
(1973) 08 GUJ CK 0004
In the Gujarat High Court

Maganlal Chhotalal Chhatrapati and Others

APPELLANT

Vs

Bhalchandra Chhaganlal Shah

RESPONDENT

Date of Decision : 24-08-1973

Acts Referred:

Transfer of Property Act, 1882 — Section 60, 60

Citation : (1974) 15 GLR 193

Hon'ble Judges : P.V. Desai, J

Bench : Single Bench

Judgement

P.V. Desai, J.—In the town of Jambusar, there is a piece or parcel of open land (building site) bearing City Survey No. 4013 admeasuring 24 square yards. This piece or parcel of land will be referred to as the suit land or mortgaged property in the course of this Judgement. One Bai Mani, widow of Vishnushanker Bhavanishanker, was the original owner of this property. There was some dispute between the parties as to how Bai Mani acquired title over this property. The contention of the respondent-plaintiff was that the property was bequeathed to her by her husband under his will dated April 19, 1893. This version put forward on behalf of the respondent-plaintiff has, however, not been accepted by the lower appellate Court which has found that Bai Mani had in fact purchased the same from Jagmohandas Jugaldas and another by a registered sale deed dated November 10, 1905 (Ex. 52). It appears that Bai Mani mortgaged the suit property to one Chhotalal Mathurdas Chhatrapati by a registered document dated January 4, 1909 for securing a debt of Rs. 61/-. It was a mortgage with possession for a period of 199 years. The first appellant is the son and the second and the third appellants are the grand-sons of the said Chhotalal Mathurdas Chhatrapati. Bai Mani died some time between 1941 and 1945. Prior to her death she had executed a will (Ex. 71) on June 13, 1939 bequeathing the suit property to her nephew, one Vaidya Dhaneshvar Girjashanker. The said Dhaneshvar had a son Indrashanker and under a will dated November 10, 1945 (Ex. 69) the said Indrashanker inherited the suit property from his father. Indrashanker thereafter sold the suit property to the respondent-plaintiff by a

registered sale deed (Ex. 63) executed on July 2, 1963. These are the material facts which have been found by the lower appellate Court and which have been rightly not disputed at the hearing of this second appeal on behalf of the appellants-defendants.

2. After purchasing the suit property, the respondent-plaintiff filed Regular Civil Suit No. 115 of 1965 in the Court of the Civil Judge, Junior Division, Jambusar for redemption of the mortgage created on the suit property on payment of Rs. 61/- as also for recovery of vacant possession of the said property from the appellants. The case of the respondent was that as a result of the purchase of the suit property, he had stepped into the shoes of the original mortgagor and that he was, therefore, entitled to redeem the mortgage. The respondent averred that he had served a notice dated March 22, 1965 on the appellants requiring them to redeem the mortgage and deliver vacant possession of the suit property to him against payment of Rs. 61/- and that the appellants having failed to comply with the requisition, he was compelled to commence the action. The respondent alleged that the stipulation in the mortgage deed to the effect that the mortgage was to subsist for a period of 199 years was a clog on the equity of redemption and that in the eye of law such a condition was inoperative and unenforceable.

3. The appellants resisted the suit on several grounds. The principal defence raised on behalf of the appellants was that the suit was premature. The appellants contended that according to the terms agreed upon between the original mortgagor and mortgagee, the mortgage was to subsist for a period of 199 years and since the said period had not expired, the respondent was not entitled to file the suit for redemption of mortgage. The appellants further pleaded that merely because the right to redeem was postponed for a period of 199 years by agreement between the parties, it could not be said that there was a clog on the equity of redemption and that the said term which was voluntarily agreed upon between the parties was binding upon them and their successors in title. The suit was resisted on some other grounds also but it is not necessary to notice them at the present stage because the real dispute between the parties now centres round the question whether in the facts and circumstances of the case the postponement of redemption for 199 years amounted to a clog on the equity of redemption.

4. The learned trial Judge framed appropriate issues which arose on the pleadings of the parties. He inter alia held that in the facts and circumstances of the case the postponement of redemption for a period of 199 years did not operate as a clog on the equity of redemption and as such the respondent was not entitled to enforce his right to redeem the suit property by filing a suit until the said period had expired. In view of this finding he dismissed the suit by the judgment and decree dated November 21/27, 1967.

5. The respondent, feeling aggrieved by the decree of the trial Court, preferred an appeal to the District Court of Broach. The appeal came on for hearing before

the learned District Judge who by his judgment and decree dated April 15, 1969 allowed the same and decreed the respondent's suit for redemption and directed the appellants to handover vacant possession of the suit land to the respondent on the respondent's paying a sum of Rs. 61/- to them. In reaching this decision, the learned District Judge reversed the finding of the trial Court that the postponement of redemption for 199 years did not in the facts and circumstances of the case amount to a clog on the equity of redemption and the reasons which impelled the learned District Judge to come to this conclusion may be best stated in his own words:

I, therefore, find that the long term of 199 years during which the mortgagor is not entitled to redeem the mortgage coupled with the term that the mortgagee has an unrestricted right to put up a structure worth any amount with a liability on the mortgagor to pay the whole amount at the time of the redemption is clearly a clog on the equity of redemption and as such, the plaintiff will be entitled to redemption of the said mortgage on paying Rs. 61/- to the defendants.

The present second appeal is directed against the said decision.

6. Mr. R.M. Vin, learned Advocate appearing on behalf of the appellants, fairly stated to the Court that though before both the lower Courts the appellants had resisted the suit on diverse grounds, it was possible for him to challenge the decision of the lower Appellate Court on only one ground which will be presently noticed, since the findings recorded by the lower Appellate Court on other points, being findings of facts, had become conclusive. He urged that the question which he was raising for consideration in this second appeal was whether in view of the fact that the term of the mortgage in the present case was 199 years and there was no stipulation entitling the mortgagor to redeem during that term, the suit filed by the respondent for the redemption of mortgage was premature and liable to be dismissed. His submission was that the finding of the lower Appellate Court that the postponement of the right of redemption for a period of 199 years was, in the circumstances of the case, a clog on the equity of redemption and the suit was, therefore, not premature, was not justified in law and its decision was, therefore, vitiated. The answer of the respondent to this contention was that the covenant creating the long term of 199 years for the mortgage, taken along with the provision that the mortgagee had an unrestricted right to put up a structure on the suit property and further that on redemption the mortgagor was liable to pay the price of such structure, was really a clog on the equity of redemption and was, therefore, invalid. In the result, the mortgage money had become due all along and the suit was not premature.

7. In order to appreciate the merit of the rival contentions of the parties, it would be necessary to refer to the relevant provisions in the mortgage instrument (Ex. 50). After the usual preambulatory recitals the mortgage deed recites that the mortgagor had received an amount of Rs. 61/- in cash from the mortgagee and to secure that debt she had mortgaged the suit property. The said property is described as an open building site situate adjacent to the residential house of the

mortgagee and admeasuring 4 Gajas east-west and 12 Gajas north-south. The mortgage deed then proceeds to recite that the suit property originally belonged to Desai Jibhai Karunashanker and that it was purchased at a court sale for and on behalf of Jagmohandas Jugaldas and Tribhovandas Jugaldas by their clerk Maganlal Girdharlal. The further recital is that mortgagor was a creditor of Jagmohandas and Tribhovandas and in lieu of that debt the property was conveyed to the mortgagor by a registered deed dated November 10, 1905 and further that the suit property was since then in possession and enjoyment of the mortgagor. Then follow the material recitals on which the present dispute turns and when translated into English they read as under:

That (building site) has been given in possessory mortgage to you for a period of 199 years to secure your aforesaid amount. Before the end of the said period, you and your heirs and successors would not be entitled to demand the said amount and I and my heirs and successors will not be entitled to redeem the mortgage on payment of the amount. No interest is to be charged for the said amount and no rent would be payable for the said building site. After the termination of the period of mortgage, when you or your heirs and successors claim the amount, I or my heirs and successors will pay the same and if we want to redeem the mortgage, we may do so after the stipulated period on payment of the mortgage amount. You may make any construction or raise a structure on the said building site and if you do so, we shall redeem the property on payment also of the price of the said structure.

Then follow certain other recitals which are not material for the purpose of this appeal. The answer to the question which arises for my determination, namely, whether the suit is premature, turns upon the true effect of these recitals and other relevant circumstances of the case. Before I consider that question, however, it would be convenient to refer to certain well-settled principles of law which have a bearing on the matter under consideration.

8. u/s 60 of the Transfer of Property Act, 1882, by which the present case is governed, at any time after the principal money has become due, the mortgagor has a right on payment or tender of the mortgage money to require the mortgagee to reconvey the mortgage property to him and this right is termed as the right to redeem. The section is unqualified in its terms and contains no saving provision as other sections do in favour of contract to the contrary. The mortgagor can, therefore, be deprived of that right only by means and in the manner prescribed by law. Under this section, however, the right to redeem can be exercised only "after the principal money has become due" and, therefore, 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 arise only on the expiration of the specified period (vide: *Bakhtwar Begum v. Husaini Khanam* AIR 1914 P.C. 36). However, the question which frequently arises before the Courts is whether the postponement of redemption for a long term in substance and effect prevents the mortgagor from

getting back his property or unreasonably restricts his right to redeem the property and further whether in such cases the Courts have power to relieve a party from the bargain that he has made. The contention which is often raised in such cases - as in the present case is that such a limitation or fetter on the right of redemption amounts to a clog on the equity of redemption and that the term imposing such restriction is, therefore, invalid and cannot be enforced. In order to appreciate this contention, it would be necessary to consider the content and ambit of the doctrine of clog on the equity of redemption. This doctrine means that no contract between a mortgagor and mortgagee made at the time of the mortgage and as a part of the mortgage transaction or, in other words, as a part of the loan, would be valid if it in substance and effect prevents the mortgagor from getting back his property on payment of what is due on his security. Any such bargain which has that effect is invalid and inconsistent with the transaction being a mortgage and has no binding force. It cannot be enforced or be made the basis of defence in a suit for redemption. The rule against the clog on the equity of redemption rests on the principle that once a mortgage always a mortgage and nothing but a mortgage. Whether or not any term in a mortgage document or forming part of the transaction of mortgage should be regarded as a fetter or restraint on the right of redemption is a question which has to be decided on the circumstances of each case and on consideration of all the terms of the mortgage deed. The Court's jurisdiction to relieve a mortgagor from his bargain on the ground that any condition which is a part of the transaction of mortgage constitutes a clog on the equity of redemption depends on whether it was imposed by taking advantage of any difficulty or embarrassment that the mortgagor might have been in when he borrowed the money on the mortgage. The questions which the Court must consider are: Was the mortgagor oppressed? Was he imposed upon? If he was, then he may be entitled to relief. To put it differently, if the Court on an examination of the circumstances of the case comes to the conclusion that the disputed covenant is so unduly harsh and unconscionable that it nullifies for all practical purposes the right of redemption or restricts the exercise of the said right in such an unreasonable manner as to practically deny it, the Court will relieve the mortgagor of his bargain. These principles are well-settled and they are borne out by the decision of the Supreme Court in *Seth Ganga Dhar Vs. Shankar Lal and Others*, .

9. Now, in the light of the circumstances of the case and the terms contained in the mortgage document executed in the present case, let us proceed to examine the question whether the postponement of redemption for a period of 199 years constitutes a clog on the equity of redemption. The first question is whether the length of the term by itself is capable of leading to the conclusion that it is an oppressive term. It may be conceded straightway that a long term for redemption is not necessarily or in every case a clog on the equity of redemption. It appears from a large number of reported decisions that it is not uncommon in all parts of India to have long term mortgages. But a long term for redemption may on a consideration of all the circumstances attendant on the

execution of the mortgage deed amount to a clog on the equity of redemption. As pointed out in *Vadilal Chhaganlal v. Gokaldas Mansukh* 55 B.L.R. 452, it would be necessary to consider amongst others the circumstances as to what was the amount advanced under the mortgage, the nature of the security offered by the mortgagor, the circumstances in which the mortgagor was compelled to secure the amount, the terms and conditions on which the amount was in fact advanced and the other alternatives to which the mortgagor could have taken recourse for obtaining the sum advanced before it could be said that the postponement of the right of redemption for a particular period amounts to a clog because it is unreasonably long and therefore oppressive. The conclusion as to whether a particular term amounts to a clog on the equity of redemption may be drawn either on the evidence on record which brings out the attendant circumstances or may arise by necessary implication on a conjoint reading of all the terms of the mortgage. Now in the present case, we find that the mortgagor was a childless widow when she mortgaged the property. The amount advanced by the mortgagee was a small amount of Rs. 61/- and the record does not bring out any circumstance which would show that it was necessary or customary for the mortgagor to submit to this long term of 199 years before obtaining the advance from the mortgagee. The mortgagee was the owner of the adjacent property and it would not be unreasonable to assume that by providing for postponement of redemption for this long period, he intended to use the suit property for the beneficial enjoyment of his own house for a fairly long period. The postponement of redemption for the long term of 199 years has thus conferred upon the mortgagee a collateral advantage to the detriment of the mortgagor. Besides, we must also take into consideration the other terms incorporated in the mortgage deed and the material term which must in the context be referred to is the term which entitles the mortgagee to make any construction or raise a structure on the mortgaged property and imposes upon the mortgagor the liability to pay the price of the said construction or structure at the time of redemption. It would be pertinent to note that no restriction is placed on the right of the mortgagee to raise such construction or structure. In other words, no limit is laid down as regards the nature of construction or the amount which the mortgagee may spend on raising the construction or structure. It is true that the mortgaged property admeasured only about 24 square yards. But even on that small piece of land the adjacent owner can well raise a structure which may ultimately be found to be costly enough so as to make it impossible for the mortgagor to redeem the mortgage. As stated earlier, the mortgagor in this case was a childless widow and she was compelled to mortgage the suit property for borrowing a paltry sum of Rs. 61/-. Such a mortgagor may well find it impossible to redeem the mortgage if a super-structure is constructed and if she is required to pay not only the original mortgage amount but also the price of the structure. The option given to the mortgagee by this clause is, therefore, wholly unreasonable and unconscionable. The conclusion, in my opinion, is inevitable having regard to all the facts and circumstances of the case and the relevant terms of the mortgage deed that the bargain between the mortgagor and the

mortgagee must have been obtained by taking advantage of some difficulty or embarrassment in which the mortgagor might have found herself when she borrowed the money on the mortgage. She would not, in all reasonable probability, have otherwise agreed to such a condition.

10. Mr. Vin, on behalf of the appellant, however, contended that there were other circumstances of the case which led to the contrary conclusion. In this connection he relied upon the following circumstances: (i) that the raising of a construction on the mortgaged property was a mere contingency and that in the present case since no structure in fact was constructed the relevant term did not operate to constitute a clog, (ii) that in any case no valuable construction could have been made on an area of only 24 sq. yds. and that the relevant term in the mortgage deed could not, therefore, be pressed into service to invoke the Court's jurisdiction to grant relief to the party who entered in the contract with open eyes, (iii) that the evidence disclosed that the mortgagor was possessed of sufficient funds, and that she was in fact a creditor of the persons from whom she purchased the mortgaged property and that, therefore, it cannot be said that the bargain in this case was unconscionable or was obtained by taking advantage of any embarrassment in which she might have found herself and (iv) that the fact that no suit for redemption was filed by the original mortgagor for a period of over thirty years after the date of the mortgage is itself indicative of the fact that the long term was not oppressive. Mr. Vin urged that having regard to the aforesaid circumstances, it could not be said that the postponement of redemption for a period of 199 years in the present case was a clog on the equity of redemption.

11. Now, so far as the first circumstance is concerned, the answer may be best furnished in the words of Macklin J. of the Bombay High Court before whom a similar question in somewhat identical set of facts and circumstances arose in Second Appeal No. 43 of 1935 which was decided on January 26, 1938. That was a case where the mortgage was for a period of 99 years and the suit to enforce the right of redemption was filed before the expiry of the said period. One of the contentions raised on behalf of the mortgagor in that case was that the period of 99 years taken in conjunction with another provision in the deed constituted a clog upon the equity of redemption. The other condition upon which the mortgagor relied was that the mortgagee was entitled to incur costs for the repairs of the house and was entitled even to rebuild it and claim credit for all the costs that might have been incurred by him. This was a term similar to the term which is found in the present case and in considering its effect Mr. Justice Macklin observed:

It is obvious that in certain circumstances it might under this clause become in the future almost impossible for the mortgagors to redeem. The clause itself apparently gives the widest possible powers to the mortgagees to build as they think fit; and if they wish to build a palace at unlimited expense, then so far as I can see, the mortgagors will have to pay for it all at the end of 99 years. It is

argued that this is only a contingency which may never arise, and at the end of 99 years all that the mortgagors may have to pay for is the ordinary current repairs.... I do not accept that argument. It seems to me anything which does have the appearance of clogging redemption must be examined critically, and that if the conditions in the mortgage taken as a whole and added together do create unnecessary difficulties in the way of redemption it seems to me that is a greater or less clog upon the equity of redemption within the ordinary meaning of the term.... As to the contention that the contingency has not yet arisen and that the mortgagor must wait until it does arise the answer is that if it is a clog then it is a clog from the beginning and it is open to the mortgagor to ask to be relieved against it from the very first. It seems to me to be unreasonable to expect him to wait until the contingency has actually arisen and then ask to be relieved against it. On all grounds it is better from a practical point of view that he should be relieved against it from the first. In my opinion the terms of this mortgage unnecessarily hamper the power to redeem, and redemption ought to be allowed now.

These observations furnish a clear answer to the first contention urged on behalf of the appellants.

12. As regards the second circumstance, it is true that the suit property admeasures only 24 sq. yds. However, as pointed out earlier, this small piece of land lies adjacent to the house of the mortgagee and it is not inconceivable that he may raise on it a suitable super-structure convenient for the beneficial use of his own property and make it impossible for the mortgagor to redeem the mortgage. In this connection, it will also have to be borne in mind that the period provided in the deed was 199 years and with the changing times and the rising cost of construction and the new mode of construction which is frequently employed now, namely, multistoried buildings, it cannot be said that no structure could ever be raised on the land in question during this long period which would make it impossible for the mortgagor to redeem the mortgage. The second circumstance cannot, therefore, help the appellants.

13. The third circumstance, namely, that the mortgagor was possessed of sufficient funds at the relevant time, is sought to be culled out from the recitals in the mortgage deed to the effect that the mortgagor had purchased the property from Jagmohandas and Tribhovandas who were indebted to her and that the property was conveyed to her in satisfaction of that debt. The relevant recitals undoubtedly reveal this state of affairs. However, it is not known as to in which circumstances this debt came into existence and whether in fact any amount was advanced to the vendors by the mortgagor herself or whether it was advanced to them during the life-time of her husband. In any case, the debt was extinguished by the conveyance of the property in question to the mortgagor in 1905 and the possibility cannot be ruled out that between 1905 and 1909 (the year in which the mortgage was created on the property), the mortgagor might have been in difficult financial circumstances. In fact, in view of the circumstance

that the mortgagor was a childless widow having no social obligations and other liabilities, unless she was in impecunious condition, she would not have ordinarily mortgaged the property for securing a loan in the sum of Rs. 61/-. In these circumstances, it is not possible to infer from the recitals contained in the sale-deed that the mortgagor was possessed of sufficient means at the relevant time and that the long term of 199 years was not imposed upon her.

14. It is true that no suit was filed by the original mortgagor for a period of over thirty years to redeem the mortgage and that this circumstance may be taken into account in deciding whether or not the bargain was a hard one. This circumstance by itself, however, cannot be determinative and it cannot be allowed to outweigh the other factors to which have adverted earlier. It might as well have been that the mortgagor being a widow she might not have been able to obtain proper guidance or legal advice to enforce the right of redemption during her life-time and she might have, therefore, refrained from bringing an action for redemption of the suit mortgage.

15. The conclusion is, therefore, inevitable in the facts and circumstances of the case and having regard to all that terms of the mortgage document that the long period of 199 years constituted a clog on the equity of redemption. Such a term cannot, therefore, be enforced or put forward as a plea in defence and on that ground the suit cannot be thrown out as being premature.

16. I may mention that in the view which I am taking, I am supported by the decision of Macklin J. to which I have made a reference earlier. I am also supported by the decision in Vadilal Chhaganlal's case (supra) which was also a case where the agreement between the mortgagor and the mortgagee provided that the mortgage was to be redeemed after a period of 99 years and the mortgagee was given full authority to build any structure on the mortgage property after spending any amount he liked and the mortgagor had undertaken to repay the principal amount together with the cost of the structure to the mortgagee at the time of redemption. In that case also it was held that the clause providing for the postponement of redemption until 99 years coupled with the clause which permitted the mortgagee to raise a construction on the mortgaged plot was wholly unreasonable and it conferred upon the mortgagee an advantage to which he was legitimately not entitled. I may mention that the facts in the present case and that case are very much similar because there also the mortgagee was the owner of the adjoining house. The decision of the Division Bench which decided that case supports the approach which I have adopted in this appeal.

17. Mr. Vin relied upon the decision of the Supreme Court in Ganga Dhar's case (supra). That was a case where one of the questions which arose for the consideration of the Supreme Court was whether the term in the instrument of mortgage which provided that it was not redeemable for a period of 85 years read together with another term which provided that the mortgagee could spend any amount on repairs to the mortgage property and put up new construction

thereon and the mortgagor could only redeem after paying expenses for the same, amounted to a clog on the equity of redemption. The property mortgaged in that case was a four-roomed shop with certain appurtenances standing on a piece of land measuring five yards by fifteen yards. The Supreme Court in paragraphs 17 to 20 of its decision considered the various circumstances of the case and came to the conclusion that in the facts of that case there was no clog on the equity of redemption. Now, as pointed out earlier, the question whether a particular term of the mortgage falls within the mischief of the doctrine of clog on the equity of redemption or not is essentially one which has to be decided on the circumstances of each case. The Supreme Court in that case was concerned with a term which postponed the right of redemption for a period of 85 years only as against the period of 199 years in the present case. Besides, the Supreme Court in that case construed the term relating to the right of the mortgagee to spend any amount on repairs to the mortgage property and to put up new construction thereon as authorising the mortgagee to carry out only such necessary repairs and constructions as were contemplated by the instrument and held: "We do not consider that it is hard on the mortgagor to have to pay for such repairs and construction when he redeems the property and gets the benefit of the repairs and construction." The Supreme Court also took into account the other relevant circumstances of the case and came to the conclusion that the bargain in that case was a reasonable one and that the term postponing the right of redemption for a period of 85 years was required to be enforced. All these circumstances present in that case are not present in the instant case and vice versa. I do not, therefore, think that this decision can help the appellants in the present case.

In the result, the appeal fails and is dismissed with costs.