

BOMBAY HIGH COURT

Kamlakar

Vs.

Gulamshafi Imambhai Musalman

A.F.A.D. No. 1041 of 1958 (With Second Appeal No. 1162 of 1958). against decision of Asst. J.,
at West Khandesh (Dhulia) in C. A. No. 164 01 1957

(Patel and Palekar, JJ.)

26.03.1962

JUDGMENT

Patel, J.

1. These two appeals raise at least one question in common and that is why they have been placed together. In appeal No. 1041 of 1958, the point arises in execution proceedings and in appeal No. 1162 of 1958 it arises in a suit proper. In both these cases, the mortgagors obtained redemption decrees against their mortgagees. The mortgagees had before the filing of the suit created monthly tenancies in respect of the mortgaged premises. After the decrees were obtained, the tenants of the mortgagees claimed protection under the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947. In appeal No. 1041 of 1958, the mortgagor sought to execute the decree against the tenants also on the ground that once the decree was passed in his favor against the mortgagee, the tenants of the mortgagee were bound by the decree and, therefore, he was entitled to obtain physical possession of the properties. In Appeal No. 1162 of 1958, an order for symbolical possession was passed in favor of the mortgagor in execution proceedings under which he obtained symbolical possession. Thereafter he filed the suit, out of which the present appeal arises for possession against the tenants on the ground that they were trespassers and were not entitled to the protection of the Rent Act.

2. The first question, therefore, that arises in both the appeals is, whether or not a monthly tenant of the mortgagee inducted before the date of the suit can claim protection of the Rent Act, 1947. It is contended on behalf of the tenants that under Section 76(a) of the Transfer of Property Act, a mortgagee in possession is entitled to manage the property as a person of ordinary prudence would manage it as if it were his own. It is argued that in view of this provision the mortgagee would be entitled to create monthly tenancies in respect of the properties in dispute and if that is so, on redemption the mortgagor is bound by the creation of such tenancies.

3. Mr. Kotwal relies on two cases which support his contention. These cases are *Chinnappa Thevan v. Pazhaniappa Pillai*¹, and *Hardei v. Wahid Khan*², We will first

¹ AIR 1916 Mad 911

² AIR 1954 All 16

examine the question on principle apart from authority. It is undoubtedly true that a mortgagee has got the right of making prudent management of a property that has come into his possession. That right must necessarily be co-terminus with his right to continue as a mortgagee and it must come to an end as soon as his right to continue in possession ends. If during that period the mortgagee creates any leases as any other ordinary prudent persons would do in respect of his own property, the mortgagor cannot make any grievance whatsoever. From this, the further proposition, that if the original lease or grant was within the power of the mortgagee, then it would continue even after the redemption and would bind the mortgagor does not necessarily follow. Much would depend upon the nature of the interest created by the mortgagee. In respect of leases the rights of the parties are governed by the special provisions in the Transfer of Property Act. Section 111 (c) provides that a lease of immovable property determines when the interest of the lessor in the property terminates on, or his power to dispose of the same extends only to, the happening of any event by the happening of such event. This section in clear and unmistakable terms lays down that once the authority of the lessor to lease the property ends, the lease also necessarily terminates. This section must apply to all powers and authorities derived either from the Transfer of Property Act or from any other law. The mortgagee's rights cannot be any higher than that of any other lessor whose rights are limited in point of time by the very nature of the relationship between the lessor and the owner. If once this position is reached, the Court must hold that the mortgagor is entitled to get possession of the property unless there is some provision in law which creates an exception to this doctrine. This conclusion is supported by the decision of the Supreme Court in the case of *Mahabir Gope v. Harbans Narain*³, In paragraph 6 of their Judgment, their Lordships observe :-

"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 ensure beyond the termination of his interest as mortgagee.....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."

An exception, however, is recognized to the general rule as formulated by their Lordships. It is,

"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."

4. If, therefore, by a statute a tenant is given a protection or is given certain rights in the property,

then certainly to that extent, the rights of the mortgagor to recover Khas possession will be affected. We must, therefore, turn to the Bombay Rent Act. It must be noted that there is no provision in the Rent Act under which any rights as such are conferred on the tenant. The only section on which Mr. Kotwal can possibly rely is section 12 read with the definition of the word "tenant" in section 5. Section 12 imposes merely a disability on the landlord and provides that

³ AIR 1952 SC 205

"he shall not be entitled to the recovery of possession of any premises so long as the tenant pays, or is ready and willing to pay, the amount of the standard rent....."

It is contended that a restriction on the right of the landlord must necessarily mean a right in the tenant in view of the definition of the word "tenant" contained in section 5, sub-section (11). A tenant is defined to mean

"any person by whom or on whose account rent is payable for any premises and includes (b) any person remaining, after the determination of the lease, in possession with or without the assent of the landlord, of the premises leased to such person or his predecessor who has derived title before the commencement of the Bombay Rents, Hotel and Lodging House Rates Control (Amendment) Ordinance, 1959".

It is undoubtedly true that this definition of the word "tenant" is very widely worded and may possibly include even a tenant in possession of the premises under the circumstances of the present case. But then section 12 does not give the tenant a right to remain in possession of the properties, but it imposes a disability on the landlord and unless the person who seeks to recover possession is brought within the definition of the word "landlord" the tenant cannot claim possession. The word "landlord" has been defined 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. It also further includes a tenant who has sublet the premises to a sub-tenant. Now clearly, unless it could be shown that the mortgagor claims the property on redemption through the mortgagee, it is impossible to hold that he is within the definition of the word "landlord". Mr. Kotwal emphasises the words "who is for the time being, receiving, or entitled to receive, rent" in the definition and argues that the mortgagor would be within this definition. But there is no legal basis for this contention. If the law had contemplated that the tenancy of the tenant continued in spite of redemption then and only then the mortgagor would have been the person "entitled to receive the rent" whether he consented to the continuance of the tenancy or not. In view, however, of the provisions of section 111 (c) of the Transfer of Property Act, it cannot be said that the tenancy continued and, therefore, the mortgagor was entitled to recover the rent of the premises. There is no relationship either contractual or by privity of estate between the mortgagor and the tenant. He not being a landlord section 12 does not come in his way of recovering possession.

5. In AIR 1952 Supreme Court 205 and *Pramatha Natli v. Sashi Bhusan*⁴, the tenants were held

to be entitled to remain in possession by virtue of statutory rights created in them because of their being in possession. These cases do not apply to the present case.

6. The case very strongly relied upon by Mr. Kotwal namely, AIR 1916 Madras 911, undoubtedly supports the wide proposition which he has made, wherein it is said

"Tenancies created by a mortgagee in possession are binding on the mortgagor even after the redemption of the mortgage in so far that the relationship of landlord

⁴ AIR 1937 Cal 763

and tenant continues, and that if the mortgagor desired to bring the tenancy to a close he must do so by a regular suit under Tenancy Act."

In support of this proposition *Seshamma Shettati v. Chickaya Hegade*⁵, was relied upon. The principle there stated does not go to the length to which the learned Judges have taken it. In *Seshamma Shettati* the suit for possession was filed within one year of redemption by the mortgagor against those who were claiming to be either permanent tenants or to be in adverse possession on their acquisition of possession from the mortgagee. While negating that contention Mr. Justice Bhashyam Ayyangar as he then was made only this observation :

"In the present case, on the footing that the defendants were let into possession by the mortgagee, whether as tenants from year to year or professedly as tenants with a permanent right of occupancy, the tenancy between them and the mortgagee would have continued until the redemption of the mortgage in 1894, and such possession cannot be adverse either to the mortgagee or much less to the mortgagor, and the plaintiffs cause of action would have accrued and the period of limitation commenced to run only in 1894, if such tenancy ceases by the mere fact of redemption, or subsequent thereto, when the term of notice to quit had expired, if the right view should be that a lease given by the mortgagee, as being incidental to the managements of the mortgaged property, is binding upon the mortgagor - at any rate, as a lease from year to year, until he determines the same."

It is difficult from this to bring out the principle that the lease would be binding on the mortgagor in every case. Even the learned Judge himself limits it by saying "If that view is right" in respect of which there was no discussion. In view of what we have stated above, we find it difficult to agree with the broad proposition as laid down in AIR 1916 Madras 911. It goes counter to the principles formulated in the Supreme Court judgment in *Mahabir Gope's case*, AIR 1952 Supreme Court 205. In AIR 1954 Allahabad 16, on redemption the mortgagor filed a suit against the tenants of the mortgagee and the tenants claimed protection under the Rent Restriction Act. The learned Judges referred to sections 76 and 111 of the Transfer of Property Act and then said :

"No doubt, on the redemption of the mortgage, "the mortgagor is not bound by the

transfers made by the mortgagee or by contracts entered into by him unless his action can be supported on the ground that it was authorized by law or that he was empowered to act under some power or authority, express or implied, conferred on him by the mortgagor; The mortgagor in such a case may be entitled to claim back possession of the property free from any liability created by the mortgagee after the redemption of the mortgage, but this does not mean that, if in the exercise of his powers of due management as a person of ordinary prudence he has entered into an agreement of tenancy, on the mere redemption of the mortgage without the mortgagor exercising his option of putting an end to the tenancy the tenancy automatically and ipso facto lapses on the date of the redemption."

It is not clear with respect, from the judgment how their Lordships got over the provisions of section 111 (c) of the Transfer of Property Act which is a special provision in respect

⁵ ILR 25 Mad 507

of leases created by those having limited powers. As we have stated above, undoubtedly, if there is a statutory provision which creates in the tenant a right once he is on the land by virtue of his tenancy then certainly to that extent he will be entitled to protection. If it is intended to lay down that in every case a tenant automatically becomes a tenant of the mortgagor with respect, we cannot agree with that proposition. In view of the fact that no right is given to a tenant as such, it is difficult to hold that the appellants have got the right to continue in possession after redemption. The same view was taken in *Bhanshali Khushalchand v. Sha Shamji*⁶, by Mr. Justice M. C. Shah with which we agree.

7. It is then argued in respect of Second Appeal No. 1041 of 1958 that the mortgagee in that case was a tenant before the mortgage was created and it must be presumed that the tenancy in favour of the appellant was created by him as a tenant and not as a mortgagee, since doctrine of merger has no application. The matter does not depend on the doctrine of merger since this is not a case of unity of the entire interests of the lessor in the lessee, he being only a mortgagee. The principle of surrender applies since the tenant must be deemed to have surrendered his tenancy rights and acquired rights of a mortgagee in possession which gave him much higher rights than that of a tenant. Nothing has been shown to us from the mortgage document itself from which it can be inferred that the mortgagee continued to be a tenant. Even apart from this, if the appellant had to succeed in that argument it must be shown by him that he was made a tenant by his landlord by virtue of his powers as a tenant and not those of a mortgagee. It has not been pleaded much less proved. This contention, therefore, also must be rejected.

8. It is then argued in respect of second appeal No. 1162 of 1958 that if under the decree dated 30th December 1955 in the Darkhast the plaintiff only obtained symbolical possession on 7th April 1956, automatically the appellant became his tenant. We find it difficult to appreciate this argument. Giving of symbolical possession does not create any privity of estate between the decree-holder and the occupant of the property. This contention must also therefore be rejected.

9. In the result, we are satisfied that the decisions of the Courts below were justified. The appeals must, therefore, fail and are dismissed. The appellants to pay the costs of the respondents in both the appeals.

Appeals dismissed.

⁶⁵⁹ Bom LR 684