

# GUJARAT HIGH COURT

Lalji Purshottam

Vs.

Thacker Madhavji Meghaji

LPA. Nos. 52 of 1972 and 201 of 1971

(B.J. Divan, C.J., D.A. Desai and S.N. Patel, JJ.)

24.07.1975

## JUDGMENT

### **B.J. Divan, C.J.**

1. In Letter Patent Appeal No. 52 of 1972, a Division Bench consisting of myself and P.D. Desai, J., has on July 5, 1973 referred the following three questions to a larger Bench and this Full Bench has been constituted because of that reference :

- "1. Whether under Section 76(a) of the Transfer of Property Act, a lease created by the mortgagee in possession of an urban immovable property would be binding on the mortgagor after redemption of mortgage assuming that the lease is such as a prudent owner of property would have granted in usual course of management ?
2. Whether, even apart from Section 76(a) of the Transfer of Property Act, a lease created in exercise of a general power to grant a lease expressly conferred on the mortgagee under the mortgage deed would be binding on the mortgagee after redemption of the mortgage ?
3. Whether a tenant inducted on the property by a mortgagee with possession whose tenancy is not binding on the mortgagor after redemption of the mortgage, would still be protected under the provisions of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947".

2. Letters Patent Appeal No. 201 of 1971 is against the decision of our learned brother J.M. Sheth, J., sitting singly in First Appeal No. 577 of 1965. That First Appeal arose in execution proceedings and the first appeal was filed against the order of the learned Civil Judge, Senior Division, Junagadh in Civil Miscellaneous Application No. 112 of 1964. When the Letters Patent Appeal against the decision of J.M. Sheth, J., came up for hearing before a Division Bench consisting of A.D. Desai and T.U. Mehta, JJ., it was pointed out to the Division Bench that the points arising in the Letters Patent Appeal on merits were identical with the three points which

have been referred to the larger Bench in Letters Patent Appeal No. 52 of 1972. Since all the three questions which arose on merits before them had been already referred to a Full Bench by the Division Bench in Letters Patent Appeal No. 52 of 1972, judicial propriety according to A.D. Desai and T.U. Mehta, JJ., required that they should refer Letters Patent Appeal No. 201 of 1971 also to the Full Bench for deciding the said points and the final disposal of the appeal. Under these circumstances Letters Patent Appeal No. 201 of 1971 is now before this Full Bench.

3. Before proceeding further, we must clarify that the whole controversy before us turns upon the rights of a tenant inducted into an urban immovable property by a mortgagee with possession and the rights that we have to consider are as against the mortgagor after the mortgaged property has been redeemed by the mortgagor. The question that we have to consider is, whether on redemption of a mortgage with possession by the mortgagor, the tenant inducted by the mortgagee can resist eviction at the instance of the mortgagor either under the general law set out in the transfer of Property Act or by virtue of an express power conferred upon the mortgagee by the mortgagor or by virtue of the provisions of the Bombay Rents, Hotel and Lodging Rates Control Act, 1947, (hereinafter referred to as the Bombay Rent Act), whether under any one of these three heads protection for such a tenant is available even after the redemption of the mortgage with possession.

4. Out of the three questions referred to us, first question brings out a clear provision under the Transfer of Property Act and what is the scope of Section 76(a) of the Transfer of Property Act in relation to mortgage with possession effected on urban immovable property. The second question refers to an express power conferred on the mortgagee under the mortgage deed itself but the power which is conferred is in general terms as distinguished from a special power. So far as the third question is concerned, as the language of the third question itself indicates, it proceeds on the footing that the tenant inducted on the property by a mortgagee with possession is not otherwise entitled to continue in possession after redemption of the mortgage. But the third question contemplates a situation arising under the provisions of the Bombay Rent Act and the question that we have to consider is, whether by virtue of any of the provisions of the Bombay Rent Act, the tenant contemplated by Question No. (3) is entitled to continue in possession as against the mortgagor even after redemption of the mortgage. It is in the light of these questions as thus explained that we will now proceed to deal with the question referred to us.

5. In order to appreciate the legal controversy arising before us, we will briefly set out the facts of the two Letters Patent Appeals before us. In Letters Patent Appeal No. 52 of 1972, the appellant is the original plaintiff and he is the landlord. He is the owner of property bearing Municipal Census Nos. 702 and 706 in Bhuj Town of Kutch District. In 1937 the plaintiff created a mortgage with possession in favor of Lohana Saraswati Kanyashala Trust. The document was executed on Chaitra Vad 13, Samvat Year 1993, that is, sometime in April-May 1937. Under the terms of the mortgage deed it was mentioned that the mortgagees could use the property in such manner as they thought fit for the purposes of Lohana Saraswati Kanyashala or they could allow it

to be used by others or they could let it out on rent and the rent was to be utilized by the mortgagees with possession. In 1943, the property in question was let out by the mortgagees with possession to the present respondent who was the original defendant in the suit out of which this Letters Patent Appeal arises. On March 15, 1962, by a mutual agreement between the mortgagees with possession, namely, the trustees of Bhuj Lohana Saraswati Kanyashala Trust and the present appellant, original mortgagor, the mortgage was redeemed and on redemption the property was reconveyed back to the mortgagor by the mortgagees. On March 26, 1962 the trustees of the Bhuj Lohana Saraswati Kanyashala Trust, the erstwhile mortgagees, informed the tenant that is the present respondent, that the property had been reconveyed back to the mortgagor and they asked the tenant to hand over possession of the property to the mortgagor. On March 30, 1962 the plaintiff the original mortgagor, gave notice in suit to the defendant that is, the tenant, calling upon him to deliver up the possession of the suit premises as the property had been mortgaged and as the mortgage with possession had been redeemed. On April 18, 1962, the tenant sent a reply to this notice and thereafter the suit out of which the present Letters Patent Appeal arises was filed in the Court of the learned Civil Judge, Senior Division, Bhuj. The suit was for possession of the suit premises and the suit was dismissed by the learned Civil Judge, Senior Division, Bhuj. Against the decision of the learned Civil Judge, Senior Division, there was an appeal to the District Court, Bhuj. The appeal was disposed of by the learned District Judge, Kutch at Bhuj. The learned District Judge, by his judgment and decree allowed the appeal filed by the original plaintiff against the decision of the learned District Judge, a Second Appeal was filed in this High Court being Second Appeal No. 1028 of 1965. By his judgment and order dated November 5, 1971, A.A. Dave, J. allowed the appeal, set aside the judgment and decree of the learned District Judge and restored the judgment and decree of the learned trial Judge. Therefore, on a certificate having been granted by him under Clause 15 of the Letters Patent the present Letters Patent Appeal was filed in this Court and the three questions set out herein above were referred to a larger Bench by the Division Bench. The order of reference was made on July 5, 1973.

6. In Letters Patent Appeal No. 201 of 1971, the appellants before the Court were the original mortgagors. The property is situated on Mahatma Gandhi Road, Veraval, in Junagadh District. The mortgage was created by a registered deed dated August 11, 1949. The appellants were the mortgagors and on the very day on which the mortgage with possession was created by them, they executed as a rent-note in favor of the mortgagee with possession and as tenants they remained in actual possession of a portion of the mortgaged property. The rent which was to be paid by the appellants was Rs. 110/- per month and this amount was equivalent to the interest payable on the principal mortgage amount secured by the deed of mortgage. The mortgagees filed a suit in the Court of the Civil Judge, Senior Division, Junagadh, to recover the amount due at the foot of the mortgage by sale of the mortgaged property. In that suit a preliminary decree was passed by the trial Court and on January 22, 1957 the final decree was passed. In the auction sale in execution of the decree the decree-holders, that is, the mortgagees themselves purchased the mortgaged property after following the appropriate procedure. The auction sale was

confirmed on April 27, 1959 and the sale certificate in favor of the respondents was issued on August 11, 1959. After receiving the sale certificate from the Court, the respondents, that is the auction purchasers, applied for delivery of actual possession of the suit property or at least the portion of the suit property which was in possession of the appellants. A warrant for possession was issued and the appellants raised objections contending that they were the tenants of the suit premises and hence they were entitled to remain in possession. On behalf of the auction purchasers an application under Order 21 Rule 97 of the Code of Civil Procedure was preferred to the Court for removal of the obstruction caused by the appellants before us. This application was filed on December 29, 1964. The executing Court granted the application for removal of the obstruction holding that the lease of the property was only a device to secure interest to be paid on the mortgage money and secondly, that the appellants herein were not the tenants of the mortgagees so far as the portion of the property in their possession was concerned. Against the said Judgment and order, the present appellants preferred First Appeal No. 577 of 1965 to this Court. The appeal was filed under Section 47 of the Code of Civil Procedure. This appeal came up for final hearing before our learned brother J.M. Sheth, J., and Sheth, J., held that the appeal was not maintainable since the question regarding delivery of possession to auction-purchaser was not a question relating to execution. When it was pointed out that the appeal was not maintainable, the present appellants applied that their First Appeal should be converted into a Civil Revision Application on the merits of the case while disposing of the proceeding as a Civil Revision Application, J.M. Sheth J. held that the relations between the appellants and the respondents as lessor and lessee came to an end when the relation of mortgagor and mortgagee came to end. He also held the appellants were not entitled to the benefit of the Bombay Rent Act and hence he rejected the Civil Revision Application. Against this judgment, Letters Patent Appeal No. 201 of 1971 came to be filed. By their judgment and order dated October 11, 1974 A.D. Desai and T.U. Mahta, JJ., held that the Letters Patent Appeal before them was maintainable and thereafter referred the Letters Patent Appeal to the large Bench as the three points which arose before them on merits were the same as had been referred to larger Bench in Letter Patent Appeal No. 52 of 1972.

7. In order to appreciate the controversy arising in this matter and in order to deal effectively with all the three questions which have been referred to us, it will be necessary to examine a number of decisions of the Supreme Court which have dealt with rights of a tenant inducted by a mortgagee with possession after the mortgage has been redeemed by the mortgagor. Under Section 60 of the Transfer of Property Act the right of a mortgagor to redeem the property is provided. Under that Section at any time after the principal money has become due, the mortgagor has a right, on payment or tender, at a proper time and place, of the mortgage-money, to require the mortgagee (a) to deliver to the mortgagor the mortgage-deed and all documents relating to the mortgaged property which are in the possession or power of the mortgagee; (b) where the mortgagee is in possession of the mortgaged property, to deliver possession thereof to the mortgagor; and (c) at the cost of the mortgagor either to re-transfer the mortgaged property to him or to such third person as he may direct, or to execute and (where the mortgage had been

effected by a registered instrument) to have registered an acknowledgement in writing that any right in derogation of his interest transferred to the mortgage has been extinguished. It is not in dispute before us, as indeed it cannot be in dispute, that even though a specific period, namely, 99 years as in this case has been mentioned in the deed of mortgage as the date for redemption, it is open to the parties, namely, the mortgagee and the mortgagor, by mutual consent to agree to a redemption at an earlier date and a redemption by mutual agreement between the parties will be binding on all concerned even though the due date has not yet arrived. Section 76 of the Transfer of Property Act provides for the liabilities of mortgagee in possession and it provides that when, during the continuance of the mortgage, the mortgagee takes possession of the mortgaged property, (a) he must manage the property as a person of ordinary prudence would manage it if it were his own;.....(e) he must not commit any act which is destructive or permanently injurious to the property. Under Section 111 of the Transfer of Property Act, provision is made for determination of lease and it provides under clause (c) that a lease of immovable property determines where the interest of the lessor in the property terminates on, or his power to dispose of the same extends only to the happening of any event - by the happening of such event. These are the relevant provisions of the Transfer of Property Act which have to be borne in mind while considering the different decisions which we now proceed to consider.

8. In *Mahabir Gopi v. Harbans Narain*<sup>1</sup>, the Supreme Court was concerned with a lease created by a mortgagee with possession. In paragraph 6 of the judgment at page 206, of the report. Chandrasekhara Iyer, J., delivering the judgment of the Supreme Court observed –

"The general rule is that a person cannot by transfer or otherwise confer a better title on another than he himself has. A mortgagee cannot, therefore, create an interest in the mortgaged property which will enure beyond the termination of his interest as mortgagee. Further, the mortgagee, who takes possession of the mortgaged property, must manage it as a person of ordinary prudence would manage if it were his own, and he must not commit any act which is destructive or permanently injurious to the property; see Section 76, sub-clauses (a) and (e) of the Transfer of Property Act. It follows that he may grant leases not extending beyond the period of the mortgage; any leases granted by him must come to an end at redemption. A mortgagee cannot during the subsistence of the mortgage act in a manner detrimental to the mortgagor's interests such as by giving a lease which may enable the tenant to acquire permanent or occupancy rights in the land thereby defeating the mortgagor's right to 'khas' possession; it would be an act which would fall within the provisions of Section 76 sub-clause (e) of the Transfer of Property Act.

A permissible settlement by a mortgagee in possession with a tenant in the course of prudent management and the springing up of rights in the tenant conferred or created by statute based on the nature of the land possession for the requisite period is a different matter altogether. It is an exception to the general rule. The tenant cannot be ejected by the mortgagor even after the redemption of the mortgage. He may become an occupancy 'raiyat' in some cases and a non-

occupancy 'raiyat' in other cases. But the settlement of the tenant the mortgagee must have been a 'bonafide' one. This exception will not apply in a case where the terms of mortgagee prohibit the mortgagee from making any settlement of tenants on the land either expressly or by necessary implication".

On the facts of the case the Supreme Court held that the provisions of Sections 20 and 21 of the Bihar Tenancy Act, did not apply to the lessees since they were not 'settled raiyats' and the lessees could not claim to have secured under the statute occupancy rights in the land. The Supreme Court, therefore, held that the mortgagor was entitled to the possession of the land upon redemption of the mortgage. It may be pointed out that this decision in *Mahabir Gopi v. Harbans Narain* (supra), is the starting point of all discussion in India on this particular aspect of law.

9. In *Harihar Prasad v. Deonarain Prasad*<sup>2</sup>, the Supreme Court was again concerned with a mortgage with possession effected on agricultural land. The question before the Supreme Court was again whether the rights of a tenant inducted by the mortgagee with

<sup>1</sup> AIR 1952 SC 205

<sup>2</sup> AIR 1956 SC 305

possession would enure beyond the period of redemption as against the mortgagor. It was found by the Supreme Court on the facts of the case that the lands were under the personal cultivation of the mortgagors at the time they were mortgaged. At that time there were no raiyats on the land and there was no question of transferring the right to collect rent from them being given to the mortgagees on the facts of the case in paragraph 13 at page 31 of the report, Venkatarama Ayyar, J., speaking for the Supreme Court observed that the argument urged before it proceeded on a confusion of two wholly independent concepts distinct in their origin and different in their legal incidents. He observed –

"The law is that a person cannot confer on another any right higher than what he himself possesses, and therefore, a lease created by a usufructuary mortgagee would normally terminate on the redemption of the mortgage. Section 76(a) enacts an exception to this rule. If the lease is one which could have been made by the owner in the course of prudent management, it would be binding on the mortgagors, notwithstanding that the mortgage has been redeemed. Even in such a case, the operation of the lease cannot extend beyond the period for which it was granted".

The Supreme Court then considered whether under provision of the Bihar Tenancy Act the tenant inducted on the mortgaged property during the pendency of the mortgage could claim to remain in possession after the redemption. It was observed by the Supreme Court that Section 21 of the Bihar Tenancy Act conferred on settled raiyats a permanent right of occupancy, provided the conditions mentioned in the Section were satisfied. But this right was a creature of the statute and could not be claimed apart from its provisions. Venkatarama Ayyar, J., pointed out that if the

tenant could not resist the suit for ejectment either by reason of Section 76(a) of the Transfer of Property Act or Section 21 of the Bihar Tenancy Act, the tenant could not get such a right as a result of the interaction of both those sections. The Supreme Court ultimately held that the tenants inducted by the mortgagee with possession had failed to establish that they had any right of occupancy over the suit lands and that the plaintiffs were entitled to a decree in ejectment, with further mesne profits as claimed in the plaint. Thus, a right claimable under Section 76(a) of the Transfer of Property Act because of a lease created in the course of prudent management of the property was put on a different footing altogether from a right created by a special statute. The tenant inducted by the mortgagee with possession could claim protection under either of those two pieces of legislation namely, Section 76(a) of the Transfer of Property Act or a special piece of legislation meant to protect certain tenants.

10. In *Asa Ram v. Mst Ram Kali*<sup>3</sup>, the question before the Supreme Court was again of mortgage of agricultural land when the mortgage was with possession and of the tenant inducted by the mortgagee with possession. The tenant claimed protection in the ground that this was an agricultural lease granted by the mortgagee in the course of prudent management and it was in the alternative contended that under the U.P. Tenancy Act of 1939 by virtue of Section 29(a), the tenant was protected. The judgment of the Court was delivered by Venkatarama Ayyar, J. in paragraph 6 at page 185 he observed :

<sup>3</sup> IR 1958 SC 183

"The law undoubtedly is that no person can transfer property so as to confer on the transferee a title better than what he possesses. Therefore, any transfer of the property mortgaged, by the mortgagee must cease, when the mortgage is redeemed. Now, Section 76(a) provides that a mortgagee in possession 'must manage the property as a person of ordinary prudence would manage it if it was his own'. Though on the language of the statute, this is an obligation cast on the mortgagee, the authorities have held that an agricultural lease created by him would be binding on the mortgagor even though the mortgage has been redeemed, provided it is of such a character that a prudent owner of property would enter into in the usual course of management. This being in the nature of an exception, it is for the person who claims the benefit thereof, to strictly establish it".

The Supreme Court pointed out in paragraph 7 that if there is a prohibition contained in the mortgage deed against letting of the land by the mortgagees the lease would not be binding on the mortgagors. But where there is no such prohibition, the only consequence is that parties would be thrown back on their right under the Transfer of Property Act, and the lessees must still establish that the lease is binding on the mortgagors under Section 76(a) of that Act. On examination of the facts of the case, the Supreme Court came to the conclusion that the lease before them which was granted by the mortgagees in possession was neither competent nor *bonafide* and that hence under Section 76(a) of the Transfer of Property Act, this particular lease was not binding on the mortgagors. In paragraph 13 at page 187 Venkatarama Ayyar, J. observed

"An owner will of course be entitled to admit a tenant, and a mortgagee in possession would have a right to do so, either if he is authorized in that behalf by the deed of mortgage, or if the transaction is one, which is protected by Section 76(a) of the Transfer of Property Act. But where the transaction is not one which would be upheld under Section 76(a), then there is no admission of tenant by any person having authority to do so and such a transaction though valid as between the mortgagee and the lessee, cannot from the foundation on which any rights under Section 29, sub-section (a) of the (U.P. Tenancy Act) could be based".

On examination of the provisions of Section 29(a) of the U.P. Tenancy Act, the Supreme Court held that it was a condition precedent to the application of the provisions of that section, that the person must have been admitted as a tenant by a person who had a right to do so. Where, however, the person who purported to grant the lease had no authority to do so, whatever rights *inter se* between the lessor and the lessee, as against the true owner, the lessee does not; in law; acquire the status of a tenant, and Section 29(a) of the U.P. Tenancy Act had no application to him.

11. In *Dahya Lala v. Rasul Mohamed*<sup>4</sup>, the Supreme Court was concerned with the case of a tenant inducted on agricultural land by a mortgagee in possession and the question was whether on redemption such tenant was protected by the provisions of the Bombay Tenancy and Agricultural Lands Act, Shah, J., as he then was delivering the judgment of the Supreme Court in paragraph 7 at page 1323 observed –

"Under the Transfer of Property Act, the right of a tenant who had been inducted

<sup>4</sup> AIR 1964 SC 1320

by a mortgagee in possession ordinarily comes to an end with the extinction of the mortgage by redemption, but that rule, in our judgment, has no application in the interpretation of a statute which has been enacted with the object of granting protection to 'persons lawfully cultivating agricultural lands'. Nor has the contention that the expression 'mortgagee in possession includes a tenant from such a mortgagee any force. A mortgagee in possession is excluded from the class of deemed tenants on ground of public policy; to confer that status upon a mortgagee in possession would be to invest him with rights inconsistent with his fiduciary character. A transferee of the totality of the rights of a mortgagee in possession may also be deemed to be a mortgagee in possession. But a tenant of the mortgagee in possession is inducted on the land in the ordinary course of management under authority derived from the mortgagor and so long as the mortgage subsists, even under the ordinary law he is not liable to be evicted by the mortgagor. It appears that the Legislature by restricting the exclusion of mortgagees in possession from the class of deemed tenants intended that the tenant lawfully inducted by the mortgagee

shall on redemption of the mortgage be deemed to be tenant of the mortgagor".

The Supreme Court held that in view of the provisions of Section 4 of the Bombay Tenancy and Agricultural Land Act, 1948, since the tenant inducted on the land by the mortgagee with possession was lawfully cultivating agricultural land, he was protected by virtue of the special definition of Section 4 of that Act.

12. In *Prabhu v. Ramdeo*<sup>5</sup>, the same problem again arose in connection with a person inducted into agricultural land as a tenant by a usufructuary mortgagee and the question was whether the rights of such a tenant were protected by the provision of the Rajasthan Tenancy Act, 1955. In paragraph 10 at page 1723, Gajendragadkar, C.J., delivering the judgment of the Supreme Court pointed out that the observations in *Mahabir Gopi v. Harbans Narain*, (supra), which we have extracted above, were made by reference to the normal relationship between a mortgagor and the mortgagee and their respective rights and obligations as determined by relevant provisions of the Transfer of Property Act. Then he proceeded to observe –

"Having made these observations, however, this Court has taken the precaution to point out that even in regard to tenants inducted into the land by a mortgagee cases may arise where the said tenants may acquire rights of special character by virtue of statutory provisions which may, in the meanwhile, come into operation. A permissible settlement by a mortgagee in possession with a tenant in the course of prudent management and the springing up of rights in the tenant conferred or created by statute based on the nature of the land and possession for the requisite period, it was observed, was a different matter altogether. Such a case is clearly an exception to the general rule prescribed by the Transfer of Property Act. It will thus be seen that while dealing with the normal position under the Transfer of Property Act, this Court specifically pointed out that the rights of the tenants inducted by the mortgagee may conceivably be improved by virtue of statutory provisions which may meanwhile come into operation".

<sup>5</sup> AIR 1966 SC 1721

The Supreme Court also considered the decision in *Harihar Prasad v. Deonarain Prasad*, (supra), and pointed out that decision turned upon the relevant provisions of the Bihar Tenancy Act. In view of the provisions of the Rajasthan Tenancy Act, 1955, the Supreme Court in *Prabhu v. Ramdeo* (supra), held that the tenant inducted by the mortgagee in possession was entitled to the rights of Khatedar by virtue of the provisions of Section 15 and he could not be evicted by the mortgagor on redemption of the mortgage. Thus, like the case of *Dahya Lala v. Rasul Mahomad* (supra), this was a case where a special statute came to the rescue of the tenant of agricultural land inducted by the mortgagee with possession.

13. It must be noted that all cases that we have so far considered were cases of agricultural lands and in each of these cases the question was examined from two points; first, whether the lease could be said to be a lease granted in the course of prudent management and, in the alternative,

whether the rights of the tenant inducted by the mortgagee with possession had been enlarged as a result of a special statute dealing with the rights of tenants of agricultural lands. The cases we will now consider all deal with non-agricultural lands specially in urban areas.

14. In *All India Film Corporation v. Raja Gyan Nath*<sup>6</sup>, the question was in respect of lease of a cinema house granted by the mortgagee with possession. It is necessary to refer here to the facts of the case. One Azim Baksh was the original owner of the property in dispute known as Odeon Cinema, which was formerly known as Chitra Cinema. Azim Baksh migrated to Pakistan in 1947 and before his migration, he had mortgaged it with possession with Malawa Ram and Gainda Mal. On January 22, 1946, Azim Baksh took the building on lease for eleven months from the mortgagees and executed a rent-note. A few days later the rent note was cancelled with the endorsement that the rent for a month be included in the mortgage money and the mortgagees were allowed to carry on the aforesaid cinema or lease it out to any body else. In 1951 the mortgagees leased it to appellant No. 1 for a period of five years in the first instance and it was agreed that it was renewable for ten years by yearly renewals. It was also agreed that renewal on old terms could not be refused and the lessees were to enjoy full rights of using it whether it be through agents or in partnership or by sub-leasing. Appellant No. 1, equipped the cinema with machinery, etc, and sub-leased it to other defendants in 1952.

15. Malawa Ram and Gainda Mal partitioned their property and the building fell to the share of Gainda Mal. He applied for separation of his interest under Evacuee Interest-Separation Act, 1951 and the competent officer by his order, dated August 25, 1955, after determining the mortgage charge ordered the sale of the building with another plot and the same was purchased by respondent No. 1 on December 3, 1955. The mortgage charge was paid off on April 19, 1956. Thereafter respondent No. 1 filed a suit for possession of the property from the head lessee and the sub-lessee and for mesne profits. The sub-lessee claimed the benefit of the East Punjab Urban Rent Restriction Act of 1949. It may be pointed out that when the rent-note executed by Azim Baksh was cancelled on 8-2-1946 the endorsement made on the rent-note was as follows :

"With the consent of Lala Gainda Mal, the said rent-deed has been cancelled. Rent for one month may be included in the mortgage amount. The mortgagees are

<sup>6</sup>(1969)3 SCC 79

entitled to carry on the aforesaid cinema in any way they like or may give the same on lease to any body else. I shall have no objection." In the light of the second question which has been referred to us the wording of this endorsement is material. The judgment of the Supreme Court was delivered by Hidayatullah, C.J., and in paragraph 7, he observed that the first question to consider was whether the tenancy created by the mortgagee in possession survived the termination of the mortgagee interest so as to be binding on the purchaser. Then he observed...

"A general proposition of law is that no person can confer on another a better title than he himself has. A mortgage is a transfer of an interest in specific immovable property for the

purpose of securing repayment of a loan. A mortgagee's interest lasts only as long as the mortgage has not been paid off. Therefore, on redemption of the mortgage the title of the mortgagee comes to an end. A derivative title from him must ordinarily come to an end with the termination of the mortgagee's title. The mortgagee by creating a tenancy becomes the lessor of the property but his interest as lessor is coterminous with his mortgagee interest. Section 111(c) of the Transfer of Property Act provides that a lease of immovable property determines where the interest of the lessor in the property terminates on or his power to dispose of the same, extends only to the happening of any event - by the happening of such event. The duration of the mortgagee's interest determines his position as the lessor. The relationship of lessor and lessee cannot subsist beyond the mortgagee's interest unless the relationship is agreed to by the mortgagor or a first relationship is recreated. This the mortgagor or the person succeeding to the mortgagor's interest may elect to do. But if he does not, the lessee cannot claim any right beyond the terms of his original lessor's interest. These propositions are well-understood and find support in two rulings of this Court in Mahabir Gopi v. Harbans Narain (supra), and Asa Ram v. Mst Ram Kali (supra)."

In paragraph 8 he observed –

"To the above proposition there is, however, one exception. That flows from Section 76(a) which lays down liabilities of a mortgagee in possession. It is provided there that when the continuance of the mortgage, the mortgagee takes possession of the mortgaged property, he must manage the property as a person of ordinary prudence would manage it if it were his own. From this it is inferred that acts done *bonafide* and prudently in the ordinary course of management, may bind even after the termination of the title of the mortgagee in possession. This principle applies ordinarily to the management of agricultural land and has seldom been extended to urban property so as to tie it up in the hands of lessees or to confer on them rights under special statutes. To this again there is an exception. The lease will continue to bind the mortgagor or persons deriving interest from him if the mortgagor had concurred to grant it."

(Emphasis supplied by us).

So far as the second question referred to us is concerned, it will have to be approached in the light of these words underlined by us viz., "if the mortgagor had consented to grant it". The Supreme Court on the facts of the case pointed out that the house was a house in the City of Jullundur suitable for a cinema theatre. On examining the facts the Supreme Court found that it could be held that such a long lease on such a small rent was an act of prudence whether it was a *bonafide* act or not, and whether the exception can apply to urban property. It is clear, therefore, that in this case All India Film Corporation v. Raja Gyan Nath, (supra), the Supreme Court recognised that the general rule was that on redemption of a mortgage with possession, the rights

of the tenant inducted into the property by a mortgagee with possession tenant would come to an end. To this general rule the Supreme Court recognized the exception which arose in a situation contemplated by Section 76(a), namely, when the lease was granted in respect of agricultural lands by a mortgagee with possession. The Supreme Court pointed out that this exception contemplated by Section 76(a) of the Transfer of Property Act applied ordinarily to management of agricultural lands and had seldom been extended to urban immovable property so as to tie it up in the hands of lessees or so as to confer on them rights under special statutes. The Supreme Court examined the facts of the case with a view to finding out whether it was such a lease as an owner of property in the course of prudent management of his own property would grant but even after examining that position, the Supreme Court made it clear that they were examining the position irrespective of the question whether this exception under Section 76(a) could apply to urban property. It is, therefore, clear that the examination of the facts of the case in order to find out whether the lease was such as a prudent owner would have granted under the prudent management of his own property was being examined irrespective of the question whether the exception under Section 76(a) to the general rule could apply to urban immovable property and thus the Supreme Court in no way by examination of the facts from this particular angle of the act of a prudent owner modified from its earlier statement that the exception under Section 76(a) ordinarily applies to the management of agricultural lands and has seldom been extended to the Urban property. In our opinion the words "has seldom been extended to urban property" have been used by the Supreme Court to point out that this exception has not been extended to urban property. As regards what is meant by the mortgagor concurring to grant the lease, it may be pointed out that on the facts of the particular case, the mortgagor had in terms by the endorsement made on February 8, 1946 as pointed out above, stated that the mortgagees were entitled to carry on the aforesaid cinema in any way they like or might give the same on lease to anybody else and that the mortgagor would have no objection. This clear mention in the relative document by the mortgagor that the mortgagees could give the property on lease to anybody else was not construed by the Supreme Court as a concurrence by the mortgagor in granting the lease which ultimately the mortgagees came to grant lease to the head lessees in the particular case. It may be also pointed out at this stage in the light of the third question which has been referred to us that the Supreme Court held on examination of the provisions of the relevant rent restriction Act, namely, the East Punjab Urban Rent Restriction Act, 1949 –

"The termination of the mortgagee interest terminated the relationship of landlord and tenant and it could not, in the circumstance be said to run with the land. There being landlord and no tenant the provisions of the rent Restriction Act could not apply any further. Nor it could be said that when the mortgagor cancelled the rent note and authorised the mortgagee to find any other tenant, the intention was to allow expressly a tenancy beyond the terms of the mortgage."

Thus the endorsement of February 8, 1946 was read by their lordship of the Supreme Court as not conferring a special power on the mortgagee to create a lease which would be binding on the

mortgagor after the redemption of the mortgage or beyond the terms of the mortgage. On the facts of the case, the Supreme Court held that the lease came to an end with the termination of mortgagee's interest in the property. Under these circumstances, on the termination of the mortgage in the events that had happened in that particular case, the Supreme Court held that since there was no landlord and no tenant, the provisions of the Rent Restriction Act could not apply beyond the date of the termination of the mortgagee's interest.

16. In *Sachalmal Parasram v. Ratanbai*<sup>7</sup>, the Supreme Court was again concerned with a tenant inducted on urban immovable property by mortgage in possession during the subsistence of the mortgage and the two questions before the Supreme Court were whether the tenant was protected by the provisions of Section 76(a) of the Transfer of Property Act and secondly, whether he was protected by the provisions of the M.P. Accommodation Control Act, 1961. Sikri, C.J., delivering the judgment of the Supreme Court pointed out the different passages from the earlier decisions in All India Film Corporation's case (supra), and the passage cited above from that namely, that the principle of Section 76(a) applied ordinarily to the management of agricultural lands and had seldom been extended to urban property so as to tie it up in the hands of lessees or the confer on them rights under special statutes was cited and followed. The Supreme Court pointed out that the definitions of the words "tenant" and "landlord" in the Madhya Pradesh Accommodation Control Act were similar to the definitions of those words occurring in East Punjab Urban Rent Restriction Act, 1949 with which the Supreme Court was concerned in All India Film Corporation's case and in paragraph 8 Sikri, C.J., observed –

"We may mention that the same view was taken by the Bombay High Court in *Kamlakar & Co. v. Gulamshafi*<sup>8</sup>, and *Bhaushali Khushlachand Shamji v. Shah Shamji Jivraj*<sup>9</sup>,

Thus, even in this case of urban property though the Supreme Court had examined the question whether the lease was such as a prudent owner would have granted, yet it cited the passage from All India Film Corporation's case to the effect that the case was being examined irrespective of the question whether Section 76(a) would apply to urban property or not. In our opinion, therefore, the legal position that clearly emerges from these different decisions of the Supreme Court is as follows :

"(1) The general proposition of law is that no person can confer on another a better title than he himself has and hence a mortgagee whose interest lasts only so long as the mortgage has not been paid off, cannot as a mortgagee in possession create a right in the tenant inducted by him to continue in possession beyond the period of redemption, that is beyond the termination of the mortgagee's interest. The derivative title from him must ordinarily come to an end with the termination of the mortgagee's title.

(2) Under the general rule mentioned above, the mortgagee by creating a tenancy

<sup>7</sup>1970 SCR 203 : AIR 1972 SC 637

<sup>9</sup> AIR 1958 Bom 53

<sup>8</sup> AIR 1963 Bom 42

becomes a lessor of the property but his interest as a lessor is coterminous with his mortgagee interest and by virtue of Section 111(c) of the Transfer of Property Act, the duration of the mortgagee's interest determines his position as the lessor. The relationship of lessor and lessee cannot subsist beyond the mortgagee's interest unless the relationship is agreed to by the mortgagor or a fresh relationship is created.

(3) To these propositions an exception is carved out by Section 76(a) of the Transfer of Property Act. Though on the language of Section 76(a) it is an obligation cast on the mortgagee, as pointed out in *Asa Ram v. Mst. Ram Kali* (supra), the authorities have held that an agricultural lease created by the mortgagee would be binding on the mortgagor even though the mortgage has been redeemed provided it is of such a character that a prudent owner of property would enter into it in the usual course of management. This exception carved out by Section 76(a) has been applied ordinarily to the management of agricultural lands and has seldom been extended to urban property so as to tie up in the hands of lessees or to confer on them rights under special statutes.

(4) When the mortgagor has either in the deed of mortgage or elsewhere stated that the mortgagee with possession may use the property in any way he likes or may give the same on lease to anyone else, such authorization to the mortgagee to let out the property to another tenant does not amount to any intention to allow expressly tenancy beyond the terms of the mortgage and a tenancy created by the mortgagee with possession under such authorization cannot create a tenancy which would enure beyond the terms of the mortgage.

(5) Once the mortgagee's interest terminates, the relationship of landlord and tenant comes to an end and there being no landlord and no tenant unless there is something special in the provisions of the particular Rent Restriction Act so far as urban immovable property is concerned, those provisions could not apply and would not confer any protection in the tenant inducted by the mortgagee during the subsistence of the mortgage with possession".

17. Our conclusion regarding this legal position is supported by the comments in Sir Dinsha Mulla's Textbook on the Transfer of Property Act, Sixth Edition. After pointing out the different decisions of the Supreme Court which we have referred to above, the Editor observes at page 528 :

"It is respectfully submitted that the position could be more satisfactorily stated with reference to the language of clause (a) (of Section 76). The right conferred by that clause is to manage the property during the subsistence of the mortgage. It is unlikely that a prudent manager would create a lease for a period longer than the mortgage or in circumstances which would give the lessee rights after the redemption of the mortgage. Such leases would *prima facie* be imprudent, and not binding on the mortgagor as beyond

the powers conferred by clause (a). If, however, it can be shown in any given case that such a lease was prudent, it would bind that mortgagor, even after redemption, and even though the lessee acquired thereunder rights of a permanent or quasi-permanent nature. No question of imprudence can arise where, as in *Prabhu v. Ramdeo*, (supra), the rights of the tenant were enlarged by Tenancy legislation enacted after the tenants were put in possession by the mortgagee. It is submitted that this statement of the law is consistent with all the Supreme Court decisions quoted above. It has been held, following the above-quoted Supreme Court decisions that a tenant of a mortgagee in possession cannot resist eviction by the mortgagor by relying on the Rent Act".

and the two decisions of the Bombay High Court in *Kamlakar & Co. v. Gulamshafi* (supra), and *Bhaushali Khushalchand Shamji v. Shah Shamji Jivraj*, (supra), are referred to in support of the proposition.

18. In our opinion, on the general aspect of the matter based on facts of which judicial notice can be taken, it is clear that so far as leases of agricultural lands are concerned, when a lessee cultivates land by the very process of cultivation he brings inputs and improves the fertility of the soil. Constant and continuous cultivation by proper manuring etc. would improve the fertility of the soil and on the determination of the lease, that fertility would still remain in the land. It is, therefore, necessary that security of tenure should be given to the tenant of agricultural land so that by his proper husbandry and agricultural practices, he himself may derive good benefits from the land and also improve the fertility of the soil. It is because of this aspect that in all countries legislation has been enacted to protect the actual tiller of the soil; fixity of tenure has been given and all the different measures of tenancy legislative regarding agricultural lands have provided for sufficiently long leases and protection of his tenure so as to induce the agriculturists to put on his best efforts and best inputs as they are called now-a-days, during the terms of the lease. A prudent owner of property would, therefore, see to it that the terms of lease which he grants in respect of agricultural land is sufficiently long to induce the tenant to put in the best efforts which would incidentally benefit the owner of the land by improving the fertility of the land itself. In contrast to the agricultural lands, so far as non-agricultural and urban lands are concerned, on determination of the lease the tenant who has been on the property under the terms of the lease is bound to put back the property in the condition in which it was at the time when he entered into possession and nothing is naturally done by the tenant which is likely to improve the quality of the said property by his own efforts put in during the term of the tenancy. There is, therefore, no question of a prudent owner of urban immovable property granting a long term lease merely with a view to improve the quality of the land. Barring Rent Control and Rent Restriction Acts which deal with urban immovable property, in areas where there is a scarcity of accommodation both for residential and non-residential purposes, there is no concept of protection to tenants of urban immovable property. We are of opinion that this is the rationale behind the distinction which the Supreme Court has pointed out between leases of agricultural lands and leases of urban immovable property while dealing with the provisions of Section 76(a)

of the Transfer of Property Act, whereas a prudent owner would not ordinarily speaking think of creating a long term lease purely as a matter of prudent management, an owner of agricultural land in the course of prudent management, would create a long term lease purely from the aspect of prudent management. In our opinion, therefore, the words "seldom" used by Hidayatullah, C.J., In all India Film Corporation's case (supra), while dealing with the application of the exception carved out of Section 76(a) to urban immovable property has to be read as not being extended at all and it is merely a turn of the phrase to say that this exception has seldom been extended to urban immovable property.

19. We will consider the two decisions one of a Single Judge of the Bombay High Court and another of the Division Bench of the same High Court which were approved by the Supreme Court in Sachalmal Parasram v. Ratanbai, (supra). The first of those decisions in point of time is Bhaushali Khushalchand Ramji v. Shah Shamji Jivraj, (supra). The decision was by M.C. Shah, J., sitting singly at Rajkot. The learned Judge was dealing with certain shop premises situated in a town in Kutch District. A mortgage with possession was created and the question was whether the tenant inducted by the mortgagee during the subsistence of the mortgage can be evicted by the mortgagor after the property was redeemed and whether the provisions of the Bombay Rent Restriction Act would protect such a tenant. Shah, J., relying upon the decision of the Supreme Court in Mahabir Gopi v. Harbans Narain, (supra), and the observations in that case held that Sections 76(a) and (e) of the Transfer of Property Act do not empower the mortgagor to create a lease of the mortgaged property which is to enure beyond the period of redemption and it is quite clear that under Section 111(c) of the Transfer of Property Act which the interest of the mortgagee comes to an end the lease created by him also determines, though as laid down in Mahabir Gopi's case this is subject to any rights that might be conferred or created on the tenant by any statute. After examining the provisions of Section 5(3) of the Rent Act whereby the word "landlord" is defined, Shah, J., held that it could not be seriously contended by the tenant that the mortgagee was entitled to receive rent from him but the tenants were payment and were liable to payment to the first defendant, that is the original mortgagee and if it were urged that they were liable to pay rent to the plaintiffs as well then they would be subjected to a double liability for paying rent, which clearly not contemplated. The relationship of lessor and lessee was between the mortgagee and defendant Nos. 2 to 4, the tenants. The owner of the property which was the sublet of a mortgage with possession could not by stretch of reasoning, be considered a landlord of the mortgagee's tenants within the meaning of Section 5(3) of the Rent Act. He cannot certainly claim rent from the tenants of the mortgagee nor is the tenant liable to pay it to him. Shah, J. examined the definition of the word "tenant" under Section 2(11) of the Rent Restriction Act and held that the essential requirement for the creation of a relationship of landlord & tenant is that the former should be receiving or be entitled to receive rent from the latter and the latter should be liable to pay the same to the former, and in the particular case before him, that requirement was lacking because quite evidently the mortgagors were not receiving nor was here any direct contract between them and the tenants entitling them to receive rent from the tenants and the tenants were not liable to pay any rent to the mortgagors. Therefore, no relationship of

landlord and tenant existed between them. The decision in *Som Nath v. L.D. Desai*<sup>10</sup>, was relied upon & the decision in *Hardei v. Wahid Khan*<sup>11</sup>, was distinguished.

20. In *Kamlakar & Co. v. Gulamshafi*, (supra), a Division Bench of the Bombay High Court consisting of Patel and Palekar, JJ. accepted this decision of Shah, J., in *Bhaushali Khushalchand Ramji v. Shah Shamji Jivraj*, (supra), as correct. The Division Bench held that there is no provision in the Bombay Rent Act under which any rights as such are conferred on the tenant. Section 12 of the Rent Act does not give tenant a right to remain

<sup>10</sup> AIR 1951 Pun 404

<sup>11</sup> AIR 1954 All 16

in possession of the properties, but it imposes a disability on the landlord and unless the person who seeks to recover possession is brought within the definition of the word "landlord" the tenant cannot claim possession; after redemption there is no relationship either contractual or by privity of estate between the mortgagor and the tenant; he not being a landlord, Section 12 does not come in his way of recovering possession. In this connection the Division Bench relied upon observations of the Supreme Court in *Mahabir Gopi v. Harbans Narain* (supra), and of an earlier decision of the Calcutta High Court in *Pramatha Nath v. Shashi Bhushan*<sup>12</sup>, and distinguished the decision of the Allahabad High Court in *Hardei v. Wahid Khan*, (supra), and of the Madras High Court in *Chinnappa Thevan v. Pazhaniappa Pillai*<sup>13</sup>, 'It must be borne in mind that the definitions of the words "landlord" and "tenant" as occurring in the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, have remained unchanged and the definitions with which we are concerned today are identical with the definitions which were before Shah, J. in *Bhaushali Khushalchand v. Shah Shamji Jivraj* (supra), and before Patel and Palekar, JJ. in *Kamlakar & Co. v. Gulamshafi*. The Division Bench in *Kamlakar & Co. v. Gulamshafi* has pointed out at page 44 that the definition of the word "tenant" was very widely worded and might possibly include even a tenant in possession of the premises when the tenant was inducted by a mortgagee with possession and when he continued to remain in possession of the premises on determination of the lease by redemption of the mortgage or on termination of the mortgagee's interest in the mortgaged property. However, the Division Bench relied upon the definition of the word "landlord" contained in Section 5(a) of the Bombay Rent Hotel and Lodging House Rates Control Act and pointed out that Section 12 did not give the tenant a right to remain in possession of the properties, but imposed a disability on the landlord and unless the person who sought to recover possession was said to be a "landlord" within the definition of that word, the tenant could not claim possession. On behalf of the different tenants appearing before us, Mr. M.D. Pandya on behalf of the respondents in Letters Patent Appeal No. 52 of 1972. Mr. D.D. Vyas on behalf of the appellants in Letters Patent Appeal No. 201 and 1971, Mr. Takwani, Mr. S.B. Majumdar and Mr. V.J. Desai learned advocates appearing for the different interveners in this case, urged that while examining the definition of the word "landlord" the Division Bench in *Kamlakar & Co. v. Gulamshafi* had not considered the second category falling within the definition of the word "landlord" in Section 5(3) of the Bombay Rent Act. Section 5(3) of the

Bombay Rent Act is in these terms :

"Landlord" means any person who is for the time being, receiving, or entitled to receive, rent in respect of any premises whether on his own account or on account, or on behalf, or for the benefit of any other person or as a trustee, guardian or receiver, for any other person or who would so receive the rent or be entitled to receive the rent if the premises were let to a tenant; and includes any person not being a tenant who from time to time derives title under a landlord; and further includes in respect of his sub-tenant a tenant who has sublet any premises."

An analysis of this definition clearly shows that this definition covers four different categories of persons. Category (1) is of a person who is for the time being, receiving, or

<sup>12</sup> AIR 1937 Cal 763

<sup>13</sup> AIR 1916 Mad 901

entitled to receive rent in respect of any premises. He may be receiving or entitled to receive such rent either on his own account or on account or on behalf, or for the benefit of any other person or as trustee, guardian, or receiver for any other person. Category (2) covers person who would receive the rent, or who would be entitled to receive the rent in respect of any premises, whether on his own account, or on account or on behalf of any other person or as a trustee, guardian, or receiver for any other person if the premises were let to a tenant. This second category, in our opinion, contemplates a class of persons who are not actually receiving or who are not actually entitled to receive rent in presenti but who would receive or who would be entitled to receive the rent if the premises were let to a tenant. That is, it covers the category of persons who may in the event of the premises being let out to a tenant become entitled to receive the rent or who would receive the rent. The third category covers persons who are not tenants but who from time to time, derive title under the landlord concerned and the category covers tenants who have sublet the premises and *qua* the sub-tenant the tenant would be the landlord. It has been seriously contended by Messrs M.D. Pandya, D.D. Vyas, C.K. Takwani, S.B. Majumdar and V.J. Desai that the second category of persons covers the owner of the property who by virtue of his ownership is a person who would receive or who would be entitled to receive rent if the premises were let to a tenant. In connection with this category of persons, an attempt was made by Mr. Pandya to contend that the word 'if the premises were let to a tenant' indicates a situation that happened in the past and, therefore, if in the past the premises had been let out, the owner of the property would still continue to be the landlord. In our opinion, the words "if the premises were let out to a tenant" are merely correct grammatical for expressing a situation which would arise in the event of premises being let to a tenant. The hypothetical situation would arise if the premises were let to a tenant though in fact they are not let. The correct grammatical meaning so far as use of language to cover second category is, in our opinion, that only those persons who would receive the rent in the event of the premises being let out on a future occasion or who would be entitled to receive the rent in similar eventuality would be covered in the covered in the second category. Now the very concept of letting out to a tenant and the concept of the word "rent" covered under the Transfer of Property Act deal with a situation where in the first instance a

contractual relationship between the landlord and the tenant arises, and unless and until a stage of that contractual relationship first arises, there cannot be said to be any "rent" and there cannot be said to be any letting out. There is no definition in the Bombay Rent Act of the words "rent" or of "letting" and, therefore, these words as used in Section 5(3) must be given their ordinary meaning as occurring under the Transfer of Property Act. Under Section 105 of the Transfer of Property Act a lease of immovable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms. The second paragraph of Section 105 indicates that the money, share, service or other thing to be so rendered periodically is called "rent". It is obvious that Section 106 of the Transfer of Property Act contemplates a contractual tenancy and the definition of the word "tenant" in Section 5(11) of the Bombay Rent Act covers persons by whom or on whose account rent is payable for any premises and includes any person remaining, after the determination of the lease in possession, with or without the assent of the landlord, of the premises leased to such person. As pointed out by Hidayatullah, C.J., in All India Film Corporation's case (supra) the termination of the mortgagee's interest terminates the relationship of landlord and tenant and since it cannot be said that there is tenancy running with the land there would be no landlord and no tenant. There is nothing, in our opinion, in the definition of the word "landlord" particularly as regards the second category which would give the protection of the Bombay Rent Act to a tenant inducted by the mortgagee with possession during subsistence of the mortgage when protection is sought by such a tenant against the mortgagor after the mortgagee's interest has come to an end. It is true that in Kamlakar & Co, v. Gulamshafi, (supra) as appears at page 44 of the report in paragraph 4, the specific attention of the Division Bench consisting of Patel and Palekar, JJ. was not drawn to the second category of 'landlords' as defined by Section 5(3) of the Bombay Rent Act. However, we find that in Bhaushali Khushalchand v. Shah Shamji Jivraj (supra) Shah, J., has in paragraph 7 referred to and set out the entire definition of 'landlord' occurring in Section 5(3) and even this second category is occurring in the definition so set out, and still he held that the mortgagor would not be falling within the definition of the word "landlord" *qua* the persons who have been inducted as tenants by the mortgagee with possession during the subsistence of the mortgage. Once it is held that the tenant inducted by the mortgagee with possession did not continue to be a tenant on the termination of the mortgagee's interest it must necessarily follow that there is no scope of relationship of landlord and tenant either under the general law or under the special definition set out in the Bombay Rent Act and, therefore, the protection afforded to the tenant under Section 12 or any other provisions of the Act is not available to such a tenant.

21. We may mention at this stage that Messrs Pandya, D.D. Vyas C.K. Takwani S.B. Majumdar and V.J. Desai urged before us that it would be very difficult to conceive of a situation in which the provisions of the Bombay Rent Act would cover the second category of persons in the definition of "landlord". We are not concerned in the present case as to in what possible situation this second category of persons occurring in the definition of the word "landlord" in Section 5(3)

of the Act would come within the ambit of any of the provisions of this Act. What we are concerned with is a situation as between a mortgagor after the redemption of the mortgage with possession and a tenant inducted by the mortgagee with possession during the subsistence of the mortgage. In view of the decisions of the Bombay High Court in *Bhanshali Khushalchand v. Shah Shamji Jivraj* (supra) and *Kamlakar & Co. v. Gulamshafi* (supra), which deal with the provisions of this very statute and in view of the fact that these two decisions have been approved by the Supreme Court in *Sachalmal Parasram v. Ratanbai*, (supra) it is not open to us in the present case to hold that a tenant inducted by the mortgagee with possession during the subsistence of the mortgage can claim protection of the provisions of the Bombay Rent Control Act after the determination of the mortgagee's interest either by redemption or in any other manner.

22. At this stage we may mention that V.R. Shah, J. of this Court in Second Appeal No. 241 of 1966 decided by him on February 19, 1968 has held in the light of the decision in *Bhanshali Khushalchand v. Shah Shamji Jivraj* (supra) and *Kamlakar & Co. v. Gulamshafi* (supra), that the provisions of the Bombay Rent Control Act, 1947 would not protect a tenant of the type we are dealing with in the present case. The same view was also taken by A.D. Desai, J., sitting singly Appeal No. 839 of 1964 decided by him on December 3, 1968. A.D. Desai, J., in this case also came to the same conclusion as V.R. Shah, J., and specifically referred to said decision. J.M. Sheth, J., in First Appeal No. 577 of 1965 which is under appeal in Letters Patent Appeal No. 201 of 1971 has also taken the same view as V.R. Shah, J. and A.D. Desai, J.

23. In Second Appeal No. 254 of 1965 decided by one of us (D.A. Desai, J.) on April 9, 1969, the question before the Court was as to the rights of a tenant to whom the property in respect of which he was a tenant had been mortgaged by the owner of the property. The mortgage was a usufructuary mortgage and the right of redemption was purchased by an outsider and the purchaser of the right of redemption filed a suit for redemption of the mortgage and possession of the mortgaged property. The question arose as to the rights of the parties, that is, the purchaser from the mortgagor on redemption of the mortgaged property and the tenant and it was contended that on redemption of the mortgage the tenancy was revived and therefore decree for actual possession could not be passed against him. The question before the Court was not regarding the tenant inducted on the property by a mortgagee with possession and therefore, that decision cannot help us. Under these circumstances that decision has very little bearing on the question that arises for our consideration.

24. In *Patel Atmaram v. Patel Babubhai*<sup>14</sup>, the question was of mortgage of agricultural land and tenant was in possession even prior to the creation of the mortgage. He was a sitting tenant for more than six years before the date of the transaction and the mortgage was created in favor of the sitting tenant by the owner of the property. Our learned brother M.P. Thakkar, J. held that there was no inconsistency or incompatibility in one person being the tenant and mortgagee of the same property. All that happens in such a case is that instead of paying the rent to the

landlord he adjusts it against the amount claimable by him as a mortgagee from the landlord. I would be unreasonable to attribute to a tenant the intention to surrender the tenancy and to invoke the sophisticated doctrine of implied surrender when the unsophisticated and ignorant (often illiterate) tenant knows nothing about it. The question before our learned brother was not regarding a tenant of non-agricultural land or urban land inducted by a mortgagee with possession during the subsistence of the mortgage and, therefore, it is not necessary to consider that decision further in the course of this judgment.

25. Our learned brother J.B. Mehta, J. has in *Vohra Habsu v. Chhaganlal*<sup>15</sup>, dealt with a case similar to the one before us. In that case our learned brother was dealing with a case of a tenant inducted on urban immovable property by a mortgagee in possession and on redemption of the mortgage whether Khas, that is actual possession should be given to the mortgagor on redemption of the mortgage or whether such possession as the property was capable of should be given. Our learned brother held on construction of the mortgage document before him that by the very words of the document of mortgage an express power was conferred by the mortgage deed enabling the mortgagee with possession to induct a tenant and to recover rent from him thereof and, therefore, according to our learned brother, after redemption of the mortgage the tenancy thus created by the mortgagee with possession would be binding on the mortgagor. In paragraph 1 of the judgment our learned brother pointed out that under the terms of the mortgage deed in question it was provided that possession was delivered of the house in question and the mortgagees could use or let the suit property or get the rental income in lieu of interest. It

<sup>14</sup> AIR 1975 Guj 120

<sup>15</sup> AIR 1973 Guj 203

may be pointed out that against this decision of J.B.

Mehta, J. a Letters Patent Appeal has been filed under certificate granted under Clause 15 and that Letters Patent Appeal has been pending and Mr. R.M. Christi has intervened in the present case and has supported the contention urged before us by Mr. B.J. Shelat on behalf of the appellant in Letters Patent Appeal No. 52 of 1972. A.A. Dave, J. in his judgment which is under appeal in Letters Patent Appeal No. 52 of 1972 and J.B. Mehta, J., have both construed words permitting the mortgagee with possession to let out the mortgaged property as an express power conferred by the mortgagor on the mortgagee thus indicating concurrence of the mortgagor in the creation of the tenancy by the mortgage with possession and it has been held by A.A. Dave, J. and by J.B. Mehta, J. that these words occurring in the mortgage deed concerned carves out an exception to the general rule that on redemption of the mortgage with possession the tenancy of a tenant inducted by the mortgagee during the subsistence of the mortgage does not bind the mortgagor. In our opinion this interpretation of words occurring in the mortgage deed or in any document even subsequent to the deed of mortgage executed between the mortgagor and the mortgagee permitting the mortgagee to induct a tenant, do not amount to a special power conferred upon the mortgagee of the type which would constitute an exception to the general rule stated above. As pointed out by Hidayatullah, C.J., in *All India Film Corporation's case* (supra),

the words said to constitute such authorization must show the intention to allow the mortgagee expressly to create a tenancy beyond the terms of the mortgage and unless such intention clearly emerges from the words of the particular document said to be binding on the mortgagor, it cannot amount to a concurrence on the part of the mortgagor to the granting of the particular tenancy by the mortgagee with possession. Mere mention in the deed of mortgage or any subsequent document between the mortgagor and the mortgagee with possession authorizing the mortgagee with possession to let out or create lease in respect of the mortgaged property does not amount to conferment of an express power so as to authorize the mortgagee with possession to create a tenancy which would enure beyond the terms of the mortgage. Therefore, in each particular case whenever the question arises before a Court, the words in order to amount to a concurrence on the part of the mortgagor so as to bind the mortgagor after termination of the mortgagee's interest when there is a mortgage with possession must clearly and indubitably express an intention on the part of the mortgagor to allow the creation of a tenant which would be continuing beyond the period of the mortgage. If such intention does not clearly and indubitably appear from the terms of the mortgage deed or the document executed by the mortgagor in favor of the mortgagee with possession, the words cannot be said to constitute a concurrence on the part of the mortgagor in the action of the mortgagee in granting the tenancy. No such concurrence can be spelt out from the use of general words authorizing the mortgagee with possession to let out the premises or to create a lease in respect of the premises, and if the mortgagee with possession in exercise of such a right induces a tenant on the mortgaged property, the mortgagor is not bound by the lease. As pointed out above, in the case before the Supreme Court in All India Film Corporation's case in terms the cancellation of the rent note on February 8, 1946 allowed the mortgagee to carry on the business of the cinema in any way they liked or to give the same on lease to anybody else and words of such authorization were held by the Supreme Court not be constitute a concurrence on the part of the mortgagor in granting the particular tenancy and it was held that these words did not show an intention to allow expressly the creation of a tenancy beyond the terms of the mortgage. In view of this clear pronouncement of the Supreme Court in All India Film Corporation's case (supra), we are unable to agree with J.B. Mehta, J. in *Vohra Habsu v. Chhaganlal* (supra) and with A.A. Dave J. in his decision in second Appeal No. 1028 of 1965 which is under appeal in Letters Petent Appeal No. 62 of 1972 that these words generally authorizing the mortgagee with possession to induct a tenant during the subsistence of the mortgage amounts to such a concurrence on the part of the mortgagor to the creation of a tenancy as would bind the mortgagor after the property is redeemed or the mortgagee's interest comes to an end.

26. We may point out that a Full Bench of the Punjab High Court in *Jagan Nath v. Mattar Sain*<sup>16</sup>, has after examining all the cases decided till then formulated the following propositions of law. Mahajan, J. delivering the main judgment with which the other two Judges agreed has formulated the points at paragraph 12 at page 109 :-

(1) A tenant of a mortgagor, after the mortgage necessarily attorns to the mortgagee and

thereby becomes a tenant of the mortgagee, unless his tenancy has been put an end to by the mortgagor at the time of effecting the mortgage. On the redemption of the mortgage, he again is relegated to his position of a tenant of the mortgagor.

(2) The mere execution of rent-note by the tenant of the mortgagor in favor of the mortgagee, after the mortgage has been effected, does not create a fresh tenancy in favor of the mortgagee. But there is nothing to prevent the tenant to surrender his earlier tenancy and enter into a fresh contract of tenancy with the mortgagee, and in each case, it will have to be determined on evidence, whether a tenant of the mortgagor did surrender his tenancy and obtained a fresh tenant from the mortgagee after the mortgage came into being.

(3) That a tenant inducted by the mortgagee remains a tenant during the continuance of the mortgage and on the redemption of the mortgage and tenancy comes to an end.

(4) That in the case of agricultural tenancies proposition No. (3) does not absolutely hold good. There is an exception to it namely that the tenant of a mortgagee of agricultural land will continue to be its tenant even after redemption provided he has been inducted *bonafide* in the like manner as a prudent owner would have done for proper management of the land. Even in such a case, the operation of the lease cannot extend beyond the period for which it was granted. No lease can be granted if there is an express prohibition in the mortgage deed. The onus to prove the exception is on the tenant and unless a clear case is made out in favor of the exception, the general rule will prevail.

(5) That it is open to a mortgagor to permit the mortgagee to induct tenants even beyond the terms of the mortgage; and if the mortgagee does so, on redemption, they will continue to be the tenant of the mortgagor.

The conclusions reached by the learned Judges of the Punjab High Court are on the same lines as the conclusions reached by us and we find that our conclusions are supported by this decision of the Full Bench of the Punjab High Court.

<sup>16</sup>1969 RCR 374 : AIR 1970 Pun and Har. 104 (FB)

27. In view of the conclusions that we have reached above, with respect, we are unable to agree with the decisions of the Allahabad High Court in *Habib Seth v. Kashi Nath*<sup>17</sup>, (All.) and the decision of a Full Bench of that High Court in *Tajammul Hussain v. Mr. Khan*<sup>18</sup>, The Allahabad High Court in these two decisions has held that Section 76(a) of the Transfer of Property Act applies not only to agricultural lands but also to urban immovable property and it is because of the application of Section 76(a) which constitutes an exception to the general rule that the Allahabad High Court has come to the above conclusion. With respect to the learned Judges of the Allahabad High Court, we are unable to agree with their conclusions because in our opinion the observations of the Supreme Court regarding the non-applicability of Section 76(a) of the Transfer of Property Act to urban immovable property are very clear and hence the provisions of Section 76(a) in our opinion, cannot be invoked in the case of urban immovable property.

28. In view of these conclusions which clearly follow from these decisions, of the Supreme Court

it is not necessary for us to refer to the principles discussed by the Division Bench of the Bombay High Court consisting of Bavdekar and Gokhala, JJ. in *Dinkar Bhagwant v. Rau Babaji*<sup>19</sup>, and the decision of the Full Bench of the Bombay High Court in *Jasvantrai Tricumlal v. Bai Jiwi*<sup>20</sup>, which overruled that decision. In our opinion the points with which we have to deal are directly covered by the different decisions of the Supreme Court and hence it is not necessary to deal with these two decisions of the Bombay High Court.

29. A faint attempt on behalf of the different tenants concerned was made by referring to certain observations of the Supreme Court in *Anand Nivas Ltd. v. Anandji Kalyanji*<sup>21</sup>. It was contended that the following words in paragraph 26 at page 122 of the report clearly help the tenant so far as Section 12(1) of the Bombay Rent Act was concerned. The passage after setting out Section 12(1) of this Act proceeds :-

"For the protection of tenants the clause imposes a prohibition against the landlord against recovery of possession of the premises demised to a tenant so long as he pays or is ready and willing to pay the standard rent permitted increases and also observes and performs the other conditions of the tenancy consistent with the provisions of the Act. A person remaining in occupation of the premises let to him after the determination of or expiry of the period of the tenancy is commonly thought in law not accurately called a statutory tenant. Such a person is not a tenant at all; he has no estate or interest in the premises occupied by him. He has merely the protection of the statute in that he cannot be turned out so long as he pays the standard rent and permitted increases, if any and performs for other condition of the tenancy. His right to remain in possession after the determination of the contractual tenancy is personal; it is not capable of being transferred or assigned, and devolves on his death only in the manner provided by the Statute. The right of a lessee from a landlord on the other hand is an estate or interest in the premises and in the absence of a contract to the contrary is transferable and the premises may be sublet by him. But with the determination of the lease, unless the tenant acquires the right of a tenant holding over, by acceptance of rent or by

<sup>17</sup>1969 RCR 65 : 1969 Rent CJ 161

<sup>19</sup>(1957) 59 LR 101

<sup>18</sup>AIR 1974 All 234

<sup>20</sup>59 Bom. LR 168

<sup>21</sup>(1964)5 Guj. LR 111 : AIR 1965 SC 414

assent to his continuing in possession by the landlord, and the terms and conditions of the lease are extinguished, and the rights of such a person remaining in possession are governed by the statute alone."

It must be pointed out that in the case before the Supreme Court in *Anand Nivas Ltd. v. Anandji Kalyanji* (supra), the main question was whether a statutory tenant has such an interest in the premises let as would enable him to assign his right, title and interest in favor of a third person and the Supreme Court held that the statutory tenant has no estate or interest capable of being assigned or transferred and his statutory right to occupy could not in law be sublet, because a lawful subletting postulates a right to enjoy the property and a right to transfer the same to

another. The observations in paragraph 26 at page 122 of the report torn out of the context in which they were used may on the fact of them appear to help the tenant in the case before us but those observations have to be read in the light of the controversy before the Supreme Court and in our opinion they cannot help the tenant before us.

30. It was urged by Mr. V.J. Desai probable as an argument of dispaity that when a mortgage is redeemed and there is a tenant inducted by the mortgagee with possession during the subsistence of the mortgage, after redemption the mortgagor derives his title from the mortgagee and, therefore, by virtue of the definition of the word "landlord" in the third category, he becomes a landlord for the purpose of the Rent Act. The third category as we have observed above covers persons not being tenant but from time to time deriving title under a landlord. In our opinion, this contention must be rejected because it is the mortgagee who derives title from a mortgagor and not the other way about. The mortgagor was always entitled to the property and out of the total bundle of rights which the owner of property has now in the eye of the law a bundle of rent was carved out and transferred to the mortgagee with possession by way of security of the loan advanced by the mortgagee to the mortgagor. Under these circumstances it is, in our opinion, absurd to urge that a mortgagee confers any title on the mortgagor when the property is redeemed. On the contrary, when the property is redeemed, the mortgagor gets back that which he initially possessed before the creation of the mortgage and there is no question of the mortgagor deriving title from the mortgagee.

31. In the light of the above discussion, we answer the questions referred to us as follows :

(Q. 1.). Section 76(a) of the Transfer of Property Act cannot apply to a case of urban immovable property and hence a lease created by the mortgagee in possession of an urban immovable property would not be binding on the mortgagor after redemption of the mortgage even if it were to be assumed that the lease is such as a prudent owner of property would have granted in usual course of management.

(Q. 2.). If the words of the mortgage deed clearly and indubitably express an intention to allow expressly creation of a tenancy beyond the term of the mortgage, then only the lease created in exercise of the power expressly conferred by the mortgage deed would be binding on the mortgagor. If the words of the mortgage deed do not clearly and indubitably disclose the intention to allow expressly the creation of a tenancy beyond the terms of the mortgage, the mere fact that the mortgage deed authorizes the mortgagee with possession to induct a tenant would not create a tenancy binding on the mortgagor after the redemption of the mortgage. We may at this stage mention that the opening words of Question No. (2) "Whether even apart from Section 76(a) of the Transfer of Property Act" are apt to be misleading and what seems to have been meant while framing this question is whether granting of a lease in exercise of general power expressly conferred on the mortgagee with possession under the mortgage deed would be binding on the mortgagor after the redemption of the mortgage. It may be pointed out that according to the Supreme Court decision in *Asa Ram v. Mst. Ram Kali*, where there is no

prohibition under the mortgage deed expressly prohibiting the mortgagee with possession from granting a lease, the parties will be thrown back on the rights under the Transfer of Property Act and the lessees must still establish that the lease is binding on the mortgagors under Section 76 (a) of the Act. Under these circumstances we answer question No. (2) as indicated above.

(Q. 3.) Our answer to Question No. (3) is that a tenant inducted on the property by a mortgagee with possession when the tenancy of that tenant is not binding on the mortgagor after the redemption on the mortgage, is not protected under the provisions of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947.

32. Both Letters Patent Appeal No. 52 of 1972 and Letters Patent Appeal No. 201 of 1971 will now go back before the Division Bench concerned for decision of the respective matter in the light of the answers given by us to the three questions referred to us.

Reference answered accordingly.