

CASE NO.:
Appeal (civil) 686 of 1987

PETITIONER:
NIRMAL CHANDRA

Vs.

RESPONDENT:
VIMAL CHAND

DATE OF JUDGMENT: 08/05/2001

BENCH:
D.P. Mohapatra & Brijesh Kumar

JUDGMENT:

BRIJESH KUMAR, J.
L...I...T.....T.....T.....T.....T.....T...J

This appeal has been preferred against the judgment and decree dated August 30, 1996 passed by a learned Single Judge of Madhya Pradesh High Court, Gwalior Bench allowing the revision petition preferred by the respondent Vimal Chand and setting aside the order passed by the trial court by which the respondent was directed to hand over the physical possession of the disputed property to Nirmal Chandra in proceedings under Section 83 of the Transfer of Property Act.

The controversy involved in this case relates to the nature of possession of a tenant-mortgagee and the obligations of the respective parties in the event of redemption of mortgage in so far as it relates to the possession of such properties. We have heard learned counsel appearing for the parties and have also gone through orders passed by the Courts below.

The respondent Vimal Chand is a tenant of the appellant Nirmal Chandra in respect of a shop situate at Pared Chauraha, Bhind, Madhya Pradesh. It is not in dispute that the tenancy of the said shop had been coming down since long. The appellant-landlord however executed a mortgage deed, duly registered, in respect of the shop in question in favour of the tenant-respondent Nirmal Chandra. The mortgage was for a sum of Rs.10,000/-. The mortgage deed was executed on 19.4.1973. According to the appellant he was handed over the possession of the property. According to the terms and conditions of the mortgage the appellant was entitled to get the mortgage redeemed on expiry of ten years. On completion of ten years the appellant requested the respondent to receive the mortgage money and redeem the mortgage and a notice is said to have been served on 6.12.1983 but it brought not results. Hence, he moved a petition under Section 83 of the Transfer of Property Act in the Court of a Civil Judge by depositing a sum of Rs.10,000/- in the Court. The respondent-tenant filed its reply contesting the case of the petitioner- landlord in

respect to the possession of the property. The execution of the mortgage deed was not denied but it was pleaded that he has been tenant of the accommodation in question since a long time and according to the conditions of the mortgage agreement rent and the interest was agreed to be equal. The delivery of possession on mortgage was only symbolic in nature and the tenant-respondent namely, the mortgagee continued to be in possession. This position has not been disputed before us during the hearing of the case.

Section 83 of the Transfer of Property Act provides as under:

83. Power to deposit in Court money due on mortgage.

At any time after the principal money [payable in respect of any mortgage has become due] and before a suit for redemption of the mortgaged property is barred, the mortgagor, or any other person entitled to institute such suit, may deposit, in any court in which he might have instituted such suit, to the account of the mortgagee, the amount remaining due on the mortgage.

Right to money deposited by mortgagor:- The Court shall thereupon cause written notice of the deposit to be served on the mortgagee, and the mortgagee may, on presenting a petition (verified in manner prescribed by law for the verification of plaints) stating the amount then due on the mortgage, and his willingness to accept the money so deposited in full discharge of such amount, and on depositing in the same court the mortgage-deed [and all documents in his possession or power relating to the mortgaged property], apply for and receive the money, and the mortgage-deed, [and all such other documents] so deposited shall be delivered to the mortgagor or such other person as aforesaid.

[Where the mortgagee is in possession of the mortgaged property, the court shall, before paying to him the amount so deposited, direct him to deliver possession thereof to the mortgagor and at the cost of the mortgagor either to re-transfer the mortgaged property to the mortgagor or to such third person as the mortgagor may direct or to execute and (where the mortgage has been effected by a registered instrument) have registered an acknowledgment in writing that any right in derogation of the mortgagors interest transferred to the mortgagee has been extinguished.]

For coming to a conclusion that on redemption of a mortgage, the mortgagor is to be handed over the possession of the property, learned trial court considered certain decisions of the Madhya Pradesh High Court referred to in the order and Shah Mathuradas Maganlal & Co. versus Nagappa Shankarappa Malage, AIR 1976 S.C. 1565 and observed that where the mortgagee was in possession and no interest was agreed to be paid nor any time limit to return the amount, in such a situation the tenancy rights will come to an end and on redemption of the mortgage, the possession shall be handed over to the mortgagor. It was also observed that intention of the parties was to be taken into account as to whether the tenancy was liable to be continued or not. The petition was allowed with a direction to the respondent to hand over the possession of the property to the mortgagor-landlord, the appellant in this appeal.

Aggrieved by the order passed by the trial court, the

respondent-tenant preferred a revision which has been allowed as indicated earlier and set aside the part of the order directing handing over the possession of the mortgaged property to the mortgagor-landlord. Considering the terms and conditions of the mortgage, the revisional court came to the conclusion that tenancy rights had not been surrendered and on redemption of the mortgage, the respondent-tenant would be entitled to continue in possession as tenant of the premises. It was also found that tenancy rights could only be brought to an end under the provision as contained in the Madhya Pradesh Accommodation Control Act. It is against the said order that this appeal has been preferred.

Before considering the terms and conditions of the mortgage deed, it may be better to first consider the legal position on the point. In a case reported in AIR 1984 SC 1728, Gambangi Appalaswamy Naidu and others versus Behara Venkataramanayya Patro, this Court held that there can be no merger of lease and a mortgage, even where the two transactions are in respect of the same property as for a merger it is necessary that lesser estate and a higher estate should merge in one person at one and the same time and no interest in the property should remain outstanding. Neither of the two rights are higher or lesser estate than the other. It is further observed that a tenant mortgagee could be directed to deliver the possession of the property at the time of redemption only if at the time of the mortgage there was surrender of lease rights in favour of the lessor. It all depends on the intention of the parties at the time of execution of the mortgage and its terms and conditions as well as the surrounding circumstances. On facts it was found that rent was payable by the lessee in the shape of share in the crop and there was an adjustment of rent and interest that is to say liability to pay rent during mortgage was kept alive which runs counter to implied surrender of lease rights. It was further held that the mere fact that owner creates a mortgage in favour of a lessee is not by itself decisive to hold that the prior lease was surrendered and the possession on the earlier lease was only that of a mortgagee. The nature of possession would however be a question of fact in each case. In Gopalan KRISHNANKUTTY VERSUS Kunjamma Pillai Sarojini Amma and others AIR 1996 S.C.. 1659, a Bench of Three Judges of this Court, held that unless there was a surrender of the lessee's rights, at the time of execution of mortgage deed, mortgagor would not be entitled to obtain delivery of physical possession on redemption of mortgage. The question of actual surrender of rights depends upon the intention of the parties at the time of execution of the mortgage. It would be a question of fact depending upon evidence. It is further observed that in absence of proof of surrender of lease by the defendant, there is no automatic merger of an interest as lessee with that of the mortgagee when the same person is lessee as well as mortgagee. On redemption of the mortgage, the mortgagee is not entitled automatically to recover possession of the lease. In Narayan Vishnu Hendre and others versus Baburao Savalaram Kothawale (1995) 6 S.C.C. 608 this Court held that doctrine of merger does not apply where tenanted premises are mortgaged in favour of the lessee and such an inference cannot readily be inferred in the absence of any clear statement or indication in the deed or conduct of the parties. It has also been observed that lease of a property is a very valuable right and its implied

surrender on execution of a mortgage would not be inferred unless there was a clear statement or indication to that effect in the document itself. Redemption of mortgage would revive the tenancy of the mortgagee, the only effect of mortgage was that the lessee's rights were kept in abeyance and they stood revived by the redemption of the mortgage. In *Nemi Chand versus Onkar Lal* AIR 1991 S.C. 2046 in similar situation it was held that where it was stipulated that neither interest nor rent was payable as both amounts were equal, it clearly shows that rent was kept alive and there was no merger of lease. Lessee was held entitled to be in possession of the property as lessee despite the redemption of mortgage. In *Nand Lal and others versus Sukh Dev* and another 1987 (Supp) S.C.C. 87 also the same view was taken that tenancy rights would get revived on redemption of the mortgage and the lessee mortgagee would not be liable to be evicted.

From a perusal of the decisions of this Court as indicated above, it clearly emerges that there is no automatic merger of two rights where mortgage is executed in favour of a tenant and on redemption of mortgage, the tenancy rights kept in abeyance would revive and entitle the tenant to continue in possession even after the redemption of the mortgage. On execution of mortgage, tenancy rights would terminate only if it is clear expressly or impliedly by conduct or other related circumstances that the parties had intended so which would be a question of fact. Thus as a normal rule except in intention being to the contrary, mortgage and lease operate independent of each other and on mortgage coming to an end by redemption, tenancy would revive.

In the light of the law on the point indicated above we may now advert to the terms and conditions of the mortgage deed in hand. The Condition No.1 of the mortgage deed lays down that the interest of the mortgage money and the rent of the shop would be equal. The Condition No.4 which is also relevant and as quoted, on being translated into English, in the order of the High Court, is as follows:

After the expiry of the period of ten years when I get the shop redeemed, I would use it for my own purpose for at least three years. After getting it redeemed, I would neither give it on rent nor keep any partner with me. In case it is given to someone on rent, the mortgagee shall have right to take back possession of the shop in his capacity as a tenant.

It is to be noticed that under Condition No.1 the payment of rent is kept alive. It is sought to be adjusted by the amount of interest payable by the mortgagor-lessor to the lessee. Thus it is quite clear that element of tenancy and payment of rent operated throughout the period of mortgage. It is not denied before us that during all this period, the tenant remained in actual possession. His status as a tenant never ceased as amount of interest to which he was entitled to on Rs.10,000/- advanced to mortgagor was adjusted towards rent payable by him as a tenant of the accommodation to the landlord. In similar circumstances we have already seen that in the cases of *Gambangi Appalaswamy Naidu* as well as *Nemi Chand* (Supra) this Court held that where rent is kept alive, it runs contrary to the intention or conduct of the parties leading to any inference of surrender of lease. In our view this

fact alone is enough to hold that there was no merger of two rights nor surrender of tenancy could be inferred on the facts and circumstances or on the basis of the terms and conditions of the mortgage. As a matter of fact, Condition No.4 on which much reliance has been placed by the learned counsel for the appellant does not help him very much. It is no doubt initially indicated on expiry of ten years on redemption of mortgage the lessor would use the shop for his own purpose for at least three years. It would neither be given on rent nor he shall have any partner with him. It is further provided that in case it is given to some one on rent, the mortgagee shall have the right to take back possession in his capacity as tenant (emphasis supplied by us). This condition nowhere speaks of surrender of tenancy by the lessee. It only provides that for at least three years shop will be in personal use of the landlord failing which there would be revival of the mortgagees capacity as tenant. Such a condition cannot be said to be a clear intention of surrendering the lease rights in the property. Whatever little effect Condition No.4 if at all may have, is negated by Condition No.1 which kept the rent alive and the element of tenancy pervading throughout the period of mortgage.

Next, we also find that the High Court has rightly observed that in view of Section 12 of the M.P. Accommodation Control Act it was not possible to grant relief of possession of the tenanted premises to the landlord-lessor. The relevant parts of Section 12 are quoted below:

Sec.12 Restriction on eviction of tenants.-(1) Notwithstanding anything to the contrary contained in any other law or contract, no suit shall be filed in any Civil Court against a tenant for his eviction from any accommodation except on one or more of the following grounds only namely:-

- (a)-----
- (b)-----
- (d)-----
- (e)-----

(f) that the accommodation let for non-residential purposes is required bona-fide by the landlord for the purpose of continuing or starting his business or that any of his major sons or unmarried daughters if he is the owner thereof or for any person for whose benefit the accommodation is held and that the landlord or such person has no other reasonable suitable non-residential accommodation of his own in his occupation in the city or town concerned.

In the case in hand it can best be said that the accommodation was needed by the landlord for his own use more particularly in view of the fact that earlier he had also filed a suit for eviction of the respondent-tenant on the ground of his bona fide requirement, in the civil court which was pending at the time of execution of the mortgage. The Madhya Pradesh Accommodation Control Act 1961 is a special Act dealing with the subject of eviction of the tenants and as provided under Section 12 of the Act, notwithstanding any rule to the contrary contained in any other law or contract, no suit shall be filed in any civil court against a tenant for his eviction on the grounds

enumerated therein. In this light of the matter if the tenant consented to hand over the possession and acts upon such consent, it would entirely be a different matter and whichever provisions of Madhya Pradesh Accommodation Control Act, 1961 may then be applicable shall become operative but in case the possession is not handed over there is no other way except to file a suit under Section 12 of the Madhya Pradesh Accommodation Control Act to bring about determination of the tenancy by a decree of the Court on the grounds permissible under the provision. This we find yet another hurdle in the way of the appellant in making a request for decree for possession of the property in question. One more case was brought to our notice reported in (1973) 3 SCC 198, M/s. Sachamal Parasram versus Smt. Ratnabai and others. In that case the mortgagee in possession had admitted one tenant who was sought to be evicted on the redemption of the mortgage. The tenant of the mortgagee sought benefit of rent control laws. It was held that he was not entitled to that benefit. This case has no application to the facts and point of law involved in this case.

In view of the discussion held above, there is no merit in the appeal and it is accordingly dismissed. Costs easy.