

Harbans Singh and Another

Vs

Guran Ditta Singh and Another

Civil Appeal Nos. 122-24 of 1975

(K. Ramaswamy, N. M. Kasliwal JJ)

20.02.1991

JUDGMENT

K. RAMASWAMY, J. –

1. The appellants are mortgagees. The respondents are the heirs of Kala Singh, the mortgagor. Kala Singh executed three mortgages in favour of the appellants Resham Singh, Jaswant Singh and Harbans Singh on September 17, 1962, June 17, 1961 and May 31, 1962 respectively hypothecating the agricultural lands of 16 kanals 16 marlas in each of the first two mortgages and 16 kanals in the third mortgage. The mortgagor filed an application under Section 4 of the Redemption of Mortgages (Punjab) Act, 2 of 1913, for short 'the Act'. He deposited a sum of Rs. 10 in each mortgage and sought redemption of the mortgages. Ultimately the parties compromised and the mortgagor agreed to pay the balance of the Rs. 840 to each mortgagee within a month from May 1, 1964. The Collector passed the order on compromise under Section 11 thereof on February 3, 1964. He committed default in the payment thereof. The petitions were dismissed. He filed separate suits against each mortgagee for redemption within one year under Section 12 of the Act on June 12, 1964. Pending suits he died. Thereafter the suits were dismissed. After obtaining mutation of their names in the revenue records the respondents filed separate suits for redemption of the mortgages, but beyond one year as contemplated under Section 12 read with Article 14 of the Limitation Act, 1908. The suits were dismissed by the trial court and were confirmed by the first appellate court and by the High Court in second appeals. But the Division Bench under clause (10) of the Letter of Patent allowed the appeals and set aside the judgments and decrees of the courts below and granted decree of redemption in terms of the prayer by judgment dated April 9, 1974. Assailing the legality thereof the appeals have been filed after obtaining leave under Article 136 of the Constitution. Since common questions of facts and law arise for decision in these appeals, they are disposed of by a common judgment.

2. The only question that was argued before the High Court and reiterated in this Court is whether the suits are barred by limitation. The contention of Shri Mehta, the learned counsel for the appellants is that the order passed by the Collector under Section 12 of the Act is conclusive between the parties unless the suits are laid under Article 14 of the Limitation Act within one year from the date of the order. Admittedly, the present suits have been filed beyond such limitation of one year. The High Court committed a grave error of law in applying the provisions of Section 60 of the Transfer of Property Act and the ratio of the Privy Council in Raghunath Singh v. Mt. Hansraj Kanwar (AIR 1934 PC 205 : 61 IA 362 : 398 CWN 9). He contends that the Act provides a right and remedy to the mortgagor and mortgagees. Section 12 of the Act makes the order conclusive and binding and Section 13 bars second application in that regard unless the suit is filed within one year from the date of the order. It is not open to the civil court to go behind the order of

the Collector and enlarge the limitation provided under Article 14 of the Limitation Act. All the provisions of Transfer of Property Act were not applicable to State of Punjab. Certain provisions relating to sale deeds and gifts were made applicable to the States of Punjab with effect from April 1, 1955 and to the area comprised in the erstwhile Pepsu State, w.e.f. May 15, 1957. As on the date when the suits were laid, Section 60 of the Transfer of Property Act did not apply to Punjab and so that ratio in Raghunath Singh case (AIR 1934 PC 205 : 61 IA 362 : 398 CWN 9) is inapplicable. The High Court committed manifest error in applying Section 60. He cited decisions of Lahore High Court in support of the contention that the suit shall be laid within one year which we would advert to at a later stage. Shri Dua, learned counsel for the respondents contended that the High Court is justified in holding that the suit is not barred by limitation and the ratio of the decision cited by the appellants cannot be applied.

3. The Act is a beneficial legislation giving right to the mortgagors to seek redemption and restoration of possession of the hypotheca in summary proceedings before the revenue courts. The Act applies only to mortgage of land where the principal money secured under the mortgage does not exceed Rs. 5000 and the hypotheca does not exceed 50 acres of land. Section 4 gives right to the mortgagor and other persons entitled to sue for redemption at any time after the principal money becomes payable and before the suit for redemption is barred, by presenting a petition to the Collector for a direction i.e. mortgage be redeemed and erstwhile mortgagee shall put the mortgagor in possession of the hypotheca, after following the procedure in that behalf. Sections 5 to 11 deal with the procedure. Under Section 11 if the Collector, on an inquiry, forms an opinion that the sum is rightly due under the mortgage, he shall, unless he dismisses the petition under Section 10, make an order under Section 6. If the sum is found larger than the sum deposited, the mortgagor shall deposit the amount with any further sum that may be due on account of interest up to date of the deposit; on making deposit within the period or extended period not exceeding 30 days, thereafter, the Collector shall make an order under Section 6 thereto. On committing default by the mortgagor, the Collector shall dismiss the petition. Section 6 provides the relief of redemption; of restoration of possession to the mortgagor; delivery of the mortgage deed and payment of the mortgage money to the mortgagee. Section 12, which is material for the purpose of this case, reads thus :

"12. (1) Saving of suits to establish rights. - Any party aggrieved by an order made under Section 6, 7, 8, 9, 10 or 11 of this Act may institute a suit to establish his rights in respect of the mortgage, but subject to the result of such suit, if any, the order shall be conclusive.

(2) Setting aside ex parte orders or orders of dismissal. - Notwithstanding anything in this section a mortgagee against whom an ex parte order under Section 7 has been made or a petitioner, whose petition has been dismissed in default under Section 6 may apply to the Collector to have such order of dismissal set aside, and the Collector may in his discretion set aside, such order or dismissal on such terms as to costs or otherwise as he may deem fit; provided that the order or dismissal shall not be set aside unless notice of the application has been served on the opposite party."

4. Section 13 creates a bar to make any further petition under the Act by the mortgagor or his successor in interest. A reading of Section 12 clearly postulates that the aggrieved party, be it mortgagor or mortgagee, against an order made under Sections 6 to 11 is empowered to institute a suit to establish his right in respect of the mortgage, subject to the result of the suit the order passed by the Collector shall be conclusive. Article 14 of the Limitation Act, 1908 which is equivalent to Article 100 of the Limitation Act, 1963, prescribes limitation of one year from the date of the

decision or the order of the officer of the government in his official capacity. Article 61 of the present Limitation Act provides 30 years for redemption and recovery of the possession of the hypotheca. The limitation of 30 years runs from the date when the right to redemption or possession accrues. Articles 105, 134 and 145 of the old Limitation Act would apply to the present litigation and the limitation is 60 years. In *Tulsi Dass @ Nirmal Das v. Diala Ram* (AIR 1943 Lah 176 : 45 PLR 292 : ILR 1944 Lah 1) a Full Bench for which Tek Chand, J. wrote the leading judgment held at page 183 thus : (AIR p. 183)

"The order of the Collector does not affect the rights of the parties in any way; it is conclusive to this extent only that the petition for summary redemption has been dismissed and no other petition under the Act would lie. No suit under Section 12 being necessary or competent, there was no bar to the mortgagor suing for redemption in the civil courts within the period allowed by law in ordinary course. It must, therefore, be held that the mortgagor's suit in *Asa Ram v. Darba Mal* (AIR 1929 Lah 513 : 30 PLR 440) was rightly decreed and that the contrary conclusion reached by the Single Bench in *Darba Mal v. Asa Ram* (AIR 1927 Lah 461 : 28 PLR 289 : 102 IC 418) and re-affirmed by the Division Bench in *Prabhu Mal v. Chandan* (AIR 1938 Lah 638 : 40 PLR 886) that it is the form of the order of the Collector which has to be seen and not the substance of it, is erroneous".

5. This view was approved by this Court in *Sheo Lal v. Sultan* ((1969) 2 SCC 883 : (1970) 2 SCR 405) by a bench of three Judges. The facts were that the Collector did not decide the dispute on merits, but rejected the application filed under Section 4 of the Act holding that the application raised complicated question of facts and law and thereby he declined to exercise summary jurisdiction under the Act. On institution of the suit the plea of limitation under Article 14 of old Limitation Act was raised which was upheld by the trial court, but on appeal the decree of redemption was granted and was confirmed by the High Court in second appeal. The same contention was reiterated before this Court. In that context Shah, J. as he then was, speaking for the court, held that it is not the form of the order of the dismissal but its substance that will determine the application of the period of limitation prescribed by Article 14 of the Limitation Act. An order relegating the mortgagor to a civil suit for obtaining an order of redemption, even if becomes final, does not bar a suit for redemption for it raises no cloud on the title of the mortgagor arising out of the mortgage. Such an order is not one which is required to be set aside. An order required to be set aside is one which the officer making it has jurisdiction to make it and has the effect of barring the claim for relief unless it is set aside.

6. It is clear that an order passed by the Collector under Sections 6 to 11 is only conclusive for what was decided therein and if the adjudication made by the Collector in summary proceedings are sought to be reopened, certainly, unless the order is got over, either by the mortgagor or by the mortgagee, or any person claiming right, title or interest through them being an aggrieved person within the meaning of Section 12, the order of the Collector binds the parties or the persons claiming right, title or interest from the parties. Take for instance, there is a dispute as in the present case about the mortgage money before the Collector. Kala Singh disputed the money secured of hypothecation but had compromised and agreed to pay the amount mentioned in the mortgage bond, namely, Rs. 850 minus Rs. 10 in each of the mortgages disputed but in the suit filed within one year he reiterated his original stand. Had the same stand been taken by the respondents disputing the mortgage money, certainly it would not be open to the respondents as successor in interest of the mortgagor to contend that the money advanced under the mortgage was not Rs. 850, but something less. That is not the case in the present suit. They agreed to pay Rs. 850 as decided by the Collector

and sought redemption in the civil suit. Thereby they are not seeking to set aside the order of the Collector, but they are seeking redemption of the mortgage. Take another instance where the mortgagor disputed the execution or validity of the mortgage bond itself and the finding was recorded against the mortgagee, i.e. the mortgage bond was not either executed or is void for being vitiated by fraud, coercion or undue influence, etc. The mortgagor successfully avoided the mortgage by a specific order passed by the Collector under the relevant provisions of the Act. If no suit was filed within period of one year, the findings of the Collector become conclusive between the mortgagee and the mortgagor and it is not open to assail the order of the Collector after one year in a suit of foreclosure or sale by the mortgagee. Therefore, what was prohibited by Section 12 is only the substance of the order and not the form.

7. Once a mortgage always a mortgage and gets extinguished by payment of mortgage money by the mortgagor or decree of redemption is passed and satisfied. The creation of mortgage is an act *inter vivos* and not a statutory or common law right. The Act accords summary remedy and the default of compliance with entails dismissal of the application and Section 13 prohibits second application for the selfsame relief. The remedy of civil suit for redemption available at common law, subject to limitation, is not taken away. Civil suit is not a declaratory suit, but one to redeem the mortgage and to recover possession of mortgaged property.

8. The question then is whether the respondents are entitled to redemption of the mortgage. Section 60 of the Transfer of Property Act, 1882 gives right to redemption of the mortgage by instituting a suit for redemption of the mortgage property. But as seen, at the relevant time Section 60 was not made applicable to Punjab. In *Mussammat Bhagwan Devi v. Mussammat Bunyadi Khanum* (1902 Pun Rec 348) the Division Bench held that although the Transfer of Property Act and the Indian Easement Act are not in force in Punjab, the Punjab courts when deciding cases in which principles of law dealt with by the provisions of those Acts are involved, may adopt those provisions as embodying law applicable to the case especially when the law enunciated therein coincides with the principles of equity, good conscience and justice for which there is no statutory law applicable to the Punjab. In that it was held that the mortgagor in possession had no authority, without the consent of the mortgagee, to do an act which was likely to prove destructive or permanently injurious to the property mortgaged. In *Safdar Ali v. Ghulam Mohi-Ud-din* (AIR 1915 Lah 362 : 103 PR 1915) the Full Bench was to consider whether Doctrine of Clogging would apply when the Transfer of Property Act was not made applicable to Punjab. The Full Bench held that though the Doctrine of Clogging, in terms does not apply in Punjab, when there is no statutory prohibition, governing the matter be restricted to cases where something unconscionable or oppressive in the bargain calls for redress. In terms the Full Bench applied the principles in the provisions of the Transfer of Property Act consistent with the Doctrine of justice, equity and good conscience. In *Mian Nizam and Din v. Lala Ram Sukh Das* (AIR 1938 Lah 286) the right of prior mortgagee purchasing property mortgaged to him be deemed to keep alive for his benefit as against subsequent mortgagee. It was held that the principles contained in Section 101 of Transfer of Property Act would be applicable and applied. In *Milkha Singh v. Mst. Shankari* (AIR 1947 Lah 1 : 228 IC 434 (FB)) a Full Bench of five Judges applied the Doctrine of Part Performance under Section 53-A of the Transfer of Property Act as a defence. It was further held that Section 53-A is based on equitable principles which were previously applicable to whole of India, though the Transfer of Property Act per se was not applied to Punjab. In *Ram Gopal Dula Singh v. Sardar Gurbux Singh Jiwan Singh* (AIR 1955 Punj 215 : ILR 1955 Punj 988) Kanpur, J., as he then was, speaking for the Division Bench, held that though Section 6 of the Transfer of Property Act is not applicable to Punjab, the right to expectancy may not be transferred. It was further held that in Punjab and Lahore there is no disagreement as to principles of Transfer of Property Act being applicable to Punjab because they

are based on justice, equity and good conscience. This view was again reiterated in *Atma Singh and Gian Singh v. Mangal Singh* (ILR 1957 Punj 79) and applied Sections 58, 92 and 100, Doctrine of Subrogation, but excluded the applicability of the technical rules. This Court in *Ganeshi Lal v. Jyoti Pershad* (1953 SCR 243 : AIR 1953 SC 1) held that though the Transfer of Property Act, 1882 does not apply to Punjab, the principle of equity, justice and good conscience would apply to Punjab. If one of the several mortgagors redeems the entire mortgage by paying a sum less than the full amount due under the mortgage, he is entitled to receive from his co-mortgagors only their proportionate shares on the amount actually paid by him. He is not entitled to claim their proportionate shares on the amount which was due to the mortgagee under the terms of the mortgage on the date of redemption. The same principle laid down in *Suryanarayan v. Sriramulu* ((1913) 25 MLJ 16 : 20 IC 825) was referred to with approval in *Ganeshi Lal* case [1953 SCR 243 : AIR 1953 SC 1]. Though in *Ganeshi Lal* case (1953 SCR 243 : AIR 1953 SC 1) the entire claim under the suit for contribution was not decreed, the provisions of Transfer of Property Act were applied on the principles of equity, justice and good conscience and granted decree pro rata.

9. We hold that applying the principle of justice, equity and good conscience though Section 60 of the Transfer of Property Act per se did not apply, the principles in Section 60 would apply. Though the application for redemption was dismissed under Section 11 of the Act and became conclusive under Section 12 the mortgagor's right to redemption is not barred. A suit for redemption under Section 60 of Transfer of Property Act will be maintainable and civil court has jurisdiction to grant the decree of redemption.

10. In *Gangu v. Mohanraj Chand* (ILR 15 Lah 389 : AIR 1934 Lah 384) a Full Bench following *Kaura v. Ram Chand* (ILR (1925) 6 Lah 206 : AIR 1925 Lah 385) held that unless the order of the Collector be challenged within one year the civil court has no jurisdiction to entertain the suit. In this case the right to redemption of mortgage itself was barred by limitation. Therefore, the ratio does not apply. Though the ratio in *Bhagat Ram v. Jamna Ram* ((1928) 114 IC 447) is in favour of the appellants, in our view the ration therein is not good law. Thus we hold that the suits for redemption are admittedly within limitation either under the old Limitation or under the new Limitation Act. The bar or Section 12 of the Act does not oust the jurisdiction of the civil court to entertain and grant decree of redemption.

11. The appeals are accordingly dismissed, but in the circumstances parties are directed to bear their own costs throughout.

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