2025:PHHC:022413

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IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

RSA No.2075 of 1994 (O&M)
Date of decision : 23.01.2025

Puran Singh and another ....Appellant

Versus

Karamjit Singh and others ....Respondent

CORAM: HON'BLE MR. JUSTICE PANKAJ JAIN

Present : Mr. Kanwaljit Singh, Senior Advocate with
Mr. K.S. Brar, Advocate for the appellant.

Ms. Monita Mehta, Advocate for respondent No.1.

PANKAJ JAIN, J. (ORAL)

Defendants No.1 and 2 are in second appeal.

2. For convenience, the parties hereinafter are referred to by their original position in the suit i.e. the appellants as defendants No.1 & 2; respondent No.1 as plaintiff; respondent No.2 as defendant No.3 and respondent No.3 as defendant No.4.

3. Plaintiff filed suit for possession of land measuring 20 Kanals 8 Marlas as detailed out in the headnote of the plaint pleading that defendant No.4 Kehar Singh, mortgaged with possession suit land in favour of plaintiff through a mortgage deed duly registered on 30.03.1972. The possession was taken on behalf of the plaintiff by his mother. About 7-8 years prior to filing

of the suit, land was given for cultivation to one Bhajan Singh brother of defendants No.1 and 2 as tenant. Defendant No.4 executed sale deed dated 14.07.1982 in favour of defendants No.1 to 3. Plaintiff claimed that he is residing in England and when he came to India in October, 1983 he came to know that '*Amanat*' of mortgage amount was not kept in the sale deed. It was claimed that defendants No.1 to 3 are in unauthorized possession and the plaintiff was entitled to get back the possession as a mortgagee.

4. Defendants No.1 and 2 filed joint written statement claiming that Kehar Singh defendant No.4 executed mortgage deed dated 30.03.1972 in favour of the plaintiff. However, it was denied that the plaintiff ever came into possession of land under the said mortgage. It was also denied that mother of the plaintiff ever came in possession of the land. Defendants No.1 and 2 admitted that defendant No.4 executed sale deed in their favour on 14.07.1982. It was claimed that defendant No.4 before execution of the sale deed got land redeemed through the Court of Collector, Kapurthala vide order dated 04.03.1982.

5. On the basis of the pleadings, Court of first instance framed the following issues :

> "1. Whether the suit in the present form is not maintainable as alleged? OPD.
>
> 2. Whether the land in dispute stood redeemed as alleged? If so its effect? OPP.
>
> 3. Whether the order dated 4.3.1982 of the Collector is illegal and invalid as alleged? OPP (Objected to)

4. Whether defendant Nos.1 and 2 are owners in possession of the land in dispute as alleged? OPD (Objected to).
5. Relief."

6. Returning findings on issue No.1 and 2 Court of first instance held that in terms of mortgage deed (Exhibit P-1), the term of mortgage was for 29 years and thus, the land could not be redeemed prior thereto.

7. Relying upon the covenant contained in the mortgage deed fixing the term of the mortgage as 29 years, Trial Court decided issue No.3 in favour of the plaintiff and held that the redemption order dated 04.03.1982 passed by Collector was illegal and invalid. Consequently, Trial Court decreed the suit filed by the plaintiffs.

8. Dissatisfied defendants No.1 and 2 preferred appeal.

9. Lower Appellate Court affirmed the findings recorded by the Trial Court holding that the land was illegally redeemed and the plaintiff was wrongly deprived of his possession. Lower Appellate Court held that appellants-defendants having stepped in the shoes of mortgagor, are in illegal possession of the land as the mortgage continues to subsist for 29 years.

10. Learned Senior Counsel appearing for the appellants while assailing impugned judgments and decrees passed by the Courts below relies upon ratio of law laid down by Supreme Court in the case of **Shivdev Singh vs. Sucha Singh (2000) 4 SCC 326** to submit that term of the mortgage

cannot be held to be a clog on equity of redemption. Any term in the mortgage deed dis-entitling the mortgagor to redeem mortgage during the subsistence of mortgage, needs to be struck down as illegal creating a clog on equity of redemption. Further reliance is being placed upon law laid down in the case **C. Cheriathan vs. P. Narayanan Embranthiri and others (2009)2 SCC 673** and **Usha Rani vs. Pushpa Devi, 2008(2) R.C.R. (Civil) 163.**

11. Counsel for respondent No.1 has supported the judgment and decrees passed by the Courts below and submits that the order passed by the Collector without there being notice to the mortgagee, prior to expiry of the term of mortgage, is illegal. It has been further submitted that the Courts below have rightly appreciated the facts and circumstances of the case and have rightly decreed the suit filed by the plaintiff.

12. I have heard counsel for the parties and have carefully gone through records of the case.

13. Facts are not much in dispute.

14. The issue involved is: '*whether term in the mortgage deed fixing 29 years as the tenure of mortgage can be enforced to oust the equity of redemption or the same amounts to clog on redemption?'*.

15. Right to redemption is governed by Section 60 of Transfer of Property Act, 1982 which reads as under :

> "**60. Right of mortgagor to redeem.**—At any time after the principal money has become 9 [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 10 [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 acknowledgement 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 act of the parties or by 11[decree] of a Court.

The right conferred by this section is called a right to redeem and a suit to enforce it is called a suit for redemption.

Nothing in this section shall be deemed to render invalid any provision to the effect that, if the time fixed for payment of the principal money has been allowed to pass or no such time has been fixed, the mortgagee shall be entitled to reasonable notice before payment or tender of such money.

Redemption of portion of mortgaged property.— Nothing in this section shall entitle a person interested in a share only of the mortgaged property to redeem his own share only, on payment of a proportionate part of the amount remaining due on the mortgage, except 1[only] where a mortgagee, or, if there are more mortgagees than one, all such mortgagees, has or have acquired, in whole or in part, the share of a mortgager."

16. This Court while interpreting Section 60 in the case of **Krishan Bir Singh and others vs. Ram Nath @ Ram Prashad (since deceased) and others, 2024 NCPHHC 92825**, observed as under :

"[9] Under Indian laws, owner of the land by way of mortgage, parts with only some rights of ownership. Right of redemption is exercised by him by virtue of his residuary ownership to resume the rights which he had parted at the time of mortgage. Statute recognizes this right of redemption. Mortgagor has a right to redeem the land till the mortgage subsists. As per the bare provision, after the principle money becomes due, the mortgagor has a right, on payment or tender, of the mortgaged money, to require the mortgagee to deliver to him the mortgage-deed and all documents relating to the mortgaged property in possession or power of the mortgagee and where the mortgagee is in possession of the mortgaged property, to deliver possession thereof to the mortgagor. The only exception to the aforesaid right is that the right conferred by the statute may not have been extinguished by the act of the parties or by a decree of a Court. In the present case, there is nothing on record to show that the right of the plaintiffs to get the property redeemed was ever extinguished by the act of the parties or by any decree of the Court. Section 4 of the Redemption of Mortgages (Punjab) Act, 1913, which provides for petition for redemption, reads as under:-

> *"4. The mortgagor or other person entitled to institute a suit for redemption may, at any time after the principal money becomes payable and before a suit for redemption is barred, present a petition to the Collector applying for an order directing that his mortgage be redeemed, and where the mortgage is with possession that he be put in possession of the mortgaged property. The petition shall be duly verified in the manner prescribed by law for the verification of plaints, and shall state the sum which the petitioner declares to the best of his belief to be due under the mortgage. The petitioner shall at the same time deposit such sum with the Collector.*

The petitioner shall state in his petition such particulars and file therewith such documents as may be prescribed."

17. Supreme Court in the case of ***Shivdev Singh vs. Sucha Singh (supra)*** observed as under :

"10. In ***Pomal Kanji Govindji & Ors. v. Vrajlal Karsandas Purohit & Ors., AIR 1989 Supreme Court 436*** this Court held that "freedom of contract is permissible provided it does not lead to taking advantage of the oppressed or depressed people. The law must transform itself to the social awareness. Poverty should not be unduly permitted to curtail one's right to borrow money on the ground of justice, equity and good conscience on just terms. If it does, it is bad. Whether it does or does not, must, however, depend upon the facts and the circumstances of each case." The doctrine "clog on equity of redemption" was held to be a rule of justice, equity and good conscience. It must be adopted to the reality of situation and the individuality of transaction. The Court should take not to the time, the condition, the price spiral, the term bargain and the other obligations in the background of the financial conditions of the parties. After referring to various judgments of the High Courts in the country this Court held :

"Whether in the facts and the circumstances of these cases, the mortgage transaction amounted to clog on the equity of redemption, is a mixed question of law and fact. Courts do not look with favour at any clause or stipulation which clogs equity of redemption. A clog on the equity of redemption is unjust and unequitable. The principles of English law, as we have noticed from the decision referred to hereinbefore which have been accepted by this Court in this country, look with disfavour at clogs on the equity of redemption. Section 60 of the Transfer of Property Act in India, also recognises the same position.

It is a right of the mortgagor on redemption, by reason of the very nature of the mortgage, to get back the subject of the mortgage and to hold and enjoy as he was entitled to hold and enjoy it before the mortgage. If he is prevented from doing so or it prevented from redeeming the mortgage, such prevention is bad in law. If he is so prevented, the equity of redemption is affected by that whether aptly or not, and it has always been termed as a clog. Such a clog is inequitable. The law does not countenance it. Bearing the aforesaid background in mind, each case has to be judged and decided in its own perspective. As has been observed by this Court that long term for redemption by itself, is not a clog on equity of redemption. Whether or not in a particular transaction there is a clog on the equity of redemption, depends primarily upon the period of redemption, the circumstances under which the mortgage was created, the economic and financial position of the mortgagor, and his relationship vis-a-vis him and the mortgagee, the economic and social conditions in a particular country at a particular point of time, custom if any, prevalent in the community or the society in which the transaction takes place, and the totality of the circumstances under which a mortgage is created, namely, circumstances of the parties, the time, the situation, the clauses for redemption either for payment of interest or any other sum, the obligations of the mortgagee to construct or repair or maintain the mortgaged property in cases of usufructuary mortgage, to manage as a matter of prudent management, these factors must be correlated to each other and viewed in a comprehensive conspectus in the background of the facts and the circumstances of each case, to determine whether these are clogs on equity of redemption."

11. It was further held that Section 60 of the Transfer of Property Act confers on the mortgagor right of redemption which is a statutory right. The right of redemption is an incident of a subsisting mortgage and it subsists so long as the mortgage subsists. Whether in a particular case there is any clog on the equity of redemption, has to be decided in view of the background of a particular case. The doctrine of clog on equity of redemption has to be moulded in modern conditions. In this regard the Court held :

> "It is a settled law in England and in India that a mortgage cannot be made altogether irredeemable or redemption made illusory. The law must respond and be responsive to the felt and discernible compulsions of circumstances that would be equitable, fair and just, and unless there is anything to the contrary in the statute, law must take congnizance of that fact and act accordingly. In the context of fast changing circumstances and economic stability, long term for redemption makes a mortgage an illusory mortgage, though not decisive. It should prima facie be an indication as to how clogs on equity of redemption should be judged."

12. In the present case all the Courts below on facts held that the mortgage deed being for a period of 99 years was a clog on the equity of redemption. Such findings were returned keeping in view the facts and circumstances of the case and the financial position under which the mortgagor Shri Prakash Singh was placed at the time of execution of the mortgage deed on 19.3.1968. The appellants were found to be in an advantageous position qua the mortgagor. They were also found to be deriving the usufructs of the mortgaged land for a period of over 26 years at the time of filing of the suit on payment of meagre sum of Rs. 7,000/- only to the mortgagor. The findings of the facts returned by the Courts below do not require any interference particularly when the learned

counsel appearing for the appellants has not contended that such findings were perverse or uncalled for or against the evidence.

18. Supreme Court in the case of **Pomal Kanji Govindji and others vs. Vrajlal Karsandas Purohit and others, AIR 1989 Supreme Court 436** observed as under:

> "20. The reason justifying the court's order to relieve a mortgagor from the effects of his bargain is its want or conscience. Putting it in more familiar language the court's jurisdiction to relieve a mortgagor from his bargain depends on whether it was obtained by taking advantage of any difficulty or embarrassment that he might have been in when he borrowed the moneys on the mortgage. Length of the term, according to Sarkar, J. the aforesaid decision, was not by itself oppressive and could not operate as a clog on the equity or redemption. There was a term in the mortgage deed that the mortgagees could spend any amount on repairs and those expenses would be paid, according to the account produced by the mortgagees. All that it means was that in claiming moneys on account of repairs and construction the mortgagees had to show from their accounts that they had spent these moneys. This Court on that basis held that the clause which provided that the mortgage had to be redeemed within the specified period of six months was bad. The principle, however, is that if it was not an unconscionable bargain and it did not in effect deprive the mortgagor of his right to redeem the mortgage or so to curtail his right to redeem that it has become illusory and non-existent, then there was no clog on equity of redemption. It has to be borne in mind that the English authorities relied upon by Sarkar, J. and the principles propounded by this Court in the case of Seth Ganga Dhar were in the background of a sedate and fixed state of affairs. The spiral and escalation of prices of the immovable properties was not then there. Today, perhaps, a different conspectus would

be required to consider the right to redeem the property after considerable length of time pegging the price to a small amount of money, the value of which is fast changing.

21. The rights and liabilities of mortgagor are controlled by the provisions of Section 60 of the Transfer of Property Act, 1882. The clog on redemption has been noted in Mulla's Transfer of Property Act, 7th edn., page 401 that a mortgage being a security for the debt, the right of redemption continues although the mortgagor fails to pay the debt at due time. Any provision inserted to prevent, evade or hamper redemption is void. That is implied in the maxim "once a mortgage always a mortgage". Collins M.R. In ***Jarrah Timber & Wood Paving Corporation v. Samuel*** at page 7 observed that it is the right of a mortgagor on redemption, by reason or the very nature of a mortgage to get back the subject of the mortgage and to hold and enjoy as he was entitled to hold and enjoy it before the mortgage.

22. The doctrine "clog on the equity of redemption" is a rule of justice, equity and good conscience. It must be adopted in each case to the reality of the situation and the individuality of the transaction. We must take note of the time, the condition, the price spiral, the term bargain and the other obligations in the background of the financial conditions of the parties. Therefore, in our opinion, in view of the evidence it is not possible to hold that there was no clog on the equity of redemption in these cases.

26. Whether in the facts and circumstances of these cases, the mortgage transaction amounted to clog on the equity of redemption is a mixed question of law and fact. Courts do not look with favour at any clause or stipulation which clogs equity of redemption. A clog on the equity of redemption is unjust and unequitable. The principles of English Law, as we have noticed from the decisions referred to hereinbefore which have been accepted by this Court in this country, looks with disfavour at clogs on the equity of

redemption. Section 60 of the Transfer of Property Act, in India, also recognises the same position.

27. It is a right of the mortgagor on redemption, by reason of the very nature of the mortgage, to get back the subject of the mortgage and to hold and enjoy as he was entitled to hold and enjoy it before the mortgage. If he is prevented from doing so or is prevented from redeeming the mortgage, such prevention is bad in law. If he is so prevented, the equity of redemption is affected by that whether aptly or not, and it has always been termed as a clog. Such a clog is inequitable. The law does not countenance it. Bearing the aforesaid background in mind, each case has to be judged and decided in its own perspective. As has been observed by this Court that long term for redemption by itself, is not a clog on equity of redemption. Whether or not in a particular transaction there is clog on the equity of redemption, depends primarily upon the period of redemption, the circumstances under which the mortgage was created, the economic and financial position of the mortgagor and his relationship vis-a-vis him and the mortgagee, the economic and social conditions in a particular country at a particular point of time, custom, if any, prevalent in the community or the society in which the transaction takes place, and the totality of the circumstances under which a mortgage is created, namely circumstances of the parties, the time, the situation, the clauses for redemption either for payment of interest or any other sum, the obligations of the mortgagee to construct or repair or maintain the mortgaged property in cases of usufructuary mortgage to manage as a matter of prudent management, these factors must be co-related to each other and viewed in a comprehensive conspectus in the background of the facts and circumstances of each case, to determine whether these are clogs on equity of redemption.

28. These principles have been recognised by this Court in ***Seth Ganga Dhar v. Shankar Lal***. It has also to be borne in mind that long term for redemption in respect of immovable properties was

prevalent at a time when things and the society were, more or less, in a static condition. We live in changing circumstances. Mortgage is a security for loan. It is an axiomatic principle of life and law that necessitous men are not free men. A mortgage is essentially and basically a conveyance in law or an assignment of chattels as a security for the payment of debt or for discharge of some other obligation for which it is given. The security must, therefore, be redeemable on the payment or discharge of such debt or obligation. Any provision to contrary, notwithstanding, is a clog or fetter on the equity of redemption and hence, bad and void. "Once a mortgage must always remain a mortgage", and must not be transformed into a conveyance or deprivation of the right over the property.

30. Section 60 of the Transfer of Property Act, 1882 conferred on the mortgagor the right of redemption. This is a statutory right. The right of redemption is an incident of a "subsisting mortgage and it subsists so long as the mortgage subsists." See the observations in R. Ghose Law of Mortgage 6th edn., Page 227.

31. Whether in a particular case there is any clog on the equity of redemption, has to be decided in view of its background of the particular case. The doctrine of clog on equity of redemption has to be moulded in the modern conditions. See Mull : Transfer of Property Act, 17th edn., page 402. Law does not favour any clog on equity of redemption."

19. In view of above settled proposition of law, this Court finds that 29 years is too long a term of mortgage. It restricts right of mortgagor to redeem the property. The same would amount to clog on equity of redemption and can not be sustainable in the eyes of law.

20. As a sequel of the discussion held herein-above, this Court finds that the Courts below erred in decreeing the suit filed by the plaintiff. Defendant No.4 had a right to redeem the land. The same was validly redeemed by the order passed by the Collector. In case the plaintiffs were aggrieved of the said order, they were obligated to proceed as per the provisions contained under 1913 Act. The said order passed by authority exercising jurisdiction under statute remained unchallenged. Defendant No.4 having redeemed the land, sold the same to defendants No.1 to 3. Defendants No.1 to 3 being purchasers under registered sale deed, cannot be held to be in illegal possession over the suit land. The right of the mortgagee under a mortgage deed cannot be pressed into service even after mortgage stands redeemed.

21. Though this Court need not intervene in the concurrent findings of the fact recorded by the Trial Court and Appellate Court, yet where the findings are perverse and are result of misreading of evidence, the same will be a question of law to be determined by court in second appeal. Regular Second Appeals in the State of Punjab, Haryana and Union Territory, Chandigarh, are governed by Section 41 of the Punjab Courts Act, 1918, and not by Section 100 of the Code of Civil Procedure, 1908. Reference in this regard can be made to the judgment of the Five Judges Bench in **Pankajakshi vs. Chandrika (2016) 6 SCC 157**. Under Section 41, the High Court need not frame substantial questions of law.

22. In view of findings recorded herein-above, the present appeal merits acceptance. Resultantly, the same is ordered to be allowed. Impugned judgments and decrees passed by the Courts below are ordered to be set aside. Suit filed by the plaintiff is ordered to be dismissed.

23. Pending application, if any, shall also stand disposed off.

January 23, 2025 **(Pankaj Jain)**
Dpr **Judge**

Whether speaking/reasoned : Yes/No

Whether reportable : Yes/No