KARNATAKA HIGH COURT

R. Vijendra

Vs.

H.R. and A. Controller

Writ Petn. No. 6075 of 1982 connected with 4881 - 6230 and 4476 of 1983

(BePrem Chand Jain C.J. and A.K. Laxmeshwar and K. Shivashankar Bhat, JJ)

25.05.1988

JUDGEMENT

Prem Chand Jain, C.J.

1. The question of law that -calls for decision by us reads thus :-

> "Whether a usufructuary mortgagee is a landlord for purposes of Part-II of the Karnataka Rent Control Act, 1961 ?"

2. The facts leading to the controversy may be recapitulated :

The jurisdictional HRC Revenue Inspector vide his report dated 24-8-1981, intimated the vacancy of premises No. 24 (upstairs), Sri Subramanya Temple Street, V.V. Puram Bangalore-4. Thereafter the vacancy was notified by the House Rent Controller suo motu in HRC. ALT. 209/81. A notice under Section 8(1)(a) of the Karnataka Rent Control Act, 1961, (hereinafter referred to as the Act), was also issued to Smt. Kousalya Bai the owner of the premises. In the meanwhile, the writ-petitioner V. Vijendra also reported the vacancy of the premises. The vacancy was notified in HRC. ALT. 758/81. The petitioner was also served with notice under Section 8(1)(a) of the Act. The claim of the petitioner for self-occupation was on the ground that he is the mortgagee in possession and that the premises should be allotted in his favor for self-occupation. Respondent-3 was one of the applicants. The Rent Controller, after enquiry, allotted the premises in dispute in favor of respondent No. 3. Feeling aggrieved from the order of the Rent Controller, the petitioner preferred an appeal. The Special Deputy Commissioner who heard the appeal did not find any merit and consequently, vide his order dated 30-1-1982, dismissed the same. Still dissatisfied the petitioner filed the present writ petition calling in question the legality and propriety of the orders of the Rent Controller and the Special Deputy Commissioner.

3. The writ petition came up for preliminary hearing before a learned single Judge of this Court on 12-2-1982. After hearing the learned counsel appearing for the petitioner, the learned Judge dictated an order rejecting the writ petition in view of a Division Bench judgment of this Court in *Subramanyaswamy v. Dy. Commr*[1]. wherein it is held that a usufructuary mortgagee of a premises is not a landlord within the meaning of that

[1](1981) 1 Kant LJ 451 : (AIR 1981 Karn 190)

expression used in Section 5 of the Act and therefore he could not seek permission of the Rent Controller for self-occupation. Before the order was transcribed and signed, another decision reported in *Aswatharamaiah v. Spl. Dy. Commr*[2]. came to the notice of the learned Judge, wherein a learned single Judge has held that a mortgagee in possession steps into the shoes of the landlord and has to be regarded as landlord for the purposes of the Act and he was entitled to seek permission for self-occupation of the premises in respect of which he was a usufructuary mortgagee just as the owner could seek similar permission. In view of the said judgement, the learned Judge felt that the matter required further consideration. Accordingly he directed that the writ petition be posted for being spoken to. After hearing again the learned counsel appearing for the petitioner, the learned Judge recalled his order dated 12-2-1988 and directed issuance of Rule Nisi. The learned Judge further referred the writ petition to a Division Bench under Section 9 of the Karnataka High Court Act. Thereafter the matter came up for hearing before a Division Bench, and, finding that the decision in Subramanyaswamy's case requires reconsideration, the Division Bench referred the aforesaid question of law to be decided by a Full Bench. That is how we are seized of the matter.

4. We have heard the learned counsel for the parties at length. It is contended by the learned counsel for the petitioner that the usufructuary mortgagee of the premises is the landlord thereof as defined in clause (h) of Section 3 of the Act, that a usufructuary mortgagee for all intents and purposes is a landlord and that he could legally claim the premises which fall vacant for his personal use and occupation. On the other hand, Mr. R. Gunashekhar, learned counsel appearing for the tenant, submitted that the Act is a beneficial piece of legislation, that the main object of the Legislature is to prevent harassment and hardship to tenants, that the usufructuary mortgagee, keeping in view the scheme and object of the Act, would not fall within the definition of 'landlord' so far as Part-II of the Act is concerned, and that he is not legally entitled to claim the premises which fall vacant for his personal use and occupation. It was further submitted by the learned counsel that if every person who falls within the definition of clause (h) of Section 3 of the Act is treated to be a landlord, then the whole object of the Act would be frustrated in as much as under clause (h) a 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 is also termed as landlord and by no stretch of imagination such a person can be held to claim the premises for his personal use and occupation. The learned counsel buttressed his argument by contending that the opening part of Section 3 of the Act itself qualifies the definitions in that Section by stating "unless the context otherwise requires", and if the scheme and object of the Act is kept in view, then, except the real owner of the property no

other person shall fall within the definition of 'landlord' for purposes of Part-II of the Act. The learned counsel has commended to us to accept the view of the Division Bench in Subramanyaswamy's case.

As is evident from the order of the Division Bench the necessity of reference has arisen because of the conflicting view in the two judgments referred to in the earlier part of the judgment.

In Aswatharamiah's case (1981) 1 Kant LJ 332 after noticing the facts the learned single
[2](1977) 1 Kant LJ 332
Judge has observed thus :

> "The mortgagee in possession steps into the shoes of the landlord and has to be regarded as the landlord for the purpose of the Act having regard to the definition of the word 'landlord' in Section 3(h) which defines the said word to mean 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 rent if the premises were let to a tenant; and include any person not being a tenant who from time to time derives the title under a landlord." In Sugramanyaswamy's case (AIR 1981 Karnataka 190) Verikatachala J., speaking for the Court, has stated thus :
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> "But, should such priority be extended to an usufructuary mortgagee of such premises ? No doubt, the definition of landlord in clause (h) of Section 3 includes a usufructuary mortgagee who is entitled to receive the rent of the premises during the subsistence of such mortgage. But, the opening part of Section 3 of the Act itself qualifies the definitions in that Section by stating "unless the context otherwise requires". In construing any word occurring in a provision of an Act, it is permissible to depart from the meaning given to that word in the definition thereof in the Act, if the context of that provision so requires. The whole scheme of Part-II of the Act is to regulate letting of premises which are in great scarcity at present, so as to ensure availability of such premises when they fall vacant, to those who are in need thereof at reasonable rent and in certain order of priority. If a usufructuary mortgagee of a premises is put on par with the owner in regard to priority while deciding who should get such premises when a vacancy thereof occurs, a moneyed person who can advance money and take a usufructuary mortgage of such premises, gets an advantage over a person who is otherwise in need of such premises, and desires to take it on lease, but does not have large funds to obtain such usufructuary mortgage. The object of the legislature in enacting Part-II of the Act, will be defeated if a person who has money and takes a usufructuary mortgage of the premises, is given priority over applicants who can afford to pay nothing more than the fair rent for such premises. If such priority is given to a usufructuary mortgagee, an owner of the premises can also defeat the provisions of the Act which regulate the rent of premises so as to

> prevent rackrenting when there is scarcity of accommodation. For instance, it would not be difficult for the owner of a premises, by cleverly manipulating the terms of the usufructuary mortgage, to get much higher yield for his premises than the rent which may be fixed by the Controller while allotting the premises under Section 5 of the Act, to any person or public authority.
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> To prevent the object of Part-II of the Act being defeated, the word 'landlord' in Section 5 thereof, should in the context of the provisions of that part, necessarily be given a restricted meaning, so as not to include a usufructuary mortgagee of a premises though the definition of the word 'landlord' in clause (h) of Section 3 (apart from the context) includes a usufructuary mortgagee. Hence, we take the view that the word 'landlord' in Section 5 of the Act, does not include an usufructuary mortgagee."

Hence, it has now to be found out as to which view is more convincing and plausible.
Section 3(h) of the Act defines 'landlord' thus :-

> "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 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."

Part-II of the Act comprises of Sections 4 to 13 which talks of leasing of building. Under Section 4 every landlord shall, within 15 days after the building becomes vacant give intimation of the fact to the Controller. There is a bar against leasing out, occupying or using any building which becomes vacant without intimation of the vacancy being given to the Controller and thereafter for a period of 15 days from the date on which the intimation is received by the Controller etc. Section 5 empowers the Controller to direct the landlord that any vacant building be given to the landlord for his use and occupation or it may be given on lease to such other person as the said authority thinks fit. An order under Section 5 may be made irrespective of the fact whether intimation of vacancy has been given under Section 4 or not. Section 8 provides procedure to be followed before making an order under Section 5. Section 9 refers to the contents of such order. The consequences of an order under Section 5 are stated in Section 10. It directs the delivery of possession of the building to the allottee, by the landlord and provides for the terms of tenancy between the allottee and the landlord. Section 10A which was introduced in July 1969 provides the procedure of eviction by the Controller. The question that now arises for consideration is whether the usufructuary mortgagee is a landlord within the definition of 'landlord' under Section 3(h) of the Act, and whether he would be entitled to claim the premises which fall vacant for his personal use and occupation under the provisions of Part-II of the Act ? On the definition as it stands all the persons mentioned therein are to be treated as landlord. But there can be no

gainsaying that he purpose and object of the provision of the Act in regard to the regulation of accommodation would be defeated if this wide scope of the definition is comprehended. For example, a person acting as agent or manager of the landlord or a guardian or receiver may be entitled to receive rent on account of his principal or ward or for the person for whose property he has been appointed a receiver and would fall in the definition of 'landlord', but by no stretch of imagination can it be said that they would be entitled to claim the premises far their personal occupation. These persons have no right to possess the property. They act on behalf of their principal or ward or the person for whose property a receiver is appointed. The idea of including these persons in the definition of 'landlord' is to enable them to represent the landlord and manage his affairs and property and act for his benefit. It therefore, follows that these persons though included in the definition of 'landlord' cannot claim benefit of the provisions of Part II.

A similar question arose in *Dr. Mrs. M.T. Behanan v. V. Thyagarajan*[3] wherein it is observed thus :

> "The question for consideration is whether by virtue of the definition of the term

[3](1960) 38 Mys LJ 1092

> 'landlord' under Section 2(5) which includes an 'agent', the agent's personal need for accommodation or the need of the members of the agent's family entitles him to secure the possession of the building. It seems to be that the very object of the provisions of the Act in regard to the regulation or accommodation would be defeated if unrestricted operation were to be men to the definition of the term 'landlord'. The object of making the definition comprehensive appears to me to be to enable other persons who are in a position to act for the landlord to represent him in matters coming under the Act and not to substitute themselves for him in his place or to secure a place for themselves in addition to him. An unrestricted application of the definition would obviously tend itself to a circumvention of the object of the Act by the owner constituting any person of his choice as his agent, for if such a person establishes that he is in need of the building, he becomes automatically entitled to obtain possession. It Will be noticed that the definition of 'members of his family' puts very severe limitations in regard to their relationship to the landlord, for example, while an undivided brother is included in the membership a divided brother is not. Can it be reasonably said that while such a close relation does not come within the permissible range, a total stranger or a member of his family can come in by virtue of an agency ? It must also be remembered that an agent and indeed every one of the persons mentioned in the definition of 'landlord', other than the landlord himself, is a representative of the latter and has no right other than the right of the person whom he represents to agitate. It seems to me, therefore, that the definition of the term 'landlord' cannot be extended beyond enabling such a person to act in a representative character and that any such extension would be repugnant to the subject matter of Section 3 in the context in which the term 'landlord' occurs in that Section."

This brings us to the question whether a usufructuary mortgage though covered by the definition of 'landlord' would be entitled to avail of the benefit of the provision of Part II ? Usufructuary mortgage is defined under Section 58 of the Transfer of Property Act as follows :

> "USUFRUCTUARY MORTGAGE : Where the mortgagor delivers possession or expressly or by implication binds himself to deliver possession of the mortgaged property to the mortgagee, and authorizes him to retain such possession until payment of the mortgage money, and to receive the rents and profits accruing from the property or any part of such rents and profits and to appropriate the same in lieu of interest or in payment of the mortgage-money, or partly in lieu of interest or partly in payment of the mortgage money, the transaction is called an usufructuary mortgage and the mortgagee as usufructuary mortgagee."

In *Mohammad Saeed v. Abdul Alim*[4] the characteristics of usufructuary mortgagee are stated thus :

> "(1) That the possession of the mortgaged property is delivered or agreed to be delivered to the mortgagee
> (2) That he is to appropriate the rents and profits either :
> (a) in lieu of interest or (b) towards the principal or (c) partly in lieu of interest and partly in payment of the principal :
> (3) That in none of these cases the mortgagor incurs any personal liability to repay :
> (4) As the mortgagor does not bind himself to repay (but may repay if and when he chooses) there can be no forfeiture and therefore the remedies by way of foreclosure or sale are not open to the mortgagee."

[4] AIR 1947 Lah 40 (FB)

The effect of usufructuary mortgage is that the mortgagee is placed in possession of the property and has a right to enjoy the rents and profits until the debt is paid. For the creation of a usufructuary mortgage, delivery of possession is essential. In other words, possession by the mortgagee is the distinguishing feature of such a mortgage. A usufructuary mortgagee is entitled to the exclusive possession of the property mortgaged and has a right to exclude others, including the owner from its possession. On the creation of usufructuary mortgage, land owner not only transfers the interest in the immovable property but also transfers possession thereof. That being so, the mortgagee for all intents and purposes steps into the shoes of the original owner (mortgagor) who is only entitled to recover possession after payment of principal and interest. Hence, a usufructuary mortgagee cannot be equated with an agent or a guardian or a receiver. The mortgagee derives title from the landlord. The mortgagee can rent out the property on his own and in the event of non-payment of rent can maintain a suit for realisation of money due under the rent note against the tenant. The mortgagee can also lease out the property to the mortgagor and in that event relationship of landlord and tenant between the mortgagee and the

mortgagor comes into existence. In *Ram Udhar v. Hari Chand*[5], it is observed thus :

> "The mortgage was with possession and the mortgagees were entitled by virtue of their legal title to immediate possession of the premises in question. They were at liberty to reside in the premises themselves or to create a tenancy in favour of the mortgagors or in favour of another person. They leased out the premises to the mortgagors and the latter became the tenants of the mortgagees for a tenant is one who occupies the premises of another in subordination to that other's title and with his assent express or implied. When a mortgagee with possession allows the mortgagor to remain in possession of the mortgaged property on the mortgagor executing a lease, the relationship of landlord and tenant comes into existence, *Bakshi Ram v. Buta Singh*[6], It may be that the mortgagees intended to secure on the amount lent an income equal to the interest at a certain rate, but as pointed out in *Asa Ram v. Kishan Chand*[7], they were not precluded from entering into a transaction of this kind."

Reference may also be made to the judgement in *Mathuralal v. Keshar Bai*[8], wherein on the question that where a mortgagee leases out the mortgaged property to the mortgagor, what would be his right to the unpaid amount under the rent note, it is observed in para 15 of the report as follows :

> ".....In all such cases the leasing back of the property arises because of the mortgage with possession but we find ourselves unable to hold that the mortgagee

5 AIR 1958 Pun140
658 Pun LR 74 : (AIR 1957 Pun 57)

[7] AIR 1930 Lah 386

[8] AIR 1971 SC 310

> does not secure to himself any rights under the deed of lease but must proceed on his mortgage in case the amount secured to him under the deeds of lease is not paid. If the security is good and considered to be sufficient by the mortgagee there is no reason why he should be driven to file a suit on his mortgage when he can file a suit for realization of the moneys due under the rent note. The position of the creditor is strengthened whereas in this case the interest on the amount of the mortgage is not the same as the rental fixed. If during the continuance of the security the mortgagee wants to sue the mortgagor on the basis of the rent note and take possession himself or to induct some other tenant thereby securing to himself the amount which the mortgagor had Covenanted to pay, there can be no legal objection to it...."

Further, if any person dispossesses the mortgagee and trespasses on the mortgaged property suit for recovery of possession against the trespasser by the mortgagee is maintainable. If this is the legal status, we find it difficult to hold that the usufructuary mortgagee is not the landlord and would not be entitled to claim possession of the premises for personal occupation under Part II of the Act. In *Fakir Ram v. Sukhdeo Sao*[9], while dealing with the definition of landlord, which is in *pari materia* with our definition vis-a-vis usufructuary mortgagee, it is observed thus :

> "There is nothing in the definition of the term 'landlord' in Section 2(d) to suggest that the

landlord must be the proprietor or owner of the building. Even if therefore, the plaintiff happens to be a mortgagee of a building and not its proprietor and is otherwise entitled to receive the rent of the same, he will answer the description of a landlord as given in the Act. (See 1953 BLJR 587)."

The proposition that the usufructuary mortgagee is a landlord for the purposes of the Act also finds support from a recent judgement of this Court in *Jyotiba Shankar Karole v. Gajanan Channappa Angolkar*[10], The facts of that case are that a non-residential premises owned by the father of the second respondent was mortgaged under a possessory mortgage to Gajanan Channappa Angolkar, first respondent. At the time of execution of mortgage, the first petitioner was the tenant. After becoming the mortgagee of the schedule premises, the first respondent, initiated proceeding for eviction of the petitioner son the ground that the first petitioner had sublet the premises in question to the second petitioner. The plea raised on behalf of the petitioners was that there was no subletting of the premises and that the first respondent was not entitled to seek possession on the ground of subletting because he has become mortgagee in possession of the premises subsequent to the formation of the partnership; therefore, as per the definition of the word 'landlord' he was not entitled to rely upon the ground of subletting which existed prior to the date of mortgage and it was not taken advantage of by the then landlord. In the Revision Petition the main point that fell for consideration was whether the first respondent was entitled to rely upon the ground of subletting which existed prior to the date of mortgage ? On this aspect the learned Judge has observed thus :

"The definition of the word 'landlord' is so wide that it includes any person not being a tenant who from time to time derives title under a landlord. Thus, the

[9] AIR 1976 Pat 212

[10] ILR (1986) 2 Kant 1859

definition includes all those persons who derive title from the original landlord.

Thus, it covers all those persons who are successors-in-interests to or transferees of interest from the original landlord. Right to seek possession of the property is a right which goes with the property. It is not personal to the owner as long as it is not based on the ground of bona side personal use and occupation. Thus, the right to seek possession on the ground of unlawful subletting is not a personal right. It goes with the property as it arises out of subletting of the premises. In the instant case, the first respondent has derived title from the father of the 2nd respondent by obtaining the possessory mortgage in respect of the premises in question. The subletting of the premises unlawfully has taken place without the consent of the mortgagor-original landlord. Further, original landlord has not waived his right to seek possession on the ground of subletting. Thus, the possessory mortgagee will be entitled to seek possession of the premise son the ground of subletting as such a right which goes with the property stands transferred to the possessory mortgagee in the execution of the deed or mortgage. If the stress is laid on the

> words "for the time being" then the latter portion of the definition will be rendered nugatory. In addition to this, Section 21 of the Act does not make any distinction whether the person who seeks eviction is the one who was the landlord at the time of letting out the premises or at the time of commission of the breach on the basis of which the eviction of the tenant is sought or whether the person has become landlord on the date of filing the petition. Section 21(1)(f) makes it clear that the tenant who has unlawfully sublet the whole or part of the premises or assigned or transferred in any other manner, his interest therein and where the subletting assignment or transfer has been made before the coming into force of Part V of the Act, except in respect of subletting, assignment or transfer to which the provisions of Section 61 of the Act are applicable, and such subletting, assignment or transfer has been made contrary to any provision of law then in force. Such tenant is liable to be evicted. Thus, in the instant case, on the date the 1st respondent-landlord became the mortgagee in possession, the tenant in occupation of the premises had incurred a liability to be evicted and the right to evict the tenant on that ground had accrued to the original landlord mortgagor and such a right is transferable. Accordingly, it stood transferred to the mortgagee in possession on the execution of the deed of mortgage. Therefore, I am of the view that the first respondent who had derived the title from the landlord is entitled to rely upon the fact of subletting which had taken place earlier to his becoming the mortgagee in possession."

Though, as earlier observed, the decision is not directly dealing with the point with which we are concerned in this case, yet, it does help in understanding the status of a mortgagee in possession vis-a-vis the premises mortgaged in his favor. When a mortgagee in possession is entitled to bring an action for eviction on the ground which came into existence earlier than the creation of the mortgage on the ground that he mortgagee derives title from his landlord, we fail to understand how would a mortgagee in possession be not entitled to the benefit of the provisions of Part II of the Act and claim possession of the premises for personal occupation. The matter may be looked at from another angle. Section 21 of the Act provides ground for eviction. Clause (h) of proviso to sub-Section (1) of Section 21 of the Act makes a provision for claiming possession of a tenanted, property by the landlord if he reasonably and *bonafide* requires the same for his occupation. It is also provided that an application is also maintainable where the landlord is trustee of a public charitable trust and the premises are required for occupation for purposes of the trust. Explanation to Sub-Section (4) of Section 21 states that for the purpose of clause (h) of the proviso to Sub-Section (1) the expression 'landlord' shall not include a rent-farmer or rent-collector or estate-manager. From this explanation, it is clear that the Legislature did not intend to apply the entire definition of the word 'landlord' as it exists in clause (h) and has specifically excluded the rent-farmer rent-collector or estate-manager for the purpose of clause (h) of Section 21. Thus, wherever the Legislature intended to exclude any particular person from the category of the definition of the word 'landlord', it has so been provided. As the definition stands, it is quite clear that the Legislature did not intend to exclude a usufructuary mortgagee from the definition of 'landlord'. It is a settled proposition that the Rent Control Act is a

restriction on the rights of the owner and those restrictions are to be reasonable. Therefore, the language of the Act will have to be understood in a manner befitting a reasonable restriction, which is sought to be spelled out from the legislation. Unless the language of the law is clear and unambiguous, the scope of the restriction cannot be and should not be expanded. This is one of the principles that will have to be borne in mind while construing this legislation which no doubt is also a beneficent piece of legislation. Normally an owner has a right to convey whatever he deems fit to another. This includes his right to enter into a mortgage transaction by way of usufructuary mortgage. By executing a usufructuary mortgage the owner is entitled to transfer the rights contemplated by the Transfer of Property Act as transferable to a usufructuary mortgagee. This includes a right in the mortgagee to take possession of the premises and occupy the same and enjoy it, just like the owner himself could have occupied and enjoyed it. If such a right is to be taken away, the law should explicitly say so. Such a right cannot be curtailed on the hypothesis that the owner of the premises may utilise the opportunity to defeat the object of the legislation, which actually is not possible normally, by a voiding the scrutinising eyes of the Rent Controller. It was sought to be argued by Mr. Gunashekhar, on the strength of the observations made in Subramanyaswamy's case (AIR 1981 Karnataka 190) that an unscrupulous landlord may collude with another person and mortgage property in his favour and thereby manage to retain possession of the property in a surreptitious manner. We are afraid, the argument is far fetched and on any such assumption a provision of a statute cannot be interpreted differently when the intention of the Legislature is quite evident from the plain language used in the statute. Under the provisions of Part-II of the Act, the Controller summarily finds out the need of the applicants and it is thereafter that an allotment is made. It is not so easy for anyone to circumvent the provisions of the Act. The Controller though may not legally be in a position to say that a mortgage deed is a faked document; yet he can always decline to allot the property if he finds that the need of the mortgagee is not genuine. As has come in the earlier part of the judgement, the status of a usufructuary mortgagee is similar to that of the land-owner (mortgagor) and the words "unless the context otherwise requires" qualifying the definition would not in any way lead to a different conclusion. In this view of the matter, with respect, we are unable to subscribe to the view taken in Subramanyaswamy's case (1981-1 Kant LJ 332) and agree with the enunciation of law in Aswatharamaiah's case. As a result of the aforesaid discussion, we hold that a usufructuary mortgagee is a 'landlord' within the definition of Clause (h) of Section 3 of the Act and is entitled to claim possession of the premises for personal occupation under Part II of the Act. Accordingly, the question is answered in the affirmative. The writ petitions shall now be placed for final disposal before a learned single Judge of this Court.

Reference answered in affirmative.