PUNJAB AND HARYANA HIGH COURT

Jagan Nath

Vs

Mittar Sain

R.S.A. No. 1 of 1967

(D.K. Mahajan, Shamsher Bahadur and R.S. Narula, JJ.)

13.03.1969

JUDGMENT

Mahajan, J.

1. This case was referred to a Full Bench by my Lord, the Chief Justice, in pursuance of my referring order, dated March 16, 1967. The reference was necessitated because of the following observations of Dua, J. in *Dr. Gian Singh Karam Singh v. Mohan Lal and another*[1],:-

> ".. It has been emphasised that it is only if the mortgagee had himself created a tenancy that one could hold the tenancy not to ensure beyond the period of the mortgage. Whether the observations in the judgment in Mam Raj's case, that execution of a fresh rent-note made no difference on the facts and circumstances of that case is right or wrong does not directly concern us, for, we are not sitting on appeal against that judgment. The ratio of the Supreme Court decision, however, which was also binding on the learned Judge deciding Mam Raj's case (*Mam Raj v. Basheshar Parshad*[2]*),* is clear."

The facts of Mam Raj's case were, that a shop in dispute belonging to Rameshwar Dass had been let out by him to Mam Raj. During the currency of the tenancy, the Patiala and East Punjab States Union Urban Rent Restriction Ordinance, 2006 BK (Ordinance No. 8 of 2006 BK) came into force. This Ordinance ultimately yielded place to the East Punjab Urban Rent Restriction Act, after the merger of Pepsu in Punjab. This Act gave certain protections to the tenants; and one of them was that a tenant could only be evicted under Section 13 of that Ordinance. On December 12, 1949, Rameshwar Dass mortgaged the shop to Munshi Ram with possession. On that very day, Mam Raj executed a rent note in favour of Munshi Ram, mortgagee. Even otherwise Munshi Ram would be the landlord or Mam Raj in view of the definition of 'landlord' in Section 2(c) of the Ordinance. On January 2, 1959, Basheshar Parshad purchased the equity of redemption from Ramashwar Dass, and before November, 1959, he redeemed the shop from Munshi Ram, mortgagee. On July 17, 1959, an application was made by Mam Raj against Basheshar Parshad for fixation of fair rent under the Rent Act. Basheshar Parshad took the plea that there was no relationship of landlord and tenant between the parties and, therefore, the application was not competent. The Rent Controller found that Mam Raj was a tenant of

Bashshar Parshad. On appeal by Basheshar Parshad, the decision of the Rent Controller was set aside and it was held by Appellate Authority that Mam Raj was not the tenant of Basheshar. The reason for this conclusion was that Mam Raj was held to be the tenant of the mortgagee and with the redemption of the mortgagee, the tenancy of Mam Raj came to an end. Against this decision, a petition for revision was filed in this Court; and the same was decided by Mehar Singh, J. The learned Judge referred to the decision of the Supreme Court in *Asa Ram and others v. Mst. Ram Kali and others*[3], The learned Judge held that :-

> "....Approach of the Appellate Authority was not correct. The execution of a fresh rent-note by him in favour of Munshi Ram, mortgage, on the date of the mortgage deed made no difference is substance, for it practically amounted to an attornment by him to Munshi Ram as landlord. The tenancy has been continuous since before 1949, and had remained so up to the date of the application by Mam Raj for the fixation of fair rent. In the circumstances, it was not correct that mortgagee, Munshi Ram, had created a tenancy in favour of Mam Raj which tenancy would come to an end with the cessation of the mortgage on redemption."

As a slight doubt seems to have lurked in the minds of the learned Judges deciding Dr. Gian Singh's case. I thought it desirable to refer this case to a larger Bench; and that is how the case has been placed before us.

2. The facts of the present case may now be stated: Ram Chander, defendant No. 3, was the owner of the shop in dispute. This shop is situate in Sohana, district Gurgaon. It was under the tenancy of Jagan Nath, defendant No. 2. Ram Chander mortgaged it to Hira Lal, defendant No. 1, with possession. Later on, Ram Chander sold the equity of redemption to Mittar Sain on the 21st of June, 1961. On the 14th of June, 1962, Mitter Sain filed a suit for redemption of the mortgage against Hira Lal. Both Jagan Nath and Ram Chander were impleaded in this suit. The stand taken up by Jagan Nath was that Mitter Sain was only entitled to symbolical possession of the premises on redemption. He was not entitled to their actual possession as they were under his tenancy; and in view of the Urban Rent Restriction Act, he could only be evicted by recourse to its provisions. The trial Court found that Jagan Nath was not the tenant of Ram Chander and that he was merely the tenant of the mortgagee. Therefore, on redemption of the mortgage, his tenancy came to an end. On appeal preferred by Jagan Nath, the lower appellate Court held that he was the tenant of Ram Chander; but by reason of his having executed a rent not in favour of the mortgagee, Hira Lal, Jagan Nath had relinquished his tenancy under Ram Chander and was a tenant of the mortgagee. On redemption of the mortgage, his tenancy came to an end. Against this decision, the present second appeal has been preferred.

3. The short question, that requires determination in this appeal, is, whether Jagan Nath was the tenant of the mortgagor Ram Chander; and after the mortgage of the shop, he having attorned to the mortgagee and having executed a rent note in his favour, he ceased to be the tenant of Ram Chander and became the tenant of the mortgagee ?

4. So far as the legal position of tenant of a mortgagee is concerned, it is now well settled that a tenant of the mortgagee ceases to be a tenant on the redemption of the mortgage and does not become the tenant of the mortgagor. See in this connection the decisions of the Supreme Court in

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(1) *Mahabir Gope and others v. Harbans Narain Singh and others*[4],

(2) *Harihar Prasad Singh and others v. Deonarain Prasad and others*[5],

(3) *Asa Ram and other v. Mst. Ram Kali and another*[6], and

(4) *Prabhu v. Ramdeo and others*[7],

The reason for this rule, as stated by T.L. Venkatarama Aiyar, J. in Asa Ram's case is as follows :-

> "The law undoubtedly is that no person can transfer property so as to confer on the transferee a title better than what he possesses. Therefore, any transfer of the property mortgaged, by the mortgagee must cease, when the mortgage is redeemed".

However, there are certain exceptions to this general rule; and they are :-

(1) If in the mortgage deed, it is provided that the mortgagee could induct a tenant beyond the term of the mortgage and if such a tenant is inducted, on redemption, his tenancy will not come to an end. As a necessary corollary, after redemption, he will be the tenant of the mortgagor; and the mortgagor will be only entitled to symbolical possession on redemption;

(2) That the tenant of the mortgagor, prior to the mortgage continues to be his tenant even after the redemption of the mortgage, if during the currency of the mortgage, he attorns to the mortgagee, or, in other words, continues to be a tenant under the mortgagee. Though ceasing to be tenant of the mortgagor during the currency of the mortgage, he, after redemption becomes a tenant of the mortgagor, provided he does not give up his tenancy. In such a case, his tenancy under the mortgagor remains in abeyance during the currency of the mortgage;

(3) That in the case of tenants of agriculture land, a tenant, inducted by the mortgage would be the tenant of the mortgagor even after the redemption of the mortgagee, provided he has been inducted *bonafide* and in like manner as a prudent owner of land would have done in the usual course of management. Even in such a case, the operation of the lease cannot extend beyond the period for which it was granted.

5. I also find ample support for these propositions from the decisions of this Court. I have already dealt with, the decision of Mehar Singh, J., (as he then was), in Mam Raj's case (Civil Revision No. 332 of 1961).

6. The next case in point is the decision in *Ujagar Ram v. Hussan Lal*[8], , the facts of which are almost identical with the facts of the present case; it was held by Harbans Singh, J., that the tenancy did not come to an end on the redemption of the mortgage because the tenant was on the

premises before the mortgage was created and the mere fact, that he attorned to the mortgagee after the creation of the mortgage will not put an end to his tenancy on the redemption of the mortgage. The only difference in the case decided by Harbans Singh, J. and the present case is that by the tenant there has been an increase in the rent payable to the mortgagee to the extent of 50 Naye Paise; otherwise there is no difference. Harbans Singh, J. repelled the argument that by execution of a fresh rent note by the tenant in favour of the mortgagee, the tenancy under the mortgagor had become to an end and new tenancy had come into being under the mortgagee, in the following terms :-

> "....As a general proposition of law, that merely because the tenant executes a rent deed in favour of a mortgagee, it would automatically result in the surrender of the lease taken from the mortgagor, it cannot be accepted. It has also to be noted that Section 111 of the Transfer of Property Act as such is not applicable to Punjab and that implied surrender shall have to be inferred on the basis of general principles that if a subsequent agreement is inconsistent with the previous one, the earlier one must be taken to have been intended by the parties to have been cancelled. In this respect, reference may be made to *Vankaya v. Subbarao*[9], The relevant portion of head-note (e) is as follows :-
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> "In India, if a landlord and tenant by mutual agreement to any act or enter into any transaction which is inconsistent with the continuance of the existing lease or tenancy there would be an implied surrender. This is merely an application of the general principle of law that in respect of the same subject-matter parties cannot stand to each other in two inconsistent and incompatible relationship".

It will, therefore, depend on the facts of each case whether the second agreement is consistent and incompatible with the existing one and whether it must be implied that the tenant intended to surrender or cancel the first lease. While dealing with clause (d) of Section 111, the observations made by the Calcutta High Court in *Suraj Chandra Mondal v. Beharilal Mondal*[10], were quoted with approval by a Bench of this Court in a Letters Patent Appeal - M/s *Gian Chand-Sham Chand v. M/s Rattan Lal-Krishan Kumar*[11], as follows :-

'If the general principle of merger apart from Section 111(d), Transfer of Property Act, is sought to be applied to the present case other difficulties would arise. It would then be primarily a question of intention and we have no materials to decide that the defendant intended to merge the two interests. x x x A man is presumed to intend that which is for his benefit and judged by that test it would obviously be to the advantage of the defendant to keep the two interests separate. His interest as a lessor is affected by the mortgage and if he allows his lessee's interest to be merged in the superior one, he would be hit by mortgage decree and the sale, and his rights would be extinguished. In the present case, it is obvious that there could not be any intention on the part of tenants to surrender their rights under the lease already taken by them from the landlord and to take a lease from the mortgagee, who obviously had only a transitory interest which could come to an end at any time the mortgage was redeemed. Apart from this, it is clear that a lease in favour of the mortgagee cannot be treated to be inconsistent with the pre-existing lease from the mortgagor. When Hussan Lal created the tenancy rights in favour of the appellants, he was a full owner of the property. Later he created an intermediary estate, i.e., mortgagee rights with possession. Under the law, mortgagee with possession became entitled to

the rent that was payable by the appellants to the mortgagor. Even if there had been no writing executed by them in favour of the mortgagee, he became entitled to recover the rent from them in view of the interest created in him. The tenants would not have been justified in making the payment of the rent to the landlord in view of the intimation given to them by the landlord of the creation of this interest but the mere fact that they entered into an agreement to pay the same rent to the mortgagee, would, in no way, be inconsistent with the previous lease which, for the period of the existence of the mortgage, would only remain in suspense. As soon as the intermediary estate created by the owner came to be vested in him, and once again, he became the full owner, the previous lease would revive and come into full operation. The next case is *(Sardari Lal v. Ram Lal*[12]*,)* decided by Falshaw, Chief Justice and Gover, J. on the 26th December, 1961. The facts of this case were, that a shop belonged to Uttam Chand. It was under the tenancy of Sardari Lal. Uttam Chand mortgaged it to Sardari Lal. The mortgage was to subsist for one year, after which Uttam Chand was entitled to redeem it. If he failed to do so, the mortgagee was entitled to recover the mortgage amount in the usual manner. Sardari Lal was to retain possession of the shop and Uttam Chand had no right to recover rent and Sardari Lal had no right to recover interest on the mortgage amount. On Uttam Chand's a death in the end of December, 1959, his heirs sold the equity of redemption to Ram Lal who instituted a suit for redemption in February, 1960. The question which arose in the litigation, related to the position of Sardari Lal on redemption of the shop. The trial Court granted a decree for redemption; but only symbolical possession was ordered to be delivered to the plaintiff, Ram Lal. On appeal, the learned District Judge accepted the plaintiff's contention holding that by entering into mortgage and coming into possession as mortgagee, Sardari Lal had allowed the tenancy in his favour to terminate and that he could not be restored back to his possession as the tenant on the redemption of the mortgage. This decision was affirmed in second appeal by a learned Single Judge of this Court. On a Letters Patent Appeal it was observed as follows :-

> "The Plaintiff's case at the outset appears to have been that the tenancy was terminated under Section 111(d) of Transfer of Property Act which reads -
>
> "III. A lease of immovable property determines-
>
> (a) x x x
>
> (b) x x x
>
> (c) x x x
>
> (d) in case the interests of the lessee and the lessor in the whole of the property become vested at the same time in one person in the same right".

But obviously this is not applicable and the possession of the property in dispute as a mortgage did not necessarily and the right to possession as a tenant. Indeed before us on behalf of the plaintiff, recourse was had to Section 111(f) it being argued that the tenancy ended by implied surrender. It seems to me that whether any particular mortgage of this kind by a landlord in favour of his tenant implies a complete surrender of rights of the tenant in the tenancy on the redemption of the mortgage is a question of fact to be decided according to the terms of the contract between the parties in each case. In this case, the contract is completely silent as to what

was to happen and when the mortgage was redeemed, and it seems quite possible that no trouble at all would have arisen if the original mortgagor had not died and his heirs had not promptly sold the equity of redemption to a third party. It is, however, to be borne in mind that at the time of the mortgage in 1955, the East Punjab Urban Rent Restriction Act of 1949 had long been in force, and this Act imposes severe restrictions on the right of a landlord to eject his tenant which can only be done on certain grounds contained in Section 13 of the Act. In the circumstances I should have thought that if the parties to the mortgage intended that the tenancy should be finally terminated by the mortgage, and that the owner would be entitled to immediate possession on the redemption of the mortgage, this would have been bound to be specified in the mortgage contract and there would in agreement have been an express surrender by the mortgagee of the rights secured by him as a tenant under the Act. In the absence of any such specific provision in the contract of mortgage I am of the opinion that the tenant did not surrender his rights and that the intention of the parties to the mortgage must be interpreted as being that on the redemption of the mortgage by the landlord the tenant would still retain his rights as a tenant. In this I am fortified by the decision of H.R. Krishan, J. in *Motilal Govindram v. Gopikrishan Shadilalji and others*[13], which relates to a case in which a usufructuary mortgage was created by the owner of the house in favour of the tenant and it was even recited in the mortgage deed that the mortgagor is giving up his possession and that on redemption he would take back possession. In a suit brought by the mortgagor for redemption and possession of the house it was held that the lessee's right and the mortgagee's right are not mutually inter-related, but derived by independent routes from the right of proprietorship and the lessee's right and mortgagee's right can co-exist. Hence where usufructuary mortgage is created in favour of the lessee, there is no merger of the lessee's right into the mortgagee's right. It was held further that there was no implied surrender of the lease by operation of law by the lessee at the time he took the mortgage, because there was no impossibility in a person being a mortgagee in possession and a lessee at the same time. There was no surrender by the terms of agreement and it was only intended that on redemption the mortgagee should give back the symbolic possession. On redemption the mortgagee reverted to his position as a lessee, subject to all the terms and incidents that were in force at that time."

7. I now proceed to deal with Dr. Gian Singh's case, a reference to which has already been made above. The facts of this case were, that a residential shop owned by Shri Siri Ram was mortgaged by him with possession with Chanan Ram, defendant, some time in 1959. Dr. Gian Singh was a tenant of the premises since 1956, obviously under Siri Ram. Siri Ram sold the equity of redemption to Mohan Lal and Om Parkash, in September, 1960. Mohan Lal and Om Parkash instituted a suit for possession of the shop by redemption and Dr. Gian Singh was impleaded as a defendant. The stand taken up by Dr. Gian Singh, with which the learned Judges were concerned, was that actual possession of the shop could not be delivered to Mohan Lal and Om Parkash, plaintiffs. The Trial Court came to the conclusion that on the extinction of the mortgage by redemption, the tenancy rights of Dr. Gian Singh were extinguished and he was liable to deliver possession of the same to the owner. It was also held that Dr. Gian Singh was proved to be the tenant of Siri Ram, before he mortgaged the property to Chanan Ram and others, and that, after the execution of the mortgage deed, Dr. Gian Singh became a tenant under the mortgagees. On appeal by Dr. Gian Singh to this Court, it was held that Dr. Gian Singh did not cease to be tenant on the redemption of the mortgage. In arriving at this conclusion, it was observed that :-

> ".....he had already been on the premises as a tenant of the mortgagor and continued to pay rent to the mortgage and without showing that he continued to be the mortgagee's

tenant under a fresh agreement of lease which is improvident or is shown not to be *bonafide* or is otherwise likely to damage the property; and, therefore, violative of Section 76(a) or (e) of the Transfer of Property Act."

The last case in point is the decision in *Puran Chand v. Bakshi Gopi Chand*[14], In this case Sodhi, J. observed as follows :-

> "The execution of a fresh rent note by a tenant in favour of the mortgagee when he was already in possession of the building as tenant under the mortgagor does not amount to creation of fresh tenancy by the mortgagee, and the tenant cannot be said to have been inducted by the mortgagee, and such a tenant cannot be dispossessed when the property is got redeemed by the mortgagor. The tenant holds the property as a tenant of the mortgagor and enjoy the protection given by the East Punjab Urban Rent Restriction Act.

A mere reduction in rent cannot, by itself, amount to surrender of old lease and creation of a fresh one. No inference of surrender can be drawn if the tenant in recognition of the transfer of an interest in the demised property by the mortgagor in favour of the mortgagee executes a fresh rent note in favour of the latter and may be at a reduced rent. By executing a fresh rent note in favour of the mortgagee, the tenant does not normally get a new interest in the property surrendering his rights existing hither-to-fore when he was holding as a tenant under the mortgagor. All that is intended is that he attorns to the mortgagee and the execution of a fresh rent-note in such circumstances, in the absence of any conditions showing an intention to the contrary, is only an attornment in favour of the mortgagee".

8. No case of this Court, taking a contrary view, has been brought to our notice. The learned counsel for respondents made a reference to certain decisions which I have not noticed, for the simple reason that those are cases where a tenant was inducted by the mortgagee himself. The rule is firmly settled that the tenancy of a tenant inducted by a mortgagee comes to an end on the extinction of the mortgage. The only exception to this rule is in the case of agricultural land where a mortgagee inducts a tenant *bonafide* like a prudent owner of land in the usual course of management.

9. The only case cited for the contrary view is *Abdul Gafoor v. Lala Kunj Biharilal*[15], This case, in fact, proceeds on its own peculiar facts. In any case, if it is taken to have laid that merely because a tenant executes a rent deed in favour of the mortgagee, it would automatically result in the surrender of the lease taken from the mortgagor, it cannot be held to lay down a correct proposition of law; and I agree with the observations of Harbans Singh, J. regarding this case made in Ujjagar Ram's case.

10. After giving the matter my careful consideration, I have come to the conclusion that :-

> (1) A tenant of a mortgagor, after the mortgage, necessarily attorns to the mortgage and thereby becomes a tenant of the mortgagee, unless his tenancy has been put an end to by the mortgagor at the time of effecting the mortgage. On the redemption of the mortgage, he again is relegated to his position of a tenant of the mortgagor;

(2) The mere execution of a rent-note by the tenant of the mortgagor in favour of the mortgagee, after the mortgage has been effected does not create a fresh tenancy in favour of the mortgagee. But there is nothing to prevent the tenant to surrender his earlier tenancy and enter into a fresh contract of tenancy with the mortgagee; and in each case, it will have to be determined on evidence whether a tenant of the mortgagor did surrender his tenancy and obtained a fresh tenancy from the mortgagee after the mortgage came into being;

(3) That a tenant inducted by the mortgagee remains a tenant during the continuance of the mortgage and on the redemption of the mortgage, the tenancy comes to an end;

(4) That in the case of agricultural tenancies, proposition No. (3) does not absolutely hold good. There is an exception to it, namely, that the tenant of a mortgagee of agriculture land will continue to be its tenant even after redemption provided he has been inducted *bonafide* and in the like manner as prudent owner would have done for the proper management of the land. Even in such a case, the operation of the lease cannot extend beyond the period for which it was granted. No lease can be granted if there is an express prohibition in the mortgage deed.

The onus to prove the exception is on the tenant and unless a clear case is made out in favour of the exception, the general rule will prevail.

(5) That it is open to a mortgagor to permit the mortgagee to induct tenants even beyond the terms of the mortgage, and if the mortgagee does so, on redemption, they will continue to be the tenants of the mortgagor.

11. So for as the facts of the present case are concerned, the tenant was the tenant of the mortgagor. After the mortgage, he continued to be the tenant of the mortgagee. There was no surrender by him of the tenancy he held under the mortgagor. All that happened was that he executed a fresh rent-note and agreed to pay 50 Naya Paise per mensem over and above the rent he was paying to the mortgagor. There is no other evidence on the record which will indicate that he gave up the tenancy under the mortgagor and took up a new tenancy under the mortgagee. In this situation, it is not possible to hold that there was a surrender by the tenant of his tenancy under the mortgagor. In order to hold that a tenant has surrendered his existing lease, it must be shown that the earlier tenancy was put an end to and a new tenancy was created. The mere fact, that the same tenant has continued as a tenant of the property and has only executed the fresh rent-note in favour of the mortgagee, will not automatically amount to surrender.

12. As already observed, in the present case, no surrender can be spelt out from the execution of a fresh rent-note by the mortgagor's tenant in favour of the mortgagee. Therefore, on the redemption of the mortgage, the tenancy of the tenant under the mortgagor will revive; and the relationship of landlord and tenant will not come to an end merely because the mortgage has been redeemed.

13. For the reasons recorded above, this appeal must succeed. I accordingly allow the same and set aside the judgments and decrees of Courts below and maintaining the decree for redemption,

direct that the mortgagor will only be put in symbolical possession of the mortgaged property, the actual possession of the same remaining with the appellant, tenant of the mortgagor. In the circumstances of the case, there will be no order as to costs.

(Sd.) Shamsher Bahadur, J. - I agree

(Sd.) R.S. Narula, J. - I also agree

Order accordingly.

Cases Referred.

1AIR 1964 Pun 346
2Civil Revision No. 332 of 1961, decided on the 2nd of March, 1962
3AIR 1958 SC 183
4AIR 1952 SC 205
5AIR 1956 SC 305
6AIR 1958 SC 183
7AIR 1966 SC 1721
8Regular Second Appeal No. 494 of 1963, decided on 8th of August 1963
9AIR 1957 And Pra 619
10AIR 1939 Cal 692 at page 696
11ILR 1963, Vol. II. Pun 1
12Letters Patent Appeal No. 221 of 1961
131961 Mad Prad Law Journal 66
141968 P.L.R. 1115
15AIR 1957 All 346