

SUPREME COURT OF INDIA

Dr. Thakar Singh (D) by Lrs.

Vs.

Sh. Mula Singh (D) thr. Lrs.

C.A.No.1740 of 2007

(Dipak Misra and R.F.Nariman JJ.)

14.10.2014

JUDGMENT

R.F. NARIMAN, J.

1. In this Civil Appeal an interesting question arises for decision. One Nand Singh and Dr. Thakar Singh filed a suit for recovery for possession of various shops cum vacant sites situated in the main Bazar of Moga Town against 14 defendants. The suit property had been mortgaged to one Suba Singh and Saudagar Singh, defendants 1 and 2, for a sum of Rs.26,000/- vide registered mortgage deed dated 9th March 1942. After taking an additional amount of Rs.3,000/- from the aforesaid Suba Singh and Saudagar Singh, the plaintiffs executed an additional registered mortgage deed dated 3rd March 1943. The material terms of the mortgage deed dated 9th March 1942, with which we are concerned, reads as follows:

Now we the executants while in our full senses and with our free will having mortgaged with possession the aforesaid shops, Ahatas including lane passage together with material (malba) chob kari (wooden shafts) etc., including well together with right to ingress and egress convenience and residence in favour of Suba Singh s/o Mutsada Singh, caste Jat resident of Wara Bhai and Saudagar Singh son of Sh. Rattan Singh caste Jet r/o Jawahar Singh Didar Singh wala in equal share for a sum of Rs.26,000/- (Twenty Six thousand) only half of which comes to Rs.13000/- (Thirteen thousand) only possession of which has been

given to them. The present mortgagees shall get the actual possession from the previous mortgagees after paying their mortgage money to them and after getting the land redeemed from them. The mortgagees are competent either to be in occupation themselves or to give on rent to anyone. Whenever the total mortgage money is paid in two lots the half of the mortgage property shall be got redeemed in two lots at the discretion of the mortgagors.

The redemption of southern side of the lane shall be deemed to be half and that of the northern side shall be other half, meaning thereby that it will be discretion of the mortgagors to redeem the southern side of lane or the northern side on receipt of the half of the mortgage money. We shall be liable for any proceedings arising out of any objection thereto. We shall also be liable to make good the loss or damage caused to the mortgagees on account of any legal or factual defect in the mortgaged property. The expenses for white washing and plastering shall be borne by the mortgagees, but the expenses of repairs and reconstructions shall be borne by us, the executants. In case of our failure, the mortgagees shall get it done after giving notice to us and then we shall be liable to pay the expenses borne by the mortgagees. On the payment of mortgage money when the mortgage money is paid, from that day on taking possession we shall be entitled to receive rent in future. (Underlining ours)

2. On 25th August 1969, the plaintiffs redeemed the mortgaged properties by depositing a sum of Rs.29,000/- . The cause of action for filing the present suit arose on account of the fact that physical possession of the suit property was not handed over to the plaintiffs even after the redemption of the mortgaged property. The defendants 1 and 2 are said to have rented out portions of the suit property to defendants 3 to 14. Since the defendants failed to deliver possession, the plaintiffs filed a suit for possession and recovery of damages. In the Trial Court, a number of issues were struck between the parties. In the present appeal, we are concerned basically with Issue 4, which reads as under:

Whether the suit is barred under the provisions of the Rent Restrictions Act? The Trial Court decided the case on all 11 issues and held that on a true reading of the mortgage deed, the mortgagor had recognized the tenants of the mortgagee whose tenancy therefore did not come to an end with redemption of the mortgage. In First Appeal, the High Court of Punjab and Haryana did not go

into any of the other issues including the issue as to whether the tenancies were created before or after the execution of the two mortgage deeds. It held on a reading of a clause in the first mortgage deed that since the mortgagors would be entitled to future rent after redemption, it is clear that the mortgagors recognized all tenants created by the mortgagees during the subsistence of the mortgage. Issue No.4 was answered accordingly and the suit for vacant possession of the suit property from defendants was held not to be maintainable in law.

3. Learned counsel for the appellants raised a two-fold contention before us. Firstly, a correct reading of the two mortgage deeds would only lead to the conclusion that on redemption all tenancies created by the mortgagees would cease to have any effect and would not be binding on the mortgagors. Alternatively, it was also argued that if it were found that on a true construction of the mortgage deed the mortgagorsTM right to redeem was in fact clogged such clog would not be countenanced by the courts and full effect of redemption including the right to take back possession of the mortgaged property free from all encumbrances would ensue. Learned counsel for the respondents basically supported the judgment under appeal and argued that it was clear from a reading of the mortgage deed that the mortgagors had in fact recognized tenancies created by the mortgagees and therefore the present suit would not be maintainable

- the mortgagors have to go to a Rent Court to make out some ground of eviction against tenants recognized by them.

4. The right of a mortgagor to redeem is dealt with by Section 60 of the Transfer of Property Act. Section 60 reads as follows:

60. Right of mortgagor to redeem At any time after the principal money has become due, the mortgagor has a right, on payment or tender, at a proper time and place, of the mortgage-money, to require the mortgagee (a) to deliver to the mortgagor the mortgage-deed and all documents relating to the mortgaged property which are in the possession or power of the mortgagee, (b) where the mortgagee is in possession of the mortgaged property, to deliver possession thereof to the mortgagor, and (c) at the cost of the mortgagor either to re-transfer the mortgaged property to him or to such third person as he may direct,

or to execute and (where the mortgage has been effected by a registered instrument) to have registered an acknowledgement in writing that any right in derogation of his interest transferred to the mortgagee has been extinguished:

Provided that the right conferred by this section has not been extinguished by act of the parties or by decree of a Court.

The right conferred by this section is called a right to redeem and a suit to enforce it is called a suit for redemption.

Nothing in this section shall be deemed to render invalid any provision to the effect that, if the time fixed for payment of the principal money has been allowed to pass or no such time has been fixed, the mortgagee shall be entitled to reasonable notice before payment or tender of such money. Section 62 also recognizes the right of a usufructuary mortgagor to recover possession under certain circumstances. Further, the rights of a mortgagee in possession are dealt with by Section 72 of the Transfer of Property Act. Suffice it to say that the right to create tenancies is not one of the rights enumerated in this section. Section 76 (a) deals with a usufructuary mortgagee managing the property as a person of ordinary prudence would manage if it were his own. Section 111(c) of the Transfer of Property Act states:

S. 111 Determination of lease. "A lease of immovable property determines "-

(c) where the interest of the lessor in the property terminates on, or his power to dispose of the same extends only to, the happening of any event "- by the happening of such event; In *All Indian Film Corporation Ltd. & Ors. v. Sri Raja Gyan Nath & Ors.* [1969 (3) SCC 79], a similar question arose before this Court. In the facts of that case, the mortgage was redeemed on 19th April 1958 after which the respondent No.1 filed a suit for possession of the property from the head lessee and his sub-lessees. The sub-lessees claimed the benefit of the East Punjab Urban Restriction Act. In repelling the contention of the sub-lessees that they were protected tenants as against the mortgagor, this Court stated:

7. The first question to consider is this: Did the tenancy created by the

mortgagee in possession survive the termination of the mortgagee interest so as to be binding on the purchaser? A general proposition of law is that no person can confer on another a better title than he himself has. A mortgage is a transfer of an interest in specific immovable property for the purpose of securing - repayment of a loan. A mortgagee's interest lasts only as long as the mortgage has not been paid off. Therefore on redemption of the mortgage the title of the mortgagee comes to an end. A derivative title from him must ordinarily come to an end with the termination of the mortgagee's title. The mortgagee by creating a tenancy becomes the lessor of the property but his interest as lessor is co-terminous with his mortgagee interest. Section 111(c) of the Transfer of Property Act provides that a lease of immovable property determines where the interest of the lessor in the property terminates on, or his power to dispose of the same, extends only to the happening of any event-by the happening of such event. The duration of the mortgagee's interest determines his position as the lessor. The relationship of lessor and lessee cannot subsist beyond the mortgagee's interest unless the relationship is agreed to by the mortgagor or a fresh relationship is recreated. This the mortgagor or the person succeeding to the mortgagor's interest may elect to do. But if he does not, the lessee cannot claim any rights beyond the term of his original lessor's interest. These propositions are well- understood and find support in two rulings of this Court in Mahabir Gope and Ors. v. Harbans Narain Singh [1952]1SCR775 and Asaram and Ors. v. Mst. Ram Kali [1958] S.C.R.986

8. To the above propositions there is, however, one exception. That flows from Section 76(a) which lays down liabilities of a mortgagee in possession. It is provided there that when during the continuance of the mortgage, the mortgagee takes possession of the mortgaged property, he must manage the property as a person of ordinary prudence would manage it if it were his own.

From this it is inferred that acts done bona fide and prudently in the ordinary course of management, may bind even after the termination of the title of the mortgagee in possession. This principle applies ordinarily to the management of agricultural lands and has seldom been extended to urban property so as to tie it up in the hands of lessees or to confer on them rights under special statutes. To this again there is an exception. The lease will continue to bind the mortgagor or persons deriving interest from him if the mortgagor had concurred to grant it.

This judgment was followed in *M/s. Sachalmal Parasam v. Smt. Ratnabai & Ors.* [1973 (3) SCC 198] at paragraphs 5 to 9.

5. In *Pomal Kanji Govindji & Ors. v. Vrajlal Karsandas Purohit & Ors.* [1989 (1) SCC 458], this Court dealt with the same question and arrived at two basic conclusions. The first is that a clog on the equity of redemption will be disregarded by a Court of law and secondly that a lease created by a mortgagee in possession of an urban immovable property would not be binding on the mortgagor after redemption of a mortgage even assuming such lease is as a prudent owner of property would have granted in the usual course of management. This Court held:

32. 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, and unless there is anything to the contrary in the statute, court must take cognisance of that fact and act accordingly. In the context of fast changing circumstances and economic stability, long-term for redemption makes a mortgage an illusory mortgage, though not decisive. It should prima facie be an indication as to how clogs on equity of redemption should be judged.

33. In the facts and the circumstances and in view of the long period for redemption, the provision for interest @ ½ per cent per annum payable on the principal amount at the end of the long period, the clause regarding the repairs etc., and the mortgagor's financial condition, all these suggest that there was clog on equity. The submissions made by Mr. Sachar and Mr. Mehta are, therefore, unacceptable.

35. Before we dispose of the contentions on the second aspect, we must deal with some of the decisions of the Gujarat High Court to which reference had been made and some of which was also referred before us. We have noticed the decision of the Gujarat High Court in *Khatubai Nathu Sumra v. Rajgo Mulji Nanji*. In *Maganlal Chhotalal Chhatrapati v. Bhalchandra Chhaganlal Shah, P.D. Desai, J.* as the learned Chief Justice then was, held that the doctrine of clog on the equity of redemption means that no contract between a mortgagor and mortgagee made at the time of the mortgage and as a part of the mortgage

transaction or, in other words, as a part of the loan, would be valid if it in substance and effect prevents the mortgagor from getting back his property on payment of what is due on his security. Any such bargain which has that effect is invalid. The learned Judge reiterated that whether in a particular case long term amounted to a clog on the equity of redemption had to be decided on the evidence on record which brings out the attending circumstances or might arise by necessary implication on a combined reading of all the terms of the mortgage. The learned Judge found that this long term of lease along with the cost of repairing or reconstruction to be paid at the time of redemption by the mortgagor indicated that there was clog on equity of redemption. The learned Judge referred to certain observations of Mr. Justice Macklin of the Bombay High Court where Justice Macklin had observed that anything which does have the appearance of clogging redemption must be examined critically, and that if the conditions in the mortgage taken as a whole and added together do create unnecessary difficulties in the way of redemption it seems that is a greater or less clog upon the equity of redemption within the ordinary meaning of the term. In our opinion, such observations will apply with greater force in the present inflationary market. The other decision to which reference may be made is the decision of the Gujarat High Court in *Soni Motiben v. M/s. Hiralal Lakhamshi*. This also reiterates the same principle. In *Vadilal Chhaganlal Soni v. Gokaldas Mansukh* also, the same principle was reiterated. In that case, it was held by Gajendragadkar, J., as the learned Chief Justice then was, that the agreement between the mortgagor and mortgagee was that the mortgagor was to redeem the mortgage 99 years after its execution and the mortgagee was given full authority to build any structure on the plot mortgaged after spending any amount he liked. It was held that the two terms of the mortgage were so unreasonable and oppressive that these amounted to clog on the equity of redemption. Similar was the position in the case of *Sarjug Mahto v. Smt. Devrup Devi*, where also the mortgage was for 99 years. In *Chhedi Lal v. Babu Nandan*, the court reiterated that freedom of contract unless it is vitiated by undue influence or pressure of poverty should be given a free play. In the inflationary world, long term for redemption would prima facie raise a presumption of clog on the equity of redemption. See also the observations in *Rashbehary Ghose's 'Law of Mortgage'* 6th Edn. pages 227 and 228.

39. On the second aspect of the question whether the right of the tenants of the

mortgagees are protected after the redemption of mortgage, reliance was placed by the First Appellate Court on the decision of the Full Bench of the Gujarat High Court in *Lalji Purshottam v. Thacker Madhavji Meghaji*. There urban immovable property was mortgaged with possession, mortgagee creating lease during the subsistence of the mortgage. The question was whether after redemption of mortgage such lease is binding on the mortgagor. It was held that Section 76(a) of the Transfer of Property Act would not apply to such cases. There must be express words showing an intention if tenancy was to be created beyond the term of the mortgage. Mere reference that mortgagee is entitled to lease property does not create a binding tenancy on the mortgagor. After the redemption of the mortgage the relationship of landlord and tenant does not exist. Such tenant, therefore, does not get any protection under Section 12 of the Bombay Rent Control Act, it was held. The Gujarat High Court had referred to several decisions of this Court. In *Mahabir Gope v. Harbans Narain Singh* which was a decision dealing with a lease created by a mortgagee with possession under the Bihar Tenancy Act, this Court reiterated that the general rule is that a person cannot by transfer or otherwise confer a better title on another than he himself has. A mortgagee cannot, therefore, create an interest in the mortgaged property which will enure beyond the termination of his interest as mortgagee. Further the mortgagee, who takes possession of the mortgaged property, must manage it as person of ordinary prudence would manage if it were his own; and he must not commit any act which is destructive or permanently injurious to the property. Reliance maybe placed for this purpose on Section 76, clauses (a) and (e) of the Transfer of Property Act, 1882. It was held that the provisions of Sections 20 and 21 of the Bihar Tenancy Act, did not apply to the lessees since they were not 'settled raiyats' and the lessees could not claim to have secured under the statute occupancy rights in the land. It was further held that the mortgagor was entitled to the possession of the land upon redemption of the mortgage. In a slightly different context in *Harihar Prasad Singh v. Mst. of Munshi Nath Prasad*, this Court was concerned with a mortgage with possession effected on agricultural land. This Court had to consider in that decision whether under the provisions of the Bihar Tenancy Act the tenant inducted on the mortgaged property during the pendency of the mortgage could claim right to remain in possession after the redemption. Venkatarama Ayyar, J., speaking for the Court pointed out that if the tenant could not resist the suit for ejectment either by reason of Section 76(a) of the

Transfer of Property Act or Section 21 of the Bihar Tenancy Act, the tenant could not get such a right as a result of the interaction of both those sections. This Court ultimately held that the tenants inducted by the mortgagee with possession had failed to establish that they had any right of occupancy over the suit lands and that the plaintiffs were entitled to a decree in ejectment, with future mesne profits as claimed in the plaint. Thus a right claimable under Section 76(a) of the Transfer of Property Act because of a lease created in the course of prudent management of the property was put on a different footing altogether from a right created by a special statute.

46. We have noted hereinbefore the ratio and the basis of the decision of this Court in *Jadavji Purshottam v. Dhami Navnitbhai Amaratlal*. Shri Mehta submitted that there was no clear finding as to when the tenants were inducted whether before or after the Rent Restriction Act and therefore, he pleaded that the matter should be referred to the larger Bench. In view of the facts found in this case which were similar to the facts mentioned in *Jadavji Purshottam's* case, there is no specific authority in the lease which stated that the lease would continue beyond the period of mortgage. There is no extended authority as contemplated in *Jadavji Purshottam* case found in this case. The submission was that the matter should be considered by a larger Bench in the light of the *Jadavji Purshottam* case. We are unable to accept the said submission. In this case the words in the mortgage deed, as we are taken through, did not clearly allow creation of tenancy beyond the period of mortgage. That, in any event, would not have been prudent management, hence, there is no finding that the mortgage deed permitted, either expressly or impliedly, creation of tenancy beyond the period. We think that the tenants were not entitled to protection after redemption of mortgage. Furthermore, in all these cases the authority of the mortgagees to lease out the property, expressed or implied, was circumscribed by a stipulation that the mortgagee should re-deliver the possession of the property when the mortgage was redeemed. In that context, we are of the opinion that the submissions on behalf of the tenants cannot be entertained. (Emphasis supplied)

6. In *Shivdev Singh & Anr. v. Sucha Singh & Anr.* [2000 (4) SCC 326], this Court held that a mortgage for a period of 99 years being an unreasonably long period before which redemption could not take place would be a clog on the equity of redemption

and would therefore be disregarded by the Court. On the facts of the case, the mortgage deed was dated 19th March 1968 and the mortgage was sought to be redeemed long before the period of 99 years came to an end. It was held that such redemption was possible and the 99 year period was held unenforceable. It was further held that it is a right of the mortgagor on redemption to get back the subject of the mortgage and to hold and enjoy the property in the same manner as he was entitled to hold and enjoy it before the mortgage. If he is prevented from so doing such prevention is bad in law.

7. There is a long line of High Court judgments which hold that a mortgagee continuing in possession as a tenant after redemption is a clog on redemption and is invalid as it prevents the mortgagor from getting back the property in the same condition as he gave it when the mortgage was executed. In *Mahomed Muse v. Jijibhai Bhagvan* [(1885) 9 Bom 524 at pg 525], it was held:

The objection to the condition in the mortgage, that if the mortgagor redeemed the land, the mortgage right only should be extinguished, and the lands should remain in the right hands of the mortgagee, he paying a rent of 2 Rupees per bigha, has not been dealt with by the Assistant Judge, although it was raised by the fourth ground of the plaintiffsTM appeal. Such a condition, although it does not exclude the right of redemption, fetters it with the onerous obligation of accepting the mortgagee as a perpetual tenant, and ought not, therefore, in our opinion, to be enforced in a Court of Equity. In *Parmanand Pandit v. Mata Din Rai* [(1925) 47 All 582 at pg 584], it was held:

As to the first point, it seems to me that the condition that even after redemption the mortgagees would hold on the land, was a clog on the equity of redemption. Conditions which prevent or impede the right of redemption even after redemption, if such conditions are entered into at the same time when the mortgage is made, must be taken to be a clog on the equity of redemption. On the other hand, a subsequent contract which modifies the right of redemption may not be such a clog. Although the principle underlying the rule of a clog on redemption is very old yet it still prevails and will not permit any device or contrivance, being part of the mortgage transaction or contemporaneous with it, to prevent or impede redemption. It follows that any covenant under which some right to retain possession is reserved to the mortgagee even after the

property is redeemed is a clog on redemption as it both prevents and impedes redemption. That such a clause amounts to a clog on redemption is covered by authority.

In the case of Mahomed Muse v. Jijibhai Bhagvan, which was followed by a learned judge of this court in the case of Sheo Singh v. Birbahadur Singh, and has been subsequently followed by the Madras High Court in the case of Ankinedu v. Subbiah, a covenant under which the mortgagee, even after redemption, was entitled to retain the property on payment of a fixed rent, was considered to be a clog on the equity of redemption and unenforceable in a court of equity. I am accordingly of opinion that the clause cannot bind the mortgagorTMs representatives and that, therefore, if they have paid the entire amount due, they are entitled to take possession of the land unencumbered of any contract for the grant of perpetual lease. To the same effect the following judgments have also held that a mortgagee remaining in possession as a tenant post-redemption is invalid as a clog on redemption:

Sheo Singh v. Birbahadar Singh, (1910) 6 IC 707 (All) at pg 708, 709;

Aukinidu v. Subbiah, (1912) 35 Mad 744 at pg 749;

Daolal Rai v. Sheikh Chand, (1915) 31 IC 869 (Nag) at pg 870;

Ram Narain Pathak v. Surathnath, (1920) 57 IC 327 (Pat) at pg 338;

Bhimrao v. Sakharam, AIR 1922 Bom 277 at pg 278;

Satyavatamma v. Padmanabhan, AIR 1957 AP 30 at para 19;

Gobind Ram v. Rajphul Singh, AIR 1973 P & H 94 at para 11, and Maina Devi v. Thakur Mansingh & Ors., AIR 1986 Raj 44 at para 30.

8. On the facts of this case, it will be seen that the mortgagees were entitled to create tenancies by virtue of the mortgage deed dated 9th March 1942. However, there is nothing in the language of the mortgage deed to indicate clearly that the tenancies created by the mortgagees would be binding on the mortgagors. At the highest, after

redemption, and after possession is taken, the mortgagor or mortgagors will also be entitled to receive rent in future. It will be seen that the mortgagorTM's right to get back possession is expressly recognised by the mortgage deed without any clear and unambiguous language entitling tenants created by the mortgagees to become tenants of the mortgagors. The entitlement to receive rent in future can by no stretch be held to create a tenancy between the mortgagor and the tenants of the mortgagees. This phrase has to be reconciled with the expression immediately preceding it namely on taking possession. It is clear that taking of possession from the mortgagees and his tenants is completely antithetical to recognizing the mortgageesTM tenants as the mortgagorsTM tenants. If the clause is to be read in the manner that the High Court has read it, the mortgagors would not be able to get back possession on redemption which would in fact be a serious interference with their right to redeem the property inasmuch as the mortgagors would have to evict such tenants after making out a ground for eviction under the Rent Act. Such ground can only be bonafide requirement of the landlord or some ground based on a fault committed by the tenant such as non-payment of rent or unlawful subletting etc. Further, such ground may never become available to the mortgagor/landlord or may become available only after many years. It has already been seen that a mortgagee continuing in possession after redemption as tenant of the mortgagor is regarded as a clog on redemption. The position is not different if the mortgageeTM's tenants continue in possession after redemption. This would necessarily have to be disregarded as a clog on redemption as the right to redeem would in substance be rendered illusory. In the circumstances, the judgment of the Punjab and Haryana High Court dated 31st March 2004 is set aside. All other issues are left open and can be agitated before the High Court. It will be open to all parties to raise such pleas as are available to them in law. Considering that the cause of action in the suit arose in 1969, the High Court is requested to take up RFA No.238/1979 to decide the other issues as early as possible and preferably within six months from the date of delivery of this judgment.