

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

111

Date of decision : 11.03.2025

1. RSA-1596-2015 (O&M)

Deep Chand and others Appellants

versus

Desh Raj (Deceased) through his LRs and others Respondents

2. RSA-1559-2015 (O&M)

Deep Chand and others Appellants

versus

Desh Raj (Deceased) through his LRs and others Respondents

CORAM : HON'BLE MR. JUSTICE PANKAJ JAIN

Present: Mr. Vikas Kumar, Advocate
for the appellants.

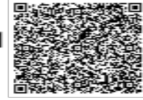
Mr. Rajesh Lamba, Advocate
for the respondents.

PANKAJ JAIN, J. (ORAL)

1. By way of present judgment, I intend to dispose off above said two appeals as common question of law and facts are involved therein.

2. Defendants are in appeal.

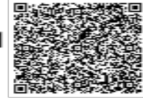
3. Plaintiffs filed suit seeking decree of declaration to the effect that they are owners in possession of the suit land as detailed out and described in para 1 of the plaint being mortgagee in possession for last



more than 55 years. Further relief was sought in the form of decree of permanent injunction restraining defendants from interfering in their peaceful possession over the suit land.

4. As per the plaintiffs Kamli wife of Durga Parshad predecessor-in-interest of defendants No.1 to 11 was owner in possession of the suit land admeasuring 14 kanal 11 marlas. She mortgaged the land with possession in favour of Harpal s/o Pirthi predecessor-in-interest of the plaintiffs vide mutation No.473 dated 30.05.1952. Harpal came into possession as mortgagee. Kamli expired leaving behind Smt. Mohra as her legal heir. Mohra created second mortgage in favour of Jagni and Chinta sons of Harpal predecessor-in-interest for consideration of Rs.5,000/- vide registered mortgage deed dated 01.08.1961. The time period for redemption was fixed for three months. As per the terms of the mortgage on the expiry of three months, Mohra agreed to lose her right to redeem the suit land. Mohra died leaving behind Mewa and Heti. Mewa expired leaving behind Dala as his legal heir. Dala also expired. He was succeeded by defendant No.1 to 5. Defendant No.6 to 11 succeeded Heti. It was claimed that plaintiffs are mortgagee in possession of the suit land. Defendants having failed to get the land redeemed within 30 years, defendants have lost their right to redeem the suit land by efflux of time and the status of mortgagees has ripened into ownership.

5. Suit was contested by the defendants. Defendants admitted mortgagee of the suit property in favour of predecessor-in-interest of



the plaintiffs. Any condition for redemption of mortgage in the mortgage deed was denied. Possession of the plaintiffs as mortgagees was admitted. Defendants claimed that the mortgage in question being usufructuary mortgage, there is no limitation prescribed for redemption of the same and thus, prayed for dismissal of the suit filed by the plaintiffs.

6. Court of the first instance put suit filed by the plaintiffs put to trial to frame following issues:-

- “1. Whether predecessor in interest of defendant no.1 to 11 had mortgaged the suit property with Harpal? OPP
2. Whether at present plaintiffs are mortgagee in possession of the suit property? OPP
3. Whether plaintiffs have become co-owners in possession of the suit property by the efflux of time? OPD
4. Whether the suit of the plaintiff is not maintainable in the present form? OPD
5. Whether the plaintiffs are estopped by their own acts and conduct to file the present suit? OPD
6. Whether alleged claimants are entitled to redeem the land on payment of mortgagee money? OPD
7. Relief.”

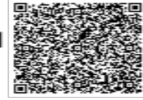
7. Deciding issue No.1 and 2, Court of the first instance held that stipulation regarding limiting the right to redeem the land as three months is nothing, but a clog on mortgagee and the same has to be read down. There being no limitation for redemption of mortgagee, plaintiffs are not entitled for decree of declaration. Trial Court dismissed the suit filed by the plaintiffs.

8. Dissatisfied plaintiffs preferred appeal. Lower Appellate Court relying upon Full Bench judgment of this High Court in **Ram**



Kishan and others vs. Sheo Ram and others reported as ***2007(2) PLJ 746*** held that since there was a time limit prescribed to get the land redeemed in the mortgage deed itself, period of 30 years to get the land redeemed shall commence from the expiry of three months of the mortgagee deed. On expiry of 30 years thereafter, defendants have lost their right to get the land redeemed and thus, reversed the findings recorded by the Court of the first instance allowing the suit filed by the plaintiffs.

9. Learned counsel appearing for the appellants while assailing findings recorded by the Lower Appellate Court submits that the Lower Appellate Court has completely misread the ratio of law laid down by Full Bench of this Court in ***Ram Kishan and others vs. Sheo Ram and others (supra)***. He relies upon larger bench of Supreme Court in the case of ***Singh Ram (D) through LRs vs. Sheo Ram and others 2014(4) RCR(Civil) 179*** to submit that as per the rule against clog on equity of redemption, the right to redeem the mortgage shall always exist and the same cannot be taken away or limited by any contract between the parties. Reliance is further placed upon ratio of law laid down by Supreme Court in the case of ***Seth Ganga Dhar vs. Shankar Lal and others 1959 SCR 509***, wherein Supreme Court held that the term to the effect that on failure of mortgagor to redeem the mortgage within a specified period of six months amounts to clog on equity of redemption and is invalid.



10. *Per contra*, learned counsel for the respondents-plaintiffs submits that there is a difference between usufructuary mortgagee comprising of a term describing for the payment of mortgage money. A mortgagor has a right to recover possession of the property which are in power or possession of the mortgagee and the limitation shall commence on expiry of the term, if so expressed. In this case, the limitation of three months was provided and thus, the defendants having failed to redeem the suit land from mortgage, the limitation shall commence on expiry of those 03 months from the date of mortgage. On the expiry of 30 years thereafter, the defendants lost their right to redeem the land.

11. I have heard counsel for the parties and have carefully gone through the records of the case.

12. The issue involved in the present *lis* involves the effect of the term and condition of the mortgage deed which reads as under:-

“I shall pay the mortgage amount to the mortgagee within a period of three months and in case I fail to pay the mortgage money within the specified period, I shall loose my right to redeem.”

13. Section 60 of the Transfer of Property Act, 1882 deals with right of mortgagor to redeem. Section 62 deals with right of usufructuary mortgagor to recover possession. The provisions read as under:-

“62. Right of usufructuary mortgagor to recover possession.—

In the case of a usufructuary mortgage, the mortgagor has a right to recover possession of the property together with the



mortgage-deed and all documents relating to the mortgaged property which are in the possession or power of the mortgagee,—

(a) where the mortgagee is authorized to pay himself the mortgage-money from the rents and profits of the property, — when such money is paid;

(b) where the mortgagee is authorised to pay himself from such rents and profits or any part thereof a part only of the mortgage-money,—when the term (if any) prescribed for the payment of the mortgage-money has expired and the mortgagor pays or tenders to the mortgagee the mortgage-money or the balance thereof or deposits it in Court as hereinafter provided.”

14. Article 61 of the Limitation Act provides for limitation to redeem or recover possession of immovable property. As per the same, the limitation prescribed is 30 years, which shall commence from the date when the right to redeem or to recover possession accrues. Interpreting the aforesaid provisions, Supreme Court in the case of **Singh Ram (supra)** observed as under:-

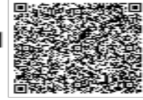
“xx xx xx

A perusal of above provisions shows that Article 61 refers to right to redeem or recover possession. While right of mortgagor to redeem is dealt with under Section 60 of the Transfer of Property Act, the right of usufructuary mortgagor to recover possession is specially dealt with under Section 62. Section 62 is applicable only to usufructuary mortgages and not to any other mortgage. The said right of usufructuary mortgagor though styled as ‘right to recover possession’ is for all purposes, right to redeem and to recover possession. Thus, while in case of any other mortgage, right to redeem is covered under Section 60, in case of usufructuary mortgage, right to recover possession is dealt with under Section 62 and commences on payment of mortgage money out of the usufructs or partly out of the



usufructs and partly on payment or deposit by the mortgagor. This distinction in a usufructuary mortgage and any other mortgage is clearly borne out from provisions of Sections 58, 60 and 62 of the Transfer of Property Act read with Article 61 of the Schedule to the Limitation Act. Usufructuary mortgage cannot be treated at par with any other mortgage, as doing so will defeat the scheme of Section 62 of the Transfer of Property Act and the equity. This right of the usufructuary mortgagor is not only an equitable right, it has statutory recognition under Section 62 of the Transfer of Property Act. There is no principle of law on which this right can be defeated. Any contrary view, which does not take into account the special right of usufructuary mortgagor under Section 62 of the Transfer of Property Act, has to be held to be erroneous on this ground or has to be limited to a mortgage other than a usufructuary mortgage. Accordingly, we uphold the view taken by the Full Bench that in case of usufructuary mortgage, mere expiry of a period of 30 years from the date of creation of the mortgage does not extinguish the right of the mortgagor under Section 62 of the Transfer of Property Act.”

15. In the considered opinion of this Court, Lower Appellate Court fell in error in interpreting the term providing for loss of right to redemption as a term relatable to Section 62(b). Section 62(b) relates to a term wherein the mortgagee who is authorized to receive rents and profits from the mortgaged property agrees for a period upto which he thinks would be sufficient for payment of mortgage money. Section 62(b) does not in any way affect the right of the mortgagee to redeem the mortgage. The term of mortgage akin to the one involved in the present case came up for interpretation and consideration by Supreme Court in the case of *Seth Ganga Dhar ibid*, wherein Supreme Court observed as under:-

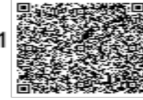


“The appellant's answer to this contention is that the covenant creating the long term of eightyfive years for the mortgage, taken along with the provision that the mortgagor must redeem within a period of six months thereafter or not at all and the other terms of the mortgage and also the circumstances of the case, is really a clog on the equity of redemption and is therefore invalid. He contends that, in the result the mortgage money had been due all along and the suit was not premature.

The rule against clogs on the equity of redemption is that, a mortgage shall always be redeemable and a mortgagor's right to redeem shall neither be taken away nor be limited by any contract between the parties. The principle behind the rule was expressed by Lindley M. R. in *Santley v. Wilde* (1) in these words:

“The principle is this: a mortgage is a conveyance of land or an assignment of chattles as a security for the payment of a debt or the discharge of some other obligation for which it is given. This is the idea of a mortgage: and the security is redeemable on the payment or discharge of such debt or obligation, any provision to the contrary notwithstanding. That, in my opinion, is the law. Any provision inserted to prevent redemption on payment or performance of the debt or obligation for which the security was given is what is meant by_ a clog or fetter on the equity of redemption and is therefore void. It follows from this, that "once a mortgage always a mortgage ".

The right of redemption, therefore, cannot be taken away. The Courts will ignore any contract the effect of which is to deprive the mortgagor of his right to redeem the mortgage. One thing, therefore, is clear, namely, that the term in the mortgage contract, that on the failure of the mortgagor to redeem the mortgage within the specified period of six months the mortgagor will have no claim over the mortgaged property, and the mortgage deed will be deemed to be a deed of sale in favour of the mortgagee, cannot be sustained. It plainly takes away altogether, the mortgagor's right to redeem the mortgage after the specified period. This



is not permissible, for " once a mortgage always a mortgage " and therefore always redeemable. The same result also follows from s. 60 of the Transfer of Property Act. So it was said in *Mohammad Sher Khan v. Seth Swami Dayal* (2):

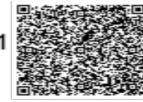
“An anomalous mortgage enabling a mortgagee after a lapse of time and in the absence of redemption to enter and take the rents in satisfaction of the interest. would be perfectly valid if it did not also hinder an existing right to redeem. But it is this that the present mortgage undoubtedly purports to effect. It is expressly stated to be for five years, and after that period the principal money became payable. This, under s. 60 of the Transfer of Property Act, is the event on which the mortgagor had a right on payment of the mortgage money to redeem.

The section is unqualified in its terms, and contains no saving provision as other sections do in favour of contracts to the contrary. Their lordships therefore see no sufficient reason for withholding from the words of the section their full force and effect.”

Under the section, once 'the right to redeem has. arisen it cannot be taken away. The mortgagor's right to redeem must be deemed to continue even after the period of six months has expired and the attempt to confine that right to that period must fail. The term in the mortgage instrument providing that the mortgage can be redeemed only within the six months and not thereafter must be held period of to be invalid and ignored.”

16. Considering the ratio of law laid down in *Seth Ganga Dhar's* case, Supreme Court in the case of *Singh Ram (supra)* thus, concluded as under:-

“14. We need not multiply reference to other judgments. Reference to above judgments clearly spell out the reasons for conflicting views. In cases where distinction in usufructuary mortgagor's right under Section 62 of the Transfer of Property Act has been noted, right to redeem has been held to continue till the mortgage money is paid for



which there is no time limit while in other cases right to redeem has been held to accrue on the date of mortgage resulting in extinguishment of right of redemption after 30 years.

15. We, thus, hold that special right of usufructuary mortgagor under Section 62 of the Transfer of Property Act to recover possession commences in the manner specified therein, i.e., when mortgage money is paid out of rents and profits or partly out of rents and profits and partly by payment or deposit by mortgagor. Until then, limitation does not start for purposes of Article 61 of the Schedule to the Limitation Act. A usufructuary mortgagee is not entitled to file a suit for declaration that he had become an owner merely on the expiry of 30 years from the date of the mortgage. We answer the question accordingly.”

17. In view of above, this Court finds that the Lower Appellate Court erred in misreading the ratio of law laid down by Supreme Court in the case of **Singh Ram (supra)** which resulted in perversity.

18. Needless to say, the appeals before this Court are to be dealt as per provisions contained under Section 41 of the Punjab Courts Act. Reference can be made to ratio of law laid down by five judges bench of Supreme Court in the case of **‘Pankajakshi vs. Chandrika’ (2016) 6 SCC 157**, wherein the Supreme Court observed as under:-

“xxxx xxxx xxxx xxxx

23. Shri Viswanathan also relied upon a Division Bench judgment of this Court in *Kulwant Kaur v. Gurdial Singh Mann* [*Kulwant Kaur v. Gurdial Singh Mann*, (2001) 4 SCC 262] , to submit that this decision is an authority for the proposition that there is no need to expressly refer to a local law when the legislative intent to repeal local laws inconsistent with the Code of Civil Procedure is otherwise clear.

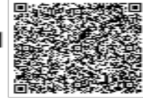


24. The judgment in Kulwant Kaur case [Kulwant Kaur v. Gurdial Singh Mann, (2001) 4 SCC 262] raised a question which arose on an application of Section 41 of the Punjab Courts Act, 1918. This section was couched in language similar to Section 100 of the Code of Civil Procedure as it existed before the Code of Civil Procedure (Amendment) Act, 1976, which amended Section 100 to make it more restrictive so that a second appeal could only be filed if there was a substantial question of law involved in the matter. The question this Court posed before itself was whether Section 41 stood repealed by virtue of Section 97(1) of the Code of Civil Procedure (Amendment) Act, 1976, which reads as under :

“97. Repeal and savings.—(1) Any amendment made, or any provision inserted in the principal Act by a State Legislature or a High Court before the commencement of this Act shall, except insofar as such amendment or provision is consistent with the provisions of the principal Act as amended by this Act, stand repealed.”

This Court concluded that Section 41 of the Punjab Courts Act was repealed because it would amount to an amendment made or provision inserted in the principal Act by a State Legislature. This Court further held that, in any event, Section 41 of the Punjab Courts Act being a law made by the Legislature of a State is repugnant to a later law made by Parliament, namely, Section 97(1) of the Code of Civil Procedure (Amendment) Act, 1976, and that therefore, by virtue of the operation of Article 254 of the Constitution of India, the said provision is in any case overridden. In arriving at the aforesaid two conclusions, this Court held [Kulwant Kaur v. Gurdial Singh Mann, (2001) 4 SCC 262.

“27. Now we proceed to examine Section 97(1) of the Amendment Act and the amendment of Section 100 CPC by the said 1976 Act. Through this amendment, right to second appeal stands further



restricted only to lie where, ‘the case involves a substantial question of law’. This introduction definitely is in conflict with Section 41 of the Punjab Act which was in pari materia with unamended Section 100 CPC. Thus, so long there was no specific provision to the contrary in this Code, Section 4 CPC saved special or local law. But after it comes in conflict, Section 4 CPC would not save, on the contrary its language implied would make such special or local law inapplicable. We may examine now the submission for the respondent based on the language of Section 100(1) CPC even after the said amendment. The reliance is on the following words:

‘100. Second appeal.—(1) Save as otherwise expressly provided ... by any other law for the time being in force....’

These words existed even prior to the amendment and are unaffected by the amendment. Thus, so far it could legitimately be submitted that, reading this part of the section in isolation it saves the local law. But this has to be read with Section 97(1) of the Amendment Act, which reads:

‘97. Repeal and savings.—(1) Any amendment made, or any provision inserted in the principal Act by a State Legislature or a High Court before the commencement of this Act shall, except insofar as such amendment or provision is consistent with the provisions of the principal Act as amended by this Act, stand repealed.’ (Noticed again for convenience.)

28. Thus, language of Section 97(1) of the Amendment Act clearly spells out that any local law which can be termed to be inconsistent perishes, but if it is not so, the local law would continue to occupy its field.

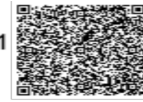
29. Since Section 41 of the Punjab Act is expressly in conflict with the amending law viz. Section 100 as



amended, it would be deemed to have been repealed. Thus, we have no hesitation to hold that the law declared by the Full Bench of the High Court in Ganpat [Ganpat v. Ram Devi, AIR 1978 P&H 137] cannot be sustained and is thus overruled.”

25. We are afraid that this judgment in Kulwant Kaur case [Kulwant Kaur v. Gurdial Singh Mann, (2001) 4 SCC 262] does not state the law correctly on both propositions. First and foremost, when Section 97(1) of the Code of Civil Procedure (Amendment) Act, 1976 speaks of any amendment made or any provision inserted in the principal Act by virtue of a State Legislature or a High Court, the said section refers only to amendments made and/or provisions inserted in the Code of Civil Procedure itself and not elsewhere. This is clear from the expression “principal Act” occurring in Section 97(1). What Section 97(1) really does is to state that where a State Legislature makes an amendment in the Code of Civil Procedure, which amendment will apply only within the four corners of the State, being made under Schedule VII List III Entry 13 to the Constitution of India, such amendment shall stand repealed if it is inconsistent with the provisions of the principal Act as amended by the Parliamentary enactment contained in the 1976 Amendment to the Code of Civil Procedure. This is further made clear by the reference in Section 97(1) to a High Court. The expression “any provision inserted in the principal Act” by a High Court has reference to Section 122 of the Code of Civil Procedure by which High Courts may make rules regulating their own procedure, and the procedure of civil courts subject to their superintendence, and may by such rules annul, alter, or add to any of the rules contained in the First Schedule to the Code of Civil Procedure.

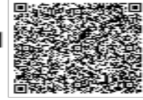
26. Thus, Kulwant Kaur [Kulwant Kaur v. Gurdial Singh Mann, (2001) 4 SCC 262] decision on the application of Section 97(1) of the Code of Civil Procedure (Amendment) Act, is not correct in law.



27. Even the reference to Article 254 of the Constitution was not correctly made by this Court in the said decision in Kulwant Kaur case [Kulwant Kaur v. Gurdial Singh Mann, (2001) 4 SCC 262] . Section 41 of the Punjab Courts Act is of 1918 vintage. Obviously, therefore, it is not a law made by the Legislature of a State after the Constitution of India has come into force. It is a law made by a Provincial Legislature under Section 80-A of the Government of India Act, 1915, which law was continued, being a law in force in British India, immediately before the commencement of the Government of India Act, 1935, by Section 292 thereof. In turn, after the Constitution of India came into force and, by Article 395, repealed the Government of India Act, 1935, the Punjab Courts Act was continued being a law in force in the territory of India immediately before the commencement of the Constitution of India by virtue of Article 372(1) of the Constitution of India. This being the case, Article 254 of the Constitution of India would have no application to such a law for the simple reason that it is not a law made by the Legislature of a State but is an existing law continued by virtue of Article 372 of the Constitution of India. If at all, it is Article 372(1) alone that would apply to such law which is to continue in force until altered or repealed or amended by a competent legislature or other competent authority. We have already found that since Section 97(1) of the Code of Civil Procedure (Amendment) Act, 1976 has no application to Section 41 of the Punjab Courts Act, it would necessarily continue as a law in force. Shri Viswanathan's reliance upon this authority, therefore, does not lead his argument any further.

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19. In view of above, there being no requirement to frame substantial questions of law, this Court finds that the Lower Appellate Court erred in law in relying upon a term which amounted to clog on redemption to decree the suit filed by the plaintiff-mortgagee. The



findings being in the teeth of law laid down by three judges Bench in the case of *Singh Ram's case (supra)*, cannot be sustained and hereby set aside.

20. As a sequel of discussion held hereinabove, the present appeals are allowed. Judgment and decree passed by Lower Appellate Court is hereby set aside. Judgment and decree passed by Court of the first instance is restored.

21. Ordered accordingly.

22. A photocopy of this order be placed on the file of other connected case.

23. Since the main case has been decided, pending miscellaneous application, if any, shall also stands disposed off.

(PANKAJ JAIN)
JUDGE

11.03.2025
Dinesh

Whether speaking/reasoned : Yes

Whether Reportable : Yes