BOMBAY HIGH COURT

Dinkar Bhagwant Salekar

Vs.

Rau Babaji Mahamulkar

Special Civil Application No. 981 of 1956

(Mr. Bavdekar and Mr. Gokhale, JJ.)

14/17.09.1956

JUDGMENT

Bavdekar, J.

1. This is an application under Article 227 of the Constitution made by one Dinkar, who has purchased from one Bhiku his mirashi rights in property ; redeemed a mortgage effected upon the property i.e. the mirashi rights on June 5, 1923, by Bhiku and his brother Rango, and then sued for possession the mortgagee's tenant Rau and obtained a decree for possession, and actual possession in execution of the decree on April 20, 1954, The original mortgagee was Khashaba, and he sold his mortgagee rights to one Sakharam in the year 1931-32. Sakharam let the property to Rau in the year 1934-35, since when Rau has been in possession of the property, till he was evicted in execution of a decree of the civil Court on April 20, 1954. When Rau was evicted by the civil Court on April 20, 1954, he made an application to the Mamlatdar under the provisions of Section 29 of the Bombay Tenancy Act claiming that he was, as a tenant, entitled to the possession of the property and he should be put back into possession of the property from which he was evicted by an order of the civil Court on April 20, 1954. The Mamlatdar held that Rau had failed to prove that he was a protected tenant of the land and dismissed his application. The Prant Officer, Satara Division, to whom he went in appeal, held however that Rau was a tenant of the land, because the mortgagee in possession was entitled to let the land and a tenant to whom the land is let by him being a person lawfully cultivating the land of another person, he must be deemed to be a tenant of the land under Section 2A of the Bombay Tenancy Act, 1939, and a protected tenant under the provisions of Section 3A of the Act of 1939 as no application under that section had been made and not liable to be evicted under the provisions of Section 14 of the 1948 Act. Dinkar went in revision to the Bombay Revenue Tribunal, who, following a full bench decision of that tribunal given recently, have held that even though Dinkar redeemed the mortgage, the protected tenancy of Rau did not come to an end upon the redemption. Hence this application.

2. Now it appears from the evidence that when Sakharam let the land in the present application to Rau, he let it to him as an annual tenant. The Act of 1939 came into force on April 11, 1946, and on Novembers, 1946, the amending Act introducing therein Section 2A of that Act which provided that if the owner had not, within one year of the coming into force of the Bombay Tenancy (Amendment) Act 1946 made an application to the Mamlatdar within whose jurisdiction the land is situated, then a person lawfully cultivating any land belonging to another person shall be deemed to be a tenant if such land is not cultivated personally by the owner and if such person does not fall within the categories mentioned in Clauses (a) and (b) of that section. It is not in disputed that in this case Rau did not fall within the categories mentioned in Clauses (a) and (b). It is also not in dispute that the owner, that means in this case Bhiku, did not make an application to the Mamlatdar within one year after the coming into force of the Bombay Act of 1946 for declaring that Rau was not a tenant. It is contended that consequently Rau must be deemed to be a tenant under the provisions of that Act. Then Section 3A 'of the Bombay Tenancy (Amendment) Act provided that unless a landlord of a tenant made an application to the Mamlatdar under the provisions of Section 3A of the Act for a declaration that the tenant was not a protected tenant within a period of one year from the date of the coming into force of the Bombay Tenancy Act 1946 he shall be deemed to be a protected tenant for the purpose of the Act. It being common ground that Rau's landlord, that is, Sakharam, did not make an application to the Mamlatdar under the provisions of Section 3A, and that the owner did not make one either it is contended that Rau became a protected tenant upon the expiry of one year of the coming into force of the Bombay Tenancy (Amendment) Act 1946 Then we come to Bombay Act LXVII of 1948. That Act came into force on December 28,1948, and under Section 31 of that Act, for the purposes of the Act, a person shall be recognised to be a protected tenant if such person is deemed to be a protected tenant under among others Section 3A of the Bombay Tenancy Act, 1939. It is contended consequently that for the purposes of the 1948 Act Rau is a protected tenant It is said that in that case Rau could not be evicted either under Section 5(2) of the 1939 Act or Section 14 of the 1948 Act, unless Rau had done one of the things referred to in those provisions. It is common ground that Rau had not done any of the things referred to in Section 5(2) of the 1939 Act, or Section 14 of the 1948 Act. It is contended that consequently in spite of the fact that Dinkar redeemed the mortgage, Raus tenancy could not be terminated.

3. Now it is quite true that under Section 2A of the 1939 Act a person who fell within the purview of the description given in that section and was not included in the excepted categories is to be deemed to be a tenant. Similarly, even under the provisions of Section 4 of the 1948 Act a person who fell within the purview of the description given in that section was to be deemed to be a tenant, unless he fell within the categories (a), (b) and (c) of that section, the last category being a fresh category added by the 1948 Act excluding the mortgagee in possession. Then if a person was to be deemed to be a tenant then just as a tenant could not be evicted except in certain cases under the provisions of Section 5(2) of the 1939 Act, a person deemed to be a tenant could also not be evicted unless he had done one of the things referred to in the provisions of Section

5(2) of that Act. This was made however further clearer, if it was necessary to do so, by the new Act. The new Act provided that a tenant meant an agriculturist who holds land on lease and includes a person who is deemed to be a tenant under the provisions of the 1948 Act. There is no dispute in this case that Rau is an agriculturist. The definition in Section 2(18) in the Act of 1948 made it quite clear that a person who was deemed to be a tenant was included in the word ' tenant' wherever it was used in the 1948 Act, and a person was to be regarded as a protected tenant under the provisions of Section 31 of the 1948 Act if he was to be deemed to be a protected tenant under Section 3A of the 1939 Act. But the principal questions in this case are whether prior to the passing of the 1948 Act Rau was to be deemed to be a tenant who was entitled to the protection of that Act and after the coming into force of the 1948 Act he was a tenant and entitled to the protection of the latter Act, and whether such protection could be availed of by him both against his own landlord, that is, Sakharam, the mortgagee, and also against the mortgagor after the mortgagor had redeemed the property.

4. Now, I shall revert to the provisions of Section 2A of the 1939 Act. It must be conceded at the outset that Rau was a person who was lawfully cultivating the land in this application and the owner of the land, who in this case must be taken to mean Bhiku, who appears to be a mirasdar, not having made an application to the Mamlatdar within the period of one year after the coming into force of the Bombay Tenancy (Amendment) Act, 1946, Rau must be deemed to be a tenant as he does not fall within the excepted categories (as) and (6) of Section 2A. But the contention raised from this that he was a tenant, though not in the ordinary sense, of Bhiku and entitled to protection as against him is, on the face of it, somewhat startling. One can understand the contention if it was made that Rau was a protected tenant so far as Sakharam is concerned and Sakharam could not evict him as long as that Act remained in force, unless the provisions of Section 5(2) were satisfied and after the 1948 Act came into force Rau had done none of the things mentioned in Section 14 of the 1948 Act. Sakharam would be the landlord, and Rau would be the tenant. But if Rau is to be considered as a tenant of Bhiku under the 1939 Act and after Dinkar purchased Bhiku's rights from him, of Dinkar under the 1948 Act, the result must necessarily be that when Dinkar redeemed the mortgage on May 29,1949, Dinkar could not evict Rau, and it is against the ordinary principle both of the Transfer of Property Act and the English law which governed agricultural leases that a mortgagor should not be able to evict after the redemption of the mortgage a tenant put upon the property by the mortgagee. Even so if Rau was entitled to such a protection under either the 1939 Act or under the 1948 Act, he must of course be given that protection. But we do not think that Section 2A can be construed in this manner. That there was some laxity in the drafting of the section is quite clear from the fact that when the 1948 Act was enacted, to the excepted categories as to who was to be deemed to be a tenant was added a third category (c). That was the mortgagee in possession. This seems to suggest that an oversight was committed in enacting Section 2A which was repaired when subsequently Section 4 of the 1948 Act was enacted. But for it a mortgagee in possession would obviously have to be regarded as a tenant of the mortgagor, and in that case he could not be evicted even after the redemption of the mortgage. Then again if Section 2A of the 1939 Act was construed as the

mortgagee's tenant wants us to construe it, there would be a relationship, a statutory one, of landlord and tenant, for example, between the owner and a purchaser from a mortgagee with possession, or a sub-mortgagee from a mortgagee in possession, or a tenant from a mortgagee in possession, or if a mortgagee in possession was cultivating the land through a servant, then the servant. Now, it appears to us that it could hardly be contended that the Legislature desired when enacting Section 2A of the 1939 Act that the relationship of landlord and tenant should be deemed to be subsisting between the owner and so many persons not having anything to do with the owner but claiming through the mortgagee in possession. Section 2A was in the first instance enacted in order to avoid all disputes after one year of the coming into force of the Bombay Tenancy (Amendment) Act, 1946, between a cultivator and the owner of a land as to whether there was a relationship of landlord and tenant between them or not. For the moment I will assume that there is no one else involved except the two persons, the cultivator himself and the owner of the land, for example, a mortgagee or his tenant. If the cultivator could show that his possession was lawful, that means, by the permission or authority of the owner, then ho was entitled to say that he was the tenant, unless within one year from the coming into force of the Bombay Tenancy (Amendment) Act, 1946, the owner had made an application and obtained a declaration from the Mamlatdar upon that application, though not necessarily within a period of one year, that the person who was cultivating the land was not a tenant. Such a provision would necessarily absolve the cultivators, most of whom cultivate lands on what may be called oral tenancies, of the necessity of proving that there was in existence a relationship of landlord and tenant between them and the owner, provided of course they could show that they wore not trespassers upon the land and they were cultivating the land lawfully, that means, either with the permission or the authority of the owner. Nor is any reason apparent for creating an artificial relationship of landlord and tenant between the owner of the land and any person who would be cultivating not with the authority of the owner but with the authority of the mortgagee in possession or someone who claimed through the mortgagee in possession. The principal object of both the Acts appears to be to give protection to the tenants from their landlords. We do not intend to suggest that the Acts did not do anything else. Mr. Vaidya, who appears on behalf of a tenant, has pointed out that the Acts gave protection to the tenants against others also ; for example, there was protection given to the tenants against creditors ; there was also protection given to certain persons who were not tenants when the 1939 Act came into force. If for example they were to be deemed as protected tenants under the provisions of Section 4(1), then they would be protected in spite of the fact that they had ceased to be tenants when the Act of 1939 came into force. He further points out that the 1948 Act makes provision not only for the protection of tenants, statutory or otherwise, from the landlord, again statutory or otherwise, but it makes provision imposing restrictions on the transfer of agricultural lands and its preamble says among other things that it was expedient to make provisions for certain other purposes. That is undoubtedly true. The Act is not confined to giving protection to tenants against their landlords. But the subject-matters of both the Acts show that that was its primary intent, and this is made further clear by the preamble of the 1948 Act, the first paragraph of which says :

"Whereas it is necessary to amend the law which governs the relations of landlords and tenants of agricultural lands;"

It is true that here again words ' landlord ' and ' tenant' would include not only a landlord and tenant under the ordinary law, but also the persons who were to be deemed as tenants under the 1948 Act. But the primary intention was to protect tenants against their landlords, and there does not seem to be any object manifest of maintaining the possession of the actual cultivators who were put on the land by persons who had not got an absolute title to the land and who were liable to be defeated not by their own landlords but by someone else claiming under a paramount title.

5. We have heard along with this application the advocates who are appearing in pertain connected applications, because this question is common to them also, and, Mr. Javli, who appears for a tenant in one of them, has raised before us an argument that the two Acts create a relationship of a tenant not having reference to another person but having reference to the land alone irrespective of any other person whatsoever. This doctrine is opposite to that of serfdom. Whereas a serf is attached to the land and cannot be separated from it or leave it irrespective of who subsequently purchased the land, the argument before us is that the land is attached to the cultivator who is either a tenant or deemed to be a tenant and it cannot be taken away from him irrespective of who it is that seeks to evict him from it. But we find no words showing the creation of such a thing either in the 1939 Act or in the 1948 Act. The words and sections upon which he relies are undoubtedly words and sections which refer to a tenant and the land of which he is a tenant and make no reference to a landlord at all; for example so far as Section 2A of the 1939 Act is concerned, it refers actually to the cultivator and the land belonging to another person which ho cultivates and does not make any reference to the landlord. Similarly, Section 4 of the 1948 Act makes reference to a tenant who is cultivating the land belonging to another and makes no reference to the landlord. Similarly, Section 23 of the old Act provided that no lease of any land situated in any area in which this section comes into force made after the date of the coming into force of this section in such area, shall be for a period of loss than 10 years; and every lease subsisting on the said date or made after the said date in respect of any land in such area shall be deemed to be for a period of not less than 10 years. Section 5(1) of the 1948 Act says that no tenancy of any land shall be for a period of less than ten years. But it appears to us that the absence of the mention of any landlord in any of these provisions does not evince any desire to create the relationship, may be even an artificial or statutory relationship of a tenant between a cultivator and the land which he cultivates not having any reference to the landlord at all. Ordinarily speaking confining ourselves to lands, the relationship of landlord and tenant postulates two persons and a piece of land, and this relationship exists between them with reference to the land in question. If the Legislature had desired that there should be departure from this ordinary law and there should be brought into being between the cultivator and his land itself an artificial relationship which had no reference to any person like a landlord, we should have expected that clear language showing such an intention, would have been used, and it has not been used. On the other hand, when the new Act after defining tenancy as the relationship

between a landlord and tenant and tenant as the person deemed to be a tenant besides the lessee goes on to say that the word ' landlord' shall be construed accordingly, it evinces a clear intention to provide that to each person deemed to be a tenant there shall correspond a person deemed to be a landlord. But even upon the limited contention which has been made before us on behalf of the tenant in the present petition, it seems to us quite clear, considering that a certain amount of looseness of language is apparent from the amendment subsequently made by the Legislature in the provisions originally embodied in Section 2A of the 1939 Act, that when the Legislature was enacting that section, it was providing for a simple case of an owner of land and the cultivator cultivating it with his permission or by his authority, and then it made a provision by which in the absence of any application made by the owner the cultivator was to be deemed to be a tenant and was absolved any further from proving his tenancy.

6. It may be necessary now to take a few cases in order to show the grave consequences which would follow in case we were to give to Section 2A the interpretation sought to be placed upon it. I am not going at the moment to Section 4, because apart from a category mortgagee in possession which has been added to the excepted categories in the provisions of that section, the wording of Section 2A of the old Act is the same as the wording of Section 4 of the now Act. But taking up first the case of a sub-tenant, it is obvious that if we interpret Section 2A so as to constitute between the owner and the person lawfully cultivating the land the relationship of landlord and tenant, a sub-tenant would have to be deemed to be a statutory tenant of the landlord, if the lessor being the owner has made no application for declaring that the sub-tenant was not a tenant, that is, his tenant, within a period of one year from the coming into force of the Act of 1946 amending the 1939 Act. This would necessarily result in the consequence at any rate after the coming into force of the 1948 Act that such a person would be not only a statutory tenant of the lessor but would be bound to pay to him rent. Under the provisions of Section 3 of the 1948 Act, the provisions of Chap. V of the Transfer of Property Act, 1882, shall, in so far as they are not inconsistent with the provisions of the 1948 Act, apply to the tenancies and leases of lands to which this Act applies. Even if, therefore, the person who is to be deemed to be a tenant is not able to point to any lease, he must pay rent to the person who is to be regarded as a statutory landlord, because Section 105, which occurs in Chap. V of the Transfer of Property Act, shall have to be applied to him, notwithstanding the fact that really speaking there is no relationship of lessor and lessee between the lessor and the sub-tenant. Then under the contract he would have also to pay rent to the lessee.

7. Then we will take the question of a mortgagor and a tenant from a mortgagee with which we are concerned in the present case. If such a person is to be regarded as a statutory tenant of the mortgagor, because the mortgagor being the owner of the land had failed to make an application under Section 2A and even under the provisions of Section 4, he would be not a mortgagee in possession though claiming through him, then in that case he would again have to pay rent to the mortgagor. His liability to pay rent to the mortgagee in possession under the lease would still obviously be there,

8. Now, in order to get over these difficulties, it has been suggested on behalf of the tenants that it may be that a person may be both a tenant and a statutory tenant, and his landlord may be both a lessee and a statutory landlord. It has also been suggested that there may be a statutory relationship of a landlord and tenant between the two persons without any liability upon the statutory tenant to pay rent to the landlord, and it would be convenient to examine the arguments which have been put forward to support these contentions. Now, it is quite true that when it is a question of a mortgagee in possession and his own tenant having a relationship of a lessor and lessee between them, where the tenant is an agriculturist, he is a tenant as defined by the 1948 Act and the mortgagee in possession is his landlord. When it is contended however that he being a person lawfully cultivating land belonging to another person, namely, the mortgagor, must be deemed to be a tenant besides of the mortgagee, as he cannot be excluded under the categories mentioned in Section 2A of the 1939 Act or Section 4 of the 1948 Act, the argument is not valid for the simple reason that what these sections enact is a legal fiction. When the Legislature says that a particular person is to be deemed to be a tenant, it is enacting a fiction making a person who is not a tenant a tenant under the statute. There could be no point consequently of providing that a person who is a tenant will be deemed as a statutory tenant. The object of the definition which provides that certain persons shall be deemed to be tenants being to confer that status under the statute to a person who is not a tenant, the argument that a tenant from a mortgagee would be both an ordinary tenant of the mortgagee and his statutory tenant is pointless. Consequently, if at all a tenant from a mortgagee is a statutory tenant, the only person of whom one can conceivably think of being the landlord of the statutory tenant would be the mortgagor, and inasmuch as the definition of " tenant" in the 1948 Act after defining him so as to include a person who is deemed to be a tenant under the provisions of the Act provides that the word " landlord " shall be construed accordingly, the only person who could be deemed to be the landlord of the mortgagee's tenant would be the mortgagor. Even under the 1939 Act it is difficult to see who else could be his statutory landlord.

9. But in that case, as I have already mentioned, under the provisions of Section 3 of the 1948 Act Section 105 of the Transfer of Property Act would be applicable and the tenant would have to pay the mortgagor rent, and that destroys the contention that there would be a relationship of a statutory landlord and a statutory tenant without there being a liability in the tenant to pay the landlord. By the very provisions of Section 3 if there is a tenancy which by definition includes the relationship of an artificial landlord and an artificial tenant, the liability to pay rent follows then there could be no such relationship without there being a liability to pay the rent. If we therefore examine the two cases, that of a sub-tenant and that of a mortgagor, and the tenant of the mortgagee, it is obvious that unless the Legislature wanted the sub-tenant to pay rent to both the lessee and the lessor or it wanted the tenant of the mortgagee in possession to pay rent both to the mortgagor and the mortgagee, it could not have intended that such persons should be included within the definition of the persons who are to be deemed to be a tenant under the provisions of either Section 2A of the 1939 Act or Section 4 of the 1948 Act.

10. It has been urged that apart from Chap. V of the Transfer of Property Act, rent is payable by a statutory tenant under the provisions of Section 6 of the 1948 Act. We are inclined to think that that section assumes that rent is payable and regulates the quantum. It provided that notwithstanding any agreement or usage, if there is no agreement or usage governing the quantum, the rent payable shall not exceed the reasonable rent to be fixed as provided in the statute. But it does not make any difference to the argument even if the rent is payable by the statutory tenant under Section 6 of the Rent Act.

11. That is why it is suggested on behalf of the mortgagee's tenant that there could be a statutory relationship of landlord and tenant without there being any liability to pay rent, even statutory rent so to speak. But we cannot accept this argument. It is common ground that whatever else Section 2A of the 1939 Act and Section 4 of the 1948 Act may be applicable to, they are applicable to the simple case of the owner and the person cultivating his land with his authority. The primary intention of the sections is to make it unnecessary for an agriculturist, who can show that he is in lawful possession of land, that there is a relationship of landlord and tenant between him and the owner, who has authorized him to cultivate it. If he does so, he cannot be evicted unless certain conditions, one of which is punctual payment of rent, are satisfied. But it may sometimes happen that the landlord may not be able to prove the lease. Suppose the owner had written to an agriculturist that he should start cultivating his land, and whether ho would be given the land on lease or the owner would be paying the cultivator as a servant would be determined later, immediately the letter was produced, the cultivator will have to be deemed to be a tenant; but if the owner cannot prove any the tenant would say that he was merely a licensee and not liable to pay rent, and Section 14 of the 1948 Act contemplates that there is amiability to pay rent. The landlord could not therefore evict him even if he did not pay rent. It cannot possibly be accepted therefore that there can be a statutory relationship of landlord and tenant without there being any liability upon the statutory tenant to pay rent to the statutory landlord.

12. Our view as to the scope of Section 2A of the old Act finds support from Section 4(c) of the new Act. That section excludes from the category of persons who are to be deemed as tenants a mortgagee in possession. This must necessarily exclude persons claiming through the mortgagee. The learned advocate who appears for the tenant has, while conceding that the purchaser from the mortgagee in possession must necessarily be excluded, says that the exclusion is compelled by the fact that the purchaser from a mortgagee in possession would be included in the mortgagee in possession. But then we come to the question of the sub-mortgagee from the mortgagee in possession, the tenant from the mortgagee in possession and the servant of the mortgagee in possession. So far as the sub-mortgagee is concerned, it is contended that if he is a sub-mortgagee in possession, then inasmuch as he was a mortgagee in possession he will be again excluded by Clause (c) of Section 4. The tenant from the mortgagee is of course the instant case; but the case against a servant of the mortgagee in possession would remain, and it seems to us that if we were to hold that mortgagee in possession does not mean anyone except such a

mortgagee or a person to whom he conveys his own estate absolutely, there will be this difficulty that the servant of a mortgagee in possession who actually cultivates the land would have to be deemed a tenant of the mortgagor. It seems to us that at any rate under Section 4 of the 1948 Act the word 'mortgagee in possession' means everyone claiming through him.

13. It is urged on behalf of the tenant of the mortgagee that the intention of the Legislature is to be gathered from the language which it has used and from that language alone. If the meaning of the language is clear, it must not be departed from, merely because in certain cases it would and to hardship. But neither Section 2A of the 1939 Act nor Section 4 of the 1948 Act state who is the landlord of the person deemed to be a tenant. The definition of landlord in the 1948 Act makes it clear that there exists a person who is the landlord of the person deemed to be a tenant under the Act, but even that Act does not lay down a rule for finding out who the landlord is. The argument that the owner is the statutory landlord is based upon the use of the word 'owner' in defining the excepted categories and the fact that under Section 2A of the old Act the application that the cultivator is not a tenant is to be made by the owner. But even so the language is not plain and there is, therefore, no question of departing from the plain words of a statute. There is scope for construing the language and we propose to interpret the sections so as to avoid hardship which could not have been intended.

14. We have dealt so far with both Section 2A of the 1939 Act and Section 4 of the 1948 Act. But Section 2A of the 1939 Act is repealed by the 1948 Act. It is true that a person who is deemed to be a protected tenant under the provisions of Section 3A of the old Act is entitled to all the privileges of a protected tenant under the 1948 Act. But the mortgagee's tenant relies in this case upon Section 14 of the 1948 Act. That section uses the word 'tenant', and he has therefore to show that he is a tenant under the new Act. In this case, therefore, we are concerned with Sections 4 and 14 of the new Act only.

15. We would like to make it clear that we have dealt with the case of the sub-tenant in this application in order to make it clear what difficulties would arise in case we were to accept the various arguments which were addressed to us by the learned advocates who appeared for the mortgagee's tenants in this group of applications. But we must not be taken as having decided the rights of a sub-tenant under either the old Act or the new Act.

16. In that case when the mortgagor in this case redeemed the mortgage in the year 1949 the mortgagee's interest came to an end. Under Section 3 of the 1948 Act the provisions of Chap. V of the Transfer of Property Act, 1882, apply to the tenancies and leases of lands to which the Act applied. The tenancy created by the mortgagee in possession is obviously such a tenancy. Under Clause (c) of Section 111 therefore when the interest of the mortgagee in possession came to an end, the interest of the mortgagee's lessee also came to an end.

17. It is pointed out, however, that Section 3 of the 1948 Act makes the provisions of Chap. V of the Transfer of Property Act, 1882, applicable only in so far as those provisions are not

inconsistent with the provisions of that Act, and it is contended that the provisions of section 111(c) of the Transfer of Property Act are inconsistent with the provisions of Section 14(2). Now, that section provides that

> "Notwithstanding any agreement, usage, decree or order of a Court of law, the tenancy of any land held by a tenant shall not be terminated...."

The section consequently imposes a disability upon a landlord who but for that section would be entitled to terminate the tenancy of a tenant, where the tenancy is not for any fixed period. We are concerned in this case with an annual tenancy, and such a tenancy could be terminated by giving notice under Section 84 of the Bombay Land Revenue Code, Section 14(1) however prevents the landlord from terminating that tenancy unless the tenant has done any one of the acts which are mentioned in Section 14(1). It is not contended in this case that the tenant has done any such act. Section 14(1) however merely prevents the landlord from terminating the tenancy. If the tenancy comes to an end owing to the operation of section 111(c) of the Transfer of Property Act, there is nothing in Section 14(2) which prevents the termination of the tenancy. Section 111(c) does not require any notice from the landlord; does not require any action from him but it provides that immediately the lessor's interest has ceased the lessee's interest ceases. The result of that is that immediately a mortgage is redeemed, the lease in favour of the tenant from the mortgagee in possession comes to an end without any action being taken by the landlord. There is no conflict, therefore, between the provisions of Section 14(2) and Section 111. That is apart from the fact pointed out on behalf of the landlord that Section 14(1) does not use the word law.

18. It is said, however, that the words 'be terminated' in Section 14(2) should not be interpreted in the sense that the tenancy could not be terminated by the landlord. It is pointed out that in Section 14(2) of the 1948 Act, as it stood before it was deleted by Bombay Act XXXIII of 1952, the Legislature had used the words 'the tenancy shall terminate.' In Section 111 of the Transfer of Property Act the word 'terminate' has been used in an intransitive sentence to denote the determination of a lease ; but that is the intransitive use of the verb 'terminate.' Where the verb 'terminate' is used transitively, it is obvious that there must be a termination of the tenancy by some person, and the only person who could terminate a tenancy in the context would be the landlord. It is obvious, therefore, that Section 14(1) prevents termination of a tenancy by the landlord unless the conditions laid down in that section are satisfied.

19. The next argument on behalf of the mortgagee's tenant is that in this case the tenancy being an annual tenancy, no notice having been given, it was an existing tenancy when the Act of 1939 came into force. In that case, Section 23(1)(b) of the 1939 Act applied. That clause provides :

> Every lease subsisting on the said date (the date upon which the Act came into force, namely, the 8th of November 1946) or made after the said date in. respect of any land in such area shall be deemed to be for a period of not less than 10 years."

It is said that consequently this lease must be taken to be a lease for a period of 10 years from November 8, 1946, and consequently in spite of the redemption of the mortgage in the year 1949 the lease did not come to an end.

20. But it seems to us that that is not the correct interpretation of Section 23(1)(b). Mr. Vaidya is trying to interpret that clause as if instead of the words 'for a period of not less then 10 years', it had got the words 'for a period of not less than 10 years from the coming into force of this Act.' Now, what the clause provides is that whether in the case of a subsisting lease or whether in the case of a lease made after the Act came into force, whatever the period originally mentioned in the lease, the lease shall be deemed to be for a period not less than 10 years. If the lease was for example for two years, and it was existing at the time when the Act came into force, for the numeral two in the lease will have to be read the numeral 10. We do not think that as a matter of fact there is any scope for interpreting anything at all. The clause clearly says that it is the lease which was to be deemed to be for a period of not less than 10 years. The words 'not less than 10 years' obviously have been put in because a subsisting lease or a lease made after the date of the Act may be for a period of 20 years, in which case it would not be permissible to substitute for the numeral 20 the numeral 10. But it is obvious that even if there is any scope for interpretation, we cannot interpret the words 'for a period of not less than 10 years' to moan ' for a period of not less than 10 years from the coming into force of this Act' because that is to be deemed to be the period not only of a subsisting lease but of a lease made after the date upon which the Act came into force. Now, if we were to give the words 'for a period of not less than 10 years' the meaning 'for a period of not less than 10 years from the coming into force of the Act,' the result would be that if the lease was entered into say, eight years after the coming into force of the 1939 Act, it would expire within a period of two years, and that could hardly be the intention of the Legislature.

21. In that case, it is obvious that Section 23(1)(a) would merely make the lease expire at the end of the year 1943-44. The provisions of that Act would really therefore make the mortgagee's tenant a trespasser. But Section 26 of the old Act provided that:

> Nothing contained in this Act shall be construed to limit or abridge the rights or privileges of any tenant under any usage or law for the time being in force or arising out of any contract, grant, decree or order of a Court or otherwise howsoever." The original contract between the mortgagee's tenant and the mortgagee was that the lease was to be an annual lease. In the circumstances, it is obvious that as no notice terminating the lease was given before the 1939 Act came into force it would be abridging the rights of the mortgagee's tenant to hold that the lease came to an end at the end of the year 1943-44. The tenant was entitled therefore to say that in that case he could fall back upon Section 26 and his status is of an annual tenant. He was therefore really an annual tenant when the Act came into force, that is, in 1946, and this tenancy could not be terminated except in accordance with the provisions of the 1939 Act. No notice terminating the tenancy was given by the

mortgagee in possession prior to the redemption. The annual tenancy continued therefore till the mortgage was redeemed.

22. Mr. Vaidya contends however that under Section 84 of the Bombay Land Revenue Code

> "an annual tenancy shall in the absence of proof to the contrary be presumed to run from the end of one cultivating season to the end of the next. The cultivating season may be presumed to end on the 31st March."

It is contended, therefore, that in this case the lease commenced not in the year 1934-35 when the mortgagee's tenant was first of all introduced by the mortgagee in the land as his tenant, but on the date on which there was a fresh lease, every year that is, on April 1, and the lease ended on March 31 of the next year. The Act came into force on November 8, 1946. The annual tenancy in favor of the tenant commenced consequently on April 1, 1946, and if that is correct, then the tenancy was to be deemed to be for a period of 10 years and would end only on March 31, 1956.

23. But it seems to us that the argument is based upon a misapprehension of the character of an annual tenancy. There are of course leases for 11 months given by certain landlords every year. Every fresh year such a lease is given and these leases are sometimes called loosely annual leases. That is not the sense in which there was created by the mortgagee in possession an annual tenancy in favor of his tenant. The tenancy which was created in favor of the tenant was an annual tenancy; that means, a tenancy from year to year, and it could only end when a notice under the provisions of Section 84 was given by the landlord terminating the tenancy. But if in any particular year the landlord did not give any notice, it did not mean that a fresh tenancy commenced on April 1 of the next year. It was the same tenancy which was created in the year 1934 which continued. It did not come to an end because a proper notice was not given. A proper notice would be a notice given in writing by the landlord or by the tenant to the landlord at least three months before the end of the year of tenancy at the end of which it is intimated that the tenancy is to cease. The landlord could have terminated consequently the tenancy by giving a notice three months before March 31, 1935, terminating the tenancy on March 31, 1935 ; but if he failed to give notice, it did not mean that a fresh tenancy came into being on April 1,1935. The same tenancy continued because of the failure of the landlord to give the statutory notice in the year 1934-35. The landlord could again terminate the tenancy by giving a notice at least three months before March 31,1935, but if he failed to do so, it did not mean that any fresh tenancy came into being again. The words in. Section 84 "be presumed to run from the end of one cultivating season to the end of the next" are intended to provide two presumptions. The first presumption is as to when the tenancy commences. The tenancy may of course commence on any other day, but the presumption is that the tenancy commences on April 1 of the year in which it was created. Then Section 84 provides when it is presumed to come to an end. That must be provided because the second para, of Section 84 requires that the tenancy could be brought to an end by a proper notice to quit given by the landlord or the tenant as the case may be terminating the tenancy with the end of the year of tenancy. Now, if the notice has got to be given more than

three months before the end of the tenancy, it was necessary to provide when the tenancy came to an end, and what Section 84 says is that the tenancy shall be presumed to end on March 31, the end of the cultivating season next to the season at the end of which the tenancy commenced.

24. It is said, however, that it was competent to the mortgagee under his power of management to create a tenancy and any tenancy which the mortgagee created in exercise of the powers of management conferred upon him under Section 7(5)(a) of the Transfer of Property Act would be binding on the mortgagor even after redemption. Now, the Transfer of Property Act is of 1882 and it would be convenient to find out what the law in England was prior to 1882. It appears that prior to the Conveyancing Act of 1881 neither the mortgagor nor the mortgagee could grant a valid lease of the mortgaged estate, though mortgagees could grant a valid lease of the mortgaged estate with the concurrence of the mortgagor. That was why Section 18 of the Conveyancing Act, 1881, was enacted and limited powers were given to the mortgagee to mortgage property. This Section 18 of the Conveyancing Act is now replaced by Section 99(3) of the Law of Property Act, 1925, which provides :

> (3) The leases which this section authorises are-
> (i) agricultural or occupation leases for any term not exceeding twenty-one years, or, in the case of a mortgage made after the commencement of this Act, fifty years; and
> (ii) building leases for any term not exceeding ninety-nine years, or, in the case of a mortgage made after the commencement of this Act, nine hundred and ninety-nine years.

Similarly, Halsbury states in Vol. XXIII of Hailsham Edition the leasing powers of a mortgagee in possession as follows (p. 367):

> Apart from statutory or express powers, a mortgagee has no power to grant, without the mortgagor's consent, a lease which will be binding on the mortgagor after redemption;...."

The powers referred to as statutory powers have obviously got reference to Section 81 of the Conveyancing Act, 1881, or Section 99 of the Law of Property Act, 1925. It is no doubt, true that there was a duty cast upon the mortgagee to manage the property, to use the words of Section 76(a) of the Transfer of Property Act, as a person of ordinary prudence would manage it if it were his own. But if the mortgagee or his tenant contended that any lease which the mortgagee had created was binding upon the mortgagor, it had got to be shown that it was necessary for the mortgagee to give such a lease ; see *Hungerford v. Clay*[1] The requirement of prudent management which necessitates a lease for a period would make it binding upon the mortgagor. It does not

[1](1772) 9 M.R. 1

seem to us, that when the Transfer of Property Act was enacted in the year 1882, it was intended to make any departure from this provision of the English law. It is true that it is necessary for the mortgagee to manage the mortgaged property as a person of ordinary prudence would manage

his own. The first thing to be noticed, however, is that this Clause 76(a) finds mention not in clauses which enumerate the powers of the mortgagee but which enumerate his liabilities. The clause clearly merely reproduces the provision of the English law that the mortgagee must, at his peril, manage the mortgaged property as a person of ordinary prudence would manage it as if it were his own. The clause confers no powers whatever upon the mortgagee. If, consequently, it is intended to argue that any lease which was created by the mortgagee in possession is binding upon the mortgagor after the redemption, there must be found either a statutory power in the mortgagee to make such a lease or an express power. An express power could obviously be given by the mortgage itself. There would be for example a case when the whole of a zamindari or a patni is mortgaged. What would consequently be mortgaged would not only be the lands comprised in the zamindari or patni but all the rights of the zamindar or the patnidar. Now, it is the ordinary right of a zamindar to come to settlement with tenants with regard to the lands which are either vacant all along or which had been surrendered by a former tenant and were lying vacant since then. Now, if the rights of a zamindar are mortgaged along with all the lands comprised in the zamindary, it is obvious that the mortgagee will have a right to lease the land unless there is anything which prevents the creation of certain rights. For example, it has been held in cases governed by the Bihar Tenancy Act that a mortgagee could not create occupancy tenanoy in respect of lands which are in the has possession of the proprietor in certain circumstances. But if the lease created by a mortgagee is binding upon the mortgagor, that is not because of the provisions of Section 76(a) of the Transfer of Property Act or any analogous provision of the English law applicable to agricultural leases, but because there is express power conferred by the mortgage document upon the mortgagee. The mortgagee is undoubtedly entitled to lease the property. There is nothing to prevent him from leasing it. He is entitled to possession of the property and to its use and enjoyment, and the mortgagee can give his own right to use and enjoy the property, that is, lease it to anyone whom he likes, provided the lease specifically contains a provision that it would come to an end along with the mortgage. But the mortgagee has not got any power to create a lease which would be binding upon the mortgagor after the redemption merely because he happened to be a mortgagee of the property entitled to its possession and in actual possession. Section 111(c) of the Transfer of Property Act makes it an implied term of every lease created by a mortgagee that it comes to an end with the mortgage.

25. In this case it has never been made out that there was any special power conferred upon the mortgagee in possession to let the property either under the mortgage document or by a statute. Consequently it is not correct to say that the lease which was created in this case did not come to an end along with the redemption of the mortgage. Reliance was placed, however, on behalf of the tenant on certain observations of their Lordships of the Supreme Court in *Mahabir Gope and Ors. v. Harbans Narain Singh and Ors*[2]. The passage relied upon is as follows (p. 779):-

> "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

[2][1952] S.C.R. 775

created by statute based on the nature of the land and possession for the requisite period is a different matter altogether."

This, however, is stated as an exception to the general rule, namely,as a general rule 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. The rule consequently is that when the interest of the mortgagee comes to an end the lease created by him also comes to an end. As we have already mentioned, to that there may be exceptions when leases created by the mortgagee either in exercise of statutory or express power may be binding on the mortgagor after redemption. No circumstances evidencing necessity for the mortgagee to lease the property beyond redemption are made out in the present case. The mortgagee had no power to lease the land beyond redemption. There is also no question of any right springing up in the tenant in consequence of a statute based on the nature of land and possession for the requisite period. One could have understood the argument in case when a mortgagee creates a lease, may be even a lease which is not to enure beyond redemption, the creation of such a lease may give certain rights to the tenant in consequence of any particular statute. The only statute which it is said confers any rights upon the tenant to retain the property when the mortgagee's own interest came to an end is the Bombay Tenancy Act. We have already examined the various provisions because of which it is contended that the tenant was to remain a tenant of the land under the mortgagor even after the redemption. None of these sections confer upon the tenant any right to retain the land as a tenant of the mortgagor after redemption. Consequently the case of *Mahabir Gope v. Harbans Narain Singh*, does not help the mortgagee's tenant.

26. We have dealt with the matter so far apart from any authority. But the view which we have taken finds support from three unreported decisions of this Court. In *Maloji Vithal Kini v. Waman Gopal Tandel*[3] a debtor under B.A. D.R. Act had obtained a decree for possession against his creditor upon the footing that the transaction entered into between him and his creditor was a mortgage, though actually it was couched in the form of a sale. When the debtor went to obtain possession of the property in execution of the decree he was resisted by the tenant who claimed that he was entitled to remain in possession of the land under the provisions of Section 5 of the 1939 Act. The learned Chief Justice pointed out that even though if the mortgage had been in existence the tenant would have been in a position to insist that he should remain in possession of the property for a period of 10 years from the date of the commencement of the lease, the lease came to an end immediately the mortgage came to an end, and consequently the tenant was not entitled to have his position protected. Similarly, in *Rama Nathu Lohar v. Tukaram Raoji Pawar*[4] there was a self-redeeming usufructuary mortgage and upon the expiration of the period mentioned in the mortgage for redemption of the lease and after redemption the mortgagors dispossessed the tenant who had been introduced upon the land as a tenant by the mortgagee. The tenant then made an application to the Mamlatdar and obtained possession. He then filed a suit against the mortgagors in the Small Causes Court claiming ₹ 50 as damages. The learned

Judge of the Court of Small Causes held that immediately the mortgage came to an end the tenanoy in favor of the plaintiff also came to an end, and therefore the mortgagors were entitled to possession of

[3](1954) Civil Revision Application No. 210 of 1954, decided by Chagia C.J., on November 5, 1954 (Unrep)

[4](1954) Civil Revision Application No. 459 of 1953, decided by Chagla C.J., on December 3, 1954 (Unrep)

the mortgaged land. This view was upheld by the learned Chief Justice on the ground that when the mortgage came to an end the tenancy created by the mortgagor also came to an end. The third case has no direct bearing upon the question before us. But this was a case of a tenancy created by a widow to whom the land in question was given for maintenance. The view which was then taken was that the tenancy which was created by the widow came to an end along with her own life time.

27. With respect we are in agreement with the view taken in all the three cases. The orders of the Revenue Tribunal and the Prant Officer will, therefore, be set aside and the order of the Mamlatdar will be restored. The parties will bear their own costs of the present application.
Order accordingly.