IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

RSA No.1133 of 2011
Date of decision: 07.01.2015

Gurnam Singh and others

...Appellants

Versus

Hazara Singh and another

... Respondents

CORAM: HON'BLE MR. JUSTICE ARUN PALLI

Present: Mr. PS Dhaliwal, Advocate,
for the appellants.

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1. Whether reporters of local papers may be allowed to see the judgment?
2. To be referred to the reporters or not? YES
3. Whether the judgment should be reported in the digest?

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ARUN PALLI J. (Oral)

Suit filed by the plaintiffs was dismissed by the trial court vide judgment and decree dated 04.08.2010. Appeal preferred against the said decree failed and was dismissed on 08.10.2010. This is how, plaintiffs are before this court, in this regular second appeal. Parties to the lis, hereinafter, would be referred to by their original positions in the suit.

In a suit filed by the plaintiffs, they prayed for a declaration that they had become owners of the suit property, comprised in khewat khatauni No.442/732 min khasra No.2954 (17-2), situated in village Sehjra, Tehsil Barnala, with afflux of time, as defendants failed to redeem the property within the prescribed period of limitation. And thus, plaintiffs were owners of the suit property in equal shares and entitled to be recorded as such in the record of rights. By way of consequential relief, an injunction was also claimed causing their forcible dispossession. It was averred that the suit land was mortgaged with possession by forefathers of the defendants almost 120 years back in favour of the forefathers of the plaintiffs. Predecessor-in-interest of the plaintiffs had been in possession of the suit property as mortgagees and now, the plaintiffs are in possession being their legal heirs. As the suit property was never got redeemed within the period prescribed in law, right of the defendants in this regard, thus, stood foreclosed. And resultantly, plaintiffs had become owners of the suit land in equal shares. It was maintained that defendant No.1 had gone abroad i.e. Singapore, and taking undue benefit of entries in the record of rights, defendant No.2 threatened to take forcible possession of the suit land. Since despite repeated requests defendants failed to acknowledge the claim of the plaintiffs, thus, the suit.

In defence, it was pleaded, inter alia, that the plaint was totally silent as regards the date, month and the year of the alleged mortgage. Further, nothing was averred as regards khasra numbers of mortgaged property and even the names of mortgagee. Still further, 120 years back, the khasra number being referred i.e. khasra No.2954(17-2), was not even in existence. Revenue record showing plaintiffs to be in possession was claimed to be forged and resulted by the plaintiffs in connivance with the revenue officials. It was denied that period to redeem the suit property had expired. Possession of the suit property was claimed to be with defendant No.2 and thus, he prayed for dismissal of the suit.

Trial court, on a consideration of the matter in issue and evidence on record, found that the plaintiffs had examined four witnesses in support of their claim. As regards the testimony of PW1 Jit Singh, it was observed that his statement could not be relied upon, as it remained incomplete due to his demise. Cross-examinations of PW2 & PW3 i.e. Ajmer Singh and Mohinder Singh, revealed that they were procoured and planted witnesses. In their cross-examinations, they testified that they did not know as to who were the mortgagors and mortgagees. They also did not know the khasra numbers of mortgaged land, amount and the period for which the suit property was mortgaged. They conceded that no mortgage qua the suit property had taken place in their presence and in fact, they just heard about such mortgage. One of the plaintiffs i.e. Bharpur Singh (PW4), for the first time deposed in his examination-in-chief that the suit property was mortgaged for a sum of ₹ 405/-. His cross-examination revealed that he did not know the name of the mortgagor, mortgagee and even the date, month or the year of the alleged mortgage. He also admitted that neither did he know, if any, mortgage deed was executed nor the terms and conditions of such mortgage. However, on a consideration of the entries in khatauni pamaish (Ex.P1 & Ex.P2) and jamabandi/khasra girdawaries (Ex.P3 to Ex.P21), it was observed that the suit property was shown to be in possession of the plaintiffs as mortgagee. Entry as regards mortgage was reflected in khatauni pamaish (Ex.P2). DW1 admitted in his cross-examination that khasra girdawaries qua the suit property were in the name of the plaintiffs for the last 8-10 years. Accordingly, it was concluded that although no mortgage deed or any other document like a receipt etc. was brought on record to show the terms and conditions of the alleged mortgage, but the evidence on record proved that the possession of the plaintiffs over the suit property was as mortgagees. In so far as the issue as to whether the plaintiffs had become owners with afflux of time, it was observed in reference to a decision of a Full Bench of this court in **Ram Kishan and others v. Sheo Ram and others, 2008(1) RCR (Civil) 334 P&H (FB)**, that in case of a usufructuary mortgage, where the period of redemption is not fixed, right of foreclosure will not accrue to mortgage till he remains in possession over mortgaged security and is appropriating usufruct of the mortgaged land towards the interest of the mortgagee debt and the right to redemption to recover possession would accrue to the mortgagor on payment of sum secured in such mortgage. That being so, it was concluded that the period of limitation of 30 years, as envisaged under Article 61(a) of the Limitation Act, had not yet started. Therefore, suit for foreclosure could not be filed by the plaintiffs, as the period of redemption had not yet expired. However, plaintiffs having been proved to be in possession of the suit property as mortgagee could only be dispossessed by following the due process of law. Accordingly, it was held that although plaintiffs were in possession of the suit property as mortgagees, but they had still not become its owner. Thus, suit of the plaintiffs was partly decreed and a decree for injunction, restraining the defendants from interfering in their possession, was passed.

Being aggrieved against the said decree, plaintiffs preferred an appeal. First appellate court reviewed the matter in issue, evidence on record and on an analysis thereof found itself in concurrence with the view drawn by the trial court and the findings recorded in support thereof. Accordingly, the appeal was dismissed.

I have heard learned counsel for the appellants at length and perused the RSA paper book.

Learned counsel for the appellants simply seeks to reiterate the submissions that were advanced before the courts below and rejected after a due and comprehensive consideration. No other argument was advanced.

On a due and thoughtful consideration of the matter in issue, I am of the considered view that the instant appeal is devoid of merit and is thus, liable to be dismissed for the reasons that are being recorded hereinafter. Needless to assert that the position of law is settled, as enunciated by a Full Bench of this court in **Ram Kishans's case** (supra), affirmed by the Hon'ble Supreme Court in **Singh Ram (D) Thr. L.Rs. v. Sheo Ram and Ors., AIR 2014 SC 3447**, that in case of usufructuary mortgage, where no time limit is prescribed for getting the property redeemed, the right to seek redemption of the mortgaged property, would not arise from the date of execution of the mortgage deed, but from the date when the mortgagor pays or tenders or deposits in court money or balance thereof. Thus, once a mortgage is always a mortgage and is always redeemable. Therefore, right of foreclosure will not accrue to the mortgagee till such time the mortgagee remains in possession of the mortgaged security and is appropriating usufruct of the mortgaged land towards the interest on the mortgaged debt. No doubt, plaintiffs have been held to be in possession of the suit property as mortgagees, however, in the absence of any proof as regards the terms and conditions of mortgage, most importantly, the date/period, if any, that was stipulated in the mortgage deed for redemption of the suit property, plaintiffs could not ask for the declaration prayed for. Ex facie, it was neither pleaded least proved, if any date was stipulated for redemption of the suit property. So much so, Ajmer Singh (PW2) testified in his cross-examination that no document in regard to mortgage of the suit property was ever executed. He deposed that he was merely told by Gurnam Singh that the suit property was mortgaged in favour of their predecessor. And he had himself had not seen any revenue record. Likewise, Mohinder Singh (PW3) failed to reveal the details of the mortgage deed and its period. Plaintiff Bharpur Singh (PW4) also failed to state as to who were the mortgagor and mortgagees. And the same was mortgaged for how many years. He even failed to disclose the date, month and the year of the mortgage. He also expressed his inability to reveal if any mutation, pursuant to the alleged mortgage, was ever sanctioned, in favour of predecessor-in-interest of the plaintiffs. That being so, in the absence of any proof or evidence on record as regards the terms and conditions of the deed of mortgage and particularly, the date/period, if any, that was fixed for redemption of the suit property, suit filed by the plaintiffs was wholly misconceived. That being so, no limitation applies qua the right of the mortgagor for seeking redemption of the suit property and the same could be redeemed at any time. Learned counsel for the appellants could not point out or show as to how the conclusions arrived at by both the courts below were either contrary to the position on record or suffered from any material illegality.

In the wake of the position as set out above, and the conclusions that have concurrently been recorded by both the courts below, there hardly exists any ground, least plausible in law, to interfere with the decree being assailed in the present appeal. No question of law, much less any substantial question of law, arises for consideration. Appeal being devoid of merit is, accordingly, dismissed.

(Arun Palli)
Judge

January 7, 2015
Rajan