

RSA-1298-1996 (O&M)

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

RSA-1298-1996 (O&M)

Date of decision : 26.02.2024

Diwan Chand (deceased) through LRs

... Appellant(s)

Versus

Thana Singh (deceased) through LRs

... Respondent(s)

CORAM : HON'BLE MRS. JUSTICE ALKA SARIN

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

Mr. R.S. Rangpuri, Advocate for the respondent.

ALKA SARIN, J. (ORAL)

1. The present appeal has been preferred by the plaintiff-appellant challenging the judgment and decree dated 23.12.1995 passed by the First Appellate Court.

2. The brief facts relevant to the present *lis* are that the plaintiff-appellant filed a suit for redemption of mortgage dated 14.06.1971 qua which a registered mortgage deed was executed. A room/shop was mortgaged for an amount of Rs.5,000/- to the defendant-respondent. On 28.07.1988 a legal notice was served upon the defendant-respondent for redemption of the property. However, since the defendant-respondent did not agree, the present suit was filed. In the present suit it was averred that the

suit property being one room/shop, which was part of a residential house, was mortgaged on 14.06.1971 (Ex.P1) for a sum of Rs.5,000/- to the defendant-respondent and vacant possession was handed over to the defendant-respondent. It was further averred that on 28.07.1978 a registered notice was issued for redemption of the property. Thereafter, the present suit was filed. In the written statement the stand taken by the defendant-respondent was that he was inducted as a tenant in the property w.e.f. 01.06.1971 by the plaintiff-appellant @ Rs.125/- per month as rent and the relationship between the plaintiff and the defendant was that of a landlord and tenant and hence the Court had no jurisdiction to try the suit. The ownership of the plaintiff was admitted. In the replication the pleadings in the plaint were reiterated and averments made in the written statement were denied.

3. On the basis of the pleadings of the parties the following issues were framed :

1. Whether the defendant is mortgagee in possession of the suit property and the plaintiff is entitled to redeem the suit property, if so on what terms and conditions ?
OPP
2. Whether the suit property has been properly described, if so its effect ? OPD
3. Whether the defendant is tenant in the suit property w.e.f. 1.6.1971 at a monthly rent of Rs.125/- per month ? OPD

4. Whether the plaintiff has not been properly drafted,
if so its effect ? OPD

5. Relief.

4. The Trial Court vide judgment and decree dated 26.04.1994 decreed the suit. Aggrieved by the same, an appeal was preferred by the defendant-respondent before the First Appellate Court which came to be allowed vide the impugned judgment and decree dated 23.12.1995. Hence, the present regular second appeal by the plaintiff-appellant.

5. Learned counsel for the plaintiff-appellant has contended that there is not an iota of evidence to show that the defendant-respondent was a tenant in the suit property. It is further the contention of the learned counsel that the plaintiff-appellant had examined PW1 Paramjit Singh from the office of Deputy Commissioner to prove the registered mortgage deed Ex.P1. The witness to the mortgage deed i.e. Bikkar Singh appeared in the witness box as PW2. The deed writer - Rajinder Kumar - appeared as PW3. Ramchand Ahlmad appeared in the witness box as PW5 who had brought the statement given by the defendant-respondent on 28.08.1978 in a petition filed by the plaintiff-appellant herein for eviction against a tenant. In the said statement he has specifically stated that the property was on mortgage with him. A Clerk from the Municipal Committee Kotkapura, namely, Hans Raj was examined as PW11 to prove a representation given by the defendant-respondent that house tax should be waived as he was a mortgagee in possession and not a tenant. PW10 Atma Singh, Tax Assistant, Income Tax Department brought the income tax returns from the year 1981-82 to 1990-

91 wherein not a single entry qua the rent was made. Learned counsel would further contend that on Issue No.3 the Trial Court has specifically held that there was no evidence to show that there was a relationship of landlord and tenant between the parties and in the absence of any evidence the stand taken by the plaintiff-appellant on the basis of the evidence produced stood proved that the property had been mortgaged with the defendant-respondent.

6. *Per contra*, the learned counsel for the defendant-respondent has contended that the plaintiff-appellant never issued any rent receipts and that he had produced *bahi khata* on the record to show that there were entries qua rent in the said account books. It is further the contention that Rs.5,000/- was actually given as a security for the property which was given on rent to the defendant-respondent and the mortgage deed was created only to safeguard Rs.5,000/-.

7. I have heard the learned counsel for the parties and with their able assistance have gone through the record.

8. As per the law laid down by a Constitution Bench of the Hon'ble Supreme Court in the case of **Pankajakshi (dead) through LR's & Ors. vs. Chandrika & Ors. [2016 (6) SCC 157]** there is no requirement for framing of substantial questions of law.

9. In the present case the Trial Court had given a categorical finding on Issue No.3 that relationship of tenant and landlord was not proved in the absence of any evidence. The plaintiff-appellant in the present case had produced on record Ex.P1 mortgage deed and had also examined PW1 Paramjit Singh from the office of Deputy Commissioner to prove Ex.P1

which was a registered mortgage deed. PW2 Bikkar Singh the witness to the mortgage deed and PW3 Rajender deed writer of the mortgage deed were also produced. The statement of PW2 Bikkar Singh, the witness to the mortgage deed, reveals that no suggestion was even put to the said witness in cross-examination that the said mortgage deed was created for securing the amount of Rs.5,000/- which was given as a security. Further still, PW5 Ram Chand Ahlmad brought the statement of the defendant-respondent recorded on 28.08.1978 in another petition filed by the plaintiff-appellant for eviction of a tenant wherein the defendant-respondent categorically stated that the property had been mortgaged to him. PW11 Clerk from the Municipal Committee stepped into the witness to prove the representation given by the defendant-respondent asking for waiver of the house tax on the ground that he was a mortgagee in the property. The income tax returns which were proved by PW10 Atma Singh, Tax Assistant, Income Tax Department reveal that from the year 1981-82 to 1990-91 there is not a single entry in the income tax returns qua the rent. The argument of the learned counsel for the defendant-respondent that the mortgage deed was created for securing the amount of Rs.5,000/- cannot be accepted in view of the fact that it is incomprehensible that a person would create a mortgage of his property in favour of a tenant to secure the amount of Rs.5,000/- which the defendant-respondent claims was given as a security. There was no impediment in writing a rent note wherein the fact of the security could have also been mentioned. There was no occasion for entering into a registered mortgage deed qua the said property had it been a case of tenancy. Sufficient

evidence, as discussed above, was brought on the record by the plaintiff-appellant to show that the property was mortgaged to the defendant-respondent. However, not a single document was produced on the record by the defendant-respondent to show the existence of relationship of tenant and landlord between the parties.

10. The second argument of the learned counsel for the defendant-respondent that the account books containing the relevant entries are Ex.DW2/B to Ex.DW2/B211 which show the payment of rent cannot be accepted in view of the fact that Section 34 of the Indian Evidence Act, 1872 states that entries in books of account including those maintained in an electronic form, regularly kept in the course of business, are relevant but such statements alone cannot be sufficient evidence to charge any person with liability. In the present case though the account books were produced, however, it has come in the cross-examination that there were multiple wrong entries which had been made and it was so admitted by the defendant-respondent also. Infact, the person maintaining the account books was also not produced. The account books stated to be produced were actually extracts from the account books.

11. In the case of **Ishwar Dass Jain (Dead) through LRs Vs. Sohan Lal (Dead) through LRs [1999(2) RCR (Rent) 714]** the Hon'ble Supreme Court has held as under :

“24. In the recent judgment of this Court in Central Bureau of Investigation Vs. V.C. Shukla (1998(3) SCC 410), it has been laid down that for purposes of Section 34, 'Book' ordinarily means a collection of sheets of

paper or other material, blank, written or printed, fastened or bound together so as to form a material whole. Loose sheets of paper or scraps of paper cannot be termed as 'book' for they can be easily detached and replaced. It has also been held that the rationale behind admissibility of parties' books of account as evidence is that the regularity of habit, the difficulty of falsification and the fair certainty of ultimate detection give them in a sufficient degree, a probability of trustworthiness." When that is the legal position, extracts of alleged account books, in our view, were wrongly treated as admissible by the courts below though the original books were not produced for comparison nor their non-production was explained nor the person who had prepared the extracts was examined.

25. Therefore, the private extracts of alleged account books like Exs.D2 to D5 are not admissible. The principal evidence relating to the alleged payment of rent disappears and the foundation for the alternative plea of tenancy crumbles. This is one reason why the finding relating to tenancy is vitiated being based on inadmissible evidence."

12. In view of the above discussion, the present appeal is allowed. The judgment and decree passed by the First Appellate Court are set aside and those of the Trial Court are restored. Pending applications, if any, also stand disposed off.

26.02.2024

Yogesh Sharma

(ALKA SARIN)

JUDGE

NOTE: Whether speaking/non-speaking: Speaking
Whether reportable: YES/NO