PETITIONER:
ISHWAR DASS JAIN (DEAD) THR. LRS.

Vs.

RESPONDENT:
SOHAN LAL (DEAD)BY LRS.

DATE OF JUDGMENT: 29/11/1999

BENCH:
M.Jagannadha Rao, M.B.Shah

JUDGMENT:

M. JAGANNADHA RAO,J.

The appellants are the legal representatives of the mortgagor, the original plaintiff in suit No.388 of 1981 on the file of the Sub-Judge, Ist Class, Panipat, who sued for redemption of the usufructory mortgage dated 15.4.1969 and for possession. The suit was dismissed by the Trial Court on 12.2.85, by the first appellate Court (appeal 47/13 of 1985) on 2.11.85 and by the second appellate Court (RSA. NO. 797 of 1986) on 6.10.86 on the ground that notwithstanding the fact that the defendants executed the registered mortgage deed on 15.4.1969, the real relationship between the parties was as landlord and tenant and that the defendant could not be evicted except under the Rent Control law.

The plaintiff's case was that he mortgaged the entire shop and his 5/6th share therein and gave possession of the whole shop to the defendant for Rs.1,000/-. Plaintiff sued for redemption and recovery of possession from the defendant on the abovesaid registered usufructory mortgage. Interest payable by the mortgagor was to be set off towards the profits arising from use of property by the mortgagee. The mortgage deed stated that on redemption possession had to be delivered back to the mortgagor. On 1.2.1981 the plaintiff demanded production of the deed and possession on redemption. The defendant did not comply. Therefore, the present suit was filed.

The defence was that there was no relationship of mortgagor and mortgagee between the parties but that the relationship was as landlord and tenant. Defendant, however, admitted that the shop was in exclusive management of plaintiff at the time possession was given to him. The plaintiff allegedly leased to the defendant at Rs.80/- P.M. and plaintiff had been receiving at that rate. These payments, it was said, were proved by the accounts of the defendant. The motive for executing the deed was stated as follows:

"The plaintiff, further demanded that the defendant will have to execute the mortgage deed by way of collateral security in order to guarantee that the shop will be vacated by the defendant whenever demanded by the plaintiff. In

fact, the said mortgage deed was to circumvent and to bye pass the provisions of the Rent Control Legislation. The alleged transaction of mortgage was only a sham transaction executed only with the aforesaid object. The consideration of Rs.1000/- was only in nature of collateral security or pagri."

It was also alleged that the plaintiff was a man of substance and very rich and there was indeed no occasion for him to mortgage the same for a petty sum. The plaintiff is alleged to have "demanded Rs.1000/- by way of security and asked the defendant to thumb mark some writing to arm the plaintiff with a right to get the shop vacated according to his sweet will". The defendant was in dire necessity of the shop and had to agree on the said condition. The defendant, therefore, paid Rs.1000/- and incurred Rs.80/- towards expenses. The alleged mortgage was not the real transaction but it was a clever device to bye-pass the provisions of the Rent Act". The suit of the plaintiff was liable to be dismissed. The trial Court considered the question whether the mortgage was proved. It initially observed that the "plea of the learned counsel for the defendant that the plaintiff was a rich man and there is no need to mortgage the shop, ..., cannot be accepted. Even if the plaintiff is rich person, he can mortgage the suit property". The plaintiff was not bound to plead that he was suffering losses but he could lead evidence. Having so observed, the trial Court stated that the defendant "produced his books of account" to show that he was paying various amounts to the plaintiff every month, ranging from Rs.20/- to Rs.80/-, "though it is not mentioned as to why the defendant is paying the said amount to the plaintiff". On these accounts, the plea of payment of rent was founded. The trial Court then made an observation contrary to what it said earlier, as follows:

"the learned counsel for the defendant contended that the plaintiff is a well to do man and no person would mortgage his shop with the defendant for petty amount of Rs. 1000/-. I find force in this contention, and plaintiff is not a poor man."

The Court then concluded that the defendant was paying to plaintiff some amount every month, towards "rent" at the rate of Rs.80/- and that the mortgage was a sham transaction. The suit was, therefore, dismissed.

On appeal, the appellate Court proceeded on the basis that the mortgage was proved. It confirmed the decree of the trial Court and observed that the plaintiff had only a half share and could not have mortgaged the share of his wife though plaintiff might have been in management, that the defendant's "accounts" showed he had been paying Rs.80/- P.M. to plaintiff though no receipt was issued or obtained. This was for the period 16.4.69 to 12.3.81. The first entry showed defendant paid Rs.1000/- to plaintiff in cash and Rs.80/- as rent in advance and Rs.80/- as miscellaneous expenditure. The Court observed that the plaintiff "got the mortgage deed...executed from defendant so that he could get the disputed shop vacated at his sweet will". The Court also observed: "Needless to say that the disputed shop was mortgaged for a petty sum of Rs.1,000/- whereas the rent of the disputed property was Rs.80/- per month". The property was very valuable and could not have been mortgaged for

Rs.1000/-. The Municipal Register showed respondent was occupying the property. Rental value was assessed at Rs.824/-. On the above reasoning, it was held that the mortgage was a sham document and that the defendant was in reality a tenant. The appeal was dismissed.

The High Court dismissed the Second Appeal without reasons. It is these judgments that are questioned in this appeal.

We have heard the appellants in person and the learned counsel for the respondents. The following points arise for consideration: (1) Whether the High Court can interfere under section 100 CPC (as mentioned in 1976) with the findings of fact arrived at by the lower appellate Court if vital evidence which could have led to a different conclusion was omitted or if inadmissible evidence was relied upon which if omitted, could have led to a different conclusion? (2) Whether on the facts of the case, the mortgage was proved by the plaintiff by production of a certified copy of the deed? (3) Whether Section 92(1) of the Evidence Act could be a bar for proving a document to be a sham document? (4) Whether the Exs. D2 to D5 were only extracts from accounts books and could not be treated as account books for purposes of Section 34 of the Evidence Act and were not admissible? (5) Whether the lower Courts had omitted vital evidence from consideration? (6) Whether the mortgagee who got possession of the entire property under the deed of mortgage could be permitted to deny the title of the mortgagor either wholly or partly? (7) What relief?

POINT 1:

Ordinarily, this Court does not go into findings of fact in exercise of its jurisdiction under Article 136 of the Constitution of India, particularly in appeals against judgment in Second Appeals decided by the High Courts under section 100 of the Code of Civil Procedure. But, in certain exceptional cases, this Court will not hesitate to interfere, if interference is called for and if the High court has failed to interfere under section 100. After hearing the appellants in person and the learned counsel for the respondent, we are of the view that this is one of those exceptional cases in which interference is called for even within the narrow parameters of section 100 CPC.

Now under section 100 CPC, after the 1976 amendment, it is essential for the High Court to formulate a substantial question of law and it is not permissible to reverse the judgment of the first appellate Court without doing so.

There are two situations in which interference with findings of fact is permissible. The first one is when material or relevant evidence is not considered which, if considered would have led to an opposite conclusion. This principle has been laid down in a series of judgments of this Court in relation to section 100 CPC after the 1976 amendment. In Dilbagrai Punjabi vs. Sharad Chandra [1988 Supple. SCC 710], while dealing with a Second Appeal of 1978 decided by the Madhya Pradesh High Court on 20.8.81, L.M.Sharma, J.(as he then was) observed that

"The Court (the first appellate Court) is under a duty

to examine the entire relevant evidence on record and if it refuses to consider important evidence having direct bearing on the disputed issue and the error which arises as of a magnitude that it gives birth to a substantial question of law, the High Court is fully authorised to set aside the finding. This is the situation in the present case."

In that case, an admission by the defendant-tenant in the reply notice in regard to the plaintiff's title and the description of the plaintiff as 'owner' of the property signed by the defendant were not considered by the first appellate Court while holding that the plaintiff had not proved his title. The High Court interfered with the finding on the ground of non-consideration of vital evidence and this Court affirmed the said decision. That was upheld. In Jagdish Singh vs. Nathu Singh [1992 (1) SCC 647], with reference to a Second Appeal of 1978 disposed of on 5.4.1991. Venkatachaliah, J. (as he then was) held:

"where the findings by the Court of facts is vitiated by non-consideration of relevant evidence or by an essentially erroneous approach to the matter, the High Court is not precluded from recording proper findings."

Again in Sundra Naicka Vadiyar vs. Ramaswami Ayyar [1995 Suppl. (4) SCC 534], it was held that where certain vital documents for deciding the question of possession were ignored - such as a compromise, an order of the revenue Court - reliance on oral evidence was unjustified. In yet another case in Mehrunissa vs. Visham Kumari [1998 (2) SCC 295] arising out of Second appeal of 1988 decided on 15.1.1996, it was held by Venkataswami, J. that a finding arrived at by ignoring the second notice issued by the landlady and without noticing that the suit was not based on earlier notices, was vitiated and the High Court could interfere with such a finding. This was in Second Appeal of 1988 decided on 15.1.1996. The second situation in which interference with findings of fact is permissible is where a finding has been arrived at by the appellate Court by placing reliance on inadmissible evidence which if it was omitted, an opposite conclusion was possible. In Sri Chand Gupta vs. Gulzar Singh [1992 (1) SCC 143], it was held that the High Court was right in interfering in Second Appeal where the lower appellate Court relied upon an admission of a third party treating it as binding on the defendant. The admission was inadmissible as against the defendant. This was also a Second Appeal of 1981 disposed of on 24.9.1985. In either of the above situations, a substantial question of law can arise. The substantial question of law that arises for consideration in this appeal is: "whether the courts below had failed to consider vital pieces of evidence and whether the Courts relied upon inadmissible evidence while arriving at the conclusion that the mortgage was sham and that there was no relationship between the plaintiff and the defendant as mortgagor and mortgagee but the real relationship was as landlord and tenant? Point 1 is decided accordingly. POINT 2: We shall first deal with the proof of the certified copy of the deed of mortgage. So far as the mortgage deed is concerned, the plaintiff filed a certified copy and called upon the defendant to file the original. The defendant refused to do so. The plaintiff, therefore, proceeded to file the certified copy as secondary evidence under sub-clause (a) of section 65 of the Evidence Act. This was certainly permissible. The mortgage is a document required to be attested by two attestors under

section 59 of the Transfer of Property Act and in this case it is attested by two attestors. The mode of proof of documents required to be attested is contained in sections 68 to 71 of the Evidence Act. Under section 68, if the execution of a document required to be attested is to be proved, it will be necessary to call an attesting witness, if alive and subject to the process of Court and is capable of giving evidence. But in case the document is registered - then except in the case of a will - it is not necessary to call an attesting witness, unless the execution has been specifically denied by the person by whom it purports to have been executed. This is clear from section 68 of the Evidence Act. It reads as follows:

"Section 68: If a document is required by law to be attested, it shall not be used as evidence until one attesting witness atleast has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence:

Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908, unless its execution by the person by whom it purports to have been executed is specifically denied."

In the present case, though it was stated in the written statement that there was no relationship between the parties as mortgagor and mortgagee, the defendant admitted in his additional pleas in the same written statement that the mortgage deed was executed but he contended that it was executed to circumvent the Rent Control legislation. In fact, in his evidence as DW2 the defendant admitted the execution of the mortgage. It must therefore be taken that there was no specific denial of execution. Hence it was not necessary for the plaintiff to call the attestor into the witness box, this not being a will. The plaintiff could therefore not be faulted for not examining any of the attestors. Hence the mortgage stood proved by the certified copy. The Courts below were right in accepting that the deed was proved. Point 2 is decided in favour of plaintiffs- appellants.

POINT 3:

The point here is whether oral evidence is admissible under Section 92(1) of the Evidence Act to prove that a document though executed was a sham document and whether that would amount to varying or contradicting the terms of the document. The plea of the defendant in the written statement was that mortgage deed though true was a sham document not intended to be acted upon and that it was executed only as a collateral security. It was pleaded that the plaintiff demanded that a mortgage deed be executed by defendant as "collateral security in order to guarantee that the shop will be vacated by the defendant whenever demanded by the plaintiff" and that this was done to circumvent the rent control law. It was said that the alleged transaction of mortgage was a sham transaction, executed only with aforesaid object. The consideration of Rs.1000/- "was only in the nature of a collateral security or 'pagri'."

The plaintiff was and is a rich man and there was no

occasion for him to mortgage his property. It was further pleaded

"The plaintiff thus demanded Rs.1000/- from the defendant by way of security and asked the defendant to thumbmark some writing to arm the plaintiff with a right to get the shop vacated according to his sweet will. The defendant who was in dire necessity of the shop, had to agree on the said condition put forward by the plaintiff".

This Court has held in Gangabai Vs. Chhabubai (1982 (1) SCC 4) that in spite of Section 92(1) of the Evidence Act, it is permissible for a party to a deed to contend that the deed was not intended to be acted upon but was only a sham document. The bar arises only when the document is relied upon and its terms are sought to be varied and contradicted. In the above case, it was observed by D.A. Desai J as follows:

"the bar imposed by Section 92(1) applies only when a party seeks to rely upon the document embodying the terms of the transaction and not when the case of a party is that the transaction recorded in the document was never intended to be acted upon at all between the parties and that the document is a sham. Such a question arises when the party asserts that there was a different transaction altogether and what is recorded in the document was intended to be of no consequence whatever. For that purpose, oral evidence is admissible to show that the document executed was never intended to operate as an agreement but that some other agreement altogether, not recorded in the document, was entered into between the parties".

But the question is whether on the facts of this case, the reason given by the defendant in his evidence for treating the mortgage as a sham document, can be accepted.

The reason given by the defendant appears to us rather curious. One can understand a debtor incurring a debt and executing a deed as collateral security. There is no such situation here. Further, if it is a deed of collateral security by defendant, then the defendant would have had to execute a deed in favour of the plaintiff and not vice-versa. Here the plaintiff-owner has mortgaged his shop to the defendant, as security. The plea and evidence of collateral security offered by the defendant appears to us not to fit into a situation where the plaintiff has executed the mortgage. Obviously, if the plaintiff wanted to secure something by way of an additional security from the defendant, the normal course would have been to ask the defendant to give such a security and not for the plaintiff to execute a mortgage. Thus the reason mentioned and evidence given by the defendant as to why a sham document was executed falls to the ground.

Under Point 3 we therefore hold that though evidence is admissible under Section 92(1) to prove that the mortgage is a sham document, such evidence is lacking in this case. Point 3 is decided against the defendant. Points 4 & 5: To accept the plea of lease set up by the defendant, the trial court and the first appellate Court, relied upon the entries Ex. D2 and Exs. D3 to D5 relating to the payment of "rents" by defendant as recorded in the 'account books' allegedly maintained by the defendant in the regular course of business.

The Courts below, in our view, failed to notice that no account book or books were ever produced by the defendant in the Court. Exs.D2 to D5 filed into Court were only 'extracts' of the defendants' account books. The extracts were filed two years after the filing of the written statement and one and a half year after the settlement of issues, without any explanation for the delay. The genuineness of the extracts was challenged seriously in the cross-examination of the defendant who was examined as DW 2. It was specifically contended by the plaintiff (see p.13 of the appellant's notes of arguments in the appellate court) that the "account books were never produced". The plaintiff's plea against the admissibility of Ex. D2 and Exs. D3 to D5 in the trial Court was rejected by the said Court and a revision under Section 115 CPC was filed by plaintiff in the High Court. That was dismissed by the High Court saying that there was no "case" decided within the meaning of the word 'case decided' in Section 115 CPC. The plaintiff therefore questioned the admissibility of Exs.D2 to D5 in the first Appeal. In our opinion, it was permissible for him to raise the said question in the first appeal in view of Section 105 C.P.C. In the light of what was stated by the plaintiff in the memo of first appeal in the appellate Court, it cannot be said that the 'accounts" produced by defendant were not objected to by the plaintiff.

Ex.D2 is an extract of accounts. So are Exs. D3 to D5. This is clear from para 21 of the judgment of the trial Court. That para reads as follows:

"The plaintiff made the contention that the defendant relied upon his account books to prove that he is a tenant of the shop in dispute under the plaintiff. He made the statement that the payment of the rent to the plaintiff is entered in his regular kept account book but strange enough, he had not produced at any stage of the proceedings an extract of account books which are Ex.D 3 to D 5 and this is wrong to state that the defendant has not produced the account books to show that he has 'not' been paying the rent to the plaintiff. The plaintiff also contended that Ex.D2 extract of the account books has been produced and which could not be liable to be accepted. Whatsoever, the document has been admitted without objection. It is liable to be considered while deciding issues".

Unfortunately, in a latter passage, the trial Court referred to these extracts as 'account books' and applied Section 34 of the Evidence Act. The Court forgot that these were extracts of alleged accounts.

Now under Section 34 of the Evidence Act, entries in "account books" regularly kept in the course of business are admissible though they by themselves cannot create any liability. Section 34 reads as follows:

"Section 34: Entries in books of account when relevant - Entries in books of account, regularly kept in the course of business, are relevant whenever they refer to a matter into which the Court has to inquire, but such statements shall not alone be sufficient evidence to charge any person with liability".

It will be noticed that sanctity is attached in the

law of evidence to books of account if the books are indeed "account books i.e. in original and if they show, on their face, that they are kept in the "regular course of business". Such sanctity, in our opinion, cannot attach to private extracts of alleged account books where the original accounts are not filed into Court. This is because, from the extracts, it cannot be discovered whether the accounts are kept in the regular course of business or if there are any interpolations or whether the interpolations are in a different ink or whether the accounts are in the form of a book with continuous page-numbering. Hence, if the original books have not been produced, it is not possible to know whether the entries relating to payment of rent are entries made in the regular course of business.

It is only in the case of Bankers' Books Evidence Act, 1891 that certified copies are allowed or the case must come under Section 65(f) or (g) of the Evidence Act. Private extracts of accounts in other cases can only be secondary evidence and unless a proper foundation is laid for adducing such secondary evidence under Section 65 or other provisions of the Evidence Act, the privately handwritten copies of alleged account books cannot by themselves be treated as secondary evidence.

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. 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. We shall next refer to the vital evidence or facts relating to the mortgage which have not been considered by the Courts below. The defendant admitted in his evidence as DW2 that the mortgage deed was executed by him. The endorsement of the Sub-Registrar shows that the money of Rs.1000/- was paid as mortgage money. There is a presumption of the correctness of the endorsement made by the Sub-Registrar under Section 58 of the Registration Act (vide Baidyanath Singh vs. Jamal Bros. AIR 1924 PC 48), it can be rebutted only by strong evidence to the contrary.

Another important aspect is that in the copy of the Municipal House Tax Register Ex.D1, the defendant, Sohan Lal was shown as 'occupier' of a shop just as certain others like Ganpat, Omprakash Niranjan were also shown as occupiers. Description as occupiers does not necessarily

imply occupation only as tenants. According to DW 3, the rent paid by Om Prakash was Rs.40/- p.m. and by Niranjan was Rs.22.50. The plaintiff submitted in the first appellate Court that the annual value of both thus comes to Rs.40 + Rs.22.50 = (Rs.62.50) x 12=Rs.750/-. The total annual value of the shop having been fixed at Rs.824 in Ex.D1, that leaves only a balance of Rs.74 (i.e. Rs.824-Rs.750). The plaintiff submitted in his memo of arguments before the appellate Court that the balance of annual rental value of Rs.74/- could not relate to the occupation of Sohanlal as tenant in this shop, for according to the defendant, the monthly rent was Rs.80/-. The plaintiff submitted that the balance of Rs.74 could be attributed only to the occupation of Ganpat. The above aspect was also not kept in view by the lower Courts.

One other important point is that the term of the mortgage deed is that the defendant is to be in possession and the interest payable by the plaintiff as mortgagor is to be set off against the 'profit' realised by the mortgagor's occupation of the shop. There is no recital that it is to be set off against any "rent" payable by the defendant.

We have already pointed out that in regard to whether the plaintiff was rich enough so as not to be in need to go in for a mortgage, there are conflicting findings by the trial Court. The plaintiff's acute need for money is proved by the fact that he incurred losses in regard to his partnership with the Haryana Woollen Mills. This aspect, according to the plaintiff (as stated in his written submissions) is borne out by the reported judgment of this Court in L.Iswar Dass Vs. The Haryana and General Woollen Mills Ltd. (AIR 1974 SC 592) to which plaintiff was a party. The said judgment was referred to as evidence of the plaintiff's losses. This aspect was also not considered by the lower Courts.

In the result, we hold that the extracts from accounts are not "account books" falling within Section 34 of the Evidence Act and are inadmissible. We also hold that vital material was omitted from consideration by the Courts. Thus, the finding in regard to tenancy is liable to be set aside. Points 4 and 5 are held in favour of the plaintiff.

POINT 6:

The appellate Court, in our view, went wrong in thinking that the plaintiff had only a half share in the property. The defendant's title was a derivative title as mortgagee. Having came into possession of the whole property as a mortgagee from the plaintiff, treating plaintiff as full owner it was not open to the defendant to question the title of the plaintiff. In Tasker Vs. Mall (3 My. 8 Cr.63 (5 L.J. Ch 321), Lord Cottenham said: "To him (mortgagee) it is immaterial, upon repayment of the money, whether the mortgagor's title was good or bad. He is not at liberty to dispute it any more than a tenant is at liberty to dispute his landlord's title". A usufructory mortgagee cannot deny the title of his mortgagor. Nor can he set up adverse possession unless he actually leaves the holding and re- enters under a different status (Jainandan Vs. Umrao) (AIR 1929 All.305) and (Sriram Vs. Thakur) (AIR 1965 All. 223)

Point 7:

The judgments of all the three courts therefore are set aside. The suit is decreed for redemption as follows. The appellants are entitled to redeem the usufructory mortgage and get possession of the suit shop from the defendant, if the appellants deposit in the trial Court, within three months from today, the sum of Rs.1000/-. There is no need to deposit any interest inasmuch as according to the deed, the defendant was to be in possession and interest was to be set off against the occupation of the shop. We direct that on such deposit of Rs.1000/-, the defendant will produce the mortgage deed into Court for cancellation. In case he does not produce the deed, within the said period, it will be deemed that the mortgage is cancelled. On such deposit of Rs.1000/- as aforesaid, the defendant shall restore possession to the appellants. On such restoration of possession, defendant shall be entitled to withdraw the sum of Rs.1000/-. In case the defendant does not surrender possession as aforesaid, it will be open to the appellants to seek possession by way of execution.

The appeal is allowed. Costs of appellants are quantified at Rs.5,000/-.