

RAJASTHAN HIGH COURT

Lalchand

Vs.

Nenuram

Second Appeal No. 31 of 1957

(D.M. Bhandari, J.)

25.07.1962

JUDGMENT

D.M. Bhandari, J.

1. This is a Civil Second Appeal in a suit for ejectment and arrears of rent.
2. The case set out by the plaintiffs is that the defendants had executed the rent note (Ex. 1) in their favour on the 15th of October, 1946, after taking on lease the house property situate at Jodhpur and mentioned in detail in Para No. 1 of the plaint. The defendants failed to pay rent for a long time and therefore two notices were served on them for ejectment and arrears of rent and ultimately the suit was brought on the 30th of October, 1950, in the Court of the Munsiff, City, Jodhpur for ejectment and arrears of rent. Two of the defendants, namely Nenu Ram and Shyam Lal contested the suit, while the case proceeded ex parte against Mst. Soni who died during the pendency of this appeal and her name has been struck off. The main defence raised by the contesting defendants is that on the 15th of October, 1946, the defendants had mortgaged the suit property with the plaintiffs for Rs. 5,500/-/-with interest at 6 per cent per annum and further executed the document (Ex. 1) in favour of the plaintiffs to the effect that they will continue to pay Rs. 27-8-0 per month. That document is not a rent note but was written to ensure payment of interest to the plaintiffs. The plaintiffs could not base their claim for ejectment and of arrears of rent on that document. The trial Court accepted the defence of the defendants and dismissed the suit for ejectment relying on a decision of Patna High Court in *Baij Nath v. Jag Bahadur Singh*,¹ It, however, decreed the plaintiffs' suit for Rs. 1,249-4-9 as arrears of rent. On appeal by the plaintiffs, the learned District Judge upheld the decision of the trial Court as regards ejectment. Hence this second appeal on behalf of the plaintiffs.

3. The facts which are no longer in controversy in the second appeal are that the defendants had executed a mortgage deed in favour of the plaintiffs on the 15th of October, 1946, the main terms and conditions of which are, as follows :-

1. That the interest on the mortgage money which comes to Rs. 27-8-0 @ 8 per cent per annum shall be paid month by month by the mortgagors to the mortgagees.

2. That the mortgagors had delivered the possession of the mortgaged property to the mortgagees;

3. The mortgagees are authorised to make necessary repairs if the same are not done by the mortgagors;

4. That in case the mortgagors did not pay interest month by month, then after interest had become due for 6 months, the amount of interest shall form part of the principal on which interest at -/8/- annas per cent per month shall, be payable.

5. The mortgagors shall have the right to recover the principal amount with interest and other charges by sale of the property mortgaged.

4. On that very day the mortgagors executed the registered qabuliat (Ex. 1) in favour of the mortgagees reciting therein that they had taken on lease the property described in lease deed at a monthly rent of Rs. 27-8-0. The defendants also agreed to vacate the house as and when desired by the landlord. Now both the lower Courts have taken the view that the mortgage deed and the rent note are part and parcel of one transaction and that the rent note was executed merely as a device to ensure payment of interest and as such, the plaintiffs were not entitled to get a decree for ejectment on the basis of the rent note. It may, however, be noticed that the Courts below had decreed the claim of arrears of rent on the basis of the rent note. If the finding of the Court below that the rent note was inoperative in the circumstances of the case is correct, the plaintiffs should not have been awarded any decree for arrears of rent on the basis of, Ex. 1. There is thus this inconsistency in the judgments of the Courts below.

5. Learned counsel for the appellants has argued that the Courts were wrong in treating the mortgage deeds and the rent note as part of the same transaction. It is contended that by the mortgage deed the plaintiffs secured possession of the property mortgaged and then they leased it back on the very same day to the defendants. The transaction giving the property on lease must be treated as

separate from that of mortgage. In this connection, the learned counsel has relied on the judgment of this Court in *Jankidas v. Laxminarain*,² That was a case in which there was a usufructuary mortgage of the house and the mortgagees had in their turn given a lease of the mortgaged property to the mortgagor on a certain rate of rent. The mortgagee had brought the suit for arrears of rent and ejectment on the basis of the rent note. Earlier they had brought the suit for arrears of rent. It was argued in that case that the appeal was barred under Order 2, Rule 2 Civil Procedure Code. Wanchoo, C. J., (as he then was), took the view that the mortgagee had claimed rent on the basis of the deed of lease and that the obligation to pay it arose independently of the mortgage and out of the lease, and the mortgagee could sue for arrears of rent whenever the rent remained due. It may be noted that Baijnath's case, AIR 1955 Patna 357 was cited. With regard to that case learned Chief Justice observed, as follows :-
"With all respect, I fail to understand why, where a usufructuary mortgagee gives back the house on lease to the mortgagor, the mortgagor does not become a tenant of the mortgagee. The fact that the mortgage also mentions a rate of interest, and the rent is equal to the rate of interest, would not make the deed of lease anything less than what it is."

Thus, there is a clear authority of this Court in support of the appellants.

6. The respondents before me are not represented and with the assistance of the learned counsel for the appellants, I have examined the case law on this point. There are two cases of the Allahabad High Court which must be first noticed. The first case is *Chimmanlal v. Bahadur Singh*.³ In that case there was a usufructuary mortgage dated the 18th of September, 1883, by Chimman Lal in favour of Bahadur Singh. The mortgagor covenanted with the mortgagee to pay interest at the rate of annas 14 per cent and at that rate of interest the mortgagor was to pay to the mortgagee Rs. 141-12-0 per annum. It was stipulated that the mortgagee should pay himself the interest from the profits of the mortgaged property and if any surplus remained out of the income, the same should be applied in reduction of the principal of the loan. By another instrument of the very same date the mortgagor executed a qabuliat by which he acknowledged to have received from the mortgagee a lease of the mortgaged premises, at an annual rental of Rs. 141-12-0, which he promised to pay by two equal half yearly instalments. The qabuliat was drawn up strictly in the form of a lease between a landlord and a tenant and set forth the remedies available to the lessor by

ejectment in case of failure to pay the stipulated rent. It was held by the Allahabad High Court that on these facts it was difficult to hold that the lease was granted for realising the interest payable on the mortgage. The second case of the Allahabad High Court was - S. A. No. 1112 of 1894, D/- 8-4-1897, and is reported at the foot note at pages 341-345 in ILR 23 All 338. That is judgment of a Division Bench consisting of Edge, C. J., and Blair, J. The following passage in that judgment is illuminating :-

"The transaction between the parties, that is, the granting of a usufructuary mortgage and the subsequent granting of a lease to the mortgagor of the mortgaged premises, is one exceedingly common in this part of India; whether it may be known in other parts of India we do not know. The grant of such a lease by a mortgagee to his mortgagor has been invariably treated, not only in the civil courts and in the courts of revenue, but outside the Courts in these Provinces, as a transaction of lease, and as putting the parties in exactly the same position as that in which they would have stood, if, instead of having been mortgagor and mortgagee, they were the zamindar and any other person taking a lease of the land."

From my limited experience I can say that much the same is the position obtainable in the State of Rajasthan.

7. The Calcutta High Court in *Uttam Chandra Daw v. Rajkrishna Dalal*,⁴ approved of the view taken by the Allahabad High Court in the aforesaid two cases.

8. The Lahore High Court in *Asa Ram v. Kishan Chand*,⁵ took the view that the tenant is not and cannot be permitted to go against the document and plead that the qabuliat executed by him should not be interpreted as a lease. It was further pointed out that the mortgagees undoubtedly intended to secure on the amount lent an income equal to interest at a certain rate but this they were not precluded from doing by any principle of law.

9. The Kerala High Court in *Venkappa Bhatta v. Gangadhara Bhatta*,⁶ has taken the view that it cannot be held that whenever as part of the same transaction, property which is usufructuarily mortgaged is leased back to the mortgagor, the rent accrued is really interest and automatically becomes a charge on the property, to be paid as part of the mortgage money at the time of redemption if it remains in arrear.

10. Now I come to the decisions of the Patna High Court.

11. In *Abdul Rahim v. Raghunath Sukul*,⁷ there was a zarpeshgi lease executed. It was decided that the mortgage and kabuliat were two distinct transactions and the relationship of landlord and tenant was created between the parties by the lease deed and on that basis the suit was maintainable.

12. However, in *Umeshwar Prasad Sinha v. Dwarika Prasad*,⁸ the position was again surveyed when the question arose of the application of Order 34, Rule 14 Civil Procedure Code. Sinha, C. J., (as he then was), examined the question as to what should be the proper test to determine whether two apparently separate transactions were or were not parts of a single transaction, the learned Judge refused to lay down any hard and fast rule which could be said to govern such cases. He, however, suggested that one test that may generally be applied to hold that two documents formed part of the same transaction is that where it appears on a reasonable construction of the documents that the properties were given in security not only for the principal amount secured under the bond but also for the interest accruing thereupon. The learned Judge referred to the judgment of the Judicial Commissioner in *Ramarayaningar v. Maharaja of Venkatagiri*,⁹ to show that the lease deed and mortgage deed in that case could be read together and held to form part of one transaction if the lease was "in the nature of a machinery for the purpose of realizing the interest due on the mortgage." Their Lordships of the Privy Council in that case were considering whether the defendant in that case was not entitled to set up a charge for the arrears of rent before redemption could be ordered. Section 61 of the Transfer of Property Act, as it stood at that time, enacted by implication that a mortgagor seeking to redeem shall not be entitled to do so without paying any money that may be due under a separate mortgage or charge if the latter relates to the same property. It was held that there was a simple mortgage or a charge subsisting on the property mortgaged in favour of the defendant by virtue of the lease deed and that the defendant in that case was entitled to recover the arrears of rent in that very suit. This case, therefore, cannot be taken to be an authority for the proposition that the mortgagee is not entitled to maintain the suit on the basis of the lease deed which the mortgagor had executed in his favour.

13. Whether the two documents represent one transaction or two different transactions,

a Court of law should be anxious to give effect to the terms in both the documents instead of being unduly critical about them. In law mortgages of various forms are recognised and a mortgagor may secure himself not only the possession of the property but also stipulate payment of interest at a particular rate of interest. The interest may be made realizable from the usufruct of one mortgaged property. Such a transaction is a well recognised form of transaction and is known as anomalous mortgage. Having secured the possession of the mortgage, the mortgagee is further entitled to leave it out even to the mortgagor. It is in the interest of the mortgagor that the property is leased out to him as he can better look after it. There is nothing objectionable in this, nor is there any statutory prohibition for such transactions. Now if the parties do this by executing proper documents, it is the duty of the Court of law to give effect to them. It does not take the argument very far if we say that they represent one transaction. As observed by Wanchoo, C. J., in ILR (1957) 7 Raj 268 , the transactions may be one in the sense that they arise out of a common purpose. There is no reason why the rights and liabilities of the parties should not be governed by the terms of the document to which they had solemnly agreed. Cases may arise in which the terms and conditions in the two documents are so interwoven that in order to determine the true nature of the contract entered into by the parties, both must be read together and considered part of the same transaction. Such cases apart, on principle I find it difficult to accept that even in cases where the nature of the two transactions can be spelt out separately the terms of any of the documents should be treated as not binding on the parties. Of course, there might be statutory provision of law which may insist that the two transactions must be put together for a particular purpose. Thus while applying Order 34, Rule 14 Civil Procedure Code there may be room for argument that the words 'arising under the mortgage' used in that rule are so wide in their scope as to prohibit the mortgagee to bring the mortgaged property to sale in execution of a decree obtained for rent, but I am not addressing myself to this aspect of the matter at present. I may, however, mention that the Madras High Court in *Narasinhulu v. K. Ramanatha Mudaliar* ¹⁰ has taken this view.

14. The decision given by the Patna High Court in AIR 1944 Patna 5 has been followed by the same Court in AIR 1955 Patna 357, *Dr. Haji Muhammad Ahsanul Tauhid v. Shah Akhtar Hussain*, ¹¹ and *Ganpat Turi v. Mohammed Asraf Ali*, ¹² In AIR 1955 Patna 357, the Patna High Court held that the mortgage deed represented one transaction, in AIR 1960 Patna 106 it was held that it represented one transaction while in AIR 1961 Patna 133, it was held that the mortgage deed and the lease deed

represented two separate transactions. It cannot be said that the Patna High Court laid down any final test for determining whether the two transactions represented in reality one transaction but it appears in the two cases AIR 1955 Patna 357 and AIR 1960 Patna 106, the execution of the two documents at one and the same time and the rent being equivalent to the amount of interest which was payable monthly were circumstances significant enough to conclude that the two transactions were one and suit for ejection and rent could not be decreed.

15. With great respect I do not find myself in a position to take this view of the matter.

16. In the present case, though both the documents were executed on one and the same day and monthly rate of rent fixed is equivalent to the monthly interest payable under the mortgages, yet the document showed that both are independent of each other. There is no reference of one in the other Both can stand independently without taking any assistance from the other. Further no case has been made out that the execution of the lease deed was merely a sham transaction. Under these circumstances, I am of opinion that the plaintiff is entitled to maintain a suit for ejection on the basis of the rent note (Ex. 1).

17. As a result of the aforesaid discussion the appeal is allowed and the suit of the plaintiff for ejection of the defendants Nenu Ram and Shyam Lal is decreed with costs in all the Courts.

Appeal allowed.

Cases Referred.

1. AIR 1955 Pat357
2. ILR (1957) 7 Raj 268
3. ILR 23 All 338
4. ILR 47 Cal 377 (FB)
5. AIR 1930 Lah 386
6. AIR 1959 Ker 112
7. AIR 1931 Pat 22
8. AIR 1944 Pat 5

9. AIR 1927 PC 32
10. AIR 1961 Mad 378
11. AIR 1960 Pat 106
12. AIR 1961 Pat133