

Order-34 Suits relating to Mortgages of Immoveable Property

CONTENTS

1. Parties to suits for foreclosure, sale and redemption
2. Preliminary decree in foreclosure suit
3. Final decree in foreclosure suits
4. Preliminary decree in suit for sale
5. Final decree in suit for sale
6. Recovery of balance due on mortgage in suit for sale
7. Preliminary decree in redemption suit
8. Final decree in redemption suit
- 8A. Recovery of balance due on mortgage in suit for redemption
9. Decree where nothing is found due or where mortgage has been overpaid
10. Costs of mortgagee subsequent to decree
- 10A. Power of Court to direct mortgagee to pay mesne profits
11. Payment of interest
12. Sale of property subject to prior mortgage
13. Application of proceeds
14. Suit for sale necessary for bringing mortgaged property to sale
15. Mortgages by the deposit of title-deeds and charges

Order-34 Suits relating to Mortgages of Immoveable Property

Order-34 Suits relating to Mortgages of Immoveable Property

1. Parties to suits for foreclosure, sale and redemption :-

Subject to the provisions of this Code, all persons having an interest either in the mortgage security or in the right of redemption shall be joined as parties to any suit relating to the mortgage.

2. Preliminary decree in foreclosure suit :-

(1) In a suit for foreclosure, if the plaintiff succeeds, the Court shall pass a preliminary decree-

(a) ordering that an account be taken of what was due to the plaintiff at the date of such decree for-

(i) principal and interest on the mortgage,

(ii) the costs of suit, if any, awarded to him, and

(iii) other costs, charges and expenses properly incurred by him up to that date in respect of his mortgage-security, together with interest thereon; or

(b) declaring the amount so due at the date; and

(c) directing-

(i) that, if the defendant pays into Court the amount so found or declared due on or before such date as the Court may fix within six months from the date on which the Court confirms and countersigns the account taken under Cl. (a), or from the date on which such amount is declared in Court under Cl. (b), as the case may be, and thereafter pays such amount as may be adjudged due in respect of subsequent costs, charges and expenses as provided in rule 10, together with subsequent interest on such sums respectively as provided in rule 11, the plaintiff shall deliver up to the defendant, or to such person as the

(ii) that, if payment of the amount found or declared due under or by the preliminary decree is not made on or before the date so fixed, or the defendant fails to pay, within such time as the Court may fix, the amount adjudged due in respect of subsequent costs, charges, expenses and interest, the plaintiff shall be entitled to apply for a final decree debarring the defendant from all rights to redeem the property.

(2) The Court may, on good cause shown and upon terms to be fixed by the Court, from time to time, at any time before a final decree is passed, extend time fixed for the payment of the amount found or declared due under sub-rule (1) or of the amount adjudged due in respect of subsequent costs, charges, expenses and interest.

(3) Where, in a suit for foreclosure, subsequent mortgagees or persons deriving title from, or subrogated to the rights or any such mortgagees are joined as parties, the preliminary decree shall provide for the adjudication of the respective rights and liabilities of the parties to the suit in the manner and form set forth in Form No. 9 or Form No. 10, as the case may be, of Appendix D with such variations as the circumstances of the case may require.

3. Final decree in foreclosure suits :-

(1) Where, before a final decree debarring the defendant from all rights to redeem the mortgaged property has been passed, the defendant makes payment into Court of all amounts due from him under sub-rule (1) of rule 2, the Court shall, on application made by the defendant in this behalf, pass a final decree-

(a) ordering the plaintiff to deliver up the documents referred to in the preliminary decree, and, if necessary,-

(b) ordering him to re-transfer at the cost of the defendant the mortgaged property as directed in the said decree, and, also, if necessary,-

(c) ordering him to put the defendant in possession of the property.

(2) Where payment in accordance with sub-rule

(1) has not been made, the Court shall, on application made by the plaintiff in this behalf, pass a final decree declaring that the defendant and all persons claiming through or under him are debarred from all rights to redeem the mortgaged property, and also, if necessary, ordering the defendant to put the plaintiff in possession of the property.

(2) On the passing of a final decree under sub-rule (2), all liabilities to which the defendant is subject in respect of the mortgage or on account of the suit shall be deemed to have been discharged.

4. Preliminary decree in suit for sale :-

(1) In a suit for sale, if the plaintiff succeeds, the Court shall pass a preliminary decree to the effect mentioned in Cls. (a), (b) and (c) (i) of sub-rule (1) of rule 2, and further directing that in default of the defendant paying as therein mentioned, the plaintiff shall be entitled to apply for a final decree directing that the mortgaged property or a sufficient part thereof be sold, and the proceeds of the sale (after deduction therefrom of the expenses of the sale) be paid into Court and applied in payment of what has been found or declared under or by the preliminary decree due to the plaintiff, together with such amount as may have been adjudged due in respect of subsequent costs, charges, expenses and interest, and the balance, if any, be paid to the defendant or other persons entitled to receive the same.

(2) The Court may, on good cause shown and upon terms to be fixed by the Court, from time to time, at any time before a final

decree for sale is passed, extend the time fixed for the payment of the amount found or declared due under sub-rule (1) or of the amount adjudged due in respect of subsequent costs, charges, expenses and interest.

(3) Power to decree sale in foreclosure suit.-In a suit (or foreclosure in the case of an anomalous mortgage, if the plaintiff succeeds, the Court may, at the instance of any party to the suit or of any other person interested in the mortgage-security or the right of redemption, pass a like decree (in lieu of a decree for foreclosure) on such terms as it thinks fit, including the deposit in Court of a reasonable sum fixed by the Court to meet the expenses of the sale and to secure the performance of the terms.

(4) Where, in a suit for sale or a suit for foreclosure in which sale is ordered, subsequent mortgagees or persons deriving title from, or subrogated to the rights of, any such mortgagees are joined as parties, the preliminary decree referred to in sub-rule (1) shall provide for the adjudication of the respective rights and liabilities of the parties to the suit in the manner and form set forth in Form No. 9, Form No. 10 or Form No. 11. as the case may be, of Appendix D with such variations as the circumstances, of the case may require.

5. Final decree in suit for sale :-

(1) Where, on or before the day fixed or at any time before the confirmation of a sale made in pursuance of a final decree passed under sub-rule (3) of this rule, the defendant makes payment into Court of all amounts due from him under sub-rule, (1) of rule 4, the Court shall on application made by the defendant in this behalf, pass a final decree or, if such decree has been passed, an order-

(a) ordering the plaintiff to deliver up the documents referred to in the preliminary decree, and if, necessary,-

(b) ordering him to transfer the mortgaged property as directed in the said decree, and also, if necessary,-

(c) ordering him to put the defendant in possession of the property.

(2) Where the mortgaged property or part thereof has been sold in pursuance of a decree passed under sub-rule (3) of this rule, the Court shall not pass an order under sub-rule (1) of this rule, unless the defendant, in addition to the amount mentioned in sub-rule (1) deposits in Court for payment to the purchaser a sum equal to five

per cent., of the amount of the purchase-money paid into Court by the purchaser. Where such deposit has been made, the purchaser shall be entitled to an order for repayment of the amount of the purchase-money paid into Court by him, together with a sum equal to five per cent, thereof.

(3) Where payment in accordance with sub-rule (1) has not been made, the Court shall, on application made by the plaintiff in this behalf, pass a final decree directing that the mortgaged property or a sufficient part thereof be sold, and that the proceeds of the sale be dealt with in the manner provided in sub-rule (1) of rule 4.

6. Recovery of balance due on mortgage in suit for sale :-

Where the net proceeds of any sale held under ¹ [rule 5] are found insufficient to pay the amount due to the plaintiff, the Court on application by him in execution may, if the balance is legally recoverable from the defendant otherwise than out of the property sold, pass a decree for such balance.

1. Subs. by Act 104 of 1976, Sec. 82, for the words "the last preceding rule" (w.e.f. 1st February, 1977).

7. Preliminary decree in redemption suit :-

(1) In a suit for redemption, if the plaintiff succeeds, the Court shall pass a preliminary decree-

(a) ordering that an account be taken of what was due to the defendant at the date of such decree for-

(i) principal and interest of the mortgage,

(ii) the costs of suit, if any, awarded to him, and

(iii) other costs, charges and expenses properly incurred by him up to that date, in respect of his mortgage-security, together with interest thereon; or

(b) declaring the amount so due at that date; and

(c) directing-

(i) that, if the plaintiff pays into Court the amount so found or declared due on or before such date as the Court may fix within six months from the date on which the Court confirms and countersigns the account taken under Cl. (a), or from the date on which such amount is declared in Court under Cl. (b), as the case may be, and thereafter pays such amount as may be adjudged due

in respect of subsequent costs, charges and expenses as provided in rule 10 together with subsequent interest on such sums respectively as provided in rule II, the defendant shall deliver up to the plaintiff, or to such person as the plaintiff appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required, re-transfer the property to the plaintiff at his cost free from the mortgage and from all encumbrances created by the defendant or any person claiming under him, or, where the defendant claims by derived title, by those under whom he claims, and shall also if necessary, put the plaintiff in possession of the property; and

(ii) that, if payment of the amount found or declared due under or by the preliminary decree is not made on or before the date so fixed, or the plaintiff fails to pay, within such time as the Court may fix, the amount adjudged due in respect of subsequent costs, charges, expenses and interests, the defendant shall be entitled to apply for a final decree-

(a) in the case of a mortgage other than a usufructuary mortgage, a mortgage by conditional sale or an anomalous mortgage the terms of which provide for foreclosure only and not for sale, that the mortgaged property be sold, or

(b) in the case of a mortgage by conditional sale or such an anomalous mortgage as aforesaid, that the plaintiff be debarred from all rights to redeem the property.

(2) The Court, may on good cause shown and upon terms to be fixed by the Court, from time to time, at any time before the passing of final decree for foreclosure or sale, as the case may be, extend the time fixed for the payment of the amount found or declared due under sub-rule (1) or of the amount adjudged due in respect of subsequent cost, charges, expenses and interest.

8. Final decree in redemption suit :-

(1) Where, before a final decree debarring the plaintiff from all rights to redeem the mortgaged property has been passed or before the confirmation of a sale held in pursuance of a final decree passed under sub-rule (3) of this rule the plaintiff makes payment into Court of all amounts due from him under sub-rule (1) of rule 7, the Court shall on application made by the plaintiff in this behalf, pass a final decree or, if such decree has been passed, an order-

(a) ordering the defendant to deliver up the documents referred to in the preliminary decree, and, if necessary,-

(b) ordering him to re-transfer at the cost of the plaintiff the mortgaged property as directed in the said decree, and also, if necessary,-

(c) ordering him to put the plaintiff in possession of the property.

(2) Where mortgaged property or a part thereof has been sold in pursuance of a decree passed under sub-rule (3) of this rule, the Court shall not pass an order under sub-rule (1) of this rule, unless the plaintiff in addition to the amount mentioned in sub-rule (1), deposits in Court for payment to the purchaser a sum equal to five per cent., of the amount of the purchase-money paid into Court by the purchaser. Where such deposit has been made, the purchaser shall be entitled to an order for re-payment of the amount of purchase-money paid into Court by him, together with a sum equal to five per cent., thereof.

(3) Where payment in accordance with sub-rule (1) has not been made, the Court shall, on application made by the defendant in this behalf,-

(a) in the case of a mortgage by conditional sale or of such an anomalous mortgage as is hereinbefore referred to in rule 7, pass a final decree declaring that the plaintiff and all persons claiming under him are debarred from all rights to redeem the mortgaged property and, also, if necessary, ordering the plaintiff to put the defendant in Possession of the mortgaged property; or

(b) in the case of any other mortgage, not being a usufructuary mortgage, pass a final decree that the mortgaged property or a sufficient part thereof be sold, and the proceeds of the sale (after deduction therefrom of the expenses of the sale) be paid into Court and applied in payment of what is found due to the defendant, and the balance, if any, be paid to the plaintiff or other persons entitled to receive the same.

8A. Recovery of balance due on mortgage in suit for redemption :-

Where the net proceeds of any sale held under ¹[rule 8] are found insufficient to pay the amount due to the defendant, the Court, ² [on application by him in execution] may, if the balance is legally recoverable from the plaintiff otherwise than out of the property

sold, pass a decree for such balance.]

1. Subs. by Act 104 of 1976, for the words "the last preceding rule" (w.e.f. 1st February, 1977).

2. Subs. by C.P.C. (Amendment) Act 104 of 1976., for the words "on application by him."

9. Decree where nothing is found due or where mortgage has been overpaid :-

Notwithstanding anything hereinbefore contained, if it appears, upon taking the account referred to in rule 7, that nothing is due to the defendant or that he has been overpaid, the Court shall pass a decree directing the defendant, if so required, to re-transfer the property and to pay to the plaintiff the amount which may be found, due to him; and the plaintiff, if necessary, be put in possession of the mortgaged property.

10. Costs of mortgagee subsequent to decree :-

In finally adjusting the amount to be paid to a mortgagee in case of a foreclosure, sale or redemption, the Court shall, unless in the case of costs of this suit the conduct of the mortgagee has been such as to disentitle him thereto, add to the mortgage-money such costs of the suit and other costs, charges and expenses as have been properly incurred by him since the date of the preliminary decree for foreclosure, sale or redemption up to the time of actual payment: ¹ [Provided that where the mortgagor, before or at the time of the institution of the suit, tenders or deposits the amount due on the mortgage, or such amount as is not substantially deficient in the opinion of the Court, he shall not be ordered to pay the costs of the suit to the mortgagee and the mortgagor shall be entitled to receive his own costs of the suit from the mortgagee, unless the Court, for reasons to be recorded, otherwise directs.]

1. Ins. by Act 104 of 1976, Sec. 82 (w.e.f. 1st February, 1977).

10A. Power of Court to direct mortgagee to pay mesne profits :-

Where in a suit for foreclosure, the mortgagor has, before or at the time of the institution of the suit, tendered or deposited the sum due on the mortgage, or such sum as is not substantially deficient in the opinion of the Court, the Court shall direct the mortgagee to pay to the mortgagor mesne profits for the period beginning with the institution of the suit.]

11. Payment of interest :-

In any decree passed in a suit for foreclosure, sale or redemption where interest is legally recoverable, the Court may order payment of interest to the mortgagee as follows, namely:

(a) interest up to the date on or before which payment of the amount found or declared due is under the preliminary decree to be made by the mortgagor or other person redeeming the mortgage-

(i) on the principal amount found or declared due on the mortgage- at the rate payable on the principal, or, where no such rate is fixed, at such rate as the Court deems reasonable; ¹[* * *];and

(iii) on the amount adjudged due to the mortgagee for costs, charges and expenses properly incurred by the mortgagee in respect of the mortgage- security up to the date of the preliminary decree and added to the mortgage- money,-at the rate agreed between the parties, or, failing such rate, [at such rate not exceeding six per cent per annum as the Court deems reasonable]; and

² [(b) subsequent interest up to the date of realization or actual payment on the aggregate of the principal sums specified in Cl. (a) as calculated in accordance with that clause at such rate as the Court deems reasonable.]

1. Clause in) omitted by Act 66 of 1956, Sec. 14.

2. Subs. by Sec. 14, Act 66 of 1956,. for Cl. (b).

12. Sale of property subject to prior mortgage :-

Where any property the sale of which is directed under this Order is subject to a prior mortgage, the Court may, with the consent of the prior mortgagee, direct that the property be sold free from the same, giving to such prior mortgagee the same interest in the proceeds of the sale as he had in the property sold.

13. Application of proceeds :-

(1) Such proceeds shall be brought into Court and applied as follows : First, in payment of all expenses incident to the sale or properly incurred in any attempted sale; secondly, in payment of whatever is due to the prior mortgagee on account of the prior mortgage, and of costs, properly incurred in connection therewith; thirdly, in payment of all interests due on account of the mortgage in consequence whereof the sale was directed, and of the costs of

the suit in which the decree directing the sale was made; fourthly, in payment of the principal money due on account of that mortgage; and lastly, the residue (if any) shall be paid to the person proving himself to be interested in the property sold, or if there are more such persons than one, then to such persons according to their respective interests therein or upon their joint receipt.

(2) Nothing in this rule or in rule 12 shall be deemed to affect the powers conferred by Section 57 of the Transfer of Property Act, 1882

.

14. Suit for sale necessary for bringing mortgaged property to sale :-

(1) Where a mortgagee has obtained a decree for the payment of money in satisfaction of a claim arising under the mortgage, he shall not be entitled to bring the mortgaged property to sale otherwise than by instituting a suit for sale in enforcement of the mortgage, and he may institute, such suit notwithstanding anything contained in Order II, rule 2.

(2) Nothing in sub-rule (1) shall apply to any territories to which the Transfer of Property Act, 1882 (4 of 1882), has not been extended.

15. Mortgages by the deposit of title-deeds and charges :-

1 [(1)] All the provisions contained in this Order which apply to a simple mortgage shall, so far as may be, apply to a mortgage by deposit of title-deeds within the meaning of Section 58 , and to a charge within the meaning of Section 100 of the Transfer of Property Act, 1882 .]

2 (2) Where a decree orders payment of money and charges it on immoveable property on default of payment, the amount may be realised by sale of the property in execution of that decree.]

1. Renumbered by Act 104 of 1976. Sec. 82 (w.e.f. 1st February, 1977).

2. Ins. by Act 104 of 1976. Sec. 82 (w.e.f. 1st February, 1977).