting a suit for redemption or recovery of possession of a mortgage is totally distinct and different from clog on equity of redemption. Clog on equity of redemption is an act of parties whereas limitation is sheer operation of law.

21. Sampuran Singh and Others Vs. Smt. Niranjan Kaur and Others, is a case directly on the point as to what is the starting point of period of limitation in a usufructuary mortgage which has not fixed a period in the deed but when there is an acknowledgment by way of assignment during the subsistence of the original mortgage. The mortgage in that case was executed in the year 1893 and in 1960, the original mortgagee sold his right by a registered deed to a third party. The suit for redemption was filed in the year 1980. The defendants, the assignees took up the defence that the suit was barred by limitation, among other defences. While holding on facts that the time would run for the mortgagor from the date of accrual of his right to redeem the mortgage, it was held as follows :--

12. Learned counsel also referred to the language of Article 61(a) of part V of the Schedule to the Limitation Act, which is quoted hereunder :

61. By a mortgagor--

13. It is not in dispute at the relevant time period of limitation under this was 60 years and not 30 years

14. Submission was as aforesaid, right to redeem only accrue when either mortgagors tender the amount of mortgage or the mortgagees communicate satisfaction of the mortgage amount through the usufruct from the land. This submission is misconceived, as aforesaid, if this interpretation is accepted, then till this happens the period of limitation never start running and it could go on for an infinite period. We have no hesitation to reject this submission. The language recorded above makes it clear that right of redemption accrues from the very first day unless restricted under the mortgage deed. When there is no restriction mortgagors have a right to redeem the mortgage from that very date when the mortgage was executed. Right accruing means, right either existing or coming into play thereafter. Where no period in the mortgage is specified, there exist a right to a mortgagor to redeem the mortgage by paying the amount that very day in case he receives the desired money for which he has mortgaged his land or any day thereafter. This right could only be restricted through law or in terms of a valid mortgage deed. There is no such restriction shown or pointed out. Hence, in our considered opinion the period of limitation would start from the very date the valid mortgage is said to have been executed hence the period of limitation of 60 years would start from the very date of oral mortgage that would be from March. 1893.

22. Prabhakaran and Others Vs. M. Azhagiri Pillai (Dead) by LRs. and Others, (already referred at the beginning) again is a case directly on the point: the only difference is that in this case it was held by the Apex Court that the acknowledgment having been made with the intention of admitting the jural relationship, the period of limitation would start from that date. In other words, in the peculiar facts of the case, it was held that the acknowledgment had the effect of extension of limitation u/s 18 of the Limitation Act. The principle on limitation has been clearly explained and dealt with at paragraph 11, which reads as follows :--

11. Article 148 of the Limitation Act, 1908 (referred to as "old Act") provided a limitation of 60 years for a suit against a mortgagee, to redeem or to recover possession of immovable property mortgaged. The corresponding provision in the Limitation Act, 1963 ("new Act" or "Limitation Act" for short), is Article 61(a) which provides that the period of limitation for a suit by a mortgagor to redeem or recover possession of the immovable property mortgaged is 30 years The period of limitation begins to run when the right to redeem or to recover possession accrues. In the case of a usufructuary mortgage which does not fix any date for repayment of the mortgage money, but merely stipulates that the mortgagee is entitled to be in possession till redemption, the right to redeem would accrue immediately on execution of the mortgage deed and the mortgagor has to file a suit for redemption within 30 years from the date of the mortgage. Section 27 of the Limitation Act provides that "at the determination of the period

hereby limited to any person for instituting a suit for possession of any property. his right to such property shall be extinguished". This would mean that on the expiry of the period of limitation prescribed under the Act, the mortgagor would lose his right to redeem and the mortgagee would become entitled to continue in possession as the full owner.

23. Having thus dealt with two direct decisions on the point dealing with the issue on the first principle of law of limitation, we shall also refer to two decisions of the Apex Court, which have taken a contrary view. At the outset, it has to be noted that both the decisions have not analyzed or dealt with the question in the history and background of principles of law of Panchanan Sharma Vs. Basudeo Prasad Jaganani and others, is a case wherein the mortgagee was bound to pay the land revenue in respect of the mortgaged property and on his default, the same was sold in auction. It was held by a two Judges Bench that the mortgagor has not lost his right of redemption by the conduct and action of the mortgagee, to quote:

...If the deed gives time for redemption or adjustment of the rent or profits and liabilities in terms of the contract read with the relevant provisions of the Act stood discharged, the limitation for redemption would run from the date fixed in the mortgage deed. Otherwise, there is no limitation for redemption of usufructuary mortgage. The usufructuary mortgagor does not lose his title to the property or right to redemption by lapse of time. By operation of the last para of S. 76, the mortgagor is entitled to the accounting of the loss occasioned to it. At best the auction-purchaser, on redemption, would look to the mortgagee who had committed default in terms of the mortgage and the Court would give suitable direction in that behalf. The possession of the purchaser must be on behalf of the mortgagee and becomes liable to accounting etc...

24. In that case neither was there any reference as to the defence of limitation or was there any contention at any stage or was the ground of limitation raised by any party. It has to be specifically seen from the facts that the suit was one instituted within the period of limitation of 60 years (usufructuary mortgage was dated 10-7-1911, the revenue sale was on 3-8-1946 and the first appeal number is No. 8 of 1971). Therefore, necessarily, the suit would have been the one instituted within 60 years, as per the permissible period of 60 years under Article 148 of Limitation Act, 1908.

25. Harbans v. Om Prakash and others, is yet another decision by a two Judges Coram of the Apex Court, reported in Harbans Vs. Om Prakash and Others, Referring to Seth Ganga Dhar Vs. Shankar Lal and Others, , which we have referred to above while dealing with the principle on clog on redemption in contra-distinction to law of limitation, and also referring to the principle "once a mortgage always a mortgage", it was held that the suit was not barred by limitation. Reference to Ganga Dhar's decision is made at paragraph 7 of the judgment to hold that a mortgage shall always be redeemable and that mortgagor's right to redeem shall neither be taken away nor be limited by any

contract between the parties. As we have already held above, the right of redemption cannot be taken away by a contract between the parties creating a clog on equity of redemption. A mortgage is always redeemable, subject, of course, as held by the Constitution Bench in *Murari Lal's case* (supra), to the law of limitation. The principle that "once a mortgage always a mortgage" only means that any subsequent events or transactions in respect of the mortgage do not change the essential characteristics of the original conveyance as mortgage. Therefore, it is now well settled that once a mortgage, it is always a mortgage and nothing but a mortgage and hence despite any intervening transactions like lease, assignment etc., the original mortgagor has always a right to redeem the mortgage, subject only to the law of limitation. It is also to be seen that at paragraph 10 of the said judgment, commentary in Mulla's Transfer of property Act has also been discussed and according to the author of the text book also, to quote:

.....The right of redemption is an incident of a subsisting mortgage and subsists so long as the mortgage itself subsists. It can be extinguished as provided in the section and when it is alleged to be extinguished by a decree, the decree should run strictly in accordance with the forum prescribed for the purpose. Dismissal of an earlier suit for redemption whether as abated or as withdrawn or in default would not be barred (sic. debar) the mortgagor from filing a second suit for redemption so long as the mortgage subsists and the right of redemption is not extinguished by the efflux of time or by a decree of the Court in the prescribed form.

The Supreme Court has held that the right of redemption under a mortgage deed can come to an end only in a manner known to law. Such extinguishment of the right can take place by a contract between the parties, by a merger or by a statutory provision which debars the mortgagor from redeeming the mortgage. A mortgagee in possession of the property will have to deliver possession to the mortgagor when a suit of redemption is filed unless he is able to show that the right of redemption has come to an end or that a suit is liable to be dismissed on some other valid ground. The mortgagor's right of redemption is exercised by the payment or tender to the mortgagee at the proper time and the proper place, of the mortgage money. When it is extinguished by the act of parties, the act must take the shape and observe the formalities which the law prescribes. The expression "act of the parties" refers to some transaction subsequent to the mortgage and standing apart from the mortgage transaction. A usufructuary mortgagee cannot by mere assertion of his own or by a unilateral action on his part, convert his position on moiety of the property as mortgagee into that of an absolute owner...

Though the decision in *State of Punjab and others Vs. Ram Rakha and others*, was canvassed to the contra position, there is no detailed discussion on the issue. However, it is significant to note that the said decision in *Ram Rakha's case* (supra) has also not dealt with the principle in law, though it has been held

that after 60 years, the mortgage has become irredeemable and consequently, the mortgagee has become the owner of the property, in a suit filed to that effect. However, it is crucially relevant that the direct ruling in Sampuran Singh's case (supra) decided in the year 1999 on the point and the decision of the Constitution Bench in Murari Lal's case (supra) rendered in the year 1965 regarding the application of law of limitation on the redemption of mortgage had not been brought to the notice of the Court in this case and of course, Prabhakaran's case (supra) again a direct ruling on the point, was not available to the Court, being rendered later in point of time. In this context, we may also refer to another decision of the Apex Court relevant to the context in Jayasingh Dnyanu Mhoprekar and Another Vs. Krishna Babaji Patil and Another, wherein at paragraph 6 it has been held as follows :--

...It is well-settled that the right of redemption under a mortgage deed can come to an end only in a manner known to law. Such extinguishment of right can take place by a contract between the parties, by a merger or by a statutory provision which debars the mortgagor from redeeming the mortgage. A mortgagee who has entered into possession of the mortgaged property under a mortgage will have to give up possession of the property when the suit for redemption is filed unless he is able to show that the right of redemption has come to an end or that the suit is liable to be dismissed on some other valid ground. This flows from the legal principle which is applicable to all mortgages, namely "Once a mortgage, always a mortgage."

26. Now we shall deal with the Full Bench decision of the Punjab & Haryana High Court in Ram Kishan and Others Vs. Sheo Ram and Others, The Court has extensively dealt with the various legal aspects of the issue and some of the decisions referred to above. The baseline principles are available at paragraph 16 of the judgment which reads as follows:--

...It is thus evident that very conception of mortgage involves three principles. First, there is the maxim: "Once a mortgage, always a mortgage" that is to say, a mortgage is always redeemable and if a contrary provision is made, it is invalid. And this is an exception to the aphorism, *modus et convention vincunt legem* (custom and agreement overrule law). Secondly, the mortgagee cannot reserve to himself any collateral advantage outside the mortgage agreement. Thirdly, as a corollary from the first another principle may be deduced, namely, "once a mortgage, always a mortgage, and nothing but a mortgage". In other words, any stipulation which prevents a mortgagor from getting back the property mortgaged is void. That is, a mortgage is always redeemable.

27. We have no dispute with the principles as stated above. As we have already held above, there cannot be a provision in the mortgage deed which makes the mortgage irredeemable and that the mortgagee cannot have any collateral advantage outside the mortgage agreement and still further, once a mortgage it is always a mortgage and nothing but a mortgage. But the mortgage being a mode of transfer of property, it is subject to Section 60 of the Transfer of

Property Act and in the case of usufructuary mortgage, Section 62 of the Act and it is governed by the prescribed period of limitation for instituting a suit for recovery or redemption and foreclosure of a mortgage. A provision in a mortgage making it irredeemable is certainly antithetic to the principle of once a mortgage always a mortgage and nothing but a mortgage and hence redeemable as a mortgage. But a mortgage is a transfer of property and can be only made in terms of the Transfer of Property Act, 1882 and recovery and redemption and foreclosure of the transfer thus made as per the mortgage is subject to the law of limitation.

28. Originally, there was no limitation for redemption or recovery of possession of a mortgaged property. The concept of limitation was introduced for the first time only in the year 1859. These crucial aspects, unfortunately, have missed the notice of the Punjab and Haryana High Court in Ram Kishan's case (supra).

29. All that apart, we respectfully disagree with the stand of the Full Bench of the Punjab and Haryana High Court with respect to the approach in distinguishing the two direct rulings of the Apex Court in Sampuran Singh's case and Prabhakaran's case (supra). The Full Bench at paragraphs 41 & 42 has taken the view as follows:

41. In Sampuran Singh's case (supra), the primary question revolved around acknowledgment of the mortgage. Although the said judgment supports the argument raised by learned counsel for the mortgagee but the judgment of the larger Bench including that of Seth Ganga Dhar's case (supra) were not noticed. The said judgment is on the lines of another judgment of Hon'ble Supreme Court in Ram Rakha's case (supra) which was noticed in Harbans's case (supra) and it was held that the said decision does not lay down correct position in law.

42. In Prabhakaran's case (supra), the primary question again was in respect of acknowledgment. Though in Para No. 13 of the judgment it has been observed that in case of a usufructuary mortgage which does not fix any date for repayment of the mortgage money, the right to redeem would accrue immediately on execution of the mortgage deed. But said observation is obiter inasmuch as Hon'ble Supreme Court has allowed the appeal of the mortgagor for redemption while holding that there is acknowledgment. Therefore, the said judgment provides little assistance to the mortgagees.

30. With great respect, as far as Sampuran Singh's case is concerned Sampuran Singh and Others Vs. Smt. Niranjana Kaur and Others, we are not persuaded and we cannot accept the view taken by the Punjab and Haryana High Court. For one thing it has to be noted that Ram Rakha's case (State of Punjab and others Vs. Ram Rakha and others, , was not even referred to in Sampuran Singh's case and as we have already noted above, it is a case directly dealing with the issue of limitation in the matter of redemption or recovery of possession of a usufructuary mortgage whereas Seth Ganga Dhar Vs. Shankar Lal and Others, , is not on the point of limitation but on clog on the equity of redemption. Limitation was not

even an issue in that case. As far as Prabhakaran and Others Vs. M. Azhagiri Pillai (Dead) by LRs. and Others, is concerned, again with great respect, the point that the right to redeem would accrue immediately on the execution of the mortgage deed settled in that decision is not an obiter but the ratio in that decision. A simple test to distinguish between ratio decidendi and obiter dicta in a judgment is, just take away the ratio and if the decision does not stand, it is nothing but the ratio in the case. In case of obiter dicta, even if the same is just taken away from the judgment, the decision would still stand. As far as the Prabhakaran's case is concerned, the whole decision is based on the question of limitation as to what is the date on which the limitation starts to run. The position under law with reference to the provisions under the Transfer of Property Act and the Limitation Act have been directly dealt with in the above mentioned two decisions in (Sampuran Singh and Others Vs. Smt. Niranjani Kaur and Others, and Prabhakaran and Others Vs. M. Azhagiri Pillai (Dead) by LRs. and Others, The Constitution Bench decision in Murarilal (since deceased through his Lrs. Umedi Lal & Ors. v. Devkaran (since deceased through his Lrs. Jagan Prasad & Ors.), also has not been, with great respect, appreciated from the point of view of the law of limitation, by the Full Bench of the Punjab and Haryana High Court.

31. In this context, we may refer to a decision of the Apex Court on ratio decidendi in Union of India (UOI) and Others Vs. Dhanwanti Devi and Others, , wherein it has been held as follows :

It is not everything said by a Judge while giving judgment that constitutes a precedent. The only thing in a Judge's decision binding a party is the principle upon which the case is decided and for this reason it is important to analyse a decision and isolate from it the ratio decidendi. According to the well-settled theory of precedents, every decision contains three basic postulates - (i) findings of material facts, direct and inferential. An inferential finding of facts is the inference which the Judge draws from the direct, or perceptible facts; (ii) statements of the principles of law applicable to the legal problems disclosed by the facts; and (iii) judgment based on the combined effect of the above. A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in the judgment. Every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generally of the expressions which may be found there is not intended to be exposition of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. It would, therefore, be not profitable to extract a sentence here and there from the judgment and to build upon it because the essence of the decision is its ratio and not every observation found therein. The enunciation of the reason or principle on which a question before a Court has been decided is alone binding as a precedent. The concrete decision alone is binding between the parties to it, but it is the abstract ratio decidendi, ascertained on a consideration of "the judgment

in relation to the subject-matter of the decision, which alone has the force of law and which, when it is clear what it was, is binding. It is only the principle laid down in the judgment that is binding law under Article 141 of the Constitution. A deliberate judicial decision arrived at after hearing an argument on a question which arises in the case or is put in issue may constitute a precedent no matter for what reason, and the precedent by long recognition may mature into rule of stare decisis. It is the rule deductible from the application of law to the facts and circumstances of the case which constitutes its ratio decidendi.

32. Yet another binding guidance by the Apex Court in this context is in *The Oriental Insurance Company Limited Vs. Meena Variyal and Others*, wherein it has been held at paragraph 26 as follows :

...An obiter dictum of this Court may be binding only on the High Courts in the absence of a direct pronouncement on that question elsewhere by this Court. But as far as this Court is concerned, though not binding, it does have clear persuasive authority

33. As far as the principle of limitation for recovery of possession or redemption of a mortgage is concerned, the direct pronouncements on the question are available in three decisions :

(1) *Murarilal Vs. Dev Karan*, (2) *Sampuran Singh and Others Vs. Smt. Niranjani Kaur and Others*, and (3) *Prabhakaran and Others Vs. M. Azhagiri Pillai (Dead) by LRs. and Others*, *Panchanan Sharma Vs. Basudeo Prasad Jaganani and others*, and *Harbans Vs. Om Prakash and Others*, (Coram in both cases in two only) have not dealt with the issue in the history and background of the Transfer of Property Act and the Limitation Act on the issue. Therefore, once the binding principle is available in a direct pronouncement on the question in a decision of the Apex Court, it is that principle which is to be followed as a precedent. The decisions which have not directly dealt with the questions are to be distinguished as obiter.

34. Having dealt with the decisions of the Apex Court, we may also seek assistance on the principles as enunciated in the basic textbook - *Salmond on Jurisprudence*, Twelfth edition as edited by P. J. Fitzgerald, dealing with circumstances disturbing or weakening the binding force of precedent (Twelfth Edition, Chapter 5, page 151). Having referred to various English decisions, it is stated thus :

(5) Inconsistency between earlier decisions of the same rank. A court is not bound by its own previous decisions that are in conflict with one another. This rule has been laid down in the Court of Appeal, Court of Criminal Appeal and Divisional Court, and it obviously applies also to the House of Lords. There may at first sight seem to be a difficulty here: how can a situation of conflict occur, if the court is bound by its own decisions? At least two answers may be given. First, the conflicting decisions may come from a time before the binding force of precedent was recognized. Secondly, and more commonly, the conflict may have arisen through inadvertence, because the earlier case was not cited in the later.

Owing to the vast number of precedents, and the heterogeneous ways in which they are reported or are not reported it is only too easy for counsel to miss a relevant authority. Whenever a relevant prior decision is not cited before the Court, or mentioned in the judgments, it must be assumed that the Court acts in ignorance or forgetfulness of it. If the new decision is in conflict with the old, it is given per incuriam and is not binding on a later Court.

Although the later Court is not bound by the decision so given per incuriam, this does not mean that it is bound by the first case. Perhaps in strict logic the first case should be binding, since it should never have been departed from, and was only departed from per incuriam. However, this is not the rule. The rule is that where there are previous inconsistent decisions of its own, the Court is free to follow either. It can follow the earlier, but equally, if it thinks fit, it can follow the later. This rule has been laid down for the Court of Appeal, and it is submitted that it applies also to other Courts. It will be seen, therefore, that this exception to the binding force of precedent belongs both to the category of abrogation by subsequent facts and to the category of what is here called inherent vice. The earlier case can be disregarded because of the subsequent inconsistent decision on the same level of authority and the later case can be disregarded because of its inherent vice of ignoring the earlier case.

Where authorities of equal standing are irreconcilably in conflict a lower Court has the same freedom to pick and choose between them as the schizophrenic Court itself. The lower Court may refuse to follow the later decision on the ground that it was arrived at per incuriam. or it may follow such decision on the ground that it is the latest authority. Which of these two courses the Court adopts depends, or should depend, upon its own view of what the law ought to be. However, it takes a somewhat bold Judge to disregard a precedent handed down by a Court of higher standing on the ground that the decision was per incuriam.

(All emphases in this order are supplied)

35. For all the above reasons, with great respect, we are unable to be persuaded by the Full Bench Decision of the Punjab & Haryana High Court in Ram Kishan and Others Vs. Sheo Ram and Others, . To conclude, the Division Bench decision of this Court in Jaimal and Others Vs. State of H.P. and Others, , the un-reported decisions in RSA No. 378 of 2008 titled Shri Parkash Chand and Others Vs. Shri Amar Singh and Another, , and Tula Ram & another v. Shanti RSA No. 271 of 2002, which have taken the view that there is no period of limitation for filing a suit for redemption or recovery of possession of usufructuary mortgage which has not fixed any time for repayment of mortgaged money do not reflect the correct position of law and hence they are overruled. Reference is answered as follows:

The period of limitation for filing a suit for recovery of possession of immovable property or redemption of usufructuary mortgages which have not fixed any time

for repayment of mortgage money is 30 years as prescribed under Article 61 to the Schedule to the Limitation Act, 1963 (60 years under Article 148 as per Indian Limitation Act, 1908).

36. The case be posted before the appropriate Bench for disposal in terms of the answer to the reference, as above.