IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

RSA-1493-2014(O&M)
Date of decision:-17.1.2019

Nirmal Singh

...Appellant

Versus

Harbans Singh

...Respondent

CORAM: HON'BLE MR.JUSTICE H.S.MADAAN

Present: Mr.Harsh Aggarwal, Advocate
for the appellant.

Mr.S.S. Salar, Advocate
for the respondent.

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H.S. MADAAN, J.

Briefly stated, facts of the case are that plaintiff - Harbans Singh had brought a suit against defendant Nirmal Singh seeking possession by way of redemption of mortgage of the shop situated at Mehlan Road, Sangrur detailed as under:

East : House Nanku;

West : Sangrur Mehlan Road;

North: Property of Harbans Singh;

South: Property of Gurdial Singh;

Situated within the revenue estate of Mehlan Road, Sangrur besides recovery of Rs.2,000/- per month on account of unauthorized use and occupation of the shop in dispute by the defendant.

Inter alia, in the plaint, the plaintiff had contended that he was owner of the shop in question, which he had mortgaged with the defendant vide mortgage deed No.1419 dated 3.8.1994 for a sum of Rs.10,000/- receiving Rs.10,000/- from the defendant; the mortgage deed was got registered with the Registration Authority; that the defendant is in possession of the shop since the date of mortgage i.e. 3.8.1994; that the terms and conditions of the mortgage were as under:

(i) that the the mortgagee could do his business in the shop but would not deliver the possession of the shop to a third person;

(ii)that the mortgagee would not carry out any alteration in the shop;

(iii)that the electricity bills and municipal house tax would be paid by the mortgagee;

(iv)that the interest of the mortgage amount would be equal to the rent of the shop; and

(v)that the mortgagee would be entitled to get the possession of the shop in dispute by making the payment of mortgage amount of Rs.10,000/- and the possession would be delivered to the mortgagee.

That the plaintiff requested the defendant that he wanted to make the payment of Rs.10,000/- to him and to take possession of the shop from the defendant but the defendant refused to accede to the request of the plaintiff giving rise to a cause of action to the plaintiff to bring the suit.

On notice, the defendant appeared and filed written statement contesting the suit. In the written statement, the defendant admitted the plaintiff to be owner of the shop in dispute, however denied that it was mortgaged by the plaintiff in favour of the defendant for Rs.10,000/- vide registered mortgage deed dated 3.8.1994. According to the defendant, he was in possession of the shop in dispute as a tenant under the plaintiff and there was relationship of landlord and tenant between the parties; that the plaintiff had obtained Rs.10,000/- as security from the defendant; that the defendant had taken the shop on rent from the plaintiff @ Rs.700/- per month on 1.8.1994; that the plaintiff had delivered the possession to the defendant on that very date and the defendant had paid a sum of Rs.700/- as rent in advance to the plaintiff but the plaintiff did not issue any receipt; that rate of rent was being enhanced from time to time since defendant paid rent @ Rs.700/- per month from 1.8.1994 to 31.3.2000 and since 1.4.2000, the rent @

Rs.1,000/- had been paid up to 30.4.2005 and in May 2005, the rent was enhanced from R.1,000/- to Rs.1,150/- per month; that the defendant had paid rent @ Rs.1,150/- per month up to March, 2006 to the plaintiff but the plaintiff did not issue any receipt; that now the rent was due since April 2006, which the defendant was ready to pay; that the house tax has also been paid by the defendant regarding the shop in dispute and the defendant has been shown to be tenant of the shop in question; that the plaintiff taking benefit of the mortgage deed and non-issuance of receipt for the rent had filed a false and frivolous suit; that even the terms and conditions mentioned in the mortgage deed show that the defendant is in possession of the shop in dispute as a tenant; that there was no occasion for the plaintiff to give the shop in dispute on mortgage to the defendant since the adjoining shops are already in possession of Dhanjit Singh tenant of the plaintiff @ Rs.225/- per month and another shop is in possession of Jagjit Singh @ Rs.300/- per month and their rent notes and receipts would be got produced during the pendency of the suit; that the interest from the amount of Rs.10,000/- could fetch Rs.100/- or Rs.150/- only, so it could not be said that the plaintiff would mortgage the shop only for an interest of Rs.100/- or Rs.150/- per month; that the shop in dispute was on rent with one Mohinder Singh prior to the defendant; that the mortgage deed had been executed by the defendant in the shape of security; even otherwise the defendant at the time of taking the shop in dispute on rent was under pressure of the plaintiff and in dire need of the shop so the plaintiff was in a dominating position; that the mortgage deed had also been executed; that the suit is not maintainable as the shop in dispute is within the municipal limits of Sangrur where Rent Act is applicable. The defendant had taken up various other legal objections challenging the locus standi of the plaintiff to bring the suit contending that no cause of action arose to him to bring the suit; that the suit is not maintainable; that the plaintiff is estopped to file the suit by his own act and conduct. Refuting the remaining allegations, the defendant prayed for dismissal of the suit.

The plaintiff had filed replication controverting the allegations in the written statement whereas reiterating the averments in the plaint.

On the pleadings of the parties, following issues were framed vide order dated 9.8.2010:

1. Whether the plaintiff is entitled to the relief of possession by way of redemption of the shop in dispute as prayed for? OPP.
2. Whether the plaintiff is entitled to the recovery of Rs.2,000/- per month on account of unauthorized use and occupation of the shop in dispute to the defendant? OPP.
3. Whether the plaintiff has no locus standi and cause of action to file the present suit? OPD.

4. Whether the suit is not maintainable in the present form? OPD.
5. Whether the plaintiff is estopped by his own act and conduct from filing the present suit? OPD.
6. Relief.

In order to prove his case, the plaintiff had appeared himself as PW4 besides examining Ashok Kumar, Registration Clerk as PW1, Harinder Kumar Singla, Deed Writer as PW2 and Unkar Nath as PW3.

On the other hand, the defendant got his statement recorded as DW3 in addition to examining Gurcharan Singh, Clerk, Municipal Committee, Sangrur as DW1 and Ramesh Kumar as DW2.

After hearing the learned counsel for the parties, the trial Court decided issue No.1 in favour of the plaintiff against the defendant, issue No.2 partly in favour of the plaintiff, issue No.3 against the defendant and in favour of the plaintiff, issue No.4 against the defendant and in favour of the plaintiff, issue No.5 against the defendant and in favour of the plaintiff. Resultantly, a preliminary decree was passed to the effect that the plaintiff is entitled to take possession of the suit property by way of redemption of the mortgage. The plaintiff was further directed to deposit a sum of Rs.10,000/- within two months from the date of passing of judgment and thereafter, the defendant was directed to hand over the vacant possession of the suit property to the plaintiff within next two months. The plaintiff was also found entitled to recover Rs.1,000/- per month from the defendant for wrongful use and occupation of the shop in dispute from 20.9.2006 till actual realization of the amount.

Feeling aggrieved by the said judgment and decree, the defendant had filed an appeal before the District Judge, Sangrur, which was assigned to Additional District Judge, Sangrur. That appeal was partly allowed to the effect that the findings of the trial Court passing preliminary decree to the effect that the plaintiff is entitled to take possession of the suit property by way of redemption of the mortgage and issuance of direction to the plaintiff to deposit the sum of Rs.10,000/- within two months from the date of decree and thereafter directing the defendant to hand over the vacant possession of the suit property to the plaintiff within next two months were upheld and affirmed. Whereas, the verdict of the trial Court that the plaintiff is entitled to recover Rs.1,000/- per month from the defendant w.e.f. 20.9.2006 for the wrongful use and occupation of the shop in dispute till actual realization of the amount was set aside.

Still feeling dissatisfied with the judgment and decree passed by the learned Additional District Judge, Sangrur, the defendant/appellant had filed the present regular second appeal before this Court, notice of which was issued and the respondent-plaintiff appeared through counsel.

I have heard learned counsel for the parties besides going through the record.

It is specific case of the plaintiff that he had mortgaged his shop with possession in favour of the defendant – Nirmal Singh on 3.8.1994 for a sum of Rs.10,000/-; the defendant paid a sum of Rs.10,000/- to the plaintiff; the mortgage deed was executed, which was got registered with Sub Registrar, Sangrur. The defendant admits plaintiff to be owner of the shop in dispute though denying that plaintiff had mortgaged the shop with possession in favour of the defendant contending that in fact the defendant had taken the shop on rent from plaintiff @ Rs.700/- per month; that the plaintiff had got the mortgage deed executed as a security to get easy possession by making use of redemption clause; that actually there is relationship of landlord and tenant between the parties and not of mortgagor and mortgagee and therefore the plaintiff is not entitled to get the mortgage redeemed.

However, I find little merit in the contentions raised by the defendant. Undisputedly, a written mortgage deed dated 3.8.1994 was entered into by the plaintiff and defendant and it was got registered in the office of Sub Registrar, Sangrur. Admittedly, registration of document gives rise to presumption of due execution. A registered document having been entered into between the parties and defendant having entered in possession of the shop under the mortgage deed, he is obviously estopped from denying execution of mortgage deed and rather stating that he has been in possession of the shop as a tenant.

Section 91 of the Evidence Act provides that when the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence1 shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.

Whereas Section 92 exclude evidence of oral agreement providing that when the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms.

Therefore, in view of the mortgage deed, the plea of the defendant that it was entered into just for the purpose of security and as a matter of fact the defendant/appellant has been in possession as tenant under the plaintiff is rejected. According to the case of the defendant, plaintiff had been issuing receipts to him, however no such receipt has been proved in evidence to show the alleged payment of rent by the defendant to the plaintiff. Both the Courts on thorough analysis of the evidence available on record have come to the conclusion that relationship between the parties was that of a mortgagor and a mortgagee. The contention that the relationship was that of landlord and tenant is not established on the record and therefore, this argument is not acceptable. Merely because in the house tax department of the Municipal Corporation, the defendant is shown to be tenant does not mean that his status has in fact been that of a tenant.

Learned counsel for the appellant has referred to various authorities in support of his contentions, first being ***Sheo Ram Versus Jhabar and others, 1951 AIR(Punjab) 309*** wherein interpretation of word 'tender' was made. However, I find that this authority is not helpful to the case of the appellant/defendant. Firstly, the defendant does not admit that he is in possession of the shop as mortgagee under the plaintiff. It being so, there was no occasion for the defendant finding fault with the tender of mortgage money. Both the Courts below on appreciation of evidence have observed that the plaintiff had validly tendered the mortgage money.

As regards the next authority ***Nobat Ram Versus***

Mangal Singh, 1973 RCR(Rent) 147 by a Co-ordinate Bench of this Court, the case had different facts where an ejectment petition had been filed on the ground of arrears of rent. The tenant had physically tendered rent on first date of hearing, which was not accepted by the landlord. The Rent Controller had directed the tenant to deposit the rent in Court but tenant did not do so. The tenant was not held guilty of default holding that tenant was not bound under the law to deposit arrears in Court. This authority had altogether different proposition of law, which does not have any application to the present case.

One more authority referred to by learned counsel for the appellant was ***Banarsi Dass Versus Gian Chand, 2004(4) RCR(Civil)549*** by a Co-ordinate Bench of this Court. It was observed in this authority that when document showed that shop was mortgaged, the mortgagee can show by evidence that it was sham document but in fact it was tenancy agreement which was described as mortgage to avoid protection of Rent Act.

This authority had different facts wherein the Court had inferred that a shop valuing 3/4 lacs located in thickly commercial area, had been mortgaged for a sum of Rs.17,000/- only. The document though described as a mortgage deed but was in fact creation of a tenancy. It was observed that it was unimaginable that such a shop could be mortgaged by the plaintiff merely for a sum of Rs.17,000/-.

Again this authority does not come to rescue of the appellant/defendant since here it stands established on record that the defendant has been in possession of the shop as mortgagee under plaintiff and plaintiff want to redeem the mortgage by paying mortgage money tot he defendant.

In support of his contention, learned counsel for the respondent/plaintiff had also pressed into service an authority i.e. ***Tara Chand Versus Sagarbai @ Chaiyalibai, 2007(2) RCR(Civil) 870***.

I do not find any merit in the present appeal and do not see any reason to disturb the legal, valid and well reasoned judgment and decree passed by the First Appellate Court.

The appeal stands dismissed accordingly.

17.1.2019 **(H.S.MADAAN)**
Brij **JUDGE**

Whether reasoned/speaking: Yes/No

Whether reportable : Yes/No