
(1981) 09 RAJ CK 0016
In the Rajasthan High Court
Case No : Civil Second Appeal No. 140/80

Khetsidas and Others

APPELLANT

Vs

Mst. Kanchan Bai and Others

RESPONDENT

Date of Decision : 21-09-1981

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100
Evidence Act, 1872 — Section 13, 43
Transfer of Property Act, 1882 — Section 54, 60, 9

Citation : (1981) WLN 294

Hon'ble Judges : M.B. Sharma, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

M.B. Sharma, J.—This is a second appeal arising out of a redemption suit filed by the respondent No. 1 Shrimati Kanchan Bai against the appellants and others. The mortgage sought to be redeemed was executed on 24-3-1943 for sum of Rs. 2200/- by Dault Ram, father-in-law of the plaintiff Smt. Kanchan Bai, in favour of Balabux and Banshidharji of whom the appellants are the heirs. The mortgage property is whole of Talia No 143 and half of Taliano. 144 situated in Bhopalganj, Bhilwara. Under the terms of the mortgage deed Ex. A 1, the mortgagees were given a right to construct a house on the mortgagee land & the mortgagor was only to redeem after payment of the mortgage amount along with cost of construction of the house as per entries in the account books of the mortgagees. On the same day i.e. March 24, 1943 an agreement Ex. A2 was executed by Daulat Ram, the mortgagor in favour of the mortgagees on Annas 4 stamp, under which it was agreed that any amount may be spent over constructions on the mortgaged property and any constructions may be raised, after the house is constructed thereafter a sale deed was to be executed in favour of mortgagees for Rs. 11/- only. Thereafter the mortgagees were to have all ownership rights. The respondent No. 1, claiming that under a gift deed dated July 2, 1960 Ex. 1. Daulat Ram, her father in law transferred to her or his right of redemption of

mortgage filed a suit for redemption in the court of Civil Judge, Bhilwara on April 12, 1965.

2. The claim for redemption made by Smt. Kanchan Bai was contested by the appellants on various grounds. The execution of the gift deed Ex. 1 by Daulat Ram was denied and a case was set up that the mortgage property was ancestral property of Daulat Ram and his sons and as such the gift by Daulat Ram in favour of Smt. Kanchan Bai was void. It was also stated in the written statement that in the year 1960, Daulat Ram had no saleable interest because on Magsar Sud 5, Samvat year 2004, corresponding to December 17, 1947, under Ex. A3 he had received Rs. 11/- as sale price of his right of redemption as had been agreed under Ex. A2. Since then they became absolute owners of the property. They also set up a case that their right as full owners was asserted by them by taking objections under Order 21 Rule 58 (Miscellaneous case No. 9 of 1961, District Judge, Bhilwara). The objections were allowed on April 13, 1964.

3. The respondent Smt. Kanchan Bai filed rejoinder to the written statement in which she denied the execution of Ex. A2 and A3 by Daulatram and receipt of Rs. 11/- by him. During the pendency of the suit Daulatram, the mortgagor died. The case was transferred to the court of Additional Munsif No. 2, Bhilwara.

4. The trial court under its judgment and decree dated November 16, 1970 passed preliminary decree for redemption of the suit property in favour of Smt. Kanchan Bai (Plaintiff) and against the appellants but on payment of Rs. 23,499.62 p. by Smt. Kanchan Bai to the mortgagees for mortgage amount and for cost of construction and improvement and Smt. Kanchan was directed to deposit the amount in the court within three months or within such further time as may be extended by the court. On depositing the amount as directed Kanchan Bai was directed to file an application for final decree.

5. The appellants filed an appeal and cross appeal was filed by Smt. Kanchan Bai so far as amount of cost of construction and improvement was concerned. When both appeals were pending in the court of Additional District Judge, Bhilwara, an application for amendment of the written statement was filed on behalf of the appellants seeking incorporation in para 5 of the written statement, a plea that suit talias were undivided joint Hindu family property and deceased Daulatram was one of the co-parceners and was not competent to gift the property to Smt. Kanchan Bai, his daughter-in-law and gift Ex. 1 made in favour of Smt. Kanchan Bai was void ab-initio & did not confer any right in her. Thus, Smt. Kanchan was not entitled to bring any suit in respect of suit talias. Learned Additional District Judge allowed the amendment application under his order dated May 27, 1977 and in view of the amendment the learned Additional District Judge under his order dated August 24, 1977 framed two additional issues and remitted the case to the trial court Under Order 41 Rule 25 CPC for trial of the additional issues and directed the trial court to try the additional issues and to remit its finding to it. The trial court tried the additional issues and recorded its finding vide its order dated September 27, 1979 and held that the appellants have failed to prove that

the suit talias were undivided property of the joint Hindu family. It also held that talias being self acquired property of Daulat Ram he was competent to gift them to Smt. Kanchan Bai vide Ex. 1. The learned lower appellate court though reversed the finding of the trial court on issue No. 10 and held that Ex. A2 agreement of sale of right of redemption was not integral part of the mortgage deed and as such it was not a clog on the equity of redemption but dismissed the appeal of the appellants. In doing so the learned lower appellate court affirmed the finding of the trial court that under Ex. A3 Rs. 11/- were not paid by the mortgages deceased Daulatram and as such right of redemption still vested in him and he could have gifted that right to Smt. Kanchan Bai, his daughter in law. It was further held that the judgment dated April 13, 1964 Ex. A30 of District Judge, Bhilwara in proceedings under O. 21 R. 58 CPC was not resjudicata and because Smt. Kanchan Bai was not party to it, it was also not conclusive.

6. I have heard Mr. H.M. Parekh, learned Counsel for the appellants and Mr. D.S. Shishodia, learned Counsel for respondent No. 1 and have gone through the record of the case. Mr. Parakh has raised a two fold contention in this appeal namely:

(1) that in arriving at the finding that the consideration of Rs. 11/-was not paid by the mortgagees to Daulatram, the mortgagor under Ex. A3, the lower appellate court has not taken into consideration material piece of evidence having a bearing on the finding and as such finding of fact arrived at by appellate court is not binding on this court u/s 100 CPC in the second appeal. If the evidence is looked into it can be said that the passing of the consideration of Rs. 11/- under Ex. A3 is proved;

(2) that the learned lower appellate court has misconstrued Ex. A1 and Ex. A2 in holding that suit talias were the self acquired property of Daulatram, father in law of Smt. Kanchan Bai. If those documents are property of Daulat Ram and as such the gift made by him of the suit talias in favour of Smt. Kanchan Bai is void. Mr. D.S. Shishodia, learned Counsel for plaintiff-respondent besides supporting the judgment of the learned lower appellate court on the contained therein, has also tried to support it on the ground that agreement Ex. A2 to sell the right of redemption was a clog on the equity of redemption and as such is unenforceable u/s 60 of the Transfer of Property Act.

7. On the submissions made before this court by the learned Counsel for the parties the following points arise for determination in this second appeal:

(1) Whether the finding of the lower appellate court that the consideration of Rs. 11/-under Ex. A3 did not pass to Daulatram, father in law of Smt. Kanchan Bai, is vitiated because in arriving at that finding the lower court has not considered the material piece of evidence? If so (i) whether on the evidence on record passing of consideration of Rs. 11/- under Ex. A3 is proved, (ii) whether the right of the redemption of mortgage was sold by deceased Daulatram to the mortgagees and they became absolute owners of the suit property?

(2) Whether the lower court has misconstrued Ex. A 1 and Ex. A2 in holding that the suit talias were the self acquired property of Daulatram? If so, whether on proper construction of the two documents the suit talias were the ancestral property of Daulatram and as such the gift deed under Ex. A 1 in favour of Smt. Kanchan Bai is void ?

(3) Whether agreement Ex. A2 operates as a clog on the right of redemption and as such is not enforceable?

8. I will take the above points in the order in which they have been framed.

Re point No. 1

9. Generally a finding of fact arrived at by courts below is binding on this court in second appeal u/s 100 CPC and is not open to challenge. But if such a finding of fact is arrived at by ignoring relevant evidence, then such a finding is not binding on the court and the court in such a case can reappraise the evidence itself and arrive at its own finding (See Damadilal and Others Vs. Parashram and Others,

10. I have gone through the finding of the learned lower appellate court on issue No. 3. It appears that the learned court has not taken into consideration some important piece of evidence while arriving at the finding on the later part of issue No. 3. It has not considered, that the trial court under his order dated August 19, 1967 after taking evidence and after being satisfied about the loss of original of Ex. A3 allowed the appellants to lead secondary evidence of its execution, and it has said not a word in this connection in its judgment, that Ex. A33 which contains the admission of deceased Daulatram about his signatures on the original Ex. A3 has not been considered, that Ex. A4 an entry of payment of Rs. 11/- proved by Daulatram, DW 3 has not been considered and so also the statement of Daulatram, DW 3 has not even been considered, rather it has been misread, the effect of Ex. A30 an order in proceedings under Rule 58 Order 21 has not been considered. Thus, I am of the opinion that the finding of learned lower appellate court arrived at on later part of issue No. 3, ignoring important piece of evidence having bearing on the decision of the issue, is not conclusive and not binding on this court.

11. The first part of issue No. 3 has been decided by the courts below in favour of the appellants but the second part about payment of Rs. 11/- has been decided against them. Issue No. 3 if translated into English would read as under.

Issue No. 3

Whether on the date of mortgage itself an agreement of sale relating to the suit talias was executed by defendant No. 11 (Daulatram) in favour of the mortgagees. And whether a sum of Rs. 11/- as the sale price, was paid to Daulatram on Mangar Sud 5, Samvat year 2004, and thus he sold the right of redemption to the mortgagees and since then the mortgagees have become the owners of the suit property.

13. To my mind the later part of issue No. 3 is also to be further sub-divided into two parts. The first part is whether Rs. 11/- were received by deceased Daulatram as the sale price from the mortgagees under agreement of sale Ex. A2. The second part is--if so, whether the right of redemption was sold by Daulatram to the mortgagees and since then they become the full owners of suit property?

14. I have already said earlier that the finding of the learned lower appellate court about the payment of Rs. 11/- under Ex. A3 is not binding on this court. I will presently show that so far as payment of Rs. 11/- by mortgagees to deceased Daulatram is concerned, there is sufficient material on record. The burden of proof of issue No. 3 was rightly placed on the appellants in view of the pleadings of the parties. It were the appellants who pleaded in the written statement the payment of Rs. 11/- to deceased Daulat Ram as the sale price of right of redemption. In the rejoinder filed by respondent No. 1 Smt. Kanchan Bai it was not admitted. Therefore, the burden of issue No. 3 was rightly placed on the appellants and argument of the learned advocate for the appellants Shri H.M. Parekh to the contrary has no force. Burden of proof of an issue is to be placed on such of the party who if he does not produce any evidence on that issue, the issue will be decided against it. But during the course of the trial, onus may shift from one party to the other depending on the fact as to whether the party on whom the burden of proving an issue was placed has lead some evidence. In the instant case the signatures of deceased Daulatram on original of Ex. A3 stand proved on record. The execution of Ex. A3 has been proved by secondary evidence, which as already stated earlier, was permitted to be led by the court. The argument of Mr. Shishodia, learned Counsel for respondent No. 1 that Ex. A3 cannot be said to be secondary evidence being copy of the copy, has no force. A look at Ex. A3(which is in Civil Misc. case No. 9/61 Balabux etc. V. Habib etc. decided by the District Judge, Bhilwara on April 13, 1964) will show that it is not a copy of the copy, rather it is only copy of the original and as per rules the original was only returned to the appellant on October 27, 1964 after Ex. A3 was compared with the original. Thus, Ex. A3 is admissible as secondary evidence of the original Ex. A33 was produced in the court of Additional District Judge, Bhilwara on May 2, 1977 and it appears from its perusal that it is dated October 7, 1961 and is signed by deceased Daulatram and his son Nandlal who is husband of Smt. Kanchan Bai. Rameshwar DW 1 in his statement dated November 9, 1977 has proved the signatures of deceased Daulatram and Nandlal on Ex. A33. Thus, the signatures of deceased Daulat Ram and Nandlal on Ex. A33 have been proved. The written statement Ex. A33 in which signatures have been proved was filed in proceedings Under Rule 58 Order 21 CPC which were decided by the District Judge under Ex. A30 dated April 13, 1964. Para 12 of the Additional pleas of Ex. A33 is to the following effect:

that the agreement of Chait Sud 3 Samvat year 1999 was executed on three stamps of the value of 8 annas as required under law. That the two supporting stamps of value of 2 annas each attached with the agreement were also signed

by non-petitioner No. 8 having been withheld by petitioners. The receipt of Rs. 11/- on 2 annas stamp is one of the said two stamps which has forged and except the signatures.

15. From this admission it can straight away be said that the original of Ex. A3 was signed by deceased Daulatram. Admission is the best evidence against a party unless either it is successively withdrawn or is proved erroneous. Once signatures are proved on a document the onus is on the other party to then prove that the consideration mentioned therein did not actually pass. The person who alleges that the consideration did not pass under a document which is proved to be signed by him is ordinarily bound to prove his allegation and his mere denial of receipt of consideration acknowledged in the receipt or in the deed is not sufficient to prove that consideration was not received by him. Apart from this admission of deceased Daulatram about his signatures on Ex. A3 there is also evidence of a "Rokad" entry dated December 17, 1947 (Ex. A4) about payment of Rs. 11/- to deceased Daulatram, which has been proved by Daulatram, D.W. 3. Bhagat Ram, DW 1 states that the original of Ex. A3 was executed in his presence and Rs. 11/- were also paid in his presence. The learned lower appellate court has mis-read the statement of Daulatram, DW 3 when it observed that from his statement the loss of original of Ex. A3 is not proved. It only read a part of his statement and not the whole relevant portion of the statement. The relevant portion of the statement of Daulat Ram is as follows:

Gyara Sau ki Alag Rasid Likhwai Thi Usi Vakant Likhai Thi Jo Gai Pesi Par Mene Dekhi Thi/Mene Bhanwarlal se Puchha tha ki Rasid Kahan Hai To imhone kaha ki Vakil Sahib ke Pas Hai/Vakil Sahib ke Pas Ja kar Mene Nahin Dekhi/Gai Peshi Par Dekhi Nahin Thi Bhai Sahib Ne kaha Tha ki Vakil Sahib ke Pas Hai

It is clear from the extracted portion that he did not see the original receipt, Therefore, finding of the learned court which is based on the misreading of the statement of Daulatram, DW 3 is wrong. As already stated earlier execution of Ex. A3 by secondary evidence has been proved. Khetsidas, DW 5 has also proved the payment of Rs. 11/- to deceased Daulatram. DW 6 Ganpat, one of the witnesses to the original Ex. A3 has stated that he had signed the original at the instance of deceased Daulatram. In rebuttal Smt. Kanchan Bai was examined. She could not have said as to whether Rs. 11/- under Ex. A3 were received by deceased Daulatram or not. Banshi Lai PW 5 was examined who only gave negative evidence to the effect that there is no entry of Rs. 11/- in the "Khata" Ex. A5 or "rokad" Ex. 6 which were kept at the firm of deceased Daulatram. He submitted that balance was not struck daily. Some time it was struck within 2 days some time in 3 days. Nand Lal, husband of Smt. Kanchan Bai who appeared as a witness for her, in his statement dated 4-7-78 admitted that Ex. A33 is signed by him at C to D. Thus, Ex. A33 also contains the admission that Ex. A3 was signed by his father.

16. A look at Ex. A2 will show that it was only written on a stamp on the value of Annas 4. There is no entry in it that two supporting stamps of value of Annas 2

each which numbered 2815 and 2816 were also signed by the deceased Daulatram. A look at Ex. A1, the mortgage deed will show that there is mention about supporting stamps. Therefore, the possibility cannot be excluded that Ex. A2 was only executed on 4 annas stamp though two more stamps of the value of Annas 2 each were also purchased. No doubt under the Mewar Stamps Act (Act No. v of 1908) for an agreement of the type of Ex. A2 stamps of the value of Annas 8 were required. For receipts of more than Rs. 20/- ticket of Anna 1/ was required and they were not to be written on stamp sheets. But there being no mention of the supporting stamps in Ex. A2, it cannot be said that at the same time Daulatram signed them and handed them over to the mortgagees. It can also not be said that on one of those stamps signed by Daulatram Ex. A2 was forged except the signatures. So far as the effect of Ex. A30 and order dated April 13, 1964 of the learned District Judge in proceedings under Rule 58 Order 21 is concerned, it may be stated that it can not be res judicata because the proceedings under Order 21 Rule 58 are not a suit. In *Kandadai Narasimhachariar v. Raghava Padayachi and Ors.* AIR 1945 Mad. 333 it has been held that an order in proceedings under Order 21 Rule 58 does not extend beyond the execution of the decree. This was approved in *Mangru Mahto and Others Vs. Shri Thakur Taraknathji Tarakeshwar Math and Others*, . Their Lordships observed as follows:

The party against whom an order is made in the claim proceeding may institute a suit to establish the right which he claims to the property in dispute, but subject to the result of such suit, if any, the order is conclusive (Rule 63). If no suit is brought under Rule 63 within the prescribed period of limitation, the order in the claim proceeding is conclusive on the question whether the property was or was not liable to attachment and sale in execution of the particular decree. But the order is not conclusive for all purposes, See *Kandadai Narasimhachariar Vs. Raghava Padayachi*, A claim proceeding under Rule 58 is not a suit or a proceeding analogous to a suit. An order in the claim proceeding does not operate as res judicata. It is because of Rule 63 that the order becomes conclusive. The effect of Rule 63 is that unless a suit is brought as provided by the rule, the party against whom the order in the claim proceeding is made or in the claim proceeding is made or any person claiming through him cannot re-agitate in any other suit or proceeding against the other party or any person claiming through him the question whether the property was or was not liable to attachment and sale in execution of the decree out of which the claim proceeding arose, but the bar of Rule 63 extends no further.

17. It can, therefore, be said that the scope of the proceeding either under Rule 58 order 21 as stood prior to the amendment in 1976 or under Rule 63 of Order 21 is only limited to the extent as to whether the property attached was liable to be said in execution of decree or not but those orders are not conclusive on the question of the title to the property. That apart Smt. Kanchan Bai was not even a party to those proceeding and gift deed was executed in her favour even before the objections were filed. But order Ex. A30 is relevant u/s 13 read with Section

43 of the Evidence Act. But its probative value is not much so far as the title of the property is concerned because the inquiry therein was only of summary nature and intricate questions of law and the title of suit property could not be decided. Thus, on the material on record it can be said that Rs. 11/- were paid by the mortgagees to deceased Daulatram when the original of Ex. A3 was written. Smt. Kanchan Bai on whom the onus shifted in view of admission about signatures of deceased DaultRam on the original of Ex A3 has failed to prove that Rs. 11/- were not paid to deceased Daulatram by the mortgagees. Thus, finding of the lower appellate court that Rs. 11/- were not paid to deceased Daulatram is set aside and it is held that Rs. 11/- were paid to deceased Daulatram by mortgagees under Ex. A3.

18. But the matter does not end here. Rs. 11/- are said to have been paid in terms of Ex. A2. The relevant portion of Ex. A2 is as follows:

Rupia 2200/- Akhare Baiso Kaldar Rokra Lekar Gajavat ko Khat Mand Ditto...upar Kam Kamalya Kuli Ave jo Banvago Lagat Kuli Avejo Aap Legavego Makan Aap Banaya Pochh Be Bap ko jab Aapne Likh Devago Tabi ka...ka Rs. 11/- Akhare Rupiya Gyare...Upar Leyage...Taliya ka kid Malkana Rak Aap ko Rahega

19. Ex. A2 was an agreement of sale of right of redemption. A look at it will make it clear that it required construction of a house at any cost the mortgagees deemed proper and there after the sale deed was to be executed by deceased Daulatarm and the sale price of Rs. 11/- was to be received, only there after the ownership was to vest in the mortgagees. Under the Mewar Registration Act (Act No. III of 1988) u/s 5 sale deeds of immovable properties irrespective of their value were compulsorily registerable and u/s 17 of that Act in case the deed was not registered in accordance with that Act, it had no effect and was not admissible in evidence. Thus, under Ex. A2 the intention of the parties was that a sale deed was to be executed on payment of Rs. 11/- and it required registration. Under Ex. A2 mere payment of Rs. 11/- as the price of the right of redemption to deceased Daulatram was not sufficient to make the mortgagees owners of the property and a written sale deed was contemplated. At best it can be said that Rs. 11/-, the sale price agreed to be paid was under Ex.A2 was paid and it might have given a right to the other party the mortgagees to take action for specific performance of contract.

20. A case of oral sale of right of redemption by deceased Daulatram in favour of the mortgagees has been set up in the written statement. But there is absolutely no proof of oral sale. Though Transfer of Property Act was not in force in Mewar State but its principles will still be attracted. u/s 9 of the Transfer of property Act, 1882 (for short T.P. Act). A transfer of property maybe made with out writing in every case in which a writing is not expressly required by law. "Sale" is defined in Section 54 of the T.P. Act. It is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised. The mode of sale is also provided therein. In case of tangible immovable property, of a value of less than one hundred rupees such transfer may be made either by a registered

instrument or by delivery of the property. Thus, even in an oral sale before it can be said that a sale of tangible immovable property of a value of less than one hundred rupees has taken place, it is necessary that price must be paid or promised to paid and the delivery of the property must be given to the purchaser. A look at the written statement of the appellant will show that they have not come out with a case that under Ex. A3 when Rs. 11/-were paid the possession was also transferred to them or that because they were already in possession as mortgagees. Deceased Daulatram renounced his rights in the property. There is no evidence either on behalf of the appellants that there was renunciation of his rights by deceased Daulat Ram and it amounts to delivery of possession. In Bhikabhai Nanabhai Patel v. Chimanlal Maganlal Shan and Ors. AIR 1953 Bom 437 (FB) it has been observed that where a mortgagor sells the mortgaged property to a sub-mortgagee in possession, as the sub-mortgagee is already in possession no further possession can be given to him and hence, even assuming that the equity of redemption constitutes a tangible immovable property, the sub mortgagee can acquire title to the property only if he obtains a registered instrument. It has also been observed in Tukaram Ganpatrao Surve Vs. Atmaram Vinayak Gondhalekar, that the delivery of possession contemplated by Section 54 of the T.P. Act must be in pursuance of a sale which the vendee cannot prove as the unregistered sale deed cannot be used in evidence. In Bhanwarlal and Another Vs. Dhulilal and Others, it has been held that where the property subject to usufructuary mortgage is sold to the mortgagee, renunciation of rights by the vendor amounts to delivery of possession. Ex. A3 is to the following effect: (In Hindi)

It will be clear from Ex. A3 that there is no mention that possession under it was handed over by deceased Daulatram to mortgagees. All that is mentioned therein is that under agreement of Sale Ex. A2 Rs. 11/- have been received by Daulatram from the mortgagees. Therefore, neither there is any pleading nor proof that possession was transferred to the mortgagees under an oral sale or deceased Daulatram renounced his character as the owner of the suit property while taking Rs. 11/-. Thus, no case of oral sale is made out.

21. The result of the above discussion is that even by payment of Rs. 11/-under Ex. A3 the mortgagees did not become the owners of the suit property and the right of redemption was not sold to them by deceased Daulatram and it still vested in deceased Daulatram who could have executed a gift Ex. 1 in the year 1960 in favour of Smt. Kanchan Bai, respondent No. 1, who became the owner of the property and as such could have filed the suit for redemption.

Re point No. 2

22. The finding of the court that the suit property was the self acquired property of deceased Daulatram and was not undivided Hindu joint property is a finding of fact. Mr. Parekh, learned Counsel for the appellants contended that documents Ex. A1 and A2 have been misconstrued by the courts below. He has laid much emphasis on the words Hamari Vapoti ka used in Ex. A1 and A2 by reference to

Rajasthani Sabad Kosh, Tratiya Khand (Dwitiya Jild) Page 3010 column No. 1. He submits that "Bapoti" means ancestral. The said Dictionary has defined "Bapoti" as Paitrak Sampati Jo Pntra ko Milti Hai, Parumpragat Poorvajano se chali Aa Rahi Sampati, Bhumi Adi

He submits that the two documents Ex. A1 and A2 prove that property was ancestral of deceased Daulatram. The dictionary which has been referred above was prepared after formation of Rajasthan and it is a Dictionary of Rajasthani language. We do not know what was meant by word "Bapoti" in the former Mewar State. In Basant Kumar Kapali and Others Vs. Satindra Mohun Tagore and Others, it has been held that the question as to whether a particular word bears a particular meaning in a particular place is a question more of fact than of law. Nand Lai has stated that what "Bapoti" meant in the former Mewar State. That apart a look at Ex. A1 will show that there is a mention of "Patta" No. 20 of Vaisakh Bud 2, Samvat 2090 in it. Ex. A29 is that Patta. It is for talia No. 143 and 144. The suit talias are 143 and half of 144. The Patta was in the name of deceased Daulatram. Merely because Patta No. 21 for talia No. 145 was in the name of Rameshwar, brother of deceased Daulatram it cannot be said that all the talias were the joint property of the brothers. Ex. A27 is registered sale deed of half of talia No. 144 in favour of Mohmmmed Sharif etc. It is dated January 15, 1943. Merely because under it talia No. 145 was also described as belonging to deceased Daulatram it cannot be said that the suit talias were the ancestral property. Under the Hindu Law there is no presumption that family has joint property. Thus, the finding of the learned court that the suit property was the self acquired property of deceased Daulatram and was not joint Hindu undivided property of Daulatram and his sons is a finding of fact based on material and does not call for interference. It cannot be said that documents Ex. A1 and A2 have been misconstrued by the courts below. With the above result it is not necessary for me to deal with the point as to whether the gift Ex. 1 is void. Daulatram was the owner and as such could have transferred the right of redemption under Ex. 1 to Smt. Kanchan Bai.

Re point No. 3

23. The lower appellate court has held that Ex. A2 was not integral part of mortgage deed Ex. A1 and as such does not operate as a clog on the equity of redemption. A look at Ex. A2 will show that only after the suit property was mortgaged with possession with the mortgagees, Ex. A2 was entered into in between the mortgagor and the mortgagees. The doctrine of clog on redemption relates only to the dealings which take place between the parties to the mortgage at the time when the contract of mortgage is entered into. The parties can deal subsequently with each other and enter into any agreement with regard to the sale of the right of redemption or can vary the terms upon which the redemption of mortgage can be held. In Chandanmal and Another Vs. Saleraj and Others, a case where under the terms of the mortgage the postponement of right of redemption of mortgage was allowed even for a very long period as

much as 99 years and the mortgagees were allowed to incur any expenditure on the constructions at their will and the mortgagor was only to redeem property after payment of the entire amount consisting of original mortgage money and the improvement so made, it was held that it amounts to a clog on the right of redemption. Ex. A2 was executed by deceased Daulatram after 2 to 4 hours of executing the mortgage deed. Thus, it was a separate agreement and it cannot be said that it was at the time when the mortgage was executed that it was agreed that right of redemption shall be sold for Rs. 11/-. Thus to my mind the terms of Ex. A2 do not operate as clog on equity of redemption.

24. No other point has been argued before me. The result is that appeal is dismissed with costs for the aforesaid reasons. The time granted by the trial court to the plaintiff to deposit the mortgage amount, costs of improvements etc. shall run from today because this Court had on 27-10-80 ordered that the mortgage money shall not be deposited till the disposal of appeal.