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**(1986) 10 SHI CK 0003**

**High Court of Himachal Pradesh**

**Case No:** Regular Second Appeal No. 12 of 1977

Vishwa Nath

APPELLANT

Vs

Shakti Ram and Others

RESPONDENT

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**Date of Decision:** Oct. 20, 1986

**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 23 Rule 1, Order 23 Rule 2
- Transfer of Property Act, 1882 - Section 60

**Citation:** AIR 1987 HP 29 : (1987) ShimLC 52

**Hon'ble Judges:** T.R. Handa, J

**Bench:** Single Bench

**Advocate:** Parneet Gupta and Devinder Gupta, for the Appellant; O.P. Sharma, for the Respondent

**Final Decision:** Allowed

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### **Judgement**

T.R. Handa, J.

This Regular Second Appeal is at the instance of the plaintiff. It arises out of a suit for redemption in the following circumstances : -

One Smt. Durga Devi, the then owner of the property in dispute, mortgaged the same with one Daulat Ram for a consideration of Rs. 900/- on 23-12-1926. The property mortgaged included a double storeyed shop at the time of creation of the initial mortgage. Shri Daulat Ram, the original mortgagee, subsequently transferred his mortgagee rights in favour of the firm M/s. Udho Mal Shiyama Mal by means of a registered sale deed dated 31-3-1928. Smt. Durga Devi brought her suit for possession by redemption of the mortgaged property against the various partners of the firm, Udho Mai Shiyama Mal. She, however, died on 20-4-1970 during the pendency of that suit. That suit was ultimately dismissed as abated.

2. The plaintiff-appellant who is the sole heir of said Smt. Durga Devi instituted his suit giving rise to this appeal for possession of the mortgaged property by redemption. He claimed possession without payment of any mortgaged money on the ground that the mortgagees had during the subsistence of the mortgage allowed the structure existing on the mortgaged land to fall down by their negligence and as such they were liable to compensate him in that behalf. The plaintiff further claimed that he had his independent right of filing the suit for redemption so long as the mortgage subsisted and the earlier suit filed by Smt. Durga Devi could not stand in his way. The suit, it may be remarked, had been filed against the respondents-defendants under Order 1 Rule 8 CPC with the leave of the Court.

3. The suit was contested on behalf of the respondent-defendants and the various pleas raised by them would be apparent from the following issues which were struck by the trial court : -

1. What was the property mortgaged? OPP

2. Whether the plaintiff is entitled to the relief of possession by way of redemption, without payment of mortgage money as alleged? OPP

3. Whether the suit is time barred? OPP

" 4. Whether the suit in the representative capacity is maintainable? OPP

5. If issue No. 4 is proved, whether the service was not effected according to law?

OPD

"6. What is the impact of the result of previously instituted suit as mentioned in para 3 of the plaint on the present suit?

OP Parties.

7. Relief

4. The trial court found all the issues in favour of the plaintiff-appellant and granted him a decree for possession by redemption without payment of any amount.

5. The matter being taken to the District Judge in the first appeal, the learned District Judge allowed the appeal on the ground that the suit of the plaintiff-appellant was hit by the provisions of Order 23 Rule 1 CPC and as such was not maintainable. Without caring to discuss the other issues arising in the suit, the learned District Judge vide his impugned judgment set aside the judgment and decree of the trial court and dismissed the suit of the plaintiff-appellant for the reasons stated above.

6. The plaintiff has now approached this Court in second appeal.

7. As is obvious from the narration of the facts given above, the sole question which arises for consideration in this appeal is whether the earlier suit filed by Smt. Durga Devi and which had been dismissed as abated was a bar for the plaintiff to institute the present suit. Relying upon the provisions of Sub-rule. (1) of Rule 1 of Order 23, the learned District Judge held that the plaintiff in that suit having withdrawn from the suit without permission of the court to file a fresh suit on the same cause of action, he was precluded from instituting any fresh suit in respect of the same subject matter or part thereof by virtue of the provisions of Sub-rule (2) of Rule 1 of Order 23 CPC. I am afraid, the view taken by the learned District Judge cannot be sustained.

8. The record shows that on the death of Smt. Durga Devi during the pendency of the suit filed by her for redemption of the same mortgage, an application under Order 22 Rule 3 read with Section 151 CPC was filed by the present plaintiff-appellant for being brought on the record. That application was, however, dismissed in terms of the statement made in the case by the plaintiff-appellant through his counsel. That statement was in the following terms:-

"As the applicant Shri Viswa Nath has an independent right to file suit for possession by redemption or mortgage, therefore, the applicant does not press the application under Order 22 Rule 3 and Section 151 CPC as applicant is filing a fresh suit for possession by redemption against mortgagees. The application may be dismissed."

That suit was thereafter dismissed as abated without bringing on record the legal representatives, of Smt. Durga Devi, the plaintiff in the earlier suit.

9. In the case of Thota China Subba Rao v. Mattapalli Raju reported in AIR 1950 PC 1, it was held that "the right of redemption is an incident of a subsisting mortgage and it subsists so long as the mortgage itself subsists. The right of redemption can be extinguished as provided in Section 60 and when it is alleged to have been extinguished by a decree, the decree should run strictly in accordance with the form prescribed for the purpose. Unless the equity of redemption is so extinguished, a second suit for redemption by the mortgagor, if filed within the period of limitation, is not therefore barred. If the mortgagee fails to establish that the old decree extinguished the right to redeem, there is no ground for saying that the old decree operates as res judicata and the courts are prevented from trying the second suit u/s 11 CPC". It was further observed in the aforesaid case that provisions like Order 9 Rule 9 or Order 23 Rule 1 would not debar the mortgagor from filing a second suit for redemption because, as in a partition suit, the cause of action in a redemption suit is a recurring one. The cause of action in each successive suit, until the right of redemption is extinguished, or a suit for redemption is time barred, is a different one. Facts of the case decided by the Federal Court show that on the day fixed for argument in the earlier suit for redemption, the Court was informed that the plaintiff was not proceeding with the case and the court interpreted it as a case not of withdrawal but on abandonment and dismissed the suit with costs. Thereafter the plaintiff brought a second suit for redemption wherein it was held that the case did not fall

under the provisions of Order 23 Rule 1 and, therefore, the second suit was not barred under that rule. The Full Bench of the Bombay High Court had also in an earlier case reported in [Rajaram Vithal Sutar Vs. Ramchandra Pandu](#), taken a similar view. In the Bombay case the first suit for redemption was dismissed as abated on account of the death of the mortgagor. The second suit was brought by the heirs of the mortgagor. An objection having been raised that the dismissal of the earlier suit which had been dismissed as abated operated as a bar, it was held that the general terms of Order 22 Rule 9 could not override the specific directions of Section 60 of T. P. Act. Their Lordships expressed the view that so long as the relationship of mortgagor and mortgagee continues and so long as the right to redemption has not been extinguished by a decree of the Court or by the act of the parties, the mortgagor is entitled to go to a court of law to enforce his right. The abatement of suit, according to their Lordships, was not a decree of the court extinguishing the right of redemption and as such, such abatement would not operate as a bar in the second suit for the same relief. No case law to the contrary could be cited on behalf of the respondents.

10. The legal position is thus well settled that the dismissal of an earlier suit for redemption whether as abated or as withdrawn or in default would not debar the mortgagor from filing a second suit for redemption and that such second suit and for that matter every successive suit for redemption to redeem the same mortgage can be brought so long as the mortgage subsists and the right of redemption is not extinguished by efflux of time or by a decree of the court passed in the prescribed form. In the instant case it is not disputed that the mortgage was still subsisting and the plaintiff's right to redemption had not been extinguished when the plaintiff instituted his suit and as such the abatement of the earlier suit filed by Smt, Durga Devi could not operate as a bar.

11. For the foregoing reasons, I allow this appeal, set aside the judgment and decree of the District Judge and remand the case back to him with the directions to dispose of the appeal of the respondents on merits.

12. The parties, through their counsel have been directed to appear before the District Judge on 10th November, 1986.