(2016) 04 P&H CK 0123

In the Punjab And Haryana At Chandigarh

Case No : C.R. No. 2243 of 2011 (O&M)

Surender Kumar APPELLANT

Vs

State Bank of India RESPONDENT

Date of Decision : 26-04-2016

Acts Referred:
Transfer of Property Act, 1882 — Section 60

Citation : (2016) 3 PLR 707

Hon'ble Judges : Ms. Ritu Bahri, J.

Bench : Single Bench

Advocate : Mr. Kanwaljit Singh, Senior Advocate with Mr. Roopak Bansal, Advocate, for the Appellant; Mr. Sudhir Mittal, Advocate, for the Respondent

Final Decision : Allowed

Judgement

Ritu Bahri, J.—Challenge in this petition is to the order dated 25.09.2010 (Annexure P-7) passed by the Additional Civil Judge (Senior Division), Sonepat, whereby application filed by the petitioner for direction to decree holder-bank to return the title deeds to the petitioner has been dismissed.

2. A firm known as M/s Sharma Textile & General Industries was formed in the year 1971 comprising of four partners namely Sh. Deep Chand (deceased), Parkash Chand (deceased, now represented by the petitioner and proforma respondent Nos.5 to 9), Pehlad Singh (respondent No.2) and Ishwar Singh. The said firm was sanctioned a loan of Rs.2,00,000/- in July, 1971 and Rs.4,00,000/- in December, 1972 by Haryana Financial Corporation. Apart from this, another loan of Rs.3,00,000/- was sanctioned by State Bank of India against cash credit limit. At the time of availing loan from respondent No.1-Bank, the aforesaid firm had mortgaged agricultural land comprising Killa No.30/19 (8-0), 30/12 (8-0) situated in the revenue estate of village Kundli, Tehsil & District Sonepat with the bank. However, the firm had suffered a huge loss and was closed down in the year 1980. Pahlad Singh-respondent No.2 retired from the partnership firm on 01.04.1971. Thereafter, other partners namely Deep Chand and Ishwar Singh

also retired from the said firm. After closure of firm, Parkash Chand, father of the petitioner, cleared all the dues of Government departments such as Income Tax, Sales Tax, Electricity Board, Provident Fund, E.S.I. and arrears of wages of workers. Subsequently, State Bank of India-respondent No.1 filed a suit (Annexure P-1) for recovery of loan amount from the firm. This suit was decreed vide judgment and decree dated 16.10.1980 (Annexure P-2). Parkash Chand died on 07.12.1996. As per his last registered Will, all his four sons namely, Virender Kumar, Surender Kumar, Narender Kumar and Yoginder Kumar came into possession of the property. After passing of decree dated 16.10.1980 (Annexure P-2), respondent No.1- Bank filed an execution petition. During the pendency of execution petition, petitioner, from his own sources, repaid the loan amount of Rs.12,00,000/- vide draft dated 29.06.2001 (Annexure P-3). After settling the amount, the petitioner filed an application (Annexure P-4) before the Executing Court for release of registered sale deeds qua the mortgaged property, which were lying in possession of decree holder-bank. The said application was dismissed by the Executing Court vide order dated 28.10.2006 (Annexure P-5) and revision against this order was disposed of by this Court on 01.07.2008 (Annexure P-6) by giving direction to the Executing Court to decide the matter afresh after hearing both the parties. Pursuant to the above said order (Annexure P-6), the Executing Court has dismissed the application of the petitioner vide impugned order dated 25.09.2010 (Annexure P-7).

3. Mr. Kanwaljit Singh, learned senior counsel for the petitioner has argued that since Surender Kumar-petitioner has cleared the entire liability, he was entitled to take custody of the registered sale deeds with regard to the mortgaged property i.e. land comprising Killa Nos.30/19 (8-0), 30/12 (8-0) situated in the revenue estate of village Kundli, Tehsil & District Sonepat. Legal heirs of deceased-Parkash Chand are in complete possession of aforesaid land and the same has been mutated in their names. After sanctioning of mutation, all the sons of Parkash Chand became co-sharers in the suit land. If the sale deeds are returned to the petitioner, contesting respondent No.2-Pahlad Singh would be entitled to pay to the extent of his share of mortgage amount and seek possession from co-mortgagor (petitioner) within 12 years from the date of redemption. He has referred to the judgment passed by the Hon''ble Supreme Court in Vallikat Thekkedath Valappil Lakshmikutty Amma and others v. Vallikat Thekkedath Valappil Demodara Menon and others, 1997 (3) SCC 317, on the proposition that if, one of the co-mortgagors redeemed mortgage and subrogated into the shoes of mortgagee, the other co-owners would be entitled to pay to the extent of their respective shares of mortgage amount and seek possession from co-mortgagor within 12 years from the date of redemption. He has further referred to Section 47 (1) CPC to contend that since after the suit filed by respondent No.1-bank was decreed for recovery of Rs.10,56,641.53 Ps vide decree dated 16.10.1980 (Annexure P-2) and during execution petition, the entire decretal amount was paid by the petitioner being legal heir of Parkash Chand, the application for return of the title deeds from the bank after clearing

the loan amount, was maintainable before the Executing Court, in which the said decree has been executed. There was no occasion to file a separate suit against the bank for return of the sale deeds. He has further referred to the judgment passed by Division Bench of this Court in Shri Jamiat Singh v. State of Punjab, 1984 RRR 88, to contend that if, a co-mortgagor redeems the mortgage, it becomes a right of reimbursement. A redeeming co-mortgagor will be subrogated to the right of mortgagee only to the extent necessary for his own equitable protection. A non-redeeming co-mortgagor has a right to get the property redeemed within a period of 12 years from the date of redemption as per Article 61 of Limitation Act. Learned counsel for the petitioner has further argued that the application for returning the title deeds cannot be dismissed merely on the ground that RSA with regard to rendition of account is pending before this Court.

4. Mr. Sudhir Mittal, learned counsel for respondent No.2 has argued that a civil suit for rendition of account had been filed by other partners of the firm. The said suit was dismissed in the year 1986. After retirement of three partners, Parkash Chand had not become the sole owner/proprietor of the firm. Vide judgment and decree dated 23.05.1990 passed by the Additional District Judge, Sonipat, it was held that Parkash Chand was the accounting partner of firm and he had to render the account to the other partners. The firm had been ordered to be dissolved and a decree for dissolution of firm and rendition of account had been passed in favour of JD No.4 and against Parkash Chand-JD No.2 & Ishwar Singh-JD No.5. The appellate Court had turned down the plea regarding retirement of partners. He further argued that Surender Kumar and his brothers had not settled the account with decree holder-bank and the entire machinery, stock in trade, capital of the firm were in possession of Parkash Chand, who had been held to be the accounting partner. Any payment made by the successors of Parkash Chand was, in fact, the payment out of the funds of the firm. The sale deeds in possession of the bank were not the joint property of the partners/legal heirs of Parkash Chand. Said sale deeds are the property of the persons, in whose name the deeds are. Both the title deeds were submitted by JD Nos.3-Deep Chand and 4-Parhlad Singh with the bank at the time of taking the loan. In case the title deeds were handed over to Surender Kumar-petitioner, he will not be able to utilise the same for any monetary purposes. In Civil Appeal No.31/13 of 1987, titled as Parkash Chand and others v. Pehlad Singh and Civil Appeal No.35/13 of 1987, titled as Pehlad Singh v. Parkash Chand and others, it has been held that Pehlad Singh-JD No.4 and Deep Chand are the true owners of the land comprised in rectangle and Killa No.30/12 to the extent of ? share each and the land comprised in rectangle and Killa No.30/19 is the real property of deceased-Deep Chand. Deep Chand died before the decision of the suits as well as appeals, therefore, this land devolved on JD No.4, Parkash Chand-deceased, JD No.2 and Ishwar Singh-JD No.5 in equal share on the strength of the Will executed by Deep Chand. Therefore, in the land comprised in rectangle and Killa Nos.30/19, JD No.4 had got ?rd share, Parkash Chand had got ?rd share and Ishwar Singh

had got ?rd share. The above said appeals were challenged before this Court by filing regular second appeal, which is pending consideration. He finally argued that the Executing Court has rightly dismissed the application filed by the petitioner for return of the title deeds.

5. Heard, counsel for the parties.

6. The facts not in dispute are that a loan had been taken by M/s Sharma Textile & General Industries, in which there were four partners. Thereafter, three partners resigned from the partnership in 1971. Later on, respondent No.1-Bank filed a suit for recovery of loan amount against the said firm, which was decreed. During execution proceedings, legal heir of Parkash Chand had cleared the entire loan amount of Rs.12,00,000/- as per bank draft dated 29.06.2001 (Annexure P-3). As per the stand of respondents, the retired partners of the firm had subsequently filed a suit for rendition of accounts, which was dismissed. In Civil Appeal No.31/13 of 1987, titled as Parkash Chand and others v. Pehlad Singh and Civil Appeal No.35/13 of 1987, titled as Pehlad Singh v. Parkash Chand and others, the Appellate Court has held that Pehlad Singh-JD No.4 and Deep Chand were true owners of the land comprised in rectangle and Killa No.30/12 to the extent of ? share each and the land comprised in rectangle and Killa No.30/19 is the real property of deceased-Deep Chand. Against the said decision, a regular second appeal is pending before this Court. These facts merely make out a case that there was dispute with regard to rendition of account between four partners, who were original members of the firm. Once the loan amount had been cleared by Surender Kumar-legal heir of Parkash Chand, the other partners can repay to the extent of their shares to him (Surender Kumar-petitioner) after the decision of regular second appeal or within 12 years from the date of payment of loan. At this stage, reference can be made to the judgment passed by the Hon''ble Supreme Court in Vallikat Thekkedath Valappil Lakshmikutty Amma''s case (supra), wherein it has been held as under:-

"5. The learned counsel appearing for the appellant relied on Valliamma Champaka Pillai v. Sivathanu Pillai, (1979) 4 SCC 429, and contended that the respondent have failed to redeem the property within the limitation and, therefore, they cannot file a suit for partition. It is difficult to accept the contention of the learned counsel. It is seen that in that case in the suit for redemption by one of the mortgagors, he had redeemed the mortgage but the suit was filed for delivery of the possession after 50 years or after the expiry of 12 years from the date of the redemption of the mortgage was decreed. The question, therefore, was; when the limitation for filing the suit for possession would arise? It was held in para 28 as under:

"Steering clear of the tangled web of conflicting and confusing decisions rendered on an interpretation of the relevant provisions of the Transfer of Property Act, 1882, as the stood before the amendment of 1929, we may say at once that even where the Transfer of Property Act was not in force, a redeeming co-mortgagor discharging the entire mortgage debt, which was the joint and several liability of himself and co-mortgagor, was, in equity, entitled to be subrogated to the rights of the mortgagee redeemed and to treat the non-redeeming co-mortgagor as his mortgagor to the extent of the latter''s portion or share in the hypotheca and to hold that portion or share as security for the excess payment made by him. This equitable right of the redeeming co-mortgagor stems from the doctrine that he was a principal debtor in respect of his own share only, and his liability in respect of his codebtor''s share of the mortgage debt was only that of a surety; and when the surety had discharged the entire mortgage debt, he was entitled to be subrogated to the securities held by the creditor, to the extent of getting himself reimbursed for the amount paid by him over and above his share to discharge the common mortgage debt.

From what has been said above, it is clear that where the Transfer of Property Act is not in force and a mortgage with possession is made by two persons, one of whom only redeems discharging the whole of the common mortgage debt, he will, in equity, have two distinct rights; Firstly, to be subrogated to the rights of the mortgagee discharged, vis-a-vis the non-redeeming co-mortgagor, including the right to get into possession of the latter''s portion of share of the hypotheca. Secondly, to recover contribution towards the excess paid by him on the security of that portion or share of the hypotheca which belonged not to him but to the other co-mortgagor. It follows that where one co-mortgagor gets the right to contribution against the other co-mortgagor by paying off the entire mortgage debt, a correlated right also accrues to the latter to redeem his share of the property and get its possession on payment of his share of the liability to the former. This corresponding right of the ''non-redeeming'' co-mortgagor, to pay his share of the liability and get possession of his property from the redeeming co-mortgagor, subsists as long as the latter''s right to contribution subsists. This right of the ''non-redeeming'' co-mortgagor, as rightly pointed out by the learned Chief Justice of the High Court in his leading judgment, is purely an equitable right, which exists irrespective of whether the right of contribution which the redeeming co-mortgagor has as against the other co-mortgagor, amounts to a mortgage or not.

Since subrogation of the redeeming co-mortgagor would give him the right under the original mortgage to hold the non-redeeming co-mortgagor''s property as security to get himself reimbursed for the amount paid by him in excess of his share of the liability, it follows that a suit for possession of his share or portion of the property by a non-redeeming co-mortgagor on payment of the proportionate amount of the mortgage debt, may be filed either within the limitation prescribed for a suit for redemption of the original mortgage or within the period prescribed for a suit for contribution by the redeeming co-mortgagor against the other co-mortgagor."

6. It is now settled legal position that one of the co-owners or one of the co-mortgagors is entitled to redeem the mortgage and on redemption, he subrogates into the shoes of the mortgagees. To the extent of his liability for the

mortgage, he gets discharge and to the extent of the shares of other co-mortgagors, he stands in the position of mortgagee viz-a-viz other co-mortgagors. Therefore, it would be open to the other mortgagors to sue for possession of the property, after paying their share within the period of limitation. It is not in dispute that 12 years is a period of limitation for possession of the property since the appellant came into possession to the extent of the share of other co-owners, namely, their Karvans of the Tarwad as a mortgagee. They are entitled to pay to the extent of the respective share of the mortgage amount and seek possession from the co-mortgagor, namely, appellant within 12 years from the date of the redemption of the mortgage. Under these circumstances, suit has been filed within Limitation for a partition of property and preliminary decree shall follow subject to the payment of mortgage amount to the extent of their shares to the appellant."

7. In the present case, all the four partners of the firm had taken the loan and after retirement of three partners, one of the legal heir (petitioner) of the fourth partner had repaid the said loan. The other co-mortgagors can get the mortgage redeemed by reimbursing the disputed amount to petitioner-Surender Kumar within 12 years from 29.06.2001 when the loan amount was repaid vide Annexure P-3. Even 12 years'' period has since been expired after the loan was cleared by the petitioner.

8. In view of the above, the impugned order dated 25.09.2010 (Annexure P-7) is set aside and a direction is given to respondent No.1-bank to return the title deeds to the petitioner, who had executed the decree by making payment of the decretal amount vide draft dated 29.06.2001 (Annexure P-3). However, a rider is put to the effect that the sale deeds, returned to the petitioner, shall not be used by him till the final decision of regular second appeal pending before this Court.

9. Allowed accordingly.

