Gulab Chand Sharma vs Saraswati Devi And Anr. on 14 December, 1976

Equivalent citations: AIR1977SC242, (1977)79PLR205, (1977)2SCC71, 1977(9)UJ51(SC), AIR 1977 SUPREME COURT 242, 1977 2 SCC 71, 79 PUN LR 205, 1977 (1) SCWR 391, 1977 RENTLR 531, 1977 U J (SC) 51

Bench: A.C. Gupta, Y.V. Chandrachud

JUDGMENT

A.G. Gupta, J.

1. These two appeals by certificate arise out of suits, one a suit for redemption of mortgage instituted by the predecessor-in-interest of the first respondent, and the other a suit for injunction filed by the appellant. The relevant facts are these. On October 20, 1936 the Secretary of State for India in council through the Chief Commissioner, Delhi, executed a deed leasing out in perpetuity a plot of Order 445 acre of land in New Delhi, which later came to be known as 13, keeling Road, in favour of two persons, Niranjan Das Sanon and Hans Raj Sanon. The deed provides inter alia that on breach by the lessees or any persons claiming through them of any of the covenants of the lease, the lessor or any person duly authorised by him shall have right of re-entry upon the premises and thereupon the lease shall cease and stand determined. The lessees who constructed a one storeyed building on the plot sold their leasehold rights in the land with the building thereon to one Bakshi Mohan Lal Sanon on March 21, 1949. Bakshi Mohan Lal Sanon transferred the property to the appellant, Gulab Chand Sharma, by way of mortgage by conditional sale for Rs. 70,000/- on May 31, 1956. The mortgagor was given four years time from the date of execution of the mortgage deed to repay the sum. Clause 9 of the terms and conditions of the mortgage set out in the deed reads as follows:

> In case the said mortgagor received a notice of re-entry from the Land and Development Officer or any other such authority for the breach of covenants of the lease dated 20th October, 1936, before the expiry of the said period of 4 years, the transfer hereby made shall become absolute in terms stated above in favour of the mortgagee who will get the restoration of the property but all the expenses shall be borne by the mortgagor. This clause will have effect notwithstanding the fact that the period of four years shall not have expired.
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> The only question for determination in these appeals is whether the condition in Clause 9 is a ???g on the equity of redemption.

2. On October 23, 1958 the Secretary (Local Self Government), Delhi Administration, issued a notice

of re-entry to Bakshi Mohan Lal Sanon alleging that he had violated some of the conditions of the perpetual lease.It is not necessary to refer to the terms of the lease breach of which was alleged, nor to enter on a consideration of the questions raised in the course of the hearing of these appeals as to whether the notice of re-entry was subsequently withdrawn or whether waiver of such notice was possible in law so as to keep the lease alive. These are matters outside the scope of the present appeals which turn on the question whether Clause 9 of the mortgage deed is a clog on the mortgagor's equity of redemption.

3. Sometime in February, 1959 Bakshi Mohan Lal Sason called upon the appellant to receive payment of the sum of Rs. 70,000/- and reconvey the mortgaged property, and the appellant having refused Sason instituted a suit for redemption of the mortgage against the appellant on May 24, 1960 in the court of the Senior Subordinate Judge, Delhi. On July 27, 1960 the appellant filed his written statement in the suit. In the written statement the appellant took up the position that with the notice of re-entry served on Sason, Clause 9 of the mortgage deed became operative with the result that the appellant became the "absolute owner of the property including the lease hold rights of the plot" and the mortgage did not subsist.Two days after Sason had filed the suit for redemption, the appellant filed a suit for injunction restraining Sason from alienating or dealing in any manner with the lease hold rights in the land and the building thereon. The appellant claimed that in view of Clause 9 of the mortgage deed he had become the absolute owner of the property.The appellant thus assisted the same right as plaintiff in his suit that he had pleaded as his defence in the suit for redemption.These two suits were consolidated and disposed of by the Subordinate Judge by a Common judgment on January 30, 1962 holding that the appellant had become the owner of the property in view of condition 9 of the mortgage.The Subordinate Judge accordingly dismissed Sason's suit for redemption and decreed the appellant's suit for injunction. Aggrieved by this decision. Sason appealed to the Delhi High Court. He died during the pendency of the appeals and was substituted by the first respondent On August 4, 1972 the High Court allowed the appeals, dismissed the appellant's suit for injunction, and passed a preliminary decree for redemption in respect of the property in dispute.

4. The High Court held that condition No. 9 of the mortgage was a clog on the equity of redemption and, therefore, void, as it had the effect of depriving the mortgagor of his right of redemption while the mortgage was subsisting.We do not think it can be seriously disputed that the view taken by the High Court was right; condition No. 9 of the mortgage which seeks to take away the right of redemption even before the period of four years within which the mortgagor was entitled to pay off the mortgage debt had run out, is obviously a clog on the right of redemption. Counsel for the appellant contended before us that Clause 9 was not really a term of the mortgage transaction but an independent condition that was to come into operation on the service of the notice of re-entry on the mortgagor. It was argued that the notice of re-entry which was served on the mortgagor divested him of his interest in the property and in terms of Clause 9 the mortgagee became the owner of it. We find it difficult to appreciate the contention. Clause 9 provides that on the mortgagor receiving notice of re-entry before the expiry of the period of four years from the date of the mortgage, "the transfer hereby made shall be absolute in favour of the mortgagee who will get the restoration of the property but all the expenses shall be borne by the mortgagor". What was transferred to the mortgagee was the lessee's interest that the mortgagor had in the land. Clause 9 implies that on the

service of the notice of re-entry the transfer of this interest will become absolute and the mortgagee will be the owner of the leasehold property even if the notice is served during the subsistence of the mortgage. Clause 9 therefore appears clearly to be a term of the mortgage transaction. This was how the appellant also construed Clause 9 in the written statement filed by him in the suit for redemption and in the plaint of his suit for injunction. What counsel for the appellant sought to contend was that on the service of the notice of re-entry on the mortgagor the leasehold itself disappeared. If this was so, it is not clear of what property then the mortgagee claimed ownership; the land belonged to the Government and no condition contained in the mortgage instrument, whether it was part of the mortgage transaction or independent of it, could confer ownership of the land on the mortgagee. Besides, this is a point not raised in the trial court or in the High Court, and *not considered by either of them. As stated already, the only question considered both by the trial court and the High Court was whether Clause 9 of the mortgage deed was a clog on the equity of redemption.

5. The appeal is dismissed with costs.

6. The civil miscellaneous petition No. 7520 of 1976 filed on behalf of the appellant for taking into consideration certain subsequent event is rejected as we do not consider the events referred to in the application relevant for the purpose of the appeal.