

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

RSA No.2743 of 1988 (O&M)

Date of decision: 10.04.2019

Ramji Dass

... Appellant

Vs.

Ved Parkash and another

... Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present:- Mr. Rajinder Goyal, Advocate
for the appellant.

Mr. M.L.Sarin, Senior Advocate with
Ms. Himani Sarin, Advocate
for the respondents.

AMIT RAWAL J.

The present regular second appeal is directed against the judgment and decree of the Lower Appellate Court whereby appeal of the defendants preferred against the judgment and decree dated 06.11.1987 of the trial Court decreeing the suit for possession of the mortgaged shop, has been allowed.

The appellant-plaintiff claimed the possession of the shop by way of redemption on payment of mortgaged amount of Rs.10,000/- on the premise that on 20.07.1976, he had borrowed a sum of Rs.10,000/- from the defendants by mortgaging the shop bearing no.166 Ward no.9, Quilla Road, Rohtak and in lieu thereof, mortgage deed of even date was executed and registered. The mortgagor was also in possession of the shop in dispute for a

period of eight years. On expiry of the period of eight years, defendants were requested to redeem the shop and deliver the vacant possession but the same was refused.

Defendant No.1 opposed the suit and denied the mortgage deed and claimed the status as a tenant and as well as receipt of Rs.10,000/- purportedly to be transaction of mortgage. It was alleged that rent @ Rs.100/- was settled which had been regularly paid to the plaintiff. The alleged mortgage deed was fake and fictitious document and jurisdiction of the Civil Court was barred.

Defendant No.2 filed separate written statement and admitted the claim of the plaintiff saying that he alongwith defendant no.1-Ved Parkash was co-mortgagee and further clarified that by virtue of the registered transfer deed dated 6.3.1980 transferred his share in favour of defendant no.1, who was stated to be sole mortgagee.

Since the parties were at variance, the trial Court framed the following issues:-

- “1. Whether the plaintiff had mortgaged the property in dispute for a sum of Rs.10,000/- with the defendants.?OPP*
- 2. Whether possession of defendants over the shop in dispute is that of a tenant on payment of monthly rent of Rs.100/- and not as that of mortgagee?OPD*
- 3. If issue no.2 is proved, whether the Civil Court has got no jurisdiction?OPD*
- 4. Relief.”*

The plaintiff in support of the aforementioned pleadings examined PW1-Attar Singh, registration clerk from the office of sub-registrar, PW2-Raj Kumar, defendant no.2, PW3-Jagmal Singh, retired Tehsildar who proved the mortgage deed and PW4-Ramji Dass, himself and brought on record the mortgage deed and transfer deed as Ex.P1 and Ex.P2.

On the other hand, defendants examined DW1-R.C.Palliwal, an official of the Income Tax Department in order to prove the transaction to be rent instead of mortgage. DW2-defendant himself, DW3-Krishan Gopal, house tax clerk to prove assessment register, DW4-Vijay Kumar, DW5-Hans Raj, DW6-Ram Parkash, deposed that Ved Parkash gave Rs.100/- to Ramji Dass as rent in for the years 1983-84, DW7-Lal Singh, Clerk from the office of District Excise and Taxation Commissioner proved the application submitted by Ved Parkash which is Ex.D8 and DW8-Ved Parkash and brought on record copies of the registration Ex.D9 and Ex.D10, assessment orders Ex.D11 to Ex.D13, account books Ex.D14 to Ex.D57.

On the basis of the evidence, the trial Court found that it was a case of mortgage and decreed the suit with a condition of imposition of deposit of Rs.10,000/- within a period of 30 days.

In appeal taken by the defendant-Ved Parkash, the Lower Appellate Court on re-appreciation of the evidence, examining both oral and documentary evidence particularly cross-examination of PW2-Raj Kumar, terms and conditions of the mortgage, accounts books Ex.D14 to Ex.D57 reversed the findings by dismissing the suit. The Lower Appellate Court also noticed that the trial Court as per the provisions of Order 34 Rule 7 of

Code of Civil Procedure, instead of passing the preliminary decree ought to have passed the final decree which was not sustainable. Issue no.1 was decided against the plaintiff whereas issue no.2 in favour of the defendants holding him to be tenant and cross-objections of Ramji Dass were dismissed.

Mr.Rajinder Goyal, learned counsel appearing on behalf of the appellant submitted that the Lower Appellate Court has committed illegality and perversity in dismissing the suit by not noticing the provisions of Sections 91 and 92 of Indian Evidence Act, 1872. The mortgage deed was a registered document and the Court cannot interpret the intention of the parties than the one what has been written in black and white. The account books are of 1976 to 1982 and not of prior period. It was the unilateral document claiming to be a tenant without the knowledge of the plaintiff. The entries in the municipal record had no bearing on the merits of the case as it only reflected the occupier of the shop, thus, in such circumstances, cannot assume the relationship of landlord and tenant. The witnesses did not clarify that payment of Rs.100/- was regarding some interest or rent. There was no need for the appellant to amend the plaint to seek exclusive possession from Ved Parkash-defendant no.1. Even if the trial Court had not passed the final decree, the same can always be rectified, but cannot, remain un-executable.

In support of the aforementioned contentions, relied upon the ratio decidendi culled out by the Hon'ble Supreme Court in **Ishwar Dass**

(dead) through LRs vs. Sohan Lal (dead) through LRs 1999 (2) RCR (Rent) 714; 2000 (1) SCC 434; to submit that no doubt, it is permissible for a party to deed to contend the deed was not intended to be acted upon but was only a sham document. The bar of Section 92(1) of Indian Evidence Act would arise only when the document is relied upon and the terms are sought to be varied and contradicted. No such evidence has been placed on record to establish the same.

The status of the defendants was as mortgagee and had come into possession of the property from the plaintiff. He cannot be permitted to challenge the property of mortgagor and mortgage deed cannot permit to deny the title of mortgagor.

2. **Radhey Shyam Vs. Smt. Bimla Devi and others 2010 (8) RCR(Civil) 715** that defendants failed to establish any document which was acknowledged by the plaintiff treating the defendants as tenant instead of mortgagee.

3. **R.Kanthimathi and others Vs.Mrs. Beatrice Xavier 2000(9) SCC 339; 2001(3) PLR 587** that any due relation between two persons can be created through an agreement, it can be changed through an agreement but not through oral agreement or expressed as implied intention of the parties.

4. **Smt. Gangabi Vs. Smt. Chhabubai 1982(1) SCC 4; 1982 (1) RCR (Rent) 384** that no evidence can be admitted between the parties to such document for purpose of contradicting or modifying its

terms. Section 92(1) is not attracted when case of a party is that the transaction recorded in the document was never intended to be acted upon. No oral evidence is admissible to show that document executed was never intended, though oral evidence can be permitted but no such evidence has been placed on record to belie the contents of the document being a registered document.

Per contra, Mr. M.L.Sarin, learned Senior counsel assisted by Ms. Himani Sarin, Advocate appearing on behalf of the respondents submitted that no person would give the distorted information of the Important Department i.e. Sale Tax Department and Income Tax Department branding him to be a tenant instead of mortgagee. It was a common practice between the landlord and tenant to enter into mortgage deed to by pass the rigours of the prevailing rent laws to obtain the eviction. Such a practice has been referred to in many judgments. The amount of Rs.10,000/- was given as security and not towards the mortgage amount.

In support of the aforementioned contention, relied upon the ratio decidendi culled out by the Full Bench of this Court in **Sawan Ram Vs. Gobind Ram and another AIR 1980 Punjab and Haryana 106 (FB)** barring the jurisdiction of the Civil Court from the field covered specifically and squarely by the provisions of the Haryana Urban (Control of Rent and Eviction) Act 1973. He also relied upon the same judgment i.e. **Smt. Gangabi's case (supra)** to contend that party is permitted to lead an

evidence to prove the intention behind the document.

The Lower Appellate Court is empowered to re-examine the oral and documentary evidence being the last Court of fact and law. The plaintiff ought to have amended the suit claiming the exclusive possession by way of transfer deed dated 6.3.1980 Ex.P2.

The trial Court did not pass the preliminary decree, therefore, it was a nullity in the eyes of law. Ex.D1 to Ex.D57, account books, and statements of accounts were never disputed by the Income Tax Authority. The suit was filed in 1984 whereas the documents were of 5 (five) years prior to the institution of the suit and cannot be said to be void for the purpose of ousting the jurisdiction of the Court.

I have heard the learned counsel for the parties, appraised the judgments and decrees as well as records of the Courts below and as well as case laws cited at bar with their able assistance and of the view that following Substantial Questions of Law arise for adjudication of the present appeal:-

- “1. Whether the evidence in terms of the contract i.e. mortgage deed required in law to be reduced in the form of document and could be given as proof in terms of the contract by introducing the oral agreement?*
- 2. Whether the jurisdiction of the Civil Court was barred in law?”*

It would be in the fitness of the things to refer to mortgage deed Ex.P1 registered before the Sub Registrar and attested by witnesses coupled

with the statement of PW3-Jagmal Singh, retired tehsildar who in cross examination stated that he had seen the original mortgage deed dated 20.7.1976 and had appended his signatures in the capacity of Sub Registrar which was not only read over but explained to the parties after understanding its import i.e. contents and appended the signatures. He was not cross-examined except the suggestion that he did not know the parties personally. Ramji Dass-plaintiff when cross-examined by confronting to the assessment of house tax, replied that he did not raise any objection qua assessment. PW5- retired Tehsildar was examined to prove the registered transfer deed dated 06.03.1980.

The defendants examined DW1-R.C.Paliwal, Inspector from the Income Tax Department, Rohtak. In cross-examination, he stated that he did not verify the number of pages of books of account had nor any certificate was issued or appended any signatures on each and every page. He was also put a question that the pages on which the signatures were appended can always be replaced. DW3-Kishan Gopal, house tax clerk in cross examination to a question stated that it was correct that there was no column of tenant, but the name and address of the occupier. He also defined the definition of the occupier not to be a tenant.

The provisions of Section 91 of the Indian Evidence Act, 1872 recognizes the admissibility of the document which in law is required to be written. Section 92 envisages the situation where any terms and conditions of the agreement has been proved as per the provisions of Section 91. No evidence of any oral agreement or statement shall be admitted between the

parties or such instrument or their representatives with certain proviso subsequent oral agreement modified to such contract can be proved except in cases in which grant or dispossession in law is required to be in writing or has been registered. The caveat to that effect is the testimony of witnesses and terms and conditions of the mortgage deed i.e. registered document which carries a presumption of truth. Unilateral disclosure by the defendant branding him to be a tenant cannot confer the status of the parties as landlord and tenant. The juro relationship between the parties has to be noticed regarding the intention of the parties having set their hands in the written document. The Registrar was not cross examined as to whether the parties had intended to enter into mortgage deed or it was just a sham transaction to over come the rigours of prevalent rent Act.

There is much more to say that defendant no.2- Raj Kumar, vide transfer deed dated 06.03.1980 being also a registered document surrendered his mortgagee rights in favour of defendant no.1 proved through the testimony of Tehsildar, PW5. There was no requirement for the plaintiff to seek the amendment of the plaint and claiming entire possession from Ved Parkash.

It is not in dispute that Lower Appellate Court being the last Court of fact and law is not powerless to re-examine the evidence and form a different opinion which is a healthy sign but the cumulative reading of the documents and testimony leads to irresistible conclusion that intention between the parties was to enter into mortgage deed and not to take the shop in question on rent. The cross-examination of the official from Tax

Department was also not adverted to.

The judgments relied upon by the counsel for the appellant-plaintiff squarely applies to the case dealing with the provisions of Section 92 of the Indian Evidence Act qua acceptance of the oral agreement than the document which is required to be written in register. The facts and circumstances of each case have to be seen to apply the ratio decidendi and not as a general principal i.e. it is the ratio which has to be referred to.

Even if the trial Court did not pass the preliminary decree, it can always be treated preliminary decree because it was a conditional calling upon the plaintiff to deposit a sum of Rs.10,000/-.

The Lower Appellate Court did not see the import of the decree before referring to the provisions of Order 34 Rule 7 of Code of Civil Procedure which envisages any Civil Court to pass a preliminary decree in a suit for redemption as the final decree is provided in Rule 8 where only decree of possession after transferring all the documents is required to be passed. Preliminary decree being a transfer of document, payment of money within time can always be extended as per the sub-rule 2 of Rule 7 of the Code of Civil Procedure. The trial Court did not order for possession of the property and only called upon the plaintiff to deposit the sum of Rs.10,000/-. For the sake of brevity, the decree reads thus:-

“It is ordered that the suit of the plaintiff succeeds and is therefore, decreed with no order as to costs. It is however made clear that the plaintiff shall deposit the mortgaged amount of Rs.10,000/- within a period of 30 days from today

failing which the suit of the plaintiff stands dismissed.”

There was no defect in the decree. It would be construed as preliminary only. The judgment and decree of the Lower Appellate Court is hereby set aside and that of trial Court is restored. The Substantial Questions of law aforementioned are answered in favour of the appellant-plaintiff and against the respondent-defendants.

The regular second appeal is allowed.

(AMIT RAWAL)
JUDGE

April 10, 2019
savita

Whether Speaking/Reasoned	Yes/No
Whether Reportable	Yes/No