

Khan Bahadur Mehrban Khan - - - - - *Appellant*

v.

Makhna, since deceased, and others - - - - - *Respondents*

FROM

THE COURT OF THE JUDICIAL COMMISSIONER, NORTH-WEST
FRONTIER PROVINCE.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 13TH FEBRUARY, 1930.

Present at the Hearing :

LORD ATKIN.
LORD TOMLIN.
SIR LANCELOT SANDERSON.
SIR GEORGE LOWNDES.
SIR BINOD MITTER.

[*Delivered by* LORD TOMLIN.]

This is an appeal from the Judicial Commissioner, North-West Frontier Province, Peshawar.

The Judicial Commissioner has reversed the Divisional Judge, who, on his part, had affirmed the judgment and decree of the Subordinate Judge.

The point is a short one. The appellant is the plaintiff in the suit. He is the assign for value of the interest of a mortgagor in property comprised in a mortgage dated the 6th May, 1898.

Under the mortgage the mortgagees were entitled to possession for 19 years. At the end of that period, if the mortgagor paid off the mortgage 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 19 years the property was apparently to belong to the mortgagees absolutely.

After the expiration of the 19 years the appellant, as assign of the mortgagor, brought a redemption suit.

The Subordinate Judge and the Divisional Judge both held that the provisions of the mortgage deed limiting the interest of the mortgagor upon redemption constituted a clog upon the equity of redemption, and that the plaintiff was entitled to redeem without regard to these provisions.

The Judicial Commissioner agreed with the Lower Courts in thinking that the provisions in question amounted to a clog upon the equity of redemption. He took the view, however, that a purchaser of the equity of redemption is bound by the terms of the mortgage deed and cannot set up that such terms amount to a clog.

Their Lordships are of opinion that the Judicial Commissioner has misapplied the principles which govern in the matter.

It is to be observed that the Transfer of Property Act, by Section 60 of which the right of a mortgagor to redeem is regulated, has no application to the North-West Frontier Province. The matter is governed by the North-West Frontier Province Law and Justice Regulations. Section 27 of Regulation No. VII provides in effect that decisions in certain matters, which do not include mortgages, shall be according to the law of the parties concerned. By Section 28 of the same Regulation it is provided that in cases not otherwise specially provided for the Judges shall decide according to justice, equity and good conscience.

In *Waghela Rajsanji v. Sheikh Mashudin*, 14 I.A. 89, at p. 96, Lord Hobhouse pointed out 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 Section 60 of the Transfer of Property Act 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.

The relevant principle of English law was stated by Lord Lindley in *Santley v. Wilde* [1899], 2 Ch. 474, in language approved by Lord Halsbury in *Noakes & Co., Ltd., v. Rice* [1902], A.C. 24, at p. 28.

Lord Lindley said :—

“The principle is this. A mortgage is a conveyance of land or an assignment of chattels 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 performance 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, but I do not understand that this principle involves the further proposition that the amount or nature of the further debt or obligation, the payment or performance of which is to be secured, is a clog or fetter within the rule.”

At p. 30 of the last-mentioned case Lord Macnaghten said :—

“ 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 contrivance designed or calculated to prevent or impede redemption. It follows as a necessary consequence that when the money secured by a mortgage of land is paid off, the land itself and the owner of the land in the use and enjoyment of it must be as free and unfettered to all intents and purposes as if the land had never been made the subject of the security.”

At pp. 31 and 32 Lord Macnaghten added :—

“ It seems to me to be contrary to principle that a mortgagee should stipulate with his mortgagor that after full payment of principal, interest and costs he should continue to receive for a definite or an indefinite period a share of the rents and profits of the mortgaged property as the result of an obligation arising from the contract made when the mortgage was created.”

These expressions of opinion accord with the principles of the matter as they were explained by Lord Parker of Waddington in *G. & C. Kreglinger v. New Patagonia Meat & Cold Storage Co., Ltd.* [1914], A.C. 25, at pp. 51 *et seq.*

In their Lordships' opinion, all the Courts were acting in accordance with the authorities, to which reference has been made, in holding that the provisions of the mortgage deed conferring on the mortgagees on redemption an interest in the property constituted a clog or fetter upon the equity of the redemption.

Their Lordships are, however, of opinion that the Judicial Commissioner erred in holding that these provisions were binding on the assign.

Their Lordships think that the provisions in question, being a clog upon the equity of the redemption, were void and could have no more binding force against the assign of the mortgagor than they had against the mortgagor himself. They are not provisions of general validity avoided against the mortgagor personally by reason of pressure or undue influence brought to bear on him. They are provisions which, when forming part of the actual mortgage contract, have under the general law no validity at all. If it were otherwise an illogical result would follow. The mortgagor, if he redeemed, would escape from the burden, but if he sold to another he would necessarily bear the burden, as the validity of the provisions as against the assign would be reflected in the price which he received.

For these reasons, in their Lordships' judgment, the appeal should be allowed and the decree of the Divisional Judge should be restored, with costs to the appellant in the Courts below and before their Lordships' Board.

Their Lordships will humbly advise His Majesty accordingly.

In the Privy Council.

KHAN BAHADUR MEHRBAN KHAN

v.

MAKHNA, SINCE DECEASED, AND OTHERS.

DELIVERED BY LORD TOMLIN.

Printed by
Harrison & Sons, Ltd., St. Martin's Lane, W.C.2.
1930.