

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

**RSA No.2812 of 1999 (O&M)
Date of Decision:06.03.2019**

Piara Singh

...Appellant(s)

Versus

Arbindu Nath and others

...Respondent(s)

CORAM:- HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr.J.S.Brar, Advocate for the appellant.
Mr.A.K.Chopra, Senior Advocate with
Mr.Ankit Midha, Advocate for the respondents.

ANIL KSHETARPAL, J.

The defendants-appellants are in the regular second appeal against the judgments passed by the courts below, while decreeing the suit for possession by way of redemption of mortgage.

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

- (i) Whether in a suit for possession by way of redemption of mortgage, the court is entitled to pass a decree for possession without passing a preliminary decree as provided in Order 34 Rule 7 of the Code of Civil Procedure?
- (ii) Whether a decree for removal of some super structures can be passed by the court, once it is proved that the parties are co-sharers?

Some facts are required to be considered. Out of total land measuring 333 kanal, half share thereof was owned by Ajudhiya Nath son of

Mahant Ram and remaining half share of the property in equal shares was owned by Tarlok Nath, Krishan Nath, Arbindu Nath-plaintiff and Mohinder Nath-defendant No. 7, sons of Prem Nath. It is claimed by the plaintiff that there was a private partition among owners and 168 kanal and 11 marla came to the share of Ajudhiya Nath, who mortgaged the land falling to his share in favour of Hakam Singh, Lal Singh, Bishan Singh, Kishan Singh and Tehal Singh for Rs.4500/-. Thereafter, Ajudhiya Nath sold his share of land to Lachhman Singh, Gurbax Singh and Gurcharan Singh for Rs. 10,000/- on 04.11.1941. The aforesaid sale was pre-empted by the plaintiff, defendant No. 7 and Tarlok Nath. The decree passed for possession by way of pre-emption was a conditional decree, subject to the deposit of the amount before 15.04.1949. It is further case of the plaintiff that in lieu of total land measuring 333 kanal, after consolidation of holdings, land measuring 267 kanal and 9 marla was allotted. It is further claimed that in a family settlement, land measuring 164 kanal and 9 marla was allotted to Tarlok Nath, Krishan Nath, Arbindu Nath and Mohinder Nath. Tarlok Nath and Krishan Nath sold their half share, whereas plaintiff-Arbindu Nath and Mohinder Nath-defendant No. 7 mortgaged their remaining half share to Khushal Singh-predecessor-in-interest of defendants No. 1 to 6. Thereafter Mohinder Nath-defendant No. 7 sold his 1/4th share to Khushal Singh, predecessor-in-interest of defendants No. 1 to 6. Thus, the mortgage amount was adjusted when Khushal Singh became owner of share sold by Mohinder Nath.

This suit was contested by Arbindu Nath, claiming possession by way of redemption. Before this Court, entitlement of the plaintiff to

redeem the land is not in dispute.

Learned counsel appearing for the appellant has a limited grievance. He has submitted that the learned trial court erred in passing a decree for possession without passing a preliminary decree for redemption of the mortgage as provided in Order 34 Rule 7 of the Code of Civil Procedure. He has further submitted that both the courts below have erred in recording a finding that the land comprised in Khasra No. 147 measuring 3 kanal and 15 marla is not part of the joint khewat. He drew attention of the court to copy of jamabandi for the year 1958-59, wherein it is apparent that the land comprised in Khasra No. 147 is part of joint khewat. Hence, he has submitted that in absence of any evidence of partition of the joint khewat, both the courts below erred in passing a decree for possession particularly when in the plaint itself, the plaintiff has pleaded that partition proceedings are pending.

On the other hand, learned senior counsel for the respondents has defended the judgments passed by the courts below. He has submitted that a preliminary decree was only a formality. He has further submitted that the land comprised in Khasra No. 147 is part of separate khewat No. 117, as per jamabandi for the year 1982-83. Hence, he has submitted that both the courts below have correctly passed the order, granting a decree for possession.

This Court has heard the learned counsel for the parties at length and with their able assistance gone through the judgments passed by the courts below and the record.

There can be hardly any dispute with regard to requirement of

passing a preliminary decree in a redemption suit. From the reading of provisions of Order 34 Rule 7 CPC, it is apparent that the court in a redemption suit is required to pass a preliminary decree and after deposit of the mortgage amount or in compliance with other directions a final decree is required to be passed. Hence, the learned trial court committed an error in passing a final decree for redemption of the mortgage subject to payment of the mortgage amount within two months.

As regards next contention of the learned counsel for the appellant, as per copy of jamabandi for the year 1958-59 Ex.P3, it is apparent that the land comprised in Khasra No.147 is part of Khewat No. 79. The plaintiff has not produced any cogent evidence which may prove that how and in what manner the land comprised in Khasra No. 147 was separated and put in a different khewat. Jamabandis after 1958-59 have not been produced. Next jamabandi produced is of the year 1982-83 which shows that Khasra No. 147 has been put in a separate khewat. Once the parties are co-sharers in the joint khewat unless the property is partitioned either as per the provisions of the Punjab Land Revenue Act, 1887 or by way of private partition, separation of khata/khewat is not permissible. The partition proceedings as per the plaint are pending. There is no evidence in the shape of a Daily Dairy Report or any other cogent evidence which may prove that how and in what manner Khasra No. 147 was separated from the remaining land in the khewat particularly when Khasra No. 147 was part of joint Khewat No. 79.

At this stage, it may be noted that on 9. 1. 2019 while noticing arguments of learned counsel for the parties, submissions of learned counsel

for the appellant were noted. Learned senior counsel appearing for the respondents was granted time to respond. Thereafter, the case was adjourned, as counsel for the respondents made a statement that he needs to examine the original record. After taking two adjournments, today learned senior counsel for the appellant has submitted that in the partition proceedings order was passed by the Commissioner (Appeals), dismissing four revision petitions filed by the appellants against the plaintiff which included land comprised in Khasra No. 147.

This Court has considered the submission of learned senior counsel for the respondents, however, find no substance therein.

The partition proceedings are still pending. No deed of partition has been produced. Still further once the civil court is adjudicating the matter, the revenue authorities are bound by the same. The order passed by the Commissioner in revision petitions cannot be said to be binding on the civil court, because the partition proceedings are carried out by a court of limited jurisdiction and the civil court is entitled to decide the question of title. It has further been pointed out that the defendants-appellants have pleaded that they have constructed a residential house in Khasra No. 147 and share of the plaintiff can be very well adjusted in the remaining land out of Khasra No. 147. In these circumstances, the judgments and decree passed by the courts below, directing delivery of possession of land comprised in Khasra No. 147 after removal of super structures, were not called for.

In the aforesaid discussion, while upholding the judgments passed by the courts below, direction of the court for delivery of possession and removal of super structures from Khasra No. 147 is set aside. There

will be a preliminary decree for possession by way of redemption. The plaintiff is granted two months' time to deposit the mortgage amount if not already deposited. The plaintiff shall be entitled to take possession of the land on finalisation of partition proceedings pending. Accordingly, the judgments and decree passed by the courts below are modified.

In view of the above, the regular second appeal is partly allowed. Pending application(s), if any, shall also stand disposed of, in terms thereof.

06.03.2019
mks

(ANIL KSHETARPAL)
JUDGE

Whether speaking/reasoned: Yes/No

Whether Reportable: Yes/No