

**RIGHTS OF THE MORTGAGOR IN A SUIT FOR FORECLOSURE: A DISCOURSE
IN REFERENCE TO THE PROVISIONS OF THE CODE OF CIVIL PROCEDURE
1908**

by

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ABSTRACT:

Code of Civil Procedure 1908 (hereafter ‘CPC’) provides procedure for filing suits of a civil nature, for the establishment of Civil Courts, defines the rights of the litigants and provides remedies of appeal, review, revision and reference, etc. The Transfer of Property Act 1882 (hereafter ‘T.P. Act’) provides provisions for transfer of properties by mortgage, lease, etc. This paper aims to construe the provisions for recovery of the excess amount of sale of the mortgaged property in a transaction of sale in a suit for foreclosure of mortgage. The paper is doctrinal and aims to protect the rights of the judgment debtor.

KEYWORDS: Mortgage; Equitable rights; Title; Purchaser.

INTRODUCTION:

Mortgage is a type of contract and is governed by the essentials of a valid agreement provided in the Indian Contract Act 1872 (hereafter ‘Contract Act’). Section 10 of the Contract Act states, “All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void”. A contract of mortgage becomes enforceable when a mortgage amount is agreed in lieu of the mortgaged property either in possession of the mortgagor or the mortgagee. Section 58 of the T.P. Act defines the term ‘mortgage’.

LAW FOR THE RECOVERY OF MORTGAGE AMOUNT:

This section describes the provisions for fulfillment of the sale price of the mortgaged property, in different heads, the provisions of the CPC to protect the rights of the mortgagor or the judgment debtor in such transactions and the genesis of section 69 of the T.P. Act. Sections 72 and 76 of the T.P. Act provides respectively rights and liabilities of the mortgagee in possession of the mortgage property. If the mortgagor satisfies the mortgage

amount, he becomes entitled to redeem the mortgaged property and to file a suit for redemption under section 60 of the T.P. Act. Instead, when the mortgagor does not reimburse the mortgage amount, the mortgagee attains right to file a suit for foreclosure under section 67 of the T.P. Act. Section 67 of the T.P. Act provides right to foreclosure or sale.¹ Section 69 of the T.P. Act provides, 'sale when valid'. Section 69 of the T.P. Act states:

“Power of sale when valid.—A mortgagee, or any person acting on his behalf, shall, subject to the provisions of this section, have power to sell or, concur in selling the mortgaged property, or any part thereof, in default of payment of the mortgage-money, without the intervention of the Court, in the following cases and in no others, namely:—

(a) where the mortgage is an English mortgage, and neither the mortgagor nor the mortgagee is a Hindu, Muhammadan or Buddhist or a member of any other race, sect, tribe or class from time to time specified in this behalf by the State Government, in the Official Gazette;

(b) where a power of sale without the intervention of the Court is expressly conferred on the mortgagee by the mortgage-deed and the mortgagee is the Government;

(c) where a power of sale without the intervention of the Court is expressly conferred on the mortgagee by the mortgage-deed and the mortgaged property or any part thereof was, on the date of the execution of the mortgage-deed, situate within the towns of Calcutta, Madras, Bombay, or in any other town or area which the State Government may, by notification in the Official Gazette, specify in this behalf.

(2) No such power shall be exercised unless and until—

(a) notice in writing requiring payment of the principal money has been served on the mortgagor, or, one of several mortgagors, and default has been made in payment of the principal money, or of part thereof, for three months after such service; or

(b) some interest under the mortgage amounting at least to five hundred rupees is in arrear and unpaid for three months after becoming due.

(3) When a sale has been made in professed exercise of such a power, the title of the purchaser shall not be impeachable on the ground that no case had arisen to authorize the

¹ Section 67 of the T.P. Act states:

“Right to foreclosure or sale.—In the absence of a contract to the contrary, the mortgagee has, at any time after the mortgage-money has become 3[due] to him, and before a decree has been made for the redemption of the mortgaged property, or the mortgage-money has been paid or deposited as hereinafter provided, a right to obtain from the Court 4[a decree] that the mortgagor shall be absolutely debarred of his right to redeem the property, or 4[a decree] that the property be sold.

A suit to obtain 4[a decree] that a mortgagor shall be absolutely debarred of his right to redeem the mortgaged property is called a suit for foreclosure.”

sale, or that due notice was not given, or that the power was otherwise improperly or irregularly exercised; but any person damnified by an unauthorised or improper or irregular exercise of the power shall have his remedy in damages against the person exercising the power.

(4) The money which is received by the mortgagee, arising from the sale, after discharge of prior incumbrances, if any, to which the sale is not made subject, or after payment into Court under section 57 of a sum to meet any prior incumbrance, shall, in the absence of a contract to the contrary, be held by him in trust to be applied by him, first, in payment of all costs, charges and expenses properly incurred by him as incident to the sale or any attempted sale; and, secondly, discharge of the mortgage-money and costs and other money, if any, due under the mortgage; and the residue of the money so received shall be paid to the person entitled to the mortgaged property, or authorised to give receipts for the proceeds of the sale thereof.

(5) Nothing in this section or in section 69A applies to powers conferred before the first day of July, 1882.

Sub-section (4) of Section 69 of the T.P. Act provides mode for utilization of the sale price obtained from the sale of mortgage property. This provision requires the mortgagee or the decree holder to disburse the sale price for disposal of encumbrances rents and taxes on the mortgage property, secondly, on the discharge of mortgage money, and the “the residue of the money so received shall be paid to the person entitled to the mortgaged property ...” The tenets of this latter disposition of the price of sale by the mortgagee must be analyzed on the following rationales:

1. A mortgagor mortgages the property in lieu of the mortgage amount agreed to with the mortgagee. The mortgagee is entitled to file a suit for foreclosure of the mortgage in case the mortgagor does not redeem the mortgage amount. In this contract of mortgage, the mortgagor mortgages his self earned or ancestral property over which his title subsists. The mortgaged property is never owned by the mortgagee in any of the modes of mortgages, i.e. the mortgage by conditional sale², usufructary mortgage³,

² Section 58(b) of the T.P. Act.

³ Section 58(d) of the T.P. Act.

the English mortgage⁴, or mortgage by deposit of title deeds⁵ until the mortgage amount is recoverable from the mortgagor.

2. If the mortgagee does not have title over the mortgaged property, then they hold enforceable interest only on the mortgage amount and not any amount more or less than the mortgage amount. This construes that the mortgagee cannot recover the amount more than that of the mortgage amount even in a suit for recovery of the mortgage amount or in a sale in pursuance of the suit for recovery.
3. CPC provides “Mode of Execution of Decree” in Order XXI engrained in First Schedule to the CPC. Rule 72 of Order XXI of CPC specifically empowers the Court to set aside a sale of property made in a suit of execution without the permission of the Court being taken by the decree holder. This provision intends to secure the interests of the judgment debtor from any unfair sale of the property.
4. In Mangal prasad vs. Krishna Kumar Maheshwar⁶ a shop was sold to realise a decree debt of about Rs.29,000/- and the sale price at the auction was Rs. one lakh and odd. This Court finding that it is excessive execution, set aside the sale and directed return of the sale amount to the auction- purchaser with interest @ 12%.⁷
5. In Lal Chand case⁸, a sale made without permission of the Court of execution was held illegal, though the appellant judgment debtor became liable to satisfy the decree.
6. In Ambati Narasavva vs. M. Subba Rao⁹, this court had pointed out as under: "It is of importance to note from this provision that in all execution proceedings, the court has to first decide whether it is necessary to bring the entire attached property to sale or such portion thereof as may seem necessary to satisfy the decree. If the property is large and the decree to be satisfied is small, the court must bring only such portion of

⁴ Section 58(e) of the T.P. Act.

⁵ Section 58(c) of the T.P. Act.

⁶ (1992) Supp. (3) SCC 31.

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Ibid.

https://jajharkhand.in/wp/wp-content/judicial_updates_files/01_CPC/29_order_21_rule_64/Lal_Chand_vs_Viiiith_Addl._District_Judge_&_O_rs_on_21_February,_1997.PDF

https://jajharkhand.in/wp/wp-content/judicial_updates_files/01_CPC/29_order_21_rule_64/Lal_Chand_vs_Viiiith_Addl._District_Judge_&_O_rs_on_21_February,_1997.PDF

⁸ Lal Chand v. VIII Addl. District Judge, 1997 SC, https://jajharkhand.in/wp/wp-content/judicial_updates_files/01_CPC/29_order_21_rule_64/Lal_Chand_vs_Viiiith_Addl._District_Judge_&_O_rs_on_21_February,_1997.PDF

⁹ AIR 1990 SC 119.

the property, the proceeds of which would be sufficient to satisfy the claim of the decree holder, it is immaterial whether the property is one or several. Even if the property is one, if a separate portion could be sold without violating any provisions of law only such portion of the property should be sold. This, in our opinion, is not just a discretion, but an obligation imposed on the court. Care must be taken to put only such portion of the property to sale the consideration of which is sufficient to meet the claim in the execution petition. The sale held without examining this aspect and not in conformity with this requirement would be illegal and without jurisdiction."

7. In the State of Bombay, rule 72A of Order XXI of CPC provides:

"Order XXI, rule 72A has been added by the High Court of Bombay to provide that if leave to bid is granted to a mortgagee, then, as regards him, a reserve price shall be fixed, which shall not be less than the amount due as principal, etc."¹⁰ Similar provisions have been inserted by the Rule 72A in Order XXI of CP in Gazette of India dated 08.04.1974 and Rule 72A in Order XXI of CPC in the State of Gujarat.

8. The contract of mortgage requires implementation of the provisions of the Contract Act 1872. Section 23 of the Contract Act renders every agreement void and unenforceable which is against the provisions of any law enforced in India.
9. Rule 72 of Order XXI of CPC requires the decree holder to take permission from the Court of execution before making the bid in case of the sale of immovable property. Order XXI, Rule 72 of CPC states:

"Decree holder not to bid for or buy property without permission.

(1) No holder of a decree in execution of which property is sold shall, without the express permission of the Court, bid for or purchase the property.

(2) Where decree-holder purchases, amount of decree may be taken as payment-

Where a decree-holder purchases with such permission, the purchase-money and the amount due on the decree may, subject to the provisions of section 73, be set off against one another, and the Court executing the decree shall enter up satisfaction of the decree in whole or in part accordingly.

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<https://www.advocatekhaj.com/library/lawreports/civilprocedure1908/125.php?Title=Code%20of%20Civil%20Procedure,%201908&STitle=Order%20XXI,%20rule%2072>

(3) Where a decree-holder purchases, by himself or through another person, without such permission, the Court may, if it thinks fit, on the application of the judgment-debtor or any other person whose interests are affected by the sale, by order set aside the sale; and the costs of such application and order, and any deficiency of price which may happen on the re-sale and all expenses attending it, shall be paid by the decree-holder.”

10. Rule 72A of Order XXI of CPC specifically requires the mortgagee or the decree holder to take permission of the Court before bidding on or purchasing the property sold in execution of a decree of the mortgage.¹¹ In case the sale value of property gets decreased on a resale, the purchaser becomes liable to indemnify the decree holder or the judgment debtor of the price in deficit due to re-sale of the immovable property.¹²
11. Rule 83 of Order XXI of CPC provides for postponement of sale to give sufficient time to the judgment debtor for satisfaction of the decretal amount.
12. Rule 89 of Order XXI of CPC entitles the judgment debtor to file a suit for recovery of the amount in difference between the amount received by the decree holder prior to the sale and the amount more than that of the decree which the decree holder purports to receive by virtue of the sale of immovable property.
13. Similarly, Rule 90 of Order XXI of CPC confers rights to the judgment debtor to “apply to the Court to set aside the sale on the ground of a material irregularity or fraud”. Also, Rule 91 of Order XXI of CPC states, “The purchaser at any such sale in

¹¹ Rule 72A of Order XXI of CPC states:

“72A. Mortgagee not to bid at sale without the leave of the Court.

(1) Notwithstanding anything contained in rule 72, a mortgagee of immovable property shall not bid for or purchase property sold in execution of a decree on the mortgage unless the Court grants him leave to bid for or purchase the property.

(2) If leave to bid is granted to such mortgagee, then the Court shall fix a reserve price as regards the mortgagee, and unless the Court otherwise directs, the reserve price shall be-

(a) not less than the amount then due for principal, interest and costs in respect of the mortgage if the property is sold in one lot; and

(b) in the case of any property sold in lots, not less than such sum as shall appear to the Court to be properly attributable to each lot in relation to the amount then due for principal, interest and costs on the mortgage.

(3) In other respects, the provisions of sub-rules (2) and (3) of rule 72 shall apply in relation to purchase by the decree-holder under that rule.”

¹² Rule 71 of Order XXI of CPC.

execution of a decree may apply to the Court to set aside the sale, on the ground that the judgment-debtor had no saleable interest in the property sold.”

14. The proviso to Rule 92 of Order XXI of CPC “requires the Court not to confirm the sale until the final disposal of any claim or objection pertaining to the sale even if any property is sold in execution of a decree. Further Rule 93 of Order XXI of CPC provides for ‘Return of purchase money’ in case the sale of immovable property is set aside under rule 92 of Order XXI of CPC.

These provisions aim to protect the rights of the judgment debtor (mortgagor) and ensure that the sale is not vitiated due to arbitrariness or the cleverness of the decree holder. On the basis of these rationales, it can be safely inferred that the mortgagee must be required to disburse the amount left after satisfaction of the encumbrances, the mortgage money, etc. to the “mortgagor”. Such a disbursement to the mortgagor will be just and consistent with the principles of equity. Therefore, the provision in sub-section (4) of Section 69 of the T.P. Act must be amended to the following effect:

“... the residue of the money so received shall be paid to the “mortgagor ...”.¹³ Such an amendment is in line with the golden rule of interpretation which states that, “ordinarily the court must find out the intention of the legislature from the words used in the statute by giving them their natural meaning but if this leads to absurdity, repugnance, inconvenience, hardship, injustice or evasion, the Court must modify the meaning to such an extent and no further as would prevent such a consequence”.¹⁴ These principles of the golden rule of interpretation are squarely applicable for protection of the rights of the mortgagor in case of sale of the mortgaged property by the Court of execution under the provisions of Rule 72A of Order XXI of CPC and section 68 and 69 of the T.P. Act.

CONCLUSION:

¹³ Sub-section (4) of Section 69 of the T.P. Act :The money which is received by the mortgagee, arising from the sale, after discharge of prior incumbrances, if any, to which the sale is not made subject, or after payment into Court under section 57 of a sum to meet any prior incumbrance, shall, in the absence of a contract to the contrary, be held by him in trust to be applied by him, first, in payment of all costs, charges and expenses properly incurred by him as incident to the sale or any attempted sale; and, secondly, discharge of the mortgage-money and costs and other money, if any, due under the mortgage; and the residue of the money so received shall be paid to the person entitled to the mortgaged property, or authorised to give receipts for the proceeds of the sale thereof.

¹⁴ Prof. T. N. Bhattacharya, *The Interpretation of Statutes* 42 (9th ed. Central Law Agency Prayagraj 2014).

Sub-section (4) of Section 69 of the T.P. Act entitles the Mortgagee to distribute the amount of sale remaining after satisfaction of the encumbrances and the mortgage money to the person entitled to the mortgaged property i.e. the purchaser. In fact, neither the purchaser nor the mortgagee is entitled for the remaining price money and that must be disbursed or returned to the mortgagor because he is the title holder of the mortgaged property and has given the mortgage property as a security of the mortgage money. So, the amount which remains after satisfaction of the encumbrances on the mortgaged property and the fulfillment of the mortgage transaction must be disbursed to the ‘mortgagor’ and none else. Such a construction of the provisions of the sub-section (4) of Section 69 of the T.P. Act will make the provision in consonance with the provisions of the CPC and the tenets of equity.

The rule of harmonious construction provides that, “When two or more provisions of the same statute are repugnant the court will try to construe the provisions in such a manner, if possible, as to give effect to both by harmonising them with each other. It can be assumed that when the legislature gives something by one hand it does not take away the same by the other. One provision of an Act does not make another provision of the same Act useless.”¹⁵ The rule of harmonious construction becomes applicable to protect the rights of the mortgagor or judgment debtor in a suit for foreclosure in accordance to the provisions of the CPC and the T.P. Act. A discretion is to be regulated according to known rules of law¹⁶ and not the mere whim or caprice of the person to whom it is entrusted on the assumption that he is discreet.¹⁷ Thus, the arbitrariness involved in disbursement of the remnant amount to the purchaser of the mortgaged property could be resolved by an amendment for protection of the rights of the mortgagor.

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¹⁵ *Id* at 48.

¹⁶ P. St. J. Langan, *Maxwell on the Interpretation of Statutes* 105 (12th edn. 1969), Sweet and Maxwell Limited, Great Britain. *Id* at 148; *Lee v. Bude & Torrington Junction Ry. Co.* (1871) L. R. 6 C.P. 576, per Wiles J. at pp. 580, 581.

¹⁷ *Id* at 148.

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