

Carona Shoe Co. Ltd. and Another

Vs

K. C. Bhaskaran Nair

Civil Appeal No. 1065 of 1987

(S. Ranganathan, Sabyasachi Mukharji JJ)

09.03.1989

JUDGMENT

SABYASACHI MUKHARJI, J. –

1. This appeal by leave is from the judgment and order of the High Court of Kerala, dated October 21, 1986. It arises in the following circumstances :

The building in question which is a shop building No. T.C. 887, M.G. Road, Pazhavangadi, Trivandrum, is part of pucca three storeyed building belonging to one M.P. Philip and as per his settlement the disputed shop building and two other rooms devolved on one of his sons M. M. Philip. While this disputed shop building was in the possession of a tenant under the owner, the owner mortgaged the disputed building and the remaining portions to the first defendant with a direction to receive the rent from the tenant. The mortgagor directed the tenant also to attorn to this mortgagee. The first defendant subsequently in the course of his management of the mortgaged property, gave the building on lease to the appellants for a higher rent when the former tenant vacated the same. Subsequently, the owner executed a subsequent mortgage with a direction to redeem the mortgage in favour of the first defendant and before the subsequent mortgage took steps to redeem the mortgage, the owner assigned his equity of redemption to the respondent. The respondent and the subsequent mortgage together as plaintiffs 1 and 2 filed a suit to redeem the mortgage of the first defendant impleading the appellants as well as respondents and claimed recovery of the khas possession of the building. The appellants contended that they are tenants of the building inducted into possession by the mortgagee as a mode of enjoyment that the mortgage deed authorised the mortgagee to enjoy the building by letting it out and were not liable to be evicted through a decree of court in a redemption suit without an order under the Kerala Building (Lease and Rent Control) Act. 1965 (hereinafter referred to as 'the Act'). The trial court decreed the suit and directed recovery of possession of the shop building on the ground that the mortgagee could not induct a tenant and give him any right to continue in possession even after the redemption of the mortgage. On appeal by the appellants, the first appellate court held that the disputed building was a shop building which was never in the enjoyment of the owner and the mode of enjoyment of the owner of the property was by letting it out and when the mortgagee enjoyed the property in that manner, by letting it out, the person put in possession as a tenant was entitled to continue in possession even after redemption, until evicted under the Rent Control Act. The first appellate court further found that the mortgage deed impliedly authorised the mortgagee to let out the building. In that view the decree for khas possession of the shop building in possession of the appellants was denied to the respondent.

2. The respondent filed a second appeal before the High Court, raising the following three

contentions :

- (1) Whether under Section 76(a) of the Transfer of Property Act, 1882, a tenancy created by the mortgagee in possession of an urban immovable property would be binding on the mortgagor after redemption of the mortgage, assuming that the tenancy was such as a prudent owner of property would have granted in the usual course of management.
- (2) Whether a tenancy created in exercise of a general power to grant a lease expressly or impliedly conferred on the mortgagee would survive the redemption of the mortgage in view of Section 111(c) of the Transfer of Property Act, 1882; and
- (3) Whether a tenant inducted on the property by a mortgagee with possession, would after redemption of the mortgage be protected under the provisions of Section 11(1) of the Act.

3. The High Court was of the view that as the appellants had not pleaded that they were inducted into possession by the mortgagee as prudent act of management, it was not open to the appellants to contend that they could continue in possession even after redemption. Further, The High Court was of the view that it was not open to the mortgagee to induct a person into possession which conferred any right on the tenant to continue in possession even after redemption.

4. The High Court categorically came to the conclusions that protection under Section 76(a) of the Transfer of Property Act, 1882 was never claimed in the written statement. On the other hand, it was contended by the appellants that this was a pure question of law unconnected with the question of fact and, therefore, no pleadings were necessary and even without pleading such contention could be raised and considered by the court at the time of argument. Whether a particular lease is bona fide or prudent act of management, is primarily a question of fact, though whether on account of the bona fide or prudent act of the mortgagor his lessee was entitled to continue even after the mortgage was determined, is a question of law. The High Court was of the view that the decision on the question of law is dependent on the question of fact whether the lease was bona fide or a prudent act of a person of ordinary prudence, who would manage it as if it were his own. On that question of fact, there should be definite pleading so that the plaintiff must have an opportunity of meeting the claim and adduce evidence in rebuttal. The High Court therefore could not sustain the right of the tenant under Section 76(a) of the Transfer of Property Act, as a matter of prudent management. There was no issue in this respect and the judgment of the trial court did not show, according to the High Court, that such a contention was raised. The only contention that was raised was that the lease was with the knowledge or consent of the mortgagor. The High Court further came to the conclusion that there was no evidence in support of that contention. The finding of the District Judge that the mortgagee had implied authority of the mortgagor to let out, was not only lacking in pleadings or issue, but it was also not warranted by the provision of the mortgage deed or the evidence.

5. The High Court relied on several decisions and came to the conclusion that the provision of Section 76(a) of the Transfer of Property Act, 1882 which was an exception to the general rule embodied in Section 111(c) applies in appropriate cases ordinarily only to the management of agricultural lands and had seldom been extended to urban property so as to tie up in the hands of lessee or to confer on him rights under special statutes.

6. The High Court further came to the conclusions that the general proposition of law is that no man can convey a better right than he himself has. Therefore, a mortgagee in possession cannot create tenancy with a right to continue in possession beyond the period of redemption. Normally, lease by the mortgagee is determined when the mortgage is redeemed since there is no privity between the mortgagor and the lessee. The question of prudent management under Section 76(a) of the Transfer of Property Act, 1882 by granting of lease or otherwise normally arises only in rural agricultural lands and not urban immovable property. The High Court further came to the conclusion that a mere authorisation to the mortgagee to lease the property itself does not amount to any intention to allow expressly the creation of a tenancy beyond the term of the mortgage. Only where the words of the mortgage deed clearly and expressly allowed creation of tenancy beyond the term of the mortgage that the lease would be binding on the mortgagor. In that view of the matter, the High Court held that the learned District Judge was wrong in holding that defendants 2 and 3 were not liable to be evicted in this suit and that they could be evicted only through an order of a competent Rent controller. In the premises, the second appeal was allowed and a decree for eviction was passed.

7. Aggrieved thereby, the appellants have come up before this Court. The question is - was the High Court right.

8. The first contention of Sri Vishwanatha Iyer, learned counsel for the appellants, was that in view of the terms of the mortgage in the instant case, the appellants were entitled to be in possession after redemption of mortgage as against the mortgagor. He drew our attention to the mortgage deed dated July 4, 1960. The mortgagor in that mortgage deed stated that he was the absolute owner of the property and therefore he was mortgaging the property. Thereafter, the deed proceeded to state as follows :

This property is hereby secured to you on otti for a term of 2 years for Rs. 7000 which I have received as recited hereunder. Therefore, you may possess and enjoy the property by collecting the rent from the tenants and after the expiry of two years I shall pay you the sum of Rs. 7000 and get a release of the otti and the expenses for the release should be shared by us.

9. The mortgagee was to enjoy the property by collecting the rent from the tenants. This mortgage was renewed for the second time on August 17, 1977. The second mortgage deed recited that the shop in item 1 which was in possession of Carona Shoe Company, was given for enjoyment. Therefore, the fact that the tenant was there, is accepted.

10. It was contended that as no amount was being paid as interest, the mortgagee was entitled to the benefit, that is to say, the rent from the premises in question. It was contended that the High Court was wrong in holding that it was not an act of prudent management Sri Iyer referred to the document dated June 3, 1977 which recited as follows :

But the portion where the Ringal Shop was situate alone was given possession to you and the remaining portion forming upstairs to the shop previously Ringal Shop, now Carona Shoe Mart, and the shed portion behind it was let out to Chellamma Pillai by the mortgagor and she is occupying it while so the mortgagor has executed mortgage and an agreement for sale to Chellamma Pillai and she is entitled to redeem you and recover possession of the building.

11. These contentions, in our opinion, are concluded by the decision of this Court in Pomal Kanji

Govindji v. Vrajlal Karsandas Purohit (1989) 1 SCC 458), wherein it was held that except in cases where the leases specifically and categorically make exceptions in favour of the tenants that they would continue to be in possession even after the expiry or termination of the mortgage, and those leases are acts of prudent management, the tenants inducted by the mortgagee would be entitled to the protection under the Rent after redemption of mortgage and in no other cases.

12. Sri Iyer, in our opinion, is wrong in contending that in the instant case the mortgage deed specifically empowered the mortgagee to induct tenant who would continue to be in possession even after the redemption or end of the mortgage. It is true that the mortgage deed recited that the tenants were there. It is also true that the mortgage deed also enjoined that the method of realisation of the rent as the method of having the usufruct of the mortgage by the mortgagee. But it must be understood that so long as the mortgage subsisted, there was relationship of tenant and landlord. It could not be so after the mortgage was redeemed. There is nothing in the mortgage deed in the instant case which warranted the conclusion that the mortgagee could induct tenants who would continue beyond the term of the existence of the mortgage or who would be given rights even after the expiry of the mortgage. Sri Iyer then submitted that this Court in the aforesaid decision had referred to another decision of this Court, namely, *Jadavji Purshottam v. Dhami Navnitbhai Amaratlal* ((1987) 4 SCC 223) where it was held that if the lease granted to the tenant by the mortgagee had the approval or concurrence of the mortgagor, the same would entitle the tenant to claim tenancy rights even as against the mortgagor after he had redeemed the mortgage, then in such a case, such tenants would continue to be in possession. Sri Iyer drew our attention to the observations of this Court in the aforesaid decision at para 13 of page 236 of the report. With reference to the term of the mortgage in the instant case and the communications between the parties, Sri Iyer tried to contend that the lease granted in favour of the appellants by the mortgagee had the approval or concurrence of the mortgagor. We are, however, unable to accept or find in the correspondence any such approval or concurrence. We have referred to the mortgage deed and the sale deed as mentioned hereinbefore. Sri Iyer drew our attention to a letter dated October 7, 1977 addressed to the Rent Controller with a copy to the General Manager, Carona Shoe Co. Ltd. Therein, the respondent had negotiated or made an offer and expressed preference for the appellant-company. The letter contained the following statements :

Under the circumstances, I have now finally decided to settle all the issues and start the construction of the rear portion as early as possible as I have two more offers (other than yours) for renting out the entire ground floor (about 1500 sq. ft.) which includes the space now occupied by you and portion of the first floor.

I am writing this letter to you because my first preference is for your company. The main reason is that you are conducting the business in the same shop for some years. Second thing is that I have already agreed to you at the discussion even though there was no written consent. In the light of the above, I give below my terms and conditions for renting out the shop with additional space annexed, if you are interested to continue the business in my building. Of course, the expenses (portion) for the same will have to be borne by you. But I will provide you with a very good show room considering your requirements. Necessary bathroom, lavatory, office cabin etc. will also be provided in consulting with your representative. I had a discussion with Mr. L. W. Baaker, A.R.I.B.A. (The British architect who is doing so many artistic modern building and show room etc. throughout India including the Chitrlekha Film Studio) and the Art Director and Interior Decorator of our Studio regarding the subject.

13. Thereafter, certain terms and conditions of the proposed lease were suggested. Ultimately,

however, no such lease was executed. This communication strictly, in our opinion, negates the submission that there was any concurrence or approval of the mortgagor of the continuance of the appellants as tenants after the expiry of redemption of the mortgage.

14. It was then submitted by Sri Iyer that in view of the provisions of the Act, it was not possible for the respondents to execute the decree. After an exhaustive discussion of the relevant authorities, it has been held but this Court in Pomal Kanji Govindji case ((1989) 1 SCC 458) that in respect of the urban immovable properties, the tenants do not get any protection after the redemption of mortgage. Sri Iyer, however, drew our attention to Section 11 of the Act, to content that notwithstanding anything contained in any other law of contract, a tenant shall not be evicted, whether in execution of a decreed or otherwise, except in accordance with the provisions of the Act. He drew our attention to the definition of 'tenant' under Section 2(6) of the Act which defines a tenant as a person by whom or on whose account rent is payable for a building and includes the heir or heirs of a deceased tenant and a person continuing in possession after the termination of the tenancy in his favour. Similarly, landlord is defined under Section 2(3) of the Act as follows :

(3) "landlord" includes the person who is receiving or is entitled to receive the rent of a building, whether on his own account or on behalf on another or on behalf of himself and other or as an agent, trustee, executor, administrator, receiver or guardian or who would so receive the rent or be entitled to receive the rent, if the building were let to a tenant.

15. But in view of the said definitions, we are of the opinion that between the appellants and the respondent, there was never any landlord or tenant relationship. The appellants were never the tenants of the respondent. Sri Iyer drew our attention to the observations of this Court in Rai Brij Raj Krishna v. S. K. Shaw & Bros. (1951) SCR 145 : AIR 1951 SC 115), where it was held that the non obstante clause would be applicable. Our attention was drawn to the observations Fazl Ali, J. at page 150 of the report. There, the court observed that Section 11 of the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947 was a self-contained Section, and it was wholly unnecessary to go outside the Act for determining whether a tenant was liable to be evicted or not, and under what conditions he could be evicted. But in the instant case, the appellants were not the tenants. The respondent, (sic and) the original mortgagor, would never after the redemption of the mortgage have treated the appellants to be tenants. There was no relationship ever between the appellants and the respondent. The mortgagor (sic mortgagee) had a separate and distinct interest which was wiped out on the redemption of the mortgage or expiry of the period of mortgage. The Mortgagor on redemption of mortgage gets back his own right, he is not successor-in-interest of the mortgagee. Interest, if any created by the mortgagee on the mortgagor's right, must disappear on ceasing of interest of the mortgagee. In that view of the matter, in our opinion, thus the said observations would not be of any relevance to the present case. Similarly, reliance was placed on the observations of this Court by Sri Iyer in M/s. Raval & Co. v. K. G. Ramachandran ((1974) 1 SCC 424 : (1974) 2 SCR 629). The observations are that the definitions of 'landlord' and 'tenant' might apply even if the contractual tenancy has come to an end. But that is not the situation here in the instant case. In the said case, Bhagwati, J. as the Chief Justice then was, in his judgment at page 439 of the report observed that sub-section (1) of Section 4 of the Act in question i.e., Tamil Nadu Buildings (Lease and Rent Control) Act, 1960 contemplated that an application for fixation of fair rent of a building might be made by the tenant or the landlord. The definition of 'tenant', it was observed, included contractual tenant as well as tenant remaining in possession of the building after determination of the contractual tenancy, i.e. statutory tenant, and both contractual tenant and statutory tenant could, therefore, apply. It was, therefore, submitted in this case that on the analogy of the contractual

tenant, the appellants were entitled to the protection of the Act. We are unable to agree. It is not a question of a contractual tenancy coming to an end. The limited estate created in favour of the mortgages having disappeared all rights emanating from that limited estate disappear and the superior right of the mortgagor comes not in place of the mortgagee but as a result of an independent title, and as such the mortgagor cannot be bound by any act created or any relationship contracted between the mortgagee and the tenant, unless it is permitted by the mortgage deed. Reliance was also placed on certain observations of this Court in *V. Dhanapal Chettiar v. Yesodai Ammal* ((1979) 4 SCC 214 : (1980) 1 SCR 334). Therein, it was held that under the State Rent Acts, the concept of contractual tenancy has lost much of its significance and force. Therefore, giving of the notice was a mere surplusage and unlike the law under the Transfer of Property Act, 1882, it does not entitle the landlord to evict the tenant. In our opinion, the observations of the said decision cannot have any assistance or significance for the purpose of the issues involved in the present controversy.

16. Our attention was also drawn to the observations of this Court in *Pomal Kanji Govindji* case ((1989) 1 SCC 458) at para 42 of page 326 and it was contended that in this case impliedly the mortgage deed specifically and categorically made an exception in favour of the tenants that they would continue in possession after the termination or redemption of the mortgage and that these leases were acts of prudent management. In this connection, reference may be made to Section 60 of the Transfer of Property Act. It is this which gives the mortgagor right to redeem after the date fixed for payment. The mortgagor's right of redemption and the mortgagee's right of foreclosure or sale are co-extensive. Similarly, Section 76(a) of the Transfer of Property Act which determines the liabilities of the mortgagee and imposes the obligation to manage the property as a person of ordinary prudence. In the instant case, it has been held by the High Court that the induction of the appellants as tenant was not an act of prudent management.

17. Our attention was also drawn by Sri Iyer to the observation of this court in *Gian Devi Anand v. Jeevan Kumar* ((1985) 2 SCC 683 : 1985 Supp 1 SCR 1) in support of this submission that in the emerging jurisprudence of tenancy legislation the distinction between statutory tenant and contractual tenant has disappeared. The said view, in our opinion, would be of no avail as the respondent is not the successor-in-interest and does not come in place of the mortgagee but by virtue of its independent title.

18. Reliance was also placed on the observations of this Court in *G. Ponniah Thevar v. Nalleyam Perumal Pillai* ((1977) 1 SCC 500 : (1977) 2 SCR 446). That decision, in our opinion, has no application. The person inducing the tenant appellant was a co-widow who had a life interest in the lands. It was observed that the terms of the statutory protection applied clearly to all tenancies governed by the Madras Cultivating Tenants Protection Act irrespective of the nature of rights of the person who leased the land so long as the lessor was entitled to create a tenancy. In our opinion, the said observations would not be applicable. The said decision deals with the right of the co-widow in the land. Reference may be made to the facts of that case at page 504, para 10. In our opinion, in view of the said facts, the decision would not apply to the facts of the instant case. On the other hand, in view of the facts and ratio of the principle of the decisions in *Jadavji Purshottam* ((1987) 4 SCC 223) and *Pomalji Govindji* ((1989) 1 SCC 458), we are of the opinion that the contentions of Sri Iyer cannot be sustained. The non obstante clause in Section 11(a) of the Act is applicable only to a decree for eviction obtained by a landlord against a tenant. The appellants were never the tenants of the respondent.

19. In the aforesaid view of the matter, we are unable to accept the submissions urged in this case

and, therefore, the appeal must fail. But in view of the fact that the appellants have been carrying on the business for some time in the premises in question in order to enable them to adjust their business, we direct that the order for eviction of the appellants should not be executed up to October 31, 1989 if the appellants give an undertaking within a period of four weeks from this date to give vacant possession in peaceful manner on October 31, 1989; and also containing the usual terms of undertakings. In default of such undertaking being given within the time aforesaid, the decree will be forthwith executed.

20. The appeal is accordingly dismissed with costs.

</html