GUJARAT HIGH COURT

Babulal Somalal

Vs.

Kantilal Hargovandas

Civil Revn. Appln. No. 1092 of 1976

(S.H. Sheth and M.K. Shah, JJ.)

13.07.1978

JUDGMENT

S.H. Sheth, J.

1. The plaintiff filed the present suit against the defendant for recovery of possession of the suit premises on the ground that the defendant had been in arrears of rent. The suit premises consists of a shop situate at village Alina in Kaira District. It appears that on 7th May 1964 plaintiff's father purchased from the defendant the entire building of which the suit premises formed a part. The transaction was evidenced by the sale deed Ex. 18. It appears that it was a sale with a condition to re-purchase. On the same day the defendant excited rent note in favor of the plaintiff's father in respect of the suit premises which constitute only a part of the property which plaintiff's father purchased. The rent which was fixed under the rent note Ex. 19 was Rs. 135/- per year. It appears that the defendant paid rent for some time and thereafter became irregular in payment. Therefore, the plaintiff served upon the defendant notice determining his tenancy in respect of the suit premises. The defendant replied to that notice and contended that there was no relationship of landlord and tenant between the parties and that the only relationship which existed between them was that of the mortgagor and the mortgagee. The learned trial Judge upheld the plea raised by the defendant and dismissed the plaintiff's claim for possession. However, he passed in favor of the plaintiff decree for a sum of Rs. 135/- which was the amount of rent in arrears.

2. The plaintiff appealed against that decree to the District Court. The learned Extra Assistant Judge who heard the appeal recorded the same finding and upheld the decree passed by the learned trial Judge. In that view of the matter, he dismissed the appeal.

3. It is that appellate decree which is challenged in this revision application.

4. This revision application came up for hearing before Mr. Justice A.D. Desai on 21st April 1978. It appeared to the learned Judge that there was a conflict between the decision of the High

Court of Bombay in *Harilal Bhagwanji v. Shastri Hemshankar Umiyashanker*[1]. and a decision of this Court in *Jatashanker Fulchand Mehta v. Mavji Trikam*[2], It may be noted that the decision of the High Court of Bombay in Harilal's case (supra) was rendered by a learned single Judge of that Court. The decision of this Court in

[1] AIR 1958 Bom 8

[2]10 Guj LR 600 : (AIR 1969 Guj169)

Jatashanker's case (supra), was rendered by a
Division Bench. However, the reasoning given by the learned single Judge in Harilal's case (supra) appealed to Mr. Justice A.D. Desai and, therefore, he referred this revision application to a larger Bench for reconsideration of the decision rendered by this Court in Jatashanker's case (supra).

5. Before we deal with the merits of the case, we may observe with very great respect to the learned referring Judge, that so far as this Court is concerned, the question has been finally settled. The decision in Harilal's case (supra) rendered by the learned single Judge of the High Court of Bombay (prior to bifurcation) was duly considered by the Division Bench of this Court in Jatashanker's case (supra). The Division Bench of this Court overruled it in part. Secondly, the Division Bench of this Court while doing so followed two decisions of the Privy Council reported in *Saiyid Abdullah Khan v. Saiyid Basharat Husain*[3], and *Mian Feroz Shah v. Sohbat Khan*[4], The decisions rendered by the Privy Council are binding upon the High Courts. They were followed by a Division Bench of this Court in Jatashanker's case (supra). Having done so, they overruled partly the decision of the learned single Judge in Harilal's case (supra). Therefore, the decision rendered by the Division Bench of this Court in Jatashanker's case (supra) could not be reopened for fresh consideration. Even if the Division Bench of this Court had not followed the two decisions of the Privy Council to which we have referred, in view of the fact that the decision of the learned single Judge reported in Harilal's case (supra) was partly expressly over ruled, this case could not have been referred to a Division Bench by the learned single Judge for reopening the controversy and for a fresh decision.

6. However, since we are seized of the matter, we will express our views on merits and decide the controversy which has been raised.

7. The first contention which we are required to deal with relates to the rent note. The rent-note Ex. 19, *inter alia*, provides that the yearly rent of the suit premises shall be Rupees 135/- and that it shall be payable by the defendant to the plaintiff at the expiry of each year. Mr. Shaikh has argued that this recital in the rent-note amounts to reservation of yearly rent in respect of the suit premises and that, therefore, within the meaning of Section 107 of the Transfer of Property Act, 1882, the transaction could have been entered into only under a registered instrument. Section 107 of the Transfer of Property Act provides :

> "A lease of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent, can be made only by a registered instrument."

He has, therefore, argued that the terms of the transaction cannot be inferred from the rent note Ex. 19 though the Court is entitled to look at the rent note for a collateral purpose. In the instant case, determining the nature of possession would be a collateral purpose. The transaction of tenancy evidenced by Ex. 19 does not fail merely because, though compulsorily registrable, it has not been registered. If a document which creates tenancy

[3](1913) 40 Ind App 31

[4]35 Bom LR 877 : (AIR 1933 PC 178)

reserves yearly rent, it cannot be gainsaid that it is compulsorily registrable.

8. A similar question arose before the Supreme Court in *Ram Kumar Das v. Jagdish Chandra Deo*[5], In that case, the tenant had executed a registered 'Kabuliyat' in favour of a Receiver who was in charge of the plaintiff's estate. By that 'Kabuliyat,' the tenant purported to settled the land for building purpose for a period of 10 years at an annual rent. He made the first and second payments of annual rent and made no payments thereafter. Since yearly rent was reserved under the 'Kabuliyat', the 'Kabuliyat' was not an operative document under Section 107 of the Transfer of Property Act. Therefore, the question which arose was whether the tenancy which was created by implication of law was a monthly tenancy under Section 106 of the Transfer of Property Act. The Supreme Court held, on the aforesaid facts, that the tenancy created by implication of law in favour of the defendant was a tenancy from month to month since its inception. Secondly, since the tenancy was not for manufacturing or agricultural purposes, it could be regarded as a tenancy from month to month under Section 106 unless there was a contract to the contrary. It was further observed by the Supreme Court that the stipulation as to payment of annual rent would no doubt raise a presumption that the tenancy was from year to year. But merely because it was contained in an inoperative document, it could not come in the way of raising a presumption under Section 106. A lease for one year certain could not be inferred from the payment of annual rent because to do so would be to substitute a new agreement for the parties which they never intended to do. It is clear from this decision of the Supreme Court that, though rent-note Ex. 19 is inoperative in law because, though it is compulsorily registrable, it has not been registered, it certainly gives rise to a presumption under Section 106 of the Transfer of Property Act that the relationship which was established between the parties was that of landlord and tenant and that it was a monthly tenancy.

9. It has next been argued by Mr. Shaikh that the stipulation as to annual rent cannot be looked at by the Court for the purpose of finding out the rent which was fixed between the parties for the suit premises. It is not necessary for us to look to Ex. 19 for ascertaining the rent which was agreed upon between the parties. Apart from rent note Ex. 19, it is an admitted fact that the rent which was fixed between the parties was Rs. 135/- per year or Rs. 11.25 p. per month. Therefore, so far as the facts of the present case are concerned, absence of registration of rent-note Ex. 19

does not come in the way of the plaintiff in establishing his claim.

10. We now turn to the transaction of conditional sale evidenced by Ex.18. It is necessary to notice some of the recitals therein. It has been in terms stated that defendant's father was selling the property of which the suit premises formed a part subject to the condition that he would have a right to repurchase it within 25 years. The agreement between the parties in regard to the repurchase of the property by the defendant is incorporated in Ex. 18 itself. We are not concerned in this suit with determining the true nature of the transaction evidenced by Ex. 18. However, it prima facie appears to us that it was a transaction of mortgage by conditional sale. Mr. Majmudar who appears on behalf of the plaintiff has expressly proceeded on the assumption that the conveyance Ex. 18 represents a transaction of mortgage by conditional sale though he has not admitted it for all

[5] AIR 1952 SC 23

purposes. He has made that assumption only for the purpose of the present suit. Now, the transaction evidenced by Ex. 18 was entered into on 9th May 1964. The rent note Ex. 19 was also executed on 7th May 1964. It is, therefore, clear that both these acts evidenced by Exs. 18 and 19 were parts of the same transaction. It is difficult to think that they were independent transactions. Nothing has been pointed out to us to show that even though these two transactions were entered into on the same day, they were independent transactions not interlinked with one another.

11. Now, the transaction of conditional sale evidenced by Ex. 18 clearly states that the possession and enjoyment of the property sold under Ex. 18 was handed over to the plaintiff and that he would be entitled to enjoy that property as an owner. This recital contained in Ex. 18 has reference to the delivery of possession of the entire property of which the suit premises only form a part. The rent note Ex. 19 in terms states that the defendant had taken the suit premises from the Plaintiff's father on rent after he had conveyed his title to it to the plaintiff's father. These two documents make it clear beyond any doubt that the defendant handed over to the plaintiff's father the possession of the entire property in pursuance of the transaction evidenced by Ex. 18 and took back the possession only of a part thereof, viz. suit premises in pursuance of the transaction evidenced by rent note Ex. 19. It is an admitted fact that the plaintiff is in possession of the entire property except the suit premises. It is, therefore, clear that in pursuance of Ex. 18, the defendant had delivered to the plaintiff's father possession of the property which he conditionally sold under Ex. 18. It is quite probable that he might not have formally handed over the possession of the suit premises - a part of the entire property - in pursuance of Ex. 18 and entered into its possession in pursuance of Ex. 19. It is quite probable that he might be continuing in possession of the suit premises which is a shop. However, the fact remains that the possession of the entire property except the suit premises was admittedly handed over by the defendant to the plaintiff's father. Bearing these facts in mind, we proceed to examine the contention which has been raised before us and which is as follows :

12. Whether relationship of landlord and tenant could have been created between the parties merely because on the same day on which property was conveyed by conditional sale by the defendant to the plaintiff's father the plaintiff's father let it out to the defendant.

13. We will first turn to the decision of the High Court of Bombay in Harilal's case, (AIR 1958 Bombay 8) the reasoning in which has appealed to the learned referring Judge. In that case, simultaneously with the mortgage a rent note was executed and a portion of the house in the defendant's occupation was leased back to him by the plaintiff for a term of six months. The rent which was stipulated was Rs. 24-4-0. The plaintiff sued the defendant for recovering possession of the said portion and for the arrears of rent on the strength of the rent note. It was contended in defense that the rent note was a nominal document executed for securing payment of interest, that no relationship of landlord and tenant was created and that therefore the plaintiff could not sue for eviction nor for rent on the strength of the rent note. It was held by the learned single Judge of the High Court of Bombay that since the rent which was reserved was equivalent to the (interest on the) mortgage sum, the rent note was a mere device for securing payment in interest. Secondly, he held that since the property was given in security not only for the principal amount but also for the interest accruing thereon, it was a vital factor in support of the defendant's plea that the two documents formed part of one and the same transaction. On the basis of these circumstances, the learned single Judge held that the only inescapable conclusion was that the two documents formed part of one and the same transaction that no relationship of landlord and tenant was at all intended to be created thereby and that none was created. He also held that technically the plaintiff was not entitled to recover any rent as no relationship of landlord and tenant existed between the parties. The learned single Judge referred to a couple of decisions of the Patna High Court and the decision of the High Court of Bombay in that context. However, his attention was not drawn to the two decisions of the Privy Council which, in our opinion, took an exactly contrary view and which were binding upon him.

14. In *Mian Feroz Shah v. Sohbat Khan*[6], the facts of the case were as under. A mortgage with possession was executed in plaintiff's favour for a term of ten years, Possession was not, in fact, taken by the plaintiff, but by a second document of even date, the mortgaged land was leased to the mortgagor for the same term at an annual rent. Mutation was duly recorded in the revenue records on the basis of the mortgage in the plaintiff's name. It was found that possession had remained all along with the mortgagor and that there had been other similar transactions between the parties. It was, therefore, contended that the mortgage should be construed as a simple mortgage. It was also contended that the transaction of mortgage and the transaction of lease back could not co-exist. The Privy Council, upon the aforesaid facts, observed that there could not be anything suspicious about such an arrangement. The mortgagee may well have preferred to leave the cultivation of the land in the hands of the mortgagor, being entitled to take possession at any time if the provisions of the lease were not adhered to. Proceeding further, their Lordships have observed that assuming that the execution of the lease back was one of the conditions upon which mortgage was agreed to, handing back by him of possession to the

mortgagor in the character of lessee was of little significance. Indeed their Lordships also took into account the fact that the reality of the transaction was moreover supported by the mutation in the Government records. In that context, their Lordships observed that Section 92 of the Indian Evidence Act forbids the admission or consideration of evidence as to the intention of the parties or to contradict the express terms of the document. Therefore, their Lordships were of the opinion that there was no reason to construe the mortgage as other than a possessory mortgage and that since the term of lease had expired, the plaintiff in that case was entitled to possession. This decision makes it clear beyond any doubt that there is nothing inconsistent between the transaction of mortgage and the transaction of lease back taking place as the part of one and the same overall transaction.

15. In *Saiyid Abdullah Khan v. Saiyid Basharat Husain*[7]. the facts were as follows. Mortgage of the property in question there, was executed in 1880 and was duly registered. Thereafter the transaction of lease back of that property was entered into between the parties. It was contended on behalf of the mortgagor that the real intention of the parties must be gathered not from the mortgage deed but from the negotiations and conversations alleged to have taken place before the mortgage was executed and from the fact that the mortgagor relinquished mortgaged property which had been released after the date of the

[6]35 Bom LR 877: (AIR 1933 PC 198)

[7](1913) 40 Ind App 31 (PC)

original mortgage. An agreement was concluded between the parties as to the mode in which rents and profits should be dealt with. Their Lordships held that where there is an express and unambiguous stipulation in a mortgage deed that the profits of the mortgaged property shall belong to the mortgagee in lieu of interest it cannot be varied or contradicted by reference to preliminary negotiations. Secondly, under the Indian Evidence Act, effect must be given to it and therefore, the mortgage cannot be treated as usufructuary only in form. Adverting to the simultaneous transactions of mortgage and the lease back, their Lordships observed that there was no inconsistency between these two transactions nor could there be any inconsistency even if the mortgage itself had contained a provision for granting a lease upon the terms on which the lease was actually granted.

16. The observations made by Their Lordships in the last mentioned case go a step further inasmuch as they lay down that there cannot be inconsistency between a mortgage and lease back even if both the transactions are contained in the same document and are not evidenced by two different documents. The learned single Judge who rendered the decision in Harilal's case (AIR 1958 Bombay 8) (supra) did not have the benefit of these two binding decisions. Jatashanker's case, (AIR 1969 Gujarat 169), (supra) came up for hearing before Mr. Justice J.M. Sheth in the first instance. Since the learned Judge found that the question whether the relationship of landlord and tenant was created where there was a possessory mortgage and lease back to the mortgagor of the mortgaged property was an important question, he referred the case to a

Division Bench. It appears from the report that the learned Judge accepted the correctness of the ratio laid down by the learned single Judge in Harilal's case (supra). The Division Bench not only considered the two decisions of the Privy Council to which we have referred and the decision of the learned single Judge in Harilal's case but also a number of other decisions. After having exhaustively reviewed the case law, the Division Bench overruled a part of the decision of the learned single Judge in Harilal's case (supra). The material observations which the Division Bench in that case made are as follows. Even if the documents of possessory mortgage and the lease back constitute a single transaction, there would be no inconsistency between them although the documents have got to be harmoniously construed. In that case it was a deed of mortgage properly so called and not a deed of sale with a right to purchase. The mortgage deed in that case gave liberty to the mortgagee in possession to create lease in favour of anybody and there would have been ordinarily no bar to create such a lease even in exercise of his right of prudent management under the Transfer of Property Act. Even though actual physical possession remained all along with the mortgagor, execution of these two documents created two different relationships with different legal consequences. There is no inconsistency between these two transactions because under the first transaction a mortgage with possession is created giving power to the mortgagee to create a lease in favour of anybody and, under the second transaction, the mortgagee creates a lease transferring possession to the mortgagor in consideration of the agreed rent which was to be equivalent to the interest itself. There could be no doubt that in such contemporaneous transactions the mortgagee's intention is obviously to secure himself as regards the interest on the loan advanced by him. However, the intention of the parties in such a case is totally immaterial. If a transaction creates legal rights and is duly arrived at by law, it has to be given effect to so long as it is not barred by any law nor vitiated by any invalidating circumstances. In such cases merely because the Court thinks that in substance the transaction was a device, it would not be open to the Court to ignore the true legal position and seek to vary the terms of these two solemn documents deliberately arrived at between the two parties who are sui juris. When there is no inconsistency, there can also be no question of giving effect to an earlier part and ignoring the latter part. Effect must be given to both the parts. If no invalidating circumstances are pleaded and if the language of the document is also clear and unambiguous, there would be no scope for resorting to any of the provisos of Section 92. Therefore, the bar of Section 92 would remain absolute and it would not be open to the Court to hold that even though the mortgage was a mortgage with possession, it had become a simple mortgage in the circumstances of the case as possession all along had actually remained with the mortgagor, even though it might be the effect of the two different documents forming parts of the same transaction. Effect must be given to the lease and the provision cannot be ignored by resorting to any assumed intention of the parties whose evidence is wholly inadmissible by reason of Section 92 of the Evidence Act. In the opinion of the Division Bench, the learned single Judge in Harilal's case (supra) had ignored the plain provision of Section 92 of the Evidence Act. Thereafter the Division Bench has referred to the decision of the Privy Council in Saiyad Abdullakhan's case (1913) 40 Ind App 31 (supra) and followed it. Following the principle laid down by the Privy Council, the Division Bench observed that there is no inconsistency between

the two contemporaneous documents, one evidencing the transaction of mortgage and another evidencing the transaction of lease back. The Division Bench also followed the principle laid down by the Privy Council in Feroz Shah's case (AIR 1933 PC 178) (supra). It has been noted in the report that the two decisions of the Privy Council referred to above were followed by the Madras High Court in *Abdul Khadir v. Subramanya Pattar*[8], and by the High Court of Madhya Pradesh in *Motidas B.S.R.T. Board v. Ramjatan*[9], The Division Bench has also noted a contrary line of reasoning in certain other decisions which, according to them, is not good law in view of these decisions of the Privy Council. The Division Bench, therefore, turned down the contention that when two transactions of possessory mortgage and lease back constituted one and the same transaction, it would always be a device, and the lease would no longer remain legally enforceable. Indeed to this principle they themselves have laid down an exception which states that lease back would be unenforceable at law if It is hit by any law or by any invalidating circumstances.

17. It is clear that the basic and fundamental principles which have been laid down by the Division Bench following the principles laid down by the Privy Council are that there is no inconsistency between possessory mortgage and lease back and that the two transactions could simultaneously coexist. The next principle which they have laid down is that effect must be given to both the transactions unless the transaction of lease back is hit by some law or by some invalidating circumstances. The third principle which they have laid down is that in case of contemporaneous transactions of possessory mortgage and lease back, if effect is not given to lease back, it would mean that in pursuance of the transaction of possessory mortgage, possession of the immovable property was not delivered by the mortgagor to the mortgagee. If such a view is taken, the transaction of possessory mortgage would, in fact and in reality, turn out to be a transaction of simple mortgage. A transaction of possessory mortgage cannot be converted into a transaction of

[8] AIR 1940 Mad 946

[9] AIR 1963 Mad Pra265

simple mortgage by looking at the intention of the parties deducible from the contemporaneous transaction of lease back because it would be hit by the provisions of Section 92 of the Evidence Act.

18. In our opinion, the decision rendered by the Division Bench in Jatashanker's case (AIR 1969 Gujarat 169) (supra) not only lays down a sound principle but follows the principle laid down by the Privy Council in two earlier decisions referred to above. The question, therefore, of reconsidering that decision and referring the matter to the larger Bench does not arise.

19. In that view of the matter, the contention raised by Mr. Majmudar must be upheld. Since effect must be given both to the transaction of possessory mortgage as well as the transaction of lease back, it is clear that, so far as the present case is concerned, relationship of landlord and tenant was created between the parties on 7th May , 1964 when the plaintiff's father after having taken possessory mortgage of the property in question let out a part of it to the defendant. The

finding recorded by the Courts below in that behalf is set aside.

20. It appears to us that the learned appellate Judge did not consider other aspects of the case and dismissed the appeal only because he came to the conclusion that no relationship of landlord and tenant existed between the parties on account of which the plaintiff could maintain the present suit. Therefore, it has become necessary for us to remand the appeal to the lower appellate Court for a fresh decision after having decided the other contentions raised by the parties.

21. In the result, the revision application is allowed. The decree passed by the lower appellate Court is set aside and the appeal is remanded to the lower appellate Court with a direction that it shall decide the appeal afresh after hearing the parties on such other contentions as they raise according to law and in light of the observations made in this judgment. Rule is made absolute with no order as to costs in the circumstances of the case.

Revision allowed.