

101.

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

RSA-6327-2014 (O&M)

Date of decision: 21.03.2017

PARMA NAND AND ORS

... Appellants

versus

TARSEM SINGH AND ORS

.... Respondents

CORAM: HON'BLE MR. JUSTICE HARI PAL VERMA

Present: Mr. A.S. Bhatti, Advocate,
for the appellants.

HARI PAL VERMA, J.

The appellants-defendants have filed the present Regular Second Appeal against the judgment and decree dated 31.07.2014 passed by learned Additional District and Sessions Judge, SBS Nagar, whereby their appeal against the judgment and decree dated 30.04.2012 passed by learned Additional Civil Judge (Senior Division), SBS Nagar, was dismissed.

Briefly stated, respondent No.1-plaintiff-Tarsem Singh (herein referred as 'plaintiff') had filed a suit for declaration and for permanent injunction. As per the plaint, one Sarwan Singh, who is the father of the plaintiff and respondent No.2-defendant No.5-Upinder Singh (herein referred as 'defendant No.5') was originally the owner in possession of the suit land, as fully described in the headnote of the plaint. On 05.04.1971, said Sarwan Singh had mortgaged the suit land

with possession in favour of defendant No.1-Mahla Ram and Mathela Ram (father of defendants No.2 to 4, who are appellants No.1 to 3 herein), for a sum of ₹15,000/- and Sarwan Singh paid back the mortgage money to defendant No.1-Mahla Ram and Mathela Ram in the year 1973 and got redeemed the suit land. Consequently, Sarwan Singh came into possession of suit land as exclusive owner without any encumbrance and remained in possession of the same in that capacity till his death and after his death, plaintiff-Tarsem Singh and defendant No.5-Upinder Singh remained in possession. However, when the plaintiff obtained jamabandi from the patwari halqa, he came to know that mutation of inheritance of Mathela Ram was sanctioned in the name of defendants No.2 to 4 by means of Mutation No.3823. Defendants No.2 to 4, after getting the mutation sanctioned, started declaring in the village that they will forcibly dispossess or otherwise interfere in the possession of the plaintiff and defendant No.5 over the suit land. Since the defendants failed to admit the claim of the plaintiff, the suit was filed.

Defendants No.1 to 4, who are the contesting defendants, filed their written statement taking preliminary objections that the suit is barred by the plaintiff's act and conduct; concealment of material facts from the court; not maintainable in the present form as suit for redemption of mortgage is maintainable in Revenue Court under Punjab Land Redemption Act and in case of dismissal of suit by the Revenue Court only then suit is maintainable; and the suit is hopelessly

barred. However, on merits, it has been submitted that Sarwan Singh neither paid any amount to Mathela Ram nor any such amount could be legally paid for the purpose of redemption without a required written and registered redemption deed. Mathela Ram was only one of the mortgagees and even otherwise was not in a position to redeem the entire land including the share of Mahla Ram-defendant No.1. The plaintiff and defendant No.5 have trespassed over the suit land few months before the institution of the suit.

Defendants No.1 to 4 also filed counter claim under Order 8 Rule 6 CPC by way of suit for declaration to the effect that the counter claimants have become owners of land measuring 38K-14M comprised in Khasra No.1/2, 2/2, 3/1, 7/1, 8/2, 9, 19/1 of Rect. No.87 of Khewat No.376/1, Khatoni No.438/1 as entered in jamabandi for the years 2003-04 of Village Jandiala, Tehsil and District Nawanshahar by efflux of time and that the defendants are foreclosed from seeking redemption of mortgage land.

From the pleadings of the parties, the trial Court framed the following issues:-

- “1. Whether the plaintiff is entitled for declaration as alleged? OPP
2. Whether the plaintiff is entitled for permanent injunction as prayed for? OPP
3. Whether the plaintiff is barred by his act and conduct to file the present suit? OPD
4. Whether the suit is not maintainable in the present form? OPD

5. Whether the suit is time barred by way of limitation?
OPD
6. Whether the counter claimants are entitled for relief of declaration as prayed for? OPCC
7. Whether the counter claimants are entitled for permanent injunction as prayed for? OPCC
8. Whether the counter claimants are entitled for possession as prayed for? OPCC
9. Whether the counter claim is not legally maintainable? OPR
10. Whether the counter claim is not within limitation?
OPR
11. Whether the counter claim is not properly valued for the purpose of court fee and jurisdiction? OPD
12. Relief.”

The suit was partly decreed to the effect that the plaintiff and defendant No.5-Upinder Singh were declared owners in possession of the suit property, but with encumbrance and the defendants No.1 to 4 were restrained from interfering in the possession of plaintiff and defendant No.5. The counter claim filed by defendants No.1 to 4 was dismissed. The trial Court has recorded a finding of fact that the plaintiff and defendant No.5, successors of mortgagor, are in possession of suit property and no evidence has been brought on record by the defendants that the mortgage was for a fixed period of time and mortgage cannot be unilaterally terminated.

Since the counter claim was dismissed on the ground of limitation, the defendants-counter claimants filed an appeal before the

judgment and decree of the trial Court, both were dismissed by the Lower Appellate Court by a common judgment and decree dated 31.08.2014.

It is in the aforesaid circumstances, the defendants-counter claimants (appellants herein) have filed the present appeal.

Learned counsel for the appellants-defendants-counter claimants has argued that both the courts below have failed to appreciate that the appellants-counter claimants and proforma respondents were mortgagees in possession of the suit land on the basis of registered sale deed dated 01.07.1965 executed by Sarwan Singh, predecessors-in-interest of plaintiff and defendant No.5, and also failed to appreciate that the appellants-counter claimants proved on file that the possession of the suit land was handed over to the mortgagees and after his death, the same was transferred to his successors-in-interest, who became mortgagees in possession of suit land. The courts below have ignored the legal, procedural and factual proposition of Transfer of Property Act as well as Redemption of Land Mortgages Act that a mortgage created by registered deed could only be redeemed by registered Redemption Deed, and the claim of the appellants-defendants in counter claim that the land was orally redeemed has been disproved on the file. The aspect, that the original mortgage deed has been placed on file by the appellants-defendants and once the court came to the conclusion that no redemption as claimed by the appellants-counter claimants was ever effected concerning the

registered mortgage deed, then their version that they have been forcibly displaced from the suit land and are legally entitled for the possession of the same in their legal capacity as mortgagees on the basis of registered mortgage deed, has not been considered. He has further argued that the plaintiff and defendant No.5 have taken forcible possession from the appellants-defendants.

I have heard learned counsel for the appellants.

The suit property was originally owned by Sarwan Singh, the father of plaintiff and defendant No.5-Upinder Singh. Sarwan Singh had mortgaged the suit land with possession to Mahla Ram and Mathela Ram, who were predecessors-in-interest of plaintiff and defendant No.5. It is the case of the plaintiff that the mortgage money was repaid to said Mahla Ram and Mathela Ram in the year 1973 by Sarwan Singh, the suit land was got redeemed by Sarwan Singh and accordingly possession was delivered back to him. Whereas the case of the appellants-defendants is that the suit land was neither redeemed during their lifetime nor they received the mortgage money, as urged by plaintiff. The plaintiff and defendant No.5 have trespassed over the suit land few months before the institution of the suit. No doubt in the jamabandis, which are proved on record as Exs. P-1 to P-7, the possession of appellants-defendants No.1 to 4 has been recorded as that of mortgagees, but as admitted by DWs 1 and 2 that the defendants never cultivated the suit land and the same was being cultivated by Sarwan Singh-father of the plaintiff, and thereafter, by the plaintiff and

defendant No.5. Thus, it cannot be said that defendants No.1 to 4 were dispossessed by the plaintiff and defendant No.5 forcibly and illegally in the last week of August 2005. It is the case of the appellants-counter claimants that they were dispossessed in 2005, whereas the suit was filed on 29.11.2005 and the counter claim was filed on 15.12.2005 so as to bring his case within the period of limitation for filing the counter claim. DWs 1 & 2 have admitted in their cross examination that the defendants neither cultivated the suit land nor received *batai* or *theka* from the plaintiff and defendant No.5 of the suit land and the same is in their possession for the last 10/15 years and also the girdawari of the suit property is in the name of plaintiff for 25/30 years and they never initiated any proceedings for correction of girdawari. There is a concurrent finding on the fact recorded by both the courts below that the plaintiff and defendant No.5 are in possession of the suit property and the appellants-defendants have no right to disturb their settled possession over the suit property. Further, until the plaintiff has filed the suit, the appellants-defendants have not filed any suit seeking possession of the suit land alleging their dispossession from the suit land.

Taking into consideration the revenue entries i.e. girdawari in the name of the plaintiff for the last 25/30 years and the appellants-defendants have not resorted to any remedy for correction of such entry, coupled with the statements of DW2-Manohar Lal that the plaintiff and defendant No.5 are in possession of the suit land for the

last 30/32 years, it is established that the plaintiff is in possession of the suit land. Therefore, it cannot be accepted that the appellants-defendants were dispossessed in August 2005.

A Full Bench of this Court in **Ram Kishan and others Versus Sheo Ram and others-AIR 2008 P&H 77** has held that in case of 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 pays or tenders to the mortgagee or deposits in Court, the mortgage money or the balance thereof. Thus, it is held that once a mortgagee always a mortgagee and mortgaged property is always redeemable. The Hon'ble Supreme Court in **Singh Ram Versus Sheo Ram-2014 (4) RCR (Civil) 179** has affirmed the judgment of Full Bench of this Court and held that in case of a usufructuary mortgage mere expiry of a period of 30 years from the date of creation of mortgage does not extinguish the right of the mortgagor to redeem the mortgage under Section 62 of the Transfer of Property Act, 1872. The right to recovery of possession commences 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 as provided under Section 62 of the Transfer of Property Act, 1872, until then limitation does not start.

No substantial question of law arises in the present regular second appeal.

In view of concurrent finding on facts by the courts below, this Court does not find any cause for interference in the present regular second appeal and the same is, accordingly, dismissed.

(HARI PAL VERMA)
JUDGE

21.03.2017
sanjeev

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