2025:PHHC:023891

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

RSA No.2084 of 1994 (O&M)
Date of decision: 08.01.2025

Buta Singh ....Appellant

Versus

Nazar Singh and others ...Respondents

CORAM: HON'BLE MR. JUSTICE PANKAJ JAIN

Present : Mr. Baltej S. Sidhu, Sr. Advocate with
Mr. Gurpreet Singh Brar, Advocate for the appellant.

Mr. R.K. Girdhar, Advocate and
Mr. P.K. Ganga, Advocate for respondent No.1.

PANKAJ JAIN, J. (ORAL)

Defendant No.1 is in second appeal.

2. For convenience and to avoid confusion, the parties hereinafter are referred to by their original position in the suit i.e. the appellant as defendant No.1 and the respondent No.1 as the plaintiff and respondents No.2 to 9 as defendants No.2 to 9.

3. Plaintiff filed suit for possession by way of redemption of mortgage. As per plaintiff, he purchased disputed property through registered sale deed dated 09.03.1956. He mortgaged the same with Kartar Singh through registered mortgage deed dated 17.06.1964 in lieu of Rs.500/-. Kartar Singh died. Defendants are his legal heirs.

Plaintiff claimed that he offered mortgage money to the defendants. They refused to accept the same. Thus, the present suit was filed seeking possession by way of redemption of mortgage.

4. Suit was contested by defendant No.1. Other defendants opted not to appear and were proceeded *ex parte*. It was claimed that previously instituted suit by plaintiff *qua* the same property was dismissed vide judgment and decree dated 08.10.1987. The present suit is barred by principles of *res judicata* and is not maintainable. Defendant further claimed that as per mortgage deed there was a condition that the mortgage be redeemed within two months. On failure of mortgagor to redeem the property within the stipulated period, the property in dispute can be put to auction. Plaintiff failed to redeemed the property within two months. The same was put to auction. The same was purchased by defendant No.1 through his maternal uncle for a sum of Rs.600/-. In alternate, defendant No.1 claimed to have become owner by way of adverse possession being in possession over the suit property continuously and uninterruptedly since 16.12.1964. It was further claimed that defendant No.1 has reconstructed the house by spending Rs.35,000/- and the plaintiff was required to pay for the same.

5. Court of the First Instance put suit filed by the plaintiff to trial framing following issues:

> "1. Whether plaintiff is entitled for possession of the house as fully described in the headnote of the plaint by way of redemption? OPP.
> 2. Whether the suit is not maintainable, as alleged? OPD.
> 3. Whether the suit is bad for non-joinder of necessary parties? OPD
> 4. Whether the suit is within limitation? OPP.
> 5. Whether the plaintiff is estopped from filing this suit by his act and conduct? OPD
> 6. Relief."

6. Answering issue No.1, Court of the First Instance held that the mortgage is not disputed. The attempt made by defendant to take refuge under condition of mortgage fixing term thereof for two months was not enforceable in view of settled principle of *'once a mortgage always a mortgage'*. Trial Court thus held that any auction pursuant to the said condition of mortgage, was illegal and cannot be enforced. Trial Court further held that the suit having been filed within thirty years of the date of mortgage, was within limitation.

7. So far as earlier suit is concerned, while returning finding on issue No.5, Trial Court found that the same suit was filed by the plaintiff seeking decree of possession claiming that he was forcibly dispossessed by the defendants. The same was withdrawn. The instant

suit having been filed seeking possession by way of redemption is not barred by *res judicata*. Court of First Instance thus passed preliminary decree in favour of the plaintiff granting him six months' time to pay mortgage money and thereafter to seek final decree of possession.

8. Dissatisfied with the judgment and decree passed by the Trial Court, defendant No.1 preferred appeal.

9. Lower Appellate Court affirmed the findings recorded by the Trial Court and dismissed the appeal maintaining the judgment and decree passed by the Trial Court.

10. Mr. Baltej Singh Sidhu, Ld. Senior Counsel appearing for the appellant has assailed findings recorded by the Courts below contending that the present suit was barred by principles of constructive *res judicata*. The plaintiff ought to have claimed decree of possession by way of redemption in the earlier suit. He having failed to claim the said relief in the earlier suit, is barred from praying for the same in the subsequent suit. He further submits that bare perusal of Exhibit D-1 makes it explicitly clear that the plaintiff was bound to return money within a period of two months. As per agreed terms and conditions, in the event of failure to make payment within the stipulated period, mortgagee was within his right to sell mortgaged property in open auction. Defendant No.1 purchased the house through his maternal

uncle after the same was put to auction by Kartar Singh. The Courts below have wrongly held that the said term amounts to clog on redemption.

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

12. Mortgage of the suit property in favour of Kartar Singh by plaintiff vide registered mortgage deed dated 17.06.1964 is not in dispute. Defendant No.1 claims to be beneficiary of a term contained in the mortgage deed whereby mortgagee was empowered to put mortgage property for sale on expiry of two months in the event of failure of the mortgagor to pay the mortgage amount. Rights and liabilities of mortgagor have been specified under Section 60 to Section 66 of the Transfer of Property Act, 1882. Rights and liabilities of mortgagee are governed by Section 67 to Section 77.

13. Section 60 deals with right of mortgagor to redeem. Section 67 deals with right of mortgagee to foreclosure or sale. The same read 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 acknowledgment in writing that any right in derogation of his interest transferred to the mortgagee has been extinguished:

Provided that the right conferred by this section has not been extinguished by 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."

67. Right to foreclosure or sale.—In the absence of a contract to the contrary, the mortgagee has, at any time after the mortgage-money has become [3][due] to him, and before a decree has been made for the redemption of the mortgaged property, or the mortgage-money has been paid or deposited as hereinafter provided, a right to obtain from the Court [4][a decree] that the mortgagor shall be absolutely debarred of his

> right to redeem the property, or 4[a decree] that the property be sold.
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> A suit to obtain 4 [a decree] that a mortgagor shall be absolutely debarred of his right to redeem the mortgaged property is called a suit for foreclosure.
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> Nothing in this section shall be deemed—
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> 1[(a) to authorise any mortgagee other than a mortgagee by conditional sale or a mortgagee under an anomalous mortgage by the terms of which he is entitled to foreclose, to institute a suit for foreclosure, or an usufructuary mortgagee as such or a mortgagee by conditional sale as such to institute a suit for sale; or]
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> (b) to authorise a mortgagor who holds the mortgagee's rights as his trustee or legal representative, and who may sue for a sale of the property, to institute a suit for foreclosure; or
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> (c) to authorise the mortgagee of a railway, canal or other work in the maintenance of which the public are interested, to institute a suit for foreclosure or sale; or
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> (d) to authorise a person interested in part only of the mortgage-money to-institute a suit relating only to a corresponding part of the mortgaged property, unless the mortgagees have, with the consent of the mortgagor, severed their interests under the mortgage."

14. Right of mortgagor to get the mortgage redeemed has been explained by this Court in the case of **Krishan Bir Singh and others vs. Ram Nath @ Ram Prashad (since deceased) and others, 2024 NCPHHC 92825**, observing 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.*
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> *The petitioner shall state in his petition such particulars and file therewith such documents as may be prescribed."*

15. As per settled law, the equity of redemption subsists inspite of expiry of the period for redemption agreed on till a decree for foreclosure is made in a suit brought by mortgagee or till the conformation of sale in pursuance of a decree for sale obtained by mortgagee. While interpreting similar provision Privy Counsel in the case of **Mehrban Khan vs. Makhana, AIR 1930 PC** observed as under:

> "Under the mortgage the mortgagee was entitled to a possession for 19 years. At the end of the period if the mortgagor paid off the mortgage money the property was to belong, as to a limited interest therein only, to the mortgagor, and as to the major interest therein, to the mortgagee. If the mortgagor failed to pay off the mortgage money at the end of 19 years the property was to belong to the mortgagee absolutely. After the expiration of the stipulated period the assignee of the mortgagor brought a redemption suit."
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> 11. In those circumstances, it was held by their Lordships of the Privy Council that :
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> > "The provisions in the deed being a clog on the equity of redemption were void and could have no more binding force against the assignee, of the mortgagor than they had against the mortgagor himself."

16. In view of Division Bench's judgment in the case of **Punjab and Sind Bank Ltd. vs. Kishen Singh Gulab Singh, AIR 1935 Lah 350** principles of equity, justice and good conscience are

applicable despite the fact that the transfer of property is not in force in the State of Punjab. Division Bench held that:

> "The Transfer of Property Act is not in force in this Province, but its principles are generally held to be applicable."

17. Same was the view of another Division Bench in the case of **Nizam Din vs. Ramsukh Das, AIR 1938 Lah 286(C)** holding as under:

> "It should always be presumed that in India, a purchaser of previous mortgagee rights intends to keep the mortgage alive for his benefit. Though the Transfer of Property Act is not in force in the Punjab, the general principles to be applied are those embodied in the Amended Act of 1929 which must be held to be more in accordance with the principles of justice, equity and good conscience."

18. In view of afore-settled law, this Court finds that any clause in the mortgage deed providing that the amount due under mortgage, if not paid, the mortgagee would become owner of the property, cannot be invoked without the leave of court. Further reliance can be placed upon ratio of law laid down by Supreme Court in the case of **Murarilal vs. Dev Karan, AIR 1965 SC 225**. In view thereof, this Court finds that the auction of the mortgage property pleaded by the defendant/ appellant to resist the suit for possession filed by the mortgagee sans merit and cannot be accepted.

19. Coming on to the plea raised on the basis of order Exhibit D-6 whereby the earlier suit filed by the plaintiff for possession *qua* the same property was dismissed as withdrawn without permission to file fresh suit and the effect thereof on the present suit, this Court finds that the plea raised is without substance and cannot be accepted.

20. Order II Rule 2 CPC reads as under:

> "**2. Suit to include the whole claim.**—(1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish and portion of his claim in order to bring the suit within the jurisdiction of any Court.
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> (2) **Relinquishment of part of claim.**—Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.
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> (3) **Omission to sue for one of several reliefs.**—A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.
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> *Explanation.*—For the purposes of this rule an obligation and a collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action.
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> *Illustration*
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> A lets a house to B at a yearly of rent Rs. 1,200. The rent for the whole of the years 1905, 1906 and 1907 is due and

unpaid. A sues B in 1908 only for the rent due for 1906. A shall not afterwards sue B for the rent due for 1905 or 1907.

21. A bare perusal of Exhibit D-2 plaint would reveal that the earlier suit was filed wherein the plaintiff pleaded forcible possession at the hands of defendant. No right based upon equity of redemption was pleaded. Both the suits are based upon different cause of actions.

22. In view of above, this Court finds that provisions as contained under Order II Rule 2 CPC cannot be invoked to nonsuit the plaintiff invoking principle of constructive *res judicata*.

23. In view of above, this Court does not find any reason to interfere in the well reasoned findings recorded by the Courts below. Resultantly, the Regular Second Appeal preferred by defendant No.1 is ordered to be dismissed.

24. 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