

Shah Mathuradas Maganlal And Co.

Vs

Nagappa Shankarappa Malage And Others

Civil Appeal No. 450 of 1970

(Ray, C.J.)

23.03.1976.

JUDGMENT

RAY, C.J. -

1. This appeal by special leave is from the judgment dated February 6, 1970 of the High Court at Bombay. The respondent No. 1 obtained a decree for redemption of mortgage dated May 21, 1953 for possession of mortgaged property consisting of a shop and house premises at Sangli.
2. The appellant was mortgage in possession of the property by a deed of mortgage dated May 21, 1953. The property was mortgaged for Rs. 10,000. No interest was to be paid. Instead possession of the property was agreed to remain with the mortgagee. The period for redeeming the mortgage was fixed for 10 years from November 7, 1953.
3. The respondent mortgagor by notice dated October 1, 1963 informed the appellant that he was ready and willing to redeem the mortgage. The appellant replied that he should be paid Rs. 30,000 being the expenses for repairs and other incidental expenses. The appellant also claimed that even after the redemption he was entitled to retain possession because his previous tenancy right subsisted.
4. The trial Court held that the tenancy of the appellant would revive on redemption of the mortgage. The trial Court further decreed that the respondent was entitled to get only symbolical possession from the appellant and thereafter get rent of the suit property from the appellant.
5. On appeal the District Judge came to the conclusion that under the mortgage deed the appellant ceased to be a tenant with effect from November 7, 1963 and possession of the appellant thereafter was only as a possessory mortgagee and not as a tenant. On redemption of the mortgage the respondent was entitled to recover possession of the property forthwith. The District Judge passed a decree for the principal mortgage amount and a sum of Rs. 4458.24 on account of repairs in favour of the appellant. The District Judge further gave the respondent a decree for actual possession of the property from the appellant after the respondent deposited the amount in the court.
6. The High Court on second appeal held that the deed of mortgage shows that the relationship between the appellant and the respondent was that of a mortgagee and mortgagor and confirmed the decree in favour of the respondent.
7. Counsel for the appellant contended that in case of a tenant in possession who takes a possessory mortgage the effect of such mortgage is that the tenant's rights remain in abeyance during the term

of mortgage and the parties revert to their former position on redemption. It was also said that the mortgage respondent could not take possession from the appellant without actual eviction. The mortgage according to the appellant was usufructuary mortgage with the result that at the ends of 10 years being the period of mortgage possession the mortgage acquires the statutory protection given to the tenants.

8. The mortgage deed is described as a possessory mortgage deed of the house-site and was for a sum of Rs. 10,000. The respondent mortgage stated, inter alia, as follows :

I have given you the house-site in possessory mortgage in consideration of the aforesaid amount. The said property is in your possession as the last tenant by the date November 6, 1953. The possession thenceforth is confirmed by this Deed of Possessory Mortgage. Hence you are to either use the house-site and shop premises for home (persons) purpose or let it to anybody. The income that may be received by giving the property on rent is to be appropriated by you towards the interest on the said amount. I shall not pay you any interest separately. I shall not ask for the accounts in respect of the income of the house-site from you. I am to pay all the Government dues. I am also to carry out repairs of all sorts to the house premises, and I shall do so. If I fail to pay Government dues and if I do not defray the costs of repairs you are to pay all the said Government dues and defray the costs of repairs. The aforesaid amounts which you may have to pay and spend will be paid by me to you together with interest at the rate of Rs. 0-12-0 annas twelve per cent per month. The above mortgaged property is charged with the liability of repaying the aforesaid amounts. The period of this document is 10 years from November 7, 1953. I shall pay you the aforesaid amount within the said period and redeem the house-site from the mortgage. If I fail to do so you are to carry on the 'vahiwat' of the house-site under the above agreement. If you do not wish to keep the amount with me beyond the above period, you are to sell the said mortgaged property through Court and recover the entire amount due and payable to you.

9. The appellant's contentions were these : First, the defendant was a tenant of the suit building prior to the execution of the mortgage on May 21, 1953 and the tenancy could either exist concurrently with the usufructuary mortgage or be in abeyance during the currency of the mortgage but could never be extinguished as a result of mortgage. Second, once the tenancy of the appellant continued after the execution of the mortgage deed then there would be no question of either express or implied surrender of his tenancy rights during the subsistence of the mortgage. Third, the fact of a tenant taking a mortgage from his landlord does not itself extinguish the tenancy and the effect of such a mortgage on the tenant's rights is merely that they are in abeyance and when the landlord redeems the mortgage, the parties revert to their former position, and the landlord is not entitled to get actual possession. Fourth, that the existence of possessory mortgage does not necessarily terminate tenancy.

10. The respondent contended as follows : First, the conduct of the mortgagee along with the terms made it clear that the appellant mortgagee surrendered his tenancy rights at the time of execution of mortgage deed. Second, on the expiry of the period of 10 years appellant mortgagee could not insist retaining possession on the ground of the previous right of the lessee, and the lease could not be revived on the expiration of the period of the mortgage. Third, on the terms of the deed of mortgage, there was an express or implied surrender of the lease. Fourth, the tenancy in question was to be continued till November 6, 1953 though the mortgage was executed on May 21, 1953.

The possession of the mortgage was confirmed from November 7, 1963 amounting to unequivocal conduct showing that the relationship became that of a mortgagor and mortgagee only.

11. The deed of mortgage shows these features indicating that there was surrender of tenancy and the appellant was only a mortgagee. The High Court found that there was a surrender of tenancy right. No particular form of words is essential to make a valid surrender. A surrender may be oral. A surrender may be express although delivery of possession is necessary for surrender in the facts and circumstances of a given case. In the present case, delivery of possession was immediately followed by a redelivery of possession of the appellant as mortgagee. The mortgage deed establishes beyond doubt that the effect of the deed was inconsistent with the continuance or subsistence of the lease because the parties themselves stipulated that the lease was to exist only upto November 6, 1953. On the redemption of the mortgage the respondent had a right to recover possession both on the terms of the mortgage deed and under Section 62 of the Transfer of Property Act.

12. The second feature in the mortgage deed is that the appellant was given power to sublet. Section 15 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 as it stood in 1953 forbade any subletting. In 1959 the words 'but subject to any contract to the contrary' were introduced into the said Section 15, with the result that in the absence of the contract to the contrary, the tenant is not to sublet or transfer. Before 1959 there could be no subletting. In the mortgage deed, there is provision for subletting. The provision for subletting shows that the character of tenant is lost.

13. Third, the mortgagor is to do repair works and is to undertake repairs.

14. Fourth, the possession was to be under the agreement.

15. Though the mortgage deed was made on May 21, 1953, the tenancy was continued till about November 7, 1953. The possession of the appellant as mortgagee was confirmed from November 7, 1953. This is rightly held to be unequivocal conduct showing that no tenancy was to exist from November 7, 1953 but the relationship was that of mortgagor and mortgagee. If the intention of the parties was to revive the tenancy there was no necessity of a term that the appellant might let out the property to anyone.

16. The contention of the appellant was that there was no surrender and there was merger of the interest of the mortgagee and the tenant. Ordinarily, the doctrine of merger applies to extinction of mortgage security. This occurs by the merger of a lower in higher security and by the merger of lesser estate in a greater estate. Where the capacity in which a person is in possession of the mortgagee's rights is something quite different from the capacity in which he is in possession of the equity of redemption, the mere fact that the two capacities are united in same physical person cannot result in merger.

17. 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 in the lessor is a reversion. In the case of a mortgage 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 neither of them is a higher or lesser estate than the other. The view expressed in *Narayan v. Ramchandra* ((1963) 65 Bom LR 449 : 1963 Mah LJ 686), is correct.

18. Section 111 of the Transfer of Property Act in clauses (e) and (f) deal with surrender, and in clause (d) with merger. Clause (d) states that lease in movable properties determines in case the interest of the lessee or the lessor in the whole of the property becomes vested at the same time in one person in the same right. When a leasehold and a reversion coincide there is a merger of a lesser estate in the greater. The leasehold is the lesser estate, for it is carved out of the estate of the owner, which is the reversion. The lesser is merged in the greater. The lease determines and merges in the reversion. If the lessor purchases the lessee's interest, the lease is extinguished, as the same man cannot be at the same time both landlord and tenant. The interests of the lessor and of the lessee must be in the whole of the property, otherwise there is no merger. The interest of the lessor and the lessee in the whole of the property should become vested at the same time in one person in the same right. Thus a lease is not extinguished because the lessee purchases a part of the reversion.

19. A surrender under clauses (e) and (f) of Section 111 of the Transfer of Property Act, is an yielding up of the term of the lessee's interest to him who has the immediate reversion or the lessor's interest. It takes effect like a contract by mutual consent on the lessor's acceptance of the act of the lessee. The lessee cannot, therefore, surrender unless the term is vested in him; and the surrender must be to a person in whom the immediate reversion expectant on the term is vested. Implied surrender by operation of law occurs by the creation of a new relationship, or by relinquishment of possession. If the lessee accepts a new lease that in itself is a surrender. Surrender can also be implied from the consent of the parties or from such facts as the relinquishment of possession by the lessee and taking over possession by the lessor. Relinquishment of possession operates as an implied surrender. There must be a taking of possession, not necessarily a physical taking, but something amounting to virtual taking of possession. Whether this has occurred is a question of fact. In the present case if the mortgagor was not able to redeem the appellant mortgagee was to enjoy the property in accordance with the terms of the mortgage and also to sell the property for recovery of debts. This feature shows that the appellant surrendered the tenancy from November 7, 1953.

20. In the present case the terms of the deed show that the mortgagee undertook to deliver possession of the property to the mortgagor on the expiry of a period of 10 years. The mortgage deed shows that the tenancy was surrendered on November 7, 1953 and thereafter the possession was only that of mortgagor. There would be no question of the tenancy being kept in abeyance or the tenancy reviving on the expiration of the period of mortgage.

21. For these reasons the judgment of the High Court is affirmed and the appeal is dismissed with costs.

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