IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

205 **RSA-1539-2012 (O&M)**
Decided on 10.08.2017

TARA SINGH AND ANOTHER ....APPELLANTS

VS

HARDIP SINGH AND OTHERS ....RESPONDENTS

CORAM: HON'BLE MR. JUSTICE AJAY TEWARI

Present: Mr. Anil Chawla, Advocate
for the appellants.

Mr. K.S. Rekhi, Advocate
for respondents No. 1 to 3.

****

AJAY TEWARI, J.(Oral)

This appeal has been filed against the judgment of the Lower Appellate Court reversing that of the trial Court decreeing the suit of the respondents for possession by way of redemption of land.

The admitted facts are that the appellants had taken on mortgage 27 Kanals 10 Marlas of land belonging to predecessor in interest of respondents on 18.6.1969 for an amount of Rs. 21,000/- which the predecessor in interest of the respondents required to complete the purchase of some other land. In the mortgage deed, it was specified that mortgage could not be redeemed for a period of 90 years. After 35 years suit for redemption was filed. The trial Court dismissed it holding that the facts and circumstances did not show that the mortgagor was in any disadvantageous position at the time of mortgage and consequently held that since the mortgage was created voluntarily and with his own desire the period of 90 years could not be taken to be a clog on the equity of redemption. The Lower Appellate Court however held that such a long period restricting the redemption was a clog on the equity of redemption. Since after paying Rs. 21,000/- the appellants had enjoyed the usufruct of the land for 35 years. The Lower Appellate Court relied upon the judgments of Supreme Court in the matters of "***Shivdev Singh vs. Sucha Singh 2000(3) PLR 495" and "Pomal Kanji Govindji & Ors. V. Vrajlal Karsandas Purohit & Ors., AIR 1989 SC 436".*** The basic exposition of law in both these judgments is that redemption would not normally cause any prejudice to the mortgagee, especially in an English mortgagee, because during the period of mortgage, the mortgagee has enjoyed the usufruct of the land.

In the present case, learned counsel for the appellants has argued that actually this was a case where the mortgagor wanted to transfer the land but it was only under fear of the then prevalent law of pre-emption that this long term mortgage was created. He also brought it to my notice that 4 years prior to the mortgage on 3.4.1965 an equal amount of land had been purchased by the appellants from the brother of the mortgagor for a sum of Rs. 5,000/- and the fact that 4 years later huge amount of Rs. 21,000/- was paid for the same amount of land clearly illustrates that the fear of the appellants regarding pre-emption was there.

Counsel for the respondents has argued that this assertion is ex-facie wrong because if the appellants had fear of pre-emption in 1969 there was no reason why they did not have the same fear in 1965 and if they purchased land in 1965 they could very well purchase land in 1969 also. The real issue before this Court is whether this long period of 90 years is a clog on the equity of redemption.

In the considered opinion of this Court, this long period of 90 years is definitely a clog on the equity of redemption. What is sought to be canvassed is that actually the transaction was of sale and not of mortgage. I am afraid this argument is not available. In this case the written contract specified the relationship to be that of mortgage and the proviso to Section 92 of The Evidence Act, 1872 are not available to the appellants. No other question of law arises.

Consequently, the appeal stands dismissed.

Since the main case has been decided, the pending civil miscellaneous application, if any, also stand disposed of.

10.08.2017 **(AJAY TEWARI)**
anuradha **JUDGE**

-

Whether speaking/reasoned - Yes/No

Whether reportable - Yes/No