2024:PHHC:065277

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

226 **RSA-431-1999 (O&M)**
Date of Decision : 09.05.2024

PRITPAL SINGH (SINCE DECEASED) THR LR & ORS ...Appellants

VERSUS

SUKHDEV KAUR & ORS ...Respondents

CORAM : HON'BLE MRS. JUSTICE ALKA SARIN

Present : Mr. Aakash Singla, Advocate and
Ms. Vaishali Singla, Advocate for the appellants.

Mr. Sukant Gupta, Advocate for respondent No.1.

ALKA SARIN, J. (ORAL)

1. The present appeal has been preferred by the plaintiff-appellants challenging the judgment and decree dated 04.08.1998 passed by the First Appellate Court whereby the appeal filed by defendant-respondent No.1 was allowed and the judgment and decree dated 26.05.1994 passed by the Trial Court has been reversed.

2. The brief facts relevant to the present case are that on 08.04.1990 the plaintiff-appellants filed a suit seeking declaration to the effect that they were owners in possession of the suit land measuring 21 Kanals and 10 Marlas in the khasra numbers as fully detailed in the plaint as per the Jamabandi for the year 1985-86 on the ground that the suit land was mortgaged with possession with the ancestors of the plaintiff-appellants for more than 50 years and since then the plaintiff-appellants are in possession as mortgagees and since the defendant-respondents herein had not redeemed

the land, therefore, they had perfected the title by efflux of time. It was further averred in the plaint that the plaintiff-appellants were in possession of the suit land for more than 50 years as mortgagees of the suit land and were in adverse possession which was continuous and hostile and to the knowledge of the defendant-respondents.

3. On notice, defendant-respondents No.2 to 4 and 6 did not appear in the Court and were proceeded against *ex-parte*. Defendant No.7 admitted the claim of the plaintiff-appellants. Defendant No.5 did not file a written statement. Defendants No.1, 8 and 9 filed their written statement on 20.01.1992 raising the legal objection of *locus standi* and the suit not being maintainable as well as for non-joinder of necessary parties. A replication was filed reiterating the contents of the plaint and denying those of the written statement.

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

1) Whether the plaintiffs are mortgagees of the suit land more than 50 year's and have owners by efflux of time ? OPP

2) Whether the plaintiff has no locus standi to file this suit ? OPD

3) Whether the suit is not maintainable in the present form ? OPD

4) Whether the plaintiffs have wrongly described defendant No.2 and 7 and the suit is bad for mis-joinder of the parties ? OPD

5. Relief.

5. The Trial Court decreed the suit of the plaintiff-appellants vide judgment and decree dated 26.05.1994. It is apt to notice at this stage that on 06.04.1993 another suit was preferred by the plaintiff-appellants for possession on the ground that they were owners in possession of 40 Kanals of land, which included the suit land in the present suit, having become owners by way of adverse possession. The appeal preferred by the defendant-respondent No.1 challenging the judgment and decree dated 26.05.1994 was allowed by the First Appellate Court vide judgment and decree dated 04.08.1998. Aggrieved by the same the present regular second appeal has been preferred by the plaintiff-appellants.

6. Learned counsel for the plaintiff-appellants would contend that since the mortgage deed was not on the record, the period of mortgage could not be determined and hence the law laid down by the Full Bench of this Court in **Ram Kishan & Ors. Vs. Sheo Ram & Ors. [2008 (1) RCR (Civil) 334]** which has been affirmed by the Supreme Court in the case of **Singh Ram (D) through LRs Vs. Sheo Ram & Ors [AIR 2014 SC 3447]** would not be applicable. It is further the contention that an application was

filed by the plaintiff-appellants before the Trial Court under Order 41 Rule 27 CPC which remains pending.

7. Per contra, learned counsel for defendant-respondent No.1 would contend that the plaintiff-appellants never placed on record the mortgage deed to state that that there was any time period for redemption of the suit property. In the absence of any time period for redemption of the suit property there would be no period for redemption as per the law laid down by the Full Bench of this Court in the case of **Ram Kishan & Ors.** (supra), affirmed by the Supreme Court in the case of **Singh Ram (D) through LR** (supra). Learned counsel for the defendant-respondent No.1 has further contended that after having filed the present suit for declaration for having become owners by efflux of time since the property was not redeemed, a second suit was filed by the plaintiff-appellants herein for possession of land measuring 40 Kanals on the basis of having become owners by way of adverse possession. The 40 Kanals of land included the suit land in the present case. It is further the contention of the learned counsel that the matter came upto this Court in proceedings arising out of the suit for possession by way of adverse possession in RSA-1035-1999 which was dismissed by this Court vide judgment and decree dated 07.02.2001. The said judgment and decree dated 07.02.2001 passed in RSA-1035-1999 was not challenged and hence it has attained finality.

8. Heard.

9. In the present case the plaintiff-appellants have come to the Court claiming to have become owners of the suit property which was alleged to have been mortgaged with their forefathers 50 years ago and since the same was not redeemed they claimed to have become owners by efflux of time. The argument of the learned counsel for the plaintiff-appellants that since there was no period of redemption which was coming forth, therefore, the judgment of the Full Bench of this Court in the case of **Ram Kishan & Ors.** (supra)**,** affirmed by the Supreme Court in the case of **Singh Ram (D) through LR** (supra) would not be applicable deserves to be rejected. The plaintiff-appellants had approached the Civil Court on the plea that there was a mortgage, however, neither the date of the mortgage was given nor any detail of the mortgage is forthcoming. The only stand taken by the plaintiff-appellants herein was that they were in possession for the last 50 years. In the absence of any mortgage deed having been brought on the record by the plaintiff-appellants, it does not lie in the mouth of the plaintiff-appellants to now say that since there was no time period fixed for the mortgage, hence, the judgment of Full Bench of this Court in the case of **Ram Kishan & Ors.** (supra), affirmed by the Supreme Court in the case of **Singh Ram (D) through LR** (supra) would not apply. Infact it applies on all fours.

10. 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."

11. The Hon'ble Supreme Court in the case of **Singh Ram (D) through LR** (supra) has 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."

12. The argument of the learned counsel for the plaintiff-appellants that the application under Order 41 Rule 27 CPC remains pending and hence the matter may be remanded back also deserves to be rejected. The civil suit was filed in the year 1990. The matter has been pending before this Court since 1999. On a query by this Court as to the nature of the additional evidence which was sought to be lead, learned counsel for the plaintiff-appellants has candidly admitted that the said evidence has nothing to do with the date of the mortgage deed. In the considered view of this Court, since the application itself does not further the case of the plaintiff-

appellants, there would be no requirement to remand the matter back. In the absence of the mortgage deed the judgment of the Full Bench of this Court in the case of **Ram Kishan & Ors.** (supra), affirmed by the Supreme Court in the case of **Singh Ram** (supra), would apply on all fours in the present case. It is also to be noticed that on the one hand a stand has been taken by the plaintiff-appellants that they had become owners by efflux of time and on the other hand during the pendency of the first suit a second suit was filed for possession of land measuring 40 Kanals, including the Khasra number mentioned in the present suit, on the ground that they had become owners by way of adverse possession. The two pleas are absolutely contradictory in nature. It is trite that once a suit was filed for adverse possession impliedly the ownership of the defendant-respondents was admitted.

13. In view of the above, no question of law, much less any substantial question of law, arises in the present case. The present appeal is devoid of any merit and is dismissed. Pending applications, if any, also stand disposed off.

09.05.2024 **(ALKA SARIN)**
Aman Jain **JUDGE**

NOTE: *Whether speaking/non-speaking: Speaking*
Whether reportable: Yes/No