

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH****RSA-3445-1999****Reserved on: 20.05.2025****Pronounced on: 22.05.2025****PIARA SINGH**

... APPELLANT

VS.

MALKIAT SINGH AND OTHERS

... RESPONDENT

CORAM: HON'BLE MR. JUSTICE DEEPAK GUPTA

Argued by:- Mr. Gagandeep Singh, Advocate,
Mr. Sandeep Bansal, Advocate and
Mr. Sameer Kumar, Advocate, for the appellant.

None for the respondents.

DEEPAK GUPTA, J.

This Regular Second Appeal has been filed by one of the plaintiffs against the concurrent findings of the Courts below.

2. On perusal of the entire paper-book, following facts emerge:-

2.1 Sh. Shiv Singh, the predecessor-in-interest of the parties was owner of 7 kanal 16 marla of land situated in village Berampur, Tehsil and District Hoshiarpur, detailed and described in head-note of the plaint. He expired on 06.01.1993, leaving behind five sons namely, Shingara & Piara Singh (*plaintiffs*), Malkiat, Chanchal & Tahar Singh (*defendants No.1 to 3*); and two daughters namely, Smt. Piaro (*defendant No.4*) and Smt. Bhajan Kaur. Suit property was ancestral in the hands of Shiv Singh. Said Shiv Singh executed a gift deed dated 25.07.1967 regarding suit property in favour of defendants No.1 to 3, which was assailed by the plaintiffs by filing a suit. By way of judgment & decree dated 22.04.1970 (*Ex.P2 & Ex.P3*), the gift deed was set aside by holding that it did not affect the reversionary rights of the plaintiff. Suit property was held to be ancestral in the hands of Shiv Singh. After the death of Shiv Singh, plaintiffs brought the present suit contending that they

are entitled to possession of the suit land to the extent of their 2/5 share, in terms of the judgment and decree dated 22.04.1970.

2.2. In the written statement filed by the defendants, neither the ancestral nature of the suit land nor the decree dated 22.04.1970 are denied. However, defendants pleaded that Sh. Shiv Singh, during his lifetime had executed various mortgage deeds in favour of Chanda Singh son of Hari Singh, Beli Ram son of Bhaga and Ram Kishan. They pleaded mortgage deeds dated 09.06.1946 (*Ex.D1 and Ex.D2*) in respect of 12 Marla each of land in favour of Chanda Singh; mortgage deeds dated 10.07.1954 (*Ex.D3 & Ex.D4*) in respect of 1 kanal each of land in favour of Beli Ram; mortgage deed dated 09.06.1956 (*Ex.D5*) of 4 marla of land; mortgage deed dated 12.06.1947 (*Ex.D6*) in respect of 10 marla of land in favour of Ram Kishan; and mortgage deeds dated 08.06.1951 (*Ex.D9 and D13 to D15*) regarding 10 marla each in favour of Ram Kishan son of Nathu. It was contended further that by virtue of the writings dated 07.07.1964 (*Ex.D7*) and dated 16.08.1963 (*Ex.D8*), defendants had purchased the mortgagee rights from earlier mortgagee Ram Singh son of Ram Kishan and since then, they were in possession of the suit land in dispute. They denied any right of the plaintiffs in the suit land by contending that period of more than 30 years had elapsed since the creation of mortgage and since Shiv Singh had failed to get the suit land redeemed from the defendants, who had entered into the shoes of the earlier mortgagees, therefore, the defendants had become owner in possession of the suit property.

2.3 Necessary issues were framed. Evidence produced by the parties was taken on record.

2.4. Learned trial Court found that Shiv Singh had mortgaged the suit land by virtue of numerous mortgage deeds (*Ex.D1 to Ex.D6 and Ex.D9 & Ex.D13 to Ex.D15*) executed on different dates as pleaded by the defendants and that all those mortgage deeds being 30 years old, were admissible. It was further found that defendants had purchased the mortgagee rights by virtue of *Ex.D7* and *Ex.D8*. The trial Court also found that as Shiv Singh i.e. the mortgagor had failed to get the suit land redeemed from the earlier mortgagees; or from defendants, who had stepped in the shoes of mortgages,

in the last more than 30 years and therefore, his right to redeem had elapsed by efflux of time and as such, defendants had become owner in possession of the suit land. Accordingly, suit was dismissed vide judgment dated 27.01.1996.

2.5 The appeal filed by the plaintiffs against the aforesaid judgment was dismissed by the First Appellate Court on 16.03.1999.

3. Assailing the aforesaid concurrent findings, only one of the plaintiffs i.e. Piara Singh has approached this Court. The sole contention raised by learned counsel is that even if it be assumed that mortgage with possession was created by Shiv Singh, the mortgage deeds relied by defendants did not prescribe any time limit for redemption and therefore, the mortgagor could get the land redeemed at any time. It is urged that plaintiffs having stepped into the shoes of mortgagor Shiv Singh after his death, so they are entitled to redemption of land at any point of time. Reliance is placed on ***Singh Ram (D) through LRS. Vs. Sheo Ram, Vol. CLXXVII (2015-1) PLR 167***

4. Initially Sh. N. K. Suneja, Advocate, had put in appearance on behalf of the contesting respondents No.1 to 3, but later on, despite sending notice to said Sh. N.K. Suneja, Advocate, received by him through his email, nobody put in appearance on behalf the respondents.

5. This Court has considered submissions of learned counsel of the appellants and has appraised the record carefully.

6. Contention of learned counsel for the appellants to the effect that mortgage deeds in question, as created by Sh. Shiv Singh in favour of the previous mortgagees, were mortgage with possession without specifying any time period for redemption, has not been repelled by the opposite side. There is nothing on file to suggest that any time period was prescribed for redemption of the mortgage deeds.

7. No doubt that as per writing Ex.D7 and Ex.D8 dated 07.07.1964 and 16.08.1963, respectively, as referred by the Courts below, contesting defendants purchased the mortgagee rights from the earlier mortgagees, and Shiv Singh failed to get the various mortgages executed by him redeemed but this in itself will not extinguish his rights in the suit land for getting the suit land redeemed.

8. In ***Singh Ram (D) through LRS. Vs. Sheo Ram, (supra)***, Full Bench of Hon'ble Supreme Court considered the issue relating to right to recover possession under a usufructuary mortgage. It was observed by Hon'ble Supreme Court as under:-

"10. The right of the mortgagor, it is now well settled, to deal with the mortgaged property as well as the limitation to which it is subject depends upon the nature of this ownership which is not absolute, but qualified by reason of the right of the mortgagee to recover his money out of the proceedings. The right to redeem the mortgage is a very valuable right possessed by the mortgagor. Such a right to redeem the mortgage can be exercised before it is foreclosed or the estate is sold. The equitable right of redemption is dependent on the mortgagor giving the mortgagee reasonable notice of his intention to redeem and on his fully performing his obligations under the mortgage.

*11. The doctrine of redemption of mortgaged property was not recognised by the Indian courts as the essence of the doctrine of equity of redemption was unknown to the ancient law of India. The Privy Council in **Thumbasawmy Mudelly v. Mohd. Hossain Rowthen** called upon the legislature to make a suitable amendment which was given a statutory recognition by reason of Section 60 of the Transfer of Property Act which reads thus:*

"60. Right of mortgagor to redeem.—At any time after the principal money has become due, the mortgagor has a right, on payment or tender, at a proper time and place, of the mortgage-money, to require the mortgagee (a) to deliver to the mortgagor the mortgage-deed and all documents relating to the mortgaged property which are in the possession or power of the mortgagee, (b) where the mortgagee is in possession of the mortgaged property, to deliver possession thereof to the mortgagor, and (c) at the cost of the mortgagor either to re transfer the mortgaged property to him or to such third person as he may direct, or to execute and (where the mortgage has been effected by a registered instrument) to have registered an 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 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 [pic]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.”

12. *A right of redemption, thus, was statutorily recognized as a right of a mortgagor as an incident of mortgage which subsists so long as the mortgage itself subsists. The proviso appended to Section 60, as noticed herein before, however, confines the said right so long as the same is not extinguished by an act of the parties or by a decree of court.*

13. *In the Law of Mortgage by Dr Rashbehary Ghose at pp. 231-32 under the heading “Once a mortgage, always a mortgage”, it is noticed:*

“In 1681 Lord Nottingham in the leading case of *Howard v. Harris* firmly laid down the principle: ‘Once a mortgage, always a mortgage’. This is a doctrine to protect the mortgagor’s right of redemption: it renders all agreements in a mortgage for forfeiture of the right to redeem and also encumbrances of or dealings with the property by the mortgagee as against a mortgagor coming to redeem. In 1902 the well-known maxim, ‘once a mortgage, always a mortgage’, was supplemented by the words ‘and nothing but a mortgage’ added by Lord Davey in the leading case of *Noakes v. Rice* in which the maxim was explained to mean ‘that a mortgage cannot be made irredeemable and a provision to that effect is void’. The maxim has been supplemented in the Indian context by the words ‘and therefore always redeemable’, added by Justice Sarkar of the Supreme Court in the case of *Seth Ganga Dhar v. Shankar Lal*.

It is thus evident that the very conception of mortgage involves three principles. First, there is the maxim: ‘once a mortgage, always a mortgage’. That is to say, a mortgage is always redeemable and if a contrary provision is made, it is invalid. And this is an exception to the aphorism, *modus et conventio vincunt legem* (custom and agreement overrule law). Secondly, the mortgagee cannot reserve to himself any collateral advantage outside the mortgage agreement. Thirdly, as a corollary from the first another principle may be deduced, namely, ‘once a mortgage, always a mortgage, and nothing but a mortgage’. In other words, any stipulation which prevents a mortgagor from getting back the property mortgaged is void. That is, a mortgage is always redeemable.

The maxim 'once a mortgage always a mortgage' may be said to be a logical corollary from the doctrine, which is the very foundation of the law of mortgages, that time is not of the essence of the contract in such transactions; for the protection which the law throws around the mortgagor might be rendered wholly illusory, if the right to redeem could be limited by contract between the parties. Right to redeem is an incident of a subsisting mortgage and is inseparable from it so that the right is coextensive with the mortgage itself. The right subsists until it is [pic]appropriately and effectively extinguished either by the acts of the parties concerned or by a proper decree of the competent court."

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20. The statutory provisions, as noticed herein before, are required to be construed having regard to the redeeming features of usufructuary mortgage, namely, (a) there is a delivery of possession to the mortgagee, (b) he is to retain possession until repayment of money and to receive rents and profits or part thereof in lieu of interest, or in payment of mortgage money, or partly in lieu of interest and partly in payment of mortgage- money, (c) there is redemption when the amount due is personally paid or is discharged by rents or profits received, and (d) there is no remedy by sale or foreclosure.

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We, thus, hold that special right of usufructuary mortgagor under Section 62 of the T.P. Act to recover possession commences in the manner specified therein, i.e., when mortgage money is paid out of rents and profits or partly out of rents and profits and partly by payment or deposit by mortgagor. Until then, limitation does not start for purposes of Article 61 of the Schedule to the Limitation Act. A usufructuary mortgagee is not entitled to file a suit for declaration that he had become an owner merely on the expiry of 30 years from the date of the mortgage. We answer the question accordingly."

9. Thus, as per Ratio Decidendi, the legal position is as under:
 - (a) Right to redeem is inherent and inseparable from a Mortgage, as the said right of redemption is a statutory and equitable right of the mortgagor under Section 60 of the Transfer of Property Act, 1882. This right continues so long as the mortgage subsists, unless it is extinguished by an act of the parties or a court decree. The principle is summed up in the maxim:

"Once a mortgage, always a mortgage", meaning a mortgage cannot be made irredeemable, and any agreement to that effect is void.

(b) In a usufructuary mortgage, the mortgagee obtains possession and satisfies the mortgage debt from rents and profits. The mortgagor's right to recover possession arises only when:

- The entire mortgage money is paid,
- Either from the mortgagee's receipt of rents and profits,
- Or partly through those profits and partly by payment or deposit by the mortgagor.

(c) Limitation period does not start until redemption right arises, as for usufructuary mortgages, limitation for recovery of possession (Article 61 of the Limitation Act) does not begin merely from the date of mortgage. It starts only after the mortgage money is fully discharged in the manner specified under Section 62 of the Transfer of Property Act.

(d) No ownership by mere lapse of time can be claimed by a usufructuary mortgagee merely because 30 years have passed since the mortgage date. The right to redeem does not lapse simply with the passage of time unless it is properly extinguished.

10. It is evident from the settled legal position that *"once a mortgage, always a mortgage."* In the case of a usufructuary mortgage—that is, a mortgage with possession—the mortgagor retains the right to redeem the property at any time, unless a specific time limit for redemption has been prescribed. The limitation period under Article 61 of the Schedule to the Limitation Act begins only when the mortgage money is fully discharged, either entirely through rents and profits, or partly through rents and profits and partly by payment or deposit made by the mortgagor. Until such discharge occurs, the limitation period does not commence, and therefore, a usufructuary mortgagee is not entitled to claim ownership of the mortgaged property merely on the ground that 30 years have passed since the mortgage was executed.

11. In view of the aforesaid legal position, it is held that defendants-respondents cannot be allowed to plead that they had become owner in possession of the suit land on account of the fact that mortgagor Sh. Shiv Singh had failed to get the suit property redeemed either from the earlier mortgagees, or from the defendants, who had stepped into the shoes of the earlier mortgagees. As such, findings to the contrary as returned by the trial Court and appellate Court, are reversed in this regard.

12. At the same time, it is noticed that as original owner - mortgagor Shiv Singh has expired, so his rights shall devolve in the suit property in favour of his seven legal heirs i.e. five sons and two daughters. As noticed by the trial Court, the two daughters had relinquished their rights in favour of the plaintiffs, meaning thereby, plaintiffs are entitled to 4/7th share in the suit property; whereas defendants No.1 to 3 shall be entitled to 3/7th share i.e. 1/7 share each. However, the defendants No.1 to 3 are still the mortgagee in possession of the suit property, having purchased these rights from earlier mortgagees, therefore, plaintiffs are not entitled to possession till suit land is redeemed.

13. As such, the present appeal is hereby disposed of with the observation that though plaintiffs are not entitled to possession of the suit land for the time being, but they will be well within their rights to get the suit land redeemed to the extent of their share on payment of the mortgage money to the extent of their share to the present mortgagees i.e. defendants.

The present appeal is partly allowed accordingly.

22.05.2025
Vivek

(DEEPAK GUPTA)
JUDGE

<i>Whether speaking/reasoned?</i>	<i>Yes</i>
<i>Whether reportable?</i>	<i>No</i>