

PETITIONER:
NARAYAN VISHNU HENDRE AND ORS.

Vs.

RESPONDENT:
BABURAO SAVALARAM KOTHAWALESINCE DECEASED BY HIS HEIRANANT B

DATE OF JUDGMENT 13/10/1995

BENCH:
KIRPAL B.N. (J)
BENCH:
KIRPAL B.N. (J)
BHARUCHA S.P. (J)

CITATION:
1996 AIR 368 1995 SCC (6) 608
JT 1995 (7) 393 1995 SCALE (5) 763

ACT:

HEADNOTE:

JUDGMENT:

J U D G M E N T

KIRPAL.J.

This is an appeal by special leave against the judgment and order of the High Court of judicature at Bombay, dated 11.12.1987 in Second Appeal No. 643/81 and the main question which arises for consideration is whether there was an implied surrender of the tenancy by the appellants-defendants in favour of the respondent-plaintiff at the time when the respondent-plaintiff executed a mortgage of the premises in favour of the appellants.

The father of the appellants-defendants, namely Vishnu Malba Hendre (hereinafter referred to as 'Vishnu') was a tenant in respect of the front portion of House No. 115, Raviwar Path, Phaltan. The said house was owned by Baburao Savalaram Kothawale, the original plaintiff, now represented by his legal heir. The said house was mortgaged by the respondent-plaintiff in favour of Vishnu by three different deeds which were styled as conditional sale-deeds. By the first deed dated 16.4.1952 for a consideration of Rs. 2,000/-, the front portion of the house was transferred and by the other two deeds, possession of the rear and the middle portions were transferred for Rs. 1,200/- and Rs. 2,000/- respectively. The documents, inter-alia, provided that in case the respondent-plaintiff returned the amounts within six, seven and nine years respectively, then Vishnu was to re-convey the property and in case the said amounts were not paid within the stipulated period, then the deeds were to be treated as sale out and out. After the execution of the third document, Vishnu created a tenancy in favour of the respondent-plaintiff in respect of the middle portion of the house and a rent note was executed on March 18, 1953. The respondent-plaintiff failed to pay the rent and Vishnu filed a suit for recovery of the said rent and the same was decreed in March, 1956.

In the year 1957, Vishnu died and thereafter, the

appellants, who were his legal heirs, filed a suit in 1958 against the respondent-plaintiff for recovery of possession of the middle portion of the said house on the ground of default of payment of rent. The said suit was decreed in 1959. The result of this was that the appellants-defendants secured the possession of the entire house consisting of three different portions.

On 23.12.1959, the respondent-plaintiff served a notice claiming redemption in respect of front portion of the property only, covered by the first document. The appellants-defendants sent a reply pointing out that the period of five years which was fixed by the document for repayment was over, and, therefore, the right of the respondent-plaintiff to recover possession stood exhausted. This was followed by notice dated 7.3.1962 sent by the appellants-plaintiff that the time in the three sale deeds having expired, the right to re-conveyance had come to an end.

After a lapse of time, the respondent-plaintiff on 17.6.1974 filed a suit for redemption of the mortgage and recovery of possession. This suit was resisted by the appellants-defendants by raising various contentions. It was claimed that the suit was barred by limitation as the right to get back the property was lost due to the failure of the respondent-plaintiff to re-pay the amount within the stipulated period set out in the document. It was also claimed that the appellants-defendants had become owners of the suit property by adverse possession. Another plea which was raised and with which we are concerned in this appeal was that the appellants-defendants were tenants in respect of the front portion of the house and in case it was found that the nature of the transaction was that of mortgage, then, on redemption, the tenancy would stand revived and the respondent-plaintiff would not be entitled to actual possession of the front portion of the house.

The Trial Court decreed the suit on 3.5.1979 by holding that the suit transactions were mortgages by conditional sale and not sales with a condition to repurchase. A preliminary decree for redemption on the respondent-plaintiff depositing Rs. 5,200/- within six months from the date of decree was, accordingly passed.

The appellants-defendants challenged the decree and contended that they had become owners of the said property by adverse possession; there was in any event a revival of tenancy in respect of the front portion of the house and, lastly, they were entitled to claim the value of the improvements which had been made in the house while they were in possession. The lower appellate court, however, turned down all the contentions and dismissed the appeal.

Second appeal was filed before the Bombay High Court wherein the aforesaid contentions were reiterated. While dismissing the appeal, the High Court held that the transactions in question were mortgages and that the right of the appellants-defendants as lessee of the front portion had merged in the right of the mortgage in possession and, therefore, the tenancy rights did not survive when the lessee obtained possessory mortgage from the landlord. It was, therefore, held that on redemption of the mortgage, the appellants-defendants could not resist delivery of possession in respect of the front portion of the house.

As the present appeal arises on the grant of special leave against the aforesaid judgment of the High Court, the leave so granted was confined only to the question of front portion of the premises in question.

It was submitted by Mr. V.M. Tarkunde, learned Senior

Counsel for the appellants-defendants than on the facts of the present case, the Doctrine of Merger did not apply. He submitted that the High Court was wrong in concluding that by virtue of ratio of decision of this Court in the case of Shah Mathuradas Maganlal & Co. Vs. Nagappa Shankarppa Malage & Ors., (1976) 3 S.C.R. 789, the tenancy rights could not survive when the lessee obtained possessory mortgage from the landlord. Proceeding on the basis that the document in question was a mortgage-deed, as held by the courts below, Mr. Tarkunde, learned Senior Counsel contended that no express or implied surrender of tenancy of the front portion of the house could be inferred from the same and, as held in Shah Mathuradas's case (supra), there could be no automatic merger of the lease and mortgage in respect of the same property. He, therefore, submitted that with the redemption of mortgage, the tenancy rights stood revived.

Mr. Raju Ramachandran, learned Counsel for the respondent-plaintiff, while supporting the judgment of the High Court very fairly submitted that he could not support the theory of automatic merger when a tenanted premises is mortgaged in favour of the lessee. He, however, submitted that the three documents should be read together and in the present case, there was a implied surrender of tenancy.

The determination of lease is provided by Section 111 of the Transfer of Property Act (hereinafter referred to as 'the Act'). The Trial Court, the first Appellate Court as well as the High Court were of the opinion that the lease stood determined by virtue of the applicability of clause (d) of Section 111 of the Act which provides that a lease of immovable property is determined in case the interest of the lessee and the lessor in the whole of the property becomes vested at the same time in one person in the same right. This proposition has been expressly repelled by this Court in following cases.

In the case of Shah Mathuradas's case (supra), the appellant was a mortgagee in possession of the property by virtue of a deed of mortgage. No interest was to be paid but instead, possession of the property was agreed to remain with the mortgagee. Though, the mortgage deed was dated 21.5.1953, the period for redeeming the mortgage was fixed for ten years from 7.11.1953. The mortgagor issued a notice after ten years to the effect that he was ready and willing to redeem the mortgage. But, the appellant, inter alia, claimed that even after redemption, he was entitled to retain the possession because his previous tenancy right subsisted. While the Trial Court held that the tenancy of the appellant would revive on redemption of the mortgage, the District Judge, on appeal, came to the conclusion that under the mortgage deed, the appellant had ceased to be tenant with effect from 7.11.1963 and, thereafter, he was in possession only as a possessory mortgagee and not as a tenant. The High Court dismissed the second appeal. The question with regard to the revival of the tenancy was again raised in this Court. Referring to clause (d) of Section 111 of the Act, it was observed as follows:

"For a merger to arise, it is necessary that a lesser estate and a higher estate should merge in one person at one and the same time and in the same right, and no interest in the property should remain outside. In the case of a lease the estate that is outstanding is the equity of redemption of the mortgagor. Therefore, there cannot be a merger of lease and mortgage in respect

of the same property since neither of them is a higher or lesser estate than the other."

On the facts of that case, however, this Court came to the conclusion upholding the findings of High Court and first Appellate Court that the mortgage deed showed that the appellant had surrendered the tenancy from 7.11.1953 and, therefore, the mortgagor was entitled to the delivery of possession of the property.

IN Sambangi Applaswamy Naidu & Ors. Vs. Behara Venkataramanayya Patro and others, 1985 (1) SCR 651, while following the ratio of decision in Shah Mathuradas's case (supra) to the effect that there could be no merger of lease and a mortgage, even where the two transactions are in respect of the same property, it was held that the question whether upon redemption of usufructuary mortgage, a tenant mortgagee could be directed to deliver actual or physical possession of the mortgaged property would depend upon whether there was an implied surrender of the lessee's right when the mortgage was executed in his favour by the lessor mortgagor. In order to find an answer to this question, this Court observed that the intention of the parties at the time of execution of the mortgage deed in favour of the sitting tenant had to be gathered 'from the terms and conditions of the mortgage transaction in the light of the surrounding circumstances of the case'. After seeing the terms of the terms of the mortgage deed and the other circumstances of the case, it was concluded that the effect of the mortgage deed in that case was that the lessee's rights were kept in abeyance and they revived upon the redemption of the mortgage because there was no implied surrender of the tenancy.

On examining the mortgage deed in Nand Lal Vs. Sukhdev, 1987 (Supl.) SCC 87, where there was an merger in favour of the lessee, this Court after perusing the mortgage deed came to the conclusion that there was nothing to warrant an inference of relinquishment of the rights of the tenants by obtaining the mortgage deed. Similarly, in Nemi Chand Vs. Onkar Lal, AIR 1991 SC 2046, this Court construed the mortgage deed and concluded that there was no implied surrender of the lease in favour of the landlord-mortgagor.

In the present case, the mortgage deed dated 16.4.1952 recited that in order to discharge the debts for the construction of the house, the respondent-plaintiff had received and had executed the conditional sale deed. It was further stated in the said deed that:

"I have sold the said property by this conditional sale-deed and delivered possession thereof to you (the purchaser). The period of this sale deed is five years and thereafter I will get released the said property for Rs. 2,000/- according to this deed. In the event I fail to pay the said amount within the said period, this sale-deed shall be presumed and treated as perpetual property and make vahiwat thereof without interruption. That I will remove the objection if any in respect of the said property if taken without sustaining any loss to you."

It is not in dispute that the second and the third mortgage deeds were similarly worded.

It was submitted by Mr. Ramachandran, learned Counsel that by stating that the mortgagor had "delivered possession

thereof to you (the purchaser)" clearly showed that there was an implied surrender of the tenancy. We find it difficult to accept this submission. The mortgage deed makes no mention with regard to the delivery of the possession of the mortgagor in the event of his redeeming the mortgage. Secondly, the principal amount which was taken by the mortgagor was Rs. 2,000/- and the deed did not provide for payment of interest and the property could be and was redeemed on the re-payment of the principal amount of Rs. 2,000/- itself. With the execution of the mortgage deed, no rent was paid for the front portion of the house and the mortgagee did not charge any interest on the mortgaged amount of Rs. 2,000/-. Redemption of the mortgage for paying at the same amount of Rs. 2,000/- showed that the parties had agreed that during the subsistence of the mortgage, neither any rent would be payable nor interest would be charged. Thirdly, it is difficult to imagine that the tenant who had a valid tenancy since the year 1942, would agree to surrender his tenancy right on the mortgage deed having executed while being conscious of the fact that the mortgagor had a right to redeem the mortgage. Lease of a property is a very valuable right and it's implied surrender would not be readily inferred. Had the parties wanted to terminate their earlier relationship of landlord and tenant on the execution of a mortgage, then one would expect a clear statement or an indication to that effect in the document itself. Neither the conduct of the parties nor the said document in the present case indicates that Vishnu intended to surrender his tenancy rights. This being so, the redemption of the mortgage would revive the tenancy of the appellants-defendants.

Accordingly, we are of the opinion that the only effect of the mortgage was that the lessee's rights were kept in abeyance and they stood revived upon the redemption of the mortgage. We, therefore, allow the appeal, set-aside the impugned judgments of the High Court and the courts below and we hold that the respondent-plaintiff is not entitled to delivery or physical possession of the front portion of the house in question. There will be, however, no order as to costs.