

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

RSA No.1630 of 1988 (O&M)

Smt Chand Kaur alias Kaki through LRs

...Appellants

Versus

Kartar Singh and Ors.

....Respondents

Date of Order: 13.12.2018

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. G.S. Bhatia, Advocate for the appellants.

Mr. N.K. Manchanda, Advocate for the respondents.

AMIT RAWAL, J (ORAL)

CM No.10289-C of 2018

Prayer in the instant application under Order 22 Rule 3 CPC is for impleading legal heirs of the appellant-Karam Singh.

Said Karam Singh has since died leaving behind her legal heirs as mentioned in para 3 of the application.

For the reasons stated in the application, which is supported by an affidavit sworn by one of his grand sons as also for the purpose of pursuing the appeal, the same is allowed. LR's of the appellant Karam Singh as mentioned in para 3 of the application are brought on record as party.

Registry to make necessary corrections in the memo of parties.

Main case

Defendants are in regular second appeal aggrieved against the judgments and decrees rendered by learned lower Appellate Court whereby

the appeal filed by the respondents against the judgment and decree passed by the Sub Judge, Ist Class, Ferozepur partly decreeing the suit of the plaintiff claiming exclusive ownership, has been accepted.

It was alleged that Assa Singh son of Sardar Singh was principal owner of the land in suit. During his life time, he mortgaged 19 kanal and 19 marlas of land qua various khasra numbers to Ujjagar Singh, his brother, which was never redeemed, therefore, had become owners by efflux of time. After the death of Assa Singh, his surviving brother Ujjagar Singh being collateral became full-fledged owner of the suit property. Plaintiffs claimed themselves to be the legal heirs of Ujjagar Singh deceased and alleged that the defendant Chand Kaur had no connection or relation with Assa Singh or Ujjagar Singh. Even ex parte decree dated 05.2.1979 obtained by Chand Kaur was also challenged.

Defendants contested the suit and denied the mortgage of 19 kanal and 19 marlas and claimed herself to be sister of Assa Singh and Ujjagar Singh. It was alleged that Assa Singh during his life time entered into agreement to sell 24 kanal and 4 marlas out of the suit land to Ishar Singh, who was already in possession of 5 killas of land out of suit land as a tenant. Said agreement of sale could not materialise and thereafter she entered into sale of 11 acres 2 kanals and 2 marlas of land.

The trial Court on the basis of pleadings of parties framed the following issues:

- “1. Whether Assa Singh mortgaged 19 kanals 19 marlas of land with the father and husband of the plaintiffs as mentioned in para 3 of the plaint?OPD*
- 2. If issue No.1 is proved whether the mortgage deed was a forged and fabricated document?OPD*
- 3. Whether the plaintiffs are owners in possession of*

whole suit land?OPD

4. Whether the decree dated 5.2.1979 is illegal, null and void?OPD

5. Whether the plaintiffs are entitled to the injunction prayed for?OPP

6. Whether the suit is barred by time?OPD

7. Whether the suit is not maintainable in the present form?OPD

8. Whether the plaintiff Nos.1 to 3 committed the murder of Assa Singh? If so its effect?OPD

9. Whether the suit is bad for non-joinder of necessary party?OPD

10. Whether the defendant is the sister of Assa Singh deceased? If so, its effect?OPD

11. Relief.”

The trial Court while dealing with issue Nos.1 & 2 declared the plaintiff to be owner of 19 kanal 19 marla by efflux of time and with regard to remaining piece of land of Assa Singh dismissed the suit. It is in these circumstances, the appeal at the instance of the plaintiff has been allowed and the suit has been decreed in toto.

Learned counsel for the appellant submitted that the provisions of Section 25 of the Hindu Succession Act in this case would not be attracted, for, Assa Singh concededly was murdered by son of Ujjagar Singh but at that time Ujjagar Singh was alive. Lower Appellate Court abdicated in not referring to the statement of PW4 who admitted the appellant-defendant to be the sister. In such circumstances, assuming for the sake of argument that the defendant did not lead evidence under Section 50 of the Evidence Act, the statement made was by none else but by one of the sons of Ujjagar Singh. Defendants also examined Balbir Singh-DW1 who disclosed the relation of sister with Assa Singh but the lower Appellate

Court laid focus on the statement of DW2. He submitted that in view of law laid down by Hon'ble Supreme Court in **Singh Ram (D) through LRs Vs. Sheo Ram and others 2014 AIR SC 3447**, declaration qua ownership of 19 kanal 19 marla could not have been granted.

Per contra, learned counsel for the respondent-plaintiff submitted that the concurrent findings of facts recorded by both the courts below are justified and cannot be interfered with, for, the appellant-defendants have failed to lead evidence in the light of provisions of Section 50 of the Evidence Act and no such relative has been examined. Attempt was made to rebut the arguments made by learned counsel for the appellants. As mortgage deed had not been placed on record, it was urged for dismissal of the present appeal.

After hearing learned counsel for the parties and appraising the paper book with their able assistance, I find merit in the submissions of learned counsel for the appellants. Avtar Singh is none else but is one of the plaintiffs and son of Ujjagar Singh. In his cross examination, he admitted Chand Kaur to be sister of his father. The relevant extract of his cross examination reads as under:

“After the death of Assa Singh no mutation of inheritance was sanctioned so far. Chand Kaur was the sister of Assa Singh and Ujjagar Singh and my father told me that she remained in Pakistan and did not come to India after partition. Assa Singh died unmarried.”

Balbir Singh also stated Chand Kaur to be sister of Assa Singh and Ujjagar Singh. Despite extensive cross examination, nothing contrary surfaced. Chand Kaur was also subjected to detailed cross examination but failed to ascertain any discrepancy with regard to relationship of Chand

Kaur with Assa Singh and Ujjagar Singh. Revenue record placed on record reflected part of land being subject to mortgage with Ujjagar Singh. It is settled law that in absence of time, one mortgagor cannot seek declaration by efflux of time.

The law laid down by the Hon'ble Supreme Court in paragraphs 21 to 23 of Singh Ram's case (supra) reads 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 overruled.”

The readings of aforesaid observations leaves no manner of doubt that there is no limitation for seeking redemption of the property until and unless the mortgagor prescribed the period for the purpose of redemption.

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 LR's and others Vs. 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 the substantial questions of law. The Constitutional Bench of Hon'ble Supreme Court held that the decision in Kulwant Kaur and others Vs. Gurdial Singh Mann (dead) by LR's 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 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.

Keeping in view the aforementioned, the present appeal is accepted and the judgment and decree passed by the lower Appellate Court is set aside.

Appeal stands allowed in the above terms.

December 13, 2018
manoj

(AMIT RAWAL)
JUDGE

Whether speaking/reasoned: Yes/No
Whether Reportable : Yes/No