IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

105 **RSA-1066-2018 (O&M)**
Reserved on : 27.05.2024
Date of Decision : 31.05.2024

Ajaib Singh (deceased through LRs) & Anr. ....Appellants

VERSUS

Ved Parkash & Ors. ....Respondents

CORAM : HON'BLE MRS. JUSTICE ALKA SARIN

Present : Mr. Sandeep Punchhi, Advocate for the appellants.

ALKA SARIN, J.

1. The present regular second appeal has been preferred by the plaintiff-appellants challenging the judgment and decree dated 30.04.2015 passed by the Trial Court and the judgment and decree dated 13.07.2017 passed by the First Appellate Court dismissing their suit.

2. The brief facts relevant to the present case are that the plaintiff-appellants are the successors of the mortgagee while defendant-respondent Nos.1 to 3 are the successors of the mortgagor. The plaintiff-appellants filed a civil suit for declaration to the effect that order dated 01.08.2008 passed by the Court of Collector, Moga in Case No.8-C dated 16.11.2007 titled Ved Parkash etc. Vs. Kartar Singh is illegal, unjust and wrong and is liable to be set aside and for further declaration that the plaintiff-appellants have become owners in possession of 24/77 share out of land bearing Khasra Nos.81//19/2(7-16), 20/1(2-0), 21(8-0), 22(8-0), 23/1(7-5), 24/1(0-7) situated in the estate of village Khukhrana, Tehsil and District Moga as

entered in the jamabandi for the year 2005-06 with consequential relief of injunction restraining the defendant-respondents from ejecting the plaintiff-appellants forcibly, illegally and otherwise than in due course of law from the land bearing Khasra Nos.81//18/2(1-16), 81//19/2(7-16), 20/1(2-0), 21(8-0), 22(8- 0), 23/1(7-5), 24/1(0-7) situated in the estate of village Khukhrana Tehsil and District Moga as entered in the jamabandi for the year 2005-06. According to the plaintiff-appellants, one Matto son of Jawahar was owner of the land measuring 51 kanals 6 marlas and he mortgaged 16 kanals of land with possession in favour of Narain Singh son of Roor Singh vide mortgage deed dated 15.08.1930 for a sum of Rs.380/- and mutation no.1055 was sanctioned in favour of Narain Singh mortgagee. The above said usufructuary mortgage could not be redeemed by the mortgagor within the time period fixed for redemption by the parties. The said Matto died and his estate developed upon Kirpa Ram son of Sewa Singh to the extent of 1⁄2 share, Lekh Ram, Bhagat Ram, Faquir Chand sons of Munshi Ram to the extent of 1⁄2 share but the suit land continued to be under mortgage with Narain Singh. Narain Singh sold his mortgagee right in favour of Kartar Singh son of Kishan Singh, predecessor-in-interest of the plaintiff-appellants for an amount of Rs.380/- as per mutation no.1410. Kirpa Ram was succeeded by Bhagwanti etc. and after consolidation in the year 1955-56 Bhagwanti etc. were recorded as mortgagors and Kartar Singh son of Kishan Singh as mortgagee in possession. This was reflected in the revenue record. The defendant-respondent Nos.1 to 3 (the successors-in-interest of the original mortgagor) moved an application no.8-C dated 16.11.2007 in the Court of SDM, Moga, exercising the powers of Collector, Moga, for redeeming the suit land who passed an order dated 01.08.2008 redeeming the suit land. As per the plaintiff-appellants the said redemption order was illegal, unjust and wrong and was liable to be set aside as the mortgage dated 15.08.1930 could not be redeemed as a period of more than 30 years had elapsed at the time of filing of the said application before the SDM as well as passing of order dated 01.08.2008. Hence, the present suit. The defendant-respondent Nos.1 to 3 contested the suit and filed written statement raising preliminary objections. On merits it was averred that no time limit was fixed for redemption and it could be redeemed at any time as per the terms and conditions mentioned in the mortgage deed. The order of the SDM dated 01.08.2008 had become final and no appeal had been filed against the said order and the same was legal and valid and binding upon the parties. Replication was filed controverting the pleas raised in the written statement and reiterating those taken in the plaint.

3. On the basis of the pleadings of the parties the following issues were framed by the Trial Court :

1) Whether the order dated 01.08.2008 passed by the court of Collector, Moga is illegal, unjust ,wrong and liable to be set aside ? OPP

2) Whether the plaintiffs have become the owner of the suit land ? OPP

3) Whether the plaintiff is entitled for declaration as prayed for ? OPP

4) Whether the plaintiff is entitled for injunction as prayed for ? OPP

5) Whether suit of the plaintiff is barred by the principle of resjudicata ? OPD

6) Whether suit of the plaintiff is not maintainable ? OPD

7) Relief.

4. The Trial Court dismissed the suit vide judgment and decree dated 30.04.2015. Aggrieved by the same, the plaintiff-appellants preferred an appeal before the First Appellate Court which appeal was dismissed vide judgment and decree dated 13.07.2017. Hence, the present regular second appeal.

5. Learned counsel for the plaintiff-appellants would contend that the suit deserved to be decreed as the same was filed on the ground that the plaintiff-appellants had become owners in possession of the land in dispute by prescription of time as the suit property had not been redeemed within the statutory period of 30 years. It is urged that the Courts below have erred in dismissing the suit.

6. I have heard the learned counsel for the plaintiff-appellants.

7. In the present case the suit filed by the plaintiff-appellants was for declaration that they had become owners in possession of the suit land by

prescription of time since the same was not redeemed by the mortgagor or his successors-in-interest. The Full Bench of this Court in the case of **Ram Kishan & Ors. Vs. Sheo Ram & Ors. [2008 (1) RCR (Civil) 334]** 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 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.

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62. Right of usufructuary mortgagor to recover *possessions*

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-appellants was not maintainable. It is trite that once a mortgage always a mortgage and there would be no period for redemption for the same. No other point was argued.

10. In view of the above, the present appeal is dismissed and the judgments and decrees passed by both the Courts are affirmed. Pending applications, if any, also stand disposed off.

(ALKA SARIN)
JUDGE

31.05.2024
Aman Jain

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