

CASE NO.:
Appeal (civil) 3008 of 2001

PETITIONER:
M/s. Hasthimal & Sons & others

RESPONDENT:
P. Tej Raj Sharma

DATE OF JUDGMENT: 04/10/2007

BENCH:
A. K. Mathur & Markandey Katju

JUDGMENT:
J U D G M E N T

CIVIL APPEAL NO. 3008 OF 2001

MARKANDEY KATJU, J.

1. This appeal has been filed against the impugned judgment of the Karnataka High Court dated 12.2.2001 in C.R.P. No. 2020/2000.

2. Heard learned counsel for the parties and perused the record.

3. This appeal has arisen out of a suit for redemption of the mortgage and for possession of the mortgaged property. The owner of the properties was one Jagadish, who mortgaged the property with the defendant-respondent under a registered mortgage deed dated 19.3.1980 with possession by creating an usufructuary mortgage. It appears that after the mortgage deed, a partial release deed was signed between the parties on 21.9.1981 by which Jagadish had undertaken to give the first option to purchase to the mortgagee. On demand for redemption, the defendant refused and hence the suit was filed by the plaintiff, who had purchased the property from Jagadish.

4. It appears that before the aforesaid mortgage deed dated 19.3.1980 was registered, the mortgagee was already in possession of the property as a tenant of the mortgagor. In the mortgage deed it was specifically mentioned that on redemption of the mortgage the mortgagee should become the lessee of the mortgagor automatically as previous to the mortgage.

5. During the pendency of the suit, the plaintiff filed application under Order 12 Rule 6 CPC for a decree on the basis of the admission by the defendant that the mortgage was for 20 years which had expired on 20.3.2000. This application under Order 12 Rule 6 CPC was rejected by the trial court, but in revision the High Court set aside the order of the trial court and decreed the suit under Order 12 Rule 6 CPC. Hence, this appeal by special leave.

6. There are basically two points involved in this case \026 (1) Whether the plaintiff had a right to get possession on redemption of his mortgage and (2) whether the provision in the agreement dated 21.9.1981 that the mortgagee will have a right of pre-emption operates as a clog on the right of redemption of the mortgagor.

7. Taking the second question first, learned counsel for the appellant has relied on a decision of the House of Lords in Lewis vs. Frank Love, Ltd, 1961 All. E.R. 446. In this decision it was clearly laid down by the House of Lords that where one of the terms arranged between the mortgagor and the mortgagee was that the mortgagee should have a right of preemption in case

the mortgagor wishes to transfer the property to a third party, such a condition operates as a clog on the right of redemption of the vendee from the mortgagor. We fully agree with this view. Hence, we decide this second point in favour of the respondent who is the vendee of the mortgagor.

8. However, as regards the first point, we are of the opinion that the respondent did not have a right to possession automatically on a suit for redemption being decreed.

9. It may be noted that even before the mortgage deed was executed on 19.3.1980, the mortgagee was in actual physical possession as a tenant, and this possession continued with him as a mortgagee. Hence, when the mortgage was redeemed, it did not follow that the erstwhile mortgagee could be straightway evicted. When the mortgage comes to an end, the appellant reverted as a tenant, particularly since there was a specific term in the mortgage deed that on redemption of the mortgage the mortgagee will be a lessee as previous to the mortgage.

10. This was a term agreed upon between the parties and we cannot see how the respondent can resile from this term.

11. In *Gopalan Krishnakutty vs. Kunjamma Pillai Sarojini Amma* \026 (1996) 3 SCC 424, a three-Judge Bench of this Court held that the mere fact that the owner creates a mortgage in favour of the lessee is not by itself decisive to hold that the prior lease was surrendered and the possession of the earlier lessee is only that of a mortgagee on creation of the mortgage, and it depends upon the intention of the parties at the time of the execution of the mortgage. This view was reiterated by this Court in *Cheriyar Sossamma & others vs. Sundarassan Pillai Saraswathy Amma & others* \026 (1999) 3 SCC 251, *Narayan Vishnu Hendre & others vs. Baburao Savalaram Kothawale* \026 (1995) 6 SCC 608. In these decisions also, it was held that there was no automatic merger of the interest of lessee with that of a mortgagee, in the absence of proof of surrender of the lease by the defendant.

12. Learned counsel for the respondent has relied upon the decision of this Court in *Shah Mathuradas Manganlal & Co. vs. Nagappa Shankarappa Malage & others* \026 (1976) 3 SCC 660. But in that case it was found as a fact that the mortgagee had surrendered his tenancy. Hence that decision is distinguishable.

13. In the present case, there was a specific term in the mortgage deed dated 19.3.1980 that on redemption of the mortgage, the mortgagee shall become the lessee of the mortgagor automatically as previous to the mortgage deed. Hence, there was a clear intention between the parties that the tenancy will continue when the mortgage is redeemed. Hence, on this point we cannot agree with the High Court. Accordingly, the impugned judgment is set aside on this point. The appeal is allowed. No costs.

14. It would, however, be open to the respondent to file a suit or proceeding for eviction of the appellant-tenant which will be decided on its own merits.