

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

1. Civil Revision No.4040 of 2016(O&M)
Date of Decision: 22.10.2016

Hamid and othersPetitioners
Vs

Jafru @ Fajru and othersRespondents

2. Civil Revision No.4887 of 2016 (O&M)

Jafru @ Fajru and othersPetitioners
Vs

Hamid and othersRespondents

3. Civil Revision No.4900 of 2016 (O&M)

JabardeenPetitioner
Vs

Hamid and othersRespondents

CORAM: HON'BLE MR. JUSTICE RAJ MOHAN SINGH

Present:Mr. S.K. Bawa, Advocate
for the petitioners in CR No.4040 of 2016 and
for the respondents in CR Nos.4887 & 4900 of 2016.

Mr. Rakesh Dhiman, Advocate
for the respondents in CR No.4040 of 2016 and
for the petitioners in CR Nos.4887 & 4900 of 2016.

RAJ MOHAN SINGH, J.

[1]. Vide this common judgment Civil Revision Nos.4040, 4887 and 4900 of 2016 are being disposed of as common issue is involved in all these petitions. For brevity, the facts are being

culled out from Civil Revision No.4040 of 2016.

[2]. Brief facts as gathered from the record are that a civil suit titled Hamid vs. Jafru and others was decided by the trial Court vide judgment and decree dated 08.12.2007. Defendants were proceeded against *ex parte* in the said suit. An application under Order 9 Rule 13 CPC was filed by the defendants for setting aside the *ex parte* judgment and decree. Trial Court framed necessary issues. Net Ram, Computer Clerk, Office of Civil Surgeon, Mandi Khera appeared as AW-1 and got recorded his statement to the effect that Ex.AW-1/A was the date of birth certificate of Kayamddin. Date of birth certificate was claimed to be in accordance with the record and name of Kayamddin was statedly recorded at Sr. No.6 in the record. The date of birth of Kayamddin was stated to be 01.05.2001. Hakmuddin appeared as AW-2 and Jabarddin appeared as AW-3.

[3]. It was held by the trial Court that except Kayamddin, no sufficient cause for setting aside the *ex parte* judgment and decree was brought on record. Kayamddin was found to be minor. Therefore, *ex parte* judgment and decree *qua* Kayamddin was set aside, however *qua* the defendants/judgment-debtors, the same was maintained vide order dated 22.08.2014 passed

by Civil Juge (Jr. Divn.) Mewat.

[4]. Jabarddin, Hamid, Jafru and others filed appeals before the lower Appellate Court. All the appeals were consolidated and were decided vide common judgment dated 19.02.2016 passed by Additional District Judge, Mewat. The appeals were dismissed thereby maintaining the order of the trial Court.

[5]. Learned counsel for the petitioners submitted that even *qua* Kayamddin, the Courts below ought to have dismissed the application as the birth entry Ex.AW-1/A depicted Kayamddin as son of Atar Khan wherein his date of birth was shown to be 01.05.2001, but date of registration was shown to be 25.02.2001 (prior to even date of birth of Kayamddin). AW-1 Net Ram while appearing as witness admitted the date of birth of Kayamddin to be 01.05.2001, however admitted that registration was done on 25.02.2001 as per record. In cross-examination the witness pleaded ignorance in respect of over writing in the original record. There was no initial on the over writing. The witness further stated that there was no material available on record as to on what basis the entry Ex.PW-1/A was made in the register. Learned counsel also pointed out that in the birth entry of Kayamddin, his father's name was shown as Atar Khan whereas in pleadings the same was shown to be

Akhtar Khan.

[6]. On the other hand, learned counsel for the respondents vehemently submitted that in view of very nature of the suit, the same could not have been decreed. In a suit for usufructuary mortgage where no period of limitation was fixed, the mortgagees do not become owner by prescription. "Principle of *'once mortgage always a mortgage and is always redeemable'* was applicable in case of usufructuary mortgage where no time was fixed for redemption. When no time was fixed for redemption, the mortgagor has a right to seek redemption at any point of time on payment of mortgaged debt.

[7]. On the strength of **Ram Kishan and others vs. Sheo Ram and other, 2008(1) CivCC 414**, learned counsel for the respondents submitted that the period of 30 years under Article 61(a) of the Limitation Act begins to run, when the right to redeem or the possession accrues to the mortgagor. Right to redeem or recover possession accrues to the mortgagor on payment of sum secured in case of usufructuary mortgage where rents and profits are to be set off against interest on the mortgaged amount, right of foreclosure is co-extensive with the right to seek redemption.

[8]. Since right to seek redemption accrues only on

payment of mortgage amount, therefore, right of foreclosure will not accrue to the mortgagees, till such time mortgagee remains in possession and appropriates and usufructs the mortgaged property towards interest on the mortgaged debt. The ratio in **Ram Kishan and others'** case (supra) was further upheld by the Hon'ble Apex Court.

[9]. I have heard learned counsel for the parties.

[10]. The first revision petition i.e. CR No.4040 of 2016 has been directed against the orders of the Courts below for setting aside the *ex parte* decree *qua* Kayamddin. Other revision petitions have been preferred by the judgment-debtors seeking to get the *ex parte* judgment and decree set aside in *toto* on the premise that once the judgment and decree is set aside *qua* Kayamddin, the same cannot be executed *qua* others, keeping in view that all the mortgagors have community of interest in the mortgaged property without there being any separation of mortgaged land.

[11]. Evidently, a suit for declaration was filed by the plaintiffs on the premise that they have become absolute owners of the mortgaged land after the period of redemption stood expired. There was no written mortgage deed. During course of arguments it was a conceded position between the parties that

the nature of mortgage was a usufructuary mortgage.

[12]. In the aforesaid suit, none appeared on behalf of the defendants and they were proceeded against *ex parte*. An application under Order 9 Rule 13 CPC filed by the defendants was also dismissed on account of insufficiency of cause for not appearing in the Court. However, *qua* Kayamddin *ex-parte* decree was set aside on the ground of his being minor at the time of passing of the decree. All the three appeals preferred against the order dated 22.08.2014 were also dismissed by the lower Appellate Court on 09.02.2016.

[13]. In the instant cases, though no sufficient cause was projected by the judgment-debtors except in case of Kayamddin. The nature of suit could not be gone into by the Courts below for want of any defence by the defendants. Question would arise whether unexecutability of decree *qua* Kayamddin would render the same as unexecutable *qua* other judgment-debtors in view of mortgage being one, where no defined partition of Kayamddin can be segregated viz-a-viz. other judgment-debtors. The mortgage is required to be redeemed in entirety that too in one go.

[14]. Learned counsel for the judgment-debtors stated that the decree-holder could not become owner by virtue of

prescription *qua* the share of Kayamddin on the strength of mortgage being usufructuary mortgage, then question arises whether plaintiff can become owner by prescription *qua* the share of other judgment-debtors in respect of usufructuary mortgage where no period of mortgage was prescribed in the mortgage deed? Rather, there was no mortgage deed as it was a case of oral mortgage.

[15]. All the aforesaid questions are required to be gone into by the Courts below. This Court is alive to the situation that the scope of Order 9 Rule 13 CPC cannot be stretched to this extent at this stage, but the trial Court would be at liberty to consider all these attending circumstances in accordance with law.

[16]. In view of above, these revision petitions are disposed of with a direction to the trial Court to revisit the entire controversy arising out of unexecutability of decree in view of Kayamddin being minor, mortgage being one and mortgage being usufructuary in nature. Trial Court shall assess the issue independently without being influenced by any observation made hereinabove.

October 22, 2016

Atik

Whether speaking/reasoned

Whether reportable

(RAJ MOHAN SINGH)
JUDGE

Yes / No

Yes / No