IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

RSA-3971-2018 (O&M)
Reserved on : 09.12.2024
Date of Decision : 17.12.2024

Shyam and Others ....Appellants

VERSUS

Shyamwati and Others ....Respondents

CORAM : HON'BLE MRS. JUSTICE ALKA SARIN

Present : Mr. Ashish Tewatia, Advocate for
Mr. Mahendra Singh Tewatia, Advocate for the appellants.

ALKA SARIN, J.

CM-10544-C-2018

1. For the reasons stated in the application, the same is allowed and the delay of 35 days in re-filing the present appeal is condoned.

RSA-3971-2018

2. Present appeal has been filed by defendant Nos.11 to 13 and 15 to 18 (appellants herein) aggrieved by the judgements and decrees dated 20.08.2015 and 13.09.2017 passed by the Trial Court and the First Appellate Court, respectively.

3. The brief facts relevant to the present *lis* are that the plaintiffs i.e. contesting respondent Nos.1 to 4 herein filed a civil suit for possession by way of redemption. It was averred in the plaint that agricultural land comprised in Khewat/Khata No.57/73 Rec. No.33, Killa No.1(8-0), 2/1(2-7), 10(8-0), 11(8-0), 20(8-0), 21(8-0), 22/1(4-0), Rect. No.34, Killa No.6/2(3-15), 15(8-0), 16(8-0), 25/1(2-13), Rect. No.38, Killa No.3(8-0), 8(8-0), 13(3-7), Rect. No.41, Killa No.1(8-0), 10/1(1-17) total measuring 97 Kanals 19

Marlas situated within the revenue estate of village Dostpur, Tehsil and District Palwal was owned by the plaintiff-respondent Nos.1 to 4 alongwith the proforma defendants and that the predecessors-in-interest of the plaintiff-respondent Nos.1 to 4 and the proforma defendants had mortgaged their property with the predecessors-in-interest of the defendant - Ram Lal - and others in the year about 1890 for an amount of Rs.125/- as detailed in the Jamabandi for the year 1890-91. The mortgage was with possession. The plaintiff-respondent Nos.1 to 4 averred that they could not redeem the land due to their financial position and that the prices of grains have already gone 100 times on the higher side since the date of the mortgage and the defendants had received more than the mortgage money. On notice, the suit was contested by defendant Nos.11, 12, 16 to 20, 24, 27 and 36 to 40 who filed their written statements raising various preliminary objections regarding *locus standi*, no cause of action, etc. On merits it was submitted that the defendants were absolute owners in possession of the suit land. It was further stated that the suit was vague and did not contain the necessary particulars of the mortgage. It was further averred that the plaintiff-respondent Nos.1 to 4 had no right to claim possession of the suit land as the suit was barred by limitation. Defendant Nos.1 to 10, 34 and 35 also appeared and filed their written statement denying the averments in the plaint. The remaining defendants were proceeded against *ex parte*. On the basis of pleadings of the parties, the following issues were framed :

1. Whether the plaintiffs and proforma-defendants are owners of the agricultural land fully detailed and described in Schedule-A attached with the plaint ? OPP

2. Whether the plaintiffs are entitled to the decree of possession to the land in dispute on the ground mentioned in the plaint ? OPP

3. Whether the suit of the plaintiffs is not maintainable in the present form ? OPD

4. Whether the plaintiffs have no locus-standi and no cause of action to file the present suit ? OPD

5. Whether the plaintiffs have not come with clean hands and have suppressed the true and material facts from the court ? OPD

6. Whether the suit is time barred ? OPD

7. Whether the plaintiffs are estopped by their own act and conduct from filing the present suit? OPD

8. Relief.

4. The Trial Court vide judgement and decree dated 20.08.2015 decreed the suit holding that the plaintiff-respondent Nos.1 to 4 and the proforma defendants are owners and entitled to possession of the suit land and further entitled to get the mortgage property redeemed after depositing the mortgage amount within a period of one month from the date of passing of the judgement and decree. Aggrieved by the same, an appeal was preferred by the defendant-appellants herein and some other defendants which appeal was also dismissed vide judgement and decree dated 13.09.2017. Hence, the present appeal by the defendant-appellants herein.

5. Learned counsel for the defendant-appellants herein would contend that both the Courts have erred in decreeing the suit. It is urged that there was no evidence on the record qua the mortgage since no mutation was

brought on the record qua the mortgage. It is further the contention that the new and the old khasra numbers were not co-related.

6. Heard.

7. In the present case the plaintiff-respondent Nos.1 to 4 led a number of documents in evidence while on the other hand the defendant-appellants herein failed to examine any witness nor any documentary evidence was led by them. The argument of learned counsel for the defendant-appellants that the old numbers and new numbers were not tallied deserves to be rejected inasmuch as it was concurrently found by both the Courts that Ex.P-27 which is a copy of the Jamabandi for the year 1890-91 and a perusal of the Hindi version of Ex.P-27 reveals that the land had been mortgaged in favour of the predecessors-in-interest of the defendants. Ex.P-26 is a copy of the Jamabandi for the year 1895-96 (translation being Ex.P-26/H), which is again regarding the entries qua the same land. Jamabandi for the year 1905-06 (Ex.P-22) (Hindi version being Ex.PW-22/H) reveals that new khasra numbers were assigned in the Jamabandi entries. Again in the Jamabandi for the year 1940-41 (Ex.P-14) (Hindi version being Ex.P-14/H), previous numbers had been changed and new numbers had been assigned. Similarly, in the Jamabandi for the year 1965-66 (Ex.P-10), the change in the khasra numbers have been depicted. Hence, the argument of learned counsel for the defendant-appellants, in the absence of any evidence having been led by them, deserves to be rejected. The argument of learned counsel for the defendant-appellants that the suit itself was barred by limitation also deserves to be rejected in view of the law laid down by the Hon'ble 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 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.*
>
> *xxx*
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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."

8. In view of the above, I do not find any merit in the present appeal. No question of law much-less substantial question of law arises in the present case. The present appeal being devoid of any merit is accordingly dismissed. Pending applications, if any, also stand disposed off.

(ALKA SARIN)
17.12.2024 **JUDGE**
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NOTE: Whether speaking/non-speaking: Speaking
Whether reportable: YES/NO