

(1997) 04 GUJ CK 0009
In the Gujarat High Court
Case No : Second Appeal No. 55 of 1993

Vora Aminbai Ibrahim

APPELLANT

Vs

Vora Taheral Mohmedali and Others

RESPONDENT

Date of Decision : 02-04-1997

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 23 Rule 1, Order 23 Rule 2, Order 34 Rule 7, Order 9 Rule 9, 100(5)
Transfer of Property Act, 1882 — Section 58 , 60

Citation : AIR 1998 Guj 31 : (1998) 1 GLR 760

Hon'ble Judges : J.M. Panchal, J

Bench : Single Bench

Advocate : Suresh M. Shah, for the Appellant; A.M. Mehta, for the Respondent

Final Decision : Dismissed

Judgement

J.M. Panchal, J.—This Second Appeal u/s 100 of the Code of Civil Procedure, 1908, has arisen from the suit brought by respondents for redemption of property which was mortgaged to the deceased appellant.

2. The suit property is a building situated in Jamnagar City and is described in detail in list "A" appended to the plaint. The suit property originally belonged to deceased Sugrabai. She was owner and in possession of the suit property since long. The suit property was mortgaged by deceased Sugrabai for Rs. 2,000/- to the deceased appellant by executing an unregistered deed dated April 21, 1965. The period of mortgage was stipulated to be of 5 years in the said deed. On the date of execution of the unregistered mortgage deed, possession of the property was handed over to the deceased appellant. It may be stated that during the pendency of the Second Appeal, the original appellant i.e. Vora Aminabai Ibrahim expired on May 10, 1995, and her heirs and legal representatives have been brought on the record of the case by allowing Civil Application No. 1531 of 1995. Deceased Sugrabai had instituted Regular Civil Suit No. 307 of 1972 in the Court of learned Civil Judge (J.D.), Jamnagar for redemption of mortgage. During the

pendency of the said suit Sugrabai expired on January 19, 1974. As her heirs and legal representatives were not brought on record of Regular Civil Suit No. 307 of 1972, the suit was disposed of as having abated. Thereafter, the present respondents as heirs and legal representatives of deceased Sugrabai instituted Regular Civil Suit No. 488 of 1976 in the Court of learned Civil Judge (J. D.), Jamnagar, for redemption of mortgage. It may be stated that this suit was instituted by the respondents on August 27, 1975.

3. The suit was contested by the deceased appellant. In view of the pleadings of the parties, the Court had framed necessary issues for determination. The parties had led oral as well documentary evidence in support of their respective claims. On appreciation of the evidence, suit for redemption of mortgaged property was decreed by the trial Court and a preliminary decree was ordered to be drawn in terms of the judgment.

4. Being aggrieved by the preliminary decree for redemption of mortgage, deceased appellant preferred Regular Civil Appeal No. 109 of 1981 in the District Court, Jamnagar. The appellate Court partly allowed the appeal, but preliminary decree for redemption of mortgage which was passed by the trial Court was confirmed. Thereupon the deceased appellant preferred Second Appeal No. 193 of 1982 in the High Court. The High Court was of the view that suit for redemption of mortgage based on unregistered deed of mortgage was not maintainable. However the High Court relied on decision of Division Bench rendered in the case of Kanbi Ladha Ukeda v. Joshi Jestaram Gangaram and others XXII, GLR 801 (sic) and held that as the deceased appellant admittedly had entered into the possession of lands as a mortgagee without any registered mortgage deed, he acquired limited title of a mortgagee and a suit for redemption against deceased appellant was maintainable at the end of 12 years. The High Court found that suit for redemption was not filed at the end of 12 years. The High Court therefore, concluded that suit for redemption of mortgage was premature. In view of these conclusions, the High Court by judgment and order dated February 17, 1983, set aside preliminary decree for redemption of mortgaged property passed by trial Court as confirmed by the first appellate Court reserving liberty to the respondents to file suit on completion of period of 12 years.

4.1 Pursuant to the liberty which was reserved to institute a fresh suit for redemption, the respondents instituted Regular Civil Suit No. 746 of 1983 in the Court of learned Joint Civil Judge (J. D.) Jamnagar, for redemption of mortgage. The deceased appellant contested the suit by filing written statement at Ex. 10. It was inter alia pleaded by the deceased appellant that in view of the judgment of the High Court, the suit was not maintainable and liable to be dismissed. Plea regarding non-joinder of necessary parties was also raised in the written statement. It was also averred in the written statement that suit was barred by time prescribed by law. Having regard to the pleadings of the parties, the trial Court framed 8 issues for determination. To prove their case, the plaintiffs

examined Vora Taherali Mohamedali at Exh. 27, whereas the deceased appellant examined her husband at Exh. 41. On appreciation of evidence led by the parties, the trial Court held that the respondents were entitled to redeem the property which was mortgaged by deceased Sugrabai to deceased appellant. The trial Court negated the plea raised by the deceased appellant that suit was liable to be defeated for non-joinder of necessary parties. The trial Court did not uphold the objection raised by the deceased appellant that suit was barred by time prescribed by law. It was also deduced by the trial Court that suit was not barred by principles of res judicata nor barred by principles governing delay, laches, etc. The trial Court further held that the deceased appellant failed to prove that the deceased appellant had incurred expenditure of Rs. 1,000/- in respect of the suit property as averred in paragraphs 20 and 21 of the written statement. In view of these conclusions, the trial Court decreed the suit by judgment and order dated August 14, 1986. By the said decree, the respondents were directed to pay Rs. 2,000/- being mortgage amount to the deceased appellant or deposit the same in the Court or on or before September 10, 1986 and the deceased appellant was directed to hand over vacant possession of the suit property with tenant to the respondents. A preliminary decree in terms of Order XXIV Rule 7(1)(b) of C.P.C. was also ordered to be drawn. While passing preliminary decree for redemption of mortgage, it was clarified that on payment of Rs. 2,000/- the respondents would be entitled to apply for final decree.

5. Feeling aggrieved by the preliminary decree for redemption of mortgage which was passed by trial Court, the deceased appellant preferred Regular Civil Appeal No. 118 of 1986 in the District Court at Jamnagar. The learned Assistant Judge, Jamnagar, who heard the appeal dismissed the same by judgment and order dated June 13, 1992 which has given rise to the present appeal.

6. At the time of admission of Second Appeal, following substantial questions of law have been formulated for determination.

1. Is the document at Exh. 28 an agreement to mortgage or a mortgage by itself?
2. When the first suit has been disposed of as abated and the second suit was withdrawn with leave to file a fresh suit, is the third suit competent?

7. Mr. S.M. Shah, learned Counsel for the appellant submitted that the suit for redemption is not filed at the end of 12 years on the footing that the deceased appellant did not acquire title to the property, and, therefore, suit for redemption against the deceased appellant was not maintainable. It was pleaded that unregistered document dated April 21, 1965, which is on record of the case at Exh. 28 is not a mortgage deed but an agreement to mortgage the property in future, and, therefore, the courts below were not justified in passing preliminary decree for redemption of mortgage. It was emphasized that the deceased appellant had properly incurred expenses in respect of mortgaged property and as liberty is not reserved to the deceased appellant to lead evidence regarding proper expenditure incurred in respect of mortgaged property nor order having

been passed that an account be taken of the expenditure incurred by the deceased appellant, preliminary decree for redemption of mortgage drawn by the Courts below should be modified.

8. Mr. A.M. Mehta learned Counsel for the respondents submitted that Regular Civil Suit No. 746 of 1983 is instituted on the basis that the deceased appellant did not acquire any title to the property on expiry of period of 12 years from the date of unregistered mortgage deed and the suit having been properly framed, no error can be said to have been committed by the Courts below in passing preliminary decree for redemption of mortgage. It was stressed that the suit for redemption is instituted on the footing that the deceased appellant did not acquire any title to the property at the end of 12 years and as the suit is not based on unregistered mortgage deed, first substantial question of law formulated by the Court does not arise for consideration at all. Learned Counsel for the respondents highlighted that the second suit was not withdrawn at all by the respondents but decree passed in favour of the respondents was set aside by the High Court on the ground that suit was premature and as factual basis on which second substantial question of law is formulated, is incorrect, the second substantial question of law also should be answered against the appellant.

9. The contention that the frame of the suit is not proper nor in accordance with direction given by the High Court while disposing of Second Appeal No. 193 of 1982, and, therefore, the Second Appeal should be allowed is devoid of merits and cannot be accepted. It is well settled that where a person enters into the possession of immovable property not on the assertion of any absolute title but on the basis of unregistered mortgage deed in his favour and remains in possession for more than 12 years, he acquires the status of a mortgagee by the doctrine of prescription and so even though unregistered mortgage deed is not a valid transaction for want of registration, the mortgagor is entitled to redeem the property. A bare perusal of the plaint makes it abundantly clear that suit for redemption of mortgage is not based on unregistered mortgage deed. What is claimed and asserted in the plaint is that even at the end of period of 12 years, the deceased appellant acquired limited title of mortgagee and nothing more and that the respondents were entitled to redeem property. This is quite evident from the averments made in paragraphs 6 and 10 of the plaint. While disposing of Second Appeal No. 193 of 1982 even the High Court held that though suit for redemption of mortgage based on unregistered deed of mortgage was premature, at the end of 12 years, deceased appellant would not acquire title to the property and suit for redemption of mortgage would be maintainable by the respondents after expiry of period of 12 years. The frame of the suit is not only perfectly legal and valid, but can in no circumstances be termed as contrary to the direction of the High Court contained in Second Appeal No. 193 of 1982. Therefore, the decrees passed by the Courts below are not liable to be set aside on the ground that suit is not properly framed or on the ground that suit for redemption is based on unregistered deed of mortgage.

10. So far as first substantial question of law is concerned, it is to be noticed that the suit for redemption of mortgage is not instituted on the basis of unregistered document of mortgage which is produced at Exh. 28. As observed earlier, the suit for redemption of mortgage is instituted by the respondents on the footing that at the end of 12 years, deceased appellant did not acquire any title to the property except as mortgagee and the respondents are entitled to redeem the mortgage. As the suit is not based on unregistered mortgage deed, strictly speaking, it is not necessary for the Court to consider substantial question No. 1 formulated by the Court. However, even if one were to agree with the submission of Mr. Shah, learned Counsel for the appellant that suit is based on Exh. 28, the preliminary decree for redemption of mortgage passed by the Courts below in favour of the respondents cannot be set aside on the ground that Exh. 28 is not a mortgage deed by itself but an agreement to mortgage in future. While disposing of Second Appeal, the High Court has held that principal money secured by deed Exh. 28 was more than Rs. 100/- and as Exh. 28 was not registered, the Courts below were not justified in passing decree for redemption of mortgage on the basis of an unregistered mortgage deed. From the findings recorded in paragraphs 4, 7, 8 and 9 of the judgment of High Court rendered in Second Appeal No. 193 of 1982 it is clear beyond pale of doubt that Exh. 28 is an unregistered mortgage deed and not an agreement to enter into mortgage deed in future. Even a bare reading of Exh. 28 makes it abundantly clear that it is mortgage deed and not an agreement to execute mortgage deed in future. In Exh. 28 itself it is mentioned that on receipt of Rupees 2,000/- deceased Sugrabai had handed over possession of the disputed property to deceased appellant. In the deed, the parties stipulated that the period of mortgage was of 5 years and before the expiry of the said period, deceased Sugrabai was not entitled to redeem the property. Deceased Sugrabai had agreed to pay municipal taxes, education cess, etc. relating to the property. It is true that it was stipulated between the parties to execute registered deed and deceased Sugrabai had agreed to bear expenditure of registration, stamp, etc., but merely because execution of registered deed was contemplated by the parties, it cannot be held that deed Exh. 28 is not an unregistered mortgage deed, but an agreement to execute mortgage deed in future. It is relevant to notice that first substantial question of law which is formulated by the Court was never argued either in the trial Court or in the first appellate Court. However, on construction of deed Exh. 28 there is no manner of doubt that it is an unregistered mortgage deed and not an agreement to execute mortgage deed in future. Moreover, as noticed, earlier, the last suit which is filed in the year 1983 for redemption of mortgage is based on the footing that at the end of 12 years, the deceased appellant did not acquire any title to the property except that of a mortgagee and the respondents were/are entitled to redeem the property. The suit is not based on unregistered mortgage deed Exh. 28. Therefore, even if substantial question No. 1 is decided in favour of the appellant, it will not make any difference so far as preliminary decree for redemption of mortgage which is passed in favour of the respondents is concerned. Even otherwise in the present case deceased appellant on her own

admission had entered into possession of suit property as a mortgagee. This is evident from first statement made by husband of the appellant in the deposition recorded in the trial Court on oath. It was not case of the deceased appellant that she had entered into the possession of the disputed property on assertion of title or any other right except as a mortgagee. Therefore, the suit for redemption filed by respondents is perfectly maintainable against the deceased appellant. On totality of the facts and circumstances of the case, I am of the opinion that the substantial question No. 1 cannot be answered in favour of the appellant. Substantial question No. 1 is therefore, answered against the appellant and it is held that document Exh. 28 is not an agreement to mortgage in future, but it is an unregistered mortgage deed by itself.

11. So far as second substantial question of law is concerned it would be useful to consider what is redemption and what is scope of a suit for that purpose. "Redemption" presupposes existence of a "mortgage." "Mortgage" as defined in the Transfer of Property Act, is the transfer of an interest in immovable property for the purpose of securing the payment of a loan. A mortgage is created by act of parties. In usufructuary mortgage, the transfer is made of the right of the possession and enjoyment of the usufruct. The rights of a usufructuary mortgage form part of the bundle of rights which constitute ownership the remainder still remains with the mortgagor and can be transferred by him. On the execution of a mortgage two distinct rights are carved out, namely, (i) the mortgagee's right (i) and (ii) the mortgagor's right. The mortgagee's right is the right of security for the respondent of his loan. The mortgagor's right is as indicated in Section 60 of the Transfer of Property Act, i.e., after the principal money has become due, the mortgagor has a right to pay the mortgage money and on such payment he has a right to require the mortgagee, among others, to deliver possession. This right cannot be extinguished except by the act of parties or by a decree of a Court. This right is called the right to redeem and a suit to enforce it is called a suit for redemption. Thus, the scope of a suit for redemption is primarily to enforce the right to make payment of the mortgage money. A claim to redeem a mortgage actually does not attach to the land, although the decree passed in that suit may ultimately affect possession which is also an interest in land. An owner has a bundle of interests in property. By executing a mortgage he transfers only some interest to the mortgagee and that also by way of security. That interest is confined to realization of mortgage debt, which, in the event of nonpayment, may be realized out of the said security. What remains with the mortgagor after execution of the mortgage, is the ownership of the property, minus the interest transferred, and the right to repay the mortgage money and to get the burden of security discharged. That right has been created in the mortgagor and not in the property. Thus, when a mortgagor enforces his right to redeem, he does not enforce a right in land. Having noticed relevant principle it would be appropriate to take into account the admitted facts of the case. The second substantial question of law proceeds on the footing that second suit for redemption of mortgage was withdrawn by the respondents. However, the

learned counsel for the appellant has failed to point out that Regular Civil Suit No. 488 of 1976 which was instituted by the respondents was withdrawn by the respondents at any point of time. The record on the contrary shows unerringly that the said suit was decreed by the trial court and a preliminary decree for redemption of mortgage was ordered to be drawn in favour of the respondents. The record also clinchingly proves that the said decree was challenged by the deceased appellant before the District Court, Jamnagar, by way of filing Regular Civil Appeal No. 109 of 1981 which was also dismissed, and, therefore, the deceased appellant had carried the matter to the High Court by way of filing Second Appeal No. 193 of 1982. The judgment rendered by the High Court in Second Appeal No. 193 of 1982 is on the record of the case at Exh. 32. The said judgment also does not indicate that Regular Civil Suit No. 488 of 1976 instituted by the respondents in the Court of learned civil Judge (J.D.), Jamnagar, for redemption of mortgage was withdrawn at all. As second unit was not withdrawn and as suit for redemption of mortgage is filed pursuant to liberty reserved by High Court while disposing of Second Appeal No. 193 of 1982, it cannot be said that the last suit in which decree is passed in favour of the respondents is not competent. In fact while formulating second substantial question of law, factual error is committed. However, even if it is assumed for the sake of argument that second suit for redemption of mortgage was withdrawn, effect of withdrawal of said suit on right of the respondents to file suit for redemption will have to be considered. It is not in dispute that suit filed by deceased Sugrabai was disposed of as having abated. However, there is no manner of doubt that successive suits for redemption of mortgage can be filed till right of redemption is not extinguished. Having regard to provisions of Section 60 of the Transfer of Property Act and Order XXIII, Rule 1 and 2 of the Code of Civil Procedure, it will have to be held that dismissal of earlier suit for redemption whether as abated or as withdrawn or in default would not debar the mortgagor from filing a suit for redemption and that such second suit for redemption to redeem the same mortgage can be brought so long as the mortgage subsists and the right of redemption is not extinguished by efflux of time or by a decree of Court passed in the prescribed form. This is because the right of redemption is an incident of a subsisting mortgage and is inseparable from it so that the right is coextensive with the mortgage itself. It subsists so long as mortgage itself subsists until it is appropriately and effectively extinguished and the extinguishment of the right of redemption can only happen either by the act of the parties concerned, or by a proper decree of the competent Court. The right of redemption can be extinguished as provided in Section 60 of Transfer of Property Act and when it is alleged to have been extinguished by a decree the decree should run strictly in accordance with the form prescribed for the purpose. The Full Bench of Bombay High Court has also in an earlier case reported in *Rajaram Vithal Sutar Vs. Ramchandra Pandu*, taken a similar view. In that case, the first suit for redemption was dismissed as abated on account of the death of the mortgagor. The second suit was brought by the heirs of the mortgagor. An objection was raised that the dismissal of the earlier suit which had been dismissed as abated

operated as a bar. Negating the said plea, the Full Bench, has held as under :

(4) Now, the CPC deals with procedure relating to all suits. There is a special law, which deals with rights of mortgagors and mortgagee, and that law is to be found in the Transfer of Property Act. Section 60 provides, that a mortgagor has the right to redeem the mortgaged property after the principal money has become due, and the mortgagor either pays or tenders the amount due on the mortgage; and the proviso to that section states that this right continues so long as it has not been extinguished either by the act of the parties or by the decree of a Court. Before the Act was amended the expression was "order of a Court" instead of "decree of a Court". Therefore, Section 60 confers the right to redeem upon the mortgagor, and also provides that the right is to continue until one or the other of the two eventualities mentioned in the section takes place : one, the act of the parties and the other, an order or a decree of a Court which extinguishes that right. Now, it is perfectly clear that when the suit abated there was no express order of the Court extinguishing the right of redemption. Can it be said that the mortgagor could not enforce that right, because the second suit was barred under Order 22, Rule 9? If the Legislature in a piece of special legislation confers a particular right upon a party, it must intend that that right should be an enforceable right. Therefore, in our opinion, the general provisions of the CPC as contained in Order 22, Rule 9, are to that extent overridden by the specific provisions of Section 60, T.P. Act. So long as the relationship of mortgagor and mortgagee continues, and so long as the right to redeem has not been extinguished by a decree of the Court, or by the act of the parties, the mortgagor is entitled to go to a Court of law to enforce his right. Of course the position with regard to limitation is different, because the Limitation Act expressly provides that the period of limitation for redemption suits is sixty years.

(6) Sir Amberson Marten C.J. and Crump J. were considering the dismissal of a suit for default, and the consequence following upon it under Order 9, Rule 9 in Shridhar Sadba Powar Vs. Ganu Mahadu Kavade, It will be noticed that the consequence is the same as on an abatement of the suit, and that Bench held that the general terms of Order 9, Rule 9, do not override the specific directions of Section 60, T.P. Act, 1882. If the general terms of Order 9, Rule 9 can not override the specific directions of Section 60, equally so that general terms Order 22, Rule 9, cannot override the specific directions of Section 60, T.P. Act. We see no difference in principle between the decision in 52 Bom 111 and the case we are considering now; and we are not satisfied by Mr. Shah's argument that that case was wrongly decided.

(8) In 44 Bom 939 : (AIR 1920 Bom 29) Sir Norman Macleod and Heaton J. had to consider the consequence of a redemption suit being dismissed under the provisions of Order 23, Rule 1, and the subsequent suit filed for redemption; and Sir Norman Macleod says (p. 941) :

"So long as it had not been decided that there was no mortgage at all then the relationship of mortgagor and mortgagee existed. The law allows a particular

period to the mortgagor within which he can redeem the mortgage. The mere fact that he files a suit to redeem and then either abandons or withdraws it will not deprive him of his right to redeem. It is only when there has been a decision that there was no mortgage at all that it necessarily follows that the right to redeem falls to the ground."

Our attention has been drawn to a recent decision of the Madras High Court *Mattapalli Raju and Others Vs. Challa Venkata Raghavayya and Others*, where in a Division Bench of that Court Palanjali Sastri J. seems to have taken a view contrary to the view taken by this Court in the case I have just referred to. That Bench held that Section 60, T.P. Act, does not override the provisions of Order 33, Rule 1, sub-rule (3), Civil P.C. This view seems to be contrary to the current (sic) of authority consistently followed by this Court.

(11) Therefore, it is clear from this decision that the right of redemption cannot be taken away from the mortgagor, except i n the manner and to the extent provided by Section 60, T.P. Act. We are of the opinion that the abatement of the suit is not a decree of the Court, which extinguishes the right of redemption. The procedural effect of Order 22, Rule 9 cannot override the express provisions of Section 60.

Thus, there is a no manner of doubt 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 manner enacted for that purposes. No case contrary to law could be cited on behalf of the appellants. Unless the equity of redemption is so extinguished, a second suit for redemption by the mortgagor if filed within the period of limitation is not therefore barred. If the mortgagee fails to establish that the old decree extinguished the right to redeem, there is no ground for saying that the old decree operates as res-judicata and the courts are prevented from trying the second suit u/s 11 of the Code of Civil Procedure. Even provisions like Order IX, Rule 9, or Order XXIII. Rule I would not debar the mortgagor for filing a second suit for redemption because, as in a partition suit, the cause of action in a redemption suit is a recurring one. The cause of action in each successive suit, until the right of redemption is extinguished or a suit for redemption is time barred, is a different one. So long as the relationship of mortgagor and mortgagee continues and so long as the right to redeem has not been extinguished by a decree of the court or by the act of the parties, the mortgagor is entitled to go to a court of law to enforce his rights. The abatement of the first suit filed by deceased Sugrabai was not a decree of the Court extinguishing the right of redemption and as such, abatement of said suit would not operate as a bar in the second suit for the same relief. At the time of filing the suit in question for redemption, the mortgage was subsisting and the respondents' right to redeem the property had not been extinguished and so the abatement of the earlier suit filed by deceased Sugrabai would operate as a bar. In view of this settled legal position, substantial question No. 2 is answered in the affirmative and against the appellant.

12. So far as last contention relating to modification of decree is concerned, it is to be noted that no substantial question of law is formulated by the court regarding rights of the appellants to take accounts for expenditure incurred by them in respect of mortgage property. It hardly needs to be emphasized that as provided by Section 100(5) of the Code of Civil Procedure, second appeal has got to be heard on substantial questions of law formulated through respondent is entitled at the hearing of the appeal to argue that the case does not involve such question. It is true that proviso to Sub-section (5) of Section 100 lays down that the power of the Court to hear for reasons to be recorded the appeal on any other substantial question of law not formulated by it is not taken away or abridged in any manner. However, power of the Court to hear the appeal on any other substantial question of law not formulated by it is dependant on the satisfaction of the court that the case involves such question. Having regard to the facts of the case, I am not satisfied that the case involves substantial question of law relating to expenditure incurred by the appellant in respect of mortgage property. Even otherwise, in the written statement and more particularly in paragraphs Nos. 20 and 21 of the written statement, the deceased appellant had pleaded that she had properly incurred expenses in respect of the mortgage property and while declaring the amount due, the same should be taken into consideration. However, on appreciation of the evidence, the trial Court has held that the deceased appellant had not incurred expenses as claimed in paragraphs 20 and 21 of the written statement. The judgment of the first appellate court does not indicate that point regarding expenses having been incurred by the appellants in respect of suit property was canvassed before it. The submission that the deceased appellant was entitled to lead evidence regarding expenditure incurred by her in respect of mortgaged property after passing of preliminary decree and that too in the proceeding to be initiated before Commissioner for taking accounts has no substance. Order XXXIV, Rule 7 of C.P.C. lays down the manner in which the court has to draw a preliminary decree in redemption suit. It provides inter alia that while passing preliminary decree, the Court should, order that an account be taken and what was due to the defendant at the date of such decree for (1) principal and interest on the mortgage, (ii) the cost of suit, if any, awarded to him and (iii) other cost charges and expenses properly incurred by him up to that date, in respect of his mortgaged security, together with interest thereon or (b) declare the amount so due at that time. In the present case, the trial Court has declared that an amount of Rs. 2,000/- is due from the respondents to deceased appellant. Before declaring the amount due at the date of passing preliminary decree, the court has taken into consideration the claim advanced by deceased appellant that she had properly incurred expenses in respect of mortgaged property. As noted earlier, the trial Court while passing preliminary decree had reserved right to the respondents to apply for final decree on payment of Rs. 2,000/-. The record of the case shows that by submitting application dated Sept. 24, 1986 at Exh. 45, the respondents prayed the court to pass final decree in their favour as an amount of Rs. 2,000/- was deposited on Sept. 9, 1986. On application being

submitted, notice was ordered to be issued to deceased appellant. Deceased appellant contested said application by filing reply which is at Exh. 57. Even in the reply also deceased appellant did not plead that she had incurred expenses in respect of mortgaged property after preliminary decree, and, therefore, she should be permitted to lead necessary evidence to prove her claim regarding expenses having been incurred. On totality of the facts and circumstances of the case, I am of the view that no error is committed by the trial Court in passing impugned preliminary decree in redemption suit. It is perfectly in consonance with the provisions of Order XXXIV, Rule 7 of CPC and no case is made out on behalf of appellant for modification of the said decree. Therefore, the third contention is also without substance and cannot be accepted.

13. For the foregoing reasons, I do not find any substance in Second Appeal and the Second Appeal is liable to be dismissed. The Second Appeal, therefore, fails and is dismissed. However, having regard to the facts of the case, there shall be no order as to cost.