

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

1. RSA No.1603 of 2008 (O&M)

Raj Kumar and others

... Appellants

Versus

Ami Chand deceased through his
L.Rs. Man Singh and others

... Respondents

2. RSA No.1604 of 2008 (O&M)

Raj Kumar and others

... Appellants

Versus

Man Singh and others

... Respondents

Date of Decision: 1.7.2015

CORAM:- HON'BLE MR. JUSTICE RAJIV NARAIN RAINA

Present: Mr. R.S. Sihota, Sr. Advocate,
with Mr. B.R. Rana, Advocate,
for the appellants.

Mr. Adarsh Jain, Advocate,
for the respondents.

1. To be referred to the Reporters or not? Yes.
2. Whether the judgment should be reported in the Digest? Yes.

RAJIV NARAIN RAINA, J.

1. This order disposes of RSA No.1603 of 2008 titled *Raj Kumar and others vs. Ami Chand deceased through his L.Rs. Man Singh and others* & RSA No.1604 of 2008 titled *Raj Kumar and others vs. Man Singh and others*.

2. These two appeals were adjourned sine die on December 08, 2009

to await the decision of the Supreme Court in SLP (Civil) CC 11029 of 2008 arising out of RSA No.1029 of 1988 tilted *Singh Ram (D) through LR vs. Sheo Ram and others* decided on August 18, 2008 and rendered by the Full Bench of this Court.

3. The plaintiffs are the appellants in these appeals. They were mortgagees of the suit property. They brought a suit for declaration to the effect that they had become owners of the property in dispute by effluxion of time with the expiry of 30 years. The suit was decreed by the trial court but was reversed by the court of first appeal on the ground that in the case of a usufructuary mortgage, where no period of limitation is prescribed to seek redemption, then the right to redemption is not foreclosed. The lower appellate court followed the law laid down by the Full Bench of this court meanwhile in **Ram Kishan and others vs. Sheo Ram and others**, 2008(1) RCR (Civil) 334 which had been pronounced by then clarifying the legal position. The view expressed by this court has been upheld by the Supreme Court in case reported in Civil Appeal No.5198 of 2008 after leave was granted in the above noted SLP reported in case **Singh Ram v. Sheo Ram**, (2014) 9 SCC 185: 2014 (4) RCR (Civil) 179. The Supreme Court has commended itself to the view that in the case of a usufructuary mortgage, limitation would run only after redemption money is paid otherwise there is no foreclosure by limitation. Verily said, once a mortgage is always a mortgage and always open to redemption.

4. The respondents have filed applications bearing CM No.5526-C of 2015 in RSA No.1603 of 2008 and CM No.5530-C of 2015 in RSA No.1604 of 2008 praying that these appeals deserve to be dismissed in view

of the law settled by the Supreme Court which applies squarely to the facts of these appeals. The ratio of the ruling in the Supreme Court judgment is in the Court holding that the special right of a usufructuary mortgagor under section 62 of the Transfer of Property Act, 1882 to recover possession commences in the manner specified therein, i.e. where mortgage money is paid out of rents or profits or partly out of rents or profits and partly by payment or deposit by mortgagor of the redemption money. Until then, limitation does not start to run for purposes of article 61 of the Schedule to the Limitation Act, 1963. The usufructuary mortgagee is not entitled to file a suit for declaration that he has become an owner merely on the expiry of 30 years from the date of the mortgage. The decision on the law point commended by this court in the Full Bench ruling in *Ram Kishan* was affirmed and the contrary view taken by the Full Bench of the High Court of Himachal Pradesh at Shimla in **Bhandaru Ram (D) Thr. L.R. Ratan Lal vs. Sukh Ram**, AIR 2012 (H.P.) 1 (FB) was overruled by the Supreme Court.

5. On facts, the position was that the suit land was mortgaged by the ancestors of the defendant with the ancestors of the original plaintiffs for more than 40 years prior to the filing of the suit in 1996 and the period of redemption of 30 years had already expired. Hence, the original plaintiffs became owners in possession of the disputed land by prescription, or so they argued. The plaintiffs stated that they asked defendant Ami Chand to admit the plaintiffs claim as owners in possession of the land in dispute but the defendant refused to acknowledge the plea. Hence, the cause of action arose to file the lawsuit and it was instituted in the civil court.

6. On notice, defendant appeared and filed written statement along with a counter-claim. In his written statement, the defendant denied plaintiffs as mortgagees in possession of the agricultural land in dispute and stated that the suit land has been under the possession of the defendant since June 15, 1960 when the same was got redeemed by defendant by paying the mortgage amount and on the same day, the mortgagee in possession had delivered the possession to the then mortgagor, the ancestors of the defendant, and promised to get revenue entries corrected but the revenue entries could not be corrected. While denying the contents of the plaint, the defendant pleaded that he is in actual physical possession of the land as absolute owner and even otherwise he has become owner of the suit land by adverse possession. In his counter-claim he prayed for a decree of declaration that he has become owner in possession of the suit land and the same is free from mortgage and entries in the revenue record regarding mortgage are null and void as stray entries which have hardly any binding effect.

7. Of the seven issues framed, issue # 1 and # 5 are central to the adjudication of these appeals. Issue # 1 was framed as to whether the plaintiffs are owners in possession of the suit property as mortgagees as detailed in para no.1 of the plaint. Issue # 5 was whether the suit of the plaintiffs is time barred. The onus of the first fell on the plaintiffs while that of issue # 5 on the defendant. The remaining are technical issues of not much moment. Parties led their evidence in support of their respective cases by bringing both oral and documentary evidence on the file.

8. There is no dispute that the suit land was once mortgaged by the

ancestors of the defendant with the ancestors of the plaintiffs. There appears to be sufficient weight of evidence on the file to suggest that the Jamabandies in the column of cultivation show the possession of mortgagees on the disputed land. Several Jamabandies were examined from the year 1963-64 to 1983-84 all of which revealed the mortgagees to be in cultivating possession of the suit property. The Jamabandi for the year 1960 was proved as Ex.P-7 which shows Ami Chand defendant as owner/mortgagor of the land in the column of ownership. The mortgagees were persons namely, Khacher, Sukha and others. The column of cultivation in this Jamabandi shows the cultivating possession of mortgagees through Dhan Singh son of Sanwalia, Gair marusi.

9. The learned trial court on a reading of the evidence found that the revenue record produced by the plaintiffs shows that they are in cultivating possession as mortgagees for the past more than 30 years. The question of adverse possession over the suit land set up by the defendant was neither tenable nor arose as the defendant was himself recorded as owner of the suit land and the plea of adverse possession cannot be taken by the defendant against himself. The defendant's stand that he was in physical possession of the suit land was negated and found incorrect on facts. He was not in possession, but he was a mortgagor. The court also did not accept the plea of the defendant that mortgaged property had been redeemed. Since land was not redeemed within the period of 30 years and the plaintiffs were in possession they argued that their title was perfected by lapse of time. Issue # 1 was decided in favour of the plaintiffs. Issue # 3 was to the effect as to whether the counter-claim was maintainable but as defendant failed to prove

possession, issue # 3 went against him. The suit was decreed by the Civil Judge (Junior Division), Palwal on November 25, 2003.

10. The appeal carried by the defendant was successful as by that time, the legal position stood clarified by the Full Bench in *Ram Kishan's* case. The appeal was allowed and the suit was dismissed by the learned Additional District Judge, Gurgaon by his judgment and decree dated February 15, 2008. The plaintiffs were held to be in possession of suit land as mortgagees but they had not become owners by way of foreclosure. The counter-claim of the defendant was also decreed to the extent that he was held owner of the suit property but not in possession thereof.

11. The only worthwhile and substantial argument projected by Mr. R.S. Sihota, learned senior counsel appearing for the appellants is the foundational question i.e. whether the suit mortgage was in nature a usufructuary mortgage at all before the decisions of the Full Bench as upheld by the Supreme Court in the aforesaid cases can be applied which cases dealt exclusively with usufructuary mortgages amongst the several known species of mortgages found in India which include Simple Mortgage, Mortgage by Conditional Sale, English Mortgage, Mortgage by deposit of title of deeds and the Anomalous mortgage.

12. However, the plaintiffs in the suit appear not to have pleaded that the mortgage was a usufructuary one but on the other hand the defendant pleaded usufructuary mortgage. The parties did not go to trial on this issue as none was framed or claimed. The appellants filed CM No.9374-C of 2008 under section 151 of the CPC [not under Order 41 Rule 27 of the CPC] seeking to place on record the Jamabandi for the year 1885-86 and

mutation entries for the year 1888. These documents were not relied upon in the two courts below and have been placed for the first time in second appeal. Though the documents have not been placed on record in the proper form by invoking the appropriate provision of the Code but the respondent has notice of these documents in the application. Since no counter has been filed this court has still heard Mr. Sihota on the revenue entry in order to avoid any miscarriage of justice by taking a fuller view of the case. The photocopy of the original mutation entry of the year 1888 is in Urdu script. This court in order to bring out any nuance or subtlety that may lie in the Urdu version passed an order on May 5, 2015 directing the office to depute a Court Translator to assist the court by a true translation of the ancient Urdu document so that the true meaning of the revenue entry in the register of mutations with reference to the report of Patwari and the attestation of Girdawar Kanungo in column No.15 is available for assistance of the court and hence I asked Mr. B.R. Rana, learned counsel appearing with Mr. R.S. Sihota, learned senior counsel to hand over a copy to the court staff for onward transmission to the translator to which process the opposite party had no objection. In the English translation of Annexure A-2 placed with the miscellaneous application there was a writing that the mortgagee was to pay the revenue to the Government out of the produce of the land. The translated copy has been produced by the court translator present in court. His work reads as follows:-

'A' "Dan Shah, guardian of Tula Ram, minor, has stated that he has verbally mortgaged the land measuring 15-8 with Nand Bakhsh s/o Kishan Sahai, caste Jat, resident of Bahin, in lieu of Rs.100/-, and he has received the

mortgaged money from the mortgagee. The mortgagee shall be responsible to pay the land revenue to the govt., out of the produce. I, guardain of Tula Ram have nothing to do with this. Girdar, Numberdar, has also verified the statement of mortgager. Thus the case has been entered at the register. .. And, orders have been explained to Numberdar as per procedure.

Dated : 8th Feb.88

Sd/- Patwari

(In Urdu)

'B' 6th April, 88.

Tula Ram is minor. His guardian is Dan Shah. He states that he is unaware of this mortgage. He states that the land was mortgaged with Todar... He states that he does not know (about this), he (Todar) may have mortgaged the land with Nand Bakhsh. Todar has died. Hardev, his son, is present. He (Hardev) states that the land was mortgaged with him in lieu of Rs.105/-. He states that he has now sub-mortgaged this land verbally with Nand Bakhsh, in lieu of Rs.100/-, with the condition that possession for cultivation will be of mortgagee and he will be responsible to pay the tax out of the produce. Possession is with mortgagee. Therefore, compliance report is hereby submitted.

Sd/- Girdawar Kanungo

(In Urdu)"

13. It would be appropriate to put work at 'A' alongside 'B' [as above], which is the translation found in the papers in the Misc application, when both the above entries in the report of the Patwari are reproduced to know their difference in substance, if there is any.

14. On a reading of the true translation done by the Court Translator it is apparent that mortgagees were responsible to pay the land revenue to the Government out of the produce of the land. Even after the mortgage was

sub-mortgaged by the mortgagee even then the original mortgagee was responsible to pay the tax out of the produce and possession remained with mortgagee. The rate of mortgage was determined at Rs.100/- for four years.

15. Therefore, Mr. Sihota is not quite correct when he canvasses that the mortgage was a simple mortgage and not a usufructuary mortgage by trying to take his case out of the fold of the judgments. Nonetheless, the recited character of the mortgage deed is a mixed question of law and fact. It was not the case pleaded by the plaintiffs that the mortgage was not usufructuary in nature and content while defendant asserted the mortgage to be a usufructuary one and the appellants are thus estopped from raising the plea in second appeal against an appellate decree without any factual foundation underlying it. The burden of proof was eminently on the plaintiffs to show that the mortgage was not usufructuary and, therefore, they could become owners by prescription and by effluxion of time elapsing by 30 years and then to urge today that the ratio of the Full Bench in *Ram Kishan's* case as affirmed by the Supreme Court in *Singh Ram's* case would not apply to the case in hand. It is well settled that what is not pleaded is not open to proof by any evidentiary weight. I have, however, only en passant tried to ascertain the true nature of the mortgage executed between the parties. If mortgagee was obliged to pay land revenue and taxes from the produce of the land or from part of the produce of the land, the case would indeed appear to fall within the scope of usufructuary mortgages and thereby be governed by the law laid down by the Supreme Court in *Singh Ram's* case. I would, therefore, reject the argument raised by Mr. Sihota that the subject-matter mortgage was not usufructuary in nature when it is

beyond doubt that revenue was paid from the usufruct of the mortgaged land to the State by the plaintiffs. The contention raised in the preceding para.11 is misconceived and without support of evidence on record and as a matter of fact the evidence is to the contrary *ex facie* on a reading of the mutation/revenue entry of the year " '88".

16. I would, therefore, not think it desirable to interfere in this matter, since the legal issue, although a substantial question of law in the past remains no longer *res integra*. The appeals are found covered by the ratio of the law declared by the Supreme Court in *Singh Ram's* case and bar of limitation would run as per law. They are accordingly dismissed as not giving rise to any other substantial question of law, other than what has been considered herein, while none other was pressed at the hearing. The parties will bear their own costs.

(RAJIV NARAIN RAINA)
JUDGE

1.7.2015
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