

Chhaganlal Keshavlal Mehta

Vs

Patel Narandas Haribhai

Civil Appeal No. 1867 of 1970

(V.B. Eradi, R.D. Misra JJ)

11.12.1981

JUDGMENT

MISRA, J. –

1. The present appeal by certificate is directed against the judgment of the High Court of Gujarat at Ahmedabad in Letters Patent Appeal No. 6 of 1966 dated February 18, 1970 decreeing the suit for redemption.
2. The property in dispute, situated in Baroda city, originally belonged to Mortibhai Bapubhai Shibandi Baxi (for short 'Motibhai'). He created a mortgage with possession of the disputed property in favour of one Nanaji Balwant Pilkhanewala (for short 'Nanaji') in 1871 for a sum of Rs. 800. In 1899 second mortgage was created in favour of the same mortgage and the amount secured by this second mortgage was Rs. 375. Somewhere between 1890 and 1912 the original mortgagee Nanaji died leaving behind his two sons Hari and Purushotham as his heirs and legal representatives. The two sons of Nanaji sold the entire mortgage rights and interest to one Ganpatram Mugutam Vyas (for short 'Ganpatram') on July 4, 1912. Ganpatram in his turn sold the mortgagee rights in a part of the mortgaged property, viz., common latrine, to one Vamanrao Laxmanarao Nirkhe (for short 'Vamanrao').
3. Ganpatram died and his son Chhotalal Ganpatram (for short 'Chhotalal') sold away his rights as a mortgagee in possession in respect of the rest of the properties which still remained with him, to Chhaganlal Keshavlal Mehta (for short 'Chhaganlal Mehta').
4. Mortgagee Motibhai also died leaving behind his son Chimanrai Motibhai Baxi (for short 'Chimanrai'). Chimanrai died leaving behind his widow Chhotibai and a daughter Taralaxmibai. On September 12, 1950 Taralaxmibai sold her right, title and interest in the suit property to one Shantilal Purushottamdas Dalia (for short 'Shantilal'). Later on Shantilal conveyed his right, title and interest in this property to the plaintiff, Narandas Haribhai Patel (for short 'Narandas').
5. It appears that during the lifetime of Chimanrai, Ganpatram, the mortgagee, had sent a notice, Ex. 77, dated April 15, 1913 to Chimanrai informing him that the mortgaged property was in a dilapidated condition and required repairs. He had already spent some amount towards repairs but still substantial repairs were needed and the same should be got done by him or he should pay the mortgage amount and redeem the property. On receipt of this letter Chimanrai made the following endorsement :

During the lifetime of my father, I had become separated from him without taking any kind of the

moveable or immovable property belonging to him and even after his death, I have not taken and kind of his properties nor have I kept my right over the said properties and so I am not in any way responsible for your any transaction whatsoever in connection with his properties. Be it known to you. And while giving you a definite assurance t that effect I have made attestation on the aforesaid document in respect of purchase of the mortgage's rights, which may also be known to you.

6. Long after the death of Chimanagerai, Chhotalal, son of Ganpatram, give a similar notice, Ex. 68, October 6, 1933 to Chhotibai, the widow of Chimanagerai calling upon her to redeem the mortgage in question. On this notice similar endorsement on behalf of Chhotibai was made on October 10, 1933 by Lomeshprasad Haripresed Desai (for short 'Lomeshprasad'), her daughter's son, as had been made by Chimanagerai earlier on the notice given by Ganpatram. Yet another notice, Ex. 78, dated September 21, 1933 was sent by Chhotalal to Taralaxmibai, daughter of Chimanagerai to the see effect. In her reply, Ex. 73, dated October 3, 1933 to the notice, Taralaxmibai stated inter alia that her father Chimanagerai had forgone all rights whatsoever in the property of his father, Motibhai, during his life-time and hence she had no concern with the property of Motibhai. It was further stated that her own mother Chhotibai was alive (in October 1933) and, therefore she had no concern whatsoever with the property of Motibhai or the liabilities arising out of the dealing of Motibhai.

7. Narandas after the purchase of the mortgagor's rights from Shantilal filed a suit for redemption impleading both the assignees of the mortgagee's rights, Chhaganlal Keshavlal Mehta, as the 1st defendant, and Vamanrao Laxmanarao Nirkhe, as the 2nd defendant.

8. The claim was resisted by the 1st defendant on ground that the plaintiff had no right to redeem inasmuch as his predecessor-in-interest, Chimanagerai, his widow Chhotiba and his daughter Taralaxmibai on their own admission had no subsisting right, title and interest in the mortgaged property. The plaintiff who is only a transfer from Taralaxmibai could not rank higher, that Ganpatram, the predecessor-in-interest of defendant 1 thereof. Defendant 1, who claims through Ganpatram's son Chhotalal, was also an absolute owner and continued to remain in possession from 1933-34 as such. As an absolute owner he carried out repairs to the mortgaged property. He also obtained permission from the municipality and built the house afresh incurring heavy expenditure and in doing so he had spent about Rs. 3374-2-0. He also denied that Shantilal, purchaser of the equity of redemption was the plaintiff's benemidar. Indeed, the plaintiff had falsely created the evidence of benemidar to bring the present suit, and that the suit was barred by limitation and estoppel. In the alternative he pleaded that he should be paid the sum of Rs. 5099-2-0 if the plaintiff's suit for redemption was to be decreed.

9. The trial court came to the conclusion that the plaintiff had no right to redeem the mortgaged property as he had failed to prove that he had purchased the property benami in the name of Shantilal and that afterwards Shantilal had passed deed of conveyance or mutation in his favour. In view of this finding it was not necessary for the trial court to decide other issues but all the same the trial court recorded findings on the remaining issues also in order to complete the judgment. It found that Chimanagerai, Chhotiba or Taralaxmibai never relinquished their right, title and interest in the suit property, that the suit was within limitation, and that the suit was not barred by estoppel. As regards the amount spent on repairs the court came to the conclusion that defendant 1 had spent Rs. 3374-2-0 and, therefore, if the plaintiff was to be allowed to redeem the property he would have to pay that amount in addition to the mortgage consideration. The suit was dismissed by the trial court on the ground that the plaintiff had no right to redeem.

10. Feeling aggrieved the plaintiff went up in appeal, and defendant 1 filed cross-objection against

the findings that went against him. The appeal and the cross-objection were allowed by the Assistant Judge by his judgment dated March 31, 1956 on the finding that the plaintiff had purchased the equity of redemption benami in the name of Shantilal and that Shantilal had executed a deed of conveyance, Ex. 66, in favour of the plaintiff and, therefore,, he was entitle to redeem the property. He further found that the endorsements made by Chimanrai, his widow Chhotiba and his daughter Taralaxmibai did not amount to relinquishment of their right, title and interest in the property. He set aside the decree of the trial court and remanded the cases for deciding the remaining points after allowing the parties to lead fresh evidence on those issues. Defendant 1 challenged the remand order by filing an appeal in the High Court. His complaint was against the direction given by the appellate court while remanding the case. The High Court allowed the appeal in part and modified the direction of the lower appellate court asking the trial court to decide other issues afresh after allowing further evidence, except issues 1 and 4.

11. Consequent upon the order of remand the Joint Civil Judge, Junior Division, decided other issues against the plaintiff. He held that Chimanrai, his widow Chhotiba and his daughter Taralaxmibai had relinquished their right, title and interest in the suit property and, therefore, Taralaxmibai had no subsisting interest or title to transfer to the plaintiff or his predecessor-in-interest. He further held that the suit was barred by time and estoppel, and that defendant 1 had spent a substantial amount on repairs. On these findings he against dismissed the suit by his judgment dated August 21, 1958.

12. The plaintiff again took up the matter in appeal.

13. It appear that during the pendency of the appeal Vamanrao, defendant 2 died in August 1958. His heirs were, however, not brought on the record. A question arose whether the appeal abated as whole or only as against defendant 2. The District Judge by his separate order dated September 25, 1959 held that the appeal abated only so far as defendant 2 was concerned but it could proceed as against the surviving defendant 1.

14. The appeal was eventually allowed by the Assistant Judge, Baroda against defendant 1 by his judgment dated November 12, 1959 holding that the appellant was entitled to redeem the mortgaged property on payment of Rs. 4724-2-0 on account of the mortgage money as well as the expenditure incurred by defendant 1 on repairs and hat the suit was neither barred by time nor by estoppel. The appeal was, however, dismissed as against defendant 2.

15. Defendant 1 challenged the judgment and decree of the Assistant Judge before the High Court and only two contentions were raised before it : (1) that the mortgage cannot be split up and mst be treated as one and indivisible security and since the right to redeem against one of the two co-mortgagees had become extinguished because of abatement of the suit against Vamanrao and his heirs, the suit against defendant 1, the other co-mortgagee, must be dismissed; and (2) that the suit was barred by estoppel inasmuch as Chimanrai the heir of the original mortgagor and after him his wide Chhotiba and daughter Taralaxmibai having relinquished their right in the disputed property which she could have conveyed to Shantilal by sale. Consequently, Shantilal in his turn could not pass a better title to the plaintiff. In the result the plaintiff had no right to field the suit for redemption. A learned Single Judge who heard the appeal repelled the first contention but accepted the second one. Accordingly he allowed the appeal and dismissed the plaintiff's suit.

16. The plaintiff undaunted took u the matter in a letters patent appeal and the defendant also filed a cross-objection. A Division Bench of the High Court allowed the appeal and decreed the suit

reversing the finding of the learned Single Judge that the plaintiff had no right to sue. The Division Bench, however, granted a certificate of fitness for appeal to this Court. The learned counsel for the appellant has raised the same two contentions before us. We take up the first point first.

17. The first contention is based on the principle of indivisibility of the mortgage. Section 60 of the Transfer of Property Act deals with the rights and liabilities of a mortgagor. It confers a right of redemption. There is, however, a rider to the right of redemption in the section itself, which provides :

Nothing in this section shall entitle a person interested in a share only of the mortgaged property to redeem his now share only, on payment of a proportionate part of the amount remaining due on the mortgage, except only where a mortgagee, or, if these are more mortgages than one, all such mortgagees, has or have acquired, in whole or in part, the share of a mortgagor.

A perusal of this provision indicates that a co-mortgagor cannot be permitted to redeem his share of the mortgaged property only on payment of proportionate part of the amount remaining due. In other words the integrity of the mortgage cannot be broken. Order 34, Rule 1 of the Code of Civil Procedure deals with the parties to suits for foreclosure, sale and redemption. It provides :

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.

18. It was already been pointed out that defendant 2 was the purchaser of mortgagee rights in respect of the common latrine while defendant 1 is the purchaser of the mortgagee rights in respect of the remaining mortgaged property, viz., the houses. When the plaintiff filed the suit he impleaded both the mortgagees as defendants 1 and 2. Before the Assistant Judge a statement was made on behalf of the original plaintiff that he was prepared to pay the entire mortgage amount for redemption of the mortgaged property to the 1st defendant. A similar statement was made by Mr. Oza, counsel for the plaintiff in the High Court who further stated that in no event hereafter would the plaintiff seek any relief against the property in possession of defendant 2, viz., the right to the common latrine in which mortgage rights had been transferred to defendant 2 by Ganpatram. Besides, the severance of the two properties by Ganpatram was recognised by the mortgagor and hence the severance was with the implied consent of the mortgagor. It is a well-recognised principle that even if all the mortgagees are not before the court in a suit filed by the mortgagor for redemption of the property, but the mortgagor is prepared to pay the entire amount due at the foot of the mortgage to such mortgagees as are before the court and gives up his right under the mortgage as against those mortgagees who are not before the court, the court can pass a decree for redemption directing that the entire mortgage amount should be paid to the mortgagees who are actually before the court. This principle was recognised in a Full Bench decision in *Motilal Jadav v. Samal Bechar*. If one of the defendants in a suit dies and his heirs are not brought on record the suit certainly would abate as against that party. The suit, however, could not abate as against the other surviving defendants. A question may arise whether the suit is maintainable against the surviving defendants. In the instant case the suit abated as against defendant 2 in respect of the common latrine. But there is no difficulty in the suit proceeding against the surviving defendant 1 if the plaintiff is prepared to pay the entire mortgage consideration.

19. It may, however, be pointed out that defendant 2 never contested the suit. He was impleaded as a

party as it was incumbent on the plaintiff to have impleaded all the mortgagees as a party. But if the defendant did not contest the suit at any stage, will he be a necessary party in an appeal ? A person may be a necessary party in a suit but he may not be a necessary party in the appeal. The Division Bench of the High Court was fully justified in holding that the suit against the surviving defendant 1 was maintainable despite the abatement of the suit against the 2nd defendant. We fully endorse the view taken by the Division Bench of the High Court.

20. This takes us to the second point. This contention is based on the aforesaid various endorsements made by Chimnrai his widow Chhotiba and his daughter Taralxmibai on he notices sent by the mortgagee. The question is whether these endorsements amount to relinquishment of their rights and interest so as to estop them from transferring the property in suit ? The notice by Ganpatram to Chimnrai and the notices by his son Chhotalal to Chhotiba and Taralxmibai and their respective endorsements thereon have been referred to in the earlier part of the judgment. Whether these endorsements amount to relinquishment of their rights and title and if so whether the same amounts to estoppel within the meaning of Section 115 of the Evidence Act ? In our opinion the endorsements have to be read not in isolation but with reference to the notices sent. So read, the endorsements only indicate that the heirs of the mortgagor were not prepared to bear the expenses on repairs of the mortgaged property. The property cannot remain in vacuum even for a single moment. It must vest in somebody. Accordingly, after the death of Motibhai his property vested in his son who was the sole heir. The endorsements of Chimnrai, his widow Chhotiba and daughter Taralxmibai on the notices at the most would amount to an admission. The contention raised on behalf of the defendant-appellant is that he would not have purchased the mortgagee rights from Ganpatram if such a statement had not been made by Chimnrai, his widow Chhotiba and his daughter Taralxmibai and, therefore, they would be estopped from taking up a different stand from the one taken by them earlier. In substance, the question is whether the endorsements would amount to estoppel.

21. The difference between an admission and estoppel is a marked one. Admissions being declarations against an interest are good evidence but they are not conclusive and a party is always at liberty to withdraw admission by proving that they are either mistaken or untrue. But estoppel creates an absolute bar. In this state of the legal position, if the endorsement made by Chimnrai or by his widow, Chhotiba or his daughter Taralxmibai amounts to an estoppel they or their transfers would be prevented from claiming the property.

22. It may be pointed out that estoppel deals with questions of fact and not of rights. A man is not estopped from asserting a right which he had aid that he will not asert. It is also a well-known principle that there can be no estoppel against a statute. After the death of Motibhai his son Chimnrai succeeded in law.

23. To bring the case within the scope of estoppel as defined in Section 115 of the Evidence Act :

- (1) there must be a representation by a person or his authorised agent to another in any form - a declaration, act or omission;
- (2) the representation must have been of the existence of a fact and not of promises de future or intention which might or might not be enforceable in contract;
- (3) the representation must have been meant to be relied upon;
- (4) there must been belief on the part of the other party in its truth;
- (5) there must have been action on the faith of that declaration, act or omission, that is to say, the declaration, act or omission must have actually caused another to act on the faith of it, and to alter his former position to his prejudice or detriment;
- (6) the misrepresentation or conduct or omission must have been the proximate cause of leading the other party to act to his prejudice;
- (7) the person claiming the benefit of an estoppel must show that he was not aware of the

true state of things. If he was aware of the real state of affairs or had means of knowledge, there can be no estoppel; (8) only the person to whom representation was made or for whom it was designed can avail himself of it. A person is entitled to plead estoppel in his own individual character and not as a representative of his assignee.

24. None of these conditions have been satisfied in the instant case, for example, no representation was made to defendant 1. Therefore, he cannot plead estoppel. Secondly, the representation was not regarding a fact but regarding a right of which defendant 1 or his predecessor-in-interest had full knowledge or could have known if he had cared to know. It is difficult to say that defendant 1 has moved his position on account of the representation made by the mortgagor or his heirs or assignees. On the facts and circumstances of this a case it is not possible to hold that ingredients of Section 15 of the Evidence Act have been fulfilled. The view taken by the Division Bench of the High Court is fully warranted by law.

25. For the foregoing discussion we find no force in this appeal. It is accordingly dismissed with costs.

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