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

**RSA No.3626 of 2015 (O&M)
Date of decision: 06.02.2019**

Jiwan Kumar **...... Appellant**

Versus

Mohinder Pal Kaur and others **...... Respondents**

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present:- Mr. Rakesh Gupta, Advocate
for the appellant.

Mr. Ashok Singla, Advocate and
Mr. Aakash Singla, Advocate
for respondent No.1.

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ANIL KSHETARPAL, J.(ORAL)

Defendant-appellant who claims to be tenant in the shop in question, is in regular second appeal against the concurrent finding of fact arrived at by the Courts below while decreeing the suit for possession by way of redemption of the mortgage. At this stage, it must be noted that the plaintiff mortgagor-Mohinder Pal Kaur is mother whereas the mortgagee is Paramjit Kaur, her daughter.

In these circumstances, the question which needs consideration is "whether in the facts of the present case, a tenant inducted by the alleged mortgagee (daughter of the mortgagor) shall be liable to deliver possession of the property on redemption of the mortgage or the tenant shall be entitled to continue in possession under the owner having protection against eviction as per the provisions of Rent Act applicable."

Some facts are required to be noticed. Mohinder Pal Kaur was owner of 7 shops. All the 7 shops were mortgaged by three mortgage deeds. Two shops were mortgaged in favour of Paramjit Kaur-defendant No.1, her daughter for a sum of Rs.20,000/-. Second mortgage was with respect to three shops in favour of nephew-Harjit Singh in the year 1990 for a sum of Rs.30,000/- and the remaining two shops were on mortgage with Sarabjit Kaur w/o Jarnail Singh. Thus, all the 7 shops were mortgaged for Rs.70,000/-. The plaintiff filed this suit for possession by way of redemption of the mortgage. Defendant No.3 contested the suit and pleaded that he is a tenant in the shop and therefore, no decree for possession can be passed against him.

Both the Courts on appreciation of evidence have decreed the suit. When this appeal came up for final disposal, this Court vide order dated 07.02.2018 framed an additional issue which reads as under:-

> *"Whether the registered mortgage deed dated 23.10.1990 is a sham transaction between the mother and the daughter in order to circumvent the protection available to the tenant under the Rent Laws?"*

Thereafter, directed the trial Court to give opportunity to both the parties to lead their respective evidence and submit a report. The report has been submitted.

This Court has heard learned counsel for the parties at length and with their able assistance gone through the judgments passed by the Courts below and the record as also the report of the trial Court.

At the outset, it must be noticed that 23.10.1990 is a registered mortgage deed in favour of daughter with respect to two shops including the shop in question. In 1992, the shop in question i.e. shop No.1 is rented out at Rs.1200/- per month by the daughter mortgagee. Neither the mortgagor nor the mortgagee have stepped into the witness-box. Husband of mortgagee Amarjit Singh has appeared in evidence. He is signatory to the mortgage deed. Learned counsel for the respondent has read over contents of the mortgage deed which is Ex.P-1 on the file. It is apparent that there was no restriction on the right to lease by the mortgagee. Rather it was provided that she can take benefit/profits from the aforesaid shop. Now the question which is posed is “whether redemption of such mortgage deed would result in depriving the tenant from possession on redemption of the mortgage or not.”

Learned counsel for the appellant while referring to the facts of the case, has submitted that the mortgagor-Mohinder Pal Kaur had executed an Attorney in favour of Amarjit Singh son of Mohinder Singh and Jarnail Singh son of Shiv Avtar Singh to prosecute litigation on his behalf. Jarnail Singh appeared in another litigation and has stated that the mortgage was created in favour of Harjit Singh-nephew in order to lease out the properties. The plaintiff has not examined the aforesaid Attorney in the present case but second attorney namely Amarjit Singh son of Mohinder Singh has appeared. (A word of caution that husband name of Paramjit Kaur and Attorney of mortgagor is common as Amarjit Singh but their father's names are different).

Lengthy arguments have been addressed by learned counsel for the parties. Learned counsel for the respondent has submitted that Ms. Kamal who was a partner with the co-tenant Jiwan Kumar, appellant-tenant herein, that she took the shop on rent after having knowledge of the mortgage. Learned counsel has further submitted that the appellant has no locus standi to challenge the mortgage deed. He further submitted that it is not open to the appellant to dispute his status as a tenant of the mortgagee. He has further submitted that as per Section 92 of the Evidence Act, 1872, no evidence can be permitted to alter the terms of a written contract.

As regards first argument of learned counsel for the respondent, there is no dispute. The appellant-tenant has taken on rent from the mortgagee but the question is "whether he is required to surrender possession in the facts of the present case on redemption of the mortgage or not." The aforesaid answer would be with regard to second and third contention of learned counsel for the respondent with respect to locus standi and whether it is open to the defendant-appellant to question the mortgage.

Here the defendant-appellant is not questioning the mortgage, however, what he is trying to save his possession from the landlord who by circumventing the law is trying to defeat the rights of the tenant available to it under rent protection laws. The facts of the present case tell a clear story that these mortgage deeds were created only for the purpose of circumventing the provisions of the Rent Act and to deny the tenant's protection under the rent protection laws. It is reported by learned Court while submitting a report that the value of one shop in the area was approximately Rs.60,000/-. The rental value of the shop was Rs.1200/- per month. So in other words, for rent of 8 months rent, the property was mortgaged with possession permitting the mortgagee to enjoy the property. In other words, for an amount less than year's rent, the mortgage was created. That itself shows that the mortgage was for the purpose of circumventing the provisions of Rent Act particularly keeping in view the relationship between the mortgagor and the mortgagee and all the 7 shops had mortgaged in similar manner.

This is not a case of normal mortgagor mortgagee relationship. In the present case, it is apparent that the mortgage was created to circumvent the provisions of the rent protection laws granting protection to the tenants from eviction except on the grounds available under the Rent Act. The mortgagor who is mother has specifically got recorded in the mortgage deed that her daughter who is a mortgagee shall be entitled to derive profits from the shop. One of the way to derive profit by the mortgagee is to lease out the property. There is no clause in the mortgage deed which provide that the tenant of the mortgagee would have to vacate the premises on redemption. In absence thereof and in particular the facts of the present case, the tenant who is not related and has fallen prey to the evil designs of the plaintiff and defendant No.1.

In view of the aforesaid discussion, the judgments passed by the Courts below are set aside only qua rights of the appellant. The decree for redemption of mortgage shall remain intact, however, the decree for possession against the defendant-appellant shall be set aside.

Hence, the question as framed earlier, is answered in favour of the appellant.

All the pending miscellaneous applications, if any, shall stand disposed of in view of the above-said judgment.

Regular Second Appeal is allowed.

(ANIL KSHETARPAL)
JUDGE

06.02.2019
Dinesh Bansal

Whether speaking/reasoned Yes / No
Whether Reportable Yes / No