

Before Anil Kshetarpal, J.

BIMLA DEVI AND OTHERS—*Appellant(s)*

versus

PARVESH KUMAR—*Respondent(s)*

RSA No. 3569 of 2012

May 21, 2020

A. Contract Act, 1872- Section 23-Limitation Act, 1963-Article 61 of Schedule-1806 resolutions-Doctrine of clog on equity of redemption-applied in two events-one when period of mortgage is too long or its too short.

Held, that it is apparent that doctrine of clog on the equity of redemption has been applied by the Courts in two eventualities. Firstly, when the period of mortgage is unreasonably long and secondly, where the period prescribed or duration of the mortgage is unreasonably short. In other words, contract of mortgage provides for forfeiture of right to redeem the mortgage after lapse of unreasonable short duration.

(Para 26)

B. Opportunity must be given to mortgager to plead and prove that mortgage deed was hit by clog on equity of redemption.

Held, that in the present case also, the mortgagors were never given an opportunity to plead and prove that such stipulation in the mortgage deed amounted to clog on the equity of redemption and therefore, could not enforced by the Court. Section 23 of the Contract Act, 1872 also enables the Court to declare that what considerations and objects are lawful and what are not. The Courts, on examination of the material, can declare that a particular clause or contract is immoral or opposed to the public policy.

(Para 32)

C.B.Goel, Advocate, *for the appellants.*

Sanjiv Gupta, Advocate, *for the respondent.*

Shivendra Swaroop, A.A.G., Haryana.

ANIL KSHETARPAL, J.

(1) The defendants have filed the regular second appeal against the judgments passed by both the Courts below while decreeing the suit

filed by the plaintiff declaring him to be the owner of the mortgaged suit property and hence, entitled to decree for possession thereof. It will be noted here that the plaintiff/respondent is a mortgagee, whereas the defendants/appellants are mortgagors. In other words, the mortgagee has been declared to be the owner of the mortgaged property and consequently, held entitled to possession thereof.

(2) In the considered view of this Court, the following question of law arises for determination:

“Whether on expiry of period of one year from the date of service of notice of the application under Regulation 8 of the Bengal Land (Redemption and Foreclosure) Regulation, 1806 (hereinafter referred to as “the 1806 Regulation”), the mortgagor is left with no right, title or interest in the property mortgaged by conditional sale even if the Court, in subsequent proceedings, comes to a conclusion that the terms of the mortgage amounted to clog/impediment in the right to redeem the mortgaged property by the mortgagor?”

(3) In a nutshell, the facts of the case are that a shop-cum-residential building, constructed on a plot measuring 92.5 square yards having two floors, was mortgaged by registered mortgage deed dated 17.07.2003 for a sum of Rs. 3,50,000/-. The defendant/mortgagors agreed to repay the mortgaged money along with interest at the rate of 2% per month upto 17.07.2005 and get the property redeemed. In case, the mortgagors failed to redeem by paying the mortgaged money with interest upto 16.07.2005 i.e. within two years, the mortgagee would become owner of the property mortgaged.

(4) The plaintiff/respondent (mortgagee), while claiming that the amount of mortgage along with interest has not been paid within the stipulated time, filed a petition dated 16.09.2006 under Section 8 of the 1806 Regulation to foreclose the mortgage and declare that the conditional sale has become absolute. Notice of the petition was issued to the appellant/mortgagors. On 10.11.2006, the following order was passed:

“Present: Petitioner in person.

Shri Virender Kumar, counsel for the respondents.

Service is complete. Now the petition is adjourned to 9.12.2006.

Sd/-District Judge, Sonipat

10.11.2006”.

(5) Thereafter, on the next date of hearing, the file was consigned to record room while passing the following order dated 09.12.2006:-

“Present: Shri A.K.Jain, Adv. With the petitioner.

Shri Yudhvir Singh Adv. has appeared for the respondents. He has been informed about the petition. Now this file be consigned to the records.

Announced in open court

Sd/-District Judge, Sonipat
Dated: 9.12.2006”

(6) The plaintiff/respondent, after lapse of one year from the date of the order passed by the Court on 09.12.2006, filed the present suit as noticed above.

(7) The defendant/appellants contested the suit and pleaded that the mortgaged money has been repaid along with interest at the rate of 2% per month. It was further pleaded that defendant No.1 is a widow. The said shop/house is the only property of the answering defendants have. It is their only mean to earn daily bread for the family. The wife of defendant No.2 is running the shop on the ground floor whereas the defendants are residing on the first floor thereof.

(8) The parties led their evidence. The mortgage deed was produced on file as Ex.P1. It is stipulated in the mortgage deed that if within two years i.e. by 16.07.2005 total amount along with interest @ 2% per month is not paid by the mortgagors in order to redeem the mortgaged property, then the shop would be considered to have been sold and the mortgagee shall be entitled to get the sale deed registered through the Court.

(9) The mortgage was without delivery of possession. On 25.07.2005, the mortgagee sent a notice to the mortgagors, which was received by them on 27.07.2005.

(10) On the other hand, the defendants have produced a copy of judgement Ex.D1 passed by the learned Civil Judge, Gannaur passed in a suit for possession by way of specific performance of the agreement to sell filed by the mortgagee i.e. plaintiff/respondent, namely Parvesh Kumar against appellant No.1-Bimla Devi with respect to a shop (another property) measuring 22.5 square yards located at railway road.

From the reading of the judgement, it is apparent that appellant No.1-Bimla Devi had agreed to sell shop measuring 22.5 square yards for a sum of Rs.2,50,000/- vide agreement to sell dated 16.07.2003. The suit was decreed on 11.06.2008.

(11) In oral evidence, the plaintiff/respondent appeared as PW.3, whereas appellant No.1-Bimla Devi appeared as DW.1. She stated that the defendants had taken a sum of Rs.3,50,000/- as loan against mortgage of the property. It was pleaded that it is the only property of the defendants. They do not have any source of livelihood except the property in question. Defendant No.1 is a widow, whereas defendant No.2 is suffering from an incurable disease whose wife, namely Monika, is running the shop on the ground floor of the property in question and the defendants are residing on the first floor. Defendant No.2 also appeared in evidence. He, apart from what has been stated by defendant No.1, has also stated that his daughter is married in the family of the plaintiff.

(12) Both the Courts below have decreed the suit as noticed above.

(13) Keeping in view the facts of the case, the matter was referred to the Mediator, however, the parties failed to arrive at any amicable settlement. On 19.12.2019, following order was passed:

“Mr. Sachin Jain, Advocate/Mediator, has interacted with both the parties.

Appellants are ready to make payment of Rs.20 lacs to the respondent.

The Court has made a suggestion that on payment of Rs.20 lacs, the dispute should be amicably resolved between the parties.

Learned counsel for the respondents seeks some time.

Adjourned to 09.01.2020”.

(14) Keeping in view the facts of the case and important question which is likely to arise, the arguments were heard on 31.01.2020 and the case was adjourned. Learned Advocate General, Haryana was also requested to inform as to whether Section 58 of the Transfer of Property Act, 1882 (hereinafter referred to as “the 1882 Act”) has been extended to the State of Haryana or not. Sh. Ashish Aggarwal, Senior

Advocate, was also requested to assist the Court.

(15) It is not in dispute that Section 58 of the 1882 Act as such has not been extended to State of Haryana. Section 59 was extended to the State of Haryana vide notification dated 05.08.1957, whereas Section 58(f) was extended to the State of Haryana vide notification dated 10.05.1972. Thereafter, Section 58(f) has been extended to various towns of the State of Haryana from time to time.

(16) As noticed above, although Section 58(c), which defines the mortgage by conditional sale has not been extended to area falling in the State of Haryana, however, general principles of the 1882 Act would be applicable. Section 58(c) of the 1882 Act is extracted as under:-

“58. “Mortgage”, “mortgagor”, “mortgagee”, “mortgage- money” and “mortgage deed” defined -

(a) and (b) XXXX XXXX XXXX

(c) Mortgage by conditional sale.—

Where the mortgagor ostensibly sells the mortgaged property— on condition that on default of payment of the mortgage-money on a certain date the sale shall become absolute, or on condition that on such payment being made the sale shall become void or on condition that on such payment being made the buyer shall transfer the property to the seller, the transaction is called a mortgage by conditional sale and the mortgagee a mortgagee by conditional sale:

Provided that no such transaction shall be deemed to be a mortgage, unless the condition is embodied in the document which effects or purports to effect the sale.”

(17) The mortgage, in the present case, would fall within the definition of mortgage by conditional sale as defined in Section 58(c) of the 1882 Act which has not been given effect to in the State of Haryana.

(18) This Court has notified the Rules and Orders of the Punjab and Haryana High Court (hereinafter referred to as “the Rules and Orders”). Part-M of Chapter-I of Volume-I of the Rules and Orders lays down the procedure for suits for redemption and foreclosure of mortgages. Sub-part (f) of Part-M of Chapter-I Volume-I of the Rules and Orders reads as under:-

“PART M.—SPECIAL FEATURES OF CERTAIN CLASSES OF CASES

(a) to (e) XXXX XXXX XXXX XXXX

XXXX

(f) Suits for Redemption and Foreclosure of Mortgages.

1 Notice to mortgagor, conditional sale in case of land not permitted. The law regulating the procedure in cases where the mortgagee whose mortgage-deed also contains a provision for conditional sale, desires to foreclose the mortgage is often misunderstood. Regulation XVII of 1806 is still the law on the subject. It will be seen that, whatever the terms of conditional sale the mortgagee cannot enforce them till he has, by summary petition to the Court, caused notice to be served on the mortgagor to the effect that, if the latter does not pay the sum secured within one year, the mortgage will be held foreclosed. After the lapse of this year, and not till then, the mortgagee can sue for possession, as owner, or, if in possession, to be declared owner in accordance with the terms of the mortgage.

2 Court competent to hear. Only a District or Additional Judge can deal with applications under Sections 7 and 8 of Regulation XVII of 1806. The procedure prescribed in the Regulation should be very strictly observed as otherwise the notice may have no legal effect.

3 Dismissal for default. According to Order IX, Rule 9, of the Civil Procedure Code (as amended by the High Court), when a suit for redemption is dismissed in default under Order IX, Rule 8, the plaintiff is not precluded from bringing another suit for redemption of the mortgage.

4 Summary procedure for redemption. The Redemption of Mortgages (Punjab) Act, 1913, provides a summary procedure for redemption of land through the Collector in the State. But any party aggrieved by the decision of the Collector, can under certain circumstances institute a suit in a Civil Court to establish his right (see Section 12 of that Act).”

(19) As per the Rules and Orders, the 1806 Regulations are applicable. Regulation 7 provides that an application for redemption

can be filed by the mortgagor or his representative, whereas Regulation 8 lays down the procedure for the mortgagee or conditional vendee desirous of foreclosing the mortgage or to render conditional sale absolute. Learned senior counsel has provided a computer print out of the 1806 Regulation, which reads as under:

The Bengal Land (Redemption and Foreclosure) Regulation, 1806

Bengal Regulation 17 of 1806 11th September, 1806.

A Regulation for extending to the Province of Benares the rates of interest on future loans, and provisions relative thereto, contained in Regulation XV 1793; also for a general extension of the period fixed by [Regulation I, 1798, and XXXIV, 1803 for the redemption of mortgages and conditional sales of land, under deeds of bai-bil-wafa, kat-kabala or other similar designation.]

7. What shall entitle mortgagor or his representative to redeem before final foreclosure, after application by mortgagee for foreclosure. - In addition to the provisions made in the Provinces of Bengal, Bihar, Orissa and Benares, by Regulation I, 1798, and in the Ceded and Conquered Provinces by [Regulation XXXIV, 1803] for the redemption of mortgages and conditional sales of land, under deeds of bai-bil-wafa, kat- kabala or any similar designation, it is hereby provided that, when the mortgagee may have obtained possession of the land on execution of the mortgaged-deed or at any time before a final foreclosure of the mortgage, the payment or established tender of the sum lent under any such deed of mortgage and conditional sale, or of the balance due, if any part of the principal amount shall have been discharged, or when the mortgagee may not have been put in possession of the mortgaged property, the payment or established tender of the principal sum lent, with any interest due thereupon, shall entitle the mortgagor and owner of such property, or his legal representative, to the redemption of his property, before the mortgage is finally foreclosed in the manner provided for by the following section; that is to say, at any time within one year [West Bengal, Fasli or Willaiti, according to the era current where the mortgage may take place] from and after the application of the mortgagee to the zila or city Court of Diwani Adalat

for foreclosing the mortgage and rendering the sale conclusive in conformity with section 8 of this Regulation:] Provided that such payment or tender be clearly proved to have been made to the lender and mortgagee or his legal representative; or that the amount due be deposited, within the time above specified, in the Diwani Adalat of the zila or city in which the mortgaged property may be situated, as allowed for the security of the borrower and mortgagor, in such cases, by section 2, Regulation I, 1798; and section 12, [Regulation XXXIV, 1803], the whole of the provisions contained in which sections, as applied therein to the stipulated period of redemption, are declared to be equally applicable to the extended period of one year, granted for an equitable right of redemption by this Regulation.

8 Procedure for mortgage or conditional vendee desirous to foreclose mortgage or render conditional sale absolute. - Whenever the receiver or holder of a deed of mortgage and conditional sale, such as is described in the preamble and preceding sections of this Regulation, may be desirous of foreclosing the mortgage and rendering the sale conclusive on the expiration of the stipulated period, or at any time subsequent before the sum lent is repaid, he shall (after demanding payment from the borrower or his representative) apply for that purpose by a written petition, to be presented by himself, or by one of the authorised vakils of the Court to the Judge of the zila or city in which the mortgaged land or other property may be situated.

The Judge, on receiving such written application shall cause the mortgagor or his legal representative to be furnished, as soon as possible, with a copy of it; and shall at the same time notify to him by a parwana under his seal and official signature that, if he shall not redeem the property mortgaged in the manner provided for by the foregoing section within one year from the date of the notification, the mortgage will be finally foreclosed and the conditional sale will become conclusive”.

(20) In these facts, the question, as noticed above, arises for consideration.

(21) This Court has heard learned counsel for the parties and

with their able assistance, gone through the judgements passed by the Courts below and the requisitioned record.

(22) Learned counsel for the parties have addressed arguments at length and drawn attention of the Court to various precedents.

(23) The Courts in England as well as in India have evolved a doctrine of clog on equity of redemption in exercise of its powers in order to apply the principles of justice, equity and good conscience to transactions which come up for adjudication. The first judgement, which has been referred to by the parties, is in *Seth Ganga Dhar versus Shankarlal*¹. In the aforesaid judgement, it was stipulated that no redemption would be permissible for a period of 85 years. It was further stipulated that after the lapse of 85 years, the mortgagor can get the property redeemed within a period of six months failing which the mortgagor would lose its right of redemption. The date of mortgage was 01.09.1899, whereas the suit for redemption of the mortgage was filed in the year 1947. The Hon'ble Supreme Court after applying the doctrine of clog on the equity of redemption, held that the clause which provided for minimum period of 85 years amounts to clog on the equity of redemption and therefore, un-enforcable.

(24) The next judgement to which reference has been made is in *Murari Lal since deceased and after his death his newly substituted legal representatives Umedi Lal and Others versus Dev Karan since deceased and after his death his legal representatives, Jagan Prasad and Others*². This is a five Judges' Bench judgement of the Hon'ble Supreme Court. In this case, although the date on which the suit was filed for redemption of the mortgage is not clear, however, the mortgage was dated 19.03.1919. It was provided in the mortgage deed that the mortgage can be redeemed within a period of 15 years and if the payment was not made within 15 years, the mortgagee would become owner of the property and right to redeem the mortgage shall stand forfeited. This case was arising from property situated in the State of Rajasthan where the relevant provisions of the 1882 Act similar to the facts of the present case. The Five Judge Bench, after applying the doctrine of clog on the equity of redemption, held that such clause cannot be enforced by the Court and after applying the principles of justice, equity and good conscience, upheld the judgment of the High Court resulting in decreeing the suit for redemption filed by the

¹ AIR 1958 SC 770

² AIR 1965 SC 225

mortgagor much after lapse of 15 years.

(25) Attention of the Court has been drawn to other judgements passed by the Hon'ble Supreme Court, detailed reference to which would not be necessary. It is suffice to notice that learned counsel for the parties have referred to the judgements in *Jayasingh Dnyanu Mhoprekar* versus *Krishna Babaji Patil*³, *Pomal Kanji Govindji* versus *Vrajalal Karsandas Purohit*⁴ and *Shivdev Singh and another* versus *Sucha Singh and another*⁵.

(26) It is apparent that doctrine of clog on the equity of redemption has been applied by the Courts in two eventualities. Firstly, when the period of mortgage is unreasonably long and secondly, where the period prescribed or duration of the mortgage is unreasonably short. In other words, contract of mortgage provides for forfeiture of right to redeem the mortgage after lapse of unreasonable short duration.

(27) At this stage, it would be relevant to take note of Article 61 of Schedule to the Limitation Act, 1963 (hereinafter referred to as "the 1963 Act") which lays down a period for a mortgagor to file and seek redemption of immovable property mortgaged within a period of 30 years from the date when the right to redeem accrues. Article 61 of Schedule to the 1963 Act is extracted as under:

THE SCHEDULE

(PERIODS OF LIMITATION)

[See sections 2(j) and 3]

FIRST DIVISION—SUITS

Description of suit	Period of Time from which Limitation period begins to run	
(1 to 60)	XXXX	XXXX
	XXXX	

61 By a mortgagor—

(a) to redeem or recover possession of immovable property mortgaged;	Thirty years.	When the right to redeem or to recover possession
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³ (1985) 4 SCC 162

⁴ (1989) 1 SCC 458

⁵ (2000) 4 SCC 326

accrues.

- | | | |
|---|---------------|---|
| (b) to recover possession of immovable property mortgaged and afterwards transferred by the mortgagee for a valuable consideration; | Twelve years. | When the transfer becomes known to the plaintiff. |
| (c) To recover surplus collections received by the mortgagee after the mortgage has been satisfied. | Three years. | When the mortgagor re-enters on the mortgaged property. |

(28) As far as doctrine of clog on the equity of redemption concerned, the facts of the present case pose no difficulty as period is two years only, particularly when the rights of the mortgagee to the amount of mortgage along with interest at the rate of 2% per month are secured. Although the mortgagee has not been delivered possession, however, the amount of mortgage with a higher rate of interest is secured, whereas the rights of the mortgagors to redeem the property have been unfairly curtailed to a period of two years only. No doubt, as per the 1806 Regulations, one year grace period was granted, however, that itself would not be sufficient. Therefore, the clause providing for a period of two years only to redeem the property from the date of mortgage is unfairly circumscribed and the law, in the considered opinion of this Court, does not countenance it.

(29) Now the stage is set to consider the question of law which has been framed in the initial part of the judgment. The question is what is the effect of the proceedings before the learned Additional District Judge under “the 1806 Regulation”.

(30) On careful reading of the Rules and Orders of this Court, it appears that under the 1806 Regulations, a petition can be filed which is a summary petition. The competent Court shall cause notice of the petition to be served on the mortgagor. If the mortgagor does not pay the sum secured within a period of one year, the mortgage will be held to be foreclosed. However, Rules and Orders of the Punjab and Haryana High Court, extracted above, provides that the mortgagee, after a period of one year, can sue for possession as an owner or if already in possession then to be declared as an owner in accordance

with the terms of the mortgage. In other words, the mortgagee can file a suit for being declared as an owner and if not in possession, then seek possession thereof. On plain reading, it appears to this Court that the Rules had envisaged filing of subsequent suit by the mortgagee for being declared as owner. Meaning thereby that in the first petition filed under Regulation 8 of the 1806 Regulations, the mortgagee is not declared owner on failure of the mortgagor to pay the amount due within one year.

(31) This aspect can be examined from another angle. The first petition filed under Regulation 8 of the 1806 Regulations is only a summary petition and the Court is not required to apply its mind and give any judgment or pass a detailed order after examining the pleadings and the evidence. What is provided is that the Court would issue notice to the mortgagor and after apprising the mortgagor (s) of the facts, consign the file to the record.

(32) In the present case also, the mortgagors were never given an opportunity to plead and prove that such stipulation in the mortgage deed amounted to clog on the equity of redemption and therefore, could not be enforced by the Court. Section 23 of the Contract Act, 1872 also enables the Court to declare that what considerations and objects are lawful and what are not. The Courts, on examination of the material, can declare that a particular clause or contract is immoral or opposed to the public policy.

(33) Keeping in view the aforesaid facts and more particularly the order passed on 19.12.2019, wherein the mortgagors have offered to make payment of Rs. 20,00,000/- to the mortgagee, this Court is of the considered view that the plaintiff/respondent cannot be granted a decree of declaration that he has become owner of the property and consequently, entitled to possession of the property mortgaged. The mortgagors would be entitled to apply for redemption of the mortgage within the time prescribed under Article 61 of the Schedule to the Limitation Act, 1963

(34) In view of the aforesaid, the present appeal is allowed and the judgements & decrees passed by both the Courts below are set aside

(35) The miscellaneous application(s), if any, shall stand disposed of.