

RAJASTHAN HIGH COURT

Saleh Raj

Vs.

Chandan

Special Civil Appeal No. 2 of 1957 against Judgment of Single Judge reported in AIR
1958 Rajasthan 298.

(J.S. Ranawat and D.M. Bhandari, JJ.)

23.09.1959

JUDGMENT

Ranawat, J.

1. This is an appeal from an order of a Single Judge of this Court dated 15-10-1957, remanding the suit to the first Court for trying other issues and then passing a decree for redemption of the mortgaged property.

2. Chandan Mal and Pukhrai filed a suit against Saleh Raj and three others in the Court of the Munsiff Jalore, on 18-12-1951, for redemption of the property described in para 2 (e) of the plaint on payment of an amount of Rs. 269-8-0 in Indian coin. It was alleged by the plaintiffs that their ancestors mortgaged the said property with the ancestors of the defendants in Sambat year 1936 Kartik Badi 3, for an amount of Rs. 430-5-0 Akheshahi equivalent to Rs. 269-8-0 in Indian coin, by way of possessory mortgage with the stipulation that the mortgage money shall carry no interest and the property shall bear no rent.

The plaintiffs prayed that a decree for redemption be passed against the defendants on payment of the mortgage-money. The defendants contested the suit and pleaded that the term of the mortgage being of 99 years and the suit having been filed before the expiry of the said term was premature. They also claimed cost of improvements to the tune of Rs. 1,169-8-0 in addition to the mortgage-money. The learned Munsiff dismissed the suit as premature and his judgment dated 23-10-1952 was upheld on appeal by the Civil Judge, Balotra on 23-7-1953. The plaintiffs filed an appeal to this Court. It was heard and decided by a Single Judge as mentioned above. It was observed by the learned Single Judge that the term of 99 years fixed by the mortgage

deed was by itself an unreasonable restriction on the right of the plaintiffs to redeem their property. In addition to the term of the mortgage being unreasonable, the learned Judge also observed that the following terms in the mortgage deed were oppressive and the length of the term, coupled with those conditions, made the said term of 99 years a clog on the equity of redemption.

- (i) An almost unlimited right was given to the mortgagees to make such improvements as they liked in the suit house. The number of medis and maliyas to be constructed were not mentioned and the quantum of expenditure to be incurred by the mortgagees was also not limited;
- (ii) The mortgagors agreed to execute a fresh deed for the amount of the expenditure incurred by the mortgagees for the improvements of the mortgaged property and in the event of their failure to do so, they agreed to pay the cost of improvements at the time of the redemption as evidenced by entries in the books of account of the mortgagees;
- (iii) The amount of the loan secured by the mortgage was of the value of Rs. 270/- in Indian coin.

3. In this appeal, the learned counsel for the appellants has referred to a decision of the Supreme Court in *Gangadhar v. Shankar Lal*,¹ and has argued that their Lordships of the Supreme Court, without expressing any opinion as to whether a long term by itself may be regarded as clog on the equity of redemption held that a term of 85 years, was not unreasonable in the circumstances of that case. It was argued that there is not much difference in the term of 85 years and that of 99 years and it was therefore not proper for the learned Civil Judge to hold that the term of 99 years for redemption of the mortgage was by itself unreasonable. As regards the circumstances mentioned by the learned Single Judge in arriving at the conclusion that the terms of the mortgage were oppressive, the learned counsel stated that the learned Single Judge mis-read the mortgage-deed inasmuch as only one medi and one malia was specified in the mortgage deed to be constructed by the mortgagor and the learned Single Judge erroneously thought that the deed authorized the mortgagee to construct as many medis and maliyas as he chose to make. It was also urged that the plot of land was very small, measuring 16 gaj x 6 gaj - a gaj is equivalent to 3 feet.

As regards the condition for payment of the cost of improvements in accordance with the books of account of the mortgagee, it was urged that the said condition was favorable to the mortgagor rather than against him. The mortgagee could not be

entitled to claim any cost of improvements unless he showed corresponding entries in his books of account and satisfied the mortgagor that the amounts claimed were actually spent by him. The observations of their Lordships of the Supreme Court regarding payment of cost of improvements as evidenced by the books of account of the mortgagee in Gangadhar's case, AIR 1958 SC 770, were relied upon.

4. The learned counsel for the respondents supported the decision of the learned Single Judge. He urged that though the term of 99 years by itself may not be considered to be unreasonable, such a term in the circumstances of the case must be regarded to be unreasonable for the conditions in the mortgage deed are very oppressive. The mortgagor only secured a sum of Rs. 269/- in cash and he got Rs. 45/- by way of redemption of the prior mortgage, and for securing such a petty sum of money he mortgaged the property for 99 years. It was also contended that an unrestricted right was conferred on the mortgagee to spend big sums of money for making constructions and in the circumstances of the case, such expenditure would virtually debar the mortgagors from redeeming their property. He also argued that after a period of 99 years, whatever constructions were raised by the mortgagee would become old and worn out and the mortgagors on payment of cost of improvements would not get the real worth of their money. It was also urged that the inclusion of the cost of repairs in the cost of improvements was rather unconscionable.

5. The mortgage in the instant case is of Sambat year 1936 when the Transfer of Property Act was not in force in the former Jodhpur State. The Transfer of Property Act was brought into force in the year 1949, and this mortgage being of a prior date, is not governed by it. Section 60 of the Transfer of Property Act thus is not directly applicable. There was no statutory law corresponding to Section 60 of the Transfer of Property Act in force before it was applied to Jodhpur State. It is common ground that the cases were decided by Courts at the time in accordance with the principles of justice, equity and good conscience. The principle underlying Section 60 may well be regarded to be a salutary one and in accordance with the principles of equity, justice and good conscience.

As Section 60 was not at that time in force, it would not be unreasonable to decide this case in accordance with the principles underlying that section. The right of redemption can be exercised only after the mortgage money has become due. In the present case, the term of the mortgage fixed was of 99 years and in accordance with the terms of

the contract, the mortgage money was to become due after the expiry of 99 years from the date of the mortgage. The suit has been filed before the expiry of the said term, and both the Courts below have dismissed it as premature for the reason that the mortgage money had not become due up to the date of the institution of the suit. The question, therefore, arises whether the term of 99 years which has been fixed by the agreement of the parties is a clog on the equity of redemption. In the opinion of the learned Single Judge, such a long term is by itself unreasonable and unenforceable being a clog on the equity of redemption. Anything which takes away the right of redemption or restricts it unreasonably, is regarded to be a clog on the equity of redemption. The right to redeem arises after the mortgage money becomes due and in the instant case as the term is of 99 years, the mortgage money is to fall due after the expiry of that term. Thus fixing of the term of mortgage of 99 years cannot be regarded as destroying the right of redemption for the right of redemption would arise after the expiry of the term and the mortgagor would be of liberty to enforce that right at that time. The point, however, remains whether fixing of such a long term of mortgage restricts unreasonably the right of redemption so as to make it illusory or operates as oppressive. In *Ganga Dhar's case*, AIR 1958 SC 770, though no opinion has been expressed as to whether fixing of a very long term of a mortgage by itself can be regarded as being oppressive so as to amount to a clog on the equity of redemption, yet under the circumstances of that case, their Lordships held that a term of 85 years was not unreasonable. Whether the condition fixing a long term is unreasonable, or otherwise, depends on the circumstances of the case. The observations of the Supreme Court in *Gangadhar's case*, AIR 1958 SC 770, are to the effect that whether the terms are oppressive, would depend on the facts and circumstances of each case and the question essentially is one of fact. Thus, it is clear that it cannot be laid down that fixing of a term, of 99 years by itself is oppressive or unreasonable. It may or may not be unreasonable according as the facts and circumstances of the particular case. We are, therefore, not in agreement with the opinion of the learned Single Judge when he observed that fixing of a term of 99 years by itself was unreasonable and a clog on the equity of redemption. In order to come to a finding on the question whether the long term of the mortgage in the instant case is unreasonable, we shall have to take into consideration the other circumstances and conditions of the mortgage. The learned Single Judge has referred to the terms of the agreement of mortgage referred to above in coming to the conclusion that the terms were unreasonable. The first condition that was noted in the judgment of the learned Single Judge is that unlimited authority was given to the mortgagee to make constructions over the mortgaged property. The

mortgage deed states that one barasali had to be roofed and one malia and one medi had to be constructed and the mortgaged deed authorized the mortgagees to make these constructions over the mortgage property. In order to avoid further disputes between the parties, the mortgagor agreed that he would execute a separate agreement for a definite sum of money spent by the mortgagee regarding cost of construction of the items referred to above, and in the event of the mortgagee not being able to execute a separate agreement, it was further agreed that the mortgagor shall make the payment of the cost of construction in accordance with the books of account of the mortgagee and would be bound by the amounts described in the mortgagee's books. The learned Single Judge probably mis-read the mortgage-deed when he observed in his judgment that unlimited power of spending was given to the mortgagee under the mortgage-deed. We find the properties, that had to be constructed, were described with that much certainly that it was not possible to spend unlimited money in their construction. In abiding by the books of account of the mortgagee in the event of his failure to execute a separate rate agreement, no unreasonable advantage can be stated to have been taken by the mortgagee for the amount to be paid as cost of construction was to be the actual amount spent by the mortgagee and in order to set at rest further disputes between the parties, they agreed that the books of account of the mortgagee would furnish sufficient proof of the amount so spent. As observed by their Lordships of the Supreme Court in Ganga Dhar's case, AIR 1958 SC 770, this term may as well be taken to be for the purpose of safeguarding the right and interest of the mortgagor. The mortgagee would be debarred from claiming such sums as he may not have spent and in respect of which no entries may have been made in his books of account at the time the constructions were undertaken.

6. Lastly, the learned Judge has taken note of the meagre amount of the mortgage money taken by the mortgagor. It may be noted that the property is very small and probably its value at the time the mortgage was executed was not much. The same property was mortgaged for a petty sum of Rs. 45/-only and that mortgage was redeemed and superseded by the instant mortgage. The contents of the mortgage deed show that the mortgaged property was an open piece of land at the time the first mortgage was made and the mortgagor permitted the mortgagee to make certain constructions on this property before he executed the mortgage deed and he further authorized the mortgagee to make the remaining constructions as detailed in the mortgage deed. The intention of the mortgagor appears to be that he wanted to get the property constructed according to his plan, and probably he had no means to do so and

he, therefore, by executing this mortgage made the property fit for occupation. As the mortgagee was not willing to undertake the expenditure of construction, he allowed him a sufficiently long term to use the constructions himself before the mortgagor could get the possession of the property. After the mortgage money would become due, the mortgagor would be able to get his property on payment of the mortgage money and the cost of constructions. The long term may also have been agreed by the mortgagor in order to be able to pay off the mortgage money and the cost of constructions which amount at the time probably it was not possible for the mortgagor to find. The long term of the mortgage thus was both in the interest of the mortgagee and the mortgagor. The terms of the mortgage deed which were regarded as unreasonable by the learned Single Judge, in our opinion, are not oppressive or unreasonable. The argument of the learned counsel of the respondents that the constructions made by the mortgagee would become old and be of little value by the time the property is redeemed, cannot by itself be regarded to be enough to make the contract of mortgage oppressive. Already about 72 years had elapsed before the date of the institution of the suit and it was not alleged by the plaintiffs that the property had depreciated in value or the constructions had become worn out.

In fact, the value of money has depreciated and the value of the property thus is likely to be more rather than less. The plaintiff himself remained silent for 72 years which shows that he did not regard the long term and the other circumstances oppressive. Having regard to the terms and the conditions of the mortgage discussed above, we are inclined to hold that the term of 99 years under the circumstances of this case cannot be considered to be unreasonable or oppressive and both the Courts below were not wrong in dismissing the suit as premature.

7. The appeal succeeds and is allowed and the order of remand of the learned Single Judge dated 15-10-1957 is set aside and the order of dismissal of the suit as being premature of the District Judge, is restored. Under the circumstances of the case the parties shall bear their own costs of this Court.

Appeal allowed.

Cases Referred.

1. AIR 1958 SC 770