

CASE NO.:
Appeal (civil) 6580 of 1999

PETITIONER:
Harbans

RESPONDENT:
Om Prakash and Ors.

DATE OF JUDGMENT: 10/11/2005

BENCH:
Arijit Pasayat & C.K. Thakker

JUDGMENT:
JUDGMENT

ARIJIT PASAYAT, J.

Judgment of a learned Single Judge of the Punjab and Haryana High Court dismissing the second appeal filed by the appellant under Section 100 of the Code of Civil Procedure, 1908 (in short the 'Code') is the subject matter of challenge.

Background facts sans unnecessary details are as follows:

A suit was instituted by the appellant against the defendants seeking decree of declaration to the effect that the plaintiff had become the owner in possession to the extent of + share and defendants 2 and 3 have become owner and possession of the balance suit property, on the ground of foreclosure since limitation for redemption of the land had expired. Consequential relief of permanent injunction, for restraining defendant no.1 from alienating the suit land and in any manner from interfering with the peaceful possession of plaintiff and defendants 2 and 3 was sought for.

Specific stand of the plaintiff was that forefathers of the plaintiff alongwith forefathers of Prem and Lakhpatt sons of Banswari took the land in suit as mortgagees from the ancestors of Bhira about more than 100 years ago, and since then they have continued to be in possession of the suit land as mortgagees. Therefore, the plaintiff and defendants no.2 and 3 are in cultivating possession of the suit land since Smt. Patori daughter of Nanha has not been seen and heard by the plaintiff since he attained majority and her name has been wrongly shown by Halqa Patwari in place of Banwari son of Nanha due to clerical mistake. That plaintiff and defendants no. 2 & 3 have become owner in possession of the suit land by way of adverse possession. The suit land has not been redeemed yet and period of limitation of sixty years had already expired. Therefore, the plaintiff and defendant nos. 2 & 3 have become owners in possession of the suit land whereas the defendant no.1 has no right, title or interest in the suit land, but he alleges that he procured a decree in his favour against Shri Bhira and has become the owner of the suit land. In fact, Shri Bhira and no other person had any title to pass a better title than he had. Hence, the alleged decree is not binding on the rights of the plaintiff. The plaintiff several times asked the defendant no.1 to admit the plaintiff and defendants no.2 and 3 to be owner in possession of the suit land and also not to interfere into the peaceful possession of the plaintiff and also not to create any charge thereon, but he was acting and did not pay any heed to the said advice.

Defendant no.1 filed his written statement raising a preliminary objection that in the original plaint, the plaintiff claimed himself to be exclusive owner in possession of the suit land by way of adverse possession, but in the present plaint he is claiming only half share. Hence the plaintiff cannot be allowed to take contradictory stands and the suit is liable to be

dismissed on this score alone and the plaintiff cannot claim any relief for defendant nos. 2 and 3. The plaint is vague since the details of mortgage are not given in the plaint and the plaintiff as well as defendant nos. 2 & 3 are not owners in possession of any part of the suit land, the suit is not maintainable in the present form and plaintiff has no locus-standi to file the present suit; the suit is bad for non-joinder of Bhira as necessary party and the plaintiff has not come to the court with clean hands and prayed for the dismissal of the suit. Plaint is vague since description of the mortgage is not given in the plaint and the plaintiff and defendant nos. 2 & 3 have no concern whatsoever with the ownership and possession of the suit land whereas the defendant no.1 is owner in possession of the suit land vide mutation No.4728 dated 18.8.1984. The defendant no.1 got the suit land redeemed after paying redemption money of Rs.99/- to the plaintiff and plaintiff and other defendants have no concern whatsoever with the ownership and possession of the suit land. He, therefore, prayed for the dismissal of the suit.

The trial Court held that the suit was to succeed and, therefore, decreed the same in favour of the plaintiff and defendant nos. 2 & 3. It held them to be owner in possession of the suit land with consequential relief of permanent injunction and restraint for alienation of the suit land in any manner. An appeal was preferred by defendant no.1 impleading the plaintiff and defendant nos. 2 & 3 as respondents. Learned Additional Sessions Judge, Panipat allowed the appeal and held that the plaintiff and defendant nos. 2 and 3 had not become owners as there was no period of limitation to redeem the usufructuary mortgage. It was, however, held that defendant no.1 had failed to prove that the mortgage has been redeemed. But plaintiff and defendant nos. 2 & 3 were in possession of the land in dispute as mortgagees only and they cannot be dispossessed except in due course of law. Regarding injunction the appeal filed was dismissed. The suit filed by the plaintiff was decreed to the effect that defendant no.1 was restrained from interfering with the peaceful possession of the plaintiff and defendant nos. 2 and 3 except in due course of law. A second appeal was filed by the plaintiff and by the impugned order learned Single Judge dismissed the same holding that there was no limitation for redeeming the mortgage as there was no evidence brought on record to show that the mortgage was for a fixed period. Since no time was fixed for redeeming the land the mortgagor has right to get the property redeemed, there being no limitation for the mortgagor.

Learned counsel for the appellants submitted that the view taken by learned Single Judge is clearly contrary to the law laid down by this Court in State of Punjab & Ors. v. Ram Rakha and Ors. JT (1997) 2 SC 577. According to him Article 61 Part V clearly support the case of the plaintiff. Right to redeem or recover possession starts from the first date of the mortgage, and has to be exercised within 30 years and in the State of Punjab, case (supra) this Court held so.

Reference may be made to certain paragraphs in Ganga Dhar v. Shankar Lal and Ors., AIR (1958) SC 770 which read as follows:

"4. It is admitted that the case is governed by the Transfer of Property Act. Under section 60 of that Act, at any time after the principal money has become due, the mortgagor has a right on payment or tender of the mortgage money to require the mortgagee to reconvey the mortgage property to him. The right conferred by this section has been called the right to redeem and the appellant sought to enforce this right by his suit. Under this section, however, that right can be exercised only after the mortgage money has become due. In Bakhtawar Begum v. Husaini Khanam, [1913] L.R. 41 I.A. 84, 89, also the same view was expressed in these words:

"Ordinarily, and in the absence of a special condition entitling the mortgagor to redeem during the term for which the mortgage is created, the right of redemption can only arise on the expiration of the specified period."

Now, in the present case the term of the mortgage is eighty-five years and there is no stipulation entitling the mortgagor to redeem during that term. That term has not yet expired. The respondents, therefore, contend that the suit is premature and liable to be dismissed."

6. The rule against clogs on the equity of redemption is that, a mortgage shall always be redeemable and a mortgagor's right to redeem shall neither be taken away nor be limited by any contract between the parties. The principle behind the rule was expressed by Lindley M.R. in *Santley v. Wilde*, (1899) 2 Ch. 474) in these words:

"The principle is this: a mortgage is a conveyance of land or an assignment of chattles as a security for the payment of a debt or the discharge of some other obligation for which it is given. This is the idea of a mortgage: and the security is redeemable on the payment or discharge of such debt or obligation, any provision to the contrary notwithstanding. That, in my opinion, is the law. Any provision inserted to prevent redemption on payment or performance of the debt or obligation for which the security was given is what is meant by a clog or fetter on the equity of redemption and is therefore void. It follows from this, that "once a mortgage always a mortgage".

7. The right of redemption, therefore, cannot be taken away. The Courts will ignore any contract the effect of which is to deprive the mortgagor of his right to redeem the mortgage. One thing, therefore, is clear, namely, that the term in the mortgage contract, that on the failure of the mortgagor to redeem the mortgage within the specified period of six months the mortgagor will have no claim over the mortgaged property, and the mortgage deed will be deemed to be a deed of sale in favour of the mortgagee, cannot be sustained. It plainly takes away altogether, the mortgagor's right to redeem the mortgage after the specified period. This is not permissible, for "once a mortgage always a mortgage" and therefore always redeemable. The same result also follows from section 60 of the Transfer of Property Act. So it was said in *Mohammad Sher Khan v. Seth Swami Dayal*, (1921) L.R. 49 I.A. 60, 65):

"An anomalous mortgage enabling a mortgagee after a lapse of time and in the absence of redemption to enter and take the rents in satisfaction of the interest would be perfectly valid if it did not also hinder an existing right to redeem. But it is this that the present mortgage undoubtedly purports to effect. It is expressly stated to be for five years, and after that period the principal money became payable. This, under section 60 of the Transfer of Property Act, is the event on which the mortgagor had a right on payment of the mortgage money to redeem.

The section is unqualified in its terms, and contains no saving provision as other sections do in favour of contracts to the contrary. Their lordships therefore see no sufficient reason for withholding from the words of the section their full force and effect.

14. In comparatively recent times Viscount Haldane L.C. repeated the same view when he said in *G. and C. Kreglinger v. New Patagonia Meat and Cold Storage Company Ltd.*, ([1914] A.C. 25, 35, 36):

"This jurisdiction was merely a special application of a more general power to relieve against penalties and to mould them into mere securities. The case of the common law mortgage of land was indeed a gross one. The land was conveyed to the creditor upon the condition that if the money he had advanced to the offer was repaid on a date and at a place named, the fee simple would revest in the

latter, but that if the condition was not strictly and literally fulfilled he should lose the land for ever. What made the hardship on the debtor a glaring one was that the debt still remained unpaid and could be recovered from the offer notwithstanding that he had actually forfeited the land to the mortgagee. Equity, therefore, at an early date began to relieve against what was virtually a penalty by compelling the creditor to use his legal title as a security.

My Lords, this was the origin of the jurisdiction which we are now considering, and it is important to bear that origin in mind. For the end to accomplish which the jurisdiction has been evolved ought to govern and limit its exercise by equity judges. That end has always been to ascertain, by parol evidence if need be, the real nature and substance of the transaction, and if it turned out to be in truth one of mortgage simply, to place it on that footing. It was, in ordinary cases, only where there was conduct which the Court of chancery regarded as unconscientious that it interfered with freedom of contract. The lending money, on mortgage or otherwise, was looked on with suspicion, and the court was on the alert to discover want to conscience in the terms imposed by lenders."

15. The reason then justifying the Court's power to relieve a mortgagor from the effects of his bargain is its want of conscience. Putting it in more familiar language the Court's jurisdiction to relieve a mortgagor from his bargain depends on whether it was obtained by taking advantage of any difficulty or embarrassment that he might have been in when he borrowed the moneys on the mortgage. Was the mortgagor oppressed? Was he imposed upon? If he was, then he may be entitled to relief.

16. We then have to see if there was anything unconscionable in the agreement that the mortgage would not be redeemed for eighty five years. Is it oppressive? Was he forced to agree to it because of his difficulties? Now this question is essentially one of fact and has to be decided on the circumstances of each case. It would be wholly unprofitable in enquiring into this question to examine the large number of reported cases on the subject, for each turns on its own facts.

17. First then, does the length of the term - and in this case it is long enough being eighty five years - itself lead to the conclusion that it was an oppressive term? In our view, it does not do so. It is not necessary for us to go so far as to say that the length of the term of the mortgage can never by itself show that the bargain was oppressive. We do not desire to say anything on that question in this case. We think it enough to say that we have nothing here to show that the length of the term was in any way disadvantageous to the mortgagor. It is quite conceivable that it was to his advantage. The suit for redemption was brought over forty-seven years after the date of the mortgage. It seems to us impossible that if the term was oppressive, that was not realised much earlier and the suit brought within a short time of the mortgage. The learned Judicial Commissioner felt that the respondents' contention that the suit had been brought as the price of landed property had gone up after the war, was justified. We are not prepared to say that he was wrong in this view. We cannot also ignore, as appears from a large number of reported decisions, that it is not uncommon in various parts of India to have long term mortgages. Then we find that the property was subject to a prior mortgage. We are not aware what the term of that mortgage was. But we find that that mortgage included another property which became free from it as a result of the mortgage in suit. This would show that the mortgagee under this mortgage was not putting any pressure on the mortgagor. That conclusion also receives support from the fact that the mortgage money under the present mortgage was more than that under the earlier mortgage but the mortgagee in the present case was satisfied with a smaller security. Again, no complaint is made that the interest charged, which was to be measured by the rent of the property, was in any manner high. All these, to our mind, indicate that the

mortgagee had not taken any unfair advantage of his position as the lender, nor that the mortgagor was under any financial embarrassment.

18. It is said that the mortgage instrument itself indicates that the bargain is hard, for, while the mortgagor cannot redeem for eighty-five years, the mortgagee is free to demand payment of his dues at any time he likes. This contention is plainly fallacious. There is nothing in the mortgage instrument permitting the mortgagee to demand any money, and it is well settled that the mortgagee's right to enforce the mortgage and the mortgagor's right to redeem are co-extensive."

On the contrary, learned counsel for the respondent submitted that in *Panchanan Sharma v. Basudeo Prasad Jaganani and Ors.*, [1995] Supp. 2 SCC 574 it was clearly held that when there is no stipulation regarding period of limitation it can be redeemed at any time. It was, inter alia, held as follows:

"The sale certificate, Ex. C-II does not bind the appellant and, therefore, the mortgage does not stand extinguished by reason of the sale. It is inoperative as against the appellant."

Though the decision in *State of Punjab* case (supra) prima facie supports the stand of the appellant, the decision rendered by a three-judge Bench of this Court in *Ganga Dhar's*, case (supra), according to us had dealt with the legal position deliberately and stated the same succinctly.

In Mulla's *The Transfer of Property Act*, Ninth Edition, certain statements are relevant. They read as follows:

"Right of redemption: The mortgagor in Indian Law is the owner who had parted with some rights of ownership and the right of redemption is a right which he exercises by virtue of his residuary ownership to resume what he has parted with. The Section affirms a right of redemption in all mortgagees and thus carries out the recommendation of the Privy Council in *Thumbuswamy's* case (1875 1 Mad 1, 2 IA, 241) that the Legislature should intervene to recognize a right of redemption in mortgagees by conditional sale. In India this right of redemption is, however, a statutory one, and, therefore a legal right as stated by the judicial committee. Right of redemption cannot be extinguished by any agreement made at the time of the mortgage as part of the mortgage transaction.

The right of redemption is an incident of a subsisting mortgage and subsists so long as the mortgage itself subsists. It can be extinguished as provided in the section and when it is alleged to be extinguished by a decree, the decree should run strictly in accordance with the forum prescribed for the purpose. Dismissal of an earlier suit for redemption whether as abated or as withdrawn or in default would not be barred the mortgagor from filing a second suit for redemption so long as the mortgage subsists and the right of redemption is not extinguished by the efflux of time or by a decree of the court in the prescribed form.

A redemption pre-supposes the existence of a 'mortgage'. As defined in the Act, a mortgage is a transfer of an interest in immovable property for the purpose of securing the payment of a loan. It is created by the act of parties. In an usufructuary mortgage, a transfer is made of the right of possession and enjoyment of the usufruct. The rights of a usufructuary mortgagee forms part of the bundle which constitute ownership. The remainder still remains with the mortgagor and can be transferred by him. The mortgagor's right is as indicated in section 60 of the 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 the right to require the mortgagee 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 preliminary to enforce the right to make a payment of the mortgage money. A claim to redeem a mortgage actually does not attach to the land, although the decree passed in the suit may ultimately affect possession which is also an interest in land.

The 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. Any such condition is void as a clog on redemption. A mortgagee's suit for sale was compromised on terms that the mortgagor should pay within a specified time and that in default, the mortgagee should take possession as usufructuary mortgagee; and that thereafter the mortgagor should have a right to redeem at any time taking out execution. The Madras High Court held that this term of the consent decree was invalid as it had the effect of reducing the time for redemption from 60 to three years. On appeal to the Privy Council, the point did not arise as their Lordships held that on a proper construction of the decree it did not exclude the mortgagor's remedy by suit. The section further explains when the right of redemption arises; how the right of redemption is exercised and what the mortgagor's right on redemption are. A mere agreement between the mortgagor and the mortgagee by which the mortgagor agrees to convey certain lands to the mortgagee in satisfaction of the mortgage does not extinguish the mortgage.

The Supreme Court has held that the right of redemption under a mortgage deed can come to an end only in a manner known to law. Such extinguishment of the right can take place by a contract between the parties, by a merger or by a statutory provision which debars the mortgagor from redeeming the mortgage. A mortgagee in possession of the property will have to deliver possession to the mortgagor when a suit of redemption is filed unless he is able to show that the right of redemption has come to an end or that a suit is liable to be dismissed on some other valid ground. The mortgagor's right of redemption is exercised by the payment or tender to the mortgagee at the proper time and the proper place, of the mortgage money. When it is extinguished by the act of parties, the act must take the shape and observe the formalities which the law prescribes. The expression 'act of the parties' refers to some transaction subsequent to the mortgage and standing apart from the mortgage transaction. A usufructuary mortgagee cannot by mere assertion of his own or by a unilateral action on his part, convert his position on moiety of the property as mortgagee into that of an absolute owner.

The right to redeem follows the interest of the mortgagor, and can be exercised by him and also by those taking the whole of his interest, whether by assignment inter vivos, or by devolution on death.

Right of redemption and right of foreclosure co-extensive.

The mortgagor's right of redemption and the mortgagee's right of foreclosure or sale are co-extensive. When the mortgagor's right to redeem accrues, the mortgagee has a right to enforce his security. But the rule may be limited by the terms of the mortgage and if the limitation is not oppressive or unreasonable, it will be given effect to. Thus when a mortgage for a fixed term provided that the mortgagee might sue for sale before the expiry of the term if his security were jeopardized, it was held that the right of redemption was not accelerated.

It has been held that the mortgagor can adopt the course provided under Section 60 only before the mortgagee has filed a suit for enforcement of the mortgage.

Clog on redemption

A mortgage being a security for the debt, the right of redemption continues although the mortgagor fails to pay the debt at the due date. Any provision inserted to prevent, evade or hamper redemption is void.

The doctrine has been described as an anachronism by Pollock, who suggested that it be moulded for modern conditions by limiting it to cases where there was something oppressive or unconscionable in the bargain. But it is settled law in India (by statute) that a mortgage cannot be made altogether irredeemable (except re. companies) nor can the right of redemption be made illusory. The test suggested by Pollock has however been generally applied in determining whether conditions which directly or indirectly fetter or limit the right to redeem violate the doctrine. In *Seth Ganga Dhar v. Shankar Lal*, Sarkat J, explained the basis of the right of the court to intervene thus:

"The reason then justifying the court's power to relieve a mortgagor from the effects of his bargain is its want of conscience. Putting it in a more familiar language, the court's jurisdiction to relieve a mortgagor from his bargain depends on whether it was attained by taking advantage of any difficulty or embarrassment that he might have been in when he borrowed the moneys on the mortgage. Was the mortgagor oppressed? Was he imposed upon? If he was, when he may be entitled to relief."

The doctrine does not apply if the transaction is not in its essence a mortgage. Thus, where the transaction gives an option to purchase property, the sole consideration being the loan of a sum of money secured on the property during the continuance of the option, the transaction is the sale of an option, the consideration being the use of the money free of interest.

The doctrine applies to anomalous mortgages. There were decisions to the contrary when the definition of anomalous mortgages was in a later section, but these are overruled by the Privy Council in *Mohammed Sher Khan v. Seth Swami Dayal*, AIR (1925) Mad 366. Even before this decision, the doctrine was applied to simple mortgages usufructuary which were not then classed as anomalous.

This doctrine also applies to transaction by which the mortgagor transferred his equity of redemption to the transferee in consideration of a loan; a clause in the said transaction by which the transferee had an option to purchase was held void.

Doctrine of clog on equity

The doctrine of a clog on the equity of redemption is a rule of justice, equity and good conscience - this has been reaffirmed by the Supreme Court in *Murarilal v. Dev Karan*, AIR (1965) SC 225. Gajendragadkar, CJ delivering the judgment of the Court, 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 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 Supreme Court has held that, it is a settled law in England and in

India that a mortgage cannot be made altogether irredeemable or redemption made illusory. The law must respond and be responsive to the felt and discernible compulsions of circumstances that would be equitable, fair and just; unless there is anything to the contrary in the Statute, law must take cognizance of that fact and act accordingly. In the context of fast changing circumstances and economic stability, a long term for redemption makes an illusory mortgage, though not decisive. It should prima facie be an indication as to how clogs on equity of redemption should be judged.

Though the Act does not apply to Sikkim, the courts should apply the principle contained in Section 60 and strike down a clog on the right of redemption, since the principle 'once a mortgage always a mortgage' is a rule of justice, equity and good conscience.

The term in the mortgage deed that the land is irredeemable for 95 years is a clog on the equity of redemption.

Whether or not in a particular transaction there is a clog on the equity of redemption, depends primarily upon the period of redemption, the circumstances under which the mortgage was created, the economic and financial position of the mortgagor and his relationship vis-a-vis him and the mortgagee, the economic and social condition in a particular country at a particular point of time, custom, if any prevalent in the community or the society in which the transaction takes place, and the totality of the circumstances under which a mortgage is created, namely, circumstances of the parties, the time, the situation, the clauses of redemption either for payment of interest or any other sum, the obligation of the mortgagee to construct or repair or to maintain the mortgaged property in cases of usufructuary mortgage, to manage as a matter of prudent management; these factors must be co-related to each other and viewed in a comprehensive conspectus in the background of the facts and circumstances of each case, to determine whether there are clogs on equity of redemption.

A long term of redemption is not necessarily a clog; whether a particular term of redemption operates as a clog is to be considered having regard to the circumstances of the case.

What is, or, what is not, a clog on the equity of redemption is a question of fact in each case.

Condition postponing redemption in case of default.

Such a condition is a clog on the equity of redemption and is invalid. In *Mohammed Sher Khan v. Seth Swami Dayal*, the mortgage was for a term of five years with a condition that if the money was not paid, the mortgagee might enter into possession for a period of 12 years during which the mortgagor could not redeem. The Privy Council held that the condition hindered an existing right to redeem and was therefore invalid. Again, a condition that in default the mortgage should be renewed for a period of 40 years is invalid. The Allahabad High Court has said that no hard and fast rule can be laid down as to what is improper restraint on alienation and upheld a condition that in default of redemption on due date, the mortgage should not be redeemable for a further period of 20 years. It is submitted that this decision is inconsistent with *Mohammed Sher Khan's* case. In a Bombay case, the mortgage was for a term of 21 years in order that the mortgagee should plant an orchard, but there was a condition that in default of redemption at the expiry of 21 years, the mortgage should be allowed to retain possession as long as the trees bore fruit. The condition was not enforced as the mortgagor was an agriculturist.

within the Dakkan Agriculturists' Relief Act.

Terms of Redemption

It has been held that if the mortgagor allows the normal limitation period to expire, he can then only file a suit on the basis of deferred date of redemption. But he will be precluded from saying that the deferred date amounts to clog on redemption. On the question of postponement of date of redemption not amounting to a clog, the court referred to an earlier Supreme Court judgment."

It appears that the decision in Ganga Dhar's, case (supra) was not noticed by the two-judge Bench in State of Punjab, case (supra). The decision according to us lays down correct position in law which is applicable.

In the background of the factual position as noticed by the Courts below, and the legal principles indicated above the inevitable result of this appeal is dismissal which we direct. There shall be, however, no order as to costs.