

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

RSA No.3179 of 2016 (O&M)

Date of Decision: 31.05.2017

Raja Ram

...Appellant

Vs.

Vishnu Dutt and others

...Respondents

CORAM: HON'BLE MR. JUSTICE AMOL RATTAN SINGH

Present:- Mr. P. K. Ganga, Advocate,
for the appellant.

Mr. Deepak Kaushal, Advocate,
for respondent no.2.

Amol Rattan Singh, J.

This is the second appeal of one of the five defendants in a suit filed by the respondents-plaintiffs (some of them now represented by their LRs), by which the plaintiffs had sought possession of the suit property by redemption of the mortgage executed on 06.04.1965 by their predecessor-in-interest, Nanak son of Ram Dayal.

The facts are being taken from the judgments of the Courts below, wherein it is stated that as per the plaint, the aforesaid Nanak being the owner of the suit land measuring 44 kanals 8 marlas at that point of time, had mortgaged it in favour of Ram Narain and Ram Partap sons of Ram Lal for a sum of Rs.5500/-, in respect of which a mutation was also sanctioned on 06.04.1965, bearing mutation no.263.

Thereafter, Nanak sold the land to Mani Ram son of Ram Lal, upon which mutation no.386 was sanctioned on 07.04.1969. After the death of Mani Ram, the plaintiffs and Krishan Kumar, inherited the land being the

legal heirs of Mani Ram, in respect of which inheritance, mutation no.1550 was sanctioned. Krishan Kumar expired on 03.09.2011 leaving behind plaintiffs no.7 to 16 as his legal heirs. (Thus, obviously, it was the first six plaintiffs and Krishan Kumar who had inherited the land from Mani Ram).

2. It was further contended in the plaint that Mani Ram had filed an application for redemption of the suit land in the court of the S.D.O. (Civil)-cum-Collector, Dabwali, against the defendants, in which the defendants took a plea that the land had been mortgaged for a sum of Rs.20,500/- and not Rs.5500/-. The Collector, however, vide his order dated 26.11.1992, allowed the application of Mani Ram, directing him to pay/deposit an amount of Rs.5500/- as the mortgage amount. Defendant no.2 Raja Ram (present appellant), Ram Narain and Ram Partap (predecessors-in-interest of defendants no.1, 2, 4 and 5), filed Civil Suit no.1287 of 1992 in the Court of the learned Additional Civil Judge (Senior Division), Dabwali, titled as Ram Narain v. Mani Ram, which was decreed on 10.03.1998, holding that the order of the Collector, dated 26.11.1992, was illegal, null and void and that Ram Narain etc. were mortgagees in possession and the application for redemption of the suit land was not filed by Mani Ram.

It was further disclosed in the plaint that an appeal was filed against the said decree before the District Judge, Sirsa, by the second plaintiff, Raj Kamal, which was dismissed on 01.10.2010. Meanwhile, Mani Ram had died on 26.05.1998, with the plaintiffs all succeeding him. The legal heirs of Mani Ram were duly impleaded in the said proceedings.

3. Thereafter, plaintiffs n.2 to 6 and Krishan Kumar, predecessor-in-interest of plaintiffs no.7 to 16, again filed an application for redemption of the suit land before the same authority, i.e. the S.D.O.(Civil)-cum-Collector,

Dabwali, on 03.11.2010, against the defendants, but that application was dismissed on 14.09.2011, on the ground that the application was not filed within a period of 30 years from the date of the mortgage and therefore, it was beyond limitation.

It was further stated that alongwith the application, bearing no.4-RM, Rs.20,500/- were deposited on 03.11.2010, accepting that to be the mortgage amount, in terms of the judgment/decreed dated 10.03.1998 of the learned Additional Civil Judge (Senior Division), Dabwali, passed in Civil Suit no.1287.

It was further stated that defendants no.1, 4 and 5 (Subhash son of Ram Narain, Sunil Kumar son of Ram Partap and Nirmal Kumar son of Ram Partap), had suffered a statement on 30.11.2010 to the effect that they had no objection if the suit land was redeemed in favour of the plaintiffs.

4. On the aforesaid averments, the civil suit in the present *lis* was instituted by the plaintiffs (present respondents no.1 to 16), on 05.01.2012, further stating therein that the order of the Collector, dated 14.09.2011, dismissing the application for redemption of the suit land, on the ground of limitation, was illegal, null and void and therefore liable to be set aside.

5. In response to the notice issued by the Civil Judge (Junior Division), Dabwali (in the present *lis*), defendant no.2, i.e. the present appellant, Raja Ram son of Ram Narain son of Ram Lal, appeared and filed his written statement, stating that the mortgage amount was Rs.20,500/- as now admitted by the plaintiffs, and that as no redemption application was filed by Mani Ram as had been held by the civil Court, with that judgment and decree having become final, the order dated 14.09.2011 passed by the Collector, was very much valid and could not be set aside, the plaintiffs

having lost the right to redemption by lapse of time in terms of the Limitation Act.

Hence, as per the appellant-defendant no.2, the defendants had become owners of their respective shares of the suit land and consequently, any admission made by any of the co-defendants was of no benefit to the plaintiffs.

6. Appellant-defendant no.2 also filed a counter claim, seeking therein that a decree of foreclosure be passed in his favour, restraining the plaintiffs from getting the suit land redeemed, as the period of 30 years to redeem it had already lapsed.

He further sought a declaration to the effect that the defendants had become owners of their respective shares of the suit land measuring 44 kanals 8 marlas, and that he, i.e. appellant-defendant no.2, was in exclusive possession of the suit land as tenant at will, on the basis of the order of the Assistant Collector 2nd Grade, Dabwali, dated 30.12.1992, and as such, he could not be dispossessed otherwise than by due course of law, under Section 9 of the Punjab Security of Land Tenures Act, 1953.

The appellant reiterated the same contention in a different manner also in his counter claim, by contending that the suit land having been mortgaged by Nanak son of Ram Dayal on 04.06.1965 in favour of Ram Narain and Ram Partap sons of Ram Lal, and it having never been redeemed either by Nanak or by Mani Ram within a period of 30 years, therefore, the plaintiffs' right to redemption stood extinguished.

7. Yet further, as per the counter-claim, the appellant contended that Ram Narain had left a registered will dated 20.06.1989 in his favour, on the basis of which also he was entitled to ownership of a half share in the suit

land.

Further reiterating that the order of the Collector dated 14.09.2011, dismissing the application for redemption as being time barred, was a lawful order, it was submitted that even in the khasra girdawari, the appellants' name had been entered by the AC 2nd Grade, Dabwali, on 30.12.1992, as a tenant at will, during the life time of Ram Narain and Ram Partap, (Ram Narain being the father of defendants no.1, 2 and 3, Subhash, Raja Ram and Sheelo, and Ram Partap being the father of defendants no.4 and 5, Sunil Kumar and Nirmal Kumar).

8. The plaintiffs filed a reply to the counter-claim, in which other than essentially reiterating the stand in the plaint, it was stated that the present appellant, defendant no.2, was not a tenant at will on the basis of the order dated 30.12.1992 and in fact, not a tenant at all and therefore, the provisions of Section 9 of the Punjab Security of Land Tenures Act would not apply to the facts of the case.

Further reiterating that the right of the plaintiffs to redeem the mortgage had not been extinguished, even the will in favour of defendant no.2, stated to have been executed by Ram Narain, i.e. the father of defendants no.1, 2 and 3, was denied. Yet further, it was submitted that even if the will stood proved, the rights of the plaintiffs were in no way affected.

Also, it was contended that defendant no.2 (the appellant herein), was not in exclusive possession of the suit land as tenant at will and that the correction of the khasra girdawari vide the order dated 30.12.1992, was also liable to be set aside, being illegal.

Yet further, it was contended that the owners had never given any consent to the appellant being inducted as a tenant and that he had, in

fact, taken contradictory pleas, on the one hand claiming to be a mortgagee, and on the other claiming to be a tenant. Thus, it was contended that such pleas were barred, further on the ground that in the previous *lis* between the parties, he had never taken any plea of being a tenant.

Consequently, dismissal of the counter-claim was prayed for by the plaintiffs.

9. Defendants no.1, 3, 4 and 5 were all proceeded against *ex parte* vide different orders passed by the learned Civil Judge, though subsequently the legal representatives of defendant no.3, Sheelo, daughter of Ram Narain (sister of the present appellant), were impleaded as defendants on an application filed by them.

The counsel appearing for defendant no.3 through her LRs, in fact, admitted the claims of the plaintiffs, as was recorded by the Civil Judge vide an order dated 07.04.2015.

10. A replication having been filed to the written statement, the following issues were framed by that Court:-

- “1. Whether the plaintiff is entitled for decree of possession by way of redemption of the land comprised as mentioned in the head note of the plaint and as prayed for? OPP
2. Whether the order passed by Court of SDO-cum-Collector, Dabwali dated 14.09.2011 is wrong, illegal, null and void, against law and facts and liable to be set aside? OPP
3. Whether the defendant is entitled for a decree for foreclosure restraining the plaintiff redeeming the suit land as mentioned in the head note of the written statement and as prayed for? OPD
4. Whether the defendant no.2 is also entitled for a declaration and he is tenant at will of the suit land and as prayed for? OPD

5. Relief.”

11. The plaintiffs examined the second plaintiff (respondent no.2 herein), Raj Kamal, and Gurdeep Singh, an Assistant Treasury Officer, with the latter deposing with regard to the plaintiffs having deposited Rs.20,500/- with the Collector, Dabwali.

Fifteen documents were also tendered by way of evidence, including *jamabandies* (records of rights) for the years 2007-08, 1960-61 and 1964-65. Orders, judgments and decrees referred to, as also mutation entries, were also tendered by way of evidence.

The defendants examined the present appellant, Raja Ram, one Dana Ram, Lambardar, who proved the receipts, Exs.D19 to D28, regarding payment of a '*Biyana*' (earnest money). They also examined Balwant Rai, Halqa Patwari, who deposed in respect of some certificates led by way of evidence.

By way of documentary evidence, they tendered 31 documents, including judgments and orders, and *jamabandies* for various years, including some of which were exhibited by the plaintiffs, and the death certificate of defendant n.3, Sheelo Devi, sister of the present appellant.

12. On the first two issues, pertaining to whether the plaintiffs were entitled to a decree of possession by way of redemption of the mortgaged land and whether the order of the Collector, Dabwali, dated 14.09.2011, was illegal, null and void, it was first noticed by the trial Court that prior to 05.08.1967 oral mortgages were prevalent in Haryana, as the provisions of Section 59 of the Transfer of Property Act were not applicable. Therefore, the mortgage in question shown to have been entered into in the year 1965, was a

valid mortgage. To hold so, that Court cited two judgments of this Court, in Khuda Buksh v. Sukhan Ram 2012(3) RCR (Civil) 54 and Amar Singh vs. Dalip Singh 1991 PLJ 469.

13. That Court then went on to examine the nature of the mortgage, on a contention raised by learned counsel for the present appellant-defendant no.2, that it was not actually a usufructuary mortgage.

Going on to refer to what constitutes such a mortgage, the definition given in Section 58(d) of the Transfer of Property Act was referred to, as was a judgment of the Lahore High Court in Lachhman Singh v. Natha Singh AIR 1940 Lahore 401.

It was further discussed that Nanak had mortgaged the suit land in favour of Ram Narain by way of an oral mortgage, with possession delivered to the mortgagees, after which Nanak sold the suit land in favour of Mani Ram, predecessor-in-interest of the plaintiffs. The mortgagee had been appropriating the rents and profits of the land till date. On the aforesaid reasoning, it was held to be a usufructuary mortgage, 'especially' as there was no document to the contrary shown, to sustain the argument that the mortgage was never intended to be a usufructuary one. An argument to the effect that an oral mortgage cannot be a usufructuary mortgage, as per Section 58 of Transfer of Property Act, was also rejected, by holding that simply because the mortgage was not registered, that not being a requirement in the State of Haryana prior to 1967, it could not be held that the mortgage in question was not a usufructuary mortgage in terms of Section 58 of the TP Act.

A judgment of this Court in Kulwant Singh and ors. v. Gurbaksh Singh and others 2009 (3) RCR (Civil) 258 was also cited.

Thereafter, other judgments of this Court were also cited, wherein it has been held that there is no limitation of time for redemption of a usufructuary mortgage.

Consequently, it was held that the right, title and ownership of the plaintiffs over the suit property did not stand extinguished, especially as the matter had been finally settled by a Full Bench of this Court in **Ram Kishan and others v. Sheo Ram and others** 2008 (1) RCR (Civil) 334 and as such, the defendants were not entitled to a decree of foreclosure, restraining the plaintiffs from redeeming the suit land.

Hence, issues no.1, 2 and 3 were decided in favour of the plaintiffs.

14. Another plea raised, to the effect that the suit land had been transferred by Nanak to Mani Ram for a consideration of Rs.21,000/-, which also covered the mortgage amount and therefore, the mortgage actually stood extinguished, was also rejected by that Court, holding that the present appellant-defendant no.2 had alleged that two months after the mortgage, Nanak had requested that Rs.15,000/- be given as additional mortgage amount, which the mortgagees had paid to Nanak. Thereafter, the present appellant alleged that Rs.15,500/- was paid to Mani Ram. On the basis of the two statements, it was found by the Court that Rs.15,000/-, paid two months after the execution of the mortgage, would mean that the said sum was paid in the year 1965 itself and therefore, could not have been paid to Mani Ram but to Nanak only, Mani Ram having purchased the land from Nanak in 1969.

Thus, it was held that Mani Ram never received any money from the mortgages, as, if he had received the sum in 1965, he would not have purchased the land by way of a registered sale deed in the year 1969 from

Nanak.

It had also come out in the cross-examination of the present appellant, Raja Ram, that he did not know that Nanak had sold the suit land to Mani Ram in 1969.

15. Having held as above, that Court then went on to discuss the issue of tenancy.

The contention of appellant-defendant no.2 in his counter-claim, to the effect that he had exclusive possession over the suit land as a tenant at will, on the basis of the order dated 30.12.1992 passed by the AC 1st Grade, Dabwali, was also rejected by the learned Civil Judge, holding that in fact, the aforesaid order was simply one directing a correction of the khasra girdawari and possession of the present appellant over the suit land (reflected in the revenue record by virtue of that order), could not be read to mean that he was a tenant at will, especially as he had taken the plea of being of having become an owner, by extinguishment of the right of redemption of the mortgagor to redeem the mortgaged land from him as a mortgagee.

16. Though no issue on *res judicata* had been specifically framed in the suit, however, that issue was also looked into by the trial Court.

It was found that the earlier civil suit had challenged the order dated 26.11.1992 passed by the Collector, by which redemption of the mortgaged land was permitted to Mani Ram. The civil suit was decreed in favour of the plaintiff therein, i.e. the present appellant, restraining Mani Ram permanently from dispossessing the plaintiff and the proforma defendants in that suit, from the suit land. As per the judgment of the Civil Judge in the present *lis*, it was also observed in that judgment, that the application for redemption of mortgage was not actually filed by Mani Ram. The appeal filed

against that judgment and decree was also dismissed.

Despite the above, the learned trial Court in the present case held that the filing of the suit and the judgment and decree dated 10.03.1998, would not constitute *res judicata* in the present case, as the order in that case was to be construed to be an order stating that the restraint was “except in due course of law”. Hence, a mortgagor could not be estopped from taking possession in due course of law by way of redemption of a mortgage.

17. The learned Civil Judge then examined the issue of whether mortgaged land could be redeemed by the successor-in-interest of the original mortgagor and after referring to various judgments held that it could be so redeemed.

18. Finally, going on to the order of Collector dated 14.09.2011, dismissing the application for the plaintiffs for redemption of the mortgage, on the ground that it was time barred, it was held that the suit in the present *lis* was maintainable against the said order, it having been filed on 05.01.2012. A judgment of a Full Bench of this Court in **Chanan Singh v. Majo and another** 1976 PLR 726 and one of the Supreme Court in **Harbans Singh and another v. Guran Ditta Singh and another** (1991) 2 SCC 523 relied upon to that effect.

All in all, the suit in the present *lis* was therefore, held to be maintainable.

19. Consequently, on the aforesaid reasoning, the suit of the plaintiffs was decreed in their favour holding that they are entitled to possession of the suit land by way of redemption of the mortgage qua 44 kanals and 8 marlas of land, as per the *jamabandi* for the year 2007-08.

The counter claim of the present appellant was dismissed.

20. The present appellant having filed an appeal against the judgment and decree, the learned lower appellate Court, after narrating the facts contained in the pleadings and referring to the issues framed, as also the evidence led before the Civil Judge, dismissed that appeal, essentially on the same grounds as per the reasoning given by the learned Civil Judge, including the issue raised in the counter claim with regard to the appellant being a tenant at will in the suit land. In that regard, it was observed that the appellant had failed to show any proof of his tenancy.

21. Consequently, the present second appeal has been filed by the appellant-defendant no.2, in which learned counsel has framed various questions of law, though most are simply with regard to the courts below not having decided the suit and the first appeal as per law.

The two questions of law framed, as fall for consideration in this 2nd appeal, are as to whether the suit is barred under Section 11 and Order 2 Rule 2 of the CPC, in view of the earlier judgment and decree dated 10.03.1998, passed between the same parties, and whether the appellant is a tenant over the suit land as per provisions of the Punjab Security of Land Tenures Act, 1953.

Inclusive in the aforesaid questions would be as to whether the courts below have correctly held the mortgage in question to be a usufructuary mortgage, for the redemption of which there is no limitation as has been held by the Supreme Court in **Singh Ram (D) through Lrs vs. Sheo Ram and others** (2014) 9 SCC 185, thereby upholding the judgment of the Full Bench of this Court in **Ram Kishans'** case (supra).

22. Mr. P.K. Ganga, learned counsel for the appellant, actually argued essentially on the issue of *res judicata*.

The contention of learned counsel for the appellant is that an application for redemption of the suit land having been filed in the year 1992 before the competent authority under the Redemption of Mortgages (Punjab) Act, 1913, i.e. before the Collector, and the order of the Collector dated 26.11.1992, allowing the application seeking redemption of the land, (the suit land in the present *lis*), having been set aside by the Civil Court, vide its judgment and decree dated 10.03.1998, neither would a fresh application under the aforesaid Act of 1913 have been competent, nor in any case would any subsequent suit seeking the setting aside of the order passed in a second application, i.e. the order dated 14.11.2011, be entertainable.

Mr. Ganga submitted that the earlier application decided by the Collector on 26.11.1992, had also sought redemption of the suit land and that order allowing such redemption was set aside by the learned Additional Civil Judge (Senior Division), Dabwali, vide the aforementioned judgment and decree dated 10.03.1998, the last part of which reads as follows:-

“Consequently, the defendant is hereby restrained permanently from dispossessing the plaintiffs and the proforma defendant from the suit land. I order accordingly.”

Hence, the contention of learned counsel is that the predecessor-in-interest of the present respondents-plaintiffs, Mani Ram, having been permanently enjoined from dispossessing the appellant and his co-mortgagees (successors-in-interest of the original mortgagees), a second application for redemption of the suit land would not lie. Therefore, the second application filed on 03.11.2010 was correctly dismissed by the Collector, Dabwali, vide his order dated 14.09.2011, though on the ground that the period to redeem the mortgage had already expired, 30 years having gone by since the date of the original mortgage, which was admittedly

executed in 1965.

23. Learned counsel for the appellant further submitted that though the ground for dismissal of the application was not the same as has been pressed by the appellant in the present appeal and before the courts below, which is to the effect that a second application would not lie because of the earlier decree dated 10.03.1998, however, a second suit in any case would not lie for setting aside even a subsequent order on an application filed for redemption of the same land, because of the earlier decree, which was even confirmed in appeal by the learned District Judge, Sirsa.

He submitted that in fact, in the previous *lis*, i.e. in Civil Suit No. 1287 of 1992 (leading to the decree dated 10.03.1998), the conduct of the predecessor-in-interest of the respondents, i.e. the conduct of Mani Ram, had been adversely commented upon by the learned Civil Judge, holding that actually the thumb impression on the application before the Collector was not of Mani Ram. It had also been held by the learned Civil Judge in that *lis* that the mortgage amount was Rs. 20,500/- as had been paid to the original mortgagor, and not Rs. 5,500/- as was tendered by the present respondents-plaintiffs/their predecessor-in-interest, when they had filed the application before the Collector in 1992, seeking redemption of the suit land.

The contention of Mr. Ganga, therefore, is that the Civil Judge having wholly rejected the prayer for redemption of the suit land on both counts, i.e. the application for redemption not proved to have been filed by the mortgagor/land owner, i.e. by Mani Ram, and for the reason that the mortgage amount was found to be insufficient, and the respondents-plaintiffs herein having been permanently restrained from dispossessing the appellant and his co-mortgages from the suit land, the suit in the current *lis* was wholly barred

on the principle of *res judicata*.

He further submitted that a finding was recorded in the previous *lis* that the application for redemption filed at that stage (1992), was so filed by Mani Rams' appointed attorney, who did not step into the witness box to testify, with Mani Ram also not having done so.

24. Learned counsel for the appellant next submitted that therefore, even though in Singh Rams' case (*supra*), it has now been held that there is no limitation prescribed in the Limitation Act, 1963, for redemption of a mortgage, the issue qua the suit land in question having reached finality in the previous *lis*, vide the judgment and decree dated 10.03.1998, and eventually the appeal against that decree also having been dismissed on 01.10.2010, with no further challenge thereto, a subsequent declaration of law (in Singh Rams' case), cannot upset a *fait accompli* established earlier between two parties in a *lis* between them, *in personem*.

On this issue, learned counsel cited a judgment of the Supreme Court, in Baburam vs. C.C. Jacob, (1999) 3 SCC 362.

25. Mr. Deepak Kaushal, learned counsel appearing for respondent no. 2 in the present appeal, addressed arguments essentially in terms of the judgments of the courts below in favour of the respondents-plaintiffs, and further submitted that the earlier suit filed by the present appellant, i.e. Civil Suit No. 1287 of 1992, eventually led to a decree, not holding that the redemption was barred by virtue of a period of 30 years having gone by and therefore the right to redemption having been extinguished, but on the aforesaid two grounds admitted by learned counsel for the appellant, i.e. that firstly the amount of Rs. 5,500/- tendered by the mortgagor (Mani Ram), to redeem the suit land, was actually not the entire mortgage amount which was

Rs. 20,500/-, and further, because a finding had been recorded that Mani Ram himself had never filed the application before the Collector seeking redemption of the suit land and eventually even his thumb impression was never proved.

Mr. Kaushal therefore submitted that the issues in the two suits being wholly different, a decree of permanent injunction against the mortgagor (Mani Ram, predecessor-in-interest of the present respondents-plaintiffs), restraining him permanently from dispossessing the mortgagees, i.e. the present appellant and his co-mortgagees, would not be a decree restraining the mortgagor from ever redeeming the suit land, but only restraining him from dispossessing them in terms of the order of the Collector dated 26.11.1992, which had been challenged in Civil Suit No. 1287 of 1992 by the present appellant and his co-mortgagee, Ram Narain, i.e. his father.

26. Having heard learned counsel for the parties, as regards the first question of law, pertaining to whether the suit in the present *lis*, i.e. Civil Suit No. 105 of 2012 (CS No. 958), instituted on 05.01.2012/01.07.2013, was barred on the principle of *res judicata*, I am not in agreement with learned counsel for the appellant and agree, in fact, with the argument of learned counsel for the respondents-plaintiffs.

This is for the reason that the suit in the present *lis*, filed by the respondents-plaintiffs herein/their predecessor in interest, sought setting aside of the order of the SDO (Civil)-cum-Collector, Dabwali, dated 14.09.2011, by which the application of the respondents-plaintiffs was dismissed, by which application, they were seeking that they (mortgagors-cum-land-owners), be allowed to redeem the suit land from the mortgagees and thereafter to take possession of it.

27. That application was dismissed only for the reason that the said application was filed on 03.11.2010, whereas the land had been mortgaged by the original land-owner, Nanak (from whom Mani Ram had purchased it) on 06.04.1965. Consequently, a period of more than 30 years having elapsed by the time the second application for redemption was filed, i.e. on 03.11.2010, the application seeking redemption of the mortgaged land was held to be beyond the period of limitation.

On the other hand, as is very obvious, from the judgment and decree of the learned Additional Civil Judge (Senior Division), Dabwali, in the previous *lis*, i.e. in Civil Suit No. 1287 of 1992, the order challenged in that suit, of the Collector Dabwali, dated 26.11.1992, was declared to be illegal, null and void only for the reasons already given earlier hereinabove, i.e. that Mani Ram not having stepped into the witness box in support of his case, it was not proved that he himself had thumb marked the application seeking redemption of the suit land; and further, because the mortgage amount was found by that Court to be Rs. 20,500/- and not Rs. 5,500/- as had been tendered by the applicants for redemption of the mortgage. The issue of the application for redemption being beyond limitation had never come up in that suit because factually that application was filed in 1992, when the period of 30 years from the date of the mortgage had still not expired and therefore, that could never have been an issue in the first place.

In the present *lis*, to repeat, the suit filed by the respondents-plaintiffs-mortgagors-land-owners, i.e. Civil Suit no. 105 of 2012, sought a declaration setting aside the order of the Collector dated 14.09.2011, dismissing their application for redemption of the suit land on the ground that more than 30 years had gone by since the date of the mortgage and therefore,

as per the Collector, limitation to redeem the mortgage had run out.

28. I therefore agree with the contention of learned counsel for the respondents-plaintiffs herein, that even the decree of permanent injunction issued by the learned Additional Civil Judge (Senior Division) on 30.03.1998, in Civil Suit No. 1287 of 1992 (that decree having attained finality), was a decree consequent upon that courts' findings on the aforesaid two issues that arose in that *lis*, i.e. on Mani Rams' thumb impressions being forged/not proved to be his, and the amount of Rs. 5,500/- tendered for redemption of the mortgage, being an insufficient amount.

29. It may need notice that the issues framed in that suit were as follows:-

“1. Whether the plaintiff is mortgage of the suit land as detailed in the head-note of the plaint as per jamabandi for the year 1989-90? OPP

2. Whether the order dated 26.11.1992 passed by the Collector, Dabwali in case titled Mani Ram Vs. Ram Narain is illegal null and void and is liable to be set aside? OPP

3. If the above issues are proved whether the plaintiff is entitled for permanent injunction as prayed for? OPP

4. Whether the civil Court has no jurisdiction to entertain the present suit? OPP

5. Whether the suit is bad for non-joinder and mis-joinder of necessary parties? OPD

6. Whether the suit of the plaintiff is not maintainable in the present form? OPD

7. Whether the plaintiff has no cause of action to file the present suit? OPD .

8. Whether the plaintiff has no locus-standi to file the present suit? OPD

9. *Relief.”*

(Emphasis on issue no. 3 applied by this Court).

The first three issues enumerated hereinabove were taken up together by that Court and eventually it was held in paragraph 17 of its judgment as follows:-

“Thus, in view of aforesaid discussion it becomes crystal clear- that the order dated 26.11.1992 passed by Collector Dabwali in case titled Mani Ram vs. Ram Narain is wrong, illegal, null and void and is liable to be set aside which in turn means that the plaintiffs and proforma defendant are still mortgagees with possession of the suit land and that the plaintiff is entitled to the injunction as prayed for by him. Resultantly all these issues are hereby decided in favour of the plaintiffs as against the defendant.”

(Emphasis again applied by this Court).

Finally, the decree issued by that Court was as is reproduced hereinbelow:-

“It is ordered that the suit of the plaintiffs succeeds and the same is hereby decreed with costs. A decree for declaration to the effect that the plaintiffs alongwith proforma-defendant are mortgagees in possession of the suit land is hereby passed in favour of the plaintiffs and against the defendant. Accordingly, the order dated 26.11.1992 passed by the then SDO (Civil) exercising the power of collector, Dabwali being wrong, illegal, null and void etc. is hereby set-aside. Consequently, the defendant is hereby restrained permanently from dispossessing the plaintiffs and the proforma defendant from the suit land. I order accordingly.”

30. Consequently, the judgment and decree in the previous *lis* having

declared the respondents-plaintiffs to be continuing to be mortgagees in possession of the suit land, with the issue of extinguishment of the right to redemption of the mortgage not arising in the previous *lis*, the decree issued pursuant to such finding, of permanent injunction, cannot be held to operate as *res judicata* to oust the mortgagees from seeking redemption of the suit land by payment of the complete mortgage amount of Rs. 20,500/- (as was held to be such amount in the previous *lis*). Therefore, neither the application dated 03.11.2010, leading to the order of the Collector dated 14.09.2011, rejecting the application for redemption only on the ground of limitation having expired (as per the Collector), nor the suit filed by the respondents-plaintiffs in the current *lis*, i.e. Civil Suit No. 105 of 2012, impugning that order, can be held to be barred on the principle of *res judicata*.

Thus, the first question of law that arises in this appeal is decided accordingly, against the appellant and in favour of the respondents-plaintiffs.

31. Coming to the next question, i.e. whether the courts below have erred in holding that the appellant is not a tenant on the suit land and therefore cannot be evicted therefrom in terms of the provisions of the Punjab Security of Land Tenures Act, 1953.

I find no reason to interfere with the judgments of the learned courts below even on that issue, for the reasoning given hereinafter.

32. It is to be specifically noticed at this stage itself, that actually no specific arguments on this question were addressed before this Court by learned counsel for the appellant and consequently, none by the counsel for the respondents, but as the issue has been raised in the grounds of appeal and a question of law has also been framed therein (though erroneously stating

that the appellant is a “sitting tenant” as per Section 77 of the Act of 1953, there being no such section in that Act), that matter still needs to be gone into by this Court.

33. Before going on to discuss the actual question of whether the appellant is a tenant on the suit land or not, the relevant provisions of the Act of 1953 are being reproduced hereinunder:-

Punjab Security of Land Tenures Act, 1953-

2. Definition- *In this Act ,unless the context otherwise requires :-*

(1) *“Landowner” means a person defined as such in the Punjab Land Revenue Act, 1887 (Act XVII of 1887),and shall include an “allottee” and “lessee” as defined in clauses (b) and (c), respectively, of section 2 of the East Punjab Displaced Persons (Land Resettlement)Act, 1949 (Act XXXVI of 1949),hereinafter referred to as the “ Resettlement Act”.*

Explanation– In respect of land mortgaged with possession, the mortgagee shall be deemed to be the landowner.

xxxx xxxx xxxx xxxx

(6) *“**Tenant**” has the meaning assigned to it in the Punjab Tenancy Act, 1887 (Act XVI of 1887) and includes a sub-tenant, and self cultivating lessee, but shall not include a present holder as defined in section 2 of the Resettlement Act.*

xxxx xxxx xxxx xxxx

[8. Continuity of tenancies *-the continuity of a tenancy shall not be affected by-*

(a) the death of the landlord, or

(b) the death of the tenant except when the tenant leaves no male lineal descendants or mother or widow, and

(c) any change therein under the same land-owner and for the purpose of sections 17 and 18 of this Act, such tenancy shall be the last area so held]

xxxx xxxx xxxx xxxx

9. Liability of tenant to be ejected-*[(1) Notwithstanding anything contained in any other law for the time being in force no land owner shall be competent to eject a tenant except when such tenant-*

(i) is a tenant on the area reserved under this Act or is a tenant of a small landowner; [or]

(ii) fail to pay rent regularly without sufficient cause; or

(iii) is in arrears of rent at the commencement of this Act; [or]

(iv) has failed , or fails , without sufficient cause, to cultivate the land comprised in his tenancy in the manner or to the extent customary in the locality in which the land is situate; or

(v) has used, uses the land comprised in his tenancy in a manner which has rendered, or renders it unfit for the purpose for which he holds it [or] has sublet the tenancy or a part thereof; provided that where only a part of the tenancy has been sublet ,the tenant shall be liable to be ejected only from such part; or

(vi) has sublet the tenancy or a part thereof; provided that where only a part of the tenancy has been sublet, the tenant shall be liable to ejected only from such part; or

(vii) refuses to execute a Qabuliyat or a Patta, in the form prescribed, in respect of his tenancy on being called upon to do so by an Assistant Collector on an application made to him for this purpose by the land-owner.

Explanation-- For the purposes of clause (iii) a tenant shall be deemed to be in arrears of rent at the commencement of this Act, only if the payment of arrears is not made by the tenant within a period of two months from the date of notice of the execution or decree or order , directing him to pay such arrears of rent.]

(2) Notwithstanding anything contained herein before a tenant shall also be liable to be ejected from any area which he holds in any capacity whatever in excess of the permissible area.

Provided that the portion of the tenancy from which such tenant can be ejected shall be determined at his option only if the area of his tenancy under the landowner concerned is in excess of the area from which he can be ejected by the said land owner.

Provided further that if the tenant holds land of several land owners and more than one land owner seeks his ejectment, shall be exercised in the order in which the applications have been made or suits have been filed by the landowners concerned and incase of simultaneous applications or suits the priority foe ejectment shall commence serially from the smallest land owner.

Explanation-- Where a tenant holds land jointly with other tenants only his share in the joint tenancy shall be taken into account in computing the area held by him.

34. As a matter of fact, the aforesaid provisions would actually come into consideration only if it is seen that the appellant was able to prove even in terms of Section 2 (6) of the aforesaid Act, that he was actually a tenant on the suit land, in addition to being a mortgagee. Before going on to discuss that issue, since Section 2 (6) of the Act of 1953 stipulates that the word “tenant” has the same meaning as has been assigned to it in the Punjab Tenancy Act, 1887, the relevant provision of that Act is also being reproduced hereinafter:-

The Punjab Tenancy Act, 1887:-

4. Definition- *In this Act, unless there is something repugnant in the subject or context-*

xxxx xxxx xxxx xxxx

(5) “tenant” means a person who holds land under another person, and is, or but for a special contract would be, liable to pay rent for that land to that other person; but it does not include-

(a) an inferior landowner; or

(b) a mortgagee of the rights of a landowner, or

(c) a person to whom a holding has been transferred, or an estate or holding has been let in farm, under the Punjab Land-revenue Act, 1887¹, for the recovery of an arrears of land-revenue or of a sum recoverable as such an arrears ; or

(d) a person who takes from the Government a lease of unoccupied land for the purpose of subletting it;

(6) “landlord” means a person under whom a tenant holds land, and to whom the tenant is, or but for a special contract would be, liable to pay rent for that land;

(7) “tenant” and “landlord” include the predecessors and successors in interest of a tenant and landlord, respectively;

(8) “tenancy” means a parcel of land held by a tenant of a landlord under one lease or one set of conditions”

(Emphasis applied by this Court)

35. Thus, as already said, the question of the applicability of the Act of 1953, would come into question only if any document had actually been produced to even *prima facie* show that the appellant, in addition to being a mortgagee on the property, was, somehow or the other, also inducted as a tenant thereon, paying rent or liable to payment, in terms of Section 4 (5) of the Act of 1887, either to the original mortgagor, or to his successors-in-interest.

A perusal of the judgments of the courts below shows that no revenue record was produced before those courts to even try and prove any actual tenancy. The learned Civil Judge has noticed on the issue of claimed tenancy (though as a separate paragraph within the consideration of the issues framed on redemption of the mortgage, and not in the actual issue framed with regard to the alleged tenancy, i.e. issue no. 4), that simply because an order of the Assistant Collector IInd Grade was produced in Court, ordering the correction of a *Khasra Girdawari* (Annual Record), that did not prove any tenancy, and therefore, the contention that the appellant was a tenant at will could not be accepted, he actually first basing his counter-claim as a mortgagee.

The first appellate Court, in its judgment, also noticed the contention of the learned counsel for the present appellant, as was made before that Court, to the effect that the appellant was a tenant on the will on the basis of the order Assistant Collector IInd Grade dated 30.12.1992, and therefore, could not be dispossessed except in terms of Section 9 of the Punjab Security of Land Tenures Act, 1953.

That Court also rejected the said argument, holding that no evidence with regard to tenancy in the entire revenue record was placed on file, and even the aforesaid order of the Assistant Collector, dated 30.12.1992, was only for a correction of the *Khasra Girdawari*, and not a single word had been mentioned as to in what capacity the appellant had got the *Girdawari* changed in his favour. It was further found that the owners of the suit land were not made party to the proceedings leading to the aforesaid order, and consequently, the said order could not be held to be binding upon them.

36. In the present appeal, as already stated, no arguments whatsoever

were actually addressed on this question of law, though it stands framed in the grounds of appeal. Hence, nothing has been shown to this Court to even allege that the aforesaid finding of the Courts below, that the revenue record did not actually show any tenancy in favour of the appellant are erroneous or perverse in any manner.

Similarly, nothing has been pointed out to the effect that the correction in the *Khasra Girdawari* (Annual Record), was actually done by the Assistant Collector on the basis of any evidence led before him, after due notice to the respondents-plaintiffs/their predecessor-in-interest.

Therefore, even the presumption in favour of the revenue record, in terms of Section 44 of the Punjab Land Revenue Act, 1887, which stipulates that there shall be such a presumption in favour of the entries in the Records of Right (Jamabandi) and Annual Records (*Khasra Girdawari*), is not a presumption which this Court can hold to not have been refuted by the courts below, on a perusal of the revenue record produced before those courts, not showing the appellant to be a tenant at will at any stage prior to the order dated 30.12.1992, which order was also held to have been passed at the back of the land-owners/mortgagees.

37. It requires to be noticed that paragraphs 327 and 359 (a) of the Land Administration Manual lay down the procedure to be followed before making any changes in the *Khasra Girdawari*, with regard to a change of cultivating tenancy on any tract of land.

The said two provisions are reproduced hereinunder:-

“327. Entries of owners and tenants. There are columns in the harvest inspection register in which to show the ownership and cultivating occupancy of every field. Changes should be noted with care. It is only through the khasra girdwari that

alterations in tenancies-at-will find their way into the record of rights.

359(a). The patwari should intimate to the gram panchyat concerned, within 15 days of finishing the girdawari, the following changes of cultivating tenancy made by him in khasra girdawari so that the latter should inform the persons concerned about these changes :-

(1) when there is a change in cultivation from a tenant that the landlord;

(2) when there is an addition of a tenant to the existing tenant;

(3) where there are two or more than two tenants and the name of one or more tenants is removed from entry in the khasra girdawari.”

Thus, the necessity of the Patwari intimating even the Gram Panchayat concerned, with regard to a change of cultivating tenancy made by him in the *Khasra Girdawari* has been stipulated, so that the Panchayat could inform the persons concerned in respect of such changes. Therefore, with the lower appellate Court having come to a specific finding, not rebutted at any stage, that the order of the Assistant Collector was passed with no information to the land-lord, there would be no reason for this Court to hold otherwise, with nothing shown to the contrary. That would be especially so when a specific finding of fact was recorded by the learned courts below, that a perusal of the revenue record prior to the order of the Assistant Collector also shows no tenancy of the present appellant.

38. Hence, I find no reason whatsoever to interfere in those findings of fact by the learned Courts below, to the effect that no tenancy was reflected in the revenue records, other than the order dated 30.12.1992.

Consequently, the second question of law is also answered to the effect that the appellant never proved himself to be a tenant, in any capacity, on the suit land, in terms of the Punjab Security of Land Tenures Act, 1953, or the Punjab Tenancy Act, 1887.

39. Before concluding, it would need to be noticed that before the learned Civil Judge an argument had also been raised that a mortgage not reduced to writing, cannot be held to be a usufructuary mortgage. That contention, as already noticed, was repelled by that Court holding that prior to as 05.08.1967 an oral mortgage was valid in the State of Haryana, Section 59 of the Transfer of Property Act, 1882, not being applicable to the State. The nature of the mortgage in issue here was gone into in detail, eventually holding that it indeed was a usufructuary mortgage.

It is seen that that finding was never challenged before the first appellate Court, and neither has it even been framed as a question of law before this Court and consequently, no argument on that issue has been raised whatsoever. Obviously, therefore, that finding of the trial Court was accepted at that stage itself.

Hence, there is no occasion of this Court to go in detail on that issue, except to state that the nature of a mortgage would not change whether it is an oral mortgage or by way of a written document, unless of course, a statutory provision exists that it must be a written document, duly registered etc. However, no argument having been raised at any stage after the trial Court, that the finding of that Court that Section 59 of the Act of 1880 was not applicable to the State of Haryana prior to 05.08.1967, obviously the appellant has accepted that finding completely, including the nature of the mortgage being a usufructuary one.

This is also discernible from the grounds of appeal before the first appellate Court, which are annexed along with this 2nd appeal itself, wherein it is specifically stated that the mortgage could not have been redeemed without payment of Rs. 20,500/-. Of course that was one of the grounds taken before that Court in addition to others, but no issue is seen to have been raised even before that Court, that the mortgage entered into in 1965 by the predecessors-in-interest of the present parties to the *lis*, was not a usufructuary mortgage.

It may be stated here that the term “ usufructuary”, comes from Latin words, “usus” (use) and “fructus” meaning fruit, and thereby, the simple translation of the word would mean usage with the fruits thereof.

Hence, the mortgagees admittedly having enjoyed all fruits of the land, upon possession of the land given to them/ their predecessor-in- interest, pursuant to the mortgage entered into, with no specific condition stipulated in respect of the mortgage, it has to be accepted to be a usufructuary one, redeemable upon payment of the mortgage amount by the mortgagor to the mortgagees.

On such a mortgage being redeemable in perpetuity, what has been held by the Supreme Court can be cited from its judgment in ***Singh Rams' case (supra)***, as follows, referring to Dr.Rash Bihari Goshs' 'Law of Mortgage:-

“It is thus evident that the very conception of mortgage involves three principles. First, there is the maxim: once a mortgage, always a mortgage. That is to say, a mortgage is always redeemable and if a contrary provision is made, it is invalid. And this is an exception to the aphorism, modus et conventio vincunt legem (custom and agreement overrule law). Secondly, the

mortgagee cannot reserve to himself any collateral advantage outside the mortgage agreement. Thirdly, as a corollary from the first, another principle may be deduced, namely, once a mortgage, always a mortgage, and nothing but a mortgage. In other words, any stipulation which prevents a mortgagor from getting back the property mortgaged is void. That is, a mortgage is always redeemable."

(In similar vein, 'The Law of Mortgages' by Edward F. Cousins was also referred to by their Lordships).

40. In view of the entire discussion hereinabove, I find no ground to interfere with the judgments of the learned courts below and consequently, this appeal is dismissed, with the parties left to bear their own costs.

May 31, 2017
dinesh

(AMOL RATTAN SINGH)
JUDGE

1. Whether speaking/reasoned?	Yes
2. Whether reportable?	Yes