

408

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

Date of Decision: 17.05.2016

1. RSA No.1303 of 1999 (O&M)

Smt. Jagiro (deceased) through LRsAppellant(s)

Vs

Kuldip Singh and othersRespondents

2. RSA No.1304 of 1999 (O&M)

Smt. Jagiro (deceased) through LRsAppellant(s)

Vs

Kuldip Singh and othersRespondents

3. RSA No.1305 of 1999 (O&M)

Smt. Jagiro (deceased) through LRsAppellant(s)

Vs

Hazura Singh and othersRespondents

4. RSA No.1380 of 1999 (O&M)

Lakhmir SinghAppellant(s)

Vs

Smt. Jagiro and othersRespondents

CORAM: HON'BLE MR. JUSTICE RAJ MOHAN SINGH

Present:Mr. Bhag Singh, Advocate and
Mr. Ashok Jindal, Advocate
for the appellant(s) in RSA Nos.1303, 1304 and
1305 of 1999 and for the respondents in
RSA No.1380 of 1999.

Mr. M.S. Rakkar, Senior Advocate with
Mr. J.S. Virk, Advocate
for the respondents in RSA No.1303, 1304 and
1305 of 1999 and for the appellant in
RSA No.1380 of 1999.

1. *Whether Reporters of local papers may be allowed to see the*

- judgment ?*
2. *To be referred to the Reporters or not ?*
 3. *Whether the judgment should be reported in the Digest?*

RAJ MOHAN SINGH, J.

[1]. Vide this common judgment RSA Nos.1303, 1304, 1305 and 1380 of 1999 are being decided as common issue is involved in all these appeals. For brevity facts are being culled out from RSA No.1303 of 1999.

[2]. Plaintiff-Jagiro filed civil suit No.80-CS of 1984 for possession against Hazura Singh and others. Norata and others filed civil suit No.357-CS of 1984 for declaration against Smt. Jagiro and others. Jagiro also filed civil suit No.79-CS of 1985 for declaration against Kuldip Singh and others. All the three suits were clubbed together.

[3]. Brief facts as gathered from the record are that Nanak was the original owner of 373 *Kanals* 16 *Marlas* of land situated in village Garnala. After his death property was inherited by his five sons namely Dhani Ram, Norata Ram, Chet Ram, Jaimal Singh and Mani Ram in equal shares. Mani Ram died issueless. His share was inherited by remaining four brothers in equal shares i.e. 93 *Kanals* 9 *Marlas* each. Share of Dhani Ram remained the contested issue between the parties, who died in the year 1931. His share was inherited by his only son Jagir Singh, who died issueless and his share was inherited by his mother Har kaur and widow Santo in equal shares. Har Kaur

died in the month of March 1976. Her share was inherited by her daughters Jagiro and Sito and widow of her son i.e. Santo. In this way, Santo became owner of $1/6^{\text{th}}$ share in total land. Jagiro and Sito became owner of $1/24^{\text{th}}$ share each. Sito transferred her share in favour of Jagiro vide judgment and decree dated 27.04.1983. In this way Jagiro became owner of $1/12^{\text{th}}$ share.

[4]. Kuldeep Singh and other sons of Chet Ram filed civil suit against their father Chet Ram and Norata Ram for declaration to the effect that they were owners in possession of *373 Kanals 16 Marlas* of land on the basis of family settlement. Prior to that fourth brother Jaimal Singh had transferred his share in favour of his brother Norata Ram and Chet Ram. In the said suit a compromise was effected and on that premise they were declared owners of the entire land vide judgment and decree dated 14.03.1983.

[5]. Smt. Jagiro challenged the said decree on the ground that she was owner of $1/12^{\text{th}}$ share in the total land and was not impleaded as party to the suit filed by Kuldeep Singh and others and, therefore, she was not bound by the decree and the same was *void ab initio* qua her share. She also claimed possession of her share and mesne profits. Norata and Kuldeep Singh etc. also challenged the decree in favour of Jagiro on the ground

that Dhani Ram and Jagir Singh had mortgaged their shares in the total land in favour of Mansa Singh and Bhagwana vide mutations dated 24.05.1930 and 02.09.1932 respectively for an amount of Rs.1300/- and Rs.250/-. Mortgagee rights were purchased by Norata Ram and Chet Ram vide mutation dated 15.12.1946 and, therefore, they subrogated to the rights of the original mortgagees. Neither Dhani Ram nor his legal heirs redeemed the land and, therefore, after expiry of 30 years they became owners of shares of Dhani Ram and Jagir Singh. They also claimed that Dhani Ram was not owner of any share in the total land and, therefore, there was no question of inheritance of any share by Jagiro and Sito, who had no right to transfer her 1/24th share vide judgment and decree dated 27.04.1983. The said decree was also pleaded to be illegal, null and void and not binding upon the rights of Kuldeep Singh etc. who claimed themselves to be owner of the entire land vide judgment and decree dated 14.03.1983.

[6]. It was further alleged that Smt. Santo executed two Wills dated 05.09.1982 in favour of Jagiro and on 01.07.1982 in favour of Hazura Singh, Lakhmir Singh, Jaspal Singh sons of Chet Ram. Jagiro claimed that Santo was living with her after the death of her husband Jagir Singh and she served Santo with all love and affection. Santo executed Will dated 05.09.1982 in

her favour in good state of health and disposing mind. After the death of Santo, Jagiro became absolute owner of the share of Santo, but Hazura Singh etc. on the basis of forged Will, got sanctioned mutation in their favour and forcibly occupied the share of Santo. With this background Jagiro filed suit for possession of the share of Santo and *mesne* profits for use and unauthorised occupation by Hazura Singh and others.

[7]. Hazura Singh and others staked their two-fold claims. First claim was that owners Dhani Ram and Jagir Singh were not owners of any share in the land, therefore, there was no question of inheritance of any share by Santo and, therefore, she had no right to execute any Will in respect of that land. Second contention was that Santo never executed any Will in favour of Jagiro. The Will, if any, was forged and fabricated which was created by Jagiro in connivance with the attesting witnesses. Santo was having strained relations with Jagiro. They further claimed that Santo had executed registered Will in their favour on 01.07.1982, which was duly registered in the office of Sub-Registrar on 03.07.1982. Mutation was sanctioned on the basis of said Will by the Assistant Collector, Ist Grade, therefore, it was claimed that if, Santo had any share in the property, the same was duly mutated in favour of Hazura Singh and others on the basis of registered Will after the the death of

Santo.

[8]. Parties went to trial on the following common issues which were framed in all the suits:-

- “1. *Whether the judgment and decree dated 14.3.83 by Chet Ram and Norata Ram in favour of Kuldeep Singh etc. is illegal, null & void and not binding on the rights of Jagiro? OP-Jagiro*
2. *Whether the impugned judgment and decree dated 27.4.1983 by Sito in favour of Jagiro is illegal, null and void and not binding on the rights of Kuldeep Singh etc.? OP-Kuldeep Singh etc.*
3. *Whether Dhani Ram and his son Jagir Singh had mortgaged their entire share in the total land in favour of Mansa Singh and Bhagwanti? OP-Kuldeep Singh etc.*
4. *Whether the mortgagee rights were purchased by Norata Ram and Chet Ram from the mortgagees? OP-Kuldeep Singh etc.*
5. *If issue No.4 is proved, whether Norata and Chet Ram and thereafter Kuldeep Singh etc. became owner of the mortgaged land by lapse of time? OP-Kuldeep Singh etc.*
6. *Whether Santo had executed a valid Will dated 5.9.1982 in favour of Jagiro? OP-Jagiro.*
7. *Whether Santo had executed a valid Will dated 1.7.1982 in favour of Hazura Singh*

etc. ? OP-Hazura Singh etc.

8. *Whether Smt. Jagiro is entitled to mesne profits? If so, at what rate and what amount? OP-Jagiro.*

9. *Relief.”*

[9]. Both the parties led their respective evidence on the aforesaid issues to prove their case.

[10]. Trial Court dealt issues No.3, 4 and 5 jointly and came to the conclusion that Dhani Ram and his son Jagir Singh had mortgaged 27 *Kanals* 3 *Marlas* of land which was not redeemed within a period of 30 years. Norata Ram and Chet Ram became owners of the said land by lapse of time. The claim of Kuldeep Singh etc. that Jagir Singh and Dhani Ram had mortgaged entire share in the land was falsified. Dhani Ram had mortgaged 1/4th share in the total land i.e. 93 *Kanals* 9 *Marlas*. On deduction of 27 *Kanals* 3 *Marlas* Dhani Ram and after his death Jagir Singh remained owner of 66 *Kanals* 5 *Marlas*. This land was firstly inherited by Har Kaur and Santo on the death of Jagir Singh and after the death of Har Kaur her share was inherited by her daughters Jagiro and Sito and widow of her son Jagir Singh i.e. Santo. The aforesaid issues were partly decided in favour of Jagiro and partly in favour of Kuldeep Singh etc.

[11]. Issues No.1 and 2 were jointly taken up by the trial

Court and were decided, thereby, setting aside the judgment and decree dated 14.03.1983 *qua* the share of Jagiro and Sito whereas judgment and decree dated 27.04.1983 suffered by Sito in favour of Jagiro was upheld *qua* the share of Sito i.e. 1/6th share in the land measuring 66 *Kanals* 5 *Marlas*. Both the issues were partly decided in favour of Jagiro and partly decided in favour of Kuldeep Singh etc.

[12]. Issues No.6 and 7 were also taken up together. Will Ex.DW-2/A was held to be valid. Will Ex.P-2 was set aside. Both the issues were decided in favour of Hazura Singh etc. and against Jagiro. Decision of issue No.8 went in favour of Jagiro. Jagiro was held entitled to the tune of Rs.4326.56 as *mesne* profits for the period prior to filing of the suit i.e. from *Rabi* 1982 to *Kharif* 1984 and future *mesne* profits @ Rs.1860/- per year from the date of filing of the suit till possession is handed over to her.

[13]. Trial Court dismissed the civil suit Nos.1 and decreed the civil suit Nos.2 and 3 and defendants of civil suit No.3 were directed to hand over the possession of 22 *Kanals* 2 *Marlas* of land to Jagiro and to pay *mesne* profits amounting to Rs.4326.56 for the period prior to filing of the suit i.e. *Rabi* 1982 to *Kharif* 1984 and to pay future *mesne* profits @ Rs.1860/- per year from the date of filing of the suit till possession is handed

over to Jagiro. It was also directed that Jagiro would make good the deficiency in court fee on the ground of *mesne* profits within 15 days of the passing of the decree, failing which it was ordered that relief of *mesne* profits shall be rejected.

[14]. Aggrieved by the judgment and decree passed by the trial Court Jagiro filed civil appeal No.172 of 04.09.1996 against Hazura Singh and others. She filed civil appeal No.173 of 04.09.1996 against Norata and others. She also filed civil appeal No.171 of 04.09.1996 against Kuldip Singh and others. Lakhmir Singh filed civil appeal No.170 of 04.09.1996 against Jagiro and others. All the appeals were clubbed together and were decided by common judgment. In civil suit filed by Jagiro against Hazura Singh etc., she prayed for possession of 62 *Kanals 6 Marlas* of land on the basis of Will dated 05.09.1982 executed by Santo in her favour. The said civil suit was dismissed and the other two civil suits were partly dismissed and partly decreed. The plaintiffs of civil suit No.2 and defendants of civil suit No.3 namely Kuldeep Singh etc. were directed to hand over the possession of 22 Kanals 2 Marlas of land to Smt. Jagiro and pay the *mesne* profits in the manner as ordered by the trial Court.

[15]. Lower Appellate Court commented upon the basic controversy with regard to the fact that Dhani Ram and Jagir

Singh mortgaged their share in favour of Mansa Singh and Bhagwana and mortgagees rights were purchased by Norata Ram and Chet Ram, who became owner by lapse of time as the mortgages were never redeemed. The mutations of mortgages viz. Ex.D-2 to Ex.D-5 were placed on record. Ex.D-4 was the mutation No.214 vide which Dhani Ram had mortgaged 11 *Bighas* 3 *Biswas* of land in favour of Mansa Singh vide oral mortgage dated 24.05.1930 for an mortgage amount of Rs.1300/-. As per entry in remarks column the possession was delivered. Similarly as per mutation No.252 Ex.D-5, Jagir Singh mortgaged the land measuring 8 *Bigha* 10 *Biswas* in favour of Bhagwana vide oral mortgage in the month of July 1932 for a sum of Rs.250/-. Possession was also delivered. Copy of mutation No.466 Ex.D-2 and mutation No.515 Ex.D-3 revealed that mortgagees rights were purchased by Norata Ram and Chet Ram in the year 1945 and 1946. Admittedly mortgages were never redeemed after the lapse of more than 30 years. Lower Appellate Court noted that in an usufructuary mortgage there was no limitation prescribed for redeeming the same. In the mortgage of such nature possession of the land was delivered to the mortgagee, who was to get rent and profit in lieu of interest on the principal amount. No personal liability was incurred by the mortgagor, therefore, question of foreclosure by

the mortgagee does not arise. Mortgagees were found to be in possession of the land. The total mortgage was 19 *Bighas* 13 *Biswas* (11 *Bighas* 13 *Biswas* + 8 *Bigha* 10 *Biswas*). After consolidation 27 *Kanals* 3 *Marlas* of land was allotted in lieu of the land under mortgage regarding which the revenue records were placed on record to show link evidence. *Qua* the aforesaid land, there was no dispute.

[16]. Lower Appellate Court on the strength of legal position on that time held that mortgagees became absolute owners of the land on account of non-redeeming of the land within stipulated period as held in **State of Punjab and others vs. Ram Rakha and others, 1997(2) PLJ 637**. Mortgagees were held to be owners of the land measuring 27 *Kanals* 3 *Marlas*, but the land of Dhani Ram and his son Jagir Singh was to the extent of 1/4th share in the total land and was deducted by 27 *Kanals* 3 *Marlas* and Dhani Ram and his son and after his death his son Jagir Singh was held owner of 66 *Kanals* 5 *Marlas* of land. The lower Appellate Court also held that Kuldeep Singh etc. were unsuccessful to prove that Dhani Ram and his son mortgaged the entire land. Only 27 *Kanals* 3 *Marlas* of land was found under mortgage. Norata Ram and Chet Ram became owners of that land by lapse of time. Therefore, findings recorded by the trial Court on issues No.3, 4 and 5 were upheld

by the lower Appellate Court.

[17]. The second controversy on which the lower Appellate Court took cognizance was in respect of validity of two Wills Ex.DW-2/A dated 01.07.1982 executed by Santo widow of Jagir Singh in favour of Hazura Singh, Lakhmir Singh, Jaspal Singh sons of Chet Ram. In that Will recital was that Santo had no son or daughter. She was residing with Hazura Singh and others, therefore, she bequeathed her entire property in their favour. This Will was proved by DW-2 Geja Singh, Lambardar. The said Will was scribed by a deed writer and was got registered from the office of Sub-Registrar. The witness attested the Will as attesting witness. Lakhmir Singh one of the beneficiaries appeared as DW-1 and stated that Smt. Santo executed Will about 1 year before her death. The possession of the land was with them since long. Execution of second Will by Santo was denied altogether.

[18]. The second Will Ex.P-2 dated 05.09.1982 was also allegedly executed by Santo. The recital of that Will was that she was resident of village Garnala. It was scribed by Ajaib Singh, who appeared in the witness box. Though, he was the resident of different village namely Balana. Japan Singh was the attesting witness, who was also resident of different village Jatwar. By virtue of this Will, Santo gave property in favour of

Jagiro. In the subsequent Will reference was made to the earlier Will, but there was no explanation as to why the second Will was not registered when the first Will was duly registered. Though registration of Will is not legally required, but the same is one of the ground to judge its validity in terms of other attending circumstances as compared to registered Will. The presence of beneficiary by the side of the executant was not viewed as ground to jump to the conclusion that the Will was surrounded by suspicious circumstances.

[19]. The lower Appellate Court commented upon the suspicious circumstances in respect of second Will with reference to residences of attesting witnesses and scribe being of different villages. The earlier registered Will could have been cancelled by the executant of a subsequent registered Will. The alleged cancellation of earlier registered Will by a subsequent unregistered Will was taken to be a suspicious circumstance by the lower Appellate Court. No explanation was given by the executant or the beneficiary as to why scribe and witnesses were that of different villages in subsequent unregistered Will. Presence of Japan Singh at the time of execution of Will was found to be doubtful. His testimony was doubted wherein he had not disclosed about the earlier execution of registered Will, whereas it was written in the Will that Santo had earlier

executed a Will in favour of Lakhmir Singh etc. Similarly witness Ajaib Singh was also discarded.

[20]. Presence of Jagiro at the time of execution of Will was not satisfactorily explained. Registered Will Ex.DW-2/A dated 01.07.1982 was found to be free from any suspicious circumstance as it was scribed by deed writer and was witnessed by the witnesses of the village. Will dated 01.07.1982 Ex.DW-2/A was upheld whereas Will Ex.P-2 was discarded being invalid. Therefore, the lower Appellate Court also endorsed the findings recorded by the trial Court on issues No.6 and 7. The decree suffered by Sito in favour of her real sister Jagiro was found to be valid. Jagiro and Sito being real sister had 1/24th share in the total land to the extent of 15 *Kanals* 11 ½ *Marlas*. Sito transferred the land in favour of Jagiro as she could have validly transferred the same. However, the entitlement was to be seen in the light of findings recorded that Jagiro was left with only 66 *Kanals* 5 *Marlas* of land and remaining 27 *Kanals* 3 *Marlas* was under mortgage. The lower Appellate Court made deduction on the basis of said mortgage having not been redeemed thereby treating the remaining land to be 66 *Kanals* 5 *Marlas* out of which Sito was the owner of 1/6th share to the extent of 11 *Kanals* 1 *Marla* and, therefore, she could transfer only 11 *Kanals* 1 *Marla* in favour of Jagiro. The decree was held

to be valid *qua* the aforesaid land. So far as the civil court decree dated 14.03.1983 was concerned it was noted that Norata Ram and Chet Ram had no right to transfer the share of Sito and Jagiro in favour of Kuldeep Singh etc., who were owners of $\frac{1}{6}^{\text{th}}$ share each in the land measuring 66 *Kanals* 5 *Marlas*. By virtue of transfer of $\frac{1}{6}^{\text{th}}$ share, Jagiro became owner of $\frac{1}{3}^{\text{rd}}$ share out of entire land 66 *Kanals* 5 *Marlas* i.e. 27 *Kanals* 2 *Marlas*. The findings recorded under issues No.1 and 2 by the trial Court were also endorsed by the lower Appellate Court.

[21]. With necessary calculation, the lower Appellate Court found that share of Jagiro was 22 *Kanals* 2 *Marlas* and Kuldeep Singh etc. were in unauthorised possession of the same and, therefore, Jagiro was held entitled to the *mesne* profits of the land. All the four appeals were dismissed thereby upholding the findings recorded under issue No.8 as well. Hence the present appeals.

[22]. At the time of hearing of these appeals, learned counsel for the appellant(s) confined his arguments only to the concept of mortgage and phenomena of redemption thereof, treating the mortgage to be usufructuary mortgage. So far as the findings recorded under both the Wills are concerned, there was no serious challenge to the impugned judgments and

decrees passed on that premise.

[23]. The following substantial questions of law were framed by the learned counsel for the appellant(s):-

- “1. *Whether there is any limitation for redemption of the usufructuary mortgage, when it is not for a fixed period?*
2. *Whether the mortgagee has become owner of the suit property by lapse of time if the land is not redeemed within 30 years?*
3. *Whether the Courts below have misread and misinterpreted the evidence on record as well as the legal position regarding the limitation of the redemption of the mortgagee?*

[23]. Having considered the aforesaid questions, I am of the view that the controversy pressed on the concept of usufructuary mortgage is no more *res integra* in view of judgment of the Full Bench in **Ram Kishan and others vs. Sheo Ram and others, 2008(1) RCR (Civil) 334** as upheld by the Hon'ble Apex Court. Apparently the possession of the property was delivered to the mortgagees, who apportioned rents and profits in lieu of interest on the principal amount. No personal liability was incurred by the mortgagor, who was not to foreclose the mortgage or was not to sue for the sale of the mortgaged property. The mortgagees were found to be usufructuary mortgagees, therefore, no limitation is attracted to

such mortgagees in view of authoritative pronouncements of this Court in Full Bench decision in **Ram Kishan and others'** case (supra).

[25]. With regard to the findings recorded under issues No.6 and 7, in considered opinion of this Court, findings are required to be reversed. Even, if Dhani Ram and Jagir Singh had mortgaged their land, the land so mortgaged was the usufructuary mortgage and the mortgagor has the right to redeem the same by paying the mortgaged amount for which no limitation of 30 years or 60 years was attracted as held by the Courts below. Norata Ram and Chet Ram cannot be held to be owners of land so mortgaged by Dhani Ram and his son.

[26]. With the aforesaid modification, these appeals are liable to be partly accepted. So far as the findings recorded by the Courts below under others issues are concerned, no interference is called for. Resultantly, these appeals are partly allowed to the extent of findings recorded by the courts below on the concept of extent and nature of mortgage.

May 17, 2016

Atik

**(RAJ MOHAN SINGH)
JUDGE**