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

1. RSA No.4503 of 2001 (O&M)
Date of decision : 11.02.2019

Matadeen (since deceased) through his LRs and others

...Appellants

Versus

Deen Dayal (since deceased) through his LRs and others

...Respondents

2. CR No.6505 of 2016 (O&M)
Date of decision : 11.02.2019

Jagdish @ Jagdish Parsad

...Petitioner

Versus

Competent Authority, Revenue Officer, Rewari and others

...Respondents

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

Present: Mr. M.L. Sarin, Sr. Advocate with
Mr. Ritesh Aggarwal, Advocate for the appellants.
(In RSA No.4503 of 2001)

Mr. Ashok Aggarwal, Sr. Advocate with
Mr. Rajinder Goyal, Advocate for the respondents.
(In RSA No.4503 of 2001)

Mr. Jai Singh Yadav, Advocate for the petitioner
(In CR No.6505 of 2016)

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**ANIL KSHETARPAL, J. (ORAL)**

This judgment shall dispose of RSA No.4503 of 2001 and CR No.6505 of 2016.

**RSA No.4503 of 2001 (O&M)**

Defendants-appellants are in the Regular Second Appeal against the concurrent findings of fact arrived at by both the Courts below, decreeing the suit filed by the plaintiff for declaration that he is owner in possession of the property with consequential relief of permanent injunction, in the alternative, the plaintiff has also prayed for decree for possession.

The question which requires consideration is "Whether a mortgagor can defeat the suit filed by the mortgagee for declaration that he is owner in possession of the property particularly when the previous suit filed by the mortgagor for possession by way of redemption of the mortgage had been dismissed and the aforesaid decree has become final?".

Undisputedly, the descendants of Khamanand had mortgaged with possession land measuring 115 bighas and 10 biswa vide mortgage deed dated 19.03.1931 for a sum of ₹4500/-. Out of the mortgage land, Dal Chand, predecessor-in-interest of the defendants redeemed half of the land mortgaged by paying ½ of the amount i.e. ₹2250/- on 18.05.1942. Thereafter, another piece of land was got redeemed by paying another sum of ₹500/- to Bhim Raj and Ram Swaroop on 15.06.1946. The consolidation of holdings took place in the village and in lieu of the land which had not been redeemed, land measuring 216 kanals and 14 marlas was allotted. The defendants or their predecessors filed a suit for possession by way of redemption of the mortgage of remaining area which had not been already redeemed. The aforesaid suit was dismissed by the Court on 08.12.1980 while returning a finding that the redemption of the mortgage has become barred by time. Appeal against the aforesaid judgment was dismissed on 21.11.1981. Thus, effort of the mortgagor to get the possession of the property by way of redemption failed. It is in these circumstances, the plaintiff-respondent filed a suit for declaration as noticed above.

The defendants contested the suit and pleaded that mortgage was between near relations and the plaintiff was minor and it is in fact they who are in possession of the property. In the alternative, the defendants also pleaded that they have perfected their title by way of adverse possession.

Learned trial Court, on appreciation of the evidence held that at the time of mortgage, the possession of the property was delivered and in view of the judgment inter parties dated 08.12.1980, right of possession by way of redemption of the property has since been lost, therefore, the plaintiff has to be declared owner of the property. The aforesaid judgment has been affirmed by the First Appellate Court.

This Court has heard both the learned Senior Counsels appearing for the parties and with their able assistance gone through the judgments passed by both the Courts below and the record.

Learned Senior Counsel appearing for the appellants submitted that the right to redeem the land may have been held to be barred by time but still the mortgagor has right to seek possession. He further submitted that in the previous suit, since there was no issue on the possession, hence, the aforesaid judgment passed in the previous suit would not operate as res judicata. He further submitted that the mortgagor has a right to pay the amount at any point of time before there is foreclosure and hence, the suit filed by the plaintiff could not be decreed.

Learned Senior Counsel for the appellants has made an attempt to distinguish between Sections 60 and 62 of the Transfer of Property Act, 1882 (hereinafter to be referred as "the Act of 1882") which deals with the right of mortgagor to redeem and with the right of usufructuary mortgagor to recover possession. Sections 60 and 62 of the Act of 1882, are extracted as under:-

> *"**60. Right of mortgagor to redeem -** At any time after the principal money has become due, the mortgagor has a right, on payment or tender, at a proper time and place, of the mortgage-money, to require the mortgagee (a) to deliver to the mortgagor the mortgage-deed and all documents relating to the mortgaged property which are in the possession or power of the mortgagee, (b) where the mortgagee is in possession of the mortgaged property, to deliver possession thereof to the mortgagor, and (c) at the cost of the mortgagor either to re-transfer the mortgaged property to him or to such third person as he may direct, or to execute and (where the mortgage has been effected by a registered instrument) to have registered an acknowledgment in writing that any right in derogation of his interest transferred to the mortgagee has been extinguished:*
>
> *Provided that the right conferred by this section has not been extinguished by the act of the parties or by decree of a court.*

*The right conferred by this section is called a right to redeem and a suit to enforce it is called a suit for redemption.*

*Nothing in this section shall be deemed to render invalid any provision to the effect that, if the time fixed for payment of the principal money has been allowed to pass or no such time has been fixed, the mortgagee shall be entitled to reasonable notice before payment or tender of such money.*

***Redemption of portion of mortgaged property-*** *Nothing in this section shall entitle a person interested in a share only of the mortgaged property to redeem his own share only, on payment of a proportionate part of the amount remaining due on the mortgage, except only where a mortgagee, or, if there are more mortgagees than one, all such mortgagees, has or have acquired, in whole or in part, the share of a mortgagor.*

***62. Right of usufructuary mortgagor to recover possession*** *- In the case of a usufructuary mortgage, the mortgagor has a right to recover possession of the property together with the mortgage-deed and all documents relating to the mortgaged property which are in the possession or power of the mortgagee,-*

*(a) where the mortgagee is authorized to pay himself the mortgage-money from the rents and profits of the property,-when such money is paid;*

*(b) where the mortgagee is authorized to pay himself from such rents and profits or any part thereof a part only of the mortgage-money,-when the term if any, prescribed for the payment of the mortgage-money has expired and the mortgagor pays or tenders to the mortgagee [the mortgage-money or the balance*

*thereof] or deposits it in court as hereinafter provided."*

Learned counsel has relied upon a judgment passed by Hon'ble the Supreme Court in the case of ***Singh Ram (dead) through LRs Vs. Sheo Ram and others, (2014) 9 SCC 185***, to contend that once a mortgagee always a mortgagee and the suit for foreclosure is not maintainable at the behest of usufructuary mortgagee. He has also relied upon another Single Bench Judgment of this Court in the case of ***Samadh Baba Narain Dass Ba-Ihaman Swami Ram Tirath Vs. Surta and others, AIR 2002 Punjab and Haryana 108***.

As regards reliance of learned Senior Counsel on Sections 60 and 62 of the Act of 1882, it may be noticed that Section 60 of the Act of 1882, deals with right of mortgagor to redeem, however, Section 62 of the Act of 1882 specifically deals with the right of usufructuary mortgagor to recover possession. The basic distinction between these two Sections is that Section 60 deals with all other type of mortgage whereas Section 62 deals with rights of a usufructuary mortgagor to recover possession. However, Section 62 of the Act of 1882 does not provide that if a mortgagor had already filed a suit for redemption of mortgage and lost in the Civil Court while praying for possession by way of redemption, still, the usufructuary mortgagor would have right to file a subsequent suit for possession. The judgment passed by Hon'ble the Supreme Court in the case of Singh Ram (Supra) is not dealing with a situation when mortgagor had already lost its right to redeem through Court decree. The judgment passed by the Court in the previous inter parties suit with respect to the property in dispute has become final and, therefore, operate as res judicata.

Second argument of learned Senior Counsel also does not have substance because in the previous suit, the defendants-appellants had filed a suit for possession by way of redemption of the mortgage. The aforesaid suit was dismissed. Even if no issue on the question that who is in possession of the property was framed, still, once defendants/appellants were not granted any relief of possession, in view of the explanation to Section 11 of the Code of Civil Procedure, such relief would be deemed to have been declined. In such circumstances, the defendants cannot be permitted to contend that the possession is with them.

Last argument of the learned counsel is that mortgagor has a right to repay the amount at any point of time. No doubt in a case of usufructuary mortgage, mortgagor had a right to pay but that amount is payable only within the time prescribed under law and particularly when mortgagor has not lost his right to redeem the property and that also because of a decree passed by the Court.

In view thereof, question of law which has been framed earlier is answered against the appellants.

On 19.02.2004, this Regular Second Appeal was admitted with reference to the substantial questions of law detailed in para 33 of the grounds of appeal, which are extracted as under:-

> *"(i) Whether the judgment and decrees of the Courts below are without jurisdiction, and contrary to the law and the evidence on record?*
>
> *(ii) Whether the suit for declaration with the consequential reliefs was maintainable, at the instance of*

*mortgagor in respect of usufructuary mortgage where rent/income of land was taken in lieu of interest?*

*(iii) Whether the Courts below have acted contrary to the Usurious Loans Act, 1918 as amended by the Punjab Relief of Indebtedness Act, 1934 and the rule of Damdupat, in decreeing the suit of the plaintiff-respondent?*

*(iv) Whether the plaintiff-mortgagor has lost his right to possession of the suit land in view of the statutory and case law regarding mortgages of the type involved in the present suit?*

*(v) Whether the Lower Appellate Court acted with manifest illegality and without jurisdiction in allowing the plaintiff-respondent to amend the plaint to add the alternative prayer of possession of the suit land?*

*(vi) Whether the terms of the mortgage were a clog on the equity of redemption, and whether the Courts ought to have required the plaintiff-mortgagor to follow the procedure of foreclosure?*

*(vii) Whether the question of possession has become resjudicata, when in the earlier suit this was never a matter substantially in issue?*

*(viii) Whether the suit was maintainable in view of the fact the plaintiff-respondent was never in possession of the suit land, and limitation to recover possession had run out?*

*(ix) Whether the findings of the Courts below rejecting the defendant-appellants case that they had become owners by adverse possession, was manifestly illegal and perverse?*

*(x) Whether the Courts have totally misdirected themselves, and totally misapplied the law in reaching findings under issues no.1 to 6, adverse to the defendants?"*

It may be noted that learned Senior Counsel appearing for the appellants during the course of arguments has neither referred to the aforesaid substantial questions of law nor made any submissions based thereon.

Accordingly, the present Regular Second Appeal filed by the defendants-appellants is dismissed.

**CR No.6505 of 2016 (O&M)**

In this revision petition, the order passed by the Reference Court under The Land Acquisition Act, 1894, adjourning the case sine die has been challenged.

The reference was adjourned sine die on the ground that the dispute between the parties is pending in this Court. Once the appeal has been decided, this Court has no doubt that the Court would immediately proceed to decide the reference.

In view of what has been observed above, the present revision petition is disposed of.

All the pending miscellaneous applications, if any, are disposed of, in view of the abovesaid judgment.

**11.02.2019** **(ANIL KSHETARPAL)**
*Pawan* **JUDGE**

**Whether speaking/reasoned:- Yes/No**

**Whether reportable:- Yes/No**