IN THE PUNJAB & HARYANA HIGH COURT AT CHANDIGARH

RSA-3465-2016(O&M)
Date of decision : 20.04.2017

Ashutosh Modi

... Appellant

Versus

Lachhman Dass

... Respondent

CORAM: HON'BLE MR. JUSTICE AMOL RATTAN SINGH

Present: Mr.Sanjiv Gupta, Advocate
for the appellant.

AMOL RATTAN SINGH, J.(ORAL)

1. This is the second appeal of the defendant, after the suit filed by the respondent-plaintiff, seeking redemption/ possession of the suit property was decreed in his favour, with the first appeal filed by the present appellant having been dismissed by the learned Additional District Judge, Fazilka.

2. The facts, taken from the judgments of the learned Courts below, are that the respondent-plaintiff (hereinafter referred to as a plaintiff), had contended in his plaint that he had one shop measuring 280 square feet being a $1/4^{th}$ share out of a total area measuring 184 square yards and 4 square feet contained in khasra number 1170, khewat no.509, khatauni no.942, situated at Circular Road, Abohar, (as was more fully described in the plaint).

It was contended that the appellant-defendant (hereinafter referred to as the defendant) had taken possession of the suit property pursuant to a mortgage deed executed on 17.09.2003, for an amount of

₹5000/- and he had been in occupation thereof since then, carrying on his business under the name and style of M/s Shri Balaji Machinery Store.

The mortgage deed was duly registered at the office of the Sub Registrar, Abohar, on 24.09.2003, with both the parties signing the deed. As per the terms and conditions of the mortgage, the plaintiff was entitled to redeem it at any time by paying the mortgage money in a lump sum.

Thus, with the intention to redeem the suit property, the plaintiff had tendered a sum of ₹5000/-, i.e. the mortgage money, to the appellant herein on 07.04.2008, requesting him to deliver vacant possession of the shop in question but he did not pay any heed to the request of the plaintiff, even after notice by registered post was issued to him on 08.04.2008. Consequently, the suit was instituted on 24.04.2008.

3. Upon notice being issued, the appellant herein put in his appearance and opposed the suit by filing a written statement taking preliminary objections of concealment of true facts and estoppel on account of the plaintiffs' own act and conduct.

The other averments in the plaint are also stated to have been denied, as per the judgment of the learned trial Court, i.e. the Civil Judge (Junior Divisioin), Abohar.

4. Upon 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 that Court:-

> *"1. Whether plaintiff is entitled to redemption/possession as prayed for ?OPP*
>
> *2. Whether plaintiff is entitled to injunction as prayed for?OPP*
>
> *3. Whether plaintiff has concealed any material fact*

from the Court. If so to what extent?OPD

4. Whether this Court has no jurisdiction to try the suit?OPD

5. Whether plaintiff has no cause of action to file the suit?OPD

6. Relief."

5. In support of his claim, the plaintiff examined five witnesses including the Registration Clerk (PW1 Ram Singh), the document writer of the mortgage deed (PW2 Krishan Kumar Goyal), himself, a draftsman, in the context of the site plan of the suit property (PW4, Raj Kumar) and one Ragunandan Lal, who was an attesting witness to the mortgage deed.

6. The appellant examined one Mahesh Chander to prove the 'collector rates' in respect of the properties in the area between 2003-2013, Jaspal Singh, a Clerk in the Municipal Council (DW2), a property advisor, Pawan Kumar (DW-3) and the appellant (defendant) himself, as DW4.

7. The primary plea of the present appellant/defendant was that the relationship between the parties was that of tenant and landlord and as such the mortgage deed was actually a sham document.

On this contention, the learned Civil Judge found that the mortgage deed, Ex.P1, had been duly proved by both, its deed writer, PW2, as also the attesting witness thereto, Ragunandan Lal (PW5). The plaintiff himself also obviously deposed in favour of the mortgage deed.

The contention of the present appellant that it having been registered one week later to its date of execution proved that it was 'a fake document', was repelled by the learned trial Court, holding that subsequent registration of a document does not take away its authenticity, if otherwise duly proved. That was in the instant case held to be more so, with the appellant in fact having admitted as DW4, that he had gone to the Court for the purpose of executing a rent deed and had signed the document there, which was however not read over and explained to him. It was held that, hence, obviously the execution of the document itself was not denied by even the appellant-defendant.

As regards his contention that he had signed it presuming it to be a rent deed, that was repelled by the learned trial Court, holding that the appellant herein was not shown to be an illiterate person and therefore it could not be accepted that he did not know what he was signing.

Consequently, the mortgage deed further being a registered document, its execution was held to be duly proved.

8. A judgment of this Court in ***Radhey Sham and others vs. Kaushalaya Devi, 1984, Haryana Rent Reporter, 368***, which was cited on behalf of the present appellant to the effect that once it was shown that rent was being paid, then the relationship of the landlord and tenant stood established, was repelled by the learned Civil Judge, holding that in that case the defendant had even got the assessment of house tax proved and in fact objections had been raised by the plaintiff in that case with regard to the assessment of rent before the assessing authority, qua such house tax.

Some copies of account books showing therein payments made by the present appellant were also rejected by the first Court, on the ground that the present appellant had admitted in his cross-examination that all the account books were prepared by his father, but even the father was not examined.

Hence, it was held that a simple withdrawal of an amount which was paid to the plaintiff could not be proved to be money paid by way of rent.

9. The contention with regard to payment of ₹65000/- by the present appellant to the son of the plaintiff, without interest, in respect of which the receipt, Ex.D1, was also proved by the present appellant, was also rejected on the ground that nothing could be read into the receipt to hold that the said amount was given by way of security regarding a tenanted shop and a mere assertion to that effect could not also be held to be proof of tenancy, as it could also be a financial dealing on any other account.

10. As regards the contention of the present appellant that the rates of the property were much higher and therefore it could not be assumed that a shop would be mortgaged for a small amount of ₹5000/-, that too was rejected, on the ground that simply producing the collectors' rate of the area did not prove the property rates in the face of the fact that the plaintiff had deposed in cross-examination that his annual income was ₹44,000/-. Thus it was held that it cannot be said that he could not approach the appellant seeking a loan of ₹5000/- only, in lieu of which he mortgaged his property to him.

Further, the plaintiff not having been further cross-examined on that issue, it could not be held that the plaintiff was not in need of ₹5000/- on the date of execution of the mortgage deed.

Still further, with the appellant-defendant in his own affidavit also having stated that at the time he took the shop, the condition of the structure was very poor, and thereafter he had spent money for its construction and renovation, it was held by the trial Court that it further showed that the plaintiff was in need of money and that the shop had been mortgaged for a small amount even due to its condition.

11. On the aforesaid reasoning, holding that the mortgage was a

usufructuary one, with possession admittedly handed over to the appellant-defendant, the plaintiff was held entitled to get it redeemed upon payment of the mortgage money.

12. Issues no.1,2 & 4 having been taken up together, the 4th one being with regard to jurisdiction of the Civil Court, in the light of the aforesaid finding it was held that the tenancy not having been proved, for redemption of mortgage the suit was maintainable and consequently, issues no.1, 2 & 4 were decided in favour of the respondent-plaintiff. The ancillary issues of concealment of facts and lack of cause of action are also shown to have not been pressed and therefore decided in favour of the plaintiffs.

13. Consequently, the suit of the plaintiff was decreed with a direction to the appellant herein that upon the plaintiff depositing the mortgage amount of ₹5000/- in the Court within a period of 2 months from the date of the judgment, he would hand over the possession of the suit property to the plaintiff within 15 days thereafter and also get the mortgage deed cancelled.

14. In the first appeal filed by the appellant herein, the learned Additional District Judge, after noticing the pleaded facts including what was not noticed in the judgment of the lower Court, to the effect that the appellant-defendant and his mother had spent about ₹1,25,000/- on the construction and improvement of the shop, eventually also came to the same conclusion as had the trial Court.

The first appellate Court also noticed that the specific contention of the appellant herein was that he was paying rent at the rate of ₹2000/- per month to the plaintiff but had not been issued any receipts. Yet, the account book maintained by the father of the appellant was also rejected on the same ground, that the father was never examined.

15. Thus, eventually on the same reasoning as was given by the learned Civil Judge, the first appellate Court also dismissed the appeal of the present appellant.

16. Before this Court, Mr. Sanjiv Gupta, learned counsel for the appellant-defendant, relied upon a judgment of the Supreme Court in ***Nirmal Chandra vs. Vimal Chand, AIR 2001 SC 2284,*** to submit that a mortgage deed cannot be accepted to be one at face value, and even in the absence of a rent deed, with no proof of rent shown to have been paid, it can still be considered to be an agreement of tenancy.

Hence, learned counsel contended that with the mortgage amount shown to be only ₹5000/-, it cannot be expected that the deed was a genuine one but was in fact a 'cover up' for a rent deed and was executed only by way of security.

Learned counsel further contended that the Courts below wrongly rejected the contention of the appellant that payment of rent was duly reflected in the register / account books produced, with monthly rent shown to be paid therein @ ₹2000/- per month.

17. Having considered the aforesaid arguments, at the outset it must be observed that without a doubt, the law settled is that a mortgage deed cannot be accepted at its face value and the Court is required to go into the issue of whether it is a cover up for a rent agreement or not.

In this regard, a judgment of the Supreme Court in ***Puzhakkal Kuttappu vs. C.Bhargvee, 1977 CLJ 8*** can be cited.

However, in the present case, though at first blush it does appear that ₹5000/- is a highly inadequate amount for a shop to be mortgaged for, however, I find myself unable to disagree with the learned Courts below to the effect that with the appellant-defendant himself having admitted that the shop in question was in a very dilapidated condition and he and his mother had spent ₹1,25,000/- for its renovation, and nothing shown even before this Court to the effect that the contention of the respondent-plaintiff that his annual income was only ₹ 45,000/-, was disbelievable, the finding of those Courts cannot be said to be erroneous.

With the earning of the respondent-plaintiff being only ₹45,000/- per annum, i.e. less than ₹4000/- per month, even though that may be difficult to accept at face value, however, with no rebuttal thereto, it is not difficult to accept that a dilapidated shop of the size of 280 square feet, may indeed have been mortgaged for a small sum. Thus, even though ₹5000/- may be considered too paltry a sum for a shop to be mortgaged for, but with the appellant-defendant also not having been able to prove any kind of payment of rent, even to the extent of the hand written account register, with the author of the register, i.e. the father of the appellant, not having testified to its correctness, I see no reason to interfere with the judgments of those Courts.

Consequently, this appeal is dismissed, but with no order as to costs.

(AMOL RATTAN SINGH)
JUDGE

April 20, 2017.
Davinder Kumar

Whether speaking / reasoned	Yes/No
Whether reportable	Yes/No