
(2009) 09 SHI CK 0020
In the High Court Of Himachal Pradesh

Jaimal and Others

APPELLANT

Vs

State of H.P. and Others

RESPONDENT

Date of Decision : 01-09-2009

Acts Referred:

Himachal Pradesh Restitution of Mortgaged Lands Act, 1976 — Section 4

Citation : AIR 2010 HP 7

Hon'ble Judges : V.K. Ahuja, J;Deepak Gupta, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Deepak Gupta, J.—This appeal is directed against the judgment of a learned Single Judge of this Court, dated 25.8.2008, passed in CWP No. 814 of 2003. The appellants before us had filed the writ petition, which has led to the filing of the present appeal.

2. The brief facts of the case are that the respondents No. 3 to 5 are the successors of the original mortgagors and are referred to hereinafter as "the mortgagors". The appellants are the successors of the original mortgagee and are referred to by the said term.

3. Respondents No. 3 to 5 filed an application u/s 4 of the H.P. Restitution of Mortgage Land Act, 1976 before the Collector, Sub Division, Dalhousie on 13.12.1983 for redemption of the mortgage and for restoration of the mortgaged land measuring 8 bighas and 17 biswas situated in Mohal Tika, Khewat No. 45, Khatauni No. 90, Khasra Nos. 956, 957 and 958. The case of the appellants is that Govind and Mingo, sons of Kapura, mortgaged the land in question prior to 5.5.1953 in favor of Rojgari, father of the present appellants. On 5.5.1953, one Tankiat No. 42 was drafted. In this writing, it is recorded that Govind on 11.10.1952 had stated that the land was mortgaged with Rojgari for payment of Rs. 60/- more than 8 years ago. Mutation on the basis of this document called Tankiat was attested on 24.12.1953 and entry of the mortgagees being in

possession was made. The application for redemption of the mortgage and restoration of the land was dismissed by the Collector on 19.1.1987 on the ground that the limitation would start from 11.10.1952 and since the application was filed on 13.12.1983, more than 30 years after the creation of the mortgage, the same was not within limitation.

4. This order was set aside in appeal by the Divisional Commissioner, Kangra on 4.8.1988. The appellants herein filed an appeal before the Financial Commissioner, which appeal was dismissed by the learned Financial Commissioner on 12.8.2002, which led to the filing of the writ petition. Both the Divisional Commissioner as well as the Financial Commissioner held that the application for redemption was within time because the time for calculating the limitation was to commence from 24.12.1953 when the mutation regarding the mortgage was attested.

5. The appellants filed the writ petition in which the main ground urged was that the application for redemption was not within limitation since the period had to be calculated not from the date of attestation of mutation but from the date of creation of the mortgage or at least from the date when the statement was made and recorded in the Tankiat. The Tankiat was recorded on 5.5.1953. The statement of Govind is alleged to have been recorded on 11.10.1952 and the mortgage is alleged to have been created 8 years prior to the said date. Even if the date of execution of the writing (Tankiat) is taken into consideration, the application would not be within limitation if the period of limitation prescribed is 30 years.

6. We are of the considered view that if any limitation was prescribed, then the limitation could not be reckoned from the date of attestation of the mutation because there was a writing, evidencing the mortgage and if the period of limitation is reckoned from the date of writing, the application for redemption was not within limitation.

7. A mutation entry is merely a fiscal entry conferring no title on any party. It may be true that if there is no other document or evidence to show on which date the mortgage has been created, then the date of attestation of mortgage can be taken to be the effective date of mortgage. However, in case there is material on record to show that the mortgage was actually executed much prior to the attestation of the mutation, then the limitation has to be reckoned from the date of the actual execution of the mortgage. In the present case, the Tankiat is dated 5.5.1953. This is a writing wherein one of the mortgagors has himself admitted that the possession of the mortgaged land was handed over to the mortgagee eight years prior to the execution of the Tankiat. The statement referred to the Tankiat is dated 11.10.1952. Therefore, the limitation, if any, had to be reckoned from this date at least and the application could not be within limitation. We are, therefore, not in agreement with the learned Single Judge in so far as the computation of the limitation is concerned.

8. Having held so, the next question which arises is whether any limitation is applicable to the present case. Mr. Janesh Mahajan, learned Counsel for respondents No. 3 to 5, has urged that the mortgage in question was a usufructuary mortgage as the mortgagee was enjoying the benefits of the usufruct of the land in question. He contends that in such an event, no limitation is prescribed and the application for redemption can be filed at any stage. He has drawn our attention to a decision of the Apex Court in Panchanan Sharma Vs. Basudeo Prasad Jaganani and others, wherein in para 3 the Apex Court held as follows:

...Otherwise, there is no limitation for redemption of usufructuary mortgage. The usufructuary mortgagor does not lose his title to the property or right to redemption by lapse of time. By operation of the last para of Section 76, the mortgagor is entitled to the accounting of the loss occasioned to it. At best the auction-purchaser, on redemption, would look to the mortgagee who had committed default in terms of the mortgage and the court would give suitable direction in that behalf. The possession of the purchaser must be on behalf of the mortgagee and becomes liable to accounting etc. Instead, the court held that the mortgagor lost his title due to misfeasance committed by the mortgagee and the property was sold on account thereof to the third parties. Accordingly, we are of the considered view that the High Court has committed grave error of law in dismissing the appeal in limine. The appellate court also committed same error of law in reversing the decree of the trial court without appreciating the correct legal position. Accordingly, the appeal is allowed....

9. In Seth Ganga Dhar Vs. Shankar Lal and Others, it was held by the Apex Court as follows:

Ordinarily, and in the absence of a special condition entitling the mortgagor to redeem during the term for which the mortgage is created, the right of redemption can only arise on the expiration of the specified period.

10. In Harbans v. Om Parkash and Ors. (2006) Scc 129 , a two-Judge Bench of the Apex Court noted that a Single Judge of the Apex Court in State of Punjab and others Vs. Ram Rakha and others, had taken a view which is contrary to the Ganga Dhar's case supra and reaffirmed the law laid down in Ganga Dhar's case as well as in Panchanan Sharma's case. The Apex Court held that in the case of a usufructuary mortgage in which no time for redemption of mortgage is prescribed, there is no limitation to redeem the mortgage.

11. This question also came up for consideration before a Full Bench of the Punjab and Haryana High Court in Ram Kishan and Others Vs. Sheo Ram and Others, , wherein the Full Bench held as follows:

43. ...Since at one point of time the mortgagor for one or the other reason mortgaged his property to avail financial assistance on account of necessities of life, the mortgagor's right cannot be permitted to be defeated only on account of passage of time. The interpretation sought to be raised by the mortgagees is to

defeat the right of the mortgagor and is wholly inequitable and unjust. The mortgagee remains in possession of the mortgaged property; enjoys the usufruct thereof and, therefore, not to lose anything by returning the security on receipt of mortgage debt.

44. Section 60 of the Act is general in nature applicable to all kinds of mortgages including usufructuary mortgage which is evident from Clause (b) of Section 60 of the Act, where the mortgagee in possession of the mortgaged property is required to deliver possession to the mortgagor. But Section 62 of the Act is a special provision dealing only with the rights of usufructuary mortgagor. In terms of Clause (a) of Section 62 of the Act, the suit is for possession after the mortgage comes to an end by self redeeming process as the mortgagee is authorized to pay himself the mortgage money from the rents and profits of the property. The mortgagee has to look to the rents and profits only to repay himself and when his entire charge is so liquidated he must re-deliver possession of the mortgaged property to the mortgagor. However, in terms of Clause (b) of Section 62 of the Act, the right of the mortgagor will arise only after rents and profits derived by the mortgagee out of the usufruct of the mortgaged property are adjusted towards the interest or the principal and on mortgagor paying the balance in the manner prescribed. In such mortgages, rents and profits are to be set off against interest and the mortgagee is entitled to retain possession until such time as the mortgagor chooses to redeem on payment of the principal sum secured. Such right for possession will accrue after the mortgage money is paid off.

45. The limitation of 30 years under Article 61(a) begins to run "when the right to redeem or the possession accrues". The right to redemption or recover possession accrues to the mortgagor on payment of sum secured in case of usufructuary mortgage, where rents and profits are to be set off against interest on the mortgage debt, on payment or tender to the mortgagee, the mortgage money or balance thereof or deposit in the Court. The right to seek foreclosure is coextensive with the right to seek redemption. Since right to seek redemption accrues only on payment of the mortgage money or the balance thereof after adjustment of rents and profits from the interest thereof, therefore, right of foreclosure will not accrue to the mortgagee till such time the mortgagee remains in possession of the mortgaged security and is appropriating usufruct of the mortgaged land towards the interest on the mortgaged debt. Thus, the period of redemption or possession would not start till such time usufruct of the land and the profits are being adjusted towards interest on the mortgage amount. In view of the said interpretation, the principle that once a mortgage, always a mortgage and, therefore, always redeemable would be applicable.

46. The argument that after the expiry of period of limitation to sue for foreclosure, the mortgagees have a right to seek declaration in respect of their title over the suit property is not correct. From the aforesaid discussion, it is apparent that the mortgage cannot be extinguished by any unilateral act of the

mortgagee. Since the mortgage cannot be unilaterally terminated, therefore, the declaration claimed is nothing but a suit for foreclosure. It is equally well settled that it is not title of the suit, which determines the nature of the suit. The nature of the suit is required to be determined by reading all the averments in the plaint. Such declaration cannot be claimed by an usufructuary mortgagee.

12. A person mortgages his land when he is in need of money. He borrows money and as security to ensure repayment of the amount, he mortgages his land. When he hands over his land also, then he permits the mortgagee to enjoy the usufruct thereof. The mortgagee, therefore, has a right not only to recover the amount of mortgage but also to utilize the benefits and profits from the land.

13. The right to redeem the mortgage arises only on payment of mortgage money or the balance thereof after adjusting the profits and benefits of the usufruct of the property against the interest, if any, prescribed. If no interest is prescribed, then the usufruct itself is treated equivalent to the interest. The mortgagee, therefore, adjusts the usufruct of the land and the profits thereof towards the interest on the mortgage amount. There is a well known principle of law that once a mortgage always a mortgage. If this principle is applied, then there is obviously no limitation prescribed unless the parties had agreed that the mortgage is only for a particular period in which event the limitation will start after the expiry of the said period. We may make it clear that this discussion is only in respect of usufructuary mortgages.

14. In view of the law laid down by the Apex Court and the ratio of the Full Bench of the Punjab and Haryana High Court with which we are in respectful agreement, we are of the considered view that no limitation was prescribed for redemption of the usufructuary mortgage and the application could not be held to be time barred. As such, the respondents No. 3 to 5 were entitled to redeem the mortgage. Therefore, we dismiss the appeal though for totally different reasons. No order as to costs.