IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

RSA-1549-1989 (O&M)
Reserved on: 28.03.2025
Pronounced on:21.04.2025

Shiv Narain and others ...Appellant(s)

Vs.

Ishwar Dutt and others ...Respondent(s)

CORAM: HON'BLE MS. JUSTICE NIDHI GUPTA

Present:- Mr. Ashish Aggarwal, Sr. Advocate with
Ms. Pooja Sareen, Advocate for the appellants.

Mr. M.L.Sarin, Sr. Advocate with
Ms. Hemani Sarin, Advocate
for respondent No.1.

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<u>NIDHI GUPTA, J.</u>

The plaintiffs No. 1 to 3 and 5 to 7 are in second appeal against the concurrent judgments and decrees of the learned Courts below, whereby the suit filed by the plaintiffs for declaration and injunction, has been dismissed by both the Courts below.

2. The parties shall hereinafter be referred to as per their status before the learned trial Court i.e. the appellants/plaintiffs No. 1 to 3 and 5 to 7 are 'the plaintiffs'; and respondent No.1 is the 'defendant'.

3. Brief facts of the case as pleaded in the plaint are that the agricultural land measuring 166 Kanals-14 Marlas comprised in Khewat No.147 bearing rect.No.35 killa Nos.6,15,16,24,25 Rect. No.36 Killa Nos. 10,21, Rect. No.40 Killa Nos. 1,2,9/1,10-11,20,21/1 Rect. No.41 killa Nos.5,6,15,16,24,25 Rect. No.65 Killa Nos. 4,5/1,7/1, Rect. Nos.353, 616,

situated within the revenue estate of Songal was owned and possessed by Shri Teju, father of plaintiffs no. 1 to 3, 5 and 6, father-in-law of plaintiff No.4, and husband of plaintiff No.7. Said Teju died on 5.10.1978 and his estate including the aforementioned agricultural land, was succeeded by the plaintiffs and in this way the plaintiffs became owners in possession of the aforesaid property. It is further alleged that the defendant, claiming himself to be the mortgagee of 1/2 share of the said land, has installed a tubewell in killa no.5 of Rect. No.41. However, as per further pleadings, no part of the said land was ever mortgaged by the plaintiffs or any of their predecessors with the defendant or any of his predecessors, and thus any entry to that effect in the revenue record is against the facts and law. The defendant has entered into joint possession of the agricultural land measuring 70 Kanals 10 Marlas bearing Rect. No.35 killa No.6,15,16 Rect. No.40 Killa No.1,2 Rect. No.41 Killa Nos.5,6,24, and 25. It is alleged that the defendant, under the colour of the wrong entry of mortgage in his favour has threatened to interfere into the possession of the plaintiffs over the suit property i.e. land measuring 96 Kanals-13 Marlas as detailed in para No.8 of the plaint. Thus, through the present suit filed on 10.05.1983, the plaintiffs have sought issuance of:

a) a decree for declaration to the effect that they are owners of the suit land without any encumbrances;

b) a decree for prohibitory injunction restraining the defendants from interfering into the possession of the plaintiffs over the land measuring 96 Kanals 13 Marlas detailed in para No.8 of the plaint; and

c) a decree for exclusive possession of the land measuring 70 Kanals 10 Marlas detailed in para-No.6 of the plaint.

4. Upon notice, the defendant/respondent no.1 herein, had resisted the suit by filing written statement dated 03.06.1983. Besides formal objections, defendant had pleaded that predecessor-in-interest of the plaintiffs Teju son of Mohli was not the owner of the entire agricultural land mentioned in the plaint; rather he was owner of 1/2 share out of the said suit land. Other 1/2 share thereof belonged to his uncle Sh. Mam Chand son of Ramdyal, who had in his lifetime, mortgaged his 1/2 share in favour of Father of defendant namely Deoti Ram son of Rikhi Ram for a sum of Rs.7,000/-. The said mortgage dated 15.08.1926 was oral in nature and possession was also delivered to the defendant/mortgagee. It was further stated in the written statement that in this respect mutation No. 217 was also attested on 28.12.1927. Possession of the mortgaged land was also delivered by mortgagor Mam Chand in favour of the defendant as mortgagee; and after his death, the defendant is continuously in possession of the mortgaged land. It was further pleaded that plaintiff has no right, title or interest in the 1/2 share as the only right of equity of redemption stood distinguished by prescription as the mortgaged land had not been redeemed within limitation. It was further stated that the said mortgage had not so far been redeemed; and therefore, by the lapse of time, the defendant had become owner of 1/2 share of the total land measuring 166 Kanal 14 Marlas by prescription. Exclusive possession of the land measuring 96 Kanals 13 Marlas in favour of the plaintiff was denied.

5. In response to the same, the plaintiff had filed first replication dated 13.06.1983 mentioning that mutation of the alleged mortgage was non-existent, bogus and result of fraud between the father of the defendant and the revenue authorities. It was further stated in the first replication that as the defendant was claiming ownership of the property on the basis of mortgage, he be asked to furnish the terms and conditions of the mortgage.

6. On the basis of the pleadings of the parties, following issues were framed vide order dated 15.06.1983:-

> *1. Whether the plaintiffs are in exclusive possession of the land measuring 96 Kls 13 Mls as detailed in para No.8 of the plaint? OPP.*
>
> *2. Whether the entry of mortgage in favour of the defendant is wrong, if so to what effect ? OPP*
>
> *3. Whether the plaintiffs are owners of the suit property? OPP*
>
> *4. Whether the suit is within limitation? OPP*
>
> *5. Whether the suit is not maintainable? OPD*
>
> *6. Whether the suit is barred by time? OPD*
>
> *7. Relief.*

7. Subsequently, the plaintiff had moved application to amend his replication, which was allowed pursuant to which additional issue No.4-A was was framed on 30.10.1987, which reads as under: -

> *"4-A. Whether the plaintiff is entitled to redeem the suit land as alleged? OPP"*

8. Upon appraisal of the pleadings and the evidence led by the parties, the ld. trial Court decided Issue No. 1 against the plaintiffs; Issues No. 2, 3, 4, 4-A and 6 were decided against the plaintiffs and in favour of the defendant; Issue No. 5 in favour of the defendant and against the plaintiffs;

and accordingly, vide judgment and decree dated 04.12.1987, the learned trial Court dismissed the suit of the plaintiffs with costs. The appeal filed by the plaintiffs was also dismissed by the learned Additional District Judge, Kurukshetra vide judgment and decree dated 05.12.1988, thereby affirming the findings as recorded by the learned trial Court in the judgment and decree dated 04.12.1987. Hence, the present second appeal by the plaintiffs.

9. Learned Senior counsel appearing on behalf of the appellants/plaintiffs submits that the present case is covered by the 3-Judge Bench judgment of the Hon'ble Supreme Court in "**Singh Ram v. Sheo Ram" (SC) : Law Finder Doc Id # 603373**, affirming the view taken by a Full Bench of this Court in "**Ram Kishan and others vs. Sheo Ram and others," Law Finder Doc Id # 135963** holding that in a usufructuary mortgage i.e. mortgage in which possession of land is delivered, no time limit is fixed for redemption of the mortgage. It is submitted that as per the said judgments the mortgager has a right to seek redemption at any time on payment of mortgage debt; and period of limitation of 30 years for redemption under the Limitation Act is not applicable. It is contended that the said legal position is well settled by the above said judgments; and therefore, the present case is fully covered by the above said judgments.

10. It is further submitted by learned Senior counsel that the present is a case of usufructuary mortgage is established from the fact that admittedly, possession was handed over to the defendant at the time of

mortgage itself. It is submitted that this fact has been admitted by the defendant himself that possession was handed over to the defendant. It is pointed out that it has been pleaded by the defendant in para No.2 and para-No.5 of reply on merits in the written statement that on the date of mortgage i.e. 15.08.1926, possession of the suit land was delivered to the defendant. Even from the admission of the defendant in their reply to the amended replication, it is quite evident that the mortgage was usufructuary mortgage; and therefore, the submission that the right of redemption has been extinguished by lapse of time is not tenable. It is reiterated that in Para Nos. 2 and 5 of the written statement, the defendants have admitted that the land was mortgaged *'with possession'* in favour of their father for Rs. 7000/- on 15.08.1926 vide Mutation No. 217 attested on 28.12.1927. It is contended that all these facts conclusively proved that the nature of the mortgage was usufructuary and in view of the above said position of law, there is no limitation to seek redemption and hence the suit of the plaintiffs deserves to be decreed.

11. Learned Senior counsel for the plaintiffs further elaborates that as per Section 58 (d) of the Transfer of Property Act, 1882, it is expressly mentioned that where the mortgagor delivers possession, or expressly or by implication binds himself to deliver possession of the mortgage property, such mortgage is usufructuary mortgage. Section 58(d) is reproduced as under: -

> ***"S.58(d) Usufructuary mortgage-*** *Where the mortgagor delivers possession or expressly or by implication binds himself to deliver possession of the mortgage property to the mortgagee, and*

authorities 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 partly in payment of the mortgage money, the transaction is called an usufructuary mortgage and the mortgagee an usufructuary mortgagee."

12. Learned Senior counsel for the plaintiffs submits that consequentially, the findings of both the Courts below to the effect that the suit of the plaintiff was barred by limitation, are unsustainable and are based on the old law. It is contended that as demonstrated above, it is now established law by way of Full Bench judgment of this Court, as also by judgment of the Hon'ble Supreme Court in **Sheo Ram's case (supra)** that there is no period of limitation for redeeming usufructuary mortgage.

13. It is then argued that it has been wrongly observed by the learned Trial Court in Para 6 of the impugned judgement dated 4.12.1987, that the plaintiffs have failed to prove their exclusive possession over the suit land measuring 96K 13M. It is contended that however, the said observation implies that the defendant is in exclusive possession of the suit land; and hence the plaintiffs are entitled to redeem the mortgage. It is reiterated that in a Usufructuary mortgage i.e. mortgage with possession of land, there is no time limit fixed for redemption. Mortgagor has the right to seek redemption at any time on Payment of mortgage debt. Period of 30 years limitation for redemption under Limitation Act will not be not applicable.

14. Learned Senior Counsel for the plaintiffs further submits that replication is a part of the pleading, and if a plea is taken in replication, it

will be taken to have been pleaded in the case/suit itself. In support, reliance is placed upon the following judgments: **AIR 1977 P&H 68 (DB), Jag Dutta Vs. Smt. Savitri Devi; AIR 1978 PLJ 137 (SB), Punjab State Vs. Gram Panchayat Mallah;** and **AIR 1983 (P&H) 197 (SB), Mateshwar Dayal Vs. Amar Singh.** It is argued that this being the law, the plaintiffs are entitled for redemption of mortgage as has been averred by them in Para No.5 of the Amended Replication. The plea of the defendant that the factum of the redemption of mortgage was not mentioned in the plaint is clearly brushed aside by the law laid down in the judgments above and the pleading made in Para 5 of the Amended Replication has to be considered.

15. Learned Senior Counsel for the plaintiffs lastly submits that it is established principle of law that a party should have full opportunity to produce its evidence and to contest his case, irrespective of the fact whether the plea in question is taken or not, and whether there is any issue framed regarding the plea in question. In this regard, learned, Senior Counsel relies upon the following judgements: **AIR 1964 SC 164; AIR 1966 SC 735; AIR 1981 SC 2128; AIR 1989 SC 1530; AIR 1981 P&H 397 (DB).**

16. It is accordingly prayed that in view of the above facts and circumstances and in the interest of justice, the present appeal filed by the plaintiffs/appellants may be allowed and the impugned judgments and decrees passed by the learned courts below be set-aside.

17. *Per contra*, learned Senior Counsel representing the defendant counters the above submissions of learned Senior counsel for the plaintiffs and submits that the present is not a usufructuary mortgage *in-as-much* as

it is admitted fact on record that it was an oral mortgage dated 15.08.1926 that was executed between the parties. As such, period of limitation would apply in the present case. It is further submitted that in respect of the mortgage dated 15.8.1926, the present suit was filed on 10.5.1983, i.e. after about 60 years, and therefore, the suit has been rightly held to be barred by limitation. In support of her contention, learned Senior counsel for the defendant relies upon judgment of the Hon'ble Supreme Court in "**Sampuran Singh and others vs. Niranjan Kaur (SMT) and others" decided on 23.02.1999 Law Finder Doc Id # 28980** wherein, in similar facts and circumstances where oral mortgage was executed in the year 1893 and question/ issue for determination was whether the suit for redemption was barred by time, was decided in affirmative.

18. As regards possession, it is submitted by learned Senior Counsel for the defendant that the parties were in joint possession of the suit property. Therefore, it is misleading to say that possession was solely with the defendant. It is pointed out that it has been found that the plaintiff had failed to prove his exclusive possession; and in fact the learned trial Court has positively found that suit property was in "*joint possession of the owner and the mortgagee"* as recorded in the last line of para 5 of the judgment and decree dated 04.12.1987 of the learned trial Court. It is contended that accordingly argument of learned Senior counsel for the plaintiffs that the present was the usufructuary mortgage as possession was delivered, is misleading and misconceived.

19. It is further submitted that it is to be noted that in their suit the plaintiffs had totally denied the mortgage. It is only in the amended replication that the plaintiffs have taken the pleas which are now sought to be advanced; and therefore, the plaintiffs cannot be permitted to take the said plea of limitation etc. at the belated stage.

20. Learned Senior Counsel for the defendant points out that in the first instance in para 5 of the plaint, the mortgage itself had been denied by the plaintiff. Therefore, in the absence of any plea, the appellants cannot be allowed to lead evidence. In the present suit, no plea for redemption has been raised. As such, no evidence can be seen on a plea which is not raised. In this regard, learned Senior counsel for the defendant relies upon Constitution Bench judgment of the Privy Council in **Siddik Mahomed Shah v. Mt. Saran and others (PC) : Law Finder Doc Id # 285260;** and judgment of the Hon'ble Supreme Court in **Bhagat Singh and others Vs. Jaswant Singh**, **Law Finder Doc Id# 110409.**

21. It is further submitted that moreover, when a suit is only for redemption of mortgage, the same has to be in accordance with law. In the present case the provision of Order 34 Rule 7 CPC has not been complied with inasmuch as mandatory details as required under the said provision in case of usufructuary mortgage, have not been given by the plaintiffs. In this regard, reference is again made to the averments made in para 5 of the plaint. In any event, even if the amended replication is taken into consideration, it has nowhere been pleaded by the plaintiff that the present was a usufructuary mortgage. Further submits that Limitation would start

from the date of mortgage; and in the present case, it was an oral mortgage, therefore, registration of mortgage was not required.

22. In rebuttal, learned Senior Counsel for the plaintiffs again refers to the relied-upon judgment of the Hon'ble Supreme Court in **Sheo Ram's case supra**, to submit that the reliance of the defendant upon the judgment in **Sampuran Singh's case supra** is misplaced as the same has been distinguished.

23. No other argument is made on behalf of the parties.

24. I have heard learned Senior Counsel for the parties and perused the voluminous case record as also the case law, with their able assistance.

25. I have given my very thoughtful consideration to the rival submissions made on behalf of both the parties; and I find myself unable to agree with the submissions advanced on behalf of the appellant/plaintiffs, for the reasons recorded here in below.

26. The brief factual background of the case is as follows: –

15.8.1926 – Mam Chand (Mortgagor) and Mohli (predecessor-in-interest of the plaintiffs) were joint owners in equal share (1/2 share each) of land in dispute measuring 166K 14M situated in revenue estate of Village Sangal, Tehsil Kaithal. Mam Chand orally mortgaged his half share with possession for Rs.7,000/-in favour of Deoti Ram son of Rikhi Ram (father of Ishwar Dutt-Defendant).

16.12.1926 – Mutation no. 217 (<u>Ex.D-1</u>) was entered by the Patwari on the statement of mortgagee Deoti Ram son of Rikhi Ram, during attestation of

Jamabandi that Mam Chand had mortgaged with possession his share of land for Rs.7,000/-.

28.12.1927 – The above mutation no. 217 regarding 37 Bighas 3 Biswas was sanctioned on the basis of the above mortgage by Mam Chand in favour of Deoti Ram.

29.3.1928 - Mam Chand mortgager died issueless.

12.7.1928 – Subsequently a note of correction was appended in the above Mutation that share of Khata No.87 be considered as 47 Bighas-3 Biswas instead of 37 Bighas-3 Biswas.

1959-60 – In Consolidation of Holdings, land comprising new killa numbers was allotted in lieu of old Khasra Numbers.

5.10.1978 - Teju son of Mohli died leaving behind the plaintiffs/his sons-Shiv Narayan etc., daughters, and widow.

6/10.5.1983 - Present Suit was filed by Shiv Narain and others against Ishwar Dutt in the Court of the Ld. Senior Sub Judge, Kaithal. In the plaint it is mentioned that the plaintiffs are the owners in possession of the suit land; no part of the suit land was mortgaged with the defendant; and the entry of mortgage in the revenue record is against facts and law. The relevant averments of the plaint are as under: -

> *"5. <u>That no part of the suit land has been mortgaged</u> either by the plaintiffs or any predecessor of the plaintiffs with the defendant and the entry of mortgage in the revenue record is against facts and law.*
>
> *6. <u>That the defendant has entered into joint possession</u> of the land measuring 70 Kls. 1 Ml. bearing Rect. no. 35 Killa nos.*

6,15,16, Rect. No.40 Killa nos. 1,2, Rect.no.41 Killa nos. 5,6,24 and 25.

XXX XXX XXX

14. That the <u>plaintiffs pray that (a) a decree for declaration</u> to the effect that the plaintiffs are the owners of the suit land without any encumbrance; (b) a <u>decree for prohibitory injunction</u> restraining the defendant from interfering into the possession of the plaintiffs over the land measuring 96 Kls. 13 Mls. detailed in para 8 of the plaint above; and (c) a <u>decree for exclusive possession</u> of the land measuring 70 Kls. 1 Ml. detailed in para 6 of the plaint above, be passed with costs in favour of the plaintiffs and against the defendant.

Any other proper relief to which the plaintiffs are found entitled by the court be also granted to them."

(Emphasis added)

From a bare reading of the above averments, it is evident that the plaintiffs have totally and completely denied the mortgage; that joint possession of the defendant upon the suit land is admitted; and that no prayer for redemption of mortgage is made.

3.6.1983 - The defendant filed his written statement, inter alia, mentioning that Mam Chand son of Ram Dial, the original owner of 1/2 share of the land, had mortgaged the land with possession in favour of the defendant's father Deoti Ram son of Rikhi Ram, for Rs.7000/- on 15.8.1926; and in this respect Mutation No. 217 was attested on 28.12.1927. The possession of the mortgaged land was also delivered by Mam Chand mortgagor to the father of the defendant as mortgagee, and after his death the defendant is continuously in possession of the mortgaged land. The plaintiffs have no right, title or interest in 1/2 share of the property as their only right of equity of redemption regarding it has been extinguished by prescription as the mortgage has not been got redeemed within limitation. The relevant paras 2, 3 and 5 of the written statement dated 03.06.1983, are as under: -

> *"2. That para no 2 of the plaint is wrong and denied. Teju son of Mohli son of Ram Gopal was the owner of 1/2 share out of the suit land mentioned in para no. 1 of the plaint. The other 1/2 share belongs to his uncle Mam Chand s/o Ram Dayal, who had in his life time mortgaged the said 1/2 share in favour of Devati Ram son of Rikhi Ram (father of the defendant) for Rs, 7000/- in August 1926 and had delivered the possession of the same to the mortgagee and as the said mortgage has not been redeemed upto now, the defendant has become the owner of 1/2 share of the land measuring 166 Kls. 14 Mls. by prescription, although Teju inherited the equity of redemption in respect of that land is on that account shown as owner in the revenue records. <u>It is absolutely wrong that Teju or the plaintiffs have been in possession of the whole land or that they are owners thereof.</u>*
>
> *3. That in reply to para no. 3 of the plaint, it is true that after the death of Teju the plaintiffs have succeed to his estate but it is wrong that they are now owners of the aforesaid land. <u>Rather the defendant is jointly in possession of 1/2 share of the property as mortgagee and has now become owner thereof, by prescription.</u>*
>
> *XXX XXX XXX*
>
> *5. That para no. 5 of the plaint is absolutely wrong and denied in toto. As stated in para no. 2 above. Mam Chand s/o Ram Dayal, the original owner of 1/2 share of the land mentioned above had mortgaged the land with possession in favour of the defendant's father for Rs. 7000/- on 15-8-1926 by mutation No. 217 attested on 28-12-1927. <u>The joint</u>*

> *possession of the mortgaged land was also delivered by Mam Chand Mortgagor to the father of the Defendant as mortgagee and after his death the defendant is continuously in possession of the mortgaged land joint with Teju."* (Emphasis added)

From the above averments it is the clear plea of the defendant that he was in joint possession of the suit property along with the plaintiffs.

13.6.1983 - Plaintiffs filed replication, inter alia, mentioning that mutation of the alleged mortgage is non-existent, bogus, the result of fraud and collusion between the father of the defendant and the revenue authorities. It was further averred that "*As the defendant is claiming the ownership of the property on the basis of the mortgage, he may be asked to furnish the terms and conditions of the mortgage. Anyhow, if the mortgage is proved, though a fact denied and disputed, the same must be a self-redeemed one."*

4.8.1987 – More than 4 years thereafter, an Application for amendment of the replication was moved by the plaintiffs to add the following in the 10th line of Para 5 on merits of the replication and after the words "a self-redeemed one" and before the words "Para 5 of the plaint is correct." *'Even if, any mortgage as pleaded by the defendant is proved, though a fact denied and disputed, even then the plaintiffs are entitled to the relief claimed in the plaint by redemption of the mortgage pleaded by the defendant."* Thus, even at this stage of amended replication, the mortgage was denied by the plaintiffs.

10.8.1987 - Reply of the defendant to the application for amendment of the replication was filed contesting the application.

7.9.1987 – Vide order dated 7.9.1987, the Ld. Additional Senior Sub Judge Kaithal accepted the application for amendment of the replication. Against the above order no appeal or revision was filed by the defendant.

14.9.1987 - Plaintiffs filed the amended replication. The relevant portion of amended replication dated 14.09.1987 is as under: -

> *"2. That para no.2 of the written statement is wrong and that of the plaint is correct. <u>The suit land or any part thereof was never mortgaged by Mam Chand</u> s/o Ram Dayal with Deoti s/o Rikhi Ram. <u>The entries of mortgage, if any, are the result of fraud and collusion between the father of the defendant and the revenue officials.</u> The entries have been brought into existence to harm the interest of the owners. It is wrong that the defendant has become the owner of one-half share. The plea is also a fake one. No terms and conditions of the mortgage have been given. <u>Any how, if there was any mortgage, that was the self redeeming one and has been redeemed already. The defendant may be asked to furnish better particulars</u> by filing better statement in that behalf prior to proceeding for trial.*
>
> *XXX XXX XXX*
>
> *5. That para 5 of the written statement is wrong. As already stated, <u>Mam Chand never mortgaged his share with the father of the defendant.</u> The mutation of the alleged mortgage is non-existent, bogus, the result of fraud and collusion between the father of the defendant and the revenue authorities. As the defendant is claiming the ownership of the property on the basis of the mortgage, he may be asked to furnish the terms and conditions of the mortgage. <u>Any how, no mortgage is proved,</u> though a fact denied and disputed, the same must be a self-redeemed one. <u>Even if, any mortgage as pleaded by the defendant is proved, though a fact denied and</u>*

disputed, even then the plaintiffs are entitled to the relief claimed in the plaint by redemption of the mortgage pleaded by the defendant. Para 5 of the plaint is correct. The defendant has entered into joint possession of the property detailed in Para 6 of the plaint, while the remaining land detailed in para 8 of the plaint is in exclusive possession of the plaintiffs." (Emphasis is mine)

1.10.1987 - The defendant filed his reply to the amended replication on 1.10.1987, the relevant portion of which i.e. para 1 of Preliminary Objections and paras 2 and 5 of Reply on merits, reads as under:

"1. That reply to the pre. objection no.1 is wrong. The Parties in fact are in joint possession of the entire land measuring 166 Kls. 14 Mls. and mentioned in para no.1 of the plaint. It is absolutely wrong that land mentioned in para no.8 of the plaint is inclusive possession of the plaintiffs.

On Merits:

2. That para no 2 of the replication is wrong and denied. No details of the alleged fraud and collusion between the defendant and revenue officer have been given and hence this plea is not tenable. The mortgage is the mortgage with possession and could be redeemed within the time limit laid by law from the date of mortgage. It is also wrong that mortgage was self-redeeming one. Para no. 2 of the written statement is correct.

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5. That para no.5 of replication is wrong and none of the averments contained herein are correct. The question of redeeming the mortgage in this suit does not arise. Moreover as the right of redemption has extinguished by lapse of time no redemption can be ordered or any right to redeem can be

<u>*declared in this suit.*</u> *All the other averments made in this Para of replication are denied. Para 5 of written statement is correct."* (Emphasis is mine)

From the above pleadings, it is clear that at no stage was the mortgage ever admitted by the plaintiffs; no prayer was made for redeeming the same; and joint possession of the parties was admitted. On the other hand, the case of the defendant remained consistent that: the mortgage was oral; that possession was handed over; that parties are in joint possession; and that limitation for redemption of mortgage had expired.

30.10.1987 – Pursuant to the above, the following additional issue was framed by the ld. Trial Court:-

> *'4-A.Whether the plaintiff is entitled to redeem the suit land as alleged? OPP.'*

4.12.1987 – Vide judgment and decree dated 4.12.1987, the Id. Additional Senior Sub Judge, Kaithal dismissed the suit observing that the plaintiffs have not been successful to prove that the entry of mortgage in favour of the defendant is wrong, rather the defendant has shown that ½ share of the suit land was mortgaged with his predecessor and that the same has not so far been redeemed. It was further held that: "*As already stated, the mortgage in question was effected orally on 15-8-1916 (correct date 15-8-1926) i.e. about 71 years ago. Thus by lapse of time, the defendant has now become owner of share of the suit land mentioned in para 1 of the plaint, and redemption thereof now stands barred by limitation."*

5.12.1988 - The appeal of the plaintiffs was dismissed by the learned District Judge, Kurukshetra observing that the plaintiffs have not been able to show that entry with regard to mortgage in the record of rights to the extent of half share from Mam Chand in favour of Deoti Ram was wrong. The ld. Lower Appellate Court also returned the finding that the oral mortgage with possession had taken place on 15.8.1916 (correct date 15.8.1926) more than 17 years back (it should be 71 years back) which was never redeemed. Therefore, the plaintiffs were debarred from redeeming the same. They were not owners of the suit land. It was held that the suit for declaration to the effect that the plaintiffs were owners in possession of the suit land was not maintainable.

27. It has been contended by the learned Senior Counsel for the plaintiffs that the present is a usufructuary mortgage as possession is admitted to have been delivered; and therefore, the present case will be governed by the Full Bench judgment of this Court in **Ram Kishan's case supra**, as also by the judgment of the Hon'ble Supreme Court in **Sheo Ram's case supra**. The said contention of the learned Senior Counsel is factually incorrect as, it is the clear finding of the learned trial court that the plaintiffs were not in exclusive possession of the suit land and that the parties are in joint possession of the Suit land. The relevant findings of the ld. trial Court as contained in para Nos. 5, 6 and 9 of the judgment and decree dated 04.12.1987, are as under:-

> *"5. To prove their exclusive possession over the land measuring 96 Kls-13 Mls, the plaintiffs have relied upon the entries made in revenue document Ex.P2, the copy of khasra girdawari from*

Kharif 1978 upto Rabi, 1983, and Ex.D-2, the copy of Khasra girdawari from kharif 1985 upto Rabi 1986. But it is not so, Ex. P1, the copy of the jamabandi for the year 1977-78, speaks about the joint possession of the owners and mortgagee over the suit land. The entries contained in the copy of Jamabandi carry the presumption of truth. The contention of the learned counsel for the plaintiffs that the said presumption of truth stands rebutted in view of the entries made in khasra girdawari, is not sustainable. Once the possession has been shown to be joint of the owner and the mortgagee then a heavy onus lies upon the plaintiffs to show how they came into exclusive possession of the land measuring 96 Kls-13 Mls. Even if some entries have appeared in their favour, the same cannot be of much help to them in the event of specific denial of the defendant and without any record speaking the manner in which that possession took place. <u>Ex. D-5 copy of khatoni Paimise, Ex.D-6, copy of Naksha Haq Darwar; and Ex. D7 copy of khatoni Istemal, also show the joint possession of the owner and the mortgagee.</u>

6. As a result, I hold that the <u>plaintiffs have failed to prove their exclusive possession over the land measuring 96 Kls 13 Mls, detailed in para No.8 of the plaint.</u> As such I hereby decide this issue against them.

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9. Thus the plaintiffs have not been successful to prove that the entry of mortgage in favour of the defendant is wrong, rather the defendant has shown that 1/2 share of the suit land was mortgaged with his predecessor and that the same has not so far been redeemed. As already stated, the mortgage in question was affected orally on 15-8-1916 i.e. about 71 years ago. Thus by lapse of time the defendant has now become owner of 1/2 share of the suit land mentioned in *para No.1 of the plaint and redemption thereof now stands barred by limitation.”*

28. In this regard the relevant findings of the learned lower Appellate Court are contained in para Nos.8 to 11 of the judgment and decree dated 05.12.1988, which read as under:-

“8. Entry in the column of ownership in jamabandi for the year 1977-78 Ex.P1 when translated into English would read somewhat as under :-

"Teju son of Mohli son of Ram Dial half share and mortgagee Ishwar Dutt son of Deoti son of Rikhi Ram mortgagee to the extent of remaining half share."

Entry in the column of cultivation is to the following effect :-

<u>"Khudkasht Va Makbuza Malkan Va Murtahin."</u>

The above entries read with entries in column No.8 and 9 of the said document show that Teju was co-sharer to the extent of half share in total area measuring 166 Kanals 14 Marlas whereas remaining half was mortgaged with Ishwar Dutt son of Deotia son of Rikhi Ram defendant and both the parties were in joint possession thereof.

9. Basing reliance on copy of khasra girdawari Ex. P2 for Kharif 1978 to Rabi 1983 and Ex. D2 for Kharif 1985 to Rabi 1988, learned counsel for the plaintiffs has argued that presumption of truth attached to the jamabandi entries under Section 44 of the Land Revenue Act stood rebutted in view of these khasra girdawari entries. On the other hand learned counsel for the defendant has pressed into service Ex. D5 copy of Khatoni Pamaish, Ex. D7 copy of Khatoni istemal and Ex. D6 copy of Naksha haqdarwar and has argued that these *documents also show that the mortgagee was in joint possession. He has urged that entries in the Khasra girdawari mentioned above do not have the effect of rebutting the presumption of truth attached to jamabandi Ex. P2 because the plaintiffs have miserably failed to show as to how they had come into exclusive possession of the suit land measuring 96 Kanals-13 Marlas in question. I find force in the said argument. <u>There is not even a shred of scintilla of evidence on record to show as to how the plaintiffs had taken exclusive possession after jamabandi Ex.P2 for the year 1977-78</u>. I, therefore, uphold the finding of the ld. trial court on Issue No.1.*

*10. It has been argued on behalf of the defendant that mortgage of half share of the land in favour of the predecessor-in-interest of the defendant was oral. He has sought corroboration from copy of mutation No.217 Ex.D1 dated 15-8-1926 which was entered on 16-11-1926 and sanctioned on 12-7-1928 from Mam Chand in favour of Devti Ram son of Rikhi Ram. Entry In the column No.13 is "**<u>Rahan Zabani Bakabza 15th August, 1926</u>** in column No.10 of this document pertaining to the cultivation the entry is :-*

<u>"Khudkasht Murthin."</u>

Khasra girdawari entries do not have the effect of rebutting the said entry. It is not understood as to how the mortgagee was dispossessed from the land in dispute. The evidence comprised of this document has not been rebutted. A hypertechnical objection has been raised on behalf of the plaintiffs that towards the end of this mutation note has been appended on 12-7-28 to the effect that half share of khata No.87 be considered to be 47 Kanals 3 biswas instead of 37 kanals 3 biswas which tantamounts to review of the order dated 28-12-

1927 vide which mutation had been sanctioned which could not be done without hearing the parties. This argument attractive at first-sight is not tenable on the sound appreciation of jamabandi Ex. D4 for the year 1925-26 which shows that Mam Chand mortgagor was owner to the extent of half share of the suit land. I agree with the learned counsel for the defendant that through an inadvertent mistake of calculation the area mentioned in the mutation Ex.D1 had been mentioned as 37 Kanals 3 Marlas instead of 47 Kanals 3 Marlas and the note mentioned above appended to the said mutation does not tantamount to review and was only a rectification of the area of half share of Mam Chand which had been mortgaged in favour of Devtia Ram. Such mistake which is clerical or arithmetical or in-advertent could be corrected under section 34 of the Land Revenue Act without obtaining permission for review and hearing the concerned parties. The above said technical argument of the learned counsel falls to the ground.

11. In view of my findings the plaintiffs have not been able to show that entry with regard to mortgage in the record of rights to the extent of half share from Mam Chand in favour of Devtia Ram was wrong, the oral mortgage with possession had taken place on 15-8-1916 more than 17 years back which was never redeemed. Therefore, the plaintiffs were debarred from redeeming the same. They were not owners of the suit land. The suit for declaration to the effect that the plaintiffs were owners in possession of the suit land was not maintainable. Findings of the learned trial court returned on Issues No.2, 3, 4, 4A, 5 and 6 are affirmed."

29. A bare reading of the above concurrent findings of facts establishes that the plaintiffs were *not* in exclusive possession of the suit land. The record and findings categorically, unequivocally, unambiguously

and without a shred of doubt reveal that by way of oral mortgage dated 15.8.1926, possession of Suit land was handed over to the mortgagee, who was thereafter in self cultivating possession of the suit property. This is so recorded by the learned Lower Appellate Court that entry in Column No. 13 of Mutation No.217 (Ex. D-1 dated 16.12.1926) is **"Rahan Zabani Bakabza 15th August,1926"** which translates to mean '**oral mortgage with possession 15.8.1926**'; and in the very same document in the entry pertaining to the cultivation it is recorded **"Khudkasht Murthin"** which means '**self-cultivation of the mortgagee**'. Thus, it is irrevocably established that the defendant was in possession however, in joint possession with the plaintiffs. Plaintiffs have been unable to show as to how they came into exclusive possession of the suit land. Accordingly, possession of the parties over the suit land was joint. Thus, once the plaintiffs have failed to establish exclusive possession of the defendant over the suit land their entire case fails; as, the mortgage is not a usufructuary mortgage; and therefore limitation for redemption thereof would apply.

30. In this regard it has been sought to be contended by learned Senior counsel for the plaintiffs that the finding of the learned trial court to the effect that the plaintiffs are not in exclusive possession would imply that the defendant is in exclusive possession of the suit land; and hence the plaintiffs are entitled to redeem the mortgage. The said argument borders on the absurd. The entire record is testimony to the fact that the parties were in joint possession of the land in question. It is the own averment of the plaintiffs in Para 6 of the plaint reproduced above '*that the defendant*

has entered into joint possession… … .' It is reiterated that from the above facts it is established that the present was not a usufructuary mortgage but was a case of oral mortgage; and as such, was not governed by the judgments in **Ram Kishan's case supra** and **Sheo Ram's case supra** relied upon by the plaintiffs.

31. In this situation, judgment of the Hon'ble Supreme Court rendered in **"Sampuran Singh v. Niranjan Kaur", (SC) : Law Finder Doc Id # 28980,** would come into play in which in similar facts and circumstances where **oral mortgage** was executed in the year 1893 between the parties and question for determination was whether the suit of the plaintiff for redemption was barred by time, was decided in affirmative by holding that:-

> "*Limitation Act, Section 18 - Redemption - Limitation - Oral mortgage deed with possession was executed in March 1893 for a sum of Rs. 53/- - Period of limitation of 60 years for filing suit for redemption would expire in year 1953 - Acknowledgement by execution of document dated 1, January 1960 cannot revive fresh period of limitation - Acknowledgement has to be prior to expiration of prescribed period for filing the suit - Suit if filed in 1982 for redemption is time barred - No interference is warranted.*
>
> XXX XXX XXX
>
> *5. The trial court decreed the suit for redemption on payment of Rs. 53 and held that the suit is within time and hence they have right to redeem the mortgage. The trial court held that the suit is within time by holding that the acknowledgment by the respondents on behalf of the original mortgagees was vide sale deed dated 11-1-1960 and a fresh period of limitation starts from the date of this deed. It further placed reliance on the case of **Inder Singh v. Kishno** to hold that the period of*

limitation would only run after expiry of 12 years from the date of mortgage, in cases of unregistered mortgage. Since the present case is also a case of unregistered mortgage it held that such mortgage and possession would only become valid after a period of 12 years from the date of such mortgage. The present oral mortgage in question was of the year 1893 thus the limitation would only start after 12 years of this date which would be in the year 1905 and adding 60 years from this, the limitation for filing suit would only expire in the year 1965 and since there is acknowledgment by the mortgagees on 11-1-1960, as aforesaid, a fresh limitation starts from this date hence the suit is within limitation. However, the first appellate court set aside this judgment. It held that the aforesaid decision in ***Inder Singh (supra)*** *is of no help to the plaintiffs (mortgagors) as it is not disputed by the parties and rather conceded that earlier, specially during the year in question, oral agreement was permissible in the State of Punjab and was treated to be a valid agreement. This coupled with the fact that the principal money secured under the said agreement was less than Rs. 100, so the mortgage could have been effected either by a registered instrument or by delivery of possession of the land in question. In this view of the matter, admittedly, the land in the suit was mortgaged with possession for Rs. 53 in March 1893. Hence, a valid mortgage came into existence on the very day of its execution. In view of this, it held that the period of limitation of redemption of the land in suit started on that very date of the execution and thus the period of 60 years is to be counted from March 1893, hence the suit is barred by time. When the matter was taken in second appeal the High Court relied on its Full Bench decision entitled* ***Shri Chand v. Nathi*** *dated 21-1-1983, in which it overruled its earlier decision in*

Inder Singh *and hence dismissed the appeal of the present appellants.*

6. Learned Senior Counsel for the appellants, Mr A.B. Rohtagi fairly stated that the aforesaid Full Bench decision is no doubt against the appellants but made submissions for holding contrary to what has been held therein. In the said case of ***Shri Chand*** *one of the core questions raised was, whether an oral mortgage was valid in the eyes of law, which is executed on 14-6-1948 in the State of Punjab, prior to the extension of the provisions of Section 59 of the Transfer of Property Act, 1882 which requires registration of a mortgage. It is also not in dispute that the Transfer of Property Act by virtue of Section 1 is only extended in the State of Haryana on 5-8-1967 with which the Full Bench was concerned and to the State of Punjab after 1-11-1956, with which we are concerned. It held that there was no bar to give effect to an oral mortgage in a case where a mortgagor gave possession of the land to a mortgagee. The Full Bench held:*

> *"Now once that is so on the admitted stand that an oral mortgage was made on June 14, 1948 it seems to inflexibly follow that no legal infirmity attached thereto and the transaction was in essence, legally valid and enforceable. All that, therefore, remains for adjudication is as to what would be the period of limitation for the redemption of such a valid oral mortgage."*

XXX XXX XXX

10. Learned counsel for the appellants has also made reference in the case reported in ***C. Beepathuma v. Velasari Shankaranarayana Kadambolithaya****. In view of this decision it was submitted that since the mortgagee-respondents continued to enjoy the property with possession under the mortgage they cannot shirk from accepting their obligation under it. This Court held: (SCR Headnote)*

"That doctrine is that a person who accepts a benefit under a deed or Will or other instrument must adopt the whole contents of the instrument, must conform to all its provisions and renounce all rights that are inconsistent with it, in other words a person cannot approbate and reprobate the same transaction."

This has no relevance to the present case. The present case is not a case where the mortgagee has received any benefit under any instrument and is renouncing to perform any obligation under it. In the present case, there is neither any deed or document of mortgage. Even under oral mortgage the only obligation for a mortgagee was to hand over possession of the property mortgaged at the moment the mortgagor pays the mortgage money. It is nobody's case that the mortgagor has paid back the money. This part of the judgment only refers to the doctrine of election. There is no obligation under the oral mortgage which could be said to be not performed by the mortgagee. We are only concerned here, whether the suit filed by the appellants is within time or not. It is significant that this very decision also makes reference about the limitation in filing such suits. Here a suit was filed for redemption of mortgage deed, Ex. P-2 by the 1st and 2nd respondents. The first respondent purchased Schedule 'A' property and undertook to redeem the mortgage property described in Schedules 'A' and 'B' and hand over possession of Schedule 'B' property to the legal representatives in the family of one Madana. Before this on 14-4-1842 Madana, who was then Ejaman of the family, usufructuarily mortgaged the 'A', 'B' and 'C' Schedule properties under Ex. P-1. This deed did not contain any provision for repayment of the amount or for the usufructuary mortgage to be worked off. So no period was stated for redemption. Then it was later converted into a mortgage specifying time through Ex. P-2, as aforesaid, in 1862. The Court held:

> *"In 1842 when Ex. P-1 was executed, there was no law prescribing a period of limitation for the redemption of a usufructuary mortgage. Such limit came in 1859 for the first time and a period of 60 years from the date of the mortgage was prescribed. It is this statute which seems to have been the cause for the execution of Exs. P-2 and P-2(a); the mortgagees were perhaps afraid that the mortgage could be redeemed at any time within 60 years from the date of the mortgage of 1842. The last date for redemption thus was 1902. By getting the term certain for 40 years, the date for redemption was shifted by them to 1902 and redemption could not take place till that year. The mortgagors also benefited, because they obtained a release of some properties and received Rs. 100 in cash. The period of 60 years was repeated in the Act of 1871; but it contained a rider that if during the period of 60 years, there was an acknowledgment then the period would run from the date of that acknowledgment. Article 148 of the Limitation Act as it stands today was introduced by the Act of 1877. It makes the 60 years' period run from the time when redemption is due." (emphasis supplied)*

The aforesaid passage clearly shows that the mortgage could be redeemed at any time within 60 years from the date of mortgage."

32. It has been contended by the ld. Senior Counsel for the plaintiffs that the said judgment in **Sampuran Singh's case supra** has been distinguished by the Hon'ble Supreme Court in subsequent judgment in **Sheo Ram's case supra**. However, the said argument of the learned Senior Counsel is misconceived as what has been held by the Hon'ble Apex Court is as under:-

*"20. Contrary view has been expressed in **Sampuran Singh v. Niranjan Kaur** as follows:-*

> *"14. Submission was, as aforesaid, that right to redeem only accrues when either the mortgagors tender the amount of mortgage or the mortgagees communicate*

satisfaction of the mortgage amount through the usufruct from the land. This submission is misconceived, as aforesaid, if this interpretation is accepted, then till this happens the period of limitation never start running and it could go on for an infinite period. We have no hesitation to reject this submission. The language recorded above makes it clear that right of redemption accrues from the very first day unless restricted under the mortgage deed. When there is no restriction the mortgagors have a right to redeem the mortgage from that very date when the mortgage was executed. Right accruing means, right either existing or coming into play thereafter. Where no period in the mortgage is specified, there exists a right to a mortgagor to redeem the mortgage by paying the amount that very day in case he receives the desired money for which he has mortgaged his land or any day thereafter. This right could only be restricted through law or in terms of a valid mortgage deed. There is no such restriction shown or pointed out. Hence, in our considered opinion the period of limitation would start from the very date the valid mortgage is said to have been executed and hence the period of limitation of 60 years would start from the very date of oral mortgage, that would be from March 1893. In view of this, we do not find any error in the decision of the first appellate court or the High Court holding that the suit of the present appellants is time-barred."

However, the facts mentioned in para 3 show that possession remained with mortgagor and it was not a case of usufructuary mortgage.

21. We need not multiply reference to the other judgments. Reference to the above judgments clearly spell out the reasons for conflicting views. In cases where distinction in usufructuary mortgagor's right under Section 62 of the TP Act has been noted, right to redeem has been held to continue till the mortgage money is paid for which there is no time-limit while in other cases right to redeem has been held to accrue on the date of mortgage resulting in extinguishment of the right of redemption after 30 years.

22. We, thus, hold that special right of usufructuary mortgagor under Section 62 of the TP 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 the mortgagor. Until then, limitation does not start for the 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."

(Emphasis added)

33. Clearly therefore, the argument of the ld. Senior counsel for the plaintiffs is based on a mis-reading of the above said pronouncement of the Hon'ble Supreme Court. Judgment of **Sampuran Singh's case supra** has been distinguished, however to be *not* a case of usufructuary mortgage; and therefore, implying/holding that limitation will apply. It has been held that limitation for redemption of mortgage will not apply only in cases of usufructuary mortgage where monies are being paid and received.

34. Furthermore, as per judgment of the Hon'ble Supreme Court in **Sampuran Singh's case supra** it has been held that oral mortgage was valid before extension of Transfer of Property Act to Punjab on 01.11.1956 and Haryana on 05.08.1967. This is identical to the present case. In oral mortgage, limitation starts from that date.

35. Even otherwise, the limited reference answered by the Full Bench of this Court in **Ram Kishan's case supra** was as under:-

"4. The Division Bench while hearing the present appeal along with other appeals framed the following questions for opinion of the larger Bench:-

1. Whether the right to seek redemption would arise on the date of mortgage itself in case of usufructuary mortgage when no time limit is fixed to seek redemption?

2. Whether there is any time limit in the case of a usufructuary mortgagor to get his property redeemed?"

36. Thus, the reference was only with regard to a 'usufructuary mortgage', and not an oral mortgage such as the present one.

37. From the above discussion it is evident that both the Courts below, after appraising the entire evidence on the record have returned pure findings of fact that:

(i) That the plaintiffs are not in exclusive possession.

(ii) The defendant has become the owner of mortgaged land by prescription.

(iii) Suit is not maintainable. (reference may be made to above-reproduced extract of the Lower Appellate Court judgment).

38. It is well entrenched position in law that findings of fact, howsoever erroneous, cannot be set aside by this Court in a second appeal under Section 100. Ref.: **AIR 1959 SC 57 Deity Pattabhiramaswamy V. S. Hanymayya & Ors.** (Para 13).

39. It is also very pertinent to note that in the present case challenge has been laid to the mutation after more than 60 years. Admittedly, entry is incorporated in subsequent Jamabandis. Further, clerical mistakes can be corrected under Section 34 Regulations 6 & 7 of The

Punjab Land Revenue Act. However, an allegedly wrong entry of mutation cannot be challenged in a suit 64 years later. In the present case, by correction, 37 Bighas 10 Biswas was corrected to read 47 Bighas 10 Biswas which was ½ of the total khata which admittedly was 95 Bighas. Even otherwise, Mutation has not been challenged in plaint or even in replication.

40. Very importantly, the plaintiffs cannot claim relief of redemption of a mortgage, which mortgage is verily denied by them, even in the amended replication filed by them. The plaintiffs cannot be permitted to rely upon a mortgage when their own case in the plaint was that no land was ever mortgaged. In this regard reference may be made to the above-reproduced pleadings of the plaintiffs from which it is abundantly clear that the plaintiffs have denied the mortgage at every stage. It is well settled law that no amount of evidence can be seen on a point not raised. In this regard, reference may be made to judgment of the Hon'ble Supreme Court in **"Bhagat Singh & others V. Jaswant Singh" 1966 SC 1861** wherein it is held that merely because the issues have been framed and evidence has been led, the same will not be sufficient to cure the lack of pleadings. In any event, the plaintiffs cannot be permitted to raise a new point in second appeal. In this regard reference may be made to another judgment of the Hon'ble Supreme Court in **"Smt. Chander Kali Bai & others V. Jagdish Singh Thakur & another", 1977 SC 2262**; wherein also it is held that a new question of fact cannot be entertained at any appellate stage.

41. Last but not the least, the learned Senior Counsel for the plaintiffs has been unable to inform as to how in the above-noted circumstances when the mortgage itself is not admitted, how can a suit for redemption be maintained without providing the mandatory details required to be given under Order 34 Rule 7 in case of a usufructuary mortgage.

42. Before parting, it may also be pointed out that while issuing Notice of Motion in the present second appeal vide order dated 14.07.1989 it was directed that "*status quo with regard to possession is existing today*" be maintained. However subsequently at the time of admission of the appeal on 20.07.1990, the said status quo was vacated as follows:-

> *"Admitted.*
>
> *Since the applicants have not been found to be in exclusive possession of any portion of the land, stay is declined. The order of status quo passed by this Court at the time of issuing notice of motion is vacated."*

43. In view of the above discussion, the present second appeal is hereby **dismissed.**

44. Pending applications, if any, stand disposed of.

21.04.2025 **(NIDHI GUPTA)**
Divyanshi **JUDGE**

Whether speaking/reasoned: Yes/No
Whether reportable: Yes