

Gambangi Applaswamy Naidu and Others

Vs

Behara Venkataramanayya Patro and Others

Civil Appeal No. 1339 of 1977

(V. D. Tulzapurkar, M. P. Thakkar JJ)

28.08.1984

JUDGMENT

TULZAPURKAR, J. -

1. The short question involved in this appeal is whether upon redemption of a usufructuary mortgage a tenant-mortgagee could be directed to deliver actual or physical possession of the mortgaged property to the lessor-mortgagor ? By reason of the grant of a limited special leave the appeal has been confined to that question.
2. Facts relevant to the question may be stated : One Behara Audinarayana Patro, the original owner of suit property executed two usufructuary mortgage deeds dated August 30, 1939 and August 25, 1942 in favour of the first defendant Sambangi Thavitinaidu, who was then a sitting tenant of that property. In 1951 the mortgagor filed a suit for redemption of the mortgages and obtained a preliminary decree on December 31, 1952. Subsequently, the mortgagor died and the respondents were brought on record as his legal representatives. On October 21, 1963 the respondents filed an application for passing a final decree by way of ascertainment of the amount due and for delivery of possession upon deposit of entire dues so ascertained. The application was resisted by the first defendant and other defendants (the appellants before us) on several grounds. Inter alia the appellants contended that even after depositing the entire amount found due to them no decree directing delivery of actual or physical possession in favour of the respondents should be passed but delivery of symbolical possession alone should be ordered inasmuch as the appellants' possession of the suit property as a tenant or lessee could not be disturbed. In other words, the appellants contended that on redemption the original relationship of landlord and tenant would revive which needed to be protected. The learned District Munsif, Parvatipuram took the view that the relationship of landlord and tenant had ceased to subsist after the mortgages come into existence, that the mortgage-bonds did not provide that the said relationship would be restored or revived upon redemption and that therefore the respondents were entitled to delivery of physical possession upon their depositing the entire dues payable to the appellants. The tenant-mortgagees (the defendants) preferred an appeal against the order of the learned District Munsif and the learned Additional District Judge Srikarulam who heard the appeal took the contrary view relying upon a decision of Andhra Pradesh High Court in Varada Bongar Raju v. kirthali Avatharam (AIR 1965 AP 86) and held that the defendants-mortgagees were sitting tenants of the mortgaged property at the time of the execution of the mortgage deeds, that there was nothing in those deeds to suggest that their rights as lessees were extinguished either by merger or implied surrender, that the landlord-tenant relationship continued to exist after termination of mortgagor-mortgagee relationship and therefore the respondents were not entitled to delivery of physical possession; he, therefore, allowed the appeal.

3. The respondents preferred a second appeal to the Andhra Pradesh High Court and the learned Single Judge relying upon a subsequent decision in *P. Satyanarayana v. Janardhan Chetty* (ILR 1967 AP 1341) which had distinguished the earlier decision, reversed the view of the learned Additional District Judge and restored the decree passed by the District Munsif. The learned Judge took the view that the question whether the relationship of landlord and tenant would subsist even after the execution of the usufructuary mortgage depended upon the intention of the parties to be gathered from the terms of the mortgage transaction and held that on the terms of mortgage-deeds there was no doubt that the landlord-tenant relationship had ceased to exist after the relationship of mortgagor and mortgagee came into existence and the mortgage bonds had not specifically provided that the landlord and tenant relationship would be restored after the redemption of the mortgages. A letters patent appeal preferred by the tenant-mortgagees to the Division Bench of the High Court failed and hence this appeal to this Court.

4. Counsel for the appellants urged upon us to accept the view taken by the learned District Judge that the two transaction namely a lease and a usufructuary mortgage could co-exist and there was nothing in the two mortgage deeds to suggest that the appellants' rights as lessee were extinguished either by merger or by implied surrender and in that behalf strong reliance was placed upon the earlier decision of the Andhra Pradesh High Court in *Varada Bongar Raju* case (AIR 1965 AP 86), while counsel for the respondents contended that the High Court, both in second appeal as well as letters patent appeal, was right in restoring the learned District Munsif's decision by relying upon the later decision in *P. Satyanarayana* case (ILR 1967 AP 1341) and prayed for dismissal of this appeal.

5. In our view there can be no merger of a lease and a mortgage, even where the two transaction are in respect of the same property. It is well-settled that for a merger to arise, it is necessary that 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 outstanding. In the case of a lease, the estate that is outstanding in the lessor is the reversion; in the case of a mortgage, the estate that is outstanding in the equity of redemption of the mortgagor. Accordingly, there cannot be a merger of a lease and a mortgage in respect of the same property since neither of them is a higher or lesser estate than the other. Even if the rights of the lessee and the rights of the mortgagee in respect of a property were to be united in one person the reversion in regard to the lease and the equity of redemption in regard to the mortgage, would be out-standing in the owner of the property and accordingly, there would not be a complete fusion of all the rights of ownership in one person. This position in law as explained by the Bombay High Court in *Narayan Dogra Shetty v. Ramchandra Shivram Hingne* ((1963) 65 Bom LR 449), has been fully approved by this Court in *Shah Mathuradas Maganlal and Co. v. Nagappa Shankarappa* (AIR 1976 SC 1565 : (1976) 3 SCC 660 : (1976) 3 SCR 789).

6. In our view the answer to the question raised in this appeal must depend upon whether there was an implied surrender of the lessee's rights when the usufructuary mortgage was executed in his favour by the lessor-mortgagor. And this obviously depends upon what was the intention of the parties at the time of the execution of the mortgage deed in favour of the sitting tenant to be gathered from the terms and conditions of the mortgage transaction in light of the surrounding circumstances of the case. It may be stated that in both the decisions of the Andhra Pradesh High Court on which reliance was placed by the respective counsel of the parties in support of his own contention the question was ultimately decided on proper construction of the terms and conditions of the mortgage transaction; in the earlier decision the Court took the view that there was nothing in the mortgage deed to suggest that there was an implied surrender of the lessee's rights while in the later case the Court held that the terms of the mortgage deed showed that the lessee had impliedly

surrendered his rights. In other words, it all depends upon whether by executing a possessory or usufructuary mortgage in favour of a sitting tenant the parties intended that there should be a surrender of lessee's rights or not, and only if an implied surrender of lessee's rights could be inferred then the mortgagor would be entitled to have delivery of physical possession upon redemption but not otherwise.

7. In the instant case the earlier usufructuary mortgage deed of 1939 is not on record before us but the parties have produced a copy of Exhibit A-3 which is the later usufructuary mortgage deed dated August 23, 1942, the terms thereof are required to be construed. It runs thus :

Exhibit A-3

Deed of mortgage of land accompanied by delivery of possession of land for Rs. 250 (in words two hundred and fifty rupees) executed on August 23, 1942 in favour of Sambangi Taviti Naidu, son of late Jogi Naidu, of Koppula Velama caste, living by cultivation, resident of Dathivalasa village, hamlet of Tummalavalasa of Parvatipuram sub-district by Behara Adinarayana Patro, son of late Bhera Narayana Patro Sista Karnam, Inamdar, resident of Markonduputti, village of the same sub-district.

The amount of principal and interest due on the promissory note executed by me in your favour previously on April 24, 1940 for my necessity, the amount paid by you on my behalf to the Estate towards the cist etc., due on this land and the amounts borrowed from you by me in instalments subsequent thereto - all those amounts are found to be Rs. 200 and I have found due to you in this sum. The amount borrowed now for paying the cist to the Estate and for my own maintenance is Rs. 50. In all, Rs. 250 (in words two hundred and fifty rupees) I shall pay interest at the rate of Re. 0-4-0 (four annas) per cent. Per mensem and shall discharge the principal and interest. For this, the produce of all kinds of crops raised on the half share of the lands previously being cultivated by you as my sub-tenant on condition of paying $\frac{1}{4}$ (?) share out of the Jarayathi dry and wet lands bearing No. 1 and known as "Tummulamanu Polam" which passed to me as my self-acquired property, which has been in my possession and enjoyment till this day, which is situate in Tummalavalasa village and the boundaries etc. of which are given hereunder, shall be utilised for paying interest due on this deed and the interest due on the deed executed previously on August 30, 1939 and get registered in the office of the Sub-Registrar of Parvatipuram as No. 1148/39 and for paying the cist due to the Government on my behalf and obtaining receipt in my name. The remaining amount shall be paid to me by January 15 of every year and the receipt obtained from me. When the above-mentioned principal and interest are paid to you in full, payment shall be endorsed on this deed and this deed shall be returned and the land mentioned herein shall be delivered possession of to me.

8. Three or four things become amply clear on a fair reading of the aforesaid document (1) that though the deed commences by reciting that possession of the land has been delivered thereunder it refers to the fact that the original mortgagee (first defendant) was actually cultivating the lands as a tenant of the mortgagor on crop share basis; that is to say the rental was payable by the tenant in the shape of a crop share; (2) that the mortgagor had agreed to pay interest at the specified rate on the total loan of Rs. 250 and had undertaken to discharge the principal and interest; (3) that the rental of the land payable by the first defendant was to be adjusted against the interest payable by the mortgagor under this deed as well as the earlier deed and the cist payable by him to the Government; and excess, if any, to be paid to mortgagor; (4) that when the principal and interest are fully repaid such payment was to be endorsed on this deed and the deed as also the land shall be "delivered to the possession of mortgagor". It may be noted that the last portion of the document is

equivocal in that it does not mention whether on redemption physical possession is to be delivered or symbolical possession is to be delivered to the mortgagor. But under the terms of the deed one thing is clear that during the currency of the mortgage the liability to pay rent to the lessor-mortgagor (albeit to be discharged by adjustment) is kept alive. If anything such a terms clearly runs counter to any implied surrender of the lessee's rights. Secondly, there is no term fixed for redemption of mortgage property which means that it was open to the mortgagor to redeem the mortgage at any time that is to say even within a very short time and if that be so, would a sitting tenant cultivating the lands under a lease, who has obliged his lessor by advancing monies to him to tide over his financial difficulties give up his rights as a lessee no sooner redemption takes place ? In our view, it does not stand to reason that he would do so. This circumstance coupled with a fact that the mortgage deed keeps alive the lessee's liability to pay rent during the currency of the mortgage clearly suggests that no implied surrender was intended by the parties.

9. In the result, we are of the view that the only effect of the execution of usufructuary mortgage deeds in this case was that the lessee's rights were kept in abeyance and they revived upon the redemption of mortgage. We therefore, allow the appeal, set aside the impugned judgments of the High Court and restore the direction given by the learned Additional District Judge that the respondents are not entitled to delivery of physical possession. Respondents will pay the cost of the appeal to the appellants.

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