

M/S NEW KENILWORTH HOTELS (P) LTD.

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v.

ASHOKA INDUSTRIES LTD. AND ORS.

OCTOBER 17, 1994

[K. RAMASWAMY AND N. VENKATACHALA, JJ.]

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State Financial Corporation Act—Section 29/Transfer of Property Act, 1882—Section 60—Scope of Right of redemption u/s 60—Mortgage other than a mortgage by conditional sale or an anomalous mortgage—Sale pursuant to final decree not confirmed—Mortgagor entitled to exercise right u/s 60—No question of merger of mortgage debt in decretal debt—Limited right of Financial Corporation u/s 29 to act as an owner to bring properties of defaulter to sale—Corporation not to act in derogation of right u/s 60 of T.P. Act.

C

The appellant filed writ petition in the High Court seeking for an order to recall the judgment rendered by the High Court in another writ petition dated 16.9.91 and also to direct impleading of the appellant as a party to that writ petition and to hear it afresh in accordance with law. That writ petition was dismissed under the impugned order holding that the appellant was not a necessary party to the writ petition and the contesting respondent had a statutory right of redemption u/s 60 of the Transfer of Property Act.

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The appellant had offered bid by tenders offering to purchase the hotel constructed by the mortgagor and taken over by the Orissa State Financial Corporation but its offer had not become final by virtue of the order of the High Court. The High Court by its order had given option to the mortgagor to exercise the right of redemption u/s 60 of the T.P. Act. In furtherance thereof the mortgagor had filed a suit and that suit was still pending.

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This appeal had been filed against the judgment of the High Court.

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The appellant contended that under Section 29 of the State Financial Corporation Act, while taking over the property, the Corporation shall act in derogation of the right as a mortgagee u/s 60 of the Transfer of Property Act. Therefore, under the proviso to Section 60 when the Orissa State Financial Corporation had entered into an agreement with the appellant,

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A it had acted in derogation of the mortgage and since the appellant had already offered his bid by tender though his bid was not accepted pursuant to the order of the Court, he had an interest in the bid. It was also contended that the appellant was a licensee to run the Hotel as entered into with the Corporation and as such it was a necessary party, and therefore, he had a right to be heard, before the High Court, directing the mortgagee to work out the right u/s 60 of the T.P. Act.

B
 Dismissing the appeal, this Court

C HELD 1.1. It is settled law that in the suit for redemption unless it is a conditional sale or anomalous mortgage so long as the sale is not confirmed, the debtor has a right to deposit the entire sale money including the sale expenses and poundage fee and the Court is under the statutory duty to accept the payment and direct redemption of the mortgage. Therefore, it was not open to the appellant to contend that under the proviso to Section 60 of the Transfer of Property Act, the Corporation has acted in derogation of its right as a mortgagee but acted as an owner u/s 29 of the State Financial Corporation Act. Though u/s 29 of the Act, the Corporation acts as an owner in putting the property to sale, it does not act in derogation of the right of the Corporation as a mortgagee and that of mortgagee. The limited right given to the Corporation u/s 29 is to act as an owner to bring the properties of the defaulter to sale. The fiction of law u/s 29 does not have the effect of wiping out the statutory right of redemption u/s 60 of the T.P. Act. Therefore, the right of the mortgagee still subsists and thereby the mortgagee is entitled to exercise the right u/s 60 of the T.P. Act. [430-H, 431-A-C]

F *Maganlal v. M/s Jaiswal Industries & Ors.*, [1989] 4 SCC 344, relied on.

G 1.2. It is only an interim arrangement made pending sale of the property. Therefore, the licensee does not have any right other than that to be in possession as licensee pending the dispute between the mortgagee and the mortgagee. Accordingly, the appellant is not a necessary party to be heard before the order was passed by the High Court directing the mortgagee to exercise the right of redemption under Section 60 of the T.P. Act. [431-D-E]

H CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 7379-81

of 1994.

From the Judgment and Order dated 16.8.94 & 9.8.94 of the Orissa High Court in O.J.C. No. 5392 & Misc. Case No. 5390 of 1994.

P. Chidambaram, Harish Salve and Sunil K. Jain for the Appellant.

R.K. Jain, G.L. Sanghi, Gautam Acharya, Y. Adharyu, A.P. Medh, Pratap Sahni and S.B. Upadhyay for the Respondents.

The following Order of the Court was delivered :

Leave granted.

We have heard the learned counsel for the parties. We do not think that there is any justifiable reason for interference with the order of the High Court of Orissa. The appellant filed OJC No. 5392/94 in the High Court seeking for an order to recall the judgment rendered by the High Court in OJC No. 4047/89 dated 16.9.91 and also to direct impleading of the appellant as a party to the aforesaid writ petition and to hear it afresh in accordance with law. That writ petition was dismissed under the impugned order dated August 16, 1994 holding that the appellant is not a necessary party to the writ petition and the contesting respondent Ashoka Industries Ltd. has a statutory right of redemption under s.60 of the Transfer of Property Act and that, therefore, the appellant cannot be heard to contend that Ashok Industries Ltd. have no right to redemption under s.60 of the Transfer of Property Act.

Sri P. Chidambaram, learned Senior counsel for the appellant contended that under s.29 of the State Financial Corporation Act, for short 'the Act', while taking over the property, the Corporation shall act in derogation of the right as a mortgagee under s.60 of the T.P. Act. Therefore, under the proviso to s.60 when the O.S.F.C. had entered into an agreement with the appellant, it had acted in derogation of the mortgage and, therefore, the mortgagor M/s. Ashoka Industries had no right of redemption. Since the appellant had already offered his bid by tender on November 2, 1989 though his bid was not accepted pursuant to the order of the Court, he has an interest in the bid. It was also contended that the appellant is a licensee to run the Hotel entered into with O.S.F.C. and as such it is a necessary party. Therefore, he had a right to be heard, before the High Court directing M/s Ashoka Industries Ltd. by order dated

A 16.9.1991 to work out the right under s.60 of the T.P. Act. Thirdly, it was contended that this Court in *Maganlal v. M/s Jaiswal Industries, Neemach & Ors.*, [1989] 4 SCC 344, had decided the question only under s.31 of the Act. It did not deal with the effect of s.29. Therefore, the ratio has no application. We find no force in any of the contentions. It is true that the appellant had offered bid by tenders on November 2, 1989 offering to purchase the hotel constructed by Ashok Industries Ltd. and taken over by O.S.F.C. and offered a sum of Rs. 3.18 crores at the sale price. Admittedly, its offer had not become final by virtue of the order of the High Court. The High Court in the order dated 16.9.1991 had given option to Ashok Industries Ltd. to exercise the right of redemption under s.60 of the T.P. Act. In furtherance thereof Ashoka Industries Ltd. had admittedly filed a suit and that suit is still pending. Since the appellant had only inchoate right he does not get any higher right than of a mere offerer for its consideration before sale is effected. As seen, there is no sale which is materialised. Though under s. 29 of the O.S.F.C. acts as an owner in putting the property to sale, it does not act in derogation of the right of the O.S.F.C. as a mortgagee and Ashok Industries as mortgagor. This Court has considered in *Magan Lal's* case the scope of the right under s.60 and held in paragraphs 13 and 14 thus :

E "It was further held that in a suit for redemption of a mortgage other than a mortgage by conditional sale or an anomalous mortgage, the mortgagor has a right of redemption even after the sale has taken place pursuant to the final decree, but before the confirmation of such sale. In view of these provisions the question of merger of mortgage debt in the decretal debt does not arise at all.

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 G In this view of the matter we are of the opinion that in case the provisions of Order XXXIV, Rule 5 of the Code are held to be applicable to the instant case appropriate relief can be granted thereunder as the order of confirmation of the sale passed by the High Court in favour of the first purchaser has not become absolute due to the pendency of these appeals against that order nor has the right of redemption of Maganlal yet extinguished."

H It is also equally settled law that in the suit for redemption unless it is a conditional sale or anomalous mortgage so long as the sale is not

confirmed, the debtor has a right to deposit the entire sale money including the sale expenses and poundage fee and the court is under the statutory duty to accept the payment and direct redemption of the mortgage. In the light of the above law, it is not open to the appellant to contend that under the proviso to s.60 of the T.P. Act, the Corporation has acted in derogation of its right as a mortgagee but acted as an owner under s.29 of the Act. As stated earlier, the limited right given to the Corporation under s.29 is to act as an owner to bring the properties of the defaulter to sale and not in derogation of right under s. 60. The fiction of law under s.29 does not have the effect of wiping out the statutory right of redemption under s.60 of the T.P. Act. Therefore, the right of the mortgagee still subsists and that thereby the mortgagor is entitled to exercise the right under s. 60 of the T.P. Act.

Further contention that the appellant had become a licensee and, therefore, he has a right to be heard has no force. It is only an interim arrangement made pending sale of the property. Therefore, the licensee does not have any right other than that to be in possession as licensee pending the dispute between the mortgagor and the mortgagee, namely, the O.S.F.C. and Ashok Industries Ltd. Accordingly, we are of the view that the appellant is not a necessary party to be heard before the order was passed by the High Court on September 16, 1991 in the writ petition directing the Ashoka Industries Ltd. to exercise the right of redemption under s.60.

The appeals are accordingly dismissed but without costs.

A.G.

Appeals dismissed.