IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

RSA No. 3047 of 2012
Date of Decision: 20.09.2016

Pawan Kumar ... Appellant

Vs.

Dr. Sham Kishore ... Respondent

CORAM: HON'BLE MR. JUSTICE AMOL RATTAN SINGH

1. To be referred to the Reporters or not?
2. Whether the judgment should be reported in the Digest?
3. Whether the order is speaking/reasoned?

Present:- None for the appellant.

Mr. B. R. Gupta, Advocate,
for the respondent.

Amol Rattan Singh, J.

This is an appeal of the defendant, in a suit filed by the respondent-plaintiff seeking possession of the suit property upon redemption of a mortgage stated to have been entered into on 17.12.1986, in respect of the suit property, i.e. one shop measuring 14' x 36', fully described in the plaint and the judgment of the learned Civil Judge (Junior Division), Kurkshetra, located in Shahabad Markanda, District Kurukshetra.

The suit was dismissed by the learned Civil Judge but on appeal filed before the first appellate Court, that judgment was reversed and the suit of the plaintiff decreed in his favour, leading to the defendant filing this appeal.

2. As per the respondent-plaintiff, he had mortgaged the aforesaid shop bearing No.30, located in Rama Market, Shahabad, to the defendant, for

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a sum of Rs.3000/-, vide a registered mortgage deed dated 17.12.1986. The suit property was stated to consist of one room and verandah and land measuring 14' x 14'.

The plaintiff wanting to redeem the mortgage by paying off Rs.3000/- to the defendant, the defendant allegedly refused to accept the mortgage amount. The plaintiff, consequently, had a legal notice served upon him on 11.11.2005, vide registered post as also under postal certificate, through his counsel, asking the defendant to hand over vacant possession of the shop, upon accepting the mortgage amount of Rs.3000/-, within a period of 15 days of the receipt of the said legal notice.

The defendant still having refused to do so, the suit was filed on 18.01.2006.

3. Upon notice being issued to him, the appellant-defendant filed a written statement taking preliminary objections alleging that the mortgage deed was a sham transaction and that there was no legal necessity for the plaintiff to have mortgaged the suit property for just a sum of Rs.3000/- and that it could not be believed that he could not redeem such a small sum for 20 years, even though he was a very rich person having many shops in Shahabad Markanda, receiving rental income therefrom. It was also stated that the plaintiff was earlier a Director in the Medical College at Mulana, and was also doing private practice in his clinic in Ambala City, where he was earlier posted as Chief Medical Officer.

Further, he had also a big house near the Central Jail, at Ambala, and other properties.

4. It was further contended in the written statement that actually the defendant was a tenant over the suit property since the year 1986, initially at

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a monthly rent of Rs.300/-, including house tax, in support of which the assessment record for the year 1988-89 was also tendered by the defendant.

It was further stated that the defendant was in the 'hotel business' in the property and that subsequently, the rent was increased to Rs.500/- per month and actually the suit property was entered in the name of the brother of the plaintiff, for the years 1993-94 to 1997-98, in the house tax assessment record.

Yet further, it was contended that the rate of rent was Rs.600/- per month, with the house tax assessment entry continuing in the name of the brother of the plaintiff, with the plaintiff continuing as a tenant but with the plaintiff not issuing any rent receipt to him.

5. On merits, apart from reiterating the above, it was stated that the mortgage deed was just created by the plaintiff, so as to try and recover possession of the suit property easily under the provisions of the Transfer of Property Act, rather than as per the provisions of the Haryana Urban (Control of Rent & Eviction) Act, 1973.

The appellant also denied signing the mortgage deed in favour of the plaintiff.

6. The plaintiff having filed a replication denying the contents of the written statement, thereafter the following issues were framed by the learned Civil Judge:-

> "1. Whether the plaintiff is entitled for the relief of possession by way of redemption of the suit property, as detailed in para no.1 of the plaint? OPP
> 2. Whether the mortgage deed is a sham transaction? OPD
> 3. Whether defendant is tenant in the suit property since 1986 at the rate of Rs.300 per month? OPD
> 4. Relief."

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7. The plaintiff examined one Parminder Kaur, a Clerk from the office of the Sub-Registrar, as PW1, and himself appeared in the witness box as PW2 and further examined four other witnesses. He also tendered the following documentary evidence:-

"Ex.P1	Site plan dated 26.3.2008;
Ex.P2	Mortgage-deed dated 17.12.1986
Ex.P3	Plan drawn;
Ex.P4	Death certificate of Tirlok Nath Sethi;
Ex.P5	Death certificate of Ajit Singh;
Ex.P6	Legal notice dated 11.11.2005;
Ex.P7	Postal receipt;
Ex.P8	Acknowledgment;
Ex.P9	UPC"

8. The appellant-defendant also stepped into the witness box as DW1 and examined four other witnesses. He relied upon the following documents:-

"Ex.D1	Mortgage deed dated 11.12.1986;
Ex.D2	Mortgage deed dated 11.12.1986;
Ex.D3	Mortgage deed dated 11.12.1986;
Ex.D4	Mortgage deed dated 17.12.1986;
Ex.D5	Mortgage deed dated 27.7.1988;
Ex.D6	Copy of assessment register 1988-89 to 1992-93;
Ex.D7	Copy of assessment register 1988-89 to 1992-93."

9. Upon appraising the aforesaid evidence, the learned Civil Judge found that the plaintiff deposed in terms of his plaint, admitting suggestions with regard to his medical service and the property he owned, the factum of

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his brother running a business and the fact that notice of the house tax, goes to the owner of the property.

He also testified to the effect that one Ajit Singh, who was a Namberdar of village Ravi, was a witness to the mortgage deed, whereas the 2nd witness was from Shahabad. He also admitted that Ajit Singh was a witness to some other mortgage deeds also, executed by the plaintiff in favour of other persons and that Roshan Lal Gupta was also the deed-writer of the instant and other mortgage deeds.

The document writer, PW6 Roshan Lal Gupta, testified with regard to the mortgage deed and the site plan, both of which he admitted had been scribed/drafted by him, on the directions of the parties. He further deposed that the deed had been read out to the parties, who had put their signatures on it, as had the witnesses, and he had made an entry in his register with regard to the deed dated 17.12.1986.

10. The defendants' witnesses, included a Registration Clerk who produced five mortgage deeds, identifying the signatures of the Sub-Registrar on them, and a house tax clerk, who deposed with regard to the record with the Municipal Committee, stating that in some entries qua the suit property, the name of the owner was not given, whereas at one place, the plaintiffs' name was written and at another, the defendants' name was written in the column of possession, with the name of one Ram Lal written in the next column. The value of the property assessed at that time, in that order, was Rs.600/- per year, after which it was assessed at Rs.3240/- after deduction of repair charges. A rental value of Rs.1200/- was also written with red ink and the house tax was assessed at Rs.1500/-, after giving an opportunity of a hearing to the owner of the property.

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11. After appraising the aforesaid evidence as well as the testimonies of the other witnesses, the learned Civil Judge found that as per the testimony of the Registration Clerk (PW1), on the basis of the summoned record, the mortgage deed had, in fact, been registered on 17.12.1986 (wrongly typed as 17.12.1985 in the judgment), in favour of the appellant-defendant by the plaintiff, which had been exhibited as Ex.P2.

However, it was held that it was not possible to believe that the plaintiff, who was a rich man, had any necessity to mortgage the suit property for Rs.3000/. Also, he had failed to prove the mortgage deed in terms of Sections 47, 68 and 73 of the Indian Evidence Act, 1872. Neither of the attesting witnesses had testified to the execution of the deed and the Registration Clerk (PW1), though had testified in favour of the deed having been registered, had otherwise admitted that she was posted on her seat only in the year 2007 and as such, the signatures of the parties and of the Sub-Registrar, were not appended in her presence.

Further, as regards Sections 47 and 73, it was found that no family member or a person recognising the handwriting and signatures of the attesting witnesses, was produced. Thus, in effect, the deed was held to be not admissible in evidence.

12. Further citing from the judgments of this Court in **Banarsi Dass v. Gian Chand** (1999) PLR 127, **Radheysham and others v. Kaushalya Devi** 1984 HRR 368 and **Bakshi Jaswant Singh v. Smt.Pushpawati and others** 1998 HRR 585, it was concluded by the trial Court that the mortgage deeds were actually a "device to override the provisions of the Rent Act" and as such, it was not proved that the suit property had been mortgaged by the plaintiff to the defendant.

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Consequently, the suit was dismissed.

13. The respondent-plaintiff having filed an appeal before the learned Additional District Judge, Kurkshetra, that Court, after appraising the evidence and hearing the arguments before it, held that though the registered mortgage deed was for a small sum of Rs.3000/- only, however, in the year 1986 the value of Rs.3000/- was not so small and as such, whether the plaintiff was a rich person or not, made no difference and that the Court has to consider the mortgage deed as it is, without modifying its terms and conditions.

It was found that the deed being a registered document, with the witnesses thereto, i.e. Namberdar Ajit Singh and Tirlok Chand having died, as per their death certificates, Exs.P5 and P4 respectively, the scribe, Roshan Lal Gupta, duly testified as PW6, to prove that the document had been scribed by him, with an entry made in his register, at Sr. No.1454-A, on 17.12.1986.

Hence, it was held by the first appellate Court that the registered mortgage deed stood duly proved.

14. The document being a fictitious document, as contended by the defendant, was held to be not proved as in his cross-examination, the defendant had denied his signatures on the written statement, on his Power of Attorney, on the mortgage deed and on his own affidavit, Ex.DW1/A (submitted by way of his examination-in-chief). Yet, if the signatures on these documents were compared even with his signatures made on 09.05.2009, beneath his cross-examination, even to the naked eye they could be seen that they were of the same person.

Various judgments were also cited from different High Courts,

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by the learned first appellate Court, to hold that the Court could form its own opinion on disputed signatures.

Further, it was seen that the appellant-defendant had denied his signatures on all the documents to try and show that he had never executed the mortgage deed. Yet, on a mortgage deed produced by himself, i.e. Ex.D4, which was in favour of Tirlok Chand (witness to the mortgage deed in favour of the appellant-defendant), the defendant was shown to be a witness therein, though he stated that his signatures had been obtained on some blank papers. However, he admitted those signatures which proved that, as a matter of fact, the mortgage deed in his own favour was also signed by him.

15. On the plea that actually the appellant-defendant was a tenant on the suit property, which could be also seen from the house tax register of the Municipal Committee, the learned first appellate Court cited a judgment of the Supreme Court in **Ishwar Dass Jain v. Sohan Lal** (2000 (1) Apex Court Journal 68) to hold that a house tax register is not proof of occupancy of a person on a premises, as a tenant. He was required to prove that he was actually a tenant and in the present case, though the appellant-defendant had stated that he was paying rent at the rate of Rs.300/- per month earlier and subsequently, Rs.500/- and Rs.600/- per month, no rent receipt had been placed on record.

It was also noticed that in his cross-examination, the defendant had stated that he had never paid rent after filing the suit and had also admitted that he had never filed any suit regarding non-issuance of rent receipts against the plaintiff. Also, he never filed any complaint to the police with regard to his signatures having been obtained on blank papers.

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Consequently, it was held that the defendant could not be treated to be a tenant, but as a mortgagee.

16. Distinguishing the judgment cited by the learned Civil Judge in *Radheyshams'* case (supra), it was found that in that case, the business record showed that the tenant was paying a monthly rent of Rs.150/- and as such, the mortgage deed was found to be a sham transaction, which was not so in the present case.

Thereafter, without really distinguishing the other judgments relied upon by the trial Court, eventually the appeal of the plaintiff was allowed by the first appellate Court and his suit decreed, directing the defendant to hand over vacant possession of the suit property within one month from the date of the judgment, upon receipt of the mortgage amount of Rs.3000/-.

17. Before this Court, at the time when notice was issued, on July 17, 2012, status quo regarding possession was ordered, and thereafter, learned counsel for the appellant had been appearing through out. However, on the date of final arguments, he did not appear, but submitted his written arguments thereafter.

It is stated therein that the huge 'disproportion' between the amount shown to be advanced by way of mortgage money, and the actual value of the property, showed that the mortgage deed was a wholly sham transaction. In this regard, a judgment of the Supreme Court in **Magala Kunhamina Umma and others v. Puthiyaveettil Paru Amma and others**, AIR 1971 SC 1575, has been cited, wherein it was held as follows:-

> *"19. The proportion between the amount advanced and the value of the property is one of the important tests to be taken into consideration in deciding the nature of the transaction...".*

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Further, the judgments relied upon by the learned Civil Judge have also been cited, (*Radheyshams' and Banarsi Dass'* cases), wherein also it was held that if the value of the property, and the amount that it was shown to be mortgaged for, were too disproportionate, then the mortgage deed would have to be taken to be accepted to be a sham transaction.

The cross-examination of the plaintiff has also been referred to, wherein he admitted that he was a retired Director of Health Services, Haryana, receiving a pension of Rs.15,000/- per month, from the year 2000 onwards and that he also had worked as a part time medical practitioner at Ambala, and that he was posted as a Director at the Medical College, Maulana, after his retirement. His admission of owning agricultural land and six other shops has also been referred to, from which he received rent of about Rs.5000/- per month.

It has also been contended in the written arguments on behalf of the appellant, that DW4, Krishan Lal, and DW5, Harjeet Singh, had both deposed that the appellant-defendant was a tenant of the plaintiff and was paying rent initially @ Rs.300/- per month and thereafter, @ Rs.600/- per month.

Hence, it is contended that once it is seen that the transaction actually was never supposed to be acted upon as a mortgage and was a sham transaction, then Section 92 of the Indian Evidence Act would not be attracted to hold that documentary evidence would override any oral evidence.

On this learned counsel has cited the judgment in **Smt. Gangabai v. Smt.Chhabubai** AIR 1982 SC 20. Similarly, various judgments of co-ordinate benches, as were relied upon by the learned Civil

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Judge, have been relied upon by the learned counsel for the appellant.

18. On the interpretation of a document, the learned counsel has cited a judgment of the Supreme Court in **Puzikkal Kuttapppu v. C.Bhargavi** 1977 Current Law Journal 8, wherein it was held that in construing a document, it is necessary to see the intention of the party executing it. The intention has to be seen from the recitals and the terms of the entire document and from its surrounding circumstances, and where there are some mixed elements in an instrument, disclosing features of a mortgage as well as of a lease, the Court would have to find out the predominant intention of the party executing the document, "viewed from the essential aspect of the reality of the transaction".

It was further held as follows:-

> *"Even so, there is one most essential feature in a mortgage which is absent in a lease, that is, that the property transferred is a security for the repayment of debt in a mortgage whereas in a lease it is a transfer of a right to enjoy the property. We have seen that this essential feature of a mortgage is missing in the document in question. We are, therefore unable to come to the conclusion that it is a mortgage and not a lease."*

19. Mr. B. R. Gupta, learned counsel for the respondent-plaintiff, on the other hand, submitted that, firstly, the Clerk of the Registration Office having been examined, who proved that the mortgage deed was actually registered on 17.12.1986, the learned Civil Judge wholly erred in holding that because the witness herself had not seen the Sub-Registrar signing the agreement, she having been posted to the seat only 21 years later, in 2007, does not take away the authenticity of the registration, as long as the entry in the registration records is duly proved by a person authorised to do so, from the office of the Sub-Registrar. Therefore, he submitted that once the deed

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was duly registered, even an attesting witness need not testify in respect thereof, especially where both attesting witnesses were proved to have died, by way of production of their death certificates.

Mr. Gupta further submitted that the appellant-defendant having denied his signatures even on his own written statement filed in the suit, obviously showed his intention of not admitting his signatures on the mortgage deed and therefore, the learned first appellate Court correctly came to the finding, after comparing his signatures beneath his testimony with those appended on various other documents, including the mortgage deed, that the disowning of the signatures was wholly false and with an ulterior motive, to try and show that the mortgage deed was not executed in his favour.

20. Learned counsel next submitted that issue no.3, framed by the trial Court, was with regard to whether or not the defendant was a tenant in the suit property since 1986 @ Rs.300/- per month.

That Court, despite having held, on issues no.1 and 2, that the mortgage deed was a sham transaction and the plaintiff was therefore, not entitled to the relief of possession on the basis of the said deed, the issue of tenancy (issue no.3) was decided against the present appellant (defendant) by the Civil Judge, holding that he had not been able to prove by leading any cogent evidence, that he was a tenant on the suit property. That finding was never challenged by the appellant before the first appellate Court, even by way of any cross-objections filed in the appeal filed by the present respondent-plaintiff. Therefore, Mr. Gupta submitted, that he is estopped from taking a plea before this Court now in a second appeal filed against the reversal of the judgment of the Civil Judge, there being a specific bar

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contained in under Order 41 Rule 22 of the Code of Civil Procedure, 1908.

21. Next, learned counsel for the respondent-plaintiff submitted that though the appellant had taken a plea that the mortgage deed was a fraudulent document, he could not prove that in any manner, whatsoever.

Lastly, it was contended that Section 91 of the Evidence Act actually is a complete bar on the production of any oral evidence, when a document is a registered document and has been accepted to be a genuine document under Section 79 of the Evidence Act.

He, consequently, prayed for dismissal of the appeal.

22. Having considered the judgments of the Courts below, as also the arguments on behalf of the parties (written arguments on behalf of the appellant), I find myself in agreement with the contentions raised by learned counsel for the appellant, despite agreeing with some arguments on behalf of the respondent.

Without a doubt, the appellant was not able to show, other than by way of oral evidence, that he was actually paying a monthly rent of Rs.300/-, Rs.500/- and Rs.600/-, at different points of time since 1986, as contended in his written statement. It is also true that no evidence has been pointed out to show the rental value of the property as it existed on 17.12.1986, i.e. the date when the mortgage deed was registered, to come to a firm conclusion as to whether the contention of the appellant is correct or not, that the amount of Rs.3,000/- stated to have been taken as a loan by the respondent-plaintiff, (which was secured by way of mortgaging the suit property to the appellant-defendant), was, in fact, the value for which such a property would normally have been mortgaged at that time.

I also find myself in agreement with learned counsel for the

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respondent-plaintiff, that as has been held by the learned first appellate Court, the mortgage deed itself was a duly registered document which the appellant-defendant entered into with the respondent-plaintiff, and the appellants' contention that he had not actually entered into such a mortgage, is not something which stands proved. The appellant, without a doubt, did sign the mortgage deed before the Registrar as can be seen from his signatures beneath the Registrars' stamp and entry/endorsement of the deed. The contention that those were not his signatures was rightly rejected by the first appellate Court by comparing them with the signatures between beneath his cross-examination on 09.05.2009, with the scribe to the agreement also having testified to its correctness, in the absence of both the attesting witnesses, who had died. Hence, in the opinion of this Court, the registered mortgage deed stood duly proved in terms of the proviso to Section 68 of the Indian Evidence Act, 1872, with an official in the Registrars' office having testified to the registration being authentic.

To that extent, the learned Civil Judge was incorrect in holding that since the registration clerk did not see the Sub-Registrar and the other signatories to the document, actually signing it, it could not be accepted to be an authentic registered document. Once the witness, i.e. the registration clerk, had duly verified that the mortgage deed was the same as was shown to be entered in the records of the office of the Sub-Registrar, on 17.12.1986, no further evidence with regard to its authenticity need have been led, it obviously not being a will, and the executor of the document, i.e. the mortgagor-plaintiff, having himself relied upon it.

23. Yet, having held as above, in the opinion of this Court, the mortgage deed cannot be said to be proof of the actual transaction entered

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into and the intention behind it, which was obviously realization of rental income and to enable the respondent-plaintiff to not have to resort to the provision of the Haryana Urban (Rent Control & Eviction) Act, 1973.

On that issue, I agree with the findings of the learned Civil Judge, that the respondent-plaintiff having admitted to his having many properties and no dearth of income otherwise, there was no likelihood of his having entered into a mortgage for a sum of Rs.3000/- only, even in the year 1986, which he could not redeem for a period of 19 years thereafter, (the suit having been instituted on 18.01.2006).

One argument on behalf of the respondent-plaintiff would be that the appellant-defendant having entered into the transaction, i.e. having entered into a mortgage deed with the mortgagor, he obviously gave up any right of tenancy. In fact, this view was earlier held by this Court itself (this Bench). However, upon a perusal of the judgment of the Supreme Court, cited in his written arguments by learned counsel for the appellant, i.e. in *Magala Kunhamina Ummas'* case (supra), and in *Puzikkal Kuttapppus'* case (supra), it would be obvious that the intention of the parties executing the deed is to be gone into by the Court.

As already seen, in *Puzikkal Kuttapppus'* case, it was held by their Lordships that the most essential feature in a mortgage, which is absent in a lease, is that the property transferred "is a security for the repayment of debt in a mortgage whereas in a lease it is a transfer of a right to enjoy the property".

In that case, it was held that the essential feature of a mortgage was missing in the document in question.

In this case, in the opinion of this Court, that essential feature is

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also missing, with many such mortgage deeds having been entered into by the respondent-plaintiff and his sound financial position having been admitted to. Thus, it would be very obvious that the mortgage deed in question in this case was not one which secured a loan taken or a debt entered into by the plaintiff with the defendant.

Of course, one method of looking at it would be that no matter what the financial position of a mortgagor, even money taken by way of advance rent, can be taken to be a loan. However, in the opinion of this Court, in the present context, that view cannot hold, in the light of the aforesaid judgments. Most definitely even if Rs.3000/- taken by the respondent-plaintiff from the appellant-defendant, on 17.12.1986, was an advance rent for a particular period of time, it cannot be stated to be a loan to secure to which the mortgage was entered into; therefore, the character of the money taken would still remain to be a rent/lease advance, which aspect is not being specifically commented upon by this Court, this not being a lis to determine the exact status of the possession of the appellant, except to determine whether he is a mortgagee or not.

24. It would be useful to reproduce here, a passage from the judgment of the hon'ble Supreme Court in *Puzikkal Kuttapppus'* case (supra) wherein it was stated as follow:-

> "6. In construing a document like the one before us it is always necessary to find the intention of the party executing it. The intention has to be gathered from the recitals and the terms in the entire document and from the surrounding circumstances. How the parties or even their representatives in interest treated the deed in question may also be relevant. It is also well settled that the nomenclature given to a document by the scribe or even by the parties is not always conclusive. The word 'otti', as such,

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used in the document, is not therefore, of much consequence."

In the present case, though the recital in the mortgage deed, Ex.P2, is that the mortgagor-plaintiff was in need of Rs.3000/- and for that the purpose had to secure a loan from the respondent-defendant-mortgagee, to secure which the mortgagee had been delivered the possession of the suit property, the circumstances, as referred to above, i.e the admitted sound financial position of the respondent-plaintiff, do not bear out the recital to the effect that he was in need of a small sum of Rs.3000/-, even in the year 1986. This is to be especially seen in the light of the fact that he, admittedly, even at that time, had various other properties and was a Haryana Government servant, being a doctor who some years later retired as the Director, Health Services, of the State.

25. Another judgment of the Supreme Court in **Tara Chand v. Sagabai @ Chaiyalibai** (2007) 5 SCC 392 also needs to be referred to, in which it was held that a transaction of mortgage is governed by the provisions of the Transfer of Property Act, 1882.

In that case, the landlord had entered into a mortgage with an existent tenant, upon taking a loan of Rs.25,000/-, the interest upon which was to be treated as rent during the period of the usufructuary mortgage in favour of the tenant. However, there was a recital to the effect that the mortgagor would not pay any kind of interest to the mortgagee, on the mortgage amount of Rs.25,000/-, but would also not take any rent for the shop, and that the mortgagee would continue using the ground-floor (i.e. the property mortgaged), in lieu of interest, for a period of 10 years, after which the mortgagor would have a right to get the mortgage redeemed.

In the above situation, in fact, it was held by their Lordships that

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there was a clear intention on the part of the mortgagee only to retain his interest in his capacity as a mortgagee and not as a tenant and that a new relationship of mortgagee and mortgagor was created, in place of the existing relationship of landlord and tenant.

26. One way of looking at the present case, in the light of the aforesaid judgment, would be that when a relationship with an existing tenant can be changed to that of a mortgagee, by creating a mortgage upon a payment of certain sum, then in the present case, the appellant being a newly inducted person into a property, on the basis of a mortgage deed, the terms of the mortgage deed would prevail and he could not be treated as a tenant in any case.

This Court actually may have been inclined to take this view but for the ratio of the law laid down in *Puzikkal Kuttapppus'* and *Magala Kunhamina Ummas'* cases, wherein it has been specifically held that the intention behind the transaction has to be gone into.

27. In fact, it could otherwise also be held that in view of the fact that the appellant entered into a mortgage deed with open eyes, with his contention of the deed not having been signed by him rejected, he is precluded from even raising an issue that he is a tenant.

However, when the ratio of the aforesaid judgments is applied, then this Court is required to go into the issue of whether the mortgage deed was indeed created in respect of a genuine mortgage, or was a 'cover up' for a rent agreement.

That aspect having been gone into, in the opinion of this Court, it is obvious that with the respondent-plaintiffs' very sound financial position, the mortgage deed dated 17.12.1986 was actually only to cover up a case of

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tenancy, with the property actually being tenanted out to the appellant-defendant, rather than it being mortgaged with him for a sum of only Rs.3,000/-

Whether or not the amount of Rs.3000/- was the entire advance rent paid, or there was subsequently monthly rent paid or not, is not an issue which this Court going into in any manner, as that issue would be gone into by the appropriate authority under the Haryana Urban (Control of Rent and Eviction) Act, 1973, if any proceedings in that regard are brought before it.

28. Coming then to the contention of Mr. Gupta, learned counsel for the respondent, Order 41 Rule 22 CPC, that the appellant not having filed any cross-objections or an appeal against the finding of the learned Civil Judge on issue No. 3, he cannot take a plea before this Court that he is a tenant. Though whether he is a tenant or not, is something which this Court would not go into as already said immediately hereinabove, however, on the issue of the appellant being debarred from raising any such plea, the contention of learned counsel for the respondent-plaintiff is rejected, in view of the pronouncement on that issue, by the hon'ble Supreme Court in **Ravinder Kumar Sharma** vs. **State of Assam** (1999) 7 SCC 435.

In that case, after discussing the law on the subject and the amendment made in the aforesaid provision in the year 1976, their Lordships held as follows:-

> "*In our view, the opinion expressed by Mookerjee, J. of the Calcutta High Court on behalf of the Division Bench in **Nishambhu Jana** vs. **Sova Guha** (1984-85) 86 CWN 685 and the view expressed by U.N.Bachawat, J. in **Tej Kumar Jain** vs. **Purshottam** AIR 1981 MP 55 in the Madhya Pradesh High Court reflect the correct legal position after the 1976 Amendment. We hold that the*

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*respondent-defendant in an appeal can, without filing cross-objections attack an adverse finding upon which a decree in part has been passed against the respondent, for the purpose sustaining the decree to the extent the lower court had dismissed the suit against the defendants-respondents. The filing of cross- objection, after the 1976 Amendment is purely optional and not mandatory. In other words, the law as stated in **Gaddem Chinna Venkata Rao** vs. **Koralla Satyanarayanamurthy** AIR 1943 Mad 698 by the Madras Full Bench and **Chandre Prabhuji Jain Temple** vs. **Harikrishna** (1973) 2 SCC 665 by this Court is merely clarified by the 1976 Amendment and there is no change in the law after the amendment."*

Hence, on the basic issue that in fact the mortgage deed was a cover up for a tenancy/lease etc., this Court does not find itself inhibited in dealing with that argument, even though the tenancy was held to be not proved by the learned Civil Judge. Yet, to repeat again, whether or not such tenancy can be proved on the parameters that are required for such proof in terms of the Haryana Urban (Rent Control & Eviction) Act, 1973, is something which would be gone into in appropriate proceedings under that Act, or in other appropriate proceedings with regard to the nature of possession of the appellant. In the present proceedings, since the suit filed by the respondent-plaintiff was only one seeking possession after redemption of the mortgage shown to be entered into by the mortgage deed in question, nothing further on the status of the appellant is being stated, other than to hold that the mortgage deed was not actually the reflection of a true mortgage.

Hence, whether the appellant was a tenant, a lessee, a licensee or was occupying the suit property in any other capacity, is not something which

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has been gone into by this Court, no issue in that regard having been framed by the Courts below in this *lis,* the suit being only one seeking possession after redemption of the mortgage.

29. Consequently, in view of the discussion above, this appeal is allowed and the impugned judgment and decree of the learned lower appellate Court is set aside and the decree passed by the learned Civil Judge is affirmed. The suit of the plaintiff is dismissed with costs through out, which are quantified at Rs. 5,000/-.

A decree-sheet be drawn up accordingly.

September 20, 2016 **(AMOL RATTAN SINGH)**
dinesh **JUDGE**

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