

RSA No.1411 of 2003 (O&M)

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

**RSA No.1411 of 2003 (O&M)
Date of decision : 20.08.2018**

Matu Singh and others

... Appellant

Versus

Madan Singh and others

... Respondent(s)

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. Akshay Kumar Goel, Advocate
for the appellants.

Mr. Amit Kashyap, Advocate for
Mr. Parveen Hans, Advocate
for respondent Nos.1, 5, 7, 10, 12 and 14 to 18.

AMIT RAWAL, J.

CM No.6910-C of 2004

The present application has been filed under Order 1 Rule 10 (2) of the Code of Civil Procedure for impleading Smt. Kela widow of Pirthi (one of the plaintiffs) and others as respondent Nos.2 to 2(F) in place of Inder Singh s/o Pirthi Singh in the array of respondents and for striking out the name of Inder Singh s/o Pirthi Singh as respondent No.2.

It has been averred in the application that on the basis of the information at the time of filing of the appeal, it was apprised that Pirthi Singh/plaintiff No.1 on demise had left two sons Madan Singh and Inder Singh. After notice of motion, respondent No.1 was served, whereas notice issued to respondent No.2 has been received back unserved with the report that no such person of that name resided at the given address. Direction was

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given to file correct address as well as for filing the application for Legal Representatives of other respondents. Accordingly, CM Nos.12863-C to 12869-C of 2003 for impleading the Legal Representatives of the respondents were listed, however, the appellants were directed to file better affidavit and furnish correct address of respondent No.2. Better affidavit could not be filed due to reason that correct address of respondent No.2 was given to the Registry, but on inspection of file, it was revealed that summons qua respondent No.2 were served upon Inder Singh son of Ram Singh/respondent No.5 and not upon Inder Singh son of Pirthi Singh, therefore, appellant No.1 after recovering from ill-health apprised the counsel and in this process, the present application has been filed, whereas it has been noticed that Pirthi Singh had also left one Smt. Kela and five daughters, namely, Murti, Mukhi, Mako, Susi, Siroj, besides two sons, Madan Singh and Kashmir Singh (deceased), therefore, Inder Singh son of Pirthi Singh was impleaded improperly i.e. due to inadvertence joined the array of the parties, thus, sought the indulgence of this Court to array the aforementioned persons as respondent Nos.2 to 2(F)

The aforementioned application in pursuance to the notice has been rebutted by filing reply dated 12.01.2005 by respondent Nos.1, 5, 7, 10, 12 & 14 to 18 by denying the averments.

I have heard learned counsel for the parties and of the view that one of heirs of Pirthi Singh, namely, Madan Singh had already been served and represented his estate and non-impleading of other Legal Representatives, in the absence of any clash and for adjudication of the appeal would not make any stark difference in view of the law laid down by the Division Bench of this Court in **“Sardara Singh and another V/s**

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Harbhajan Singh and others” 1974 PLJ 341. For the sake of brevity, relevant para No.6 of the judgment reads as under:-

"6. Mr. Jain, learned Counsel for the appellants then argued that Harbhajan Singh, respondent No. 1. Is dead and although his three sons, respondents Nos. 2 to 4, who are also the transferees by reason of the exchange, are on record, yet his two daughters though impleaded, have not been served. In our opinion, it is not necessary to serve them because their interests are fully protected by their three brothers who are already on record. It is not necessary in every case to bring all the legal representatives or record. What has to be seen is whether the estate is effectively represented. In this case it is so."

In view of such fact, I am of the view that no harm and prejudice would be caused to Legal Representatives of Pirthi Singh as one of Legal Representatives of Pirthi Singh appeared and represented his estate. Accordingly, the application is dismissed.

CM No.4225-C of 2005

The present application has been filed under Order 22 Rule 4 CPC for impleading the Legal Representatives of respondent Nos.3, 4, 6, 8, 9, 11 and 13.

For the reasons stated in the application which is duly supported by an affidavit, the application is allowed and the Legal Representatives of respondent Nos.3, 4, 6, 8, 9, 11 and 13 are ordered to be impleaded for the purpose of prosecuting the appeal.

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The present regular second appeal is at the instance of the defendants against the judgment and decree of the lower Appellate Court,

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whereby the suit of the respondents-plaintiffs for declaration of having become owner by efflux of time on account of non-redemption of the property within a period of 30 years, dismissed by the trial Court, has been decreed.

Succinctly, the facts which emanate from the pleadings of the parties, are that the plaintiffs instituted the suit by alleging that the agriculture land measuring 84 kanals 3 marlas was mortgaged in the year 1987 by the mortgagor-Jiwan in favour of their predecessors-in-interest. The aforementioned land was never redeemed by the defendants-mortgagors or earlier owners of the land, as during the pendency of mortgage, the property was purchased by the defendants from Partap, Maha Singh and Smt. Prem and therefore, they had become owner in possession of the suit land and sought declaration on account that the defendants had no right to redeem the property.

Defendant Nos.1 and 2 contested the suit alleging that the defendants along with Fateh Singh purchased the land, in dispute, from Partap, Maha Singh and Smt. Prem and denied that the property remained mortgaged as it was redeemed by the owners before it was sold to the defendants i.e. on 18.06.1956. Even an application was submitted by the plaintiffs for withdrawal of mortgaged amount, which was allowed and the amount so deposited was held to be withdrawn and therefore, no declaration can be granted of having become owner and prayed for dismissal of the suit.

Defendant Nos.3 and 5 did not file the written statement and the remaining defendants were proceeded *ex parte*.

Since the parties were at variance, the trial Court framed the following issues:-

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1. Whether the plaintiffs are entitled to a decree of declaration qua the land in suit of the grounds stated in the plaint? OPP
2. Whether the suit is time barred? OPD
3. Whether the plaintiffs are estopped from filing the present suit by their own act and conduct? OPD
4. Whether the sui has been filed against a dead person and is not maintainable? OPD
5. Relief.

Both the parties led oral as well as documentary evidence in support of their respective case.

The trial Court on the basis of the evidence, dismissed the suit and the appeal laid before the lower Appellate Court by the plaintiffs, as noticed above, has been allowed and the suit has been decreed. It is, in these circumstances, the present regular second appeal has been filed.

Mr. Akshay Goel, learned counsel for the appellants-defendants submitted that the judgment and decree of the lower Appellate Court not only perverse, but capricious, for, there is a gross misreading of oral and documentary evidence on record as for all intents and purposes, the suit claiming declaration of having become owner in the absence of redemption of the land was not maintainable in view of the law laid down by Hon'ble the Supreme Court in **“Singh Ram (dead) through Legal Representatives vs. Sheo Ram and others” (2014) 9 Supreme Court Cases 185.**

Even otherwise, the suit property concededly was, vide order dated 18.06.1956 (Ex.D1), redeemed. Predecessor-in-interest of the defendant had filed a petition for redemption of the suit land and the

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aforementioned application was allowed, vide order dated 18.06.1956 (Ex.D1). The amount of mortgage deposited i.e. ₹105/- had been withdrawn by the plaintiff in pursuance to the application Ex.D4 and Form 32A challan (Ex.D5). The defendants were ill-advised to file civil suit No.29 of 1978 titled as “Matu Versus Partap” (Ex.P9) for redemption of the property, but the same was dismissed in default. This would not entail into conferring a title of ownership in favour of the plaintiffs as there is no limitation, in view of the law referred to above, for seeking redemption of the property, therefore, non-filing of the suit or its dismissal in default pales insignificant. The order dated 18.06.1956 was passed with the consent of the mortgagee.

Per contra, learned counsel for respondent-plaintiff Nos.1, 5, 7, 10, 12 and 14 to 18, submitted that the appellants-defendants waived their right to claim the redemption of the property for not taking appropriate steps for restoring suit No.29 of 1978, seeking redemption. In such circumstances, as per law in vogue at the relevant point of time, mortgagees had no option, but to claim declaration and rightly so, has been granted by the lower Appellate Court. There is no illegality and perversity. There was no need for the defendnats to institute the civil suit No.29 of 1978 (Ex.P7), when the property had already been redeemed. The amount of redemption was in respect of the different land and not for the disputed land, which fact is evident from Ex.P10 to Ex.P13 i.e. judgments and decrees, whereby Pirthi Singh had been declared to be owner of the suit property, thus, urges this Court for dismissal of the present regular second appeal.

In rebuttal, Mr. Akshay Kumar Goel, submitted that Ex.P10 to Ex.P13 relate to some different property and not to the suit property, therefore, the lower Appellate Court misdirected in not adverting the

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contents thereof.

I have heard learned counsel for the parties, appraised the paper book as well as records of the courts below and of the view that there is force and merit in the submissions of Mr. Goel, for, the lower Appellate Court being the last Court of fact and law was enjoined upon an obligation to refer to each and every document for adjudication of the *lis*. The judgment and decree of Civil Suit No.243 of 1986 (Ex.P-10 & Ex.P13) as well as judgment and decree in respect of Civil Suit No.241 of 1986 (Ex.P-11 & Ex.P12), on plain and simple reading, relate to different parties and different properties. Descriptions of the properties in the aforementioned civil suits as well as in the present suit are as under:-

"Civil Suit No.241 of 1986

Land comprised in Khewat No.108 khatoni No.176 to 179 Murabba No.15 Killa No.17(8-0) and murabba No.16 Killa No.20 (8-0) Murabba No.15 Killa No.13 (8-0), 16 (7-8), 14 (8-0), 15 (7-8) total measuring 46 kanal 16 marla according to jamabandi for the year 1982-83 and situated within the revenue estate of village Kharak Khurd, Tehsil and District Rohtak.

Civil Suit No.243 of 1986

Land comprised in Khewat No.108 khatoni No.176 Murabba No.16 Killa No.21(8-0), 22 (8-0), 23 (8-0) total measuring 24 kanal 0 maral according to jamabandi 1982-83 and situated within the revenue estate of village Kharak Khurad Tehsil and District Rohtak.

Civil Suit No.925 of 1986

Agriculture land comprised in Khewat No.50, Khatoni No.87 to 90, Murabba No.3/Killa No.12(8-0), 13 (6-13), 17(7-12), 18 (8-0), 19 (8-0), 22 (8-0), 23 (8-0), 24 (9-0), 21 (8-0), 11/2(8-18), 20 (8-0), totaling 84 kanals, 3 marals, according to Jamabandi for the year 1982-83, situated in the area of Village

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Kharak Khurd, Tehsil and District Rohtak.

In view of such situation, I am of the view that in the absence of any steps taken by the appellants-defendants in not restoring Civil Suit No.29 of 1978 (Ex.P-9) claiming redemption of the property cannot be fatal, for, the suit property had already been redeemed vide order dated 18.06.1956 (Ex.D1). There is no denial to the fact that the plaintiffs, in the present case, had submitted an application for withdrawal of the mortgaged amount of ₹105/-, which had been withdrawn as per Challan Form No.32A. This fact has not been denied by either of the counsel representing the parties. In such circumstances, the suit for redemption was inconsequential. If at all, dismissal of the suit had to be considered against interests of the appellants-defendants, the same would not affect their interests as in view of the law laid down by Hon'ble the Supreme Court in **Singh Ram's case** (supra), there is no time line prescribed for seeking redemption of the suit property. Equally so, the mortgagees cannot have no right to file suit for declaration claiming ownership or foreclosure of the mortgage.

No doubt, this Court, on earlier occasions had been framing the substantial questions of law while deciding the appeals but in view of the *ratio decidendi* culled out by five learned Judges of the Hon'ble Supreme Court in **“Pankajakshi (dead) through LRs and others V/s. Chandrika and others AIR 2016 SC 1213”**, wherein the proposition arose as to whether in view of the provisions of Section 97(1) CPC, provisions of Section 41 of the Punjab Courts Act, 1918 would apply or the appeal i.e. RSA would be filed under Section 100 of Code of Civil Procedure and decision thereof could be without framing substantial questions of law. The Constitutional Bench of Hon'ble Supreme Court held that the decision in **“Kulwant Kaur and others**

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V/s. Gurdial Singh Mann (dead) by LRs and others” 2001(4) SCC 262, on applicability of Section 97(1) of CPC is not a correct law, in essence, the provisions of Section 41 of the Punjab Courts Act, 1918 had been restored back.

For the sake of brevity, the relevant portion of the judgment of five learned Judges of the Hon'ble Supreme Court in “Pankajakshi 's case (supra) reads thus:-

“Since Section 41 of the Punjab Act is expressly in conflict with the amending law, viz., Section 100 as amended, it would be deemed to have been repealed. Thus we have no hesitation to hold that the law declared by the Full Bench of the High Court in the case of Ganpat [AIR 1978 P&H 137 : 80 Punj LR 1 (FB)] cannot be sustained and is thus overruled.” [at paras 27 - 29] ”

27. Even the reference to Article 254 of the Constitution was not correctly made by this Court in the said decision. Section 41 of the Punjab Courts Act is of 1918 vintage. Obviously, therefore, it is not a law made by the Legislature of a State after the Constitution of India has come into force. It is a law made by a Provincial Legislature under Section 80A of the Government of India Act, 1915, which law was continued, being a law in force in British India, immediately before the commencement of the Government of India Act, 1935, by Section 292 thereof. In turn, after the Constitution of India came into force and, by Article 395, repealed the Government of India Act, 1935, the Punjab Courts Act was continued being a law in force in the territory of India immediately before the commencement of the Constitution of India by virtue of Article 372(1) of the Constitution of India. This being the case, Article 254 of the Constitution of India would have no application to such a law for the simple reason that it is not a law made by the

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Legislature of a State but is an existing law continued by virtue of Article 372 of the Constitution of India. If at all, it is Article 372(1) alone that would apply to such law which is to continue in force until altered or repealed or amended by a competent Legislature or other competent authority. We have already found that since Section 97(1) of the Code of Civil Procedure (Amendment) Act, 1976 has no application to Section 41 of the Punjab Courts Act, it would necessarily continue as a law in force.”

Therefore, I do not intend to frame the substantial questions of law while deciding the appeal, aforementioned.

As an upshot of my observations, the judgment and decree of the lower Appellate Court is not sustainable in the eyes of law and the same is hereby set aside and that of the trial Court is restored. The suit of the respondents-plaintiffs is dismissed.

The present regular second appeal is, resultantly, allowed.

20.08.2018
Yogesh Sharma

(AMIT RAWAL)
JUDGE

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Whether speaking/reasoned **Yes/ No**

✓

Whether Reportable **Yes/ No**