

RSA No.1856 of 1997 (O&M)

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

**RSA No.1856 of 1997 (O&M)
Date of decision:26.03.2018**

Natha Singh and others

... Appellants

Vs.

Bachan Singh (since deceased) through LRs and others ... Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present:- Mr. I.S.Brar, Advocate
for the appellants.

Mr. A.K.Khunger, Advocate
for the respondents.

AMIT RAWAL J. (Oral)

The appellant-defendants are in Regular Second Appeal against the concurrent findings of facts and law, whereby, suit filed by the respondent-plaintiff claiming to be owner in possession of the property by efflux of time on the basis of the property having been taken on mortgage, had been decreed by both the Courts below.

It would be in the fitness of things to give brief preface of the matter.

The plaintiff/respondent No.1, Bachan Singh (since deceased) instituted a suit bearing No.76 of 1990 for declaration that he had become the owner of suit land which had been mortgaged with him for the last more than 30 years owing to the fact that mortgagor did not get the property redeemed. It was pleaded that Chanan Singh, uncle of plaintiff had

mortgaged the suit land with Bachan Singh, Wariam Singh and Santi more than 60 years back. Chanan Singh had died and defendants are his legal heirs. Wariam Singh had also died and therefore, the plaintiff became the owner of 1/6th share in the suit land by efflux of time.

The aforementioned suit was contested by defendants No.1 to 7, 9 and 11, whereas, defendants No.8 and 10 were proceeded against ex parte. The contesting respondents had taken the objection with regard to maintainability and cause of action but the factum of suit land having been mortgaged was not denied, rather it was stated that whole area including the share of plaintiff was redeemed partly in favour of Chanan Singh sometime in the year 1946 A.D and since then, the possession had been with the owner/mortgagor. The factum of right having become owner by efflux of time was emphatically denied.

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

- “1. Whether the plaintiff has become the owner in possession of the suit land by efflux of time and the right of the defendants to get the land redeemed has gone to end? OPP*
- 2. Whether the defendant no.1 has got the suit land redeemed in the year 1946, if so, its effect? OPD*
- 3. Whether the plaintiff is entitled to declaration prayed for? OPP*
- 4. Whether the plaintiff has got no cause of action to file the present suit? OPD*

5. *Whether the defendants are entitled to special costs under Section 35-A CPC? OPD*

6. *Relief.”*

Both the parties examined the witnesses in respect of their cases.

The trial Court on the basis of evidence found the status of the plaintiff was of mortgagee and since period of 30 years had elapsed, therefore, had granted the decree of declaration declaring him to be owner. The appeal preferred by the mortgagors was dismissed.

Mr. I.S.Brar, learned counsel appearing on behalf of the appellant-defendants submitted that the suit was not maintainable, in view of the law laid down by the Supreme Court of India in **Singh Ram (D) through LRs Vs. Sheo Ram and others 2014 AIR SC 3447**, wherein it has been held that such type of suits in the absence of any time line fixed in the mortgage deed, are not maintainable. The Court could not have granted the declaration and thus, there is abdication, much less illegality and perversity in the findings rendered by the Courts below.

Per contra, Mr. Ashok Kumar Khunger, learned counsel appearing on behalf of the respondents submitted that judgment rendered by the Supreme Court of India in Singh Ram (supra) would not have retrospective effect, for, the suit was filed in the year 1990 and at that time, the provisions of Article 61 of Limitation Act, were applicable and the period prescribed was 30 years. All these factors weighed in the mind of the Courts below in decreeing the suit and thus, urged this Court for dismissal

of the appeal.

I have heard the learned counsel for parties, appraised the judgments and decrees of both the Courts below and of the view that there is force and merit in the submissions of Mr. Brar, for, as per the ratio decidendi culled out in Singh Ram (supra), it has been held that suit filed by the mortgagee claiming declaration of ownership having acquired the title by efflux of time, is not maintainable, for, there is no limitation seeking redemption. It has been held that once the mortgage is for infinite period there is no limitation to seek redemption of the property. For the sake of brevity, 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 over-ruled.”

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 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 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 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.

The judgments and decrees of both the Courts below are not sustainable in the eyes of law. The same are hereby set aside. It is made clear that since there is no limitation to seek redemption, the appellants are at liberty to seek redemption of the property and take possession in accordance with law.

Resultantly, the appeal stands allowed.

(AMIT RAWAL)
JUDGE

March 26, 2018

savita

Whether Speaking/Reasoned

Yes/No

Whether Reportable

Yes/No