

BOMBAY HIGH COURT

Ramdas Popat Patil

Vs.

Fakira Pandu Patil

Special Appln. No. 1462 of 1956

(Bavdekar and Gokhale, JJ.)

19.09.1956

JUDGMENT

Bavdekar, J.

1. The land in the present application under Article 227 originally belonged to one Dhana Supadu. He created two mortgages upon it in the year 1928, the first a mortgage in favor of one Madhav Martand and then a mortgage in favor of one Rajmal Lakhichand. We will not be concerned with the second mortgage in the present case. Madhav Martand sued upon his own mortgage in suit No. 511 of 1928 joining as parties to it Rajmal and the original mortgagor. Rajmal himself purchased the property pendente lite in the year 1933. Subsequently on 10-4-1935 Madhav obtained a decree for sale on the first mortgage and in execution of the decree brought the mortgaged property to sale. The application for execution was made in the year 1938 and while it was still pending-it is not quite clear whether in the year 1939 or 1940-41 - Rajmal let the property to opponent No. 1. Subsequently in that application for execution made by Madhav the property was sold on 17-3-1953 and the petitioner purchased it. He then made the application to the Mamlatdar, from which the present application under Article 227 arises. That application was for a declaration that opponent No. 1 was not his tenant. The Mamlatdar held that opponent No. 1 was not the tenant of the petitioner, because the lease created by Rajmal in 1939 or 1940-41 was affected by the doctrine of lis pendens and could not affect the rights of the auction purchaser, the petitioner. The Prant Officer upheld his order, but when the matter went to the Revenue Tribunal, they held that even though the result of Section 52 was that the lease which was created by Rajmal would not affect the rights of the mortgagee, still the purchase by the lessee could not be said to be unlawful in its inception. Rajmal was entitled to cultivate the lands himself, or to let them out to any other person, till the property was sold. Consequently the lease was lawful in its inception. He was, therefore, lawfully cultivating the lands under the ordinary law. Then they went on to observe :

"The opponent auction purchaser may be entitled to evict the applicant under the provisions of the Act. The opponent will be obliged to take action under the provisions of the said Act if he wants possession. It cannot be accepted that the applicant was not a tenant."

2. The petitioner has made this application under Article 227 and it appears to us that this was a lease which was created after Section 65A of the Transfer of Property Act was enacted and consequently if it had not been a lease which was created *pendente lite*, then, it would have to be investigated, before determining whether the lease was binding or not, as to whether the lease fell within the powers of a mortgagor under that section. It is not however necessary to go into that question in this case, because the question can be decided upon the doctrine of the pendants, which is embodied in Section 52 of the Transfer of Property Act.

3. Now, Madhav had filed his suit upon the first mortgage in the year 1928. That suit was a properly constituted suit having as parties the second mortgagee as well as the mortgagor. Subsequently Rajmal having purchased the interest of the mortgagor, the mortgagor of course went out of the suit for all practical purposes. But the result of the application of Section 52 of the Transfer of Property Act was that no lease could be created by Rajmal pending the suit filed by Madhav so as to affect Madhav's rights. Now, it is quite true that subsequently Madhav having brought to sale the mortgaged property, it has been purchased by the petitioner. But the argument that allowing the lease to hold good as against Madhav would not affect the rights of Madhav cannot for a moment be accepted. It is quite true that the petitioner purchased the interest of the mortgagor as well as the second mortgagee at the auction sale and if that was all that he had purchased, then, it could be said that holding the lease good as against the petitioner would not affect the interest of the mortgagee. But what an auction purchaser purchases at a sale upon a mortgage is not only the interest of the mortgagor, or the interest of any subsequent mortgagees who have been made parties to the suit, but also the interest of the mortgagee who has brought the property to sale. The petitioner, therefore, had in him both the interests of the mortgagor and the mortgagee ? after his purchase and if the lease in favor of opponent No. 1 is held good as against him, then, in that case, the result must necessarily be that Madhav's rights in the property, which were the subject matter of the suit, would be affected. Mr. Desai, who appears on behalf of the tenant, contends however that in this case there was power in the mortgagor under Section 65A of the Transfer of Property Act to let the property in such a manner as the case would be binding upon the mortgage and he says that this power the mortgagor had, whether a suit had been filed or not. The power would not come to an end by the mere fact that Madhav had filed a suit. Now, Section 65A was enacted, because there was a difference of opinion between the different High Courts before it was enacted as to whether a mortgagor had got power to let the property to another in such a manner that the lease would be binding upon the mortgagee. This question is now set at rest by the decision of their Lordships of the Supreme Court in *Kamakshya Narayan Singh v. Chohan Ram*¹, But the question was undecided when Section 65A was enacted and the only effect of this enactment was to make it quite clear that a mortgagor had a right to lease the property, provided the conditions mentioned in Section 65A(2) were satisfied. But it

seems to us that that does not affect the question of lis pendens. The question whether one party to a suit had or had not got a right to enter into a transaction does not affect the question of lis pendens. A mortgagor for example, may, pending a suit filed by the mortgagee, convey the equity of redemption to anybody he likes. He may similarly create a second mortgage. The only things which he cannot do is do these things in such a manner as to affect the first mortgagee. If he does create a second mortgage, or if he conveys the equity of

¹(1953) SCR 108

redemption, then the second mortgagee or the purchaser takes subject to the result of the suit. That is because once a suit is filed, Section 52 prohibits one party to the suit to effect a transfer which he could have done, if the suit had not been filed, not absolutely, but in such a manner as to affect the rights of the other party to the suit. It seems to us therefore that if Section 52 is to be allowed to have full effect, it must be decided that any lease, which is created by a mortgagor pending a suit which was filed by the mortgagee, would not be binding upon the mortgagee, or any person who has subsequently purchased the interest of the mortgagee along with that of the mortgagor in the property in suit and the lessee will have to take subject to the result of the suit. There is authority for this proposition in the case of the Calcutta High Court in *Muhammad Juman Mia v. Akali Mudiani*²,

4. Then we come to the provisions of the Bombay Tenancy and Agricultural Lands Act. Now, it is quite true that, as their Lordships of the Supreme Court observed in the case of *Mahabir Gope v. Harbans Narain Singh*³, if the mortgagee had power to create a lease in favor of a third person, then rights may spring up in a tenant whom he has introduced in the land, because of a statute which makes such rights dependent upon the nature of the land and possession for the requisite period. But the question is whether in this particular case there are any rights created because of the provisions of the Bombay Tenancy Act in the tenant who was introduced upon the land by the mortgagor. Now, Mr. Desai, who appears on behalf of the tenant, points out that in this case it was the mortgagor who let the property to opponent No. 1. He failed to make an application within the time mentioned in Section 3A of the Tenancy Act of 1939 for a declaration that the tenant was not a protected tenant. The result was that the tenant became a protected tenant under the provisions of Section 3A of the Old Act and such a person is to be regarded as a protected tenant for the purposes of even the 1948 Act. His next argument is that it was permissible for the mortgagor to create such a lease, because nothing prevented him from creating it. Even Section 52 of the Transfer of Property Act did not prevent a mortgagor from creating a lease and the lease was not invalid in its inception. He says that in that case there is no reason why if a valid lease was created by the mortgagor in favor of opponent No. 1, if subsequently owing to the operation of Section 3A of the Act opponent No. 1 became a protected tenant of the mortgagor, then he should not subsequently also become a protected tenant of the person who was entitled to the possession of the property as a result of the auction sale in the mortgagee's suit. Now, the reply to that is that it is true that there was nothing to prevent the mortgagor from creating a lease of the mortgaged property and the lease was not void in its inception. But Section 52 of the Transfer of Property Act prevented the mortgagor from creating any lease. so as to affect the

rights of the mortgagee, or any person who would purchase the property as a result of the suit pending which the lease was made. Any rights, therefore, which would be created in such a tenant because of the operation of the provisions of the Tenancy Act would not help the tenant as against the mortgagee, unless there was anything in the provisions of the Tenancy Act which required that notwithstanding the provisions of Section 52 of the Transfer of Property Act such rights would be created in the tenant. Now, as I have already mentioned, the only provision which creates any rights in the tenant introduced by the mortgagee is Section 3A of the old Act. Under that provision opponent No. 1 became a protected tenant : but that was so far as the mortgagor himself was concerned. There is

²47 Cal WN 682

³(1952) SCR 775

nothing in the provisions of Section 3A, or for the matter of that anywhere else in the Act, which gave opponent No. 1 any rights because of the lease created in his favor by the mortgagor as against the mortgagee. It is true that to do so is to hold that the doctrine of lis pendens is not affected by any of the provisions of the Tenancy Act. Now, we do not say that if the legislature had wanted it could not have provided that a person would be a protected tenant of the property, notwithstanding the provisions of Section 52 of the Transfer of Property Act. But our attention has not been drawn to any provisions of the Tenancy Act in which it is so provided. We must, therefore, take it that any leases which are created and which are affected by the doctrine of lis pendens do not enable the lessee to exercise any rights, created in his favor by the Bombay Tenancy Act, because of the creation of such a lease, against the mortgagee. In the result, therefore, the petitioner was not affected by the lease, which was created by the mortgagor, because of the doctrine of lis pendens. No relationship of a protected tenant was consequently created after the purchase by the petitioner between him and opponent No. 1. Opponent No. 1 was not consequently a protected tenant of the petitioner.

5. In the result, the order which has been, passed by the Tribunal must be set aside and those which have been passed by the Prant Officer and the Mamlatdar restored. There will be no order as to cost of this application.

Petition allowed.