Pomal Kanji Govindji & Ors vs Vrajlal Karsandas Purohit & Ors on 4 November, 1988

Equivalent citations: 1989 AIR 436, 1988 SCR SUPL. (3) 826, AIR 1989 SUPREME COURT 436, 1989 (1) SCC 458, 1989 30 GUJLR 418, 1989 (1) ALL RC 41, (1988) 4 JT 307 (SC), 1989 SCFBRC 31, (1989) 1 GUJ LR 418, (1989) 2 GUJ LH 165, 1989 BBCJ 1, (1989) 1 RENCR 83, (1989) 1 SCWR 39

Author: Sabyasachi Mukharji

Bench: Sabyasachi Mukharji

PETITIONER:
POMAL KANJI GOVINDJI & ORS.

Vs.

RESPONDENT:
VRAJLAL KARSANDAS PUROHIT & ORS.

DATE OF JUDGMENT04/11/1988

BENCH:
MUKHARJI, SABYASACHI (J)
BENCH:
MUKHARJI, SABYASACHI (J)
RANGNATHAN, S.

CITATION:
1989 AIR 436 1988 SCR Supl. (3) 826
1989 SCC (1) 458 JT 1988 (4) 307
1988 SCALE (2)1287
CITATOR INFO :
F 1989 SC1110 (11,14,16,18)

ACT:
Transfer of Property Act, 1882/Sections 60 and 76--Whether long term mortgages are clog on equity redeemable at the mortgagor's instance before the stipulated period--Tenants inducted by mortgagee's can be evicted on termination of mortgage.
%
Bombay Rents, Hotel and Lodging House Rates Control Act 1947, Lease created by mortgagee in possession of urban immovable property--Tenancy whether entitled to statutory protection of Rent Act.

HEADNOTE:

In the matter giving rise to the Special Leave Petition (Civil) No. 8219 of 1982 the plaintiffs filed a suit alleging that their father, who dies in the year 1956, had mortgaged the suit property for 30,000 Koris by a registered mortgage deed dated 20th April, 1943, executed in favour of the power of attorney holder and manager of the defandants Nos. l and 2. The defendant No. 3 is the heir of the attorney who was also managing the properties of the defendants Nos. I and 2. The mortgage property consisted of two delis having residential houses, shops, etc. The mortgagees had inducted tenants in the suit property being defandants Nos. 4 to 9 in the original suit. When the mortgage transaction took place the economic condition of the father of the plaintiffs was weak and he was heavily indebted to others. Taking advantage of that situation, the mortgagees took mortgage deed from him on harsh and oppressive conditions by getting incorporated a long term of 99 years for redemption of mortgage. Though possession was to be handed over to the mortgagees, they took condition for interest on the part of principal amount in the mortgage deed. Mereover, the mortgagees were given liberty to spend any amount they liked for the improvement of the suit property and were also permitted to rebuild the entire property.

A registered notice to the defendants Nos. I and 2 was given to redeem the mortgage, but they failed to do so, hence, the present suit was filed to redeem the mortgage and to recover actual possession from the defendants Nos. 4 to 9 who were the tenants Inducted by the mortgagees.

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Defendant No. 1 resisted the suit alleging that the term of the mortgage was for 99 years, so the suit filed before the expiry of that period was premature. The defendant No. 3 resisted the suit by filing the written statement. The defendants Nos. 4 to 9 resisted the suit on the grounds that the plaintiffs were not entitled to redeem the mortgage and even if they were so entitled, they could not get actual physical possession from the tenants who were protected by the Bombay Rent Act, because they were inducted by the mortgagees. The Court proceeded against defendants Nos. 2/1 to 2/7 (heirs of mortgagee-defendant No. 2) ex-parte, and a preliminary decree for redemption of mortgage was passed on 2nd April, 1974 by the Trial Court. But this ex-parte decree was set aside by the District Court in the appeals filed by the heirs of defendant No. 2 on the ground that summons of the suit had not been duly served upon them. Thereafter defendent No. 2/1 filed his written statement alleging that the suit was bad for non-joinder of the sisters of the plaintiffs as parties. Moreover, as per the terms and conditions of the mortgage deed, there was usufructuary mortgage for 20,000 koris, and the remaining

10.,000 koris were advanced to the mortgagor at monthly interest at the rate of 1/2 per cent. There was a condition in the mortgage deed that the mortgagor would pay principal amount us well as the interest at the time of redemption. When the suit was filed in the year 1972, the mortgagees were entitled to recover interest on 10,000 Koris for a period of 29 years, that the total mortgage amount along with interest would come to 47,400 koris equivalent to Rs. 15800 and the Civil Judge had no jurisdiction to try such suit; that the court fees was also not sufficient; that it was not true that the father of the plaintiffs was of weak economic condition. The grand father of the plaintiffs was as Advocate and the father of the plaintiffs was the clerk of an advocate. 'The plaintiff No. l was also working as an Advocate at the time of the mortgage, so they knew the legal position; that at the relevant time the prevalent custom in Kutch State was to take mortgages of long term for '99 years and when it was permissible to take mortgage deeds with such a long term, it was also necessary to give permission for rebuilding the whole property, for better enjoyment of lt. So these terms could not amount to clog on equity of redemption of mortgage, the mortgagees did not take any undue advantage and they were not present physically when the transaction took place through their power of attorney holders. If the conditions of mortgage deed did not amount to clogs on equity of redemption, the suit would be clearly premature. The plaintiff No. I had subsequently became a Civil Judge and was ultimately the Chairman of the Tribunal so if the said terms and conditions of the mortgage were onerous and oppressive, he would not have sat idle for 29 years. But he remained silent because he was aware of the

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said custom. The prices of immovable properties had increased tremendously, therefore, the suit had been filed with mala fide intention; that in case the Court comes to the conclusion that there was a clog on equity or redemption and the plaintiffs were entitled to the redemption, then the interest on 10,000 koris should be awarded to the mortgages; and that the suit should be dismissed as there was no clog on equity of redemption and the Court had no jurisdiction to try the suit. The other defendants remained absent.

The Trial Court while decreeing the suit came to the conclusion that there was mortgage transaction between the father of the plaintiffs and the mortgagees on 20th April, 1943, that the terms and conditions in the mortgage deed being harsh and oppressive, amounted to clog on equity of redemption, so the plaintiffs were entitled to file the suit even before the expiry of the term of the mortgage; that the sisters of the plaintiffs were not necessary parties to the suit and even if they were, a co-mortgagor was entitled to file the suit for redemption so the suit was not bad for want of non-joinder of necessary parties; that it had jurisdiction to try the suit; that the mortgagees were not

entitled to claim interest on 10,000 koris and that the plaintiffs were entitled to recover possession from the defendants Nos. 4 to 9 who were the tenants inducted by the mortgagees.

The appeals filed by the mortgagees as well as the tenants were dismissed by the first appellate Court holding that the terms and conditions of the mortgage deed were oppressive and harsh, there was clog on equity of redemption and the mortgagor should be freed from that bondage that the tenants had no right to he in possession and were not entitled to the protection of the Bombay Rent Control Act after the redemption of the mortgage. The High Court dismissed the second appeal.

Civil Appeal No. 9993 of 1983 is an appeal by the tenant. Civil Appeal No. 397 of l980 is also an appeal by the tenant. In this case the decree-holder instituted a regular suit for redemption of the mortgage property. The suit was dismissed. Thereupon the respondent No. l preferred an appeal to the District Judge where the suit was decreed. The defendants filed a second appeal which was dismissed. The decree-holder made an application for final decree. The Court while giving the final decree for redemption of the mortgage directed the judgment-debtors to hand over the possession of the mortgage property within three months on the decree-holder making payment of dues in respect of the mortgage in the court. In pursuance of the final decree the decree-holder took out the execution proceedings and

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deposited the dues in the Court and claimed possession of the mortgage property from the appellant herein stating that he was a tenant in the possession of the property. Notice was issued to the tenant, who submitted his objection stating that he was a tenant, not to be evicted in the execution of the decree and that he was entitled to get the protection under the Bombay Rent Control Act. The District Judge held that there was no conduct on the part of the decree-holder which would stop him from claiming physical possession from the tenant of the mortgagee in possession. The High Court rejected the appeal summarily. Hence the appeal.

Civil Appeal No. 1286 of 1981 is also an appeal by the tenant. The appellant is the tenant of the mortgagee inducted in 1955. The property was mortgaged in 1948 for a period of five years. It appears that the tenant was inducted after the period of redemption had expired. The mortgagor had a right to redeem after the expiration of the mortgage. The first appellate court came to the conclusion that the tenants were not protected under the provision of the Bombay Rent Control Act. The appellant preferred this appeal in this Court.

On behalf of the appellants it was contended that in the former Kutch District there was a custom to mortgage for a long term of 99 years and when the period was long,

naturally the mortgagee would he required to give full authority to repair and reconstruct the mortgaged property with a view to keep pace with new demands of changing pattern, so the condition should not he treated as clog on equity of redemption; (2) that there is no evidence to lead to the conclusion that there was any undue influence; (3) that the provision for the payment towards cost and expenses of repairs and construction did not amount to a clog on the equity of redemption; (4) that on the evidence and the facts the transactions did not amount to clog on the equity of redemption; (5) that in Civil Appeal No. 9993 of 1982 the plaintiff's were not entitled to recover possession from the appellants, who are tenants in the mortgage properties, since their rights are protected under the Bombay Rents, Hotel and Lodging House Rates Control Act? 1947 as the said Act applies to the area of Kutch in the Bombay State. Therefore, no decree for eviction could he passed against them except in accordance with the provisions of the said Act; (6) that the Trial Court did not make any finding as to when the tenants were inducted, either before or after the rent restriction Act was made applicable to the area of' Kutch and (7) that the High Court has erred in not following the said legal position entrenched by a line of decisions of this Court with the rights of a tenant inducted by a mortgagee with possession would enure beyond the period of

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redemption of the mortgage if his rights are enlarged by subsequent tenancy legislation in force in the area in which the property is situated.

Dismissing the Appeals,

HELD: 1. The Court will ignore any contract the effect of which is to deprive the mortgagor of his right to redeem the mortgage. [844E]

2. The rights and liabilities of the mortgagor are controlled by the provisions of section 60 of the Transfer of Property Act, 1882. [846F]

3. Any provision inserted to prevent. evade or hamper redemption is void. [846G]

4. The doctrine "clog on the equity of redemption" is a rule of justice, equity and good conscience. It must be adopted in each case to the reality of the situation and the individuality of the transaction [847A]

5. Freedom of contract is permissible provided it does not lead to taking advantage of the oppressed or depressed people. The law must transform itself to the social awareness. Poverty should not be unduly permitted to curtail one-s right to borrow money on the ground of justice, equity and good conscience on just terms. If it does, it is bad. Whether it does or does not. however, depends upon the facts and the circumstances of each case. [847H; 848A]

6. Whether in the facts and the circumstances of these cases. the morgage transaction amounted to clog on the equity of redemption, is a mixed question of law and fact.

[848D]

7. Courts do not look with favour at any clause or stipulation which clogs equity of redemption. A clog on the equity of redemption is unJust and unequitable. The principles of English law, as we have noticed from the decisions referred to hereinbefore which have been accepted by this Court in this country, looks with disfavour at clogs On the equity of redemption. Section 60 of the Transfer of Property Act, in India, also recognises the same position. (848D-E]

8. It is a right of the mortgagor on redemption, by reason of the very nature of the mortgage, to get back the subject of the mortgage and to hold and enjoy as he was entitled to hold and enjoy it before the mortgage. If he is

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prevented from doing so or is prevented from redeeming the mortgage, such prevention is bad in law. If he is so prevented, the equity of redemption is affected by that whether aptly or not, and it has always been termed as a clog. Such a clot is inequitable. The law does not countenance it. [848F-G]

9. Whether or not in a particular transaction there is a clog on the equity or redemption, depends primarily upon the period of redemption, the circumstances under which the mortgage was created, the economic and financial position of the mortgagor, and his relationship vis-a-vis him and the mortgagee, the economic and social condition in a particular country at a particular point of time, customs if any, prevalent in the community or the society in which the transaction takes place, and the totality of the circumstances under which a mortgage is created, namely circumstances of the parties, the time, the situation, the clauses for redemption either for payment of interest or any other sum, the obligation of the mortgagee to construct or repair or maintain the mortgaged property in cases of usufructuary mortgage to manage as a matter of prudent management, these factors must be co-related to each other and viewed in a comprehensive conspectus in the background of the facts and the circumstances of each case, to determine whether these are clogs on equity of redemption. [848H; 849A-C]

10. A mortgage is essentially and basically a conveyance in law or an assignment of chattels as a security for the payment of debt or for discharge or some other obligation for which il is given The security must, therefore, be redeemable on the payment or discharge of such debt or obligation. ,any provision to the contrary, notwithstanding, is a clog or fetter on thc equity of redemption and, hence. bad and void. "Once a mortgage must always remain a mortgage", and must not be transformed into a conveyance or deprivation of the right over the
property. [849D-E]

11 . The law must respond and be responsive to the felt

and discernible compulsions of circumstances that would be-equitable. fair and just, and unless there is anything to the contrary in the Statute, law must take cognisance of that fact and act accordingly. Ia the context of fast changing circumstances and economic stability, long-term for redemption makes a mortgage an illusory mortgage, though not decisive. [850D-E]

12. Even apart from section 76(a) of the Transfer of Property Act if the words of the mortgage deed clearly and indubitably express an intention to allow expressly creation

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of a tenancy beyond the term of' the mortgage, then only the lease created in exercise of the power expressly conferred by the mortgage deed would be binding on the mortgagor. If the words of the mortgage deed do not clearly and indubitably disclose the intention to allow expressly the creation of a tenancy beyond the terms of the mortgage, the mere fact that the mortgage deed authorises the mortgagee with possession to induct a tenant would not create a tenancy binding on the mortgagor after the redemption of the mortgage. [857E-G]

13. In the instant cases the tenancy rights did not come to be enlarged by the Tenancy Legislation after the tenant was put into possession by the mortgagee and the tenancy created in favour of the tenants by the mortgagor did not have the concurrence of the morfgagor so as to claim tenancy rights even after redemption of the mortgage. [866C]

Khatubai Nathu Sumra v. Rajgo Mulji Nanji and Ors., A.I.R. 1979 Gujarat 171; Lalji Purshottam v. Thacker Madhavji Meghaji, 17 Gujarat Law Reporter 497; Maganlal Chhotalal Chhatrappati and Ors. v. Bhalchandra Chhaganlal Shal, 15 Gujarat Law Reporter 193; Soni Motiben v. M/s. Hiralal Lakhasmhi, 22 Gujarat Law Reporter 473; Vadilal Chaganlal Soni and Others v. Gokaldas Mansukh and Other, A.I.R. 1953 Bombay 408; Sarjug Mahto and Others v. Smt. Devruo Devi and Others, A.I.R. 1963 Patna 114; Kunjbiharilal v. Pandit Prag Narayan, A.I.R. 1922 Oudh 283; S. V. Venkatarama Reddiar v. Abdul Ghani Rowther & Ors., A.I.R. 1980 Mad. 276 and Devkinandan and Another etc. v. Roshan Lal and Others, A.I.R. 1985 Rajasthan 11, approved.

Santley v. Wilde, [1989] 2 Ch. 474; Vermon v. Betheli, 28 E.R. 838 and 839; G. and C. Kreglinger v. New Patagonia Meat and Cold Storage Company Ltd., [1914] Appeal Cases 25; All lndia Film Corporation v. Raja Gyan Nath, [1969] 3 SCC 79; Sachalmal Parasram v. Ratnabai, [1973] 3 SCC 198 and Om Prakash Garg v. Ganga Sahai & Ors., [1987] 3 SCC 553, relied on.

Seth Ganga Dhar v. Shankar Lal & Ors., [1959] S.C.R. 509 and Jadavji Purshottam v. Dhami Navnitbhai Amaratlal & Ors., [1987] 4 SCC 223, distinguished,

Aziz Khan v. Duni Chand and Others, A.I.R. 1918 P.C. 48; Jarrah Timber & Wood Paving Corporation v. Samuel, 119031 2 Ch. l; Chhedi Lal v. Babu Nandan, AIR 1944 Allahabad 204;

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Bhika and Anr. v. Sheikh Amir and Ors., A.l.R. 1923 Nagpur 60; Mahabir Gope v. Harbans Narain Singh, [1952] SCR 775; Hariher Prasad Singh v. Must. of Munshi Nath Prasad, [1956] S.C.R. l; Asa Ram v. Mst. Kam Kali, [1958] SCR 986; Dahya Lal v. Rasul Mohammed Abdul Rahim, [1963] 3 SCR 1; Madan Lal v. Bedri Narain and Others, [1987] 3 S.C.C. 460; Mulla's Transfer of Property Act, 7th Edition, pages 401 and 402; Rashbehary Ghose's 'Law of Mortgage' 6th Edition, pages 227 and 228; Dalal's Rent Act 4th Edn. page 814 referred to.

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No 9993 of 1983 etc From the Judgment and Order dated 16.12.1982 of the Gujarat High Court in S A No. 168 of 1982.

B.K. Mehta, Kajinder Sachhar, T.U. Meita, S.K. Dholakia. Vimal Dave Krishan Kumar. Mrs C.M. Chopra, P.H. Parekh, Ms. Sunita Sharma, Mrs. Rani Chhahra. R C Bhatia and P.C. Kapur for the appearing parties The Judgment of that Court was delivered by SABYASACHI MUMKHARJI. J. These appeals and the special leave petition are directed against the decision of the High Court of Gujarat, upholding the right of the mortgagors to redeem the properties before the period stipulated In the deeds. as well as the right of the mortgagors to recover possession of the properties from the tenants and/or the mortgagees without resort to the relevant Rent Restriction Act. All these matters were separately canvassed before us as these involved varying facts, yet the fundamental common question is, whether long term mortgages in the present infaltionary market in fast moving conditions are clogs on equity of redemption and as such the mortgages are redeemable at the mortgagors' instance before the stipulated period and whether the tenants who have been inducted by the mortgagees can be evicted on the termination of the mortgage or do these tenants enjoy protection under the relevant Rent Restriction Acts. One basic fact that was emphasised in all these cases was that all these involve urban immovable properties. In those cirumstances, whether the mortgages operate as clogs on equity of redemption is a mixed question of law and facts. It is necessary to have a conspectus of the facts involved in each of the cases herein. We may start with the facts relating to Special Leave Petition (Civil) No. 8219 of 1982 because that is a typical case.

PG NO 834 In this matter by our order dated 9th January, 1988 we had directed that this special leave petition should be heard first in these series of matters. We do so accordingly. We grant leave and dispose of the appeal by the judgment herein along with other appeals.

This is an appeal from the judgment and order of the Gujarat High Court, dated 26th April, 1~82 dismissing the second appeal. The High Court observed that the learned Judge had followed the judgment of the said High Court in Khalubai Nathu Sumra v. Rajgo Mulji Nanji and others, AIR 1979 Gujarat 171 where the learned Single Judge in the background of a mortgage, where the mortgagor was financially hard-pressed and the mortgage was for 99 years and the term gave the mortgagee the right to demolish existing structure and construct new one and the expenses of such to be reimbursed by mortgagor at the time of redemption, it was held that the terms were

unreasonable, unconscionable and not binding. In order, however, to appreciate the contentions urged therein, it will be necessary to refer to the decision of the first Appellate Court, in the instant case before us. By the judgment, the Assistant Judge, Kutch at Bhuj in Gujarat disposed of two appeals. These appeals arose from the judgment and decree passed by the Civil Judge, Bhuj, in Regular Civil Suit No. 35/72 by which the decree for redemption of mortgage was passed and the tenants inducted by the mortgagees were also directed to deliver up possession to the mortgagors. The plaintiffs had filed a suit alleging that the deceased Karsandas Haridas Purohit was their father and he died in the year 1956, he had mortgaged the suit property to Kanasara Soni Shivji Jotha and Lalji Jetha for 30,000 Koris by a registered mortgage deed dated 20th April, 1943. The moltgage deed was executed in favour of Soni Govindji Nalayanji who was the power of attorney holder and manager of the defendants Nos. 1 and 2. The defendant No. 3 is the heir of said Govindji Narayanji and he was also managing the properties of the defendants Nos I and 2. The mortgage property consisted of two delis in which there were residential houses, shops etc. The mortgagees had inducted tenants in the suit property and they were defendants Nos. 4 to 9 in the original suit When the mortgage transaction took place, thc economic condition of the father of the plaintiffs was weak. he was heavily indebted to other persons. It was alleged and it was so held by the learned Judge and upheld by the Appellate Judge that the mortgagees took advantage of' that situation and took mortgage deed from him on harsh and oppressive conditions. They got incorporated long term of 99 years for redemption of mortgage. It is further stated that though possession was to be handed over to the mortgagees, they took condition for interest on the part of principal amount in the mortgage PG NO 835 deed. Moreover, the mortgagees were given liberty to spend any amount they liked for the improvement of the suit property. They were also permitted to rebuild the entire property. Thus these terms and conditions, according to the Appellate Judge, were incorporated in the mortgage deed to ensure that the mortgagors were prevented for ever from redeeming the mortgage. The terms and conditions, according to the Assistant Judge, Bhuj, being the first Appellate Court were unreasonable, oppressive and harsh and amounted to clog on equity of redemption and, as such, bad and the plaintiffs were entitled to redeem the mortgage even before the expiry of the term of mortgage. A registered notice to the defendants Nos. I and 2 was given to redeem the mortgage but they failed to do so, hence, the present suit was filed to redeem the mortgage and to recover actual possession from the defendants Nos. 4 to 9 who were the tenants inducted by the mortgagees.

The defendant No. 1 resisted the suit. It was his case that the term of mortgage was for 99 years, so the suit filed before the expiry of that period was premature. The defendant No. 3 resisted the suit by written statement. The defendants Nos. 4 to 9 resisted the suit on the grounds that the plaintiffs were not entitled to redeem the mortgage and even if they were so entitled, they could not get actual physical possession from the tenants who were protected by the provisions of the relevant Bombay Rent Act. It was their case that the plaintiffs were not entitled to get actual possession of the premises in which they were inducted by the mortgagees. The defendants Nos. 2/1 to 2/7 who were the heirs of mortgagee Shivji Jetha were residing in London and New Delhi, so the personal service of summons could not be effected upon them. The summons was published in the local newspapers but none of them appeared before the Court so the Court proceeded ex-parte against them. The trial was conducted and a preliminary decree for redemption of mortgage was passed on 2nd April, 1974 by the Trial Court. Thereafter, the decree-holder applied for final decree so the notices were issued to all the defendants. The heirs of Shivji Jetha appeared in response to that notice and filed

applications before the Trial Court to set aside the ex- parte decree on the ground that summons of the suit had not been duly served upon them. That prayer was rejected by the Trial Court. Thereafter, they filed Civil Misc. Appeals in the District Court. The appeals were allowed by the District Court and the ex-parte decree for redemption of mortgage was set aside. The Trial Court was directed to proceed with the suit after permitting the concerned defendants to take part in the proceedings right after receiving their written statements. Accordingly defendant No. 2/1 appeared in the PG NO 836 suit and filed his written statement while other defendants remained absent.

It was the case of the defendant No. 2/1 that the sisters of the plaintiffs had not been joined as parties in the suit, so the suit was bad for want of necessary parties. Moreover, as per the terms and conditions of the mortgage deed dated 20th April, 1943, there was usufructuary mortgage for 20,000 koris and the remaining l0,000 koris were advanced to the mortgagor at monthly interest at the rate of 1/2 per cent. There was a condition in the mortgage deed that the mortgagor should pay principal amount as well as the interest at the time of redemption. When the suit was filed in the year 1972. the mortgagees were entitled to recover interest on l0,000 koris for a period of 291 ears . That interest would be 17,400 koris so the total mortgage amount will be Rs.47400 which would be equivalent to Rs. 15,800) and and the Civil Judge had no jurisdiction to try such suit so the plaint Should have been returned for presentation in the proper court. It was further alleged that the court fees paid by the plaintiffs was also not sufficient. Moreover, it was not true that the father of the plaintiffs was of weak economic condition. The grand father of the plaintiffs was an Advocate and the father of the plaintiffs was the clerk of an Advocate. The plaintiff No. l was also working as an Advocate at the time of the mortgage. so they knew the legal position. It was further alleged that at the relevant time the prevalent custom in Kutch State was to take mortgages of long term for 99 years and when it was permissible to take mortgage deeds with such a long term It was also necessary to give permission for rebuilding the whole property, for better enjoyment of it. So long term mortgage and the conditions for reconstruction of the property could not amount to clogs on equity of redemption of mortgage it was the case of the mortgagees and/or tenants. The mortgagees did not take any, it was pleaded. undue advantage and they were not present physically when the transaction took place through their power of attorney holders If the conditions in the mortgage deed did not amount to clogs on equity of redemption, the suit would be clearly premature. It may be mentioned that the plaintiff No. 1 had subsequently become a Civil Judge and was ultimately the Chairman of the Tribunal so if the said terms and conditions of the mortgage were onerous and oppressive, he would not have sat idle for 29 years. But he remained silent because he was aware of the custom, It was pleaded. It was alleged that the prices of immovable properties had increased tremendously, therefore, th. suit had been filed with mala fide intention. It was averred that in case the Court came to the conclusion that there was clog on equity of redemption and the plaintiffs were entitled to the PG NO 837 redemption, then the interest on 10,000 koris should be awarded to the mortgagees. In the premises, it was averred that the suit should be dismissed as there was no clog on equity of redemption and the court had no jurisdiction to try the suit The Trial Court then recorded additional evidence in the suit and ultimately decreed the suit on 28th September, 1978. The Trial Court came to the conclusion that there was mortgage transaction between the father of the plaintiffs and Soni Shivji Jetha and Lalji Mulji on 20th April, 1943. The Trial Court further came to the conclusion that the terms and conditions in the mortgage deed were harsh and oppressive, which amounted to clog on equity of redemption, so the plaintiffs were entitled to file the suit even

before the expiry of the term of the mortgage. The Trial Court also came to the conclusion that the sisters of the plaintiffs were not necessary parties to the suit and even if they were necessary parties, a co-mortgagor was entitled to file the suit for redemption, so the suit was not bad for want of non-joinder of necessary parties. The Trial Court further came to the conclusion that it had jurisdiction to try the suit and held that the mortgagees were not entitled to claim interest on 10,000 koris. It was further directed that the plaintiffs were entitled to recover possession from the defendants Nos. 4 to 9 who were the tenants inducted by the mortgagees. Accordingly, a preliminary decree was passed in the suit.

Aggrieved thereby the mortgagees filed Regular Civil Appeal No. 149/78 and the tenants filed Regular Civil Appeal No. 150/78. These were disposed of by the judgment of the first Appellate Court The learned Judge of the first Appellate Court framed the following issues:

> "(1) Whether the terms and conditions in the mortgage deed dated 20.4.1943 amount to clog on equity of redemption?
>
> (2) Whether the decree passed is bad for want of jurisdiction with trial court?
>
> (3) Whether the mortgagees are entitled to get interest on 10,000 koris?
>
> (4) Whether the tenants are protected from the effect of redemption decree by virtue of the provisions of Bombay Rent Act?
>
> PG NO 838 (5) Whether the decree passed by the trial court is legal and proper?
>
> (6) What order?"

It is not necessary any longer in view of the findings made and the subsequent course of events to detain ourselves on all the issues. For the purpose of the present appeal is well as the connected appeals we are concerned with two issues, namely, Issue Nos. 1 and 4 stated above, in other words, whether the terms and conditions of the mortgage deed dated 20th April, 1943 amounted to clog on equity of redemption and secondly, whether the tenants are protected from the effect of redemption decree by virtue of the provisions of the Bombay Rent Act. The learned Assistant Judge in the first appeal had noted that it was not in dispute that the document. Ext. 103 dated 20th April, 1943, the certified copy of which was also produced at Ext. 51 was executed by the father of the plaintiffs in favour of Kansara Soni Shivji Jetha. According to this document, an usufructuary mortgage was created on the suit property for 20,000 koris and the possession was to be delivered to the mortgagees. Over and above that a further amount of 10,000 koris was also paid to the mortgagor for which he had to pay interest at the rate of 1/2 per cent per month. The mortgage period was fixed for 99 years and after the expiry of that period, the mortgagor had to pay 30,000 koris as principal amount along with interest due on 10,000 koris. This was a registered document and it was acted upon by the parties. The learned Trial Judge held that the long term of 99 years for redemption coupled with other circumstances, indicated that there was clog on equity of redemption It was argued that the long term for redemption was not necessarily a clog on equity of redemption.

Certain deeisions were referred to. The Trial Court noted that there was no quarrel with the proposition of law that long term itself could not amount to clog on equity of redemption, when the bargain otherwise was reasonable one and the mortgagee had not taken any undue or unfair advantage. But, if in a mortgage with long term of redemption, there were other circumstances to suggest that the bargain was unreasonable one and the mortgagee had taken unfair advantage, then certainly long term also will be clog on equity of redemption. It is a question to be judged in the light of the surrounding circumstances. It may be noted here that there was a condition in the mortgage deed permitting construction of structure after demolishing the existing structure, costs of which were to be paid by the mortgagor. After examining the PG NO 839 facts and the relevant decisions, the first Appellate Court came to the conclusion that the terms were oppressive and harsh and there was clog on equity of redemption and the mortgagor should be freed from that bondage. Shri Rajinder Sachar, Shri B.K. Mehta as well as Shri Dholakia urged on behalf of their respective clients that in former Kutch district, there was a custom to take mortgages for long term of 99 years and when the period was long. naturally the mortgagee would be required to give full authority to repair and reconstruct the mortgaged property with a view to keep pace with new demands of changing pattern, so the condition permitting the mortgagee to reconstruct the whole premises was natural consequence of long term and that should not be treated as clog on equity of redemption. The learned Assistant Judge had rejected the similar contention made before him on behalf of the mortgagees and tenants in view of the decisions of the Gujarat High Court which were also arising out of the decisions in the suits filed in Kutch district and in those cases it was held that there was clog on equity of redemption. We will deal with some Gujarat decisions separately, presently. The learned Assistant Judge referred to another circumstance i.e., to the condition of mortgage which indicated the oppressive nature of the term. By mortgage deed being Ext. 103 usufructuary mortgage was created for 20,000 koris only and additional mortgage of 10,000 koris was also created for which the mortgagor had to pay interest at the rate of 1/2 per month. Furthermore, the mortgagor was not allowed to discharge interest liability periodically, but he had to pay to whole amount of interest at the end of 99 years at the time of redemption of the mortgage. Naturally, there would be hugh accumulation of interest which for all practical probabilities in most of the cases will be an impossibility to discharge. It was held that the purpose was to ensure that the right of redemption could never be exercised. On the other hand, it was contended before the learned Assistant Judge that the transaction was bona fide because reasonable consideration was paid as mortgage money. They was no direct contact between the mortgagor and the mortgagee. There could not be any collusion. The mortgagees were abroad. The learned Assistant Judge examined the evidences of one Madhavji Shivji Soni in order to show comparable instances for reasonableness of the consideration. The learned Assistant Judge after discussing the evidence proceeded on the assumption that the consideration paid as mortgage money was reasonable and proper and, according to him, it did not make any difference if the other conditions in the mortgage deed were found to be oppressive and amounting to clog on equity of redemption.

PG NO 840 Attention of the learned Assistant Judge was drawn to the fact that this was a bona fide transaction at the time when made, but subsequently, the prices of immovable properties increased so the plaintiffs had come forward to file suits after a lapse of long time. It was highlighted that the plaintiff No. I was serving as a Civil Judge and if he came to know that the transaction was oppressive, he would not have sat idle for such for a long period. Reference was made to the decision

of this Court in Seth Ganga Dhar v. Shankar Lal & Ors., [1959] S.C.R. 509. We will examine that decision in detail. The learned Assistant Judge came to the conclusion on point No. 1 that there was clog on equity of redemption and accordingly answered the Issue No. 1 in the affirmative. With the other issues we are not concerned in this appeal except Issue No. 4. Regarding Issue No. 4, as mentioned hereinbefore, which is on the question whether the tenants are protected from the effect of redemption decree by virtue of the provisions of the Bombay Rent Act, it may be mentioned that the tenants had filed regular civil appeal and it was urged before the learned Assistant Judge that even if the mortgage was redeemed, the tenants inducted by the mortgagees would be entitled to continue in possession of the properties in question as they were protected by the provisions of the said Rent Act. There was no dispute in this case and in the facts of the other three appeals that thc tenants were inducted by the mortgagees after the mortgage was created. It is also true that in all these mortgage deeds, there was provision that the mortgagees were competent to lease out the suit property and if in exercise of that power, they inducted the tenants in the suit properties, their tenancies would not come to an end on the redemption of mortgage, it was argued. The Full Bench of the Gujarat High Court in Lalji Purshottam v. Thacker Madavji Meghaji, 17 Gujarat Law Reporter 497 held that the mortgagee in possession might lease the property, but authorisation to the mortgagee to let out the property to any other tenant would not amount to an intention to create tenancy beyond the term of mortgage. Following the said decision, however, it was held that the tenant had no right to be in possession and was not entitled to the protection of the Bombay Rent Act after the redemption of the mortgage. The appeal was accordingly disposed of. As mentioned hereinbefore, there was a second appeal to the High Court and thc High Court expressed the view in brief order and dismissed the second appeal on 26th April, 1982 It appears, however, that in second appeal two questions were agitated, (1) the question of jurisdiction and Damdupat and (2) the tenants' right to be in possession. So far as the question of jurisdiction and Damdupat, the High Court observed that the Assistant Judge was right. This PG NO 841 point is not before us in this appeal under Article 136 of the Constitution. So far as the question of tenants' right to be in possession after the redemption of mortgage, the High Court followed the decision in Khatubai Nathu Sumra v. Rajgo Mulji Nanji and others, (supra).

Before we deal with the question of law and the respective submissions, we may briefly so far as relevant for the present purpose refer to the facts of the other three appeals.

Civil Appeal No. 9993 of 1983 is an appeal by the tenant arising out of the Regular Civil Appeal No. 150 of 1978 before the learned Assistant Judge, Kutch, at Bhuj, referred to hereinbefore. The facts have been set out hereinbefore and it is not necessary to reiterate these. We will deal with the contentions in respect of the same at the appropriate stage.

Civil Appeal No. 397 of 1980 is also an appeal by the tenant. It arises from the judgment and order of the High Court of Gujarat, dated 7th November, 1978 in Civil Revision Application No. 1447 of 1978. One Naranji Nanshi Thacker (hereinafter referred to as the decree-holder) instituted a Regular Civil Suit No. 10 of 1968 in the Court of the learned Civil Judge (J.D.), Bhuj. The suit was originally dismissed on 29th November, 1967. It was a suit for redemption of the mortgaged property located in the town of Bhuj. Thereupon, the respondent No. I preferred an appeal to the District Judge where the suit was decreed. The defendants filed a second appeal which was

dismissed and the decree-holder made an application for final decree and the Court gave the final decree on 30th November, 1974. While giving the final decree for redemption of the mortgage a direction was given in the decree to the judgment debtors to hand over the possession of the mortgaged property within three months on the decree-holder making payment of dues in respect of the mortgage in the Court. In pursuance of the final decree the decree-holder took out the execution proceedings and deposited the dues in the Court. At the same time the decree-holder claimed possession of the mortgaged property from one Shambhulal Vallabhji Thacker, the appellant herein, stating that he was a tenant in the possession of the property. The notice was issued to Shambhulal Vallabhji, who appeared before the Court and submitted his obJections stating that he was a tenant protected by law and he could not be evicted in the execution of the decree obtained by the decree-holder. He also stated that he was entitled to get the protection under the Bombay Rent Control Act.

PG NO 842 The learned District Judge held that there was no conduct on the part of the decree-holder which would estop him from claiming physical possession from the tenant of the mortgagee in possession. It was contended that when the mortgagee leased out the mortgaged property under the ordinary prudent management of the mortgaged property the mortgagor on redemption of the mortgage was not entitled to recover physical possession of the property from the tenant. The learned Judge negatived this contention. The High Court rejected the appeal summarily. Hence, this appeal.

Civil Appeal No. 1286 of 1981 is also an appeal by the tenant. The appellant is the tenant of the mortgagee. The plaintiffs Nos. 1 to 6 are the heirs and legal representatives of deceased Mehta Kanji Bhagvanji. It may be mentioned that the tenant was inducted by the mortgagee in 1955. The property was mortgaged in 1948 for a period of five years. It appears, therefore, that the tenant was inducted after the period of redemption had expired. The mortgagor had a right to redeem after the expiration of the mortgage. It was contended that though the mortgagee had inducted tenants in the suit property with a mala fide intention on the part of the mortgagee, it was still an act of prudent management. The first Appellate Court on the question before us, namely, whether the tenant was protected by the Bombay Rent Act, came to the conclusion after discussing all the relevant evidence and relying on the decision of the Lalji Purshottam v. Thacker Madhavji Meghaji (supra) that the tenants were not so protected under the provisions of the Bombay Rent Act in the facts of the case The appellant preferred this appeal and this is in issue in this case .

Shri Rajinder Sachar appearing for the appellant- mortgagee in Special Leave Petition (Civil) No. 8219 of 19X 2 drew our attention to the evidence of Vrajlal which appears at page 163 of the Special Leave Petition (Civil) No. 8219/82 wherein he stated about the execution of the documents. He stated that when document, Exhibit No. 51 was made, his father's economic (financial) position was bad. On his father, there was a debt of 12,000 koris of Kansara Motilal Madhavji. There was also sundry debt of 7,000--8,000 koris. His father was an Advocate in Kutch since old times. He was in service. The younger brother was studying. Therefore, father-mortgagor was in need of money, it was clear. Motilal Madhavji was pressing for his debt. They were staying in suit property and had no property except the suit property. He tried to explain the circumstances in which the mortgage deed was executed.

PG NO 843 Shri Sachar drew our attention to the observations of the Judicial Committee in the case of Aziz Khan v. Duni Chand and others, A.I.R. 1918 P.C. 48, where it was held that even where the transaction in question was undoubtedly improvident in the absence of any evidence to show that the money-lender had unduly taken advantage of his position, it was difficult for a Court of justice to give relief on grounds of simple hardship. Shri Sachar tried to urge in the facts and circumstances of the instant case that there is no evidence to lead to the conclusion that there was any undue influence. Great deal of reliance, however, by the appellants as well as the respondents was placed on the observations of this Court in Seth Ganga Dhar v. Shankar Lal & others, (supra). There, this Court observed that the rule against clog on equity of redemption embodied in section 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 the 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 he borrowed the money. In that case it was held that in a suit for redemption where the mortgage deed, by two distinct and independent terms provided that the mortgage would not be redeemed for eightyfive years all(l 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 as between parties dealing with each other on equal footing. 1. was 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 bargain was in any way oppresive or unreasonable. The term was enforceable in law and the suit for redemption filed before the expiry of the period was premature. It was further held that the term that on the failure of the mortgagor to redeem within the specified period of six months. he 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 011 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 apart. It was PG NO 844 explained by Sarkar, J. as the learned Chief Justice then was, that 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. This principle was clearly established by the observations of Lindley M.R. in Santley v. Wilde, [1899] 2 Ch. 474. where the Master of Rolls observed as follows:

> "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 mortgage. It was further reiterated at page 515 of the report in Seth Ganga Dhar's case (supra) that the rule against clogs on the equity of redemption no doubt involves that the Courts have the power to relieve a party from his bargain. 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. It is a power evolved by 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 is better to refer to the observations of Northington L.C. in Vermon v. Bethell, 28 E.R. 838 and 839. Lord Chancellor observed therein as follows:

> "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 PG NO 845 time of making the laon 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 craft may impose upon them."

The same view was reiterated by Viscount Haldane L.C. in G. and C. Kreglinger v. New Patagonia Meat and Cold Storage Company Ltd., [1914] Appeal Cases 25, where it was observed at pages 35 and 36 of the report as follows:

> "This jurisdiction was merely a special application of a more general power to relieve against penalties and to mould 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 for ever. What made the hardship on the debtor a glaring one was that the debt still remained unpaid and could be recovered from the feeoffor 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.
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> 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 parol 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 con-science in the terms imposed by lenders."

PG NO 846 The reason 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. Length of the term, according to Sarkar, J. in the aforesaid decision, was not by itself oppressive and could not operate as a clog on the equity of redemption. There was a term in the mortgage deed that the mortgagees could spend any amount on repairs and those expenses would be paid, according to the account produced by the mortgagees. All that it meant was that in claiming moneys on account of repairs and construction the mortgagees had to show from their accounts that they had spent these moneys. This Court on that basis held that the clause which provided that the mortgage had to be redeemed within the specified period of six months was bad. The principle, however, is that it was not an unconscionable bargain and it did not in effect deprive the mortgagor of his right to redeem the mortgage or so to curtail his right to redeem that it has become illusory and non-existent, then there was no clog on equity of redemption. It has to be borne in mind that the English authorities relied upon by Sarkar, J. and the principles propounded by this Court in the case of Seth Ganga Dhar's, case (supra) were in the background of a sedate and fixed state of affairs. The spiral and escalation of prices of the immovable properties was not then there. Today, perhaps, a different conspectus would be required to consider the right to redeem the property after considerable length of time pegging the price to a small amount of money, the value of which is fast changing.

The rights and liabilities of the mortgagor are controlled by the provisions of section 60 of the Transfer of Property Act, 1882. The clog on redemption has been noted in Mulla's Transfer of Property Act. 7th Edition, page 401 that a mortgage being a security for the debt, the right of redemption continues although the mortgagor fails to pay the debt at due date. Any provision inserted to prevent, evade or hamper redemption is void. That is implied in the maxim "once a mortgage always a mortgage". Collins, M.R. in Jarrah Timber & Wood Paving Corporation v. Samuel, [1903] 2 Ch. 1 at page 7 observed that it is the right of a mortgagor on redemption, by reason of the very nature of a mortgage to get back the subject of the mortgage and to hold and enjoy as he was entitled to hold and enjoy it before the mortgage.

PG NO 847 The doctrine clog on the equity of redemption" is a rule of justice, equity and good conscience. It must be adopted in each case to the reality of the situation and the individuality of the transaction. We must take note of the time, the condition, the price spiral, the term bargain and the other obligations in the background of the financial conditions of the parties. Therefore, in our opinion, in view of the evidence it is not possible to hold that there was no clog on the equity of redemption in these cases.

A very large number of decisions have been cited at the Bar. Shri T.U. Mehta, Shri Rajinder Sachar, Shri B.K. Mehta and Shri Dholakia very ably and painstakingly argued this case in respect of their cotentions.

Our attention was drawn to the observations of the Allahabad High Court in Chhedi Lal v. Babu Nandan, A.I.R. 1944 Allahabad 204 where it was held that the provision inserted to prevent redemption on payment or performance of the debt or obligation for which security was given, was a clog on equity of redemption. Condition in mortgage was in that case that if mortgagee constructed new building by demolition of mortgaged property which was kachcha structure, mortgagor would pay cost of construction at the time of redemption. Stipulation in circumstances of the case, it was held, did not amount to clog on equity of redemption. It was argued before us by th. mortgagees that the provision for the payment towards cost and expenses of repairs and construction did not amount to a clog on the equity of redemption because the repairs and construction were to be effectuated to keep the property in good condition. In the aforesaid decision Verma, J. at page 207 of the report observed that in the case before the Court it was not pleaded that any pressure and undue influence had been exercised upon the mortgagors. Verma. J referred to the observations of the Viscount Haldane L.C. in G & C. Kreglinger v. New Patagonla Meat and Cold .Storage Co., (supra) and Lindley M.R. in Santley v. Wilde, (supra). Sir Tej Bahadur Sapru argued before Verma, J. that it is not his contention that the mortgagee in this case tried to gain a collateral advantage. His argument was that a onerous term has been incorporated in the deed which placed such a burden on the mortgagor as to make it impossible for him to redeem. There is a freedom of contract between the mortgagor and the mortgagee as observed by Verma, J. at page 207 of the report We must, however, observe that we live in a changed time. Freedom of contract is permissible provided it does not lead to taking advantage of the oppressed or depressed people. The law must transform itself to the social awareness.

PG NO 848 Poverty should not be unduly permitted to curtail one's right to borrow money on the ground of justice, equity and good conscience on just terms. If it does, it is bad. Whether it does or does not, must, however, depend upon the facts and the circumstances of each case.

Reference was also be made to the case of Bhika and Anr. v. Sheikh Amir and Ors., A.I.R. 1923 Nagpur 60 where there was no provision under which power was given to the executant of the Deed to pay off the amount which was the consideration for the Deed, and no accounts were to be rendered or required. It was held that relief against an agreement forming a clog on the equity of redemption can only be obtained if it was challenged within a reasonable time. It was an equitable relief which cannot be granted as a matter of course. In that decision Sri Vivian Bose, as the learned counsel appearing for the appellant unsuccessfully sought to obtain relief against an agreement containing a clog on the equity of redemption.

Whether in the facts and the circumstances of these cases, the mortgage transaction amounted to clog on the equity of redemption, is a mixed question of law and fact. Courts do not look with favour at any clause or stipulation which clogs equity of redemption. A clog on the equity of redemption is unjust and unequitable. The principles of English law, as we have noticed from the decisions referred to hereinbefore which have been accepted by this Court in this country, looks with

disfavour at clogs on the equity of redemption. Section 60 of the Transfer of Property Act, in India, also recognises the same position.

It is a right of the mortgagor on redemption, by reason of the very nature of the mortgage, to get back the subject of the mortgage and to hold and enjoy as he was entitled to hold and enjoy it before the mortgage. If he is prevented from doing so or is prevented from redeeming the mortgage, such prevention is bad in law. If he is so prevented, the equity of redemption is affected by that whether aptly or not, and it has always been termed as a clog. Such a clog is inequitable. The law does not countenance it. Bearing the aforesaid back-ground in mind, each case has to be judged and decided in its own perspective. As has been observed by this Court that long-term for redemption by itself, is not a clog on equity of redemption. Whether or not in a particular transaction there is clog on the equity of redemption, depends primarily upon the period of redemption, the circumstances under which the mortgage was created, the economic and financial position of the mortgagor, and his PG NO 849 relationship vis-a-vis him and the mortgagee, the economic and social conditions in a particular country at a particular point of time, custom, if any, prevalent in the community or the society in which the transaction takes place, and the totality of the circumstances under which a mortgage is created, namely, circumstances of the parties, the time, the situation, the clauses for redemption either for payment of interest or any other sum, the obligations of the mortgagee to construct or repair or maintain the mortgaged property in cases of usufructuary mortgage to manage as a matter of prudent management, these factors must be co-related to each other and viewed in a comprehensive conspectus in the background of the facts and the circumstances of each case, to determine whether these are clogs on equity of redemption.

These principles have been recognised by this Court in Ganga Dhar v. Shankar Lal (supra). It has also to be borne in mind that long-term for redemption in respect of immovable properties was prevalent at a time when things and the Society were, more or less, in a static condition. We live in changing circumstances. Mortgage is a security of loan. It is an axiomatic principle of life and law that necessitous men are not free men. A mortgage is essentially and basically a conveyance in law or an assignment of chattels as a security for the payment of debt or for discharge of some other obligation for which it is given. The security must, therefore, be redeemable on the payment or discharge of such debt of obligation. Any provision to the contrary, notwithstanding, is a clog or fetter on the equity of redemption and, hence, bad and void. "Once a mortgage must always remain a mortgage", and must not be transformed into a conveyance or deprivation of the right over the property.

This is the English law based on principles of equity. This is the Indian law based on justice, equity and good conscience. We reiterate that position. Though, long-term by itself as the period for redemption, is not necessarily a clog on equity but in the changing circumstances of inflation and phenomenal increase in the prices of real estates, in this age of population-explosion and consciousness and need for habitat, long-term, very long- term, taken with other relevant factors, would create a presumption that it is a clog on equity of redemption. If that is the position then keeping in view the financial and economic conditions of the mortgagor, the clause obliging the payment of interest even in case of usufructuary mortgage not periodically but at the time of ultimate redemption imposing a burden on the mortgagor to redeem, the clauses permitting

construction and reconstruction of the PG NO 850 building in this inflationary age and debiting the mortgagor with an obligation to pay for the same as an obligation for redemption, would amount to clog on equity.

Section 60 of the Transfer of Property Act, 1882, conferred on the mortgagor the right of redemption. This is a statutory right. The right of redemption is an incident of a subsisting mortgage and it subsists so long as the mortgage subsists. See the observations in R. Ghose "Law of Mortgage" 6th Edn. page 227.

Whether in a particular case there is any clog on the equity of redemption, has to be decided in view of its background of the particular case. The doctrine of clog on equity of redemption has to be moulded in the modern conditions. See Mulla: 'Transfer of Property Act', 17th Edn. 402. Law does not favour any clog on equity of redemption.

It is a settled law in England and in India that a mortgage cannot be made altogether irredeemable or redemption made illusory. The law must respond and be responsive to the felt and discernible compulsions of circumstances that would be equitable, fair and just, and unless there is anything to the contrary in the Statute, Court must take cognisance of that fact and act accordingly. In the context of fast changing circumstances and economic stability, long-term for redemption makes a mortgage an illusory mortgage, though not decisive. It should prima facie be an indication as to how clogs on equity of redemption should be judged.

In the facts and the circumstances and in view of the long period for redemption, the provision for interest (1/2% per annum payable on the principal amount at the end of the long period, the clause regarding the repairs etc., and the mortgagor's financial condition, all these suggest that there was clog on equity. The submissions made by Mr. Sachar and Mr. Mehta are, therefore, unacceptable.

In that view of the matter, we are of the opinion that the decision of the High Court as well as the Courts below that there existed clog on the equity of redemption in case of these mortgages, is correct and proper, and we hold so accordingly.

Before we dispose of the contentions on the second aspect, we must deal with some of the decisions of the Gujarat High Court to which reference had been made and some of which also referred before us. We have noticed the decision of the PG NO 851 Gujarat High Court in Khatubai Nathu Sumra v. Rajgo Mulji Nanji and others, (supra). In Maganlal Chhotalal Chhatrapati and Ors. v. Bhalchandra Chhaganlal Shah, 15 Gujarat Law Reporter 193. P.D. Desai, J. as the learned Chief Justice then was, held that the doctrine of clog on the equity of redemption 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. The learned Judge reiterated that whether in a particular case long term amounted to a clog on the equity of redemption had to be decided on the evidence on record which brings out the attending circumstances or might arise by necessary implication on a combined reading of all the terms of the mortgage. The learned Judge found that

this long term of lease along with the cost of repairing or reconstruction to be paid at the time of redemption by the mortgagor indicated that there was clog on equity of redemption. The learned Judge referred to certain observations of Mr. Justice Macklin of the Bombay High Court where Justice Macklin had observed that 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 that is a greater or less clog upon the equity of redemption within the ordinary meaning of the term. In our opinion, such observations will apply with greater force in the present inflationary market. The other decision to which reference may be made is the decision of the Gujarat High Court in Soni Motiben v. M/s. Hiralal Lakharnshi, 22 Gujarat Law Reporter 473. This also reiterates the same principle. In Vadilal Chhaganlal Soni and Others v. Gokaldas Mansukh and Others, A.I.R. 1953 Bombay 408 also, the same principle was reiterated. In that case, it was held by Gajendragadkar J., as the learned Chief Justice then was, that the agreement between the mortgagor and mortgagee was that the mortgagor was to redeem the mortgage 99 years after its execution and the mortgagee was given full authority to build any structure on the plot mortgaged after spending any amount he liked It was held that the two terms of the mortgage were so unreasonable and oppressive that these amounted to clog on the equity of redemption. Similar was the position in the case of Sarjug Mahto and other. v. Smt. Devrup Devi and Others A.I.R. l963 Patna 114, where also the mortgage was for 99 years. In Chhedi Lal v. Babu Nandan's case (supra), the court reiterated that freedom of contract unless it is vitiated by undue influence or pressure of poverty should be giver. a PG NO 852 free play. In the inflationary world, long term for redemption would prima facie raise a presumption of clog on the equity of redemption. See also the observations in Rashbehary Ghose' 'Law of Mortgage' 6th Edn. pages 227 and

228. Bearing the aforesaid principles in mind we must analyse the facts involved in these appeals. It has been noticed in S.L.P. (Civil) No. 8219 of 1982 that the High Court of Gujarat by its order impugned had dismissed the second appeal. The High Court had merely observed in dismissing the second appeal that the First Appellate Court had followed the decision of the Gujarat High Court in Khatubai Nathu Sumra v. Rajgo Mulji Nanji and Others, (supra). We have noted the salient features of the said decision. The High Court, therefore, found no ground to interfere with the decision of the First Appellate Court and accordingly dismissed the second appeal. The First Appellate Court by its judgment disposed of Civil Regular Appeal No. 149 of 1978 and another civil appeal which was the appeal by the tenant was also disposed of by the said judgment. The learned Judge of the Appellate Court had referred to the ratio of the decision in Gangadhar v. Shankerlal (supra). The learned Judge bearing in mind the principle of the aforesaid decision and the relevant clause of Ext. 103 came to the conclusion that the clauses amounted to clog on the equity of redemption in the facts of this case. Shri Sachhar tried to urge before us that on the evidence and the facts in this case having regard to the position of the parties, the transaction did not amount to clog on the equity of redemption. It was emphasised by the First Appellate Court that the fact that the son of the mortgagor subsequently became Civil Judge would not affect the position because what was relevant was the financial condition at the time of the transaction. We have further to bear in mind that it has come out in the evidence that the father of the plaintiff was residing in the suit property at the relevant time and there was no other residential house except the suit property. The First Appellate Court, therefore, emphasised in our opinion rightly that if there was no pressure from the creditor,

no body would like to mortgage the only house which is sole abode on the earth.

In that view of the matter and in view of the position in law, we are of the opinion that the First Appellate Court was right in the view it took.

The First Appellate Court referred to the decision of Kunjbiharilal v. Pandit Prag Narayan, AIR 1922 Oudh 283. In that case there was a condition that the mortgagor should PG NO 853 pay interest along with the principal amount at the time of redemption after 50 years. It was held that the intention was to see that right of redemption could never be exercised. If the condition was such which would result in making redemption rather difficult, if not impossible, it would be a dog on the equity of redemption and could not be enforced. Similar was the position of the Allahabad High Court in Rajai Singh v. Randhir Singh, A.I.R. 1925 Allahabad

643. There the term fixed for redemption was of 96 years and there was a stipulation for payment of interest along-with principal not periodically but only at the time of redemption. In the instant case before us the mortgagor was required to pay the whole amount of interest at the end of 99 years which will practically make the redemption impossible. Applying the well-settled principles which will be applicable to the facts of this case in determining whether there was in fact a clog on the equity of redemption, we are of the opinion what the First Appellate Court was right in holding that there was a clog on equity of redemption.

On the second aspect of the question whether the right of the tenants of the mortgagees are protected after the redemption of mortgage, reliance was placed by the First Appellate Court on the decision of the Full Bench of the Gujarat High Court in Lalji Purshottam v. Thacker Madhavji Meghaji, (supra). There urban immovable property was mortgaged with possession, mortgagee creating lease during the subsistence of the mortgage. The question was whether after redemption of mortgage such lease is binding on the mortgagor. It was held that Section 76(a) of the Transfer of Property Act would not apply to such cases. There must be express words showing an intention if tenancy was to be created beyond the term of the mortgage. Mere reference that mortgagee is entitled to lease property does not create a binding tenancy on the mortgagor. After the redemption of the mortgage the relationship of landlord and tenant does not exist. Such tenant, therefore, does not get any protection under section 12 of the Bombay Rent Control Act, it was held. The Gujarat High Court had referred to several decisions of this Court. In Mahabir Gope v. Harbans Narain Singh, [1952] SCR 775 which was a decision dealing with a lease created by a mortgagee with possession under the Bihar Tenancy Act, this Court reiterated that the general rule is that a person cannot by transfer or otherwise confer a better title on another than he himself has. A mortgagee cannot, therefore, create an interest in the mortgaged property which will enure beyond the termination of his interest as mortgagee. Further the mortgagee, who take possession of the mortgaged property, must manage it is Person of ordinary prudence would manage if it were his own;

PG NO 854 and he must not commit any act which is destructive or permanently injurious to the property. Reliance may be placed for this purpose on section 76, clauses (a) and (e) of the Transfer of Property Act, 1882. It was held that the provisions of sections 20 and 21 of the Bihar Tenancy Act,

did not apply to the lessees since they were not 'settled raiyats' and the lessees could not claim to have secured under the statute occupancy rights in the land. It was further held that the mortgagor was entitled to the possession of the land upon redemption of the mortgage. In a slightly different context in Harihar Prasad Singh v. Must. of Munshi Nath Prasad, [1956] S.C.R. 1 this Court was concerned with a mortgage with possession effected on agricultural land. This Court had to consider in that decision whether under the provisions of the Bihar Tenancy Act the tenant inducted on the mortgaged property during the pendency of the mortgage could claim right to remain in possession after the redemption. Venkatarama Ayyer, J., speaking for the Court pointed out that if the tenant could not resist the suit for ejectment either by reason of section 76(a) of the Transfer of Property Act or section 2 1 of the Bihar Tenancy Act, the tenant could not get such a right as a result of the interaction of both those sections. This Court ultimately held that the tenants inducted by the mortgagee with possession had failed to establish that they had any right of occupancy over the suit lands and that the plaintiffs were entitled to a decree in ejectment, with future mesne profits as claimed in the plaint. Thus a right claimable under section 76(a) of the Transfer of Property Act because of a lease created in the course of prudent management of the property was put on a different footing altogether from a right created by a special statute.

Similarly, in Asa Ram v. Mst. Ram Kali. [1958] SCR 986, the question before this Court was again of mortgage of agricultural land when the mortgage was with possession and of the tenant inducted by the mortgagee with possession. In Dahya Lal v. Rasul Mohammed Abdul Rahim, [1963] 3 SCR 1, this Court was concerned with the case of a tenant inducted on agricultural land by a mortgagee in possession. There under the Bombay Tenancy and Agricultural Lands Act, 1948, a tenant lawfully inducted by the mortgagee on the land would on redemption of the mortgage be deemed to be a tenant of the owner mortgagor under section 4 of the Bombay Tenancy and Agricultural Act. This Court held that all persons other than those mentioned in clauses (a), (b) and (c) of section 4 of the Bombay Tenancy and Agricultural Lands Act, 1948, who lawfully cultivated land belonging to other persons whether or not their authority was derived directly from the PG NO 855 owner of the land must be deemed tenants of the lands under section 4 of the said Act. So, therefore, the Bombay Tenancy Act required at the relevant time the lawful cultivation by tenant. This Court had also considered this question in Prabhu v. Ramdev, [1966] 3 S.C.R. 676. There the same problem again arose in connection with a person inducted into agricultural land as a tenant by an usufructuary mortgagee and the question was whether the rights of such a tenant were protected by the provisions of the Rajasthan Tenancy Act, 1955. In view of the special status, the tenant in question was held to be entitled to the protection. It must be noted as observed by the Full Bench of the Gujarat High Court that all the cases that we have so far considered are cases of agricultural lands and in each of these cases the question was examined from two points; first, whether the lease could be said to be a lease granted in the course of prudent management and, in the alternative, whether the rights of the tenant inducted by the mortgagee with possession had been enlarged as a result of a special statute dealing with the rights of tenants of agricultural lands.

This question, however, has been agitated before this Court in the background of the non-agricultural lands especially in urban areas. In All India Film Corporation v. Raja Gyan Nath, [1969] 3 SCC 79, the question was in respect of lease of a cinema house granted by the mortgagee with possession. Hidyatullah, C.J. delivering the judgment of the Court. observed in paragraph 7

that a general proposition of law is that no person can confer on another a better title than he himself has. A mortgagee is a transfer of an interest in specific immovable property for the purpose of securing repayment of a loan. A mortgagee's interest lasts only as long as the mortgage has not been paid off. It was further observed by the learned Chief Justice that on redemption of the mortgage the title of the mortgagee comes to an end. It was held that section 111(c) of the Transfer of Property Act provides that a lease of immovable property determines where the interest of the lessor in the property terminates on, or his power to dispose of the same, extends only to the happening of any event--by the happening of such event. The duration of the mortgagee's interest determines his position as the lessor. But there is one exception. That flows from section 76(a) which lays down liabilities of a mortgagee in possession. It is provided there that when during the continuance of the mortgage, the mortgagee takes possession of the mortgaged property, he must manage the property as a person of ordinary prudence would manage it if it were his own. It was observed that this principle applied ordinarily to the management of agricultural lands and has been extended to urban property so as to tie it up in the hands of lessees or to confer on them rights under special PG NO 856 statutes. It was emphasised by the Chief Justice that lease would continue to bind the mortgagor or persons deriving interest from him if the mortgagor had concurred to grant it. Ultimately, this Court in that case held that on the termination of the mortgage in the events that had happened in that particular case, that since there was no landlord and no tenant, the provisions of the Rent Restriction Act could not apply beyond the date of the termination of the mortgagee's interest. Similar, is the view in the case of Sachalmal Parasram v. Ratnabai, [1973] 3 S.C.C. 198. There, the question was whether the tenant was protected under the Madhya Pradesh Accommodation Control Act, 1961. The Court did not accept the rights of the tenant in possession.

The question whether the tenant from usufructuary mortgagee of building was entitled to protection on redemption of mortgage, was considered by the Full Bench of the Madras High Court in S.V. Venkatarama Reddiar v. Abdul Ghani Rowther & Ors., A.I.R. 1980 Mad. 276. There Justice Natarajan, as the learned Judge then was, of the Madras High Court delivering the judgment of the Full Bench of the said Court held that if a tenancy was created by a mortgagee with possession, the ties of landlord and tenant were snapped eo instanti the mortgage is redeemed and, unless there is a fresh forging of the relationship of landlord and tenant between the mortgagor and the erst-while tenant by (i) the voluntary act of the parties or (ii) a deemed forging of the relationship by express provision in the Act itself, the erstwhile tenant cannot claim protection under the Act so as to perpetuate his occupation of the building as a tenant. The rule of exception contained in Section 76(a) of the T. P. Act cannot be readily and automatically invoked by a tenant let into possession of urban property by a mortgagee with possession. The principle of exception afforded by section 76(a) of that Act applies ordinarily to the management of agricultural lands and has seldom been extended to urban property so as to tie it up in the hands of lessees or to confer on them rights under special statutes. It may be open to a tenant inducted upon urban property by a mortgagee with possession to rely upon Section 76(a) to claim tenancy right for the full term of the tenancy notwithstanding the redemption of the mortgage earlier. But, it is for the person who claims such benefits to strictly establish the binding nature of the tenancy, created by the mortgagee, on the mortgagor. Reference may be made to a Full Bench decision of the Rajasthan High Court in Devkinandan and another etc. v. Roshan Lal and others, A.I.R. 1985 Rajasthan 11 where several relevant authorities have been discussed. The question before the Full Bench was whether a tenant of a mortgagee in possession is

entitled to PG NO 857 the protection of the provisions of the Rajasthan Premises (Control of Rent and Eviction) Act, 1950 against the mortgagor after the redemption of the mortgage. P.K. Banerjee, C.J. delivering the judgment of the Court after discussing all relevant authorities held that in respect of tenancy of urban property or premises, the mortgagee in possession has no right to jeopardise the right of the mortgagor by giving a tenancy which would continue even after the redemption of the mortgage. This negates the submission that as a matter of prudent management the tenants had been inducted and after induction the tenants got their rights enlarged. In Lalji Purshottam v. Thacker Madhavji Meghaji, (supra), where the Full Bench of the Gujarat High Court had considered the effect of continuation of tenancy under the Bombay Rents, Hotel and Lodging Houses Rates Control Act, 1947 which are precisely the cases in the facts of the instant appeals, after discussing all the relevant provisions of the Act including the theory of the prudent management the Full Bench of the Gujarat High Court observed that where a lease is created by the mortgagee in possession of an urban immovable property, such a lease would not be binding on the mortgagor after redemption of mortgage assuming that the lease is such as a prudent owner of property would have granted in usual course of management. The Court observed that that was so because section 76(a) could not apply to a case of urban immovable property and hence a lease created by the mortgagee in possession of an urban immovable property would not be binding on the mortgagor after redemption of the mortgage. Even apart from section 76(a) of the Transfer of Property Act if the words of the mortgage deed clearly and indubitaly express an intention to allow expressly creation of a tenancy beyond the term of the mortgage, then only the lease created in exercise of the power expressly conferred by the mortgage deed would be binding on the mortgagor. If the words of the mortgage deed do not clearly and indubitably disclose the intention to allow expressly the creation of a tenancy beyond the terms of the mortgage, the mere fact that the mortgage deed authorises the mortgagee with possesion to induct a tenant would not create a tenancy binding on the mortgagor after the redemption of the mortgage. In such a case a tenant inducted on the property by a mortgagee with possession when the tenancy of that tenant is not binding on the mortgagor after the redemption of the mortgage, is not protected under the provisions of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947. We are of the opinion that the aforesaid view expressed by the Chief Justice Diven on behalf of the Full Bench represents the correct position in law in respect of the second aspect of the question canvassed before us.

PG NO 858 We have noticed the view of the Full Bench of the Rajasthan A High Court on this aspect. This question was again envisaged by this Court in the background of the Rajasthan Premises Act in Om Prakash Garg v. Ganga Sahai & Ors., [1987] 3 SCC 553 holding that on passing of the final decree of redemption of the mortgage, the lease did not subsist and the tenant is not entitled to protection under the Rajasthan Premises (Control of Rent & Eviction) Act, 1950. Again viewing this question in the context of the Bombay Rents, Hotel & Lodging House Rates Control Act, 1947 in Jadavji Purshottam v Navnitbhai Amaratlal & Ors., [1987] 4 SCC 223, in which the judgment was delivered by Natarajan J., and one of us was a party to that decision, it was held that it was recognised by this Court in a number of cases that the question of imprudent management of the mortgaged property by the mortgagee would not arise where the rights of the tenant were enlarged by the tenancy legislation enacted after the tenant was put in possession by the mortgagee. Hence, in that case the question was whether the tenancy rights of the appellant-tenant, who was inducted by the mortgagee, came to be enlarged by tenancy legislation after he was put in possession by the

mortgagee. The fact founding that case was that the tenant-appellant was not inducted into possession soon after the execution of mortgage deed and the mortgagee was put in possession of the property but long thereafter. In fact, there was already a tenant on the mortgage Property when the mortgagee was put in possession. During the period o f tenancy of that tenant the Saurashtra Act 22 of 1951 came to be enacted and gave protection to the tenants from paying exorbitant rent and from unreasonable eviction. Despite the enlargement of his tenancy right by the Act. that tenant vacated the lease premises in 1956 and thereafter the mortgagee inducted the appellant in possession. It was held that that was a case where the Saurashtra Act was already in force when the appellant cannot be inducted into possession. The tenancy rights of the appellant cannot be said to have become enlarged after the mortgagee granted him the lease by subsequent legislation enacted for affording protection to tenants. The fact that the mortgagee had granted lease only for period of one year will not alter the case in any manner as not only had the mortgagee executed the lease deed after the expiry of the lease period but also because the restriction of the lease period to one year was of no consequence in view of the provisions contained in the Saurashtra Act 22 of 1951. The enlargement of the tenancy rights cannot also be claimed on the basis of the fact that the Bombay Rent Act had been enacted after the appellant was inducted into the property because the Saurashtra Act was already In force when the mortgagee granted lease to the appellant and it was only from January' 64 the Bombay Rent PG NO 859 act came to replace the Saurashtra Act. In Civil Appeal No. 9993 of 1982, Pomal Kanji Govindji & Ors. v. Vrajlal Karsandas Purohit ,& Ors., Shri B.K. Mehta took us to the factual background. The appellants who are tenants in the mortgage properties being defendants Nos. 4 to 9 in the original suit had resisted the suit for redemption and contended that the plaintiffs were not entitled to recover possession from them since their rights are protected under the Bombay Rents. Hotel and Lodging House Rates Control Act, 1947 and the said Act has applied to the area of kutch in the Bombay State. Therefore, no decree for eviction could be passed against them except in accordance with the provisions of the said Act. The High Court held that redemption of mortgage was possible and the suit was maintainable as mentioned hereinbefore. However, as regards the question of protection of the tenants under the Bombay Rent Act, Shri Mehta proceeded to submit that the learned Judge did not make any finding as to when the tenants were inducted nor did he express his opinion about the evidence of respondent No. 5. Shri Mehta further submitted that the learned Judge did not make any finding as to when their tenants were inducted, either before or after the rent restriction Act was made applicable to the area of Kutch. On that basis, following the Full Bench decision of the Gujarat High Court in Lalji Purshottam v. Thacker Madhavji Meghaji, (supra), the courts below rejected the claim of he tenants. Shri Mehta submitted hat the High Court has erred in not following the settled legal position entrenched by a line of decision of this Court that he rights of a tenant inducted by a mortgagee with possession would enure beyond the period of redemption of the mortgage if his rights are enlarged by subsequent tenancy legislations in force in the area in which the property is situated. He drew our attention to the decision in the case of Mahabair Gope v. Harbans Narain, (supra). There as mentioned hereinbefore this Court had found that the provisions of sections 20 and 21 of the Bihar Tenancy act, did not apply to the lessees since they were not `settled raiyats'. Shri Mehta also drew our attention to the observations of this Court in Asa Ram v. Mst. Ram Kali, (supra). He also drew our attention to Dahya Lal v. Rasul Mahommed, (supra) which we have discussed hereinbefore. Similar, was the position in Prabha v. Ramdev (supra) which is also being discussed hereinbefore. Reference was made to the decision in All India Film Corporation v. Gyan Nath, (supra), the basis of

which has been explained hereinbefore. The said decision will not be applicable in respect of the facts and circumstances of the case and in view of the terms of the renancy. Our attention was drawn by Shri Mehta to the observations of this Court in Madan Lal v. Badri Narain and others, [1987] 3.S.C.C. 460. In that case, it was contended before this Court that there PG NO 860 was no such rule of general acceptance that a lease of urban property by the mortgagee in possession cannot be regarded to be an act of prudent management within the meaning of section 76(a) of the Transfer of Property Act which carves out an exception to the general rule that a mortgagee in possession cannot create, in the tenant inducted by him, a right to continue in possession beyond the period of redemption. Before this Court, in that case, a reference was made to the Full Bench decision of the Rajasthan High Court in Devkinandan v. Roshan Lal, (supra). But in view of the facts that there was no definite finding the question whether the alleged lease was an act prudent management on the part of the mortgagee in possession in terms of section 76(a) was left open and that to be determined by the learned trial Judge. It has been held by this Court in numerous decisions that in case of immovable properties in urban areas, unless the leases specifically and categorically make an exception in favour of the tenant that they would continue in possession even after the expiry of termination of the leases, and those leases were acts of prudent management, in no other case, the tenants inducted by the mortgagee would be titled to the production under the Rent Act after the redemption of mortgage.

In this connection, it will be appropriate here to refer to the position as mentioned in the Mulla's `Transfer of Property Act', 7th Edn. pages 513 and 514, which is as follows:

> "Whether a mortgagee in possession can by reason of clause (a) grant a lease of the mortgaged property has been considered in several decisions of the Supreme Court. In Mahabir Gope v. Harbans Narain, (1952 S.C.R. 775, the Supreme court observed that the right conferred under clause
>
> (a) was an exception to the general rule that a person cannot confer a better title on another than he possesses himself. The Court pointed out that it followed that though a mortgagee may, if it is prudent, grant leases, these would determine on redemption. The Court recognised, however, that in some cases the granting of a lease in the course of prudent management might result in the tenant acquiring rights under other laws so that he could not be evicted by the mortgagor, but this was an exception, and could not apply where the mortgage deed prohibits such a lease either expressly, or by necessary implication. These observations do not appear to have been followed in Harihar Prasad Singh v. Deonarayan Prasad, [1956] S.C.R. 1 where the Suprerne PG NO 861 Court held that even a lease created by a mortgagee in possession in the course of prudent management though binding on the mortgagors after redemption, could not create the rights of a raiyat on the tenants. The question was next considered in Asa Ram v. Ram Kali, [1958] S.C.R. 986, where the Supreme Court held that the creation of a lease which would create occupancy rights in favour of the tenants could not be regarded as a prudent transaction. In Prabhu v.

Ramdev, [1966] 3 S.C.R. 676. however, the Supreme Court without referring to Asa Ram s case held that a tenant of a mortgagee can invoke the benefit of subsequent Tenancy legislation which provided that such a tenant could not be evicted except in the circumstances set out in that legislation. The Court explained Mahabir Gope's case as being a decision given with reference to the normal relationship of landlord and tenant. and stressed that the Supreme Court in that case had contemplated an extraordinary situation arising from a tenant acquiring rights under other laws. The Court explained Harihar Prasad Singh's case as having been decided on the peculiar facts of the case, viz,. that in that case the tenants were not entitled under the Local law to invoke the protection of that law. In Film Corporation Ltd. v. Gyan Nath, [1970] 2 S.C.R. 581 the Supreme Court again considered the question. The Court did not refer to either Harihar Prasad Singh,s case (supra) or Prabhu v. Ramdev (supra). The Court observed that the principle laid down in Mahabir Gope's case (supra) that a bona fide and prudent lease would bind the mortgagor "ordinary'' applies only to agricultural lands and has "seldom" been extended to urban property. This observation is strictly speaking, obiter, as the Court found that the lease in question was neither bona fide nor prudent in view of the long term and the low rent. It is respectfully submitted that there is no warrant for limiting sec. 76(a) to agricultural land. Whether a particular lease is bona fide or prudent is a question of fact; obviously a lease of urban land which would confer on the lesson the protection of special statutes such as the Rent Acts would prima facie be imprudent. In Sachalmal Parasram v. Ratanbai, [1987] 3 S.C.C. 198, however, the Supreme Court has repeated the obiter observation in the Film Corporation case (supra) that except in the case of agricultural land acts of a mortgagee would not bind the mortgagor.

PG NO 862 It is respectfully submitted that the position could be more satisfactorily stated with reference to the language of clause (a). The right conferred by that clause is to manage the property during the subsistence of the mortgage. It is unlikely that a prudent manager would create a lease for a period longer than the mortgage, or in circumstances which would give the lessee rights after the redemption of the mortgage. Such leases would prima facie be imprudent, and not binding on the mortgagor as beyond the powers conferred by clause (a). If, however, it can be shown in any given case that such a lease was prudent, it would bind that mortgagor, even after redemption, and even though the lessee acquires thereunder rights of a permanent or quasi-permanent nature. No question of imprudence can arise where, as in Prabhu v. Ramdev, [1966] 3 S.C.R. 676 the rights of the tenant were enlarged by Tenancy legislation enacted after the tenant was put in possession by the mortgage. It is submitted that this statement of the law is consistent with all the Supreme Court decisions quoted above."

We are of the opinion that the rationale of the various decisions of this Court have been explained by Chief Justice Diven in the Full Bench decision of the Gujarat High Court in Lalji Purshottam v. Madhavji Meghaji, (supra) which is the correct enunciation of law The learned Chief Justice observed at pages 514 and 515 of the report as follows:

> "In our opinion, on the general aspect of the matter based on facts on which judicial notice can be taken it is clear that so far as leases of agricultural lands are concerned, when a lessee cultivates land by the very process of cultivation he brings inputs and improves the fertility of the soil. Constant and continuous cultivation by proper

manuriny etc. would improve the fertility of the soil and on the determination of the lease, that fertility would still remain in the land. It is, therefore, necessary that security of tenure should be given to the tenant of agricultural land so that by his proper husbandry and agricultural practices, he himself may derive good benefits from the land and also improve the fertility of the soil. It is because of this aspect that in all countries legislation has been enacted to protect the actual tiller of the soil, fixity of tenure has been given and all the different measures of tenancy legislation regarding agricultural lands PG NO 863 have provided for sufficiently long leases and protection of his tenure so as to induce the agriculturist to put in his best efforts and best inputs as they are called now-a-days, during the term of the lease. A prudent owner of property would, therefore, see to it that the term of lease which he grants in respect of agricultural land is sufficiently long to induce the tenant to put in the best efforts which would incidentally benefit the owner of the land by improving the fertility of the land itself. In contrast, to the agricultural lands. so far as non-agricultural and urban lands are concerned, on determination of the lease the tenant who has been on the property under the terms of the lease is bound to put back the property in the condition in which it was at the time when he entered into possession and nothing is normally done by the tenant which is likely to improve the quality of the soil property by his own ettorts put in during the terms of the tenancy. There is, therefore, no question of a prudent owner of urban immovable property granting a long term lease merely with a view to improve the quality of the land. Barring Rent Control and Rent Restriction Act which deal with urban immovable property, in areas where there is scarcity of accommodation both for residential and nonresidential purposes, there is no concept of protection to tenants of urban immovable property. We are of opinion that this is the rationale behind the distinction which the Supreme Court has pointed out between leases of agricultural lands and leases of urban immovable property while dealing with the provisions of sec. 76(a) of the Transfer of Property Act, whereas a a prudent owner would not ordinarily speaking think of creating a long term lease purely as a matter of prudent management, an owner of agricultural land in the course of prudent management would create a long term lease purely from the aspect of prudent management. In our opinion therefore, the word "seldom" used Hidayatullah C.J. in All India Film Corporation's case (supra) while dealing with the application of the exception carved out by see 76(a) to urban immovable property has to be read as not being extended at all and it is merely a term of the phrase to say that this exception has seldom been extended to urban immovable property."

PG NO 864 We have noted hereinbefore the ratio and the basis of the decision of this Court in Jadavji Purshottam v. Dhami Navnitbhai Amaratlal (supra). Shri Mehta submitted that there was no clear finding as to when the tenants were inducted whether before or after the Rent Restriction Act and therefore, he pleaded that the matter should be referred to the larger Bench. In view of the facts found in this case which were similar to the facts mentioned in Jadavji Purshottam's case, (supra) there is no specific authority in the lease which stated that the lease would continue beyond the period of mortgage. There is no extended authority as contemplated in Jadavji Purshottam's case

found in this case. The submission was that the matter should be considered by a larger Bench in the light of the Jadavji Purshottam's case (supra). We are unable to accept the said submission. In this case the words in the mortgage deed, as we are taken through, did not clearly allow creation of tenancy beyond the period of mortgage. That, in any event, would not have been prudent management. hence, there is no finding that the mortgage deed permitted, either expressly or impliedly. creation of tenancy beyond the period. We think that the tenants were not entitled to protection after redemption of mortgage. Furthermore, in all these cases the authority of the mortgagees to lease out the property, expressed or implied, was circumscribed by a stipulation that the mortgagee should re-deliver the possession of the property when the mortgage was redeemed. In that context, we are of the opinion that the submissions on behalf of the tenants cannot be entertained.

As mentioned hereinbefore, Sh. B.K. Mehta, especially in the background of the facts in C.A. No.9993/83, has made certain submissions relying on the observations of this Court in Jadavji Purshottam's case (supra). That decision requires recapitulation of the basic principle. That decision reiterated that the tenant-appellant therein was not inducted into possession soon after the mortgage deed was executed and the mortgagee was put into possession of the property hut long thereafter. It is not necessary to detain us on the facts of this case. The basis of that decision was: whether the Saurashtra Act was already in force. The appellant therein was inducted into possession and his tenancy rights could not have become enlarged after the mortgagee granted him the lease by a subsequent legislation enacted for affording protection to tenants. In this case, relying on the said decision it may be reiterated that the tenancy right was not created by a mortgagee in possession, wherein the mortgagor had not concurred in the grant of a lease beyond the period of mortgage. The question in that decision was whether the lease granted to the tenant by the appellant had the approval or concurrence of the PG NO 865 mortgagor so as to entitle the tenant to claim tenancy right even against the mortgagor after redemption of the mortgage. In all these cases the major term in the mortgage deed was that the possession would be delivered on redemption. In none of these cases was there any term, at least none was adverted to, which stipulated any condition in the mortgage deed which entitled the mortgagees to create tenancy beyond the period of the mortgage. This factor along with the condition in the mortgage deed postulating the obligation to deliver possession at the expiry of the term of mortgage to the mortgagors, in our opinion, are the decisive factors showing that the tenants did not get their rights enlarged on the coming into force of the subsequent Rent Legislation. The very Preamble to the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 indicates that it was "An Act to amend and consolidate the law relating to the control of rents and repairs of certain premises, of rates of hotels and lodging houses and of evictions (and also to control the charges for licence of premises etc.)". It was thought expedient to amend and consolidate the law relating to the control of rents and repairs of certain premises. But that, in our opinion, has indeed never been construed as enlarging the rights of any group of tenants who were not the tenants of the mortgagors. Hence, the question of enlargement of right by tenancy legislation of persons who were in occupation but had no rights as tenants of the mortgagors, would not arise in the context of these cases. Incidentally, it may be referred that in appeal from S.L.P. No. 8219/82, this question does not arise.

In C.A. No. 1286/81, the tenancy after the period of mortgage was not bona fide. In C.A. No. 9993/83, it was submitted that the tenants were inducted after the mortgage on 28th April, 1943. The Bombay Rent Act was made applicable to the area of Kutch in September, 1951.

See Dalal's Rent Act 4th Edn. page 814 on that basis it was submitted that as there was no Act in the area of Kutch which is in pari materia with the Bombay Rent Act and therefore the rights of the tenants were enlarged by the subsequent Act. In view of the tact that the mortgage deed did not contemplate rights of the mortgagees to grant tenancy beyond the period of mortgage, and had imposed an obligation that on the expiry of the period of mortgage, mortgagors were entitled to the possession of the demised premises . In our opinion, these contentions cannot be entertained.

PG NO 866 Incidentially, it may also be mentioned that in C.A. No. 1286/81, the suit property was mortgaged in 1948 for a period of 5 years. The tenant was inducted by the mortgagee in 1955. The period of mortgage had expired in 1953. Apparently, the mortgagee had inducted the tenant after expiry of the period of mortgage, and such a conduct was grossly imprudent management, and was not bona fide. Such tenant cannot, in any event, claim any protection.

Having considered the facts and the circumstances and the ratio of the decision in Jadavji Purshottam's case (supra), we are clearly of the opinion that the tenancy rights did not come to be enlarged by the Tenancy Legislation after the tenant was put into possession by the mortgagee and the tenancy created ia favour of the tenants by the mortgagor did not have the concurrence of the mortgagor so as to claim tenancy rights even after redemption of the mortgage. See the observations in para 12 of the Jadavji Purshottam's case (supra).

In the premises, the appeals must fail and are dismissed. Civil Miscellaneous Petition in C.A. No. 397/80 must also fail and is dismissed. The parties will pay and bear their own costs.

A.P.J. Appeals dismissed.