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SHRI SHIVDEV SINGH AND ANR.

v.

SH. SUCHA SINGH AND ANR.

MARCH 31, 2000

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[S. SAGHIR AHMAD AND R.P. SETHI, JJ.]

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*Transfer of Property Act 1882—Section 60—Right of Redemption—Provision regarding—Held, at any time after the money has become due, the mortgagor has a right, on payment or tender of the mortgage-money, to require the mortgagee to deliver the mortgage deed and all documents relating to the mortgaged property and where the mortgagee is in possession of the mortgaged property, to deliver possession thereof to the mortgagor—Right of redemption being a statutory and legal right, cannot be extinguished by any agreement made at the time of mortgage as part of the mortgage transaction—Such right being an incident of a subsisting mortgage, subsists so long as mortgage subsists—Clog on the equity of redemption—Constitution of—Held, whether in a particular case there is any clog on the equity of redemption, has to be decided in view of the background of a particular case—In the present case, the mortgage deed being for a period of 99 years constitutes a clog on the equity of redemption having regard to the financial position under which the mortgagor was placed at the time of execution of the mortgage-deed and the advantageous position of the mortgagee qua the mortgagor—Moreover, mortgagees having already enjoyed the usufructs of the mortgaged land for over 26 years at the time of filing of the suit.*

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The disputed property was owned by P who had mortgaged the same in favour of B for a sum of Rs. 7000. B having died, the appellants stepped into her shoes qua the disputed and became mortgagees in possession of the said land. P sold a part of the mortgaged property to the respondent vide a registered sale deed for a valid consideration by which the mortgage money of Rs. 7000 was kept with the respondent as security to be paid to the appellants. Despite the respondent having purchased only a part of the mortgaged land, he offered the whole of the mortgage money to the appellants realising that partial redemption was not permissible. The appellants having refused to deliver possession, the respondent filed a suit for possession by way of redemption against the appellant in the Court of Additional Senior Sub-Judge. The suit was decreed with a direc-

tion for delivery of possession by way of redemption on paying/depositing the mortgage money of Rs. 7000 minus the cost of the decree. Both the first and the second appeals preferred by the appellants were dismissed. Hence this appeal.

On behalf of the appellants, it was contended that the clause prescribing the period of mortgage for a period of 99 years did not constitute a clog on the equity of redemption and that the suit filed before the expiry of the stipulated time was premature in terms of Section 60 of the Transfer of Property Act.

Dismissing the appeal, this Court

**HELD :** 1.1. The right of redemption is an incident of a subsisting mortgage and it subsists so long as the mortgage subsists. Whether in a particular case there is any clog on the equity of redemption, has to be decided in view of the background of a particular case. In the present case, the mortgage deed being for a period of 99 years is a clog on the equity of redemption having regard to the facts and circumstances of the case and the financial position under which the mortgagor was placed at the time of execution of the mortgage deed. The appellants were in an advantageous position qua the mortgagor. They have been deriving the usufructs of the mortgaged land for a period of over 26 years at the time of filing of the suit on payment of meagre sum of Rs. 7000 only to the mortgagor. [887-B; E-F]

1.2. Section 60 of the Transfer of Property Act provides that at any time after the money has become due, mortgagor has a right, on payment or tender, at a proper time and place of the mortgagor-money to require the mortgagee to deliver the mortgage-deed and all documents relating to the mortgaged property and where the mortgagee is in possession of the mortgaged property, to deliver possession thereof to the mortgagor. Such a right of the mortgagor is called, in English law, the equity of redemption. The mortgagor being an owner who has parted with some rights of ownership has a right to get back the mortgage deed or mortgaged property, in exercise of his right of ownership. The right of redemption recognised under the Transfer of Property Act is thus a statutory and legal right which cannot be extinguished by any agreement made at the time of mortgage as part of the mortgage transaction. [882-G-H; 883-A-B]

A *Jayasingh Dnyanu Mhoprekar & Anr. v. Krishna Babaji Patil & Anr.*, AIR (1985) SC 1646; *Ganga Dhar v. Shankar Lal*, AIR (1958) 770; *Pomal Kanji Govindji & Ors. v. Vrajlal Karsandas Purohit & Ors.*, AIR (1989) SC 436, relied on.

B *Vernon v. Bethell*, (1762) 2 Eden 110 : 28 ER 838; *G & C Kreglinger v. New Patagonia Meat and Cold Storage Company Ltd.*, (1914) AC 25, referred to.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2333 of 2000.

C From the Judgment and Order dated 28.7.99 of the Punjab and Haryana High Court in R.S.A. No. 2897 of 1998.

S.P. Singh and Prem Sunder Jha for the Appellants.

D Manoj Swarup for the Respondents.

The Judgment of the Court was delivered by

SETHI, J. Leave granted.

E Claiming to be the owner of the disputed property being land measuring 23 kanals 2 marlas situate in Village Sansra, Tehsil Ajnala, Punjab, the respondent-plaintiff filed a suit for possession by way of redemption against the appellants in the Court of Additional Senior Sub- Judge, Ajnala. The suit was decreed by the Trial Court with a direction for delivery of possession by way of redemption on paying/ depositing the mortgage money of Rs.7,000/- minus the cost of the decree. The appeal filed by the appellants was dismissed by the First Appellate Court on 25th July, 1998 and second appeal was dismissed vide the judgment impugned in this appeal.

F It is contended on behalf of the appellants that the clause prescribing the period of mortgage did not constitute a clog on the equity of redemption and that the suit filed before the expiry of the stipulated time was premature in terms of Section 60 of the Transfer of Property Act. In support of their contentions the appellants have relied upon the judgment of this Court in *Ganga Dhar v. Shankar Lal*, AIR (1958) SC 770 = [1959] SCR 509 and distinguished the judgment relied upon by the High Court in the case of *Pomal Kanji Govindji & Ors. v. Vrajlal Karsandas Purohit & Ors.*, AIR

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(1989) SC 436.

In order to appreciate the rival contentions, it is necessary to take note of the facts of the case which have given rise to the filing of the present appeal. The disputed property was owned by one Prakash Singh who had mortgaged the same in favour of Smt. Basant Kaur for a sum of Rs.7,000 vide mortgage deed dated 19.3.1968. The said Smt. Basant Kaur died whereafter the appellants herein stepped into her shoes qua the suit property and, according to the plaintiffs became mortgagees in possession of the said land. The said Shri Prakash Singh, the original owner, sold the land measuring 19 kanals 2 marlas out of the mortgaged property in favour of the respondent Sucha Singh vide registered sale deed dated 25th March, 1987 for a valid consideration by which the mortgage money of Rs.7,000 was kept with the respondent-plaintiff as security (Amanat) to be paid to the appellants. It was further pleaded by the plaintiff that at the time of the original mortgage deed dated 19.3.1968 the said Shri Prakash Singh was financially tight and allegedly taking undue advantage of his poor financial condition and helplessness the appellants got incorporated a term in the mortgage deed, to the effect that the mortgage was for a period of 99 years which constituted a clog on the equity of redemption and that the appellants had been enjoying the usufructs of the mortgage for more than 20 years before the date of the filing of the suit. Despite the fact that the respondent-plaintiff had purchased only 19 kanals 2 marlas out of the mortgaged land, he offered the whole of the mortgage money to the appellants-defendant realising that partial redemption was not permissible. The appellants were stated to have refused to deliver possession which necessitated the filing of the suit.

Prakash Singh who was impleaded as defendant No.3 was proceeded *ex-parte*. The appellants, though admitted that the disputed land under mortgage was in their possession on the basis of a mortgage for a sum of Rs.7,000/- since the year 1968, yet contended that the plaintiffs had no right to get the suit land redeemed before the expiry of mortgage period of 99 years. The suit was stated to be premature and liable to be dismissed.

On the basis of the pleadings of the parties, the Trial Court framed the following issues:

"1. Whether the disputed land is liable to be redeemed in favour of the plaintiff as claimed through 'his Suit? OPP.

- A 2. Whether the period of 99 years of mortgage is a clog on the equity of redemption? OPP.
3. Whether the plaintiff has no locus standi to file this suit? OPD
4. Relief?"

B The Trial Court while deciding Issue Nos.1 and 2 held:

C "The clause in the mortgage deed providing for the mortgage of the land for a period of 99 years constitutes a clog on the equity of redemption and as such is illegal and void and the same cannot be allowed to stand in the way of the plaintiff to get the suit land redeemed or acquire its possession. The statutory right of redemption cannot be fettered by any condition which impedes or prevents the redemption clause. This view stands fully fortified from the relevant law laid down through an authority, 1992(1) All India Land Laws Reporter (P&H) 524, *Ajit Singh v. Kakhbir Singh and Others*. As such the argument advanced on behalf of the defendants on this account must fail. The case of the plaintiff could not be resisted on any other cogent ground."

D The plaintiff-respondent was held to have proved that he was entitled to get whole of the disputed land redeemed by payment of the mortgage money of Rs.7,000/- to the appellants-defendants. In view of positive findings on Issue Nos.1 and 2 in favour of the plaintiffs, issue No.3 was decided against the defendants and suit decreed as noticed earlier. The appellate court also decided on facts that the plaintiff after the purchase of the land, the subject matter of the suit, had become mortgagor and was entitled to redeem the same prior to the period of 99 years fixed in the mortgage deed. The clog or fetter of redemption imposed in the mortgage deed was held to be void which did not prevent the plaintiffs to seek redemption of the mortgaged property prior to the aforesaid period.

G Section 60 of the Transfer of Property Act provides that at any time after the money has become due, the mortgagor has a right, on payment or tender, at a proper time and place of the mortgagor-money to require the mortgagee to deliver the mortgage-deed and all documents relating to the mortgaged property and where the mortgagee is in possession of the mortgaged property, to deliver possession thereof to the mortgagor. Such a right

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of the mortgagor is called, in English Law, the equity of redemption. The mortgagor being an owner who has parted with some rights of ownership has a right to get back the mortgage deed or mortgaged property, in exercise of his right of ownership. The right of redemption recognised under the Transfer of Property Act is thus a statutory and legal right which cannot be extinguished by any agreement made at the time of mortgage as part of the mortgage transaction.

This Court in *Jayasingh Dnyanu Mhoprekar & Anr. v. Krishna Babaji Patil & Anr.* AIR (1985) SC 1646 held:

“It is well settled that the right of redemption under a mortgage deed can come to an end only in a manner known to law. Such extinguishment of the right can take place by a contract between the parties, by a merger or by a statutory provision which debars the mortgagor from redeeming the mortgage. A mortgagee who has entered into possession of the mortgaged property under a mortgage will have to give up possession of the property when a suit for redemption is filed unless he is able to show that the right of redemption has come to an end or that the suit is liable to be dismissed on some other valid ground. This flows from the legal principle which is applicable to all mortgages, namely “Once a mortgage, always a mortgage.”

Any provision incorporated in the mortgage deed to prevent or hamper the redemption would thus be void. A mortgage cannot be made irredeemable and the right of redemption not an illusory. This Court in *Ganga Dhar v. Shankar Lal*, AIR (1958) SC 770 held:

“The rule against clogs on the equity of redemption is that, a mortgage shall always be redeemable and a mortgagor’s right to redeem shall neither be taken away nor be limited by any contract between the parties. The principle behind the rule was expressed by Lindley M.R. in *Santley v. Wilde*, (1899) 2 Ch. 474(B) in these words:

“The principle is this: a mortgage is a conveyance of land or an assignment of chattles as a security for the payment of a debt or the discharge of some other obligation for which it is given. This is the idea of a mortgage; and the security is redeemable on the payment or discharge of such debt or obligation, any provision to the contrary notwithstanding. That, in my opinion is the law. Any provision inserted to prevent redemption on payment or perform-

A                   ance 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.”

B                   The right of redemption, therefore, cannot be taken away. The court will ignore any contract the effect of which is to deprive the mortgagor of his right to redeem the mortgage. One thing, therefore, is clear, namely, that the term in the mortgage contract, that on the failure of the mortgagor to redeem the mortgage within the specified period of six months the mortgagor will have no claim over the mortgaged property, and the mortgage deed will be deemed to be a deed of sale in favour of the mortgagee, cannot be sustained. It plainly takes away altogether, the mortgagor’s right to redeem the mortgage after the specified period. This is not permissible, for “once a mortgage always a mortgage” and therefore always redeemable. The same result also follows from S.60 of the Transfer of Property Act. So it was said in *Mohammad Sher Khan v. Seth Swami Dayal*, 49 Ind App. 60 at p.65: AIR (1922) PC 17 at p.19 (C).

E                   An anomalous mortgage enable a mortgagee after a lapse of time and in the absence of redemption to enter and take the rents in satisfaction of the interest would be perfectly valid if it did not also hinder an existing right to redeem. But it is this that the present mortgage undoubtedly purports to effect. It is expressly stated to be for five years, and after that period the principal money became payable. This, under S.60 of the Transfer of Property Act, is the event on which the mortgagor had a right on payment of the mortgage money to redeem.

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

G                   It was observed that the rule against clog on equity of redemption empowered the courts to relieve a party from his bargain. If a person has agreed to forfeit wholly his right to redeem in certain circumstances, that agreement will be avoided. After referring to judgments in *Vernon v. Bethell*, (1762) 2 Eden 110 at 113; 28 ER 838 at p. 839 (D), *G & C. Kreglinger v. New Patagonia Meat and Cold Storage Company Ltd.*, (1914) AC 25 at pp. 35 &

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36) this Court held:

“The reason then justifying the court’s power to relieve a mortgagor from the effects of his bargain is its want of conscience. Putting it in mere familiar language the Court’s jurisdiction to relieve a mortgagor from his bargain depends on whether it was obtained by taking advantage of any difficulty or embarrassment that he might have been in when he borrowed the moneys on the mortgage. Was the mortgagor oppressed? Was he imposed upon? If he was, then he may be entitled to relief.

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

The Court further held that the length of term by itself would not lead to the conclusion that it was an oppressive term. Restricting their findings on the facts of the case, the Court observed “it is not necessary for us to go so far as to say that the length of the term of the mortgage can never by itself show that the bargain was oppressive. We do not desire to say anything on that question in this case. We think it enough to say that we have nothing here to show that the length of the term was in any way disadvantageous to the mortgagor”.

In *Pomal Kanji Govindji & Ors. v. Vrajilal Karsandas Purohit & Ors.*, AIR (1989) SC 436 this Court held that “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, must, however, depend upon the facts and the circumstances of each case”. The doctrine “clog on equity of redemption” was held to be a rule of justice, equity and good conscience. It must be adopted to the reality of situation and the individuality of transaction. The court should take note of the time, the condition, the price spiral, the term bargain and the



A other obligations in the background of the financial conditions of the parties. After referring to various judgments of the High Courts in the country this Court held:

B “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 decision referred to hereinbefore which have been accepted by this Court in this country, look with disfavour at clogs on the equity of redemption. Section 60 of the Transfer of Property Act, in India, also recognises the same position.

D 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 background 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 a 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 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 correlated to each other and viewed in a comprehen-

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sive conspectus in the background of the facts and the circumstances of each case, to determine whether these are clogs on equity of redemption.”

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It was further held that Section 60 of the Transfer of Property Act confers on the mortgagor right of redemption which is a statutory right. The right of redemption is an incident of a subsisting mortgage and it subsists so long as the mortgage subsists. Whether in a particular case there is any clog on the equity of redemption, has to be decided in view of the background of a particular case. The doctrine of clog on equity of redemption has to be moulded in modern conditions. In this regard the Court held:

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“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, law 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.”

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In the present case all the courts below on facts held that the mortgage deed being for a period of 99 years was a clog on the equity of redemption. Such findings were returned keeping in view the facts and circumstances of the case and the financial position under which the mortgagor Shri Prakash Singh was placed at the time of execution of the mortgage deed on 19.3.1968. The appellants were found to be in an advantageous position qua the mortgagor. They were also found to be deriving the usufructs of the mortgaged land for a period of over 26 years at the time of filing of the suit on payment of meager sum of Rs.7,000/- only to the mortgagor. The findings of the facts returned by the courts below do not require any interference particularly when the learned counsel appearing for the appellants has not contended that such findings were perverse or uncalled for or against the evidence.

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There is no merit in this appeal which is accordingly dismissed but without any order as to costs.

M.P.

Appeal dismissed. .