

**(1986) 07 P&H CK 0010**

**High Court Of Punjab And Haryana At Chandigarh**

**Case No:** Regular Second Appeal No. 712 of 1977

Bawa Ram Nath Singh

APPELLANT

Vs

Babu Ram (deceased) and  
Mohan Lal (deceased) and  
Others

RESPONDENT

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**Date of Decision:** July 11, 1986

**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Section 100
- Punjab Courts Act, 1918 - Section 41

**Hon'ble Judges:** B.S. Yadav, J

**Bench:** Single Bench

**Advocate:** Maluk Singh, for the Appellant; H.L. Sarin, M/s M.L. Sarin, Sukhdev Singh and Mr. A.S. Grewal, for the Respondent

**Final Decision:** Dismissed

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**Judgement**

B.S. Yadav, J.

Respondent Nos. 1 to 6 had filed this suit against the Appellant Ram Nath Singh and Respondent No. 7 Gurditta for a declaration that they were owners of the suit land and the Defendants had no connection with it nor had any right of redemption therein and the entries in the revenue papers were wrong. They also prayed for joint possession of the suit land as a consequential relief. According to the averments in the plaint, Jai Ram and Hari Kishan were owners (they were in fact occupancy tenants) of 1 /5th share in the land comprised in Khashra detailed in para No. 1 of the plaint. They mortgaged their share with possession in favour of Amar Chand and Hans Raj for Rs. 1300/- on 10th February, 1914, vide a registered deed and delivered possession of the land to them. Amar Chand transferred his share in the mortgagee rights in favour of Hans Raj, the other Co-mortgagee and thus the latter became the sole mortgagee. During consolidation proceedings which took place in the year 1951-52 Hans Raj transferred half share of his mortgage rights in favour of Babu

Ram (Plaintiff No. 1, now Respondent No. 1). Hans Raj has since died and Plaintiff Nos. 2 to 5 were his successors-in-interest. Both Jai Ram and Hari Kishan, original mortgagors, have also died and the Defendants, who are their brothers, have inherited their rights and have thus become mortgagors of the land. During consolidation proceedings, the suit land was allotted in view of the mortgaged land and the Plaintiffs became its mortgagees. Under the Limitation Act, 1963, the mortgagors could have redeemed the land upto December, 1968. As it has not been done so, the Plaintiffs have become owners of the land by efflux of time and the Defendants have lost their right of redemption. However, about two years prior to the filing of the suit the Defendants took illegal possession of the suit land. Hence, the suit.

2. The suit was contested only by Defendant No. 1. He pleaded that the original mortgage had been created by Jai Ram and Hari Kishan in favour of Amar Chand only and subsequently Amar Chand had transferred the mortgage rights in favour of Hans Raj. Amar Chand was not given possession of the mortgaged land nor Hans Raj ever came into possession of the land. Babu Ram the alleged transferee of half share of Hans Raj in the mortgagee rights, also never came into possession of the suit land.

3. Upon the allegations of the parties, the learned trial Court framed the following issues:

1. Whether the Plaintiffs were the mortgagees with possession of the suit land ?

2. Whether the Plaintiffs have become owners of the suit land by efflux of time ?

3. Whether the land in suit has been allotted during consolidation proceedings in lieu of the land originally mortgaged ?

4. Relief.

4. Under issue No. 1, it was held that the land had been mortgaged with Amar Chand and Hans Raj and later on Amar Chand had transferred his mortgagee rights in favour of Hans Raj and thereafter Hans Raj had transferred half share of the mortgagee rights in favour of Babu Ram. It was further held that Hans Raj and Babu Ram were in possession of the suit land. It was also remarked that no specific khasra number was mortgaged and only a share in the land had been mortgaged and thus Hans Raj and Babu Ram became joint owners alongwith other owners of the suit land and as the possession of one co-sharer is deemed to be on behalf of all the co-sharers, therefore, the mortgagees would be deemed to be in possession. Accordingly issue No. 1 was decided in favour of the Plaintiffs Under issue No. 2 it was held that the mortgage in question was created in 1914 and in view of the new Limitation Act (i.e. Limitation Act, 1963) the mortgage could have been redeemed upto 31st December, 1970 and as it had not been done so, the mortgagors' rights of redemption had been extinguished and the Plaintiffs have become owners of the

suit land by of the of time. Under issue No, 3 it was held that the suit land had been allotted in lieu of the land mortgaged to Hans Raj and Amar Chand. the original mortgagees. As a result of the above findings, the Plaintiffs' suit was decreed. Feeling aggrieved, Ram Nath Singh (contesting Defendant) filed an appeal which was heard by learned Senior Subordinate Judge (with Enhanced Appellate Powers), Hoshiarpur. He confirmed the findings of the learned trial Court and dismissed the appeal. Ram Nath Singh has now come to this Court in second appeal.

5 The learned Counsel for the contesting Respondents raised a preliminary objection to the effect that both the learned Courts below have given a finding of fact to the effect that the Plaintiffs have been proved to be mortgagees and in possession of the suit land and therefore, it is not liable to be interfered with in second appeal. In support to this contention he has placed reliance upon [Sadhu Vs. Kishni](#), wherein it was remarked:

The scope of second appeal as envisaged by Section 100 of the Civil P. C. and Section 41 of the Punjab Courts Act has been a matter of judicial scrutiny a number of times by this Court as well as by the final court, that is, the Supreme Court of India. The learned Counsel for the Appellant has actually made a reference in this regard to *Diety Pattabhiramaswamy v. S. Hanymayya*, AIR 1959 S. C 57, [Madamanchi Ramappa and Another Vs. Muthalur Bojiappa](#), *Bithal Das Khanna v. Hafiz Abdul Hai* 1969 S. C. 481, and *Afsar Shaikh v. Soleman Bibi*, AIR 1976 S. C. 163. These pronouncements, in a nut shell, lay down that there is no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact, however gross or inexcusable the error may seem to be. Nor does the fact that the finding of the first appellate Court is based upon some documentary evidence make it any the less a finding of fact. A Judge of the High Court has, therefore, no jurisdiction to interfere in second appeal with the finding of fact given by the first appellate court based upon an appreciation of the relevant evidence. Their Lordships have further observed that the only ground on which such an appeal can be said to be competent is where there is an error in law or procedure and not merely or on error on a question of fact.

The learned Counsel for the Appellant did not dispute the above proposition of law but argued that the documents have been misread and misinterpreted in the present case and, therefore, the finding of fact is vitiated.

6. To appreciate the argument of the learned Counsel for the Appellant it will be necessary to give here some admitted facts of the case. Jai Ram, Hari Kishan and others were the occupancy tenants of the land in lieu of which the suit land had been allotted in consolidation proceedings. Vide mortgage deed, copy Exhibit P. 1, dated 10th February, 1914 registered on 12th February, 1914 (this copy of the deed was produced in the lower Appellate Court as incomplete mortgage deed had been produced in the trial Court), Hari Kishan and Jai Ram mortgaged their shares in the occupancy rights in favour of Hans Raj son of Gonda Ram and Amar Chard. There was a recital in the mortgage deed that the mortgagees would get possession of the

mortgaged land in the month of Jeth of Samvat 1971 B K and upto that time the mortgagors would pay interest on the mortgage debt. This was perhaps so stipulated as at the time of the mortgage, crops of the mortgagors must be standing on the land. In respect of that mortgage mutation, Exhibit P. 5 was sanctioned on 29th May, 1914. The order of the Revenue Officer shows that the possession had been transferred to the mortgagees. Later on Amar Chand transferred his half share of the-mort-gagee rights in favour of his co-mortgagee Hans Raj and in that respect mutation Exhibit P. 4 was sanctioned in 1931. The order of the Revenue Officer shows that there was family partition between Amar Chand and Hans Raj mortgagees in which the mortgage rights fell to the share of Hans Raj. Thus Hans Raj became the sole mortgagee. Vide mutation, copy Exhibit P. 3, sanctioned on 14.2.1954 (date in the copy appears to be incorrect because the mutation itself was entered on 10.2.1955). Hans Raj transferred half share in the mortgagee rights in favour of Babu Ram son of Puran Chand, Plaintiff No. 1. In that respect mutation Exhibit P. 3 was sanctioned on 14th February, 1954. The order of the Revenue Officer shows that possession had been transferred in favour of Babu Ram (in respect of his share). Plaintiff Nos. 2 to 6 are the sons and daughter of Ram Parkash, pre-deceased son of Hans Raj. The learned counsel for the Appellant argued that the learned courts below have held Hans Raj son of Gonda Ram and Babu Ram were put in possession of the mortgagee rights but none of the revenue documents produced on the file support that finding and on the other hand, there are circumstances to show that they had never remained in possession. After consideration of the arguments and documents produced on the file I am of the opinion that the said argument has force.

7. Exhibit P 5 is the mutation which was sanctioned on 20th May, 1914. Thus the mutation which was sanctioned when Hans Raj son of Gonda Ram and Amar Chand took on mortgage the occupancy rights of Jai Ram and Harikishan. Before the attestation of the mutation the entries according to jamabandi are:

Ishwar Singh son of Nihala	1/2 share
Jai Ram, Harikishan Dasaundhi, Gurditta and Nath (i.e. Ram Nath Singh defendant No. 2), sons of Nanak	1/2 share

After the sanction of the mutation the relevant entries were to the effect:-

Ishwar son of Nihala	5 shares
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Dasaundhi, Gurditta and Nath (in equal shares)	3 shares
Jai Ram and Harikishan mortgagors (in equal share), mortgagors	2 shares
AmarChand and Hans Raj	
Mortgagees	

The above entries occur in the cultivation column because as noticed earlier, Ishar, Jai Ram, Harikishan, Dasaundi, Gurditta and Nath were occupancy tenants. The owners were somebody else. Exhibit P. 4 is the mutation which was sanctioned on 5th February, 1932 when in private partition these mortgagees rights fell to the share of Hans Raj. These entries are also in the cultivation column. The total shares recorded are 40 out of which Hans Raj and Amar Chand were shown as mortgagees of 8 shares. After the sanction of the mutation Hans Raj was shown as mortgagee of these 8 shares. It is mentioned "Rahanan Badastoor" (i.e. mortagors as before). About the remaining 32 shares no details are given.

8. The earliest jamabandi Exhibit P. 7 produced on the file is for the year 1933-34. The details of the shares are given in the cultivation column as below:

Ishar son of Nihala	20 shares
Dasaundhi mortgagor	5 shares
Gurditta mortgagor	5 shares
Nath alias Ram	10
Nath Singh	shares

out of the shares of Nath alias Ram Nath Singh 6 shares were shown under mortgage while 4 were without mortgage. Mansa Devi, Hans Raj, Salig Ram and Gokal sons of Harnam Singh were shown as mortgagees of 10 shares i. e. of Dasaundhi and Gurditta occupancy tenants Hans Raj son of Gonda Ram is shown as mortgagee of 6 shares of Ram Nath Singh. By that time Jai Ram and Harkesh appear to have died. It is not understood how the shares of Nath became 10. His shares ought to have been equal to the shares of Dasaundhi and Gurditta. None of the parties has made any attempt to clarify this ambiguity. The other mortgagee-occupancy tenants are shown in possession of some part of the land either through the mortgagor-occupancy tenants or some non-occupancy tenants. Hans Raj son of Gonda Ram is not recorded in possession of any Part of the land. As

noticed above, Hans Raj son of Gonda Ram is shown to be mortgagee of 6 shares of Ram Nath Singh. Exhibit D. 2 is the jamabandi for the years 1941-42 while Exhibit D-3 is the jamabandi for the year 1945-46. The cultivation on part of the land is shown to be under occupancy tenants, while part of the land is shown to be in possession of the mortgagees through non-occupancy tenant. Those mortgagees can include Hans Raj son of Gonda Ram as his name does not occur in those jamabandis in the array of the mortgagees. In Exhibit D. 3(sic) the details of the mortgagees under whom non-occupancy tenants were cultivating are not given but in Exhibit D. 2, these details are given. The names of the mortgagees given are Mansa Devi and Hans Raj and Salig Ram sons of Harnam. Thereafter no jamabandi was prepared. In 1954-55 consolidation proceedings took place in the village. During those proceedings, on 4th November, 1954 the Patwari entered a Badar in the register of Badars for the correction of the subsequent jamabandis. The report appears to be to the effect that in the jamabandi for the year 1937-38 the entry with respect to Khata Nos 876 to 878 was to the effect that Ram Nath Singh was shown mortgagor of 6 Shares in favour of Hans Raj son of Gonda Ram but in subsequent jamabandis for the years 1941-42 and 1945-46 the name of the said mortgagee had been omitted and, therefore, these entries should be repeated in the subsequent jamandis. On 6th November, 1954 the Assistant Consolidation Officer in the register of Badars ordered the correction in accordance with the report of the Patwan. Feeling aggrieved against that correction, Ram Nath Singh went in appeal before the Revenue Assistant exercising the powers of Collector, who dismissed the same. Ram Nath Singh filed revision before the Commissioner who recommended it to the Financial Commissioner for acceptance. Vide order Exhibit D-1 dated 3rd September, 1959 the Financial Commissioner accepted the revision on the ground that the correction ought to have been made after full scrutiny. This litigation clearly shows that Hans Raj son of Gonda Ram was not in possession of any part of the land, otherwise, there was no occasion on the part of Ram Nath Singh to be aggrieved of the correction in subsequent jamabandi.

9. The Plaintiffs have not produced any order of any Revenue Officer which might have been passed after 3rd September, 1959. They have, of course, produced jamabandi Exhibit P. 4/2 for the year 1955-56. Hans Raj son of Gonda Ram and Babu Ram are recorded as mortgagees of some shares of Ram Nath Singh. It may be mentioned here that by that time the occupancy tenants had become owners of the land in their occupancy under the Occupancy Tenants (Vesting of Proprietary Rights), Act, 1954. Therefore, these entries occur in the ownership column. In the column of cultivation, the entry is as "Khud Kast". No value can be given to the entries so far as Hans Raj son of Gonda Ram and Babu Ram are concerned because it is based upon the order which was set aside in revision. By mere inclusion of their names in an unauthorised manner, Hans Raj son of Gonda Ram and Babu Ram cannot be deemed to be co-sharers in the land.

10 Exhibit P. 6 is jamabandi for the year 1967-68. Gurditta etc. owners are shown in possession of the land through non-occupancy tenants.

11. The Defendants have also produced Khasra Girdawri entries Exhibit D. 6 from Kharif, 1938 to Rabi, 1942, Exhibit D. 7 from Kharif, 1942 to Rabi 1949 In none of these documents, Hans Raj son of Gonda Ram and Babu Ram are recorded in possession of any part of the land.

12. The learned trial court committed two mistakes while appreciating the evidence. In that court on behalf of the contesting Defendants it was urged on the basis of the order Exhibit D. 1 and jamabandis Exhibit D 2 for the year 1941-4 and D. 3 for the year 1945-46 that as Hans Raj was never recorded as mortgagee thus he was never in possession of the property in dispute. That argument was controverted on behalf of the Plaintiffs by submitting that as the Defendants had failed to produce the final order of any Revenue Officer, which might have been passed, when the case was remanded in revision for fresh decision, therefore, it had not been proved by the Defendants that it was decided by the revenue authorities that Hans Raj was not a mortgagee and rather to the contrary Hans Raj and Babu Ram were recorded as mortgagees in possession of the suit land in the subsequent jamabandi for the year 1955-56. The learned trial court accepted the contention submitted on behalf of the Plaintiffs and remarked that the revenue authorities must have decided that appeal again in favour of Hans Raj, that is why the entries of Hans Raj and Babu Ram as mortgagees had been recorded in subsequent jamabandi for the year 1955-56 and in subsequent revenue records the names of Hans Raj and Babu Ram also exist as mortgagees. The trial court forgot to notice the jamabandi for the year 1955-56 has been prepared on the basis of the orders passed by the Assistant Consolidation Officer in the register of Badars. The order Exhibit D. 1 was passed in revision in September. 1959.

13. The second mistake which was committed by the trial court was that it remarked that in the cultivation column the owners are shown as cultivating the land which meant that all the persons recorded as owners were in cultivating possession of the property and, therefore, Hans Raj and Babu Ram mortgagees recorded in the column of ownership were also in cultivating possession alongwith others and moreover, as no specific Khasra number was mortgaged, but only a share out of the whole land had been mortgaged, Hans Raj and Babu Ram became joint owners alongwith other co-owners and the possession of one co-owner is to be deemed to be on behalf of all the co-owners. The court forgot to notice that the original mortgage was of the occupancy rights and it was only by two occupancy tenants of their shares who had promised to deliver possession in Jeth, Samvat 1971, B. K As actual possession was not delivered to the mortgagees the term about interest on the mortgage debt upto Jeth Samvat, 1971 B K. was introduced in the deed. There is nothing on the file to show that after Jeth Samvat 1971 B. K. the mortgagees came into possession of any part of the land. After the occupancy tenants became owners,

their mortgagees cannot be regarded as co-sharers or co-owners with them. Therefore, from the entry of self-cultivation by the owners, it cannot be presumed that Hans Raj and Babu Ram mortgagees were also cultivating any part of the land.

14. The learned lower Appellate Court also fell into error. It has remarked that since the mortgage was created with possession and fixed advance interest was allowed for the period prior to Jeth Samvat, 1971 B. K. the mortgagees were not to do anything further, more so when only a share was mortgaged. If actual possession of any particular land was not to be delivered to the mortgagees by Jai Ram and Harkishan mortgagors, that condition about interest would have occurred in the mortgage deed. There is no evidence that those mortgagees cultivated any part of the land. The lower Appellate Court also remarked that the possession of the mortgagees before 20th September, 1970 was joint with the other co-sharers and, therefore, possession before that date was that of co-sharer. The date of 0th September, 1970 appears to have been taken by the court as on that date mutation No. 3286 about private partition was sanctioned. It is not understood how the mortgagees could be treated as co-owners.

15. The Plaintiffs in para No. 7 have stated that Defendants took illegal possession from them recently. It has not been specified that on which date the Defendants took possession. In para No 9 of the plaint the Plaintiffs have mentioned that cause of action arose on 1st January, 1969 when the Plaintiffs became owners of the land in dispute and about two years earlier when the Defendants took illegal possession of the suit land. As noticed earlier, no Khasra Girdawri has been produced on the file to show that the Plaintiffs were in actual possession of any part of the land prior to 2 years of the filing of the suit. The suit was filed on 20th July, 1971. The Plaintiff examined DW Maha Singh Lambardar, who has stated that he was realising land revenue from Jawala Singh and Pakhar Singh and that the Defendants had never been in possession of the suit land. It was suggested to him that Jawala Singh and Pakhar Singh were cultivating the land owned by Ram Nath Singh. The witness had denied the suggestion. P.W. 2 Pakhar and P. W. 3 Sansar Singh have stated that the suit land was being cultivated by the former and Jawala Singh. Babu Ram Plaintiff also appeared in the witness-box as P.W. 5 to support the plaint allegations. This evidence can be hardly relied upon. The Plaintiffs have not filed this suit for possession of any particular Khasra number. The suit is for possession of 13 Kanals 3 Marias being 36/240th share of 92 Kanals 1 Maria. The Plaintiffs are not claiming ownership of any specific part of the suit land. Therefore, it is not understood how the disputed land was being cultivated by Pakhar Singh and Jawala Singh.

16. There is another aspect of the case. As noticed earlier, the name of the mortgagee Hans Raj son of Gonda Ram had been removed from the revenue papers. His name did not find mention in jamabandis for the years 1941-42 and 1945-46. His name as well as the name of Babu Ram were entered in jamabandi for the year 1965-1966. That entry has been held to be invalid. Therefore, on the basis



of those wrong entries in the jamabandi the Plaintiffs cannot be held to be mortgagees to the suit land. As noticed earlier, they have not been found to be in possession of any part of the land since the mortgage was created.

17. As the possession had not been delivered to the mortgagors, the suit was governed by Articles 63 (b) of the Limitation Act, 1908. terminus quo being Jeth, Samvat 1941 B.K. After the expiry of the period of limitation the right of the mortgagees to recover the possession of the mortgaged property was extinguished in view of Section 28 of the Act. Thus they ceased to be mortgagees.

18. For the foregoing reasons I set aside the judgments and decree, passed by the learned courts below and accept the present appeal and dismiss the suit of the Plaintiffs. In the circumstances of the case, I leave the parties to bear their own costs throughout.