(2016) 09 P&H CK 0031

In the Punjab And Haryana At Chandigarh

Case No : RSA No. 835 of 1987.(O&M)

M/s Mohar Singh Ishwar Dayal Jewellers Main Bazaar, Ballabhgarh — APPELLANT

Vs

Chuni Lal — RESPONDENT

Date of Decision : 19-09-2016

Acts Referred:

Citation : (2017) 1 PLR 217 : (2017) 1 RCRRent 602

Hon'ble Judges : Mr. Amit Rawal, J.

Bench : Single Bench

Advocate : Mr. M.L. Sarin, Senior Advocate with Ms. Alka Sarin, Advocates, for the Respondent; Dr. Surya Parkash, Advocate, for the Appellant

Final Decision : Dismissed

Judgement

Amit Rawal J. - C.M. No.7907-C of 2010

The application for impleading the legal representatives of deceased-respondent No.15 is allowed subject to all just exceptions. Registry is directed to carry out amendment to the memo of parties.

RSA No.835 of 1987 (O&M)

The questions for discussion arise in this second appeal are :-

(i) Whether the appellant/plaintiff/mortgagor can seek possession of the tenants allegedly inducted by the mortgagee?

(ii) Whether the tenants already in occupation of the premises can be directed to surrender possession to the mortgagee on redemption of the mortgage?

2. In order to answer the aforementioned questions, it would be apt to give a brief pre-face of the matter. The appellant-plaintiff instituted a suit for redemption of the mortgage dated 11.05.1953, Ex.P13. The mortgagor was none else but the appellant and the mortgagee was Nathe. On 11.05.1953, the

plaintiff No.1-Khichu Mal and his brother Nanak Chand mortgaged the shop mentioned as per the site plan attached with the suit to Nathe son of Jaisukh @ Ghosi, resident of village Mohla, Tehsil Ballabhgarh, Distt. Faridabad for a sum of Rs.7350/-. Later on, Nathe had expired and his heirs, defendant Nos.3 to 13 have been impleaded as parties. The terms and conditions of the mortgage deed as borne out from true translated copy of the mortgage deed are as under:-

"The possession of the shop has been physically handed over to the mortgagee. The mortgagee will have right to use the shop in question as his own or to let out the same to anyone till he is in possession of the same as mortgagee. The terms and conditions of the mortgage deed as follows:-

1. The rent and interest of the mortgage amount is equal.

2. The repairs of the mortgage property will be done at out costs and expenses and if we do not repair the same, the mortgagee will get the same repaired from his pocket and the genuine amount in the accounts of repair will be paid to mortgagee at the time of the redemption of the mortgage.

3. The time the mortgagor will pay the entire amount of mortgage money to the mortgagee the shop in question will be redeemed and will take the possession back and mortgagee will have also right to recover the mortgage amount in case of any fault in us from out properties of any kind.

4. In case the mortgagee is dispossessed from the shop or any part of it due to any cause, the mortgagee will have right to recover the mortgage amount and other claims from our properties of all kinds.

5. The terms and conditions of the mortgage have now been final.

6. In case of any claim by any person regarding the shop in question we shall be responsible. Therefore, these contents of this day of mortgage deed within Abadi along with physical possession are executed so as the same will be used as evidence in future."

3. From the averments in the plaint that Nathe had transferred mortgagee rights to defendants No.1 and 2 on 26.03.1959 and defendant Nos.14 and 15, Lokman Dass and Raghubar Dayal and heirs of their brother Ramesh Chand, defendant Nos.19 to 24 and daughters of Kirpa Ram, defendant Nos.16 to 18, had been made parties to the suit in order to avoid any controversy. On repeated requests to the defendants and heirs of Nathe to redeem the aforementioned mortgaged property after receiving the mortgage money and to put the plaintiffs in possession and on refusal, despite having sent registered notices, the present suit was filed by depositing the amount of Rs.4285/- as Court fees.

4. The aforementioned suit was contested by the contesting defendants on the plea that suit for possession was not maintainable as it tantamounts to ejectment of the tenants, who were in possession of the property much prior to the execution of the mortgage deed and thus, the suit was not maintainable as

barred in view of the provisions of Haryana Urban Control of Rent and Eviction Act, 1973. It was further submitted that they were tenants under the mortgagors i.e. plaintiffs and defendant No.25 to 31 and the tenancy rights are distinct and independent. The shop in dispute and another shop was taken on rent by Kirpa Ram and Munshi Lal sons of Shri Devi Sahai, father and uncle of the respondents-answering defendants from Khichu Mal and his brother Nanak Chand, whose successors-in-interest are plaintiffs and defendant Nos.25 to 31 through rent note dated 02.12.1930 and occupied the said shop as tenants. The rent note was duly scribed by a deed writer. Copy of the same entered in the register of the deed writer, which was enclosed. On 23.08.1935, plaintiff No.1 and his brother Nanak Chand mortgaged the shop in dispute together with another shop with Shri Umarao Singh s/o Ghasi Ram and others with possession and the said mortgagors recited and acknowledged in the said mortgage deed dated 23.08.1935 that the shop in dispute together with another shop has been in possession, as tenant with Sh. Kirpa Ram and Munshi Lal sons of Shri Devi Sahai. The physical possession of the shops in dispute together with other shops was not given to the mortgagees namely Umrao Singh and others, in essence, the tenancy rights of Sarvshri Kirpa Ram and Munshi Lal remained intact and they attorned to the mortgagees and began to pay rent till the mortgage was redeemed. It was further stated that the shop in dispute was redeemed by the mortgagors in or about 1944-45 and Kirpa Ram and Munshi Lal started paying rent to the said mortgagors namely Khichu Mal and Nanak Chand i.e. earlier mortgagors. On death of Kirpa Ram and Munshi Lal, the defendant Nos.1, 14 and 15 and their brother Ramesh Chand became the tenants of plaintiff No.1 and Nanak Chand, whose successors-in-interest are plaintiff No.1 and defendants No.25 to 31, have been in possession of the shop in dispute. Written statement filed on behalf of defendant Nos.1 and 2 was on similar lines and replication to the written statement of defendant Nos.4 and 5 was only simple denial. In this background of the matter, the Court below was called upon to adjudicate whether the tenants in possession were actually inducted by the mortgagee or not and in case, they were inducted by the mortgagee then while ordering of redemption, the Court was required to pass decree of possession or not.

5. Dr. Surya Parkash, learned counsel appearing for the appellant-plaintiff submits that the Courts below have failed to refer to the documentary evidence on record namely Ex.PX, the rent note executed by Nathe dated 01.12.1953 with the tenants and the bahi entry Ex.D18/1 and D17/1 to contend that the such entries are the self-serving documents created by the tenants itself to show that they had been paying rent to the erstwhile mortgagors/owners from time to time. In fact, from the perusal of Ex.D18/1 and D17/1, it revealed that they are ante-dated documents as on reading of the entry Ex.D15, which is entry No.7 having page No.34 is of Rs.600/- dated 03.03.1952. The next entry i.e. Ex.D16/1 is No.8, page No.23 of Rs.400/-. Ex.D17/1 is of entry No.9 page No.6 of Rs.129/- showing the payment of rent of 5 months 5 days whereas Ex.D18/1 is of 6 months 8 days at Sr. No.10 page 125. How can page 125 come immediately after

page No.6 and it is of 01.12.1953 and Ex.D19/1 is of 10.07.1954 having page No.82 entry No.10, thus, these documents could not be taken into consideration for the purpose of adjudication of lease and therefore, both the Courts below have abdicated while misreading the aforementioned documentary evidence. In fact, the defendants were inducted tenants by Nathe and therefore, there were no relationship of landlord and tenants tantamounting to extinguishment of the mortgage i.e. redemption of the mortgage and they cannot retain the possession. In support of his contentions, he has relied upon judgments of Hon''ble Supreme Court in Niranjan Kumar and others v. Dhyan Singh and another 1977 PLR 57 that Section 91 and 92 of the Indian Evidence Act, provides, to the extent material that when the terms of a contract or of a grant have been reduced to the form of a document, no evidence shall be given in proof of the terms of such contract or grant except the document itself or secondary evidence, in essence, no evidence of any oral agreement shall be admitted as between the parties to the instrument or their representatives in interest for the purpose of contradicting, varying, adding to or subtracting from its terms.

6. He further submitted that both the Courts below have erred in law in holding that the firm Devi Sahai and Kirpa Ram were in continuous and uninterrupted possession from 1930 merely on the basis of rent which was being tendered on account of the disputed shop. From the evidence such finding is not borne out. The courts below also erred in holding that the possession had not been handed over by the mortgagors while executing the mortgage deed dated 11.05.1953. The instrument of mortgage clearly recites that the possession of the shop was handed over to Nathe. The parties were not alien to the situation and therefore, no other interpretation could be introduced for determining the controversy. As per the income tax records for the financial year April 1953 to March 1954, there is no reference to the payment of the rent. The courts below did not appreciate that the rent for the shop prior to May, 1953 had been shown in profit and loss account of the firm but for the period 12.05.1953 to November, 1953 the rent for the period of 6 months and 18 days was not shown in the profit and loss account of the firm, thus, rent receipt for this period was later on fabricated by the defendants to show the tenancy and uninterrupted possession. Ex.PW6/4 the rent note showed that one Tikka Ram remained in possession from 1940 to 1952 assumes credence which the Courts below did not rely upon. All these facts clearly showed that the around the period and prior to 1944 before the mortgage was redeemed from Umrao Singh, Munshi Lal had vacated the disputed shop and it had been later on let out to one Tikka Ram, thus, urges this Court for setting aside/modification of the judgments and decrees passed by the Courts below by passing decree for possession, instead of passing decree of redemption subject to tenancy rights intact, it should have been redemption with possession.

7. Per contra, Mr. M.L. Sarin, learned Senior Counsel assisted by Ms. Alka Sarin, Advocate for the respondents submitted that both the Courts below, being the Courts of fact and law, have examined the evidence and came to the finding that

the defendants were the tenants much prior to the mortgage deed and they have been only attorning the mortgagees and therefore, till the currency of the mortgage and on expiry of the mortgage, they had continuously been paying rent to the mortgagors and this fact has been proved through the direct and cogent evidence He submitted that once a tenant is always a tenant. In support of his contentions, he relies upon the Full Bench judgment of this Court in Jagan Nath v. Mittar Sain AIR 1970 P&H 104 to contend that a tenant of a mortgagor, unless his tenancy is determined at the time of mortgage, necessarily attorns to mortgagee but after redemption, he is again relegated as tenant of the mortgagor. Similarly, he relied upon judgment of Supreme Court in Gambangi Appalaswamy Naidu and others v. Behara Venkataramanayya Patro AIR 1984 SC 1728 to contend that terms of the mortgage deed showed that the lessee had impliedly surrendered his rights. In other words, it all depends upon whether by executing a possessory or usufructuary mortgage in favour of a sitting tenant, the parties intended that there should be a surrender of lessee''s rights or not. The terms and conditions of the mortgage deed as reproduced above would read that the mortgagee was entitled to realize the rent which was to be treated as interest of the mortgage amount. The lower Appellate Court, being last court of fact and law, has examined the evidence threadbare and found that both the persons remained tenants of the aforementioned shops. The entry Ex.D1 dated 02.12.1930 irresistibly proved that Munshi Lal and Kirpa Ram were tenants over the two shops and this fact is also reiterated in the mortgage deed dated 23.08.1935, thus, urges this Court for confirming the judgments and decrees passed by the Courts below by dismissing the appeal.

8. I have heard learned counsel for the parties and appraised the paper book. Keeping in view the aforementioned, the answers to the questions posed by me are as under :-

9. It is now settled law as per the judgment of Full Bench rendered in Jagan Nath''s case (supra) that in case the person is tenant of a mortgagor and a mortgage is created, attornment of mortgagee by the tenant would not clog the status of present tenancy, in essence, expiry and surrender of previous tenancy does not prevent the tenant to enter into fresh tenancy with the mortgagee. It would continue to be a tenancy and the mortgagees will be entitled to realize the rent and on expiry of the mortgage deed, much less, on redemption, his status is again relegated as tenant of the mortgagor. In the instance case by observing the aforementioned ratio decidendi culled out in Gambangi Appalaswamy Naidu''s (supra), it has to be examined as to whether the defendants have been able to prove that they had been tenant on creation of the mortgage deed dated 11.05.1953 or not. The answer is in positive and against the appellant, for, Ex.D1 is the rent note dated 02.12.1930, which reveals about tenancy of both Munshi Lal and Kirpa Ram over the two shops. In the mortgage deed of the year 1935 in favour of Umrao, the erstwhile owner stated that Munshi Lal and Kirpa Ram were tenants in both the shops. Much emphasis had been laid to bahi entries enabling this Court to form a different opinion that at the trial Court defendants have kept

two bahi entries to show the status of the tenant but the fact remains that the aforementioned documents were created to prove that the defendants were tenants since long. It has been established on record that Kirpa Ram was tenant of the shop prior to the mortgage of 1953 and then his successor-in-interest cannot be ejected along with the mortgagee, in essence, independent right remains with the appellant till the eviction. The owners had mortgaged the shop in favour of Nathe and even at that time the firm was doing business in the shop and the rent note of December, 1953 executed by Kirpa Ram in favour of Nathe was simply an attornment in his favour and it was not a new creation of tenancy. The tenancy was continuous and independent since 1930, thus, execution of the rent note as per the ratio decidendi culled out by Full Bench of this Court in Jagan Nath''s case (supra) in favour of Nathe would not be fresh tenancy and surrender of the previous tenancy. It would be only an attornment to the mortgage. In my view, the plaintiff has failed to establish that after redemption in 1944, he entered into possession of the shop and after the mortgage in favour of present mortgagee i.e. Nathe, he conducted any business therein till he leased out the property in favour of Kirpa Ram. The aforementioned evidence was required to be proved in order to make out a case of fresh tenancy or thwart the claim of the defendants of attornment of tenancy. The rent note Ex.PW6/4 showed that Tika Ram obtained the shop on rent from Khichu Mal and Nanak Chand in October, 1949 and he remained in possession upto the year 1952. The rent note had not rightly been believed by the Courts below as it was not proved in accordance with law. The plaintiff made an attempt to move application for additional evidence for getting the signatures of Tika Ram compared and to all his near relatives to be examined who were able to identify the signatures and that of the witnesses but later on it transpired that the document pertained to the year 1929 and the figure 29 written in Urdu was misread as 49 and thereafter withdrew the application. This fact has also been noticed by the lower Appellate Court which leads to irresistible conclusion that defendants were not tenants of Nathe and therefore, they were not required to hand over possession of the disputed shop by way of redemption. The findings of the Courts below ordering for redemption of the property subject to tenancy rights of the defendants is perfectly legal and justified. The ratio decidendi culled out in the judgments of Hon''ble Supreme Court in Niranjan Kumar''s case (supra) as well as in D.R. Rathna Murthy v. Ramappa 2011 (1) SCC 158 and Rajasthan State Road Transport Corp. and others v. Bajrang Lal relied upon by Mr. Surya Parkash, learned counsel appearing for the appellant go against the terms and conditions of the contract as noticed above. In the present case, the mortgagee created a tenancy in favour of Nathe and he conducted his business but it does not mean that the property was free from possession of the erstwhile tenant, in essence, the possession to Nathe was only symbolic.

10. For the foregoing reasons, I do not find any illegality and perversity in the judgments and decrees passed by the Courts below as the same are based upon correct appreciation of documentary as well as oral evidence, much less, no

substantial question of law arises for consideration. The second appeal is dismissed.