

C.R. No.7532 of 2016

Gurpreet Kaur
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high court

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

C.R. No.7532 of 2016

Date of Decision: 04.07.2017

Rajinder Singh (since deceased)
through his legal heirs
Smt. Udesh Rani and another

....Petitioners

Versus

Dharampal

....Respondent

BEFORE :- HON'BLE MRS. JUSTICE DAYA CHAUDHARY

Present:- Mr. Sandeep K. Sharma, Advocate
for the petitioners.

Mr. Dalik K. Tuteja, Advocate
for the caveator-respondent.

DAYA CHAUDHARY, J.

The present revision petition has been filed under Article 227 of the Constitution of India for setting aside the impugned order dated 04.07.2016 passed by learned Additional District Judge, Rohtak, whereby, the application moved by the petitioners has been disposed of on the ground that as the amount has already been deposited, therefore, no action is required.

Briefly, the facts of the case, as made out in the present revision petition, are that a petition under Section 7/8 of the Bangal Regulation XVII of 1806 (here-in-after called as 'the Regulation 1806') as applicable to the Haryana for foreclosure of the conditional sale/mortgage and rendering the sale conclusive was filed with a prayer that mortgage created vide registered mortgage deed No.1206 dated 02.02.1999 by mortgager/respondent in favour of the petitioner may be ordered to be foreclosed and the conditional sale may be rendered conclusive. Notice in

the said petition was issued to the respondent but it was received back un-served for want of correct address. Learned District Judge, Rohtak directed the petitioners to furnish the correct address and thereafter notice was ordered to be issued to the respondent. Service upon the respondent could not be effected and ultimately, he was directed to be served through publication. In spite of service being effected through publication, the respondent did not appear and he was proceeded ex-parte and the petition was allowed by the learned Additional District Judge, Rohtak vide order dated 27.05.2003. Thereafter, petitioners filed a Civil Suit for possession claiming that the defendant has not bothered to get the land redeemed within one year of the closure of the proceedings under “the Regulation 1806” as per judgment dated 27.05.2003. Accordingly the plaintiffs have become owner of the suit land as the mortgage was without possession and they became entitled to get the possession of said land being owner. The suit was decreed by the learned Civil Judge (Junior Division), Rohtak. In terms of said judgment and decree, the petitioners got the possession of the mortgaged land and it was mutated in their favour vide Mutation No.4154 vide order dated 09.06.2008.

On 13.11.2009, the respondent filed an application for setting aside the ex-parte order/judgment dated 27.05.2003 on the ground that he was not residing at the given address. He came to know about passing of judgment dated 27.05.2003 only on 14.10.2009. Said application was allowed by learned District Judge vide order dated 25.08.2012. After setting aside the ex-parte order/judgment dated 27.05.2003, the learned Additional District Judge, Rohtak again passed an order/judgment dated 05.04.2013 on the application filed by the petitioners. Thereafter, the respondent filed an

application dated 26.08.2013 for allowing him to deposit an amount of ₹ 2 lacs along with interest with effect from 06.11.1998 till 30.08.2013 amounting to ₹ 9 lacs for payment to the mortgagee. During pendency of the said application, the mortgager deposited an amount of ₹ 9,96,000/- in the treasury vide E-challan dated 24.08.2015. Thereafter, the learned Additional District Judge, Rohtak passed order dated 04.07.2016 by recording a finding that the amount had been deposited on 25.08.2015 by the mortgager and the same was treated to be paid within time from the date of setting aside the ex-parte order dated 27.05.2003. Accordingly, the application dated 26.08.2013 was disposed of. Said order dated 04.07.2016 passed by learned Additional District Judge, Rohtak is subject matter of challenge in the present petition.

Learned counsel for the petitioners submits that the learned Additional District Judge, Rohtak, should have dismissed the application filed by the respondent as he had failed to comply with the mandatory requirements as provided under “the Regulation 1806”. The relevant provisions have not been appreciated properly and grave prejudice has been caused to them. Learned counsel also submits that a valuable right has accrued to the petitioners in terms of provisions of “the Regulation 1806” and the same has been nullified. A perverse finding has been recorded in the impugned order and a material irregularity and illegality has been committed while passing the impugned order. Learned counsel also submits that the respondent is not entitled for any relief as he did not deposit the amount within the stipulated period of one year in view of provisions of “the Regulations, 1806”.

Learned counsel for the petitioners has relied upon the

judgments in case ***Mange Ram vs Smt. Parmeshri Devi 1996(2) RRR 51*** as well as ***Sayyid Mansur Ali Khan vs Babu Sarju Parshad 1886(13) L.R.-I.A. 113.***

Learned counsel for the respondent-caveator submits that the respondent was not served at the correct address and he was proceeded ex-parte. Subsequently, under the orders of the Court, the amount was deposited within a period of one year and hence, it cannot be said that the amount was not deposited within the stipulated period. An application was moved by respondent-Dharam Pal for setting aside the ex-parte order dated 27.05.2003 and it was allowed on 25.08.2012. The application dated 26.08.2013 filed by respondent was allowed letting him to deposit an amount of ₹ 2 lacs along with interest till 30.08.2013, which was deposited on 25.08.2015. The respondent deposited the amount within a period of one year as per order and same was considered to be deposited within the prescribed period of one year.

Learned counsel for the respondent-caveator has relied upon the judgments of Hon'ble the Apex Court in cases ***Bishwanath Prasad Singh vs Rajendra Prasad and another 2006(2) RCR (Civil) 231***, judgments of this Court in cases ***Pirthi and others vs Daya Kishan and another 2008(1) RCR (Civil) 705***, ***Hukmi and others vs Bharat Singh 1997(1) RCR (Civil) 108***, ***Shiv Lal vs Badle Ram 1969 Current Law Journal 294*** and judgment of Lahore High Court in case ***Munshi Ram vs Nauranga and others 1924 AIR (Lah) 176***, in support of his contentions.

Heard the arguments of learned counsel for the parties and have also perused the impugned order dated 04.07.2016 passed by the learned Additional District Judge, Rohtak.

The facts are not disputed between the parties. The issue for consideration before this Court is as to whether the amount which was deposited by the respondent within a period of one year from the date of passing of order shall be considered to be deposited within a period of one year after setting aside the ex-parte order. As per case of the respondent, he was never served. The amount of consideration could not be deposited within the stipulated period as the notice was not served upon the respondent at the address, where, he was residing. Ultimately, he was proceeded ex-parte. Thereafter, an application for setting aside the ex-parte order was moved, which was allowed on 25.08.2012. The application for depositing the amount of Rs.2 lacs + interest was allowed and the amount was ordered to be deposited within a period of one year and it was deposited on 25.08.2015.

In the present case, defendant-Dharam Pal mortgaged his agricultural land comprised in Khewat No.398, Khatoni No.479, Killa No.118/12 measuring 8 kanals situated in Village Gandhra Tehsil and District Rohtak vide registered conditional sale deed No.1206 dated 02.02.1999 in favour of plaintiff Sh. Rajinder Singh (Since deceased) for a period of two years. The limitation for the conditional sale/mortgage without possession was for two years with a stipulation of 2% per month interest on the consideration. The defendant did not pay the mortgage money of ₹ 2,00,000/- along with agreed interest within a period of two years. Accordingly, he lost his right to get the land in suit redeemed and conditional sale thus matured to full fledged sale after passing the stipulated period of two years since 02.02.1999. The plaintiffs, after passing of stipulated period of two years, filed a petition under “the Regulation, 1806”

for foreclosure of the conditional sale/mortgage and for rendering the sale conclusive in the Court of the then learned Additional District Judge, Rohtak. A notice was served upon defendant-Dharam Pal but he did not appear even after publication of the notice and ultimately, he was proceeded ex-parte. The proceedings against the defendant were closed vide order dated 27.05.2003. The plaintiffs became owners of the suit land as the mortgage was without possession and they become entitled to get the possession of suit land as its owners. The plaintiffs requested the defendant to admit his title over the suit land and to hand over the possession of the land but there was no effect. Thereafter, the suit was filed. Ex-parte order was set aside on moving of an application by the respondent on the ground that he was not served at the given address. The respondent was allowed to deposit the amount with interest.

There is a distinction between mortgage by conditional sale and a sale with a condition of repurchase. In a mortgage, the debt subsists and the right to redeem remains with the debtor; but a sale with a condition of repurchase is not a lending and borrowing agreement. There does not exist any debt and no right to redeem is reserved thereby. An agreement to sell confers merely a personal right which can be enforced strictly in accordance with terms of the deed as it was agreed upon. Proviso appended to Section 58(c), however, states that if the condition for retransfer is not embodied in the document which effects or purports to effect a sale, the transaction will not be regarded as a mortgage.

In the present case, it was a registered conditional sale deed for a period of two years. The limitation for conditional sale/mortgage without possession was for two years with a stipulation of 2% per month interest on

the consideration. The defendant did not pay the mortgage money of ₹ 2,00,000/- along with agreed interest and on the expiry of period of two years, he lost his right to get the land in suit redeemed. Thereafter, on issuing notice in the suit, the defendant did not appear to contest the suit despite the fact that he was served through publication and thereafter, he was proceeded ex-parte. Plaintiff Udesh Ram appeared as PW-1, who tendered into evidence his affidavit Ex. PW-1/A. Conditional sale deed dated 02.02.1999 was exhibited as Ex. P-1.

In order to succeed in a suit filed by a mortgagee seeking declaration of ownership on the basis of the order of foreclosure/conditional sale, it is mandatory for the plaintiff to prove that :

- (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 mortgaged amount to the mortgagee within stipulated period; and*
- (b) valid foreclosure proceedings were initiated and in spite of receiving the Parwana/notice along with the copy of the foreclosure petition, the mortgagor has failed to pay the mortgage money within a period of one year of the receipt of the said Parwana/notice. ”*

In the present case, the plaintiffs have failed to prove the aforesaid conditions, and as such, it has not been proved on record that the mortgager was served. When this fact came to the knowledge of respondent-Dharampal, an application for setting aside the ex-parte order was moved, which was allowed and the amount was also deposited within a period of one year.

It is mandatory requirement that along with Parwana/notice, a copy of the foreclosure petition should be served upon the mortgager. In the

suit, the plaintiffs cannot be permitted to rely upon the other notice. Nothing has been proved on record that any proper notice was served upon the respondent or he was made aware about the ex-parte proceedings. The amount was deposited within a period of one year, which was treated as amount deposited within the stipulated period. Even in the order dated 25.08.2012, counsel for the plaintiffs has stated that he had no objection for setting aside the ex-parte order dated 27.05.2003 subject to heavy cost. His statement in this regard was also recorded separately. After considering the statement of counsel for Smt. Udes, the application dated 13.11.2009 for setting aside order dated 27.05.2003 was allowed subject to payment of costs of ₹ 3,000/- which was duly received by the counsel.

The relevant paras No.14 to 17 of said order dated 05.04.2013 are reproduced as under :-

“14. “In response to the application for setting aside ex-parte order dated 27.5.2003, learned counsel for Smt. Udes has stated that he has no objection for setting aside ex-parte order dated 27.5.2005 subject to heavy cost. His statement in this regard recorded separately.

15. I have heard learned counsel for both the parties. In view of contention made in the application as well as in view of statement of learned counsel for Smt. Udes etc., the application dated 13.11.2009 for setting aside order dated 27.5.2003 is allowed subject to payment of costs of Rs. 3000/-.

16. Ld. Counsel for Smt. Udes stated that he has received Rs. 3000/-. Now the case is adjourned to 8.9.2012 for reply and arguments.

Sd/-

Kamal Kant,

ADJ, 25.8.2012

17. It is further added here that for getting review the order, it was incumbent upon the mortgagee/petitioners to attach with the file at least affidavit of Shri H.S.Hooda, Advocate, that he had made the statement without any authority inadvertently, but no such affidavit has been attached with it. Even cost had also not been returned which had been received by Shri H.S.Hooda nor it is deposited the Court for its refund in favour of Dharam Pal stating that he was not authorized to make statement. Further more, there is power of attorney in favour of Shri H.S.Hooda, Advocate by Smt. Udesb etc. Under these circumstances, the application dated 20.9.2012 fails and the same is hereby dismissed.

The judgments relied upon by learned counsel for the petitioners are not applicable keeping in view the facts and circumstances of the case.

Accordingly, in view of facts as mentioned above, I find no merit in the present revision petition and the same, being devoid of any merit, is hereby dismissed.

(DAYA CHAUDHARY)
JUDGE

04.07.2017
gurpreet

Whether speaking/reasoned

Yes/No

Whether Reportable

Yes/No