

CASE NO.:
Appeal (civil) 4122 of 1999

PETITIONER:
Kaveripatnam Subbaraya Setty Annaiah Setty Charities Trust

RESPONDENT:
S. K. Viswanatha Setty

DATE OF JUDGMENT: 22/07/2004

BENCH:
ASHOK BHAN & S.H. KAPADIA.

JUDGMENT:
J U D G M E N T

KAPADIA, J.

This is an appeal by special leave filed by appellant-plaintiff against the judgment dated 4th August, 1998 of the High Court of Karnataka confirming the judgment and order dated 6th February, 1993 passed by the District Judge, Mysore dismissing the suit filed by the appellant\026plaintiff holding inter alia that Ex.P5 dated 1.10.1976 was only a device to get over the provisions of the Karnataka Rent Control Act, 1961 (hereinafter referred to for the sake of brevity as "the said Act, 1961").

The undisputed facts are as follows:

Appellant\026Kaveripatnam Subbaraya Setty Annaiah Setty Charities Trust was the owner of an old building in which there were 8 to 9 shops situated in Rave Beedi. In 1950 one of the shops was let out to the respondent-defendant as a tenant. In the year 1969, the appellant conveyed to the respondent and other tenants of the old building its desire to demolish the old building and in its place to erect modern shops so that higher rent could be fetched. Respondent herein surrendered his shop in the old building on 27.8.1969 after receiving notice from the appellant indicating its intention to demolish the old building and to construct a new building. Some of the tenants refused to surrender. Appellant filed eviction petitions against those tenants under the said Act, 1961. They were evicted under the orders of the Court. Respondent herein and the trustees belonged to the same community and, therefore, he surrendered possession of his shop pursuant to the above mentioned notice. The old building was demolished in 1969 and the construction of the new building was completed by 1975. On 10.10.1975, the respondent called upon the appellant to re-let the shop in the new building as he was a tenant in the old building to which no reply was given by the appellant.

On 1.10.1976, Ex.P5 was entered into between the appellant and the respondent. In Ex.P5, it was recited that the appellant was in need of money and, therefore, a redeemable mortgage for three years had to be executed for Rs.16,200/- in favour of respondent. Under Ex.P5,

the said sum of Rs.16,200/- was to be repaid in full by virtue of respondent being in possession and enjoyment of the shop for three years. On 4.10.1976, the respondent paid Rs.16,200/- to the appellant against delivery of possession. The mortgage period expired on 1.10.1979.

On 12.3.1980, suit no.41 of 1980 was instituted by the appellant in the court of Principal Civil Judge, Mysore for possession, damages and mesne profits. The above facts were stated in the plaint. By his written statement, the respondent pleaded that he was a tenant from 1950 of the shop in the old building. In 1969, the trustees expressed their desire to demolish the old building and to construct a new building. He did not resist the eviction as he belonged to the same community as the trustees and as he was orally assured by the trustees that the shop in the new building would be re-let to him. He further pointed out that on 10.10.1975, he had called upon the trustees to re-let the shop in the new building to him as a tenant, to which no reply was received. He further alleged that he had offered to pay Rs.6000/- and that he had also offered to pay rent @ Rs.335/- per month, to which no reply was given.

According to the written statement, in 1976, a suggestion came from the trustees that they were ready and willing to consider his offer if he was ready to advance Rs.16,200/- and if he was ready to pay increased rent of Rs.450/- to the appellant. The respondent pleaded his inability to raise Rs.16,200/- upon which he was assured by PW2 that one Anjaneya Gupta (father-in-law of PW2) would advance a loan of Rs.10,000/- against the promissory note. PW2 was the managing trustee. On 4.10.1976, Anjaneya Gupta advanced the said amount to the respondent. On the same day, the respondent paid Rs.16,200/- to the appellant against delivery of possession. The respondent, therefore, submitted in his written statement that he had taken the possession of the shop in the new building as a tenant and not as a mortgagee. According to the written statement, Rs.16,200/- represented advance rent for three years @ Rs.450/- per month. In the written statement, the respondent submitted that he was entitled to protection under the said Act, 1961. In the alternative, it was pleaded that Ex.P5 violated the provisions of the said Act, 1961 and consequently, it was void.

The trial Court found that the respondent was a tenant of the shop in the old building from 1950; that in 1969 the respondent was asked to vacate the premises as the trustees desired to demolish the old building; that the respondent had voluntarily vacated the premises and consequently, the relationship of landlord and tenant ended on 27.8.1969, as there was no intention to continue the tenancy or to re-let the premises in the new building. The trial Court further found that after 1.10.1976, the respondent did not pay rent; that no rent was fixed and, therefore, the respondent was in occupation of the shop as a mortgagee and not as a tenant. The trial Court in this connection placed reliance on the returns filed by the respondent under the Income Tax Act for the years 1977-78 up to 1980-81. The trial Court concluded that the respondent was not entitled to protection under the said Act, 1961. Consequently, the trial Court decreed the suit filed by the appellant.

Being aggrieved by the judgment and decree passed by the trial Court, the respondent preferred Regular Appeal No.15 of 1985 before the District Judge, Mysore (hereinafter referred to for the sake of brevity as "the lower appellate Court"). By judgment and order dated 6.2.1993, the lower appellate Court concluded that the respondent was a tenant of the shop in the old building from 1950 and in 1969 the respondent vacated the shop in the old building when he was assured by the appellant that the shop in the new building would be re-let to him after construction. The lower appellate Court believed the case of the respondent as the respondent had categorically called upon the trustees to re-let the shop in the new building vide notice dated 10.10.1975 to which no reply was given by the trustees. In this connection the lower appellate Court placed reliance on the evidence of PW2. The lower appellate Court also came to the conclusion that Rs.16,200/- represented advance rent calculated @ Rs.450/- per month. The lower appellate Court on going through the entire evidence on record, both oral and documentary, concluded that the respondent had taken the premises after the construction as a tenant and not as a mortgagee. In the circumstances, the lower appellate Court allowed the appeal; set aside the judgment and decree passed by the trial Court and dismissed the suit instituted by the appellant.

Being aggrieved by the decision of the lower appellate Court dated 6.2.1993, the appellant carried the matter in the second appeal to the High Court under section 100 CPC.

At the time of admission, the following question of law was framed:\027

"Whether the finding of the appellate Court that the self redeeming mortgage deed executed by respondent in favour of the appellant, as a void document, as being opposed to the provisions of Rent Control Act, is sustainable without a plea and an issue in that behalf?"

On reading the terms and conditions mentioned in Ex.P5 in the light of the above-mentioned circumstances, including the conduct of the parties, the High Court held that the Ex.P5 was only a device to defeat the provisions of the said Act, 1961. Consequently, the High Court dismissed the appeal filed by the appellant. Hence, this civil appeal.

Shri S.N. Bhat, learned counsel for the appellant submitted that the High Court had erred in holding that Ex.P5 was void. He submitted that in 1969, the respondent had voluntarily surrendered the shop in the old building and with the surrender, his tenancy came to an end. It was submitted that after 1969, the respondent was not a tenant. He submitted that the surrender was

voluntary and consequently, the provisions of the said Act, 1961 were not applicable. He contended that Ex.P5 in the light of the above circumstances conclusively proves that the respondent was in possession of the shop as a mortgagee and on expiry of the mortgage period, he was required to vacate and hand over vacant possession of the shop to the trustees. He submitted that Ex.P5 was a self-redeeming mortgage. He further contended that the High Court erred in holding that the respondent continued to be a tenant after 1969 duly protected under the Rent Act, 1961. Lastly, he submitted that in view of the amendment to section 2(7)(bb)(iii) vide Amending Act No.32 of 1994, respondent herein was not entitled to protection as the suit premises belonged to a charitable institution and under the said Amending Act, the protection available to tenants of such institutions stood withdrawn on and from 18.5.1994.

We do not find any merit in this civil appeal for the following reasons: firstly, the evidence on record proves that the respondent was a tenant of the shop in the old building from 1950. He continued to be a tenant of that shop till 1969, which is not disputed. The evidence brought on record further shows that the old building was demolished around 1969 and by 1975 the new building stood constructed. The appellant as plaintiff has not brought on record the circumstances under which they claim that the original shop was voluntarily surrendered by the respondent. On the contrary, after reconstruction, the respondent had specifically called upon the appellant to re-let the shop in the new building to him. He offered Rs.6000/-. He also offered enhanced rent. However, no reply was given by the appellant to his letter dated 10.10.1975. This circumstance proves that the respondent had not voluntarily surrendered his shop in the old building as alleged by the appellant. Secondly, the respondent has proved that in 1976, PW2 offered to re-let the shop in the new building on the respondent's advancing Rs.16,200/- to the trustees for three years. In this connection, PW2 has admitted, in his evidence, receipt of the letter dated 10.10.1975 from the respondent calling upon the trustees to re-let the premises. Further, in his evidence, PW2, has admitted that the respondent herein had raised a loan of Rs.10,000/- from his father-in-law as suggested by him (PW2). Thirdly, as found by the Courts below, Rs.16,200/- represented three years advance rent calculated @ Rs.450/- per month. Fourthly, as rightly held by the High Court, there was no reason for voluntarily surrendering the tenancy by the respondent. Lastly, the entries in the Income-tax returns of the respondent, brought on record by the appellant, proves that the amount paid by the respondent was on account of rent. It is relevant to point out that the appellant has not produced its own accounts to show how they have accounted for Rs.16,200/- in their books.

The guidelines for deciding whether a transaction is a lease or a mortgage contemplate that the name given to the document is not conclusive. The question has to be decided with reference to the predominant intention of the parties as gathered from the recitals and the terms of the documents and the surrounding circumstances including conduct of the parties. In the case of a mortgage, there is a transfer of interest to secure repayment of debt and in the case of a

lease, there is a transfer of a right to enjoy the property [See: T.P. Act by Mulla \026 9th Edn. Page 621]. In the case of Fuzhakkal Kuttappu v. C. Bhargavi & Ors. reported in [AIR 1977 SC 105], it has been observed that the nomenclature given to a document by the writer or even by the parties is not always conclusive. In construing a document, it is necessary to find out the intention of the parties executing such document. Such intention has to be gathered from the recital, the terms in the document and from surrounding circumstances. When there is a document of a composite character disclosing features of mortgage and lease, the Court will have to find out the pre-dominant intention of the parties executing the document viewed from the essential aspect of the reality of the transaction. In that case, it was further observed that the mortgages are not always simple, English, usufructuary as defined in T.P. Act. They may be anomalous. Even so, the essential feature of a mortgage, which is not there in a lease, is that the property transferred is a security for repayment of a debt in a mortgage whereas in a lease, it is transfer of a right to enjoy the property. In the instant case, the suit property is a shop; the transferee was put in possession as he was to carry on his business; however, he had no power to lease or sell; no rate of interest was fixed; there is nothing to indicate as to how Rs.16,200/- was to be appropriated. In the present matter there is no evidence to show that Ex.P5 was executed as security for the alleged loan. As stated above, the tenancy of the respondent continued even after 1969 and in the above circumstances the High Court was right in holding that Ex.P5 was a device to defeat the said Act. The judgment of the Supreme Court in the case of Shah Mathuradas Maganlal & Co. v. Nagappa Shankarappa Malaga & Ors. reported in [AIR 1976 SC 1565] has no application to the facts of the present case. In that matter, the respondent\026landlord executed a mortgage deed in favour of the appellant\026tenant. The period for redeeming the mortgage was fixed for 10-years. The appellant claimed that after redemption he was entitled to retain possession because his previous tenancy right subsisted. On facts, it was found by this Court that the delivery of possession by the tenant to the landlord was immediately followed by re-delivery of possession to the appellant as mortgagee. In the present case re-delivery is after almost five years. In the case cited, the deed of mortgage was executed on 21.5.1953 and it recited that the erstwhile tenancy shall continue only till 7.11.1953. That under the deed the possession of the appellant was confirmed as a mortgagee on and from 7.11.1953. Further, under the mortgage deed it was provided that if the mortgagor was not able to redeem the mortgage, the mortgagee was entitled to sell the property for recovery of debts. In view of the above terms and conditions, it was held that on redemption of the mortgage, the respondent had a right to recover possession. None of such terms exist in Ex.P5. In the circumstances, the judgment of this Court in Shah Mathuradas Maganlal & Co.(supra) has no application to the present case.

Lastly, it may be pointed out that in the present case, the suit was filed in 1980. Section 2(7)(bb)(iii) was amended in 1994. Under the said Amendment, the expression "under the management of the State Government" stood deleted. Therefore, it was argued on

behalf of the appellant that the Karnataka Rent Control Act, 1961 has no application. As held by the High Court, this plea was not taken by the appellant in the Courts below. Further, section 2(7)(bb)(iii) states that the Act will not apply to any premises belonging to a religious or charitable institution. However, there is no material placed on record by way of pleadings to show whether the appellant is a religious or charitable institution. The plaint was never amended. The appellant seeks exemption. Exemption needs to be alleged and proved. Opportunity is required to be given to the respondent to meet the plea of exemption. In the circumstances, we are in agreement with the view expressed by the High Court that the said plea was not open to the appellant at the stage of second appeal, particularly in the absence of any material available to substantiate such plea.

For the aforesaid reasons, we do not find any merit in this civil appeal and the same is dismissed, accordingly, with no order as to costs.