

PATNA HIGH COURT

Sarjug Mahto

Vs

Devrup Devi

A.F.A.D. No. 269 of 1957

(Kanhaiya Singh and Ramratna Singh, JJ.)

09.05.1962

JUDGMENT

Ramratna Singh, J.

1. The only question involved in this appeal is whether the term of ninety-nine years in the usufructuary mortgage bond in suit amounts to a clog on the equity of redemption. Girdhari Mahto, defendant-respondent second party, executed the bond in suit on the 28th August 1939 in respect of a certain area of land in favor of the defendants first party, the appellants in this Court, for a sum of Rs. 211 only. The bond was taken in the name of Ramfula Kuer, wife of defendant No. 3; and the mortgagees were put in possession of the mortgaged property. The term of the bond was for ninety-nine years and, therefore, the due date for redemption was some time in 1435 Fasli. The mortgagor sold the mortgaged land along with other lands to the plaintiffs-respondents first party under a sale deed dated the 8th November 1949 on the allegation that the term of the mortgage was only nine years. The plaintiffs deposited the mortgaged dues, that is, Rs. 211, under section 83 of the Transfer of Property Act to the credit of the mortgagees, who filed an objection in the proceeding arising out of the deposit. Hence, the suit for redemption. The plaintiffs alleged that the period of ninety-nine years was entered in the bond without the knowledge of the mortgagor and in collusion with the scribe and witnesses; and that such a long period amounted to a clog on the equity of redemption. The mortgagor-defendant supported him. On the other hand, the present appellants asserted that the term was for ninety-nine years and that there was no fraud committed in the recitals of 'the bond which were read out and explained to the mortgagor before execution of the document. It was also alleged that the mortgage bond was really a sale deed; and as in 1929 there was no custom to execute a sale deed without the consent of the landlord, the bond in suit was executed.

2. The learned Munsif found that there was no fraud or collusion in respect of the recitals in the bond and that the term was for ninety-nine years. He further found that the document was a mortgage bond and not a sale deed; but he dismissed the suit on the ground that, inasmuch as there was no oppressive or onerous term in the mortgage bond, the long period of ninety-nine years could not be considered as a clog on the equity of redemption and that the deposit by the plaintiffs was premature. The plaintiffs went up in appeal before the District Judge; and an

Additional Subordinate Judge, who heard the appeal, agreed with the trial Judge in respect of the findings of fact. The learned Subordinate Judge held that, inasmuch as the mortgagees had claimed to be vendees of the mortgaged land under the bond in suit, the period of ninety-nine years amounted to a clog on the equity of redemption. The appeal was accordingly allowed; and a decree for redemption was passed. The mortgagees have, therefore, come up in appeal to this Court.

3. Section 60 of the Transfer of Property Act, which gives the mortgagor the right of redemption, as far as is relevant for the purpose of the present appeal, runs as follows :

"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 where the mortgagee is in possession of the mortgaged property, to deliver possession thereof to the mortgagor"

The word "due" in this section was substituted for the word "payable" by the amending Act of 1929. Before the amendment of this section the right of redemption arose when the principal money became payable. There was, however, a difference of opinion on the question whether the right to redeem could be exercised before the expiry of the period fixed for the payment of the mortgage-money. In some cases it was held that the period fixed for the payment of the money was for the convenience of the mortgagor and, therefore, this right could be exercised even before the expiration of the period fixed in the bond. A contrary view was taken in various other cases in which it was held that such a right could not be exercised until the expiry of that period, and that where the mortgage deed specified the period for payment, the right to redeem accrued only on the expiry of that period and not before it, except where there was a special contract to the contrary. In order to set at rest the conflict between these views, this section was amended in 1929 by substituting the word "due" for the word "payable". I may, however, observe that by this amendment the legislature did not intend to alter the law but only declared the law that existed, namely, the view taken in the majority of cases that the right of redemption could accrue only after the expiry of the period fixed for the payment of the mortgage-money, unless there was a contract to the contrary.

4. It will be noticed that this section is not prefaced with any such words as "in the absence of a contract to the contrary". The right of redemption is therefore, a statutory right which cannot be fettered by any condition which impedes or prevents redemption and any such condition is void as a clog on the equity of redemption. In *Mehrban Khan v. Makhana*¹, the provisions in the mortgage deed had conferred on the mortgagee upon redemption an interest in the mortgaged premises. The mortgage deed stipulated that the mortgagees were entitled to remain in possession for nineteen years and that, at the end of that period, if the mortgagor paid off that money, the property was to belong, as to a limited interest therein only, to the mortgagor, and as to the major interest therein to the mortgagees. If the mortgagor failed to pay off the mortgage money at the end of the nineteen years, the property was apparently to belong to the mortgagees absolutely. The case came before the Privy Council from the North West Frontier Provinces where section 60 of the Transfer of Property Act was not applicable. Still their Lordships of the Judicial committee applied the doctrine as to the clog on redemption after citing with approval the observations of Lord Hobhouse in *Waghela Rajsanji v. Shekh Mashudin*², that a direction to

decide by equity and good conscience was generally interpreted to mean the rules of English law if found applicable to Indian society and circumstances.

Their Lordships then observed :

"The terms of section 60 of the Transfer of Property Act are an indication that the rules of English law relating to a mortgagor's right to redeem are applicable to Indian society and circumstances. There is no indication to the contrary. The matter must, therefore, be determined by the rules of English law."

In other words, their Lordships of the Judicial Committee took the view that the terms of section 60 themselves indicate that the rules of English law as to the clog should be applied in favour of the mortgagor. It will be noticed from the language of section 60 itself that a mortgagor can legitimately seek for the protection of the doctrine of the clog on redemption in proper cases. The question to be considered now is whether there was any term in the bond in suit or any subsequent (sic) of the mortgagees so as to justify the inference that the term of ninety-nine years amounted to a clog on the equity of redemption.

5. It was conceded at the bar that a long term in a mortgage bond as the due date for redemption is not by itself a clog on the equity of redemption. The first appellate court, however, observed in the present case;

".....but the defendant has repudiated his position as a mortgagee by claiming title in himself. Not only the defendant says that the transaction was out and out a sale but he took all sorts of objections to the plaintiff's title as also the plea of limitation. In such circumstances redemption of the property by the plaintiff after lapse of 99 years will be extremely difficult, if it (be) not possible (impossible). The mortgagee has not acted according to the term of the contract nor is (he) willing to act in accordance with it. The conduct of the defendant in short has been such as to entitle the plaintiffs to equitable relief. On these grounds the mortgagor may redeem the property even though the period of 99 years has not elapsed."

There is no material on the record to justify these observations. It is true that the mortgagees took the plea that the mortgage bond was really a sale deed; but, at same time, they took an alternative plea that the contents of the document were read out and explained to the parties before execution and the term of ninety-nine years was inserted with the consent of the parties. They further said that, if the document be treated as a bharna, then the deposit is premature. Had this alternative plea not been there, there would have some force in the observation that the mortgagees had not acted according to the terms of the contract, nor were they willing to act in accordance with the same. There was another plea by the mortgagees that they had been paying rent of the land since the execution of the document and that the deposit was illegal, because the rent which had been paid by them together with interest thereon had not been deposited by the original mortgagor or the plaintiffs. But this plea was a part of the plea that the mortgage bond in suit was really a sale deed; and I have already pointed out that this was an alternative plea. The plea of limitation taken by the present appellants also arose out of the same plea, but this plea was not pressed at the time of the hearing of the suit. In my opinion, neither the conduct of the

mortgagee nor the contents of the bond in suit justifies an inference that the term of ninety-nine years was inserted with the object of preventing the mortgagor or his successor-in-interest from exercising his right of redemption on or after the due date.

6. Learned counsel for the plaintiffs-respondents relied on two decisions. In *Durga Charan Maji v. Poresh Bewa*³, a document purporting to be a sale of land for fifty years on condition of its return after that period had been executed; and it was held that this transaction was a mortgage. The plaintiff, there, sought for redemption after 26 years. The plea of the defendant-mortgagee was that it was really a sale out and out, and not a sale for a term, and that it was drawn up in these terms in order to avoid trouble with the landlord. There was also a plea of limitation urged. A Division Bench of the Calcutta High Court decreed the claim for redemption with these observations :

"There cannot be any doubt whatsoever that the conduct of the defendant is such as to entitle the plaintiff to equitable relief. Not only did the defendant say that it was a document of sale out and out but he took all sorts of objections to the plaintiffs' title as also the plea of limitation. Under such circumstances it appears that there is no doubt that redemption of the property by the plaintiff after the lapse of fifty years will be extremely difficult if not impossible. The mortgagee, therefore, has not acted in accordance with the terms of the contract and is not willing to act in accordance with it. He did not take the plea that under the terms of the deed he was entitled to remain in possession for fifty years. On these grounds the mortgagor may redeem the mortgage before the period of fifty years."

But the facts of that case are distinguishable. The plea of limitation had been pressed by the mortgagee. He did not take the plea that under the terms of the deed he was entitled to remain in possession for a period of fifty years. In the present case, however, the appellants did not press the plea of limitation at the trial and they did take the alternative plea that the mortgage could not be redeemed before the expiry of ninety-nine years, the terms mentioned in the bond in suit. In *Vadilal Chhaganlal Soni v. Gokaldas Mansukh*⁴, a Division Bench of the Bombay High Court said that a long term for redemption is not necessarily in every case a clog on the equity of redemption and observed :

"In dealing with the question as to whether a long term for redemption is a clog on the equity of redemption, it would be necessary to consider the mortgage deed. The amount advanced under mortgage the nature of the security offered by the mortgagor, the circumstances in which the mortgagor

was compelled to secure the amount, the terms and conditions on which the amount was in fact advanced and the other alternative to which the mortgagor could have taken recourse for obtaining the sum advanced, would have to be considered before it is held that a particular term of redemption amounts to a clog because it is unreasonably long. Clearly, if the period stipulated is 200 years it would not be difficult to hold that it is unreasonably long that it amounts to a clog as was done in *Fateh Muhammad Khan v. Ram Dayal*⁵."

Their Lordships granted a decree for redemption in that case for these reasons.

"In the present case the amount advanced is a very small amount of Rs. 176, and on the record it does not appear that it was necessary that the mortgagor should have submitted to this long term of 99 years before obtaining this advance from the mortgagee. The mortgagee is the owner of a neighbouring property and it would not be unreasonable to hold that by stipulating for this long term for redemption he wanted to use this property which was beneficial for the enjoyment of his house for a very long period. In other words, in this particular case this long term for redemption has undoubtedly conferred upon the mortgagee a collateral advantage which is unfair to the mortgagor. Besides, in dealing with the present mortgage we must also consider the other term to which the mortgagor has taken objection. Under this stipulation the mortgagee was given full liberty to spend any amount he liked for building a structure on the wada or open space which had been mortgaged to him. The mortgagor comes from a poor family and if the mortgagee were to exercise his option under this particular clause, he would easily make it impossible for the mortgagor to redeem his property. No restrictions are placed as to the nature of the structure which the mortgagee should raise and as to the amount which he should spend on raising such a structure. The option given to the mortgagee by this clause is in our opinion, wholly unreasonable and it confers upon the mortgagee an advantage to which he was legitimately not entitled."

It is obvious that the facts in that case were completely different, from those in the present case. In *Noakes and Co. Ltd. v. Rice*⁶, which is the leading case on the principle relating to a clog on the equity of redemption, it was observed by Lord Davey :

"the mortgagee shall not make any stipulation which will prevent a mortgagor, who has paid principal interest and costs, from getting back his mortgaged property in the condition in which he parted with it."

In other words, a mortgagee is prevented from stipulating for a collateral advantage which is unfair to the mortgagor or from imposing any other terms which would act as a fetter on his right to redeem. In the present case, there is nothing to indicate that there was a stipulation for a collateral advantage to the mortgagee; nor is there any term in the bond in suit which would act as a fetter on the right of the mortgagor to redeem. The mere fact that the due date for redemption is to come after ninety-nine years from the date of the execution of the bond in suit, does not by itself indicate any collateral advantage to the mortgagees or any disadvantage to the mortgagor. It was not alleged or contended on behalf of the plaintiffs or the original mortgagor that the usufruct of the area mortgaged was sufficient to satisfy the mortgage dues within nine years or within a period of much less than ninety-nine years. None of the reasons which led the learned Judge to hold in favor of the mortgagor in the Bombay case referred to above is applicable to the facts of the present case. On the other hand, there are two single Bench decisions of this Court, which

support the contentions of the appellants. In *Hasar Ali v. Ajodhya Sah*⁷, Agarwala, J. was dealing with a mortgage bond dated the 8th September, 1928. The term of the mortgage stated in the bond was ninety-nine years. There was a further provision that, if the mortgage be not redeemed at the end of the term it should not be redeemable for another term of ninety-eight years. The suit for redemption was instituted in 1945, long before the expiry of the term it being contended by the plaintiff that the reference to ninety-eight years in the bond had been fraudulently inserted in it by the defendant mortgagee in place of eleven years' which had been agreed upon between the parties. Both the trial court and the first appellate court negatived the plea of fraud and held that ninety-nine years was the term agreed upon in the bond. After discussing a large number of decisions of different High Courts, namely, Allahabad, Madras, Lahore and Calcutta the learned Judge observed that in India a long term was not by itself a clog on the equity of redemption entitling the mortgagor to redeem before expiry of the term agreed upon and that the plaintiffs of that suit were entitled to redeem only after ninety-nine years, the term agreed upon. The Calcutta decision in Durga Charan's case, AIR 1925 Calcutta 105, was also considered by Agarwala, J. The decisions in which the mortgagor was allowed to redeem before the expiry of the term had to deal with such terms as would amount to a collateral advantage to the mortgagee and a fetter on the right to the mortgagor to redeem. For instance, in *Bhullan v. Bachcha Kunbi*⁸, the term of the bond was for sixty years, and there was a further provision that if it were not redeemed on the date following the sixtieth year, it would not be redeemable for a further period of sixty years. In *Rajai Singh v. Randhir Singh*⁹, the term of the mortgage was for ninety-nine years and there was a provision that the interest for the entire period should be paid along with the principal at the end of the term. Obviously, the continuance of the mortgage for a further period of sixty years in the first case and the payment of the entire principal along with interest in the second case amounted to an unfair advantage to the mortgagee and that is why redemption was allowed earlier. On the other hand in *Wit. Sabratan v. Dhanpat Gadaria*¹⁰, it was held that the term of sixty years per se did not amount to a clog on the equity of redemption. In *Muhammad Ibrahim v. Muhammad Abiz*¹¹, the term of the mortgage was ninety years and it was held that the mortgagor was not entitled to redeem before the expiry of that period. In *Jagannadham v. Narasimham*¹², it was held that the mortgagor could not redeem before the agreed term, that is, sixty years, as it could not be regarded as a clog on the equity of redemption. In *Raman Nair v. Vasudevan Namboodripad*¹³, the mortgage was for a term of fifty-nine years, and though the mortgagee denied the title of the mortgagor and set up a title in himself, it was held that the disclaimer of title would not entail a forfeiture so as to enable the mortgagor to sue for redemption of the mortgage before the expiry of fifty-nine years. In *Bakhtawar Begum v. Husaini Khanum*¹⁴, their Lordships of the Judicial Committee held that ordinarily, and in the absence of a special condition entitling the mortgagor to redeem during the term for which the mortgage was created, the right of redemption can arise only on the expiration of the specified period. The same view was taken in *Mela Ram v. Prithvi Chand*¹⁵, and it was held that a long term in a mortgage of sixty years does not per se make the bargain an unconscionable one and that in the absence of undue influence or fraud the parties who enter into a contract with their eyes open are bound by the stipulation contained in their instrument of mortgage. A similar view was taken in *Abdur Rahman v. Rampadarath Ram*¹⁶,

7. In *Jodhiram Sah v. Harihar Missir*¹⁷, a period of sixty years was fixed in the mortgage bond as the due date for redemption. It was contended on behalf of the plaintiff respondent who had instituted the suit for redemption that he was entitled to redeem the mortgage before the expiry of sixty years on account of the conduct of the mortgagees in disclaiming the title of the mortgagor and in misappropriating the trees standing on the mortgaged properties. The mortgagees-

defendants had, inter alia, pleaded that they were in possession of the properties as vendees and not as mortgagees and that, at any rate, the suit for redemption was premature, as having been brought before the expiry of the term of the due date of payment, namely, sixty years, as stipulated in the mortgage bond. After considering several decisions of the different High Courts Choudhary J. held that the plea of the mortgagees claiming to be purchasers did not entitle the plaintiff to redeem before the expiry of sixty years and set aside the decree for redemption granted by the first appellate Court. This decision is on all fours with the facts of the present case in so far as the plea of the mortgagees claiming to be the purchasers under the usufructuary mortgage bond is concerned.

8. The view of the authorities discussed above, therefore, shows that a long period for redemption is not by itself a clog on the equity of redemption though in certain and other circumstances it may amount to the same. Judged, in the light of this principle there is no material in the present case to justify the view taken by the learned Subordinate Judge. He himself has found that the plaintiffs failed to prove that the period of ninety-nine years was inserted in the bond in suit on account of undue influence, or fraud. As pointed out earlier, the plea of the mortgagees appellants that the mortgage was really a sale was merely an alternative plea. They also pleaded that the suit for redemption was premature on account of the non-expiry of the period of ninety-nine years, the period agreed upon. Hence, the present suit for redemption which was instituted long before the expiry of the period agreed upon that is, ninety-nine years, is premature, inasmuch as the said period has not expired as yet.

9. In the result, the suit for redemption must fall and the same is dismissed. The appeal is accordingly allowed and the decree of the trial court is restored. The appellants mortgagees shall get costs throughout.

Kanhaiya Singh, J.

10. I agree.

Appeal allowed.

Cases Referred.

¹ AIR 1930 PC 142

² 14 Ind App 89 (PC)

³ AIR 1925 Cal 105

⁴ AIR 1953 Bom 408

⁵ AIR 1927 Oudh 224

⁶ (1902) AC 24

⁷ AIR 1950 Pat 173

⁸ ILR 53 All 580

⁹ AIR 1925 All 643

¹⁰ ILR 54 All 1041

¹¹ 8 Ind Cas 1068 (Mad)

¹² AIR 1944 Mad 501

¹³ ILR 27 Mad 26

¹⁴ AIR 1914 PC 35

¹⁵ AIR 1929 Lah 523

¹⁶ AIR 1945 Oudh 113

¹⁷ AIR 1958 Pat 464