IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

1. RSA-2424-2019 (O&M)
Date of decision : 16.03.2020

Sunil Kumar Dahiya ...Appellant

Versus

Jaishree Jain ...Respondent

2. RSA-4747-2019 (O&M)
Date of decision : 16.03.2020

Sunil Kumar Dahiya ...Appellant

Versus

Jaishree Jain ...Respondent

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL.

Present: Mr. Atul Nagarajan, Advocate and
Mr. Ajay Khanna, Advocate and
Mr. Tushar Garg, Advocate for the appellant.

Mr. Adarsh Jain, Advocate with
Mr. Apoorv Jain, Advocate for the respondent.

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ANIL KSHETARPAL, J.

This judgment shall dispose of two appeals bearing RSA No.2424 and 4747 of 2019, arising from a common judgment passed by the learned trial Court as well as First Appellate Court while deciding a suit filed by the respondent for possession of the suit property and for recovery of rent.

The undisputed facts of the case are that on 07.02.2014, three documents were executed between the parties:-

(1) A registered sale deed dated 07.02.2014 transferring the suit property in favour of the plaintiff by defendant-appellant.

(2) A Memorandum of Understanding executed between the parties providing for an agreement to buy back at predetermined price on or before 06.02.2017.

(3) A lease deed executed on 07.02.2014 leasing out the suit property by the plaintiff in favour of the defendant @ ₹11,22,000/- per month.

It is not disputed by learned counsel for the parties that the registered sale deed is an absolute sale of the property and title passed from the defendant to the plaintiff on execution of the sale deed dated 07.02.2014. It may be significant to note that the sale deed neither incorporates any condition nor any clause providing for agreement to buy back the property at a predetermined price.

A Memorandum of Understanding has been executed between the parties to this lis. The relevant Clauses 1, 3, 4 and 6 of the Memorandum of Understanding are extracted as under:-

> *"1. In pursuance of this MOU and in consideration of a sum of Rs.2,82,00,000/- (Rupees two crores and eighty two lakhs only) to be paid by BUYER to Mr. Sunil Kumar Dahiya, Mr. Sunil Kumar Dahiya shall execute a sale deed in favour of the BUYER in respect of the property and shall also deliver the original documents of the property to the BUYER.*
>
> *3. BUYER agree not to create any encumbrances and shall not sell, gift, exchange, mortgage or alienate in any*

other manner nor shall assign its/their interest in the PROPERTY of whatsoever nature, nor shall create any charge or encumbrance on the PROPERTY during the subsistence of this MOU.

4. Mr. Sunil Kumar Dahiya shall on 6th February, 2017, buy-back the PROPERTY from the BUYER at a value of Rs.4,20,00,000/- (Rupees four crores and twenty lakhs only). Buyer confirm that the PROPERTY shall be free from any encumbrances at the time of buy-back, in pursuance of this MOU, the parties have also entered into an agreement to sell and purchase in respect of the PROPERTY for the transfer of PROPERTY back to Mr. Sunil Kumar Dahiya. It is agreed that Mr. Sunil Kumar Dahiya shall make payment of the said Rs.4,20,00,000/- (Rupees four crores and twenty lakhs only) on 6th February 2017 itself and the BUYER shall not dispute the buy-back or sale of the PROPERTY back to Mr. Sunil Kumar Dahiya.

6. In case of any 5 consecutively cheque's dishonoring by Mr. Sunil Kumar Dahiya, then this MOU, the lease deed and the agreement to sell and purchase between Seller and Buyer (to be executed tomorrow) shall stand null and void, and the buyer can sell the property to recover its invested amount."

It is also undisputed that there was no agreement to sell executed between the parties as provided under Clause 4. It is the positive case of the plaintiff that since the plaintiff did not agree, therefore, no agreement to sell was executed.

Next document is lease deed dated 07.02.2014. It is provided in the unregistered and unstamped lease deed, that the plaintiff has given on lease the suit property to the defendant on a monthly rent of ₹11,22,000/-. The monthly payment has been secured through post dated cheques issued by the defendant in favour of the plaintiff.

At the outset, it is important to notice that the counsel appearing for the defendant has not contended that there was any relationship of landlord and tenant between the parties. Rather, on the other hand, learned counsel for the appellant has submitted that suit is not maintainable as there was no relationship of landlord and tenant.

At this stage, it must be noticed that the defendant although appeared in the suit and filed various applications, however, thereafter, did not choose to contest. He did not file written statement or produced any evidence in the suit.

Learned trial Court, on appreciation of evidence, decreed the suit for possession filed by the plaintiff, however, declined to grant relief of recovery of arrears of rent on the ground that the rate of rent is exorbitant and therefore, not recoverable.

Two first appeals were filed, one by the defendant and second by the plaintiff. Learned First Appellate Court, on re-appreciation of evidence, has dismissed the appeal filed by the defendant whereas partly accepted the appeal filed by the plaintiff, thereby, ordering recovery of rent at the rate of ₹1,00,000/- per month.

That's how these two appeals have been filed by the defendant against the concurrent judgments passed by the Courts below.

It is appropriate to notice that the defendant-appellant filed the petition for grant of Special Leave to Appeal (C) No(s).15417 of 2019, which has been dismissed by the Hon'ble Supreme Court with the following order:-

> *"We do not find any good ground to entertain this Special Leave Petition against the impugned order.*
>
> *The Special Leave Petition is, accordingly, dismissed.*
>
> *The High Court is requested to dispose of the appeal as expeditiously as possible.*
>
> *Pending applications, if any, shall also stand disposed of."*

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 requisitioned record.

Learned counsel appearing for the appellant has submitted that on co-joint reading of the three documents, referred to above, it is apparent that there was a loan transaction between the parties and therefore, the Courts have erred in decreeing the suit. On collective reading of the documents executed between the parties, it is apparent that it was a case of conditional mortgage and therefore, the Courts have erred. He further submitted that the possession of the suit property never changed hands and therefore, sale was also not complete. He further submitted that the lease deed being unstamped and unregistered was not admissible in evidence and therefore, the Courts erred in relying thereupon. He further submitted that as per Clause 6 of the Memorandum of Understanding, dishonour of five consecutive cheques has not been proved and therefore, also the suit filed by the plaintiff is premature. He further submitted that the defendant-appellant has been acquitted in all eight cases filed by the plaintiff under Section 138 of the Negotiable Instruments Act, 1881 against the defendant.

On the other hand, learned counsel appearing for the respondent-plaintiff has supported the judgments passed by the Courts below and has prayed for dismissal of the appeals.

On critical analysis of the judgments passed by the Courts below and the record coupled with the submissions of learned counsel for the parties, this Court now proceeds to examine the case.

As regards first argument of learned counsel for the appellant, it may be noted that from the co-joint reading of all the three documents, it cannot be stated that the entire transaction between the parties was only a loan transaction. Majority of the transaction entered into between the parties depict that the parties had entered into sale and purchase of the immovable property with an option to the vendor to buy back the property at a predetermined price within a predetermined period. The sale in favour of the plaintiff is absolute and it is not based upon any restriction. The title in the suit property passed on to the plaintiff, upon the execution of the sale deed. No doubt, in the Memorandum of Understanding, there are certain restrictions on the vendee with respect to creation of encumbrance, sale, gift, exchange, mortgage or alienate or assign the interest in the property sold, however, these are part of a separate agreement. Still further, no doubt, on careful reading of Clause 6, it appears that the vendee was given right to dispose of the property and recover invested amount, however, that itself shall not be sufficient to record a finding that it was only a loan transaction. As noticed above, the nature of transactions between the parties clearly depict a combination of transfer of the property with right to buy back at a predetermined price alongwith simultaneous lease of the suit property in favour of the vendor. In view thereof, this Court does not find that the transaction between the parties was only a loan transaction.

Next argument of learned counsel is with reference to conditional mortgage as provided in Section 58(c) of the Transfer of Property Act, 1882 (hereinafter to be referred as "the 1882 Act"). Section 58 of the 1882 Act is extracted as under:-

> *"**58. "Mortgage", "mortgagor", "mortgagee", "mortgage-money" and "mortgage-deed" defined-***
>
> *(a) A mortgage is the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability.*
>
> *The transferor is called a mortgagor, the transferee a mortgagee; the principal money and interest of which payment is secured for the time being are called the mortgage-money, and the instrument (if any) by which the transfer is effected is called a mortgage-deed.*
>
> *(b) Simple mortgage - Where, without delivering*

possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgage-money, and agrees, expressly or impliedly, that, in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage-money, the transaction is called a simple mortgage and the mortgagee a simple mortgagee.

(c) Mortgage by conditional sale - Where the mortgagor ostensibly sells the mortgaged property -

on condition that on default of payment of the mortgage-money on a certain date the sale shall become absolute, or

on condition that on such payment being made the sale shall become void, or

on condition that on such payment being made the buyer shall transfer the property to the seller,

the transaction is called a mortgage by conditional sale and the mortgagee a mortgagee by conditional sale:

[Provided that no such transaction shall be deemed to be a mortgage, unless the condition is embodied in the document which effects or purports to effect the sale.

(d) Usufructuary mortgage - Where the mortgagor delivers possession [or expressly or by implication binds himself to deliver possession] of the mortgaged property to the mortgagee, and authorizes him to retain such possession until payment of the mortgage-money, and to receive the rents and profits accruing from the property [or any part of such rents and profits and to appropriate the same] in

lieu of interest, or in payment of the mortgage-money, or partly in lieu of interest [or] partly in payment of the mortgage-money, the transaction is called an usufructuary mortgage and the mortgagee an usufructuary mortgagee.

(e) English mortgage - Where the mortgagor binds himself to repay the mortgage-money on a certain date, and transfers the mortgaged property absolutely to the mortgagee, but subject to a proviso that he will retransfer it to the mortgagor upon payment of the mortgage-money as agreed, the transaction is called an English mortgage.

(f) Mortgage by deposit of title-deeds - Where a person in any of the following towns, namely, the towns of Calcutta, Madras, [and Bombay], [***] and in any other town which the [State Government concerned] may, by notification in the Official Gazette, specify in this behalf, delivers to a creditor or his agent documents of title to immovable property, with intent to create a security thereon, the transaction is called a mortgage by deposit of title-deeds.

(g) Anomalous mortgage - A mortgage which is not a simple mortgage, a mortgage by conditional sale, an usufructuary mortgage, an English mortgage or a mortgage by deposit of title-deeds within the meaning of this section is called an anomalous mortgage."

Clause (c) of Section 58 of the 1882 Act, makes it amply clear that no such transaction shall be deemed to be a mortgage unless a condition is embodied in the document which effects or purports to effect the sale deed. In other words, unless the condition of mortgage is incorporated in the document of transfer/sale, it cannot be treated as mortgage by conditional sale as is sought to be projected by learned counsel for the appellant. Although, it is not argued by learned counsel for the appellant, however, this transaction would not even fall within the scope of English Mortgage as provided in Clause (e) of Section 58 of the 1882 Act, because the mortgagor has not bound himself to repay the mortgage money on a certain date. Before a document can said to be an English Mortgage, it is necessary that the mortgagor binds himself to repay the mortgage money on a certain date. In this regard, reference can be made to the judgment passed by the Hon'ble Supreme Court in ***Raj Kishore (Dead) by LRs Vs. Prem Singh and others, (2011) 1 SCC 657***.

In view of the aforesaid authoritative pronouncement, there can hardly be any doubt that the transaction between the parties does not fall within the meaning of mortgage by conditional sale.

Next argument of learned counsel for the appellant is with respect to non-transfer of possession and, therefore, the sale between the parties is not complete. It may be noted here that transfer of title is not dependent upon transfer of possession. The sale of immovable property has been defined in Section 54 of the 1882 Act, which does not makes it mandatory that before there is transfer of title, the possession must be transferred/exchanged between the parties. Still further, Section 55 of the 1882 Act has laid down the rights and liabilities of buyer and seller. One of the rights available to the buyer is to recover possession. Therefore, there is no substance in this argument of learned counsel for the appellant.

Next argument of learned counsel is with reference to the lease deed which was executed between the parties being unstamped and unregistered and, therefore, not admissible in evidence. In this regard, it may be noted that objection with regard to the document being unstamped could only be raised at the time when the document was admitted in evidence. Section 36 of the Indian Stamp Act, 1899, clearly debars the Court from looking into this aspect at a later stage. However, there is some substance in the argument of learned counsel for the appellant that the lease deed was required to be compulsorily registered and therefore, it cannot be relied upon. However, learned counsel has overlooked Section 49 of the Registration Act, 1908 which provides that for collateral purpose, even an unregistered document can be taken into consideration. Still further, even if there is no relationship of landlord and tenant, still the plaintiff being owner is entitled to file a suit for possession which has been filed in the present case.

Next argument of learned counsel for the appellant is based upon Clause 6 of the Memorandum of Understanding. It may be noted here that the plaintiff has positively pleaded in the plaint that consecutive cheques have been dishonoured. There is no written statement. The defendant has not led any evidence to rebut the aforesaid pleadings. Even as per the argument of learned counsel for the appellant, eight cases under Section 138 of the Negotiable Instruments Act, have been filed by the plaintiff against defendant. Still further, on careful perusal of the aforesaid Clause, it is apparent that on dishonour of five consecutive cheques, the Memorandum of Understanding, the Lease deed and the agreement to sell and purchase between the buyer and seller were to stand null and void. However, there was no reference to the sale deed. Hence, pursuant to the sale deed, the title of the property passed on to the plaintiff and, therefore, he is entitled to possession thereof.

Last argument of learned counsel is also to be noted and rejected because the acquittal in criminal cases filed under Section 138 of the Negotiable Instruments Act would not have any adverse impact/effect on the decision of the present case. Such judgments passed are not binding on the Civil Court. Still further, in any case, the plaintiff has filed the present suit on the basis of title and, therefore, he has a right to recover the possession.

In view thereof, there is no ground to interfere.

Hence, both the Regular Second Appeals are ordered to be dismissed.

All the pending miscellaneous applications, if any, are disposed of, in view of the abovesaid judgment.

16.03.2020 **(ANIL KSHETARPAL)**
Pawan **JUDGE**

Whether speaking/reasoned:- **Yes/No**

Whether reportable:- **Yes/No**