(2019) 02 P&H CK 0020

In the Punjab And Haryana At Chandigarh

Case No : Regular Second Appeal No. 4018 Of 2013 (O&M)

Dalel Singh And Others — APPELLANT

Vs

Rampal And Others — RESPONDENT

Date of Decision : 06-02-2019

Acts Referred:

Transfer Of Property Act, 1882 — Section 58, 58(c), 58(d), 58(g), 60, 62
Mortgages (Punjab), Act, 1913 — Section 12
Code Of Civil Procedure, 1908 — Order 23 Rule 1(4), Order 23 Rule 1

Citation : (2019) 02 P&H CK 0020

Hon'ble Judges : Anil Kshetarpal, J

Bench : Single Bench

Advocate : Arun Jain, Amit Jain, Varun Parkash, Vikas Bahl, Nitin Jain, Nikhil Sabharwal

Final Decision : Dismissed

Judgement

Plaintiffs-appellants are in the regular second appeal against the concurrent finding of fact arrived at by the Courts below dismissing the suit for declaration that the order passed by the Collector under Redemption of Mortgages (Punjab), Act, 1913 is wrong and illegal with a consequential relief of permanent injunction.

Detail facts have been noticed by the Courts below. However, to complete narration of facts, the necessary facts are being noticed.]

Yaad Ram was owner of 47 bighas and 8 biswas of land vide sale deed dated 26.06.1879 (Ex. P-3). He sold 23 bighas and 14 biswas of land in favour of predecessor-in-interest of the plaintiffs for a sum of Rs.200. After little more than one year i.e. on 05.08.1880, he also mortgaged 23 bighas and 14 biswas of land (equivalent to the land sold) for a sum of Rs.225/- in favour of predecessor-in-interest of the plaintiffs. The plaintiffs filed a suit for declaration claiming that they have become owners as limitation for redemption of the mortgage has elapsed. The suit was dismissed vide judgment and decree dated 28.05.2005. The plaintiffs-appellants filed appeal, however, during the pendency of the suit, the plaintiffs-appellants withdrew the suit on 09.09.2008. No permission of the Court to file the fresh suit was sought.

The successors of mortgagor filed an application before the competent authority under the Redemption of Mortgages (Punjab), Act, 1913 and deposited the mortgage amount. The application was allowed by the authority after returning a finding that the mortgage was an usufructuary mortgage. The order passed by the authority has been challenged in the present suit under Section 12 of the Act of 1913.

Lengthy arguments have been addressed by senior counsels appearing for both the parties. Two contentions have been raised by learned counsel appearing for the appellants.

1. The mortgage deed was a mortgage by conditional sale as the mortgage provided that if the property is not redeemed within four years, the property mortgaged would be treated as sale. In the present case, Courts have erred in treating the mortgage to be usufructuary mortgage.

2. Even if the mortgage deed is not a mortgage by conditional sale, still period to redeem the mortgage having been prescribed, the limitation for redemption would begin to run on expiry of such period, therefore, also the order passed by the authority under the Act of 1913 is illegal.

On the other hand, learned senior counsel appearing for the respondents has submitted that the plaintiffs-appellants had filed a similar suit with respect to same property claiming declaration that they have become owner as by prescription of time which has been withdrawn without permission of the Court and therefore, the suit is barred under Order 23 Rule 1(4) of the Code of Civil Procedure. He has further submitted that four year prescribed in the mortgage deed is a clog on equity of redemption and therefore, illegal. He relied upon a judgment passed by the Hon'ble Supreme Court in the case of Seth Ganga Dhar Vs. Shankar Lal and others, AIR 1958 SC 770. He has further submitted that this is not a mortgage by conditional sale. He further submitted that the possession of the land was given and the mortgagee (predecessor-in-interest of the plaintiffs-appellants) have enjoyed usufruct of the land. Hence, the present case is of usufructuary mortgage as there is no personal liability of the mortgagor.

This Court has analyzed the arguments of learned counsel for the parties and with their able assistance gone through the judgments passed by the Courts below and the record.

In the considered opinion of this Court, the following issues need determination:-

1. Whether deed of mortgage is a mortgage by conditional sale?

2. Whether limitation for redemption of the mortgage would begin to run after the expiry of the period prescribed in the mortgage for treating the property as sale?

3. Whether the present suit filed by the appellants is barred under Order 23 Rule 1 of the Code of Civil Procedure?

Answer to issue No.1 is straight and simple. On careful reading of Section 58 which defines various types of mortgage, it is apparent that the mortgage by conditional sale can only be in the eventuality there is a sale of the property. The mortgage by conditional sale is defined in Section 58(c) of the Transfer of Property Act, 1882 which is extracted as under:-

"58(c) Mortgage by conditional sale.-Where the mortgagor ostensibly sells the mortgaged property- on condition that on default of payment of the mortgage-money on a certain date the sale shall become absolute, or on condition that on such payment being made the sale shall become void, or on condition that on such payment being made the buyer shall transfer the property to the seller, the transaction is called a mortgage by conditional sale and the mortgagee a mortgagee by conditional sale:

Provided that no such transaction shall be deemed to be a mortgage, unless the condition is embodied in the document which effects or purports to effect the sale."

It is apparent that the deed should be in the form of sale and not in the form of mortgage deed. First part of Section 58(c) provide that where the mortgagor ostensibly sells the mortgage property on condition that on default of payment of mortgage money on a certain date, the sale shall become absolute. Thus, there is a requirement that it should be a sale not by a mortgage deed which would become sale after a particular period in the eventuality of non-payment of the mortgage money. As regards second part, that also provides that it should be a sale which would become void on payment of the money. Similarly, there is another eventuality provided when there is a sale deed which incorporates in itself a condition that on payment of the amount agreed to between the parties, the buyer shall re-transfer the property to the seller. Hence, in the present case, the mortgage is not by conditional sale.

Now let us examine whether such mortgage fulfills the requirement of usufructuary mortgage as defines in Section 58(d) of the Transfer of Property Act or not. The mortgagor had delivered possession and authorized him to retain such possession until the payment of the mortgage money and the mortgagee was entitled to receive the rents and profits accruing from the property and the mortgagor had not personally made liable to pay anything except tender of the amount at the time of redemption of the mortgage. In other words, mortgagor had not made himself personally liable. In such circumstances, the mortgage in the present case is an usufructuary mortgage. No doubt, Section 58(g) provide that a mortgage which is not a simple mortgage or mortgage by conditional sale or an usufructuary mortgage or an English mortgage or a mortgage by deposit of title deeds, such mortgage is called anomalous mortgage. However, once the mortgage in question falls within the definition of usufructuary mortgage, therefore, it cannot be held that it is a anomalous mortgage.

The second issue which has been pressed by senior counsel appearing for the appellants needs little bit detail deliberation. The argument of learned counsel is that even if in the present case the mortgage is an usufructuary mortgage, however, the limitation period as prescribed in the Limitation Act has elapsed as in the present case the period would begin to run on expiry of period as provided in the mortgage deed for treating the property as a sale. He, while elaborating has submitted that in the present case, the mortgage deed is not the one which does not prescribe any period for redemption. The period of redemption has been prescribed that is four years and therefore, the limitation would begin to run after expiry of period of four years for the date of the mortgage. He further submitted that the Hon'ble Supreme Court in the case of Singh Ram Vs. Sheo Ram and others (2014) 9 SCC 185 has upheld a Full Bench decision of this Court in the case of Ram Kishan and others Vs. Sheo Ram and others, 2008(1) RCR (Civil) 334 wherein it was held that in case of usufructuary mortgage not prescribing any period for redemption, the limitation would not begin to run till the amount is tendered. He submitted that the Hon'ble Supreme Court was hearing an appeal arising from the judgment of the Full Bench should be read in a manner upholding the aforesaid judgment and therefore, the period for redemption has expired.

The Court has considered the submission. Although, on first blush, there appears to be some substance, however, on close scrutiny, the argument of learned counsel does not hold water. When appeal went against the judgment of the Full Bench, the matter was ordered to be listed before a Larger Bench. The Hon'ble Supreme Court has held that in case of usufructuary mortgage, the mortgagee has no right to file a suit for declaration that he has become owner and once a mortgagee always a mortgagee. Relevant discussion by the Larger Bench on this aspect in Para 12 and 22 which are extracted as under:-

"12. A perusal of above provisions shows that Article 61 refers to right to redeem or recover possession. While right of mortgagor to redeem is dealt with under Section 60 of the T.P. Act, the right of usufructuary mortgagor to recover possession is specially dealt with under Section 62. Section 62 is applicable only to usufructuary mortgages and not to any other mortgage. The said right of usufructuary mortgagor though styled as 'right to recover possession' is for all purposes, right to redeem and to recover possession. Thus, while in case of any other mortgage, right to redeem is covered under Section 60, in case of usufructuary mortgage, right to recover possession is dealt with under Section 62 and commences on payment of mortgage money out of the usufructs or partly out of the usufructs and partly on payment or deposit by the mortgagor. This distinction in a usufructuary mortgage and any other mortgage is clearly borne out from provisions of Sections 58, 60 and 62 of the T.P. Act read with Article 61 of the Schedule to the Limitation Act. Usufructuary mortgage cannot be treated at par with any other mortgage, as doing so will defeat the scheme of

Section 62 of the T.P. Act and the equity. This right of the usufructuary mortgagor is not only an equitable right, it has statutory recognition under Section 62 of the T.P. Act. There is no principle of law on which this right can be defeated. Any contrary view, which does not take into account the special right of usufructuary mortgagor under Section 62 of the T.P. Act, has to be held to be erroneous on this ground or has to be limited to a mortgage other than a usufructuary mortgage. Accordingly, we uphold the view taken by the Full Bench that in case of usufructuary mortgage, mere expiry of a period of 30 years from the date of creation of the mortgage does not extinguish the right of the mortgagor under Section 62 of the T.P. Act.

22. 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."

Once, the Hon'ble Supreme Court has laid down by a judgment of a Larger Bench, this Court being bound thereof declines to go into this issue.

Next issue which needs determination, when the plaintiffs themselves had filed a suit for declaration that they have become owner by prescription of time. The plaint filed by the plaintiffs in previous suit is available, the judgment passed by the trial Court as well as the order passed by the First Appellate Court are available on the file. Thus, the plaintiffs-appellants now cannot claim that they have become owners of the property.

In view of the aforesaid discussion, there is no ground to interfere with the findings of fact arrived at by the Courts below.

The pending miscellaneous application, if any, shall stand disposed of in view of the above-said judgment.

Hence, the appeal is dismissed.

