

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

CR No.7790 of 2016 (O&M)

Date of Decision: July 03, 2019

Davinderpal

.... Petitioner

Versus

Kanwardeep Singh

.... Respondent

CORAM: HON'BLE MR. JUSTICE SUDIP AHLUWALIA

Present: Mr. Rajan Bansal, Advocate for the Petitioner.

Mr. Preetwinder Singh Dhaliwal, Advocate for the
Respondent.

SUDIP AHLUWALIA, J.

This Revisional Application is directed against the Judgment dated 27.10.2016 passed by the Ld. Appellate Authority, Barnala in Rent Appeal No.05 of 2015 affirming the Judgment of the Rent Controller, vide which the Eviction Petition filed by the Respondent/Landlord under Section 13 of the East Punjab Urban Rent Restriction Act, 1949 had been allowed.

2. The Eviction Petition had been filed on behalf of Respondent/Landlord seeking eviction of the Petitioner/Tenant on the grounds that he had defaulted in payment of rent for the period between 1.4.2010 to 31.5.2012, and that the Landlord required the demised premises for his own use and occupation, since he was an unemployed Graduate without any source of income; and he was a Student of Law, but had to leave his studies on account of an accident; but after regaining his health he was not in a position to continue to resume his studies, and wanted to start his own business

being an already married man with one daughter.

3. It was also pleaded in the Eviction Petition that after having defaulted in payment of rent, the Tenant had filed a Civil Suit on false allegations against the Landlord on 15.4.2011, in which, he had falsely and motivatedly claimed the rate of rent being at Rs.1200/- per month instead of actual rent of Rs.3000/- per month. In addition, it was also pleaded that with ill-intention and greed, the Tenant/present Petitioner had got executed a Deed of Mortgage from the Landlord in his favour for a mortgage amount of Rs.10,000/- on 16.5.2011, which was got registered on 6.6.2011, but had thereafter resiled from its contents and on the contrary, had filed an Application under Order 39 Rule 2-A of the Code of Civil Procedure with a view to harass the Landlord for his alleged violation of the Injunction Order granted in the said Civil Suit filed on 15.4.2011.

4. Both the Ld. Courts below held that the present Petitioner/Tenant was not liable to be evicted on the ground of default in payment of rent, since he had admittedly paid up the entire arrears and current rent till the disposal of the Eviction Petition. He was nevertheless found liable to be evicted since the Respondent/Landlord had been able to make out a successful case of bonafide personal necessity of the demised premises for occupation by himself and his family. The evidence led on behalf of the Landlord in this regard went virtually unchallenged.

5. The Eviction Petition was nevertheless strongly resisted on behalf of the Petitioner/Tenant on the ground that after execution of the registered Mortgage Deed as referred to in the preceding

Paragraph, the relationship of Landlord-Tenant between the parties *interse* came to an end and the Tenant therefore, became a Mortgagee in respect of disputed premises, the possession of which therefore, could be taken by the Mortgagor/Respondent only by way of its redemption, and not through an Eviction Petition under Section 13 of the East Punjab Urban Rent Restriction Act. Both the Ld. Courts below however, did not find any substance in the contention raised on behalf of the Tenant and held that the Eviction Petition was maintainable, since the Landlord-Tenant relationship between the parties continued to subsist.

6. At the outset, it may be mentioned that determination of the existence of Landlord-Tenant relationship by both the Courts below essentially remains confined to a question of fact, and findings in this regard having gone concurrently in favour of Respondent/Landlord, this Court in its Revisional Jurisdiction is not expected to interfere with such findings on factual issues. It has however, been stressed on behalf of the Petitioner/Tenant that the decisions of both the Ld. Courts below in this respect are manifestly perverse, and contrary to the settled principles of law. As such, it would be appropriate to first take note of the reasonings of both the Ld. Courts below, on the basis of which, they had come to the same conclusion, that the Landlord-Tenant relationship between the parties did continue inspite of execution of disputed Mortgage Deed dated 16.5.2011. The relevant observations of the Rent Controller in his impugned Judgment are set out below -

“13. *The main controversy in this case is that one document has been executed between the parties which is Ex.R1 on the*

file. This is a mortgage deed and it is a registered document. Now this court has to see that whether this document was ever acted upon or not or by way of this document, whether tenancy between the parties was terminated? First of all, document is without consideration because respondent in his cross examination, himself admitted the fact that no money was paid at the time of execution of this document.

- 14.** *From the circumstances and from the evidence, it is also proved that this document is a sham document and it was executed just for the purpose of security and circumstance shows also this document is sham document, for e.g. admittedly one civil suit was filed by the respondent against the plaintiff on 16.4.2011 which was ultimately decided on 17.2.2014. In that suit, the present respondent himself filed the suit on the ground that he is a tenant in the property in question and up to 17.2.2014, he did not shift his stand qua the tenancy. Copy of written reply is proved as Ex.A3, copy of plaint is proved as Ex.A4 and these documents are not disputed by the respondent. During the pendency of that suit, another application was moved by the present respondent under order 39 rule 2(a) CPC for violation of the order of the court and that application was also withdrawn on 12.3.2014. Meaning thereby, up to 17.2.2014 and up to 12.3.2014, the present respondent did not bother to plead mortgage deed in the judicial proceedings which were pending up to 12.3.2014. Meaning thereby, Ex.R1 was never came into picture till 12.3.2014. Surprisingly, applicant examined himself on 25.2.2014 and on that day, applicant under order 39 rule 2(a) CPC was pending in which respondent himself pleaded that he is a tenant in the property. Meaning thereby, after filing of this petition and after filing of reply he pleaded that he is a mortgagee in the property but did not amend his pleadings in the civil suit as well as in the application under order 39 rule 2(a) CPC and as per the law, no person can be allowed to “blow hot and cold”, “fast and loose” or*

*“approve and reprobate” at the same time and qua this law has been laid down by the Hon'ble Supreme Court of India in case titled as **M/s Cauvery Coffee Traders, Mangalore Vs. M/s Hornor Resources (Intern.) Co. Ltd., reported in 2011(4) Civil Court Cases 723 (S.C.)**.*

15. *Further more, in this petition when respondent denied his relationship of landlord and tenant, then he should not have tendered the rent. Further more, the rent was tendered on 19.2.2013. Meaning thereby, he indirectly admitted the relationship of landlord and tenant between the parties.*

16. *In this petition, another fact is also very important because as per the basic law, mortgage deed is required to be attested and as per section 68 of Indian Evidence Act, the documents which are required to be attested, must be proved by examining one attesting witness but in this case, no attesting witness has been examined by the respondent. Hence, mortgage deed Ex.R1 cannot said to be proved.”*

7. The Ld. Appellate Authority in upholding the decision of the Rent Controller recorded its findings as below -

“14. *This petition is filed by the landlord on the ground that respondent/tenant took the shop in dispute on rent on 26.2.2010 @ Rs.3000/- PM and a written rent note was executed. Respondent admitted this fact in reply of para no.1 but disputed the rate of rent as Rs.1200/- instead of Rs.3000/-. The respondent/tenant admitted that a written rent note was executed. The written rent note is brought on record is Ex.A1. This rent note is on a stamp paper, which was purchased by tenant Devinderpal. Perusal of rent note Ex.A1 reveals that rate of rent was Rs.3000/- PM. The respondent filed a civil suit on 16.4.2011 against petitioner Kanwardeep Singh and his father Jagtar Singh for permanent injunction to restrain them from taking possession of the shop in question illegally and forcibly.*

Copy of plaint is brought on record as Ex.A4. In this plaint the respondent/tenant claimed that he is tenant in the premises in dispute @ Rs.1200/- PM. Devinderpal respondent appeared in the witness box as RW1 and his affidavit is Ex.RW1/A where he also admitted that he took the shop on rent from the petitioner but @ Rs.1200/-PM. So initially entry of respondent in the premises in dispute was as a tenant and he admitted this fact in the plaint filed by him against the petitioner and his father. During cross examination filing of this suit for permanent injunction is admitted by the respondent and he also admitted copy of plaint Ex.A4 and he also admitted that he mentioned this fact in the plaint that he took the shop in dispute on rent from the petitioner. This suit was filed on 15.4.2011. This suit for permanent injunction filed by the respondent/tenant remained pending up to 17/2/2014. Ex.A3 copy of written statement filed by the petitioner and Ex.A4 copy of plaint of suit no.45 of 18.4.2011 filed by the respondent/tenant reveals that suit for permanent injunction was decided on 17.2.2014. Hence up to 17.2.2014 tenant/respondent never taken the plea that he is in possession of the shop in question as a mortgagee on the basis of mortgage deed dt. 16.5.2011. So up to 17.2.2014 claim of respondent was of a tenant and not of a mortgagee.

- 15.** *The respondent Davinderpal also filed a contempt petition u/o 39 rule 2A CPC which was registered as a Civil Misc. Application no.13 of 12.9.2011 and decided on 12.3.2014. Copy of the same is Ex.A4 (double marking). In this application u/o 39 rule 2 A CPC, respondent claimed himself to be as a tenant in the shop in dispute. During the cross examination, this fact is admitted by the respondent about filing of application u/o 39 rule 2A CPC and also admitted that he mentioned in this application that he never took the shop in dispute under mortgage and he did not pay the mortgage amount and this mortgage deed was got prepared forcibly from him. This conduct of the respondent reveals that he remained in possession of the*

shop in dispute as a tenant under the petitioner/landlord Kanwrdeep Singh inspite of execution of mortgage deed dt. 16.5.2011, copy of which is Ex.R1. However, petitioner/landlord has admitted that he received an amount of Rs.10,000/- from the respondent on 16.5.2011 in pleadings of his written statement Ex.A3. But this mortgage deed was never acted upon as the respondent did not withdraw his suit inspite of execution of Ex.R1 and did not desert his status of tenant in the premises in dispute and he did not get amended his pleadings of previous suit for permanent injunction and even he filed the application u/o 39 rule 2A CPC on 12.9.2011 even after the execution and registration of the mortgage deed dt. 16.5.2011 which was registered on 6.6.2011. In this case both the parties changed their respective stands. Petitioner took the stand of mortgagor and mortgagee in the written statement filed to the suit for permanent injunction filed by respondent/tenant and copy of the written statement is Ex.A3. Present ejectment petition was filed on 14.5.2012 when the respondent did not withdraw his previous suit for permanent injunction. So the petitioner/landlord reverted back to the initial situation when respondent/tenant failed to give effect to the mortgage deed Ex.R1 as he failed to withdraw his suit filed by him on the basis of tenancy. So learned trial court has rightly concluded the relationship of landlord and tenant between the parties.

- 17.** *As the petitioner landlord has admitted during cross examination as well as in the pleadings of previous litigation that he received an amount of Rs.10,000/- under the mortgage deed but mortgage deed was never acted upon. Both the parties admitted the execution of mortgage deed dt.16.5.2011 and copy of the same is Ex.R1. Copy of mortgage deed is produced by the respondent/tenant and if this mortgage deed was executed to give effect then the original mortgage deed must be in possession of mortgagee/tenant/respondent. Hence the respondent is entitled to get back his amount of Rs.10,000/- or petitioner*

is at liberty to adjust this amount out of rent due against the respondent.”

8. Regarding the observations of the Rent Controller in Para 16 of its impugned judgment as reproduced above, it has been contended on behalf of the Petitioner/Tenant that the disputed Mortgage Deed (Ex.R-1) cannot be considered as having not been proved in accordance with Section 68 of the Indian Evidence Act, since in his original Eviction Petition itself, the Respondent/Landlord had himself admitted about its execution and as such, no further proof is required of facts, which are admitted. Reliance in this regard has been placed upon the decisions of this Court in **“Parkash Kaur and others Vs. Joginder Singh and others”**, 2018(1) R.C.R. (Civil) 145 and of Delhi High Court in **“Hukam Singh Through Lrs. Vs. Badri Pershad Tandon/shri Sohan Lal”**, 2011(7) R.C.R. (Civil) 2573.

9. It has been furthermore contended that admittedly, the Mortgage Deed (Ex.R-1) was got registered on 6.6.2011 and therefore, automatically it carries with it the presumption of having been executed validly. To support this contention, the decisions of Supreme Court in **“Jamila Begum (D) Thr. Lrs. Vs. Shami Mohd. (D) Thr. Lrs. & Another”**, 2019(1) R.C.R. (Civil) 387 and of Gauhati High Court in **“Subodh Nath & Ors. Vs. Fulu Rani Devi & Ors.”**, 2015(59) R.C.R. (Civil) 345 have been cited.

10. This Court is also in agreement with the above noted contentions, since the execution of the Mortgage Deed was itself pleaded on behalf of Respondent in his Eviction Petition, and its registration is also an admitted fact. To that extent, the observation of

Rent Controller to the effect that it has not been proved in accordance with Section 68 of the Indian Evidence Act is also erroneous.

11. We are, however, to test the merit of the Petitioner's contentions qua his status as having been transposed to that of the 'Mortgagee' in place of the original 'Tenant' as a consequence of the disputed Mortgage Deed, in the light of the conduct of the parties after execution of the said Deed. Ld. Counsel for Petitioner from his side has referred to following decisions of Apex Court and Bombay High Court respectively in this regard -

i) Tara Chand Vs. Sagarbai @ Chaiyalibai, 2007(2)

R.C.R. (Civil) 870 (Supreme Court);

ii) Shah Mathuradas Maganlal and Co. Vs. Nagappa

Shankarappa Malaga and ors, 1976 R.C.R. (Rent)

866 (Apex Court);

iii) Nivruti Dnyanu Patil, Age 44 years Resident of

Budhgaon, Taluka : Miraj, District Sangli Vs.

Shankar Krishna Bhagat-Patil (Since deceased

through his legal heirs representatives) (a) Uttam

Shankar Bhagat-Patil, (b) Hirabai Bhagat Daund,

2018(3) R.C.R. (Civil) 523 (Bombay High Court);

12. In all the above three decisions, it was held that where the demised property in which, the concerned party was originally a Tenant, was mortgaged with him by the Landlord, his erstwhile status of a Tenant and even the Statutory protections available to him as such stood extinguished, and he was to be regarded only a Mortgagee thereafter.

13. It was further contended by Ld. Counsel for Petitioner that the Mortgage Deed being a registered document, it cannot be invalidated in the absence of a regular Deed of Cancellation, since the effect of a registered instrument cannot be curtailed by any oral or unregistered Agreement between the parties. To support this contention, the decision in “**Kishan Chand Vs. Amar Singh**”, 2015(3) R.C.R. (Civil) 507 was relied upon, in which, a Coordinate Bench of this Court had in relation to a registered Sale Deed, held that its cancellation could not have been done by way of an unregistered document even in a situation where the parties had mutually agreed to revoke the Sale Deed.

14. Thereafter, Ld. Counsel for Petitioner has relied upon a Single Bench decision of Patna High Court in “**Ram Jyoti Devi Wife of Late Gyanchand Sahni, Resident of Village Godhna, P.O. Godhna, P.S. Bachhwara, District Begusarai & Ors. Vs. Ram Bilas Sahni Son of Late Gopi Sahni, Resident of Village Godhna, P.O. Godhna, P.S. Bachhwara, District Begusarai & Ors.**” 2018 AIR (Patna) 45, in which, the Execution Case for delivery of possession of mortgaged property was dismissed by holding that such execution of mortgaged property would not be maintainable in the absence of any decree for redemption.

15. Ld. Counsel for Petitioner has also drawn attention of the Court to the provisions pertaining to rights of the mortgagor to redeem a mortgage as provided under Section 60 of the Transfer of Property Act, 1882, which is set out as below -

“60. Right of mortgagor to redeem.—At any time after the principal money has become [due], the mortgagor has a

right, on payment or tender, at a proper time and place, of the mortgage-money, to require the mortgagee (a) to deliver [to the mortgagor the mortgage-deed and all documents relating to the mortgaged property which are in the possession or power of the mortgagee], (b) where the mortgagee is in possession of the mortgaged property, to deliver possession thereof to the mortgagor, and (c) at the cost of the mortgagor either to re-transfer the mortgaged property to him or to such third person as he may direct, or to execute and (where the mortgage has been effected by a registered instrument) to have registered an acknowledgement in writing that any right in derogation of his interest transferred to the mortgagee has been extinguished:

Provided that the right conferred by this section has not been extinguished by act of the parties or by [decree] of a Court.

The right conferred by this section is called a right to redeem and a suit to enforce it is called a suit for redemption.

Nothing in this section shall be deemed to render invalid any provision to the effect that, if the time fixed for payment of the principal money has been allowed to pass or no such time has been fixed, the mortgagee shall be entitled to reasonable notice before payment or tender of such money.

Redemption of portion of mortgaged property.—
Nothing in this section shall entitle a person interested in a share only of the mortgaged property to redeem his own share only, on payment of a proportionate part of the amount remaining due on the mortgage, except [only] where a mortgagee, or, if there are more mortgagees than one, all such mortgagees, has or have acquired, in whole or in part, the share of a mortgagor.” (Emphasis added)

16. From the emphasized extract of Section 60 of T.P. Act as reproduced above, it is seen that the said provision of law specifically contemplates a situation, in which, the right of redemption conferred can be extinguished not only by a Decree of a Court, but also by the

“act of the parties”, meaning thereby that there can be situations, in which, by any overt acts of the concerned parties, the right of redemption of the mortgage can be considered extinguished, even in the absence of any separate registered instrument or conveyance. This specific contemplation of extinguishment of right of redemption simply “by acts of the parties” without any reference to the requirement of execution of any other registered document for that purpose is a clear distinguishing feature peculiar to a mortgage as against any other mode of transfer of immovable property, particularly by way of a registered Deed of Sale, as relied upon by citing the decision in **“Kishan Chand's” case (supra)**.

17. Consequently, the conduct of both the parties after execution of the disputed Mortgage Deed would warrant a close scrutiny to determine whether their acts could have had the effect of extinguishing the mortgagor's right to redeem in the given facts and circumstances of the present case.

18. Now in the present case, the Petitioner filed his Civil Suit against the Respondent/Landlord on 15.4.2011. The disputed Mortgage Deed was purportedly executed on 16.5.2011 and thereafter registered on 6.6.2011. Till that time, the Landlord had not filed any Ejectment Petition against the Petitioner. Thereafter on 12.9.2011, the Petitioner filed an Application under Order 39 Rule 2-A of the Code of Civil Procedure seeking to have the Respondent/Landlord punished for alleged violation of the interim order passed in his favour by the Civil Court earlier. It was for the first time only in this Application, that he referred to the disputed

Mortgage Deed, the genuineness of which was explicitly disowned by him by contending that the Respondent/Landlord had intimidated the Petitioner and his family members with threats and muscle power, and had coerced him into executing the Sham Mortgage Deed, which was even got registered totally against the willingness of the Petitioner. The relevant allegations in this regard pertaining to the Mortgage Deed as made in the Petitioner's own Application under Order 39 Rule 2-A of the CPC are set out as below -

“7. That on 06.06.2011, in furtherance of the criminal conspiracy and at the behest of the defendants Kanwardeep Singh referred above Joginder Singh Nambardar, Ramesh Kumar son of Pala Ram resident of Barnala and the above said accused/defendants came to the shop of the applicant in the presence of his wife and they were armed with deadly weapons. They all terrorized the applicant of being eliminated with his children and wife and took the applicant under undue duress, pressure and fear and got a mortgage deed executed and registered at the office of Sub-Registrar, Barnala absolutely against facts thereby falsely showing that Kamaldeep Singh had mortgaged the shop in question for a petty amount of Rs.10,000/- only to the applicant, all the said persons pressurized and terrorized the applicant to such an extent that he could not dare tell the Registering Authority that the document was being got executed on account of undue fear, pressure, duress and in total violation of the court order referred above.

8. That the accused/defendants then again threatened the applicant not to make any hue and cry before any authority and lest he and his daughters and wife would be harmed in such a way that they would become a laughing stock before the world.

9. That the applicant suffered heavily under the duress and did not dare to make a complaint to the authorities as no action

was taken on earlier complaints. However as the applicant used to remain under great depression, the applicant's wife got him treated from Civil Hospital, Barnala, which is still continuing. Copy of the treatment slip dated 15-07-2011 is enclosed.

10. That the applicant is a tenant in respect of the suit property under accused Kamaldeep Singh and Jagtar Singh and has got protection from the Civil Court by virtue of order dated 18-04-2011 passed by Sh. H.S. Grewal, Civil Judge (Senior Division) Barnala.”

19. The certified copy of the aforesaid Application under Order 39 Rule 2-A of the CPC is available as Ex.A/4 in the record of the Ld. Rent Controller. It was filed in the concerned Court on 12.9.2011, and the affidavit in support of the same was sworn by the Petitioner on 6.9.2011. The same makes it crystal clear that even four months after execution of the disputed Mortgage Deed, it was his own version that the Deed was a Sham document, which was got forcibly executed from him, and that even on 12.9.2011, the Petitioner explicitly claimed to be a Tenant under the Respondent. Significantly till that time, the Eviction Petition had not yet been filed against him.

20. The Respondent/Landlord filed the Eviction Petition eight months later on 14.5.2012 at a stage when not only the Petitioner's original Suit, but even his Application under Order 39 Rule 2-A of the CPC was still pending, in which, he had explicitly disowned the very Mortgage Deed as having been got executed under duress, and which he now seeks to make his shield to contend that he is no longer a Tenant after its execution, even though it was his specific contention in the said Application that the Mortgage Deed was null and void, and that he continued to be a Tenant under the

Respondent/Landlord.

21. But even in his cross-examination as RW-1 in the Trial Court on 11.12.2014, which is available on Page 33 of the LCR in Vernacular, it is seen that the Petitioner had stated -

“It is wrong that I keep changing my statement to suit my interest. It may be mentioned that in my said Suit, I might have got written that registration of the mortgage was got done by Jagtar and others forcibly after making me to execute, and that I never took the Shop on mortgage. I also mentioned that the Shop was with me on rent. Ex.A/4 is the copy of the Application filed by me against the Petitioner and his father under Order 39 Rule 2-A of the CPC for contempt. It is correct that I mentioned in this Application that I never took the Shop in mortgage. The Mortgage Deed was got forcibly executed from me. I did not pay any mortgage money. Whatever mentioned in Ex.A/4 was mentioned correctly.....”

(Emphasis added)

22. In view of such stand taken by the Petitioner in his Application under Order 39 Rule 2-A of the CPC, in which, he had specifically denied validity of the Mortgage Deed, and asserted that he was a Tenant in the demised Shop many months after execution and registration of the Deed, the Respondent/Landlord could not have been faulted in filing the Eviction Petition against the Petitioner/Tenant on 14.5.2012, when even till that time, he had claimed to be in possession of the demised Shop only as a Tenant and had comprehensively disowned and discredited the Mortgage Deed. This act coupled with the explicit admission in his cross-examination as already reproduced above, to the effect that he had never taken the Shop in mortgage nor paid any mortgage money to the Respondent, in the opinion of this Court certainly covers a situation, in which the

Mortgagor could legitimately seek eviction of the Petitioner as a Tenant, since due to disowning of the Mortgage Deed and contending that it was a Sham document, the question of redemption of mortgage by the Mortgagor could not have arisen in the given situation, and such right would therefore, clearly be presumed to have 'extinguished' within the meaning of Section 60 of the Transfer of Property Act.

23. This Court is, therefore, in agreement with the observations of the Ld. Rent Controller that the Petitioner was not justified in denying the existence of Landlord-Tenant relationship when it was his own stand at the time of filing of the Eviction Petition that he was a Tenant in the demised Shop and the alleged Mortgage Deed was a Sham and void document, since ***“no person can be allowed to “blow hot and cold”, “fast and loose” or “approbate and reprobate” at the same time and qua this law has been laid down by the Hon'ble Supreme Court of India in case titled as M/s Cauvery Coffee Traders, Mangalore Vs. M/s Hornor Resources (Intern.) Co. Ltd., reported in 2011(4) Civil Court Cases 723 (S.C.).”***

24. For the aforesaid reasons, the Court finds no tangible grounds to interfere with the impugned Judgments, whereby the eviction of the Petitioner/Tenant from the demised premises has been ordered.

25. Dismissed.

(SUDIP AHLUWALIA)
JUDGE

July 03, 2019
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|--------------------------------|--------|
| 1. Whether speaking/reasoned ? | Yes/No |
| 2. Whether reportable ? | Yes/No |