
(1992) 12 P&H CK 0012

In the Punjab And Haryana At Chandigarh

Case No : Letters Patent Appeal No. 739 of 1984

Shri Gursewak Singh and Others

APPELLANT

Vs

Ram Chand (Deceased) and Others

RESPONDENT

Date of Decision : 09-12-1992

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10, Order 1 Rule 3A, Order 2 Rule 1, Order 2 Rule 2, Order 2 Rule 3

Citation : (1993) 105 PLR 161

Hon'ble Judges : M.S. Liberhan, J;G.C. Garg, J

Bench : Division Bench

Advocate : M.L. Sarin, Alka Sarin, for the Appellant; J.N. Kaushal Ajay Kumar Nittal and Sanjay Kaushal, for the Respondent

Judgement

M.S. Liberhan, J.—This judgment will dispose of letters patent appeals No. 739 and 740 of 1984 as in both these appeals common questions of law and fact are involved. The question raised in both these appeals to be answered is whether a trespasser or a person claiming to be a tenant of the mortgagor is a necessary or proper party in a suit for redemption.

2. Succinctly, the material facts to answer the question are :- The appellants filed a suit for possession by redemption of the land in dispute. The mortgagee took possession of the land in dispute and leased it out to the mortgagor Bhagwan Singh at Rs. 700/- per annum. The mortgagor gifted his land to the plaintiffs. The plaintiffs arrayed respondents Nos. 5 to 13 as defendants in his suit for possession inter-alia, contending that they are in physical possession of the land in dispute claiming to be the sub tenants of Bhagwan Singh though their possession was unlawful. In the alternative it was pleaded that even if they had any interest in the mortgaged land as sub tenants, the interest ceased with the redemption.

3. In their defence, the mortgagees admitted the mortgage. Various objections were taken by them in their written statement which are not relevant for dealing

with the issue in hand. Defendants Nos. 5 to 13 who were alleged to be trespassers, claimed to have come into possession of the land in dispute as non-occupancy tenants since the last many generations, even prior to the creation of the mortgage. The maintainability of the suit was challenged on the ground of misjoinder of parties.

4. The trial Court returned a finding that defendants Nos. 5 to 13 are not in possession on the suit land as tenants, rather they are the trespassers. The trial Court further found that the suit is not bad for misjoinder of parties. Consequently, on 30.9.1974 a preliminary decree for possession by redemption was passed. The mortgagees impugned the preliminary decree in R.F.A. No. 1 of 1975 while defendants Nos. 5 to 13 impugned the preliminary decree in R.F.A. No. 2 of 1975. In the meantime final decree was also passed. The mortgagees challenged the final decree in R.F.A. No. 487 of 1975 whereas defendants Nos. 5 to 13 impugned the final decree vide R.F.A. No. 573 of 1975. All the four appeals were disposed of by the impugned judgment of the learned Single Judge.

5. The learned Single Judge affirmed the findings of the trial Court and found that defendants Nos. 5 to 13 are in possession of the land in dispute as trespassers. They have failed to prove their tenancy on the disputed land prior to the mortgage or even their induction as tenants by the mortgagor. The suit is not bad for misjoinder of parties. It was observed that no documentary evidence on record has been produced to the effect that defendants Nos. 5 to 13 were in possession and were tenants on the land in dispute prior to 7.1.1929 i.e. at the time of creation of the mortgage. Finally, the Hon"ble Single Judge found that in view of evidence on record the trial Court rightly came to the conclusion that plaintiffs have failed to prove their tenancy rights on the suit land as claimed. The Hon"ble Single Judge further observed that defendants Nos. 5 to 13 neither claimed any interest either in the mortgaged security or right of induction nor they were inducted by the mortgagees. Accordingly to the plaint, the mortgagor claimed himself to be in possession of the suit land throughout. Consequently in a suit for redemption or possession against a person inducted by himself, they cannot be a necessary or proper party particularly when according to the plaint itself they are in illegal possession of the land in dispute. Though the preliminary decree was affirmed yet while dealing with the final decree, the Hon"ble Single Judge observed that no decree could be passed against the trespassers for their dispossession, simply because the suit land had been redeemed by pursuance of the preliminary decree particularly when they have never claimed themselves in adverse title against the plaintiffs on the mortgagee. After referring to Order 34 Rule 1, Order 1 Rule 3 of the Code of Civil Procedure, and assuming that they are proper parties, the learned Single Judge refused to pass a decree for possession in favour of the mortgagors and against the defendants. It was observed that plaintiffs have got a right of redemption. It was noticed that the parties have not challenged the passing of the preliminary decree. The only challenge is to the passing of the final decree against defendants 5 to 13. After referring to Order 34 Rule 8 of the C.P.C., the Hon"ble Single Judge found that the decree can be

passed only against the mortgagee or the mortgagor or a person claiming interest or right through either of them. Since defendants Nos. 5 to 13 claimed no rights under the mortgagee, therefore, no decree could be passed against them. It was left open to the plaintiffs to file a separate suit on the basis of their title even without redemption. While granting the final relief, the Hon"ble Single Judge modified the final decree to the extent that defendants Nos. 5 to 13 would not be dispossessed in execution of the decree for redemption as no decree could be passed against them in a suit for redemption.

6. The appellants have challenged in this letters patent appeal the setting aside/ modification of the final decree by the learned Single Judge thereby restricting the relief of possession.

7. It would be pertinent to note at this stage though it will be dealt with later, that the preliminary decree for possession in favour of the plaintiffs and against the defendants was passed. It was further decreed that the plaintiffs shall be entitled to get back all the documents from defendant No. 1 and get possession of the suit land from the defendants free from all encumbrances. The said decree has been confirmed by the Hon"ble Single Bench which has not been challenged either by appeal or by cross objections. Though a final decree was passed subject to deposit of the amount found due to get back possession of the suit land free from all encumbrances in favour of the plaintiffs i.e. the decree was passed by the trial Court in favour of the plaintiff and against the defendants for possession of the suit land, the Hon"ble Single Bench modified the said decree the purport of which is that the plaintiff would be entitled to the relief of redemption from mortgagee but defendants Nos. 5 to 13 would not be dispossessed in execution of the said decree in view of the observation that no decree could be passed against them in a suit for redemption.

8. Mr. M.L. Sarin, Senior Advocate, Learned counsel for the appellants has vehemently challenged the judgment and decree of the learned Single Bench in this Letters patent appeal and put forth his contention that the relief of possession could not have been denied to the appellants as impleading of parties is a rule of convenience. Impleading defendant No. 5 to 13 as a party, would not cause any prejudice to the defendants in view of their claim of tenancy having been considered and decided against them in a preliminary decree which has been confirmed by the High Court and particularly when they were impleaded as a party under Order 1 Rule 10 C.P.C. after a contest, vide order dated 18.6.1969 which was never challenged and was accepted. They are not in possession as tenants. The acceptance of appeal against a final decree after affirming the preliminary decree by itself would be contradictory and, would lead to an anomalous situation. It is necessary rather essential to pass a decree in favour of the plaintiffs and against defendants Nos. 5 to 13 who are shown to be in possession as trespassers in order to avoid multiplicity of proceedings particularly when the finding has been returned after giving them an opportunity of hearing. The issue between the parties has been effectively and completely adjudicated

upon. The declining of a decree for possession would amount to a fruitless decree rather only a paper decree. It was vehemently argued that in view of the provisions of Section 99 of the C.P.C. wherein it is envisaged that no decree would be reversed or modified for any error or irregularity not affecting the merits of the case or jurisdiction of the Court. It has been specifically provided for that no decree shall be reversed, substantially varied, nor shall the case remanded on account of misjoinder or non-joinder of parties or causes of action or any error, defect or irregularity in any proceedings in the suit, nor affecting the merit of the case or jurisdiction of the Court. The learned counsel for the appellants contended that though the trial Court found that there is no misjoinder of parties or causes of action and the Appellate Authority has affirmed the same, still the appellate Court held that in view of Order 34 Rule 1 C.P.C. the defendants could not have been joined as parties in a suit for redemption. It was argued that at the most it would amount to misjoinder of parties and consequently, in view of Section 99 of the C.P.C., the decree could not have been varied or set aside. In order to support of his contention, the learned counsel relied upon *Mst. Satwati and Ors. v. Kali Shankar and Ors.*,¹ AIR 1955 Allahabad 4, *Jaddu Koeri Vs. Deep Chand Koeri and Another*, *Aneshwar Prasad and Another Vs. Misri Lall and Others*, *Rambuddi Veeraswamy Vs. Rambuddi Jangammayya and Others*, and *Pachakhan Vs. H.D. Gopalakrishna Rao and Others*, .

9. The learned counsel for defendants Nos. 5 to 13 contended that an appeal is a continuation of the original proceedings of the suit and an objection having been taken with respect to the maintainability of the suit on account of misjoinder of parties, the suit against the appellants was not maintainable. It was contended that the parties in a suit for redemption are governed by Order 34 Rule 1, C.P.C. No person can be arrayed as a party in a redemption suit other than the one provided for by Order 34 Rule 1, C.P.C. In order to support his contention, the learned counsel for the respondents relied upon *Garikapatti Veeraya Vs. N. Subbiah Choudhury*, .

10. The factum of the basic object of the procedural law being to shorten the litigation and to grant expedient justice, cannot be denied. The procedural law has to be interpreted with an object of granting final justice to the parties to the lis and not for weaving a spider web to entangle the parties into the litigation for time immemorial and land the parties in the lis in the proverbial delays in getting justice in Courts. The procedural law cannot be permitted to be read in a manner as to decline or refuse the just relief to the parties because of an infraction of any procedural rule when the violation of the said rule does not in any manner prejudicially effect the right of the parties claiming violation of the rule. The procedural rules cannot be filled with a life to produce unjust results resulting in either injustice or decisions against good conscience. Legal niceties cannot be stretched to such an extent which would result in keeping the litigation alive perpetually and thereby allowing the sword of uncertainty hanging on the right of the parties.

11. Though strict provisions relating to the mortgage are not applicable to Punjab but since precedently it has been accepted that they will be looked into as principles of justice equity and good conscience. In case of mortgage with possession, I may venture to state that mortgagor creates an interest in the security in favour of the mortgagee by transferring his interest to the mortgagee for a consideration of the loans secured by him. The only right left with the mortgagor in a mortgage with possession is the equity of redemption which is a substantive right and capable of transfer.

Similarly, the rights of mortgagee in possession are the tangible rights capable of transfer by creating some mortgage etc. Mortgage is a transfer of an interest in a specific Immovable property with an object of securing payment of money. Transfer of interest under the immovable property is the first requisite of creating mortgage with possession or any mortgage depending upon the privity of contract between the mortgagee and the mortgagor.

12. Courts must make an attempt to avoid multiplicity of suits. An attempt should be made that all claims affecting the parties to the lis with respect to the demised premises should be decided or settled in one Court. Multiplicity of suits should be avoided unless it is absolutely necessary in the circumstances or the facts of a case. In the normal course, the Courts must determine all causes of actions in a suit even though there may be separate causes of actions unless in the peculiar facts and circumstances of that case, it is absolutely necessary to decide separate causes of action in separate suits or trial of them together result in undue delay and embarrassment to the question involved in the suit.

13. At this stage, it would be expedient to refer to Section 99 of the C.P.C., which envisages that Civil Courts shall have jurisdiction to try all suits of a civil nature except the suits cognizance of which is either expressly or impliedly barred. Reference may also be made to Section 99 of the C.P.C. which puts an embargo on the appellate jurisdiction to the effect that no decree shall be reversed or modified for error or irregularity not affecting the merits or the jurisdiction. It has been specifically provided that for mis-joinder or non-joinder of parties or causes of actions not affecting the merits of the case or resulting in prejudice to a party and which does not affect the jurisdiction of the Court, no decree shall be varied. Non joinder of parties has been specifically added as one of the non-consequential error which particularly when not affecting the merits of the suit or jurisdiction of the Court shall not be a ground for reversing or substantially varying the judgment and decree.

14. Order I of the C.P.C. envisages the parties to the suits. It contemplates two types of parties to a suit viz. (i) in whose absence no adverse decree can be passed against a person or whose presence is necessary to give effective relief to the plaintiff. In the absence of a necessary party no suit can be decreed. Who can be joined as plaintiff or defendant has been defined therein. By amendment of Order I, Rule 3-A has been added where power has been given to the Court, to the effect that where it appears to the Court that any joinder of defendants

may embarrass or delay the trial of the suit, the Court may order separate trials or make such other order as may be expedient in the interest of justice. In case of misjoinder of parties as defendants, the necessary concomitant for ordering separate trial is either delay or embarrassment in the trial of the suit. It has been provided by Order I Rule 5 C.P.C., that it is not necessary or essential that every defendant should be interested in all the reliefs claimed against him in any suit. Order 1 Rule 10 provides for substitution or adding as plaintiff any other person in case the suit is filed in the name of wrong plaintiff. Sub-rule (2) of this rule empowers the Court to strike off the name of the improperly named plaintiff or defendant or order the joining of any person as plaintiff or defendant whose presence the Court thinks to be necessary in order to enable to it effectively and completely adjudicate upon and settle all the questions involved in the suit.

15. Order II provides the frame of the suit. It enjoins upon the plaintiff to frame the suit as far as practicable so as to afford ground for final decision upon the subject in dispute and to prevent further litigation on those points, Order II rule 2 envisages that the plaintiffs should include whole of the claim which the plaintiff is entitled to make in respect of the cause of action. It enjoins that the plaintiff is bound to seek all reliefs in respect of the same cause of action and in the eventuality of his missing or omitting one of them, the plaintiff would not be entitled to seek the relief in a fresh proceedings. Under Order II Rule 3 the plaintiff is entitled to unite in the same suit several causes of action against the same defendants unless specifically barred. Order II Rule 4 provides that no cause of action shall be joined except expressly provided by the leave of the Court. A proviso has been added to this rule by which an exception has been carved out to this rule to the effect that a party shall not be prevented in a suit for foreclosure or redemption from asking to be put into possession of the mortgaged property. The objection with respect to mis joinder of cause of action is required to be raised at the initial stage i.e. before framing of the issues and, if not so raised it would be deemed to have been waived.

16. Order XXXIV provides the procedure with respect to suits relating to mortgage of immovable property. Order XXXIV Rule 1 provides for the parties to the suit for foreclosure, sale and redemption. Rule 1 runs as under:-

"1. Subject to the provisions of this Code, all persons having an interest either in the mortgage security or in the right of redemption shall be joined as parties to any suit relating to the mortgage."

Order XXXIV rule 7 provides for preliminary decree in redemption suit. It has been made mandatory that in a suit for redemption the Court shall pass a preliminary decree ordering (i) taking of an account what was due to the mortgagee on the date of such decree, keeping in view the principal and interest on the mortgage, the costs of the suit if any awarded, other costs, charges and expenses properly incurred by the mortgagee upto that date in respect of mortgage-security, together with interest thereon. The Court would declare the amount so due on that date and direct the plaintiff to pay the amount so found

or declared due within the fixed time with subsequent amount due after the decree. To pay the amount due to the mortgagee or the defendant and the defendant to deliver to the plaintiff all documents in his possession or the powers relating to the mortgaged property, retransfer the property to the plaintiff free from all encumbrances, created by the defendant or any person claiming under him and if necessary put the plaintiff in possession of the property. It further provides that if the payment of the amount found due under the decree is not made before the date so fixed, or any amount falling due after the decree, the defendant would be entitled to apply for a final decree. The Court may order conditional sale except in case of a usufructuary mortgage. It authorises the Court to extend the time from time to time. Order XXXIV Rule 8 provides for passing of the final decree ordering the defendant to deliver all the documents referred to in the preliminary decree, retransfer of the mortgaged property as stated in the preliminary decree and also ordering the mortgagee to put the plaintiff in possession of the property, of course, subject to the other conditions provided under Order XXXIV Rule 8, C.P.C.

17. On a reading of the statutory provisions as referred to above as well as the law laid down in the above mentioned authorities, it emerges that (i) Under Order XXXIV Rule 1 subject to the other provisions of this code, in a redemption suit the mortgagor is bound to implead all persons as a party to the suit who has an interest in (a) the mortgage-security (b) in the right of redemption. It provides that a puisne mortgagee may sue for foreclosure or for sale without making the prior mortgagee a party to the suit. Similarly, a prior mortgagee need not be joined in a suit to redeem a subsequent mortgage. (2) Order XXXIV Rule 1, C.P.C. is subject to the other provisions of the Code i.e. Order I Rule 3, 3-A, 5, 9, 10(2), Order II Rule 1, 2, 3, 4, 6, 7(3) the object of these rules is to avoid multiplicity of suits.

18. Trying a suit or different causes of action in one suit or ordering trial of them separately is a rule of convenience and prudence and is not a rule affecting the jurisdiction of the Court to try the suit. Basically a suit for redemption by the mortgagor is a suit for possession on redemption i.e. on payment of the mortgaged money. It would be nothing else but a retransfer of the interest created by providing security of the immovable property by delivering its possession to the mortgagee by the mortgagor to secure the loan advanced by the mortgagee. In order to grant necessary relief of a decree for redemption the Court is bound to deliver the documents of title in possession of the mortgagee, retransfer the property and effect the delivery of possession free from all encumbrances created at the time of the mortgage. In case of mortgage of immovable property with possession, the mortgagee shall be deemed to be in legal possession irrespective of the fact that any other person is in actual physical possession of the immovable property which is a security by the mortgagor to the mortgagee for repayment of his debt.

19. Order XXXIV Rule 1, C.P.C. categorically enjoins upon the plaintiff in a suit

for redemption to join all persons who claim interest either in redemption or in the security as parties to the suit. There is no bar in joining a number of causes of action. The plaintiff may in a suit for possession by redemption claim possession on the basis of title too and though these two may be separate causes of action but the Court may in appropriate cases, keeping the facts and circumstances of the case in view, expressly or impliedly grant leave to the plaintiff to join the causes of actions in order to give effective relief to the plaintiff where the defendants might claim paramount title and are in possession of the mortgaged property.

20. The rule of non-joinder of different causes of action is not a rule of inflexible nature. Joining the causes of action will depend upon a number of contingencies in the peculiar facts and circumstances of each case. The rule of non-joining of causes of action is based on convenience to avoid unnecessary complication. It is meant to confer speedy and appropriate relief keeping multiplicity of suits at bay. It further provides efficiency of granting justice to a party by passing an effective decree and not an infructuous or paper decree in favour of the plaintiff. The rule regarding joinder of causes of action or the parties is a rule of prudence not affecting the jurisdiction of the Court.

21. The question whether a person is a proper or necessary party has to be determined keeping in view the, peculiar facts and circumstances of each case. There cannot be a litmus test or mechanical water tight cheque that a person cannot be impleaded as a party in a suit particularly when he has got interest in the demised property. To be impleaded as a party in a redemption suit, it is not essential that the person must claim either through the mortgagor or the mortgagee. The claim of interest in the immovable property by a person may be of paramount title or even of possessory title is sufficient to implead him as a party to the suit for possession by redemption in order to give effective relief to the plaintiff. The attempt of the Court should be to decide all the questions in one suit in one go provided it does not embarrass the trial or prejudice the interest of a person in particularly when no question of jurisdiction is involved.

22. The Court has the jurisdiction and may in its discretion in the facts and circumstances of each case allow all issues including those other than the ones between the mortgagee and the mortgagor even if they depend upon separate causes of actions particularly relating to the status of a person in possession or proclaiming paramount title either independently or through the mortgagee or the mortgagor.

23. Order II Rule 4 specifically provides that a mortgagor can seek possession in a suit for redemption. When the Status specifically provides that a mortgagor can claim possession, as a necessary corollary a person who is in physical possession of the property in dispute becomes, if not a necessary party, a proper party in order to determine all the questions raised in the suit.

24. Apart from this mere impleading of improper party like the person who is in

physical possession of the property in dispute in a redemption suit cannot be attributed any other incidence except an irregularity relating to impleading of the parties. It is desirable in order to enable the plaintiff to reap the fruit of his decree to permit him to implead a person in physical possession as a party, as he has a direct interest in the possession of the immovable property. 25. In the case in hand, the mortgagor has impleaded defendants Nos. 5 to 13 inter-alia, averring that they are trespassers in physical possession of the land in dispute though legal possession is with the mortgagee. In the alternative if they proclaim to be in possession of the land in dispute as sub tenants of the mortgagor then since the mortgagor himself is holding the possession on behalf of the mortgagee, who is legally entitled to the possessory title under the mortgage, consequently these defendants would be deemed to be persons interested in the security as envisaged by Order XXXIV Rule 1. Defendants themselves also proclaim interest in the security claiming possessory title and interest of lessee under the mortgagor prior to the mortgage. In view of the averments made in the plaint as well as the defence taken, we may venture to state that it cannot be stated that defendants 5 to 13 are not the persons interested in the security the necessary parties. Assuming that they are not necessary parties, they are at least proper parties to the suit in order to pass an effective decree for possession in favour of the mortgagor. The argument that the mortgagor being in possession of the land in dispute as a tenant cannot claim decree for possession in his own favour from the mortgagee, cannot be sustained particularly in view of the fact that in a mortgage with possession legal possession shall continue with the mortgagee and he is bound to protect the security from the trespassers for the benefit of the mortgagor.

26. Even otherwise, we are of the view that infact, as found by both the Courts below, the mortgagor is not in physical possession of the property in dispute and the mortgagee is bound to deliver the possession thereof as well as the documents. In a suit for redemption an effective decree can only be passed if the person claiming possessory title, though in the present case defendants 5 to 13 are claiming the same through the mortgagor, should be impleaded as a party. The Courts are bound to pass an effective decree in order to put an end to the litigation and categorically determine the rights of the parties. A Court is duty bound to pass an effective decree and not keep the doors of litigation open and refuse the appropriate, equitable and just reliefs to the plaintiff solely on hypertechnicalities of procedure. We are further of the opinion that in the present case the parties have gone to trial on issues, led evidence and invited a decision. Defendants Nos. 5 to 13 have been found to be trespassers which is a finding of fact arrived at by the trial Court and affirmed by the Hon"ble Single Bench and the said finding having become final in the preliminary decree, the defendants are estopped from challenging the same in the final decree. The appellants cannot be permitted to approbate and reprobate with respect to the same finding. In the absence of a challenge to the preliminary decree wherein the defendants have been directed to give possession of the suit land free from all

encumbrances, which has not been challenged in the Letter Patent Appeal, nullifying the preliminary decree for delivery of possession by setting aside the final decree, would result in an analogous situation in-as much as it amounts to passing of two contradictory decrees in the same proceedings. We are further of the view that before the first appellate Court, the appellants cannot complain of any prejudice during the trial because of their having been joined as a proper parties to the suit by way of redemption. In these circumstances, Section 99 categorically prohibits the reversing of a decree on the ground of any irregularity or error in misjoinder or non-joinder of parties or causes of action.

27. The trial Court by permitting the trial to continue and impleading the defendants Nos. 5 to 13 on specific allegations, under the provisions of Order I Rule 10, would be deemed to have granted permission in the facts and circumstances of the case.

28. In view of the observations made above, the findings of the learned Single Judge to the effect that since the defendants have been improperly joined and they having not claimed any interest either in the mortgaged security or right of redemption, cannot be tried in the redemption suit, cannot be sustained. We find no ground for ordering separate fresh trial at this stage when the parties have already fought this litigation for decades. At this fag end of this litigation, this mortgagor cannot be deprived of his-right for physical possession from the trespassers in a suit for redemption, solely on the ground of an irregularity in joining the trespassers as party, even if they are not necessary party though in one considered view, they are necessary as well as proper party to the Us in order to determine the issue finally.

29. In view of the observations made above, the appeal is accepted, the judgment of the learned Single Bench is set aside and the suit of the plaintiff is decreed for possession. The plaintiffs shall be entitled to the delivery of possession as well as delivery of all the documents with regard to the suit land free from all encubrances. Keeping in view the question raised, we pass no order as to costs.