BOMBAY HIGH COURT

Anaji Thamaji Patil

Vs.

Ragho Bhivraj Patil

Special Civil Appln. No. 2155 of 1965

(Kotval, C.J., Chandrachud and Deshmukh, JJ.)

05.11.1971

JUDGMENT

Kotval, C.J.

1. After hearing counsel for both the sides it appears to us that the question which has been referred for our decision in this Reference is somewhat too widely stated and that in order to bring out the exact scope of the points to be determined in the Reference the question must be split into two questions which we have retrained as follows with the consent of counsel:

> (1) Where agricultural land is mortgaged by a simple mortgage and the mortgagor leases that land pending a suit by the mortgagee for sale of the mortgaged property, is the lease affected by the doctrine of lis pendens contained in Section 52 of the Transfer of Property Act?
> (2) Can the lessee be considered to be a deemed tenant under Section 4 of the Bombay Tenancy and Agricultural Lands Act in such a case?

2. The facts upon which these questions arise are simple. Survey No. 86 of village Nimon, District Nasik, belonged to one Deoji who mortgaged it to one Multanmal by way of a simple mortgage. Multanmal died and his heirs instituted a suit upon that mortgage, Civil Suit No. 25 of 1930. The plaintiffs in that suit, Motilal the son of Multanmal and others obtained a decree against Deoji on 26th January, 1932 and since the decree ordered the sale of agricultural property the execution of that decree was transferred to the Collector. The darkhast proceedings were instituted on 1st September, 1937 (Regular Darkhast No. 1226 of 1937). The execution was transferred to the Collector for sale of the property on 11th October, 1937. Curiously enough the land was only sold by public auction almost 25 years later by the Collector on 17th March, 1962. In that auction the respondent No. 1 in this petition Ragho Bhivraj Patil was held to be the auction-purchaser. The sale was confirmed in his favour on 1st November, 1962 and on 14th

December, 1962 possession was delivered to Ragho Bhivraj Patil.

3. As we have said the darkhast proceedings were kept pending before the Collector for almost 25 years between 11th October, 1937 and 17th March, 1962 and during that time other events occurred. The original mortgagor Deoji sold Survey No. 86 out of the mortgaged property to one Bhikchand Jitmal. The date of this transfer is not clear but it is accepted on all hands that it was a transfer pending the Civil Suit No. 25 of 1930, that is to say, prior to 28th January, 1932 when the decree for sale in that suit was passed. Bhikchand Jitmal who had thus purchased the equity of redemption of the original owner Deoji held the field for some years and at the commencement of the agricultural year 1943-44 granted a lease to the petitioner before us, Anaji Thamaji Patil. Anaji, therefore, claims to be the tenant of the field under Section 4 of the Bombay Tenancy and Agricultural Lands Act and all the rights that go along with it.

4. As we have said, because of this lease being granted to Anaji and Anaji being in possession of the field, the auction-purchaser Ragho Bhivraj was unable to obtain possession in the execution of the mortgage-decree. He was therefore given merely symbolical possession on 14th December, 1962. He was obviously not satisfied with merely getting such symbolical possession and, therefore, he filed an application under Section 70 (b) of the Bombay Tenancy and Agricultural Lands Act on 19th January, 1963 before the Mamlatdar of Chandor.

5. The Mamlatdar held that the lease in favour of the petitioner cannot have any effect against the respondent No. 1, because the latter had purchased the land in auction sale and was not affected by the lease which was created by the mortgagor Bhikchand because of the doctrine of lis pendens. The lessee went up in appeal to the Special Deputy Collector, Nasik, who reversed the decision of the Mamlatdar and allowed the appeal. He held that Bhikchand was the full owner of the land and there is nothing to show that he had no right to lease out the land. It cannot be said that the creation of the tenancy in the agricultural year 1943-44 in favour of Anaji was in any way illegal. His possession therefore was quite lawful and he must be deemed to have been a tenant under Section 4 of the Bombay Tenancy and Agricultural Lands Act.

6. The Maharashtra Revenue Tribunal reversed the decision of the Special Deputy Collector and held that the lease was given during the pendency of the execution proceedings and is, therefore, affected by the rule of lis pendens contained in Section 52 of the Transfer of Property Act and since by virtue of that rule the property cannot be transferred or otherwise dealt with by any party to the suit so as to affect the rights of any other party thereto except under the authority of the Court, which was not obtained, Anaji could not become a deemed tenant. The Tribunal relied upon a decision of this Court in *Ramdas Popatlal v. Fakira Pandu Patil*[1], and held that that decision "concludes the question which arises in this case". They also referred to two other decisions of this Court *Narayan Laxman v. Vishnu Waman*[2], and *Narayan Maruti v. Bhau*[3], by a Division Bench of this Court. Reference was made before the Tribunal also to a decision of the Supreme Court in *Dhaya Lala v. Rasul*[4], and the Tribunal held that there was nothing in that

decision which "affects the rule of lis pendens in cases under the Tenancy Act." The Tribunal also referred to a contrary view taken in *Bahadurbhai v. Ambalal, (1963) 4 Guj LR 681*, wherein the decision in 59 Bom LR 46 was distinguished but they felt that they were bound by the decision of this Court in preference to the Gujarat view.

7. It is against the decision of the Tribunal that the Special Civil Application was directed.

[1]59 Bom LR 46 [3] Special Civil Appln. No. 1398 of 1961 decided on 26-7-1962 (Bom.)
[2]59 Bom LR 205 [4]65 Bom LR 328

The matter first came before a learned single Judge who pointed out that there was a considerable divergence of opinion between the decision of this Court in 59 Bom LR 205 which followed Dhaya Lala's case, 65 Bom LR 328 and the decision of this Court reported in 59 Bom LR 46 . Moreover there was also the Gujarat view which distinguished the latter case. He accordingly referred the matter to a Division Bench and the Division Bench in its turn has referred the case for a decision by the Full Bench because in their opinion the decision in 59 Bom LR 46 requires reconsideration in view of the decision in 65 Bom LR 328 .

8. The claim of the petitioner to be the tenant of field No. 86 is based upon the provisions of Section 4 of the Bombay Tenancy and Agricultural Lands Act and it is urged that when the original owner, the mortgagor, sold the Survey No. 86 to Bhikchand and Bhikchand in his turn gave a lease to the petitioner Anaji, Anaji must be deemed to have been in lawful cultivation of the land within the meaning of Section 4 and therefore he would become a deemed tenant under Section 4 of the Tenancy Act. Bhikchand could grant the lease under Section 65-A of the Transfer of Property Act. If that be so, then there is nothing contained in the provisions of Section 52 of the Transfer of Property Act which affects or takes away that right. Even assuming that Section 52 applies, the requirements of Section 52 of the Transfer of Property Act do not justify it being held that the rights of the mortgagee in this case, which the respondent No. 1 purchased in the auction, were in any way affected and therefore the doctrine contained in Section 52 would be inapplicable to the present case and that therefore there was no need for the tenant or Bhikchand to seek the permission of the Court in creating the lease in the former's favor.

9. The contention on behalf of the respondent No. 1 has been that Section 4 of the Tenancy Act would not apply because the petitioner was not then in lawful cultivation. The petitioner's lease was during the pendency of the darkhast proceedings and having regard to the provisions of Section 52 of the Transfer of Property Act, that lease is hit by the doctrine of lis pendens. It was urged that no doubt a mortgagor's power to lease is now recognised by Section 65-A of the Transfer of Property Act, but Section 65-A is in itself subject to Section 52 and not vice versa. Moreover Section 52 itself controls Section 4 of the Tenancy Act. Alternatively it was urged that even if the lease is not hit by the provisions of Section 52, it is hit by the provisions of the then operative Schedule III color:black'> of the Code of Civil Procedure and Paragraph 11 thereof which makes any transfer pending an execution by the Collector void.

10. We may first of all dispose of the last mentioned argument. No doubt the lease in the present case was given at the commencement of the agricultural year 1943-44 at a time when the third Schedule of the Code of Civil Procedure was in operation. It was only repealed by the Code of Civil Procedure Amendment Act of 1956. Therefore the provisions of the third Schedule would apply to the facts of the present case. It is also no doubt true that paragraph 11 of the third Schedule says that so long as the Collector can exercise or perform in respect of the judgment-debtor's immovable property, or any part thereof, any of the powers or duties conferred or imposed on him by paragraphs 1 to 10, of the Schedule, the judgment-debtor or his representative in interest "shall be incompetent to mortgage, charge, lease or alienate such property or part except with the written permission of the Collector....." and it was held that when the paragraph says "shall be incompetent to mortgage, charge, lease or alienate" it means that any of those transfers would be void. Prima facie this may be a good point but, we fail to see how it can be urged or entertained by us in this reference. In the first place, it is a completely new point, which was never urged before any of the Revenue Authorities or even before the learned single Judge of this Court or the Division Bench. Secondly the reference to this Bench is only limited to certain specific questions which we have formulated above and we do not think that we ought really to go beyond the ambit of those questions. This point cannot form the subject-matter of the reference at all. Thirdly, we may point out that even if entertained, the point may conceivably give rise to a disputed question of fact. Paragraph 11 says "except with the written permission of the Collector" and the question whether permission was or was not obtained would have to be gone into and that would be a pure question of fact. In fact on behalf of the petitioner that question was raised by counsel. In all the circumstances, therefore, we do not think that we can go into this contention raised on behalf of the Respondent No. 1

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11. We then turn to the main point in this case and the question that arises is, was the petitioner to whom a lease was granted by Bhikchand at the commencement of the agricultural year 1943-44 lawfully cultivating the land which was leased to him. If he was lawfully cultivating the land, then he would be entitled to the protection of Section 4 of the Tenancy Act. Section 4 says that "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 is not-

> "(a) a member of the owner's family or
> (b) a servant on wages payable in cash or kind but not in crop share or a hired labourer cultivating the land under the personal supervision of the owner or any member of the owner's family, or
> (c) a mortgagee in possession".

With the two Explanations to the section we are not here concerned.

12. The section obviously lays down a fiction by the use of the words "shall be deemed to be a tenant." In other words, normally a person lawfully cultivating could not by virtue of the fact of lawful cultivation alone be a tenant, but this section enjoins that he shall be regarded as a tenant

The only conditions to the coming into force of Section 4 are three namely:-

(a) that the person should be lawfully cultivating;
(b) that the land should be belonging to another person; and
(c) that that land is not cultivated personally by the owner.

If these conditions are fulfilled, then the person in cultivation is deemed to be a tenant. Then there are exceptions to this rule namely that the person in cultivation should not be a member of the owner's family or a servant or hired laborer or a mortgagee in possession in which case of course he cannot be deemed to be a tenant. None of these exceptions fall to be construed here.

13. It may be noticed that the essential condition is that the person claiming to be a deemed tenant should be a person "lawfully cultivating". If he is once found to be in lawful cultivation, then immediately the other provisions of the Tenancy Act would be attracted in his case and he would become a "protected tenant", protected by the provisions of the Act. Therefore, what will have to be determined is whether the petitioner in this case was in lawful cultivation at the inception of the lease, that is to say, when he was first inducted on to the land by Bhikchand. We stress this point here, because in some of the cases the subsequent applicability of Section 52 has been considered. If the person who is inducted on to the land is at the inception in lawful cultivation, Section 4 would become applicable and any other position that may arise subsequent to his being a deemed tenant would not matter.

14. The principal reason why it is said that the petitioner was not lawfully cultivating, was that the lease in his favour was contrary to or prohibited by the provisions of Section 52 of the Transfer of Property Act. The transfer itself being illegal under Section 52, it is said his possession or cultivation under that transfer can never be lawful.

15. One of the answers on behalf of the petitioner to this contention has been to invoke the provisions of Section 65-A of the Transfer of Property Act. Section 65-A was introduced into the Transfer of Property Act by Act 20 of 1929 and sub-section (1) thereof provides that subject to the provisions of sub-section (2), a mortgagor, while lawfully in possession of the mortgaged property, shall have power to make leases thereof which shall be binding on the mortgagee. Of course, sub-section (2) in clauses (a) to (e) thereof lays down a number of conditions which the mortgagor shall observe. These conditions are explicable if one considers briefly the history on the law of this subject prior to the introduction of Section 65-A. Under the English Common Law the mortgagor had no power to lease, for in an English mortgage the mortgagor was deemed to have made an absolute conveyance of his land and was a tenant on sufferance and being a tenant on sufferance himself he could not create another tenancy but it was held that the lease granted by the mortgagor was not wholly without any effect, but such a lease was binding on the mortgagor himself because as the lessor he would be estopped from disputing it. Some of the decisions in India followed this rule and other cases pointed out that the rule in England was not

applicable as the mortgagor in India remains the owner and when in possession can prima facie exercise the right of ownership. The amendment settled this conflict. The Section 65-A was thus enacted merely to reaffirm the position that the mortgagor was in the position of a manager of the property even though he had mortgaged it and that as a manager he could grant a lease of the mortgaged property provided he was in possession. Clauses (a) to (c) of sub-section (2) of Section 65-A merely give statutory recognition to his powers of management. There is no question here that the lease granted to the petitioner was in compliance with Section 65-A. Therefore there was power in Bhikchand to grant the lease to the petitioner.

16. But the further question that has been argued is that nevertheless Section 52 of the Transfer of Property Act governs and controls the provisions of Section 65-A. Therefore even though there was a power to grant the lease, that power may not be exercised in derogation of the principle of lis pendens laid down in Section 52.

17. In our opinion, this contention is in law a correct contention and must be Upheld. There is nothing in the provisions of Section 65-A which suggests that the provisions of Section 52 will not apply where a lease is granted under Section 65-A. Section 52 lays down a principle of general application and appears in Chapter II of the Transfer of Property Act which lays down general principles governing all transfers. It is also an important principle of equity which so far as India is concerned is embodied in Section 52 and unless therefore there is any express exclusion of that principle we think that Section 52 must be held to govern Section 65-A which is a provision of the same statute.

18. We are fortified in our opinion by the two decisions which were brought to our notice in this and other connections. One is the decision in *Maganlal v. Lakhiram*[1] (see page 195 column 2) where a Division Bench of the Gujarat High Court held:-

> "We are, therefore, of the view that all these ingredients of Section 52 have been satisfied in the present case and although Section 65-A gives a statutory power to the mortgagor in possession to lease the mortgaged property, that section would be subject to Section 52 of the Transfer of Property Act."

While we accept the Gujarat decision on this point, we should not be understood to accept all that has been said in paragraph 3 of that judgment at pages 194-195 as to which we shall have presently something to say. The same view was taken by a learned single judge of this Court, Palekar J. as he then was, in regard to a similar argument where Section 4 of the Tenancy Act was concerned. It was there urged that in view of Section 4 of the Tenancy Act the provisions of Section 52 must be deemed inapplicable and the learned Judge answered the point by observing:

> "This doctrine of ancient origin which is based upon sound public policy would, therefore, require for its abrogation much more in a statute than a general description of it

as an ameliorative piece of legislation."

The learned Judge also referred to Section 3 of the Tenancy Act which expressly mentions that Chapter V of the Transfer of Property Act relating to leases which did not previously apply to agricultural lands, has expressly been made applicable to such tenancies and leases. Once again while we accept that decision only so far as this point is concerned, we may not be taken to have endorsed the whole of the decision as to which we will have something to say later on. In our opinion, therefore, the mere existence of the power to lease in Section 65-A of the Transfer of Property Act does not advance the case on behalf of the petitioner any further, because despite the enactment of Section 65-A, Section 52, which is an overriding section will continue to apply. That would also be the case even though Section 4 of the Tenancy Act is applicable.

19. The question then remains, is Section 52 applicable to the present case? the material portion of Section 52 with which we are concerned runs as follows:

> "During the pendency in any Court having authority within the limits of India .....or established beyond such limits by the Central Government of any suit or proceeding which is not collusive and in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose."

[1] AIR 1968 Guj 193

There is an Explanation added which defines what is the pendency of a suit or proceeding and it provides that the suit or proceeding shall be deemed to commence from the date of the presentation of the plaint or the institution of the proceeding in a Court of competent jurisdiction, and to continue until the suit or proceeding has been disposed of by a final decree or order and complete satisfaction or discharge of such decree or order has been obtained, or has become unobtainable by reason of the expiration of any period of limitation prescribed for the execution thereof by any law for the time being in force. Having regard to this Explanation, the entire period taken in the present suit filed by Multanmal, Civil Suit No. 25 of 1930, from the date of the presentation of the plaint and including the darkhast proceedings which terminated by delivery of symbolical possession to the auction-purchaser, the respondent No. 1, on 14th December, 1962, would be deemed to be the pendency of the suit within the meaning of Section 52. Thus there is no doubt that the lease granted by Bhikchand to the petitioner Anaji at the commencement of the agricultural year 1943-44 would fall within the pendency of the suit.

20. The further question, which is the real question in controversy in this reference, is; upon a plain reading of Section 52 do the consequences contemplated by Section 52 arise in this case? Section 52 when analyzed shows that it is in two parts. The first part lays down the conditions for the applicability of the doctrine and the second part lays down what are the consequences if the

doctrine applies. The conditions for the applicability of the doctrine are:-

(a) that a suit or proceeding should be pending;
(b) that it should not be collusive;
(c) that it should be a suit or proceeding in which any right to immovable property is directly and specifically in question;
(d) that the suit should be pending in a court having jurisdiction; and
(e) that the Court must be in India of beyond India, but established by the Central Government.

If these conditions are fulfilled, then the doctrine applies, but even if the doctrine applies, the consequences which flow from the application of the doctrine are again limited by the Section itself and these consequences indicated in the latter half of the section are as follows:-

(a) that the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding;
(b) so as to affect the rights of any other party thereto; and
(c) if it does affect the rights of any other party thereto, then permission of the Court is necessary.

21. The cardinal point in the present case is, did the lease granted to the petitioner by the mortgagor Bhikchand in any way affect the right of any other party in this case, namely the mortgagee Multanmal? It may be noted that on the date on which the lease was created the present respondent No. 1, who is only the auction-purchaser, was nowhere upon the scene. His rights had not arisen at all on the date of the lease. Such right as he has arose only when the land was sold by auction on 17th March, 1962 and so far as he, the auction-purchaser (the respondent No. 1) is concerned, he was not affected at all by the doctrine of lis pendens on the date on which the lease was granted. The short question then is, was any right of the decree-holder who was the other party in the suit in any way affected by the lease? In order to answer this question it is necessary to look a little deeper into what were the rights of the mortgagee pending the suit.

22. The mortgage was admittedly a simple mortgage and the incidents of such a mortgage are clearly laid down in Section 58 (b) of the Transfer of Property Act which defines a simple mortgage as follows:

"Where, without delivering possession of the mortgaged properly, the mortgagor binds himself personally to pay the mortgage-money, and agrees, expressly or impliedly, that, in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage-money, the transaction is called a simple mortgage and the mortgagee a simple mortgagee." The essential characteristic of a simple

mortgage therefore is that possession is not given to the mortgagee of the mortgaged property. That is expressly provided in the definition itself. All the rights which the mortgagee has are these: First to recover the money which he has loaned. His second right is that in the event of non-payment, "the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of sale to be applied..... in payment of the mortgage-money". Therefore, the mortgagee under a simple mortgage has no right whatsoever to actual possession of the mortgaged property or any possession at all. In fact, this is what makes the crucial difference between a simple mortgage and usufructuary mortgage. In an usufructuary mortgage possession is given to the mortgagee (see clause (d) of Section 58) whereas in a simple mortgage the possession of the mortgaged property remains with the mortgagor.

23. If then the only right which the mortgagee had in the present case was to the recovery of his money or in case of default of payment of his money to have the mortgaged property sold and the sale proceeds applied in satisfaction of his debt, can it be said that the lease created in favour of the petitioner by Bhikchand, who stepped into the shoes of the mortgagor by virtue of his purchase, in any way affects those rights? Notwithstanding the mortgage, the original owner Deoji in whom inhered the equity of redemption, continued to be the owner of the property. The right which he transferred to the mortgagee was not the ownership of the property. Mulla in Ms commentary on the Transfer of Property Act, 5th Edition, 382 puts it thus : -

"A simple mortgage consists of (1) a personal obligation, express or implied, to pay and (2) the transfer of a right to cause the property to be sold. The right transferred to the mortgagee is not ownership." Therefore the ownership continues with the mortgagor as well as the possession of the property. Section 65-A permits the mortgagor to lease the property and it was under that right that the purchaser from the mortgagor who for all purposes is the mortgagor (see Section 59-A) granted the lease to the petitioner. A lease is merely a transfer of a right to enjoy the property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, therefore, by the lease in favour of the petitioner Bhikchand merely transferred possession and the right to enjoy such property to the petitioner. None of these rights inhered in the mortgagee as we have shown. The mortgagee had not got the right of possession nor the right to enjoy the property. How then can it be said that the transfer, (the lease in the present case) assuming that it was during the pendency of the suit, was made "so as to affect the rights of any other party" to the suit? In our opinion, no right of the mortgagee was in any manner affected by the grant of the lease to the petitioner by Bhikchand in this case. If so, assuming that the other conditions for the application of the doctrine of lis pendens as laid down in Section 52 are fulfilled, still the essential consequence prescribed by the section does not follow and, therefore, Section 52 would be wholly inapplicable in the present case.

24. It is not disputed that if the petitioner is held to be lawfully cultivating the field on the date on which the lease was granted to him at the commencement of the agricultural year 1943-44, then he would be protected by the provisions of the then operative Tenancy Act and by the Tenancy Act of 1948 which replaced it and he would be protected by all the provisions of the Act. Upon this discussion the first question posed for our decision must be answered in the negative and the second question in the affirmative.

25. But then there remain to be considered a number of decisions which were pointed out and particularly with reference to the point we have just made the remarks in the decision of the Gujarat High Court in Maganlal's case, which we have already referred to above in another context (AIR 1968 Gujarat 193). In that case also the appellant was a simple mortgagee of the property of the second respondent and the mortgagee filed a suit for the realisation of the mortgage-money by sale of the mortgaged property. A preliminary decree was passed on 29th June, 1955 and a final decree on the 27th January, 1956. The decree-holder mortgagee then filed an application for execution and the property was sold at an auction on 20th July, 1959 and was purchased by the appellant decree-holder himself. Meanwhile, after he had obtained the final decree on 27th January, 1956 the mortgagor respondent No. 2 had given a lease of the property to the respondent No. 1 for a period of three years on 17th January, 1957. When the auction-purchaser filed an application for possession of the property, which he had purchased at the court sale, he was met with the plea by the 1st respondent who was in actual possession that he was a tenant. The single Judge of the Gujarat High Court reversing the decision of the Court below had held that the mortgagee was only entitled to symbolical possession, but the Division Bench reversed the learned Single Judge's decision in an appeal under the Letters Patent and held that the lease was not binding on the mortgagee or the auction-purchaser and therefore the lessee had to deliver up actual possession to the auction-purchaser. In that case one of the main points canvassed was that Section 65-A gave plenary powers to the mortgagor to lease and that the provisions of that section therefore were not controlled by the provisions of Section 52. The Division Bench held that Section 52 controlled Section 65-A, a point with which we are in respectful agreement. Unfortunately in that case, that was the main point urged and therefore answered by the Division Bench, but counsel on behalf of the auction-purchaser did not further argue as in the present case that even if Section 52 were held to be applicable in the case of a simple mortgagee or his auction-purchaser the mere grant of a lease by the mortgagor would not affect their rights. It does not seem to have been urged there that the right of a simple mortgagee is not one of possession and that his only right is to the recovery of his moneys or the right to have the mortgaged property sold in the event of non-payment. The case, therefore, was not argued from the point of view which has commended itself to us. We may say with respect therefore that upon the view which we have taken we are unable to accept the findings which the Division Bench gave in paragraph 3 at page 195 as follows : -

> "Moreover, the mortgagor has also, some rights in his property left in him after the mortgage and these rights would be extinguished by the sale of the property, made in

execution of the decree passed in a suit brought by the mortgagee in exercise of his rights of sale and whoever purchases the property at the auction sale would be entitled to the possession of the property along with the rights both of the mortgagor and the mortgagee. The right of sale of the property includes the right of possession of the property in sale and the purchaser at the auction sale in the execution of the decree passed in the suit would be entitled to apply for possession in the execution proceedings. The proceedings by way of sale, the purchase by the auction-purchaser and the application by the auction-purchaser for actual possession are all the consequences of the suit for sale of immovable property which was the subject-matter of the mortgage and are, therefore, incidents of the suit in which a right to immovable property was directly and specifically in question. The auction-purchaser at a Court sale purchases the interest of the judgment-debtor and also the interest of the mortgagee and on a sale in such a suit, the whole mortgage is extinguished and the interest of the mortgagor also passes to the auction-purchaser. What thus passes to the auction-purchaser is the title of the property and also the right to have possession of the property. " With respect, it is correct to hold that the auction-purchaser at a Court sale purchases the interest of the judgment-debtor and also the interest of the mortgagee and on a sale in such a suit the whole mortgage is extinguished and the interest of the mortgagor also passes to the auction-purchaser. We are also in agreement with the remark that the right of sale of the property includes the right of possession of the property in sale and that the purchaser at the auction sale in the execution of the decree passed in the suit would be entitled to apply for possession in the execution proceedings, but we are unable to see how that possession must be actual possession. On the other hand, it seems to us that it would be such possession as the property is then capable of. That is to say, the auction-purchaser would get such possession subject to the rights created in favour of a lessee, if any. Those rights of possession and enjoyment of the property were never part of the mortgage (we again emphasize that we are only saying this with reference to a simple mortgage). These rights are also never challenged in such a suit. All that the mortgagee sues for is the money which he had advanced and for a declaration that in the event of non-payment the property should be sold and the money applied in satisfaction of the mortgage debt. In so far as the auction-purchaser purchases the mortgagee's rights he does not become entitled to any possessory right to the property other than the right which he purchases by virtue of the auction sale and therefore he would take such right as there exists on the date of the sale. In so far as the auction-purchaser purchases the right of the mortgagor, we have already shown that there is no impediment to the mortgagor leasing the property during the pendency of a simple mortgage, nor does it affect any right of the mortgagee and therefore when the auction purchaser purchases the right of the mortgagor it would be such rights as inhered in the mortgagor on the date of the auction purchase. In either case the rights created in favor of the lessee, of possession, use and enjoyment of the property would not pass to the auction-purchaser. To this extent, therefore, we are not in agreement with the Gujarat decision.

26. The Revenue Tribunal relied upon two decisions (1) the decision of the Supreme Court in 65 Bom LR 328 and (2) 59 Bom LR 46 for holding that in this case the lease in favor of the petitioner was effected by the rule of lis pendens contained in Section 52 of the Transfer of Property Act. In Dahya Lala's case it was a mortgage with possession and shortly after the mortgage the mortgagee granted a lease to one Mohammed Abdul Rahim who claimed to be the tenant of the land. The owners of the property who were the appellants before the Supreme Court had applied for redemption of the mortgage debt under the Bombay Agricultural Debtors' Relief Act and there took place a compromise between the parties declaring that only an amount of Rs. 3000/- was due to the mortgagee under the mortgage and that the land in dispute was in possession of Mohammed Abdul Rahim as a tenant of the mortgagee and that the mortgagee was entitled to take possession of the land from the said tenant. Accordingly the award was executed and Mohammed Abdul Rahim was evicted but later on his son applied for being restored to possession under Section 29 of the Bombay Tenancy Act. The High Court had ordered that the possession of the land should be restored to the son of the deceased tenant. The Supreme Court held that Mohammed Abdul Rahim had been inducted upon the land by the mortgagee who was in possession on that date and therefore Mohammed Abdul Rahim was lawfully cultivating the land. Once that was the position, he could not be ousted despite the award. The main point argued in that case was whether Mohammad Abdul Rahim who was inducted into the land by the mortgagee in possession could be a deemed tenant under Section 4 when he was not inducted with the consent of the owners namely the mortgagors and the Supreme Court held on that point that it was not necessary that he should be inducted into the land with the consent of the owners. "In our view", they said, all persons other than those mentioned in clauses (a), (b) and (c) of Section 4 who lawfully cultivate land belonging to other persons whether or not their authority is derived directly from the owner of the land must be deemed tenants of the lands". The case, therefore, is only an authority for the proposition that the deemed tenant under Section 4 need not be inducted into the land of which he becomes a tenant, with the consent of the owner of the land. We fail to see what applicability this case can have upon the facts of the present case. There was no question of lis pendens involved in that case or the applicability of Section 52 at all. In that case moreover the lease was by a mortgagee in possession. In the present case the lease is by a mortgagor in possession and so far as the applicability of the doctrine of lis pendens is concerned, that would make a crucial difference because of the words in the section "so as to affect the rights of any other party thereto". In that case, "the other party thereto" was the mortgagor. In the present case, "the other party thereto" is the mortgagee and the two rights, one of redemption and the other of enforcement of the mortgage are totally different. In our opinion, Dahya Lala's case 65 Bom LR 328 cannot apply upon the facts of the present case.

27. The other case relied on by the Tribunal and also on behalf of the first respondent before us is the decision of this Court in 59 Bom LR 46 . In that case one Dhana Supadu the owner of certain land had mortgaged it in 1928 to one Madhav Martand by a simple mortgage. He had also created a second simple mortgage in favour of one Rajmal Lakhichand. The first mortgagee

Madhav had filed a suit against Rajmal and Dhana Supadu upon his own mortgage for sale of the mortgaged property and in the meanwhile Rajmal filed a separate suit against Dhana Supadu, obtained a decree and in execution of that decree himself purchased the land at an auction sale in 1932. This was pending the suit of the 1st mortgagee. The first mortgagee Madhav obtained a decree for sale only on 10th April, 1935 and he made an application for execution of that decree in 1938. Pending this application in execution Rajmal sold the lands to respondent Fakira Pandu Patil who claimed to be in possession of those lands as a tenant. Here again Rajmal who had purchased the property mortgaged to himself in an auction was in the position of a mortgagor and as such he created the lease in favour of the respondent Fakira Pandu. No doubt in this case the Division Bench held that the doctrine of lis pendens applied and the lease created by Rajmal in favour of Fakira was liable to be set aside and possession delivered to Madhav. In the whole of the case, however, we do not find any discussion on the question, which has directly been raised in the present case, namely, how the lease created by Rajmal in favour of Fakira affected the rights of the other party to the suit namely Madhav. No doubt Madhav Martand was a mortgagee in that case but again he was a simple mortgagee. When Rajmal who had succeeded to the interests of the mortgagor by virtue of his purchase sold the land to Fakira it did not in any way affect the rights of Madhav Martand under the mortgage. That fact seems to have been assumed in that case as is clear from the following remark at page 48: -

> "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." Merely the principle that at an auction sale the auction-purchaser purchases not only the interest of the mortgagor but also the interest of the mortgagee who has brought the property to sale was invoked, but in invoking that principle it does not seem to have been further urged or considered whether there was any possessory right in the mortgagee or in the mortgagor left over after the lease, which could be pursued by the auction-purchaser. Throughout it seems to have been assumed in that case that the lease created in that case affected the rights of the mortgagee and therefore affected the auction-purchaser, which as we have already shown is not the case where a simple mortgage is involved. With respect, we are unable to accept the ratio of this case. The true position, in our opinion, is as we have explained above.

28. A decision of another Division Bench of this Court in Special Civil Appln. No. 1398 of 1961 decided on 26-07-1962 (Bom.) was referred to but that decision really follows decision in 59 Bom LR 46 . That also was a case of a lease granted by a mortgagee in possession. That case, therefore, can be distinguished upon its own facts. In a decision in Special Civil Appln. No. 2006 of 1967 (Bom.) which we have referred to above, again a learned single Judge of this Court applied the decision in 59 Bom LR 46 to the case of a lease by the legal representative of the mortgagee in possession. In that case, however, the lease was granted pending a suit for redemption by the mortgagee in possession. The learned Judge merely relied upon the decision in Dahya Lala's case 65 Bom LR 328 to hold that a tenant lawfully inducted by the mortgagee on the land will, on redemption of the mortgage, be deemed to be a tenant of the owner mortgagor

under Section 4 of the Tenancy Act. The Precise point which has arisen in the present case namely, whether the rights of the opposite party to the suit were or were not affected, was not considered in that case because it was not raised at all. We do not think, therefore, that the ratio of that case will apply here. The same view was taken in a decision of the Gujarat High Court, in *Bahadurbhai v. Ambalal*[2], We do not think that we need consider that case.

29. In our opinion, upon a consideration of the provisions of Section 52, it is clear to us that in the present case the lease granted by Bhikchand in favour of the petitioner is not affected by the doctrine of lis pendens contained in Section 52. We would, therefore, answer the two questions which arise for decision in this case as follows :

Question No. 1 ..... No.
Question No. 2 ..... Yes.

The papers will now be returned to the Division Bench for further disposal of the Special Civil Application.
Order accordingly.
[2](1963) 4 Guj LR 681