

Murarilal

Vs

Dev Karan

Civil Appeal No. 484 of 1961

(P. B. Gajendragadkar, M. Hidayatullah, K. C. Das Gupta, J. C. Shah, Raghuvar Dayal JJ)

08.05.1964

JUDGMENT

GAJENDRAGADKAR, C.J. –

This appeal by special leave arises out of a redemption suit filed by the respondent Dev Karan against the appellant Murarilal. The mortgage sought to be redeemed was executed on the 19th March, 1919 for a sum of Rs. 6,500. The mortgaged property consisted of a shop which was delivered over in the possession of the mortgagee after the execution of the mortgage deed. The mortgage deed had provided that the amount due under the mortgage should be repaid to the mortgagee within 15 years, whereupon the property would be redeemed. It had also stipulated that if the payment was not made within 15 years, the mortgagee would become the owner of the property. The mortgagor was Mangal Ram who died and the respondent claims to be the heir and legal representative of the said deceased mortgagor. In the plaint filed by the respondent, it was averred that the transaction was, in substance, a mortgage and the mortgagor's right to redeem was alive even though the stipulated period of 15 years for the repayment of the loan had passed. On these allegations, the respondent claimed a decree for redemption of the suit mortgage on payment of Rs. 6,500. It appears that the original mortgagee Gangadhar had also died before the institution of the suit, and so, the appellant Murarilal was impleaded as the defendant on the basis that he was the only heir and legal representative of the deceased mortgagee Gangadhar.

The claim for redemption thus made by the respondent was resisted by the appellant on several grounds. It was alleged that after the expiry of the stipulated period of 15 years, the property had become the absolute property of the mortgagee and it was urged that the original transaction was, in substance, and in reality, not a mortgage but a sale. Several other pleas were also raised by the appellant in resisting the respondent's claim, but it is unnecessary to refer to them. The learned trial Judge framed appropriate issues which arose on the pleading of the parties. In substance, he held that the claim for redemption made long after the 15 years' period had expired could not be sustained. Findings were made on other issues also and they were against the respondent. In the result, the respondent's suit was dismissed.

The respondent then took the matter in appeal before the Rajasthan High Court. He urged that the view taken by the trial Court that the stipulation as to the mortgagor's liability to re-pay the loan within 15 years did not bar his present suit for redemption, because the said stipulation amounted to a clog on the equity of redemption and as such, could not affect the mortgagor's right to redeem, and he added that the transaction, in substance, was a mortgage and not a sale, and so, his right to redeem was alive and be effectively enforced by the present suit. The High Court has upheld his first contention that the relevant provision as to the period within which the mortgage amount had to

be repaid amounted to a clog on the equity of redemption and could not be pleaded as a bar to the present suit. But on the question about the character of the original transaction itself, the High Court appears to have been inclined to take the view that the relevant clause on which the plea about the bar was raised did not really support the said plea, because it was by no means clear that even after the expiration of 15 years, the mortgagee was intended to be the absolute owner of the property. On these findings, the decree passed by the trial Court dismissing the respondent's suit has been reversed and the suit has been remanded to the trial Court to be disposed of in accordance with law. It is against this order that the appellant has come to this Court by special leave. Pending the appeal before this Court, both the appellant and the respondent have died, and their respective heirs have been brought on the record.

The first question which calls for our decision is whether the relevant clause on which the appellant relies makes the mortgagee the owner of the property at the end of the stipulated period of 15 years. The mortgage provides, inter alia, that after the house which was the mortgage property was delivered over to the mortgagee, it was open to him either to live in it, or to let it out to tenants. The mortgagee was further given liberty to spend up to Rs. 35 for repairing the house and if more expenses were intended to be incurred, the said expenditure would be incurred through the mortgagor. On the expenditure thus incurred the mortgagor was liable to pay interest at the rate of As. 0-6-0 per cent per month. Then the document proceeded to add that the mortgagor would get the property redeemed on payment of the mortgage amount as well as the cost of Patta which may have been incurred by the mortgagee and the repairing expenses within a period of 15 years. Then, occurs the relevant clause : "After the expiry of the stipulated period of 15 years, this shop would be deemed as an absolute transfer "Mala Kalam" for this very amount. Till the mortgage money is paid, I shall have no concern with the shop." The High Court appears to have taken the view that the words "Mala Kalam" which occur at the end of the relevant clause do not necessarily import the notion that the mortgage property would be the absolute property of the mortgagee. According to the High Court, the said words literally mean "where there is no scope for having any say". If that is the meaning of the relevant words, it seems difficult to accept the view that the document did not intend to make the mortgagee the owner of the property at the end of 15 years if the debt due was not paid within that period. When the document says that there would be no scope for the mortgagor to say anything, it necessarily means, in the context, that the mortgagor would, in that case, have lost his title to the property, and that means the mortgagee would become the absolute owner of the property. Therefore, we feel no difficulty in holding that if the terms of the document were to prevail, the appellant's contention that the present suit for redemption is barred, must succeed. It is common ground that the amount due under the mortgage deed was not paid by the mortgagor or his heir within the stipulated period and that would extinguish the title of the mortgagor and make the mortgagee to be the owner of the property.

But the question is whether such a stipulation can be allowed to be pleaded as a bar to the respondent's claim for redemption. Just as it is common ground that if the terms of the document were to prevail, the suit would be barred, it is also common ground that if the doctrine that the clog on the equity of redemption cannot be enforced is to prevail in the present proceedings, the respondent's action for redemption must succeed. The fact that a stipulation of the kind with which we are concerned in the present case amounts to a clog on the equity of redemption, is not and cannot be disputed. Therefore, the main question which arises in the present appeal is : does the equitable doctrine ensuring the mortgagor's equity of redemption in spite of a clog created on such equity by stipulations in the mortgage deed apply to the present case ? This question arises in this form, because the Transfer of Property Act did not apply to Alwar at the time when the mortgage was executed nor at the time when the 15 years' stipulated period expired.

Mr. Sarjoo Prasad for the appellant contends that the High Court was in error in applying the equitable principle, because the said principle cannot be invoked in cases where the Transfer of Property Act does not apply. In support of this argument, he has very strongly relied on an early decision of the Privy Council pronounced in 1870, in the case of *Pattabhiramier v. Vencatarow Naicken and Narasimha Naicken* [(1890) 13 Moore's I.A. 560]. In that case, the Privy Council was dealing with a *Bye-bil-wuffa*, or mortgage and conditional sale usufructuary executed in 1806 under which the mortgagees were put in possession. The deed contained a condition that if the mortgagor failed to redeem within five years, the conditional sale was to be absolute. The mortgagor failed to redeem within the stipulated period, and the mortgagee, without foreclosing the mortgage, sold the mortgaged property. Thereafter, the mortgagor's representative sued to redeem the mortgage under s. 8 of the Madras Regulation XXXIV of 1802. The Privy Council held that the interest of the mortgagee after the expiry of the stipulated period had become absolute. In dealing with this question, Lord Chelmsford who delivered the opinion of the Board observed that the form of security with which the Board was concerned had long been common in India, and he added that the stipulations in such contracts were recognised and enforced according to their letter by the ancient Hindu law as well as under Mohammedan law; and in support of this statement, reference was made to certain passages from Colebrooke's Digest on Hindu Law and Baillie's introduction to his book on Mohammedan Law of Sale. If the ancient law of the country, observed Lord Chelmsford, has been modified by any later rule, having the force of law, that rule must be founded either on positive legislation, or on established practice; and since neither any specific statutory provision had been cited before the Board, nor established practice in that behalf had been proved, the Privy Council upheld the mortgagee's plea that he became the absolute owner of the property at the expiration of the stipulated period. While pronouncing this decision, Lord Chelmsford, however, took the precaution of adding that while the Board was allowing the appeal, "it must not be supposed that their Lordships design to disturb any rule of property established by judicial decisions so as to form part of the Law of the Forum, wherever such may prevail, or to affect any title founded thereon." As we will presently point out, the appeal of *Pattabhiramier* was pending before the Privy Council for as many as 10 years. Meanwhile, Indian High Courts were enforcing the equitable principle that stipulations contained in mortgage-deeds which amounted to clog on the equity of redemption could not be enforced. In other words, the jurisdiction which courts of equity exercised in England by refusing to enforce clogs on the equity redemption, was being exercised by High Courts in India.

However, before we refer to those decisions, it would be convenient to cite another decision of the Privy Council pronounced in *Thumbusawmy Moodelly v. Hossain Rowthen & Ors* [I.L.R. 1 Mad. 1]. In that case, the Privy Council held that the contract of mortgage by conditional sale is a form of security known throughout India, and by the ancient law of India, it must be taken to prevail in every part of India, where it has not been modified by actual legislation or established practice, and so, must be enforced according to its letter. In this case, Sir James W. Colvile who delivered the opinion of the Board, referred to the earlier decision of the Privy Council in *Pattabhiramier's* case [(1870) 13 M.I.A.], noticed the trend of judicial pronouncements made by the High Courts in India while *Pattabhiramier's* case was pending before the Privy Council, and strongly reiterated the view that the said decisions of the High Courts were radically unsound. He referred to the fact that unfortunately, *Pattabhiramier's* case "slept for nine years, and that in the interval the Sudar Court, and afterwards the High Court which succeeded it, continued the course of decision which the former had given in 1858". Then he mentioned the relevant decisions of the Madras and Bombay High Courts and expressed the opinion that in trying to enforce principles of equity in dealing with stipulations contained in mortgage documents, the High Courts were really assuming the functions of Legislature. So, it is clear that the Privy Council emphatically declared in 1875 that unless there

is a legislative enactment or established practice to the contrary, terms in the contract of mortgage by conditional sale must be taken to prevail in every part of India and must be strictly enforced according to their letter. Mr. Sarjoo Prasad naturally relies on these decisions and contends that so far as the State of Alwar is concerned, there is no legislative enactment to the contrary, nor is there any established practice on which the equitable doctrine could be pleaded by the respondent in support of his case that though 15 years have elapsed, his right to redeem still survives.

There are two other decisions of the Privy Council to which we may refer at this stage. In *Kader Moideen v. Nepean* [25 I.A. 241], the Privy Council was dealing with a case from Burma, and it observed that the Burmese Courts are directed, in the absence of any statutory law applicable to accounts against a mortgagee in possession, to follow the guidance of justice, equity, and good conscience. Acting on this principle, the Privy Council accepted Mr. Haldane's contention that there was no rule of abstract justice in taking the accounts of a mortgagee in possession, and that the Indian rule, which was embodied in s. 76 of the Transfer of Property Act, should, though the Act had not been extended to Burma, be followed there in preference to the English practice. It would thus be seen that the equitable principle underlying the provisions of s. 76 was extended to the case on the specific ground that the Burmese Courts had been directed by the relevant statutory provision to follow the guidance of justice, equity and good conscience in the absence of any statutory law applicable to accounts against a mortgagee in possession. This decision, therefore, is in line with the two earlier decisions of the Privy Council.

Similarly, in *Mehrban Khan v. Makhna* [57 I.A. 168], where the Privy Council was dealing with the provisions in a mortgage deed conferring on the mortgagee upon redemption an interest in the mortgaged property, it was held that the said provisions amounted to a clog or fetter on the equity of redemption and as such, were void not only against the mortgagor, but also against the purchaser of his interest, since they were inconsistent with the very nature and essence of a mortgage. In this case, again, s. 28 of Regulation No. VII which was applicable to the North-West Frontier Province, had expressly provided that in cases not otherwise specially provided for, the Judges shall decide according to justice, equity and good conscience; and so, recourse to the equitable doctrine was permissible because there was the statutory mandate requiring the Judges to apply the said doctrine where there was no specific legislative provision in relation to the matter with which they were dealing.

Though the position of the Privy Council decisions is thus clear and consistent, the trend of the decisions of the High Courts in India continued to conform to the same pattern which was set up by the decision of the Madras High Court in the case of *Venkata Reddi v. Parvati Ammal* [1 Mad. H.C. Rep. 460] and adopted by the Bombay High Court in *Ramji bin Tukaram v. Chinto Sakharam* [1 Bom. H.C. Rep. 199 (1864)]. The question was elaborately argued on several occasions before the said High Courts and the two earlier decisions of the Privy Council in the case of *Pattabhiramier* [(1870) 13 M.I.A. 560] as well as in the case of *Thumbusawmy Moodelly* [I.L.R. 1 Mad. 1.] were cited and yet, the High Courts have consistently adhered to the view that in dealing with mortgage transactions which contain unfair, unjust or oppressive stipulations unreasonably restricting the mortgagor's right to redeem, the Court would be justified in refusing to enforce such stipulations and recognising the paramount character of the equity of redemption. In *Bapuji Apaji v. Sonavaraji Marvati* [I.L.R. 11 Bom. 231], Westropp, C.J., has elaborately considered the relevant aspects of this question. He referred to the two Privy Council's decisions and observed that the doctrine of *Ramji v. Chinto* [1 Bom. H.C. Rep. 199 (1864)] had been uniformly followed in the Bombay Presidency in a multitude of cases, and he saw no reason to depart from that decision. In expressing his firm adherence to the pattern of the law prescribed by the decision of the Bombay High Court in *Ramji v.*

Chinto, the learned Chief Justice elaborately considered all the precedents on the point, trend of authorities bearing on the question, the opinion of scholars, and held that he was inclined to take the law to be that which was settled in *Ramji v. Chinto* [1 Bom. H.C. Rep. 199 (1864)] and gave effect to it. So far as the Bombay High Court is concerned, the practice consistently had been to follow the decision of Westropp, C.J. till the Transfer of Property Act was extended to Bombay.

In Madras, we find that same position. In *Ramasami Sastrigal v. Samivappanayakan* [I.L.R. 4 Mad. 179 at p. 190], the majority view of the Full Bench was that in the Madras Presidency, where contracts of mortgage by way of conditional sale have been entered into subsequent to the year 1858, redemption after the expiry of the term limited by the contract must be allowed. The point with which we are dealing in the present appeal was elaborately argued before the Madras High Court; the opinion expressed emphatically by the Privy Council was cited, but Turner, C.J., with whose opinion Muttusami Ayyar, J., agreed made a very significant observation after elaborately examining the merits of the question. "For these reasons," said the learned C.J., "we conceive that we shall not be wanting in due respect for the distinguished tribunal by whose decisions we are bound, if we follow the course they have pronounced there were strong reasons for adopting and apply the rules introduced, however erroneously, by judicial decisions in these provinces." That view has prevailed in the Madras High Court ever since.

These decisions show that the High Courts in India conformed to the view that whether or not there is a statutory provision directing the Judges to give effect to the principles of justice, equity and good conscience, it is their duty to enforce that principle where they are dealing with stipulations introduced in mortgage transactions which appear to them be unreasonable, oppressive or unjust.

It is true that according to the strict letter of the ancient Hindu Law, a stipulation that the mortgagor shall pay the amount advanced to him by the mortgagee within a specified period, was intended to be enforced. The ancient Hindu law texts use the word "Adhi" to denote pledge of a movable or mortgage of immovable property. Nar. IV 124 divides Adhi into two sorts, viz., one that is to be redeemed within a certain time fixed (by agreement at the time of contracting the debt) or to be retained till the debt is paid off. In regard to the first category of mortgages, if the money is not paid at the time fixed, the thing pledged or mortgaged would belong to the creditor (vide Yaj. II. 58 and as explained by Mitakshara) [Dr. Kane's History of Dharmasastra Vol. III. p. 428]. It also appears that if the mortgage is not redeemed even when the debt has grown to double of the principle by non-payment of the interest agreed upon, the mortgagor lost his title over the mortgaged property; so that it must be conceded that under the strict letter of the Hindu law texts, if a mortgage deed contains a stipulation for the repayment of the mortgage amount within a specified period, at the expiration of the said period the mortgagor may lose his title over the mortgaged property. The principle underlying this provision appears to be that Hindu law as enunciated by the ancient texts, attached considerable importance to a person keeping his promise. Through that is so, we ought also to add that according to Sir R. B. Ghose, ordinarily, time was not of the essence of the contract of mortgage in Hindu law [Ghose on 'The Law of Mortgage in India' Tagore Law Lectures 1875-6, 5th Ed. Vol. 1 p. 56.], and in support of this opinion the learned author quotes with approval Colebrooke's opinion.

Basing himself on this position of the Hindu law, Mr. Sarjoo Prasad contends that we ought to assume that Hindu Law which was applicable to Alwar recognised the importance of compelling the mortgagor to perform his promise that he would repay the debt within a specified time and if he failed to do so, he would lose his title over the mortgaged property. He urged that the dispute between the parties in the present appeal should be decided in the light of this position of the Hindu

law as well as the principles enunciated by the Privy Council in the cases of Pattabhiramier [(1870) 13 M.I.A. 560] and Thumbusawmy Moodelly [I.L.R. 1 Mad. 1].

In dealing with this arguments, it would be relevant to observe that traditionally, courts in India have been consistently enforcing the principles of equity which prevent the enforcement of stipulations in mortgage deeds which unreasonably restrain or restrict the mortgagor's right to redeem. We may, in this connection, refer to some of the statutes which were in force in India. The old Bengal Regulation III of 1793 by s. 21 directed the Judges of the District and City Courts in cases where no specific rule existed to act according to justice, equity and good conscience. Similar provision occurs in s. 17 of the Madras Regulation II of 1802. The Bengal Civil Courts Act, 1887, and the Madras Civil Courts Act, 1873, contain similar provisions in ss. 37 and 16 respectively. Likewise, in regard to Courts in the Mufassal of Bombay, Bombay Regulation IV of 1827 by s. 26 provides that the law to be observed in the trial of suits shall be Acts of Parliament and Regulations of Government applicable to the case; in the absence of such Acts and Regulations, the usage of the country in which the suit arose; if none such appears, the law of the defendant, and in the absence of specific law and usage, equity and good conscience. In fact, in *Namdeo Lokman Lodhi v. Narmadabai* [(1953) S.C.R. 1009], this Court has emphatically observed that it is axiomatic that the courts must apply the principles of justice, equity and good conscience to transactions which come before them for determination even though the statutory provisions of the Transfer of Property Act are not made applicable to these transactions. These observations, in substance, represent the same traditional judicial approach in dealing with oppressive, unjust and unreasonable restrictions imposed by the mortgagees on needy mortgagors when mortgage documents are executed.

There is one other circumstance to which we ought to refer. We do not know what the true position of the Hindu law was in the State of Alwar at the relevant time. In fact, we do not know what the provisions of the Contract Act were in the State of Alwar. Even so, we think it would be reasonable to assume that civil courts established in the State of Alwar were like civil courts all over the country, required to administer justice and equity where there was no specific statutory provision to deal with the question raised before them. Whether or not the Hindu law which prevailed in Alwar was similar to that prescribed by ancient Hindu Sanskrit texts, is a point on which no material is produced before us. It may well be that just as in Bombay and Madras, notwithstanding the ancient provisions of Hindu Law which seem to entitle the mortgagee to insist upon the performance of a stipulation as to time within which the mortgage debt has to be paid, the High Courts had consistently refused to enforce such stipulations, the Courts in the State of Alwar also may have adopted the same approach. In the absence of any material on the record on the point, we are reluctant to accept Mr. Sarjoo Prasad's argument that the doctrine of equity and justice should be treated as irrelevant in dealing with the present dispute.

In this connection, it is material to refer to the recent decisions pronounced by the Rajasthan High Court in which this position has been upheld either because it was conceded, or because the High Court took the view that the principles of equity were enforceable in dealing with mortgage transactions in Rajasthan. In *Amba Lal v. Amba Lal* [I.L.R. 1957 Raj. 964.], the Rajasthan High Court held that s. 60 and its proviso contained a general principle of law applicable to mortgages in this country, which should be applicable even in those places where the Transfer of Property Act may not be in force as such, but where its principles may be in force. The property in question which was the subject-matter of the mortgage was situated in the State of Udaipur.

Similarly, in the case of *Seleh Raj v. Chandan Mal* [I.L.R. 1960 Raj. 88.], the Rajasthan High Court held that the principle underlying s. 60 may well be regarded to be a salutary one and in accordance

with the principles of equity, justice and good conscience. Accordingly it took the view that though the Transfer of Property Act may not be in force in the territory in question, it would not be unreasonable to decide a case in accordance with the principles underlying the said section. The property with which the Court was concerned in this case was situated in the State of Jodhpur.

The same principle has been applied in Himachal Pradesh (vide *Nainu v. Kishan Singh*) [A.I.R. 1957 H.P. 46.].

Thus, it is clear that the equitable principle of justice, equity and good conscience has been consistently applied by Civil Courts in dealing with mortgages in a substantial part of Rajasthan and that lends support to the contention of the respondent that it was recognised even in Alwar that if a mortgage deed contains a stipulation which unreasonably restrains or restricts the mortgagor's equity of redemption, courts were empowered to ignore that stipulation and enforce the mortgagor's right to redeem, subject, of course, to the general law of limitation prescribed in that behalf. We are, therefore, satisfied that no case has been made out by the appellant to justify our interference with the conclusion of the Rajasthan High Court that the relevant stipulation on which the appellant relies ought to be enforced even though it creates a clog on the equity of redemption.

In the result, the appeal fails and is dismissed with costs.

Appeal dismissed.

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