

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

RSA-485-2013(O&M)

Date of decision:-6.2.2019

Yash Pal and others

...Appellants

Versus

Urmila Devi and others

...Respondents

CORAM: HON'BLE MR.JUSTICE H.S.MADAAN

Present: Mr.Arvind Kashyap, Advocate
for the appellants.

Mr.R.S. Chauhan, Advocate
for the respondent.

H.S. MADAAN, J.

Briefly stated, facts of the case are that plaintiffs Yashpal, Om Parkash, Dharam Pal, Darshan Lal – sons, Raj Kumari, Leela Rani, Satish Kumari – daughters as well as Suhagwanti – widow of Sh.Munshi Ram had brought a suit against the defendants – Baldev Raj, Subash Chander, Dalip Kumar – sons of Jagan Nath as well as Smt.Urmila Devi – widow of Sh.Chajju Ram craving for issuance of a decree for permanent injunction restraining the defendants and persons claiming under them to interfere in possession of the plaintiffs over land bearing Khata No.2, Khatauni No.13, Killa No.10R/7(0-4), 13/2/2, (1-15), 14/1, 9(0-6) kitats 3

measuring 2 kanals 15 marlas and Khatauni No.21, Killa No.10R/13/2/1(0-10), situated in the revenue estate of Sultanpur, Tehsil Pathankot as per the jamabandi for the year 1994-95.

According to the case of the plaintiffs, the defendants were recorded as owners of the suit land, whereas the land was in actual possession of Om Parkash – plaintiff No.2 as a mortgagee; that Om Parkash was not liable to pay any rent and it was also reflected in column No.9 of the jamabandi for the year 1994-95; that the mortgage in favour of the plaintiff Om Parkash had not been redeemed by the defendants; that out of this area, plaintiff Om Parkash had his abadi in killa No.14/1 measuring 16 marlas and a Haveli over a area of 5 marlas in killa No.13/2/2, remaining area is being cultivated; that 10 marlas was sold by defendant No.4 – Smt.Urmila Devi to Sh. Munshi Ram, predecessor-in-interest of the plaintiffs and possession of the sold area was delivered to the vendee, who had constructed shops over the area besides installing a machine in it; that Sh.Munshi Ram was in possession of this property during his life time, doing business there and after his death, plaintiffs stepped into his shoes and they are also doing business in that property; that defendants No.1 to 3 intended to raise construction in the area and to dispossess the plaintiffs; that the plaintiffs had filed a suit for grant of permanent injunction with regard to killa No.10R/132/1 on 29.7.2007 wherein the parties were directed to

maintain status quo; that when the defendants threatened to dispossess the plaintiffs forcibly, feeling aggrieved the plaintiffs had brought a suit for grant of permanent injunction in the Court at Pathankot.

On getting notice, defendants No.1 to 3 appeared and filed written statement raising preliminary objections that the plaintiffs had not approached the Court with clean hands since the mortgage had already been redeemed and the original mortgage deed had been handed over to the defendant No.4 by the predecessor-in-interest of the plaintiff Sh.Munshi Ram, who had also executed a receipt for Rs.2,000/-; since mutation with regard to redemption of mortgage was not entered and only a kacha receipt was there; nevertheless if it is not proved that mortgage had been redeemed even then defendant No.4 is ready to deposit Rs.2,000/- for redemption of the mortgage and as such entitled to recover possession of the remaining land out of the suit land, which was in possession of the plaintiffs where they had constructed residential house marked ABCD; that the defendant No.1 had filed a counter-claim against the plaintiffs to get back the possession of the suit land bounded as ABCD after removal of MALBA from the plaintiffs, rest of the land detailed in the mortgage deed is already in possession of Urmila, where she has got her Haveli on northern side. On merits, the defendants averred that mortgage was for a period of 5 years only,

however, Sh.Munshi Ram had redeemed the land on 8.4.1988 by executing the receipt in presence of Sohan Lal – Sarpanch of Gram Panchayat, Sultanpur; that plaintiff No.2 had raised illegal construction of house in Killa No.14/1 measuring 18 kanals; that the answering defendants denied having threatened the plaintiffs but according to them plaintiffs were changing the roof of *chakki* and threatening to throw MALBA on the joint land of Urmila to which they had no right.

In the written statement filed on behalf of defendant No.4, she had taken up a plea that mortgage had already been redeemed and original mortgage deed was handed over to the defendant No.4 by predecessor-in-interest of the plaintiffs Sh.Munshi Ram, who had executed a receipt for Rs.2,000/-; that mutation with regard to redemption of mortgage was not entered; that defendant No.4 had also filed a counter-claim submitting that defendant No.4 being owner of the suit land bearing Khewat No.2, Khatauni No.10, Khasra No.10R/7/134/2/2, 14/1, (2-16) situated at village Sultanpur, Tehsil Pathankot to the extent of $\frac{1}{2}$ share of mortgage; the suit land of counter claim to the extent of $\frac{1}{2}$ share in favour of Munshi Ram vide mortgage deed dated 28.6.1977; that the mortgage was for a period of 5 years and mortgage amount was Rs.2,000/-; that the possession of 1 kanal $21\frac{1}{2}$ marlas was given to the plaintiff at the time of mortgage deed; that Munshi Ram had received Rs.2,000/-

from Urmila on 8.4.1988 and redeemed the mortgage and later on even given the original mortgage deed to Urmila Devi and also handed over the possession of the land bearing 10R 7 and 13/2/2 to the counter-claimant; that the construction raised over portion ABCD is liable to be removed and vacant possession handed over to the counter claimant after redemption of mortgage; that the counter-claimant had requested the respondent to accept Rs.2,000/- and redeem the mortgage and formally hand over the vacant possession of the suit land after removal of the MALBA to the counter claimant but to no effect; hence the counter claim was filed.

The plaintiff had filed replication to the written statement filed by defendants No.1 to 3 controverting the allegations in the written statement whereas reiterating the averments in the plaint. Replication-cum-written statement to the counter claim filed by defendant No.4 was also filed on behalf of the plaintiffs contending that the mortgage can only be redeemed by making an endorsement at the reverse of the mortgage deed and this endorsement does not require registration and the only other mode is by execution of a regular deed of redemption and such deed of redemption requires compulsory registration since the document extinguishes a right in immovable property and it appears that the defendants have fabricated the alleged receipt and the equity of redemption has been lost by efflux of time; that the mortgage is not liable to be redeemed

without payment of the improvements as claimed.

On the pleadings of the parties, following issues were framed:

1. Whether the plaintiffs are in possession of the suit land as mortgagee? OPP.

1-A Whether the plaintiffs have made the improvement in the mortgage property? OPP.

2. Whether the plaintiffs are entitled to relief of permanent injunction as prayed for?OPP.

3. Whether the defendants are entitled for possession by way of redemption of suit land after payment of Rs.2,000/- as mortgage money as alleged in the counter claim? OPD.

4. Relief.

In order to prove their case, the plaintiffs had examined Sh.Raj Kumar, Advocate as PW1. The plaintiff Yash Pal had himself appeared as PW2.

On the other hand, the defendants examined Parbhat Chander as DW1, Urmila Devi as DW2, Gurdeep Kumar, Registration Clerk as DW3 and Sh.D.K. Mahajan, Advocate as DW4.

After hearing the learned counsel for the parties, the trial Court decided issues No.1 and 2 partly in favour of the plaintiffs and against the defendants, issue No.1-A against the plaintiffs and in

favour of the defendants, issue No.3 against the counter claimant and in favour of the plaintiffs. Resultantly, the suit of the plaintiffs was decreed partly only to the extent of 0 kanal 10 marlas with no order as to costs, whereas the counter claim filed by defendant No.4 was dismissed.

Feeling aggrieved by the said judgment and decree, the defendant No.4 – Smt.Urmila Devi had filed an appeal in the Court of District Judge, Gurdaspur wherein cross-objections were filed by the plaintiffs, which were assigned to Additional District Judge (Ad hoc), Fast Track Court, Gurdaspur, who vide judgment dated 8.5.2012 allowed the said appeal. Resultantly, cross-objections and suit of the plaintiffs were dismissed. The counter-claim was decreed and the defendant No.4 was found entitled to joint possession of one-half share of part-1 land measuring 2 kanals 15 marlas subject to payment of mortgage money of Rs.2,000/- to respondents/plaintiffs or to be deposited with Court within two months from the date of preparation of copy of judgment. The said judgment and decree left the plaintiffs aggrieved and they have filed the present regular second appeal before this Court, notice of which was issued to the respondents.

I have heard learned counsel for the parties besides going through the record and I do not find any merit in the appeal.

Even as per own case of the plaintiffs, the defendants

being owners of the suit land had mortgaged the same with possession with the plaintiffs though 10 marlas of land denoted by the First Appellate Court as Part-II was sold by Smt.Urmila Devi to Sh.Munshi Ram, in that way the dispute is with regard to remaining 2 kanals 15 marlas of land denoted as Part-I by the First Appellate Court. According to the case of the defendants, the mortgage had been redeemed by payment of mortgage amount of Rs.2,000/-. The original mortgage deed was handed over to defendant No.4 by predecessor-in-interest of the plaintiff Sh.Munshi Ram, who had executed a receipt for Rs.2,000/-. However, such version of the defendants was not accepted by the First Appellate Court for the reason that mutation with regard to redemption of mortgage was not entered and only a kacha receipt had been issued by Sh.Munshi Ram. Thus, it is to be taken that the land was still under mortgage with the plaintiffs and they have been in possession thereof as mortgagees. A mortgagor has got a right to redeem the mortgage on payment of mortgage money and get the possession back and defendant No.4 co-mortgagor had taken up a plea that she is ready to deposit the mortgage money of Rs.2,000/- for redemption of mortgage, in that way to recover possession of 2 kanals 15 marlas of land. The First Appellate Court by cogent and convincing reasoning has come to the conclusion that appellant/defendant No.4 Urmila Devi and respondents/defendants No.1 to 3 have admitted factum of mortgage

though clarified that appellant/defendant No.4 alone had mortgaged her one-half share in the said Part 1 land measuring 2 kanals 15 marlas, whereas the respondents/defendants No.1 to 3 were given 1 kanal 15 marlas of the land comprised in killa No.13/2/2, rectangle No.1. The First Appellate Court in para No.21 of the judgment has observed that appellant/defendant No.4 had raised averment that she had mortgaged her one-half share in Part1 land measuring 2 kanals 15 marlas, although in the mortgage deed, the area has been given as 2 kanals 5 marlas. The First Appellate Court has observed that despite the fact that appellant/defendant No.4 had brought on record mortgage deed Ex.D1 purported to have been executed by her in favour of Munshi Ram, predecessor-in-interest of the plaintiffs and she had examined Gurdeep Kumar, Head Registration Clerk as DW3, who had brought the summoned record showing that mortgage deed Ex.D1 was registered in the office of Sub Registrar. DW4 Sh.D.K.Mahajan, Advocate had deposed regarding mortgage deed Ex.D1 having been scribed by his father Sh.Faqir Chand Mahajan (since dead). But then the First Appellate Court had observed that appellant/defendant No.4 failed to prove receipt Ex.D2 with regard to redemption and such receipt does not prove the redemption of mortgage and consequently establish that defendant No.4 had come in possession of suit land as owner after redemption. Such receipt was inadmissible in evidence for non-registration in light of Section

17(1)(c) and (2) of the Registration Act, 1908. It has also been noticed by the First Appellate Court that for the reason of purchase of 10 marlas of land from appellant/defendant No.4, plaintiffs have become co-sharers in the entire suit land measuring 3 kanals 5 marlas. The land being still joint, therefore, appellant/defendant No.4 could not get the relief of possession by removal of malba from other co-sharer though she was entitled for joint possession of one-half share of Part-1 of the suit land after redemption of mortgage.

In support of his contention that the counter-claim filed is not barred by limitation learned counsel for the respondents has referred to authority **Singh Ram(D) through L.Rs Versus Sheo Ram and others, 2014(3) PLJ 96** by Hon'ble Supreme Court wherein it was observed that in case of usufructuary mortgage right to recovery of possession by redemption commences when mortgage money is paid out of rents and profits or partly out of rents and profits and partly by payment or deposit by mortgagor as provided under Section 62 of T.P. Act and until then limitation does not start for the purpose of Article 61 of the Schedule to the Limitation Act. It was further observed that in case of usufructuary mortgage, mere expiry of a period of 30 years from the date of creation of mortgage does not extinguish the right of mortgagor under Section 62 of the T.P. Act.

The mortgage in this case was created by execution of mortgage deed on 28.4.1977. Therefore, the counter claim is

certainly not barred by limitation.

No other point was pressed or put forward on behalf of the appellants.

The judgment and decree passed by First Appellate Court is well reasoned, based upon proper appraisal and appreciation of evidence and correct interpretation of law. There is no illegality or infirmity therein.

Finding no merit in the present appeal, the same stands dismissed with costs.

6.2.2019
Brij

(H.S.MADAAN)
JUDGE

Whether reasoned/speaking: Yes/No

Whether reportable : Yes/No