In the High Court of Punjab and Haryana, at Chandigarh

Regular Second Appeal No. 4300 of 2019 (O&M)

Date of Decision: 20.04.2022

Gurtej Singh and Others

... Appellant(s)

Versus

Paramjit Singh and Others

... Respondent(s)

CORAM: Hon'ble Mr. Justice Anil Kshetarpal.

Present: Mr. J.S.Brar, Advocate
for the appellant(s).

Mr. Rajesh K. Sharma, Advocate
for the respondents.

Anil Kshetarpal, J.

1. While assailing the concurrent findings of fact, arrived at by both the Courts below, while allowing an application for preparation of the final decree, the appellants have filed the present regular second appeal.

2. Some facts are required to be noticed. A preliminary decree for redemption of the property, with respect to usufructuary mortgage, was passed in favour of the respondents on 24.12.1968. It was directed that Lal Singh shall pay by 22.03.1969 a sum of ₹1,185.50 to Kaka Singh with respect to the land measuring 10 kanals and 17 marlas, whereas Hari Singh shall pay an amount of ₹1,765.50 to Bhajan Singh. The amount was deposited on 19.03.1969. Two first appeals, filed by Lal Singh and Kaka Singh, were dismissed on 11.01.1974. Two regular second appeals, filed in the High Court, were also dismissed on 02.03.1983. The suit filed by the mortgagees for foreclosure was also dismissed on 02.06.2012 which was

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upheld on 06.07.2013 in the first appeal. An application for passing of final decree was filed by the legal representatives of the original mortgagors on 05.03.2013, which has been allowed on 28.02.2018. The first appeal, filed against the order directing passing of the final decree, has also been dismissed on 10.07.2019.

3. Heard the learned counsel representing the parties, at length and with their able assistance, perused the paper-book and the record of the Courts below, which was requisitioned.

4. The learned counsel representing the appellants, while relying upon the judgment passed by the Supreme Court ***in K. Parameswaran Pillai (Dead) v. K.Sumathi alias Jesis Jessie Jacquiline and Another (1993) 4 SCC 431***, contends that Article 137 of the Schedule to the Limitation Act, 1963 (hereinafter referred to as "the 1963 Act"), applies to this matter and since the amount was deposited on 19.03.1969, the limitation for filing an application would begin to run and after the expiry of three years, the mortgagor has no right to apply for a final decree. He also relies upon the judgment in ***Baldev Singh v. Kishan 1991 PLJ 692, Ram Lal v. Girdhari 2010 (4) CCC 204*** and ***AIR 2007 Kerala 44***.

5. Per contra, the learned counsel representing the respondents, while relying upon ***Achaldas Durgaji Oswal (Dead) Through LRS v. Ramvilas Gangabisan Heda (Dead) Through LRS. and Others AIR 2003 SC 1017***, contends that the mortgagee in a usufructuary mortgage has no right to file an application either for foreclosure or for sale. Therefore, the application is not barred by the period of limitation. He submits that these aspects have been clarified by the Supreme Court in ***Achaldas Durgaji Oswal's case*** *(supra)*.

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6. Keeping in view the aforesaid facts, the only issue which arises for consideration is as to whether the application filed by the mortgagor of a usufructuary mortgage is within the prescribed period or not. This Court has carefully read the judgments relied upon. In ***K.Parameswaran Pillai's case*** *(supra)*, undoubtedly the Court observed that no limitation begins to run until the deposit is made. However, the aforesaid position has been clarified in an elaborate manner by the Supreme Court in the subsequent judgment in ***Achaldas Durgaji Oswal's case*** *(supra)*. In para 21 and 25 of the aforesaid judgment, the Supreme Court held that Order XXXIV Rule 7 and 8 CPC do not confer any right to the usufructuary mortgagee to apply for a final decree which is conferred on the mortgagee of other kinds of mortgages. The Court further went on to observe that in fact, Order XXXIV Rule 8(3)(b) CPC expressly excludes the right of the usufructuary mortgagee to apply for foreclosure or sale or redemption. While examining the observation made in ***K.Parameswaran Pillai's case*** *(supra)*, the Supreme Court, in para 43, has observed that the passing observations made in the said case, without any argument and without any precedent, cannot be treated as declaration of law in terms of Article 141 of the Constitution of India. In para 36, the Supreme Court held that Article 137 of the Schedule to the 1963 Act will not apply. Paras 36 to 44 of the judgment in ***Achaldas Durgaji Oswal's case*** *(supra)* is extracted as under:-

> *"36. We are, therefore, of the opinion that although by reason of preliminary decree in the suit for redemption of usufructuary mortgage, the Court may fix the time for payment of the amount declared due but default in depositing such payment would not*

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debar him from a right to redeem the mortgaged property.

37. In the aforementioned backdrop the decisions of this Court relied upon by Mr. Bobde are required to be considered.

38. In K. Parameswaran Pillai's case (supra) whereupon Mr. Bobde has placed strong reliance, a suit was filed by successors-in-interest of the mortgagee of the usufructuary mortgage. Consequent to suborgation, the appellant became a mere puisne mortgagee and the respondent therein after the preliminary decree transposed herself to be mortgagor. The direction of the court in the preliminary decree was, inter alia, as under:-

> *"and it is hereby further ordered and decreed that, in default of payment as aforesaid, the defendants may apply to the court for a final decree for the sale of the mortgaged property; and on such application being made, the mortgaged property or a sufficient part thereof shall be directed to be sold; and for the purpose of such sale the defendant shall produce before the court or such officer as it appoints all documents in his possession if power relating to the mortgaged property."*

39. In the a aforementioned situation, a two-Judge Bench of this Court observed as under:-

> *"In the case of usufructuary mortgage clause (a) of sub-rule (3) of Rule 8 expressly excludes the right to the mortgagee to apply for foreclosure or sale or redemption. Necessary consequence is that so long as the*

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right subsists though there is delay in compliance of the condition imposed in the preliminary decree, the right of redemption to the mortgagor is not lost. It will be barred only on expiry of the period of limitation prescribed under the Limitation Act. The reasons are obvious. Order 34 Rule 8(3) does not give any right to the mortgagee but the right is given only to the mortgagor, to seek redemption of the usufructuary mortgage in a decree under Rule 8(3) of Order 34. The mortgagee, having been in possession and enjoyment of the hypotheca is not disabled by the preliminary decree. On the other hand the liability continues to subsist against the mortgagor. Therefore, it is up to the mortgagor to redeem the mortgage. Till then his liability under the mortgage continues to run on the estate. It is, therefore, clear that the limitation to file an application under Order 34 Rule 8(1) to pass a final decree for redemption, other than the preliminary decree for redemption of ususfructuary mortgage, starts running and continues to run its course from the date of expiry of the period fixed in the preliminary decree, unless it is stayed or suspended or the time prescribed in the preliminary decree is extended by an order of the court. In its absence on expiry of the limitation of three years from the date fixed in the preliminary decree expired under Article 137 of the

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Schedule to Limitation Act, 1963 (Article 181 of Schedule I of Old Act), the plaintiff is debarred to enforce the right to pass the final decree. But in the case of preliminary decree for redemption of usufructuary mortgage no limitation begins to run until deposit is made though there is a conditional preliminary decree and default was committed by the mortgagor for compliance thereof. " (Emphasis supplied)

40. This Court, thus, made a distinction on the applicability of limitation as regard initiation of a proceeding for passing a final decree between other types of mortgages and usufructuary mortgage. This Court is no uncertain terms held:-

"The proceeding in the preliminary decree does not get terminated by dismissal of LA. No 58 of 1972, on June 26, 1975 or for non-prosecution, Till date of passing the final decree and its execution or till the remedy is barred by limitation under Article 137 of the Schedule to the Limitation Act, 1963 the court has power and jurisdiction to entertain the application to pass the final decree. At any time before the remedy is barred, it is open to the plaintiff to deposit the redemption money under the preliminary decree. The dismissal of the earlier application or non-prosecution, therefore does not per se bar the right of the plaintiff. But if remedy to enforce preliminary decree for the redemption is barred

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by the limitation, thereafter the right remains unenforceable. The deposit, therefore, is non est and the court cannot proceed to pass final decree as the remedy is lost. Therefore, the mere dismissal of the first application for non- prosecution and withdrawal of the redemption money deposited thereunder per se creates no bar to entertain second application. Equally instead of availing the remedy of depositing the redemption amount in the pending proceedings under Rule 8(1) of Order 34, the respondent instituted an independent suit for redemption. Per force, though it does not operate as bar to maintain the application to pass final decree, court cannot proceed further with the application. Otherwise conflicting decisions would arise giving rise to multiplicity of proceedings. The court would stop to proceed further in the matter. In view of the finding that the application to pass final decree is barred by limitation, the trial court has no jurisdiction to proceed with the application under Rule 8(3) of Order 34 and to pass final decree. Accordingly, though for different reasons, the decree of the High Court, in the second appeal, is legal and does not warrant interference. The appeal is dismissed but without costs."

41. The aforementioned decision was, therefore, rendered in the facts of that case and is distinguishable.

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42. In Mohd. Abdul Khader Mohd. Kastim's case (supra), this Court was concerned with the question as to whether in absence of any time having been fixed by the court passing the preliminary decree directing the appellant to deposit the redemption money, the decree passed in terms of Order XXXIV could be called a preliminary decree at all. This Court examined the preliminary decree and held that the obligation and counter obligation made therein are separate in, nature and by reason thereof the appellant was required to deposit the redemption money of Rs. 18,000 within the statutory period of six months provided under Order XXXIV Rule 7 C.P.C. This Court in the facts of that case had not and could not have laid down a law to the effect that the deposit must be made within a period of six months as otherwise the application for passing a final decree was to become barred by limitation.

43. In the said case, the contentions raised herein had not been raised obviously because no such question arose for consideration and any passing observation made therein without any argument and without any precedent cannot be treated to be a declaration of law in terms of Article 141 of the Constitution of India.

44. Any observation made therein contrary to what we have held above cannot be said to be good law and is hereby overruled".

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7. The other judgments of the High Courts, relied upon by the learned counsel representing the appellants, have been passed relying upon the judgment of the Supreme Court in ***K.Parameswaran Pillai's case*** *(supra)* with respect to the applicability of Article137 of the Schedule to the 1963 Act. Keeping in view the subsequent judgment in ***Achaldas Durgaji Oswal's case*** *(supra)*, the position stands clarified.

8. In the considered opinion of this Court, the law expounded in the judgment in ***Achaldas Durgaji Oswal's case*** *(supra)* is a complete answer to the argument of the learned counsel representing the appellants.

9. Furthermore, a larger Bench of the Supreme Court in ***Singh Ram (Dead) through LRs v. Sheo Ram and Others (2014) 9 SCC 185***, while examining the question of limitation for applying redemption of the usufructuary mortgage, in case there is no period prescribed for redemption, has held as under:

> *"22. We, thus, hold that special right of usufructuary mortgagor under Section 62 of the TP 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 the mortgagor. Until then, limitation does not start for the 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"*.

10. In view of the aforesaid discussion, finding no merit, the appeal is dismissed.

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11. The miscellaneous application(s) pending, if any, shall stand disposed of.

(Anil Kshetarpal)
Judge

April 20, 2022
"DK"

Whether speaking/reasoned :Yes/No
Whether reportable : Yes/No

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