

(1961) 12 P&H CK 0004

High Court Of Punjab And Haryana At Chandigarh

Case No: Second Appeal No. 272 of 1961

Jang Singh and Another

APPELLANT

Vs

Jewa Singh Shib Singh

RESPONDENT

Date of Decision: Dec. 8, 1961

Citation: AIR 1962 P&H 478

Hon'ble Judges: D.K. Mahajan, J

Bench: Single Bench

Judgement

(1) The land in dispute measuring 36 bighas 11 biswas was owned by Mst. Jiwi and other who mortgaged the same to Kalu in 1947 BK. On Kalu's Death Jiwa Singh succeeded as his legal representative. Jiwa Singh in his turn effected a mortgage on his mortgagee rights in favour of Jagat Singh to secure an advance of Rs. 605/15/-. This was done in 1972 Bk. The present suit was filed by Jiwa Singh for redemption of the mortgagee rights which he held under the mortgage of 1947 Bk., against the transferees from the sons of Jagat Singh, the sub-mortgagee. The defence taken up by the defendants is that the mortgage being beyond 60 years cannot be redeemed, and that there is a term in the deed itself barring redemption after a period of five years. It was also pleaded that the sub-mortgagees, i.e., the defendants, had acquired the equity of redemption from the heirs of the original mortgagors and therefore, the suit for redemption was not competent. But, however, no issue was claimed by the parties on the latter question. May be for the reason that this acquisition of the mortgagors' interests by the sub-mortgagee would not wipe out the mortgage so far as the mortgagee is concerned. The principal contest raised in the Courts below was whether the plaintiff was entitled to redeem the mortgage of his mortgagee rights in view of the clause in the mortgage deed that he would not be entitled to do so after five years. Both the Courts have decreed the suit and the defendants have come up in appeal.

(2) The only contention raised before me is that in view of the clause in the mortgage deed to the effect that after the sub-mortgage is not redeemed within five

years the mortgagee will lose his right of redemption and the right of redemption will only vest in the original mortgagors. In support of this contention reliance has been placed on *Usuman Khan v. Nagalla Dasanna* AIR 1914 Mad 578 (2) and *Kamisetti Venugopala Rao v. Kyanam Hanumantha Rao* AIR 1958 AP 541. None of these cases help the appellant. The rule is firmly settled that when a mortgage is effected any clause which bars redemption would be in the nature of a clog and as such would be void. This rule is subject to the qualification namely, that it does not prevent the parties to the mortgage from entering into a fresh agreement whereby the mortgagor may totally part with his interests in the mortgage property. The Madras and the Andhra cases relate to such a fresh agreement.

In both these cases after the mortgage a new contract came into being. Under that contract the mortgagee was allowed to hold on to the land as an owner and possession to him as an owner was transferred and the suit for redemption was filed after 12 years of that date. It was held that by holding the property adversely to the mortgagor for over 12 years the mortgagee had become an absolute owner of the property and there would be no question of the mortgagor redeeming the same. These cases have no applicability to the present case. Here, there is no fresh contract between the mortgagor and the mortgagee or, in other words, between the mortgagee and the sub-mortgagee. It cannot be disputed that the rights of the mortgagee while mortgaging the property to the sub-mortgagee are to be governed by the rules relating to the mortgage by a mortgagor to a mortgagee and applying those rules it must be held that the clause in the mortgage deed, Exhibit D-3, barring redemption after 5 years is a clog on the redemption.

(3) In this view of the matter, this appeal fails and is dismissed with costs.

(4) Appeal dismissed.