IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

211 **RSA No.1321 of 1995 (O&M)**
Reserved on : 06.05.2024
Date of Decision : 13.05.2024

Nagina Singh (deceased) through LRs ....Appellants

VERSUS

Dr. Dharam Bir Singh ....Respondent

CORAM : HON'BLE MRS. JUSTICE ALKA SARIN

Present : Mr. Babar Bhan, Advocate and
Mr. Jagdeep Singh Rana, Advocate for the appellants.

Mr. Bhag Singh, Advocate for the respondent.

ALKA SARIN, J. (Oral)

1. The present appeal has been preferred by the defendant-appellants aggrieved by the judgment and decree dated 27.01.1995 passed by the First Appellate Court reversing the judgment and decree dated 24.01.1994 passed by the Trial Court.

2. The brief facts relevant to the present *lis* are that the plaintiff-respondent herein filed a suit for declaration that he had become owner of the suit land by efflux of time. The case set up was that defendant – Nagina Singh – was owner of the land measuring 02 kanals 19 marlas being 1/5th share of the land measuring 14 kanals 10 marlas and the land was mortgaged with possession in favour of the plaintiff-appellant vide mortgage deed dated 23.12.1959 for a consideration of Rs.500/- and the mutation being mutation No.239 was also sanctioned in favour of the plaintiff-respondent and since the land has not been redeemed, hence, the plaintiff-respondent had become owner of the suit land by efflux of time. Written statement was filed by the

defendant-appellant who stated that the mortgage money amounting to Rs.2,000/- stood paid on 13.06.1989 through Court of the Collector, Thanesar and the property stood redeemed and that inadvertently in the order passed by the Collector the Khasra Nos.13 and 14 were not mentioned. On the basis of pleadings of the parties the following issues were framed :

1. Whether the plaintiff has become owner of the suit land as mentioned in para No.1 of the plaint by lapse of time of mortgage ? OPP
2. Whether the plaintiff has got no locus-standi to file the present suit ? OPD
3. Whether the plaintiff cannot take any benefit of technical flaw of procedure, if so to what effect ? OPD
4. Whether the whole of the mortgage money stood paid to the plaintiff within limitation and if so to what effect ? OPD
5. Relief.

3. The Trial Court dismissed the suit vide judgment and decree dated 24.01.1994. Aggrieved by the same an appeal was preferred by the plaintiff-respondent which appeal was allowed vide judgment and decree dated 27.01.1995. Hence, the present regular second appeal by the defendant-appellant.

4. Learned counsel for the defendant-appellant would contend that the suit itself would not be maintainable in view of the law laid down in the case of **Ram Kishan & Ors. Vs. Sheo Ram & Ors. [2008 (1) RCR (Civil) 334]** which has been affirmed by the Hon'ble Supreme Court in the case of **Singh Ram (D) through LRs Vs. Sheo Ram & Ors [AIR 2014 SC 3447]**.

5. Heard.

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

7. In the present case the suit filed by the plaintiff-respondent was for declaration that he had become owner of the suit land by efflux of time. The Full Bench of this Court in the case of **Ram Kishan** (supra) has 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."

8. The said judgment of the Full Bench of this Court was affirmed by the Hon'ble Supreme Court in the case of **Singh Ram (D) through LRs** (supra) 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.

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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.

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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.*

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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."*

9. The above reproduced extracts from the judgments in the cases of **Ram Kishan** (supra) and **Singh Ram (D) through LRs** (supra) clearly reveal that the suit filed by the plaintiff-respondent was not maintainable. It is trite that once a mortgage always a mortgage and there would be no period for redemption for the same.

10. In view of the above, the present appeal is allowed and the judgment and decree passed by the First Appellate Court is set aside and that of the Trial Court is restored. The suit of the plaintiff-respondent stands dismissed accordingly. Pending applications, if any, also stand disposed off.

(ALKA SARIN)
JUDGE

13.05.2024
jk

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