

Nemi Chand

Vs

Onkar Lal

Civil Appeal No. 2728 of 1986

(Dr. T. K. Thommen, R. M. Sahai JJ)

19.07.1991

JUDGMENT

THOMMEN, J. –

1. This appeal arises from the judgment of the Rajasthan High Court dated April 24, 1986 in S.B. Civil Second Appeal No. 32 of 1986. The High Court, confirming the decrees of the courts below, held that the appellant had surrendered his possession over the suit property as a lessee upon his lending money on the security of the very same property which was mortgaged to him by the borrower.

2. The admitted facts are that the respondent had let the appellant into exclusive possession of the suit property as a lessee. During the period of the lease, the appellant lent a sum of Rs. 5000 to the respondent on the security of the suit property which was mortgaged to him by the respondent, as evidenced by the mortgage deed dated March 19, 1975. The deed provided that the mortgage was due to expire on March 18, 1980. Accordingly the respondent issued notice to the appellant of his intention to redeem the property. But the appellant refused to surrender possession of the property contending that he was entitled to retain it in his capacity as a lessee. Accordingly the respondent instituted the suit for redemption. All the courts below, on construction of the mortgage deed, came to the conclusion that the appellant had surrendered his possession as a lessee on his entering into a new relationship with the respondent in terms of the deed of the mortgage, and upon redemption of the mortgage, the appellant had no further right to retain possession of the property. The High Court held that the appellant had symbolically surrendered his possession as a lessee, and no rent was, therefore, payable by him under the lease during the period of the mortgage. On redemption of the mortgage, he had no further right or interest in the property and was no longer entitled to retain possession of the same.

3. Annexure 'A' is the English translation of the mortgage deed dated March 19, 1975 which reads :

"... the upper storey is on rent to you Shri Nemi Chand Jain himself son of Shri Dhyan Singh Ji Jain, resident of Bundi. Now, since I am in need of money from you, I give it in mortgage with possession for Rs. 5000 in figures Five thousand ...

That I have received a sum of Rs. 5000 and handed over the possession of the aforesaid house to you, Shri Nemi Chand son of Dhyan Singh Ji caste Jain resident of Bundi and have mortgaged the same with you and I shall not get the said house redeemed for a period of 5 years and any time after the period of 5 years, I shall repay your full amount of Rs. 5000 to redeem and shall obtain the possession. ... So

long as the house will remain mortgaged with you, there shall be no interest of amount to you and no rent of the house.

The interest of the amount and the rent of the house are equal. That I am in need of money on account of the marriage of my daughter. Therefore I have received a sum of Rs. 5000 from you, Shri Nemi Chand son of Shri Dhyan Singh Ji caste Jain resident of Bundi and have written with sound and stable mind so that it may be used as and when needed. Written over 4 stamps valued Rs. 170 ..."

4. The deed shows that the appellant was in possession of the property as a lessee. This is clear from the words "the upper storey is on rent to you". It is not disputed that this was the position. The document further shows that during the period of the mortgage, which was to last 5 years, neither interest nor rate was payable by the parties, both amounts being equal. This shows that the rent was kept alive and it was to be adjusted against the interest. The lease subsisted, though the parties entered into a new relationship of creditor and debtor on the security of the property already in the possession of the appellant as a lessee. The mortgage was usufructuary in character, the possession being already with the appellant. He held the property both as a lessee and a mortgagee.

5. The courts below misconstrued the document to read that no rent accrued during the period of the mortgage and that there was a symbolic surrender of possession by the appellant upon execution of the mortgage deed. This was not the correct position and it was a wrong reading of the document resulting in an error of law. The words "there shall be no interest of amount to you and no rent of the house. The interest of the amount and the rent of the house are equal" show that both interests and rents accrued, but both being in equal sums, neither was payable.

That was an adjustment of one liability against another. In another words the relationship between the parties as lessor and lessee subsisted. There was no merger of the lease and the mortgage. No such merger could take place in law.

6. The decree for redemption only redeemed the mortgage and did not determine the lease. That is a relationship which still subsists and is determinable according to law. See the principle stated by this court in *Nand Lal v. Sukh Dev* (1987 Supp SCC 87), *Shah Mathuradas Maganlal & Co. v. Nagappa Shankarappa Malage* ((1976) 3 SCC 660 : (1976) 3 SCR 789) and *Sambangi Applaswamy Naidu v. Behara Venkataramanayya Patro* ((1984) 4 SCC 382 : (1985) 1 SCR 651).

7. In the circumstances we are of the view that the courts below were clearly in error in coming to the conclusion which they did. Accordingly, we set aside the judgments and decrees of the courts below. The appeal is allowed in the above terms. No Costs.

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