

## FULL BENCH

Before S. S. Sandhawalia, C.J., P. C. Jain and G. C. Mital, JJ.

SIRI CHAND AND OTHERS,—Petitioners.

versus

NATHI,—Respondent.

Civil Revision 345 of 1981

January, 21, 1983.

*Limitation Act (XXXVI of 1963)—Art. 68(1)(a)—Transfer of Property Act (IV of 1882)—Section 59—Oral mortgage of Land—Section 59 not applicable at the time of mortgage—Such mortgage—Whether valid—Suit for redemption—Period of limitation for such a suit.*

*Held*, that the oral mortgage had been made at a time when the provisions of Section 59 of the Transfer of Property Act, 1882 had not been made applicable to the area where the land was situate. The law, thus, imposed no bar on the creation of a mortgage by a land-owner either orally or by an unregistered document. In fact, prior to the extension of the relevant provisions of the Act, even an oral transfer of all the property rights in land by way of sale or gift was legally valid. The oral transaction of mortgage was, therefore, valid and a legally enforceable one. Consequently, the terminus for the limitation for redemption has to run from the date of the mortgage.

(Paras 6 and 12).

*Inder Singh and others v. Mst. Kishno and others, 1966 P.L.R. 408. (OVERRULED).*

*Case referred by the Division Bench consisting of Hon'ble Mr. Justice Prem Chand Jain and Hon'ble Mr. Justice Surinder Singh on 2nd November, 1981 to a Full Bench for deciding the important question of law involving in this case. The Full Bench consisting of the Hon'ble the Chief Justice Mr. S. S. Sandhawalia, Hon'ble Mr. Justice Prem Chand Jain and Hon'ble Mr. Justice Gokal Chand Mital finally decided the case on 21st, January, 1983.*

*Petition under section 115 C.P.C. for the revision of the order of the court of Shri R. C. Gupta, Sub Judge 1st Class, Faridabad, dated the 17th December, 1980 allowing the application dated 16th August, 1978 and permitting the plaintiff to implead the L.Rs of Smt. Ram Kali on the record.*

M. L. Sarin with R. L. Sarin, Advocate, for the Petitioner.

O. P. Goyal Advocate, for the Respondents.

## JUDGMENT

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(1) A meaningful challenge to the ratio of the Division Bench judgment in *Inder Singh and others v. Mst. Kishno and others*, (1), has inevitably necessitated this reference to the Full Bench.

2. As would be apparent hereinafter, the legal issue falls within a somewhat narrow compass. It, therefore suffices to notice briefly the facts which are directly relevant to the question.

3. The plaintiff-respondent Nathi instituted a suit for possession by way of redemption on October 4, 1977 on the ground that the land in dispute had been mortgaged by him with possession with the defendants by an oral mortgage on June 14, 1948 for a sum of Rs. 2,000. The mutation with regard to this oral transaction was sanctioned later on September 17, 1948. The case of the plaintiff was that he had already paid Rs. 2,000 to the defendants on or about April 1, 1976, but the latter did not get the revenue entries corrected in his name, hence the suit for a decree of possession by redemption and in the alternative if the payment of Rs. 2,000 was not proved, a decree for possession by way of redemption on payment of mortgage money. In the said suit, apart from other defendants, Smt. Ram Kali was also impleaded as defendant No. 3.

4. All the defendants except Smt. Ram Kali defendant No. 3 contested the suit *inter alia* on the ground that the same was not within time and further that it was barred on the principle of *res judicata*. The factum of mortgage was also denied. Specific objection was taken that since defendant No. 3 had already expired on August 14, 1972, the suit had been filed against a dead person and was, therefore, incompetent.

5. The application giving rise to the present Civil Revision was presented on behalf of the plaintiff on August 16, 1978, for bringing the legal representatives of defendant No. 3 on the record stating that he had come to know about the death of Smt. Ram Kali defendant No. 3 on July 21, 1978. This application was contested on behalf of the defendants and was ultimately dismissed on November 24, 1979 by the order of the then trial Judge Shri B. L. Singal.

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This dismissal was assailed by way of revision which was allowed by this Court in the following terms:—

“It is agreed between the counsel that the impugned order may be set aside but the finding that Smt. Ram Kali died on August 14, 1972 be kept intact. It is further agreed that application, dated August 14, 1978 for bringing legal representatives of Ram Kali on record be treated under Order 1 Rule 10 of the Code of Civil Procedure and be decided taking into consideration sub-rule 5 of the Order 1 Rule 10 of this Code, Section 21 of the Limitation Act, and observation in *Joginder Singh and others v. Krishan Lal and others* (2).”

In compliance with the above, the trial court then heard the arguments afresh and by its detailed order, dated December 17, 1980, which is under revision, allowed the application and directed the impleading of the legal representatives of Smt. Ram Kali to be brought on the record. In doing so, it relied primarily on the Division judgment in *Inder Singh and others*' case (supra) for holding that the application was within the period of limitation of 30 years which would start after the expiry of twelve years from the date of the original oral mortgage. It is this stand which has been assiduously assailed in this Revision petition which was admitted for hearing by the Division Bench at the motion stage and the case was later directed to be placed before the Full Bench,—*vide* the lucid referring order of the Division Bench, dated November 2, 1981.

6. Now it would be manifest on a reference to the material facts that the core question herein is, whether an oral mortgage was a valid one in the eye of law on June 14, 1948, in the erstwhile State of Punjab, that is, prior to the extension of the provisions of Section 59 of the Transfer of Property Act, 1882. To clear the decks for the consideration of this legal issue, an arena of admitted premises on which there is no controversy may first be highlighted. It is common ground that the Transfer of property Act, 1882 (being a Central statute) by virtue of Section 1 thereof had not been extended to the territories, which immediately before November 1, 1956,

were comprised in Part B States or in the States of Bombay, Punjab and Delhi. It was, however, provided by Section 1 that any part of the said statute may, by notification in the official gazette, be extended to the whole or any part of the said territories by the State Governments concerned. Section 59 of the Transfer of property Act, 1882 (hereinafter called 'the Act') lays down that where the principal money secured is Rs. 100 or upward on immoveable property, the mortgage thereof can only be affected by a registered instrument signed by the mortgagor and attested by at least two witnesses. Admittedly, the area herein was the District of Faridabad within the State of Haryana to which the provisions of Section 59 of the Act had not been made applicable at the time of the original oral mortgage on June 14, 1948. It was only on August 5, 1967, that the provisions of the said Section were extended to Haryana by the State Government by a notification in the following terms:—

“REVENUE DEPARTMENT

The 5th August, 1967.

No. S.O. 75/C.A. 4/1882 S.I/67.—In exercise of the powers conferred by section 1 of the Transfer of property Act, 1882 (Central Act No. 4 of 1882), the Governor of Haryana is pleased to extend the provisions of Section 59 of the said Act to the State of Haryana with effect from the date of publication of this notification in the Official Gazette.”

From the aforesaid notification and the date of its enforcement, whereby for first time the provisions of Section 59 of the Act were extended to Haryana, it seems manifest that prior to August 5, 1967, the law imposed no bar on the creation of a mortgage by a landowner either orally or by an unregistered document. Indeed, the learned counsel for the respondents—Mr. O. P. Goel was ultimately fair enough to concede that it could not be disputed that prior to the date aforesaid, there was no legal impediment in the validity of an oral mortgage on that score alone or on the ground of the same being unregistered. In fact, it could not be controverted before us that prior to the extension of the relevant provisions of the Act to these areas, even an oral transfer of all the property

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rights in land by way of sale or gift was, therefore, possible and legally valid therein.

7. Now once that is so, on the admitted stand that an oral mortgage was made on June 14, 1948, it seems to inflexibly follow that no legal infirmity attached thereto and the transaction was, in essence, legally valid and enforceable. All that, therefore, remains for adjudication is as to what would be the period of limitation for the redemption of such a valid oral mortgage.

8. On the aforesaid premises, one may now turn to *Inder Singh and others case* (supra), the correctness of which is the primary issue. A close perusal of the judgment would indicate that their Lordships indeed simply followed the view in *Purusottam Das and another v. S. M. Dodouza and another*, (3), which had been relied upon by the court below as well. Without in any way itself examining the issue on principle and precedent. It was observed that the ratio in *Purusottam Das and another's case* (supra) was attracted and in the absence of any contrary decision thereto, the District Judge was held to be right in following the same. Consequently, the applicability of the judgment in *Purusottam Das and another's case* (supra) in a way becomes the primary question.

9. Now at the very threshold it may be noticed that by virtue of Section 1 of the Act, its provisions were applicable to the State of Orissa. Consequently all the mortgages and charges of immoveable property where the principal amount was Rs. 100 or onwards, were invalid unless affected by a registered instrument signed by the mortgagor and attested by at least two witnesses. In *Purusottam Das and another's case* (supra) undoubtedly the alleged mortgage was of land and for an amount above Rs. 100. The firm finding arrived at was that the mortgaged bonds exhibits 2 to 2-E were unregistered and, therefore, not valid as such of creating any mortgage interest. On that firm and indeed admitted foundation the Division Bench in para 6 itself noticed that the primary question was whether a person, who obtains possession under an invalid and void mortgage, who has not at any time asserted possession or any claim of absolute right, could wholly extinguish the title of the original owner and what would be the period of limitation in such a

case?. Again in para-8 of the report, the Judges referred specifically to decisions where a person had obtained possession under a void mortgage. It was in that peculiar context that it was held that after the expiry of twelve years, such a possession would be perfected into a mortgage by prescription which could thereafter be redeemed within the period prescribed for the redemption of mortgages.

10. It would appear that the crucial and indeed the conclusive factor—whether the original mortgage was a valid one or a void one—seems to have been altogether missed in *Inder Singh and others' case* (supra). Therein the mortgage undisputedly executed long before the extension of Section 59 of the Transfer of property Act to the area, had been recorded in a *bahi* leaf which was unregistered. Therefore, in the eye of law, as existing at the relevant time, an oral and obviously an unregistered mortgage was both valid and legally enforceable one and the factual position was thus diametrically opposite to *Purusottam Das and another's case* (supra). Therefore, the ratio of *Purusottam Das and another's case* (supra), could not possibly be attracted. It would appear that in *Inder Singh and other's case* (supra), counsel were sorely remiss in not bringing this salient factor to the notice of the Bench. As is apparent from an examination of the judgment, the crucial question—whether at that particular time the unregistered mortgage based on the *bahi* entry as also its subsequent acknowledgement was a valid or a void one—seems to have altogether missed consideration. The whole emphasis being on the correctness of the view in *Purusottam Das and another's case*, (supra), the Division Bench in *Inder Singh and others' case*, did not even advert to this aspect of the matter that prior to the extension of Section 59 of the Act to the States of Punjab and Harvana, oral mortgages and even oral sales and gifts were valid in the eye of law whilst the legal position may have been wholly to the contrary in Orissa. A close analysis of *Inder Singh and other's case* (supra), therefore, makes it plain that the judgment proceeded on the erroneous legal foundation that the unregistered mortgage at that particular time was void and invalid.

11. Even the learned counsel for the respondent could not deny that this aspect of the case, which goes to the root of the applicability of the ratio of *Purusottam Das and another's case* (supra) was not even adverted to in *Inder Singh and others' case* (supra). Inevitably, on the admitted legal position *Purusottam Das and another's case* (supra) was, therefore, plainly distinguishable and not attracted

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to the situation. Once it is held that prior to the extension of Section 59 of the Act, oral or unregistered mortgages were valid, the very bottom falls from underneath the observations made in *Inder Singh and others' case* (supra). With the greatest respect and deference to the learned Judges of the Division Bench, we are constrained to overrule the said judgment.

12. In the present case, admittedly the oral mortgage had been made on June 14, 1948. At that time the relevant provisions of the Transfer of Property Act had not been made applicable to the area. The said transaction at that time was, therefore, valid and legally enforceable one and the fact whether the mortgage was registered or not, was wholly irrelevant with regard to the issue of its validity. Consequently, the terminus for the limitation for redemption has to run from the aforesaid date of June 14, 1948. The application for bringing the legal representatives, having been admittedly brought after the period of 30 years, therefrom, namely; on August 16, 1978 was thus beyond the period prescribed. This application, therefore, must be held to be barred by time. This Civil Revision has, therefore, to be allowed and the application for bringing the legal representatives is hereby dismissed on the ground of limitation and the impugned order of the trial court is hereby set aside.

13. It is common ground that other issues may well survive in the suit which is pending. The trial court will proceed with the expeditious disposal thereof in the light of the above. The parties are directed to appear before it on Monday, the 21st of February, 1983.

*Prem Chand Jain, J.*—I agree.

*Gokal Chand Mital, J.*—I also agree.

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N. K. S.