

CASE NO.:
Appeal (civil) 2411 of 2007

PETITIONER:
Tara Chand

RESPONDENT:
Sagarbai @ Chaiyalibai

DATE OF JUDGMENT: 09/05/2007

BENCH:
S.B. Sinha & P.K. Balasubramanyan

JUDGMENT:
J U D G M E N T

CIVIL APPEAL NO. 2411 2007
[Arising out of S.L.P. (C) No. 13190 of 2006]

S.B. SINHA, J.

1. Leave granted.

2. This appeal is directed against the judgment and decree dated 5.5.2006 passed by the High Court of Madhya Pradesh, Indore Bench at Indore in Second Appeal No. 474 of 2001 whereby and whereunder the judgment and decree dated 16.8.2001 passed by the District Judge, Jhabua in Civil Regular Appeal No. 4A/1999 arising out of the judgment and decree dated 23.12.1998 passed by Civil Judge, Class-1 Jhabua in Civil Suit No. 1-A/97, was reversed. Respondent admittedly is the owner of the premises in suit. Appellant was a tenant under him. Respondent, however, executed a deed of usufructuary mortgage in favour of the appellant on or about 1.10.1986, the relevant portions whereof read as under:-

"Therefore, I hereby mortgage with possession (Kabza Girvi) the entire portion of the ground floor of my aforesaid house for a sum of Rs. 25000/- with you mortgagee. I the mortgagor have received the mortgage money Rs. 25000/- from you the mortgagee by cheque as mentioned above and that now no mortgage money is due or payable and possession of the ground floor of the suit house has been delivered to you.

As the ground floor of the aforesaid house is in possession of you the mortgagee no interest would be payable on the aforesaid amount. You may keep on using the ground floor in lieu of interest and I will have no objection thereto.

I shall keep on paying the house tax and other taxes payable in respect of the house.

The period for redemption of the ground floor of the said house has been settled between the parties for 10 years. Before the expiry of ten years I the mortgagor shall not be entitled to get the ground floor of the said house redeemed from the mortgage held by you and the mortgagee.

After ten years on payment of the entire mortgage money you the mortgagee shall vacate the house and deliver it.

In the event of failure to pay the entire mortgage money within ten years you the mortgagee shall have the right to get the mortgaged house auctioned through court and to recover your entire mortgage money due and I shall have no objection thereto.

In case of any accident to the house you the mortgagee shall be entitled to recover the entire mortgage money from the open land and if the entire mortgage money is not realized from open land the balance amount may be realized personally from me or from my other property and I shall have no objection thereto.

If any person makes a claim in respect of this house I the mortgagor shall be responsible for it. If for any reason you the mortgagee shall be responsible for it. If for any reason you the mortgagee is deprived of the possession of the said house or any portion thereof you can recover the money paid by you with expenses personally from me or from my other property and I shall have no objection thereof.

I the mortgagor need money to purchase this mortgaged house and therefore, I have obtained money from you by cheque."

3. The said document was an unilateral one. It was, however, preceded by an agreement of mortgage which is in the following terms:-

"2. I Smt. Sagarbai w/o Narayan Singh Solanki, I am purchasing this house. For this purpose I am taking Rs. 25,000/- by cheque from Shri Tarachand Gadia towards mortgage of shop. The registered deed being in my name I shall mortgage the three rooms of the lower portion in which you are running the shop at present, with you. I shall not pay any kind of interest on Rs. 25,000/- and shall not take rent of the shop."

4. The said document was also an unilateral one. Appellant admittedly gave to the respondent the aforementioned sum of Rs. 25,000/-. It is also not in dispute that no rent was demanded or paid to the respondent by the appellant since execution of the said Deed of Mortgage. On expiry of 10 years from the date of mortgage, a notice was issued for redemption of mortgage and delivery of possession.

5. As the demand contained in the said notice was not acceded to, a suit for redemption of the mortgage was filed by the respondent.

6. The issues framed in the said suit are:-

1
Whether the plaintiff mortgaged the disputed house on 1.10.86 to the defendant for a period of 10 years by a registered document?

2.
Whether the plaintiff has right to get the disputed property redeemed from mortgage? If so what is the effect of the same?

3.
Whether inspite of the fact that plaintiff is ready and wiling to redeem the mortgage and due to not handing over the

possession of disputed house by defendant whether plaintiff is entitled for damages @ Rs. 1500/- per month?

4

Whether the plaintiff has not impleaded the necessary parties in present suit.

5.

Whether the defendant took possession of the disputed house for 10 years after paying Rs. 25000/- to Mangilal Solanki in lieu of the rent to be paid?

6.

Relief and cost

7. No issue, thus, was framed in regard to the purported right of the appellant to continue in the suit premises as a tenant. The learned Trial Judge, however, dismissed the suit holding that the respondent being a landlord can obtain possession of the premises in question, only in terms of the provisions of the M.P. Accommodation Control Act, 1961 (1961 Act). An appeal preferred thereagainst was dismissed.

8. The High Court, however, by reason of the impugned judgment allowed the second appeal preferred by the respondent herein.

9. Mr. S.K. Gambhir, learned senior counsel appearing on behalf of the appellant would submit that the Deed of Mortgage being an unilateral one and the same not having been signed by the mortgagee, the relationship between the parties continued to be governed by the 1961 Act. It was submitted that in any event, only because a deed of mortgage was executed, the same would not amount to surrender of the tenancy rights. It was furthermore, contended that a merger of the lease into the mortgage shall not be readily inferred. Learned counsel submitted that in any view of the matter, the terms and conditions in the agreement for mortgage as also the deed of mortgage are inconsistent, a suit for redemption was not maintainable.

10. Mr. K. Radhakrishnan, learned senior counsel appearing on behalf of the respondent, on the other hand, would submit

(i) There being a personal covenant contained in the deed of mortgage and having regard to Section 59 of the Transfer of Property Act execution of an unilateral mortgage deed was permissible in law.

(ii) The Deed of Mortgage read as a whole clearly established that there was a personal covenant to give up vacant possession on the expiry of the period of 10 years

(iii) The termination of tenancy by implied surrender is permissible in terms of Section 111(f) of the Transfer of Property Act (The said Act).

11. A transaction of mortgage is governed by the provisions of the said Act. The Deed of Mortgage dated 1.10.1986 was a registered document. In terms of Section 59 of the said Act, a mortgage can be effected by a registered instrument signed by the mortgagor and attested by at least two witnesses. Requirements of Section 59, therefore, stood fulfilled in the instant case.

12. Section 62 of the said Act provides for the right of an usufructuary mortgagor to recover possession; clause (b) whereof reads as under:-

"Section 62(b) :- Where the mortgagee is authorized to pay himself from such rents and profits or any part thereof a part only of the mortgage-money, when the term (if any) prescribed for the payment of the mortgage-money has expired and the mortgagor pays or tenders to the mortgagee the mortgage-money or the balance thereof or deposits it in court as hereinafter provided."

13. Indisputably, the relationship of the parties were governed by the

provisions of the 1961 Act. It contains a non-obstante clause protecting the rights of the tenant. The right of a tenant, however, would be available provided the tenancy continues. Once, the tenant ceases to be a tenant, question of applicability of the said Act would not arise.

14. Whether the rights of a tenant would give way to rights of a mortgagor would essentially depend upon the terms and conditions of the mortgage. If the tenant surrenders the tenancy either explicitly or by necessary implication, the terms of the deed of mortgage shall prevail. Having surrendered the tenancy, it would not lie in the mouth of a mortgagor to contend that as he had been a tenant, he would be entitled to the rights of a tenant.

15. The right of a Usufructuary Mortgagor to redeem the mortgage and recover possession is well known, and with a view to enforce the same, a mortgagor may file a suit for redemption or may take recourse to the summary process of deposit and notice under Section 83 of the Transfer of Property Act.

16. A suit for redemption is essentially a suit for recovery of possession. When a debt is satisfied out of the usufructs of the property or otherwise, the mortgagor recovers possession on his title.

17. Profits arising out of possession of the mortgage property can be taken by the mortgagee in lieu of interest.

18. Clause (d) of Section 58 of the said Act reads as under:-

"58(d) Usufructuary mortgage. \026 Where the mortgagor delivers possession or expressly or by implication binds himself to deliver possession of the mortgaged property to the mortgagee, and authorizes him to retain such possession until payment of the mortgage-money, and to receive the rents and profits accruing from the property or any part of such rents and profits and to appropriate the same in lieu of interest, or in payment of the mortgage-money, or partly in lieu of interest or partly in payment of the mortgage-money, the transaction is called an usufructuary mortgage and the mortgagor an usufructuary mortgagee."

19. The case at hand comes within the purview of the said clause.

20. The Deed of Mortgage might have been preceded by an agreement, but, when the terms are altered by a later document which is registered, the latter would prevail. We have noticed hereinbefore the effect of Section 59 of the said Act. It is immaterial for the purpose of admissibility of the document or otherwise, whether the mortgagee was a signatory to the Deed of Mortgage or not. Indisputably, the deed of mortgage has been acted upon. Appellant himself purchased the stamp paper for its execution. He knew the terms thereof. The parties proceeded on the basis that the said terms were binding on them. It, therefore, does not lie in the mouth of the appellant now at this stage to contend, particularly when no such contention had been raised before the courts below, that the same cannot be given effect to.

21. Appellant has been allowed to use the ground floor of the premises in question in lieu of interest, Respondent as owner of the property was to pay the house tax and other taxes, The deed clearly stipulates the period on the expiry whereof, the right of redemption would vest in the mortgagor. Prior to the expiry of the said period, the respondent could not claim recovery of possession. He could not have filed a suit for eviction under the 1961 Act even if one of the other conditions laid down therefor were fulfilled. The terms of tenancy was fixed. The mortgagee was to vacate the house and

possession thereof after 10 years on payment of the entire mortgage money. The stipulations contained in the deed do not stop there. It conferred a right upon the mortgagee to get the house auctioned and to recover the entire mortgage amount in the event, the amount advanced is not paid back. Other covenants contained also clearly show the right of the appellant as a mortgagee and not as a tenant. The stipulations contained in the mortgage deed, therefore, are such that they would lead to an inference that the tenancy was impliedly surrendered by the appellant.

22. Section 111(f) of the Transfer of Property Act provides for termination of tenancy by implied surrender.

23. Such implied surrender may be either:-
(i) by creation of a new relationship or
(ii) by relinquishment of possession.

24. When the parties altered their position knowing fully well their mutual rights and obligations under an agreement thereto existing, the rule of estoppel shall apply. Appellant, was, thus estopped from disputing the contents of the mortgage or the relation arising thereunder. As surrender is founded upon estoppel, the intention of the parties may not be of much significance.

25. Mr. Gambhir has placed strong reliance on a decision of this Court in *Nemi Chand v Onkar Lal* [(1991) 3 SCC 464]. Therein the conduct of the parties were such, which led to an inference that the right to recover rent was kept alive by the landlord and it was only to be adjusted against interest. In the said fact situation, this Court opined that the defendant therein continued both as a mortgagee as also a lessee. Although the said decision is distinguishable on facts, we may notice that therein the court failed to notice an earlier binding precedent in *Shah Mathuradas Maganlal & Co. v Nagappa Shankarappa Malage and Others* [(1976) 3 SCC 660], wherein the law was stated in the following terms:-

"11. The deed of mortgage shows these features indicating that there was surrender of tenancy and the appellant was only a mortgagee. The High Court found that there was a surrender of tenancy right. No particular form of words is essential to make a valid surrender. A surrender may be oral. A surrender may be express although delivery of possession is necessary for surrender in the facts and circumstances of a given case. In the present case, delivery of possession was immediately followed by a redelivery of possession of the appellant as mortgagee. The mortgage deed establishes beyond doubt that the effect of the deed was inconsistent with the continuance or subsistence of the lease because the parties themselves stipulated that the lease was to exist only upto November 6, 1953. On the redemption of the mortgage the respondent had a right to recover possession both on the terms of the mortgage deed and under Section 62 of the Transfer of Property Act."

26. Although technically a tenant may continue to occupy the premises, once the nature of possession changes resulting in change in his status, which he accepts, the same may amount to virtual taking of possession.

27. In any event, virtual taking of possession is not a sine quo non for implied surrender as the same can be created by a new relationship also. In *Nemi Chand* (supra) this aspect of the matter has not been considered.

28. In *Nirmal Chandra v Vimal Chand* [(2001) 5 SCC 51], whereupon again Mr. Gambhir placed strong reliance, this Court proceeded on the basis that where the right to receive rent is kept alive, the same would run contrary

to the intention or conduct of the parties leading to an inference of surrender of lease. It was held that condition No. 4 contained in the deed of mortgage was contrary to condition No. 1 thereof and in that situation it was opined;

"9. This condition nowhere speaks of surrender of tenancy by the lessee. It only provides that for at least three years the shop will be in personal use of the landlord failing which there would be revival of the mortgagee's capacity as a tenant. Such a condition cannot be said to be a clear intention of surrendering the lease rights in the property. Whatever little effect Condition 4 if at all may have, is negated by Condition 1 which kept the rent alive and the element of tenancy pervading throughout the period of mortgage."

29. We may, however, notice that in *Gambangi Applaswamy Naidu and Others v Behara Venkataramanayya Patro and Others* [(1984) 4 SCC 382], an implied surrender was not inferred in the fact situation obtaining therein.

30. On the terms and conditions of the lease deed, in question, which was noticed by this Court, it was observed;

"....It may be noted that the last portion of the document is equivocal in that it does not mention whether on redemption physical possession is to be delivered or symbolical possession is to be delivered to the mortgagor. But under the terms of the deed one thing is clear that during the currency of the mortgage the liability to pay rent to the lessor-mortgagor (albeit to be discharged by adjustment) is kept alive. If anything such a term clearly runs counter to any implied surrender of the lessee's rights. Secondly, there is no term fixed for redemption of mortgage property which means that it was open to the mortgagor to redeem the mortgage at any time that is to say even within a very short time and if that be so, would a sitting tenant cultivating the lands under a lease, who has obliged his lessor by advancing monies to him to tide over his financial difficulties give up his rights as a lessee no sooner redemption takes place? In our view, it does not stand to reason that he would do so. This circumstance coupled with a fact that the mortgage deed keeps alive the lessee's liability to pay rent during the currency of the mortgage clearly suggests that no implied surrender was intended by the parties."

31. In a case, therefore, where the term is fixed for redemption of mortgaged property, if the lessee's liability to pay rent is not kept alive, a contrary inference is permissible to be drawn.

32. The matter appears to be now covered in *Polammarasetti Varana Venka Satyanarayana v Suddha Apparao Naidu (Dead) and Others* [(1997) 9 SCC 244], wherein law has been laid down in the following terms;

"4. We have taken into consideration the mortgage deed executed in 1946. In our view, a clear intention of only retaining the mortgagee's interest is to be inferred in view of the specific statement that on redemption, the mortgagee should deliver possession to the mortgagor. We may indicate that the expression to that effect used in the mortgage deed has been noted by the courts below. We may also indicate that there is no indication in the mortgage deed as to how the rent payable by the mortgagee qua lessee was to be adjusted between the parties. The absence of any mode of adjustment

of leasehold rent implies that it was not intended that despite the said mortgage, parties intended that the leasehold interest was to continue. It may also be indicated here that leasehold interest was to expire in 1948. In the absence of any payment of rent for such leasehold interest and acceptance of such payment after expiring of the period of lease it cannot also be contended that there was a case of holding over by the lessee. In the aforesaid circumstances, the finding by the courts below that the leasehold interest had come to an end and the plaintiff was entitled to the redemption of the mortgage and to take delivery of the properties under this mortgage deed cannot be held to be unjust or improper. We, therefore, do not find any reason to interfere with the impugned judgment of the High Court. The appeal, therefore, fails and is dismissed. No costs."

33. In this case also, there is a clear intention on the part of the mortgagee only to retain his interest in that capacity and not as a tenant. The parties altered their position, A new relationship was created. It was acted upon and in that view of the matter, we are of the opinion that the High Court was correct in its view. There is, thus, no merit in this appeal which is dismissed accordingly with costs. Counsel fee assessed at Rs. 10,000/-.