

(2019) 01 SHI CK 0014

In the High Court Of Himachal Pradesh

Case No : Regular Second Appeal No. 183 Of 2005

Dharam Singh And Others

APPELLANT

Vs

Tulsi Ram (since deceased) through her legal heirs And
Others

RESPONDENT

Date of Decision : 08-01-2019

Acts Referred:

Transfer of Property Act, 1882 — Section 60, 62, 62(e)
Limitation Act, 1963 — Article 61

Citation : (2019) 01 SHI CK 0014

Hon'ble Judges : Sureshwar Thakur, J

Bench : Single Bench

Advocate : K.S. Banyal, Inder Rana, Suneet Goel

Final Decision : Disposed Off

Judgement

Sureshwar Thakur, J

1. The instant appeal, stands, directed by the defendants, who are aggrieved, by the verdict pronounced, by the learned First Appellate Court, upon, Civil Appeal No. 96 of 2003, wherethrough, the latter Court, while, allowing the plaintiffs' appeal, hence reversed the verdict pronounced by the learned trial Court, upon, C.S. No. 44/2000, wherethrough, the plaintiffs' suit, for, rendition of a declaratory decree qua his/theirs becoming owner of the suit land, by efflux of time, rather stood dismissed.

2. Briefly stated the facts of the case are that one Prabh Dayal, the predecessor-in-interest of defendants No.1 to 8, was owner of the suit land of old khasra No.255/75 (new Khasra No.49), measuring 67 kanals, tika Samtana Khurd, Tappa Dhatwal. He mortgaged the suit land with the plaintiff for consideration of Rs.1500/- on 14.12.1965 qua which mutation No.120 was sanctioned on 30.03.1966. Neither Shri Prabh Dayal, or after his death, defendant No.1 to 8 redeemed the suit land despite his requests. Hence plaintiff has become owner in possession of the suit land by efflux of time. Plaintiff assailed Rapat No.192 dated

5.2.1967 vide which defendant NO.9 got the suit land of Shri Prabh Dayal, attached for consideration of Rs.302.50. Though the amount had been received by defendant No.9 on 17.5.1967 despite it the entry was not deleted and as such is superfluous. Claim that defendants have no right, or title in the suit land. Despite it, they interfered in possession of the plaintiff and deserve to be prohibited from doing so.

3. Defendants No.1 to 4 filed joint written statement, and, defendants No.5 to 8 also filed joint written statement but they contested claim of the plaintiff to be wrong and false. It was averred that Shri Prabh Dayal, their predecessor-in-interest, never mortgaged the suit land with the plaintiff in 1965 for Rs.1500/-. Mutation of mortgage is also claimed wrong. They claimed themselves to be owners in possession of the suit land but admitted that Rs.302.50 were paid to defendant No.9 on 17.5.1967. Plaintiff is neither in possession nor became owner of the suit land by efflux of time. Preliminary objections qua maintainability, cause of action, estoppel, misjoinder, non joinder were raised.

4. Defendant No.9 contested the suit by filing separate written statement. He has also denied that any mortgage qua the suit land was ever created by Prabh Dayal with the plaintiff. Claimed that the plaintiff is not in possession of the suit land. It is pleaded that the suit land was auctioned in 1967 and he paid the auction money and since then possessing the suit land. Plaintiff has no locus standi to sue and his suit is not maintainable and plaintiff has no cause of action.

5. The plaintiff(s) filed replication to the written statement of the defendant(s), wherein, he/they denied the contents of the written statement and re-affirmed and re-asserted the averments, made in the plaint.

6. On the pleadings of the parties, the learned trial Court struck the following issues inter-se the parties at contest:-

1. Whether the plaintiff is the owner in possession of the suit land, as alleged? OPP.
2. Whether the plaintiff is entitled to the injunction prayed for?OPP.
3. Whether the suit is not maintainable in the present form?OPD.
4. Whether the plaintiff has a cause of action?OPP.
5. Whether the suit is bad for non joinder and misjoinder of the necessary parties?OPD.
6. Whether the plaintiff is estopped from filing the present suit by his act and conduct?OPD.
7. Whether the suit has not been properly valued for the purposes of court fee and jurisdiction?OPD.
8. Whether the defendants are entitled to special costs u/s35-A CPC as claimed. If so, their quantum?OPD.

9. Relief.

7. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court dismissed the suit of the plaintiff(s)/respondent(s) herein. In an appeal, preferred therefrom, by, the plaintiff(s)/respondent(s) herein, before the learned First Appellate Court, the latter Court allowed, the, appeal, and, reversed the findings recorded by the learned trial Court.

8. Now the defendants/appellants herein, have instituted the instant Regular Second Appeal, before, this Court, wherein they assail the findings, recorded in its impugned judgment and decree, by the learned first Appellate Court. When the appeal came up for admission, this Court, on 26.4.2005, admitted the appeal instituted by the defendants/appellants, against, the judgment and decree, rendered by the learned first Appellate Court, on the hereinafter extracted substantial questions of law:-

1. Whether the mortgage of suit property for consideration of Rs.1500 can be created by oral sale in contravention of Section 58 of the Transfer of Property Act and Section 17 of Registration Act?
2. Whether the cogent, trustworthy and reliable evidence of defendant could be ignored solely on the basis of mutation, Ex.P-3 and D-1, whereas, the entry made therein has been duly rebutted by the appellant/defendant No.3?
3. Whether the First Appellate Court was justified to set aside the judgment and decree of the learned trial Court only on the strength of mutation EX.P-3?
4. Whether the suit of mandatory and permanent injunction is maintainable, when the plaintiff is out of possession of the said suit land?
5. Whether the suit of mandatory and permanent injunction is maintainable, when the plaintiff is out of possession of the said suit land?
6. Whether the judgment and decree of the First Appellate Court is mis-construction and misleading of Ex.P-3 and Ex.D-1 etc.?

Substantial questions of Law No.1 to 6:

9. The defendant, does not controvert the validity, of, attestation of mutation No.120, borne in Ex.P-3, (a) wherein, rather clear, and, graphic depictions hence exist qua a usufructuary mortgage, vis-a-vis, the suit land, standing, hence created inter se the mortgagor, one Prabh Dayal (the predecessor-in-interest of the defendants), and, the mortgagee (plaintiff herein). During the course of hearing of the appeal, the counsel for the aggrieved defendants also, does not, challenge the entries, existing in Ex. D-1, (b) exhibit whereof, is, the jamabandi appertaining to the suit land, and, appertaining to the year 1962-63, (c) wherein the plaintiff is reflected, as, a mortgagee, under the mortgagor, one Prabh Dayal, (e) nor he contests the subsequent thereto, entries occurring, in the thereafter prepared jamabandis, vis-a-vis, the suit land. His limited onslaught, vis-a-vis, the impugned verdict is focused, upon, mis-attraction, by the learned First

Appellate Court, upon, the afore documentary evidence existing on record, rather, the, mandate of Article 61 of the Limitation Act, (f) wherein rather a period of 30 years is prescribed, vis-a-vis, the mortgagor to beget redemption of the immovable mortgaged property, (g) and, hence with the afore striving remaining unrecoursed, thereupon, the learned First Appellate Court concluded, qua, the plaintiffs' suit, for a declaratory decree qua his acquiring title, by efflux of time, rather being renderable qua him.

10. The afore contention reared before this Court by the aggrieved defendants/ the mortgagors of the suit khasra numbers, is, anvilled upon a judgment rendered, by the Hon'ble Three Judges Bench, of, the Hon'ble Apex Court, in a case titled as Singh Ram (d) through LRS. Vs. Sheo Ram and others, reported in (2014)9 SCC 211, (a) wherein the Hon'ble Apex Court, upon, making a conjoint reading of Section 62 of the Transfer of Property Act, provisions whereof stand extracted hereinafter, and, vis-a-vis, the mandate borne in Article 61 of the Limitation Act, provisions whereof also stand extracted hereinafter, (b) and, when in tandem therewith the extantly created mortgage, vis-a-vis, the suit khasra number, evidently falls, within, the domain of a usufructuary mortgage, (c) hence, made a conclusion that the right, of, a usufructuary mortgagor, through, styled as "right to recover possession", is, for all purposes, a right to redeem, and, to recover possession, (d) AND, while in a case of any other mortgage, the right to redeem stands covered under Section 60, contrarily rather in a case of usufructuary mortgage, the right to recover possession, falling within, the domain of Section 62, (e) 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, (f) and, a further expostulation, is, also borne therein, that, the mere expiry of 30 years, from, the date of creation, of, a usufructuary mortgage, rather not extinguishing the right of the mortgagor, to, within the contemplation of Section 62 of the Transfer of Property Act, hence redeem the mortgaged property. Obviously hence, the commencement of a period of 30 years, as stands statutorily hence encapsulated in Article 61, of, the Limitation Act, not being reckonable, to commence, from, the date, of execution of the relevant deed of mortgage or from the date of attestation of the apt mutation, (g) rather the afore period being reckonable to commence, from, on payment/deposit of mortgaged money out of usufructs or party out of the usufructs, and, partly on payment or deposit by the mortgagor. Provisions of 62 of the Transfer of Property Act, read as under:-

"62. Right of usufructuary mortgagor to recover possession.-In the case of a usufructuary mortgage, the mortgagor has a right to recover possession of the property 1[together with the mortgage-deed and all documents relating to the mortgaged property which are in the possession or power of the mortgagee],-

(a) where the mortgagee is authorized to pay himself the mortgage-money from the rents and profits of the property,- when such money is paid;

(b) where the mortgagee is authorised to pay himself from such rents and profits

2[or any part thereof a part only of the mortgage-money],-when the term (if any) prescribed for the payment of the mortgage-money has expired and the mortgagor pays or tenders to the mortgagee 3[the mortgage-money or the balance thereof] or deposits it in Court as hereinafter provided."

Provisions of Article 61 of the Limitation Act, reads as under:

Art. 61 By a mortgagor.

(a) To redeem or recovery possession of immvable property mortgaged

Thirty years

When the right to redeem or to recover possession accrues

(b) Xxxx

Xxxx

xxxx

Re-emphasisingly a usufructuary mortgagee, is not, entitled to file a suit for declaration qua his being declared to be the owner, of, the mortgaged property, merely on the expiry of 30 years, from, the date of creation, of, mortgage.

11. Be that as it may, all the afore expostulations of law, borne in the afore verdict rendered by the Hon'ble Three Judges Bench of the Hon'ble Apex Court in Singh Ram's case (supra), (i) imperatively, and, necessarily, enjoins also eruption of evidence, and, the apt evidence also hence making, a, display qua during the currency of mortgage, (ii) the mortgagee hence utilizing, the, mortgaged property, and, his rather from the rents and the profits, as, derived therefrom, hence making apposite adjustment, towards, the interest accrued, on the mortgage debt, (iii) and, right of redemption rather hence commencing from the date, of, payment or deposit of mortgage money by the mortgagor, vis-a-vis, the mortgagee. Hereat apparently, and, evidently, the mortgagor, the appellants herein failed, to, within 30 year, rather make deposit of the mortgage money, vis-a-vis, the mortgagee, (iv) and, obviously within, the, afore expostulation of law, until, the afore endeavours commenced, rather thereupto, obviously, the commencings, of, the period of thirty years, prescribed in Article 61, of, the Limitation Act, is, not amenable for its rather being pressed into service, for, the relevant purpose, by the mortgagee, nor obviously, merely, after expiry of 30 years, since, the attestation of mutation of mortgage, as borne in Ex. D-1, the extant declaratory suit, is, maintainable, (v) rather the appropriate time, for, the afore mandate being pressed into service, arises on evident payment of mortgage money out of the usufructs or partly out of the usufructs, and, partly on payment or deposit, by the mortgagor. Since, all the afore, part payments never occurred, during, the currency of 30 years, (vi) hence, merely on expiry of 30 years, from, the date of creation, of, mortgage, and, uptill the institution of the suit, no decree for foreclosure, by elapse of statutory period, of time prescribed in Article 61 of the Limitation Act, hence was renderable nor any

declaratory decree, was pronounceable qua the mortgagee hence becoming owner of the suit land, rather by efflux of time. Even otherwise, the plaintiff (mortgagee) was enjoined to maintain accounts, vis-a-vis, the profits or rents, if any derived by him, from, his utilizing the usufruct, and, the afore accounts, maintained by him, were enjoined to make clear display, that, he had proceeded to appropriate the afore derivations, towards, the interest accrued, on the mortgage debt, (vii) and, wherefrom it was fathomable that with 30 years, expiring, since his making the afore appropriations, in, the apposite books of account, (viii) thereupon, within the ambit, of, the expostulation of law, as, embodied in Singh Ram's case (supra), he, was empowered to maintain the suit for rendition, of, a declaratory decree, qua, his becoming hence owner of the suit land. However, the afore books of account, remained neither prepared nor adduced into evidence, whereas, upon the plaintiff, maintaining, the afore books of account, and, theirs making clear depictions therein, qua, upon his utilizing the usufructs, his deriving rents, and, profits therefrom, (ix) and, his also appropriating them towards the interest, of, the mortgaged debt, (x) whereupon alone he would stand facilitated, to, after elapse of 30 years therefrom, to maintain the apt suit. Consequently, the suit for declaration, cast by the plaintiff(s), on anvil of the mandate, of, Article 61 of the Limitation Act, and, his despite, all the afore requisite satiating evidence being amiss, rather claiming therein qua merely, upon, 30 years standing elapsed, from, the date of creation of mortgage, hence, his/theirs becoming owner of the suit land, was, neither maintainable nor decreeable.

12. The above discussion, unfolds, that the conclusions as arrived by the learned first Appellate Court hence being not based, upon a proper and mature appreciation of evidence on record. While rendering the findings, the learned first Appellate Court has excluded germane and apposite material from consideration. Accordingly, in tandem with afore discussion, all the substantial questions of law, are, answered in favour of the appellants/defendants, and, against the plaintiffs/respondents.

13. In view of the above discussion, the instant appeal is allowed and in sequel, the, judgment and decree rendered by the learned First Appellate Court, upon, Civil Appeal No. 96 of 2003 is set aside, in sequel, the plaintiffs' suit bearing Civil Suit No. 44 of 2000 is dismissed. Decree sheet be prepared accordingly. All pending applications also stand disposed of. No order as to costs. Records be sent back forthwith.