Thus, in effect, the rule enunciated by Mr. Justice Telang in 1891 has become a part of the statutory law in 1947.

The result is, the appeal substantially fails. The decree has, however, to be modified by adding to the decretal amount Rs. 894 as already mentioned.

Decree varied.

M. W. P.

APPELLATE CIVIL

Before Mr. Justice Gajendragadkar and Mr. Justice Vyas

SONI CHHAGANLAL JETHALAL AND OTHERS (ORIGINAL DEFENDANTS), APPELLANTS *v.* GOKALDAS MANSUKH AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Nov. 6 1952

Transfer of Property Act (V of 1882), s. 60—Clog on equity of redemption—Applicability of English doctrine in India—Long term of redemption when a clog on equity—Mortgage with a period of 99 years—Mortgagee stipulating for collateral and illegitimate advantages—Whether terms amount to clog on equity.

The English doctrine of the clog on equity of redemption, which is applied in India as a rule of justice, equity and good conscience, is consistent with the provisions of s. 60 of the Transfer of Property Act, 1882, itself. The section so clearly recognizes the right to redeem that a mortgagor can legitimately invoke the protection of the doctrine in proper cases. However, in applying the doctrine care must be taken not to apply the English precedents without scrutiny because the question as to what amounts to a clog on the equity of redemption is always a question of fact.

Mohammad Sher Khan v. *Seth Swami Dayal*,[1] and *Mehrban Khan* v. *Makhna*,[2] relied upon.

Since the words "in the absence of a contract to the contrary" which are used in some of the sections of the Transfer of Property Act are absent in s. 60, it is a legitimate inference that if an agreement is made between the mortgagor and the mortgagee which obstructs, hampers or fetters the mortgagor's right to redeem, it is invalid. The principle "once a mortgage always a mortgage" is a well

* Second Appeal No. 869 of 1949.

[1] (1921) L. R. 49 I. A. 60. [2] (1930) L. R. 57 I. A. 168.

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established principle so that the right to redeem must always remain unimpaired. This right can be extinguished only by an act of parties or by operation of law; the act of parties must obviously be subsequent to the execution of the mortgage and its effect must clearly be to extinguish the equity of redemption.

Noakes and Co., Ltd. v. *Rice*,[1] referred to.

A long term for redemption is not necessarily or in every case a clog on the equity of redemption. In dealing with the question as to whether a particular term for redemption amounts to a clog on the equity of redemption because it is unreasonably long, it is necessary to consider all the circumstances attending the execution of the mortgage deed such as the amount advanced under the mortgage, the nature of the security offered by the mortgagor, the circumstances in which the mortgagor was compelled to secure the amount, the terms and conditions on which the amount was in fact advanced and the other alternatives to which the mortgagor could have taken recourse for obtaining the sum advanced.

Sayad Abdul Hak v. *Gulam Jilani*,[2] *Fateh Mahomed* v. *Ram Dayal*,[3] *Genu* v. *Narayan*,[4] *Shubratan* v. *Dhanpat Gadariya*,[5] and *Cheddi Lal* v. *Babu Nandan*,[6] referred to.

On November 9, 1884, an open piece of land admeasuring 34 square yards was mortgaged with possession to the adjoining owner for Rs. 176. The mortgage contained two material stipulations, namely, that the mortgagor was to redeem the mortgage 99 years after its execution and that the mortgagee was given full authority to build any structure on the plot after spending any amount he liked and the mortgagor would repay that amount to the mortgagee at the time of redemption. The mortgagor contended that both these terms operated as a clog on his right to redeem the property and therefore on August 9, 1944, he sued to redeem the mortgage before the expiry of the period of 99 years on payment of Rs. 176. The mortgagee pleaded that the mortgagor was precluded from relying upon the doctrine of the clog on equity of redemption to avoid the performance of the agreed terms of contract between the parties:

Held, that it was open to the mortgagor to contend that the two terms of the mortgage were so unreasonable and oppressive that they amounted to a clog on the equity of redemption;

that the long term for redemption conferred upon the mortgagee a collateral advantage which was unfair to the mortgagor; similarly the option given to the mortgagee by the second term was wholly unreasonable and it conferred upon him an advantage to which he was not legitimately entitled;

that, therefore, the mortgagor was entitled to redeem.

SECOND APPEAL from the decision of B. D. Nadkarni, Esquire, District Judge, at Godhara, confirming the decree passed by V. T. Desai, Esquire, Civil Judge, Senior Division, at Godhra.

(1) (1902) A. C. 24.
(2) (1895) 20 Bom. 677.
(3) (1927) 2 Luck. 588.
(4) (1920) 45 Bom. 117.
(5) (1932) 54 All. 1041.
(6) [1944] A. I. R. All. 204.

D. V. Patel, for the appellants.

V. T. Gambhirwala, for respondents Nos. 1 and 2.

GAJENDRAGADKAR J. This is an appeal by the mortgagees against the preliminary decree for redemption which has been passed by both the Courts below. The property in suits is an open plot bearing Tika No. 17, Lot No. 11, measuring 34 sq. yards. It was mortgaged on the 9th November 1884 for Rs. 176. The agreement between the parties 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 this plot after spending any amount he liked. The mortgagor undertook to repay this amount to the mortgagee at the time of redemption. When the suit was filed by the plaintiffs to redeem this mortgage the mortgagee pleaded that the claim was premature; 99 years had not still passed and so the amount under the mortgage could not be said to have become due within the meaning of s. 60 of the Transfer of Property Act. This was the contention of the mortgagee. The Courts below have held that the two material stipulations in the mortgage amounted to a clog on the equity of redemption and so they have allowed the plaintiffs to redeem the mortgage and passed a preliminary decree in that behalf. In this appeal Mr. Patel has contended that the Courts below should have held that the suit was premature.

The first argument which has been urged before us by Mr. Patel is that the doctrine of the clog on the equity of redemption is inapplicable in India. Mr. Patel says that the right to redeem which vests in the mortgagor is the result of a statutory provision contained in s. 60 of the Transfer of Property Act and in dealing with the exercise of this right Indian Courts must confine themselves to the consideration of the said section. A mortgage under the Transfer of Property Act is the result of a contract between the mortgagor and the mortgagee and all the stipulations contained in this contract would bind the parties, unless they are shown to be contrary to any provisions of the law. Mr. Patel concedes that if the contract of mortgage is the result of undue influence, coercion, misrepresentation or fraud, it may not bind the mortgagor and the terms of such a mortgage could be challenged by him. But if the terms of the mortgage are otherwise not inconsistent with any of the provisions of the Contract Act or the Transfer of Property Act, they must be

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enforced between the parties. The terms as to when the amount due under the mortgage should be paid has been settled between the parties, and since they have agreed that the due date would arrive after the lapse of 99 years, it is not open to the mortgagor to tender the amount before the due date. In other words, the terms of the mortgage in suit are otherwise perfectly valid and it is not open to the mortgagor to rely upon the doctrine of the clog on the equity of redemption to avoid the performance of these terms. That is the first contention raised by Mr. Patel before us.

It is true that in dealing with the provisions of Indian law it is not always safe to rely upon doctrines of English law, and if there is any provision in s. 60 which is inconsistent with the doctrine as to the clog, it would not be open to us to invoke that doctrine in dealing with mortgages executed under the Transfer of Property Act. But the doctrine of the clog on the equity of redemption is applied as a rule of justice, equity and good conscience, and in a sense it is consistent with the provisions of s. 60 itself. The words "in the absence of a contract to the contrary" which are used in some of the sections of the Transfer of Property Act are absent in s. 60. So that it is legitimate to infer that if an agreement is made between the mortgagor and the mortgagee which obstructs, hampers or fetters the mortgagor's right to redeem, it would be invalid. The principle that "once a mortgage always a mortgage" is well established, and it brings out emphatically the mortgagor's right to redeem which must always remain unimpaired. This right can be extinguished only by an act of parties or by operation of law. The act of parties must obviously be subsequent to the execution of the mortgage and its effect must clearly be to extinguish the equity of redemption. The rule as to the clog has been thus expressed by Lord Davey in *Noakes & Co. Limited* v. *Rice*.[1]

> "The meaning of that is that the mortgagee shall not make any stipulation which will prevent a mortgagor, who has paid principal, interest, and costs, from getting back his mortgaged property in the condition in which he parted with it."

By this rule the mortgagee is prevented from stipulating for a collateral advantage which is unfair to the mortgagor or from imposing any other terms which would act as a fetter

[1] [1902] A. C. 24.

on his right to redeem. This doctrine has no doubt been criticized by some jurists. Dr. Ghose in his "The Law of Mortgage in India" observes:

> "Many lawyers will be inclined to agree with Sir Frederick Pollock that the doctrine of 'clogging,' though useful enough in a primitive age when ignorant people were often entrapped into oppressive bargains, is an anachronism in our day."

According to Dr. Ghose, in enforcing this doctrine Courts virtually exercise:

> "a paternal jurisdiction which is an anomaly in a system which permits every adult person who is not a lunatic to ruin or to make a fool of himself and can end only in much straining at gnats and swallowing of camels."

Even so, there is no doubt that this doctrine has been applied by Indian Courts for nearly a century and it has now become virtually a part of the law of mortgages. It must be conceded that in applying this doctrine care must be taken not to apply the English precedents without scrutiny; because it is clear that the question as to what amounts to a clog on the equity of redemption would always be a question of fact. But, in our opinion, it is too late now to contend that the doctrine of the clog on redemption itself is inapplicable in India. We may at this stage conveniently refer to two decisions of the Privy Council in which this doctrine has been applied to Indian mortgages in support of our conclusion that this doctrine can and ought to be invoked for the protection of the mortgagor in a proper case.

In *Mohammad Sher Khan* v. *Seth Swami Dayal*,[1] the Privy Council had to deal with a mortgage which had provided that the mortgagor was to redeem at the end of five years and that if he did not do so the mortgagee was to have an option of taking possession for a period of 12 years. If the mortgagee took possession it was provided that during the period of 12 years the mortgagor was not to be entitled to redeem. The mortgagee in fact had gone into possession at the end of five years, and before 12 years thereafter had expired the mortgagor sought to redeem the mortgage and he was met with the plea that the claim for redemption was premature. This plea was rejected by the Privy Council. Their Lordships observed that the date for the payment of the amount had been fixed by the parties and that the subsequent agreement to enable the mortgagee to remain in possession of the property for twelve years

[1] (1921) L. R. 49 I. A. 60.

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amounted to a clog on the equity of redemption. If the true position under s. 60 had been that the parties were at liberty to make any agreement as to how the right of redemption should be enforced, the conclusion that the subsequent agreement was invalid as it amounted to a clog on the equity of redemption would not have followed. This conclusion however, in our opinion, suggests that even though the mortgagor may stipulate to submit his equity of redemption to certain fetters, those fetters would be removed by the Court on the ground that they amount to a clog which is invalid and inoperative.

In *Mehrban Khan* v. *Makhna*,[1] the Privy Council were dealing with another stipulation which was construed as amounting to a clog on the equity of redemption. Provisions in the mortgage deed with which they were dealing had conferred on the mortgagee upon redemption an interest in the mortgaged premises which was treated as a clog or a fetter on the equity of redemption. The mortgage deed had stipulated that the mortgagees were entitled to remain in possession for nineteen years and that at the end of that period, if the mortgagor paid off that money, the property was to belong as to a limited interest therein only, to the mortgagor, and as to the major interest therein to the mortgagees. If the mortgagor failed to pay off the mortgage money at the end of the nineteen years the property was apparently to belong to the mortgagees absolutely. The case before the Privy Council came from the North-West Frontier Province where s. 60 of the Transfer of Property Act was not applicable. Their Lordships, however, applied the doctrine as to the clog on redemption after citing with approval the observations of Lord Hobhouse in *Waghela Rajsanji* v. *Sheikh Masludin*,[2] that a direction to decide by equity and good conscience was generally interpreted to mean the rules of English law if found applicable to Indian society and circumstances. "The terms of s. 60 of the Transfer of Property Act," says the judgment. "are an indication that the rules of English law relating to a mortgagor's right to redeem are applicable to Indian society and circumstances. There is no indication to the contrary. The matter must therefore be determined by the rules of English law." It would thus appear that the Privy Council took the view that the terms of s. 60 of the Transfer of Property Act themselves indicate that the rule of English law as to the clog

[1] (1930) L. R. 57 I. A. 168. [2] (1887) L. R. 14 I. A. 89 at p. 96.

should be applied in favour of the mortgagor. There is nothing inconsistent in s. 60 with the said rule. On the contrary the right to redeem is so clearly recognized in s. 60 that a mortgagor can legitimately seek for the protection of the doctrine of the clog on redemption in proper cases. In this very case the observations of Lord Macnaghten in *Noakes & Co., Limited v. Rice*,[1] are cited with approval and, in our opinion, they are very pertinent to the question which we are considering. Said Lord Macnaghten:

> "Redemption is of the very nature and essence of a mortgage, as mortgages are regarded in equity. It is inherent in the thing itself. And it is, I think, as firmly settled now as it ever was in former times that equity will not permit any device or contriance designed or calculated to prevent or impede redemption."

Therefore, in our opinion, it is impossible to accept Mr. Patel's contention that if the mortgagor permits the mortgagee to adopt a device which would impede or prevent his right of redemption he is precluded from appealing to the doctrine of the clog on redemption in protection of his right to redeem.

The next question which we must consider is whether in fact the two stipulations in the mortgage in suit amount to a clog on the equity of redemption. The period of 99 years which is stipulated in the mortgage is undoubtedly a very long period. It may be that a long term for redemption is not necessarily or in every case a clog on the equity of redemption. In England the period for redemption is usually not as long as in India. As Halsbury points out, the doctrine of the clog on redemption does not prevent the mortgage being for a fixed term provided that the term is reasonable, for instance 5 or 7 years. We agree that it would not be legitimate to apply this rigorous test to the period stipulated for redemption in India. In *Sayad Abdul Hak* v. *Gulam Jilani*,[2] this Court was considering a term of fifty years which was provided in a mortgage for redemption. The explanation given by the mortgagee for stipulating for such a long period was not found to be very satisfactory. Even so, Mr. Justice Parsons observed that periods restricting redemption are undoubtedly much longer in this country than in England, and he referred to the earlier reported judgments in which periods of 15, 25, 29, 30 and 35 years had been upheld. The learned Judge added that no case had been cited before them in which a Court in India

[1] [1902] A. C. 24 at p. 30. [2] (1895) 20 Bom. 677.

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had held any period fixed by the parties to be bad solely on the ground of its being unreasonably long. We would, however, like to add that we have not been referred to any case in which a period of 99 years has been held to be reasonable.

In dealing with the question as to whether a long term for redemption is a clog on the equity of redemption, it would be necessary to consider all the circumstances attending the execution of the mortgage-deed. The amount advanced under the mortgage, the nature of the security offered by the mortgagor, the circumstances in which the mortgagor was compelled to secure the amount, the terms and conditions on which the amount was in fact advanced and the other alternatives to which the mortgagor could have taken recourse for obtaining such advance, would have to be considered before it is held that a particular term of redemption amounts to a clog because it is unreasonably long. Clearly, if the period stipulated is 200 years, it would not be difficult to hold that it is so unreasonably long that it amounts to a clog as was done in *Fateh Mahomed* v. *Ram Dayal*[1]. In the present case the amount advanced is a very small amount of Rs. 176, and on the record it does not appear that it was necessary that the mortgagor should have submitted to this long term of 99 years before obtaining this advance from the mortgagee. The mortgagee is the owner of a neighbouring property and it would not be unreasonable to hold that by stipulating for this long term for redemption he wanted to use this property which was beneficial for the enjoyment of his house for a very long period. In other words, in this particular case this long term for redemption has undoubtedly conferred upon the mortgagee a collateral advantage which is unfair to the mortgagor. Besides, in dealing with the present mortgage we must also consider the other term to which the mortgagor has taken objection. Under this stipulation the mortgagee was given full liberty to spend any amount he liked for building a structure on the Wada or open space which had been mortgaged to him. The mortgagor comes from a poor family and if the mortgagee were to exercise his option under this particular clause, he would easily make it impossible for the mortgagor to redeem his property. No restrictions are placed as to the nature of the structure which the mortgagee should raise and as to the amount which he should spend on raising such a structure. The option given to the mortgagee by this clause is, in our

[1] (1927) 2 Luck. 588.

opinion, wholly unreasonable and it confers upon the mortgagee an advantage to which he was legitimately not entitled. Mr. Patel, however, contends that the decision of this Court in *Genu* v. *Narayan*,[1] precludes the mortgagor from contending that the two impugned stipulations in the mortgage deed amount to a clog and indeed, the whole of Mr. Patel's argument has really been based upon this decision. In this case a mortgage deed had been executed in 1867 and it had provided that on payment of the principal sum on the expiry of 21 years, the mortgagor shall be entitled to recover the land and trees free of all charges. Then the deed went on to add that if the money was not so paid, the mortgagee would be allowed to develop the land by growing fruit-bearing trees on it and would not be required to give up possession until the trees had ceased bearing fruit. The mortgagor did not redeem at the end of 21 years with the result that the mortgagee remained in possession subsequently and planted a number of fruit bearing trees. When the mortgagor sought to redeem the mortgage in 1913, his claim was resisted on the ground that the trees which had been subsequently planted by the mortgagee had not ceased to bear fruit and so the suit for redemption was premature. This plea was upheld and the suit was dismissed. In dealing with the contention of the mortgagor that the second clause of the mortgage deed amounted to a clog on the equity of redemption, Heaton Ag. C. J. observed:

> "Section 60, as it stands, merely enacts that redemption is to be according to the terms of the mortgage contract, and there is nothing in the Transfer of Property Act that I know of which says anything about clogs on the equity of redemption."

He pleaded:

> "...if we are to determine in this country whether a certain provision in a mortgage contract is contrary to law, we are not, as it seems to me, to look to the English rule. We must look to the law applicable in British India."

Having made these general observations, the learned Judge proceeded to examine the nature of the agreement itself and he found that on the facts and in the circumstances of the case the impugned agreement was very fair. Mr. Justice Crump who delivered a concurring judgment also came to the conclusion that the agreement in question was a fair agreement and that the mortgagee had not really received any undue collateral advantage. It would thus be clear that in view of the conclusion of both the learned Judges that the agreement it-

[1] (1920) 45 Bom. 117.

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self was very fair, the general observations as to the inapplicability of the doctrine of the clog on the equity of redemption can, with respect, be treated as obiter.. It seems to us that in the context these observations were really made to repel the argument that the technical rules evolved by the English Courts in enforcing the doctrine of the clog on redemption should be blindly applied to Indian mortgages. And if this was the real purport of these observations, no exception can possibly be taken to them. On the other hand, if these observations were meant to lay down a clear and categorical rule that the doctrine of the clog on the equity of redemption could never be invoked by a mortgagor in India, with respect, it would be difficult to hold that they describe the correct legal position on the point.

In this connection Mr. Patel has also invited our attention to a decision of the Allahabad High Court in which similar observations are to be found. In *Shubratan* v. *Dhanpat Gadariya,*[1] the mortgagee had been given the option to recover from the mortgagor at the time of redemption any money which he might spend in building or rebuilding the house with interest thereon at 2 per cent. per mensem, and the period stipulated for redemption was 60 years. The contention of the mortgagor was that the period of 60 years was unduly long and the liberty given to the mortgagee to rebuild the house was unreasonable. This contention was rejected. As to the authority given to the mortgagee to rebuild the house, it would be noticed that he was not given the option to spend any amount he liked as in the present case; but he was only allowed either to rebuild the house or to build a similar house. In fact, it had been found that the building of the house had cost only Rs. 300 to the mortgagee. Thus, on the facts the conclusion that the mortgagor was not entitled to invoke the doctrine of the clog on redemption can, with respect, be well appreciated. The circumstances under which the mortgage in question had been executed were considered and it was found that the terms entered into by the mortgagor were neither onerous nor unconscionable. However, Mr. Patel has relied more particularly upon the general observations made in the judgment that in dealing with such pleas the Indian Courts were concerned with the provisions of the Indian Contract Act as to coercion, undue influence, fraud, misrepresentation or mistake, or as to penalty as provided

[1] (1932) 54 All. 1041.

for in s. 74 of the said Act. "Mere vague grounds of equity," said the learned Judges, "will not justify a Court in interfering with the terms of a contract." Even so, they added that the rules as to the clog on redemption established in English Courts must be applied within well defined limits. According to them, "a stipulation which gives the mortgagee an advantage which does not arise legitimately out of the mortgage contract is treated as a stipulation to clog the redemption." It would thus be clear that even these observations do not support the bold and general argument urged before us by Mr. Patel that the doctrine of the clog on redemption is itself inapplicable to India. With respect, the broad test laid down in this judgment does represent an important aspect of the rules which have been evolved under the doctrine of the clog on the equity of redemption. Incidentally, we may add that in *Chheddi Lal* v. *Babu Nandan*,[1] Verma and Yorke JJ. have expressed their strong dissent from the general observations made in *Shubratan's* case.

Therefore, in our opinion, it is open to the mortgagor in the present case to contend that the two terms of the mortgage are so unreasonable and oppressive that they amount to a clog on the equity of redemption. The Courts below have upheld this contention, and we think their conclusion is right.

The result is the appeal fails and must be dismissed with costs.

Appeal dismissed.

M. W. P.

[1] [1944] A. I. R. All. 204.