

(2010) 01 P&H CK 0068

High Court Of Punjab And Haryana At Chandigarh

Case No: None

Sushil Kumar

APPELLANT

Vs

Lajja Ram alias Laj Ram and
Another

RESPONDENT

Date of Decision: Jan. 25, 2010

Acts Referred:

- Evidence Act, 1872 - Section 92

Citation: (2010) 158 PLR 451

Hon'ble Judges: L.N. Mittal, J

Bench: Single Bench

Final Decision: Allowed

Judgement

L.N. Mittal, J.

Sushil Kumar defendant No. 1 having remained unsuccessful in both the courts below has filed the instant second appeal.

2. Lajja Ram alias Laj Ram respondent No. 1 filed suit against the appellant and his brother Vijay Kumar proforma respondent No. 2 for possession of the shop by redemption of mortgage thereof alleging that the plaintiff after purchasing the suit land vide registered sale deed dated 18.6.1993 for Rs. 24,000/- constructed disputed shop there and mortgaged it with possession with defendants vide registered mortgage deed dated 13.8.1993 for Rs. 14,000/-. However, defendants on demand refused to accept the mortgage money and to redeem the mortgage. The plaintiff accordingly sought possession of the shop in suit by redemption of mortgage and also claimed Rs. 2500/- per month as mesne profits from the date of filing of suit till delivery of possession.

3. The defendants pleaded that they had taken the shop on rent from the plaintiff in August, 1993 at the rate of Rs. 200/- per month rent and later on defendant No. 2 left business and defendant No. 1 alone has been doing the business in the shop in

suit and has been paying rent regularly to the plaintiff, who, however, never issued any receipt. The plaintiff rather got the mortgage deed executed to deny protection of Rent Control Act to the defendants.

4. Learned Civil Judge (Junior Division), Panchkula vide judgment and decree dated 17.4.2009 decreed the suit for possession of the shop in suit by redemption of mortgage but relief of mesne profits claimed by the plaintiff was denied. Both plaintiff and defendant No. 1 preferred appeals against judgment and decree of the trial court. Learned Additional District Judge, Panchkula vide judgment dated 22.10.2009 dismissed the appeal preferred by defendant No. 1 but partly allowed the appeal preferred by the plaintiff and directed appellant-defendant No. 1 to pay mesne profits to the plaintiff @ 1000/- per month from the date of institution of the suit till delivery of vacant possession thereof. Feeling aggrieved, defendant No. 1 has preferred the instant appeal.

5. I have heard learned Counsel for the appellant and perused the case file.

6. Learned Counsel for the appellant vehemently contended that mortgage deed in question was a sham transaction and in fact defendants had taken the shop in dispute on rent. Reliance in support of this contention has been placed on two judgments of this Court namely *Banarsi Dass v. Gian Chand* (2005) 142 P.L.R. 127 and [Narain Dass Vs. Mulkh Raj Gulati and Others](#), . However, both the judgments are completely distinguishable on facts. In those cases, plaintiff had lost in both the courts below and it was found as a matter of fact that the shop had been let out to the defendant and mortgage was a sham transaction. In the instant case, however, the plaintiff has succeeded in both the courts on this aspect and it was found as a fact that the mortgage deed is not a sham transaction and defendants were not inducted as tenant in the shop. Moreover in the case of *Banarsi Dass*, shop valuing Rs. 3 lacs to Rs. 4 lacs located in a thickly commercial area of municipal town was allegedly mortgaged for Rs. 17,000/-only. It was a material circumstance to hold the mortgage to be a sham transaction in that case. In the instant case, however, plaintiff himself purchased suit land for Rs. 24,000/- and just after two months after constructing shop mortgaged it for Rs. 14,000/-. So the mortgage amount is not heavily disproportionate to the value of the shop in the instant case. The concurrent finding of the courts below against the defendants on this aspect is based on appreciation of evidence and is not shown to be perverse or illegal.

7. In addition to the aforesaid, even defendant No. 1 appellant himself admitted in cross-examination that the shop in suit had been mortgaged by plaintiff in favour of defendants vide registered mortgage deed Ex.P1 for Rs. 14,000/-. In view of the said admission made by defendant No. 1-appellant himself in the witness box, it does not lie in the mouth of the appellant to contend that the mortgage was a sham transaction or to contend that the defendants were in fact inducted as tenant in the shop. Learned Counsel for the appellant has also relied upon judgment of Hon"ble Supreme Court in the case of *Smt. Gangabai v. Smt. Chhanbai* 1982 (1) R.C.R. (Rent)

384. In that case, however, there was a sale deed as well as rent note. The plaintiff had purchased the house for Rs. 4000/- and allegedly sold it for Rs. 2000/-. The sale was held to be a sham transaction. Section 92 of the Evidence Act was held to be no bar to such a finding. However, that was finding of fact in that case on the basis of evidence led therein. No parallel can be drawn between facts and evidence of that case and the instant case. This judgment also does not help the appellant in any manner.

8. In view of the aforesaid findings of the courts below that the shop in suit had been mortgaged to the defendants and the plaintiff is entitled to possession thereof by redemption of mortgage is upheld.

9. Learned Counsel for the appellant next contended that learned lower appellate court without any evidence has awarded mesne profits @ 1000/- per month. There is considerable merit in this contention. Notice of motion limited to rate of mesne profits.

10. Mr. M.L. Saini, Advocate accepts notice on behalf of respondent No. 1.

11. I have heard learned Counsel for the parties and perused the case file.

12. No cogent evidence has been led by plaintiff-respondent to prove as to what rent could have been fetched of the shop in dispute on the date of filing of suit. Consequently the trial court did not award any amount of mesne profits to the plaintiff. However, lower appellate court without any basis has assessed the mesne profits at Rs. 1000/- per month. The same appears to be excessive. To assess the rate of mesne profits, it may be noticed that the defendants themselves pleaded that the rate of rent settled by them in August, 1993 was Rs. 200/- per month. The suit was filed in February, 2006. Obviously, rates of rent had increased during this long period of twelve and half years. Consequently, it would be just and appropriate if mesne profits are awarded to the plaintiff @ Rs. 500/- per month only. Finding of learned lower appellate court stands modified to this extent.

13. For the reasons recorded hereinabove, the instant appeal is allowed partly and in modification of judgment and decree of lower appellate court, it is directed that plaintiff-respondent No. 1 shall be entitled to mesne profits for the shop in suit @ 500/- per month since the date of filing of the suit till delivery of vacant possession thereof to the plaintiff. Judgments and decrees of both the courts below in all other respects are affirmed.