

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

RSA No.2401 of 1985

Date of Decision: 20.02.2017

Joginder Singh LR of Shangara Singh and another

...Appellants

Vs.

Ajmer Singh @ Amar Singh and others

...Respondents

CORAM: HON'BLE MR. JUSTICE AMOL RATTAN SINGH

Present:- Mr. K.B. Sharma , Advocate
for the appellant(s).

Mr. A. P. Kaushal, Advocate,
for respondents No.1, 3, 4 and 5.

Amol Rattan Singh, J.

This appeal has been filed by two of the plaintiffs who had instituted a suit before the learned Additional Senior Sub Judge, Jalandhar, on 22.12.1980, seeking joint possession of land bearing khewat no.4, khatoni no.6, khasra nos.3//1/2 and khasra no.10, situated in village Mansurpur, Tehsil Jalandhar. The land is shown to be measuring 10 kanals and 2 marlas in the heading of the judgment of the learned Sub Judge, as also in the plaint, though the measurements of the aforesaid khasra numbers are given as 6 kanals 2 marlas and 5 kanals respectively, i.e. 11 kanals & 2 marlas.

2. In their plaint, the appellants had averred that Ishar Singh, father of the first appellant herein (Shangara Singh), was the owner of the land in dispute and had mortgaged it in favour of Onkar Singh, father of defendants no.1 to 4 (respondents No.1 to 4 herein) and husband of respondent no.5, vide

a mortgage deed dated 04.08.1947, registered on 06.08.1947.

Ishar Singh is stated to have died leaving behind four sons, including the present appellant-plaintiff no.1, Shangara Singh, as also Kartar Singh, Chanan Singh and Darshan Singh. (It is to be noticed that the said Darshan Singh, brother of the first appellant-plaintiff, is a different person from the second appellant-plaintiff no.3, who is seen to be the son of Mahan Singh and not Ishar Singh). Kartar Singh executed a will in favour of Sukhdev Singh, respondent-defendant no.6 and Joginder Singh, both of whom are sons of the first appellant-plaintiff, Shangara Singh.

It is also to be noticed that in the suit instituted, Joginder Singh was a co-plaintiff with the present appellants, i.e. Shangara Singh and Darshan Singh, but is now impleaded as respondent no.7 in this appeal, as he was even in the first appeal filed by the present two appellants.

The third brother of the present appellants, i.e. Chanan Singh, is stated to have died without leaving behind any children or a widow. The 4th brother, Darshan Singh, is stated to have left behind Surinder Singh as his legal representative, who sold his share in favour of the present second appellant-plaintiff no.3, Darshan Singh son of Mahan Singh.

3. It was further contended by the plaintiffs that respondent no.6- Sukhdev Singh, son of appellant Shingara Singh and also a legal heir of the late Kartar Singh, paid the entire mortgage money to Resham Kaur (respondent-defendant no.5), widow of the mortgagee (Onkar Singh) and that Resham Kaur also issued a receipt to that effect on 19.06.1976. Thus, as per the plaintiffs, the land actually stood redeemed on that date but Resham Kaur, as contended, did not return the original mortgage deed.

Her sons and she, i.e. respondents no.1 to 5 herein, having been

requested many times to deliver possession of the land but they having not done so, the suit came to be filed.

It was further contended that after the mortgage was entered into, consolidation proceedings took place in the village, with the suit land having been “formed” in lieu of the previous Khasra Nos.858/59, as per the *jamabandi* for the years 1943-44.

4. Upon notice issued to them, defendants No. 1, 4 and 5, i.e. Ajmer Singh, Devinder Singh and Resham Kaur, contested the suit and pleaded that the plaintiffs are estopped by their own act and conduct from filing the suit, as Darshan Singh-plaintiff no.3 (present appellant no.2) had taken the suit property on lease from the defendants by executing a lease deed on 03.11.1980, thereby admitting that the property was still mortgaged with the defendants. Thus, it was contended that, in fact, it had never been got redeemed by the plaintiffs and as such, the suit was not maintainable.

Other preliminary objections with regard to improper Court fee, jurisdiction and locus were also taken by the respondents-defendants who otherwise admitted that Ishar Singh was the owner of land measuring 12 kanals 8 marlas falling in Khasra No.858/691 as entered in the *jamabandi* for the year 1942-43, which was mortgaged by him to the father/husband of defendants no.1 to 5, for an amount of Rs.465/- (wrongly shown as Rs.665/- in the judgment of the learned Sub-Judge).

However, it was contended that the mortgage never having been redeemed, it stood extinguished by lapse of time and defendants no.1 to 5 had, therefore, become owners thereof.

It was denied that Resham Kaur was ever paid any money or that she had issued the receipt dated 19.06.1976. Instead, it was contended that

defendant no.6, Sukhdev Singh (son of appellant-plaintiff no.1), used to cultivate the land at will, as also land belonging to defendants no.1 to 5 in village Wadala, measuring about 10 kanals, for which he had paid Rs.500/- as rent, i.e. rent for the land in village Wadala, to Resham Kaur. Thus, it was actually rent money and not the mortgage amount which had been paid by him. The receipt in any case was denied to be false and fabricated, in connivance with the scribe and attesting witnesses.

5. The plaintiffs are shown to have filed a replication to the aforesaid written statement denying the contents thereof and, in fact, reiterating what they had stated in their plaint.

Consequently, the following issues were framed by the learned Additional Senior Sub Judge:-

- “1. Whether the plaintiff has paid off the mortgage money to Resham Kaur defendant no.5 as alleged? If so to what effect? OPP
2. Whether the property in dispute has been got redeemed by the plaintiff as alleged? OPP
3. Whether the defendants No.1 to 5 have become owners of suit property by lapse of time? OPD
4. Whether the plaintiffs are estopped to sue by their act and conduct as alleged? OPD
5. Whether the suit in the present form is not maintainable as alleged? OPD
6. Whether the plaintiffs have locus standi to file this suit? OPP
7. Whether suit is not properly valued for Court fee and jurisdiction? OPD
8. Relief.”

6. The plaintiffs examined five witnesses, including the three plaintiffs themselves, one Joginder Pal and respondent-defendant no.6

Sukhdev Singh, son of the first plaintiff, Shingara Singh.

The defendants examined the first and fifth defendant, i.e. Ajmer Singh and Resham Kaur as also the aforesaid defendant no.6, Sukhdev Singh.

7. On appraising the evidence, the pleadings and the arguments before him, the learned Sub Judge first referred to CW-1, Kewal Chand, who stated that he had scribed a receipt of Rs.500/- paid by Sukhdev Singh, for redeeming the mortgaged land. This witness also deposed that the receipt was read out to Resham Kaur, who thumb marked it after admitting to its contents. CW1 also testified that the mortgage deed was not in possession of Resham Kaur, who stated at that time that she had misplaced it.

PW1, Joginder Pal, was seen to be the marginal witness to the receipt, Ex.C1, alongwith one Sardar Masih who however was given up as a witness.

Joginder Pal testified that though he had signed the receipt on the asking of a "petition writer", however, no money was paid in his presence. He was consequently declared to be hostile and was cross-examined by the counsel for the plaintiffs, but as per the learned Sub Judge, nothing favourable could be discerned in favour of the plaintiffs even from his cross-examination.

This witness further stated that he was asked by one 'Tari' that a receipt had been written and he should attest it, which he did.

8. Though the first appellant-plaintiff testified as PW2 to the effect that the money was paid by Sukhdev Singh, however, that was disbelieved by the Court in view of the testimony of the marginal witness, PW1 Joginder Pal, with the other witness, Sardar Masih, having been given up.

Moreover, defendant no.6 himself, i.e. Sukhdev Singh, son of the

first appellant, while appearing as DW2, stated that he paid no money to Resham Kaur for redemption of the land. Resham Kaur, of course, stated to the same effect.

9. Other than the fact that the material witness to the payment of the money by way of redemption of the mortgage, himself did not testify to that effect, the learned Sub-Judge further held, by citing judgments of this Court to that effect, that a document which extinguishes a right of the mortgagee, is compulsorily registrable in terms of Section 17(1)(c) of the Registration Act, 1908. Hence, the receipt, Ex.C1, in any case could not be held to be admissible in evidence.

10. Having held as above, it was further held that the mortgage, having been executed on 04.08.1947, could have been redeemed only upto 04.08.1977 and with the mortgage amount not shown to have been returned, and a period of 30 years having expired after the mortgage was entered into, limitation to redeem it had also expired and as such, the defendants had become owners of the suit property.

11. Though the other issues with regard to jurisdiction, locus and adequate Court fee were held in favour of the plaintiffs, the principal issue having been decided against them, their suit was dismissed.

12. In the first appeal filed by two of the three plaintiffs, i.e. the present two appellants, impleading the third plaintiff as respondent no.7, the learned Additional District Judge, Jalandhar, after noticing the pleadings and the issues framed by the learned Additional Senior Sub Judge, as also upon consideration of the judgment of that Court, came to the same conclusion, that neither was the mortgage amount proved to have been repaid, nor was the receipt, Ex.C1, admissible in evidence it not having been registered, and with

limitation to redeem the suit land also having run out, the learned Sub Judge had correctly dismissed the suit.

Consequently, the first appeal was also dismissed.

13. Before going on to the arguments addressed by learned counsel in this 2nd appeal before this Court, the three questions of law that arise in this appeal need to be enumerated as follows:-

- i) Whether in the light of the testimony of the witness shown to be a Court witness, i.e. CW1, Kewal Chand, to the effect that he had read over the contents of the receipt dated 19.06.1976 to defendant no.5 Resham Kaur, who had thereafter signed it in acceptance of Rs.500/- as money redeeming the mortgage, the mortgage can be accepted to have been redeemed on that date?
- ii) If the aforesaid question is answered in the affirmative, would the said receipt, Ex.C1, still be acceptable by way of evidence for redemption of the mortgage, it having been denied by the defendants, and it not being a registered document?
- iii) If the receipt is not found to be 'truly executed' or is not admissible in evidence, whether the plaintiffs have lost the right to redemption, 30 years having expired since the mortgage was entered into on 04.08.1947, and whether the respondents-defendants no.1 to 5 have thereby become owners of the suit property by efflux of time?

14. As regards the first question hereinabove, learned counsel for the appellants submitted that the scribe to the agreement, who was a Court witness, having testified to the effect that he had read over the contents thereof to respondent-defendant no.5 Resham Kaur, who admitted to the same and thereafter thumb marked it, that is to be accepted as evidence enough to prove that the mortgage was redeemed by Sukhdev Singh, respondent-defendant

no.6.

In the opinion of this Court, the contention of Mr. K.B. Sharma, learned counsel for the appellants, to that effect, has to be rejected, in view of the fact that not even the person who the appellants-plaintiffs had claimed had paid the mortgage amount, i.e. Rs.500/- (the original amount being Rs.465/-), testified to having paid it to respondent no.5, Resham Kaur. The marginal witness to the receipt, Ex.C1, as was examined by the plaintiffs-appellants, i.e. Joginder Pal, PW1, also did not support the stand of the appellants in that regard. He simply stated that he had signed the receipt on the asking of a document writer but no money was exchanged in his presence. The other person shown to be a marginal witness to the document, one Sardar Masih, was never examined and in fact was given up as a witness for the plaintiffs before the trial Court. Hence, simply because two of the plaintiffs themselves, and the person claiming to have scribed the receipt, testified to the amount of Rs.500/- having been paid by way of redemption of the mortgage, does not prove any such redemption.

Further, the contention of the respondents-defendants in their written statement, to the effect that applicant-plaintiff no.2, Darshan Singh, had taken the suit land on lease (*Patta*) from them on 03.11.1980, i.e. more than four years after 19.06.1976, obviously showed that even upto 1980 the plaintiffs were accepting the suit land to be mortgaged with the respondents-defendants no.1 to 5 and therefore, plaintiff no.2 executed a lease deed with them for cultivating the land. The factum of the lease deed (*Patta*) having been entered into, has been admitted by the plaintiffs in their replication.

Hence, firstly, seeing that even the person who is stated to have paid Rs.500/- by way of redemption of the mortgage to the respondents-

defendants, testified wholly to the contrary (i.e. respondent-defendant Sukhdev Singh, son of appellant-plaintiff no.1 Shangara Singh), secondly, the attesting witness to the receipt of the aforesaid Rs.500/- also having denied that any money was actually paid in front of him, with the second witness never having been examined, and thirdly, a lease deed having been admitted to have been entered into by plaintiff no.2 with respondents no.1 to 5, after such alleged date of redemption, obviously it cannot be accepted that Rs. 500/- was paid as an amount so as to redeem the suit land.

Consequently, I see no reason to interfere with that finding of the Courts below and therefore, the first question of law framed, which is more a question of fact, is answered as above, which would operate against the appellants.

15. Coming therefore to the next question, though that need not actually be now gone into at all, with the receipt, Ex.C1, not having been accepted to be a genuinely executed document, however, even if, hypothetically, the said receipt were to be accepted as payment of the mortgage amount so as to consider it a document by which the mortgage stood redeemed, I agree with the judgments of the Courts below, to the effect that such document in any case was not admissible in evidence, redemption of a mortgage, (thereby affecting a right in immovable property worth more than Rs.100/-), being a compulsorily registrable document in terms of Section 17 of the Registration Act, 1908.

Clauses (b) and (c) of sub-section (1) of Section 17 of the Registration Act, 1908, as also clause (xi) of sub-section (2) thereof are reproduced herein below, in this context:-

“17. Documents of which registration is compulsory.—(1) The following documents shall be registered, if the property to which they relate is situate in a district in which, and if they have been

executed on or after the date on which, Act No. XVI of 1864, or the Indian Registration Act, 1866, or the Indian Registration Act, 1871, or the Indian Registration Act, 1877, or this Act came or comes into force, namely:—

- (a) instruments of gift of immovable property;
- (b) other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property;
- (c) non-testamentary instruments which acknowledge the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extinction of any such right, title or interest; and

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(2) Nothing in clauses (b) and (c) of sub-section (1) applies to-

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(xi) any endorsement on a mortgage-deed acknowledging the payment of the whole or any part of the mortgage-money, and any other receipt for payment of money due under a mortgage when the receipt does not purport to extinguish the mortgage;”

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Hence, a reading of the aforesaid provisions shows that if by any instrument, an acknowledgment of payment of any part of the mortgage-money is made, by which the mortgage is sought to be extinguished, compulsory registration of such instrument is necessary, if the immovable property mortgaged is of a value of more than Rs.100/-.

Only if the endorsement with regard to payment of the whole or part of the mortgage-money is made on the mortgage deed itself, but such payment does not extinguish the mortgage for any reason, then in terms of

Section 17(2)(xi), registration would not be compulsory.

Admittedly, the document, Ex.C1, was not a registered document and therefore, even if it were to be believed for any reason to be a document paying the mortgage money, which of course, has been disbelieved as a matter of fact, it would not be admissible in evidence.

Hence, the 2nd question of law framed is also answered to the above effect, which would operate against the appellants in this case.

16. Coming next to the vital question, i.e. even with the mortgage of the suit property not shown to have been redeemed upto the date of the filing of the suit or even thereafter, whether the appellants have lost the right to redeem the suit property, thereby making the respondents the owners thereof by efflux of time, more than 30 years having gone by after the mortgage was entered into, on 04.08.1947.

17. Mr. Kulbhushan Sharma, learned counsel for the appellants, submitted that even if the mortgage is held to have not been redeemed vide the receipt dated 19.06.1976, the appellants would still be within their right to redeem the suit land after paying off the mortgage amount to respondents no.2 to 5 or their successors-in-interest, there being no limitation of time to redeem a usufructuary mortgage. In this regard, learned counsel relied upon a judgment of a Full Bench of this Court in **Ram Kishan and others v. Sheo Ram and others** 2008(1) RCR (Civil) 334, affirmed by the hon'ble Supreme Court in **Singh Ram (D) through Lrs v. Sheo Ram and others** (2014) 9 SCC 185.

18. Mr. A. P. Kaushal, learned counsel appearing for respondents No.1, 3, 4 and 5, on the other hand, firstly submitted that there being no written document led by way of evidence to prove the kind of mortgage that

was entered into by Ishar Singh (father of the first appellant), with Onkar Singh (father of respondents No.1, 3 and 4), the mortgage cannot be held to be a usufructuary mortgage. Hence, he submitted that it would have to be taken to be an anomalous mortgage, for the redemption of which there is a specific period of limitation, to seek possession of the mortgaged property. Therefore, as per Mr. Kaushal, the judgments, of the Full Bench of this Court as also of the hon'ble Supreme Court, in *Sheo Rams'* case (supra), would not apply.

19. Mr. Kaushal then raised another issue, with regard to Section 58 of the Transfer of Property Act, 1882, not being applicable to the State of Punjab, there having been no notification issued by the Government adopting the said provision in the State, in terms of Section 1 of the Act. Hence, as per learned counsel, the Transfer of Property Act never having been adopted in the State of Punjab, except in respect of Sections 54, 107 and 123 thereof, which were notified to be applicable to the State in 1925, Chapter IV, pertaining to mortgages, as per Mr. Kaushal, has to be held to be non-applicable to the State.

On specific query put to learned counsel by the court, he admitted that of course, *Sheo Rams'* case pertains to the State of Haryana which was carved out of the State of Punjab in the year 1966. Learned counsel fairly conceded that he knew of no notification after 1966 also, which made Chapter IV of the Transfer of Property Act applicable to the State of Haryana.

He, however, relied upon a judgment of a co-ordinate Bench of this Court in State of Punjab through Collector, Patiala and others v. Nasib Singh through LRs and others (RSA No.4011 of 1999, decided on July 13, 2015), in support of his contention.

20. In rebuttal, Mr. K.B. Sharma, learned counsel for the appellants-

plaintiffs relied upon a judgment of another co-ordinate Bench of this Court in Tara Singh and others v. Amrik Singh and others 2008(3) RCR (Civil) 464, to submit that even in the State of Punjab there would be no period of limitation prescribed for redemption of a usufructuary mortgage. He reiterated that the judgment of the Supreme Court in *Sheo Rams'* case (supra), was an affirmation of the judgment of the Full Bench, whereby the principles pertaining to the redemption of a usufructuary mortgage would be held to be applicable even to the State of Punjab by implication, there being no specific notification of the State of Haryana in any case after 1966, specifically adopting any provisions of the Transfer of Property Act. He relied upon another judgment in Gurdev Kaur and others v. Niranjan Singh and another 2008(67) AIC 581, to the same effect.

21. Having considered the aforesaid arguments addressed by learned counsel for the parties, first of all, the contention of Mr. Kaushal as to whether the mortgage in question is a usufructuary or an anomalous mortgage has to be considered. For that purpose, Section 58 of the Transfer of Property Act, 1882, is reproduced hereinunder, even though Mr. Kaushals' contention is that the provision is inapplicable to Punjab. However, as to how these two kinds of mortgages have been defined, the provision is being reproduced.

“58. “Mortgage”, “mortgagor”, “mortgagee”, “mortgage-money” and “mortgage-deed” defined.—(a) A mortgage is the transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability.

The transferor is called a mortgagor, the transferee a mortgagee; the principal money and interest of which payment is secured for the time being are called the mortgage-money, and the instrument (if any) by which the transfer is effected is called a mortgage-deed.

(b) **Simple mortgage**.—Where, without delivering possession of the

mortgaged property, the mortgagor binds himself personally to pay the mortgage-money, and agrees, expressly or impliedly, that, in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage-money, the transaction is called a simple mortgage and the mortgagee a simple mortgagee.

(c) **Mortgage by conditional sale.**—Where, the mortgagor ostensibly sells the mortgaged property—

on condition that on default of payment of the mortgage-money on a certain date the sale shall become absolute, or

on condition that on such payment being made the sale shall become void, or

on condition that on such payment being made the buyer shall transfer the property to the seller,

the transaction is called mortgage by conditional sale and the mortgagee a mortgagee by conditional sale:

1[Provided that no such transaction shall be deemed to be a mortgage, unless the condition is embodied in the document which effects or purports to effect the sale.]

(d) **Usufructuary mortgage.**—Where the mortgagor delivers possession [or expressly or by implication binds himself to deliver possession] of the mortgaged property to the mortgagee, and authorises him to retain such possession until payment of the mortgage-money, and to receive the rents and profits accruing from the property [or any part of such rents and profits and to appropriate the same] in lieu of interest, or in payment of the mortgage-money, or partly in lieu of interest [or] partly in payment of the mortgage-money, the transaction is called an usufructuary mortgage and the mortgagee an usufructuary mortgagee.

(e) **English mortgage.**—Where the mortgagor binds himself to repay the mortgage-money on a certain date, and transfers the mortgaged property absolutely to the mortgagee, but subject to a proviso that he will re-transfer it to the mortgagor upon payment of the mortgage-money as agreed, the transaction is called an English mortgage.

[(f) **Mortgage by deposit of title-deeds.**—Where a person in any of the following towns, namely, the towns of Calcutta, Madras, [and Bombay], [* * *] and in any other town which the [State Government concerned] may, by notification in the Official Gazette, specify in this behalf, delivers to a creditor or his agent documents of title to immoveable property, with intent to create a security thereon, the transaction is called a mortgage by deposit of

title-deeds.

(g) **Anomalous mortgage.**—A mortgage which is not a simple mortgage, a mortgage by conditional sale, an usufructuary mortgage, an English mortgage or a mortgage by deposit of title-deeds within the meaning of this section is called an anomalous mortgage.]

22. Thus, as per Section 58(d) a usufructuary mortgage is that by which the mortgagor delivers possession or binds himself to deliver possession to the mortgagee, of the mortgaged property, also authorising him to retain such possession until the mortgage-money is not repaid to him (the mortgagee). The delivery of possession of the mortgaged property to the mortgagee, as per Section 58(d), would also entitle the mortgagee to receive the rents and profits accruing from the property either in whole or in part, in lieu of interest or even towards payment of the mortgage money or part thereof.

An anomalous mortgage, on the other hand, is a mortgage that does not fall within the category of mortgages defined in clauses (b) to (f) of Section 58.

23. It is, of course, Mr. Kaushals' specific contention that Section 58 of the Transfer of Property Act is not applicable in the State of Punjab and to that effect, learned counsel has relied upon an observation of a co-ordinate Bench in *Nasib Singhs'* case (supra), wherein, while discussing the nature of mortgage in that case, it was observed that “Even till date provisions of Section 58-d which deals with the concept of usufructuary mortgage are not made applicable to the area falling within the jurisdiction of Punjab and Haryana High Court”.

However, what Mr. Kaushal has failed to point out is that despite having held as above, the mortgage in question in that case was still held to be

a usufructuary mortgage. This was by virtue of the fact that possession of the mortgaged land had been handed over to the mortgagee by the mortgagor, with right of user thereof.

24. In the present case also, it is seen that even as per the respondents-defendants themselves, in their written statement, referred to by the learned Sub Judge, which fact is not denied by learned counsel, it had been stated that Darshan Singh, plaintiff no.3 (now appellant no.2) took the property in dispute on *Patta* (as already noticed), from defendants no.1 to 5 and a deed to that effect was also executed by him on 03.11.1980. Further, land falling in Khasra No.858/691 having been mortgaged in favour of Onkar Singh by Ishar Singh, father of the first appellant, was also admitted by respondents-defendants no.1 to 5, though the specific khasra numbers mentioned in the suit, having been mortgaged, is seen to have been denied. Yet, the finding of the Courts below was to the effect that the originally mortgaged property was substituted in consolidation proceedings with the suit property. That finding of fact is not under challenge in the present appeal. In fact, no appeal against any finding of the learned Sub-Judge was filed by the respondents-defendants even before the first appellate Court, nor even is any argument seen to have been raised before that Court, that the suit land was not substituted during consolidation proceedings for the original land mortgaged in the year 1947 by Ishar Singh to Onkar Singh. In fact, no such argument has been made even before this Court to that effect and in fact no issue was framed with regard thereto, by the learned Sub-Judge. Consequently, no evidence whatsoever was led to that effect. Hence, as regards that factual aspect, there is not seen to be any effective contest made at any stage, to say that the suit land was not land that had come by way of mortgaged land to the

successors-in-interest of the original mortgagee, Onkar Singh.

That being so, and the fact that appellant Darshan Singh admittedly took it on lease from the respondents-defendants in the year 1980, with a lease deed duly admitted to have been executed, obviously possession of the suit property was with the respondents-defendants who were enjoying the fruits thereof. Hence, whether or not Section 58 has been notified to be applicable to the State of Punjab, the nature of the mortgage still does not change and it remains to be a usufructuary mortgage.

25. Moreover, their Lordships of the Supreme Court in *Sheo Rams'* case (supra), though having referred to the term usufructuary mortgage as defined in Section 58(d) of the Transfer of Property Act, further dealt with the basic principles of a mortgage, even quoting from the 'Law of Mortgage' by Dr. Rash Bihari Gosh, wherein the law laid down as far back as 1681 has been cited. Referring to the aforesaid, it was further observed by the Supreme Court in *Sheo Rams'* case as follows:-

“It is thus evident that the very conception of mortgage involves three principles. First, there is the maxim: once a mortgage, always a mortgage. That is to say, a mortgage is always redeemable and if a contrary provision is made, it is invalid. And this is an exception to the aphorism, *modus et conventio vincunt legem* (custom and agreement overrule law). Secondly, the mortgagee cannot reserve to himself any collateral advantage outside the mortgage agreement. Thirdly, as a corollary from the first, another principle may be deduced, namely, once a mortgage, always a mortgage, and nothing but a mortgage. In other words, any stipulation which prevents a mortgagor from getting back the property mortgaged is void. That is, a mortgage is always redeemable.”

(In similar vein, 'The Law of Mortgages' by Edward F. Cousins

was also referred to by their Lordships).

26. Thus, whether or not Section 58 has been adopted in the States of Punjab and Haryana, the basic law on mortgages would remain constant, i.e. that a property handed over by the mortgagor to the mortgagee, to enjoy the fruits thereof till its redemption, would be a usufructuary mortgage.

Having therefore found that the mortgage in question in the present *lis* was a usufructuary mortgage, obviously, thereafter the issue on whether there is any limitation to redeem such a mortgage, would be governed by the ratio of the judgment of this Court in *Sheo Rams'* case, affirmed by the hon'ble Supreme Court in its judgment cited heretofore.

27. On the issue of limitation, other than what has already been reproduced hereinabove from that judgment, it was held, in reference to Article 61 of the Schedule to the Limitation Act, 1963 and Section 62 of the Transfer of Property Act, that the limitation to recover possession of a suit property, in the case of a usufructuary mortgagee, does not commence till the mortgage money is paid out, either from the rent and profits of the property, or on deposit of the money by the mortgagor. Hence, once the mortgage money has been paid by any means, thereafter limitation to recover possession of the suit property, if such possession is not taken at the time of payment of the mortgage money, would expire 30 years from the date of such payment.

In the present case, it is the specific stand of the respondents-defendants themselves that the mortgage money was never paid, which has been found to be a fact by the Courts below, as also by this Court. Consequently, the question of limitation for redemption by way of possession of the suit property, would only begin 30 years from the date that the mortgage money is paid to respondents no.1 to 5/their successors-in-interest, by the

appellants-plaintiffs.

28. It needs to be however further noticed here, that in *Sheo Rams'* case, no doubt their Lordships specifically referred to Section 62 of the Transfer of Property Act in relation to Article 61 of the Schedule to the Limitation Act. Hence, Mr. Kaushals' contention to the effect that the said provision (Section 62 of the Act of 1882) never having been notified to be adopted by the State of Punjab, would yet again need to be considered.

In this regard, firstly of course, the contention of Mr. Sharma, learned counsel for the appellants, is only too obvious to the effect that the judgments of the Full Bench and of the Supreme Court, in *Sheo Rams'* case, being in a case of the State of Haryana, with no specific notification of the State of Haryana also having been referred to, by which Sections 58 or 62, or in fact, Chapter IV of the Transfer of Property Act, were adopted, the ratio of those judgments would equally apply to the State of Punjab.

Second, even *de hors* Section 62 of the Transfer of Property Act, the principle on which a mortgage is based, would remain the same as already observed hereinabove, with Article 61 of the Schedule to the Limitation Act nowhere limiting its application to only Section 58 of the Transfer of Property Act. In other words, Articles 61 to 63 of the Schedule to the Limitation Act, are not restricted in their application specifically to the provisions of the Act of 1882, but are applicable to mortgages in general, of course in terms of what is contained in the said Articles (61 to 63).

29. Section 62 of that Act is reproduced hereinunder:-

“62. Right of usufructuary mortgagor to recover possession.—In the case of a usufructuary mortgage, the mortgagor has a right to recover possession of the property [together with the mortgage-deed and all documents relating to the mortgaged property which are in the possession or power of the

mortgagee],—

- (a) where the mortgagee is authorized to pay himself the mortgage-money from the rents and profits of the property,—when such money is paid;
- (b) where the mortgagee is authorised to pay himself from such rents and profits [or any part thereof a part only of the mortgage-money],—when the term (if any) prescribed for the payment of the mortgage-money has expired and the mortgagor pays or tenders to the mortgagee [the mortgage-money or the balance thereof] or deposits it in Court as hereinafter provided.”

Undoubtedly, Section 62 provides for the stage when a mortgagor has a right to redeem a property given by way of a usufructuary mortgage. However, in the opinion of this Court, even in the absence of Section 62, it not specifically having been shown to have been adopted by the State of Punjab, the basic principle again, to repeat, as regards the nature of a usufructuary mortgage, remains the same and on first principles, the right to redeem the mortgage and take possession of the suit land, can only accrue when the mortgage money has been repaid in full, in the absence of any specific contract providing otherwise.

Consequently, whether or not Sections 58 and 62 of the Act of 1882 have been adopted specifically in the State of Punjab, the net result would still be the same, i.e. that limitation to take possession of a property mortgaged by a mortgagor to a mortgagee, with possession thereof given to the mortgagee, would not commence till the time the mortgage money is not repaid. From such date of final payment, of course, the possession of the property must be taken, or a suit to take such possession instituted, within 30 years (of that date).

Thus, in the present case, with the 'mortgage money' still to be

paid by the appellants to respondents no.1 to 5, limitation to take possession of the suit property has, in fact, not even commenced as yet.

30. Hence, in the light of the discussion hereinabove, this appeal is partly allowed, to the extent that the finding of the Courts below to the effect that the mortgage-money was never repaid by the appellants-plaintiffs to the respondents-defendants is upheld, but the finding that the appellants' right to redeem the suit property by repaying the mortgage amount has been extinguished by efflux of time, and that respondents-defendants no.1 to 5 have thereby become owners of the suit property, is set aside.

The suit of the plaintiffs is thus partly decreed in the same manner, to the effect that only upon payment of the mortgage amount to respondents-defendants no.1 to 5, would they be handed over possession of the suit property. Upon such payment, with neither any encumbrance shown to have been created on the suit land, nor any plea having been raised with regard to any improvement made on it, respondent-defendants no.1 to 5 would be bound to hand over possession of the suit property to the appellants, failing which the appellants can get the decree executed as per law.

The appellants are also held entitled to costs of Rs.5000/-.

A decree-sheet be drawn up accordingly.

February 20, 2017
dinesh

(AMOL RATTAN SINGH)
JUDGE

1. Whether speaking/reasoned?	Yes/No
2. Whether reportable?	Yes/No