BOMBAY HIGH COURT

Narayan Dogra Shetty

Vs.

Ramchandra Shivram Hingne

Second Appeal No. 151 of 1960, against the decision of N.M. Indurkar, in Civil Appeal No. 662 of 1958, Poona in Regular Civil Suit No. 1736 of 1957

(Shah, J.)

10.12.1962

JUDGMENT

Shah, J.

1. The plaintiffs, who had purchased the equity of redemption in 6 of the 'khans' comprising a house, filed a suit for possession of the 6 'khans', on the ground that the mortgage which was created by their vendor in favour of the defendants, was satisfied out of the usufruct of the property at the end of ten years of its duration. The defendants contended that they were lessees of those 6 'khans' under a rent note dated August 6, 1946 for a period of 3 years, that the lease was suspended during the pendency of the mortgage, that on the expiry of the period of ten years of the mortgage the lease was revived for the rest of its term and that, therefore, the plaintiffs were not entitled to the possession of those premises. On the construction of both the mortgage deed as well as the rent note, the trial Court came to the conclusion that defendant No. 1 had surrendered his lease on the execution of the mortgage in favour of both the defendants and that, therefore, the defendants were liable to return the possession of the 6 'khans' to the plaintiffs. The plaintiffs' suit was accordingly decreed and the defendants were ordered to deliver possession of the premises to them Against that decree the defendants took an appeal to the District Court and the learned Extra Assistant Judge, who heard that appeal, concurred in the decision of the trial Court and dismissed the appeal. The defendants have now come to this Court by this second appeal.

2. In support of this appeal, it was urged by Mr. Kotwal, Junior, that there possibly could not be any merger of the interests of a lessee with the interests of a mortgagee and therefore, both the Courts below were in error in observing that the lease in the present case had merged with the mortgage. He further urged that the two Courts were also in error in holding that there was a surrender of the lease on the part of defendant No. 1 on the execution of the mortgage. In support

of the latter contention Mr. Kotwal relied upon the decision in *Kallu v. Diwan*[1], On the other hand, Mr. Marathe, the learned advocate for the plaintiffs, contended that the decision of both the lower Courts was perfectly justified on the construction, both of the rent note as well as the mortgage deed. He submitted that apart from the question of merger, defendant No. 1 had surrendered his lease on account

[1](1902) I.L.R. 24 All. 487

of the fact that the amount of the deposit of ₹ 90 which was made by defendant No. 1 under the rent note, was taken into account while computing the consideration of ₹ 2,500 in the mortgage and that by the terms of the mortgage, it was specifically provided that the mortgagees shall deliver possession of the mortgaged premises to the mortgagor on the expiry of the period of 10 years. Mr. Marathe relied upon *Meenakshi Amma v. K.V. Narayani*[2], and *Sardarilal v. Ramlal*[3], in support of his contention.

3. Now, it appears to me that since defendant No. 1 alone had taken the lease of the premises, he had to surrender and did, in fact, surrender his lease at the time of the execution of the mortgage in favour both of himself and defendant No. 2 jointly. It may be remembered that the lease was only for a period of 3 years, whereas the mortgage was to run for a period of 10 years, during which time the mortgagees by the terms of the mortgage deed had themselves to be in possession of the premises and at the end of the period, they had to deliver the possession thereof to the mortgagor. There cannot be any question of merger in this case. For a merger to arise, it is necessary that a lesser estate and a higher estate should merge in one person at one and the same time and in the same right and no interest in the property should remain outstanding. In the case of a lease, the, estate that is outstanding in the lessor is the reversion. In the case of a, mortgage, the estate that is outstanding is the equity of redemption of the mortgagor. Accordingly, there cannot possibly be a merger of a lease and a mortgage in respect of the same property since neither of them is a higher or lesser estate than the other. Even if the rights of the lessee and the rights of the mortgagee in respect of a property were to be united in one person, the reversion, in regard to the lease and the equity of redemption in regard to the mortgage, would be outstanding in the owner of the property and accordingly, there would not be a complete fusion of all the rights of ownership in one person. Such fusion of rights occurs when the rights of a lessee and those of the lessor or the rights of a mortgagee and those of the mortgagor vest in one person in the same right, and then one can say that the lesser estate of the lessee or of the mortgagee has merged in the higher estate of the lessor or of the mortgagor, as the case may be, and a merger in law has taken place. In the present case, however, it was only defendant No. 1 who had taken the lease of the property and the mortgage was executed in favour of both the defendants. Unless and until, therefore, some arrangement of which there is no evidence, was made by which the lease became the joint property of both the defendants, it could not possibly be urged that there was any fusion of the lessees' estate and the mortgagees' estate in both of them jointly even if such fusion was permissible in law. Besides, the mortgage was one and indivisible and it was executed in favour of both the defendants jointly. If, on the expiry of the period of 10 years of the

mortgage, both the mortgagees undertook, which in fact they did, by a specific term in the mortgage deed to deliver possession of the property to the mortgagor, I am afraid, one of them who was a lessee prior to the execution of the mortgage, could not possibly insist upon retaining the possession of the property on the ground that he was a lessee of the property prior to the execution of the mortgage and that his lease had revived on the expiration of the period of the mortgage. Considering the case from this point of view, it may not be even necessary to consider the question of surrender of the lease by defendant No. 1 since both the defendants are inextricably bound by the provisions contained in the mortgage deed. Besides, as pointed out by Mr.

Marathe, defendant No. 1 who was the only lessee of the premises in question, had

[2](1957) A.I.R. Mad. 212

[3](1962), A.I.R. Punj. 48

allowed his deposit of ₹ 90 under the lease, to be given credit for in the mortgage amount of ₹ 2,500. In other words, both the defendants, instead of paying the full consideration of ₹ 2,500 for the mortgage, only paid ₹ 2,410 and thereby defendant No. 1 necessarily relinquished his rights under the lease and undertook to abide by the terms of the mortgage. Of course, there is no specific writing on the part of defendant No. 1 to show that he had surrendered his lease, but his very conduct in regard to the deposit made by him under the lease, unequivocally shows that he had no intention to allow the lease to subsist any longer. In my opinion, therefore, although there was no merger and there could not possibly be any merger of defendant No. 1 estate as a lessee and the estate of both the defendants as mortgagees, there was undoubtedly an implied surrender of his lease by defendant No. 1, simultaneously with the execution of the mortgage of the demised premises in favor of both the defendants.

4. The reference by Mr. Kotwal to Kallu's case, in my opinion, is of no avail to him in the circumstances of the present case. It was held in that case that the fact of a tenant taking a mortgage of land comprised in his holding from his landlord did not of itself extinguish the tenancy by merging the rights of the tenant in those of the mortgagee, that the effect of such a mortgage on the tenant's rights would merely be that they would be in abeyance, and that when the landlord redeemed the mortgage, the parties would revert to their former position and the landlord would not be entitled to get possession of the land except by ejecting the tenant in due course of law. That there could not be a merger of the lessee's rights with those of the mortgagee in the same person, has been already explained by me in the earlier part of the judgment, and, with respect, I agree with the view expressed by the learned Judges in that behalf in that case. That case, however, is clearly distinguishable from the one before me on facts since the learned Judges nowhere in their judgments appear to have discussed the question of implied surrender of the tenancy in, the light of any express provision in the mortgage deed requiring the tenant-mortgagee to deliver possession of the land to the mortgagor on redemption of the mortgage or otherwise indicating that the tenancy was no longer intended to subsist. The decisions relied upon

by Mr. Marathe, on the other hand, are, with respect, correct, so far as they held that on the terms of the mortgage deed in each case, there was implied surrender of the lease, but with respect again, I am unable to agree with the observations of the learned Judges in the two cases that the lessee's estate being the lesser one had merged with the mortgagee's higher estate. As indicated above, there could not possibly be any merger of these estates in law. Truly speaking, the interest of a lessee and that of a mortgagee in reference to the same property are co-ordinate and can exist together as in the case of a lease for a period, of ten years and a simple mortgage of the same property for the same period. The lessee in such a case can continue in enjoyment of the property and he may yet have a sufficient security in that property as a mortgagee for the repayment of the money advanced by him to the owner of that property. In order to extinguish the rights of the lessee there must either be express provision in the mortgage deed to that effect or some such provision which would be inconsistent with the continuance or subsistance of the lease.

5. In the present case, in my opinion, the decision of both the Courts below that defendant No. 1 had, by his conduct, surrendered the lease of the premises in question, at the time of taking the mortgage of the same premises along with defendant No. 2, was perfectly right and I see no reason to interfere therewith.

6. In the result, the appeal fails and is dismissed with costs.
Appeal dismissed.