
(1957) 11 PAT CK 0015
In the Patna High Court
Case No : A.F.A.D. No. 274 of 1953

Jodhiram Sah and Others

APPELLANT

Vs

Harihar Missir and Others

RESPONDENT

Date of Decision : 12-11-1957

Acts Referred:

Transfer of Property Act, 1882 — Section 60

Citation : AIR 1958 Patna 464 : (1957) 5 BLJR 828

Hon'ble Judges : R.K. Choudhary, J

Bench : Single Bench

Advocate : Thakur Prasad, for the Appellant; P.B. Ganguli, for the Respondent

Final Decision : Allowed

Judgement

R.K. Choudhary, J.—This appeal by the defendants second party arises out of concurrent decisions of the courts below decreeing the suit of the plaintiff-respondent No. 1 for declaration of his title and redemption of a usufructuary mortgage bond dated 13-7-1907.

2. The case of the plaintiff in short is as follows: One Hemen Missir had two sons, Jhan-gat Missir and Chhathu Missir. The plaintiff is the grand-son of Jhangat Missir. Chhathu died issueless. On 13-7-1907, Chhathu executed a usufructuary mortgage bond for Rs. 300 in favour of Lakshmi Prasad, brother of defendant No. 1 and father of defendants 2 and 3, mortgaging certain lands described in Schedules 1(ka) and 1 (kha) of the plaint. The due date of payment under the terms of the mortgage deed was after 60 years. Chhathu was separate from Jhangat and Schedule 1 (ka) property belonged to Jhangat which was ultimately inherited by the plaintiff as being his grand-son. The property described in Schedule 1 (kha) belonged to Chhathu on whose death the same also was inherited by the plaintiff.

Chhathu Missir was a simpleton and was always in want. Taking advantage of this condition of Chhathu Missir, the aforesaid Lakshmi Prasad got the said

usufructuary mortgage deed executed in respect of the properties described in the above two schedules although he had no concern with the property appertaining to Schedule 1 (kha). Chhathu Missir did not understand the implications of the terms of the mortgage deed specially the long terms of redemption, and the mortgage bond itself was brought into existence by undue influence and coercion. Subsequently, in order to create evidence, defendants 1 to 3 fraudulently sold some of the properties under the mortgage to the defendants second party.

There were trees on the mortgaged properties and the defendants first party cut away some of them and misappropriated the same. On these facts the plaintiff prayed for declaration of his title and for redemption of the usufructuary mortgage with a right to have a set off of the price of the trees cut away by the defendants first party.

3. The suit was contested by defendants 4 to 6 of the defendants second party, namely, the transferees of some of the mortgaged properties from the defendants first party. They contested the suit on the grounds, inter alia, (1) that the plaintiff was not the heir of Chhathu Missir and had no concern with Schedule 1 (ka) or with Schedule 1 (kha) property; (2) that Chhathu Missir executed the usufructuary mortgage bond after understanding all the implications and no fraud, undue influence or coercion was practised in the execution of the same; (3) that the defendants second party were in possession of the property purchased by them as vendees and not as mortgagees and (4) that, at any rate, the suit for redemption was premature as having been brought before the expiry of the terms of the due date of payment, namely, sixty years as stipulated in the mortgage bond.

4. The courts below concurrently found (1) that the plaintiff is the heir of Chhathu Missir as alleged by him and inherited his properties after his death; (2) that both Schedules 1 (ka) & 1 (kba) properties belonged to Chhathu Missir & were in possession of the defendants first party as well as the defendants second party as being mortgagees; and (3) that although the due date of payment had not expired, the plaintiff was entitled on account of the conduct of the defendants to redeem the mortgage before the expiry of the said date on payment of the mortgage dues after deducting the amount of Rs. 30 as being the price of the trees cut and appropriated by the mortgagees. On these findings the suit of the plaintiff was decreed and the defendant second party being thus aggrieved have come up to this court in second appeal.

5. The only point that has been, argued before me by Mr. Thakur Prasad on behalf of the appellants is that the suit for redemption could not be maintainable before the expiry of the due date of payment and it was premature. On behalf of the plaintiff-respondent, however, it has been contended that though the period of sixty years as fixed in the mortgage bond has not expired, he was entitled to redeem the mortgage 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.

6. Section 60 of the Transfer of Property Act, which gives the mortgagor the right of redemption, so 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 & 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.

7. In *Raman Nair v. Vasudevan Namboodripad* ILR Mad 26 (A) a kanom was granted for a term of 59 years. The Kanomdar denied the title of the mortgagor, the jenmi and set up a title in himself, a suit for redemption was, therefore, brought before the expiry of the 59 years. 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 expiration of the 59 years. In *Bakhtawar Begam v. Husaini Khanam* 41 Ind App. 84 : AIR 1914 P. C. 36 (B) 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 is created, the right of redemption can only arise on the expiration of the specified period, in *Bir Mohamad Rowthar v. Nagoor Rowther* 27 Mad L. J. 483 : AIR 1915 Mad 425 (1) (C), a usufructuary mortgagee brought a suit for obtaining

possession of the mortgaged property from a subsequent purchaser from the mortgagors who were in possession.

The subsequent purchaser offered to redeem the mortgage in that suit itself before the expiry of the period fixed for payment of the mortgage-money under the terms of the mortgage. A Bench of the Madras High Court following the above Privy Council case held that the mortgagor cannot be allowed to redeem the mortgage before the expiry of the term mentioned in the mortgage-deed unless there is a contract to the contrary in favour of the mortgagor. In *Mela Ram v. Prithvi Chand* AIR 1929 Lah 523 (D) Shadi Lal, C. J., (as he then was), and Agha Haider, J., took the same view, namely, that ordinarily, and in the absence of a special condition entitling the mortgagor to redeem during the term for which the mortgage is created, the right of redemption can only arise on the expiration of the specified period. The same view has been taken by Patanjali Sastri, J. (as he then was), in *Akella Jagannadham and Others Vs. Venuthurupalli Narasimham and Others*, and by Chandrasekhara Aiyar, J. (as he then was), in *Manicka Nadar Vs. Arumugha Sundara Sathia Gnana Pandara Sannadhi Avergal, Atheena Kartha of Sengole Madam*, .

8. As against the above decisions, Counsel for the plaintiff-respondent has relied on *Durga Charan Maji Vs. Poresh Bewa*, ; *Dronamraju Lakshmi Narasimha Rao Pantulu Vs. Immani Seshayya and Others*, ; and AIR 1927 12 (Oudh) . In *Durga Charan Maji Vs. Poresh Bewa*, the document in question contained a recital that the executant sold the land for a period of fifty years and at the end of this period the land was to be returned to the executant without any excuse.

A suit for redemption was brought within this period of fifty years. The defence taken, was that the document was a sale out and out and not a mortgage and the suit was barred by limitation. On construction of the document their Lordships held that it was a mortgage and the question arose whether the redemption should be allowed before the expiry of the above period. On the pleas taken in defence as stated above their Lordships observed that the mortgagee did not act in accordance with the terms of the contract and was not willing to act in accordance with it and, therefore, held that in those circumstances the mortgagor could redeem, even before the expiry of the above period.

No authority was cited by their Lordships in support of the decision and the question whether a disclaimer of the title of the mortgagor could entail a forfeiture of the mortgagee's right was not gone into. The decision, of the Madras High Court in ILR Mad 26 (A) referred to above which was actually on this point was not placed before their Lordships. In *Dronamraju Lakshmi Narasimha Rao Pantulu Vs. Immani Seshayya and Others*, which is a single Judge decision, it was held that where a mortgagee commits a breach of contract it was equitable that he should not be allowed to insist that the mortgage cannot be redeemed before the expiry of the term.

In that case what happened was that the mortgagee undertook to pay three different sums for three different purposes : (1) a certain sum for the mortgagor's expenses; (2) a certain sum for Beriz on the land; and (3) a certain amount for village expenses; in addition to this, a certain amount was to be debited to the account of the mortgage-debt. With regard to item No. (1) the document contained a clause that if the above amount payable to the mortgagor every year is not paid in any year, the mortgagee should relinquish a portion in proportion to the amount payable to the mortgagor.

The mortgagee did not pay any of the amounts as agreed. In those circumstances it was held that the mortgagee committed a breach of contract and it was equitable that he should not be allowed to insist upon one of the terms of the mortgage-deed being given effect to when he himself gave a go-by to the other terms of the deed and that the mortgagor was not bound to confine himself to his right under the deed to claim a proportionate relinquishment of the land but was entitled to redeem the mortgage even before the expiration of the period fixed as the term thereof.

In the case before me there is no question of any breach of contract. This case has, therefore, no application to the facts of the present case. In the case of AIR 1927 12 (Oudh) the mortgagor mortgaged the property for a fixed period of fifteen years in consideration of the mortgagee paying a decree-holder, who had a charge on the mortgaged property, certain instalments regularly. There was a covenant that in the event of the decree-holder proceeding to bring the property to sale and selling it the mortgagee would be entitled to recall the whole of the mortgage-money due to him.

After paying some of the instalments, the mortgagee made default and the mortgagor, after satisfying the decree-holder, sued to redeem the mortgage. It was held that it was open to the mortgagor to ignore the condition of fifteen years and to seek redemption at once. It was further held that when the mortgagee failed to perform his part of the contract, it followed that the mortgagor was also entitled to rescind his promise as well and to recover possession of the mortgaged property. For the reasons given above, this case also has no application to the facts of the present case inasmuch as there is no default by the mortgagor in paying any amount of the mortgage-money. In *Manicka Nadar Vs. Arumugha Sundara Sathia Gnana Pandara Sannadhi Avergal, Atheena Kartha of Sengole Madam*, , to which a reference has already been made, *Chandrasekhara Aiyar J.* (as he then was), went so far as to hold that the mere fact that part of the mortgage-money has not been paid does not render the mortgage invalid nor does it entitle the mortgagor to rescind it at his option even before the expiry of the term.

While considering the argument advanced on behalf of the mortgagor on the principle of equity, his Lordship observed that there is hardship but the question is whether considerations of hardship entitle us to invent or create equitable rules or principles to circumvent or overcome such hardships, and quoted with

approval the observation made in *Yella Krishnamma v. Kottipalle Mali* ILR Mad 712: AIR 1920 Mad 164 (J), where the learned Judges referring to *Velayutha Chetty v. Govindasawmi Naiken* ILR Mad 543 CK), observed as follows:

"Can courts give equitable relief to mitigate or suspend the consequences laid down by a statute; and they came to the conclusion that the proposition that the plain words of the statute could be whittled away by the application of the so-called equitable doctrine, was an absolutely untenable one and they expressed their dissent from the contrary decision in *Bajinath Singh v. Paltu* ILR All 125 (L)."

His Lordship further held that if one of the parties did not conform to or fulfil the requirements of the obligation, imposed on him the other party had a remedy in damages against him. In this view of the matter, a plaintiff could not be held to be entitled to redemption before the due date of payment on the ground that the mortgagees cut away and misappropriated trees standing on the- mortgaged property.

9. On the authorities discussed above, in my opinion, there cannot but be one opinion on the question under consideration that subject to any contract to the contrary a mortgagor is not in law entitled to redeem, a usufructuary mortgage before the expiry of the due date of payment and the question of such a right by way of equitable relief does not arise in the face of the clear provision of law embodied in Section 60 of the Transfer of Property Act.

10. A faint argument has been advanced on behalf of the plaintiff-respondent that a long term of redemption for a period of sixty years amounts to a clog on the equity of redemption. In my opinion, there is no merit in this contention. The mere fact that the period of redemption is a long one is not by itself a clog on redemption though coupled with other circumstances it may amount to the same. In the present case, the findings of the courts below are that Chhathu executed the usufructuary mortgage providing for a long term of redemption after fully understanding its implications and that there was no fraud, coercion or undue influence exercised on him in execution of the mortgage.

On these findings, in my opinion, no question of there being a clog on the equity of redemption arises. In AIR 1929 Lah 523 (D), referred to above a Bench of the Lahore High Court to which Shadi Lal, C.J. (as he then was), was a party 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 stipulations contained in their instrument of mortgage. In *Mt. Sabratan and Another Vs. Dhanpat Gadariya and Another* , a Bench of the Allahabad High Court also held that the mere fact that the term of redemption is large is no ground for holding that the agreement is bad and should be relieved against. In *Akella Jagannadham and Others Vs. Venuthurupalli Narasimham and Others* , a reference to which has already been made, Patanjali Sastri J., (as he then was), held that a stipulation that the mortgagee should continue in possession for a

specified period of sixty years cannot be regarded as a clog on the mortgagor's equity of redemption and that the mortgagor's right to redeem arises only on the expiry of the period.

A similar view was taken in *Abdur Bahman v. Ram Padarath Ram* AIR 1945 Oudh 113 (N). The only decision of this Court on this point is of a single Judge in *Hasar Ali and Others Vs. Ajodhaya Sah and Others*, , Agarwala J., (as he then was), after considering various cases on the point held that in India a long term is not by itself a clog on the equity of redemption, entitling the mortgagor to redeem before the expiry of the period agreed upon, I perfectly agree with the view taken in those cases. (11) For the reasons given above, the decree of the courts below entitling the plaintiff to redeem the usufructuary mortgage before the expiry of the due date of payment is wrong in law and must be set aside.

12. The result, therefore, is that the appeal is allowed with costs, the decree of the court below decreeing the suit of the plaintiff for redemption is set aside and his suit for redemption is dismissed as being premature.