

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

RSA No.76 of 1988 (O&M)

Date of decision:01.02.2019

Gian Chand (deceased) through LRs

... Appellant

Vs.

Surinder Nath and others

... Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present:- Mr. Bhupinder Ghai, Advocate and
Mr. A.K.Handa, Advocate
for the appellant.

Mr. Rakesh Chopra, Advocate and
Mr. Naresh Prabhakar, Advocate
for respondent no.1.

AMIT RAWAL J. (Oral)

The present Regular Second Appeal is directed against the judgment and decree of the Lower Appellate Court dated 09.10.1987 whereby suit of the respondent-plaintiff dismissed by the trial Court, has been decreed.

The respondent-plaintiff instituted the suit for declaration that agricultural land described in the head note of the plaint was redeemable by defendant no.1 and laid challenge to the order dated 31.1.1983 of the Assistant Collector Ist Grade whereby while entertaining the application of Gian Chand, under the Redemption of Mortgagees (Punjab) Act, 1913 redemption was declared null and void. It was contended that Braham Singh son of Ganesha Singh was the owner of 1/3rd share in the joint holding

which, after consolidation of holding, as per jamabandi for the year 1975-76 was 479 kanals 2 marlas. Out of the said joint holding, Braham Singh had mortgaged the land measuring 48 kanals 3 marlas to Lajwanti/defendant no.2 prior to the consolidation of his exclusive possession by giving the description of khasra numbers. It was asserted that plaintiff had also become co-owners in the joint holding as vide sale deed dated 03.03.1977 had purchased the land from the various co-sharers, being one of the legal heirs of Barahm Singh, i.e. Piara Singh sold the land measuring 21 kanals 7 marlas of his exclusive possession to the plaintiff and some part from 48 kanals. Lajwanti released 33 kanals 15 marlas of land out of the land which was under mortgage from the burden of the mortgage as '*farzi fak*' and sold her mortgagee rights of the remaining 14 kanals 8 marlas of the land which was under mortgage with her in favour of the plaintiff through registered sale deed dated 31.05.1977, therefore, "integrity" of the mortgage deed had broken.

The defendants contested the suit by filing joint written statement and admitted Barahm Singh to be owner of 1/3rd share in the joint holding comprising 479 kanal 2 marlas of land. It was alleged that khewat was partitioned between three co-sharers namely Kartar Singh, Barahm Singh and Pritam Singh and accordingly, came into separate possession. They sold and mortgaged the land and 159 kanals 14 marlas came into the share of Barahm Singh out of the which he mortgaged 48 kanals 3 marlas of land which was in his exclusive possession. Piara Singh defendant no.10 sold his share which came to 53 kanals 5 marlas as he inherited from

Barahm Singh and other co-sharers i.e. defendants no.3 to 9 out of their shares sold the land to the extent of 50 kanals. The factum of redemption by Lajwanti was not denied, but the integrity of the mortgage deed, as alleged, was emphatically denied.

Since the parties were at variance the trial Court framed as many as 06 (six) issues including the issue of Relief. The plaintiff in support of the aforementioned pleadings examined himself and brought on record the documentary evidence i.e. Ex.P1 to Ex.P5, whereas, defendant examined himself and brought on record Ex.D1 to Ex.D3.

The trial Court on the basis of evidence brought on record dismissed the suit vide judgment and decree dated 13.09.1985. However, the Lower Appellate Court by noticing all the aforementioned facts allowed the appeal. In these circumstances, the present appeal has been filed.

Mr. Bupinder Ghai and A.K.Handa, learned counsels appearing on behalf of the appellant-plaintiff submitted that judgment and decree of the Lower Appellate Court suffers from illegality and perversity as it has not taken into consideration the factum that property has already been mortgaged and the status of the respondent-defendants as mortgagor was neither here nor there. The finding qua plaintiff having become co-mortgagor is not only perverse but illegal and incorrect as no such evidence has come on record. It is settled law that sale of specific land out of joint holding by one of the co-owners is sale of joint holding subject to the adjustment at the time of partition. The sale deed, Ex.P2 was not read in correct perspective as well as the definition of mortgage as defined under

Section 53-A of Transfer of Property Act. He further submitted that substantial questions of law arise for determination of this Court.

In support of the aforementioned, Mr. Ghai relied upon the following case laws:-

- 1. Bansidhar Pandey Vs. Masudan Singh and others 1962 AIR (Patna) 191;**
- 2. Gohd. Singh Vs. Teja Singh 1965 AIR (Punjab) 224**
- 3. Rahirhansa Rowther and another Vs. Madras Islamia Educational Institution, Dallam represented by its Secretary and representatives Mohideen batcha Rowther 1953 AIR (Madras) 366.**

Mr. Rakesh Chopra, learned counsel for the respondents before rebutting the arguments of Mr. Handa and Mr. Ghai, drew the attention of this Court to civil miscellaneous application bearing No.13281-CI-2015 to point out that during the pendency of the appeal, Gian Chand/defendant no.1, vide various sale deeds of 1989 upto 2004, Annexures R3 to R13 had sold the property and left with very small holding and mutation in this regard had already been sanctioned. In pursuance to the aforementioned application, reply has been filed and denied the sale of the property. In the reply, appellant stated that there was no question of selling the land out of the land measuring 14 kanals 8 marlas which was under mortgage but did not deny the mutations and sale deeds.

On merit, it was submitted that vide sale deed dated

31.05.1977, Ex.P6, the appellant had purchased mortgagee rights from Lajwanti and his status was of mortgagee whereas vide other sale deeds dated 03.03.1977, 17.06.1980, 17.6.1980, 17.6.1980, 17.6.1980, Ex.P1 to Ex.P5, had purchased the land measuring 21 kanals 7 marlas from Piara Singh, LR of Barahm Singh, (Ex.P1), 1 kanal 7 marlas, (Ex.P2), 8 kanals 13 marlas, (Ex.P3), 8 kanals 14 marlas (Ex.P4), 8 kanalas 14 marlas, (Ex.P5) and in such circumstance, the alleged mortgage could not be redeemed as the remedy is partition in accordance with law.

I have heard the learned counsel for the parties, appraised the judgments and decrees as well as record of both the Courts below and of the view that there is no force and merit in the submissions of Mr. Ghai and Mr. Handa, for, it is pertinent to mention here that Ex.P1 dated 03.3.1977, was in respect of land measuring 21 kanals 7 marlas from Piara Singh, Ex.P2, Khan Chand who already purchased from the original co-owner, Ex.P3, Hari Chand and Ex.P4 Parkash Chand purchasers from the co-owners.

It is also not in dispute that appellant-plaintiff, vide sale deed dated 31.05.1976, Ex.P6 purchased the mortgagee rights of 14 kanals 8 marlas whereas original mortgage of the land was 48 kanals 3 marlas and the farzi redemption of 33 kanals, 15 marlas Ex.P8. In such circumstances, mortgage deed cannot be separated by applying the *doctrine of severability* to seek the redemption in view of the fact that entire sale holding is of joint khewat/khata which remained un-partitioned, though there were few specific khasra numbers which were referred to in the sale deeds.

All the aforementioned judgments pertained to the right of the co-mortgagor to redeem the land. There is no dispute to the ratio decidendi culled out in the aforementioned judgments but the facts noticed above leads to irresistible conclusion that mortgagee had acquired the title of substantial piece of mortgaged land and therefore, had become the owner. The facts are totally different than the one referred to resulting into ratio decidendi in the judgments cited above.

Be that as it may, it would be a *travesty of justice* in case the order of the Collector ordering redemption of the land challenged in the suit is ordered to be maintained. The finding of fact and law arrived at by the Lower Appellate Court, in my view, is the correct law leaving parties to seek partition and take possession in accordance with law.

For the reasons aforementioned, there is no illegality and perversity in the judgment and decree of the Lower Appellate Court. No ground for interference is made out. No substantial question of law arises for adjudication of the present appeal.

The regular second appeal is dismissed.

(AMIT RAWAL)
JUDGE

February 01, 2019
savita

Whether Speaking/Reasoned
Whether Reportable

Yes/No
Yes/No