GUJARAT HIGH COURT

Salman Raje

Vs.

Madhavsang Banesang

Special Civil Application No. 380 of 1962

(J.M. Shelat and P.N. Bhagwati, JJ.)

06.02.1963

JUDGMENT

J.M. Shelat, J.

1.The controversy in this application centers round S. No. 357 situate in the village Antali Bhimji Taluka Dhandhuka District Ahmadabad. On May 31 1943 opponents 1 and 2 mortgaged this land to the Petitioner. In 1958 they filed suit No. 79 of 1958 in the Court of the learned Civil Judge (J.D.) at Dhandhuka against the petitioner praying for redemption of the mortgage and possession of the land. In that suit the petitioner contended that he was a protected tenant and therefore possession could not be taken from him by virtue of the provisions of the Bombay Tenancy and Agricultural Lands Act 1948 He also contended that he was a tenant long before the mortgage and that being so he was protected by the aforesaid Act. On these contentions the learned Civil Judge framed two issues. The first issue was whether the petitioner was a deemed tenant by virtue of his being a mortgagee in possession before the Bombay Tenancy and Agricultural Lands Act 1948 came into force and the second issue was whether the petitioner was a tenant prior to the date of the mortgage. These two issues were then referred by him to the Mamlatdar Dhandhuka. By his order dated February 15 1961 the Mamlatdar held that the petitioner was not a deemed tenant and that he could not be so by reason of the fact that he was the mortgagee in possession and secondly that he was not a tenant of the land in question prior to the date of the mortgage. The petitioner then filed an appeal before the District Deputy Collector. By his order dated September 30 1961 the District Deputy Collector held that as the petitioner was on the land and was lawfully cultivating it before the 1948 Act came into force he was a deemed tenant entitled to the protection of the 1948 Act. He came to this conclusion relying upon the Pull Bench decision in Jaswantrai Tricumlal v. Bai Jiwi 59 Bom. L.R. 168 He declined to decide the second issue as in his view it was unnecessary to do so in view of his finding on the first issue. Opponent Nos. 1 and 2 having filed a Revision Application against this order the Gujarat Revenue Tribunal by its order dated February 23 1962 held that the petitioner could not

be considered a deemed tenant by reason of his being a mortgagee in possession and reversing the order of the District Deputy Collector restored the order of the Mamlatdar. The Tribunal was of the view that the decision in Jaswantrai Tricumlal v. Bai Jiwi, 59 Bom. L.R. 168 would not apply to the facts of the case for the Pull Bench decision dealt not with the mortgagee in possession but with the rights of a tenant of a mortgagee in possession. The Tribunal remanded the case to the District Deputy Collector for his decision on the second issue. In its view a decision on the second issue was necessary because if the petitioner was a tenant of the mortgagor and was on the lands as such tenant before the mortgage was executed then Section 25A of the 1948 Act would apply and in that event his tenancy which commenced prior to the date of the mortgage would remain in abeyance until the redemption of the mortgage. This application disputes the decision of the Tribunal.

Before we deal with the contentions raised before us it would be useful first to set out a few pertinent dates. The Bombay Tenancy Act XXIX of 1939 though enacted on April 2 1940 was brought into force in the District of Ahmedabad on and from April 11 1946 Sections 2A 3 and 4 in that Act were added by amendment Act XXVI of 1946 on November 8 1946 The Bombay Tenancy and Agricultural Lands Act 1948 was brought into force on December 25 1948 Since the mortgage in favour of the petitioner was made in 1943 and the petitioner went into possession by virtue of that mortgage the parties would be governed by the Bombay Tenancy Act XXIX of 1939 which as we have said was applied to the District of Ahmedabad on and from April 1946. Originally there were no provisions in that Act as to a statutory or a deemed tenant and Section 2A 3 and 4 were introduced as aforesaid in the Act by Amendment Act XXVI of 1946 on and from November 8 1946 Section 2A of that Act defines a tenant as a person lawfully cultivating land belonging to another person if such land is not cultivated personally by the owner and secondly if such person is not

(a) member of the owners family or

(b) a servant one wages or a hired labourer cultivating the land under the personal supervision of the owner or any member of the owners family

The section further provides that such a person becomes a deemed tenant provided that the owner has not made an application no the Mamlatdar within whose jurisdiction the land is situate for a declaration that the person is not a tenant within one year from the date of the coming i to force of Bombay Act XXVI of 1946 that is to say within one year in this case from November 8 1946 It is admitted that no such application was ever made by the opponents. There is and can be no doubt that the petitioner was cultivating the land belonging to another person i.e. the opponents and he was doing so lawfully as the usufructuary mortgage executed in his favour entitled him to its possession. The petitioner also would not fall in either of the two excepted categories. Prima facie therefore he was entitled to the benefit of Section 2A and 3A of the Act. It is also clear from the language used in Section 2A that there were only two classes of persons whom the Legislature excluded from the benefit of Section 2A viz:

(1) The members of the owners family and
(2) his servants and hired labourers.

Obviously a mortgagee in possession was not included in these two categories and was therefore not excluded from the benefit of Section 2A though the Legislature must have been aware of the fact that there would be mortgagees cultivating lands belonging to mortgagors.

2. Section 3A of the 1939 Act then provides that a tenant on expiry of one year from the date of the coming into force of the Amendment Act XXVI of 1946 was to be deemed to be a protected tenant and his rights as such protected tenant shall be recorded in the record of rights unless his landlord has within the said period made an application to the Mamlatdar for a declaration that the tenant is not a protected tenant. It is an admitted position that the opponents did not file any such application and prima facie therefore the petitioner who became a deemed tenant under Section 2A was to be deemed a protected tenant under Section 3A and the revenue authorities were bound to record his rights as a protected tenant in the record of rights.

3. As we have said the Bombay Tenancy and Agricultural Lands Act 1948 came into force on and from December 28 1948 Section 89(1) thereof repealed the 1939 Act except to the extent specified in Schedule I thereto. Sub-section (2) Clause (b)(i) of Section 89 provides that nothing in the Act or any repeal effected thereby shall have as expressly provided in this Act affect or be deemed to affect any right title interest obligation or liability already acquired accused or incurred before the commencement of this Act. Schedule I expressly provided for the saving of Section 3 3A and 4 of the 1939 Act was not saved Section 3A and 4 were saved i.e. the rights of persons who were deemed tenants and protected tenants under the 1939 Act as modified by the Schedule were saved. Section 2A was not necessary to be saved because the definition of a tenant in Section 2(18) of the 1948 Act included within its scope of a person who was a protected tenant. Neither the 1939 Act nor the 1948 Act laid down any definition of a landlord except that an owner of the land was deemed to be the landlord according to who the tenant was. That would show that the Legislature did not consider it necessary that relationship of a landlord and tenant must flow directly from the owner himself. Prima facie there is nothing in the 1939 Act to exclude a mortgagee in possession from the scope of Section 2A 3 and 4 to that Act. This conclusion appears to be fortified by the fact that though the Legislature was at pains to lay down excepted categories it laid down only two such categories of persons and those two categories of persons were set out in Section 2A in clear and express terms viz. (1) the members of the owners family and (2) his servants and hired labourers who otherwise would have fallen within the definition of a deemed tenant in Section 2A for they would be lawfully on the land. If the Legislature wanted to exclude a mortgagee in possession it was not as if it was not aware of the fact that there would be numerous cases where mortgagee in possession were on the land by virtue of mortgagee in their favour. This is therefore a clear indication that the Legislature at that stage did not wish to or at any rate did not exclude such a category of persons.

4. It is no doubt true that once a mortgage is redeemed and has come to an end the mortgagee in possession is no longer entitled to retain possession of the mortgaged property. The question is has that position been affected by the impact of the tenancy legislation? The question has to be answered in the affirmative. As observed by the Supreme Court though in another connection in *J.K. cotton Spinning and Weaving Mills Co. Ltd v. State of Utter Pradesh*[1], the Courts while interpreting statutes always presume that the Legislature inserted every part thereof for a purpose and the legislative intention is that every part of the statute should have effect. That being the presumption if there is a conflict between a specific provision and a general provision the specific provision must prevail over the general provision and the general provision applies only to such cases which are not covered by the special provision. Now it is evident that Section 2A 3 and 4 of the 1939 Act deal not with contractual tenants but with a class of persons who were

[1] AIR 1961 SC 1170 at page 1174

made artificial tenants under the statute. The only qualification for becoming such a statutory tenant laid down in Section 2A of the 1939 Act was that such a person should lawfully cultivate the land of another. In other words be should have been on the land by some legal incident and not unlawfully as a trespasser and secondly that he should not fall under the two excepted categories. Obviously a mortgagee under a usufructuary mortgage is on the land lawfully by virtue of his contract and equally obviously he does not fall in the two excepted categories. Can he then be said to be not falling with in the scope of Section 2A 3 and 4 of the 1939 Act?

5. A contrary view was expressed in *Dinkar Bhagwant Salekar v. Babaji Mahamulkar*[2] There Bavdekar and Gokhale JJ. were dealing with the case of a tenant of a mortgagee governed by the 1939 Act. In that case B mortgaged the mirashi rights in certain lands to K and K in his turn sold his mortgage rights to S. In 1934-35 S let the lands to the opponent as an annual tenant who cultivated it till April 20 1954 when he was evicted in execution of a decree of the civil Court. In the meantime the applicant purchased the mirashi rights in the lands from B and redeemed the mortgage in 1949. The applicant then sued the opponent in the Civil Court for possession of the lands and obtained possession on April 20 1954 The opponent applied to the Mamlatdar under Section 29 of the 1948 Act for possession of the lands which he lost as a result of the decree of the civil Court B. the owner of the lands had not made an application under Section 2A of the 1939 Act for declaring that the opponent was not a tenant and S the landlord of the opponent had also not made an application under Sections 3A of the Act for a declaration that the opponent was not a protected tenant. The opponent did not fall within the categories mentioned in Clauses (a) and (b) of Section 2A of the Act and he had not done any of the things referred to in Section 5(2) of the Act of 1939 or Section 14 of the 1948 Act for which he could be evicted. The opponent relying inter alia upon Sections 4 and 14 of the 1948 Act contended that his tenancy could not be terminated notwithstanding the redemption of the mortgage. On these facts the learned Judges held two things.

> (1) that Section 2A of the 1939 Act dealt only with the case of an owner of a land and a cultivator cultivating it with his permission or authority and thai that section provided that

in the absence of any application made by the owner such a cultivator was to be deemed to be a tenant and was therefore absolved from proving his tenancy. This would mean that according to the learned Judges Section 2A would only apply to those cases where a person cultivates land with the privity or permission of the owner and not otherwise.
(2) that by reason of Section 3 of the 1948 Act Section III(c) of the Transfer of Property Act would apply and therefore the rights of a tenant of a mortgagee in possession would lapse once his mortgage was redeemed.

It however appears from the judgment itself that the learned Judges felt considerable difficulty in arriving at these conclusions by reason of the wide language used in Sections 2A 3 and 4 of the 1939 Act the only two excepted categories laid down in Section 2A in that Act the definition of a tenant in Section 2(18) and the provisions of Section 4 of the 1948 Act. This difficulty they sought to resolve by observing that there was some laxity in the drafting of Section 2A of the 1939 Act and by construing that section as not including within its scope a tenant of a mortgagee in possession though the section did

[2]59 Bom. L.R. 101

dot so provide in terms. At pages 108 and 109 of the Report the learned Judges set out some of the inconsistencies and hardships which they thought might follow if they were to adopt the construction of Section 2A of the 1939 Act as suggested on behalf of the tenant of the mortgagee viz. that such a tenant on plain construction of Section 2A was not excluded from the scope of that section. At page 110 of the report they concluded that they proposed to construe Section 2A in a manner which should avoid these hardships But at page 106 they observed as follows:

> It must be conceded at the outset that Rau (the opponent) was a person who was lawfully cultivating the land in this application and the owner of the land who in this case must be taken to mean Bhikhu who appears to be a mirasdar not having made an application to the Mamlatdar within the period of one year after coming into force of the Bombay Tenancy (Amendment) Act 1946 Rau must be deemed to be a tenant as he does not fall within the excepted categories (a) and (b) of Section 2A. But the contention raised from this that he was a tenant though not in the ordinary sense of Bhikhu and entitled to protection as against him is on the face of it somewhat startling. One can understand the contention if it was made that Rau was a protected tenant so far as Sukhram (the mortgagee) is concerned and Sakharam could not evict him as long as that Act remained in force unless the provisions of Section 5(2) were satisfied and after the 1948 Act came into force Rau had done none of the things mentioned in Section 14 of the 1948 Act Sakharam would be the landlord and Rau would be the tenant. But if Rau is to be considered as a tenant of Bhikhu under the 1939 Act and after Dinkar purchased Bhikhus rights from him of Dinkar under the 1948 Act the result must necessarily be that when Dinkar redeemed the mortgage on May 29 1949 Dinkar could not evict Rau and it is against the ordinary principle both of the Transfer of Property Act and the English law which governed agricultural leases that a mortgagor should not be able to evict after the redemption of the

> mortgage a tenant put upon the property by the mortgagee. Even so if Rau was entitled to such a protection under either the 1939 Act or under the 1948 Act he must of course be given that protection.

6. The learned Judges however observed that they did not think that Section 2A could be construed in that manner and further observed that there was some laxity in the drafting of the section and that that was clear from the fact that when the 1948 Act was enacted to the excepted categories as to who was to be deemed to be a tenant was added a third category in Clause (c) of Section 4 viz. the mortgagee in possession. They concluded from this that an oversight was committed by the Legislature while enacting Section 2A and that oversight was repaired when subsequently Section 4 of the 1948 Act was enacted. They also observed that but for the addition of the third excepted category a mortgagee in possession would obviously have to be regarded as a tenant of the mortgagor and in that case he could not be evicted even after redemption of the mortgage. It is thus clear that a qualified interpretation was given to the language used in Section 2A of the 1939 Act by the learned Judges because they thought the Legislature had committed an error while drafting Section 2A and that that supposed error was subsequently repaired by the legislature while they were enacting Section 4 of the 1948 Act.

This decision came in for scrutiny in the Pull Bench decision in *Jasvantrai Tricumlal v. Bai Jiwi*[3] of the Report the learned Chief Justice who delivered the judgment for the Full Bench disapproved of the first part of the decision in *Dinkar Bhagwant v. Rau Babaji*[4]*,* by first stating out that Bavdekar J. had taken the view that only that person could be considered to be lawfully in possession of the land within the meaning of Section 4 who is there with the permission or authority of the owner. The learned Chief Justice then observed:

> With great respect to take that view of Section 4 is to add words to the section which the Legislature itself has not incorporated in the section and that there was no reason why such a narrow meaning should be attached to Section 4 when the Legislature wanted to protect a much larger class of persons who were lawfully cultivating the land and who did not hold that land under any contract which would permit them to continue being in possession of that land.

As regards the second part of the conclusion in *Dinkar Bhagwant v. Rau Babaji* the Full Bench was of the view that there was a lacuna in Section 2A of the 1939 Act in the sense that the mortgagee and his tenant were through mistake not excluded from the scope of Section 2A and that that lacuna was remedied while enacting Section 4 of the 1948 Act. The learned Chief Justice at page 175 of the report commented upon an observation made by Bavdekar J. in *Dinkar Bhagwant v. Rau Babaji* where the learned Judge relied upon the fact of Section 4(c) having been inserted in the 1948 Act as strengthening his view that mortgagees in possession were never intended to be treated as statutory tenants. The learned Chief Justice in answer to this observation stated:

> In our opinion the amendment effected by Section 4(c) of the Tenancy Act (of 1948 strongly supports the view which we are inclined to take that under the old Act all persons lawfully on the land were intended to be protected but the Legislature realising the difficult position in which the mortgagor would find himself if the tenancy created by the mortgagee in possession were to be protected and on redemption the mortgagor was prevented from getting possession of the land made the necessary amendment by enacting Section 4(c).

He further observed: 2

> Therefore with very great respect we must hold that the view taken by the learned Judge with regard to the position of the tenants of the mortgagees in possession under the old Act of 1939 is not the correct position and that as far as the old Act is concerned the position of the tenants of the mortgagees in possession and the position of sub-tenants was identical; they both became statutory tenants one on the redemption of the mortgage and the other on the termination of the contractual tenancy.

7. It follows from the views categorically expressed by the Full Bench in this decision that if a tenant of a mortgagee became a deemed tenant under Section 2A of the 1939 Act on the ground only that he came on the land lawfully though not because of the

[3]59 Bom. L.R. 168 At page 174

[4]59 Bom.L.R. 168 at page 174

permission of or privity with the owner a mortgagee under an usufructuary mortgage must necessarily be in the identical position and must be said to be a deemed tenant on the same reasoning under Section 2A of the 1939 Act. This conclusion appears to be strengthened by the fact that as held by the Full Bench the principal idea running through the Tenancy Acts is that the actual tiller should be protected against eviction from the land he tills provided that his title arises not unlawfully but through some legal incident. As already stated the Act of 1939 originally had no provision with regard to statutory tenancy and that concept was brought for the first time into the Act by the Amendment Act of 1946 which inserted Section 2A in the Act. That Act gave a locus poenitentiae to the owner by enabling him to make an application that the actual tiller was not the tenant. It is only if that is not done that the person lawfully on the land becomes a deemed tenant. Therefore the owner was given a safeguard. When the 1948 Act was passed Section 4A incorporated into the Act by Schedule I the provisions of Sections 3A and 4A of the 1939 Act. The history of the tenancy legislation thus shows that it was clearly the intention of the Legislature to create by a legal fiction a class of artificial tenants who included not merely the contractual tenants and licensees of the owners but others also deriving their title not merely through the permission and the consent of the owner not merely through the contractual tenancy but also from other incidents which placed such persons on lands lawfully. Where the Legislature wanted to exclude from such a class of persons it did so just as it excluded the two categories of

persons from the benefit of deemed tenancy in the Act of 1939. As a mortgagee under an usufructuary mortgage was not included in the excepted categories and as he would be a person who came on the land lawfully he must be held to be a deemed tenant on the authority of *Jasvantrai Tricumlal v. Bai Jiwi*.

It is possible to think as argued by Mr. Chhatrapati that such a construction might perhaps entail some of the inconsistencies and hardships pointed out by Bavdekar J. in *Dinkar Bhagwant v. Rau Babaji*. Nonetheless it is clear from the decision in *Jasvantrai Tricumlal v. Bai Jiwi* that the Full Bench negatived the construction placed in *Dinkar Bhagwant v. Rau Babaji* and in the clearest possible terms held that under the 1939 Act all persons lawfully on the land who would include both the mortgagee in possession and his tenant were intended to be protected and that the language of Section 2A of that Act was both plain and unambiguous and furnished no scope for speculating about the intention of the Legislature. The rule of construction in such a case is Absoluta sententia expositore indiget. That rule is to intend the Legislature to have meant what it has actually expressed and the underlying principle is that the meaning and intention of a statute must be collected from the plain and unambiguous expression used therein rather than from any notions which may be entertained by the Court as to what is just or expedient.

8. It appears that after the 1939 Act had been worked for sometime and while they were enacting the 1948 Act the Legislature thought of excluding from the protection of the tenancy legislation the mortgagee in possession. It would seem that even when the 1948 Act was being enacted the object was the same viz. to protect the actual tiller who was lawfully on the land. As stated by the Supreme Court in an unreported judgment in Civil Appeal No. 516 of 1960 decided on May 3 1962 *(Dahya Lala v. Rasul Mahomed*[5]*)* the Act of 1948 affords protection to all persons who hold agricultural lands as contractual tenants and subject to the exceptions specified all persons lawfully cultivating lands

[5] since reported in 65 Bom. L.R. 328

belonging to others.

When the 1948 Act was being enacted it appears to have been realised that a third category of excluded persons should be added viz. a mortgagee in possession. The reason for doing so was the appreciation of the fact as observed by the Supreme Court in the decision above referred to that to confer the status of a deemed tenant upon a mortgagee in possession would be to invest him with rights inconsistent with his fiduciary character. Even so the Supreme Court held that a tenant of a mortgagee would not fall within the third category of excluded persons though a transferee of a mortgagee in possession would. It is obvious that but for this exclusion effected by inserting Clause (c) in Section 4 of the 1948 Act a mortgagee in possession being a person lawfully cultivating the land would have been entitled by the plain language of Section 2A of the 1939 Act and Section 4 of the 1948 Act to the status of a deemed tenant howsoever inconsistent or hard the result would have been. Section 4 is not retrospective and Mr. Chhatrapati has not urged that it is so and therefore the insertion of that clause in Section 4 would not effect the rights accrued to or vested in or a status acquired by a person prior to its insertion. As we have observed such rights are expressly saved by Section 89(2)(b)(i). Thus the mortgage having been

brought about in 1943 and the petitioner as the mortgagee thereunder being in possession and cultivating the same since then would be entitled to the status and the rights of a deemed tenant under Section 2A and of a protected tenant under Section 3A and therefore would be entitled to the benefit of Section 4A of the 1948 Act after that Act came into force.

9. It was fairly conceded by Mr. Chhatrapati that in view of the decision in ***Jasyantrai*** *Tricumlal v. Bai Jiwi* it would not be possible for him to argue in favour of the construction adopted in *Dinkar Bhagwant v. Rau Babaji*. But Mr. Chhatrapati argued that considering the language used in the preamble of the 1939 Act viz. the protection of tenants of agricultural lands etc. the 1939 Act was intended to apply to tenants only and that though Section 2A was couched in language of wide amplitude it should not be interpreted in the light of the preamble of that Act to include a mortgagee. He also contended that considering the various difficulties and perhaps the hardships pointed out by Bavdekar J. in *Dinkar Bhagwant v. Rau Babaji* it should be held that the Legislature while enacting Section 2A could not have contemplated to include a mortgagee in possession as a person entitled to the status of a deemed tenant under Section 2A. If the matter had been res Integra it is possible that we might have had to consider the construction urged by Mr. Chhatrapati especially in view of the language used in Section 2A itself which provides that the application to be made by the owner to the Mamlatdar would be for a declaration that the person claiming to be the deemed tenant was not his tenant. That perhaps might indicate that the person against whom such an application has been provided for and who would claim the status of a deemed tenant was a person claiming contractual tenancy and not a person with whom the owner had no privity. It is not possible however for us to sustain the contention of Mr. Chhatrapati in view of the decision in *Jasvantrai Tricumlal v. Bai Jiwi* which is binding upon us and which decision has in clearest terms laid down that Section 2A seeks to give benefit of the status of a deemed tenant to all persons lawfully cultivating land belonging to another person unless such a person falls within either of the two excepted categories laid down in that section.

10. Mr. Chhatrapati then contended that even where a mortgagee is lawfully cultivating the land of his mortgagor he cannot be said to be a deemed tenant for the reason that as a mortgagee in possession he would not in any event be made liable to pay fair rent provided for in the Act If he were to be treated as a deemed tenant the provisions as to fair rent under the Act must apply to him and that would result in an inconsistent position a position on the one hand as a mortgagee and on the other as a deemed tenant He also pointed out the provisions of Section 5(cc) and (d) in the 1939 Act and argued that if a mortgagee in possession were to be treated as a deemed tenant and he as a mortgagee were to let out the mortgaged property he would be guilty of subletting a position again inconsistent with his being a mortgagee in possession to whom a right to let out the mortgaged property is given under the deed of mortgage. We may observe that these very difficulties were urged in support of the limited construction of Section 2A before the Full Bench in *Jasvantrai Tricumlal v. Bai Jiwi. At page 174* of the Report the learned Chief Justice though he was there dealing with the case of a sub-tenant refuted this very argument by observing that questions of statutory protection can only arise when the contractual relations come to an end that

is in the case of a sub-tenant which he was dealing when the contractual tenancy of a tenant would be determined. Similar would be the position in the case of a mortgagee in possession when his mortgage gets extinguished. A further answer to Mr. Chhatrapati would be that the same difficulties must also arise in the case of a mortgagees tenant and yet such a tenant was held to be entitled to the status of a protected tenant in *Jasvantrai Tricumlal v. Bai Jiwi*. The question whether a mortgagee has to pay fair rent to his statutory landlord the mortgagor would be best answered by stating as was done in *Jasvantrai Tricumlal v. Bai Jiwi*, that no such question would arise so long as the mortgage subsists. It is on redemption that such a question would arise and naturally after the redemption of the mortgage it would be the mortgagor the owner of the land who would be entitled to receive fair rent from the protected tenant.

11. Lastly it was contended by Mr. Chhatrapati that Clause (c) of Section 4 in the 1948 Act should be treated as a clause for clarification and not one providing for the first time a new category of excluded persons. He argued that that category was already impliedly there in Section 2A of the 1939 Act. That contention in our view would be contrary to the decision in *Jaswantrai Tricumlal v. Bai Jiwi*. The contention that Section 4(c) was enacted by way of clarification only assumes that there was something in existence before the enactment of Section 4(c) and that that required clarification. But Mr. Chhatrapati was not able to point out from the 1939 Act or from the amendments made therein subsequently anything to show that a mortgagee under an usufructuary mortgage was either expressly or even impliedly excluded from Section 2A. That contention of Mr. Chhatrapati therefore cannot be accepted. Mr. Chhatrapati then pointed out that under Section 62 of the Transfer of Property Act a mortgagor in the case of an usufructuary mortgage is entitled to recover possession and that such a right cannot be taken away by a subsequent statute unless it is done either in express terms for by necessary implication. This contention too cannot be sustained for it is clear that the tenancy legislation by creating a body of artificial tenants has taken away from the owner the right to recover possession if not by express terms by necessary implication and therefore to that extent the right to recover possession of the mortgaged land given under the Transfer of Property Act is abrogated by the tenancy legislation.

12. For the reasons aforesaid we have come to the conclusion that the petitioner as the mortgagee in possession was entitled to the status of a protected tenant he not falling under either of the two excepted categories in Section 2A of the 1939 Act. He was also entitled to the status of a protected tenant under Section 4A of the 1948 Act. In that view the Tribunal was in error in coming to the conclusion that it did. We have therefore to set aside the order passed by the District Deputy Collector. The rule is therefore made absolute. There will be no order as to costs.
Rule made absolute.