Supreme Court of India
Chhaganlal Keshavlal Mehta vs Patel Narandas Haribhai on 11 December, 1981
Equivalent citations: 1982 AIR 121, 1982 SCR (2) 166
Author: R Misra
Bench: Misra, R.B. (J)

PETITIONER:
CHHAGANLAL KESHAVLAL MEHTA

Vs.

RESPONDENT:
PATEL NARANDAS HARIBHAI

DATE OF JUDGMENT11/12/1981

BENCH:
MISRA, R.B. (J)
BENCH:
MISRA, R.B. (J)
ERADI, V. BALAKRISHNA (J)

CITATION:
1982 AIR 121 1982 SCR (2) 166
1982 SCC (1) 223 1981 SCALE (3)1861

ACT:
Suit for redemption of mortgage-order XXXIV Rule I Civil Procedure Code-Right of a co-mortgagor to redeem his own share, section 60 of the Transfer of Property Act scope of-Abatement by death of parties-order XXlll Rule 2 Civil Procedure Code.
Estoppel by canduct-Section 115 of the Evidence Act-Difference between admission and estoppel explained.

HEADNOTE:
Motibhai created two mortgages in respect of the same property in the years 1871 and 1893 in favour of one Nanaji who died somewhere between 1 890 and 1912 leaving behind his two sons Hari and Purushottam as his heirs and legal representatives. They both sold the entire mortgagee rights and interest to one Ganpatram on 4th July, 1912, who in his turn sold the mortgagee rights in a part of the mortgaged property, namely, common latrine to one Vamanrao. Ganpatram died and his son Chhotalal sold away his rights as a mortgagee in possession in respect of the rest of the properties which still remained with him, to Chhaganlal Keshavlal Mehta, the appellant-defendant No. 1.
Mortgagor Motibhai also died leaving behind his son Chimanrai. Chimanrai died leaving behind his widow Chhotiba

and a daughter Taralaxmibai. On September 12, 1950 Taralaxmibai sold her right, title and interest in the suit property to one Shantilal who later on conveyed his right, title and interest in the property to the respondent-plaintiff Narandas Haribhai Patel. During the life time of Chimanrai, Ganpatram, the mortgagee had sent a notice, Exhibit 77 dated 15th April, 1913 informing him that the mortgaged property was in a dilapidated condition and required repairs. He further called upon Chimanrai to pay the amount already spent by him towards the repairs to get further repairs done or in the alternative pay up the mortgage amount and redeem the property. Chimanrai, denied his responsibility. After the death of Chimanrai Chhotalal gave a similar notices, Exhibits 68 and 78, dated 21st of September, 1933 and 6th October 1933 to Taralaxmibai daughter of Chimanrai and to Chhotiba, the widow to the same effect. Both Chhotiba and Taralaxmibai denied their liabilities. Narandas after the purchase of the mortgagor's rights from Shantilal filed a suit for redemption impleading both the assignees of the mortgagee's rights, namely, Chhaganlal Keshavlal Mehta, the appellant as defendant No. I and Vamanrao as defendant No. 2. The suit was dismissed by the trial court on the ground that the plaintiff had no right to redeem In this view of the matter it was not necessary to decide other issues but the trial court recorded findings on other issues also including the issue of estoppel. The appeal and the cross-objection filed by the parties were

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allowed by the Assistant Judge holding that plaintiff had purchased the equity of redemption and so he was entitled to redeem and that the suit was not barred by estoppel. He however remanded the case for deciding the remaining issues. On remand the Joint Civil Judge held that Chimanrai, his widow Chhotiba and his daughter Taralaxmibai relinquished their right, title and interest in the suit property and, therefore, Taralaxmibai had no subsisting interest or title to transfer to the plaintiff or his predecessor in-interest. He further held that the suit was barred by time and estoppel, and that defendant No. 1 had spent a substantial amount on repairs. On these findings the suit was dismissed once again. During the pendency of the appeal by the respondent, Vamanrao died in August, 1958. His heirs were, however, not brought on the record. The appeal was allowed as against defendant No. I but dismissed as abated against defendant No. 2 and it was held that the respondent was entitled to redeem the mortgaged property on payment of the mortgaged money as well as the expenditure incurred on repairs, and that the suit was neither barred by time nor by estoppel. On further appeal to the High Court a learned single Judge reversed the Judgment and decree of the lower appellate Court and dismissed the suit. The respondent-plaintiff took up the matter in the letters patent appeal

and the appellant-defendant No. 1 also filed a cross-objection. A Division Bench of the High Court allowed the appeal and decreed the suit reversing the finding of the learned Single Judge that the respondent-plaintiff had no right to sue. The Division Bench, however, granted a certificate of fitness of appeal to the Supreme Court.

Dismissing the appeal, the Court

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HELD: 1. Under section 60 of the Transfer of Property Act, a co-mortgagor cannot be permitted to redeem his own share of the mortgaged property only on payment of proportionate part of the amount remaining due. In other words, the integrity of the mortgage cannot be broken. [173 G]

2. It is, however, a well recognised principle that even if all the mortgagees are not before the court in a suit filed by the mortgagor for redemption of the property, but the mortgagor is prepared to pay the entire amount due at the foot of the mortgage to such mortgagees as are before the court and gives up his right under the mortgage as against those mortgagees who are not before the court, The court can pass a decree for redemption directing that the entire mortgage amount should be paid to the mortgagees who are actually before the court. [174 D-F]

Motilal Yadav v. Samal Bechar (1930) 54 Bom. 625, approved.

3:1. If one of the defendants in a suit dies and his heirs are not brought on record, the suit certainly would abate as against that party. The suit, however, G could not abate as against the other surviving defendants. A question may arise whether the suit is maintainable against the surviving defendants. In the instant case, the Suit abated as against defendant No. 2 in respect of the common latrine. But the suit may proceed against the surviving appellant-defendant No. 1 if the respondent-plaintiff is prepared to pay the entire mortgage consideration. [174 F-G]

3:2. A person may be a necessary party in a suit but he may not be a necessary party in the appeal. [175 A]

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4:1. To bring the case within the scope of estoppel as defined in section 115 of the Evidence Act: (i) there must be a representation by a person or his authorised agent to another in any form a declaration, act or omission; (ii) the representation must have been of the existence of a fact and not of promises de futuro or intention which might or might not be enforceable in contract: (iii) the representation must have been meant to be relied upon; (iv) there must have been belief on the part of the other party in its truth; (v) there must have been action on the faith of that declaration, act or omission, that is lo say, the declaration, act or omission must have actually caused another to act on the faith of it, and to alter his former position to his prejudice or detriment; (vi) the mis-

representation or conduct or omission must have been the proximate cause of leading the other party to act to his prejudice; (vii) the person claiming the benefit of an estoppel must show that he was not aware of the true state of things. If he was aware of the real state of affair or had means of knowledge, there can be no estoppel; (viii) only the person to whom representation was made or for whom it was designed can avail himself of it. A person is entitled to plead estoppel in his own individual character and not as a representative of his assignee. [176 C-F]

4:2. The difference between an admission and estoppel is a marked one. Admissions being declarations against an interest are good evidence but they are not conclusive and a party is always at liberty to withdraw admissions by proving that they are either mistaken or untrue. But estoppel creates an absolute bar. Estoppel deals with questions of facts and not of rights. A man is not estopped from asserting a right which he had said he would not assert It is also a well-known principle that there can be no estoppel against a statute. [175G, H- 176 B]

4:3. In the instant case (i) the ingredients of section 115 of the Evidence Act have not been fulfilled. No representation was made to defendant No. 1, therefore, estoppel cannot be pleaded; (ii) the representation was not regarding a fact but regarding a right of which defendant No. I or his predecessor in interest had full knowledge or could have known if he had cared to know lt is difficult to say that defendant No. ] has moved his position on account of the representation made by The mortgagor or his heirs or assignees, [176 G-H]

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 1867 of 1970.

From the judgment and order dated the 18th February, 197() of the Gujarat High Court in Letters Patent Appeal No. 6/60.

S. S. Sheth, Ravinder Narain, J. B. Dadachanji, O.C. Mathur and Mrs. Anjali K. Verma for the Appellant.

Gautham Philip, P. H. Parekh and Mrs. Vineeta Sen Gupta for the Respondent.

The Judgment of the Court was delivered by MISRA, J. The present appeal by certificate is directed against the judgment of the High Court of Gujarat at Ahmedabad in Letters Patent Appeal No. 6 of 1966 dated the 18th of February, 1970 decreeing the suit for redemption.

The property in dispute, situated in Baroda City, originally belonged to Motibhai Bapubhai Shibandi Baxi (for short Motibhai). He created a mortgage with possession of the disputed property in favour of one Nanaji Balwant Pilkhanewala (for short Nanaji) in 1871 for a sum of Rs.

800. In 1890 a second mortgage was created in favour of the same mortgage and the amount secured by this second mortgage was Rs. 375. Somewhere between 1890 and 1912 the original mortgagee Nanaji died leaving behind his two sons Hari and Purshottam as his heirs and legal representatives. The two sons of Nanaji sold the entire mortgagee rights and interest to one Ganpatram Mugutram Vyas (for short Ganpatram) on 4th of July, 1912. Ganpatram in his turn sold the mortgagee rights in a part of the mortgaged property, viz., common latrine, to one Vamanrao Laxmanrao Nirkhe (for short Vamanrao).

Ganpatram died and his son Chhotelal Ganpatram (for short Chhotelal) sold away his rights as a mortgagee in possession in respect of the rest of the properties which still remained with him, to Chhaganlal Keshavlal Mehta (for short Chhaganlal Mehta.) Mortgagor Motibhai. also died leaving behind his son Chimanrai Motibhai Baxi (for short Chimanrai). Chimanrai died leaving behind his widow Chhotiba and a daughter Taralaxmibai. On September 12, 1950 Taralaxmi sold her right, title and interest in the suit property to one Shantilal Purshottamdas Dalia (for short Shantilal). Later on Shantilal conveyed his right, title and interest in the property to the plaintiff, Narandas Haribhai Patel (for short Narandas).

It appears that during the life time of Chimanrai Ganpatram the mortgagee had sent a notice, Ext. 77, dated 15th of April, 1913 to Chimanrai informing him that the mortgaged property was in a dilapidated condition and required repairs. He had already spent some amount towards repairs but still substantial repairs were needed and the same should be got done by him or he should pay the mortgage amount and redeem the property. On receipt of this letter Chimanrai made the following endorsement:

> "During the lifetime of my father, I had become separated from him without taking any kind of the moveable or immovable property belonging to him and even after his death, I have not taken any kind of his properties nor have I kept my right over the said properties and so I am not in any way responsible for your any transaction whatsoever in connection with his properties. Be it known to you. And while giving you a definite assurance to that effect I have made attestation on the aforesaid document in respect of purchase of the mortgagee's rights, which may also be known to you."

Long after the death of Chimanrai, Chhotelal, son of Ganpatram, gave a similar notice, Ext. 28, dated 6th of October, 1933 to Chhotiba, the widow of Chimanrai calling upon her to Redeem the mortgage in question. On this notice similar endorsement on behalf of Chhotiba was made on 10th of October, 1933 by Lomeshprasad Hariprasad Desai (for short Lomeshprasad). her daughter's son, as had been made by Chimanrai earlier on the notice given by Ganpatram. Yet another notice, Ext. 78 dated 21st of September, 1933 was sent by Chhotalal to Taralaxmibai, daughter of Chimanrai to the same effect. In her reply, Ext. 73, dated 3rd of October, 1933 to the notice, Taralaxmibai stated

inter alia that her father Chimanrai had foregone all rights whatsoever in the property of his father, Motibhai, during his lifetime and hence she had no concern with the property of Motibhai. It was further stated that her own mother Chhotiba was alive (in October 1933) and, Therefore, she had no concern whatsoever with the property of Motibhai or the liabilities arising out of the dealings of Motibhai.

Narandas after the purchase of the mortgagor's rights from Shantilal filed a suit for redemption impleading both the assignees For the mortgagee's rights, Chhaganlal Keshavlal Mehta, as the 1st defendant, and Vamanrao Laxmanrao Nirkhe, as the 2nd defendant.

The claim was resisted by. the 1st defendant on grounds that the plaintiff had no right to redeem inasmuch as his predecessor in interest, Chimanrai, his widow Chhotiba and his daughter Taralaxmibai on their own admission had no subsisting right, title and interest in the mortgaged property. The plaintiff who is only a transferee from Taralaxmibai could not rank higher, that Ganpatram, the predecessor in interest of defendant No. 1 was not in possession of the property as a mortgagee but as an absolute owner thereof. The defendant No. 1, who claims through Ganpatram's son Chhotalal, was also an absolute owner and continued to remain in possession from 1933-34 as such. As an abso-

lute owner he carried out repairs to the mortgaged property. He also obtained permission from the municipality and built the house afresh after incurring heavy expenditure and in doing so he had spent about Rs. 3374-2-0. He also denied that Shantilal, purchaser of the equity of redemption was the plaintiff's benamidar. Indeed, the plaintiff had falsely created the evidence of benamidar to bring the present suit, and the suit was barred by limitation and estoppel. In the alternative he pleaded that he should be paid the sum of Rs. 5099-2-0 if the plaintiff's suit for redemption was to be decreed.

The trial court came to the conclusion that the plaintiff had no right to redeem the mortgaged property as he had failed to prove that he had purchased the property benami in the name of Shantilal and that afterwards Shantilal had passed deed of conveyance or mutation in his favour. In view of this finding it was not necessary for the trial court to decide other issues but all the same the trial court recorded findings on the remaining issues also in order to complete the judgment. It found that Chimanrai, Chhotiba or Taralaxmibai never relinquished their right, title and interest in the suit property, that the suit was within limitation, and that the suit was not barred by estoppel. As regards the amount spent on repairs the court came to the conclusion that the defendant No. I had spent Rs. 3374-2-O and, therefore, if the plaintiff was to be allowed to redeem the property he would have to pay that amount in addition to the mortgage consideration. The suit was dismissed by the trial court on the ground that the plaintiff had no right to redeem.

Feeling aggrieved the plaintiff went up in appeal, and the defendant No. 1 filed a cross-objection against the finding that went against him. The appeal and the cross- objection were allowed by the Assistant Judge by his judgment dated 31st of March, 1956 on the finding that the plaintiff had purchased the equity of redemption benami in the name of Shantilal and that Shantilal had executed a deed of conveyance, Ext. 66, in favour of the plaintiff and, therefore, he was entitled to redeem the

property. He further found that the endorsements made by Chimanrai, his widow Chhotiba and his daughter Taralaxmibai did not amount to relinquishment of their right, title and interest in the property. He set aside the decree of the trial court and remanded the case for deciding the remaining points after allowing the parties to lead fresh evidence on those issues. The defendant No. I challenged the remand order by filing an appeal in the High Court. His complaint was against the direction given by the appellate court while remanding the case. The High Court allowed the appeal in part and modified the direction of the lower appellate court asking the trial court to decide other issues afresh after allowing further evidence, except issues Nos. 1 and 4.

Consequent upon the order of remand the Joint Civil Judge, Jr. Division, decided other issues against the plaintiff. He held that Chimanrai, his widow Chhotiba and his daughter Taralaxmibai had relinquished their right, title and interest in the suit property and, therefore. Taralaxmibai had no subsisting interest or title to transfer to the plaintiff or his predecessor in interest. He further held that the suit was barred by time and estoppel, and that defendant No. I had spent a substantial amount on repairs. On these findings he again dismissed the suit by his judgment dated 21st of August, 1958.

The plaintiff again took up the matter in appeal, It appears that during the pendency of the appeal Vamanrao, defendant No. 2 died in August, 1958. His heirs were, however, not brought on the record. A question arose whether the appeal abated as a whole or only as against defendant No. 2. The District Judge by his separate order dated 25th of September, 1959 held that the appeal abated only so far as defendant No. 2 was concerned but it could proceed as against the surviving defendant No. 1.

The appeal was eventually allowed by the Assistant Judge, Baroda against defendant No. 2 by his judgment dated 12th of November, 1959 holding that the appellant was entitled to redeem the mortgaged property on payment of Rs. 4724-2.0 on account of the mortgage money as well as the expenditure incurred by defendant No. 1 on repairs and that the suit was neither barred by time nor by estoppel. The appeal was, however, dismissed as against defendant No. 2.

The defendant No. 1 challenged the judgment and decree of the Assistant Judge before the High Court and only two contentions were raised before it: (1) that the mortgage cannot be split up and must be treated as one and indivisible security and since the right to redeem against one of the two co-mortgagees had become extinguished because of abatement of the suit against Vamanrao and his heirs, the suit against defendant No. 1, the other co-mort-

gagee, must be dismissed; and (2) that the suit was barred by estoppel inasmuch as Chimanrai, the heir of the original mortgagor and after him his widow Chhotiba and daughter Taralaxmibai having relinquished their right in the disputed property which she could have conveyed to Shantilal by sale. Consequently, Shantilal in his turn could not pass a better title to the plaintiff. In the result the plaintiff had no right to file the suit for redemption. A learned Single Judge who heard the appeal repelled the first contention but accepted the second one. Accordingly, he allowed the appeal and dismissed the plaintiff's suit.

The plaintiff undaunted took up the matter in a Letters Patent Appeal and the defendant also filed a cross- objection. A Division Bench of the High Court allowed the appeal and decreed the suit reversing the finding of the learned Single Judge that the plaintiff had no right to sue. The Division Bench, however, granted a certificate of fitness for appeal to this Court. The learned counsel for the appellant was raised the same two contentions before us. We take up the first point first.

The first contention is based on the principle of indivisibility of the mortgage. Section 60 of the Transfer of Property Act deals with the rights and liabilities of a mortgagor. It confers a right of redemption. There is, however, a rider to the right of redemption in the section itself, which provides :

> "Nothing in this section shall entitle a person interested in a share only of the mortgaged property to redeem his own share only, on payment of a proportionate part of the amount remaining due on the mortgage, except only where a mortgagee or, if there are more mortgagees than one, all such mortgagees, has or have acquired, in whole or in part, the share of a mortgagor."

A perusal of this provision indicates that a co-mortgagor cannot be permitted to redeem his own share of the mortgaged property only on payment of proportionate part of the amount remaining due. In other words the integrity of the mortgage cannot be broken. Order 34, rule I of the Code of Civil Procedure deals with the parties to suits for foreclosure, sale and redemption. It provides:

> "Subject to the provisions of this Code, all persons having an interest either in the mortgage- security or in the right of redemption shall be joined as parties to any suit relating to the mortgage."

It has already been pointed out that defendant No. 2 was the purchaser of mortgagee rights in respect of common latrine while defendant No. I is the purchaser of the mortgagee rights in respect of the remaining mortgaged property, viz., the houses. When the plaintiff filed the suit he impleaded both the mortgagees as defendants Nos. 1 and 2. Before the Assistant Judge a statement was made on behalf of the original plaintiff that he was prepared to pay the entire mortgage amount for redemption of the mortgaged property to the 1st defendant. A similar statement was made by Mr. Oza, counsel for the plaintiff in the High Court who further stated that in no event hereafter would the plaintiff seek any relief against the property in possession of defendant No. 2, viz., the right to the common latrine in which mortgagee rights had been transferred to defendant No. 2 by Ganpatram. Besides, the severance of the two properties by Ganpatram was recognised by the mortgagor and hence the severance was with the implied consent of the mortgagor. It is a well recognised principle that even if all the mortgagees are not before the court in a suit filed by the mortgagor for redemption of the property, but the mortgagor is prepared to pay the entire amount due at the foot of the mortgage to such mortgagees as are before the court and gives up his right under the mortgage as against those mortgagees who are not before the court, the court can pass a decree for redemption directing that the entire mortgage amount should be paid to the mortgagees who are actually before the court. This principle was recognised in a Full Bench decision in Motilal Yadav v Samal Bechar.(1) If one of the defendants in a suit dies and his heirs are not brought on

record the suit certainly would abate as against that party. The suit, however, could not abate as against the other surviving defendants. A question may arise whether the suit is maintainable against the surviving defendants. In the instant case the suit abated as against defendant No. 2 in respect of the common latrine. But there is no difficulty in the suit proceeding against the surviving defendant No. 1 if the plaintiff is prepared to pay the entire mortgage consideration.

It may, however, be pointed out that defendant No. 2 never contested the suit. He was impleaded as a party it was incumbent on the plaintiff to have impleaded all the mortgagees as a party. But if the defendant did not contest the suit at any stage, will he be a necessary party in an appeal ? A person may be A a necessary party in a suit but he 'may not be a necessary party in the appeal. The Division Bench of the High Court was fully justified in holding that the suit against the surviving defendant No. I was maintainable despite the abatement of the suit against the 2nd defendant. We fully endorse the view taken by the Division Bench of the High Court.

This takes us to the second point. This contention is based on the aforesaid various endorsements made by Chimanrai. his widow Chhotiba and his daughter Taralaxmibai on the notices sent by the mortgagee. The question is whether these endorsements amount to relinquishment of their rights and interest so as to estop them from transferring the property in suit ? The notice by Ganpatram to Chimanrai and the notices by his son Chhotalal to Chhotiba and Taralaxmibai and their respective endorsements thereon have been referred to in the earlier part of the judgment. Whether these endorsements amount to relinquishment of their rights and title and if so whether the same amounts to estoppel within the meaning of section 115 of the Evidence Act ? In our opinion the endorsements have to be read not in isolation but with reference to the notices sent. So read, the endorsement only indicate that the heirs of the mortgagor were not prepared to bear the expenses on repairs of the mortgaged property. The property cannot remain in vacuum even for a single moment. It must vest in somebody. Accordingly, after the death of Motibhai his property vested in his son who was the sole heir. The endorsement of Chimanrai, his widow Chhotiba and daughter Taralaxmibai on the notices at the most would amount to an admission. The contention raised on behalf of the defendant-appellant is that he would not have purchased the mortgagee rights from Ganpatram if such a statement had not been made by Chimanrai, his widow Chhotiba and his daughter Taralaxmibai and, therefore, they would be estopped from taking up a different stand from the one taken by them earlier. In substance, the question is whether the endorsements would amount to estoppel.

The difference between admission and estoppel is a marked one. Admissions being declarations against an interest are good evidence but they are not conclusive and a party is always at liberty to withdraw admissions by proving that they are either mistaken or untrue. But estoppel creates an absolute bar. In this state of the legal position, if the endorsement made by Chimanrai or by his widow, Chhotiba or his daughter Taralaxmibai amounts to an estoppel they or their transferees would be prevented from claiming the property.

It may be pointed out that estoppel deals with questions of facts and not of rights. A man is not estopped from asserting a right which he had said that he will not assert. It is also a well-known principle that there can be no estoppel against a statute. After the death of Motibhai his son

Chimanrai succeeded in law.

To bring the case within the scope of estoppel as defined in section ] I 5 of the Evidence Act: t I ) there must be a representation by a person or his authorised agent to another in any form a declaration, act or omission; (2) the representation must have been of the existence of a fact and not of promises de futuro or intention which might or might not be enforceable in contract; (3) the representation must have been meant to be relied upon; (4) there must have been belief on the part of the other party in its truth; (5) there must have been action on the faith of that declaration, act or omission, that is to say, the declaration, act or omission must have actually caused another to act on the faith of it, and to alter his former position to his prejudice or detriment; (6) the misrepresentation or conduct or omission must have been the proximate cause of leading the other party to act to his prejudice; (7) the person claiming the benefit of an estoppel must show that he was not aware of the true state of things. If he was aware of the real state of affairs or had means of knowledge, there can be no estoppel; (8) only the person to whom representation was made or for whom it was designed can avail himself of it. A person is entitled to plead estoppel in his own individual character and not as a representative of his assignee.

None of these conditions have been satisfied in the instant case, for example, no representation was made to defendant No. 1. Therefore, he cannot plead estoppel. Secondly, the representation was not regarding a fact but regarding a right of which defendant No. I or his predecessor in interest had full knowledge or could have known if he had cared to know. It is difficult to say that defendant No. I has moved his position on account of the representation made by the mortgagor or his heirs or assignees. On the facts and circumstances of this case it is not possible to hold that ingredients of section 115 of the Evidence Act have been fulfilled. The view taken by the Division Bench of the High Court is fully warranted by law.

For the foregoing discussion we find no force in this appeal. It is accordingly dismissed with costs. S.R. Appeal dismissed.