IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

RSA Nos.2896 & 2897 of 2017 (O&M)
Date of Decision:11.08.2017

Ritu

...Appellant

Versus

Pardeep Kumar and others

...Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr. Ashok Arora, Advocate
for the appellant.

ANIL KSHETARPAL, J.

CM-7239-C of 2017

Application allowed. Documents attached are taken on record.

CM-7240-C of 2017

This is an application for bringing on record legal heirs of respondent No.3-Hukmi who is stated to have died on 10.03.2010. Application is allowed subject to just exceptions. Legal heirs of Hukmi mentioned in para No.3 of the application are brought on record for the purpose of prosecuting this appeal only.

Main case

Defendant No.2 is appellant in the Regular Second Appeals against the concurrent finding of fact arrived at by the Courts below.

Plaintiff had filed a suit for recovery on the basis of a registered mortgage deed dated 20.05.2008 executed by defendant No.1 Hukmi son of Sh. Sita Ram mortgaging 29 Kanal 01 Marla land as security for repayment of loan. Plaintiff had asserted that after taking the loan, defendant No.1 did not repay the amount. Plaintiff further asserted that the defendant No.1 Hukmi with dishonest intention in order to defeat the rights of the plaintiff transferred 23 Kanal 04 Marla of land by registered sale deed. Plaintiff further stated that a criminal case was registered against the defendants. He further asserts that the sale of the land shall not affect his rights as a mortgagee.

Defendant Hukmi did not appear and was proceeded against ex parte. Appellant-defendant No.2 filed written statement contesting the suit. Defendant No.2 denied that defendant No.1 executed any registered mortgage deed.

The learned trial Court after appreciating the evidence available on the file decreed the suit filed by the plaintiff. A decree of Rs.20 lacs along with interest at the rate of 12% per annum from 20.05.2008 till its actual realization was passed. Two appeals were preferred, one by defendant No.2-appellant and second by the plaintiff. Learned first Appellate Court also, after reappreciating the evidence available on the file, dismissed the appeal filed by the appellant-defendant No.2. Whereas the appeal filed by plaintiff was allowed on the ground that it is commercial transaction and hence, trial Court had no power to reduce the agreed rate of interest on the loan which was 24% p.a.

Appellant-defendant No.2 has filed these two appeals. Counsel for the appellant has submitted that the mortgage deed is not proved on the file. He has submitted that the attesting witnesses of the mortgage deed have not been examined.

Plaintiff to prove the mortgage deed, produced original mortgage deed as Ex.P1 and also produced copy of affidavit dated 11.08.2008 executed by Hukmi admitting the mortgage deed as Ex.P4. Plaintiff also produced copy of death certificate of Shamsher Singh, one of the attesting witnesses.

The execution of mortgage deed was not denied by Hukmi, who had purported to have executed the mortgage deed.

Section 68 of the Evidence Act (for short , the Act) provides as under:

> *"68. Proof of execution of document required by law to be attested.—If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least 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 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied."*

It is clear from the reading of proviso to Section 68 of the Act that examination of attesting witnesses shall not be necessary except in a case of Will, if the document is registered and its execution by the person by whom purported to have been executed specifically denies the execution.

In the present case, Hukmi is said to have executed the mortgage deed. Hukmi neither filed written statement to contest the suit nor stepped into witness-box to deny execution of the mortgage deed. Original mortgage deed has been produced on the file. One of the attesting witnesses had died. Hukmi had also sworn in an affidavit admitting the correctness of the mortgage deed. In these circumstances, the argument of the learned counsel for the appellant cannot be accepted. Further, a reading of the judgment passed by the trial Court as well as the first Appellate Court shows that no argument regarding whether mortgage deed is proved or not was never taken before the Court below.

Learned counsel for the appellant has further submitted that during the pendency of the suit, Hukmi had died and, therefore decree is against the dead person.

I have considered the submission, however, I am unable to agree. Hukmi was alive on the day when the suit was filed. Hukmi was served with the summons. Hukmi did not choose to contest. Defendant No.2 had contested the suit. In these circumstances, the death of Hukmi during the pendency of the suit would not make any difference because it was the duty of legal heirs to come on record and contest the suit. Till date, the legal heirs of Hukmi have not chosen to put in appearance and object to the decree having been passed. Defendant No.2 has no locus to take such an objection.

Learned counsel for the appellant has further submitted that the appellant is the bona fide purchaser for valid consideration, hence, the land sold to her be protected.

I have considered the submission. Hukmi had mortgaged the property in favour of the plaintiff. The appellant/defendant No.2 had purchased the property thereafter. Sale of property, which is under mortgage, is always subject to the rights of mortgagee. In view thereof, there is no merit in the submission of learned counsel for the appellant.

The judgment and decree passed by the Courts below do not suffer from any error.

Finding no merit, both the Regular Second Appeals are dismissed.

(ANIL KSHETARPAL)
11.08.2017 **JUDGE**
Parveen Kumar

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