

## RAJASTHAN HIGH COURT

Abdul Gani

Vs.

Abdul Gafoor

S.B. Civil Second Appeal Nos. 39 of 1984, 93 of 1984  
(Shiv Kumar Sharma, J.)

19.11.2005

### JUDGMENT

**Shiv Kumar Sharma, J.**

1. The point of importance that arises in the instant appeals concerns the interpretation of 'clog on the equity of redemption'. The phrase 'clog on the equity of redemption' is nowhere used in the Transfer of Property Act (for short TP Act'). The doctrine is implicit in the language of Section 60 of the TP Act, which deals with the mortgagor's right to redeem. The first proviso to Section 60 TP Act contemplates the extinguishment of the right of redemption by the act of the parties or by a decree of the Court.
2. The facts giving rise to these appeals are as under:

Abdul Gani, the plaintiff filed a suit for specific performance of agreement to sell against Abdul Gafoor, the defendant, with the averments that on February 17, 1971 the defendant obtained loan in the sum of Rs. 2500/- from the plaintiff by mortgaging his house situated at *Ghat Darwaja, Jaipur* and executed a mortgage deed on February 17, 1971. On September 8, 1971 the defendant required more money, therefore, he agreed to sell his house in consideration of Rs. 6000/-. The amount of Rs. 2,500/- already paid under mortgage was adjusted towards the sale price of the house and remaining amount Rs. 3,500/- was paid to the defendant and the receipt was obtained. The agreement to sell was drawn on September 8, 1971 with a promise to execute the sale deed within 15 days. When the sale deed was not executed the plaintiff instituted the suit for specific performance of the agreement dated September 8, 1971 and also claimed manse profit at the rate of Rs. 100/- per month.

3. The defendant in the written statement admitted the mortgage, but denied to have executed agreement to sell on September 8, 1971. He also pleaded that he never received Rs. 3.500/- from the plaintiff.

4. Learned trial Court framed necessary issues and after discussing the evidence it decreed the suit on April 24, 1973 holding that agreement to sell was executed on September 8, 1971 by the defendant and he received Rs. 3,500/- from the plaintiff and issued receipt. The defendant was directed to execute registered sale-deed and deliver possession of the disputed property to the plaintiff. Mesne profits as claimed were also awarded to the plaintiff.

5. Being aggrieved by the aforesaid decree and judgment the defendant preferred civil regular first appeal. Learned first appellate Court vide order dated July 19, 1976 remitted the following issue to the trial Court for adjudication :

"Whether the defendant was in possession of the disputed property in the capacity of tenant?"

Learned trial Court vide order dated July 24, 1978 held that the relationship of landlord and tenant existed between the parties and the defendant was in possession of the property in the capacity of tenant. The plaintiff contested the finding by submitting objections in the first appellate court.

6. Learned First Appellate Court however vide judgment and decree dated December 13, 1983 ultimately held that since execution of all documents had been duly proved and agreement dated September 8, 1971 did not create any clog on the equity of redemption, the said agreement could be enforced. It was however held that the plaintiff was not entitled to possession and mesne profit because the relationship of landlord and tenant was created between plaintiff and the defendant. Learned first appellate court, therefore, decreed the suit of plaintiff only to the extent of specific performance of agreement dated September 8, 1971.

7. It is against the decree dated December 13, 1983 that the instant second appeals have been filed by the plaintiff and the defendant.

8. Mr. A.K. Bhandari, learned Senior Counsel for defendant canvassed that agreement to sell dated September 8, 1971 (Ex. 3) was covered by first proviso to Section 60 of

the TP Act, which extinguishes the rights of redemption by the act of the party, therefore, it could not have been legally enforced.

9. Per contra, Mr. Anil Mehta, learned counsel for the plaintiff urged that the finding of learned first appellate court in partly modifying the judgment and decree of trial Court with regard to delivery of possession was perverse, since first appellate court did not apply its mind to the documentary evidence and oral evidence in proper manner and arrived at an erroneous finding that the defendant was in possession of the disputed property in the capacity of a tenant.

10. I have given my anxious consideration to the rival submissions and scanned the material on record.

11. Both the courts below concurrently held that by executing document Ex. 3 the defendant had abandoned all his rights in the property. It was the act of defendant extinguishing the right of redemption and sufficient for the application of the first proviso to Section 60 TP Act.

12. A look at the first proviso to Section 60 of Transfer of Property Act demonstrates that there was nothing to prevent the parties to a mortgage from coming to a subsequent arrangement qualifying the right to redeem. Where the mortgagor by his own overt act very much subsequent to the date of the mortgage had given possession of the mortgaged property to the mortgagee, thereby confirming the condition of absolute transfer in favor of the latter and extinguishing his own right of redemption.

13. The Division Bench of this Court in *Ratan Lal v. Prabhu Dayal*, <sup>1</sup> indicated that there can be hardly any doubt as to correctness of the proposition that by a subsequent and wholly independent transaction, the right of redemption in the mortgaged property could be conveyed to the mortgagee. The fresh transaction of conveyance must not be an integral part of the mortgage itself, but must be altogether independent thereof, otherwise it might well be regarded as clogging the right of redemption of the mortgagor which is a very valuable right jealously guarded by courts of law on account of the fiduciary relationship which subsists between the parties as long as the mortgage lasts.

14. Vaughan Williams, L.J. in the case of *Lisle v. Reeve*, <sup>2</sup> enunciated the principle

thus:

"I did not understand the defendant's counsel to dispute that it is competent for a mortgagee to enter into an agreement to purchase from the mortgagor his equity of redemption. The only objection to such an agreement is, that it must not be part and parcel of the original loan or mortgage bargain. The mortgagee cannot, at the moment when he is lending his money and taking his security, enter into an agreement, the effect of which would be that the mortgagor should have no equity of redemption. But there is nothing to prevent that being done by an agreement which in substance and in fact is subsequent and independent of the original bargain."

15. In *Jalappa v. Narasimha Setty*, <sup>3</sup>, the Division Bench held thus :

"Where the manager of a joint Hindu family incurs a mortgage debt for family necessity and sells the hypotheca to the mortgagee in discharge of the mortgage debt, there is extinguishment of the right to redeem by act of parties and a suit for redemption filed thereafter by a member of the family is misconceived. A suit for redemption can lie only if there is a subsisting mortgage. The mortgage having been discharged the suit for redemption is misconceived."

16. It is well settled that mortgagor and mortgagee can enter into a contract subsequently to the mortgage for the sale of the mortgaged property to the mortgagee. But the contract must not be part and parcel of the original loan or mortgage bargain. In other words, the act of the parties that is referred in Section 60 TP Act as extinguishing a mortgage must be one which is independent of the mortgage transaction and not a part and parcel of it. On a close scrutiny of agreement Ex. 3, I am of the view that by executing the said document the defendant acted in extinguishing his right of redemption. The agreement was in substance and in fact was subsequent and independent of the original bargain. The suit for specific performance of the said agreement was rightly decreed by the courts below.

17. That takes me to the substantial question formulated at the time of admission of the appeals which reads thus:

"Whether the appellate court was justified in law in holding that the respondent was in possession of the disputed premises as a tenant without considering the

objections that were submitted by the appellant against the finding recorded by the trial Court on additional issues framed by the appellate court ?"

18. A close look at the judgment of first appellate court reveals that the objections submitted by the plaintiff against the finding of the trial Court wherein defendant was held to be the tenant of the plaintiff, were not considered. On facts so far as the matter is concerned, after executing the mortgage deed dated February 17, 1971 (Ex. 2), the defendant became the tenant in the disputed premises. Later on when the agreement to sell Ex. 3 was entered upon by the defendant on September 8, 1971 and disputed property was agreed to be sold in consideration of Rs. 6000/- and entire amount was received by the defendant on a promise to execute the sale deed within 15 days, the tenancy of the defendant ceased to exist. After the right of redemption of the defendant was extinguished under the first proviso of Section 60 TP Act, the defendant ceased to be the tenant in the disputed premises. The documentary and oral evidence was not properly considered by the learned first appellate court while arriving at the finding that the defendant was in possession of the property in the capacity of tenant and to the extent of this finding the judgment and decree of the first appellate court deserves to be set aside. I hold that the defendant was not in possession of the disputed premises in the capacity of tenant.

19. Resultantly the appeal of plaintiff stands allowed and the impugned judgment and decree dated December 13, 1984 of the learned Additional District Judge No.4, Jaipur City to the extent of the decision of additional issue whereby the defendant was held to be tenant in the disputed premises shall stand set aside. Rest part of the judgment and decree is confirmed. The appeal of the defendant being devoid of merit stands dismissed. There shall be no order as to costs.

Appeal dismissed.

Cases Referred.

1. (ILR 1960 Raj Series 517)
2. (1902) 1 Ch. 53
3. AIR 1963 AP 420