

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH.**

(1)

**Regular Second Appeal No.953 of 2016 (O&M)
Date of Decision: September 21, 2016.**

Mukhtiar Singh, now deceased, through his legal heirs and others.

.....APPELLANT(s).

VERSUS

Budha Singh and others

.....RESPONDENT(s).

(2)

Regular Second Appeal No.954 of 2016 (O&M)

Niranjan Singh, now deceased, through his legal heirs and others.

.....APPELLANT(s).

VERSUS

Kala Singh and others

.....RESPONDENT(s).

CORAM:- HON'BLE MR. JUSTICE SURINDER GUPTA

Present: Mr. Prateek Sodhi, Advocate
for the appellant (s).

SURINDER GUPTA, J.

The above captioned appeals have been taken up together as these relate to the same land and are between the same parties.

RSA-953-2016

This is appeal by defendants Mukhtiar and others against the concurrent judgments of the Courts below decreeing the suit of the plaintiffs

(respondents No.1 and 2) for possession by way of redemption of suit land measuring 49 kanals 11 marlas situated in village *Chak Kamal Khan*, Tehsil Ajnala, District Amritsar, on payment of mortgage amount.

The suit land was admittedly mortgaged by Tehal Singh and Jarnail Singh sons of Bhagat Singh in favour of defendants No.1 to 6 vide mortgage dated 02.05.1968. Tehal Singh died leaving behind plaintiffs Budha Singh and Kala Singh as his legal heirs and Jarnail Singh died leaving behind his son Satnam Singh. Plaintiffs alleged that suit property was mortgaged with defendants No.1 to 6 when financial condition of Tehal Singh and Jarnail Singh was bad and taking undue advantage of their financial condition, above referred defendants got recorded 90 years period for redemption of the mortgage, which is a clog on the equity of redemption.

Defendants No. 8 to 10, 12 and 13 admitted the case of plaintiffs in the written statement while defendant No.1 through his legal heirs, defendants No.2 to 6 and 11 contested the claim of plaintiffs. While admitting the mortgage and the mortgage deed dated 02.05.1968, they alleged that mortgagor mortgaged the land to purchase agriculture implements, which were very costly in those days and the period of mortgage was voluntarily mentioned as 90 years as a sum of ₹8,000/- in those days was equivalent to the sale consideration of the land.

Learned Additional Civil Judge (Senior Division), Ajnala on appraisal of evidence and relying on the ratio of judgment in case of ***Shivdev Singh Vs. Sucha Singh 2000(4) SCC 326*** held that mortgage of land for a period of 90 years is a clog on the equity of redemption. The same being illegal and void, cannot be allowed to stand in the way of

plaintiffs to seek the redemption of mortgage and acquire possession of the suit land.

Not satisfied, the appellants-defendants preferred first appeal before the Additional District Judge, Amritsar, which was also dismissed.

I have heard learned counsel for the appellants and have perused the paper book with his assistance.

Both the Courts below have relied on the observations of Hon'ble Supreme Court in case of *Shivdev Singh Vs. Sucha Singh(supra)* while concluding that mortgage for a period of 90 years is a clog on the equity of redemption. Hon'ble Apex Court in case of *Seth Ganga Dhar Vs. Shankar Lal and others AIR 1958 Supreme Court 770* has discussed the rule of equity of redemption and observed in para 13 to 15 as follows:-

“13. The rule against clogs on the equity of redemption no doubt involves that the Courts have the power to relieve a party from his bargain. If he has agreed to forfeit wholly his right to redeem in certain circumstances, that agreement will be avoided. But the Courts have gone beyond this. They have also relieved mortgagors from bargains whereby the right to redeem has not been taken away but restricted. The question is the term now under consideration such that a Court will exercise its power to grant relief against it? That depends on the extent of this power. It is a power evolved in the early English Courts of Equity for a special reason. All through the ages the reason has remained constant and the Court's power is therefore limited by that reason. The extent of this power has, therefore, to be ascertained by having regard to its origin.

It will be enough for this purpose to refer to two authorities on this question.

14. In a very early case, namely, ***Vernon v. Bethell (1762) 2 Eden 110 at p. 113: 28 E.R. 838 at p. 839*** Earl of Northington L. C. said,

"This court, as a court of conscience, is very jealous of persons taking securities for a loan, and converting such securities into purchases. And therefore I take it to be an established rule, that a mortgagee can never provide at the time of making the loan for any event or condition on which the equity of redemption shall be discharged, and the conveyance absolute. And there is great reason and justice in this rule, for necessitous men are not, truly speaking, free men, but, to answer a present exigency, will submit to any terms that the crafty may impose upon them."

15. In comparatively recent times Viscount Haldane L. C. repeated the same view when he said in ***G. and C. Kreglinger v. New Patagonia Meat and Cold Storage Company Ltd. (1914 AC 25 at pp.35 and 36)*** :

"This jurisdiction was merely a special application of a more general power to relieve against penalties and to mould them into mere securities. The case of the common law mortgage of land was indeed a gross one. The land was conveyed to the creditor upon the condition that if the money he had advanced to the feoffor was repaid on a date and at a place named, the fee simple would revert in the latter, but that if the condition was not strictly and literally fulfilled he should lose the land forever. What made the hardship on the debtor a glaring one was that the debt still remained unpaid and could be recovered from the feoffor notwithstanding that he had actually forfeited the land to the mortgagee. Equity, therefore, at an early date began to relieve against what was virtually a penalty by compelling the creditor to use his legal title as a mere security."

Both the Courts below on appraisal of evidence on file have found that the term of suspending the right to seek redemption for 90 years is oppressive and the mortgagee has taken undue advantage of financial

status of the mortgagor. Apex Court in case of *Shivdev Singh Vs. Sucha Singh(supra)*, discussed the right of redemption available to a mortgagor under Section 60 of Transfer of Property Act and the law on the point terming the embargo in the mortgage deed fixed in that case for a period of 99 years as clog on the equity of redemption. It was observed in para 7 of the judgment as follows:-

“7. Section 60 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.”

It further observed in para 9 as follows:-

“9. Any provision incorporated in the mortgage deed to prevent or hamper the redemption would thus be void. A mortgage cannot be made irredeemable and the right of redemption not an illusory. This Court in *Ganga Dhar v. Shankar Lal AIR 1958 SC 770* held:

"The rule against clogs on the equity of redemption is that, a mortgage shall always be redeemable and a mortgagor's right to redeem

shall neither be taken away nor be limited by any contract between the parties. The principle behind the rule was expressed by Lindley M.R. in ***Santley v. Wilde, (1899) 2 Ch. 474(B)*** in these words:

"The principle is this: a mortgage is a conveyance of land or an assignment of chattles as a security for the payment of a debt or the discharge of some other obligation for which it is given. This is the idea of a mortgage; and the security is redeemable on the payment or discharge of such debt or obligation, any provision to the contrary notwithstanding. That, in my opinion is the law. Any provision inserted to prevent redemption on payment or performance of the debt or obligation for which the security was given is what is meant by a clog or fetter on the equity of redemption and is therefore void. It follows from this, that "once a mortgage always a mortgage."

The right of redemption, therefore, cannot be taken away. The court will ignore any contract the effect of which is to deprive the mortgagor of his right to redeem the mortgage. One thing, therefore, is clear, namely, that the term in the mortgage contract, that on the failure of the mortgagor to redeem the mortgage within the specified period of six months the mortgagor will have no claim over the mortgaged property, and the mortgage deed will be deemed to be a deed of sale in favour of the mortgagee, cannot be sustained. It plainly takes away altogether, the mortgagor's right to redeem the mortgage after the specified period. This is not permissible, for "once a mortgage always a mortgage" and therefore always redeemable. The same result also follows from Section 60 of the Transfer of Property Act. So it was said in ***Mohammad Sher Kahn v. Seth Swami Dayal, 49 Ind App. 60 at p.65: (AIR 1922 PC 17 at p.19)***.

An anomalous mortgage enable a mortgagee after a lapse of time and in the absence of redemption to enter and take the rents in satisfaction of the interest would be perfectly valid if it did not also hinder an existing right to redeem. But it is this that the present mortgage

undoubtedly purports to effect. It is expressly stated to be for five years, and after that period the principal money became payable. This, under Section 60 of the Transfer of Property Act, is the event on which the mortgagor had a right on payment of the mortgage money to redeem.

The section is unqualified in its terms, and contains no saving provision as other sections do in favour of contracts to the contrary. Their Lordships therefore see on sufficient reason for withholding from the words of the section their full force and effect."

It was observed that the rule against clog on equity of redemption empowered the courts to relieve a party from bargain. If a person has agreed to forfeit wholly his right to redeem in certain circumstances, that agreement will be avoided. After referring to judgments in **Vernon v. Bethell, (1962) 2 Eden 110 at 113; 28 ER 838 at p. 839, G&C. Kreglinger v. New Patagonia Meat and Cold Storage Company Ltd. (1914) AC 25 at pp. 35 and 36** this Court held:

"The reason then justifying the court's power to relieve a mortgagor from the effects of his bargain is its want of conscience. Putting it in mere familiar language the Court's jurisdiction to relieve a mortgagor from his bargain depends on whether it was obtained by taking advantage of any difficulty or embarrassment that he might have been in when he borrowed the moneys on the mortgage. Was the mortgagor oppressed? Was he imposed upon? If he was, then he may be entitled to relief.

We then have to see if there was anything unconscionable in the agreement that the mortgage would not be redeemed for eighty five years. Is it oppressive? Was he forced to agree to it because of his difficulties? Now this question is essentially one of fact and has to be decided on the circumstances of each case. It would be wholly unprofitable in enquiring into this question to examine the large number of reported cases on the subject, for each turns on

its own facts."

Both the Courts below on appraisal of evidence have found that the incorporation of the term that the redemption shall not be redeemed for a period of 90 years is a clog on the equity of redemption. In the connected appeal bearing RSA No.95 of 2016, which is being decided today, it has been found that date of 02.05.1968 in fact was fixed for execution of the sale deed of the suit land under the agreement dated 10.04.1968 but instead of getting the sale deed executed this mortgage deed was got executed and the plea in that case has been taken that the sale deed was to be got executed in the year 2025. All this indicate the well calculated design of the appellants who instead of purchasing the land from the mortgagor wanted to keep a lien over the same for a period of 90 years which in the facts and circumstances as discussed above was misuse of their dominant status by the mortgagee who took benefit of the monetary need and financial stress of the respondents.

On perusal of the record and judgments of the Courts below, I find no legal or factual infirmity therein calling for any interference.

No substantial question of law requiring determination arises in this appeal, which has no merits.

Dismissed.

RSA-954-2016

Plaintiffs Niranjana Singh and others filed suit seeking relief of specific performance of the agreement dated 10.04.1968 pertaining to the suit land measuring 50 kanals or in the alternate for recovery of ₹1,500/- along with damages and interest.

The case of the plaintiffs, in brief, is that original owners of the land Tehal Singh and Jarnail Singh entered into an agreement of the suit land with Nirnjan Singh and Saun Singh sons of Tarlok Singh vide agreement dated 10.04.1968 for sale consideration @ ₹900/- per acre and received ₹1500/- as earnest money. Niranjan Singh and Saun Singh have since died and now represented by their legal heirs in this case. The date for execution of the sale deed was stipulated as 20th of Baisakh 2025 on receipt of balance sale consideration. Subsequently, on 02.05.1968, Tehal Singh, Jarnail Singh and Dalip Singh sons of Bhagat Singh executed a mortgage deed in favour of Mukhtiar Singh, Gulzar Singh, Baj Singh, Sucha Singh sons of Niranjan Singh and Jagtar Singh, Suba Singh sons of Saun Singh after receiving mortgage amount of ₹8,000/-. The period of mortgage was fixed as 90 years. Possession was delivered to Niranjan Singh and Saun Singh. Tehal Singh died and his estate was inherited by Budha Singh and Kaka Singh. Jarnail Singh died leaving behind Satnam Singh as his heir. Saun Singh also died leaving behind plaintiffs No.2 to 5 as his legal heirs. The plaintiffs have always been ready and willing to perform their part of agreement and requested the defendants to execute the sale deed but they refused. Hence, this suit which was filed on 11.05.2009.

The defendants contested the claim of plaintiffs in the written statement denying all the averments made in the plaint regarding the execution of agreement, readiness and willingness of plaintiffs to get the sale deed executed.

Pleadings of the parties led to the framing of issues as follows:-

- (1) Whether the defendants entered into agreement to sell of the suit property with plaintiffs on 10.04.1968 and received earnest amount of ₹1500/- ?OPP
- (2) Whether the plaintiff remained ready and willing to execute his part of contract? OPP
- (3) Whether the present suit is within limitation? OPD
- (4) Whether plaintiffs have no locus standi and cause of action? OPD
- (5) Whether suit is not maintainable? OPD
- (6) Whether the plaintiffs are estopped from filing the present suit? OPD
- (7) Relief.

While recording findings on issues No.1 to 3, learned Additional Civil Judge (Senior Division), Ajnala held that the execution of the agreement date 10.04.1968 is not proved; the suit is not within limitation; and the plaintiffs have also failed to prove their readiness and willing to perform their part of the contract. With the above observation, the suit of the plaintiffs seeking the relief of specific performance of the agreement was dismissed. On appeal, the first Appellate Court modified the findings of learned Additional Civil Judge regarding the execution of agreement dated 10.04.1968 and held that the execution of this agreement is duly proved but on merits, dismissed the appeal and upheld the judgment of the Court below.

Against the concurrent judgments of the Courts below dismissing their suit, the plaintiffs have come up with this regular second appeal.

I have heard learned counsel for the appellants and have gone through the paper book and record of the Courts below with his assistance.

Learned counsel for the appellants has argued that both the Courts below have got swayed by misreading of evidence with regard to date of execution of the sale deed. The date was stipulated as 20th of Baisakh, a month of Hindu Calendar 2025. While the parties mentioned the date and month from the Hindu Calendar, the year was fixed as per English calendar.

Both the Courts below have rejected this contention of the appellants. The first Appellate Court on appraisal of evidence, observed as follows:-

“15. Further now comes the point for adjudication i.e. whether the present suit is barred by limitation or it is premature. The relevant point for discussion is that the date of execution of sale deed has been fixed as 20 Vaisakh, 2025. Vaisakh, in common parlance is a Nomenclature used for referring to desi month which falls within the month of April to May of English Calender. The use of month of Vaisakh depicts that parties at the time of execution of Ex. P1 had intended to use it as a date as per Desi month and year. There is no reason to use date and month i.e. Vaisakh of Desi month and 2025 year of English Calender. Therefore, it can easily be concluded that parties had intended only to use 20 Vaisakh, 2025 as of Desi month. It is pertinent to mention that 20 vaisakh 2025 of Desi Month corresponds to 2.5.1968 of English Calender. This fact has further been substantiated from the circumstances that agreement was executed on 10.4.1968 and at that time it must have been executed by a person who is major i.e. above 18 years of age so as to be competent to enter into agreement/ contract and at that time, the parties cannot visualize that they will be alive in the year 2025 of English Calender which means that

person must have reach the age of more than 75 years in 2025 of English Calender and therefore, there was no reason for them to prolong the execution of sale deed to this much extent. Further taking into account the argument of plaintiff that mortgage deed dated 2.5.1968 was executed by the parties which shows that Tehal Singh and Jarnail Singh were intending to relinquish their rights in favour of Niranjan Singh and Saun Singh but the perusal of mortgage deed dated 2.5.1968 shows that it was executed by Jarnail Singh and Tehal Singh along with Dalip Singh and it was not executed in favour of Niranjan Singh and Saun Singh rather it was executed in favour of Mukhtiar Singh, Gulzar Singh, Baj Singh, Sucha Singh, Jagtar Singh and Suba Singh and this mortgage deed was executed for 90 years and 90 years since 2.5.1968 will fall in 2058. It is relevant to mention here that the mortgage deed has been executed in favour of sons of Niranjan Singh and Saun Singh because the parties can visualize that 90 years period was too long for the executing parties to be alive at that time. Further there is lot of difference between the year 2025 and 2058 to show that the parties had intended to run both these documents Ex. P1 and Ex. P2 parallely. Further taking into account the provisions of Section 92 of the Indian Evidence Act which provides that when the terms of contract have been reduced in the form of document, then no evidence of any oral agreement shall be admitted which is contradictory or varying the terms of the written contract, therefore, taking into account the above discussion, it is hereby held that executing parties while executing Ex. P1 dated 10.4.1968 had intended the date of execution as 20 Vaisakh 2025 as of Desi Month and it is corresponding to 2.5.1968 of English Calender which is the exact date of mortgage deed. Therefore, the present suit for specific performance where the stipulated

date of execution of sale deed was 20 Vaisakh 2025 i.e. equivalent to 2.5.1968 is hopelessly time barred as the time prescribed for suit of specific performance under Article 54 of Limitation Act, 1963 is three years. ”

The Courts below have discussed the plea of appellants in detail and there is no reason to differ with findings recorded or to come to a different conclusion. The mortgage deed was executed after the agreement, as such, it cannot be said that long date was fixed in view of 90 years of period of mortgage. Had there been intention of proposed vendees to get the sale deed executed, they would not have wasted time in getting the sale deed executed on 02.05.1968, the date corresponding to 20th of Baisakh 2025, instead they got a mortgage deed executed which show that they were not intending to get the sale deed executed for obvious reasons.

Learned counsel for the appellants has argued that though the date for getting the sale deed executed, has not arrived, the cause of action accrued as a suit seeking redemption of the suit land was filed by legal heirs of Tehal Singh and Jarnail Singh which prompted the plaintiffs to seek specific performance of the agreement to sell dated 10.04.1968. He has further argued that respondent No.3 vide sale deed dated 29.12.2015, sold land measuring 64 kanals 7 marlas out of suit land to plaintiffs, which shows that he has recognised the right of appellants.

This submission of learned counsel for the appellants has also no merits. Filing of suit seeking redemption is altogether a different aspect and has nothing to do with the right which the appellants are alleging on the basis of agreement to sell dated 10.04.1968. Both the remedies are independent remedies. The findings of both the Courts below denying relief

of specific performance of agreement dated 10.04.1968 are based on proper appreciation of evidence on record. Though the first Appellate Court has held that execution of agreement Ex.P1 is duly proved but in view of the fact that the suit seeking specific performance of the agreement was filed 40 years from the stipulated date settled for execution and registration of the sale deed, it was found barred by limitation. It also recoil upon plea of appellants that they were ready and willing to perform their part of contract. So far as execution of sale deed dated 29.12.2015 in favour of appellants by respondent No.3 is concerned, this has nothing to do with merits of claim of plaintiffs in this suit. Sale deed executed by respondent No.3 will be binding qua his right, but shall not deprive or affect right of respondents No.1 and 2 in suit land. On redemption, they (respondents No.1 and 2) will get possession of land which is subject matter of suit in RSA No.953 of 2016 by reducing the land sold by respondent No.3.

On perusal of the record and judgments of the Courts below, I find no legal or factual infirmity therein calling for any interference.

No substantial question of law requiring determination arises in this appeal, which has no merits.

Dismissed.

September 21, 2016
Sachin M.

(SURINDER GUPTA)
JUDGE

Whether speaking/reasoned: ***Yes/No***

Whether Reportable: ***Yes/No***