

(1992) 09 GUJ CK 0005
In the Gujarat High Court
Case No : Second Appeal No. 79 of 1979

Ismail Nathabhai Khatri

APPELLANT

Vs

Muljibhai Shankerbhai Brahmabhatt

RESPONDENT

Date of Decision : 09-09-1992

Acts Referred:

Bombay Agricultural Debtors Relief Act, 1947 — Section 10, 12, 15, 16, 4(1)
Civil Procedure Code, 1908 (CPC) — Order 20 Rule 12, Order 23 Rule 3, Order 23 Rule 4, Order 34 Rule 7, Order 34 Rule 8
Transfer of Property Act, 1882 — Section 58 , 60

Citation : AIR 1994 Guj 8 : (1992) 2 GLR 739

Hon'ble Judges : J.N. Bhatt, J

Bench : Single Bench

Advocate : V.J. Desai, for the Appellant; Devarshi N. Pandya, for the Respondent

Final Decision : Partly Allowed

Judgement

J.N. Bhatt, J.—Whether the questioned document constitutes a mortgage by conditional sale or sale out-right is the main question which has surfaced in this Second Appeal u/s 100 of the CPC ("Code" for short).

2. A few material facts leading to the rise of the present Second Appeal may be stated, at this stage. The appellant herein is the original defendant and the respondent herein is the original plaintiff. The parties are hereinafter referred to as "the plaintiff and "the defendant" for the sake of convenience and brevity.

3. The plaintiff instituted Regular Civil Suit No. 10 of 1970 for redemption of the mortgaged property admeasuring 29 gunthas being a part of S. No. 174, situated in the sim of village Achhalia, Taluka Jhagadia, which is hereinafter referred to as the "suit land". According to the case of the plaintiff, he entered into a registered document dated 5-4-1948 in respect of the suit land, which was in the nature of a mortgage by conditional sale. The plaintiff had transferred the suit land in the name of the defendant by registered mortgage by conditional sale, on 5-4-1948, for Rs. 451/- and the defendant was given the possession of the suit land as

mortgagee. The, plaintiff had filed the above suit for redemption of the suit property and to recover the mesne profit as the defendant did not comply with the notice served by the plaintiff.

4. The defendant appeared and resisted the suit, inter alia, contending that he had, as such, purchased the suit land by a registered sale deed, dated 5-4-1948 for the consideration of Rs. 451/- He denied that the plaintiff was the owner of the suit land. He contended that the questioned deed is not in the form of a mortgage deed as such but it was a conditional sale itself and by virtue of the specific condition in the deed the defendant became absolute owner of the suit land as the plaintiff failed to repurchase the suit land within the period of five years. It was also contended that the plaintiff had filed an application for the adjustment of debt under the Bombay Agricultural Debtors Relief Act, 1947 ("BADR Act" for short), on 20-2-1951 and to redeem the suit land but it was dismissed and, therefore, the suit was not maintainable and it was barred by res judicata.

5. Upon the appreciation of the facts and circumstances and the evidence on record, the trial court dismissed the suit, on 31-1-1977, holding that the defendant had become the owner of the suit land after five years from 5-4-1948, as stipulated in the document in respect of the suit land. The contention of the plaintiff that the document, dated 5-4-1948, produced, at Ex. 78, is a mortgage by conditional sale was not accepted.

6. Being aggrieved by the said judgment and decree, the original plaintiff questioned its legality and validity by filing Regular Civil Appeal No. 27 of 1977 in the District Court, at Bharuch. The District Court, Bharuch, allowed the appeal and decreed the suit of the plaintiff for redemption. A preliminary decree was ordered to be passed along with cost. Thus, the District Court, in First Appeal, was pleased to find that the registered deed, dated, 5-4-1948, produced, at Ex. 78, was of a mortgage by conditional sale and not a sale with condition to repurchase.

7. Being aggrieved by the judgment and decree passed in the aforesaid appeal, the original defendant has now come up before this Court u/s 100 of the Code, challenging the validity of the decree granting redemption of mortgage in respect of the suit land.

8. During the course of the hearing of this, appeal, this court had raised the following issue and it was sent to the trial court for decision:

"What is the true legal effect of the withdrawal pursis, Ex. 82, and the order passed below, Ex. 81, in a proceeding under the BADR Act, 1947, on the question of maintainability of the suit?"

The trial court has certified the issue by giving a finding that the suit is maintainable. After the issue was certified by the trial court, again the matter was heard at length.

9. Before the merits of the appeal are examined, it would be appropriate to mention that the scope of the Second Appeal is very much circumscribed. Second Appeal u/s 100 of the Code is competent on a substantial question of law. Ordinarily, High Court is not entitled to go behind the findings of facts recorded by the Courts below. Unless and until illegality or manifest perversity or misconstruction or misreading is, successfully, pointed out, the High Court cannot interfere with the findings of facts of the courts below. It would be, therefore, appropriate to examine the merits of this appeal in the aforesaid legal background.

10. The first question which is required to be examined is as to whether on facts and circumstances of the case, the finding of the District Court in First Appeal, holding that the suit document, Ex. 78, dated 5-4-1948, is a mortgage by conditional sale and not an outright sale with a condition to repurchase is erroneous. The learned District Judge reversed the finding of the trial court. The learned trial court Judge was pleased to hold that the suit document, Ex. 78, is not a mortgage by conditional sale, as pleaded by the plaintiff. According to the finding of the trial court, the original defendant is an absolute owner of the suit land, being a bona fide purchaser for the value paid. Therefore, the suit for redemption was dismissed. Upon appeal, the learned District Judge was pleased to hold that the transaction dated 5-4-1948, as evidenced by the suit document, Ex. 78, is of a mortgage by conditional sale, as pleaded by the plaintiff and not a sale by condition to repurchase, as contended by the original defendant. This finding of fact recorded by the learned District Judge is fully justified in the circumstances. It cannot be contended that the learned District Judge has committed illegality in interpreting the suit document, at Ex. 78.

11. Having examined the facts and circumstances and the entire tenor of the suit document, Ex. 78, it can safely be concluded that the finding recorded by the learned District Judge is justified. It is true that the first part of the suit document, Ex. 78, speaks about the out-right sale but in the second part a tacit reference is made for getting the suit land redeemed. Probably, the learned trial court Judge must have interpreted the document mainly placed reliance on the first part of the document. The document, as such, has to be interpreted after reading it as a whole. Undoubtedly, while interpreting a document, it is one of the fundamental principles that the document must be read, as a whole, and the effect should be given to the terms thereof, as far as possible, to bring about the very real intention of the parties. Having, dispassionately examined the entire suit document, this court is satisfied that the interpretation of the trial Court is erroneous and the interpretation of the lower appellate court is justified. The appellate court has rightly placed reliance on following the words incorporated in the suit document, in Gujarati:

(Vernacular matter is omitted.)

It means that the suit land shall be redeemed within the period of five years from the date of its execution, on payment of principal amount. The expressions are

used and understood in Gujarati language to mean that "the property shall be redeemed". The learned District Judge has rightly emphasised on the aforesaid words while interpreting the suit document. Unfortunately, the learned trial court Judge has failed to appreciate the afore-said Gujarati words and has drawn unwarranted inference that the suit document was nothing but an out-right sale transaction. With due respect, this observation of the learned trial court Judge is not only erroneous but is perverse and, rightly reversed by the learned appellate Judge.

12. It also appears from the language of the document that the learned trial court Judge was led away by the first part of the document evidencing ostensible sale, which is, in reality, one of the conditions of the transaction evidencing the mortgage by conditional sale.

13. At this stage it would be necessary to refer to the provisions of Section 58(c) of the Transfer of Property Act, 1882 ("TP Act" for short) which are not seriously appreciated and examined by the learned trial court Judge. Section 58 provides provision relating to mortgage of immovable property and charges, in Chapter IV. Section 58(c) of the TP Act prescribes provision for mortgage by conditional sale. It reads as under:

"58. (c) Where the mortgagor ostensibly sells the mortgaged property -

On a condition that on default of payment of the mortgage-money on a certain date the sale shall become absolute, or

on condition that on such payment being made the sale shall become void, or

on condition that on such payment being made the buyer shall transfer the property to the seller,

the transaction is called a mortgage by conditional sale and the mortgagee a mortgagee by conditional sale:

Provided that no such transaction shall be deemed to be a mortgage, unless the condition is embodied in the document which effects or purports to effect the sale."

Section 58 of the TP Act enumerates six classes of mortgage. They are as follows:

- (i) Simple mortgage,
- (ii) Mortgage by conditional sale,
- (iii) Usufructury mortgage,
- (iv) English Mortgage,
- (v) Equitable mortgage, and
- (vi) Anomalous mortgage.

Clause (c) of Section 58 of the TP Act makes a provision for transaction evidencing mortgage by conditional sale. This is a mortgage in which ostensible sale is conditional and intended security for the debt. In case of payment at the time fixed the condition was that the sale became void or that the mortgagee executed a reconveyance. The learned trial court Judge failed to appreciate the distinction between a mortgage by conditional sale and a sale with a condition of repurchase. In a case of mortgage transaction debt subsists and the right to redeem remains with the debtor. In case of sale transaction with . condition of repurchase, there is no lending and borrowing arrangement. No question of redemption would arise in case of a sale with a condition of re-transfer. But in a mortgage by conditional sale, right of redemption subsists, notwithstanding, that the mortgagor has failed to pay at the stipulated time. This right arises from the fact that the property is considered to be merely a pledge or security for the loan.

14. It appears that there was some confusion on the part of the learned trial court Judge while interpreting the nature and terms of the suit transaction, which are produced, at Ex. 78. It must be noted that a mortgage is a transfer of the interest in a specific immovable property as security for repayment of debt. The nature of the right of transfer depends on the form of the mortgage, No particular form of words is necessary for creation of a mortgage. It is necessary to ascertain as to what was the true and exact nature of the suit transaction after examining the facts and circumstances and the terms of the suit transaction, Unfortunately, the trial court fell in serious error in interpreting the suit transaction as a conditional sale with a right to repurchase. A sale with a condition to retransfer is not a mortgage for the relationship of debtor and creditor does not subsist and there is no debt for which the transfer is a security. It is also not a partial transfer but a transfer of all rights in the property reserving only a personal right of repurchase which is lost if not exercised within the stipulated time. The real distinction between the mortgage by conditional sale and sale with a right to repurchase is not clearly appreciated by the learned trial court Judge.

15. The construction of the suit document, Ex. 78, made by the learned District Judge is quite reasonable and justified in the facts and circumstances of the case. Where a document has to be construed, the Court has to read the document, as a whole, and in case of any ambiguity, the intention has to be gathered and that too in the first place in the document itself. If the words and expressions are clear, effect must be given to them and the court should not embark upon any extraneous inquiry as to what was thought and intended by the parties at the time of execution of the document. However, even if ambiguity persists or remains in the field in the language employed in the document itself, then it is permissible to look into the surrounding circumstances as to what was intended by the parties. The proposition is very well settled since long by the Apex Court in the case of " Pandit Chunchun Jha Vs. Sheikh Ebadat Ali and Another, . No doubt, the question whether a suit transaction is intending a mortgage by conditional sale or a sale with a right to repurchase is a complex

and vexed question and which at times has given rise to trouble and litigation. Ordinarily, the interpretation of the nature of the document and if required the intention of the parties will have to be decided on the facts of each case. However, certain broad principles must be borne in mind while making construction of the documents. There are numerous decisions on this point and much industry has been expended in some of the reported cases in analysing and interpreting the nature of the document. However, one thing cannot be forgotten that two documents are seldom expressed in identical terms and when it is necessary to consider the attendant circumstances the imponderable variables which brings in its train make it impossible to compare one case with another. This proposition is also very clear from the aforesaid decision of the Apex Court. Therefore, each case has to be decided on merits of its own. Nevertheless, certain broad principles still remain in the field which require consideration at the time of making construction or interpretation of the suit transaction.

16. The first principle that requires to be considered is the intention of the parties. However, the intention, at the first place, has to be gathered from the tenor of the terms of the questioned document. Thus, the first intention has to be seen from the document itself, if available. If the words or expressions of stipulations are clear and unambiguous in the document, effect must be given to them without any estraneous aid or inquiry for the purpose of ascertaining the intention. In such a situation what the parties have thought at the time of execution is important and not the parties ought to have thought. The real question in such a case is what the parties intended or meant but what is the legal effect of the expressions which they have used and incorporated in the document itself. Still, however, if ambiguity persists in making correct construction of the document while appreciating the language employed therein then and then it will be permissible for the court to look into the surrounding circumstances and ascertain and determine as to what the parties intended to do.

17. The questioned transaction, produced, at Ex. 78, is not properly and correctly appreciated and examined by the learned trial court Judge. Considering the entire tenor and the terms and conditions of the suit transaction, it becomes crystal clear that the suit transaction dated 5-4-1948 as evidenced by document, at Ex. 78, is nothing but- a mortgage by conditional sale and not a sale with a condition to repurchase. Therefore, this court has no hesitation in rejecting the first forceful contention raised by the learned counsel for the appellant.

18. Next it will lead us to the appreciation of the merits of second point raised by the learned counsel for the appellant. The court is now required to consider as to whether on facts and circumstances of the case the suit is not maintainable in view of the application, Ex. 82, filed by the plaintiff under the provisions of the Bombay Agricultural Debtors Relief Act, 1947, hereinafter referred to as the "BADR Act", and Ex. 81, dismissing the application by the competent court. At the time of Marathon hearing, this court, prima facie, found that the trial court

ought to have raised additional issue in this behalf. Therefore, upon the joint submission made by the learned counsel for the parties, this court exercised its powers under Order 41, Rule 25 of the Code raised the following additional issue and it was sent to the trial court for decision after recording additional evidence, if any:

"What is the true legal effect of the withdrawal pursis, Ex. 82, and the order passed below Ex. 81, in a proceeding under the BADR Act, 1947, on the question of maintainability of the suit ?"

It was found that the pointed attention of the parties was not focused on the aforesaid issue and, therefore, the said issue was remitted to -the trial court for its decision.

19. Pursuant to the direction given by this Court on. 17-9-1991, the trial court has submitted its findings on the additional issue after hearing both the parties. Neither party to the proceeding had given any additional evidence on the said issue. Therefore, after hearing the learned advocates for the parties, the trial court gave the finding on the said issue. According to the opinion of the trial court, the suit filed by the plaintiff is maintainable, despite the pursis at Ex. 82 and the order passed below Ex. 81, being an application under BADR Act. This finding recorded by the learned trial court Judge, on 23-3-1992, is also seriously challenged by the Learned counsel for the appellant.

20. Learned counsel for the appellant has, vehemently, contended that in view of the provisions of Sections 15 and 51A of the BADR Act read with Order 23, Rules 3 and 4 of the Code the suit will not be maintainable. This submission is countenanced by equal vehemence by the learned counsel for the respondent. It is contended by him that the benevolent provision of BADR Act are designed to advance the interest of the debtor and the remedy pursued and later on abandoned by the original plaintiff before the competent court under the BADR Act, would not in any way, disqualify the plaintiff from filing the suit for redemption of the suit land. He has also taken this court through several provisions of the BADR Act and contended that this is a benevolent legislation of agricultural debtors and the suit filed for redemption is always maintainable under the provisions of Section 60 of the TP Act.

21. A very interesting question is raised with regard to the maintainability of the suit in the aforesaid circumstances in the present case and the right of mortgagor to redeem the mortgaged property, as prescribed in Section 60 of the TP Act. The mortgagor's right to redeem and the date fixed for payment is called, in English Law "equity of redemption". The right of redemption is" an incident of a subsisting mortgage and subsists so long as the mortgage itself subsists. Section 60 of the TP Act affirms the right of redemption in all mortgages. It will be, therefore, appropriate to refer to the provisions of Section 60 of the TP Act, which read as under:

"60. 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 to derogation of the interest transferred to the mortgagee has been extinguished.

Provided that the right conferred by this section has not been extinguished by the 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 provisions 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.

Nothing in this section shall entitle a person interested in a share only of the mortgaged property to redeem his own share only, on payment of a proportionate part of the amount remaining due on the mortgage, except only where a mortgagee, or, if there are more mortgagees than one, all such mortgagees, has or have acquired, in whole or in part, the share of a mortgagor."

22. It can very well be seen from the aforesaid provision that right of redemption conferred by Section 60 of the TP Act can be extinguished by the act of the parties or by decree of a court. The right conferred by this section is a right to redeem and a suit to enforce it is called a suit for redemption. This section is not prefaced by any such words as "in the absence of a contract to the contrary". The right of redemption is, therefore, a statutory right which cannot be fettered by any condition which impedes or prevents redemption. This proposition of law is also very well settled. Any such condition will be void as a clog on redemption.

23. Mortgage being a security for the debt, the right of redemption continues although the mortgagor fails to pay the debt at due date. Any provision inserted to prevent, evade or hamper redemption is void. This is also implied in the maxim "once a mortgage is always a mortgage". It will be appropriate to observe and mention what learned Collins, M.R. said in "Jarrah Timber & Wood Paving Corporation v. Samuel," (1903 (2) Ch. 1 at p.7):

"It is the right of a mortgagor on redemption, by reason of the very nature of a mortgage to get back the subject of the mortgage....to hold and enjoy as he was

entitled to hold and enjoy it before the mortgage. If he is prevented from doing so, that which he is entitled to on redemption is prevented, and to constitute such prevention it is not necessary that the subject of the mortgage should be directly charged with whatever causes the prevention. If he be so prevented in fact, the equity of redemption is affected by what, whether very aptly or not, has been always termed "a clog".

In that case a company borrowed money on the security of their debenture stock with a condition that the debenture holders should have an option of purchasing the stock at 40% of its price within 12 months. This condition was tested on the anvil of justice and it was held to be a "clog" on the redemption. The doctrine of a clog on the equity of redemption is a rule of justice, equity and good conscience and this has been reaffirmed by the Apex court of the land in the case of " Murarilal Vs. Dev Karan, . In that case Gagendragadkar, C.J., delivered the judgment of the court and observed that there was a long line of authorities in India in which it had been so held, notwithstanding the decisions of the Privy Council in two cases. It follows that the doctrine is applicable in an area where the TP Act is not in force. This is also supported by the fact that Section 60 is not subject to a contract to the contrary. The right of redemption, therefore, is a statutory right which as Lord Macnaghten said in the case of *Noakes & Co. v. Rice* reported in 1902 AC 24 (at p. 30), is "of the very nature and essence of a mortgage and inherent to the thing itself." The right of redemption cannot be controlled by any agreement made as part of the transaction of mortgage. In equity relationship with the mortgagor and mortgagee subsists and the right to redeem exists. This right is statutory and is recognised in Section 60 of the TP Act. Thus, it becomes clear that so long as there is a right of mortgage "there is a right of redemption.

24. However, the learned counsel for the appellant has contended that in the present case the right of redemption came to be extinguished in view of the application, at Ex. 82 and the subsequent order passed by the court below Ex. 81, under the provisions of BADR Act. Prima facie, this submission appears to be attractive but not acceptable in the circumstances of the case.

25. It is contended on behalf of the appellant/original defendant that the proceedings under the BADR Act and the present suit are between the same parties and same relief was sought in the earlier proceedings but at the relevant time the plaintiff did not proceed with earlier proceedings under "BADR" Act against the defendant and the reason behind it was that the matter had been settled as per Ex. 82 pursis and, therefore, the proceedings came to be withdrawn against the present defendant. It is further contended that the competent court under the BADR Act was pleased to dismiss the proceedings against the defendant and as no appeal was filed by the original plaintiff under the BADR Act, the suit filed by him for redemption is not maintainable. As against that, it is contended by the learned counsel for the original plaintiff that no award or decree was passed and that there was no settlement of the dues

and the proceedings initiated by the plaintiff-under the BADR Act and subsequent withdrawal would not tantamount to extinguishment of right to get the property redeemed. It is also contended that BADR Act is a benevolent enactment and it is designed in the interest of agricultural debtors. In support of this contention, reliance is also placed on the decision rendered in the case of AIR 1934 205 (Privy Council) . The right to redeem is a right conferred upon the mortgagor by enactment, of which he can only be deprived by means and in manner enacted for that purpose, and strictly complied with. The proviso to Section 60 of the TP Act provides that the right conferred by this Section can be extinguished by an act of parties or by the order of the Court. Admittedly, there is no award or order or decree of a competent court on merits. There was no decision rendered by the competent court under BARD Act in the said proceeding. However, it is contended that the application Ex. 82 submitted by the plaintiff would go to show that the mortgage dues were settled and, therefore, the proviso will be attracted and suit will not be maintainable. This submission is also without any substance in the present case.

26. It may be noted that it is true that the original plaintiff-respondent herein had filed an application recorded as Chapter Case No. 1378 of 1949 under the provisions of the BADR Act against the original defendant-present appellant in Form No. 14, prescribed under the BARD Act. Certified true copy of the said case under the BADR Act is produced, at Ex. 81. It was filed by the original plaintiff on 11-4-1949, against three persons, including original defendants, for the adjustment of his debts. In the said proceedings, application Ex. 82, was given to the original plaintiff, on 11-11-1950. Pursuant to the said application, the learned Civil Judge passed an order, on 11-12-1950, below Ex.81, stating that application against the original defendant-appellant herein, and another two persons be dismissed for want of prosecution. Thus, admittedly, no decision on merit was obtained or given by the court. Reliance is placed on the statement made in Ex. 82 to the effect that it was declared by the plaintiff that he had settled with original defendant and, therefore, the case against him and one Karsan Trikam should be dismissed. Relying on the aforesaid statement, it is contended that there was a settlement and compromise in respect of mortgage dues and, therefore, the proviso shall be attracted. This submission presupposes the settlement of mortgage dues and the same had been paid to the original plaintiff by the defendant. It cannot be read from the said statement that the mortgage debt was satisfied or that the mortgagor had lost his right of redemption. Mere mentioning of settlement without the nature or terms of settlement, in the application, Ex. 82, or any evidence anywhere on behalf of the defendant would not disentitle the plaintiff to pursue his right of redemption by filing a suit in respect of the suit land. In the facts and circumstances of the case, the proviso would not be attracted to hold that the suit is not maintainable. There is no evidence worth the candle on record to show that by virtue of making statement in the application Ex. 82 mortgage debt came to be settled and extinguished. The equity of redemption will not be extinguished by mere such statement on the

part of the mortgagor that there was a settlement with the mortgagee regardless of the nature of it. In the facts of the present case, it cannot be contended that there was an extinguishment of mortgage debt by a statement made in the application, at Ex. 82, by the mortgagor.

27. Apart from that, the original plaintiff/mortgagee has, categorically, stated in his evidence, at Ex. 68, as to what was the nature of settlement. Moreover, it is clearly denied by the plaintiff in his evidence that the mortgage dues were even paid. He has explained that the case was settled between the parties under BADR Act. That after payment the plaintiff should get the suit land redeemed. It is also further testified by the plaintiff that thereafter he had approached the mortgagee-defendant to pay the mortgage money and to get the suit land redeemed. But the defendant refused to take money. Thus, it becomes clear that there was no settlement and payment of mortgage debts or resultant extinguishment of right of redemption. It is true that the nature of settlement is not incorporated in, Ex. 82. However, that aspect itself would not lead to an inference that the mortgage dues were paid and consequently right of redemption was extinguished. On the contrary, there is a clear and cogent evidence of the mortgagor that what was settled was to pay the mortgage debt after some time and get the suit land redeemed. There is no reason to discard this part of the evidence on record. Therefore, there is no substance in the contention that the suit is not maintainable in view of the order passed below Ex. 81 pursuant to the application filed by the original mortgagor in the said proceeding under BADR Act. The additional issue framed by this court and sent to the trial court is, rightly, certified by holding that right to redeem the property is not extinguished. This finding of the learned trial court Judge is required to be affirmed. Moreover, the provisions of BADR Act are designed to protect the interest of agricultural debtors falling within the purview of the BADR Act. It is a special benevolent legislation in favour of agricultural debtors. The application under BADR Act was submitted by the original plaintiff-mortgagor in the prescribed Form No. I prescribed under the provisions of Section 16 of the BADR Act. Section 16 provides the duties of debtors and creditors. Considering the entire scheme of object of the BADR Act, this court finds much substance in the contention raised on behalf of the original mortgagor in this behalf.

28. In Section 4(1) of Chapter II of the BADR Act, provision is made about the procedure for making application for adjustment of debts. In Section 5 of the BADR Act it is mentioned that every creditor and debtor shall file true and correct statement before the Court. Provision for recording the settlement in an application under the BADR Act is provided in Section 8 of the Act. It would be expedient to refer the provisions of Section 8 of the BADR Act, which reads as under:

"8. (1) If any debtor and any or all of his creditors arrive at a settlement in respect of any debt due by the debtor to the creditor, the debtor or any of the creditors may, within thirty days from the date of such settlement, make an

application to the Court for recording such settlement.

(2) Every such application shall be in the prescribed form and shall be signed and verified in the prescribed manner.

(3) On receipt of such application the Court shall, after giving notice to the creditor or the debtor, as the case may be, and after making such inquiry as it thinks fit, if it is satisfied that the settlement arrived at is bona fide and voluntary and is not made with intent to defeat or delay any of the creditors of the debtor, and is in the interest of the debtor, record such settlement and certify the same. Every such settlement so recorded and certified shall be binding upon the parties thereto and shall not, save as otherwise hereinafter provided, be re-opened.

(4) After the Court has recorded and certified a settlement under Sub-section (3), the Court shall call upon the debtor to make a declaration whether there are any other debts due by the debtor which are not included in the settlement. If the debtor makes a declaration that there are no such debts, the Court shall make an award in terms of such settlement.

(5) If the Court is satisfied, after recording such settlement, that there are other debts due from the debtor which are not included in the settlement, the Court shall treat the application made under Sub-section (1) of an application for adjustment of debts u/s 4."

29. Notwithstanding anything contained in other provisions of the BADR Act, it is provided in Section 9 of the BADR Act that if during the pendency of the proceedings before the Court or the Court in appeal, as the case may be, a settlement is arrived at between a debtor and all his creditors and if such Court is satisfied that the settlement has been made by the debtor voluntarily and is for his benefit, such Court may make an award in terms of such settlement. It will be also interesting to refer to the provisions of Section 10 of the BADR Act, which prescribes that certain settlement shall be void. In Section 10 it is provided that every settlement of a debt due from a debtor to any creditor, which is not certified by the Court u/s 8, or in terms of which no award has been made u/s 9, shall be void shall not be recognised by any Court for any purpose whatsoever. This provision has material bearing in the present case. It is an admitted fact that the settlement as alleged is never certified by the competent court as required u/s 8 of the BADR Act, all in terms of the settlement nor such decree or award is passed by the competent court under the BADR Act. Even otherwise also mere adjustment of debt itself, without clear terms and stipulations in the settlement, if any, would not constitute extinguishment of the debt or right to redeem the property. So, on all counts, the objection against the maintainability of suit for equity of redemption of the suit land is itself not maintainable and acceptable.

30. It may also be mentioned that Section 60 of the TP Act provides that the right conferred by this section on mortgagor to redeem the property will not be extinguished except by act of the parties or by decree of a court, as aforesaid.

What is emphasised in that unless the act of parties or a decree of court extinguishes the right to redeem the equity of redemption cannot be defeated. On the facts, on record, relying on Ex. 82, the Civil Court had dismissed the case under the BADR Act, for default. Of course, there is a mention in Ex. 82, regarding settlement between the parties. Mere mention of settlement "ipso-facto" is not sufficient to presume that there was extinguishment of right to redeem. Not only that there was no order or award of the Court. There was also no permission as required u/s 12 of the BADR Act. Moreover, what kind of settlement was made was also not mentioned in the application. Therefore, even assuming that the plaintiff has not clarified as to what was the settlement, it cannot be presumed, or it will not be sufficient to hold that the right to redeem came to an end. Even assuming that Ex. 82 filed by the mortgagor in the court proceedings under BADR Act being a withdrawal pursis, then also it cannot be contended that in absence of any Order 23, Rule 4(b) of the Code, the subsequent suit for redemption will be barred. What is required to be established is the extinguishment of right to redeem the property. Even an incomplete decree or a decree not involving a decision on merit will not constitute a sufficient or legal ground to extinguish the right to redeem. It must be clearly and tacitly established that the right of redemption is extinguished by acts of parties or decree of the court, as provided in Section 60 of the TP Act. The right which is derived by the statute can only be taken away by means and manner provided in the proviso to Section 60 of the TP Act. Even the second suit for redemption will be maintainable if the decree passed in the former suit does not expressly deprive the plaintiff of his right to redeem the property. Unless it is established that the mortgagor's right to redeem is extinguished, it cannot operate as "res judicata" so as to prevent the court u/s 11 of the Code from trying a second redemption suit. So, unless and until the equity of redemption is extinguished by means and manner provided in the proviso to Section 60 of the TP Act, the Court will be at loath to uphold the contention against the right of redemption provided in Section 60 of the TP Act. In AIR 1934 205 (Privy Council) , the Privy Council has held that the right to redeem is a right conferred upon the mortgagor by enactment, of which he can only be deprived by means and in the manner enacted for that purpose. Thus, it becomes clear that in order to deprive the plaintiff of his right of redemption, it must be, categorically, and, strictly, established that either by acts of the parties or the decree of the competent court, the right of redemption has been extinguished. In view of the aforesaid discussion and the relevant legal settings, this court has no hesitation in holding that the suit filed by the plaintiff for redemption is maintainable.

31. Lastly, the learned counsel for the appellant/original defendant-mortgagee, pointed out that the learned District Judge has, seriously, erred in directing preliminary decree in terms of para 7 (1) of the plaint. It is also, seriously, criticised that the learned District Judge has committed, serious error of law in holding that the plaintiff will be entitled to file application under Order 20, Rule 12 of the Code. It is further pointed out that as directed by the learned District

Judge, decree is drawn accordingly. Thus, it is mentioned in the decree itself that decree is passed in terms of para 7 (1) of the plaint. The learned counsel for the appellant is justified in this submission. With due respect, it appears that the learned District Judge failed to appreciate the provisions of Order 34, Rule 7 of the Code while passing the final order in the First Appeal. Since this Court is of the clear opinion that the suit transaction, dated 5-4-1948, evidenced by Ex. 78, is nothing but a mortgage by a conditional sale, the preliminary decree is required to be passed in terms of Order 34, Rule 7 of the Code. Order 34, Rule 7 of the Code provides specific provision with regard to the preliminary decree in a suit for redemption and for taking accounts and for a declaration of the amount due under the suit document, at Ex. 78, due to the defendant. The direction with regard to the mesne profit contained in the final order is, seriously, questioned by the learned counsel for the appellant/original defendant-mortgagee. He contended that there cannot be such direction under Order 20, Rule 12 of the Code. This submission is also opposed by the learned counsel for the respondent/original plaintiff-mortgagor. The preliminary decree is required to be passed in a redemption suit in view of the Order 34, Rule 7 of the Code and the final decree in a redemption suit is required to be passed in terms of the provisions of Order 34, Rule 8 of the Code.

32. In view of the aforesaid facts and circumstances and the legal settings, the directions of the learned District Judge in the final order regarding preliminary decree are modified. Rest of the findings in the impugned judgment and decree are confirmed and it is directed that the preliminary decree for redemption of the mortgage shall be drawn in terms of the provisions of Order 34, Rule 7 of the Code.

33. The impugned judgment and decree stands partly, modified accordingly. The appeal is, partly, allowed to that extent. The appellant/original defendant-mortgagee shall pay the costs all throughout.

34. Before parting, it may be noted that since this Court has ordered for passing of a preliminary decree and whereas final decree is yet to be passed and considering the time so far involved and the transaction being of 1948, the lower Court is directed to accord priority to this matter and dispose it of as early as possible but not later than 31-3-1993.