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

RSA No.793 of 1996
Date of Decision.14.02.2018

Punjab State through Collector, Distt. Bathinda ......Appellant

Vs

Mohinder Singh and others ....Respondents

CORAM:HON'BLE MR. JUSTICE AMIT RAWAL

Present: Ms. Akanksha, AAG, Punjab
for the appellant.

Mr. Jaspreet Singh, Advocate
for respondent Nos.1 to 4.

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AMIT RAWAL J.(ORAL)

The appellant-State of Punjab has preferred the appeal against the concurrent finding of fact whereby the suit at the instance of the plaintiffs seeking declaration to the effect that they are owners of the land measuring 11 kanals 8 marlas to the extent as described in the plaint being the mortgagees in possession for more than 30 years by efflux of time, has been decreed by both the Courts below.

The respondents-plaintiffs instituted the suit that they had been in possession of the land measuring 11 kanals 8 marlas of land for more than 30 years i.e. the plaintiff No.1 to the extent of 3/8 shares, plaintiff No.2 to 4 to the extent of 3/8th share and plaintiff No.5 to the extent of 1/4th share. One Shanti Devi widow of Harnam Singh and Kartar Singh, Jora Singh, Nand Singh were the original owners of the suit land, who mortgaged the suit land in favour of Nihal Singh son of Gurmukh Singh, which was entered in the revenue records vide mutation No.6101 dated 10.5.1946. Copy of the jamabandi 1984-85 was the testimony of the same.

After death of Shanti, the land got vested in the name of the Provincial Government as the mortgagor, which was shown in the mutation bearing No.10969, Ex.P12. Since the property was not redeemed for a period of 30 years, therefore, they have become owners by efflux of time.

Ms. Akanksha, AAG, Punjab learned counsel appearing for the appellant-State submitted that in view of the law laid down by Hon'ble Supreme Court in ***Singh Ram Vs. Sheo Ram 2014 (9) SCC 185*** when no time limit is provided for redemption of the mortgage deed, there is no limitation for the mortgagor to redeem the land.

Per contra, Mr. Jaspreet Singh, learned counsel appearing on behalf of respondent Nos.1 to 4 submitted that the aforementioned judgment and decree would apply prospectively and not retrospectively as at the time when the suit was filed there was a limitation of 30 years. They are in possession since 1946. The jamabandi for the year 1989-90, Ex.P4, showed the status of respondents-plaintiffs as mortgagees, thus, proved the lapse of a period of 30 years. Therefore, the suit is not maintainable and the declaration granted by the Courts below is sustainable in the eyes of law.

I have heard learned counsel for the parties and appraised the paper book. Article 61 of the Limitation Act provides limitation of 30 years for a mortgagor to redeem the mortgaged land. The aforementioned question came to be debated upon before the Full Bench of this Court in ***Ram Kishan and others Vs. Sheo Ram and others 2008(1) RCR (Civil) 334*** wherein this Court after going into the various provisions of law and other aspects held that there is no limitation for mortgagor to redeem the land even after lapse of a period of 30 years. The view expressed by this Court has also been reiterated by the Hon'ble Supreme Court in ***Singh***

Ram's case (supra). The relevant paragraphs 11, 12 and 15 of the same read as under:-

> *"11. We are in agreement with the view taken in the impugned judgment that in a usufructuary mortgage, right to recover possession continues till the money is paid from the rents and profits or where it is partly paid out of rents and profits when the balance is paid by the mortgagor or deposited in Court as provided under Section 62 of the T.P. Act.*
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> *12. It will be appropriate to refer to the statutory provisions of the T.P. Act and the Limitation Act:-*
>
> ***"T.P. Act***
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> ***58. "Mortgage", "mortgagor", "mortgagee", "mortgage-money" and "mortgaged" defined.***
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> *(a) A mortgage is the transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability.*
>
> *The transferor is called a mortgagor, the transferee a mortgagee; the principal money and interest of which payment is secured for the time being are called the mortgage-money, and the instrument (if any) by which the transfer is effected is called a mortgage-deed.*
>
> *(b) Simple mortgage-Where, without delivering possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgage-money, and agrees, expressly or impliedly, that, in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage-money, the transaction is called a simple mortgage and the mortgagee a simple mortgagee.*
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> *(c) Mortgage by conditional sale-Where, the mortgagor ostensibly sells the mortgaged property-*
>
> *on condition that on default of payment of the mortgage-money on a certain date the sale shall become absolute, or*
>
> *on condition that on such payment being made the sale shall become void, or*
>
> *on condition that on such payment being made the buyer shall transfer the property to the seller,*
>
> *the transaction is called a mortgage by conditional sale and the mortgagee a mortgagee by conditional sale:*
>
> *PROVIDED that no such transaction shall be deemed to be a mortgage, unless the condition is embodied in the document which effects or purports to effect the sale.*
>
> *(d) Usufructuary mortgage-Where the mortgagor delivers possession or expressly or by implication binds himself to deliver possession of the mortgaged property to the mortgagee, and authorizes him to retain such possession until payment of the mortgage-money, and to receive the rents and profits accruing from*

the property or any part of such rents and profits and to appropriate the same in lieu of interest or in payment of the mortgage-money, or partly in lieu of interest or partly in payment of the mortgage-money, the transaction is called a usufructuary mortgage and the mortgagee a usufructuary mortgagee.

(e) English mortgage-Where the mortgagor binds himself to repay the mortgage-money on a certain date, and transfers the mortgaged property absolutely to the mortgagee, but subject to a proviso that he will re- transfer it to the mortgagor upon payment of the mortgage-money as agreed, the transaction is called an English mortgage.

(f) Mortgage by deposit of title-deeds-Where a person in any of the following towns, namely, the towns of Calcutta, Madras, and Bombay, and in any other town which the State Government concerned may, by notification in the Official Gazette, specify in this behalf, delivers to a creditor or his agent documents of title to immovable property, with intent to create a security thereon, the transaction is called a mortgage by deposit of title- deeds.

(g) Anomalous mortgage-A mortgage which is not a simple mortgage, a mortgage by conditional sale, a usufructuary mortgage, an English mortgage or a mortgage by deposit of title-deeds within the meaning of this section is called an anomalous mortgage.

60. Right of mortgagor to redeem

At any time after the principal money has become due, the mortgagor has a right, on payment or tender, at a proper time and place, of the mortgage- money, to require the mortgagee (a) to deliver to the mortgagor the mortgage-deed and all documents relating to the mortgaged property which are in the possession or power of the mortgagee, (b) where the mortgagee is in possession of the mortgaged property, to deliver possession thereof to the mortgagor, and (c) at the cost of the mortgagor either to re-transfer the mortgaged property to him or to such third person as he may direct, or to execute and (where the mortgage has been effected by a registered instrument) to have registered an acknowledgment in writing that any right in derogation of his interest transferred to the mortgagee has been extinguished:

Provided that the right conferred by this section has not been extinguished by the act of the parties or by decree of a court.

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62. Right of usufructuary mortgagor to recover possession

In the case of a usufructuary mortgage, the mortgagor has a right to recover possession of the property together with the mortgage-deed and all documents relating to the mortgaged property which are in the possession or power of the mortgagee,-

(a) where the mortgagee is authorised to pay himself the mortgage-money from the rents and profits of the property,-when such money is paid;

(b) where the mortgagee is authorised to pay himself from such rents and profits or any part thereof a part only of the mortgage-money, when the term (if any) prescribed for the payment of the mortgage-money has expired and the mortgagor pays or tenders to the mortgagee the mortgage money or the balance thereof or deposits it in court hereinafter provided.

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Limitation Act:-

Art. 61 By a mortgagor

a) *To redeem or recover possession of immovable property mortgaged*	*Thirty years*	*When the right to redeem or to recover possession accrues*
b) xxxxxx	xxxxx	xxxxx

(emphasis supplied)

A perusal of above provisions shows that Article 61 refers to right to redeem or recover possession. While right of mortgagor to redeem is dealt with under Section 60 of the T.P. Act, the right of usufructuary mortgagor to recover possession is specially dealt with under Section 62. Section 62 is applicable only to usufructuary mortgages and not to any other mortgage. The said right of usufructuary mortgagor though styled as 'right to recover possession' is for all purposes, right to redeem and to recover possession. Thus, while in case of any other mortgage, right to redeem is covered under Section 60, in case of usufructuary mortgage, right to recover possession is dealt with under Section 62 and commences on payment of mortgage money out of the usufructs or partly out of the usufructs and partly on payment or deposit by the mortgagor. This distinction in a usufructuary mortgage and any other mortgage is clearly borne out from provisions of Sections 58, 60 and 62 of the T.P. Act read with Article 61 of the Schedule to the Limitation Act. Usufructuary mortgage cannot be treated at par with any other mortgage, as doing so will defeat the scheme of Section 62 of the T.P. Act and the equity. This right of the usufructuary mortgagor is not only an equitable right, it has statutory recognition under Section 62 of the T.P. Act. There is no principle of law on which this right can be defeated. Any contrary view, which does not take into account the special right of usufructuary mortgagor under Section 62 of the T.P. Act, has to be held to be erroneous on this ground or has to be limited to a mortgage other than a usufructuary mortgage. Accordingly, we uphold the view taken by the Full Bench that in case of usufructuary mortgage, mere expiry of a period of 30 years from the date of creation of the mortgage does not extinguish the right of the mortgagor under Section 62 of the T.P. Act.

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15. The reason then justifying the Court's power to relieve a mortgagor from the effects of his bargain is its want of conscience. [pic]Putting it in more familiar language the Court's jurisdiction to relieve a mortgagor from his bargain depends on whether it was obtained by taking advantage of any difficulty or embarrassment that he might have been in when he borrowed the moneys on the mortgage. Was the mortgagor oppressed? Was he imposed upon? If he was, then he may be entitled to relief."

In my view, the suit for declaration claiming ownership by efflux of time in the absence of any time prescribed in the agreement is not maintainable, as there is no limitation for a mortgagor to redeem the mortgaged land. The judgment referred to above does not specify its applicability either retrospectively or prospectively.

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.

In view of the aforementioned, the judgments and decrees passed by both the Courts below suffered from illegality and perversity and the same are hereby set aside. Resultantly, the second appeal stands allowed. Decree sheet shall be prepared accordingly.

(AMIT RAWAL)
JUDGE

February 14, 2018
Pankaj*

Whether reasoned/speaking Yes/No

Whether reportable Yes/No