

Before Hemant Gupta, J.

GURBAZ SINGH ALIAS BAJA SINGH,—Appellant

versus

BHAL SINGH AND OTHERS,—Respondents

R.S.A. No. 419 of 1987

26th August, 2009

Code of Civil Procedure, 1908—Indian Evidence Act, 1872—S.65(c), 91 and 92—Defendants failing to produce registered mortgage deed—Registration of mortgage prior to partition of country—Claim for possession after redemption of mortgage—Whether usufructuary mortgagee who continues in possession for more than 30 years is entitled to protect his possession—Held, no—Right of redemption—Not lost with efflux of time—Plaintiff seeking possession on basis of title and in alternative by redemption of mortgage—Since land proved to be mortgaged, suit of plaintiff for possession by redemption ordered to be decreed on deposit of mortgage amount—Judgments and decrees of Courts below set aside.

Held, that the original document i.e. the registered mortgage deed has not been produced by the defendants though the same was stated to be in their possession. A certified copy could not be produced within a reasonable time as the record is in area which is now part of Pakistan. It is apparent from the record, including oral and documentary evidence, that the mortgage was registered prior to the partition of the country and such registered mortgage deed could not be produced on account of the circumstances i.e. partition of the country. Therefore, oral evidence of the contents of document is admissible. Thus, the first question of law “whether oral evidence of the mortgage can be taken into consideration to return a finding on the terms of the mortgage in the absence of written document containing the terms and conditions of the mortgage proved on record” is answered in favour of the plaintiff.

(Para 17)

Further held, that the plaintiff has claimed possession and in the alternative possession after redemption of the mortgage. It cannot be said that the usufructuary mortgagee who continues in possession for more than 30 years is entitled to protect his possession. The right of redemption is not lost with the efflux of time. The second question of law "whether the mortgagee who continues in possession for more than 30 years is entitled to protect his possession as a right of redemption can be said to be lost with prescription" is, thus, answered in favour of the plaintiff and against the mortgagee.

(Para 22)

Further held, that the plaintiff has sought possession on the basis of title and in the alternative by redemption of mortgage. Since the land is proved to be mortgaged for an amount of Rs. 27,200/-, the suit of the plaintiff for possession by redemption is decreed on deposit of mortgage amount of Rs. 27,200/- within three months from today and the judgment and decree of the Courts below are set aside. On such deposit, the land shall stand redeemed and the plaintiff shall be entitled to possession from the defendants in accordance with law.

(Para 24)

C. B Goel, Advocate, *for the appellant.*

V. K. Jindal, Advocate, *for the respondent.*

Sanjeev Manrai, Advocate for respondent No. 34.

HEMANT GUPTA, J.

(1) The plaintiff is in second appeal arising out of the judgment and decree passed by the learned Courts below dismissing his suit for possession of land measuring 321 Kanals 13 Marlas.

(2) The plaintiff and defendants No. 9 to 15 claim to be the owners of land measuring 321 Kanals 13 Marlas being descendants as well heirs and successors of Phulla Singh s/o Partap Singh. Defendants No. 1 to 8 are alleged to be in illegal and unauthorized possession of the suit land. It was pleaded that Sunder Singh, brother of Phulla Singh, has never mortgaged any land with the predecessor-in-interest of defendants No. 1 to 8 and,

thus, the plaintiff claimed possession of the suit land as owner. In the alternative, it was pleaded that if it is held that defendants No. 1 to 8 are the mortgagees then the plaintiff claimed a decree for possession by redemption of the mortgage.

(3) In the written statement, it was pleaded that the plaintiffs have sought possession though the period of redemption has expired and that the defendants are occupying the land in dispute for the last more than 30 years and as such they have become the owners by adverse possession.

(4) One of the issues framed was whether the plaintiff and defendant No. 9 to 15 are the owners of the suit land and whether the suit land was mortgaged with defendants No. 1 to 8 and they have become owners of land by prescription. Both the learned Courts below have returned concurrent finding of fact on the basis of revenue record Exhibit P-2 and P-3 that the plaintiffs are the owner of the suit land. The Court also considered the entire evidence of the defendants to the effect that the predecessor-in-interest of the plaintiff and defendants No. 9 to 15 had mortgaged the land in West Pakistan with the predecessor-in-interest of defendants No. 1 to 8 and after partition the suit land was allotted to them in lieu of the land left by them in Pakistan. Thus, it was alleged that they are in possession of the same as mortgagees and thereafter they have become owners as plaintiff has failed to redeem the same within the prescribed period.

(5) Issue No. 3 which is a material issue reads as under :—

Whether the suit land was mortgaged with defendant Nos. 1 to 8 and they have become the owners of the same by way of prescription, as alleged ? OPD 1 to 8.

(6) On the said issue, learned trial Court returned a finding on the basis of Exhibit D-1, claim for allotment of land in lieu of land owned and left by Sunder Singh, s/o Partap Singh in Pakistan. As per Khatoni Istemal Exhibits P-13 and P-14, the land in dispute was allotted to defendants No. 1 to 8 or their predecessors-in-interest. The same is in possession of the defendants which is evident from the jamabandi Exhibit D-12 for the year 1960-61, Exhibit D-11 jamabandi for the year 1972-73. DW4 Bhagat Ram, Clerk of Land Claim Office, Jullunder, has deposed that as per record Sunder Singh, s/o Partap Singh submitted claim for allotment of land in lieu

of land left by him in Pakistan. The land measuring 23 Acres 3 Kanals was mortgaged with Sunder Singh etc for Rs. 2500/- and another piece of land measuring 27 Acres 6 Kanals 10 Marlas was mortgaged with Phulla Singh for Rs. 2500/-. DW5 Bahal Singh defendant No. 1 has deposed that the land in question was owned by Sunder Singh, s/o Partap Singh and was mortgaged 6-7 years prior to the partition of the country. The land in question was Banjar and they made it cultivable by installing five tube-wells incurring expenditure to the tune of Rs. 7000/- on each tube-well. They spent about Rs. 50,000/- to 60,000/- on improvement of land. Learned counsel for the defendants has raised the following argument before the learned trial Court :—

“On the basis of this evidence, it has been vehemently argued by Mr. Bedi, the learned counsel for defendants No. 1 to 8, that it is clear from the aforesaid evidence that Sunder Singh son of Partap Singh mortgaged land in Pakistan with the predecessor-in-interest of the present defendants No. 1 to 8 and thereafter the land in question was allotted to them in lieu of the land left by them in Pakistan. He further urged that it is clear from Exhibit D-1 that Phulla Singh brother of Sunder Singh submitted an application in the year 1959 for the redemption of the said land but that was dismissed and as such they brought improvement on the said land by incurring expenditures to the tune of Rs. 50,000/- to Rs. 60,000/- considering themselves as owners”.

(7) The argument of learned counsel for the plaintiff before the learned trial Court was that since the original mortgage deed or in the alternative secondary evidence in the shape of certified copy of the same has not been produced so as to disclose the period of mortgage, defendants No. 1 to 8 have not become owners of the suit land. While considering the secondary evidence in respect of mortgage, it was held that the contents of a registered mortgage deed can only be proved either by registered deed or a certified copy thereof and no other evidence can be looked into. The Court concluded to the following effect :—

“.....I have come to the conclusion that the defendants No. 1 to 8 having failed to place on record the original registered mortgage deed (as admitted by D.W.5 Bahal Singh) or a certified copy

thereof by obtaining permission to lead secondary evidence cannot be considered to have become owners of the suit land on the ground that the plaintiff and defendants No. 9 to 13 or their predecessor-in-interest have failed to get the same redeemed. Issue No. 3 is, thus, decided in favour of the plaintiff and against the defendants No. 1 to 8”.

(8) On Issue No. 5, learned trial Court found that it was incumbent upon the plaintiff to prove the terms and conditions of the mortgage deed. The plaintiff has failed to do so and that the land still stands mortgaged with defendants No. 1 to 8. Since the plaintiff has failed to prove the terms and conditions of the mortgaged deed, therefore, he is not entitled to the possession of the suit land merely on the basis of title without making any payment and without removing the clog or encumbrances of mortgage. In respect of Issue No. 7, the learned trial Court returned a finding that the defendants are not entitled to any amount on account of improvement brought by them as they were holding the land in question as mortgagees. In view of the above findings, the suit was dismissed.

(9) In appeal, learned First Appellate Court found that the mortgage was somewhere in the year 1942 and since it has not been redeemed for the last more than 30 years, the defendants have become owners by prescription. The learned First Appellate Court concluded as under :—

“15. So in view of the relevant documents which are mostly copies of the revenue record, the oral evidence and the evidence coming from the official source and because of the admission of the appellant themselves and the entries into the redemption application filed by the appellant's predecessor-in-interest, there is inescapable conclusion which is only equitable finding which can be arrived at is that the property was mortgaged by Phulla Singh with the predecessors-in-interest of respondents No. 1 to 8 and the mortgage was certainly go somewhere in the year 1942 as mentioned in the redemption application copy of which is Exhibit D-2 and there has been no redemption of the property as such which was for the appellants to have mentioned the details particulars of the mortgage so as to enable them to redeem the same.

16. As a consequence of this finding, it would be clear that once the mortgage is not redeemed and the respondents are clearly in possession of the property for the last more than 30 years, they become the owners by prescription. Therefore, the finding on Issue No. 3 as arrived at by the learned trial Court which is absolutely illegal is reversed".

(10) I have heard the learned counsel for the parties on the following substantial questions of law framed on 11th August, 2009 :- -

1. Whether oral evidence of the mortgage can be taken into consideration to return a finding on the terms of the mortgage in the absence of written document containing the terms and conditions of the mortgage proved on record ?
2. Whether the mortgagee who continues in possession for more than 30 years is entitled to protect his possession as a right of redemption can be said to be lost with prescription ?
3. Whether in a suit for possession, a decree for redemption of mortgage on payment of mortgage amount can be granted ?

(11) Learned counsel for the appellant has vehemently argued that an application was moved by the defendants for directing the plaintiff to amend the plaint or in the alternative for recasting the issues. The defendants have claimed that the onus should be on the plaintiff to give the particulars of the mortgage. Therefore, the onus of Issue No. 3 should be placed on the plaintiff by recasting the issues. The learned trial Court dismissed the said application on 19th March, 1979 holding that it is the defendants who have set up the mortgage and, therefore, it is the defendants who will have to prove the terms and conditions of mortgage and that they have become owners of the suit property for the failure of the plaintiff to redeem the same. The said order was challenged before this Court in Civil Revision No. 1681 to 1979 titled Bahai Singh etc *versus* Gurbaj Singh etc. The said revision petition was dismissed on 20th November, 1979. It is, thus, argued that in terms of the order dated 19th March, 1979 passed by the learned trial Court, the defendants were to prove the terms of the mortgage deed. The defendants have not proved the terms of the mortgage deed as neither the original mortgage deed nor certified copy of the same has been produced.

Since oral evidence of mortgage has been led by the defendants, therefore, in terms of Section 65 (c) of the Indian Evidence Act, 1872 (for short "the Evidence Act"), the terms of the mortgage can be proved. It is contended that sections 91 and 92 of the Evidence Act exclude oral evidence of the contents of document when the document is available but when document is not available and the same is being proved by secondary evidence, the terms can be proved by oral evidence as well. Reliance is placed upon first Explanation of Section 65 of the Evidence Act. The relevant provisions of Section 65 of the Evidence Act read as under :—

“65. Cases in which secondary evidence relating to documents may be given—Secondary evidence may be given of the existence, condition, or contents of a document in the following cases :

(a) When the original is shown or appears to be in possession or power—

of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the Court, or

of any person legally bound to produce it,

and when, after the notice mentioned in Section 66, such person does not produce it ;

(b) xx xx xx xx

(c) When the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time ;

(d) xx xx xx xx

(e) xx xx xx xx

(f) When the original is a document of which a certified copy is permitted by this Act, or by any other law in force in India to be given in evidence ;

(g) xx xx xx xx

In cases (a), (c) and (d), any secondary evidence of the contents of the documents is admissible.

In case (b), the written admission is admissible.

In case (e) or (f), a certified copy of the document, but no other kind of secondary evidence, is admissible.

In case (g), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents”.

(12) Learned counsel for the appellant contends that since unregistered mortgage deed has neither been produced nor a certified copy thereof has been produced, thus, oral evidence of contents of such mortgage can be led in terms of Section 65(c) of the Evidence Act. He has relied upon **Mst. Bibi Aisha and others versus The Bihar Subai Sunni Majlis Avaqaf and others, (1)**. It is contended that sections 91 and 92 of the Evidence Act exclude oral evidence of contents of the document when the document is available. But when the document is being proved by secondary evidence, it can consist of oral evidence of the contents of the document as well. Reliance is placed upon **Jupudi Kesava Rao versus Pulavarthi Venkata Subbarao and others, (2)** and **Marwari Kumhar and others versus Bhagwanpuri Guru Ganeshpuri and another, (3)**.

(13) In **Jupudi Kesava Rao's case (supra)**, it has been held that under Section 64 of the Evidence Act, a document must be proved by primary evidence. Section 65 of the Evidence Act allows secondary evidence to be given of the existence, condition or contents of a document in circumstances specified in Clauses (a) to (g) thereof. The Court held to the following effect :—

“9. Learned counsel for the appellant Mr. Sen argued that the admissibility of secondary evidence, be it oral or in writing, must be primarily decided in terms of the Indian Evidence Act. Inasmuch as the original document which was insufficiently stamped was suppressed by the defendants in the suit for specific performance, secondary evidence of the contents of

(1) AIR 1969 S.C. 253

(2) AIR 1971 S.C. 1070

(3) (2000) 6 S.C.C. 735

the document could be led in terms of Section 65(a) of the Evidence Act. The Evidence Act imposed no bar to the reception of oral evidence by way of secondary evidence to prove the terms of the agreement to lease which was in writing and duly executed.....

10.Under section 64, documents must be proved by primary evidence except in cases mentioned thereafter. Section 65 allows secondary evidence to be given of the existence, condition or contents of a document in circumstances specified in Clauses (a) to (g) thereof. Under Section 91 when the relevant portion of a contract or of a grant or of any other disposition of property has been reduced to the form of a document, no evidence shall be given in proof of the terms except the document itself or secondary of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.
11. As the first Court of appeal recorded the finding that it was the defendants who were responsible for suppression of the original agreement to lease, a finding which was accepted by the High Court, it must be held that no objection to the reception of secondary evidence by way of oral evidence can be raised under the provisions of the Indian Evidence Act”.

(14) In **Mst. Bibi Aisha's case** (*supra*), the Court considered the scope of sub-clauses (a), (c) and (f) of the Evidence Act. It was held that if the case falls under clause (a) any secondary evidence of the document is admissible, though the case may be also fall under clause (f). Clause (a) is not controlled by clause (f). The loss of the document attracted clause (c) of Section 65 and the failure to produce it after notice attracted clause (a) and Clause (f) of Section 65 was also applicable. The Court approved the view of Wilson J. in the case of *A Collision between The Ava* (1879) ILR 5 Cal 568 wherein it was held that in cases under clauses (a) and (c) any secondary evidence is admissible ; in cases under clauses (e) and (f) only a certified copy. It was found that the case falls under clauses (a) or (c) and also under (f). It was held that in cases (a), (c) and (d) any secondary evidence is admissible.

(15) In **Marwari Kumhar's case** (*supra*), it was held to the following effect :—

“10. Thus it is to be seen that under clause (c) of Section 65, when the original has been lost or destroyed then secondary evidence of the contents of the document is admissible. Clause (c) is independent of clause (f). Secondary evidence can be led, even of a public document, if the conditions as laid down under clause (c) are fulfilled. Thus if the original of the public document has been lost or destroyed then the secondary evidence can be given even of a public document. This is the law as has been laid down by this Court in **Bibi Aisha versus Bihar Subai Sunni Majlis Awaqaf** (AIR 1969 SC 253). In this case a suit had been filed for setting aside a registered mokarrari lease deed and for restoration of possession of properties. The suit had been filed on behalf of a waqf. The original waqf deed was lost and an ordinary copy of the waqf deed was produced in evidence. The question was whether an ordinary copy was admissible in evidence and whether or not secondary evidence could be led of a public document. The Court held that under Section 65 clause (a) and (c) secondary evidence was admissible. It is held that a case may fall both under clauses (a) or (c) and (f) in which case secondary evidence would be admissible. It was held that clauses (a) and (c) were independent of clause (f) and even an ordinary copy would, therefore, be admissible. As stated above, the case that the original was not longer available in the court records and the certified copy was lost has not been disbelieved. Thus the ordinary copy of the earlier judgment was admissible in evidence and had been correctly marked as an exhibit by the trial court”.

(16) Though the aforesaid case was a case where an ordinary copy of judgment was admitted by way of secondary evidence but in a case even the ordinary copy of the document is not available, contents thereof can be proved by oral evidence. The principle that oral evidence cannot be led as to contents of a document is that the parties have crystallized the terms of agreement in writing and, therefore, they cannot be permitted to travel beyond such terms reduced in writing. But where the written terms and conditions of the agreement are not available, it cannot be said that oral evidence in such circumstances would not be permissible to prove the

contents of the written document by way of secondary evidence. Such proof is not to contradict the terms of the agreement. Thus, in terms of the provisions of the Evidence Act, secondary evidence is admissible in respect of secondary evidence falling in clause (c).

(17) In the present case, the original document i.e., the registered mortgage deed has not been produced by the defendants though the same was stated to be in their possession. A certified copy could not be produced within a reasonable time as the record is in area which is now part of Pakistan. It is apparent from the record, including oral and documentary evidence, that the mortgage was registered prior to the partition of the country and such registered mortgage deed could not be produced on account of the circumstances i.e., partition of the country. Therefore, oral evidence of the contents of document is admissible. Thus, the first question of law is answered in favour of the plaintiff.

(18) In respect to the second question of law, it is contended that in view of the Full Bench judgment of this Court in **Ram Kishan and others versus Sheo Ram and others**, (4) the plaintiff is entitled to possession as failure of the mortgagor to redeem within the period of 30 years does not amount to loss of right of redemption. It is argued that a decree for redemption on payment of mortgage amount can be granted by this Court on payment of mortgage amount as disclosed by DW5 Bahal Singh defendant No. 1.

(19) On the other hand, learned counsel for the respondents has relied upon Single Bench judgment of Kerala High Court in **Poulose and another versus State Bank of Travancore**, (5) to contend that the right of the mortgagor to seek redemption is not available to the appellant now as the appellant has failed to seek redemption within the time prescribed. Such right could be exercised in a properly constituted suit for redemption. Reliance is also placed upon **Prithi Nath Singh and others versus Suraj Ahir and others**, (6) to contend that since the plaintiff has not paid the mortgage amount to the defendant, the mortgagors have lost right to redemption.

(4) AIR 2008 Punjab & Haryana 77

(5) AIR 1989 Kerala 79

(6) AIR 1963 S.C. 1041

(20) In **Ram Kishan's case** (*supra*), it was held to the following effect:—

“38. After considering the aforesaid judgments, we respectfully agree that the view of the Full Bench of this Court in **Lachhman Singh's case** (*supra*) and that of Patna High Court in **Jadubans Sahai's case** (*supra*). The provisions of Sections 60, 62 and 67 of the Transfer of Property Act are not applicable within the jurisdiction of this Court. Therefore, these provisions are required to be interpreted keeping in view the principles of equity and good conscience. Since the mortgage is essentially and basically a conveyance in law or an assignment of chattels as a security for the payment of debt or for discharge of some other obligation for which it is given, the security must, therefore, be redeemable on the payment or discharge of such debt or obligation. That is the view of the Hon'ble Supreme Court in **Pomal Kanji Govindji's case** (*supra*) wherein it has also been held that poverty should not be unduly permitted to curtail one's right to borrow money. 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.

40. 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, when 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 co-extensive 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 of 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”.

(21) The judgment in **Poulose’s case** (supra) hardly supports the contention raised. It was held therein that right to deposit the mortgage amount is available to the mortgagor only before the mortgagee has filed a suit for enforcement of the mortgage. However, present is not a suit filed by the mortgagee. The present suit has been filed by the mortgagor to claim possession of the suit property. Even otherwise, the question whether there is any period of limitation for redemption of usufructuary mortgage has been considered by this Court in **Ram Kishan’s case** (supra) and it has been held that once a mortgage always a mortgage is the principle applicable to the usufructuary mortgage. Therefore, the aforesaid judgment is of no help to the respondents.

(22) In **Prithi Nath Singh’s case** (supra), the right to recover possession was lost on account of enactment of Bihar Land Reforms Act, 1950. It has been further held that the authority given to the mortgagee to remain in possession of the mortgaged property ceased when mortgage money has been paid up and thereafter there is no question of appropriating the rents and profits accruing from the property towards interest or mortgage money can arise. It was held that section 60 of the Transfer of Property Act describe the right of the mortgagor to redeem on payment of the

mortgage amount. The said judgment is hardly applicable to the facts of the present case. In the instant case, the plaintiff has claimed possession and in the alternative possession after redemption of the mortgage. In view of the above, it cannot be said that the usufructuary mortgagee who continues in possession for more than 30 years is entitled to protect his possession. The right of redemption is not lost with the efflux of time. The second question of law is, thus, answered in favour of the plaintiff and against the mortgagee.

(23) Coming to the third question of law, it may be noticed that earlier the plaintiff has filed application dated 29th January, 1959, Exhibit D-2, for redemption before the Assistant Collector, Ist Grade, Kaithal. The Assistant Collector has ordered on 30th January, 1959 that mortgage money be deposited and the notice be issued to the second party for 10th February, 1959. The said application was dismissed in default on 19th November, 1959, Exhibit P-4. The said application discloses that the land was mortgaged with the second party for a sum of Rs. 2500. The record of proceedings before the Assistant Collector has been produced by DW3 Din Dayal who has produced a copy of application for redemption Exhibit D-2. DW5 Bahal Singh defendant No. 1 has deposed regarding the terms of the mortgage. From his statement, the amount of mortgage comes to Rs. 2200/- and another sum of Rs. 25,000 i.e., total Rs. 27,200/-. Therefore, the statement of DW5 Bahal Singh sufficiently prove the amount of mortgage can be Rs. 27,200 and on payment of such mortgage amount, the plaintiff is entitled to redemption.

(24) The plaintiff has sought possession on the basis of title and in the alternative by redemption of mortgage. Since the land is proved to be mortgaged for an amount of Rs. 27,200, the suit of the plaintiff for possession by redemption is decreed on deposit of mortgage amount of Rs. 27,200 within three months from today and the judgment and decree of the Courts below are set aside. On such deposit, the land shall stand redeemed and the plaintiff shall be entitled to possession from the defendants in accordance with law. The suit is, thus, decreed in the abovesaid terms with no order as to costs.