IN THE HIGH COURT OF PUNJAB AND HARYANA,
AT CHANDIGARH

RSA No. 3653 of 2016 (O&M)
Date of Decision: 06.10.2016

Lal Singh (deceased) through his LRs.

......Appellant

Vs.

Amrik Singh

.........Respondent

CORAM: HON'BLE MR. JUSTICE AMOL RATTAN SINGH

Present: Mr. L.M. Gulati, Advocate,
for the appellant.

Mr. Rishu Mahajan, Advocate,
for the respondent.

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AMOL RATTAN SINGH, J. (ORAL)

CM No. 9539-C-2016

For the reasons stated in the application, it is allowed and the deficiency in Court fee is allowed to be made good subject to the fact that it is found to be sufficient Court fee.

CM No. 9540-C-2016

For the reasons stated in the application, the delay of 05 days in filing the appeal is condoned.

The application stands disposed of accordingly.

RSA No. 3653 of 2016 (O&M)

This appeal has been filed by the judgment debtors-defendants against the judgments of the Courts below, after the suit of the respondent-plaintiff was decreed in his favour and the first appeal filed by the present appellant was dismissed by the learned lower appellate Court.

2. The respondent-plaintiff sought possession of the suit property by redemption of the mortgage entered into by him with the appellants-defendants, in respect of two shops fully described in the plaint and the head note of the judgment of the learned Additional Civil Judge (Sr. Divn.), Baba Bakala Sahib, District Amritsar, which mortgage was duly registered on 20.07.2000, on a payment of Rs. 2,00,000/-, to the respondent-plaintiff by the appellants.

The prime ground on which the appellants-defendants had resisted the suit, was that at the time of entering into the mortgage, another agreement had been entered into by the parties, by which the suit property would continue to be mortgaged for another period of six years and thereafter, the mortgage would be renewed from time to time for a period of six years at a time, virtually in perpetuity, (as contended). Hence, the contention was that the respondent-plaintiff having entered into such an agreement, was not entitled to redeem the mortgage and as a matter of fact, the agreements executed for continuation of the mortgage, would create a permanent bar on redemption of the mortgage.

The aforesaid contention is reiterated by the learned counsel for the appellant presently also.

3. Having considered the aforesaid, the learned Additional Civil Judge found that the agreements referred to actually constitute a clog on redemption of the mortgage, and in view of the ratio of certain judgments cited before that Court (just the citations having been given in the judgment, without the titles), the stand of the defendants could not be accepted and as such, the suit of the plaintiff deserves to be decreed, which was then so decreed.

4. The present appellant filed an appeal against the aforesaid judgment

and decree of the learned Additional Civil Judge, in which the same pleas were raised again, as had been taken by the appellants-defendants before the lower Court.

Upon considering the appeal, the learned first appellate Court cited judgments of the hon'ble Supreme Court in **Harbans** vs. **Om Parkash and others** 2006 (1) CCC 309 and **Usha Rani** vs. **Pushpa Devi** 2008 (2) CCC 616, to uphold the finding of the learned Additional Civil Judge, that there can be no clog on redemption of a mortgage and on the right to redeem the suit property at a time when the mortgagor is able to repay the amount for which the property had been mortgaged.

Consequently, the first appeal filed by the present appellant was also dismissed.

5. In this appeal, though no notice had been issued at the time when it first come up for hearing on 28.07.2016, it had been simply adjourned on a request made on behalf of learned counsel for the appellant; however subsequently, obviously, missing the fact that no notice had been issued in the main appeal itself, on an application (CM No. 11067-C-2016) moved by the appellant seeking a stay on execution proceedings, notice was issued in that application, in response to which learned counsel has appeared and with the consent of both learned counsel, the main appeal itself has been taken up for arguments today.

6. Mr. Gulati, learned counsel for the appellants, submits that despite the fact that the appellants in their written statement had specifically raised a plea with regard to the existence of an agreement dated 20.07.2000, by which the respondent-plaintiff had agreed to extend the period of mortgage beyond the period settled in the registered mortgage deed itself, no issue with regard to the said agreement was framed by the learned Additional

Civil Judge and in fact, even no replication had been filed by the respondent-plaintiff to refute the aforesaid specific contention of the appellants-defendants, as taken in their written statement.

He, therefore, submits that a basic issue, going to the root of the matter, not having been framed, the Courts below wholly erred in decreeing the suit of the plaintiff without proper evidence led in regard thereto and therefore, the appeal deserves to be allowed and the matter remanded to the Additional Civil Judge (Sr. Divn.), Baba Bakala Sahib, District Amritsar, for framing of a proper issue with regard to the agreement stated to have been entered into, which was duly exhibited and thereafter, the suit decided afresh.

7. Learned counsel for the respondent-plaintiff, on the other hand, has submitted that both the Courts below have duly dealt with the issue raised and on the basis of law settled in that regard, that there can be no clog on the right of redemption of the mortgager of the suit property, had decreed the suit of the plaintiff and dismissed the first appeal filed by the present appellants.

He has further relied upon another judgment of the hon'ble Supreme Court in **Shivdev Singh** vs. **Sucha Singh** 2000 (2) RCR (Civil) 765, to reiterate what was held by the learned Courts below.

8. Having considered the aforesaid arguments, I find myself unable to agree with the plea raised by learned counsel for the appellants that since no issue was framed with regard to the agreement entered into between the parties, for extension of the period of mortgage, the Courts below could not have adjudicated upon the suit and appeal.

A perusal of the judgment of the learned Additional Civil Judge reveals that the following issues were framed by that Court:-

"1. Whether plaintiff is entitled for possession of

two shops in disputes by way of redemption as detailed in the head note of the plaint? OPP

2. Whether the suit is not maintainable in the present from? OPD.

3. Whether the plaintiff has got no locus standi to file the present suit? OPD

4. Whether the plaintiff is estopped by his own work and conduct from filing the present suit? OPD.

5. Whether the plaintiff has concealed the material facts from the Court at the time of filing the present suit? OPD

6. Whether the suit of plaintiff is premature? OPD

7. Relief. "

It is undoubtedly true that no specific issue with regard to the subsequent agreements was framed by that Court, but the first issue itself, as to whether the plaintiff is entitled to possession of the two shops in dispute by way of redemption, would obviously cover all pleas, as taken by the defendants, for opposing the redemption sought by the plaintiff, in the opinion of this Court.

9. Of course if the stand of the appellants-defendants with regard to the agreement entered into, Ex. D-1 before the Courts below, had not been considered by those Courts, learned counsel for the appellants may have had a point. However, the Courts below have discussed the agreement specifically, as in fact that was the primary and the entire argument of the defendants, to oppose the redemption and as such, simply because an issue specifically referring to the agreement had not been framed does not mean that the agreement in question was ignored by the Courts below or that the said issue was not covered in the basic issue of whether the respondent-plaintiff was entitled to redemption of the suit property or not.

It is further seen that the learned Additional Civil Judge has also held that in any case, since the stand of the appellants-defendants was based upon the agreement for extension of a period of mortgage, he should have filed a suit for specific performance. I find no reason to even interfere with that finding, in view of the fact that even if no separate suit for specific performance of the agreement was filed, a counter-claim could also have been raised by the defendant, which he did not do. Thus, a plea at this stage, that a specific issue was not framed, is not a plea that can stand, on that ground either, in the absence of any counter-claim filed with regard to specific performance of the agreement relied upon. This is other than the fact that as already held above, the said issue was very much a part of the main issue no. 1 itself, framed by the learned Additional Civil Judge.

10. On merits, with regard to the agreement being a bar on the respondent-plaintiff from seeking redemption of his suit property, I find absolutely no reason to hold that the judgments of the hon'ble Supreme Court relied upon by the Courts below, and now by learned counsel for the respondent-plaintiff, do not apply to the facts of the present case.

In **Shivdev Singhs'** case (supra), after discussing the entire law on the subject, it was held by their Lordships as follows:-

> *"7. Section 80 of the Transfer of Property Act provides that at any time after the money has become due, the mortgagor has a right, on payment or tender, at a proper time and place of the mortgagor-money to require the mortgagee to deliver the mortgage-deed and all documents relating to the mortgaged property and where the mortgagee is in possession of the mortgaged property, to deliver possession thereof to the mortgagor. Such a right of the mortgagor is called, in English Law, the equity of redemption. The mortgagor*

being an owner who has parted with some rights of ownership has a right to get back the mortgage deed or mortgaged property, in exercise of his right of ownership. The right of redemption recognised under the Transfer of Property Act is thus a statutory and legal right which cannot be extinguished by any agreement made at the time of mortgage as part of the mortgage transaction."

xxxx xxxx xxxx xxxx xxxx

"11. It was further held that Section 60 of the Transfer of Property Act confers on the mortgagor right of redemption which is a statutory right. The right of redemption is an incident of a subsisting mortgage and it subsists so long as the mortgage subsists. Whether in a particular case there is any clog on the equity of redemption, has to be decided in view of the background of a particular case. The doctrine of clog on equity of redemption has to be moulded in modern conditions. In this regard the Court held:

> *"It is a settled law in England and in India that a mortgage cannot be made altogether irredeemable or redemption made illusory. The law must respond and be responsive to the felt and discernible compulsions of circumstances that would be equitable, fair and just, and unless there is anything to the contrary in the statute, law must take cognizance of that fact and act accordingly. In the context of fast changing circumstances and economic stability, long term for redemption makes a mortgage an illusory mortgage, though not decisive. It*

> *should prima facie be an indication as to how clogs on equity of redemption should be judged."*

11. Having observed as above, it was finally held by their Lordships (in Shivdev Singhs' case) that the mortgage deed being for a period of 99 years, itself was a clog on the equity of redemption and as such, the findings of all the courts below, in favour of the respondent (in that case), that the appellant could not claim continuation of the mortgage on the basis of such a clog, were not to be interfered with. Hence, the Supreme Court dismissed that appeal.

12. In the present case, in the opinion of this Court, the judgment in *Shivdev Singh* would apply all the more, in view of the fact that when an original mortgage deed created for a period of 99 years, cannot be held to be a bar on redemption of a property prior to the expiry of 99 years, then certainly an agreement to extend the mortgage beyond a period of 06 years, cannot be held to be a bar to redemption of the mortgaged land, by the mortgagor. In fact, such an agreement would be a clog on the right of redemption with the mortgagor, as has been held by the learned Courts below.

In view of the above, finding no merit in this appeal, it is dismissed in *limine*, with no orders as to costs.

(AMOL RATTAN SINGH)
JUDGE

October 06, 2016
nitin/dinesh

Whether speaking/reasoned Yes

Whether Reportable Yes