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

**RSA No. 3170 of 1994 (O&M)
Decided on: 04.04.2018**

Roshan lal**.....Appellant**

versus

Hari Kishan and others**.....Respondents****Coram: HON'BLE MR. JUSTICE RAJBIR SEHRAWAT**

Present: Mr. K.S.Dadwal, Advocate &
Mr. Naresh Kumar, Advocate
for the appellant.

Mr. Kulbhushan Sharma, Advocate
for the respondents.

Rajbir Sehrawat, J.(Oral)

1. This is an appeal filed by the defendants in the original suit challenging the judgment and decree passed by the lower Appellate Court; which had reversed the judgment and decree passed by the Trial Court and had ordered the suit filed by the plaintiffs to be decreed.

2. For convenience, the parties would be referred herein as the plaintiffs and the defendants; as they were described in the original suit.

3. The brief facts of the case are that the plaintiffs/respondents No. 1 to 4 herein filed a suit for declaration that they have become the owner in possession of the agricultural land; total measuring 6 Kanals 16 marlas comprised in Killa no. 15/17 situated in revenue estate of Village Jawahari, District Sonapat. It was averred in the suit that one Jesse Ram, father of the defendants, was the owner in possession of the agricultural land situated in Village Yakian Wali, Tehsil Alipur,

District Mazaffar Garh, now in Pakistan and he had mortgaged this land in favour

of Lekh Raj, the father of the plaintiffs. During the partition, both the parties left Pakistan and migrated to India. In view of the agricultural land, left behind by Jesse Ram in Pakistan, he was allotted the agricultural land in India, the details of which are mentioned in the plaint and are as mentioned above. It was further averred that since the plaintiffs were the mortgagees over the holding of the defendants, therefore, they were given the mortgagee rights over the land allotted to the defendants in India. Accordingly, the entries were made in the revenue records. The plaintiffs further averred that Jesse Ram died on 01.02.1958 leaving behind Smt. Devi Bai and others. Devi Bai also died. This is how the present defendants are the successor-in-interest of mortgagor. The plaintiffs are successor-in-interest of Lekh Raj, mortgagee. The claim of the plaintiffs was based on the fact and with the averment that the mortgagor could have redeemed the equity of redemption only upto the period of 30 years from the date of mortgage. Since he has not done so, therefore, the plaintiffs have a right to foreclose the redemption and they are entitled to get the declaration having become owner in possession of the land mortgaged to them.

4. On being put to notice, the defendants had filed a written statement. In the written statement, the factum of mortgage was not denied. It was further averred that it was a usufructuary mortgage. Still further the defendants averred that the terms and conditions of the mortgage have not been mentioned by the plaintiffs in the suit. In the written statement, it was also pleaded that as per the mortgage, the usufruct of the mortgaged land was to be adjusted by the mortgagee towards the mortgage money for a period of 50 years from the date of creation of the mortgage. Accordingly, on the expiry of the period of 50 years from the date of mortgage, the mortgage amount was to be considered to have been fully paid and the mortgagee was required to hand over the property to the mortgagor free

the mortgage, the mortgagor could not have redeemed the property for 50 years, therefore, they could not have filed a suit before that. Hence, the plaintiffs had got the cause of action.

5. On the pleadings of the parties, the Trial Court framed the following issues:-

1. *“Whether Jessa Ram s/o Kanwar Bhan predecessor-in-interest of defendants was owner in possession of agricultural land situated in Village Yakian Wali Tehsil Alipur District Muzaffar Garh (West Pakistan)? OPP*
2. *Whether the suit land as mentioned in para No. 2 of the plaint was allotted in the name of Jessa Ram mortgagor subject to mortgagee rights of Lekh Raj, Mortgagee, predecessor-in-interest of plaintiffs? OPP*
3. *Whether Jesse Ram became owner of suit land as mentioned in para No. 3 of the plaint, as alleged?OPP*
4. *Whether after the death of Lekh Raj, plaintiffs are the only successor-in-interest of mortgagee in possession of suit land?OPP*
5. *Whether the predecessor-in-interest of defendants and defendants have failed to get the suit land redeemed within prescribed period and plaintiffs have become owners-in-possession of the same?OPP*
6. *Whether the suit of the plaintiff is not property valued for the purposes of court fee and jurisdiction?OPD*
7. *Relief.”*

6. Parties led their respective evidence.

7. After appreciating the evidence, the Trial Court dismissed the suit filed by the plaintiffs. While dismissing the suit, the Trial Court held that it was incumbent upon the plaintiffs to prove the terms and conditions of the mortgage. It was for the plaintiffs to prove before the Court that the defendants could have mortgaged the land only upto 30 years. However, the mortgagor or the mortgagee had failed to prove any terms and conditions on record. Therefore, the Trial Court held that simply because the period of 30 years had expired from the date of mortgage, it cannot be held that the plaintiffs had become owners of the suit land.

before the lower Appellate Court.

8. Reversing the judgment and decree passed by the Trial Court, the lower Appellate Court decreed the suit filed by the plaintiffs. While decreeing the suit, the lower Appellate Court held that no doubt, no documentary evidence had been led by either of the parties to prove the terms and conditions of mortgage. However, even if the mortgage is deemed to have been created on some date in the month of July, 47 i.e. immediately prior to the partition, as alleged by the defendants; the period of 30 years had already passed. Article 61 of the Limitation Act provides the period of 30 years; starting from the date of mortgage; for the purpose of redemption of the mortgage. Since the mortgagor had not redeemed within 30 years, therefore, the mortgagees have rightly filed the suit for foreclosure and for declaration of their title over the suit land. The lower Appellate Court further held that the Trial Court had gone wrong in putting upon the mortgagees the burden of proof of terms and conditions of the mortgage; to prove covenant and to specify the period of mortgage. Accordingly, the suit was decreed by the lower Appellate Court.

9. While arguing the present appeal, learned counsel for the appellant/defendant has submitted that since the mortgage in the present case is usufructuary mortgage, therefore, there is no limitation prescribed for seeking redemption of the mortgage. It is his submission that even after passing of 30 years, if no suit is filed then also; mortgagee does not have any right for foreclosure. He relied upon the judgment of Full Bench of this Court rendered in **2008(1)RCR (Civil) 334** titled as ***Ram Kishan and others Versus Sheo Ram and others***. This judgment has been upheld by the Supreme Court reported in **2014 AIR(SC) 3447** titled as ***Singh Ram (Deceased) through LRs Versus Sheo Ram and others***; wherein it has been held that a usufructuary mortgagee is not entitled

to file a suit for declaration that he had become owner; merely on the expiry of 30 years from the date of mortgage. Accordingly, it is submitted by the learned counsel for the appellant that the suit filed by the mortgagee itself was not maintainable and the right of the mortgagor to redeem the land had not been extinguished merely by passage of 30 years from the date of alleged mortgage.

10. On the other hand learned counsel for the respondents/plaintiffs has submitted that although he was given possession of mortgaged land in Pakistan, however, after migrating to India, when the land was allotted to the mortgagor then tenants were already sitting on the holding allotted to the mortgagor. Resultantly, possession could not be given to the plaintiffs. Therefore, the character of the mortgage changed after the parties migrating to India because of the intervening factor of non-handing over of the possession of the property to the plaintiffs. Learned counsel for the respondents/plaintiffs further submits that mortgage in question was not usufructuary mortgage. Therefore, these judgments are not applicable and do not support the case of defendants. Learned counsel for the respondents/plaintiffs further submits that after the decree was passed in their favour, the plaintiffs had sold the suit property in favour of the third party before filing of the appeal by the appellant. Accordingly, since third party rights have stepped in, therefore, the present appeal is rendered infructuous.

11. Having heard the learned counsel for the parties, this Court finds sufficient force in the arguments raised by the learned counsel for the appellant/defendant. The plaintiffs had themselves pleaded in the suit that it was a mortgage with possession. The defendants had taken a specific plea in the written statement that the usufruct of the mortgaged land was to be adjusted against the mortgage money for the next 50 years. There is no rebuttal to this averment raised by the defendant. Hence, it has to be held that the mortgage in question was a

respondents that since after migration to India, the possession of the land was not given to them, therefore, it was no more left as a usufructuary mortgage; is liable to be noticed only to be rejected. Once the plaintiffs are claiming the mortgage made in Pakistan to travel to India along with their mortgagee rights then their mortgagee rights, as existed in Pakistan; has to be taken as mortgagee rights in India. Simply because due to the intervening factors, beyond the control of the defendants, the possession of the land could not be handed over by the defendants to the mortgagee; does not change the nature or terms and conditions of the mortgage. Needless to say that after getting allotment of land in India even the defendants could not get the actual possession. Therefore, no fault could be found with the defendants if possession of the land holding allotted to them in India; could not be handed over to the plaintiffs. In any case, once the terms of mortgage had been finalized before the partition and the parties are claiming under that mortgage; then the terms of mortgage cannot be deemed to have been altered except with the express consent of the parties. There is nothing on record to show that the parties ever agreed to change the terms of mortgage. Hence, mortgage which was usufructuary mortgage in what is now Pakistan, continued to be as such in India. Therefore, in this case, it has to be held to be usufructuary mortgage.

12. So far as the limitation for redemption is concerned, this Court conclusively held in Full Bench judgment in case of ***Ram Kishan's case (Supra)***, that there is no limitation for filing a suit for redemption in case of usufructuary mortgage. When the matter reached the Supreme Court, even the Supreme Court in ***Singh Ram's case (Supra)*** upheld the prepositions and held that even on expiry of the period of 30 years, the mortgagee cannot file a suit for foreclosure or for declaration of his title in the suit property; if the mortgage happened to be a usufructuary mortgage.

13. In view of the above the decision, as has been held by the Hon'ble Supreme Court, the plaintiff as mortgagee was not even entitled to file a suit for declaration that he had become owner; merely on expiry of the 30 years from the date of mortgage. Accordingly, this suit is liable to be dismissed.

14. So far as the plea raised by the learned counsel for the defendants that third party rights have been created; is concerned, suffices it to say that, admittedly, the same was affected by the plaintiffs after the decree was passed by the Trial Court but before the limitation for filing the appeal had expired. Therefore, the third party rights could very well be held to be hit by the doctrine of *lis pendens*. However, this Court has not adjudicated upon the right of the parties qua the same.

15. No other argument was raised by the learned counsel for the parties.

16. In view of the above, the judgment and decree passed by the lower Appellate Court is set aside and the suit filed by the plaintiffs is ordered to be dismissed. The present appeal is hereby allowed.

4th April, 2018

shabha

**[RAJBIR SEHRAWAT]
JUDGE**

<i>Whether speaking/reasoned</i>	-	<i>Yes</i>
<i>Whether reportable</i>	-	<i>Yes</i>