IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

203 **RSA No.1979 of 1990**
Date of Decision: 14.09.2022

Hira Lal @ Hari Lal ....Appellant

VERSUS

Girraj Kishore ....Respondent

CORAM : HON'BLE MRS. JUSTICE ALKA SARIN

Present : Mr. Dhruv Mittal, Advocate for the appellant.

None for the respondent (proceeded against *ex parte* vide order dated 19.07.1991).

ALKA SARIN, J. (Oral)

The present regular second appeal has been filed by the defendant-appellant challenging the judgment and decree dated 15.06.1990 passed by the lower Appellate Court reversing the judgment and decree dated 30.01.1987 passed by the Trial Court. The Trial Court had dismissed the suit of the plaintiff-appellant while the lower Appellate Court decreed the same.

The brief facts relevant to the present *lis* are that the plaintiff-respondent filed a suit for declaration to the effect that the plaintiff-respondent was owner and in possession of the suit land. It was further averred that the plaintiff-respondent is mortgagee in possession of the land measuring 34 *kanals* situated in the revenue estate of village Chhainsa as described in para 1 of the plaint. It was further averred that forefathers of the defendant-appellant created the mortgage in favour of Mishri Lal son of Har Narain, who was the forefather of the plaintiff-respondent, and the suit land has been in continuous possession of the plaintiff-respondent for the last more than 100 years as mortgagee. It was hence pleaded that since the plaintiff-respondent had been in possession of the land as mortgagee for the last over 100 years and the same has not been redeemed, he has become owner of the suit land.

The suit was contested by the defendant-appellant on the ground that the plaintiff-respondent had never been in possession of the suit land and that the suit was barred by limitation and that the defendant-appellant had become owner of the suit land by way of prescription and adverse possession. Replication was filed by the plaintiff-respondent.

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

1. Whether the plaintiff has become owner of the suit land by way of prescription ? OPP
2. Whether plaintiff has no *locus standi* to file the present suit ? OPD
3. Whether the plaintiff is estopped from bringing the present suit ? OPD
4. Whether the suit is barred by time ? OPD
5. Whether the defendants have become owners as alleged in preliminary objection No.5 of the written statement ? OPD
6. Relief.

The Trial Court, vide judgment and decree dated 30.01.1987, dismissed the suit of the plaintiff-respondent on the ground that he had failed to prove that he became owner of the suit land by way of prescription.

Aggrieved by the said judgment and decree, the plaintiff-respondent preferred an appeal before the lower Appellate Court which was allowed vide judgment and decree dated 15.06.1990 holding that since more than 75 years have elapsed after the mortgage was created with possession and that since the land has not been redeemed, therefore, the plaintiff-respondent has become owner of the suit land by way of prescription. Aggrieved by the said judgment and decree, the present appeal has been preferred.

The respondent in the present case was proceeded against *ex parte* vide order dated 19.07.1991.

Learned counsel for the defendant-appellant has relied upon judgment of Hon'ble Supreme Court in case of **Singh Ram (D) through LRs vs. Sheo Ram & Ors. [2014 (4) RCR (Civil) 179]** to contend that there is no limitation in case of usufructuary mortgage and 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 Transfer of Property Act, 1882.

Heard.

In the present case, the finding has been recorded by the lower Appellate Court that the property was usufructuary mortgaged with possession and that the plaintiff-respondent had become owner of the suit property by efflux of time.

Hon'ble Supreme Court in case of **Singh Ram** *(supra)* has held as under :

"12. xx xx xx xx

A perusal of above provisions shows that Article 61 refers to right to redeem or recover possession. While right of mortgagor to redeem is dealt with under Section 60 of the Transfer of Property Act, the right of usufructuary mortgagor to recover possession is specially dealt with under Section 62. Section 62 is applicable only to usufructuary mortgages and not to any other mortgage. The said right of usufructuary mortgagor though styled as right to recover possession is for all purposes, right to redeem and to recover possession. Thus, while in case of any other mortgage, right to redeem is covered under Section 60, in case of usufructuary mortgage, right to recover possession is dealt with under Section 62 and commences on payment of mortgage money out of the usufructs or partly out of the usufructs and partly on payment or deposit by the mortgagor. This distinction in a usufructuary mortgage and any other mortgage is clearly borne out from provisions of Sections 58, 60 and 62 of the Transfer of Property Act read with Article 61 of the Schedule to the Limitation Act. Usufructuary mortgage cannot be treated at par with any other mortgage, as doing so will defeat the scheme of Section 62 of the Transfer of Property Act and the equity. This right of the usufructuary mortgagor is not only an equitable right, it *has statutory recognition under Section 62 of the Transfer of Property Act. There is no principle of law on which this right can be defeated. Any contrary view, which does not take into account the special right of usufructuary mortgagor under Section 62 of the Transfer of Property Act, has to be held to be erroneous on this ground or has to be limited to a mortgage other than a usufructuary mortgage. Accordingly, we uphold the view taken by the Full Bench that in case of usufructuary mortgage, mere expiry of a period of 30 years from the date of creation of the mortgage does not extinguish the right of the mortgagor under Section 62 of the Transfer of Property Act."*

It was further held as under :

"15. We, thus, hold that special right of usufructuary mortgagor under Section 62 of the Transfer of Property Act to recover possession commences in the manner specified therein, i.e., 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. Until then, limitation does not start for purposes of Article 61 of the Schedule to the Limitation Act. A usufructuary mortgagee is not entitled to file a suit for declaration that he had become an owner merely on the expiry of 30

years from the date of the mortgage. We answer the question accordingly."

In the present case the factum of the mortgage is not in dispute. The lower Appellate Court has categorically returned the finding that the mortgage was with possession and the mortgagees i.e. the plaintiff-respondent was in possession of the suit property. In view of the finding, the present case would be squarely covered by the judgment of Hon'ble Supreme Court in case of **Singh Ram** *(supra)*.

In view of the above, the present appeal is allowed. The judgment and decree passed by the lower Appellate Court is set aside and the suit of the plaintiff-respondent for declaration is accordingly dismissed. Pending applications, if any, also stand disposed off.

(ALKA SARIN)
JUDGE

14.09.2022
jk

NOTE : Whether speaking/non-speaking: Speaking
Whether reportable: YES/NO