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DOCTRINE OF CLOG ON REDEMPTION

When a mortgage takes place, there exists a right of the mortgagee to buy back the property without any encumbrances by paying the loan. This right arises out of equity, and is commonly known as the right to redemption. It is codified under Section 60 of the Transfer of Property Act, 1882. Any obstruction to this right is void as it constitutes a clog on the equity of redemption. The maxim 'once a mortgage always a mortgage' means that there can no covenant that modifies the character of the mortgage agreed between the parties that would stop the mortgagor to redeem his property back on payment of the principal and respective interests.

Equity would mean in a layman's life as fairness. Back during the middle Ages in England, there were certain grey areas where it was observed that the Common Law was inadequate in its abilities to deliver justice to the common person[1]. This led to a directive by the King to appoint Chancellors in special courts who would go beyond the realm of the law to dole out justice and fairness to the parties[2]. In Common Law, equity is used as a means to sharpen the meticulousness of the law in order to achieve justice[3]. Such courts were called Courts of Equity.

Under a mortgage, two interests are generated by the owner of the property. One is the interest of the creditor on the property, which is limited and fixed and another, is the residuary interest left which can be quantified only by deducting the creditor's interest from the value of the security[4]. The fundamental bargain from this division of interests is the presence of a right to buy back the property without any encumbrances by paying the loan[5]. This right is called the equitable right to redeem. The first instance of the presence of the right of redemption was found in Roman law[6]. It has been rightfully said that "Redemption is purely a creature of courts of equity"[7].

Section 60 of the Transfer of Property Act, 1882 provides the right of redemption to the mortgagee. This right becomes alive only after the principal money becomes[8]. There are certain limitations to this right by the fact that it exists only till the mortgagee decides to exercise

his right of foreclosure on the property[9]. Thus, the contract of mortgage between the parties ends, when the debtor exercises his right to redeem through paying off the loan[10].

This right provided by the Transfer of Property Act is a statutory right which can only be done away by compliance to the procedure established by law[11]. It would henceforth follow that any obstruction to this right would be declared as void as a clog on the equity of redemption[12].

Clog on redemption:

In *Stanley v. Wilde*[13], *Lindley* M.R. gave one of the founding explanations of the basis of this doctrine –

“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’.”

The maxim ‘once a mortgage always a mortgage’ means that there can no covenant that modifies the character of the mortgage agreed between the parties that would stop the mortgagor to redeem his property back on payment of the principal and respective interests[14].

The basis of this doctrine lies in the exercise equity, justice and good conscience[15] and is extensive to areas where the act is not applicable[16]. On a realistic perusal of the workings of a mortgage, it is observed in most of the cases that the mortgagor enters into such an agreement because of some financial predicament[17]. The law recognizes the power of the dominant party to insert clauses which will serve his personal interests by creating impediments on the right to redeem the property[18]. Such obstructions are henceforth struck down by the courts to enable

the mortgagee to redeem his property[19]. In *U. Nilan v. Kannayyan (Dead) Through Lrs.*[20], explaining the philosophy behind the doctrine, it was said that –

“Adversity of a person is not a boon for others. If a person in stringent financial conditions had taken the loan and placed his properties as security therefor, the situation cannot be exploited by the person who had advanced the loan. The Court seeks to protect the person affected by adverse circumstances from being a victim of exploitation. It is this philosophy which is followed by the Court in allowing that person to redeem his properties by making the deposit under Order 34 Rule 5 C.P.C.”

There are no fixed qualifying circumstances in determining what would or would not amount to a clog[21]. It has been something that would have to be decided on the facts and circumstances of the case[22]. There are certain situations where it was held that the covenant was a clog on the right.

Long Term Mortgages:

Long term mortgages are common in cases of usufructuary mortgages. A term of 95 years or 100 years would definitely extend beyond one’s lifetime and superficially seems like a clog[23]. Taking cognizance of the same, the Supreme Court has ruled that only by virtue of lengthy period, a mortgage would not amount to a clog, there must exist a presence of undue advantage or fraud to term it as a clog[24].

In *Vadilal Chhaganlal v. Gokaldas Mansukh*[25], the mortgage agreement provided that it would subsist for 99 years and the mortgagee would be allowed to construct any structure on the property without any limit on the cost. The Supreme Court reasoned that it would be beyond the ability of the mortgagor to repay the principal money along with the interests and the construction expenses. It was held that both the conditions amounted to a clog on the mortgagee’s right of redemption.

In *Ramkhilawan Dilrakhan Ahwashi v. Mullo*[26], the case of the plaintiff was that a covenant for the payment of principal money after 80 years and only in the month of Baisakh, was a clog. The Trial Court dismissed the suit by calculating that the profits from the mortgaged

property was sufficient to pay the interests on the principal. On appeal, the High Court upheld the lower courts decision. However in *Balbhaddar Prasad v. Dhanpat Dayal*[27], the property mortgaged for 50 years was worth Rs.9000. The final amount to be paid after deducting the profits from the property was around two and a half lakhs. The Court held that such an enormous fund had led the property to be irredeemable and the terms of the contract were oppressive and unconscionable.

Condition of Sale of Property:

A covenant that a mortgaged property, if not redeemed within a fixed time, would translate into a sale is a clog[28]. However if there is a separate agreement whereby the mortgagor executes a sale deed in favor of the mortgagee as an independent transaction, such sale deed is valid[29].

In *Meharban Khan v. Makhna*[30], the mortgage agreement provided that the mortgagee was to be entitled to possession of the property for 19 years. There was a stipulation that if the mortgagor paid off his debt, he would be allowed to redeem the property only till a limited interest and the residual interest would belong to the mortgagor. It was further envisaged that on failure of the mortgagor to pay, the property would be deemed to be sold to the mortgagee permanently. The Court ruled that both conditions amounted to a clog. It was held that on payment of the full amount due, the property would be reverted back without any encumbrance.

This principle would also extend to cases where on default of payment, the property would be deemed to have been foreclosed, amounts to a clog[31]. However parties are free to stipulate such a condition subsequently after the mortgage agreement[32].

In *Kuddi Lal v. Aisha Jehan Begam*[33], the plaintiff-mortgagor was allowed to redeem the property back by paying from her own pockets and not through transferring the property. The Court held that such a covenant was a clog on redemption since it restrained alienation by the mortgagor.

Penalty in case of default:

Payment of a penalty if there is default on behalf of the mortgagor can be reasonable but in certain situations it may be unreasonable and penal[34]. Certain situations where a penalty has been held to be unreasonable are –

1. On default, compound interest is stipulated even when the original interest was very high[35].
2. On default, increased rate of interest would apply from the time the agreement is made[36].

By merely the virtue of there being a high interest does not lend the condition to be a clog on redemption unless it could be shown that there was undue influence in the dealing[37].

Collateral Benefit to Mortgagor:

A mortgagor may avail of a collateral benefit either during the subsistence of the mortgage, which is valid, or after the redemption, which in some cases is not valid[38].

In *Noakes & Co. v. Rice*[39], a covenant in the mortgage agreement stipulated that the mortgagee would buy all the beer he would consume on his property from the mortgagor who was a brewer. It was held that the tie was valid during the subsistence of the mortgage but not beyond redemption. The property must be delivered back without any tie.

One of the famous cases on collateral benefit was *Kreglinger v. New Patagonia Meat and Cold Storage Co. Ltd*[40]. In that case, the mortgage was of a term of 5 years with an option to the mortgagor to redeem the property before completion of the term. The agreement further stipulated that the mortgagor should sell sheepskins exclusively to the mortgagee as long as both parties agreed to a fixed price. The mortgagee paid the mortgage before 5 years and filed a suit for declaring the tie of exclusive selling to be declared as a clog on redemption.

The House of Lords held that the provision of exclusive sale to lenders did not amount to a clog. It was reasoned that the mortgagee is allowed to stipulate for a collateral benefit beyond the period of redemption provided that the stipulation is not –

1. Unconscionable or unfair.

2. A penalty amounting to a clog on the right to redeem.
3. Contrary to the right of redemption.

Kreglingers case is important in recognizing the limits of the doctrine by the terms of the contract unless they are oppressive, unconscionable or unreasonably hard[41]. The freedom of the parties to contract is asserted by this case[42].

The rule enunciated in Kreglingers met with approval in re Cuban Land and Development Co.[43], where it was stipulated that in the event of the winding up of the company, the debenture-holders were entitled to a part of the remaining profits. Such a provision was held not to be a penalty clogging the right of redemption.

It has also been approved by Indian Courts. A provision that allowed the mortgagee to remain in possession of the mortgaged property through permanent tenancy was held to be clog because the collateral benefit extended beyond the period of redemption[44].

Subsequent Agreement to postpone redemption:

A subsequent agreement which becomes an obstruction to the mortgagee by creating a personal obligation is a clog on his right to redemption[45]. The reason is that unless the agreement forms a charge on the property, the mortgagee is not liable to pay any sum arising from his personal obligation except the mortgage amount.

In *Sheo Shankar v. Parma*[46], the mortgagor had already executed a usufructuary mortgage in favor of the mortgagee. He further executed a simple mortgage in order to borrow more money. A provision in the simple mortgage provided that the mortgagor was stopped from redeeming the property till the amount in the simple mortgage was paid. It was held that such a provision was void as a clog.

In *Hari v. Vishnu*[47], a loan of Rs.1500 was advanced to the plaintiff on mortgage by the defendant. The mortgage deed provided that Rs.5000 was still to be paid by the plaintiff on a previous mortgage and stipulated that till both the sums were paid, the plaintiff was not entitled to redeem the property. The deed was stamped at a value on Rs.6500. It was held that since both the transactions were clubbed into one, the provision was not a clog.

Conclusion:

As we have seen, whether something would or would qualify as clog on the right of redemption is something that cannot be determined absolutely. It has to be settled through a careful perusal of the of the mortgage deed, the circumstances surrounding the parties entering into a mortgage, the amount advanced and nature of the transaction[48].

However the doctrine has not escaped without controversy. Sir Fredrick Pollock has made his displeasure known by terming this doctrine as an ‘anachronism’[49]. He believed that the doctrine cannot keep on assuming that the mortgagor is a victimized party in the bargain. According to him, in the modern age, both parties are at a level playing field and giving a mortgagor a ground to repudiate his obligations by portraying one of the clauses of the contract as unconscionable, it works against public policy as a whole[50].

Pollock isn’t completely wrong in his analysis of the doctrine. The doctrine was envisaged at a time when feudal landlords would use their power over oppressed peasants to enter into unfair agreements by virtue of their necessity. But with the growth of commerce and passage of time, such inequality has been more or less abolished. Providing an excuse to one party to escape his obligations is a bad precedent to set. However these criticisms have not stopped the courts in India to apply this test. Where a major chunk of the population in India still works in the agrarian sector and lives under below poverty line without any formal banking systems, the doctrine still has some prevalence in such situations. It is left at the discretion of the judiciary to decide in which cases a prudent application of this doctrine lies.

MCQ

1. “Once a mortgage, always a mortgage”. This sentence is

- (a) Absolutely True
- (b) Absolutely False
- © can not say
- (d) None of the above

2. Who can file a suit for redemption?

- (a) Mortgagee
- (b) Mortgagor
- (c) Both (a) & (b)
- (d) None of the above

3. The right of redemption will be considered as a clog on redemption and will be null and

- (a) Voidable
- (b) Void
- (c) Partial Void
- (d) None of the above

4. If a mortgage property subsequently sold to the same mortgagee, it can be

- (a) Voidable
- (b) Void
- (c) Partial Void
- (d) None of the above

5. A person who has advanced to a mortgager, money with which the mortgage has been redeemed is known as.....

- (a) Redemption
- (b) Foreclosure or sale
- (c) Implied redemption
- (d) None of the above