GUJARAT HIGH COURT

Khatubai

Vs.

Rajgo Mulji Nanji

Second Appeal No. 491 of 1976

(M.K. Shah, J.)

10.11.1978

JUDGMENT

M.K. Shah, J.

1. The appellant is the original plaintiff who filed a suit against the original defendant for redemption of mortgage of a property mortgaged by one Aishabai, grandmother of the plaintiff to the father of original defendant No. 1 Jusab Sidik Gulmohmed who, it appears, was the son-in-law of the said Aishabai. Original defendant No. 2 having died, his heirs are brought on record as respondents Nos. 1 to 10, the said defendant was impleaded as he was the assignee of the rights obtained by the said Jusab Sidik, original defendant No. 1's father from Aishabai. It may be noted at this stage that the suit was withdrawn against defendant No. 1 and it then proceeded against defendant No. 1 only.

2. The plaintiff's case was that the property consisting of a room, with Osri and Angna, that is, chowk or verandah and open space, which property was self contained, the same being Deli Bandh, was mortgaged for a consideration of Rs. 2,000 Koris on Aso Vad 3 of S.Y. 1998 equivalent to 1942 A.D. The property was formerly mortgaged to Khatri Jamat and the possession was obtained by redeeming the same from it through court. By the suit deed of mortgage Ex. 45, it was provided that the property was mortgaged with possession for a period of 99 years with condition that there will be no interest on the security amount of 2000 Koris (Rs. 667) and there will be no rent for the property given in possession to the mortgagee. The document further provided that the mortgagee was at liberty to spend for repairs and to incur incidental expenses on the property as also to demolish the property and to reconstruct from the foundation with upper floor, and at the time of redemption, the mortgagor will be bound to pay along with mortgage amount the said expenses so incurred by the mortgagee for repairs and reconstruction of the property. It was also mentioned that out of the said amount of 2000 Koris advanced on mortgage, an amount of 1900 Koris was received by the mortgagor for the purpose

of meeting with household expenses. It was, therefore, the plaintiff's case that these terms in the mortgage were such as to amount to a clog on equity of redemption and they therefore, had no binding effect on her and she was, therefore entitled to redeem the mortgage before, expiry of the stipulated period of 99 years. The original mortgagee's (Sidik Gulmohmed) son Jusab, that is original defendant No. 1 sold the rights in the property obtained by the said document to defendant No. 2 on 3-12-1966 as per Ex. 56 for a sum of Rs. 1,700 and it was *inter alia* mentioned in that document that for repairs and new construction after demolishing the old one, an amount of Rs. 1,100 had been spent on the property.

3. The learned second joint Civil Judge, Junior Division, Bhuj, on the evidence led before him, came to the conclusion that the terms with regard to the period of 99 years and other terms contained in the document were such as to amount to a clog on equity of redemption and had, therefore, no binding effect on the plaintiff and the plaintiff was, therefore, entitled to redeem the property from the defendants. He, therefore, passed a preliminary decree for redemption of property on depositing in court the amount which may be declared by the court to be due within six months of the decision on issue No. 4, second part, which related to the amount to be deposited on redemption and on issue No. 5 which was with regard to the proof concerning the amount of Rs. 2287-31 paise alleged to have been spent after repairs and improvement of the property by defendant No. 2 and he, therefore, kept the matter for evidence on issue No. 4 (second part) and issue No. 5 after ordering preliminary decree to be drawn up as per Order 34, Rule 7 of the Civil Procedure Code.

4. Aggrieved by this judgement and decree of the trial court, original defendant No. 2 -Rajgor Mulji Nanji preferred regular Civil Appeal No. 77 of 1971 to the court of the District Judge, Kutch at Bhuj and the learned District Judge who heard the same, came to the conclusion, on construing the terms in the said document, Ex. 45, that it did not contain any terms which would amount to a clog on the equity of redemption. In his opinion, there was nothing on record to warrant a conclusion that the mortgagor had been in a position to dominate the will of Aishabai or undue influence had been exercised or that the transaction was unconscionable. He, therefore, allowed the appeal, set aside the decree passed by the trial court and dismissed the suit of the plaintiff with costs, and hence this second appeal by the original plaintiff.

5. Mr. R.A. Mehta, the learned Advocate appearing for the appellant contends that the ratio laid down in the case of *Maganlal Chhotalal Chhatrapati v. Bhalchandra Chhaganlal Shah*[1], would apply to the facts of the instant case and the learned District Judge erred in not following this judgement. Now, this was a case in which a child widow had mortgaged a building site admeasuring 24 sq. yds. situated in a taluka town to an owner of an adjacent property for a period of 199 years to secure a debt of Rs. 61 and one of the terms of the mortgage was that the mortgagee can make any type of construction and raise any super-structure on the mortgaged property and that if he did so, the property was to be redeemed on payment of the price in addition to the mortgage money, and this court held, after referring to *Ganga Dhar v. Shankar*

Lal[2]*,* as also other cases, that having regard, inter alia, to the fact that (1) the mortgagee was a child lady who mortgaged the property in question for 199 years to secure a debt of Rs. 61 although it was not necessary or customary to submit to such long term; (2) that the mortgagee who was the owner of the adjacent property thereby obtained a collateral advantage of beneficial enjoyment of his own property for a considerable period of time to the detriment of the mortgagor and (3) that the mortgagee was entitled to raise any construction or super-structure on the mortgaged property and the mortgagor was liable to may the price of the said construction or super-structure at the time of redemption, the bargain between the mortgagee and the

[1](1974) 15 Guj LR 193

[2] AIR 1958 SC 770

mortgagor was unconscionable and the long term of the mortgage constituted a clog on the equity of redemption. It is true, in the instant case, the mortgage is also for a long term of 99 years though it is not for such a long term of 199 years as was the case in Maganlal's case (supra). It is also true that in that case, the property was mortgaged for such a long period to secure a debt of only Rs. 61 although it was not necessary or customary to submit to such a long term and in the instant case, the debt secured is not a small amount, but the amount which would be equivalent to the market price of the property as is evident from the fact that the mortgagor herself had agreed to sell the same for that amount a few days before she executed the deed of mortgage. It is also true that in the Maganlal's case (supra), the mortgagee was the owner of adjacent property who by the deed of mortgage obtained a collateral advantage of beneficial enjoyment of his own property for a considerable period of time to the detriment of the mortgagor while such is not the case so far as the instant case is concerned. But as in the case considered in Maganlal's case, so also in the instant case, there was a term entitling the mortgagee to raise any construction or super-structure on the mortgaged property and to spend any amount thereon and the mortgagor was made liable to pay the price of the super-structure at the time of redemption and *prima facie* this would show that the bargain between the mortgagee and mortgagor was unconscionable, particularly in view of the fact that the mortgage was for a long term of 99 years. There is no evidence led to show as to whether it was customary in the region in which the property was situated, to create a mortgage of this type for a long term of 99 years. But Mr. Mankad the learned Advocate appearing for the respondents draws my attention to the passage from Ganga Dhar's case (supra) at p. 774, para 17, which reads as follows :-

> "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".

In my opinion, this general remark does not show that in the region in which the property is situated in the instant case, it was customary to have long term mortgages or that there is such a custom in the entire India without exception including Kutch region where the suit property was situated. This remark also cannot help Mr. Mankad in his submission that there is such a custom prevalent in Kutch region. Again, beyond an averment in the written statement to the effect that

the Transfer of Property Act was not applicable to the Kutch region at the relevant time or that there was a custom of entering into long term mortgages, in that region, there is no material on record justifying any such conclusion. It was for the defendants to prove such custom as averred by them in the written statement. It seems, they were rest content with the said averment made in the written statement and the question was not pressed any further. No evidence was led to prove the same, nor any argument advanced before the trial court obviously because there was not even an issue raised. The point was also not taken up and argued before the lower appellate court and it would be therefore an exercise in futility on the part of Mr. Mankad to rake up this question in the second appeal at argument stage. He realised this when the true position was pointed out to him and then he did not pursue the matter further. Again, a custom has to be ancient, certain, reasonable and being in derogation of the general rules of law must be construed and proved strictly. It has, therefore, to be proved, as such, by the party propounding the same. A mere statement in the written statement does not amount to proof.

6. In the case before the Supreme Court, so far as the length of the term was concerned, it was observed that it was not necessary for the court 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 and the court did not desire to say anything on that question in the said case. The Supreme Court thought it enough to say that it had nothing to show that the length of the term was in any way disadvantageous to the mortgagor, but on the contrary it was quite conceivable that it was to the advantage of the mortgagor because the suit for redemption was brought over forty-seven years after the date of the mortgage and from this, it was observed, "it seems to us impossible that if the term was oppressive, that was not realised much earlier and the suit brought with in a short time of the mortgage." It was, therefore, on the peculiar facts of that case that in spite of long term of 85 years (though not so long as 99 years as in the instant case), the Supreme Court did not hold the transaction to be unreasonable.

7. Now, so far as the third ground is concerned, viz. the ground with regard to the expenses to be incurred for repairs and reconstruction without any limit, and liability of the mortgagor to pay all the expenses so incurred, at the time of redemption, Mr. Mankad also draws my attention to the fact that in the case before the Supreme Court also, there was similar term to the effect that the mortgagee can spend any amount for repairs to the mortgaged property and for putting up new construction thereon and the mortgagor can only redeem the property after paying the expenses for this. But it appears the Supreme Court did not agree that such was the effect of the mortgage instrument and the following observations in this connection are very important :-

> "We cannot lose sight of the fact that the mortgaged shop and the area of the land on which it stood were very small. It was not possible to spend a large sum on repairs or construction there. Furthermore, having agreed to 85 years as the term of the mortgage, the parties must have imagined that during this long period repairs and constructions would become necessary. It is only such necessary repairs as are contemplated by the

instrument and we do not consider that it is hard on the mortgagor to have to pay for such repairs and construction when he redeems the property and gets the benefit of the repairs and constructions."

8. It would be thus seen that it was on the peculiar facts of that case that a pretty similar term was not considered as a hard one on the mortgagor. The transaction was in respect of a small shop and, therefore, any repairs and reconstruction would be to a limited extent, and as observed by the Supreme Court, it was only necessary repairs as were contemplated by the instrument for which the mortgagor was bound to pay at the time of redemption. But in the instant case, we find that the property consists of a room with an Osri (Verandah) or Corridor and open chowk (Angna) with Deli Bandh, that is - closed by surrounding wall with an entrance gate. Again, the property which was mortgaged was only a one storey structure, yet the rights which are given to the mortgagee in respect of reconstruction are, inter alia, to remove the entire structure and to reconstruct from the foundation not only limited to the ground floor but with liberty to put up upper structures also. There is no limit to the expenses which can be incurred in this behalf. As a matter of fact, it is the claim of defendant No. 2 that he has spent a sum of Rs. 1,700 and odd on reconstruction and repairs of the property which was worth Rs. 667 and which was mortgaged to secure a debt of Rs. 667. This is, therefore, a distinguishing feature and the consideration, therefore, which applied to the case before the Supreme Court would not apply to the facts of the present case. After all, each case has to be decided on its own facts.

9. Again, in the instant case, there are a couple of features which do support the conclusion that the transaction was an unreasonable and unconscionable one. First of all, as the material on record shows, the property was mortgaged from time to time. It was lastly redeemed from the last mortgagee by paying the amount due to Khatri Jamat against whom Aishabai, that is, the mortgagor, had to file a suit for redemption of mortgage, the debt secured being 600 Koris equivalent to Rs. 200. Again, the suit document itself shows that out of 2000 Koris which she received as advance on security of the property, she had received 1900 Koris in cash for the purpose of meeting with her household expenses. This shows that she was hard pressed financially and she needed the amount for her day to day household expenses. The mortgagee was her own son-in-law. In these circumstances if the mortgage document executed is for a long term of 99 years coupled with a stipulation, that the mortgagee was free to incur any expenses for repairs, and was further free even to demolish the entire structure and reconstruct the same from the foundation, and put up not only the ground floor but an upper floor also, and that the mortgagor would be bound to pay all such expenses incurred, at the time of redemption of mortgage, a conclusion is inescapable that the mortgagor was oppressed and was impressed upon. In any event, there is no doubt that the transaction was unreasonable and unconscionable with conditions which constitute a clog on the equity of redemption, because the covenants earlier referred to are unduly harsh and unconscionable and they nullify for all practical purposes, the right of redemption, or restrict the exercise of the said right in such an unreasonable manner as to practically deny the same; and the mortgagor was, therefore, entitled to be relieved of the

bargain, which bargain, in substance and effect, prevents the mortgagor from getting back her property on payment of what is due on her security.

10. Mr. Mehta for the appellant drew my attention to an unreported decision of this court in Second Appeal No. 978 of 1961 decided on 5th February, 1969 by B.G. Thakore, J. As rightly pointed out by Mr. Mehta, the conditions with regard to the length of the term as also the expenses to be incurred for reconstruction are almost identical in the document Ex. 32 which was dealt with in that appeal and the document Ex. 45 which is the document of mortgage with which we are concerned in the present appeal. Ex. 32 in the said case contained the following conditions :
(Original in Gujarati omitted. - Ed.)
meaning thereby that the period of mortgage for the said property has been fixed at 99 years and whatever expenses may be incurred for putting up any type of construction after demolishing the said property will be tagged on to this property.

Now, in Ex. 45, the following conditions are relevant : (Original in Gujarati omitted. - Ed.) meaning thereby that the said property has been granted to you on a clear mortgage of a term of 99 years and in the said property any tenantable repairs or any expenses in respect of floors, walias and roof tiling etc. which would be incurred or any expenses which may be incurred for your convenience or comfort by putting up entirely a new structure from the foundation with an upper storey after demolishing the property etc. will be no concern of the mortgagor and all such expenses will be tagged on to the property. This, therefore, shows that the condition with regard to reconstruction and reimbursement of expenses on that account as a condition in the document Ex. 45 with which this court is concerned, is far more harder than the condition contained in Ex. 32 which was being dealt with in Second Appeal No. 978 of 1961 (supra). In the instant case, though the property as mortgaged consists only of a ground floor structure the right which was given to the mortgagee was to demolish that structure and to reconstruct from the foundation not only with regard to the ground floor but with regard to upper storey also, and in this view of the matter, the ratio laid down in the said second appeal holding that the term in the mortgage deed Ex. 32 amounted to a clog on the equity of redemption would apply with greater force to the facts of the present case and in that view of the matter also, the terms in Ex. 45 closely scrutinised and properly construed, do show that the document is unreasonable and unconscionable and in substance and effect it prevents the mortgagor from getting back her property on payment of what is due on her security. The bargain is invalid and inconsistent with the transaction being a mortgage and has not binding force and cannot be enforced or form basis of the defendants' defence in a suit for redemption (vide (1974) 15 Guj LR 193).

11. It is thus clear that the lower appellate court committed an error in setting aside the order of the trial court dismissing the suit, on the ground that the said terms in the deed of mortgage did not create a clog on the equity of redemption. The result will be the following order :-

12. Appeal allowed. Decree of the lower appellate court set aside. There will be a preliminary mortgage decree for redemption in favour of the plaintiff in terms of the decree passed by the trial court which is restored. Respondents Nos. (i) to (vi) to pay costs of this appeal to the appellant and bear their own. There will be no order as to costs with regard to respondents Nos. (Vii) to (X).

Appeal allowed.