

## APPELLATE CIVIL

*Before Kapur J.*

SARDAR BAHADUR RISALDAR LIEUTENANT

UJ AGAR SINGH AND OTHERS,—Appellants

*versus*

BASAWA SINGH AND OTHERS,—Respondents

Regular Second Appeal No. 67 of 1951

1954

October, 21st

*Mortgage—Redemption—Decree for redemption containing a penalty for not redeeming within the time specified—Whether bars the right of redemption—Restitution of Mortgaged Lands Act (Punjab Act IV of 1930). Section 2, Explanation—Whether the mortgage is in existence or not—Right to determine—Whether of Collector or Civil Court—Interpretation of Statutes—Vested rights—When Statute to be deemed to take away—Rule stated.*

B's ancestors mortgaged the land with T.R. On 9th May, 1928 B or his predecessors-in-interest brought a suit for redemption against K. C. and H. R. successors-in-interest of T.R. On 14th November, 1925, land was ordered to be redeemed on payment of Rs. 10,000 with the condition that if the amount was not paid, right of redemption would be barred. The decretal amount was not paid but appeal was taken to the High Court but no stay was granted. On 17th December, 1928, a final decree was passed in same terms. On 17th May, 1930, High Court confirmed the decree but extended the time for payment up to 16th November, 1930. No money was paid in accordance with the High Court decree. H.R. and K.C. mortgaged the land to R.R. and P.W. who brought a suit on this mortgage and obtained a decree for sale. The land was sold in 1933 to R.R. and P.W. and they got possession. On 30th June, 1942, J.S., S.S. and Sunder Singh purchased 69 K 18 M of land from P.W. S.S. then died sonless. In 1943, J.S. and Sunder Singh applied for restitution of the land under the Restitution of Mortgaged Lands Act. Restitution was ordered ex-parte. Before the order B.S. purchased 59 K. from P.W. In restitution proceedings the passing of the decree or the various purchases were not disclosed. On 3rd August, 1940, R.R. and P.W. sold a portion of the land to D.R. D.R. sold it to U.S. and others. Two suits were filed to challenge the order of restitution. Suit No. 180 of 1948, by R.R. and 181 of 1948, by U.S. and others. Both these suits were dismissed by the Trial Court and its decree affirmed by Senior Sub-Judge. Plaintiffs preferred a Second Appeal to the High Court.

*Held*, that by not redeeming the land as provided for by the decree the right of redemption was lost and the right of the mortgagees fructified into full proprietorship and the second suit for redemption was consequently barred.

Held, further, that the mortgage having ceased to exist it was not within the jurisdiction of the Collector to order restitution of the land in dispute.

Held also, that in interpreting statutes the Court will presume against taking away any vested rights and it is well recognized rule that statutes should be interpreted, if possible, so as to respect vested rights and such a construction should never be adopted if the words are open to another construction.

*Dhanpat Mal v. Jhaggar Singh and others* (1), *Sunker v. Jaru* (2), *Ramji Das v. Mangat Ram* (3), *Atma Ram v. Surjan* (4), referred to and discussed, *Mohindra Supply Company, Delhi v. Governor-General in Council* (5), *Atiqa Begum's case* (6), *Attorney-General v. Horner* (7), *Western Counties Ry v. Windsor etc. Ry.* (8), relied upon.

Regular Second Appeal from the decree of *Shri Mohinder Singh, Senior Sub-Judge* (with enhanced appellate powers), *Ferozepore*, dated the 5th October, 1950, affirming that of *Shri K. S. Gambhir, Sub-Judge, 1st Class, Ferozepore*, dated the 13th December, 1949, dismissing the plaintiffs' suit with costs, the lower appellate court allowing the costs of his court to the defendants-respondents.

K. L. GOSAIN, for Appellants.

SHAMAIR CHAND, for Respondents.

#### JUDGMENT

KAPUR, J. This judgment will dispose of two appeals, Regular Second Appeals Nos. 67 and 68 of 1951, in which the point involved is the same as also the facts.

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A long time ago, the date is not exactly known, the ancestors of the present defendants mortgaged the land in dispute to Telu Ram. On the 9th May, 1923, the present defendants or their predecessors-in-interest brought a suit for redemption against Kishore Chand and Hans Raj, successors-in-interest of Telu Ram. On the 14th

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- (1) 93 P.R. 1908
  - (2) A.I.R. 1923 Lah. 680
  - (3) A.I.R. 1952 Punjab 308
  - (4) A.I.R. 1928 Lah. 355
  - (5) 1954 P.L.R. 199
  - (6) A.I.R. 1941 F.C. 70
  - (7) (1884) 14 Q.B.D. 245, 257
  - (8) (1882) 7 App. Cas. 178, 189

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November, 1925, the land was ordered to be deemed on payment of Rs. 10,000 and it was also ordered that if the amount is not paid the plaintiffs shall be debarred from all right to redeem the property. The decretal amount was never paid but an appeal was taken to the High Court against the decree of the District Judge and no stay was granted by the Court. On the 17th of December, 1928, at the instance of the mortgagees a final decree was passed in the same terms. On the 17th of May, 1930, the High Court affirmed the decree of the District Judge but extended the time for payment up to the 16th November, 1930. This judgment which is Ex. D. 6 mentioned that the appeal was against the final decree also. The decree of the High Court is Ex. P. 22, and it in the opening portion sets out the decree of the Additional District Judge including the clause as to the penalty for non-payment. In the operative portion of the decree it is ordered—

“the appeal being dismissed, that the decree of the Additional District Judge, Ferozepore, dated the 14th November, 1925, which varied that of the Sub-Judge, 1st Class, Ferozepore, dated the 8th December, 1924, and granted the plaintiffs possession, by redemption, of 502 *kanals* and 19 *marlas* of land in suit, as described overleaf, on payment of Rs. 10,000 (ten thousand), be and the same is hereby affirmed.”

No money was paid in accordance with the new decree. Hans Raj and Kishore Chand mortgaged the land in dispute to Mst. Ram Rakhi and Mst. Parkash Wati who brought a suit on their mortgage and obtained a decree for sale. In 1933, the land was sold to the decree-holders Mst. Ram Rakhi

and *Mst. Parkash Wati* and they got possession :  
see Ex. P. 25.

On the 12th June, 1939, *Jita Singh*, *Surain Singh* and *Sudar Singh*, three of the present defendants, applied for correction of entries which was ordered by the Assistant Collector but on appeal on the 25th November, 1940, this order was reversed (Ex. P. 20). On the 30th of June, 1942 those very defendants, *Jita Singh*, *Surain Singh* and *Sundar Singh*, purchased 69 *kanals* 18 *marlas* from *Mst. Parkash Wati* (Ex P. 23). *Surain Singh* then died sonless.

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In 1943, *Jita Singh* and *Sundar Singh* applied for restitution of the land under the Restitution of Mortgaged Lands Act. The other defendants also did the same, and these applications are Exs. P. 15, P. 16 and P. 17. The Assistant Collector refused restitution on the 18th July, 1945, but the Commissioner on appeal reversed the order and ordered restitution. This was *ex parte*. In the meanwhile after the order of the Assistant Collector *Basawa Singh*, one of the defendants, purchased from *Mst. Parkash Wati*, 59 *kanals*. In the applications which had been made to the Assistant Collector and the Commissioner the passing of the decree or the purchase by the various defendants was not disclosed.

On the 3rd August, 1940, the two ladies, *Mst. Ram Rakhi* and *Mst. Parkash Wati*, sold a portion of the land to *Dev Raj* and thus the whole of the land owned by *Parkash Wati* had been transferred to different persons and a portion of the land owned by *Ram Rakhi* was transferred to *Dev Raj*. *Dev Rai* sold the whole land which he had purchased to *Risaldar Ujagar Singh* and others who are plaintiffs in Suit No. 181 of 1948, on 15th May, 1946.

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Two suits have been brought to challenge the order of the Commissioner, Suit No. 180 of 1948, by Ram Rakhi and Suit No. 181 of 1948, by Risaldar Ujagar Singh and four others, the latter in respect of the land sold by Dev Raj to Ujagar Singh and others. Both the suits were dismissed by the trial Court and this decree was confirmed by the Senior Subordinate Judge, and the plaintiffs have come up in appeal to this Court.

The questions for determination in this Court are (1) whether the decree Ex. P. 22, passed by the High Court contains the penalty for non-payment of Rs. 10,000, (2) whether in the Punjab a decree for redemption containing a penalty debarring the mortgagor from redeeming if he does not redeem within a time specified prohibits the bringing of a second suit and puts an end to the right of redemption, and (3) whether the jurisdiction to determine whether a mortgage is in existence or not is in the Collector or it is for the Civil Court to determine this.

I have set out the decree of the High Court at another place and in my opinion a proper construction of the decree would be that the penalty imposed as a result of non-payment is contained in the High Court decree also. Preliminary decree for redemption is set out in order XXXIV, rule 7, and in sub-rule (1)(c)(ii)(b) it is provided—

“(b) in the case of a mortgage by conditional sale or such an anomalous mortgage as aforesaid, that the plaintiff be debarred from all right to redeem the property.”

Rule 8 provides for a final decree and in Form No. 7-D under rule 8 the bar to redemption if payment is not made in accordance with the decree is

specifically provided for. I have no reason to doubt that these provisions were present to the mind of the learned Judges who passed the decree, Ex. P. 22, and from its language it is quite clear that it affirmed the whole of the decree of the Additional District Judge including the penalty clause. In my opinion the Courts below have taken an erroneous view on this matter.

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It is then submitted that in the Punjab a second suit for redemption is not barred even if a decree such as Ex. P. 22 exists and by way of analogy Mr. Shamair Chand refers to the Punjab amendment to Order IX, rule 9 of the Code of Civil Procedure which specifically exempts suits for redemption. I am unable to agree that because there is an exemption under rule 9 of Order IX the specific language of Order XXXIV rule 7 and the form of the decree '7-D' under Order XXXIV rule 8 will become nugatory. Reference was made to a Full Bench decision of the Punjab Chief Court in *Dhanpat Mal v. Jhaggar Singh and others* (1), where it was held that it is open to a mortgagor who has brought a suit for redemption and obtained a decree to bring a second suit for redemption and that the second suit is not barred, but there is nothing to show as to what was the form of the decree in that case. It may have been a decree for sale something like what had been provided for in Form 7-E, under Order XXXIV, rule 8 of the Code of Civil Procedure. Before the Code of 1908, Order XXXIV did not exist in the Code of 1882 and this Order is the re-enactment with some alterations of some of the sections of the Transfer of Property Act, 1882, relating to suits on mortgage. In *Sunker v. Jaru* (2), it was held that if a preliminary decree is passed then the mortgage

(1) 93 P.R. 1908

(2) A.I.R., 1923 Lah. 680

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continues to exist and a second suit can be brought because the right of redemption is not barred. The same was held in *Ramji Das v. Mangat Ram* (1), but the present case is a different one. In *Atma Ram v. Surjan* (2), it was held that where a mortgage is an anomalous one then the provisions of rules 7 and 8 of Order XXXIV, Civil Procedure Code, are no bar to the passing of a decree debarring the mortgagor from redeeming the land if the decree contained the penalty debarring a mortgagor from redeeming the land if money was not paid in the time specified, and I know of no case and researches of counsel have not succeeded in finding any which keeps the mortgage still alive and does not foreclose the right of redemption. In my opinion therefore by not redeeming the land as provided for by the decree Ex. P. 22 the present defendants lost their right of redemption and the right of the plaintiffs fructified into full proprietorship.

Mr. Shamair Chand then submits that the Civil Court had no jurisdiction to take cognizance of this case because restitution was ordered under a special Act—The Punjab Restitution of Mortgaged Lands Act (Punjab Act IV of 1938), section 2 of which applies to subsisting mortgages effected prior to 8th June, 1901. Section 2 runs as under—

“Notwithstanding anything contained in any enactment for the time being in force, this Act shall apply to any subsisting mortgages of land, which were effected prior to 8th June, 1901.

*Explanation.* A mortgage shall be deemed to subsist notwithstanding a decree or

(1) A.I.R. 1952 Punjab 303

(2) A.I.R. 1928 Lah. 355

order for its redemption having been passed provided redemption has not taken place before the non-amendment of this Act."

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Counsel strongly relies on the Explanation and submits that merely because there was a decree for redemption and the land was not redeemed the mortgage will continue to be subsisting. Now, the Transfer of Property Act deals with substantive rights and is not merely procedural and the provisions of that Act which were incorporated into the Civil Procedure Code must also continue to be substantive rights and are not only procedural; see *Mohindra Supply Company, Delhi v. Governor-General in Council* (1). Undoubtedly rights which have vested and have become screened from attack can be affected by competent legislature. And reference to List II of the Government of India Act, 1935, Item 21, 'land' is wide enough as was held in *Atiqa Begum's case* (2), and therefore the Punjab Legislature had plenary powers of affecting rights in land, but the question is—have they done so by the use of the language contained in Explanation to section 2 of the Restitution of Mortgaged Lands Act. The words used, as far as I can see, mean that in spite of the decree or order for redemption and redemption not having taken place the mortgage shall be deemed to subsist. I must take it that the Legislature was fully aware of the judgment of the Lahore High Court in *Atma Ram's case* (3), where a penalty contained in a decree passed under rules 7 and 8 of Order XXXIV, Civil Procedure Code, was held to be effective. There are no words contained in the Explanation which affect the view taken in that

(1) 1954 P.L.R. 199 at p. 223

(2) A.I.R. 1941 F.C. 70

(3) A.I.R. 1928 Lah. 355



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ruling, and all that the Explanation does is to give effect to the opinion of the Punjab Chief Court in *Dhanpat Mal v. Jhaggar Singh and others* (1), which was also the opinion of the Lahore Court in *Sunkar v. Jaru* (2) As the Full Bench was based on *stare decisis* the Explanation only gave effect to that view of the law. There are no words used which expressly or even by necessary intendment take away the right of a person who has become a full proprietor as a result of foreclosure. Indeed, it would have been an extraordinary performance for any Legislature to have taken away people's rights, which are effectuated into ownership and have been perfected; without expressly saying so and providing for adequate compensation.

It was held by Brett, M. R., in *Attorney-General v. Horner*, (3),—

“It is a proper rule of construction not to construe an Act of Parliament as interfering with or injuring persons' rights without compensation unless one is obliged to so construe it.”

The following passage from Craies on Statute Law at page 111 may be quoted with advantage which is in my opinion applicable to the facts of this case—

“Therefore rights, whether public or private, are not to be taken away, or even hampered (*L. N. W. Ry. v. Evans* (4)), by mere implication from the language used in a statute, unless, as Fry, J., said in *Mayor, etc., of Yarmouth v. Simmons* (5), ‘the Legislature clearly and distinctly authorise the doing of something which is physically inconsistent

(1) 93 P.R. 1908

(2) A.I.R. 1923 Lah. 680

(3) (1884) 14 Q.B. 245, 257

(4) (1893) 1 Ch. 16, 27

(5) (1878) 10 Ch. D. 518, 527

with the continuance of an existing right' (i.e., the words taking away the right should be clear and unambiguous)."

Lord Watson in *Western Counties Ry. v. Windsor, etc., Ry.* (1) said—

"In order to take away a right, it is not sufficient to show that the thing sanctioned by the Act, if done, will of sheer physical necessity put an end to the right; it must also be shown that the Legislature have authorised the thing to be done at all events, and irrespective of its possible interference with existing rights."

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It is not necessary to say that in interpreting statutes the Courts will presume against taking away any vested rights, and it is a well recognised rule that statutes should be interpreted, if possible, so as to respect vested rights and such a construction should never be adopted if the words are open to another construction; see page 368 of *Craies on Statute Law*. I am, therefore, of the opinion that the words in the Explanation do not expressly affect the rights of persons such as the plaintiffs and it was not within the jurisdiction of the Collector to order restitution of the plaintiffs' lands. In a previous case decided by me, Regular Second Appeal No. 316 of 1950, I discussed the question of jurisdiction of the Collector at great length and it is not necessary to repeat those arguments. In an other case, Regular Second Appeal No. 260 of 1950, Bishan Narain, J., has taken the same view.

I would therefore allow these appeals, set aside the decrees of the Courts below and decree the plaintiff's suits with costs throughout.

(1) (1882) 7 App. Cas. 178, 189 (P.C.)