

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

**ESA No.26 of 2012 (O&M)
Date of decision: 04.02.2015**

Jagdish Kumar

....Appellant

Versus

Partap Madan and others

...Respondents

CORAM: Hon'ble Mr. Justice Rakesh Kumar Jain

Present: Mr. M.S.Joshi, Advocate for the appellant.

Mr. Raj Kapoor Malik, Advocate for respondent No.1.

Rakesh Kumar Jain, J. (Oral)

The present appeal is filed by the plaintiff who has filed a suit for recovery of ₹70,000/-, alleged to have been obtained as loan by Sham Lal, by executing a promissory note on 04.06.1996 and mortgaging the house in question measuring 92 square yards. The suit was decreed on 14.12.2004 in which the Court has held that the plaintiff would be entitled to recover the amount of ₹70,000/- from the defendant and if the defendant would not make the payment of the decretal amount within a period of six months along with agreed rate of interest, he would be entitled to recovery of the said amount by way of sale of mortgaged property. The said decree has become final between the parties, therefore, the appellant filed the execution

application not only against Sham Lal but also against his wife Veena Rani who has been impleaded as a party during the pendency of the suit. It is submitted that Sham Lal has played a fraud as he has transferred the mortgaged property in favour of his wife by way of a collusive decree which was passed on 6.06.1995. Thereafter his wife, namely, Veena Rani sold the property to Radhey Sham on 4.06.1999, who further sold it to the objector Partap on 6.02.2001, during the pendency of the suit.

It is submitted by learned counsel for the appellant that the objection filed by Partap/respondent-objector was dismissed by the Executing Court and appeal filed by respondent No.1-objector was allowed by the Appellate Court.

Counsel for the appellant has vehemently argued that he was cheated by Sham Lal as he has transferred the mortgaged property in favour of his wife and since respondent No.1-Partap has stepped into the shoes of the wife of Sham Lal, therefore, the property purchased by him is liable to be sold for the purpose of recovery.

On the other hand, learned counsel for respondent No.1 has argued that though there is no dispute that he has purchased the property from Radhey Sham who had earlier purchased it from Veena Rani wife of Sham Lal but Veena Rani had become owner of the property in dispute much prior to its mortgage, which took place on 04.06.1996. It is further submitted that had there been any transfer of property during the pendency of the suit that it would have been hit by Section 52 of the Transfer of Property Act but the property had

already been transferred by Sham Lal in favour of his wife Veena Rani and he was not the owner on the date when the property in dispute was mortgaged. It is also submitted that Sham Lal played a fraud upon the appellant and for that Sham Lal should be blamed and not Veena Rani.

After hearing learned counsel for the parties and after examining the available record, I am of the considered opinion that there is no merit in the present appeal as the property mortgaged by Sham Lal in favour of the present appellant in order to obtain ₹70,000/- as loan, had already been transferred by Sham Lal in favour of his wife Veena Rani by way of consent decree dated 6.06.1995. The transaction of loan between the appellant and Sham Lal by mortgaging the suit property took place on 4.06.1996 much later, therefore, Section 52 of the Transfer of Property Act cannot be applied. In these circumstances, the appellant-plaintiff is not entitled to proceed against the mortgaged property, which may be in the hands of the appellant but he can still seek execution against the other property of Sham Lal or take other steps in accordance with law.

Resultantly, the present appeal stands dismissed being denuded of any merit.

February 04, 2015
Manoj Bhutani

(Rakesh Kumar Jain)
Judge