



**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

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RSA-1430-1993 (O&M)
Date of Decision: 17.01.2025

Bhupal Singh and others

...Appellants

V/s

Jagdev and others

...Respondents

CORAM : HON'BLE MR. JUSTICE VIKRAM AGGARWAL

Present: Mr. Adarsh Jain, Advocate, for the appellants.

Mr. Rahul Aggarwal, Advocate, for the respondents.

VIKRAM AGGARWAL, J (ORAL)

Plaintiffs (Bhupal Singh and others) are in appeal against the judgment and decree dated 12.10.1992 passed by the Court of learned Addl. District Judge, Faridabad, dismissing the appeal filed by the plaintiffs against the judgment and decree dated 25.08.1990 passed by the Court of learned Sub-Judge, III Class, Faridabad, vide which the suit for possession filed by them was dismissed.

2. For the sake of convenience and clarity, parties shall be referred to as per their original status.

3 The plaintiffs filed a suit for possession of land measuring 15 *kanals*, 5 *marlas* (fully described in the plaint) situated within the revenue estate of Village Unkheer, Tehsil Ballabgarh, District Faridabad (hereinafter to be referred to as the “suit land”). It was claimed that Shiv Dayal, predecessor-in-interest of the defendants had mortgaged the suit land to the father and grand-father of the plaintiffs namely Likhi by way of a “simple



mortgage”. It was claimed that the plaintiffs had filed Suit No.140 on 18.03.1983 for declaration of ownership rights of the suit land on account of the period of redemption having expired. The said suit was decreed by the Court of learned Addl. Sr. Sub-Judge, Faridabad vide judgment and decree dated 08.10.1985 and as such, the plaintiffs had become owners of the suit land. It was claimed that the defendants were in illegal possession of the suit land as they had no right to remain in possession of the same.

4. The suit was opposed by defendants No.1 to 7, who filed written statement raising preliminary objections as regards *locus standi*, *estoppel*, the suit being barred under Order 2 Rule 2 CPC, *res-judicata*, limitation and the suit not having been properly valued for the purposes of jurisdiction and Court fee. On merits, the factum of the suit land having been mortgaged was denied. It was claimed that the defendants were in possession of the suit land as co-owners. It was further averred that in case the plaintiffs succeeded in proving that the suit land was subject to some charge on account of mortgage, they were competent to enforce their rights within 12 years from the date of such charge for recovering the charged amount along with interest. As regards the previous suit, it was averred that the plaintiffs had no right to file such a suit and a suit for declaration simplicitor was not maintainable. It was averred that the judgment and decree dated 08.10.1985 was illegal, void and *non-est* and was not binding on the rights and interest of the defendants. A counter claim was also raised that the judgment and decree dated 08.10.1985 passed in Civil Suit No.140 be declared to be void, ineffect and *non-est* and not binding on the rights and interest of the defendants. Replication was filed by the plaintiffs denying the averments made in the written statement and reiterating those made in the plaint.



5. From the pleadings of the parties, the following issues were framed:-

- “1. Whether the plaintiffs are owners of the suit land?OPP***
- 2. Whether they are entitled to possession of the suit land?OPP***
- 3. Whether the suit is barred by Order 2 Rule 2 CPC? OPD***
- 4. Whether the suit is barred by res-judicata?OPD***
- 5. Whether the suit is barred by limitation?OPD***
- 6. Whether the decree dated 08.10.1985 passed in Suit No.140 dated 1983 is liable to be set aside on the grounds alleged?OPD***
- 7. Relief.”***

6. Parties let their respective evidence after which the trial Court dismissed the suit filed by the plaintiffs. The judgment and decree dated 08.10.1985 was also declared to be *non-est* and the appeal was preferred by the plaintiffs which was also dismissed by the Court of learned Addl. District Judge, Faridabad vide judgment and decree dated 12.10.1992 leading to the filing of the present second appeal.

7. I have heard learned counsel for the parties and have perused the record.

8. Learned counsel for the appellants has submitted that the plaintiffs have been erroneously been non-suited by both the Courts and the judgment and decree dated 08.10.1985 has wrongly been held to be *non-est*. It has been submitted that cogent evidence was led by the plaintiffs to prove their case but still they have been non-suited.

9. On the other hand, learned counsel representing the respondents submits that there is no illegality in the judgments and decrees passed by both the Courts and, therefore, no interference is called in the second appeal.



10. I have considered the submissions made by learned counsel for the parties.

11. Issue No.6 was framed by the trial Court as to whether the decree dated 08.10.1985 passed in Civil Suit No.140 of 1983 is liable to be set aside. While delving upon the issue, it was held by the learned trial Court that it is settled law that in the case of a “simple mortgage”, the only remedy available to the mortgagee under Section 67 of the Transfer of Property Act, 1882 is to get the property sold with the intervention of the Court, if the mortgage amount is not paid within time. It was also held that the second remedy available is to sue the mortgagor personally for recovery of the mortgaged amount. It was held that a mortgagee cannot foreclose the “simple mortgage” nor can he be declared as owner of the mortgaged property. The matter was examined thread bear and based upon the evidence led before the trial Court. It was held that the judgment and decree dated 08.10.1985 was without jurisdiction and was not binding on the defendants;

“11. In the instant case plaintiffs have admitted that the property was subject to simple mortgage for Rs.60/- which was mortgaged on 06.08.1932. In support of this defendants have also produced DW3 which is certified copy of plaint filed in Suit No.140 of 1983 in which plaintiffs had described the nature of the mortgage as simple. Ex.D3, which is the certified copy of the judgment in Suit No.140 of 1983 also records the mortgage of suit to be transaction of simple mortgage. Despite this PW1 Bhupal Singh plaintiff has admitted that predecessor-in-interest of the defendants were owners of the suit land which was mortgaged to the predecessor-in-interest of the plaintiff. While being cross-examined, he admitted that he or his father never filed a suit for the recovery of mortgage amount within 12



years. DW2 Jagdev has also deposed that property was mortgaged by way of simple mortgage to predecessor-in-interest of the plaintiffs but it was not redeemed because possession was with them. He also deposed that plaintiffs or their ancestors never filed any suit for recovery of mortgage amount within 12 years. He also deposed that they never parted with the possession of the suit land, to the plaintiff. He has deposed further that he came to know about the decree passed in Suit No.140 of 1983 just 3 years back through their Advocate Sh. Om Jiwan Sharma when the present suit was filed. He denied that any service personal or through publication was ever effected on them by the plaintiff in the previous suit. Defendants (wrongly mentioned as defendants instead of plaintiffs) have not produced before me any evidence to the effect that service was duly effected in that suit on the defendants. In view of the evidence discussed above it is apparently clear that the decree passed in Suit No.140 of 1983 is non-est and void ab-initio because the only remedy available to the plaintiff was to file a suit for recovery of mortgage amount or to get the mortgage property sold to recover the mortgage amount and that too within a period of 12 years as per Article 62 of the Limitation Act. There is no evidence to show that plaintiffs or their ancestors ever filed any suit for the recovery of mortgage amount within the period of limitation. As in a case of simple mortgage declaration or ownership rights cannot be given, therefore, I hold that decree passed in Suit No.140 of 1983 dated 08.10.1985 is void ab-initio, non-est, without jurisdiction and not binding on the defendants. Reliance can also be placed on the judgment of Hon'ble Supreme Court in Kiran Singh vs. Chaman Paswan reported in AIR 1954, Supreme Court 340, in which the Hon'ble Supreme Court held in para No.6:-



“It is a fundamental principle well-established that a decree passed by the court without jurisdiction is a nullity and that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon even at the stage of execution and even in collateral proceedings. A defect of jurisdiction whether it is pecuniary or territorial or whether it is in respect of subject matter of the action, strikes at the very authority of the court to pass any decree and such a defect cannot be cured even by the consent of the parties.”

12. In view of the authority relied upon above and as discussed above, the present issue is decided against the plaintiffs and in favour of the defendants.”

12. As regards issues No.1 and 2, it was held that since the judgment and decree dated 08.10.1985 itself has been declared to be null and void and there was no other ground on the basis of which the plaintiffs could claim to be owners of the suit land, the learned trial Court held that the plaintiffs were not entitled to possession of the suit land. The suit was accordingly dismissed. The first appellate Court also took the same view and dismissed the appeal.

13. Even as per the case of the plaintiffs, it was a “simple mortgage”, for which the only remedy was to recover the mortgaged money within the stipulated period of 12 years. Admittedly, no such action was taken. A suit for declaration was filed which was decreed on 08.10.1985. Since, it was found that no valid service had been effected upon the respondents, the judgment and decree dated 08.10.1985 was rightly held to be *non-est*. Still further, it has come on record that one of the defendants in the previous suit



was already dead when the suit was filed and, therefore, a decree could not have been passed against a dead person.

14. As has been noticed above, in case of a “simple mortgage”, the only remedy available with the mortgagor under Section 67 of the Transfer of Property Act, 1882 was to get the property sold with the intervention of the Court, if the mortgaged amount had not been paid or the other remedy was to sue the mortgagee personally for recovery of the mortgaged amount.

15. In view of the settled law, I do not find any illegality in the findings recorded by the Courts below.

16. In view of the aforementioned facts and circumstances, I do not find any merit in the present appeal and the same is accordingly dismissed.

(VIKRAM AGGARWAL)
JUDGE

January 17, 2025

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Whether speaking/reasoned : Yes/No

Whether reportable : Yes/No