Seth Ganga Dhar vs Shankar Lal & Others on 15 April, 1958

Equivalent citations: AIR 1958 SUPREME COURT 770, 1958 SCJ 935 1959 SCR 509, 1959 SCR 509, 1959 SCR 509 1958 SCJ 935, 1958 SCJ 935

PETITIONER:
SETH GANGA DHAR

Vs.

RESPONDENT:
SHANKAR LAL & OTHERS

DATE OF JUDGMENT:
15/04/1958

BENCH:

ACT:
Mortgage-Mortgagor's right redeem-Instruntent providing that mortgage shall not be redeemable for eightyfive years-Term, if a clog on the equity of redemption-Power of Court-Extent-Applicability-Transfer of Property Act, 1882 (4 of 1882), s. 60.

HEADNOTE:
The rule against clogs on the equity of redemption embodied in s. 60 of the Transfer of-Property Act empowers the Court not only to relieve a mortgagor of a bargain whereby in certain circumstances his right to redeem the mortgage is wholly taken away, but also where that right is restricted. The extent of this latter power is, however, limited by the reason that gave rise to it, namely, the unconscionable nature of the bargain, which, to a court of equity, would afford sufficient ground for relieving the mortgagor of his burden, and its exercise must, therefore, depend on whether the bargain, in the facts and circumstances of any particular case, was one imposed on the mortgagor by taking advantage of his difficult and impecunious position at the time when lie borrowed the money.
Vermon v. Bethell, (1762) 2 Eden 110; 28 E. R. S38 and D. and C. Kreglinger v. New Patagonia Meat and Cold Storage Company, Ltd., [1941] A.C. 25, relied on.
Santley v. Wilde, (1913) L. R. 41 I. A. 84 and Mohammad Sher Khan v. Seth Swami Dayal, (1912) L. R. 49 I. A. 60, referred to.
Consequently, in a suit, for redemption where the mortgage deed, by two distinct and independent terms provided that

(1) the mortgage shall not be redeemed for eightyfive years and (2) that it could be redeemed only after that period and within six months thereafter, failing which the mortgagor would cease to have any claim on the mortgaged property and the mortgage deed would be deemed to be a deed of sale in favour of the mortgagee, and it was clearly evident from the facts and circumstances of the case that the bargain was quite fair and one as between parties dealing with each other on an equal footing :
Held, that the term providing for a period of eightyfive years was not a clog on the equity of redemption, and the mere length of the period could not by itself lead to an inference that the bar. gain was in any way oppressive or unreasonable. The term was enforceable in law and the suit for redemption, filed before the expiry of the period was-premature.
Held, further, that the term that on the failure of the mortgagor to redeem within the specified period of six months, he
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would lose his right to do so and the mortgage deed was to be deemed to be a deed of sale in favour of the mortgagee, was clearly a clog on the equity of redemption and as such invalid but its invalidity could not in any way affect the validity of the other term as to the period of the mortgage, that stood clearly apart.

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 150 of 1954. Appeal from the judgment and decree dated March 21, 1950, of the Court of Judicial Commissioner at Ajmer in Civil First Appeal No. 13 of 1948, arising out of the judgment and decree dated March 30, 1948, of the Court of Sub-Judge 1st Class, Ajmer, in Civil Suit No. I of 1947.

Tarachand Brijmohan Lal, for the appellant. S. S. Deedwania and K. L. Mehta, for the respondents. 1958. April 15. The Judgment of the Court was delivered by SARKAR J.-This appeal arises out of a suit for the redemption of a mortgage dated August 1, 1899. The property mortgaged was a four-roomed shop with certain appurtenances, standing on a piece of land measuring 5 yards by 15 yards in Naya Bazar, Ajmere. The mortgage was created by Purshottamdas who is now dead and was in favour of Dhanrupmal, a respondent in this appeal. The mortgage instrument stated that the property had been usufructuarily mortgaged in lieu of Rs. 6,300 of which Rs. 5,750 had been left with the mortgagee to redeem a prior mortgage on the same and another property. It also provided that on redemption of the prior mortgage, the possession of the shop would be taken over and retained by the mortgagee, Dhanrupmal, who would appropriate its rent in lieu of interest on the money advanced by him and the possession of the other property covered by the prior mortgage, being a share in a Kachery would be made over to the mortgagor, Purshottamdas. The provisions in

the mortgage instrument on which the present dispute turns were in these terms:

> " I or my heirs will not be entitled to redeem the property for a period of 85 years. After the expiry of 85 years we shall redeem it within a period of six months. In case we do not redeem within a period of six months, then after the expiry of the stipulated period, 1, my heirs, and legal representatives shall have no claim over the mortgaged property, and the mortgagee shall have no claim to get the mortgage money and the lagat (i. e., repairs) expenses that may be due at the time of default. In such e, case this very deed will be deemed to be a sale deed. There will be no need of executing a fresh sale deed. The expenses spent in repairs and new constructions will be paid along with the mortgage money at the time of redemption according to account produced by the mortgagee."

The mortgagee, Dhanrupmal, duly redeemed the earlier mortgage and, went into possession of the shop while possession of the Kacheri was delivered to the mortgagor. On April 12, 1939, Dhanrupmal assigned his rights under the mortgage to Motilal who died later, and whose estate is now represented by his sons, who are the other respondents in this appeal. 'The estate of Purshottamdas, the original mortgagor, is now represented by his son, the appellant. On January 2, 1947, the appellant filed the suit in the Court of the Sub-Judge, Ajmere, against the respondents. The suit was contested by the sons of Motilal, the assignee of the mortgage, who are the only respondents appearing in this appeal and whom we shall hence, hereafter refer to as the respondents. They said that the suit was premature as under the mortgage contract there was no right of redemption for eighty five years after the date of the mortgage, that is to say, till August 1, 1984. The learned Sub-Judge, purporting to follow a decision of the Judicial Commis- sioner, Ajmere, to whom he was subordinate, held that the provision postponing redemption for eightyfive years was invalid as it amounted to a clog on the equity of redemption. He, therefore, passed a preliminary decree for redemption. On appeal, the learned Judicial Conmmissioner, Ajmere, held, that the decision which the Sub-Judge had purported to follow was, distinguishable. He examined a large number of cases on the subject and came to the conclusion that the provision in question did not amount to a clog on the equity of redemption. He, therefore, allowed the appeal and dismissed the appellant's suit. From this decision the appeal to this Court arises.

It is admitted that the case is governed by the Transfer of Property Act. Under s. 60 of that Act, 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. The right conferred by this section has been called the right to redeem and the appellant sought to enforce this right by his suit. Under this section, however, that right can be exercised only after the mortgage money has become due. In Bakhtawai- Begum v. HusainiKhanam (1), also the same view was expressed in these words:

> " 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. "

Now, in the present case the term of the mortgage is eighty- five years and there is no' stipulation entitling the mortgagor to redeem during that term. That term has not yet expired. The respondents, therefore, contend that the suit is premature and liable to be dismissed.

The appellant's answer to this contention is that the covenant creating the long term of eightyfive years for the mortgage, taken along with the provision that the mortgagor must redeem within a period of six months thereafter or not at all and the other terms of the mortgage and also the circumstances of the case, is really a clog on the equity of redemption and is therefore invalid. He contends that, in the result the mortgage money had been due all along and the suit was not premature.

(1) (1913) L.R. 41 I.A. 84, 89.

The rule against clogs on the equity of redemption is that, a mortgage shall always be redeemable and a mortgagor's right to redeem shall neither be taken away nor be limited by any contract between the parties. The principle behind the rule was expressed by Lindley M. R. in Santley v. Wilde (1) in these words:

> " The principle is this: a mortgage is a conveyance of land or an assignment of chattles as a security for the payment of a debt or the discharge of some other obligation for which it is given. This is the idea of a mortgage: and the security is redeemable on the payment or discharge of such debt or obligation, any provision to the contrary notwithstanding. That, in my opinion, is the law. Any provision inserted to prevent redemption on payment or performance of the debt or obligation for which the security was given is what is meant by_ a clog or fetter on the equity of redemption and is therefore void. It follows from this, that "once a mortgage always a mortgage ".

The right of redemption, therefore, cannot be taken away. The Courts will ignore any contract the effect of which is to deprive the mortgagor of his right to redeem the mortoage. One thing, therefore, is clear, namely, that the term in the mortgage contract, that on the failure of the mortgagor to redeem the mortgage within the specified period of six months the mortgagor will have no claim over the mortgaged property, and the mortgage deed will be deemed to be a deed of sale in favour of the mortgagee, cannot be sustained. It plainly takes away altogether, the mortgagor's right to redeem the mortgage after the specified period. This is not permissible, for " once a mortgage always a mortgage " and therefore always redeemable. The same result also follows from s. 60 of the Transfer of Property Act. So it was said in Mohammad Sher Khan v. Seth Swami Dayal (2) :

> "An anomalous mortgage enabling a mortgagee after a lapse of time and in the absence of redemption to enter and take the rents in satisfaction of the interest. would be perfectly valid if it did not also hinder an (1) [1899] 2 Ch, 474.
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> (2) (1921) L.R. 49 1,A. 60, 65.

existing right to redeem. But it is this that the present mortgage undoubtedly purports to effect. It is expressly stated to be for five years, and after that,period the principal money became payable. This, under s. 60 of the Transfer of Property Act, is the event on which the mortgagor had a right on payment of the mortgage money to redeem.

The section is unqualified in its terms, and contains no saving provision as other sections do in favour of contracts to the contrary. Their lordships therefore see no sufficient reason for withholding from the words of the section their full force and effect. "

> Under the section, once 'the right to redeem has. arisen it cannot be taken away. The mortgagor's right to redeem must be deemed to continue even after the period of six months has expired and the attempt to confine that right to that period must fail. The term in the mortgage instrument providing that the mortgage can be redeemed only within the six months and not thereafter must be held period of to be invalid and ignored. The learned Judicial Commissioner took the same view and this has not been challenged in this appeal on behalf of the respondents.
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> With this term however this case is not really con cerned. Learned advocate for the appellant directed his attack on the term in the instrument of mortgage that it will not be redeemable for eighty five years. He contended that this term amounts to a clog on the equity of redemption. We wish to observe here that the learned advocate did not contend that the invalidity, as we have earlier held, of the term taking away the right to redeem the mortgage after the period of six months makes the term fixing the period of the mortgage at eighty five years invalid. This latter term stands quite apart. It only fixes the time when the principal sum is to become due, that is, when the right to redeem will accrue and has, therefore, nothing to do with a term which provides when that right will be lost. The invalidity of one does not make the other also invalid. The term providing that the right to redeem will arise after eightyfive years does not, of course, take away the mortgagor's right to redeem and is not, therefore, in that sense, a clog on the equity of redemption. It does, however prevent accrual of the right to redeem for the period mentioned. Is it then, in so far as it prevents the right to redeem from accruing for a time, a clog ? As we have already said, the right to redeem does not arise till the principal money becomes due. When the principal sum is to become due must of course depend on the contract between the parties. In the present case the parties have agreed that the right to redeem will arise eightyfive years after the date of the mortgage, that is to say, the principal money will then become due. The appellant says that he should be relieved from this bargain that he has made. This is the contention that has to be examined. The rule against clogs on the equity of redemption no doubt involves that the Courts have the power to relieve a party from his bar 'gain. If he has agreed to forfeit wholly his right to redeem in certain circumstances, that agreement will be avoided. But the Courts have gone beyond this. They have also relieved mortgagors from bargains whereby the right to redeem has not been taken away but restricted. The question is the term now under consideration such that a Court will exercise its power to grant relief

against it ? That depends on the extent of this power. It is a power evolved in the early English Courts of Equity for a special reason. All through the ages the reason has remained constant and the Court's power is therefore limited by that reason. The extent of this power has, therefore, to be ascertained by having regard to its origin. It will be enough for this purpose to refer to two authorities on this question.

In a very early case, namely, Vermon v. Bethell Earl of Northington L. C. said, " This court, as a court of conscience, is very jealous of persons taking securities for a loan, and converting such securities into purchases. And therefore I take it to be an established rule, that a mortgagee can never provide at the time of making the (1) (1762) 2 Eden 110, 113; 28 E.R. 838,839.

loan for any event or condition on which the equity of redemption shall be discharged, and the conveyance absolute. And there is great reason and justice in this rule, for necessitous men are not, truly speaking, free men, but, to answer a present exigency, will submit to any terms that the crafty may impose upon them. "

In comparatively recent times Viscount Haldane L. C.repeated the same view when he said in G. and C. Kreglinger v. New Patagonia Meat and Cold Storage Company Ltd. (1): This jurisdiction was merely a special application of a more general power to relieve against penalties and to could them into mere securities. The case of the common law mortgage of land was indeed a gross one. The land was conveyed to the creditor upon the condition that if the money he had advanced to the feoffor was repaid on a date and at a place named, the fee simple would revest in the latter, but that if the condition was not strictly and literally fulfilled he should lose the land forever. What made the hardship on the debtor a glaring one was that the debt still remained unpaid and could be recovered from the feoffor notwithstanding that he had actually forfeited the land to the mortgagee. Equity, therefore, at an early date began to relieve against what was virtually a penalty by compelling the creditor to use his legal title as a mere security.

My Lords, this was the origin of the jurisdiction which we are now considering, and it is important to bear that origin in mind. For the end to accomplish which the jurisdiction has been evolved ought to govern and limit its exercise by equity judges. That end has always been to ascertain, by patrol evidence if need be, the real nature and substance of the transaction, and if it turned out to be in truth one of mortgage simply, to place it on that footing. It was, in ordinary cases, only where there was conduct which the Court of Chancery regarded as unconscientious that it interfered with freedom of contract. The lending of money, on mortgage or otherwise, was looked on with suspicion, and the court was on the alert to discover want of conscience in the terms imposed by lenders."

The reason then justifying the Court's power to relieve a mortgagor from the effects of his bargain is its want of conscience. Putting it in more familiar language the Court's jurisdiction to relieve a

mortgagor from his bargain depends on whether it was obtained by taking advantage of any difficulty or embarrassment that he might have been in when he borrowed the moneys on the mortgage. Was the mortgagor oppressed ? Was he imposed upon ? If he was, then he may be entitled to relief.

We then have to see if there was anything unconscionable in the agreement that the mortgage would not be redeemed for eightyfive years. Is it oppressive ? Was he forced to agree to it because of his difficulties ? Now this question is essentially one of fact and has to be decided on the circumstances of each case. It would be wholly unprofitable in enquiring into this question to examine the large number of reported cases on the subject, for each turns on its own facts.

First then, does the length of the term-and in this case it is long enough being eightyfive years-itself lead to the conclusion that it was an oppressive term ? In our view, it does not do so. It is not necessary for us to go so far as to say that the length of the term of the mortgage can never by itself show that the bargain was oppressive. We do not desire to say anything on that question in this case. We think it enough to say that we have nothing here to show that the length of the term was in any way dis-advantagous to the mortgagor. It is quite conceivable that it was to his advantage. The suit for redemption was brought over forty-seven years after the date of the mortgage. It seems to us impossible that if the term was oppressive, that was not realised much earlier and the suit brought within a short time of the mortgage. The learned Judicial Commissioner felt that the respondents' contention that the suit had been brought as the price of landed property had gone up after the war, was justified. We are not prepared to say that he was wrong in this view. We cannot also ignore, as appears from a large number of reported decisions, that it is not uncommon in various parts of India to have long term mortgages. Then we find that the property was subject to a prior mortgage. We are not aware what the term-of that mortgage was' But we find that mortgage included another property which became freed from it as a result of the mortgage in suit. This would show that the mortgagee under this mortgage Was not putting any pressure on the mortgagor. That conclusion also receives support from the fact that the mortgage money under the present mortgage was more than that under the earlier mortgage but the mortgagee in the present case was satisfied with a smaller security. Again, no complaint is made that the interest charged, which was to be measured by the rent of the property, was in any manner high. All these, to our mind, indicate that the mortgagee had not taken any unfair advantage of his position as the lender, nor that the mortgagor was under any financial embarrassment. It is said that the mortgage instrument itself indicates that the bargain is hard, for, while the mortgagor cannot redeem for eighty-five years, the mortgagee is free to demand payment of his dues at any time he likes' This contention is plainly fallacious. ; There is nothing in the mortgage instrument permitting the mortgagee to demand any money, and it is well settled that the mortgagee's right to enforce the mortgage and the mortgagor's right to redeem are co-extensive.

Then it is said that under the deed the mortgagee can spend any amount on repairs to the mortgage property and in putting up new constructions there- and the mortgagor could only redeem after paying the expenses for these. We are unable to agree that such is the effect of the mortgage instrument. We cannot lose sight of the fact that the mortgaged shop and the area of the land on which it stood were very small. It was not possible to spend a large. sum on repairs or construction

there. Furthermore, having agreed to 85 years as the term of the mortgage, the parties must have imagined that during this long period repairs and constructions would become necessary. It is only such necessary repairs as are contemplated by the instrument and 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. Neither do we think that there is anything in the contention that under the document the mortgagor was bound to accept whatever was shown in the mortgagee's account as having been spent on the repairs and con- struction. That is not, in our view, the effect of the relevant clause which reads, " The expenses spent in repairs and new constructions will be paid..... according to the account produced by the mortgagee. " All that it means is that in claiming moneys on account of repairs and construction the mortgagee will have to show from his account that he spent these moneys. It is really a safeguard for the mortgagor. It was also said that all the terms in the deed were for the benefit of the mortgagee and that showed that the bargain was a hard one. We do not think that all the terms were for the benefit of the mortgagee, or that what there was in the instrument was for his benefit and indicated that the mortgagee had forced a hard bargain on the mortgagor. We have earlier said how the bargain appears to us to have been fair and one as between parties dealing with each other on equal footing. We have no evidence in this case of the circumstances existing at the date of the mortgage as to the pecuniary condition of the mortgagor or as to anything else from which we may come to the conclusion that the mortgagee had taken advantage of the difficulties of the mortgagor and imposed a hard bargain on him. It was said that the fact that the property was subject to a prior mortgage at the date of the mortgage in suit indicates the impecunious position of the mortgagor. We are unable to agree with this contention. Every debtor is not necessarily impecunious. The mortgagor certainly derived this advantage from that mortgage that he was able to free from the earlier mortgage the kacheri and he has been in enjoyment of it ever since.

That, to our mind, indicates that the bargain had been freely made, There was nothing else to which our attention was directed as showing that the bargain was hard. We, therefore, think that the bargain was a reasonable one and the eighty-five years term of the mortgage should be enforced. We then come to the conclusion that the suit was premature and' must fail.

In the result we dismiss this appeal with costs.

Appeal dismissed.