

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

RSA-1381-2014 (O&M)
Date of decision: 20.04.2023

SAROJ BALA

...Appellant

VS

RAM KUMAR

...Respondent

CORAM: HON'BLE MR. JUSTICE ARUN MONGA

Present: Mr. Sandeep K. Sharma, Advocate,
For the appellant.

ARUN MONGA, J. (ORAL)

For convenience, parties herein are described as per recitals
before learned trial Court.

2. Having suffered concurrent adverse findings by the two Courts
below, plaintiff in second appeal before this Court is assailing learned trial
Court judgment and decree dated 09.05.2012, as upheld by learned First
Appellate Court vide its judgment and decree dated 13.11.2013, dismissing
the suit filed by appellant/plaintiff for declaration that conditional sale be
treated as absolute and for possession of the suit property.

3. Briefly stated, facts as noticed by Courts below, are as under:

*“The case of the plaintiff is that the defendant was
owner in possession of a house situated in Kodhi Colony,
Rohtak bounded as under:*

East 20' Road 20' wide

West 20' Ahata No.82

North 60' Ahata No.79/89

South 60' Ahata No.51/91

*Measuring 133.33 sq. yards. The defendant executed a
registered mortgage deed dated 19.05.2000 against the
mortgage money of Rs.75,000/- qua the suit property. It was
agreed that defendant will get redeemed the property on
payment of mortgage money along with interest @ 18% per
annum till 18.05.2003 and that if the defendant failed to get the
property redeemed, Saroj Bala shall become owner of the suit
property. Defendant failed to get suit property redeemed in
time. Consequently, the plaintiff filed an application under the*

Bengal Regulation Act in the Court of learned District Judge, Rohtak. Notice of the application was served upon the defendant under the Act but defendant failed to get the suit property redeemed within prescribed period of one year. Since, defendant failed to get the suit property redeemed even after one year as aforesaid, plaintiff has filed the present suit claiming herself to have become owner of the suit property.”

4. Defendant failed to appear before learned trial Court despite service and was proceeded against *ex parte* vide order dated 25.05.2009.

5. On appraisal of *ex parte* evidence vis-à-vis pleadings, suit of plaintiff was dismissed with costs by learned trial Court vide impugned judgment and decree dated 09.05.2012.

6. Feeling aggrieved, plaintiff went in appeal, which was also dismissed by learned First Appellate Court, resulting in instant Regular Second Appeal by plaintiff before this Court.

7. In its judgment, learned First Appellate Court, *inter alia*, observed as below:

XXX XXX XXX

“Moreover this court wants to mention here that mortgage deed Ex.P-1 does not fall in any of the categories of conditional sales as defined under Section 58 C of the Transfer Property Act. Mortgage deed Ex.P1 goes to show this fact that the suit land was mortgaged by Ram Kumar defendant in favour of Saroj Bala without handing over possession of the suit property and with the condition that if the mortgager failed to redeem the property till 18.05.2003, property shall be considered to be sold to mortgage Saroj Bala. Thus, the property in the present case was never sold to Saroj Bala with the condition that in default of same, the sale shall become absolute.”

XXXX XXX XXX

*Though there is just a fine distinction between mortgage by conditional sale and a mortgage with condition that in default of payment of mortgage money, it shall be considered as a sale, so this distinction is quite important. Learned lower Court has rightly observed that it is important to note that such condition is considered as a clog on the right of redemption of mortgager. In this context, reliance is placed on **Banwarilal Vs. Puran Chand AIR 1985 189 (P&H)** wherein there was a clause to the*

effect that the property would be redeemed within period of one year failing which the mortgage would be turned into a sale and it was held that the said clause is a clog on equity of redemption and therefore, void. Thus, learned lower court has also rightly observed that the mortgage deed Ex.P1 is not a conditional sale between the parties, but is a mortgage deed with a clause that the mortgage deed shall be turned into sale on failure of mortgagor to redeem the property till a specific time and as such condition contained in mortgage deed Ex.P1 amounts to clog on the right of redemption and is thus void. Learned lower court has rightly observed that the entire summary proceedings initiated by plaintiff under the Bengal Regulation Act are of no avail to the plaintiff since Bengal Regulation Act is applicable only in the case of conditional sales. It is also settled law that no one can be condemned being unheard. It was the duty of the plaintiff to intimate Ram Kumar that you have to redeem the land and if this land would not be redeemed then you have to sale the same to Saroj Bala with the condition that in default of the same, sale was become absolute. So, no earnest efforts has been taken by the plaintiff to implement mortgage deed Ex.P1. Moreover, no attesting witness of the mortgage deed Ex.P1 has been examined by the plaintiff. Neither the scribe nor attesting witness has been examined by the plaintiff. When such is the situation then plaintiff has failed to prove his case by leading oral as well as documentary evidence. Moreover, in the present case, plaintiff has not appeared in the witness box to prove his case. Neither the plaintiff has given the power of attorney to Gori Shankar to depose the statement on her behalf. When, plaintiff herself has not appeared in the witness box to prove her case then the plaintiff is not entitled for any relief because it is settled law that pleadings cannot take the place of proof unless and until it is proved by leading cogent and convincing evidence. When the plaintiff herself not appeared in the witness box to prove her case then plaintiff is not entitled for the relief of declaration and possession which has been sought by her in the present case. Learned lower Court has rightly decided the case against the plaintiff. So, the findings given by learned lower court are well reasoned and justified.”

8. Having heard learned counsel for appellant, I am unable to persuade myself with the submission of learned counsel for appellant that the learned trial Court or learned First Appellant Court below have erroneously rendered the concurrent finding so as to deserve interference in second appeal. In fact, learned Trial Court has laboriously gone into the very concept of a restrictive clause in mark ‘D’ which bars the redemption by its

nature *per se* being a clog on the wheel of equity *qua* the rights of the mortgagor to seek redemption and, therefore, is to be treated as void. In fact the said proposition of law was settled in a judgment of the Supreme Court titled “**Murari Lal Vs. Dev Karan (AIR 1965 SC 225)**” which in turn was relied upon by this Court in case titled “**Banwarilal Vs. Puran Chand**” reported in **AIR 1985 189 (P&H)** and the applicability of the judgment rendered therein resulted in dismissal of the suit. For better appreciation of the view taken by learned Courts below that judgment rendered by this Court in Banwarilal, *ibid*, being apposite, its relevant part is reproduced herein below:-

“5. The question before us has not been formulated in specific words, but I apprehend the question to be as follows:

“If a deed effecting or purporting to effect a sale after the amendment in Clause (c) of Section 58 of the Transfer of Property Act came into force, contains any one of the three conditions mentioned in that clause, is it in every case a deed of mortgage by conditional sale.

A reference to Section 58 of the Transfer of Property Act will show that it defines a "mortgage", "mortgagor", "mortgage money", "mortgagee" & at the same time defines and enumerates the various forms of mortgages in Sub-sections (b), (c), (d), (e), (f) and (g). We are concerned in this case with a mortgage by conditional sale as defined in Sub-section (c). Sub-section (c) lays down the statutory requirements which must be fulfilled before a transaction can be considered to be a mortgage by conditional sale. As the real transaction as opposed to the ostensible transaction described in the sub-section is a mortgage, the parties involved are referred to as "mortgagor" and "mortgagee" and the money is referred to as the "mortgage money" and the security as "mortgaged property". The relationship of mortgagor and mortgagee arises directly from the transaction and is not antecedent to it or independent of it. This view is supported by a decision of the Full Bench of the Madras High Court in MUTHUVELU MUDALIAR v. VYTHI-LINGA MUDLIAR', 42 Mad 407 (FB), wherein Willis C. J. has stated at p. 418 with respect to Section 58 as follows:

"The section begins with a definition of the terms mortgage', mortgagor and mortgagee and proceeds, as pointed out by Napier J. to describe or define the different sorts of mortgages which are met within India. Sub-section (c) deals with mortgages by conditional sale, in which the transaction is ostensibly a sale or transfer of ownership in exchange for a

price (Section 34) but is really intended to be a mortgage or transfer of an interest in specific immovable property for the purpose of securing the payment of money (Section 53(e)) As the transaction is really a mortgage- and only ostensibly a sale, Sub-section (c) refers to the transferor as the mortgagor, and speaks of the ostensible sale of the mortgaged property subject to certain conditions as to the payment of the mortgage money"

This interpretation was accepted by the other two learned judges who constituted with the learned Chief Justice the Full Bench.

6. Section 58 (C) requires first that there should be a sale subject to one of the three conditions mentioned in the sub-section. It then lays down that it is only ostensibly a sale but not really a sale, then it is a mortgage by conditional sale. The proviso then lays down the test to show when the transaction is not a mortgage by conditional sale."

9. Shorn of unnecessary details, the submissions in this Regular Second Appeal are that the findings returned by learned Courts below are against the facts of the case and are based on conjectures and surmises; and are contrary to law and evidence on record,

10. Having perused the impugned judgments, I find that PW Saroj Bala had actually stepped into the witness box and tendered her affidavit Ex PW2/A and proved documents Ex P-1 to P-6 as noted in the impugned judgment passed by the learned trial Court. To that extent, the learned First Appellate Court erred in mentioning in its judgment that Saroj Bala plaintiff had not stepped into the witness box and making incidental observations on that account. None-the-less, I am of the opinion that for the other reasons recorded by the learned two courts below consistent with the record and the applicable law, the suit was rightly dismissed. Except as above, my considered opinion is that the submissions made before learned Courts below were duly considered and repelled by recording sound and sufficient reasons consistent with record and the applicable law. I am inclined to agree with the same. There seems

no substance in the submissions that the impugned judgments are based on conjectures and surmises.

10.1. No new arguments have been raised other than reiteration of the stand taken before learned Courts below.

11. To my mind, judgments under challenge have been rendered after due and correct appreciation of record, including the evidence adduced by the parties.

12. There seems no perversity or illegality in the concurrent findings of facts returned by the Courts below. No interference is thus called for to disturb the said concurrent findings. In this second appeal, no fresh ground worthy of interference is made out.

13. No question of law, much less substantial one, a *sine qua non* for entertaining regular second appeal, is involved herein, for exercise of appellate jurisdiction of this Court under Section 100 of Civil Procedure Code.

14. As an upshot of my preceding discussion, the appeal is dismissed, being bereft of any merit. Resultantly, both the impugned judgments and decrees passed by learned Courts below are upheld.

15. Pending application/s, if any, shall also stand disposed of.

16. No order as to costs.

(ARUN MONGA)
JUDGE

20.04.2023
Vandana

Whether speaking/reasoned:	Yes/No
Whether reportable:	Yes/No