IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

RSA- 4472-2011 (O&M)
Date of decision: 17.02.2018

Gurdial Singh and others

…..Appellants

versus

Kamaljit Kaur and others

……Respondents

RSA- 269-2012 (O&M)

Gurdial Singh and others

…..Appellants

versus

Kamaljit Kaur and others

……Respondents

RSA- 458-2012 (O&M)

Gurdial Singh and others

…..Appellants

versus

Kamaljit Kaur and others

……Respondents

CR- 3927-2012 (O&M)

Gurdial Singh and others

….. Petitioners

versus

Kamaljit Kaur and others

……Respondents

CORAM: Hon'ble Mr.Justice Kuldip Singh

Present: Mr.Sunil Chadha, Senior Advocate with
Mr.Chetan Bansal, Advocate for the appellants/ petitioners
in all the cases
Mr.H.S.Awasthy, Advocate for respondent nos.3 to 5
in all the cases

1. Whether Reporters of Local Newspapers may be allowed to see the judgment ?
2. To be referred to the Reporters or not ?
3. Whether the judgment should be reported in the Digest?

Kuldip Singh, J.

By this single judgment, I shall dispose of RSA No.4472-2011 titled as *Gurdial Singh and others vs. Kamaljit Kaur and others*, RSA No.269-2012 titled as *Gurdial Singh and others vs. Kamaljit Kaur and others*, RSA No.458-2012 titled as *Gurdial Singh and others vs. Kamaljit Kaur and others* and CR No.3927-2012 titled as *Gurdial Singh and others vs. Kamaljit Kaur and others.* However, for facility of reference, facts are being mentioned from RSA No.4472-2011.

Impugned in the present regular second appeal is the judgment dated 11.5.2011, passed by learned Additional District Judge, Chandigarh, affirming the judgment and decree dated 18.2.2005, passed by learned Civil Judge (Junior Division), Chandigarh, vide which, suit of the plaintiff was decreed and plaintiff was held entitled to possession by way of redemption of House 2175, Sector 22-C, Chandigarh on payment of Rs.32,000/- remaining mortgage money and also amount of Rs.57,800/- as interest on mortgage without possession and Rs.26,500/- as rent due along with interest 18% on Rs.26,500/- from August 1991 till 17.1.1994 along with interest @ 12% per annum as pendente lite and @ 6% per annum till realization of payment of above said amount to the defendants. It was further ordered that after receiving the said amount, the defendants shall also return all the documents and recover the property in accordance with law to the plaintiffs.

Facts of the case, as made out from the lower Court file, are that Hardev Singh plaintiff filed a suit for possession by way of redemption of house No.2175, Sector 22-C, Chandigarh. In the suit, it was claimed that the plaintiff mortgaged house No.2175, Sector 22-C, Chandigarh with possession on 26.10.1981 in favour of defendant nos.1 to 5 for Rs.20,000/-. Two days later, i.e. on 28.10.1981, plaintiff took the premises in dispute on lease on the monthly rent of Rs.700/- and executed a lease deed in favour of the defendants. Again, on 2.11.1981, plaintiff secured another sum of Rs.20,000/- against another mortgage without possession from defendant nos.1 to 5. In this way, plaintiff twice mortgaged the disputed house against sum of Rs.40,000/- from defendant nos.1 to 5. Plaintiff delivered possession of the disputed House No.2175, Sector 22-C, Chandigarh to one Sh.Sarvjeet Singh, one of the mortgagee in the year 1986. Plaintiff now wishes to redeem his property from the defendants.

Here, it is important to note that before the trial Court, an application for amendment of the plaint was filed by the plaintiff, which was dismissed by the trial Court on 29.5.1996 and application for amendment of written statement filed by defendant was dismissed by trial Court on 14.10.1999. Thereafter, both the parties had again filed application for amendment of their pleadings, which was dismissed by the trial Court on 11.6.2003. In this way, it was the un-amended suit, which was tried by the trial Court. However, it comes out that inadvertently, the trial Court has narrated the facts of the amended plaint in its Judgment, which appears to be inadvertent error.

In the written statement filed by defendant nos.1, 2, 4 and 5, they pleaded that rate of rent was Rs.900/- p.m. and not Rs.700/- p.m. First mortgage of Rs.20,000/- was with possession and second mortgage of Rs.20,000/- was without possession. It was denied that the possession of the disputed house was delivered to Sh.Sarvjeet Singh or any of the mortgagee. It was claimed that plaintiff is liable to pay not only Rs.40,000/- under the mortgage but also liable to pay rent of disputed house which was taken on rent by the plaintiff from the mortgagees which are subject matter of the following suit:-

> *(i)Civil suit no.135 Dated 18.3.1986 titled Gurdial Singh and others vs. Hardev Singh and another for the recovery of rent etc. (over Rs.51636/-) for the period from 1.10.1982 to 15.3.1986 which is pending in the Court of Sh.Shekhar Dhawan, SSJIC, Chandigarh and is next fixed for 30.8.94.*
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> *(ii)Civil suit no. 80 Dated 31.7.1989 titled Gurdial Singh and others vs. Hardev Singh and another for the recovery of rent etc (over Rs.47530/-) for the period from 16.3.1986 to 31.7.1989 which is pending in the court of Sh.Jagdeep Jain, SJIC, Chandigarh and next fixed for 11 Nov 94.*
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> *(iii)Civil suit no.154 Dated 4.8.1992 titled Gurdial Singh and others vs. Hardev Singh and another for the recovery of rent etc (over Rs.32940/-) for the period from 1.8.1989 to 31.7.1992 which is pending in the court of Sh.Jagdeep Jain, SJIC, Chandigarh and is next fixed for 20.10.94 and*
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> *(iv)further rent etc from the plainitff from the period from 10.8.1992 to date (over Rs.19800/-) still suit to be filed.*
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> *(v)And still further rent etc, which would fall due from the plaintiff under the mortgage deed with possession for the period from 12 Aug 1994 till the date he pays all the dues.*

The claim in the said four cases comes to Rs.160011/-, which is inclusive of interest 18% per annum upto the date of filing of the suit, interest during the pendency of the suit and further interest after the decree is payable including a sum of Rs.8106/- as Court fee paid by the mortgagee for filing of the suit for recovery. It was further pleaded that the plaintiff mortgagee deliberately did not appear in the civil suit for recovery of rent dated 31.7.1989 and 4.8.1992, mentioned above. Plaintiff and defendant no.3 Sh.Sarvjeet Singh fraudulently and in conspiracy with each other colluded and want to cause wrongful loss to the other mortgagees.

Defendant no.3, in the separate reply, also claimed that the plaintiff has not deposited the mortgage amount along with the interest and rent. Interest on the second mortgage amount comes to Rs.60,000/- till 31.5.1994 and share of defendant no.3 comes to Rs.12,000/-. Plaintiff had paid Rs.8,000/- in the Court to defendant no.3 which was accepted by him under protest.

From the pleadings, following issues were framed:-

1. *Whether the plaintiff is entitled to redemption of the suit property? OPP*
2. *Whether the defendants are entitled to recover the mortgaged amount along with interest, if so, to what effect? OPD*
3. *Relief*

Following additional issue no.2(a) was framed on 16.8.2000:-

2(a) Whether the defendants are liable to recover the rent from plaintiff. If so at what rate? OPP

It is also necessary to add here that taking that the amendment has been allowed on the basis of the amended plaint, trial Court framed the following additional issues on 28.9.2001:-

> *2(d) Whether Bachan Singh was never in possession of the suit property as tenant and rent recipts are fabricated, forged, fraudulently and dishonestly prepared documents through conspiracy of plaintiff with def. no.3? OPD*

However, issue no.2D was deleted vide order dated 28.9.2001.

After hearing both the parties and going through the evidence, the impugned judgment and decree was passed, which was affirmed by the lower appellate Court.

It is also to be noted here that the mortgage money was deposited by the plaintiff before the trial Court on 17.1.1994.

In RSA No.269 of 2012, in Civil Suit No.80 of 1989, filed by Gurdial Singh and others against Hardev Singh and another, the plaintiffs, who are mortgagees, claimed arrears of rent of amounting to Rs.36450/- from 16.3.1986 to 31.7.1989 @ Rs.900/- per month and Rs.11080/- as interest @ 18% per annum from 16.3.1986 to 31.7.1989 as per clause 4 of the rent note dated 28.10.1981. The suit was decreed by the trial Court vide judgment and decree dated 18.2.2005 for recovery of Rs.22,680/- from defendant no.2 along with interest @ 12% per annum pendente lite and future interest @ 6% per annum from the date of decree till realization. Appeal against the said judgment and decree was dismissed by learned Additional District Judge, Chandigarh vide judgment dated 11.5.2011.

In RSA No.458-2012, challenge is to the judgment and decree passed in Civil Suit No.154 of 1992 decided on 18.2.2005. In the said suit, Gurdial Singh mortgagee has claimed rent for the period 1.8.1989 to 31.7.1992 to the extent of $4/5^{th}$ share amounting to Rs.25920/-. Trial Court vide judgment and decree dated 18.2.2005, decreed the suit for Rs.13,434/- with interest @ 12% per annum pendente lite and future interest @ 6% per annum against defendant no.2. In the appeal, learned Additional District Judge, Chandigarh vide judgment dated 11.5.2011 partly allowed the appeal and decreed the suit for Rs.20,162/- against defendant no.2, out of which decree for recovery of Rs.13,434/- has already been passed by the trial Court with proportionate costs and interest @ 12% per annum pendente lite and future interest @ 6% per annum from the date of decree till realization against defendant no.2.

In CR No.3927-2012, impugned is the order dated 25.2.2012 passed by learned Civil Judge (Junior Division), Chandigarh, vide which, objections filed by the JD Hardev Singh were allowed and the execution was dismissed holding that the tenancy created by the decree holder merged into the decree of redemption which is as good as suit for possession and that tenancy comes to an end on the redemption of the mortgage property. Consequently, execution to execute the order passed by the Rent Controller was dismissed.

I have heard learned counsel for the parties and have also carefully gone through the record.

On behalf of the appellants, it has been contended that even if the first and second mortgage are redeemed, plaintiff will continue in possession as a lessee and is liable to pay rent and that even if the mortgage is redeemed, the lease will not merge in mortgage. It has been pleaded that rent is liable to be paid till the year 2016. It is contended that now, in the execution of the decree, possession has been delivered to mortgager in the year 2016. Learned counsel has also pointed out that other suits were pending between the parties for ejectment and recovery of the rent.

Learned counsel for the appellant has relied upon the authority of the Apex Court in *Gambangi Applaswamy Naidu vs. Behara Venkataramanappa Patro, 1985(2) RCR (Rent) 359,* wherein it was held that there is no merger of lease and a mortgage. In the said case usufructuary mortgage was created and the premises was leased back to the mortgager and accordingly, the Apex Court observed as under:-

> *4. Counsel for the appellants urged upon us to accept the view taken by the learned District Judge that the two transactions namely a lease and a usufructuary mortgage could co-exist and there was nothing in the two mortgage deeds to suggest that the appellants' rights as lessee were extinguished either by merger or by implied surrender and in that behalf strong reliance was placed upon the earlier decision of the Andhra Pradesh High Court in Varada Bangar Raju's ease (supra), while counsel for the respondents contended that the High Court, both in second appeal as well as Letters Patent Appeal, was right in restoring the learned District Munsif's decision by relying upon the later decision in P. Satyanarayana's case (supra) and prayed for dismissal of this appeal.*
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> *5. In our view there can be no merger of a lease and a mortgage, even where the two transactions are in respect of the same property. It is well-settled that for a merger to arise, it is necessary that lesser estate and a higher estate should merge in one person at one and the same time and in the same right*

> *and no interest in the property should remain outstanding. In the case of a lease, the estate that is outstanding in the lessor is the reversion; in the case of a mortgage, the estate that is outstanding is the equity of redemption of the mortgagor. Accordingly, there cannot be a merger of a lease and a mortgage in respect of the same property since neither of them is a higher or lesser estate than the other. Even, if the rights of the lessee and the rights of the mortgagee in respect of a property were to be united in one person the reversion in regard to the lease and the equity of redemption in regard to the mortgage, would be outstanding in the owner of the property and accordingly, there would not be a complete fusion of all the rights of ownership in one person. This position in law as explained by the Bombay High Court in Narayana Dogra Shetty v. Ramchandra Shivram Hingne, 65 Bom LR 449 has been fully approved by this Court in Shah Mathuradas Maganlal & Co. v. Nagappa Shankarappa & Ors, AIR 1976 Supreme Court 1565.*

Further reliance has been placed upon another judgment of the Apex Court in *Gopalan Krishankutty vs. Kunjamma Pillai Sarojini Amma, 1996 (AIR (SC) 1659,* wherein a similar view was taken and it was observed as under:-

> *6. The High Court, in the present case, proceeded on the erroneous assumption in law that surrender of the lease by the lessee (defendant) must be implied from the fact of execution of the usufructuary mortgage in his favour by the lessor*

(plaintiff). As indicated, this is an erroneous assumption in law. This question has to be decided on the contents of the deed since there is no other evidence of surrender of the lease by the defendant on execution of the mortgage. We find nothing in the mortgage deed (Annexure AI) dated 18th July, 1974 read with the release deed of the same date to prove either an express or an implied surrender of the lease by the defendant in favour of the plaintiff on execution of the mortgage deed. Since there is no automatic merger of the interest of a lessee with that of a mortgagee when the same person is the lessee as well as the mortgagee, in absence of proof of surrender of the lease by the defendant, on redemption of the mortgage, the plaintiff is not entitled automatically to recover possession of the leased premises. The defendant's right to continue in possession as a lessee, therefore, continues to subsist.

On the other hand, learned Counsel for the respondents has relied upon the authority of the Apex Court in *Tara Chand vs. Sagarbai @ Chaiyalibai, 2007(1) RCR 612*, wherein it was held that suit for redemption is essentially a suit for recovery of possession when a debt is satisfied out of the usufructs of the property or otherwise the mortgagor recovers the possession.

Law point arising before this Court is as to whether in the present case, there is merger of lease and mortgage?

I am of the view that in view of the authoritative pronouncements by the Apex Court, there is no merger of lease with the mortgage. In this case, when the first usufructuary mortgage was created on

26.10.1981, the possession was delivered to the mortgagees. On 28.10.1981, the plaintiff took back the possession as a lessee and agreed to pay the rent of Rs.900/- with the stipulation that if it is paid before 7th day, then there is a rebate of Rs.200/-. Meaning thereby, in case rent is paid till 7th of every month, rate of rent will be Rs.700/- for that month. Admittedly, in this case, mortgage money was deposited before the trial Court on 17.1.1994. However, defendant contested the suit and was able to drag it till 2005 when it was ultimately decided by the trial Court on 18.2.2005. Further the plaintiff preferred appeal against the said judgment, which was dismissed by the learned Additional District Judge, Chandigarh on 11.5.2011.

I am of the view that once the mortgage money is paid, the defendants cannot be allowed to continue in the character as mortgagee and therefore, the effect of the judgment is that the mortgage stood redeemed w.e.f. 17.1.1994. In this way, on 17.1.1994, the defendants were no more the mortgagee of the house, though they could claim the rent from the plaintiff in their character as a landlord. On the redemption of the house, they were expected to immediately deliver back the possession to the plaintiff.

Learned counsel for the appellants has further contended that the plaintiffs should have first surrender the possession to the defendants and then took it back.

I am of the view that it was a mere formality of delivering back the possession and taking it back. Therefore, on the redemption of the mortgage w.e.f. 17.1.1994, plaintiff is deemed to have surrendered the possession to the defendants and since, suit was decreed for possession by way of redemption, the same is deemed to have been delivered back on the same date.

In view of what has been discussed above, the impugned judgments and decree passed in RSA No.4472-2011 titled as *Gurdial Singh and others vs. Kamaljit Kaur and others*, RSA No.269-2012 titled as *Gurdial Singh and others vs. Kamaljit Kaur and others* and RSA No.458-2012 titled as *Gurdial Singh and others vs. Kamaljit Kaur and others* and impugned order passed in CR No.3927-2012 titled as *Gurdial Singh and others vs. Kamaljit Kaur and others* have to be upheld. Consequently, I do not find any illegality or infirmity in the impugned judgments. All the present Regular Second Appeals and Civil Revision accordingly fail and are dismissed.

A copy of the order be placed on the connected case files.

17.02.2018 **(Kuldip Singh)**
gk **Judge**

Whether speaking/ reasoned: Yes
Whether Reportable: No