

PETITIONER:
DEV RAJ DOGRA AND ORS.

Vs.

RESPONDENT:
GYAN CHAND JAIN AND ORS.

DATE OF JUDGMENT 10/03/1981

BENCH:
SEN, AMARENDRA NATH (J)
BENCH:
SEN, AMARENDRA NATH (J)
FAZALALI, SYED MURTAZA
VARADARAJAN, A. (J)

CITATION:
1981 AIR 981 1981 SCR (3) 174
1981 SCC (2) 675 1981 SCALE (1) 663

ACT:

Code of Civil Procedure 1908, Order XXI Rules 95 and 96 and Transfer of Property Act 1882, Ss 52, 58 and 65A-Mortgage-Consent decree passed in suit for money due-property let out by owner to tenants-property sold in court auction Auction purchaser applying to court for delivery of possession of property-Whether entitled to actual physical possession or symbolic possession.

HEADNOTE:

Order XXI Rules 95 and 96 of the Code of Civil Procedure enable a purchaser of immovable property in a Court sale, to apply for delivery of possession. Rule 95 provides for actual physical possession and rule 96 provides for symbolic possession. A purchaser will be entitled to physical possession of the property purchased if the property sold is in the occupation of the judgment-debtor, of some person on behalf of the judgment-debtor or some person claiming under a title created by the judgment-debtor subsequent to the attachment of the property. If the property sold is in the possession of a tenant or other person entitled to occupy the same, symbolic possession is to be made over to the purchaser under Rule 96.

The first respondent was an auction purchaser of property, of which the three appellants were tenants occupying different portions. The property was mortgaged by its owner with a Bank. As the amount due was not paid, the Bank instituted a suit for its recovery. A decree was passed by consent of the parties which provided that if the amount was not paid within two years, the Bank could enforce the decree by sale of the property. After the compromise decree was passed, the owner leased out different portions of the property to the appellants. As the owner failed to make payment of the decretal dues, the property was sold by Court auction and the first respondent, whose bid was the highest, was declared to be the purchaser of the premises, and the sale in his favour was confirmed.

The first respondent/auction-purchaser filed an application under Order XXI, Rules 95 and 96 read with Section 151 of the Code of Civil Procedure in the High Court, for delivery of vacant physical possession of the

entire property and prayed that if it was not possible to grant vacant physical possession of any part of the property, symbolic possession of that part may be granted. This application was contested by the three appellants/tenants.

A Single Judge of the High Court holding that the tenancies in favour of the appellants having been created after the institution of the suit by the Bank and after the passing of the compromise decree in the said suit, and the said tenancies would have no effect on the rights acquired by the auction-purchaser in view of Section 52 of the Transfer of Property Act, and relying on the Division Bench Judgments of the Bombay High Court in Ramdas Popat Patil v. Fakira Patil and Ors. AIR 1959 Bom 19 and of the Gujarat High Court in Jagjiwandas a Firm v.

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Lakhiram Haridasmal and Ors. AIR 1968 Guj 193 passed an order for delivery of physical possession of the portions in the respective occupation of the appellants.

In appeal it was contended that the Full Bench decision of the Bombay High Court in Anaji Thamaji Patil v. Ragho Bhivraj Patil and Anr. AIR 1973 Bom 75, over-ruled the Bombay Division Bench decision and doubted the correctness of the Gujarat decision, but the Division Bench of the High Court dismissed the appeal accepting the contention put forward on behalf of the respondent-purchaser that the decision of this Court in M/s Supreme General Films Exchange Ltd. v. His Highness Maharaja Sir Brijnath [1976] 1 SCR 237 concluded the controversy.

In the appeal to this Court, it was contended on behalf of the appellants that:

(1) Section 52 of the Transfer of Property Act has no application to the facts and circumstances of this case as the conditions laid down therein for its applicability are not satisfied.

(ii) The right that the mortgagee had was only to put the property to sale in the event of the mortgagor failing to pay the decretal amount in terms of the provisions of the compromise decree, and this right cannot be said to be a right to immovable property directly and specifically in question in the suit.

(iii) Section 65A of the Transfer of Property Act should be read alongwith Section 52 and both these sections have been incorporated with the object of preserving the interest of the mortgagee by making suitable provisions so that the security of the mortgagee might not in any way be affected by any act done by the mortgagor after the creation of the mortgage and also after the institution of any suit for enforcement of the mortgage.

(iv) Section 52 makes provisions for the parties to the suit or proceeding and can have no application to any auction purchaser who is not a party to the suit or proceeding and who only acquires his right after the sale in execution of the decree has been confirmed.

(v) The right of the third party auction-purchaser to get physical possession of the property purchased at the auction sale was not considered by the Supreme Court in M/s Supreme General Films Exchange Ltd. v. His Highness Maharaja Sir Brijnath Singhji Deo of Maihar and Ors. and Jayaram Mudaliar v. Ayya Swami and Ors. AIR 1973 SCR 569.

(vi) Order XXI, Rule 95 and Rule 96 of the Code of Civil Procedure provides that the rights of an auction-purchaser are governed by the provisions contained therein and that the auction purchaser cannot claim physical possession of the portions in the occupation of the

appellants even though they might have been inducted as tenants after the compromise decree in the suit had been passed.

On behalf of the first respondent auction-purchaser it was submitted that (1) as the tenants were inducted not only after the institution of the suit for enforcement of the mortgage but also after the compromise decree that has been passed therein, Section 52 of the Transfer of Property Act must be held to be applicable

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and it must be held that the tenancies were illegal and were created in breach of these provisions. S.(2) 65A the Transfer of Property Act does not in any way control section 52. S. 65A makes provisions with regard to the powers of the mortgagor to grant leases of the mortgaged property after the creation of the mortgage but before the institution of suit, while S. 32 makes provisions for cases of transfer or otherwise dealing with any property after the institution of a suit or proceeding and S. 52 imposes a complete ban on the transfer of any kind or dealing with immovable property except with the authority of the Court during the pendency of the suit or proceeding so that the rights of any part may not be affected when any decree or order is passed.

3. Section 58 of the Transfer of Property Act provides that a mortgage is a transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan. In a suit for the enforcement of a mortgage, the right to immovable property is directly and specifically in question and after the decree for sale is passed, the mortgagor loses even his right to redeem the property. The tenancies in the instant case having been created long after the compromise decree, are illegal and void and in contravention of S. 52 of the Act.

4. The decisions of this Court in M/s Supreme General Films Exchange Ltd. Manager Mahto and Ors. and Jayaram Mudaliar conclude the question involved in the appeal.

On the question whether the 1st Respondent as auction purchaser in an application under Or. XXI, rules 95 and 96, of the Code of Civil Procedure is entitled to recover actual physical possession of the portions in the occupation of the appellants as lessees, the lease in respect of which were created after the decree in the mortgage suit by consent between the parties had been passed.

Allowing the appeal

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HELD 1. The Judgment and Order passed by the High Court directing physical possession of the portions in the occupation of the appellants to be made over to the auction-purchaser Respondent No. 1 is set aside. Symbolic possession of the portions in occupation of the appellants to be made over to the auction-purchaser respondent. [194 D]

2. In the case of M/s Supreme General Films Exchange Ltd., the validity of the lease had been questioned by the mortgagee decree holder in a suit for declaration. The claim was not for possession by a third party auction-purchaser in a proceeding, under rules 95 and 96 of order XXI of the Code of Civil Procedure and the merits of such an application and the scope and effect of the said provisions of the Code did not come up for consideration. In Mangru Matho and Ors. v. Shri Thakur Taraknath Tarakeshwar Math and Ors. a suit was instituted by the mortgagee auction-purchaser for recovery of possession of mortgaged property sold in execution of the mortgage decree and purchased by the mortgagee himself and the decision rested mainly on the basis that the lease was

not granted by the mortgagor in the usual course of business. This case was also not concerned with an application by an outsider-auction purchaser for physical possession of the property purchased by him in an application made under order XXI Rules 95 and 96 of the Code of Civil Procedure. These two decisions do not therefore conclude the question involved in the present appeal.[190 A-B, 191 H-192 C]

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3. The auction-purchaser derives his right to obtain possession only after the sale in his favour has become absolute and sale certificate has been obtained by him. The mode and manner of obtaining such possession are regulated by Rules 95 and 96 of the Code of Civil Procedure.[193 F]

In the instant case a third party auction-purchaser is seeking recovery of the physical possession of the property purchased by him at the auction from the appellants who are in possession of different portions of the said premises as tenants of the said portions. The auction-purchaser was not the mortgagee and he was no party to the suit in which the compromise decree was passed. The auction purchaser in view of the provisions contained in Rule 95 which regulate the rights of the auction-purchaser to obtain physical possession of the property, is not entitled to recover the physical possession of the portions in the occupation of the appellants as tenants. The appellants are not the judgment-debtors. They are not in occupation of the property on behalf of the judgment-debt or. They are also not claiming to be in occupation under a title created by the judgment-debtors subsequent to any attachment of the property. There is no question of any attachment in the case. The appellants are in the occupation of their respective portions as tenants and they claim to occupy the same as such. The auction purchaser must therefore be held to be entitled to only symbolic possession in terms of the provisions contained in Or XXI rule 96 in respect of the portions in occupation of the appellants. [192 H-193 A, 193 H-194 A, C]

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 1653 of 1979.

Appeal by special leave from the Judgment and Order dated 23.5.1979 of the Delhi High Court in E.F.A. No. 8/76.

Madan Bhatia and Sushil Kumar for the Appellant.

S N. Kacker, S.K.Mehta, P.N. Puri, E.M.S. Anam and M.K. Dua for the Respondents.

The Judgment of the Court was delivered by

A.N. SEN J. The principal question which falls for determination in this appeal by Special Leave granted by this Court, is whether Gyan Chand Jain, the Respondent No. 1 in this appeal, who purchased a two and half storeyed Bungalow at No. 5-C/96, W.E.A. Karol Bagh, New Delhi, at an auction sale held pursuant to the terms of the compromise decree between the mortgagor and the mortgagee, is entitled to recover actual physical possession of the portions in the occupation of the appellants as lessees, the leases in respect of which were created after the decree in the mortgage suit by consent between the parties had been passed, in an application made by the auction purchaser Gyan Chand Jain under O.XXI, rules 95 & 96 of the Code of Civil Procedure.

There is no serious dispute with regard to the facts

material for the purpose of appeal. Des Raj Agarwal, the sole proprietor of M/s.

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Raj Kumar & Co., mortgaged the 2/1/2 storeyed bungalow No.5-C/96, WEA. Karol Bagh, New Delhi (herein-after referred to as the premises) along with various other properties with Oriental Bank of Commerce (hereinafter referred as the Bank) on 28.6.1960 by deposit of title deeds. The Bank filed a suit to recover its dues on the mortgage on 6.11.1962. On 3.9.1963, a decree was passed by consent of the parties in favour of the plaintiff-mortgagee for the sum of Rs. 479177.49 with costs and future interest at 6% till realisation of the decretal amount. The other relevant terms of the consent decree which are contained in clauses 8 and 9 of the compromise are to the following effects:

"8. If the judgment debtor pay Rs. 479177.49 less costs and interest as after March, 1961 within two years of the decree, then whole of the decree shall stand satisfied.

9. If full amount of the decree with costs and interest is not paid as agreed above, within two years of the decree, then the decree-holder shall be free to enforce the decree against the property mortgaged which shall be sold in execution of the same and the decree holder shall be entitled to proceed against other property and person of the judgment-debtor in the case of the proceeds of the property not being sufficient to satisfy the decree".

After the decree had been passed on 3.9.1963, it appears that the judgement-debtor leased out different portions of the premises to Dev Raj Dogra, Ish Kumar Khosla and Balwant Singh, the appellants herein, 1966, 1967 and 1970 respectively. The judgment debtor failed to make payment of the decretal dues in terms of the provisions contained in the consent decree and the premises in question resold by public auction on 28.10.1971. Gyan Chand Jain whose bid was the highest, was declared to be the purchaser of the premises and the sale in his favour was confirmed on 6.8.1973. On 25.10.76 an application was made on behalf of Gyan Chand Jain, the auction purchaser, in the Delhi High Court under O. XXI rules 95 and 96 and also S.151 of the Code of Civil Procedure for the following reliefs:-

(i) Warrants of possession with the direction that vacant physical possession of the entire property be delivered to the applicant, be issued and vacant physical possession of the entire property be got delivered to the applicant;

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(ii) in case the Hon'ble Court comes to a conclusion that the applicant is not entitled to vacate physical possession of any part of the property symbolic possession of that part of the property be granted to him;

(iii) notices be issued to the persons mentioned in para 9 above to show cause why vacant physical possession of the portion of the property in their occupation be not delivered to the applicant.

The three tenant who were in possession of the respective portions leased out to them and on whom notices had been served, contested the said application. A learned Single Judge of the Delhi High Court passed an order of physical possession of the said portions in the respective occupation of the tenants, the appellants before us, to be made over to the auction purchaser Gyan Chand Jain. The Learned Judge held that the tenancies in favour of the tenants had been

created after institution of the suit by the Bank and after the passing of the compromise decree in the said suit; and, the said tenancies would have no effect on the rights acquired by the auction purchaser, in view of the provisions contained in S. 52 of the Transfer of property Act. The Learned Judge had relied on the judgment of a Division Bench of the Bombay High Court in the case of Ramdas Popat Patil v. Fakira Pandu Patil and Ors.(1) and also on decision of Division Bench of the Gujarat High Court in case Jagjiwandas a Firm v. Lakhiram Haridasmal and Ors.(2) The tenants preferred an appeal against the said order of the learned Judge. Before the Division Bench of the Delhi High Court, it was urged on behalf of the tenants that the decision of the Division Bench relied on by the learned Single Judge had been subsequently over-ruled by a decision of the Full Bench of the Bombay High Court in case of Anaji Thamaji Patil v. Ragho Bhivraj Patil and Anr.(3) and the correctness of the decision of the Gujarat High Court had also been questioned in this Full Bench judgment. Various other arguments were also advanced before the Division Bench on behalf of the tenants and the said arguments have been noted in the judgment of the Division Bench. The Division Bench however, dismissed the appeal, accepting the contention put forward on behalf of the respondent auction-purchaser that the decision of this Court in the case of M/s Supreme General Films Exchange Ltd. v. His Highness Maharaja Sir Brijnath Singhji.

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Deo of Maihar and Ors., concludes the controversy. The Division Bench also referred to the decision of this Court in case Jayaram Mudaliar v. Avva Swami and Ors.(2) Against the judgment and decision of the Delhi High Court the tenants have preferred this appeal after obtaining special leave from this Court.

Mr. Bhatia, learned counsel appearing on behalf of the tenants the appellants before us, has urged that S. 52 of the Transfer of Property Act has no application to the facts and circumstances of this case, as the conditions laid down in the said Section for the applicability of the said section are not satisfied. It is the argument of Mr. Bhatia that the requirements of the said Section are-(1) there must be a suit or proceeding which is not a collusive one and any right to immovable property must be directly and specifically in question in the said suit or proceeding and (2) transfer or otherwise dealing with the property by any party to the suit or proceeding must affect the right of any other party thereto under any decree or order which may be passed therein. Mr. Bhatia has contended that in the instant case the right that the mortgagee had was only to put the property to sale in the event of the mortgagor failing to pay the decretal amount in terms of the provisions of the compromise decree. It is his contention that the right to put the property to sale cannot be said to be a right to immovable property directly and specifically in question in the suit. He also referred to S. 65A of the Transfer of Property Act which empowers the mortgagor while lawfully in possession of the mortgaged property to grant lease in terms of the provisions contained in the said Section. He has submitted that S. 65A should be read along with S. 52 and both these sections have been incorporated with the object of preserving the interest of the mortgagee by making suitable provisions so that the security of the mortgagee might not in any way be affected by any act done by the mortgagor after the creation of the mortgage and also after the institution of any suit for enforcement of the mortgage.

It is his submission that in S. 65A of the Transfer of Property Act the Legislature has made it manifestly clear that the mortgagor will be entitled to grant a lease of the property in conformity with the provisions of the said Section and he submits that when a mortgagor grants a lease of the mortgaged property in terms of the provisions of Section 65-A of the Transfer of Property Act, it cannot be said that the granting of any such lease affects the right of the mortgagee. Mr. Bhatia has next contended that in any event S.52 makes provisions for the

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parties to the suit or proceeding and can have no application to any outside auction purchaser who is not a party to the suit or proceeding and who only acquires his right after the sale in execution of the decree has been confirmed. Mr. Bhatia argues that the judgment of the learned Single Judge of the Delhi High Court must be held to be wrong, as the learned Single Judge came to his decision relying on the decision of the Division Bench of the Bombay High Court in the case of Ramdas Popat Patil v. Fakira Pandu Patil and Ors. (supra) and the decision of the Gujarat High Court in the case of Jagjiwandas a Firm v. Lakhiram Haridasmal and Ors. (supra) and the decision of the Division Bench of the Bombay High Court in Ramdas Popat Patil's case has been over ruled by the Full Bench decision of the Bombay High Court in Anaji Thamaji Patil v. Ragho Bhivraj Patil and Anr. (supra) in which the correctness of the decision of the Gujarat High Court has also been questioned. Mr. Bhatia has commented that the decisions of this Court in the case of M/s. Supreme General Films Exchange Ltd. v. His Highness Maharaja Sir Brijnath Singhji Deo of Maihar and Ors. (supra) and in the case of Jayaram Mudaliar v. Ayya Swami and Ors. (supra) do not conclude the question involved in the instant case. He has submitted that the rights of a third party auction-purchaser to get physical possession of the property purchased at the auction sale was not considered by the Supreme Court in any of these two decisions; and he has further submitted that in these two cases the Supreme Court had indeed proceeded on the assumption that S. 52 of the Transfer of Property Act was applicable without considering whether the requirements of the said Section had been complied with or not, as these aspects were not argued before the Supreme Court in these two cases. Mr. Bhatia has drawn our attention to O.XXI, rule 95 and also to rule 96 of the Code of Civil Procedure and has submitted that the rights of an auction purchaser are governed by the provisions contained therein. It is the argument of Mr. Bhatia that in view of the provisions contained therein, the auction purchaser cannot claim physical possession of the portions in the occupation of the appellants, even though the appellants might have been inducted as tenants after the compromise decree in the suit had been passed.

Mr. Kakkar, learned counsel appearing on behalf of the auction purchaser, has submitted that as the tenants in the instant case were inducted not only after the institution of the suit for enforcement of the mortgage but also after the compromise decree had been passed, therein S. 52 of the Transfer of Property Act must be held to be applicable and it must be held that the tenancies were illegal and were created in breach of the provisions contained in S. 52 of the

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Transfer of Property Act. Mr. Kakkar has argued that S. 65-A of the Transfer of Property Act does not, in any way, control S. 52 of the said Act. It is his argument that S.

65-A makes provisions with regard to the powers of the mortgagor to grant leases of the mortgaged property after the creation of the mortgage but before the institution of suit, while, on the other hand S. 52 makes provisions for cases of transfer or otherwise dealing with any property after the institution of a suit or proceeding and S. 52 imposes a complete ban on the transfer of any kind or dealing with immovable property except with the authority of the Court during the pendency of the suit or proceeding in which any right to immovable property is directly or specifically in question so that the rights of any party may not be affected when any decree or order is passed in the suit or in the proceeding. Mr. Kakkar has referred to S.58 of the Transfer of Property Act in support of his contention that in case of a mortgage, there is a transfer of an interest in specific immovable property for the purpose of securing of the payment of money advanced or to be advanced by way of loan. He has argued that in a suit for the enforcement of mortgage it must, therefore, be held that the right to immovable property is directly and specifically in question; and he has further argued that after the decree for sale is passed in a mortgage suit the mortgagor loses even his right to redeem the property. He has submitted that in the instant case tenancies have been created long after the compromise decree in which provision for sale of the mortgaged property had been made and the right of the mortgagee-decree-holder to put up the mortgaged property to sale had also arisen for failure on the part of the mortgagor judgment-debtor to pay the decretal dues in terms of the compromise decree and the tenancies created by the mortgagor must be held to be illegal and void as they are clearly in contravention of the provisions contained in S. 52 of the Transfer of Property Act. He submits that there cannot be any manner of doubt, that the creation of a tenancy affects the value of the property and to that extent affects the security, even though it may be said that the Legislature in its wisdom has thought it fit to permit the mortgagor to grant leases of the mortgaged property in terms of the provisions contained in S. 65-A of the Transfer of Property Act. It is his argument that the Legislature has thought it fit not to impose any kind of absolute prohibition in respect of the dealing with any property by the mortgagor after the creation of a mortgage and has imposed only such restrictions which the Legislature thought would not prejudicially effect the security of the mortgagee; but the Legislature, however, in S. 52 of the Act has thought fit to impose complete ban on the transfer

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of or otherwise dealing with any property after the institution of a suit or proceeding in which the right to property is directly or specifically in question, so that the rights of any party thereto may not be affected under a decree or order which may be made in the suit or proceeding. Mr. Kakkar has next submitted that the auction purchaser at the Court sale acquires all the right, title and interest of the mortgagor and also of the mortgagee as a result of the purchase and the auction-purchaser, therefore, steps into the shoes of the mortgagee and becomes entitled to obtain physical possession of the property purchased in the same manner as the mortgagee himself would have been able to do. Mr. Kakkar in this connection has referred to the decision of this Court in the case Mangru Mahto and Ors. v. Shri Thakur Taraknath Tarakeshwar Math and Ors.(1); and also to the decision of the Supreme Court in M/s. Supreme General Films Exchange Ltd. v. His Highness Maharaja Sir Brijnath

Singhji Deo of Maihar and Ors. (supra) It is the submission of Mr. Kakkar that the decisions of this Court in the case of M/s. Supreme General Films Exchange Ltd. (supra) and also in the case of Jayaram Mudaliar (supra) conclude the question involved in the present appeal and the Division Bench rightly dismissed the appeal relying on the said decisions.

Before we proceed to deal with the respective contentions of the parties, it will be convenient to consider the material provisions of the relevant statutes to which we were referred in the course of submissions made from the bar. Section 52 of the Transfer of Property Act reads as follows:-

"During the pendency in any Court having authority within the limits of India excluding the State of Jammu and Kashmir or established beyond such limits by the Central Government of any suit or proceeding which is not collusive and in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose.

[Explanation-For the purposes of this section, the pendency of a suit or proceeding shall be deemed to commence from the date of the presentation of the plaint or the institu-

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tion of the proceeding in a Court of competent jurisdiction, and to continue until the suit or proceeding has been disposed of by a final decree or order, and complete satisfaction or discharge of such decree or order has been obtained, or has become unobtainable by reason of the expiration of any period of limitation prescribed for the execution thereof by any law for the time being in force.]"

Material provisions of S. 58 (a) and (b) of the said Act are in the following terms:-

"(a) A Mortgage is the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability.

The transferor is called a mortgagor, the transferee a mortgagee; the principal money and interest of which payment is secured for the time being are called the mortgage-money, and the instrument (if any) by which the transfer is effected is called a mortgage-deed.

(b) Where, without delivering possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgage-money, and agrees, expressly or impliedly, that, in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of sale to be applied so far as may be necessary, in payment of the mortgage-money, the transaction is called a simple mortgage and the mortgagee a simple mortgagee."

S. 65A which was subsequently introduced into the Act by S. 30 of the Transfer of Property (Amendment) Act, 1929 provides:-

"(1) Subject to the provisions of sub-section (2), a mortgagor, while lawfully in possession of the mortgaged property, shall have power to make leases thereof which shall be binding on the mortgagee.

(2) (a) Every such lease shall be such as would be made in the ordinary course of management of the property concerned, and in accordance with any local law, custom or usage.

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(b) Every such lease shall reserve the best rent that can reasonably be obtained, and no premium shall be paid or promised and no rent shall be payable in advance.

(c) No such lease shall contain a covenant for renewal.

(d) Every such lease shall take effect from a date not later than six months from the date on which it is made.

(e) In the case of a lease of buildings, whether leased with or without the land on which they stand, the duration of the lease shall in no case exceed three years. and the lease shall contain a covenant for payment of the rent and a condition of re-entry on the rent not being paid within a time therein specified.

(3) The provisions of sub-section (1) apply only if and as far as a contrary intention is not expressed in the mortgage-deed; and the provision of sub-section (2) may be varied or extended by the mortgage-deed and, as so varied and extended shall, as far as may be, operate in like manner and with all like incidents, effects and consequences, as if such variations or extensions were contained in that sub-section.

Rules 95 and 96 of O.XXI of the Code of Civil Procedure under which the auction-purchaser in the instant case had made the application for possession are in the following effect:-

"95. Where the immovable property sold is in the occupancy of the judgment-debtor or of some person on his behalf or of some person claiming under a title created by the judgment-debtor subsequently to the attachment of such property and a certificate in respect thereof has been granted under rule 94, the Court shall, on the application of the purchaser, order delivery to be made by putting such purchaser or any person whom he may appoint to receive delivery on his behalf in possession of the property, and, if need be, by removing any person who refuses to vacate the same.

96. Where the property sold is in the occupancy of a tenant or other person entitled to occupy the same and a certificate in respect thereof has been granted under rule 94, the Court shall, on the application of the purchaser, order delivery to be made by affixing a copy of the certificate of sale in

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some conspicuous place on the property and proclaiming to the occupant by beat of drum or other customary mode, at some convenient place, that the interest of the judgment-debtor has been transferred to the purchaser.

An analysis of S. 52 of the Transfer of Property Act indicates that for application of the said section the following conditions have to be satisfied:-

1. A suit or a proceeding in which any right to immovable property must be directly and

specifically in question, must be pending;

2. The suit or the proceeding shall not be a collusive one;
3. Such property during the pendency of such a suit or proceeding cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the right of any other party thereto under any decree or order which may be passed therein except under the authority of Court. In other words, any transfer of such property or any dealing with such property during the pendency of the suit is prohibited except under the authority of Court, if such transfer or otherwise dealing with the property by any party to the suit or proceeding affects the right of any other party to the suit or proceeding under any order or decree which may be passed in the said suit or proceeding.

It has to be noted that this section imposes a prohibition on transfer or otherwise dealing with any property during the pendency of a suit provided the conditions laid down in the section are satisfied.

S. 58 makes it clear that in case of a mortgage there is a transfer of an interest in the specific immovable property mortgaged for the purpose of securing the payment of money advanced or to be advanced by way of a loan, an existing or future debt, or the performance of an engagement which may give rise to pecuniary liability. It further confers, in case of a simple mortgage where, without delivering the possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgage-money, a right on the mortgagee to cause the mortgaged property to be sold and the proceeds of sale to be applied, so far as may be necessary in payment of the mortgage-debt, 187

S. 65A which as we noticed earlier, was introduced by the Amending Act, 1929 in recognition of the mortgagor's powers exercised bona fide to grant lease of the mortgage-property in the usual course of management, makes provision with regard to the exercise of such powers by the mortgagor, while the mortgage subsists and the mortgagor is in lawful possession of the mortgaged-property. This section further makes it clear that any lease granted by the mortgagor in accordance with the provisions of this section would be binding on the mortgagee.

Rules 95 and 96 of O.XXI of the Code of Civil Procedure makes provisions for enabling a purchaser of immovable property in a Court sale after obtaining the necessary certificate from the Court in terms of the provisions contained in rule 94 of the Code to apply for delivery of possession of the immovable property purchased by him at the Court sale. Rule 95 provides for actual physical possession and rule 96 provides for symbolic possession. A plain reading of rule 95 which we have earlier set out, clearly establishes, that the purchaser will be entitled to physical possession of property purchased and the Court will direct delivery of actual possession of the property sold to him by removing any person who refuses to vacate the same, if need be, if the following conditions are satisfied:-

1. The property sold must be in the occupation of the judgment debtor;
2. The property sold must be in the occupancy of some person on behalf of the judgement-debtor;
3. The property sold must be in the occupation of some person claiming under a title created by the

judgment-debtor subsequently to the attachment of the property.

Rule 96 on the other hand makes it clear that where the property sold is in the occupancy of a tenant or other person entitled to occupy the same, symbolic possession of the property in the manner provided in the said rule is to be made over to the purchaser after the purchaser has obtained the necessary certificate under rule 94 of the Code.

We shall now proceed to consider the decision of this Court in the case of M/s. Supreme General Films Exchange Ltd. v. His Highness Maharaja Sir Brijnath Singh Deo of Maihar and Ors. (supra) and also the decision of this Court in Jayaram Mudaliar v. Ayya Swami and Ors (supra). In the case of M/s. Supreme General Films Exchange

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Ltd., the plaintiff-respondent who were the mortgagee of a cinema theatre of which the appellant Supreme General Films Exchange Ltd. claimed to be a lessee in occupation, had filed a suit against the mortgagor and a decree by compromise had been passed in the said suit on 7th May, 1960. By the said compromise decree it was agreed that the amounts due to the mortgagee decree-holder would be realised by the sale of the theatre. The Central Bank of India, another creditor of the mortgagor, assigned its rights under the decree to the plaintiff decree holder. The theatre was attached in the course of execution of the decree. The original lease of 1940 on the basis of which the appellant, the Supreme General Films Exchange Ltd. had entered into possession, expired in 1946 but thereafter the Company had continued in possession as a tenant holding over until the impugned lease-deed of 1946 in favour of the company was executed. The company filed a suit in 1954 for specific performance of the agreement to lease and the lease deed of 1956 was executed in compliance with the terms of the compromise decree passed in the said suit filed by the appellant company. In the said suit for specific performance by the appellant company, the plaintiff mortgagee was not impleaded as a party. The plaintiff mortgagee thereafter filed a suit claiming that the lease of 1956 was void as the same came within the mischief of Ss. 52 and 65A of the Transfer of Property Act and also S. 64 of the Code of Civil Procedure. The appellant company contested the said suit contending inter alia that the suit of this nature filed by the plaintiff mortgagee did not lie as it fell outside the purview of S. 42 of the Specific Relief Act. The trial Court decreed the said suit of the plaintiff mortgagee and granted the declaration asked for. The appellant-company preferred an appeal against the decree of the trial Court to the High Court which dismissed the said appeal. Thereafter the appellant company filed a further appeal to this Court by special leave granted by this Court. This Court for reasons recorded in the judgment held that the plaintiff was entitled to the declaration asked for on proper construction of S. 42 of the Specific Relief Act. One of the contentions which was raised on behalf of the appellant in this Court was that S. 52 of the Transfer of Property Act was not attracted to the lease in question. Dealing with contention this Court observed at pp. 243-244 as follows:-

"The contention that the case fell outside the purview of section 52 of the Transfer of Property Act as the lease was executed in purported satisfaction of an antecedent claim rests upon the terms of an agreement of 1948, embodied in a letter, on the strength of which the defendant-appellant had

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filed his suit for specific performance. We find that the terms of the compromise decree in that suit and lease-deed of 1956 purported to confer upon the defendant-appellant new rights. Indeed, there are good grounds for suspecting that the compromise in the suit for specific performance was adopted as a device to get round legal difficulties in the execution of the lease of 1956 in favour of the defendant-company. We are unable to accept the argument, sought to be supported by the citation of Bishan Singh and Ors. v. Khazan Singh and Anr. (AIR 1951 Assam 101) that the lease was merely an enforcement of an antecedent or pre-existing right. We think that it purported to create entirely new rights pendent lite. It was, therefore struck by the doctrine of lis pendens, as explained by this Court in Jayaram Mudaliar v. Ayyaswami and ors. [1973 SCR. 139] embodied in Section 52 of the Transfer of Property Act.

An alternative argument of the appellant was that a case falling within S. 65A (2) (a) of the Transfer of Property Act, confining the duration of a lease by a mortgagor to three years, being a special provision, displaces the provisions of section 52 of the Transfer of Property Act. This argument overlooks the special object of the doctrine of lis pendens which applies to a case in which litigation relating to property in which rights are sought to be created pendente lite by acts of parties, is peening. Moreover, for the purposes of this argument, the defendant-appellant assumes that the provisions of Section 65A(2) (e) Transfer of Property Act are applicable. If that was so, it would make no substantial difference to the rights of the defendant-appellant, which would vanish before the suit was filed if Section 65A applies. We, however, think that, as the special doctrine of lis pendens, is applicable here, the purported lease of 1956 was invalid from the outset. In this view of the matter, it is not necessary to consider the applicability of Section 65A (2) (e), which the defendant-appellant denies, to the facts of this case."

This Court further held agreeing with the concurrent findings of the Trial Court and the High Court that the lease of 1956 was also struck by the provisions of S. 64 of the Civil Procedure Code, as the property continued to remain under attachment at the time of the grant of the lease in 1956.

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It may be noted that in the case the validity of the lease had been questioned by the mortgagee decree-holder in a suit for appropriate declaration. The claim was not for possession by a third party auction-purchaser in a proceeding under rr. 95 and 96 of O.XXI of the Code of Civil Procedure and the merits of an application under the said provisions of the Code and the scope and effect thereof did not come up for consideration,

In the case of Mangru Mahto and Ors. v. Shri Thakur Taraknath Tarakeshwar Math and Ors. (supra), the mortgagor had granted lease of the mortgaged-property to certain persons. In execution of the mortgage-decree, the mortgagee himself purchased the property at the auction. The lessees of the mortgaged-property had allowed the property to be sold and had not applied for being added as a party. The mortgagee had also obtained the money decree against one of the lessees and in execution of the decree had attached the

mortgaged land. The lessees filed claim petitions objecting to the attachment under O.XXI, rule 58 of the Code of Civil Procedure. The claim petitions filed by the lessees were allowed and the executing court held that the leases were genuine. The mortgagee auction-purchaser did not file any suit under Order XXI, rule 63 but latter filed a suit against the mortgagor and the lessees for recovery of possession of the lands, alleging that the leases were collusive transactions and were otherwise not binding on him. The Trial Court dismissed the suit holding that the leases were genuine; but the High Court decreed the suit holding that the leases were sham transactions and were made in contravention of S. 65A of the Transfer of Property Act. The lessees thereafter preferred an appeal to this Court under certificate granted by the High Court. One of the contentions raised before this Court was that as the mortgagee did not file a suit under O. XXI, rule 63 of the Code of Civil Procedure after the claim petitions of the lessees under O.XXI rule 58 of the Code of Civil Procedure had been allowed and the mortgagee was not entitled to maintain the suit for recovery of possession of the mortgaged land and for mesne profits on the allegation that the leases were collusive transactions and were otherwise not binding on him. This contention was negatived by this Court for reasons recorded in the judgment. This Court further held that the validity of the leases granted by the mortgagor was not affected by S. 65A of the Transfer of Property Act as the leases were granted before the enactment of S. 65-A. As these aspects do not have any material bearing on the question involved in the present appeal, it does not become necessary for us to pursue these two aspects any further. This Court, however, held that the leases in question were not granted by the mortgagor in the ordinary

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course of management as the agent or bailiff of the mortgagee and were not binding on the mortgagee and in that view of the matter this Court dismissed the appeal. This Court observed at p. 132 as follows:-

"A lease granted by the mortgagor, out of the ordinary course of management, though not binding on the mortgagee is binding as between the mortgagor and the lessee. Such a lessee acquires an interest in the right of redemption and is entitled to redeem. If such a lease is created before the institution of a suit relating to the mortgage, the lessee must be joined as a party to the suit under O. 34, r. 1, C.P.C.; otherwise he will not be bound by the decree passed in the suit and will continue to retain his right of redemption. But in view of S. 52 of the Transfer of Property Act, if the mortgagor grants such a lease during the pendency of a suit for sale by the mortgagee, the lessee is bound by the result of the litigation. If the property is sold in execution of the decree passed in the suit, the lessee cannot resist a claim for possession by the auction purchaser. The lessee could apply for being joined as a party to the suit and ask for an opportunity to redeem the property. But if he allows the property to be sold in execution of the mortgage decree and they have now lost the present case, the lessees allowed the suit lands to be sold in execution of the mortgage decree and they have now lost the right of redemption. They cannot resist the claim of the auction-purchaser of recovery of possession of the lands."

It may be noted that the Court immediately after the

aforesaid observations has further observed as follows:-

"If a mortgagor in possession of the mortgaged property executes a lease of the property in the ordinary course of management as the agent or bailiff of the mortgagee during the pendency of a suit by the mortgagee to enforce the mortgage, a question may arise whether such a lease is in the eye of the law a lease granted by the mortgagee through his agent and therefore binding on him. But in the present case, that question does not arise as the leases were not granted by the mortgagor in the ordinary course of management as the bailiff or agent of the mortgagor."

It is to be noticed that this decision arose out of the suit instituted by the mortgagee auction-purchaser for recovery of possession of

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mortgaged-property sold in execution of the mortgage decree and purchased by the mortgagee himself and the decision in the case rested mainly on the basis that the lease was not granted by the mortgagor in the usual course of business. This case was also not concerned with an application by an outside-auction purchaser for physical possession of the property purchased by him in an application made under O.XXI, rr. 95 and 96 of the Code of Civil Procedure, and the Court did not have to consider this scope and effect of a proceeding under O.XXI, rr. 95 and 96 of the Code of Civil procedure.

In our opinion, it cannot, therefore, be said that these two decisions of this Court conclude the question involved in the present appeal before us.

It may be true that S. 52 and S. 65-A of the Transfer of Property Act operate in different spheres. S.65-A, as we have earlier noticed deals with the powers of the mortgagor to grant a lease of the mortgaged property., while the mortgagor remains in lawful possession of the same. S. 52 deals with cases of transfer of or otherwise dealing with any immovable property after any suit or proceeding in which any right to the said immovable property is directly and specifically in question, has been filed. It is also to be noted that S. 65-A which came to be inserted by the Amending Act 1929, is neither made 'subject to' nor 'notwithstanding the provisions' contained in S. 52 of the Act. S. 52 will, however, be only applicable, if the requirements of the said section are satisfied. We have earlier noticed what the requirements of the said section are. In the instant case, it does not become necessary for us to consider whether the grant of any lease by a mortgagor in conformity with the provisions of S. 65-A of the Transfer of Property Act during the pendency of a suit by the mortgagee to enforce the mortgage will attract the provisions of S. 52 of the Act or will be outside the mischief of the provisions of the said section on the ground that the creation of such a lease may not affect the rights of the mortgagee under any decree or order which may be passed in the suit. We have earlier quoted the observations of this Court in the case of Mangru Mahto (supra) and it will be noticed that the Supreme Court in the said case did not decide this question and left this question open. In the instant case an outside auction-purchaser is seeking recovery of the physical possession of the property purchased by him at the auction from the appellants who are in possession of different portions of the said premises as tenants of the said por-

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tions. The auction-purchaser in the instant case was not the mortgagee and he was no party to the suit in which the

compromise decree was passed. S. 52 in clear terms speaks of the rights of the parties to the suit or proceeding. In this connection it may be noted that this Court in the case of Jayaram Mudaliar (supra) held at p. 153 as follows:-

"It is evident that the doctrine, as stated in section 52, applies not merely to actual transfers of rights which are subject-matter of litigation but to other dealings with it by any party to the suit or proceeding, so as to affect the right of any other party thereto. Hence it could be urged that where it is not a party to the litigation but an outside agency such as the tax collecting authorities of the Government, which proceeds against the subject-matter of litigation, without anything done by a litigating party, the resulting transaction will not be hit by section 52. Again, where all the parties which could be affected by a pending litigation are themselves parties to a transfer or dealings with property in such a way that they cannot resile from or disown the transaction impugned before the Court dealing with the litigation the Court may bind them to their own acts. All these are matters which the Court could have properly considered. The purpose of Section 52 of the Transfer of Property Act is not to defeat any just and equitable claim but only to subject them to the authority of the Court which is dealing with the property to which claims are put forward."

The auction-purchaser derives his right to obtain possession only after the sale in his favour has become absolute and sale certificate has been obtained by him. The mode and manner of obtaining such possession are regulated by rr. 95 and 96 of the Code of Civil Procedure. It is of interest to note that in the instant case, the auction purchaser had applied for obtaining possession under r. 95 which provides for actual possession and also under r. 96 which provides for symbolic possession. We have earlier set out the provisions of these two rules. In the facts and circumstances of this case, the auction purchaser, in view of the provisions contained in rule 95 which regulates the rights of the auction purchaser to obtain physical possession of the property purchased, is not entitled to recover the physical possession of the portions in the occupation of the appellants as tenants. The appellants are not the judgment-debtors. They are not in occupation of the property on behalf of the judgment-debtor. They are also not claiming to be in occupation under

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a title created by the judgment-debtor subsequently to any attachment of the property. There has been no question of any attachment in the instant case. The appellants are in the occupation of the respective portions as tenants and they claim to occupy the same as such. The question of validity or otherwise of the tenancy may have to be considered and determined in an appropriate proceeding. In the present proceeding, the auction-purchaser who is an outsider and was not a party to the suit resulting in the compromise decree in execution of which the property was put up for sale, is not entitled to recover physical possession from the appellants in view of the provisions contained in O. XXI, rule 95, and the auction-purchaser must be held to be entitled to symbolic possession in terms of the provisions contained in O. XXI, rule 96 in respect of the portions in occupation of the appellants.

We, accordingly, allow this appeal. We set aside the judgment and order passed by the High Court directing

physical possession of the portions in the occupation of the appellants to be made over to the auction-purchaser Gian Chand Jain, We direct that symbolic possession of the portions in occupation of the appellants is to be made over to the auction-purchaser Gian Chand Jain. In the facts and circumstances of this case, we make no order as to costs.

N.V.K.

Appeal allowed.

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JUDIS