

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

RSA No.256-A-1986 (O&M)

Date of decision:21.12.2018

Harbhajan Singh (since deceased) through LRs and others ...Appellants

Vs.

Naurang Singh (since deceased) through LRs and another
... Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present:- Mr. Sukant Gupta, Advocate
for the appellants.

AMIT RAWAL J.

The following substantial questions of law arise in the present
appeal for determination:-

- “1. Whether the respondent-plaintiff can seek declaration of ownership, in the absence of any time line in the mortgage deed, by efflux of time?
2. Whether the judgment and decree Ex.D1 and Ex.D2 according the status of ownership in favour of the defendants, can be hit by doctrine akin to res judicata or not?”

To answer the aforementioned questions, it would be apt to
give certain part of the pleadings and evidence.

The respondent-plaintiff claimed the declaration to be owner in
possession of land bearing khasra no.8/21/2 measuring 5 kanals 4 marlas
and khasra no.8/21/2 (2 kanals 10 marlas) entered in the jamabandi for the

year 1975-76 alongwith consequential relief of injunction seeking restrained against the defendants qua forcible interference.

It was alleged that one Balwant Singh son of Natha Singh was recorded as joint owner of land bearing khasra no.1174 and 1175 and other land alongwith other co-sharers. He was recorded in sadari possession. He was mortgagee of land bearing khasra no.1175 khewat no.304 khatauni no.689. Balwant Singh had passed on the mortgagee rights in respect of the land bearing khasra no.1175 and mutation no.152 in this regard was attested on 9.9.1915 and after the death of Inder Singh, Naurang Singh-plaintiff had been in continuous possession of the mortgaged land.

During the interregnum, there was a panchayati consolidation and in lieu of old khasra numbers, new khasra numbers were allotted and khasra no.8/21/2(5-4) was allotted to the original owner in lieu of 7 kanals 1 marla and declaration was sought of having acquired the ownership by efflux of time.

Defendant no.1 was proceeded against ex parte and rest of the defendants contested the suit and raised the objection qua maintainability of suit to be hit by principle of *res judicata* as plaintiff had only laid claim to khasra no.8/21/2.

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

- “1. Whether the suit is barred by the principles of *res judicata*?OPD
2. Whether the plaintiff is entitled to declaration prayed

for?OPP

3. *Relief.*

2A *Whether defendants no.2 to 13 have become owners of the disputed land and are in possession of the same? If so, its effect?OPD”*

The plaintiff in support of the aforementioned pleadings examined Pritpal Singh, Patwari, Gurdev Singh, Naib Office Kanungo and himself and brought on record the documents, Ex.P1 to Ex.P14.

On the other hand, defendants examined Ram Singh Patwari only and brought on record certified copy of the judgment and decree dated 15.11.1977 as Ex.D1 and Ex.D2.

The trial Court noticed that despite the amendment having been allowed, khasra number sought to be corrected as 8/21/1 alongwith khasra no.8/21/2, no amended written statement was filed and dismissed the suit by holding that in the judgment and decree dated 15.11.1977, Ex.D1 and Ex.D2, the defendants had already been held to be owners. The Lower Appellate Court, in appeal, as noticed above, reversed the findings.

Mr. Sukant Gupta, learned counsel appearing on behalf of the appellant-defendants submitted that judgment and decree of the Lower Appellate Court is not sustainable in the eyes of law as it has established on record by production of judgment and decree Ex.D1 and Ex.D2 that they were owners of the land in dispute. The plaintiff miserably failed to connect the identity of the property subject matter of the mortgage pre and post consolidation. The death certificate, Ex.PX, has not been proved on record

as on bare look father's name of Inder Singh @ Mall Singh has been changed from unknown to Karam Singh. The Lower Appellate Court, therefore, should not have believed the death of Inder Singh as 23.03.1966. The aforementioned document was required to be looked into in tandem with the cross-examination of Naurang Singh, plaintiff who could not explain the death of his father as his examination-in-chief and cross-examination were at variance. The plaintiff also miserably failed to discharge the onus in claiming the ownership as per the judgment rendered by the Hon'ble Supreme Court in **Singh Ram (D) through LRs Vs. Sheo Ram and others 2014 AIR SC 3447**. A person cannot seek the ownership of the suit property by efflux of time, therefore, finding of the Lower Appellate Court according them the status of ownership on account of failure of redemption after a period of 30 years, is not correct law.

Regarding applicability of provisions of Section 11 of Code of Civil Procedure, relied upon the judgment rendered by the Hon'ble Supreme Court in **Sri Gangai Vinayagar Temple vs. Meenakshi Ammal and others 2014(4) RCR (Civil) 920** to contend that even if the party to the lis had raised two issues and judgment has been rendered on one issue and there is no appeal against another issue, it would operate as *res judicata*. The Lower Appellate Court ought not to have rendered any finding on the date of death of Inder Singh as no issue was framed. The jamabandi for year 1975-76 (Ex.P5), onwards reflected the status of Balwant Singh as mortgagee and once a mortgagee always a mortgagee.

There is no representation on behalf of the respondents despite service. The respondents have been served long time back. On few occasions, some lawyer appeared but when the case was argued none appeared on behalf of the respondents. Accordingly, I proceeded to hear the matter.

I have heard the learned counsel for the appellants, appraised the judgments and decrees as well as record of both the Courts below and of the view that there is force and merit in the submissions of Mr. Sukant Gupta. In the absence of any time line in the mortgage deed, there is no limitation to seek redemption. The Hon'ble Supreme Court in paragraphs 21 to 23 of Singh Ram's case (supra) held as under:-

“21. We need not multiply reference to other judgments. Reference to above judgments clearly spell out the reasons for conflicting views. In cases where distinction in usufructuary mortgagor’s right under [Section 62](#) of the T.P. Act has been noted, right to redeem has been held to continue till the mortgage money is paid for which there is no time limit while in other cases right to redeem has been held to accrue on the date of mortgage resulting in extinguishment of right of redemption after 30 years.

22. We, thus, hold that special right of usufructuary mortgagor under [Section 62](#) of the T.P. Act to recover possession commences in the manner specified therein, 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.

23. 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. Ratan Lal vs. Sukh Ram](#) (supra) will stand over-ruled.”

Therefore, the Lower Appellate Court could not have granted the declaration to the plaintiff having become owner by efflux of time. The death of Inder Singh has not been proved on record. Even otherwise, the defendants disclosed the factum of judgment and decree dated 15.11.1977, Ex.D1 and Ex.D2, whereby, title with regard to khasra number in dispute was held to be in their favour. In the absence of any amendment in the plaint or challenge thereto, the suit could not have been decreed, rather was barred by law of *akin to res judicata*, in view of the ratio decidendi culled out by the Hon'ble Supreme Court in paragraph 24 of **Sri Gangai Vinayagar Temple's case (supra)**. The same reads thus:-

“24. The application of res judicata, so very often, conjures up controversies, as is evident from the fact that even in this Court divergent opinions were expressed by the two Judge Bench, leading to the necessity of referring the appeal to a Larger Bench. It was for this reason that we thought it appropriate to deal with the dispute in detail. It seems to us that had the decisions of the three Judge Bench in Lonankutty and Prabhu been brought to the attention of our Learned and Esteemed Brothers on the earlier occasion when this appeal was heard by two Judge Bench, the dichotomy in opinion would not have arisen. The outcome of the appeal before the High Court would have also shared a similar fate. On the foregoing analysis, especially the previous enunciation of law by three Coordinate Benches, we are in agreement with the opinion of our Learned Brother Asok Kumar Ganguly that the appeal calls to be allowed. We are of the opinion that having failed or neglected or concertedly avoided filing appeals against the decrees in O.S.5/78 and O.S.7/78 the cause of the Respondents/Tenants was permanently sealed and foreclosed since res judicata applied against them.

Thus, questions of law framed above are answered in favour of the appellant-defendants and against the respondent-plaintiff. The judgment and decree of the Lower Appellate Court is set aside and that of trial Court is restored.

The regular second appeal is allowed.

(AMIT RAWAL)
JUDGE

December 21, 2018
savita

Whether Speaking/Reasoned	Yes/No
Whether Reportable	Yes/No