IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

RSA No.2842 of 1997 (O&M)
Date of Decision:27.04.2018

Balbir Singh

...Appellant

Versus

Karnail Singh

...Respondent

CORAM:- HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr.Aakash Singla, Advocate for the appellant.
Mr.M.L.Saini, Advocate for the respondent.

ANIL KSHETARPAL, J.

The defendant-appellant is in the regular second appeal against the concurrent findings of fact arrived at by the learned courts.

The plaintiff filed a suit, claiming that 13 kanals and 17 marlas of land was mortgaged with possession vide mortgage deed dated 17.2.1961 for an amount of Rs.4500/-. It was pleaded that redemption of the mortgage was not permissible for a period of 59 years, validity whereof was challenged on the ground that such restriction amounts to clog on equity of redemption.

The defendant contested the suit. The factum on mortgage was not disputed. However, it was pleaded that the suit is premature as the suit could only be filed after a period of 59 years.

This appeal came up for hearing in the year 2018 when more than 57 years have already elapsed.

Both the courts after examining the evidence available on the file have recorded a concurrent findings of fact that restriction on the right to redeem the land for a period of 59 years amounts to clog on equity of redemption. Hence, redemption has been ordered by the courts below on payment of mortgage amount.

This Court has heard the learned counsel for the parties at length and with their able assistance gone through the record.

Learned counsel for the appellant has argued that merely because a long period for redemption of the mortgage has been given then that itself is not sufficient to record a finding that such restriction amounts to clog on equity of redemption. He has further drawn attention of the Court to the amendment carried out in Section 60 of the Transfer of Property Act, 1882, vide Amendment Act No.20 of 1929. He has next submitted that initially the word in Section 60 of the Transfer of Property Act was 'payable' which was substituted with the word 'due'. He has also submitted that after the amendment in the Act, redemption of the mortgage would be possible only after the expiry of the period prescribed in the mortgage deed.

Normally what has been submitted by the learned counsel for the appellant that the redemption is possible only after the expiry of term of mortgage is correct. However, the courts have found that usually the mortgagor is a poor person and mortgagee provide for unreasonable period of redemption of the mortgage and thereafter keep enjoying the usufruct of the land for a meager sum of the mortgage money.

In the present case, 13 kanals and 7 marlas of land, which is more than half acre was mortgaged for Rs.4500/- only. It has come in the evidence that from 1986 to 1990, i.e. for a period of four years, the defendant-appellant derived income from the land to the extent of Rs.32,363/- as per Goshwara Ex.P1. The Hon'ble Supreme Court has examined this issue in more than one judgment. It has been consistently held by the Hon'ble Supreme Court that the court has to examine each case on a peculiar fact situation and thereafter arrive at a conclusion that whether the clause incorporated providing for a longer period of restriction on the right of redemption of mortgage, amounts to clog on equity of redemption or not.

In the present case, it is apparent particularly while considering the amount of mortgage that the period of 59 years is a clog on equity of redemption, the learned first appellate court while passing the impugned judgment, has relied upon a judgment of the Hon'ble the Supreme Court in **Pomal Kanji Govindji Vs. Vrajlal Karsandas Purohit, 1989(1) SCC 458.**

The relevant observations made by the Hon'ble Supreme Court in paras 21 and 26 of its judgment in **Pomal Kanji Govindji's** s case (supra), read as under:-

> "21 *The doctrine "clog on the equity of redemption" is a rule of justice, equity and good conscience. It must be adopted in each case to the reality of the situation and the individuality of the transaction. We must take note of the time, the condition, the price spiral, the term bargain and the other obligations in the background of the financial conditions of the parties. Therefore, in our opinion, in view of the evidence it is not possible to hold that there was no clog on the equity of redemption in these cases.*
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> *"26 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 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 corelated to each other and viewed in a comprehensive conspectus in the background of the facts and the circumstances of each case, to determine whether these are clogs on equity of redemption."

No other argument was raised.

In view of the above, there is no good ground to interfere in the impugned judgments passed by the learned courts below. The Regular Second Appeal is dismissed. Pending application(s), if any, shall also stand disposed of.

27.04.2018 **(ANIL KSHETARPAL)**
mks **JUDGE**

Whether speaking/reasoned: Yes/No

Whether Reportable: Yes/No