

(1903) 01 BOM CK 0004
In the Bombay High Court

Kanhayalal Bhikaram and Others

APPELLANT

Vs

Narhar Laxmanshet Vani

RESPONDENT

Date of Decision : 23-01-1903

Acts Referred:

Citation : (1904) ILR (Bom) 193

Hon'ble Judges : Chandavarkar, J;Aston, J

Bench : Division Bench

Judgement

Chandavarkar, J.—The law is well established that, though once a mortgage always a mortgage and no clog can be placed by the mortgagee on the mortgagor's equity of redemption, it is open to both of them to enter into a contract subsequent to the mortgage for the sale of the mortgaged property to the mortgagee. That principle was enunciated by the Court of Appeal in England in the case of *Lisle v. Reeve* (1902) 1 Ch. 53 where Vaughan Williams, L.J., said: 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 is substance and in fact is subsequent and independent of the original bargain." The decision of the Court of Appeal in *Lisle v. Reeve* (1902) 1 Ch. 53 has been affirmed by the House of Lords (1902) A.C. 461. That being the law, and it being in accordance with the Fall Bench case of *Ramji v. Chinto* (1864) 1 Bom. H.C. 199 and the other decisions of this Court following it, it is not clear from the judgment of the District Judge in the case before us whether he had the law fully in his mind in holding that the plaintiffs had lost their right to redeem in consequence of a fresh transaction between them and the defendant. The facts found by the District Judge are shortly these. The mortgagor mortgaged the property with possession and the deed contained the usual gahan

lahan clause. The mortgagor failed to pay within the stipulated period, and about a year after his failure the parties made up an account of the mortgage and it was agreed that the mortgagor should sell the property to the mortgagee. The mortgagor paid Rs. 10 or 12 to the mortgagee for costs of repairs and the mortgagee continued in possession as owner. They acted upon that understanding for several years. It is this "fresh transaction" which, according to the District Judge, extinguished the mortgage and passed the property to the mortgagee as purchaser. But though this was a fresh transaction the question still remains, was it independent of the mortgage? Though it is not clear whether the District Judge had fully in mind the legal principle to which we have referred at the outset, yet he has found very distinctly that the mortgagor entered into the fresh transaction under the belief that he was bound by the gahan lahan clause; and that the mortgagee entered into it because he also believed that he could become absolute owner under it. The necessary inference from that finding is that the agreement for the sale of the property to the mortgagee which the District Judge calls "a fresh transaction" was not a bargain independent of the mortgage, but was based upon the gahan lahan clause in the mortgage-deed. It was virtually a transaction enforcing that clause, and therefore, it falls within the principle laid down by this Court in the leading case of *Ramji v. Chinto* (1864) 1 Bom. H.C. 199. It cannot be contended in such a case that the principle of either estoppel or acquiescence concludes the mortgagor and bars his right to redeem. He is not estopped because he did not by any declaration, act or omission cause or permit the mortgagee to believe that the mortgage had become extinguished. The mortgagee was as much responsible for the belief as the mortgagor. The parties did, indeed, act for several years upon the understanding that the mortgage had been converted into a sale, but, as held in *Abdul Rahim v. Madhavrav* (1889) 14 Bom. 78 that is not sufficient to extinguish the mortgagor's equity of redemption where the understanding and the conduct of the parties was solely due to their belief as to the gahan lahan clause and was not the consequence of any transaction independent of the mortgage. We must, therefore, reverse the decree and remand the appeal to the District Judge for passing a proper redemption decree including costs.