Sr. No.363

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

LPA NO. 762 OF 2009
Date of Decision: April 18, 2017

Subhash Chand and others .....Appellants

VS.

The District and Sessions Judge, Hoshiarpur and others ....Respondents

CORAM HON'BLE MR. JUSTICE MAHESH GROVER
HON'BLE MR.JUSTICE DR. SHEKHER DHAWAN

Present:- Mr.Sanjay Majithia, Sr. Advocate
with Mr. Inderjit Singh, Advocate for the appellants.
Mr. Manoj Bajaj, Addl. A. G. Punjab.
Mr. H.S.Grewal, Advocate
for respondent no.2.

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MAHESH GROVER, J

This Letters Patent Appeal is directed against the judgment of the learned Single Judge dated 20.02.2009 passed in CWP No2354 of 1982 titled Sukh Ram Dass v. District and Sessions Judge, Hoshiarpur and others.

The controversy raised in the present appeal lies wrapped in a maze of facts which need to be noticed in detail.

Joginder Singh son of Ranbir Singh arrayed as respondent no.2 in writ petition mortgaged two chunks of land, one measuring 64 kanals 17 marlas for a sum of ₹ 8,000/- vide registered mortgage deed dated 10.03.1947 and the other measuring 11 kanals 16 marlas for a sum of ₹ 1,000/- by way of deed dated 05.01.1946.

Both these mortgages were created in favour of Muslims who eventually migrated to Pakistan upon partition of the country.

To manage such like properties which were mortgaged in favour of people who migrated to Pakistan, an Act by the name Evacuee Interest (Separation) Act, 1951 (hereinafter "Act of 1951" for short) was promulgated. The earlier Act Administration of Evacuee Property Act, 1950 evidently did not deal with such contingencies of mortgages of existing / surviving mortgages in favour of the persons who had migrated. Under the provisions of this Act, the competent officer appointed in terms of Section 2(C) of the Act of 1951 was authorised to take a decision after holding an inquiry in accordance with the procedure laid down in Section 17 of the Act of 1951 and pass an order determining the interest of the evacuee and the claimant in the property in question.

The competent officer vide his order dated 29.12.1958 declared both these properties as Evacuee Properties to vest in the custodian. This order was challenged by way of an appeal and the matter was remitted back for decision afresh. The competent officer then considered two separate claims set up by respondent no.2; one qua property of 11 kanals 16 marlas vide Claim No.4484 / 4498 and the other qua 64 kanals 17 marlas vide Claim No. 4497- 4485.

Insofar as the claim of 11 kanals 16 marlas is concerned, respondent no.2 suffered a statement before the competent officer relinquishing his claim, therein, resulting in a declaration by the competent officer of the land of this particular chunk to be vested in the custodian free from all encumbrances.

It may not be out of place to mention here that consolidation took place in the village whereupon the total holding which could have been in the hands of respondent no.2 (64 kanals . 17 marlas + 11 kanals . 16

marlas) was consolidated in one chunk measuring 58 kanals.

Upon relinquishing of claim qua 11 kanals and 16 marlas of land, the competent officer was left to deal with a singular surviving claim qua Claim Application no. 4497 / 4485. Accordingly, competent officer passed an order dated 12.10.1962 accepting the application and directing the claimant i.e respondent no.2 to redeem the mortgage land on payment of ₹ 8002/- (eight thousand as the mortgage amount + 2 rupees as notice charges). Opportunity was given to respondent no.2 to deposit the amount and produce the treasury challan before the competent officer on 17.11.1962. This amount, however, was not deposited. Even though, the time was extended upto January 1, 1963. Infact, respondent no.2 did not even appear before the competent officer on 01.01.1963 which led to another order of the competent authority directing the sale on 01.02.1963 after notice to respondent no.2 as is the procedure prescribed.

Accordingly, the sale was conducted on 01.02.1963 and instantaneously it met with a challenge by respondent no.2 vide application dated 13.02.1963.

The competent authority entertained the application to adjourn the auction proceedings to 18.03.1963 and afforded an opportunity to the respondent no.2 to deposit the mortgage amount on 01.04.1963 but amount was still not deposited and finally the sale was confirmed on 30.04.1963 and resultant sale certificate issued to the present appellant.

Respondent no.2 in the writ petition had a remedy of filing an appeal under Section 14 of the Act of 1951 within a period of 60 days but no such appeal was preferred. Instead after a lapse of 9 years, a Civil Suit No. 462 of 1972 was filed for redemption of the mortgage. However, suit was dismissed on 25.03.1975 inviting decision on merit as also on the issue that the Civil Court would have no jurisdiction to entertain the suit.

Thereafter, the respondent no.2 challenged the order dated 30.04.1963 by way of a Civil Writ Petition No. 3735 of 1975 where the Court had the benefit of the response of the disputants before it pronounced its decision on 15.07.1975 to order dismissal.

It is then that *suo moto* reference was initiated by the State while respondent no.2 himself preferred a revision petition on 07.12.1979. For the purposes of references and continuity of narrative, we may extract Section 15 of the Act of 1951 herebelow:

> 15. ***Power of revision of the appellate officer.*** *The appellate officer may at any time call for the record of any proceeding in which the competent officer has passed an order for the purpose of satisfying himself as to the legality or propriety of any such order and may pass such order in relation thereto as he thinks fit: Provided that the appellate officer shall not pass an order under this section prejudicially to any person without giving him a reasonable opportunity of being heard.*

This plea of the respondent no.2 as also the Reference Claim by the State was then accepted by the revisional authority on 30.04.1982 to set aside the order dated 19.11.1962 passed in claim No.4484/4498 as also the auction sale in favour of the present appellant dated 30.04.1963. This led to the filing of Writ Petition No. 2354 of 1982 from where the impugned order has emanated.

Learned counsel for the appellant has made the following submissions:-

i that once the sale certificate was issued and auction proceedings confirmed on 30.04.1963, his rights qua the properties were crystallized of which he could not have been divested under a sham proceedings for a suo moto reference and a revision under Section 15 of the Act where the revisional authority did not even broach this aspect of the matter:

ii that the legal and valid arrangement creating rights under a sale could not have been unsettled after a lapse of 16 years;

iii that no appeal was preferred by the respondent no.2 under Section 14 of the Act of 1951 once the competent officer decided the claim;

iv Even otherwise, once the order dated 30.04.1963 was challenged by way of Civil Writ Petition No. 3735 of 1975 which met with a dismissal after the stands of the parties were perused by this Court, the order of 30.04.1963 would stand merged with the order of this Court lending finality to it and no further challenge was mounted and thus, by way of revision or a reference under Section 15 of the Act of 1951, the matter could not have been reopened at all;

v that the revisional authority as also the learned Single Judge did not even remotely comment upon the rights of the appellant which fructified on 30.04.1963;

vi that not only this even when the auction proceedings had been conducted and awaiting confirmation, the respondent no.2 was offered sufficient opportunities by the competent authority to deposit the amount and redeem the mortgage but since the offer was not availed of, it virtually amounted to waiver of his rights.

As against this, learned counsel for respondent no.2 has submitted that once the original order passed by the competent officer was erroneous, subsequent proceedings would be a nullity. It has been argued that the property was composite and without segregating the entire auction qua the property could not have been done. Infact he has questioned the very vesting of the property in the custodian.

It has further been contended before us that Section 15 of the Act of 1951 was clearly available to the respondent no.2 in view of the expressive language of statute empowering the Appellate Officer at any time to call for the record of any procedure in which the competent officer has passed an order and satisfied itself as to the legality or propriety of said order. Learned counsel for the respondent no.2 would have the Court to believe that such an opportunity is available with the officer and any aggrieved person can also evoke the revisional power of the Appellate Officer to bring to its notice the illegality committed at any period of time to invite interference.

We have heard the learned counsel for the parties and have perused the record as also the relevant material produced on record.

Some of the provisions of the Act of 1951 need to be mentioned here:

> ***2. Definitions:-*** *In this Act, unless the context otherwise requires,-*
> *(a) " appellate officer" means an officer appointed as such by the State Government under section 13;*
> *(b) " claim" means the assertion by any person, not being an evacuee, of any right, title or interest in any property--*
> *(i) as a co- sharer or partner of an evacuee in the property; or*
> *(ii) as a mortgagee of the interest of an evacuee in the property; or*
> *(iii) as a mortgagor having mortgaged the property or any interest therein in favour of an evacuee; and includes any other interest which such person may have jointly with an evacuee and which is notified in this behalf by the Central Government in the Official Gazette;*
> *(c) " competent officer" means an officer appointed as such by the State Government under section 4;*

***(d) " composite property"** means any property which, or any property in which an interest, has been declared to be evacuee property or has vested in the Custodian under the Administration of Evacuee Property Act, 1950 (XXXI of 1950), and--*

(i) in which the interest of the evacuee consists of an undivided share in the property (other than agricultural land) held by him as a co- sharer or partner of any other person, not being an evacuee; or

(ii) in which the interest of the evacuee is subject to mortgage in any form in favour of a person, not being an evacuee; or

(iii) in which the interest of a person, not being an evacuee, is subject to mortgage in any form in favour of an evacuee; or

(iv) in which an evacuee has such other interest jointly with any other person, not being an evacuee, as may be notified in this behalf by the Central Government, in the Official Gazette;

(e)" evacuee interest", in relation to a composite property, means the right, title and interest of an evacuee in that property;

(f)" mortgage debt" means any liability in respect of a property due under any form of mortgage (including any usufructuary mortgage or mortgage by conditional sale) whether such liability is payable presently or in future, or under any decree or order of a Court or otherwise, or whether ascertained or not, which--

(i)in any case where it is incurred by an evacuee, is secured by the mortgage of the interest of the evacuee in the property in favour of a person, not being an evacuee;

(ii)in any case where it is incurred by a person not being an evacuee, is secured by the mortgage of the interest of such person in the property in favour of an evacuee;

but does not include any such liability of an evacuee arising out of any transaction entered into after the 14th day of August, 1947 unless such transaction has been confirmed by the Custodian under the Administration of Evacuee Property Act, 1950 (XXXI of 1950);

***6. Notice to submit claims**. (1)For the purpose of determining or separating the evacuee interest in a composite property, any competent officer having jurisdiction over such property may, either on information received in this behalf from the Custodian or on an application from a claimant, issue, in such form and manner as may be prescribed,--*

(a)a general notice requiring all persons who claim interest in such property, and

(b) also a notice on every person who, in the opinion of the competent officer, may have a claim in such property, to submit claims, if any, in respect of that property.

(2)xxxxx

(3)xxxxx

7. ***Submission of claims.*** *(1) Any person claiming an interest in a composite property may, within sixty days of the date of the issue of the general notice or service of individual notice under section 6, whichever is later, submit to the competent officer a statement of his claim in writing and signed and verified in the prescribed manner.*

(2) [******]

(2) A statement of claim under sub- section (1) shall be drawn up, as far as may be, in the form of pleadings under the Code of Civil Procedure, 1908 (Act V of 1908) and shall include the following particulars, namely:-

(a) the nature of the interest of the claimant in the composite property;

(b) the estimated money value of the composite property;

(c) where the claim is made by a co- sharer or partner, the extent of the share of the claimant and the money value of such share;

(d) where the claim is made by a mortgagee,--

(i) the principal money and the rate of interest chargeable under the mortgage deed;

(ii) payments made towards the mortgage debt after the principal money was advanced or deemed to have been advanced;

(iii) the history of the mortgage debt in so far as it is relevant to the determination of the principal money;

(iv) particulars of the property mortgaged and the estimated value of such property;

(v) particulars of any property the possession of which has been taken by the mortgagee as security for, or in lieu of payment of, the mortgage debt;

(vi) the total amount claimed under the mortgage debt in accordance with the provisions of this Act;

(e) where the claim is made by a mortgagor, the total amount due under the mortgagee debt and the particulars necessary to determine the same;
(f) the order of preference in which the claimant desires to have his interest separated from that of the evacuee under section 10;
(g) any other particulars which may be prescribed.

8. *Decision by competent officer.* *(1) On receipt of a statement of claim under section 7, the competent officer shall, subject to the provisions of sub- sections (2) and (3), hold an inquiry into the claim in accordance with the procedure laid down in section 17 and pass an order determining the interest of the evacuee and the claimant in the property in question and the order shall contain all or any of the following particulars, namely:-*
(a) the money value of the property;
(b) in any case where the evacuee and the claimant are co-sharers or partners, their respective shares in the property and the money value of such shares;
(c) in any case where the claim is made by a mortgagor, the amount due to the evacuee;
(d)in any case where the claim is made by a mortgagee, the amount due under the claim in accordance with the provisions of section 9.

10. ***Separation of the interests of evacuees from those of claimants in composite property****. -Notwithstanding anything to the contrary in any law or contract or any decree or order of a Civil Court or other authority, the competent officer may, subject to any rules that may be made in this behalf, take all such measures as he may consider necessary for the* purpose of separating the interests of the evacuees from those of the claimants in any composite property, and in particular may,--
(a) in the case of any claim of a co- sharer or partner,--
(i) direct the Custodian to pay to the claimant the amount of money assessed in respect of his share in the composite property or deposit the same in a Civil Court having jurisdiction over such property and deliver possession of the property to the Custodian and the claimant may withdraw the amount in deposit in the Civil Court; or

(ii) transfer the property to the claimant on payment by him of the amount of money assessed in respect of the share of the evacuee in the property; or

(iii) sell the property and distribute the sale proceeds thereof between the Custodian and the claimant in proportion to the share of the evacuee and of the claimant in the property; or

(iv) partition the property according to shares of the evacuee and the claimant and deliver possession of the shares allotted to the evacuee and the claimant to the Custodian and the claimant respectively;

(b) in the case of any claim of a mortgagor or a mortgagee,--

(i) pay to the Custodian or the claimant the amount payable under the mortgage debt and redeem the mortgaged property;or

(ii)sell the mortgaged property for satisfaction of the mortgage debt and distribute the sale proceeds thereof; or

(iii) partition the property between the mortgagor and the mortgagee having regard to the share to which the mortgagee would be entitled in lieu of his claim;

(c) adopt a combination of all or some of the aforesaid measures: Provided that before taking any measure under this section, the competent officer shall take into account the order of preference filed by the claimant under clause (f) of sub- section (2) of section 7; and in any case where the claimant is a mortgagor and tenders the amount due, the competent officer shall accept the same in full satisfaction of the mortgage debt. ;

14. Appeals.

(1) Any person aggrieved by an order of the competent officer made under section 8 or section 10 may, within sixty days from the date of the order, prefer an appeal to the appellate officer in such form and manner as may be prescribed:

Provided that the appellate officer may entertain the appeal after the expiry of the said period of sixty days if he is satisfied that the appellant was prevented by sufficient cause from filing the appeal in time.

(2) The appellate officer may, after hearing the appeal, confirm, vary or reverse the order appealed from and may pass such orders as he deems fit."

The facts would reveal that respondent no.2 had made an application for his claims in terms of the afore extracted provisions of law as per his entitlement thereby submitting himself to the provisions of the Act. It would, thus, not lie in his mouth to turn around the question vesting of the property in the custodian. The competent officer in turn fully acknowledged the claim of the respondent no.2 and offered him an opportunity to deposit the amount to redeem the mortgage repeatedly. It was the failure of respondent no.2 to deposit the amount and redeem the mortgage that led to proceedings of sale and even after the auction was conducted but before issuance of the sale certificate and upon an application made by respondent no.2 himself opportunities were once again given to him to deposit the said amount and redeem the mortgage to retreat the property.

It is not in dispute that respondent no.2 did not deposit the amount despite the indulgence shown by the competent officer, the legitimacy of which after the conduct of auction would be debatable.

Once the auction proceedings were confirmed and sale certificate issued on 30.04.1963, the appellant acquired a vested interest in the property which could not have been defeated.

We notice from the impugned order as also the order passed in revision that this issue has not been addressed at all and the discussion had proceeded on certain issues which though germane would not sustain if this issue was eliminated from the discussion.

Even looking it from another angle, the respondent no.2 never challenged the order of the competent officer by filing an appeal in terms of Section 14 of the Act of 1951. Rather, he challenged it by way of a civil suit and that too after a lapse of 9 years which itself was a cause of concern as by then an indefeasible right had accrued to the appellant not only by way of purchase in a valid auction but also by efflux of time.

We need not comment on the remedy available to respondent no.2 of filing a civil suit, its efficacy or maintainability. Suffice it to say that the proceedings themselves were initiated after 9 years and the Courts while dealing with the controversy resulting in the impugned order have totally ignored this aspect.

We are also at pains to notice that after having failed in the Civil suit, a Civil Writ Petition was filed in the year 1975 again seeking to over turn and unsettle a valid legal arrangement resulting from sale in auction in favour of the appellant after an inordinate delay of 12 years. After this dismissal of the writ petition, there was absolutely no occasion either for respondent no.2 to invoke the provision under Section 15 of the Act of 1951 or for the State to initiate the *suo moto* reference. The word "in time" appearing in Section 15 of the Act of 1951 would not suggest an infinite period of time and even if initiated after considerable lapse of time, an authority could not have ignored events that intervened such as sale in favour of the appellant and the ensuing proceedings initiated by respondent no.2 himself. Apart from the legality of the issue, dictates of equity would also persuade us to lean in favour of the appellant. We would, thus, set aside the impugned order to accept the appeal.

(MAHESH GROVER)
JUDGE

(SHEKHER DHAWAN)
JUDGE

April 18, 2017
mamta

Whether speaking/reasoned Yes/No
Whether reportable Yes/No