IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

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RSA No.1595 of 1989 (O&M)
Reserved on : 19.12.2022
Date of decision : 04.01.2023

Dharu Ram ....Appellant

Vs.

Ladha Ram and Ors. ....Respondents

CORAM : HON'BLE MRS. JUSTICE ALKA SARIN

Present : Mr. Ashwani Kumar Chopra, Sr. Advocate with

Mr. Brahmjot Singh Nahar, Advocate for the appellant.

Mr. Umesh Aggarwal, Advocate for the respondent No.1.

ALKA SARIN, J.

The present appeal has been preferred by the defendant-appellant against the concurrent findings of both Courts below decreeing the suit for declaration filed by the plaintiff-respondent No.1.

The brief facts relevant to the present *lis* are that the present suit was filed by the plaintiff-respondent No.1 averring therein that the predecessors-in-interest of the plaintiff-respondent No.1 and the defendants were originally residents of Tehsil Dera Gazi Khan, which now forms a part of Pakistan, and that they migrated to India in 1947. It is the case set up by the plaintiff-respondent No.1 that Topan Ram predecessor-in-interest of the defendants had mortgaged with possession the land measuring 46 Kanals and 8 Marlas being 5/8th share in Village Yaru, Tehsil Dera Gazi Khan with

Khota Ram father of Ladha Ram, plaintiff-respondent No.1, for a sum of Rs.2700/- by way of registered mortgage deed dated 03.07.1920. It is further the case that land measuring 25 kanals 15 marlas bearing Killa Nos.22/2 and 23 of Rect. No.107 and Killa Nos.3 and 8 of Rect. No.110 situated in Village Likhi, Tehsil Palwal, District Faridabad was allotted to Topan Ram and his successors-in-interest in lieu of the land which was mortgaged in Pakistan. It is further the averment that Topan Ram or his successors have failed to redeem the mortgage within a statutory period of 30 years and as such the plaintiff-respondent No.1 had become owner in possession of the land by lapse of time.

The suit was contested by the defendants wherein the mortgage was denied. On the basis of the pleadings of the parties, the following issues were framed :

1. Whether the plaintiff has become owner of the suit land by way of lapse of period of redemption as alleged ? OPP
2. Whether the suit is not maintainable in the present form ? OPD
3. Whether the plaintiff has no cause of action to file the present suit ? OPD
4. Whether the suit of the plaintiff is false and vague as alleged ? OPD
5. Whether the plaintiff has no locus-standi to file the present suit? OPD

6. Whether the suit has not been properly valued for purpose of court fee and jurisdiction ? OPD
7. Relief.

The Trial Court, vide judgment and decree dated 19.12.1988, decreed the suit. Aggrieved by the said judgment and decree an appeal was preferred by the defendant-appellant which appeal was dismissed vide judgment and decree dated 19.05.1989. Hence, the present regular second appeal.

Learned counsel for the defendant-appellant would contend that in the present case the pleadings as well as the evidence is woefully missing qua the tallying of the land involved in the mortgaged deed Ex.P/1 and the suit property. Learned counsel would further contend that there is not an iota of evidence to show that the land in the present suit was allotted in lieu of the land qua which the mortgage deed was executed.

Per contra, learned counsel for the plaintiff-respondent No.1 has contended that both the Courts below have concurrently found that the suit property was not redeemed within the statutory period of 30 years and hence the suit has rightly been decreed. According to counsel the suit property was allotted in lieu of the mortgaged property left by the defendants in Pakistan.

Heard.

The present suit has been filed by the plaintiff-respondent No.1 for a declaration that he has become owner in possession of the suit land by prescription of time as the suit property was not redeemed within a statutory period of 30 years. The Full Bench of this Court in the case of **Ram Kishan & Ors. Vs. Sheo Ram & Ors. [2008 (1) RCR (Civil) 334]** has held that once a mortgage always a mortgage and it is always redeemable. It has further been held as under :

> *"40. The limitation of 30 years under Article 61(a) begins to run "when the right to redeem or the possession accrues". The right to redemption or recover possession accrues to the mortgagor on payment of sum secured in case of usufructuary mortgage, where rents and profits are to be set off against interest on the mortgage debt, on payment or tender to the mortgagee, the mortgage money or balance thereof or deposit in the court. The right to seek foreclosure is co-extensive with the right to seek redemption. Since right to seek redemption accrues only on payment of the mortgage money or the balance thereof after adjustment of rents and profits from the interest thereof, therefore, right of foreclosure will not accrue to the mortgagee till such time the mortgagee remains in possession of the mortgaged security and is appropriating usufruct of the mortgaged land towards the interest on the mortgaged debt. Thus, the period of redemption or possession would not start till such time usufruct of the land and the profits are being adjusted towards interest on the mortgage amount. In view of the said interpretation, the principle that once a mortgage, always a mortgage and, therefore always redeemable would be applicable.*

41. The argument that after the expiry of period of limitation to sue for foreclosure, the mortgagees have a right to seek declaration in respect of their title over the suit property is not correct. From the aforesaid discussion, it is apparent that the mortgage cannot be extinguished by any unilateral act of the mortgagee. Since the mortgage cannot be unilaterally terminated, therefore, the declaration claimed is nothing but a suit for foreclosure. It is equally well settled that it is not title of the suit, which determines the nature of the suit. The nature of the suit is required to be determined by reading all the averments in the plaint. Such declaration cannot be claimed by an usufructuary mortgagee.

Thus, we prefer to follow the dictum of law laid down by the larger Bench in Seth Ganga Dhar's case (supra) as well as judgments of Hon'ble Supreme Court in Jayasingh Dnyanu Mhoprekar's case (supra), Pomal Kanji Govindji's case (supra), Panchanan Sharma's case (supra) and Harbans's case (supra) in preference to the judgments relied upon by the mortgagees in Prabhakaran's case (supra) and Sampuran Singh's case (supra).

42. Therefore, we answer the questions framed to hold that in case of usufructuary mortgage, where no time limit is fixed to seek redemption, the right to seek *redemption would not arise on the date of mortgage but will arise on the date when the mortgagor pays or tenders to the mortgagee or deposits in Court, the mortgage money or the balance thereof. Thus, it is held that once a mortgage always a mortgage and is always redeemable.*

43. Having answered the questions of law framed, we do not find any merit in the present appeal filed by the mortgagees to seek declaration in respect of their title. The appeal is dismissed."

The said judgment of the Full Bench of this Court was affirmed by the Supreme Court in the case of **Singh Ram (D) through LRs Vs. Sheo Ram & Ors. [AIR 2014 SC 3447]** wherein it has been held as under :

"12. It will be appropriate to refer to the statutory provisions of the Transfer of Property Act and the Limitation Act :

"T.P. Act

58. "Mortgage", "mortgagor", "mortgagee", "mortgage-money" and "mortgaged" defined.

(a) A mortgage is the transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability.

The transferor is called a mortgagor, the transferee a mortgagee; the principal money and interest of which payment is secured for the time being are called the mortgage-money, and the instrument (if any) by which the transfer is effected is called a mortgage-deed.

(b) Simple mortgage - Where, without delivering possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgage-money, and agrees, expressly or impliedly, that, in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage-money, the transaction is called a simple mortgage and the mortgagee a simple mortgagee.

(c) Mortgage by conditional sale - Where, the mortgagor ostensibly sells the mortgaged property -

on condition that on default of payment of the mortgage-money on a certain date the sale shall become absolute, or

on condition that on such payment being made the sale shall become void, or

on condition that on such payment being made the buyer shall transfer the property to the seller, *the transaction is called a mortgage by conditional sale and the mortgagee a mortgagee by conditional sale:*

PROVIDED that no such transaction shall be deemed to be a mortgage, unless the condition is embodied in the document which effects or purports to effect the sale.

(d) Usufructuary mortgage - Where the mortgagor delivers possession or expressly or by implication binds himself to deliver possession of the mortgaged property to the mortgagee, and authorizes him to retain such possession until payment of the mortgage-money, and to receive the rents and profits accruing from the property or any part of such rents and profits and to appropriate the same in lieu of interest or in payment of the mortgage-money, or partly in lieu of interest or partly in payment of the mortgage-money, the transaction is called a usufructuary mortgage and the mortgagee a usufructuary mortgagee.

(e) English mortgage - Where the mortgagor binds himself to repay the mortgage-money on a certain date, and transfers the mortgaged property absolutely to the mortgagee, but subject to a proviso that he will re-transfer it to the mortgagor upon payment of the mortgage-money as agreed, the transaction is called an English mortgage.

(f) Mortgage by deposit of title-deeds - Where a person in any of the following towns, namely, the towns of Calcutta, Madras, and Bombay, and in any other town which the State Government concerned may, by notification in the Official Gazette, specify in this behalf, delivers to a creditor or his agent documents of title to immovable property, with intent to create a security thereon, the transaction is called a mortgage by deposit of title-deeds.

(g) Anomalous mortgage - A mortgage which is not a simple mortgage, a mortgage by conditional sale, a usufructuary mortgage, an English mortgage or a mortgage by deposit of title-deeds within the meaning of this section is called an anomalous mortgage.

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.

xxx xxx xxx

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 authorised to pay himself the mortgage-money from the rents and profits of the property,-when such money is paid;

(b) where the mortgagee is authorised 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 hereinafter provided.

xxx xxx xxx

Limitation Act :

Article 61 By a mortgagor

a) To redeem or recover possession of immovable property mortgaged	*Thirty years*	*When the right to redeem or to recover possession accrues*
b) xxx	*xxx*	*xxx*

(emphasis supplied)

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.*

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 view of the law laid down, the suit itself filed by the plaintiff-respondent No.1 would not be maintainable.

Still further, a perusal of the mortgage deed dated 03.07.1920 reveals that the land alleged to have been mortgaged was situated at Village Yaru bearing Khata No.181 measuring 46 kanals and 8 marlas. There is a specific recital that the mortgage was without any certain period. There is not an iota of evidence on the record to tally the land as mentioned in the mortgage deed with the land involved in the present suit. Infact, the plaintiff-respondent No.1 in his cross-examination had denied any knowledge of the land mortgaged in Pakistan and the killa numbers.

Learned counsel for the plaintiff-respondent No.1 on a pointed query put by the Court as to which of the documents on record show the land allotted in lieu of the land left in Pakistan and further the consolidated khasra numbers post consolidation, was unable to refer to any such documents. The lower Appellate Court has held that the sanad of allotment of land in India has been withheld by the defendant-appellant. The onus was not on the defendant-appellant to show that the land involved in the present case was allotted in lieu of the land alleged to have been mortgaged in Pakistan. Rather, it was for the plaintiff-respondent No.1, who had come to Court, to prove this fact in the affirmative.

As per the law laid down by a Constitution Bench of the Supreme Court in **Pankajakshi (dead) through LR's & Ors. Vs. Chandrika & Ors. [2016(6) SCC 157]**, there is no requirement for framing of substantial questions of law.

In view of the above-discussion, the present appeal is allowed and judgment and decrees passed by both the Courts below are set aside. The suit of the plaintiff-respondent No.1 stands dismissed. Pending applications, if any, also stand disposed off.

04.01.2023 **(ALKA SARIN)**
tripti **JUDGE**

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