IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

RSA No.1499 of 2017(O&M)
Date of Decision-16.10.2018

Nanak Chand (deceased) and others ... Appellants

Versus

Hitender and others ... Respondents

CORAM:-HON'BLE MR. JUSTICE RAJ MOHAN SINGH

Present: Mr. Adarsh Jain, Advocate
for the appellants.

Mr. Ashok Aggarwal, Advocate
for the respondents.

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RAJ MOHAN SINGH, J.

[1]. Defendants are in regular second appeal against the concurrent judgments and decrees passed by the Courts below in a suit for possession by way of redemption.

[2]. Plaintiff filed a suit for possession by way of redemption on the ground that his predecessor-in-interest mortgaged the suit land with the predecessor-in-interest of the defendant and mortgagee was delivered possession of the suit land. The entries were made to the said effect in the revenue record. Mortgage was effected in the year 1880 for a sum of

Rs.32/-. It was agreed between the parties that the mortgagor could redeem the suit property at any time on making payment of the mortgage amount in the beginning of the agriculture year. It was also agreed that the payment towards land revenue was the responsibility of the mortgagee. Mortgage was usufructuary mortgage in nature.

[3]. Plaintiff alleged that he had purchased the mortgagor right from Rattan Singh for a consideration of Rs.19,80,000/- vide sale deed dated 21.02.2011 wherein vendor admitted the jural relationship of mortgagor and mortgagee with the defendants. Defendants No.1 to 4 have been shown to be usufructuary mortgagees in possession and have been receiving profits from the suit land.

[4]. The suit was contested by the defendants on the ground that limitation of 30 years has already expired and equity of redemption had barred by operation of law and the defendants have become owners by afflux of time. Defendants also denied that they are usufructuary mortgagees in possession. From the year 1880, defendants had claimed adverse possession over the suit property and they have become absolute owners in possession without any interference from the plaintiff.

[5]. Both the parties went to trial on the following issues:-

"1. Whether the predecessor in interest of the plaintiff was owner/mortgagor of the agricultural land comprising Khewat

No.107, Khatoni No.122, Rect. No.34, Killa No.16/2(4-16) situated within the revenue estate of village Sarurpur, Tehsil Ballabgarh, District Faridabad and the predecessors-in-interests of the defendant was mortgagee in possession of the suit land and the suit land was mortgaged with the original mortgagees in the year 1990 for a sum of Rs.32/- and it was a usufructuary mortgage? OPP

2. Whether the plaintiff purchased the ownership/mortgagor rights from the vendor Shri Rattan Singh son of Shri Tulla, resident of Village Sarurpur, Tehsil Ballabgarh, District Faridabad for Rs.19,80,000/- vide registered sale deed No.13852 dated 21.02.2011 and since the plaintiff has become mortgagor by coming in the shoes of his vendor qua the suit land? OPP

3. In case issues No.1 and 2 are decided in favour of the plaintiff, then whether the plaintiff is also entitled to a preliminary decree for redemption in respect of the suit land on payment of amount of Rs.32/- due on the mortgage or any other amount deem fit by the Court alongwith a decree for possession by way of redemption of suit land as detailed in para No.1 of the plaint, as prayed for? OPP

4. Whether the plaintiff has no locus standi to file the present suit? OPD

5. Whether the suit of the plaintiff is not maintainable? OPD

6. Whether the plaintiff has concealed the true and material facts from the Court and has not come to the Court with clean hands? OPD

7. Whether the suit filed by plaintiff is barred by limitation? OPD

8. Relief."

[6]. Both the Courts below have decreed the suit on the ground that a mortgage was required to be redeemed being usufructuary in nature. In a case of usufructuary mortgage, mortgagor has a right to get it redeemed by making payment of the mortgage money under Section 62 of the Transfer of Property Act. Mere expiry of the period of 30 years from the date of mortgage does not extinguish right of mortgagor under Section 62 of the Transfer of Property Act. On the strength of ***Ram Kishan Vs. Sheo Ram and others, AIR 2008 P&H page 77*** affirmed by the Hon'ble Apex Court in ***Singh Ram (D) through legal heirs Vs. Sheo Ram and others, AIR 2014 SC page 3447***, both the Courts below have concurrently held that once mortgage is created, it will remain intact till the same is redeemed i.e. "once the mortgage always a mortgage and same is always redeemable".

[7]. Learned counsel for the appellants submitted that as per condition in the mortgage, the mortgage property could be redeemed in the month of Jeth in the next year i.e. the year following the year when the mortgage was created. Learned counsel by relying upon *jamabandi* for the year 1880-81 Ex.D2 submitted that the condition was to the following effect:-

> *"Sharayat Rehan Awwal; Shuru Saal ke Mah Jeth Mein, jab, Aaj Rehan Ada Kar Ke, Fakul Rehan Kara Lunga."*

According to learned counsel, the aforesaid condition of mortgage was misread and misconstrued by the Courts below. Secondly, the suit is bad for partial redemption.

[8]. I have considered the submissions made by learned counsel for the parties and have also perused the material evidence on record.

[9]. Perusal of the document Ex.D2 would show that the intention of the mortgage was to specify the month only. No time was fixed for getting the land redeemed. The mortgagor had not specified the year for getting the land redeemed from the mortgagee. The purpose of mentioning the aforesaid recital was only to facilitate the mortgagee to reap the crop before the redemption. If the definition of agricultural year is taken, the same is prescribed in Punjab Tenancy Act, 1887 and the year used to commence on sixteenth day of June or other such date as the State Government may notify. Therefore, the words "when" and "anytime" were significant to show that no limitation was prescribed at the time of mortgaging the land. The period of 30 years as alleged by the defendants if read as per ratio laid down in ***Singh Ram (D) through legal heirs case (supra)***, the same would give irresistible conclusion that the suit was not barred by any limitation.

[10]. Article 61 of the Limitation Act refers to right to redeem or recover possession of immoveable property. Right of

mortgagor to redeem is dealt with under Section 60 of the Transfer of Property Act. The right of usufructuary mortgagor to recover possession of immoveable property is dealt with under Section 62 of the Transfer of Property Act which is applicable to usufructuary mortgage and not to any other mortgage. It can be seen that right to recover possession in case of usufructuary mortgage is covered under Section 62 of the Transfer of Property Act, whereas other mortgages are covered under Section 60 of the Transfer of Property Act. The distinction in an usufructuary mortgage and other mortgage is clearly made out from the provisions of Sections 58, 60 and 62 of the Transfer of Property Act if the same are read in conjunction with Article 61 of the Schedule of the Limitation Act. Usufructuary mortgage cannot be treated at par with any other mortgage as by doing so very purpose of the scheme of Section 62 of the Transfer of Property Act would be defeated in equity. This right of the usufructuary mortgagor is not only an equitable right, but has statutory recognition under Section 62 of the Transfer of Property Act. This right cannot be defeated on any principle of law.

[11]. The Hon'ble Apex Court in ***Singh Ram (D) through legal heirs case (supra)*** has held that any contrary view which does not take into consideration the specific right of usufructuary mortgagor under Section 62 of the Transfer of Property Act has to be treated to be erroneous view. The Court further held that in case of usufructuary mortgage, mere expiry of 30 days from the

date of creation of mortgage does not extinguish right of mortgagor under Section 62 of the Transfer of Property Act. The controversy if tested at the threshold of ratio laid down in ***Singh Ram (D) through legal heirs case (supra)***, would give irresistible conclusion that once the mortgage is found to be usufructuary, recital if any, to the contrary would not take away the right of mortgagor under Section 62 of the Transfer of Property Act. This right is indefeasible and any contrary view would be erroneous in view of spirit of Section 62 of the Transfer of Property Act.

[12]. Firstly the recital of Ex.D2 is explanatory inasmuch as that no time was specified. Secondly, the aforesaid recital has been recorded in the *jamabandi* without proving its source. Even if it is taken to be a recital as per mortgage deed, the same would not take away the right of mortgagor under Section 62 of the Transfer of Property Act. The second ground taken by the appellants was in respect of partial redemption. Learned counsel for the appellants submitted that total area was 2 bighas 16 biswas, but the suit was filed in respect of 4 kanals 16 marlas.

[13]. Both the Courts below have found that as per revenue record, the property was shown to be the same which was mortgaged. Earlier it was in bighas and biswas and thereafter, it was shown to be in kanals and marlas. Ex.PW4/A i.e. excerpt showing the details of the land, wherein 4 kanals 16 marlas was

the property computed as against 2 bighas 17 biswas. The land mentioned in para No.1 of the plaint was 4 kanals 16 marlas and the same was the land purchased by the plaintiff and the same was mortgaged in favour of the mortgagee for the purpose of redemption. Even as per written statement filed by the defendants/appellants, no such plea of partial redemption was taken. No such plea was set up as a defence in the written statement. Learned counsel for the appellants sought to address arguments on the aforesaid point under issue No.3 which was also not specific in the absence of pleadings/foundation made by the defendants in the written statement. No evidence was led on the aforesaid premise by the defendants/appellants. Even otherwise, recital in the long standing revenue record would show that the same has presumption of truth and no evidence to the contrary was led by the appellants on record.

[14]. The findings of fact recorded by the Courts below cannot be held to be erroneous or result of misreading of evidence and the same are not proved to be suffered with any perversity. No law point worth consideration is involved in the present appeal. The present regular second appeal is accordingly dismissed.

[15]. Since the main appeal has been dismissed on merits, therefore, there is no necessity to pass any order in CM No.7916-

C of 2018 and other miscellaneous applications. The same are accordingly disposed of.

(RAJ MOHAN SINGH)
JUDGE

16.10.2018
Prince

Whether Reasoned/Speaking Yes/No

Whether Reportable Yes/No