IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

RSA No.1512 of 2009(O&M)

Date of decision:22.4.2016

Parveen Kumar ....Appellant

VERSUS

Karambir .....Respondent

CORAM: HON'BLE MRS. JUSTICE REKHA MITTAL

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?

Present: Mr. Sudhir Mittal, Advocate for the appellant.

Mr. D.V. Sharma, Senior Advocate with
Ms. Shivani Sharma, Advocate for the respondent.

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REKHA MITTAL, J.

The present Regular Second Appeal has been directed against the judgment and decree dated 28.02.2009 passed by the Additional District Judge, Sonepat whereby the appeal preferred by the respondent/defendant against the judgment and decree dated 11.12.2008 passed by learned trial Court decreeing suit of the appellant/plaintiff was allowed and the suit filed by the appellant/plaintiff for declaration, possession and permanent injunction was ordered to be dismissed.

The facts relevant for disposal of the present appeal are that the respondent/defendant mortgaged his agricultural land (without possession) measuring 12 kanals 5 marlas i.e. 245/3291 share out of total land measuring 164 kanals 11 marlas detailed in headnote of the plaint situated at village Thana Kalan, Tehsil Kharkhoda, District Sonepat as per Jamabandi for the year 1999-2000. The mortgage deed was executed on 09.09.2002 and registered on 16.10.2002. The mortgage was created for a sum of Rs.4,50,000/- and the respondent/defendant agreed to pay interest at the rate of 2% per mensem on the mortgaged amount. The mortgaged land could be redeemed within a period of six months from the date of mortgage failing which right of redemption was to be foreclosed and mortgaged land would be deemed to have been sold for the mortgage amount.

As per averments in the plaint, the appellant/plaintiff, on expiry of period of redemption of six months served a demand notice dated 05.09.2005 through registered post calling upon the respondent to pay the mortgage amount along with interest within 15 days of receipt of notice. The respondent/defendant gave reply to the notice wherein factum of execution of mortgage deed was denied and it was pleaded that he had executed lease deed for two years.

The respondent/defendant filed a civil suit alleging that land in dispute was given on lease to the appellant/plaintiff for two years but later the suit was withdrawn when the plaintiff filed a petition under Section 8 of the Bengal Regulation No.XVII of 1806 (for brevity 'the Regulation') in the Court of District Judge, Sonepat. Notice dated 26.09.2005 was issued to the respondent in the petition and the Court passed order on 17.11.2005. Subsequent thereto, the respondent filed an application for redemption of suit land in the

Court of Collector Sonepat and deposited a sum of Rs.8,91,000/- on 06.11.2006 in the Treasury but the said amount was not adequate. In terms of order dated 20.04.2007 passed by the Collector, Sonepat, the respondent deposited a sum of Rs.4500/- in the Treasury on 30.04.2007. It is further averred that even after deposit of the aforesaid amount, there is still deficiency of amount of Rs.3600/-.

The respondent/defendant filed the written statement raising certain preliminary objections inter alia maintainability of the suit; jurisdiction of the Court to entertain and try the suit; suit being not properly valued for the purpose of Court fee and the plaintiff is stopped from filing the suit. On merits, it was pleaded that transaction of money was effected on 16.10.2002, the day the mortgage deed was registered. The loan amount was repaid well in time, thus, the plaintiff has no cause of action to file the suit. All other material averments of the plaint have been denied with a prayer for dismissal of the suit.

On consideration of the pleadings, issues framed for determination, evidence adduced and rival submissions made by counsel for the parties, the learned trial Court accepted plea of the appellant/plaintiff; passed a decree for declaration to the effect that order dated 20.04.2007 passed by the Collector, Sonepat, is illegal and not binding upon rights of the plaintiff and the plaintiff was declared as owner of the suit land measuring 12 kanals 5 marlas. Further, the defendant was directed not to alienate the suit land and hand over vacant possession of the same to the plaintiff.

The matter was carried in appeal by the defendant that came to be allowed by the Additional District Judge, Sonepat vide impugned judgment and decree dated 28.02.2009. Feeling aggrieved by judgment of the first Appellate Court, the present Regular Second Appeal has been preferred by the unsuccessful plaintiff/appellant.

Counsel for the appellant has assailed the findings of the Court of appeal primarily on two counts. The first submission made by counsel is that even if there was any defect in the parwana/notice issued by the District Judge, Sonepat in the proceedings initiated under the Regulation, the appellant cannot be allowed to suffer for an act of the Court particularly in the circumstances that the alleged defect cannot be said to be material resulting in misleading the respondent/defendant. For this purpose, heavy reliance has been placed upon judgment of this Court Murari Vs. Pehlad represented by his LRs and others, 1982 PLJ 44, wherein in para 7, the Court has held, quoted thus:-

> "7. Now here in the notice, mention of section 7 has been made. Options of tender and payment have been enumerated. There is no dispute on that score. The dispute is with regard to "or unless you pay said sum into this account within the above period" signifying that payment in Court was not suggested in the notice. From the summoned foreclosure file of the District Judge, I have noticed that the original from which copy, Exhibit P.3, has been prepared is a printed form used by the Court in preparing the notice. This is the official copy kept on the record and the one sent to the defendant has not been produced by him. The official copy is on official stationery and the recital afore-noted is printed there. It contains the signatures of the District Judge. In the Rules and Orders of the Punjab High Court, Volume VI, Part A-II, there is a

form prescribed for notice under section 8 of the Regulation XVII of 1806 pertaining to petition for foreclosure of mortgage of land. It bears printed form No.189. Now here the recital afore-noted is a part of that form, but the word is *Court* instead of *account* as found in the printed form filed in as the official copy on the foreclosure file of the District Judge. So this is an obvious misprint. The notice sent by the District Judge on such form bearing this patent mistake would not be fatal to the proceedings especially when mention has been made of section 7 of the Regulation in the notice. *Dhum Chand's* case (supra) would lend support to this view. Even otherwise, there is no higher principle for the guidance of the Court than the one that no act of the Court should harm a litigant and it is the bounden duty of the Courts to see that if a person is harmed by a mistake of the Court, he should be restored to the position he would have occupied but for that mistake. This is amply summed up in the maxim "*actus curiae neminem gravabit"*. The copy of the notice on the foreclosure file, prepared and signed by the District Judge, could not by itself have misled the defendant for it never reached him. The notice which he received has not been brought on the file to detect if there was any such mistake which misled the defendant. The plaintiffs could not be made to suffer for such a defect in the official copy of the notice found on the District Judge's file. No capital can be made out by the defendant for the printer's error over-looked by the District Judge. The view of the lower appellate Court on this score is unassailable. It is equally unassailable on the question whether the said copy of notice bore the initials or the signatures of the Presiding Officer since it has come to the view that these were his official signatures and not mere initials. That is a finding of fact incapable of being interfered with in second appeal."

It is further argued that, admittedly, the respondent filed an application in the aforesaid proceedings on 08.11.2005 seeking permission to deposit the amount. Even if the period of one year is reckoned w.e.f. 08.11.2005, the petition filed by the respondent for redemption of the mortgage on 13.11.2006 is clearly beyond the statutory period of one year. In addition, it is submitted that the respondent did not deposit the entire amount on 06.11.2006 as a part of the amount i.e. Rs.4500/- was deposited on 30.04.2007 and the Collector is not empowered to extend the period of one year prescribed under Section 8 of the Regulation.

Counsel for the respondent, on the other hand, has supported the judgment passed by the Court of appeal with the submissions that the Appellate Court has noticed various defects in the notice/parwana issued by the District Judge in the proceedings under Section 8 of the Regulation and, therefore, the Court was justified in holding that non-compliance of the essential ingredients of Section 7 and 8 of the Regulation would enure to benefit of the respondent/mortgagor. It is further argued that the provisions of Section 7 and 8 of the Regulation are stringent and technical in nature and they are required to be complied with in letter and spirit and non-compliance thereof would vitiate the foreclosure proceedings, therefore, the order of redemption passed by the Collector, in the circumstances of the present case, cannot be faulted with. In support of his contention, he has relied upon judgment of this Court Pirthi and others vs. Daya Kishan and another, 2008 (1) R.C.R. (Civil) 705, Shib Lal vs. Badle Ram, 1969 Cur. L.J. 294 and Hukmi and others vs. Bharat Singh, RSA No.769 of 1981 decided on 19.07.1996. Further a reference has been made to judgment of the Lahore High Court Munshi Ram vs. Nauranga and others, AIR 1924 Lahore 176.

Before adverting to the rival submissions made by counsel for the parties and the judgments cited at bar, the provisions of Section 8 of the Regulation, relevant in the context are extracted hereinbelow:-

> "8. Whenever, the receiver or holder of a deed of mortgage and conditional sale, such as is described in the preamble and preceding sections of this Regulation, may be desirous of foreclosing the mortgage and rendering the sale conclusive on the expiration of the stipulated period, or at any time subsequent before the sum lent is repaid, he shall (after demanding payment from the borrower or his representative) apply for that purpose by a written petition, to be presented by himself, or by one of the authorised vakils of the Court, to the Judge of the zila or city in which the mortgaged land or other property may be situated.
>
> The Judge, on receiving such written application shall cause the mortgagor or his legal representative to be furnished, as soon as possible, with a copy of it, and shall at the same time notify to him by a parwana under his seal and official signature that, if he shall not redeem the property mortgaged in the manner provided for by the foregoing section within one year from the date of the notification the mortgage will be finally foreclosed and the conditional sale will become conclusive."

The learned Appellate Court in para 14 of the judgment has noticed that in order to succeed in a suit filed by a mortgagee seeking declaration of ownership on the basis of foreclosure, it is enjoined upon him to prove the following essentials:-

a) a notice of demand to discharge the mortgage debt was served upon the mortgagor and in spite of that, he has failed to pay the mortgage amount to the mortgagee within the stipulated time.

b) valid foreclosure proceedings were initiated and despite receiving the parwana/notice along with copy of the foreclosure petition, the mortgagor failed to pay the mortgage money within a period of one year of receipt of the said parwana/notice.

Further, after taking into consideration the provisions of Section 7 and 8 of the Regulation, the parwana/notice dated 26.09.2005 issued by the then District Judge, Sonepat, in the petition filed under Section 8 of the Regulation, the Court has pointed out various shortcomings and lacunae in the notice (Ex.P9), reads as follows:-

i) particulars of the mortgaged property, as to how much land was mortgaged were not mentioned in the notice (Ex.P9).

ii) serial No.267 as well as date of mortgage deed 09.09.2002 have been wrongly described in the notice (Ex.P9) whereas in fact mortgage deed bears serial No.998 dated 16.10.2002.

iii) though, there is a specific recital in the mortgage deed (Ex.P1) that mortgagor was required to pay interest at the rate of 2% per mensem on the mortgage amount of Rs.4,50,000/- but no such condition of payment of interest has been enshrined in the notice.

iv) there is no mention of provision of Section 7 of the Regulation in the notice.

It is an undisputed position of the case that the proceedings initiated by the appellant under Section 8 of the Regulation were concluded on 17.11.2005. Subsequent thereto, an application was filed by the appellant in December, 2005 in regard to failure of the Court to notify the factum of liability of the mortgagor to pay interest and the application was disposed of vide order dated 12.12.2005 (Ex.P10).

The Appellate Court has held that omission on the part of the Court regarding non-disclosure of rate of interest in the notice could not be rectified by merely issuing a notice to counsel of mortgagor on 12.12.2005 and that too after the proceedings under Section 8 of the Regulation have already been concluded on 17.11.2005. Counsel for the appellant is not in a position to dispute the factual observations made by the first Appellate Court in para 17 of the judgment (pages 77 and 78 of the paperbook).

Counsel for the appellant, by referring to judgment in <u>Murari's case</u> (supra) has contended that deficiencies noticed by the Appellate Court cannot be said to be material in nature, therefore, the same cannot enure to benefit of the respondent/mortgagor. I find myself unable to accept the submissions as the shortcomings in the notice, pointed out by the first Appellate Court relate to material facts, particularly failure of the Court to notify liability of the mortgagor to pay interest at the rate of 2% per mensem on the amount of Rs.4,50,000/- much less giving the exact amount payable by him at least up to the date of filing of the petition under Section 8 of the Regulation.

The application filed by the appellant, subsequent to conclusion of the proceedings under Section 8 of the Regulation cannot be construed to rectify the earlier notice/parwana issued by the Court not intimating the mortgagor qua his liability to pay interest at the rate of 2% per mensem. It is pertinent to mention that as soon as the proceedings under Section 8 of the Regulation got terminated by passing of order dated 17.11.2005, any notice issued by the Court to counsel representing the mortgagor in the proceedings qua an application filed in December, 2005 cannot be taken as a notice to the respondent/defendant. Analysed from any angle, there was no valid notice given to the mortgagor in regard to his liability to pay interest at the rate of 2% per mensem on the mortgage amount of Rs.4,50,000/-. Under these circumstances, assuming that notice (Ex.P9) was served upon the mortgagor, he at best was liable to deposit an amount of Rs.4,50,000/- mentioned in the notice within the stipulated period of one year w.e.f. 08.11.2005 but in the present case the mortgagor deposited an amount of Rs.8,91,000/- within a period of one year, by way of deposit in the Treasury on 06.11.2006.

The notice (Ex.P9) in the proceedings under Section 8 of the Regulation is dated 26.09.2005. The notice was received back unserved with the report of process server dated 21.10.2005. The respondent filed an application on 08.11.2005 seeking permission to deposit the amount. The application was disposed of by the Court without any direction to the mortgagor to deposit the amount.

The proceedings initiated under Section 8 of the Regulation, culminated in order dated 17.11.2005. A relevant extract therefrom reads as follows:-

> "Respondent has been served. Service is complete. He has been informed of the petition. File be consigned to the record room."

The order dated 12.12.2005 passed on the application under Section 151, 152 and Order 47 Rule 1 CPC that was filed after decision dated 17.11.2005, is quoted hereinbelow:-

> "The counsel for the respondent has been informed of the application given by the petitioner to the effect that the interest was omitted to be mentioned in the notice of the application under section 8 of the Bengal Regulation Act issued to the respondent. Now this application is ordered to be filed."

There is nothing on record suggestive of the fact that after report dated 21.10.2005 was made by the process server on parwana/notice, any further report was made with regard to service of notice upon the respondent. As per order dated 17.11.2005, the respondent was merely informed of the petition. There is no material on record to prove that the respondent was supplied with a copy of the petition under Section 8 of the Regulation which is mandatory in nature.

As an upshot of the aforesaid discussion i.e. notice issued by the District Judge, Sonepat, in the petition under Section 8 of the Regulation was deficient in material aspects coupled with the factum that copy of the petition was not supplied to the respondent, I have no hesitation to concur with the findings of the first Appellate Court that the proceedings in regard to foreclosure of the right of the mortgagor to redeem the mortgage were not conducted in compliance with the provisions of Section 7 and 8 of the Regulation, therefore, the appellant cannot be heard to say that failure of the respondent to deposit the entire amount can either result in foreclosing right of redemption or conferring a title qua mortgaged land in favour of the appellant/plaintiff.

The judgment in Murari's case (supra) relied upon by counsel for the appellant has got no bearing on the facts of the case in hand. In the said case, some defect was pointed out in the official copy of notice issued under Section 8 of the Regulation. The Court held that copy of the notice received by the defendant has not been brought on the file to detect if there was any such mistake which misled the defendant. The word 'court' instead of 'account' as found in the printed form (official copy) is an obvious misprint and the notice sent by the District Judge on such form bearing this patent mistake would not be fatal to the proceedings especially when mention has been made of Section 7 of the Regulation in the notice.

Conversely, in the case at hand, no mention of Section 7 has been made in the notice/parwana. The notice/parwana in original is a part of judicial record that was received back unserved with a report of the process server. Counsel for the appellant is not in a position to counter the factual observations made by the first Appellate Court in regard to various deficiencies and lacunae in the notice. The Court did not permit the mortgagor to deposit the mortgage money despite an application having been filed by him on 08.11.2005. The printed form No.189 prescribed in the Rules and Orders of the Punjab High Court, Volume VI, part A-II for notice under Section 8 of the Regulation contains a column for describing extent of liability together with interest as may be due on the amount payable/outstanding but the notice here does not contain a reference to liability of the mortgagor to pay interest.

In Shib Lal's case (supra), the Court has held that Section 7 and 8 of the Bengal Regulation XVII of 1806 are technical and, therefore, if the mortgagor can take advantage of technicality he can be allowed to do so.

In Hukmi's case (supra), it has been held that Section 8 of the Bengal Regulation XVII of 1806 has been violated in the foreclosure proceedings making these proceedings bad in law. A critical reading of the notice would show that particulars of the mortgaged property were not mentioned and mention was with respect to agricultural land situated in village Kurar Ibrahimpur only and not with regard to land situated in village Abdulpur and the house. The object of the deterrent provisions is that the mortgagor must be made aware of the subject matter of the foreclosure proceedings and if there is an error in the strict provisions, which entails far-reaching consequences, the benefit should go to the mortgagor.

When the facts and circumstances of the present case are examined in the light of judgments in Shib Lal's case (supra) and Hukmi's case (supra), the inevitable conclusion is that there is no error much less perversity in the findings recorded by the first Appellate Court warranting intervention in exercise of jurisdiction under Section 100 of Code of Civil Procedure, 1908. That being so, no question of law much less a substantial one arises for adjudication.

For the foregoing reasons, finding no merit, the appeal fails and is accordingly dismissed with costs.

APRIL 22, 2015 **(REKHA MITTAL)**
D. Gulati' **JUDGE**