IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

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RSA 5127 of 2015 (O&M)
Date of decision: 27.01.2016

Daljit Kaur (Dead) through LRs .... *Apellant*

Versus

Rajesh Sood ....*Respondent*

Coram: **Hon'ble Mrs. Justice Rekha Mittal**

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Present: Mr. S S Panag, Advocate
for the appellant

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1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether the judgment should be reported in the Digest?

Rekha Mittal, J.

The present regular second appeal lays challenge to the judgment and decree dated 12.05.2015 passed by the Additional District Judge, Ludhiana whereby an appeal preferred by the appellant was dismissed and the judgment and decree passed by the trial Court dismissing the suit, has been affirmed.

Facts, in brief, are that the appellant filed a suit for possession by way of redemption of mortgagee dated 07.09.1993 bearing vasika No. 137712 dated 07.09.1993, registered in the office of Sub Registrar, Ludhiana with a direction to the respondent to hand over the original mortgage deed to the appellant; to receive mortgage amount of Rs.5,000.00 or in the alternative, the mortgage amount may be allowed to be deposited in the Court. Further prayer has been made for a decree of injunction restraining the respondent from transferring possession of the suit property to any body else, except the appellant. It is pleaded that the appellant is owner of land measuring 344-1/3 sq. yards, detailed in the head note of the plaint, as she purchased the same from Raghbir Singh and Dalbir Singh through sale deed dated 14.06.2005. Raghbir Singh, mortgaged the shop in question measuring 24-1/2 square yards to the respondent on 07.09.1993 for a sum of Rs.5000.00 and executed registered mortgage dated 07.09.1993. The original mortgage deed is in possession of the respondent, in which, it is clearly mentioned that Raghbir Singh mortgager can redeem said property at any time after payment of Rs.5,000.00 and can recover possession. At the time of purchase of property by the appellant, Raghbir Singh told that the shop was mortgaged with the respondent and she can pay mortgage amount and take back possession.

The respondent filed the written statement, raising a categoric plea that he is not a mortgagee and is a tenant under the predecessor-in-interest of the appellant. The shop was taken on rent from Raghbir Singh along with his father, namely Baldev Singh as Baldev Singh was managing said property. The terms of tenancy were settled between the respondent and Raghbir Singh accompanied by Baldev Singh and it was let out @ Rs.500/- per month, besides payment of electricity charges. The terms of tenancy were settled on 01.09.1993 when possession of the suit property was handed over to the respondent and he is running business under the name and style of *Suraaj Clinic and Clinical Laboratory*. Baldev Singh and Raghbir Singh came to the respondent and represented that the terms of tenancy settled orally on 01.09.1993 should be reduced into writing. Raghbir Singh further represented that he was going abroad and rent should be paid to his father Baldev Singh. The respondent had been paying rent to Raghbir Singh and thereafter to Baldev Singh and it stands paid upto 30.06.2008. He had never executed any mortgage deed nor there is any relation of mortgagee and mortgagor between the respondent and Raghbir Singh. The alleged mortgage deed dated 07.09.1993 is a sham transaction as the demised premises was taken on rent on 01.09.1993 @ Rs.500/- per month.

The learned trial Court, on a thoughtful consideration of the pleadings of the parties, issues framed for determination, evidence adduced on record and rival submissions made by counsel for the parties non-suited claim of the appellant that the respondent is a mortgagee in the suit property or the appellant is entitled to get possession of the suit shop by way of redemption of mortgage on payment of mortgage money to the tune of Rs.5,000.00. The findings recorded by the trial Court were affirmed in appeal by dismissal of the appeal preferred by Smt. Daljit Kaur (since deceased) now represented by her Legal Representatives.

Counsel for the appellant has submitted that the Courts below have rejected claim of the appellant primarily on the ground that the appellant has failed to prove the mortgage deed propounded by her. It is vehemently argued that the mortgage is a document required to be attested by two attestors under Section 59 of the Transfer of Property Act, 1882 and in this case, it is attested by two attestors. The mode of proof of document requires to be attested is contained in Sections 68 to 71 of the Evidence

Act. Under Section 68 of the Evidence Act, if execution of a document requires to be attested is to be proved, it will be necessary to call an attesting witness, if alive and subject to the process of the Court and capable of giving evidence. But in case the document is registered, than except in the case of Will, it is not necessary to call an attesting witness, unless the execution has been specifically denied by the person by whom it purports to have been executed. Counsel has urged that in the present case, the executor of the mortgage deed namely Raghbir Singh has never denied execution of the document, therefore, it was not incumbent upon the appellant to call an attesting witness of the mortgage deed for its proof in accordance with section 68 of the Evidence Act. It is further argued that as no attesting witness was required to be examined in the circumstances of the present case, the findings recorded by the Courts below that the mortgage deed, has not been proved cannot be allowed to sustain and liable to be set aside. In addition, it is submitted that as the respondent is a mortgagee in the suit property, he is liable to deliver back possession of the suit shop on receipt of Rs.5000.00 towards mortgage amount. It is urged that the respondent has failed to adduce satisfactory much less tangible evidence on record to substantiate his plea that he was inducted as a tenant in the shop in question with effect from 01.09.1993 on payment of rent of Rs.500.00 per month. Similarly, plea of the respondent that he has already paid rent upto the year 2008 does not get substantiated from any materials on record.

I have heard Counsel for the appellant, perused the records and find no merit in the appeal.

The suit was filed by Daljit Kaur - appellant on the premise that she has stepped into the shoes of Raghbir Singh, the erstwhile owner and mortgagor under the mortgage deed (registered) dated 07.09.1993. Daljit Kaur is *nonelse* but the mother of said Raghbir Singh and wife of Baldev Singh. Raghbir Singh did not appear in the witness box to prove factum of mortgage despite a specific plea raised by the respondent that he was inducted as a tenant at the rate of Rs.500/- per month by said Raghbir Singh. Baldev Singh, the husband of the appellant has also not stepped into the witness box to deny receipt of rent. Not only this, Daljit Kaur did not personally appear in the witness box to prove her case and she examined Kuldeep Singh as her attorney.

The original mortgage deed has not been produced on record and a certified copy thereof has been marked as Ex.P1. Counsel for the appellant is not in a position to confirm if permission was sought from the Court for proving the mortgage deed by way of secondary evidence by invoking Section 65 of the Evidence Act much less having been granted. The certified copy of a mortgage deed is not admissible in evidence unless there is permission by the Court to prove the original deed by way of its certified copy.

The question with regard to admissibility of certified copy of the mortgage deed came up for consideration before the Hon'ble Supreme Court in ***Ishwar Dass Jain (dead) through LRs v. Sohan Lal (dead) through LRs, 2000(1) R.C.R (Civil) 168***. The apex Court culled out six points for its consideration and point No. (2), relevant in the present context, read thus:-

"(2) whether on the facts of the case, the mortgage was proved by the plaintiff by production of a certified copy of the deed?"

The answer to point (2) has been made in para 13 of the judgment. A relevant extract therefrom reads as follows:-

"13. We shall first deal with the proof of the certified copy of the deed of mortgage. So far as the mortgage deed is concerned, the plaintiff filed a certified copy and called upon the defendant to file the original. The defendant refused to do so. The plaintiff, therefore, proceeded to file the certified copy as secondary evidence under sub-clause (a) of section 65 of the Evidence Act. This was certainly permissible. The mortgage is a document required to be attested by two attestors under section 59 of the Transfer of Property Act and in this case it is attested by two attestors. The mode of proof of documents required to be attested is contained in sections 68 to 71 of the Evidence Act. Under Section 68, if the execution of a document required to be attested is to be proved, it will be necessary to call an attesting witness, if alive and subject to the process of Court and is capable of giving evidence. But in case the document is registered - then except in the case of a will - it is not necessary to call an attesting witness, unless the execution has been specifically denied by the person by whom it purports to have been executed. This is clear from section 68 of the Evidence Act. It reads as follows:

> *"Section 68 : If a document is required by law to be attested, it shall not be used as evidence until one attesting witness atleast has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence :*

> *Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908, unless its execution by the person by whom it purports to have been executed is specifically denied."*

> *In the present case, though it was stated in the written statement that there was no relationship between the parties as mortgagor and mortgagee, the defendant admitted in his additional pleas in the same written statement that the mortgage deed was executed but he contended that it was executed to circumvent the Rent Control legislation. In fact, in his evidence as DW2 the defendant admitted the execution of the mortgage. It must therefore be taken that there was no specific denial of execution. Hence it was not necessary for the plaintiff to call the attestor into the witness box, this not being a will. The plaintiff could therefore not be faulted for not examining any of the attestors. Hence the mortgage stood proved by the certified copy. The Courts below were right in accepting that the deed was proved. Point 2 is decided in favour of plaintiffs-appellant."*

Counsel for the appellant has not been in a position to contend that certified copy of a mortgage deed can be relied upon without seeking permission of a Court to prove the original by way of secondary evidence under Section 65 of the Evidence Act. In this view of the matter, I find myself unable to accept submissions of the appellant that the Courts below have committed any error much less illegality by holding that the appellant has failed to prove the mortgage deed, in accordance with law. The submission made by Counsel for the appellant in regard to there being no need to examine an attesting witness would have been worth consideration, had the appellant produced the original mortgage deed or its certified copy after necessary permission to prove the original by way of secondary evidence. In this view of the matter, neither any substantial question of law arises for adjudication nor there is any error much less illegality in the consistent findings recorded by the Courts below.

For the reasons aforestated, finding no merit, the appeal is dismissed in limine. No order as to costs.

(Rekha Mittal)
Judge

27.01.2016
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