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

**RSA No.921 of 2013 (O&M)**
**Date of Order:12.09.2018**

**Devi Singh**

**..Appellant**

**Versus**

**Nazar and others**

**..Respondents**

**CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL**

Present: Mr. Birinder Singh Rana, Sr. Advocate, with
Ms. Divya Bajaj, Advocate,
for the appellant.

Mr. Harkesh Manuja, Advocate,
for the respondents.

**ANIL KSHETARPAL, J.**

Plaintiff-appellant is in the regular second appeal against the judgment passed by the courts below, dismissing his suit for possession by way of redemption of the 3 different mortgagees.

Plaintiff claims that the aforesaid 3 mortgages were usufructuary mortgages, whereas it is the case of the defendants that it was a case of simple mortgage as mortgagees were never put in possession. Hence, it is pleaded that the plaintiff has no right to remain the land after expiry of limitation i.e. 30 years. It is further pleaded case of the defendants that application for redemption of the mortgage filed under Redemption of Mortgagees (Punjab) Act, 1913 was dismissed on 29.09.2006 and, therefore, defendants have become owners thereof.

In the considered opinion of this Court, following substantial questions of law arise for determination:-

(i) Whether an order passed by the authority under the Redemption of Mortgagees(Punjab) Act, 1913, is specifically required to be challenged while filing a suit for possession by way of redemption, as provided in Section 12 of the Act of 1913?

(ii) Whether the nature of the mortgage changes, if the mortgagor takes possession of the land on deposit of the redemption amount?

Before answering the questions, some facts would be required to be noticed.

Plaintiff has filed the present suit claiming that his predecessor-in-interest had mortgaged the land measuring 17 marlas, 2 Kanals and 2 kanals and 4 marlas vide mortgages dated 02.05.1945 and 12.08.1945 for Rs.95/-, Rs.100/- and Rs.100/-. It may be noticed here that the plaintiff has in fact purchased rights of the mortgagor (equity of redemption) vide two sale deeds dated 22.08.2002.

Plaintiff in paragraph 9 of the plaint has pleaded that an application for redemption of the mortgage was filed before Collector which was rejected on the ground that after expiration of 30 years, the court has no order to redeem the land and the civil court is competent to decide. The relevant pleadings in paragraph 9 of the plaint are extracted as under:-

> "*9.That the plaintiff also filed an application for the redemption of the mortgage before the Sh. Virander Singh, HCS Collector on 26.3.2003 and the same was decided on 29.9.2006 by holding that after expiration of the 30 years he has no right to entertain the application of redemption and the Civil Court is competent to decide the matter in issue in the General law and the*

> *civil court has the jurisdiction to adjudicate the matter in issue. Copy of the said order is attached."*

Defendants contested the suit and pleaded that although it was a case of usufructuary mortgage but physical possession of the land was never delivered. The pleadings of the defendants in paragraph 5 of the written statement are extracted as under:-

> "*5. That contents of para 5 of the plaint as stated are wrong and hence denied. However, it is made clear that **the suit land was a usufructuary mortgage**, but it is added that the physical possession of land never delivered to the mortgagee at the time of mortgage and it is also denied that the predecessor of the defendant were taking benefit of the produce of the standing crops till today. It is also denied that after the death of the predecessor of the defendants, the answering defendant are taking benefits of the produce in the land in dispute."*

It was further pleaded that the application for redemption has been dismissed by the court and since the plaintiff has not challenged the validity of the aforesaid order passed by the Collector, therefore, the suit is not maintainable. Pleadings to this effect in paragraph 9 of the written statement is extracted as under:-

> "*9. That contents of para no.9 of the plaint as stated are admitted to be correct to the extent that the plaintiff filed an application before the Collector, Ganaur for the redemption of the suit land on 26.3.2003 and the same was decided on 29.9.2006 by holding that after expiration of 30 years, the applicant has no right to file an application for redemption of the suit land. However, it is made clear that the court of Collector is competent to decide the application for redemption and the court of*

> *Collector is the final authority in the matter of redemption of the land and mere suit for redemption filed by the plaintiff is not maintainable because the plaintiff has not challenged the validity of the judgment, passed by the court of Collector on 29.9.2006."*

In the evidence, plaintiff produced copies of the mutation sanctioned on the basis of mortgage in the year 1945. There are 3 mutations bearing Nos.528, 529 and 546. In all these three mutations, it is specifically mentioned that mortgages have been put in possession, which is admitted by the parties. Still further, defendants when appeared in the application for redemption, it was pleaded by them that they are owners in possession of the land in dispute.

When defendant-Nazar appeared in evidence, he was specifically asked the question and he stated that since girdwaries of the land in dispute was in their name, therefore, he had taken a stand that possession is with them.

Learned trial court as well as learned first appellate court has chosen to dismiss the suit filed by the plaintiff. Both the courts have dismissed the suit basically on two grounds:-

(1) that the order of Collector passed on 29.09.2006, has not been specifically challenged by the plaintiff;

(2) Since, the plaintiff has admitted that now he is in possession, therefore, the suit filed by the plaintiff is barred by time.

Learned first appellate court has also held that since the plaintiff admits his possession, hence, it is a case of simple mortgage and not usufructuary mortgage.

Section 58 of the Transfer of Property Act, 1882 defines the definitions of 'simple mortgage' as well as 'usufructuary mortgage' which is extracted as under:-

> ***"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."*
>
> ***"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 authorises 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 an usufructuary mortgage and the mortgagee an usufructuary mortgagee."*

It is now well settled that in case of usufructuary mortgage, if no period for redemption of the mortgage has been specified, the limitation for redemption of the mortgage does not begin to run till the amount is tendered by the mortgagor and mortgagee refuses to accept the same. Reference in this regard can be made to a judgment passed by a larger

Bench of the Hon'ble Supreme Court in ***Singh Ram vs. Sheo Ram, (2014) 9 SCC, 185***.

Now let's examine whether in these cases mortgage was simple mortgage or a usufructuary mortgage.

First of all, defendants have themselves admitted in the written statement that it is a case of usufructuary mortgage. However, only defence pleaded is that the defendants were never put in possession. It may be noted that the stand taken by the defendants is clearly against the record as delivery of possession is proved from the mutations which were sanctioned in the year 1945 at the time of incorporating the factum of mortgage in the revenue record. Still further, when predecessor of the plaintiff filed an application for redemption of the mortgage, the defendants claim that they are owners in possession. From the reading of the order passed by the Collector, it is apparent that when one of the defendant appeared in evidence, he admitted that they are owners in possession of the property as more than 30 years have elapsed.

Still further, copies of the jamabandies for the years 1996-1997 and 2001-2002 clearly prove that possession is with the mortgagees. Although, learned counsel for the respondents has submitted that in khasra No.17/3/5/ possession of Chandan Singh has been shown, whereas the aforesaid land was mortgaged in favour of Sultana. However, it may be noticed that in the 3 mortgages are Chandan son of Mara, Sultan son of Mara and Reham Baj son of Chandan, so all the mortgagees are from one family of Mara son of Nihala.

Still further, it is the specific case of the plaintiff that they entered into possession after the redemption amount was deposited pursuant to the order passed by the Collector.

Now the stage is set to consider the questions of law.

***QUESTION NO.(i)***

> ***Whether an order passed by the authority under the Redemption of Mortgagees(Punjab) Act, 1913, is specifically required to be challenged while filing a suit for possession by way of redemption, as provided in Section 12 of the Act of 1913?***

Section 12 of the Act of 1913 is extracted as under:-

> "***12.*** *Any party aggrieved by an order made under Section 6, 6, 8, 9,10 or 11 of this Act may institute a suit to establish his rights in respect of the mortgage, but, subject to the result of such suit, if any, the order shall be conclusive.*
>
> *Notwithstanding anything in this section a mortgagee against whom an ex parte order under section 7 has been made or a petitioner whose petition has been dismissed in default under Section 6 may apply to the Collector to have such order or dismissal set aside and the Collector may in his discretion set aside, such order or dismissal on such terms as to costs or otherwise as he may deem fit, provided that the order of dismissal shall not be set aside unless notice of the application has been served on the opposite party."*

It is apparent from the reading of the aforesaid provision that any party aggrieved by an order made under Sections 6,7,8,9,10 or 11, may institute a suit to establish his right in respect of the mortgage. However, it is nowhere required that the order passed by the Collector is required to be challenged. In the present case, the order passed by the Collector is under Section 10 of the Act of 1913.

Learned counsel for the appellant while relying upon a Full Bench judgment of this Court reported as ***Chanan Singh v. Majo and***

***another, 1976 PLR 726*** has submitted that it is necessary for the plaintiff to bring a suit to set aside the order passed by the Collector. He referred to the paragraph 7 of the judgment, which is extracted as under:-

> *"I am of the view that the plain language of this provision is clear and unequivocal. It lays down in terms that unless a suit is brought to set aside any order of the Collector (passed under Sections 6 to 11 of the Act), which may be to the detriment of either party, the said order would become conclusive. The intention of the Legislature appears to be clear that when parties have resorted to the special jurisdiction of the Act end an order has been duly passed therein, then the same would become final and binding on them, unless either one of them avoids it by instituting a suit against that order. One cannot imagine that the Legislature would have possibly intended that a dispute which had been focussed and decided under the special proceedings of the Act, before the Collector, should nevertheless remain suspended and inchoate till either one of the parties exercises his substantive right of redemption which might well extend to another 60 years. It is a settled principle of construction that the words in a statute are designedly used, and an interpretation of a provision must be avoided which would render it either nugatory or a part thereof, otiose. If the view expressed by Tuli J., were to be adopted, in regard to the dismissal of a redemption application under Sections 6 to 11 of the Act, then the provisions of Section 12 aforementioned would virtually stand effaced from the statute book. This is a result which has necessarily to be avoided. I am, therefore, of the view that the plain and categorical language of Section 12 negates the construction which has been sought to be placed upon it by the Division Bench in Gurditta Singh's case (supra).*

Before the Hon'ble Full Bench, the matter reached when correctness of decision of the Division Bench was doubted. The Hon'ble Full Bench has only held that a suit must be brought to avoid the order passed by the Collector under the Act of 1913 within prescribed period. The Hon'ble Full Bench has nowhere held that the order passed by the Collector is specifically required to be challenged.

In the present case, a suit was filed by the plaintiff within the limitation prescribed. In the suit, plaintiff had referred to the order passed by the Collector. Plaintiff further pleaded that he is entitled to decree for possession by way of redemption. Hence, in the considered view of this court, the plaintiff had filed a suit to avoid the order of the Collector.

Section 12 of the Act extracted above does not provide that there has to be a challenge to the order passed by the Collector. Section 12 only provides that any party aggrieved by an order may institute a suit to establish his right in respect of the mortgage. In the present case, plaintiff did file a suit to establish his right in respect of mortgage.

On the other hand, learned counsel for the respondents while drawing attention of the court to the judgment passed by the Hon'ble Supreme Court in the case of ***Harbans Singh and another v. Guran Ditta Singh and another (1991) 2 SCC 523,*** has submitted that the order passed by the Collector does not effect the rights of the parties and, there is no bar to the mortgagor suing for redemption in the civil court within the period allowed by the law in ordinary course.

However, without going into this controversy, it is suffice to notice that Section 12 of the Act does not require a party aggrieved by an order to challenge the order of the Collector before the Civil Court. The party aggrieved is to file a suit to establish his rights in respect of redemption of the mortgage in the civil court, which has been filed. Still further, the pleadings of the plaintiff have to be given proper meaning. No doubt, in the prayer clause, the order passed by the Collector has not been specifically challenged but once the plaintiff has filed a suit for possession by way of redemption and has also referred to the order, obviously the prayer made in the suit is to establish his rights in respect of right of redemption of the mortgage and he is aggrieved of an order passed by the Collector.

In view of the discussion made above, question no.(i) is answered in favour of the appellant.

***QUESTION NO.(ii)***

> ***Whether the nature of the mortgage changes if the mortgagor takes possession of the land on deposit of the redemption amount?***

Learned counsel for the respondents could not point out any provision of law which may provide that on change of the possession subsequently, the nature of the mortgage would change.

In the present case in 1945, delivery of possession in favour of the mortgagees is proved. Still further, when the application for redemption was filed, respondents-defendants had pleaded that they are now become owner in possession as more than 30 years elapsed. They have also taken a plea that the mortgage was with possession since 1945. When they appeared in the evidence as noticed in the order of Collector, they took a plea that the land is continuing in their possession as a mortgagee since 1945. Still further in the written statement, defendants have themselves taken a plea that it is usufructuary mortgage.

Still further, copies of the revenue record prove that possession is with the mortgagees. Jamabandi for the years 1996-1997 and 2001-2002 clearly prove that fact. Still further Nazar, one of the defendant when appeared in evidence, has admitted that he had admitted his possession before the Collector.

Still further, once the nature of the mortgage was usufructuary mortgage, it does not get converted into a simple mortgage merely because plaintiff who has stepped into the shoes of mortgagor on purchase equity of redemption has taken over possession of the land on deposit of the mortgage money in the court of Collector.

In view of the aforesaid discussion, question no.(ii) is also answered in favour of the appellant and against the respondents.

In view of the above, the appeal is allowed and the judgments passed by the courts below are set aside. A preliminary decree for redemption of the mortgage is passed. However, since the mortgage amount has already been deposited vide treasury deposit slip Ex.P9 and Ex.P11, dated 26.03.2003, therefore, application for final decree for possession by way of redemption, if filed be decided by the court expeditiously.

**12th September, 2018** **(ANIL KSHETARPAL)**
**nt** **JUDGE**

Whether speaking/reasoned : Yes/No
Whether reportable : Yes/No