

IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH.

RSA No.2288 of 1986
Date of decision:10.11.2016

Kewal Singh

... Appellant

versus

Gurnam Singh

... Respondent

CORAM: HON'BLE MR. JUSTICE AMOL RATTAN SINGH.

Present: Mr.Shekhar Verma, Advocate,
for the appellant
Mr.Ranjit Saini, Advocate,
for the respondent
...

AMOL RATTAN SINGH, J. (Oral)

1. This appeal has been filed by the plaintiff who instituted a suit seeking a declaration to the effect that he is owner in possession of land measuring 1 kanal 2 marlas, contained in Khata no.188/261, comprised in Rect. No.33, Killa No.14/3, as entered in the '*jamabandi*' for the year 1980-81, situated in village Dhanoa P.S. Mukerian. It was contended that the entry of the name of the defendant in the revenue records, as a mortgagee, is wrong. He further sought a decree of permanent injunction restraining the defendant from interfering with his possession of the suit land.

2. As per the case set up by the plaintiff, one Bishni, widow of Harnama, resident of Village Dhanoa, was the owner of the suit land, which the plaintiff purchased (from her) and took possession thereof. The plaintiff claimed that since the day of purchase, he was in possession of the suit property as its owner and that this fact was also recorded in the revenue

records.

It was further stated that Kh.1/2 of Rect. No.51, Killa No.21/3 of Rect. No.42, as also the suit land, were under mortgage with the defendant before 1969 and that in the year 1969, the entire mortgage amount qua all three pieces of land, was paid off by the daughters of Bishni and the land was got redeemed by her and possession taken.

Mutations were entered to that effect, which were sanctioned, except a mutation with regard to the suit land, which “was dismissed” in the year 1970, on the ground that nobody had appeared before the revenue officer. (Seemingly the application for such mutation was dismissed).

The plaintiff thus claimed that the suit land was earlier redeemed by the daughters of Bishni “on the basis of a receipt dated 8.5.1969” and that the defendant delivered possession to Bishni, after which nobody interfered in such possession. A mutation qua the redemption is stated to have been again entered in the year 1982 but was “again dismissed” by the Assistant Collector Ist Grade, Dasuya, as the defendant denied issuing the receipt. It was contended in the plaint that the said order was illegal and void.

The plaintiff having asked the defendant earlier to admit his claim and the latter having refused to do so even one month before the filing of the suit, it was instituted on 10.6.1983.

3. Notice having been issued to the defendant, he filed his written statement taking the usual preliminary objections regarding maintainability etc. On merits, it was contended that the plaintiff was neither the owner nor in possession of the suit land, which was mortgaged with possession by the

forefather of Harnama (late husband of Bishni), to the defendant/his forefather. It was further stated that the defendant inherited the suit land as a mortgagee and that he continued to be in possession thereof.

Yet further, it was contended that the revenue records, i.e. the *Jamabandis* and *Khasra Girdwaris*, do not depict the actual position with regard to possession and that there was connivance in that regard with the Circle Patwari. Receipt of the mortgage amount was also denied by the defendant, who further denied that he ever appeared before the revenue authorities to get the mutation sanctioned qua redemption of the mortgaged land.

An important plea taken was that the land having been mortgaged more than 30 years earlier, the plaintiff had lost the right to redemption.

Dismissal of the application for sanction of mutation filed by the plaintiff, by the Assistant Collector Ist Grade, Dasuya, in the year 1982, was, however, admitted, which according to the defendant was a perfectly legal and valid order.

Lastly, it was contended that the defendant had become owner of the suit property by efflux of time.

4. From the pleadings of the parties, the following issues were framed by the learned Sub-Judge (Ist Class), Dusuya:-

- “1. Whether the plaintiff is entitled to the injunction prayed for? OPP
2. Whether the plaintiff is owner in possession of the suit property? OPP
3. Whether the suit is not maintainable in the present form? OPD

4. Whether the suit is properly valued for the purpose of court fee and jurisdiction? OPP
5. Whether the court has no jurisdiction to hear the suit? OPD
6. Whether the plaintiff has no cause of action? OPD
7. Relief.”

5. In support of his suit, the plaintiff examined one Joginder Singh, Registration Clerk in the office of the Sub Registrar, Mukerian, as PW1, himself as PW2, Batan Singh, Sada Kaur and Kehar Singh as PW3, PW4 and PW5 respectively.

By way of documentary evidence, he tendered photostat copies of the receipt dated 8.5.1969 pertaining to payment of Rs.315/- in respect of Kh.No.33/14/3, another receipt of the same date pertaining to payment of the same amount qua Kh.No.51/1/2 and a receipt dated 11.8.1979 for another amount of Rs.315/- received by Tej Kaur and Sada Kaur, daughters of Bishni, from the plaintiff. He also tendered copies of the *jamabandies* for the years 1974-75, 1975-76 and 1980-81 qua the suit land, as also copies of the *Khasra Girdwaries* for the years 1980-81 and 1982-83. Still further, he tendered copies of mutation nos.1865, 1857 and 1856.

6. The defendant, on the other hand, examined Narinder Singh, also a Registration Clerk in the office of the Sub Registrar, Ravinder Singh, Patwari, and himself, as DW1, DW2 and DW3 respectively.

By way of documentary evidence, he tendered, as exhibits, a copy of the sale deed executed by Bishni in favour of the plaintiff on 9.7.1979 qua 7 kanals 1 marla of land (including the suit land), a copy of the *jamabandi* for the year 1970-71, copies of *Khasra Girdwaries* from Kharif 1971 to Rabi 1974, and a copy of mutation no.1864 rejected on 23.6.1970.

A copy of the order of the Assistant Collector Ist Grade, Dasuya, dated 11.10.1982 and a statement made by one Battan Singh, were taken on record as Marks X and Y respectively.

7. After appraising the evidence and considering the pleadings and arguments, the learned Sub Judge held that the signatures contained on Exs.P-1 and P-2, i.e. on the receipts dated 8.5.1969, did not tally with the signatures on the mortgage deed which was produced by DW1 Narinder Singh, i.e. the Registration Clerk, upon summoning of the file, though PW3 testified to the effect that Rs.315/- was paid by PW4 Sada Kaur and Tej Kaur (daughters of Bishni), to the defendant, with PW4 also testifying to the same effect. PW5 testified to the plaintiff having paid the said amount to Tej Kaur and Sada Kaur, as per the receipt Ex.P3, dated 11.08.1979.

8. On the all important issue of whether the suit land had been redeemed or not, in that respect, the sale deed dated 09.07.1979 (Ex.D1) was taken as the most material document and it was held by the learned Sub-Judge that Bishni had got recorded in it that the land was still mortgaged to Gurnam Singh (respondent-defendant).

The contention of the appellant-plaintiff that Bishni being an illiterate lady, the aforesaid recital could not be given any importance, was not accepted by that Court. It was found that even as per the plaintiff, the mortgage amount was paid by Sada Kaur and Tej Kaur, with Sada Kaur testifying as PW4. She deposed that the bargain regarding the sale of the land was struck in her presence in the village. She also deposed that even at the time of registration of the sale deed in favour of the plaintiff, she was present. Hence, it was held by the Court that if the mortgage amount had

been paid by her and Tej Kaur on 08.05.1969, and the mortgage had been redeemed on that date, she could have said so at the time when the sale deed was executed by her mother, Bishni.

It was further held that even otherwise it did not sound to reason that Bishni would be unaware of such a material fact of redemption of the suit land by her daughters.

Further, it was found that the basis of the case of the plaintiff, as regards the redemption of the suit property, was the receipt, Ex.P1, dated 08.05.1969. However, it not being a registered document, no benefit therefrom could be derived by the plaintiff, even though it contained a recital that Gurnam Singh had delivered possession of the suit property to the daughters of Bishni, who was the mortgager. Thus, holding that even though it was a document of relinquishment by the mortgagee, it could not be relied upon as such by the plaintiff, in the absence of its registration.

Other than that, it was held that it was also not proved that it had actually been issued by defendant Gurnam Singh.

This was held to be so even though in the copy of the mutation No.1865, Ex.P9, it was stated that the mutation regarding redemption had been “got entered by Gurnam Singh”. The said mutation having been entered by Daljit Singh, Patwari, on 24.08.1969, firstly, the mutation itself was rejected on 23.06.1970 and further, Daljit Singh was never examined.

Hence, as a cumulative result of the aforesaid factors, the mortgage was held to have not been redeemed.

9. Next, on the question of whether possession of the suit property was delivered by the respondent-defendant on 08.05.1969, as stated in

Ex.P1, with Gurnam Singh having denied the execution of the said receipt, it was found that as per the *khasra girdawari* for the years 1971 to 1974, Ex.D3, and the copy of the '*jamabandi*' for the year 1975-76 (Ex.P6), as also in the *khasra girdawari* for the same period, Ex.P4, possession of one Battan Singh was shown. Despite the above, it was found that no suggestion had been given to Battan Singh, when he testified as PW3, that he was cultivating the land as a tenant of the defendant. Similarly, no suggestion was put to him that he had inducted the plaintiff as his sub-tenant. However, still holding that the plaintiff was found to be in possession of the suit property, his possession was held to be that of a trespasser.

10. Eventually, even having found the appellant-plaintiff to be in possession of the suit land, it was held that more than 30 years having expired since the land was mortgaged to the defendant, and the mortgage not having been redeemed, the appellant-plaintiff had lost his ownership over the property, with the respondent-defendant having become owner thereof by efflux of time.

11. Consequently, the suit of the plaintiff was partly decreed to the extent that he was held to be in possession of the suit property, though as a trespasser. All other reliefs were declined.

12. The learned Additional District Judge, Hoshiarpur, also, in the first appeal filed by the present appellant-plaintiff, after noticing the facts and appraising the evidence and considering the judgment and decree of the trial Court, came to the same conclusion and dismissed the appeal.

13. Thus, as a matter of fact, though the purchase of the suit land by the appellant-plaintiff, vide the registered sale deed executed in his

favour, by Bishni on 9.7.1979, was not doubted even by the defendant, however, the appellant-plaintiff was held, by both the Courts, to have lost ownership by efflux of time, the suit land having been held to have not been redeemed for a period of more than 30 years from the date of mortgage.

14. Before this Court, Mr. Shekhar Verma, learned counsel for the appellant, has first submitted that the questions of law to be adjudicated upon by this Court are, as contained in Annexure A-1 with CM No.11206-C of 2013, as follows:-

- “i) Whether the appellant-plaintiff is owner in possession of the suit property?
- ii) Whether the mortgage in favour of the respondent stood redeemed vide receipt dated 8.5.1969, Ex.P1?
- iii) Whether the respondent-defendant became the owner of the suit property by efflux of time by way of its non-redemption?”

15. Mr. Ranjit Saini, learned counsel for the respondent, does not dispute the questions of law that arise.

Though in the opinion of this Court, the second question is purely a question of fact and the first and the third question are really a single issue, the questions framed would otherwise be necessary to be determined, especially the second question, to arrive at a conclusion as to whether it is the appellant-plaintiff or the respondent-defendant who can be declared to be the owner of the suit property, either by way of redemption of the mortgage, or by way of efflux of time (in the case of the respondent). To determine that, the other question of law which arises and is essential to the controversy is:-

Whether simply by efflux of time the mortgage stand

extinguished, even if the finding of the Courts below is upheld to the extent that the mortgage was actually never redeemed?

Consequently, the appeal is being adjudicated upon as regards the aforesaid questions of law.

16. Mr. Verma, learned counsel for the appellant, at this stage submitted that he is not now contesting the issue of non payment of the mortgage amount of Rs.315/- to the respondent-defendant, either by the appellant-plaintiff himself, or by his predecessor-in-interest, and as regards redemption of the mortgage, the appellant-plaintiff would avail of his remedy of such redemption under the provisions of the Redemption of Mortgages (Punjab) Act, 1913.

He, however, cites a Full Bench judgment of this Court in Ram Kishan and others vs. Sheo Ram and others, 2008(1) RCR (Civil) 334, upheld by the hon'ble Supreme Court in Singh Ram vs. Sheo Ram, 2014(4) RCR (Civil) 179, by which it was held that a mortgagors' right to redeem the property in the case of a usufructuary mortgage, does not cease by efflux of time and simply because 30 years have gone by without redemption of the suit land, the mortgagor would not cease to be owner of the land and his right to redeem it would remain in perpetuity till such time the suit land is redeemed by him. Only for the purpose of seeking possession of the land, would limitation start running in terms of Article 61 of the Schedule to the Limitation Act, 1963, from the date of such redemption.

Mr. Verma has further argued that the finding of the Courts below, to the effect that the appellant-plaintiff is a trespasser on his own property, also deserves to be set aside.

In this regard, he submits that the factum of possession of the appellant-plaintiff, over the suit land, was not denied and was found to be a fact by the learned Courts below, even on the basis of the revenue records, which finding has not been challenged by the respondent-defendant.

Mr. Verma also pointed to the fact that the suit land being part of a large chunk of land that was mortgaged by the original owner, i.e. Harnama, to the respondent, and the rest of such land (other than the suit land), having actually been redeemed, possession of the entire land was handed over back by the mortgagee to the mortgagor, i.e. to Bishni widow of Harnama.

He further submits that this in fact even proves that the suit land was either not mortgaged at all, or had been actually redeemed, but in the absence of a registered deed having been executed to that effect, it could not be proved to have been so redeemed.

17. Mr. Saini, learned counsel for the respondent-defendant, very fairly submits that as regards the proposition of law settled up to the Supreme Court, he could have further nothing to say, with regard to a usufructuary mortgage being redeemable virtually in perpetuity. However, he submits that as regards actual non-redemption of the mortgage in the present case, even till the filing of the suit by the appellant-plaintiff, on 10.06.1983, the Courts below have recorded a specific finding that the mortgage did not stand redeemed by way of the receipts to that effect, dated 08.05.1969 and 11.08.1979 (Exs. P1 to P3). Hence, as regards that aspect, i.e. specifically the question of law at Sr. No.(ii) hereinabove, this Court would not interfere in a concurrent finding of fact.

On specific query with regard to the issue of possession of the

suit land being with the appellant, as also found by the learned Courts below, he admitted that no appeal against that finding has been filed and as such, he has nothing specific to say with regard thereto.

18. Having heard learned counsel and having considered the judgments of the learned Courts below, as regards the concurrent finding of fact, on whether the mortgage stood redeemed in terms of the aforesaid receipts, question no.(ii), which, as already noticed hereinabove, is actually not a question of law but more of fact, that has to be answered against the appellant-plaintiff. This is for the reason that both the Courts have disbelieved the signatures of the appellant-plaintiff on the receipts Exs.P1 to P3, holding that they do not tally with his specimen signature.

Even though that may be a matter of debate, as, if no money had been paid by the appellant-plaintiff and his predecessor-in-interest (Bishni/ her daughters), it would be difficult to explain as to how possession of the suit property came to be with the appellant upon his purchase thereof vide a registered sale deed dated 09.07.1979. Again as already noticed, the factum of the said purchase was not disputed and in fact, the registered sale deed was exhibited by the defendant himself, as Ex.D1.

Yet, with the respondent-defendant having wholly denied having received the mortgage money, from either the plaintiff or his predecessors-in-interest, the only way by which redemption could have been proved by the appellant-plaintiff, was by way of a registered instrument, no other document pertaining to transfer of immovable property of a value of more than Rs.100/-, being admissible in evidence, in terms of Section 17(1) (b) of the Registration Act, 1908.

19. Having held so, the question that then arises is, that with the

mortgage on the suit property never having been proved to have been redeemed, but with possession thereof admittedly being that of the appellant-plaintiff, at the time of the filing of the suit in 1983, as held by the Courts below in terms of the revenue entries in that regard, does the right of redemption now subsist to the appellant-plaintiff, who became the owner of the suit property having purchased it from the legal heirs of the original mortgagor?

In this regard, the judgment of the Full Bench of this Court in *Singh Rams'* case (supra), holding that there is no limitation to the right of a mortgager of a usufructuary mortgage to redeem the mortgage, was upheld by the hon'ble Supreme Court in *Singh Rams'* case, wherein their Lordships eventually held as follows:-

“22. We, thus, hold that special right of usufructuary mortgagor under Section 62 of the TP Act to recover possession commences in the manner specified therein i.e. when mortgage money is paid out of rents and profits or partly out of rents and profits and partly by payment or deposit by the mortgagor. Until then, limitation does not start for the purposes of Article 61 of the Schedule to the Limitation Act. A usufructuary mortgagee is not entitled to file a suit for declaration that he had become an owner merely on the expiry of 30 years from the date of the mortgage. We answer the question accordingly.”

(SCC citation)

20. In the present case, even though possession since 1979 is shown to be that of the appellant-plaintiff, the mortgage has not been stated to be anything other than a usufructuary mortgage, because at least up to the 1970-71, the suit property was shown to be in the possession of the respondent-defendant, i.e. the mortgagee, as per the '*jamabandi*', Ex.D2,

duly referred to by the learned Sub-Judge.

In the next '*jamabandi*', i.e. for the year 1975-76, one Battan Singh was shown to be in possession. It was argued before that Court, (reference paragraph 16 of that judgment), on behalf of the defendant, that the appellant-plaintiff was in possession of the suit property in the capacity of a sub-tenant of the aforesaid Battan Singh, who was a tenant of the respondent-defendant.

This contention was rejected by the learned Sub-Judge and that finding was upheld by the lower appellate Court, on the ground that nowhere in the pleadings had it been stated that Battan Singh was a tenant of the respondent-defendant.

Even if that be so, what is, however, clear, is that the appellant-plaintiff never took forcible possession of the suit property and in whatever capacity, (possibly actually that of a sub-tenant of Battan Singh, tenant of the respondent-defendant), he held it, it was permissive possession.

Hence, the finding of the Courts below that the cultivating possession of the suit land by the appellant was as a trespasser, cannot be upheld, that not even being the case of the respondent-defendant. In all probability, Battan Singh was inducted as a tenant by the defendant mortgagee but that was never reflected in the revenue record and was also not taken as a stand in the written statement by the respondent-defendant. That, however, does not alter the fact, that the respondent-defendant himself admitted the possession of the appellant-plaintiff to be permissive possession. This would also be seen to be obvious from the fact that no proceedings, civil or criminal, were ever even contended to have been initiated by the respondent herein, against the appellant.

Hence, in the opinion of this Court, he could not have been declared to be a trespasser on the suit land. Consequently, that finding of the Courts below is set aside.

21. Coming back to the issue of whether the mortgage in question was a usufructuary mortgage or otherwise, (to determine whether it would come within the ambit of the ratio of Singh Rams' judgment), it is seen that a finding was recorded by the learned Sub-Judge that the mortgage was at least 40 to 50 years old, even at the time when evidence was led before that Court, with the respondent stating that it had been mortgaged with his grand-father. PW3, Battan Singh, also admitted that the husband of Bishni, Harnama, had mortgaged the suit land and that Harnama had died 40 to 50 years ago.

Thus, undoubtedly with the suit land being in the possession of the respondent-defendant and his fore-fathers till such possession was handed over to the appellant-plaintiff, even possibly as a sub-tenant/licensee of Battan Singh, the fruits of the land continued to be enjoyed by the respondent-defendant at least till 1971 with himself in possession of it and thereafter, as per his contention, through Battan Singh as a tenant.

In any case, not even a whisper has been forthcoming through out the *lis*, that the mortgage was not in the nature of a usufructuary one and no issue in that regard was ever framed, or was sought to be framed by even the respondent-defendant. However, this Court has still felt it necessary to look at that aspect at this stage, as the law with regard to redemption of usufructuary mortgages not being subject to any limitation, has been laid down during the pendency of the appeal, and since reliance thereupon has been placed by the counsel for the appellant. The fact that the

mortgage in question was not anything but a usufructuary mortgage, is also evident from the fact that, as already stated, no contention has been raised even up to this Court to the contrary, with counsel for the respondent also not opposing the proposition of law, even while defending the factual issue that the mortgage has actually not been redeemed till now, by payment of the mortgage amount.

22. Hence, with the mortgage being admittedly a usufructuary one, and the issue of possession in any case not being in question, such possession already being with the appellant-plaintiff, the only question would be as to whether the mortgage is still redeemable, or was redeemable at the time when the suit was instituted by the appellant-plaintiff on 10.06.1983.

In that regard, the finding of the Courts below to the effect that more than 30 years having elapsed from the time when the land was mortgaged to the fore-father of the respondent-defendant, the right of redemption stood extinguished and the respondent-defendant acquired ownership rights in the suit land, has to be set aside, in view of the ratio of the judgment of the Supreme Court in *Singh Rams'* Case (supra).

23. Consequently, the judgments and decrees of the Courts below, to the extent that they hold the appellant-plaintiff to be a trespasser on the suit land and hold the respondent-defendant to have acquired ownership thereof, are set aside.

It is held that the respondent-defendant has not acquired rights of ownership in the suit property by efflux of time, simply because the mortgage is more than 30 years old. Therefore, the appellant would have the right to recovery of the mortgage amount, in accordance with law, if not

made good to him by the appellant-plaintiff.

24. The appeal is accordingly allowed as above, with the suit of the appellant-plaintiff decreed to the extent that he is declared to be owner in possession of the suit property. However, the respondent would be at liberty to recover the mortgage amount in accordance with law.

A decree-sheet be drawn up accordingly.

10.11.2016
pk

(AMOL RATTAN SINGH)
JUDGE

Whether speaking/reasoned	Yes/No
Whether Reportable	Yes/No