

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

RSA No.3570 of 2005(O&M)

Date of decision: 8.1.2019

Laxmi Narain

.....Appellant

VERSUS

Jagdish

.....Respondent

CORAM: HON'BLE MRS. JUSTICE REKHA MITTAL

Present: Mr. Amit Jain, Advocate for the appellant.

Mr. Lokesh Sinhal, Advocate for the respondent.

REKHA MITTAL, J.

The present appeal directs challenge against judgment and decree dated 31.08.2005 passed by the Additional District Judge, Gurgaon whereby appeal against judgment and decree dated 15.09.2004 passed by the Civil Judge (Junior Division), Gurgaon (hereinafter referred to as the 'trial Court') was allowed and suit filed by the respondent/plaintiff was ordered to be decreed.

The facts relevant for disposal of present appeal are that the respondent/plaintiff filed suit for possession by way of redemption of mortgage in respect of the shop in question, situated in the abadi of Jacobpura, Gurgaon. It is averred that Sh. Bal Kishan, father of the plaintiff was owner in possession of said shop. He executed Will dated 30.08.1984 in favour of the plaintiff. Bal Kishan died on 11.05.1985 and thereafter, the respondent/plaintiff became sole owner in possession of the shop. Bal Kishan was in need of money and accordingly, he mortgaged

the suit property in favour of the appellant/defendant vide mortgage deed bearing No.4311 dated 25.01.1984 and possession of the shop was delivered to the appellant. It was agreed that possession will be handed over to the respondent after payment of mortgage amount of Rs.10,000/-. The plaintiff called upon the defendant to receive the mortgage money but he refused on 07.11.1994.

The appellant/defendant filed the written statement and raised preliminary objection that the suit is not maintainable as he is a tenant in the shop in dispute. He also challenged locus standi of the plaintiff to file the suit and jurisdiction of the Civil Court to entertain and decide the suit. The suit is stated to be bad for non-joinder of necessary party and result of collusion between plaintiff and other heirs of Bal Kishan who had already collected rent in respect of the suit property from the defendant on various occasions. It is further averred that the plaintiff has concealed material facts from the Court. Govind Ram, brother of the plaintiff filed ejectment petitions under Section 13 of the Haryana Urban (Control of Rent and Eviction) Act admitting him to be tenant in the shop in dispute.

Bal Kishan was a man of means. He had no need to mortgage the property for a meagre sum of Rs.10,000/- despite the fact that property was worth Rs.1,50,000/- at the time of alleged mortgage. At the time of taking shop on rent, Bal Kishan insisted the defendant to sign some blank and printed papers, forms etc and those papers have been converted into mortgage deed but defendant never signed any mortgage deed. He has denied the plaintiff to be sole owner of the shop in dispute with the plea that all the legal heirs of Bal Kishan are owners of the shop in question.

The respondent filed replication and re-asserted his stand taken in the plaint while controverting the averments raised in preliminary objections .

The controversy between the parties led to framing of following issues on 03.04.1996:-

1. Whether the plaintiff is sole owner of shop in question?
OPP
2. Whether the plaintiff is entitled for relief as claimed in suit? OPP
3. Whether the suit is not maintainable in the present form?OPD
4. Whether this Court has no jurisdiction to try the suit?
OPD
5. Whether the plaintiff has no locus standi and cause of action to file the suit? OPD
6. Whether the suit is bade for non-joinder of necessary parties? OPD
7. Whether the plaintiff is estopped from filing the present suit by his own act and conduct? OPD
8. Whether the plaintiff has suppressed the material facts from the Court? OPD
9. Relief.

The parties were permitted to adduce evidence in support of their respective claims. To prove his case, the respondent appeared in the witness box and examined Pardeep Kumar, DRC, Tehsil Gurgaon PW-2, Balbir Singh, Advocate PW-3, Nanak Singla, document writer PW-4, Smt.

Usha from Record Room Gurgaon PW-5, Sube Singh PW-6, Rajpat Rai PW-7.

To rebut evidence of the plaintiff, the appellant/defendant examined himself and Om Parkash, Clerk, Nagar Palika DW-1, Virender DW-2, Manoj DRK Judicial Record Room Gurgaon DW-3, Sanjay Singh DW-4, Jagdish DW-6 and Khazan Singh DW-7.

Having heard counsel for the parties in the light of materials on record, the trial Court answered issues No.1 to 3 and 5 to 8 against the plaintiff and eventually suit filed by the plaintiff was dismissed with costs.

The appeal preferred by unsuccessful plaintiff against the decree and judgment passed by the trial Court were allowed and judgment and decree dated 15.09.2004 were set aside and suit filed by the respondent/plaintiff for possession by way of redemption was decreed and the appellant was directed to hand over vacant possession of the demised shop within a period of two months.

Counsel for the appellant/defendant has assailed judgment and decree passed by the Appellate Court by making few submissions. It is argued with vehemence that mortgage deed dated 11.04.1984 Ex.PW2/1 is a sham transaction created with a clear intent to circumvent the rigours of rent proceedings for seeking eviction of the appellant from the shop in question. To bring home his contention, it is argued that Bal Kishan, father of respondent created tenancy at the rate of Rs.300/- per month. As the appellant was in dire need of the shop in question, he was rendered helpless to append his signatures on blank papers at the insistence of Sh. Bal Kishan that a rent agreement for a period of 11 months would be prepared. It is further argued that the appellant was not in a position to pay

an amount of Rs.10,000/- as mortgage money to Sh. Bal Kishan at the relevant time. On the contrary, Sh. Bal Kishan was a man of means and was never in need of Rs.10,000/- to mortgage the shop in dispute. It is further argued that respondent in his cross examination has deposed that Bal Kishan needed the money for installation of an idol in a temple. According to counsel, had Bal Kishan not been a man of means, it is difficult to believe that he would decide to install an idol in a temple by mortgaging the shop in dispute. In addition, it is argued that Sh. Bal Kishan did not have any financial difficulty or was not suffering from any financial crunch due to some urgent or emergent need so there was no reason for Sh. Bal Kishan to mortgage the shop in dispute for a paltry sum of Rs.10,000/- when examined in the context of value of the shop in question at the relevant time.

Another submission made by counsel is that the respondent did not adduce any evidence to prove the Will dated 30.08.1984 purported to be executed by Sh. Bal Kishan whereby the respondent became exclusive owner of the shop in question. One of the class I heirs of Sh. Bal Kishan namely Govind Ram, brother of the respondent filed ejectment petitions under Section 13 of the Haryana Urban (Control of Rent and Eviction) Act, 1973 (in short 'the Act') and admitted the appellant to be a tenant in the shop in dispute. Govind Ram also accepted rent tendered by the appellant in those petitions. It is argued that in view of admission of Govind Ram in the ejectment proceedings, it negates plea of the respondent that appellant is a mortgagee and not a tenant in the shop in question. In support of his contentions, he has relied upon judgments of this Court **Banarsi Dass Vs. Gian Chand, 2004 (4) RCR (Civil) 549** and

Pawan Kumar Vs. Dr. Sham Kishore, 2017 (1) Haryana Law Reporter

258. Further argued that any findings recorded by the Court in proceedings for grant of succession certificate initiated at the behest of respondent would not constitute res judicata in respect of the Will in question set up by the respondent/plaintiff. For this purpose, he has relied upon judgment of Hon'ble the Supreme Court **Madhvi Amma Bhawani Amma Vs. Kunjikutty Pillai Meenakshi Pillai, 2000(3) RCR (Civil)**

187. Further reference has been made to judgment of the Karnataka High Court **Anantswami Vs. Radha Srinath and another, 2010(2) RCR (Rent) 403.**

Counsel for the appellant would argue that in the case of tenancy of another shop left behind by Sh. Bal Kishan, a mortgage deed was prepared and on the basis thereof, the respondent/plaintiff filed a suit for possession and the same was dismissed by the trial Court vide judgment dated 29.03.2005. It is argued that subsequent to decision dated 29.03.2005 (Annexure A-1), respondent entered into an agreement with Laxmi Narain, son of Sukh Lal (Annexure A-2) wherein the respondent had admitted said Laxmi Narain to be a tenant of shop No.483/6, part of house No.57/16 (old) and 478/16 (new) old railway road Jacobpura, Gurgaon of which the shop in question is a part, therefore, the document (Annexure A-2) dated 16.04.2005 goes a long way to negate plea of the respondent that the appellant is a mortgagee in the suit shop rather substantiates plea of the appellant that he was inducted as a tenant therein.

Counsel representing the respondent has supported the impugned judgment and decree with the submission that error committed by the trial Court has rightly been rectified by the Appellate Court. It is

further argued that plea of the appellant that mortgage deed has been prepared on his blank signatures gets falsified and belied in view of overwhelming evidence adduced by the respondent to prove the mortgage deed Ex.PW2/1. It is further argued that as the appellant has not raised a plea that a mortgage deed was executed between the parties, he cannot be heard to say that the same is a sham document created to circumvent the rent control legislation. According to counsel, as the mortgage deed is a registered document, a presumption of correctness is appended to the endorsement made by the Registering Authority wherein it has also been recorded that a sum of Rs.5000/- was paid towards mortgage money to Sh. Bal Kishan before the Registering Authority. It is further argued that the endorsement of the Sub Registrar falsifies and belies plea of the appellant that either he did not have the capacity to pay mortgage sum of Rs.10,000/- or he did not pay amount of Rs.10,000/- to Sh. Bal Kishan as per the document in question. It is further argued that no sooner plea of the appellant that mortgage deed was not executed between the parties is rejected, his entire version that the mortgage deed is a sham document or the same was created with an ulterior object to achieve falls to the ground like a pack of cards. In support of his contention, he has relied upon judgment of Hon'ble the Supreme Court **Ishwar Dass Jain Vs. Sohan Lal, 2000(1) SCC 434.**

To refute contention of the appellant that respondent either cannot take advantage of the judgment passed in succession certificate proceedings or the appellant can derive any advantage to his contention from the eviction proceedings initiated by Govind Ram, brother of the respondent, it is argued that application for grant of succession certificate

filed by the respondent was seriously contested by Govind Ram by disputing the Will dated 30.08.1984 of Sh. Bal Kishan propounded by the respondent but the said Will has been upheld by the Court. The findings recorded by the Court in those proceedings in respect of the Will in question have attained finality between the legal heirs of Sh. Bal Kishan. It is argued that since the appellant does not claim any right of ownership in the suit shop on the basis of succession to Sh. Bal Kishan, he cannot have an escape of those findings even if he was not a party to the succession proceedings. In support of his contention, he has relied upon judgment of Hon'ble the Supreme Court **Sawarni (Smt) Vs. Inder Kaur (Smt.) and others, (1996) 6 SCC 223**. In the alternative, it is argued that as the respondent is admittedly son of Sh. Bal Kishan, he can otherwise maintain a suit for possession even being one of the co-owners of the property in question.

With regard to documents (Annexure A-1 and A-2) relied upon by the appellant, it is argued that the appellant sought to place on record these documents by filing civil miscellaneous No.9485-C of 2005. No application has been filed by the appellant for adducing additional evidence by invoking the relevant provision in Code of Civil Procedure, 1908 i.e. Rule 27 of Order 41 thereof. It is vehemently argued that in absence of an application for additional evidence being filed and allowed, the appellant cannot derive any advantage to his contention from the documents (Annexure A-1 and A-2) which are photocopies of the documents and otherwise have not been proved, in accordance with law. In the alternative, it is argued that in view of the plea raised by the appellant a settlement was arrived at between the respondent and Laxmi

Narain son of Sukh Lal in April 2005, therefore, there was no occasion for the respondent to challenge the judgment and decree dated 29.03.2005 (Annexure A-1) whereby suit filed by the respondent against Laxmi Narain was dismissed by the Court. Another submission made by counsel is that as per the agreement (Annexure A-2) sought to be relied upon by the appellant, Laxmi Narain had already handed over physical possession of the shop to Sh. Jagdish and in those circumstances even if Jagdish had agreed to accept that Laxmi Narain was tenant in the second shop/shop subject matter of judgment dated 29.03.2005, by no means, can enure to benefit of present appellant either to contend that he was inducted as a tenant in the suit shop or the mortgage deed is a sham document.

I have heard counsel for the parties, perused the paper-book and records.

The substantial question of law framed by this Court vide order dated 05.03.2007 reads thus:-

“Whether the mortgage is a sham transaction executed to circumvent the provisions of the Haryana Urban (Control of Rent & Eviction) Act, 1973?”

Before advertng to the issue aforesaid, it is appropriate to deal with other contentions raised by counsel for the appellant. The respondent/plaintiff is admittedly one of the sons of Sh. Bal Kishan, erstwhile owner of the shop in question. Jagdish has claimed exclusive ownership of the shop in question on the basis of Will dated 30.08.1984 purported to be executed by Sh. Bal Kishan. The appellant/respondent does not claim any right of ownership in the suit shop on the basis of natural or testamentary succession to Sh. Bal Kishan. The litigation

initiated by Jagdish for grant of succession certificate on the basis of Will dated 30.08.1984 in which Govind Ram, another son of Bal Kishan and others were impleaded as respondents had been decided in favour of Jagdish and has attained finality. This apart, respondent being one of the class I heirs of Sh. Bal Kishan and having become co-owner of the suit shop on that basis is otherwise competent to file the instant suit seeking redemption of alleged mortgage. In this view of the matter, contention raised by counsel for the appellant that non-proving of Will dated 30.08.1984 is a circumstance to be taken against the respondent is patently misconceived and ordered to be rejected. Similarly, the appellant cannot derive any advantage to his contentions from any such statement made by Govind Ram and application for eviction on the ground of non-payment of rent particularly in the circumstances that plea of Govind Ram to be entitle to succeed to Sh. Bal Kishan has been rejected in proceedings for succession certificate and there is nothing on record suggestive of the fact that Govind Ram has filed a suit to challenge correctness of Will dated 30.08.1984 propounded by the respondent. In the given scenario, judgments relied upon by counsel for the appellant in the aforesaid context has no bearing on the controversy involved in the present case.

The appellant has sought to draw some mileage from judgment dated 29.03.2005 and agreement dated 16.04.2005 (Annexure A-1 and A-2), sought to be produced by filing an application under Section 151 of the Code of Civil Procedure, 1908. Firstly, as there is a special provision for adducing additional evidence in the second appeal and the appellant has not invoked Order 41 Rule 27 CPC for the purpose, there is no question of this Court exercising inherent jurisdiction under Section 151

CPC for deciding if the appellant can produce additional documents before this Court. This apart, as per plea of the appellant himself, subsequent to decision dated 29.03.2005 in favour of occupant of second shop of Sh. Bal Kishan, there was an agreement dated 16.04.2005 that records the factum of alleged tenant having surrendered possession in favour of Jagdish. That being so, there was no occasion for Jagdish to challenge the judgment and decree dated 29.03.2005 passed in favour of Laxmi Narain son of Sukh Lal. Furthermore, the document dated 16.04.2005 (Annexure A-2) cannot be read into evidence unless proved in accordance with law after seeking necessary permission of the Court to adduce additional evidence under relevant provisions of the Code of Civil Procedure. Even otherwise, once there was compromise between Jagdish and Laxmi Narain son of Sukh Lal on certain terms and conditions including Laxmi Narain having surrendered possession of the shop in his occupation, any such admission by Jagdish that Laxmi Narain son of Sukh Lal was a tenant in the said shop would not enure to benefit of the appellant to substantiate his plea that he was actually inducted as a tenant in the suit shop. Analyzed from any angle, the appellant cannot derive any advantage to his contention from the documents (Annexure A-1 and A-2).

This brings the Court to the substantial question of law, reproduced hereinbefore.

Hon'ble the Supreme Court in **Ishwar Dass Jain's case** (supra) has held in para 16 to 19, reads thus:-

“16. This Court has held in Gangabai Vs. Chhabubai, 1982 (1) SCC 4 that in spite of Section 92(1) of the Evidence Act, it is permissible for a party to a deed to contend that the deed was

not intended to be acted upon but was only a sham document. The bar arises only when the document is relied upon and its terms are sought to be varied and contradicted. In the above case, it was observed by D.A. Desai J as follows:

"the bar imposed by Section 92(1) applies only when a party seeks to rely upon the document embodying the terms of the transaction and not when the case of a party is that the transaction recorded in the document was never intended to be acted upon at all between the parties and that the document is a sham. Such a question arises when the party asserts that there was a different transaction altogether and what is recorded in the document was intended to be of no consequence whatever. For that purpose, oral evidence is admissible to show that the document executed was never intended to operate as an agreement but that some other agreement altogether, not recorded in the document, was entered into between the parties".

17. But the question is whether on the facts of this case, the reason given by the defendant in his evidence for treating the mortgage as a sham document, can be accepted.

18. The reason given by the defendant appears to us rather curious. One can understand a debtor incurring a debt and executing a deed as collateral security. There is no such situation here. Further, if it is a deed of collateral security by

defendant, then the defendant would have had to execute a deed in favour of the plaintiff and not vice-versa. Here the plaintiff-owner has mortgaged his shop to the defendant, as security. The plea and evidence of collateral security offered by the defendant appears to us not to fit into a situation where the plaintiff has executed the mortgage. Obviously, if the plaintiff wanted to secure something by way of an additional security from the defendant, the normal course would have been to ask the defendant to give such a security and not for the plaintiff to execute a mortgage. Thus the reason mentioned and evidence given by the defendant as to why a sham document was executed falls to the ground.

19. Under Point 3 we therefore hold that though evidence is admissible under Section 92(1) to prove that the mortgage is a sham document, such evidence is lacking in this case. Point 3 is decided against the defendant.”

Reverting to the case at hand, the question for consideration is whether the appellant has been able to establish that the mortgage is a sham document executed to circumvent the rent control legislation.

The appellant has not admitted execution of mortgage deed dated 11.04.1984, therefore, it is difficult to accept his contention that mortgage deed is a sham transaction created to circumvent the rigors of rent control legislation. The plea raised by the appellant is that his signatures on blank papers were obtained at the insistence of Sh. Bal Kishan that rent agreement would be prepared. Counsel for the appellant

has not advanced any arguments to assail findings of the Court that mortgage deed was executed between the parties. The respondent examined witnesses to prove the mortgage deed, a registered document. This shows that conduct of the appellant is not bona fide but is mala fide. His version that he was rendered helpless to append his signatures on blank papers at the insistence of Sh. Bal Kishan is bereft of truth and untenable. No sooner the appellant has denied execution of mortgage deed dated 11.04.1984, it is otherwise not open for him to contend that it was a sham transaction.

The appellant has ventured to plead certain grounds in support of his plea that mortgage deed is a sham document. One of the pleas is that the appellant was not in a position to pay an amount of Rs.10,000/- as mortgage money to Sh. Bal Kishan. This plea of the appellant gets demolished from the recitals in the mortgage deed and more so from the endorsement made by the Sub Registrar wherein it has been specifically recorded that a sum of Rs.5000/- out of mortgage money was paid by the mortgagee to Sh. Bal Kishan in the presence of Registering Authority concerned. There cannot be denial that a presumption of correctness is appended to the endorsement made by the Registering Authority in discharge of its official functions. In this view of the matter, the Court below has rightly rejected plea of the appellant that since he did not have the resources to pay an amount of Rs.10,000/- as mortgage money, neither any such payment was made by him nor any such document was executed with an intention to create mortgage of the shop in question.

Another submission made by counsel for the appellant is that Bal Kishan was a man of means and was not in need of Rs.10,000/- to

mortgage the shop in dispute. There is no clear much less cogent evidence on record that Bal Kishan was a moneyed man and it was not expected of him to mortgage the shop for an amount of Rs.10,000/-. The documents on record with regard to grant of succession certificate to the tune of approximately Rs.17,000/- bears testimony to the fact that Bal Kishan did not have much financial backing and he left only an amount of Rs.17,000/- in his bank account. The contention of the appellant that if a person is not a man of means, he would not spend money for some religious ceremony i.e. to install an idol in a temple cannot be accepted because such a decision is subjective and depends upon the perception and religious bent of mind of an individual. In India, there are many people who would like to spend their money on religious ceremonies even without bothering about their resources and financial status.

The appellant has also put a question mark on the mortgage deed by contending that in view of value of the shop in question in 1984, there was remote possibility of Bal Kishan having decided to mortgage the shop for a paltry sum of Rs.10,000/-. The mortgage was created in April 1984. Jagdish in his cross examination has stated that he did not know if value of the shop in 1984 was Rs.1,50,000/-. This statement of Jagdish is not at all sufficient to establish plea of the appellant in respect of market value of the shop in 1984. Counsel for the appellant has failed to point out any materials on record with regard to market value of the shop in dispute in order to accept his plea that no prudent person would agree to mortgage his property for a sum of Rs.10,000/- viz-a-viz market value of the shop in question. In this view of the matter, I find merit in contention of the respondent that appellant has failed to establish his plea that the mortgage

deed is a sham document created to circumvent rent control legislation. That being so, the ratio laid down in Ishwar Dass Jain’s case (supra) squarely covers the controversy in favour of the respondent/plaintiff. On the contrary, in view of the discussion made hereinbefore, the appellant cannot derive any advantage from the judgment of this Court in Banarsi Dass’s case (supra) wherein judgment of Hon’ble the Supreme Court Gangabai Vs. Chhabubai, AIR 1982 SC 20 has been relied upon as also in Ishwar Dass Jain’s case (supra). In view of the above, aforesaid substantial question of law is answered against the appellant and in favour of the respondent.

No other point has been raised.

In view of what has been discussed hereinbefore, finding no merit, the appeal fails and is accordingly dismissed with costs. As a natural corollary, judgment and decree dated 31.08.2005 passed by the first Appellate Court are affirmed.

JANUARY 8, 2019
‘D. Gulati’

(REKHA MITTAL)
JUDGE

Whether speaking/reasoned	:	yes/no
Whether reportable	:	yes/no