

RSA No. 3861 of 2015 (O&M)

RSA No. 5028 of 2015 (O&M)

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

RSA No. 3861 of 2015 (O&M)

Date of Decision: 15.2.2017

Rajinder Kumar and others

.....Appellants

Vs.

Jaswant Rai and others

.....Respondents

2.

RSA No. 5028 of 2015 (O&M)

Rajinder Kumar and others

.....Appellants

Vs.

Jaswant Rai and others

.....Respondents

CORAM : HON'BLE MR. JUSTICE RAMESHWAR SINGH MALIK

Present : Mr. R.K.Rana, Advocate
for the appellants.

RAMESHWAR SINGH MALIK J. (ORAL)

These two identical regular seconds appeals, between the same parties, are being decided vide this common judgment with the consent of learned counsel for the appellants as both these appeals are arising out of same set of facts. However, for the facility of reference, facts are being culled out from RSA No. 3861 of 215.

Unsuccessful mortgagees are in regular second appeal, against

RSA No. 3861 of 2015 (O&M)

RSA No. 5028 of 2015 (O&M)

the concurrent findings of facts recorded by both the learned courts below, whereby suit of mortgagees for declaration to the effect that they have become owners of the property in question by efflux of time, was dismissed and suit for possession of the suit land by way of redemption filed by the mortgagers, was decreed.

Brief facts of the case bearing Civil Suit No. 1768/28.5.2006, as recorded by learned trial court in para 2 of its impugned judgment, are that land in question was mortgaged by Santu son of Pirdiya in favour of Johri son of Chajju. The land was mortgaged by Santu to Johri more than 100 years back before the bandobast of the land. The entry regarding mortgaging the land in dispute before the bandobast of land up till was now continuous in the revenue record as per missal hakiat for the year 1956-57 and revenue record up to the year 2002-03 was attached with the plaint. Johri son of Chhaju was mortgagee in possession of the suit land before Bandobast of the land. The plaintiffs were the legal heirs and successors of Johri who have since died. Johri had three sons namely Punnu, Nathu, Bachna and one daughter Punni. Punnu died on 30.7.1994 unmarried but not interstate, he executed a registered Will dated 11.12.1979 in favour of Charanjit and Rajinder Kumar his nephew. The father of plaintiff No.1 namely Nath was died on 29.5.1994. He had also executed a registered Will dated 19.11.1990 in favour of his sons namely Charanjit and Rajinder Kumar-plaintiff No.1. Punni died on 1.1.1980 and she executed a Will dated 10.9.1979 in favour of plaintiffs No.5 to 8 to her nephew. Bachna had died on 20.3.1996. He executed Will dated 20.7.1985 in favour of his sons i.e. Plaintiffs No.5 to 8. Charanjit son of Nathu had died on 12.2.2005 and he left behind his legal heirs plaintiffs No.2 to 4. In this way, the plaintiffs became successor of

RSA No. 3861 of 2015 (O&M)
RSA No. 5028 of 2015 (O&M)

Johri and they were continuing as mortgagee in possession of suit land after the death of Johri.

The defendants were the legal heirs and successors of mortgagor Santu son of Pirdiya. The suit land was previously remained under the mortgage in possession of the father and forefathers of the plaintiffs. Now the plaintiffs were in possession of the suit land as mortgagees. The suit land was never got redeemed by the forefathers of defendants or by defendants themselves. The suit land was under the mortgage in possession of the plaintiffs and the forefathers of the defendants more than 100 years back before the bandobast of land which was done in the year 1903-1904.

As per the Indian Limitation Act, required period for redemption of the land had been already expired. Now the plaintiffs had become the owners of the suit land by afflux of time. Plaintiffs many times requested the defendants to admit the plaintiffs as owners of the suit land but the defendants put off the matter on one pretext or the other and one day prior to the filing of the suit, the defendants refused to admit the claim of the plaintiffs. The defendants were threatening to alienate the suit land, dispossessing the plaintiffs from the suit land. If the defendants succeed in their evil designs then the plaintiffs would suffer irreparable loss and injury which cannot be compensated in any terms otherwise. The cause of action arose for the plaintiffs for first time when the required period of redemption of land was expired and finally one day prior to the filing of the suit and the defendants refused to admit the claim of the plaintiffs. Hence the present suit, which has been prayed to be decreed with cost.

Defendants-mortgagers, having been served in the suit for

RSA No. 3861 of 2015 (O&M)
RSA No. 5028 of 2015 (O&M)

declaration filed by the mortgagees, put appearance and filed their contesting written statement, raising more than one preliminary objections. Plaintiffs-mortgagees did not file any replication. On completion of pleadings of the parties, learned trial court framed the following this issues:-

1. Whether the plaintiffs are entitled to declaration as prayed for?OPP
2. Whether the plaintiffs are entitled for permanent injunction as prayed for? OPP
3. Whether the suit is not legally maintainable?OPD
4. Whether the suit is false and liable to be dismissed?
OPD
5. Relief”

Second suit for possession by way of redemption of suit land was filed by mortgagers vide civil suit No. RT-644/28.7.2006. Brief facts of this case, as recorded by learned trial court in para 5 of its impugned judgment at page 32 of the paper book, are that case of the plaintiffs-Jaswant Rai etc. was that land fully described in the headnote was owned by the plaintiff and it was under mortgage with the defendants. The land in question was mortgaged with possession by Santu son of Pirdiya in favour of Johri son of Chhajju. The entries were incorporated in the revenue record regarding mortgage, but there was no mortgage in writing. It was an oral mortgage.

The land in question was usufructuary mortgage and for that, there was no limitation for redemption of the same as per law. The plaintiffs were the legal heirs of Santu son of Pirdiya the original mortgagor and the defendants were the legal heirs of Johri (the original mortgagee) son of Chhajju. It was denied being wrong that land in question was mortgaged

RSA No. 3861 of 2015 (O&M)

RSA No. 5028 of 2015 (O&M)

more than 100 years back before the bandobast of the land. Plaintiff had number of times requested the defendant to redeem the land in question on receiving the payment of mortgage money, but the defendants had always been postponing the matter on one pretext or the other and instead of redeeming the land in question, the defendants were threatening to alienate the property in dispute which was totally wrong and illegal. In case the defendants succeed in their guilty motive, it would cause irreparable loss and injury to the plaintiff which could not be compensated otherwise and it would lead to multiplicity of litigation. The defendants finally refused to accept the request of the plaintiffs on 14.6.2006 and hence the suit was prayed to be decreed in view of prayer made in the plaint.

Defendants-mortgagees were served. Defendants No. 1 and 5 appeared and filed their joint written statement, but defendants No. 2, 3, 4 and 7 did not appear and they were proceeded against ex parte, vide order dated 4.8.2009. However, later on, they were also allowed to join the proceedings of the suit through their counsel. On completion of pleadings of the parties, learned trial court framed the following issues:-

1. Whether the plaintiffs are entitled for possession by way of redemption of land measuring 1 bighas 16 biswas fully detailed in the head not of plaint above? OPP
2. Whether the plaintiff is entitled for permanent injunction as prayed for? OPP
3. Whether the suit of the plaintiff is bad for mis-joinder, non joinder of necessary parties? OPD
4. Whether the suit of the plaintiffs is not maintainable? OPD

RSA No. 3861 of 2015 (O&M)
RSA No. 5028 of 2015 (O&M)

5. Whether the plaintiffs are estopped by their act and conduct from filing the present suit?

6. Whether the suit of the plaintiff is time barred?OPD

7. Relief'

As both the abovesaid suits were pertaining to the same suit property and parties in both the suits were also the same, learned trial court rightly ordered consolidation thereof and it was ordered that evidence led in first suit by both the parties, shall be read and considered for the purpose of decision of both the suits.

In order to prove their respective stands taken, both the parties led their oral as well as documentary evidence. After hearing learned counsel for the parties and going through the evidence brought on record, learned trial court came to the conclusion that mortgagees-Rajinder Kumar and others-plaintiffs in civil suit No. 1768 of 28.5.2006 have failed to prove their case, whereas Jaswant Rai etc-mortgagers and plaintiffs in Civil suit No. 644 of 28.7.2006 have duly proved their case. Accordingly, civil suit No. 1768 was dismissed and civil suit No. 644 for possession by way of redemption of the suit land was decreed, vide common impugned judgment and decree 1.5.2012. Dissatisfied, Rajinder Kumar and others-mortgagees filed two identical civil appeals bearing CA 119 and 119-A. Both these appeals were dismissed by learned first appellate court vide common impugned judgment and decree dated 20.1.2015. Hence these regular second appeals at the hands of mortgagees-Rajinder Kumar and others.

Heard learned counsel for the appellants.

During the course of hearing, when repeatedly and specifically confronted with the settled proposition of law that, once mortgage is always

RSA No. 3861 of 2015 (O&M)
RSA No. 5028 of 2015 (O&M)

a mortgage and mortgager of usufructuary mortgage never loses his right of redemption, as there is no fixed period for getting such a mortgage redeemed, he had no answer and rightly so, it being an established principle of law. Having said that, this Court feels no hesitation to conclude that learned courts below committed no error of law, while passing the impugned judgments and decrees and the same deserve to be upheld.

Facts of the cases in hand are hardly in dispute. Santu son of Pirdiya mortgaged the suit land in favour of Johari son of Chhajju. It was an oral and usufructuary mortgage. Appellants-Rajender etc. are the descendants of original mortgagee-Johari son of Chhajju whereas the respondents are descendants of mortgager-Santu son of Pirdiya. Mortgage amount was ₹9. Basis of suit for declaration filed by mortgagees-appellants herein by way of civil suit No. 1768/28.5.2006 was, that they had become owners of the suit land by efflux of time, because they were in possession for more than 30 years and mortgagers have not filed the suit to get the suit land redeemed within the prescribed period of limitation.

On the other hand, basis of suit for possession filed by mortgagers by way of civil suit No. 644 was that it was an oral and usufructuary mortgage and for the redemption of such mortgage, there was no fixed period prescribed. Under these circumstances, it can be safely concluded that learned courts below were well within their jurisdiction to dismiss the suit filed by the mortgagees and the suit for possession filed by the mortgagers was rightly decreed, thus, the impugned judgments and decrees deserve to be upheld, for this reason also.

The abovesaid view taken by this Court also finds support from the following judgments of the Hon'ble Supreme Court as well as this

RSA No. 3861 of 2015 (O&M)
RSA No. 5028 of 2015 (O&M)

Court:-

Harbans VS. Om Parkash and others, 2006 AIR (SC)
686 (SC)

M/s L.K.Trust Vs. EDC Ltd. and others, 2011 AIR (SC)
2060 (SC)

Sidharath Raj Vs. Ayodhya Parshad (deceased) by his
Lrs, 1992 (1) RRR 138(P&H)

Ram Kishan and others Vs. Sheo Ram and others, 2008
(1) RCR (civil) 334 (P&H)

Lachhman Singh Vs. Natha Singh through Harnam
Singh (FB) AIR 1940 Lahore 401.

Before arriving at a judicious conclusion, learned first appellate court re-considered the factual as well as legal aspect of the matter, in the correct perspective. Each and every relevant fact as well as piece of evidence was examined, discussed and appreciated in minute details. Cogent findings recorded by the learned first appellate court in para 19 to 21 of its impugned judgment, which deserve to be noticed here, read as under:-

*“As per Article 61(a) of the Limitation Act, 1963, period of limitation prescribed for filing suit relating to immovable property by a mortgagor to redeem or recover possession of immovable property mortgaged is 30 years from the date when the right to redeem or to recover possession accrues. The Hon’ble supreme Court in case **Singh Ram (D) Thr. L.Rs. Vs. Sheo Ram & Ors. 2014(3) Apex Court Judgments 303(SC)**, observed in para No.2 of the judgment, as under:-*

2. These matters have been put up before this Bench in pursuance of the order passed by a Bench of two Judge on 18.08.2008, as under :-

*“As it appears that observations made by this Court in **Prabhakaran & Ors. Vs. M. Azhagiri Pillai & Ors.**, reported in 2006(4) SCC 484, in regard to the*

RSA No. 3861 of 2015 (O&M)

RSA No. 5028 of 2015 (O&M)

interpretation and/or application of Article 61 of the Schedule appended to the Limitation Act, 1963 are contrary to the principles laid down by this Court in a large number of decisions, including Jayasingh Dhyanu Mhoprekar & Anr. Vs. Krishna Babaji Patil & Anr., 1985(4) SCC 162 as also various decision referred to by the Full Bench of the High Court, we are of the opinion that the matter should be heard by a larger Bench.” Before advertng to the question of reconciling conflicting opinions in various decisions, including the two decisions referred to above, we consider it appropriate to mention that by the impugned judgment, the Full Bench of the High Court of Punjab and Haryana at Chandigarh, considered the question “whether there is any time limit for usufructuray mortgagor to seek redemption?” and decided the said question in the negative, in favour of the respondent mortgagor as follows:-

“Therefore, we answer the questions framed to hold that in case of usufructuray mortgage, where no time limit is fixed to seek redemption the right to seek redemption would not arise on the date of mortgage but will arise on the date when the mortgagor pays or tenders to the mortgagee or deposits in Court, the mortgage money or the balance thereof. Thus, it is held that once a mortgage always a mortgage and is always redeemable.”

The correctness of the above view is the subject matter of consideration before this Court.

Further it has been observed in para No.15 and 16 of this judgment, as under:-

15. We, thus, hold that special right of usufructuray mortgagor under Section 62 of the T.P. Act to recover possession commences in the manner specified therein,

RSA No. 3861 of 2015 (O&M)
RSA No. 5028 of 2015 (O&M)

i.e., when mortgage money is paid out of rents and profits or partly out of rents and profits and partly by payment or deposit by mortgagor. Until then, limitation does not start for purposes of Article 61 of the Schedule to the Limitation Act. A usufructuary mortgagee is not entitled to file a suit for declaration that he had become an owner merely on the expiry of 30 years from the date of the mortgage. We answer the question accordingly.

On this conclusion, the view taken by the Punjab and Haryana High Court will stand affirmed and contrary view taken by the Himachal Pradesh High Court in Bhandaru Ram(D) Thr. L.R. Rattan Lal vs. Sukh Ram(supra) will stand over-ruled.

So, from the ratio of law laid in the above said judicial pronouncements, it is evident that the Full Bench of our own Hon'ble High Court in Ram Kishan's case(Supra) while distinguishing law laid by the Hon'ble Supreme Court in Prabhakaran's case(Supra) held that in case of a usufructuary mortgage where no time limit is fixed to seek redemption, the right to seek redemption would not arise on the date of mortgage, but will arise on the date when the mortgagor pay or tender to the mortgagee or deposits in the Court the mortgage money or balance thereof. However, the Full Bench of Hon'ble Himachal Pradesh High Court in Bhandaru Ram's case (Supra) took a different view and held that limitation period for redemption of such a mortgage would be 30 years as prescribed under Articles 60 of the Limitation Act, 1963. However, the Hon'ble Supreme Court in Singh Ram's case(Supra) over ruled the above said view of the Hon'ble Himachal Pradesh and affirmed the view of the Hon'ble Punjab & Haryana High Court and dismissed the appeal filed against the judgment of the Hon'ble Punjab & Haryana High Court in Ram Kishan's

case(dupra).

In the present case it is not disputed that the suit land was orally mortgaged by predecessor-in-interest of the respondents in favour of the predecessor-in-interest of the appellants. The mortgage money was Rs.9/- and no period was fixed. Possession was delivered by the mortgagor to the mortgagee and entries in this regard was incorporated in the revenue record. Appellants are still recorded as mortgagees in the suit land and the respondents are recorded as mortgagors. As per the evidence led by the parties, these entries are continuing since the year 1953-54. As it was an usufructuary mortgage and no period of mortgage was fixed, hence as per law laid in Singh Ram's case(Supra) by the Hon'ble Supreme Court, the limitation for the purpose of Article 61 of the Limitation Act, 1963 does not start from the date of mortgage. Rather, the same starts from the date when the mortgagor pay or tender the mortgagee or deposit in the Court the mortgage money or balance thereof. Hence, Civil Suit No.RT-644 filed by the respondents for redemption is within limitation and the respondents/defendants are entitled to decree for possession of the suit land by way of redemption of the mortgage land and for permanent injunction as prayed for. The appellants, who filed Civil Suit No.RT-1768 for declaration to the effect that they have become owners by way of efflux of time i.e. more than 30 years as mortgagee in possession are not entitled to declaration as prayed for. Therefore, the learned Lower Court has rightly held that the respondents/plaintiffs in Civil Suit No.RT-644 are entitled to decree for possession of the suit land by way of redemption of the mortgage and the appellants, who are plaintiffs in Civil Suit No.RT-1768 are not entitled to declaration as prayed for. Therefore, no ground is made out to interfere in the findings

RSA No. 3861 of 2015 (O&M)
RSA No. 5028 of 2015 (O&M)

returned by the learned Lower Court on the above-said issues and hence the same are upheld and affirmed.

The Hon'ble Supreme Court in Harbans's case (supra) has held that mortgager of usufructuary mortgage had right to get it redeemed even after expiry of 100 years. After following the law laid down by the Hon'ble Supreme Court in Harbans's case (supra), the Hon'ble Full Bench of this Court in Ram Kishan's case (supra), held that mortgagees cannot seek declaration that they have become owners, because the usufructuary mortgage can be got redeemed by the mortgagers at any time. The Hon'ble Full Bench in Ram Kishan's case (supra) also followed the law laid down by Hon'ble Full Bench of Lahore High Court Natha Singh's case (supra).

In view of what has been discussed hereinabove, there is no escape from the inevitable conclusion that mortgagees-Rajinder Kumar etc. could not have sought a decree for declaration that they have become owners of the suit land by afflux of time only because mortgagers-Jaswant Rai etc did not get the land redeemed even after 30 years. On the other hand, since the mortgagers had the subsisting right of redemption of usufructuary mortgage, which they could have invoked at any time even after 100 years, as held by Hon'ble Supreme Court Harbans's case (supra), their suit was rightly decreed by learned courts below. In this view of the matter, no fault can be found with the concurrent findings recorded by learned courts below and the impugned judgments and decrees deserve to be upheld, for this reason as well.

Finally, no question of law much less substantial question of law has been pointed out by learned counsel for the appellant, nor any substantial question of law has been found involved in both these appeals,

RSA No. 3861 of 2015 (O&M)

RSA No. 5028 of 2015 (O&M)

which is sine qua non for entertaining a regular second appeal at the hands of this Court, while exercising its appellate jurisdiction under Section 100 of the Code of Civil Procedure. In this regard, reliance can be placed on the judgments of the Hon'ble Supreme Court in **Naryanan Rajendran and another Vs. Lekshmy Sarojini and others, 2009 (2) RCR (civil) 286** and **Santosh Hazari Vs. Purshottam Tiwari, 2001 (3) SCC 179**.

No other argument was raised.

Considering the peculiar facts and circumstances of the case noted above, coupled with the reasons aforementioned, this Court is of the considered view that both these appeals are misconceived, bereft of merit and without any substance. Thus, these must fail. No case for interference has been made out.

Resultantly, with the abovesaid observations made, both these regular second appeals stand dismissed, however, with no order as to costs.

(RAMESHWAR SINGH MALIK)
JUDGE

15.2.2017
Ak Sharma

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