

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

RSA No.1955 of 2013 (O&M)

Date of Decision: 04.07.2017

Barinder Singh

...Appellant

Vs.

Sat Pal

...Respondent

CORAM: HON'BLE MR. JUSTICE AMOL RATTAN SINGH

Present:- Mr. S. K. Singla, Advocate,
for the appellant.

Mr. J. L. Malhotra, Advocate,
for the respondent.

Amol Rattan Singh, J.

This is the second appeal of the defendant in a suit filed by the respondent-plaintiff seeking possession of the suit property, upon redemption of the mortgage stated to have been entered into between the parties to the *lis* on 23.08.1990. The suit property is stated to be a shop owned by the respondent-plaintiff (hereinafter to be referred to as the plaintiff).

2. The facts, taken from the judgments of the learned Courts below, are that as per the plaintiff, he was the owner of the shop in question which he mortgaged to the defendant with possession thereof, for a consideration of Rs.6500/-, vide a registered mortgage deed dated 23.08.1990 and since then the appellant-defendant (hereinafter to be referred to as the defendant) had continued in possession over the shop as a mortgagee. The original mortgage deed was stated to be in the possession of the defendant.

It was further contended that despite repeated requests from the plaintiff, that the mortgage be redeemed upon him making a payment of

Rs.6500/- in favour of the defendant, it had not been redeemed and the mortgaged shop had not been vacated, leading to the institution of the suit on 22.07.2003.

3. Upon notice issued to him, the defendant filed a written statement to the effect that, firstly, the plaintiff had no locus standi to file the suit, which was not maintainable, as in fact there was a relationship of landlord and tenant between the parties, in respect of the suit property itself and that the alleged mortgage deed was a “forged and fictitious” document.

On merits, it was contended that no amount of Rs.6500/- had ever been paid by the defendant to the plaintiff and consequently, no mortgage deed had been entered into.

As per the defendant, he was in need of a shop for running his business of tailoring in the year 1989 and therefore he had requested the plaintiff to let out the shop to him and it was against the tenancy so created, that a mortgage deed had been reduced into writing by way of security. Actually the shop had been taken on rent at the rate of Rs.325 per month, with it being agreed that rent would be enhanced by Rs.100/- per month, every five years. A number of respectable persons, namely Kuldeep Singh, Kashmira Singh, Bachittar Singh and Tarlochan Singh, were present at the time of that oral agreement but on pressure exerted by the plaintiff, the defendant had executed the mortgage deed dated 23.08.1990, with no mortgage money paid at that time.

Thereafter, the plaintiff insisted that the rent be increased after every three years and then threatened to get the property vacated by filing a suit for redemption.

Denying the rest of the averments of the plaint also, dismissal of

the suit was consequently prayed for.

A replication having been filed by the plaintiff, denying the contents of the written statement and reiterating those of the plaint, the following issues were framed by the learned Additional Civil Judge (Senior Division), Sunam:-

- “1. Whether plaintiff mortgaged the shop in dispute to the defendant for a sum of Rs.6500/- vide mortgage deed dated 23.08.1990? OPP
2. Whether plaintiff is entitled to possession by way of redemption of shop as described in the head note of the plaint? OPP
3. Whether the mortgage agreement was a 'sham transaction'? OPD
4. Whether plaintiff has not come to the court with clean hands? OPD
- 4A. Whether plaintiff has no cause of action and locus standi to file the present suit? OPD
- 4B. Whether suit is not maintainable in the present form? OPD
- 4C. Whether plaintiff is stopped by his own act and conduct from filing the present suit? OPD
- 4D. Whether this court has no jurisdiction to entertain the suit? OPD
7. Relief.”

4. In support of his case, the plaintiff examined a Registry Clerk, Gurdeep Singh, deed-writer Raj Kumar and one Pawan Kumar, other than himself.

He also relied upon certain documents which he tendered in evidence.

Subsequently, an application under Section 65 of the Indian

Evidence Act, seeking to lead secondary evidence relating to the mortgage deed, was also filed, and actually, as per the judgment of the learned trial court, it was thereafter that PW1 Gurdeep Singh, Registry Clerk, was summoned, who placed on record and proved the certified copy of the mortgage deed as Ex.P1.

The defendant examined himself and the aforementioned Kashmira Singh and Kuldeep Singh as DWs1 to 3 respectively.

5. Upon appraising the evidence and the arguments raised before him, the learned Additional Civil Judge found that the plaintiff by examining the Registry Clerk, the scribe of the mortgage deed, the attesting witness thereto, i.e. Pawan Kumar, and he himself having also testified in terms of his plaint, had proved that the mortgage deed was duly executed between the parties, whereas on the other hand, the defendant had simply denied the execution of the mortgage deed, taking the plea that actually it was an oral rent agreement which was converted into a mortgage. However, no documentary evidence in respect of any rent paid, was stated to have been adduced by the defendant (appellant herein).

Consequently, issues no.1, 2 and 3 were decided accordingly, holding that the mortgage deed had been duly proved and the plaintiff was entitled to get the mortgage redeemed upon payment of Rs.6500/-, i.e. the mortgaged amount, and thereafter take possession of the shop.

6. It having been decided as above on the preliminary issues, the issues on maintainability of the suit, cause of action etc, i.e. issues no.4 to 4D, were also decided in favour of the plaintiff and against the defendant.

7. As a consequence thereof, the suit of the plaintiff was decreed in his favour, with a direction to him to deposit the mortgage money of

Rs.6500/- within one month, after which the defendant would vacate the shop in dispute within 15 days, failing which the plaintiff would be at liberty to get the suit property in dispute vacated by due process of law.

8. Upon the present appellant- defendant having filed an appeal before the first appellate Court, the learned Additional District Judge, Sangrur, after noticing the pleadings of the parties and the issues framed, as also the evidence led by the parties, other than discussing the evidence led in favour of the mortgage deed by the plaintiff, noticed that the plaintiff as also DW2 Kashmira Singh had deposed that the disputed shop was occupied by the defendant as a tenant, and that at the time of his having taken the shop on rent from the plaintiff, in August 1989, the monthly rent was fixed @ Rs.325/- in the presence of this witness and other persons, including Kuldeep Singh and Bachitar Singh. The factum of the rent settled to be enhanced after every five years @ Rs.100/- per month, was also testified to by both witnesses.

As per the judgment of the first appellate Court, DW3 Kuldeep Singh also testified in the same manner, in favour of the defendant.

9. However, upon appraisal of the evidence, the learned Additional District Judge also concluded that with the mortgage deed having been duly proved to have been executed, but with no proof of any rent agreement, other than the oral testimonies of the defendants' witnesses, including the defendant himself, the rent agreement did not stand proved.

Consequently, the first appeal filed by the present appellant was dismissed.

10. After notice was issued in this second appeal, with an interim order directing that any execution proceedings pending would be adjourned to a date beyond the date given by this Court and that order having been

continued subsequently also, it is seen that an application was filed (CM-14339-C of 2014) by the plaintiff, seeking therein *mesne profits* from the appellant-defendant, as he continues to occupy the shop in dispute, execution proceedings having been practically stayed by this Court.

In the said application, it is stated that the plaintiff-respondent is a senior citizen aged 77 years and a “retiree” and further that the market rent of the shop currently is not less than Rs.1000/- per month (as in 2014). Notice having been issued in the said application on 02.12.2014, a reply thereto has also been filed by the appellant-defendant, reiterating therein that the mortgage deed is a camouflage to deprive the defendant from the protection available to a tenant under the Rent Act (The East Punjab Urban Rent Restriction Act, 1949). It has also been reiterated that the respondent-plaintiff (applicant in the application) is a well educated person and remained well settled throughout his life, having remained in a Government job from December 1964 to March 1999, when he was also an income tax assessee. He is also stated to be a Master in Business Administration, as per the appellant-non-applicant-defendant.

11. Thereafter, as recorded in the order of this Court dated 30.03.2015, learned counsel for the appellant had made a statement that the appellant is ready to pay Rs.500/- per month as *mesne profits* w.e.f. 2003, i.e. from the date of institution of the suit, upon which counsel for the respondent had sought time to get instructions, with the parties directed to be present in Court personally on the next date.

On 04.05.2015, learned counsel for the appellant had handed over a sum of Rs.72,000/- as *mesne profits* w.e.f. 2003 @ Rs.500/- per month to learned counsel for the respondent, as recorded in the order of that date.

The order further states that both learned counsel had stated that the matter be referred to the Mediation and Conciliation Centre of this Court and consequently, the parties were directed to appear in the Mediation and Conciliation Centre on 13.05.2015, to try and settle the matter amicably.

The mediation proceedings having failed, as per the report of the Director, Mediation & Conciliation Centre, dated 14.09.2015, the matter was referred back for adjudication.

Thereafter an order was passed on 27.07.2016, that if the *mesne profits* as have not been paid for the last one year are not paid by the next date of hearing, the interim order would be deemed to have been vacated.

It seems that the *mesne profits* agreed to be paid by the appellant, @ Rs.500/- per month, were thereafter paid regularly because no issue was raised thereon, except by learned counsel for the appellant, submitting that since they are being paid continuously, therefore the appeal may be heard expeditiously.

12. In the aforesaid background, it is first necessary to depict here the questions of law raised by learned counsel for the appellant in the grounds of appeal, which are as follows:-

- “i) As to whether the impugned judgments and decree are perverse and vitiated in view of the fact that the findings have been recorded without considering the relevant evidence?
- ii) As to whether the impugned judgments and decree are the result of ignoring the actual and factual position of the case as also of the peculiar facts and circumstances involved herein?
- iii) As to whether the learned courts below have failed to exercise the jurisdiction vested in them while not trying to lift the veil of the alleged transaction of mortgage?”

As a matter of fact, the sole question of law which actually arises for adjudication by this Court is at serial no.(iii) hereinabove, to the effect as to the whether actually the mortgage deed was a cover up for a rent agreement between the parties and therefore, whether a suit for possession after redemption of the mortgage amount, would be maintainable at all or not.

13. Addressing arguments, after referring to the facts of the case as contained in the pleadings of the parties, Mr. S. K. Singla, learned counsel for the appellant, first submitted that the plaintiff himself in his testimony as PW3, stated that he had given Rs.6500/- to the appellant-defendant. However, upon his pointing to the said part of the testimony (at page 64 of the lower Court record), which is in Punjabi, it is seen that what is recorded therein is that Rs.6500/- was given by the defendant, though the first letter in that sentence has seemingly been recorded incorrectly to show “I” (*Mayn*) instead of “to me” (*Maynu*). The second part however clearly states that it was given by the defendant (*Mudaila Nay Ditta Si*).

Hence, that contention is not acceptable and it may be stated so at this stage itself.

14. Learned counsel next drew attention to the testimony of PW2, i.e. deed-writer Raj Kumar, who in his cross-examination also deposed that there was no consideration paid in front of him.

He next drew attention again to the cross-examination of the respondent-plaintiff himself, wherein he first stated that the amount of Rs.6500/-had been received in the office of the Tehsildar by him but then corrected himself to state that it was actually received by him at home.

Thus, Mr. Singla submitted, that because it was stated in the mortgage deed, Ex.P1, that the mortgage amount had already been received at

home by the respondent-plaintiff, the plaintiff corrected himself to be “in tune” with the documentary evidence and that actually no mortgage money was ever paid to him by the appellant.

Learned counsel next drew attention to the testimony of the Registry Clerk, Gurdeep Singh (PW1), to the effect that no consideration is shown to have been paid in front of the Sub-Registrar. He therefore submitted that obviously the mortgage deed was actually just a sham transaction.

Learned counsel for the appellant submitted that in the light of the aforesaid testimony, the finding of the Courts below, holding that the mortgage was a true mortgage, is a wholly perverse finding.

15. He next reiterated what had been argued before the Courts below, to the effect that the respondent being a retired Government servant, possessing a degree of Master in Business Administration, he is obviously very well settled and therefore, it would not be believable that he would borrow Rs.6500/- from the appellant, who is a tailor, and in lieu of such a small loan would give a shop to him by way of a mortgage.

16. Controverting the aforesaid arguments on behalf of the appellant, Mr. J.L. Malhotra, learned counsel appearing for the respondent-plaintiff, referred to the reasoning given by the both the learned Courts below, to the effect that the mortgage deed had been duly proved by the testimonies of the plaintiff himself, the scribe of the deed, Raj Kumar (PW2), the attesting witness, Pawan Kumar and the Registry Clerk, Gurdeep Singh (PW1). He further submitted that the document being a registered document, such registration duly proved by the aforesaid witnesses, it would not be taken as a sham transaction, which having been entered into with open eyes by the appellant, who, other than the oral testimonies of himself and two other

witnesses, in respect of an oral rent agreement, could not produce even a receipt to show that any rent had been paid during the entire period that the shop remained with the appellant-defendant, till the time that *mesne profits* have now been paid during the pendency of the appeal, on the application of the respondent-plaintiff himself.

Mr. Malhotra submitted that in fact in the year 1990 the amount of Rs.6500/- was not such a small sum and therefore, it is not unbelievable that a person would mortgage a small shop for that much amount.

17. In support of his arguments, Mr. Malhotra relied upon a judgment of a Division Bench of this Court in **Vijay Kumar and another v. Punjab Financial Corporation and another** 2002 (3) CCC 304, wherein it has been held that when the terms of a contract have been reduced into writing, no evidence could be given in proof of the terms of that contract, except as per the written agreement itself.

In fact, learned counsel further submitted that the ratio of the judgment would be in consonance with Section 91 of the Indian Evidence Act, 1872.

He therefore submitted that both the courts below have made no error in holding that the transaction was actually a mortgage, duly reduced into writing vide a registered document and as such, upon payment of the mortgage amount of Rs.6500/-, which the respondent-plaintiff has already deposited pursuant to the directions of the learned Additional Civil Judge as per his judgment and decree, this appeal deserves to be dismissed.

18. Having considered the arguments of both learned counsel, as also the judgments of the learned Courts below, what is clear is that the mortgage deed was most definitely entered into, duly registered by the parties on

23.08.1990, as proved by the plaintiffs' witnesses including the Registry Clerk, even though only secondary evidence could be led by him, with the original mortgage deed alleged to have been in the possession of the appellant herein (defendant).

18-A The question therefore is only whether the mortgage deed was in respect of a genuine mortgage, or was to actually secure the property of the plaintiff by actually inducting the appellant-defendant, as a tenant in the shop in question.

Again undoubtedly, other than the oral evidence of the appellant himself, as also of DWs2 and 3, Kashmira Singh and Kuldeep Singh, there is no documentary proof of the tenancy; either in the form of any rent agreement, or even by way of any rent receipts with regard to rent paid by the appellant to the plaintiff.

If viewed wholly from that perspective, then there would be no reason to hold that the transaction between the parties to the *lis* was not in respect of a mortgage entered into for a sum of Rs.6500/-, paid by the appellant to the respondent-plaintiff, to secure which the shop of the respondent-plaintiff was mortgaged with the appellant-defendant.

With the appellant having signed the mortgaged deed, Ex.P1, in the presence of witnesses, with the deed also registered in the office of the Sub-Registrar, Sunam, it cannot be said that he did not sign the document with open eyes.

As such, this Court would have no reason to not hold that the appellant was simply backing out of his part of the contract, of returning the shop upon the mortgage amount being paid to him.

19. However, the issue is not as simple, in view of the fact that the

law settled is that the Court is actually required to go into the nature of the transaction, practically by lifting the veil, to determine as to whether what was shown to be a mortgage, even by a registered mortgage deed, was indeed that or was actually a security measure for an oral rent agreement that was never reduced into writing in any manner.

In the judgment of the Supreme Court in **Magala Kunhamina Umma and others v. Puthiyaveettil Paru Amma and others** AIR 1971 SC 1575, 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...”.

In **Puzikkal Kuttappu v. C. Bhargavi** 1977 CLJ 8, it was held that in construing a document, it is necessary to see the intention of the party executing it and that the intention has to be seen from the recitals and the terms of the entire document and surrounding circumstances, and where there are some mixed elements in a 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.

20. In the present case, it is the contention of learned counsel for the appellant-defendant that the respondent being a very well qualified retired Government servant, he cannot be expected to have taken a loan of Rs.6500/- from the appellant, the latter being a tailor, and that too by mortgaging a shop to him for such a small sum.

The contention of Mr. Malhotra, learned counsel for the respondent-plaintiff, on the other hand, is that Rs.6500/- was not such a small sum in 1990 and as such, there is nothing unbelievable about the mortgage.

21. Though this Court may otherwise have accepted that indeed Rs.6500/-, even in the year 1990, was not a large enough sum for a Government servant to have mortgaged his shop to a tailor, however, with neither any evidence on the value of the property having been led by the appellant-defendant, nor on the income of the respondent-plaintiff at the time when the suit property was mortgaged, then simply on the oral evidence of the appellant-defendant, it would be difficult for this Court to hold that the amount of Rs.6500/- was wholly dis-proportionate to the value of the property, at a time when, due to the circumstances then prevalent in Punjab, value of properties was rather low.

22. It is necessary to notice here that this Court (this Bench) in RSA no.3047 of 2012, decided on 20.09.2016, has held that the mortgage executed in that case was actually not a mortgage but the transaction between the parties was a rent agreement and as such, despite the mortgage deed being a registered document, entered into with open eyes by the defendant in that *lis*, he could not be ousted simply on the payment of what was contended to be the mortgage amount.

However, in that case, there was specific evidence shown to be led that the plaintiff - landlord was a retired Director of Health Services, Haryana, and was also shown to have been owning many such properties which he had similarly rented out/"mortgaged". It was also shown from the cross-examination of the plaintiff-landlord in that case, that as a retired Director from the Health Department, he was receiving Rs.15,000/- per month as pension and that he had also worked as a part time medical practitioner at Ambala, after his retirement, other than having taken up a private job in a good position. Thus, it was held that a man in that position would not

normally mortgage his shop for a sum of Rs.3000/-, taken as a loan from the defendant therein.

Therefore, in view of the evidence specifically led with regard to not just the status of the plaintiff-landlord in that case, with even his income and ownership of other properties having been shown, this Court had come to a conclusion, agreeing with the judgment of the learned trial Court in that case (and disagreeing with that of the first appellate Court), that the transaction in question was actually a rent agreement but given the appearance of a mortgage.

23. In the present case though, to repeat, otherwise this Court may not disbelieve that Rs.6500/- even in the year 1990 was not probably such a large sum for which a government servant would mortgage his property, yet in the absence of any evidence led with regard to the actual income of the appellant-plaintiff in the year 1990 and his financial condition at that time, nor with regard to the value of the shop at that time, this Court would not like to interfere with the judgments and decree of the learned Courts below.

24. Consequently, in view of the aforesaid discussion, I find no merit in this appeal, which is therefore dismissed but with the parties left to bear their own costs.

July 4, 2017
dinesh

(AMOL RATTAN SINGH)
JUDGE

1. Whether speaking/reasoned?	Yes
2. Whether reportable?	Yes