

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

RSA No.2023 of 1987 (O&M)

Date of decision:31.01.2019

Gurnam Singh and another

... Appellants

Vs.

Gurdial Chand (D) through LR's and others

... Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present:- Mr. Surinder Mohan Sharma, Advocate
for the appellants.

None for the respondents.

AMIT RAWAL J.

C.M.No.4096-C of 2014

Allowed as prayed for.

RSA No.2023 of 1987 (O&M)

The present Regular Second Appeal is directed against the concurrent findings of fact and law whereby suit of appellant-plaintiffs for declaration challenging the order dated 25.1.1984 of the Collector granting redemption of the mortgage of suit land measuring 53 kanals 4 marlas to be declared illegal, null and void was dismissed by the trial Court and affirmed in appeal.

The plaintiffs in suit were Gurnam Singh, Shamsheer Singh alias Shinda, whereas, the defendants were Gurdial Chand, Dharam Pal and Mukhtiar Singh etc.

During the pendency of the appeal, civil miscellaneous application bearing No.1023-C of 2001 under Order 22 Rule 10 read with Section 151 CPC was submitted by Kashmir Singh, Rakesh Bhandari, Kamal Kishore and Ashok Kumar for impleading/substituting themselves as respondents on the premise that Gurdial Chand/respondent no.1 had died on 30.3.1998 and was survived by his widow Sheelawanti , sons Dharampal, Vijay Kumar, Ashwani Kumar and daughter Pushpa Devi. They have already been impleaded as legal representatives of Gurdial Chand, vide order dated 19.08.1998. However, all the aforementioned legal heirs, have sold the property in dispute vide two registered sale deeds dated 13.7.1999 and 14.7.199 in favour of the applicants.

This Court, vide order dated 17.08.2001 allowed the application and were permitted to be brought on record as added respondents. The order dated 17.08.2001 reads thus:-

“In this case the appeal was filed by Gurnam Singh and Shamsher Singh against Gurdial Chand and others. Gurdial Chand died during the pendency of appeal and his Lrs were brought on record. It is the case of the applicants that the Lrs of Gurdial Chand had sold the property in their favour and therefore, they should be substituted in place of Gurdial Chand. It is also the case of non-applicants that one of the Lrs of Gurdial Chand has also sold his interest. Be that as it may, since the applicants have stepped into the shoes of Gurdial Chand, therefore, they are brought on record as added

respondents.

C.M. stands disposed of.”

Another subsequent event during the pendency had taken place when the appellants submitted an application 10871-C of 2013 for placing on record certified copies of Annexures A2 to A5, sale deeds dated 11.8.2010, 15.6.2010, 05.12.2000 and 16.03.2007 vide which they have purchased the part of suit land from Kamal Kishore, Kashmir Singh, Ashok Kumar and as well as to one Jagtar Singh who died and his LRS sold it to the appellants, therefore, the appellants during the pendency of the appeal had become co-owners instead of mortgagees.

The aforementioned application was allowed, vide order dated 10.10.2013. In view of existence of subsequent events, the property had exchanged in many hands and the alleged mortgagees had acquired the right of co-owner.

I am of the view that judgment and decree of redemption has become un-executable and therefore, cannot be ordered to be remain intact. If at all, some part of the property had not been sold to the appellants, they, in my view, would be at liberty to take the benefit of the provisions of Section 4 of the Partition Act, in view of the doctrine of severability. The judgment and decree in my view cannot be said to remain intact.

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 judgment and decree under challenge is modified to the aforementioned extent. Resultantly, the regular second appeal is disposed of. The parties are left to bear their own costs and avail appropriate remedy in accordance with law.

(AMIT RAWAL)
JUDGE

31.01. 2019
savita

Whether Speaking/Reasoned	Yes/No
Whether Reportable	Yes/No