

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

114

RSA-3180-1994
Date of decision: 10.04.2024

SARDARI LAL (DECEASED) THROUGH LRS. ..Appellant

Versus

ASA NAND & OTHERS ..Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr. Anurag Jain, Advocate
and Mr. Kuljeet Singh, Advocate
for the appellant.

Mr. Piyush Bansal, Advocate
for Mr. Rajinder Goyal, Advocate
for respondent No.1 and 2.

Mr. Vinod Gupta, Advocate
for respondent No.3 and 4.

ANIL KSHETARPAL, J(Oral)

1. Brief facts of the case:-

1.1 The plaintiff has filed this regular second appeal challenging the judgment and decree passed by the First Appellate Court, which in turn has reversed the judgment passed by the trial Court.

1.2 In order to comprehend the issues involved in the present case, the relevant facts, in brief, are required to be noticed.

1.3 The plaintiff filed a suit for possession by way of redemption of two shops, which are a part of his residential house at village Barwala. It is his case that on 26.11.1968, he along with his brother Sh. Mohan Lal mortgaged the shops with possession in favour of Sh. Nand Ram son of

Hunda Ram (defendant No.5) for a sum of Rs.6,000/-. Subsequently, Sh. Nand Ram (defendant No.5) sold his mortgagee rights in favour of Sh. Asa Nand son of Sh. Dewat Ram and Sh. Amin Lal son of Sh. Banwari Lal, who inducted defendant No.3 and 4 namely Sh. Rameshwar son of Sh. Banwari Lal and Sh. Babu Ram son of Sh. Rameshwar, as tenants. Defendant No.1 and 2 claim that there is no relationship of landlord and tenant between the answering defendants and defendant No.3 and 4, however, creation of mortgage by the plaintiff and defendant No.6 in favour of Sh. Nand Ram was admitted and defendant No.1 and 2 purchased the mortgagee rights vide registered mortgage deed dated 10.08.1979.

1.4 Defendant No.3 and 4 while filing a separate written statement claim themselves to be in possession of the property before 26.11.1968 as tenants under the mortgagers and in its response the plaintiff filed the replication.

2. Reasons recorded by the trial Court:-

2.1 Upon appreciation of pleadings, the trial Court identified the following issues for adjudication:-

- “1. Whether possession was actually delivered along with the mortgage to defendant No.5 at the time of mortgage of suit land on 26.11.1968? OPP*
- 2. For what amount of the plaintiff and defendant No.6 are entitled to redeem the property? OPP*
- 3. If issue No.1 is proved whether defendants No.3 and 4 are the bonafide tenants of the mortgagee and not liable to be effected in these proceedings? OPD*
- 4. Whether the suit is not properly valued for the purposes of Court fees? OPD*
- 5. Whether plaintiff alone is not entitled to file the present suit? OPD*
- 6. Whether the suit is bad for non-joinder and mis-joinder of parties? OPD*
- 7. Relief.”*

2.2 The trial Court after permitting the parties to lead evidence, decreed the suit. Defendant No.3 and 4 filed a separate appeal, whereas, Sh. Asa Nand and Sh. Amin Lal (defendant No.1 and 2) filed separate appeal. The First Appellate Court has partly accepted the appeal and held that defendant No.3 and 4 are tenants under the ownership of plaintiff and defendant No.6 before creation of the mortgage on 26.11.1968, hence, decree for possession cannot be passed.

3. **Arguments put forth by the learned counsel representing the parties:-**

3.1 This Bench has heard the learned counsel representing the parties at length and with their able assistance perused the paperbook along with the scanned digital record.

3.2 The learned counsel representing the appellant has also provided a photocopy of the pleadings and the record to the Court.

3.3 The learned counsel representing the appellant while drawing the attention of the Court to the registered mortgage deed dated 26.11.1968 (Ex.PW3/1) submits that the possession of the mortgaged properties i.e. two shops was handed over to Sh. Nand Ram son of Sh. Hunda Ram (defendant No.5). While referring to the registered mortgage deed dated 10.08.1979, he submits that Sh. Nand Ram sold his mortgagee rights with possession in favour of defendant No.1 and 2 with possession. He submits that defendant No.2 Sh. Amin Lal is brother of Sh. Rameshwar (defendant No.3) and uncle of Sh. Babu Ram (defendant No.4) being brother of Sh. Rameshwar. He submits that the execution of the mortgage deeds dated 26.11.1968 as well as 10.08.1979 are admitted by them and the First Appellate Court has erred in relying upon oral evidence instead of the documentary evidence.

3.4 Per contra, the learned counsel representing the respondents submits that Sh. Mohan Lal brother of the plaintiff has appeared as DW-1 and admitted that defendant No.3 and 4 are in possession of the property as tenants in the premises owned by them from 01.04.1967 i.e. before the creation of mortgage and the plaintiff while filing the replication has stated that the possession of the shop was not handed over to the defendants at the time of creation of the mortgage. In oral evidence, the plaintiff also states that the possession was given to the defendants in the year 1973.

4. Discussion by this Court:-

4.1 This Court has considered the submissions and analyzed the arguments of the learned counsel representing the parties.

4.2 It is well settled principle of evidence law that in the presence of the documentary evidence, the preference cannot be given to the oral evidence.

4.3 In this case, the registered mortgage deed dated 26.11.1968, evidences the delivery of possession in favour of Sh. Nand Ram (defendant No.5). In this mortgage deed, it is specifically recorded that the possession of the shops have been given by the plaintiff Sardari Lal and Mohan Lal to Sh. Nand Ram (defendant No.5) at the time of execution and registration of the mortgage. Sh. Mohan Lal is also a signatory to the aforesaid mortgage deed. While appearing as DW-1, he admits his signatures.

4.4 Subsequently, Sh. Nand Ram sold the mortgagee rights in favour of Sh. Asa Nand and Sh. Amin Lal on 10.08.1979, again through a registered mortgage deed. In that mortgage deed also, it has been specifically recited that the possession has been delivered by the original mortgagee

namely Sh. Nand Ram in favour of Sh. Asa Nand and Sh. Amin Lal, the new mortgagees. Sh. Amin Lal is brother of Sh Rameshwar (defendant No.3). Both are sons of Sh. Banwari Lal. Sh. Amin Lal while filing the written statement admits that he along with Sh. Asa Nand purchased the mortgagee rights vide registered mortgage deed dated 10.08.1979.

4.5 Secondly, the First Appellate Court has erred in appreciating the oral evidence. The date of the institution of the suit as well as the date on which the statements were recorded are incorrectly mentioned in the judgment. At more than one places, the First Appellate Court has erred in appreciating the oral evidence.

4.6 Furthermore, the defendants have relied the upon deposition of Sh. Mohan Lal, who has appeared as DW-1. His statement makes an intriguing material for perusal. He admits the execution of both the mortgage instruments i.e. 26.11.1968 and 10.08.1979. he states that one shop was rented to Sh. Rameshwar, whereas, the second shop was rented to Sh. Banwari Lal and Sh. Rameshwar. He states that he used to receive the entire rent. During cross-examination, he has stated that he does not maintain any accounts of the receipt of rent or payment to the plaintiff namely his brother Sh. Sardari Lal. He spilled beans while stating that Sh. Sardari Lal is not giving his share and denying his title. Obviously, Sh. Mohan Lal felt aggrieved and wanted to settle the score with his brother Sh. Sardari Lal. Moreover, it is the case of defendant No.3 and 4 that they were inducted as tenants in the year 1968, whereas, the alleged receipts issued exclusively by Sh. Mohan Lal in favour of defendant No.2 and 3 are with effect from 01.04.1967, which is not even the pleaded case of the defendants.

4.7 Moreover, the defendants have claimed that they are maintaining accounts of the payment of rent, however, they did not produce the same. Obviously, the best evidence has been withheld.

4.8 Additionally, this Court has perused the alleged receipts issued by Sh. Mohan Lal (Ex.D-1 to D-42). None of the receipts is signed by Sh. Sardari Lal. These receipts are appeared to have been prepared in one go. The hand writing and the pen used for writing these alleged receipts is the same, although, the receipts are having been issued with respect to the period from 1967 till 1988. There are as many as 42 receipts. The First Appellate Court has erred in overlooking this aspect.

4.9 There is no reason why Sh. Amin Lal, the brother of defendant No.2 and 3 would purchase mortgagee rights with possession from Sh. Nand Ram if his brother and nephew were already in possession as tenant. Even if he wanted to purchase the mortgagee rights, he would have got it recited in the mortgage deed that his brother and nephew are already in possession as tenant under the original owner i.e. the mortgagor.

4.10 Moreover, DW-3 Sh. Atma Ram states that Sh. Satya Narain is a tenant, whereas, Sh. Rameshwar (defendant No.3) states that he is tenant from the year 1968, although, he has produced receipts from the year 1967.

4.11 There is yet another aspect of the matter. Defendant No.3 and 4 are claiming to be in possession from 1967/1968, however, apart from the receipts, they have not produced any other evidence to show that they were running the business from the aforesaid two shops from 1967 or 1968.

4.12 As already discussed, the receipts have been issued by Sh. Mohan Lal with the explicit intent of taking revenge from his brother.

5. Decision:-

5.1 Keeping in view the aforesaid discussion, the result is inevitable, hence, the appeal is allowed. The judgment passed by the First Appellate Court is set aside and that of the trial Court is restored.

5.2 All the pending miscellaneous applications, if any, are also disposed of.

April 10th, 2024

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(ANIL KSHETARPAL)
JUDGE

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