IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH

RSA No.3313 of 1986 (O&M)
Date of decision: 16.09.2015

Mohinder Kaur (through LRs) & others ... Appellants

Vs.

Lakha Singh (through LRs) & others ... Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

1. Whether reporters of local newspapers may be allowed to see judgment?
2. To be referred to reporters or not? Yes
3. Whether the judgment should be reported in the Digest?

Present:- Mr. Baldev Raj Mahajan, Senior Advocate with
Mr. Akhilesh Vyas, Advocate
for the appellants.

Mr. M.K.Dogra, Advocate
for respondents No.1(ii)(iii), 2(ii), (iii), (iv), 3(i), 4(i)(vi) & 5(i).

AMIT RAWAL J. (Oral)

Challenge in the present appeal is to the impugned judgments and decrees of both the Courts below, whereby, the suit seeking redemption of the mortgage deed dated 17.12.1966 by the successor-in-interest of the mortgagors, namely, Buta Singh and Santa Singh (since deceased), has been dismissed.

It would be apt to give preface of the facts.

Buta Singh and Santa Singh sons of Alla Singh being owners of land measuring 182 kanals 11 marlas, executed a registered mortgage deed dated 17.12.1966, Ex.P3, for a period of

80 years, in favour of Saudagar Singh (since deceased), being represented through LRs, regarding the aforesaid land for a consideration of ₹15,000/-. As per the terms and conditions of the mortgage deed, a sum of ₹9500/- was paid before the Sub Registrar and sum of ₹ 3,000/- + ₹ 2,000/- was to be paid by the mortgagee to Niranjan Singh and Darshan Singh respectively, towards re-payment of loan of the mortgagor and the remaining amount, i.e., ₹500/- had been received by the mortgagee from mortgagor. The mortgage deed envisaged that income from the mortgaged land will be considered as equal to interest of amount of ₹8000/- out of mortgage amount and on balance mortgage amount of ₹7000/-, mortgagor will pay interest at the rate of 1 percent per month.

Two sale deeds were executed, i.e., one on 11.09.1968, Ex.P1, whereby, Buta Singh and Santa Singh sold land measuring 33 kanals 10 marlas of land in favour of Hira Singh and Ram Singh, plaintiffs No.2 and 3 and another one dated 28.05.1969, Ex.P2, in respect of 98 kanals 15 marlas of land in favour of Gurdial Singh, plaintiff No.1. On 03.10.1981, the aforementioned subsequent vendees filed suit for possession of ½ share of 182 kanals 11 marlas of mortgaged land by way of redemption.

Mr. B. R. Mahajan, learned Senior counsel assisted by Mr. Akhilesh Vyas, Advocate for the appellant submits, that both the Courts below have committed illegality and perversity in not referring the provisions of Section 60 of the Transfer of Property Act, inasmuch as there is no clause seeking redemption before the period of 80 years.

In support of his contention, he relied upon five judgments of the Hon'ble Supreme Court as well as of this Court in **Shivdev Singh vs. Sucha Singh 2002(2) R.C.R.(Civil) 765; Usha Rani vs. Pushpa Devi 2008(2) R.C.R.(Civil) 163; Mukhtiar Singh (dead) through LRs. vs. Gurmej Singh 2005(1) R.C.R.(Civil) 58; Ajit Singh vs. Kakhbir Singh and others 1992(2) R.C.R. (Rent) 335 and Pomal Kanji Govindji vs. Vrajlal Karsandas Purohit 1988 (2) R.R.R.431,** to contend, that now it is well settled law that redemption of the mortgage can be sought before expiry of period, in essence, it would not be a clog. He further submits that therefore, following substantial questions of law arise to be determined by this Court:-

i) Whether the suit for redemption of the mortgaged property before expiry of mortgaged period mentioned therein would be maintainable or not?

ii) Whether the period of 80 years of mortgage is a clog on equity of redemption, in case, the suit for redemption is filed before expiry of mortgaged period?

Mr. M.K.Dogra, learned counsel appearing on behalf of the respondents No.1(ii)(iii), 2(ii), (iii), (iv), 3(i),4(i)(vi) and 5(i) submits that appellants being subsequent vendees, though had knowledge that Buta Singh and Santa Singh, had already mortgaged the property in favour of Saudagar Singh, but the fact remains that certain terms and conditions need to be adhered to between the parties. They could not negotiate upon the terms and conditions of the mortgage deed between Buta Singh, Santa Singh and Saudagar Singh, which would have been applicable to the appellant-defendants. He further submits that there is no illegality and perversity, much less, no substantial question of law arises to be determined by this Court.

I have heard learned counsel for the parties and appraised the impugned judgment and decrees, as well as, record of the Courts below.

As per the provisions of Section 60 of the Transfer of Property Act, right of mortgage is a statutory act and the same cannot be extinguished by the act of the parties. Period of 80 years would not prevent a mortgagor or hamper his interest in seeking redemption. Such clause, in my view is void. In order to lend support to the aforesaid, I rely upon the ratio decidendi culled out by the Hon'ble Supreme Court in Shivdev Singh's case (supra) and the relevant portion of the same is reproduced herein below:-

> *"7 Section 80 of the Transfer of Property Act provides that at any time after the money has become due, the mortgagor has a right, on payment or tender, at a proper time and place of the mortgagor-money to require the mortgagee to deliver the mortgage deed and all*

documents relating to the mortgaged property and where the mortgagee is in possession of the mortgaged property, to deliver possession thereof to the mortgagor. Such a right of the mortgagor is called, in English Law, the equity of redemption. The mortgagor being an owner who had parted with some rights of ownership has a right to get back the mortgage deed or mortgaged property, in exercise of this right of ownership. The right of redemption recognized under the Transfer of Property Act is thus a statutory and legal right which cannot be extinguished by any agreement made at the time of mortgage as part of the mortgage transaction."

I also rely upon the judgment of the Hon'ble Supreme Court in Pomal Kanjit Govindji's case (supra) and the relevant portion of the same is reproduced herein below:-

"17. The right of redemption, therefore cannot be taken away. The Courts will ignore any contract the effect of which is to deprive the mortgagor of his right to redeem the mortgage. It was further reiterated at page 515 of the report in Ganga Dhar's case (AIR 1958 Supreme Court 770) (supra) that the rule against clogs on the equity of redemption no doubt involves that the Courts have the power to relieve a party from his bargain. If he has agreed to forfeit wholly his right to redeem in certain

circumstances, that agreement will be avoided. But the Courts have gone beyond this. They have also relieved mortgagors from bargains whereby the right to redeem has not been taken away but restricted. It is a power evolved by the early English Courts of Equity for a special reason. All through the ages the reason has remained constant and the Court's power is, therefore, limited by that reason. The extent of this power has, therefore, to be ascertained by having regard to its origin. It is better to refer to the observations of Northington L.C. In Vermon v. Sethell, 1762 (28) ER 838. Lord Chancellor observed therein as follows:

> *"This Court, as a Court of conscience is very jealous of persons taking securities for a loan, and converting such securities into purchases. And therefore, I take it to be an established rule, that a mortgagee can never provide at the time of making the loan for any event or condition on which the equity of redemption shall be discharged, and the conveyance absolute. And there is great reason and justice in this rule, for necessitous men are not, truly speaking, free men, but to answer a present exigency, will submit to any terms that the crafty may impose upon them."*

In view of the aforesaid position, the finding rendered by both the Courts below are perverse and illegal and are not based upon law, thus, are liable to be set aside. Accordingly, the same are set aside. The substantial questions of law, noticed above, are answered in favour of the appellant-plaintiffs and against the respondent-defendants.

Accordingly, the appeal is allowed.

The plaintiffs are granted three months' time to deposit the amount with the executing Court. On deposit of the same, they shall be entitled to seek redemption of the property.

Decree sheet be prepared.

(AMIT RAWAL)
JUDGE

September 16, 2015
savita