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

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Date of decision : 27.07.2018

Harbax Singh (deceased) through LRs and others

... Appellant(s)

Versus

Rajwant Kaur and others

... Respondent(s)

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. Arun Bansal, Advocate
for the appellants.

Mr. Gaurav Chopra, Advocate
for the respondents.

AMIT RAWAL, J. (ORAL)

The appellants-plaintiffs are in regular second appeal against the judgment and decree of the lower Appellate Court dated 07.03.1991, whereby the appeal preferred by defendant Nos.5 & 6 against the judgment and decree of the trial Court dated 19.08.1988 decreeing the suit, has partly been allowed.

The facts which spelled out from the pleadings of the parties, are that one Bhagwan Singh, had mortgaged the shop situated in Post Office Bazar, Bhatinda, to defendant Nos.1 & 2 to 4 for a sum of ₹90,000/- vide registered mortgage deed dated 14.05.1973. During the subsistence of the aforementioned mortgage, defendant Nos.1 & 2 to 4 sold their mortgagee's rights in favour of Rajwant Kaur/respondent-defendant No.5 vide registered mortgage deeds dated 02.03.1981 and 04.05.1981, respectively. On demise

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of Bhagwan Singh, original mortgagor, his four sons, namely, Dilawar Singh, Jaswant Singh, Harbax Singh and Pritam Singh succeeded to his share. Out of four sons, three sons, namely, Dilawar Singh, Jaswant Singh and Harbax Singh instituted the suit bearing No.290 of 13.06.1986 for redemption of the shop, in question. The aforementioned suit was decreed vide judgment and decree dated 19.08.1988. The plaintiffs were ordered to pay a sum of ₹90,000/- on or before 03.09.1988 as the registered mortgage deed was not in dispute. Defendant No.5-Rajwant Kaur preferred a civil appeal bearing No.27 of 1988 and defendant No.7 also instituted civil appeal bearing No.3 of 1988.

During the pendency of the appeals before the lower Appellate Court, Pritam Singh sold his 1/4th share in respect of the shop to Rajwant Kaur-defendant/respondent vide sale deed bearing No.239 dated 06.01.1989. Noticing the aforementioned facts, the lower Appellate Court modified the judgement and decree of the trial Court by ordering the redemption without possession.

Mr. Arun Bansal, learned counsel appearing on behalf of the appellants-plaintiffs submitted that the lower Appellate Court upheld the partial redemption, but the rider without possession should not have been there as the redemption qua 3/4th share remained intact. The factum of mortgage deed and its subsequent acquisition of mortgagee rights had not been disputed, therefore, there is gross illegality and perversity. The relationship of mortgagee and mortgagor did not come to end and continued, thus, urges this Court for modification of the judgment and decree, under challenge.

Per contra, Mr. Gaurav Chopra, learned counsel appearing on

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behalf of the respondent(s)-defendant(s) submitted that the lower Appellate Court though protected the possession of the mortgagee could not have passed decree of partial redemption, which is not sustainable in the eyes of law. The aforementioned decree can always be assailed by taking into consideration the provisions of Order 41 Rule 33 of the Code of Civil Procedure in the absence of any cross-appeal/objections. In support of his contentions, relied upon the *ratio decidendi* culled out by this Court in **Bharat Singh (deceased) through LRs and others V/s Sidharth and others” 2016(4) PLR 484.** The status of a mortgagee becomes a co-sharer and the remedy, if any, lies for partition as the right of other mortgagor ceased to exist, therefore, the decree without possession also cannot be executed. The mortgage amount was also not deposited within time frame i.e. on 03.09.1988, whereas it was deposited on 15.09.1988, thus, urges this Court for dismissal of the present regular second appeal.

I have heard learned counsel for the parties, appraised the paper book as well as records of the Courts below and of the opinion that there is no merit and force in the submissions of Mr. Bansal, for, the registered mortgage deed, transfer of mortgagee rights and purchase of share of Pritam Singh vide sale deed *ibid*, are not in dispute. The only question which arises for consideration before this Court is whether in such change of circumstances surfaced during the pendency of the appeal, the cause of action to institute the suit for redemption subsists or evaporated. The answer would be in "negative", for, it is a settled law that partial redemption cannot be passed. The status of the mortgagee after purchase of land qua 1/4th share would be that of a co-sharer and the remedy is to acknowledge the status of ownership by way of declaration or consequential relief of joint

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possession or separate possession by way of partition. This is what the import of the civil law, therefore, in my view, the lower Appellate Court even though rightly did not grant redemption without possession, but partial redemption could not have been passed, but decree in the terms indicated above should have been passed.

Keeping in view the aforementioned facts and circumstances, I invoke the provisions of Order 41 Rule 33 of the Code of Civil Procedure as per the ratio decidendi culled out by the Hon'ble Supreme Court of India in **“U.P.S.R.T.C. V/s Km. Mamta and others” (2016) 4 SCC 172** as the act of the Court prejudice none. The law of the land has to be adhered to/respected. The aforementioned view of mine is also derived from the judgment rendered in **Bharat Singh's case** (supra), wherein this Court in such circumstances gave the following findings:-

"I have heard learned counsel for the parties and appraised the impugned judgments and decrees of the Courts below and of the view that there is no force and substance in the plea of Mr. Jain, for, in case, the argument of partial redemption is accepted, in my view, the suit for seeking of redemption of the property at the instance of defendants No.1 and 2 was also not maintainable as it was also a case of partial redemption. Once the respondent-plaintiffs had stepped into shoes of mortgagors and the property had already been redeemed, there was no question of filing a suit for redemption at their instance. After the redemption, all the three mortgagors are co-owners, in case, they do not seek partition, the remedy is to acknowledge the status of ownership by way of declaration and consequential relief of joint possession. It is on this background of the matter, the Courts below decreed the suit.

7. *It is conceded position on record that mortgage money has been deposited on 21.09.1996 by appellants No.1*

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and 2 only. The Courts below have not taken into consideration this aspect, whereas, the entire payment of mortgage money cannot be fastened upon the appellants and the other mortgagors, i.e., now the plaintiffs, cannot seek the possession of the property without discharging the liability of the payment of mortgage amount. As noticed above, mortgage money was ₹35,000/-, so share of the respondent-plaintiffs would be ₹23,500/-. The respondent-plaintiffs shall not be entitled to seek execution of the decree until and unless, they do not deposit their share of mortgage amount, i.e., ₹23,500/-. On deposit of the same amount, status of appellants No.1, 2 and 37 and of the plaintiffs would be of co-sharers.

8. *The judgment relied by both the parties in Valliama Champaka Pillai's case (supra) basically supports the case of the appellants. Paragraph 31 of the judgment reads thus:-*

“From what has been said above it is clear that where the Transfer of Property Act is not in force and a mortgage with possession is made by two persons, one of whom only redeems discharging the whole of the common mortgage debt, he will, in equity, have two distinct rights: Firstly, to be subrogated to the rights of the mortgagee discharged, vis-a-vis the non-redeeming co-mortgagor, including the right to get into possession of the latter's portion or share of the hypotheca. Secondly, to recover contribution towards the excess paid by him on the security of that portion or share of the hypotheca, which belonged not to him but to the other co- mortgagor. It follows that where one co-mortgagor gets the right to contribution against the other co-mortgagor by paying off the entire mortgage debt, a correlated right also accrues to the latter to redeem his share of the property and get its possession on payment of his share of the liability to the former. This corresponding right of the 'non-redeeming' co-

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mortgagor, to pay his share of the liability and get possession of his property from the redeeming co-mortgagor, subsists as long as the latter's right to contribution subsists. This right of the 'nonredeeming' co-mortgagor, as rightly pointed out by the learned Chief Justice of the High Court in his leading judgment, is purely an equitable right, which exists irrespective of whether the right of contribution which the redeeming co-mortgagor, has as against the other co-mortgagor, amounts to a mortgage or not."

9. *Thus, in my view, there is no force in the submission of Mr. Jain, regarding the maintainability of the suit as the right of the non-redeeming mortgage subsists. As regards, the suit being barred by law of limitation, I am also not impressed with the aforementioned submission, for, as per the law laid down by the Hon'ble Supreme Court in Singh Ram's case (supra), where mortgage does not provide any period of redemption, there is no limitation for seeking redemption. The pith and substance in a suit for acknowledgment of declaration also tantamount to redeeming the mortgage.*

10. *In pursuance to the interim order dated 23.04.2010 passed by this Court while disposing of the application for determination of the mesne profits, the appellants have furnished the security for mesne profits and the respondent-plaintiffs shall be entitled to seek execution thereof, in accordance with law.*

11. *With the aforementioned observations and modification in the judgments and decrees, the judgment and decree qua declaration and possession is hereby affirmed. The questions of law, as noticed above are answered against the appellants-defendants No.1, 2 and 37 and in favour of the respondent-plaintiffs.*

12. *Accordingly, the appeal stands disposed of.*

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Final decree sheet be prepared in the aforementioned terms."

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 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*

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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.

As an upshot of my observations, I am of the view that the judgment and decree of the lower Appellate Court is required to be modified to the following extent:-

Instead of ordering of redemption without possession, the status of defendant-respondent No.1, who purchased 1/4th share from Pritam Saini would be that of a co-sharer/co-owner

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and the remedy for the co-sharer would be to seek the relief as indicated above.

Accordingly, the appeal stands disposed of.

Decree sheet be prepared in the aforementioned terms.

27.07.2018
Yogesh Sharma

(AMIT RAWAL)
JUDGE

Whether speaking/reasoned **Yes/ No**

Whether Reportable **Yes/ No**