

# **BOMBAY HIGH COURT**

Bhanshali Kushalchand Ramji

Vs.

Sha Shamji Jivraj

Civil Revn. Appln. No. 107 of 1956

(Shah, J.)

25.03.1957

## **ORDER**

**Shah, J.**

1. This revision application under paragraph 35 of the Kutch Province (Courts) Order, 1948, arises out of a suit for partition. The only question falling for consideration is whether the applicant-plaintiffs are entitled to recover actual possession of the Vakhar (shop) in suit. This property and another shop had been originally mortgaged with possession by the plaintiffs' uncle Laxmichand Jutha with the first defendant Shamji Jivraj on Jeth Vad 30 of Samvat year 1989 for 5000 Koris and, on taking accounts of the mortgage, 7700 Koris were found due to the mortgagee towards which the plaintiffs paid 7000 Koris and for the balance of 700 Koris and for a cash consideration of 300 Koris, in ail 1000 Koris, the plaintiffs mortgaged with possession the suit shop with the said defendant 1 by a deed of mortgage dated Vaishak Sud 4 of Samvat year 2001 and this is referred to in this suit as the first mortgage. By a second possessory mortgage the plaintiffs mortgaged the shop to defendants 2, 3 and 4 for Rs. 1000/- by a deed of mortgage dated Chaitra Sud 13 of St. year 2008 corresponding to 8-4-52 (Ex.20). However the said defendants 2, 3 and 4 were in possession of the suit shop from Samvat year 1994, that is to say, from prior to the date of the first mortgage and the deed of mortgage, Ex. 20. recites the fact of their possession as tenants. The document also says that the defendants were at liberty to redeem the first mortgage on payment of the sum due to the first mortgagee Shamji Jivraj (defendant 1) and that the mortgagors will redeem the second mortgage on payment of the sum due to defendants 2, 3 and 4 together with whatever sum the said defendants might have paid for redemption of the first mortgage. The plaintiffs served the defendants with a notice for redemption and thereafter brought the present suit for redeeming both the mortgages.

2. By their written statements the defendants agreed that the property may be redeemed on payment of whatever sum was found due on the two mortgages, and in addition defendant 1

claimed Rs. 296-15-0 for the cost of repairs etc., incurred by him on the property. Defendants 2, 3 and 4 contended that since they were tenants of the property from before the date of the two mortgages they were entitled to the benefit of the Bombay Rent Act and were not liable to deliver actual possession to the plaintiffs even after the redemption and that the plaintiffs may be awarded symbolical possession of the property only.

3. The learned trial Judge decreed redemption of both the mortgages and also awarded Rs. 296-15-0 to defendant 1 for the cost of repairs. He held that as defendants 2, 3 and 4 were in possession as tenants of the shop in question they were entitled to continue in possession thereof and the learned Judge therefore awarded symbolical possession to the plaintiffs. In appeal the learned Additional District Judge concurred with this finding of the Subordinate Judge, and held that Clauses (d) and (e) of Section 111 of the Transfer of Property Act, on which reliance was placed by the plaintiffs, had no application to the proved facts of the case. A new contention was urged in the appeal, viz., that the Bombay Rent Act was not duly applied to Bhachau where the property is situate and therefore defendants 2, 3 and 4 could not claim the benefit of the said Act. The learned Judge rejected this contention holding that the Bombay Rent Act did apply to the present case, and in the above view he dismissed the appeal with costs.

4. It is not disputed for the plaintiffs and indeed it could not be disputed that defendants 2, 3 and 4 were in possession of the suit shop from before the date of their mortgage, and this fact is even recited in the document Ex. 20. Their case, as set out in the written statement is that they were in possession of the shop since Samvat year 1994 and defendant 3 Lakhamshi Devshi has deposed to that effect and this has not been demurred to by the plaintiffs. But whether the said defendants were tenants of the property from Samvat year 1994, that is to say, from before the date of the first mortgage in suit, or whether the shop was leased to them by defendant 1 subsequent to the date of his mortgage, the fact does remain that they were in possession of the property as tenants from before the date of the second mortgage (Ex. 20). But Mr. Shah for the applicants has urged that under Section 76(a) of the Transfer of Property Act a mortgagee in possession must manage the property as a person of ordinary prudence would manage it if it were his own, and that the property in question being a shop it was not necessary for the mortgagee, first defendant, to let it out to a tenant and the said mortgagee could well have used it for himself. The short answer to this contention is that the plaintiffs were aware of the lease of the shop by the mortgagee first defendant to defendants 2, 3 and 4 and they had accepted that position and had never demurred to it. In point of fact, in the second document (Ex. 20) they have themselves acknowledged the fact that the shop was already in the possession of defendants 2, 3 and 4 as tenants of the first defendant Shamji Jivraj. Therefore it is too late in the day now to contend that defendant 1 should have remained in possession of the property himself and should not have given it on lease to others, and must be taken that defendants 2, 3 and 4 were validly in possession as tenants.

5. Now under Section 111 (c) of the Transfer of Property Act the interest of the first defendant in the suit shop as a mortgagee terminates on the redemption of his mortgage and equally his power

to dispose of the property extends only upto that event and not beyond. The term of his mortgage was one year ending on Samvat year 2009 and the term having expired the plaintiffs are undoubtedly entitled to redeem his mortgage, a position to which the defendants do not demur, but the question is whether on such redemption defendants 2, 3 and 4 are not liable to deliver actual possession of the property to the plaintiffs. A similar question had arisen in *Mahabir Gope v. Harbans Narain*<sup>1</sup>, where the

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

defendants first party claimed to continue in possession even after the redemption on the ground that they were the tenants of the property under the mortgage. Dealing with the question their Lordships observed :

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

At the same time their Lordships held :

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

On the facts of that case their Lordships held that the defendant first party was not a 'raiyat' and was therefore not entitled to claim the benefit of the Bihar Tenancy Act and to remain in actual possession even after redemption. Therefore Section 76 (a) and (e) of the Transfer of Property Act do not empower the mortgagee to create a lease of the mortgaged property which is to enure beyond the redemption of the mortgage itself, and it is quite clear that under Section 111 (c) of the Act when the interest of the mortgagee comes to an end the lease created by him also determines, though as laid down by the Supreme Court in Mahabir Gope's case this is subject to any rights that might be conferred or created on the tenant by any statute (See also *Dinkar*

*Bhagwant v. Rau Babji*<sup>2</sup>).

6. The question therefore is whether any rights are conferred on or created in defendants 2 to 4 under the Bombay Rent Act. As to this it was urged on the plaintiffs' behalf that the said Act has not been made applicable to Bhachau and therefore the defendants cannot claim the benefit of the Act. The point of the contention is that the Notification No. 215-J dated 19-9-51, by which the Rent Act was made applicable to Kutch, contains a Schedule which says inter alia that the Act was applied to the area of the Bhachau Municipal Borough and because Bhachau had no Municipal Borough at all the area to which the Act

<sup>2</sup>59 Bom LR 101 pp. 114-115

was intended to be applied could not be determined so far as the Bhachau Taluka was concerned and therefore it could not be said that the Act was made applicable to Bhachau town. It is true that Bhachau had no municipal borough but it is not alleged that Bhachau had no District Municipality. In any event, the position appears to be as has been pointed out by the learned Additional District Judge that the towns which had no Municipal Boroughs were included in the Schedule and the Act was applied to those towns, and it was intended therefore that the Act was also to apply to Bhachau town, and that the mention in the Notification of the Bhachau Municipal Borough was a case of misdescription. No attempt has been made on behalf of the plaintiffs to controvert this statement of the learned Additional District Judge. Considering that the Rent Act has been applied to Bhachau and has been in force since some years without objection, this contention of the plaintiffs appears to rest on a mere technicality and it should not be allowed to prevail.

7. But in order that defendants 2 to 4 may become entitled to the benefit of the Bombay Rent Act it has first to be shown that there is a relationship of landlord and tenant between the plaintiffs and them. "Landlord" is defined in Section 5 (3) of the Rent Act as meaning any person who is for the time being, receiving, or entitled to receive, rent in respect of any premises whether on his own account or on account, or on behalf, or for the benefit of any other person, or as a trustee, guardian, or receiver for any other person or who would so receive the rent or be entitled to receive the rent if the premises were let to a tenant. Now it cannot seriously be contended for the defendants that the plaintiffs are entitled to receive rent from them. They are paying and are liable to pay rent to the first defendant, and if it were urged that they are liable to pay rent to the plaintiffs as well then they would be subjected to a double liability for paying rent which is clearly not contemplated. The relationship of lessor and lessee is between the first defendant and defendants 2 to 4. The owner of the property which is the subject of a mortgage with possession cannot by any stretch of reasoning, be considered a landlord of the mortgagee's tenants within the meaning of Section 5 (3) of the Rent Act. He cannot certainly claim rent from the tenants of the mortgagee nor is the tenant liable to pay it to him. "Tenant" as defined in Section 2 (11) is a person by whom or on whose account rent is payable for any premises and includes sub-tenants. Therefore the essential requirement for the creation of a relationship of a landlord and tenant is that the former should be receiving or be entitled to receive rent from the latter and the latter

should be liable to pay the same to the former, and in the present case that requirement is lacking because quite evidently the plaintiffs are not receiving, nor is there any contract between them and defendants 2, 3 and 4 entitling them to receive rent from them; and the said defendants are not liable to pay any rent to the plaintiffs. Therefore no relationship of landlord and tenant exists between them. This view finds support from *Som Nath v. L. D. Desai*<sup>3</sup>, The relevant Act in that case was the East Punjab Urban Rent Restriction Act, 1949, and the tenant was the tenant of the mortgagee. The definition of "landlord" under the said Act was almost similar to the one contained in the Bombay Rent Act. The definition of "tenant", though restricted, was for the purpose of the present case similar to that of "tenant" in the Bombay Rent Act. It was held that an owner of property does not become a person entitled to receive rent of the property until there is brought into existence a contract of lease between himself and another person and as the plaintiff had not entered into any such contract with the defendant nor was there any such contract which would be

<sup>3</sup> AIR 1951 Pun 404

binding on them he could not be held as landlord within the meaning of the definition. Eventually it was held that the protection of Restriction Act was available only against a landlord and the plaintiff not being a landlord the defendant could not claim any rights against him under the said Act.

8. Mr. Jadeja has relied on *Hardei v. Wahid Khan*<sup>4</sup>, where the principle laid down in AIR 1952 Supreme Court 205, was followed, but it was held that where a mortgagee in possession of a shop has, in exercise of his right under Section 76 (a) of the Transfer of Property Act, let out the shop on a monthly tenancy, on the redemption of the mortgage the tenant continues to be a tenant and does not become a trespasser; and further that Section 111 (c) of the Act does not mean that if in the exercise of his powers of due management as a person of ordinary prudence the mortgagee has entered into an agreement of tenancy the tenancy automatically and 'ipso facto' lapses on the date of the redemption without the mortgagor exercising his option putting an end to it. But it does not appear from the facts of that case that any rights were claimed by the tenants under a statute like the Rent Act, and therefore that decision is distinguishable from the present case.

9. The question of eviction in the present case must necessarily depend upon the relationship of landlord and tenant between the plaintiffs and defendants 2 to 4, and if that relationship is not established, as indeed it cannot be established, then no question of claiming the benefit of the Bombay Rent Act can at all arise. In order to attract the provisions of Section 12 of the Bombay Rent Act the requisite condition is that the plaintiff should be a landlord and the defendant should be a tenant and there should exist between them a relationship of landlord and tenant. Evidently, as the plaintiffs here are not the landlord of the defendants, the provisions of the Bombay Rent Act cannot be available to the defendants. It follows that the plaintiffs are entitled to actual possession of the suit shop.

10. Accordingly I allow this revision application and vary the decree of the lower Courts by directing that instead of delivering symbolical possession of the suit property, viz., the Vakhar, the defendants shall deliver to the plaintiffs actual possession of the said property. Subject to this variation the decree passed by the lower Courts is confirmed. The defendants to pay the applicant's costs of this Court and to bear their own.

Order accordingly.

<sup>4</sup> AIR 1954 All 16