

RAJASTHAN HIGH COURT

Chand Mal

Vs.

Sumer Mal

Second Appeal No. 170 of 1999

(N.P. Gupta, J.)

31.05.2000

JUDGMENT

N.P. Gupta, J.

1. Present appeal has been filed by the defendants in a suit for redemption and recovery of actual physical possession of the mortgaged property being shop situated at Moti Bazar, Nimbahera Dist. Chittorgarh. The suit was decreed by the learned trial Court for redemption inasmuch as while deciding issue Nos. 1 and 4 the learned trial Court held that since the defendant did not have objection in redeeming the property, the plaintiff was held entitled to redemption, but the plaintiff was held to be not entitled to actual physical possession of the property. Against this decree the plaintiff filed appeal before the learned lower Appellate Court which has been allowed by impugned judgment and decree. The learned lower Appellate Court modified the finding of the learned trial Court on issue Nos. 1 and 4, and held that on payment of mortgage amount, consequent upon redemption, the plaintiff is also entitled to actual physical possession of the suit shop. The learned lower Appellate Court by deciding issue No. 2 against the defendant also held the plaintiff to be entitled to mesne profits at the rate of Rs. 2000/- per month from the date of the suit till the delivery of possession of the plaintiff.

2. Aggrieved of this judgment and decree the defendants have filed this appeal. The challenge to the impugned judgment in appeal is confined so far as it relates to the decree ordering delivery of actual physical possession of the suit shop to the defendant, so also to the award of manse profits at the rate of Rs. 2000/- per month from the date of suit till the delivery of possession.

3. The facts necessary for appreciating the controversy raised and submissions made

on the either side are as under :-

According to the plaintiff the suit shop was mortgaged by way of usufructuary mortgage on 7.3.72 for a sum of Rs. 12,000/- by a registered mortgaged deed which was registered on 16.3.72. Thereafter in family partition the suit shop fell to the share of plaintiff No. 1, the plaintiff No. 1 borrowed further sum of Rs. 28,000/- and consequently on 30.3.83 a fresh mortgage deed was executed and registered, again being usufructuary mortgage for a period of nine years. According to the plaintiff, as per the terms of this mortgage deed the mortgagee was entitled to use the shop himself so also it could be used by his brothers and nephews, on payment of mortgage money the plaintiff was entitled to redeem and recover the actual physical possession of the shop. On 13.7.92 the plaintiff is alleged to have served a notice but of no avail. Hence the suit has been filed. In para 7 of the plaint the plaintiff also claimed mesne profits at the rate of Rs. 2000/- per month from the date of suit till possession.

4. The defendant in the written statement contended that as a matter of fact the defendants were continuing in the suit premises as a tenant since prior to 7.3.72 at monthly rent of Rs. 45/-. At the time of mortgage also, since, the defendant was continuing in possession as a tenant, and since in the mortgage deed dated 7.3.72 it is clearly mentioned that even after redemption the defendants will continue to remain in possession as tenants, and the plaintiff will be entitled to realize monthly rent at the rate of Rs. 45/- per month, the plaintiff is not entitled to actual physical possession. Regarding the second mortgage it was contended that it was really not the second mortgage but only additional money was advanced, and thus the burden of mortgage was increased, and since the defendant was continuing as tenant, the plaintiff is not entitled to get actual physical possession. In para No. 3 of the written statement another plea was taken in view of the provisions of Section 13 of the Rajasthan Premises (Control of Rent & Eviction) Act, 1950 (hereinafter referred to as 'the Act'), until and unless the grounds mentioned in the said section are shown and found to exist notwithstanding any contract to the contrary, eviction cannot be ordered, as such contract would be void, and since no such ground of eviction has even been pleaded, the plaintiff is not entitled to get actual physical possession. However, if the plaintiffs so desire they can get the shop redeemed by paying Rs. 45,000/- being mortgage money. Then in para 4 again it was contended that if the plaintiffs so want they can redeem the shop, but then in view of the provisions of the Act, immediately the

relationship of landlord and tenant would revive and actual physical possession cannot be recovered by the plaintiffs. Similar plea has also been raised in para 7, by pleading that since there is stipulation between the parties that on redemption the defendant would again become tenant, the plaintiff is not entitled to actual physical possession. Then in para 2 of the additional pleas again it has been contended that the mortgage deed dated 30.3.83 is only an enhancement of mortgage amount and is not a fresh mortgage deed, and therefore both the parties are bound by the earlier mortgage deed dated 7.3.72. Regarding the claim of mesne profits, it was contended that since the plaintiff is not entitled to actual physical possession in view of the provisions of the Act, the plaintiff is not entitled to the said amount of mesne profits.

5. A rejoinder has been filed by the plaintiff wherein in para 3 it was specifically contended that at the time of mortgage deed dated 30.3.83 it was expressly stipulated that on payment of mortgage amount of the mortgage dated 7.3.72 and of 1983, the tenancy rights as per document dated 7.3.72 will come to an end and thus the tenancy was voluntarily surrendered, and it was also stipulated that on receiving the mortgage money the defendant will hand over actual physical possession of the shop to the plaintiff, and will also not be entitled to let it out to anybody else. It was contended that at the time of execution of mortgage dated 30.3.83, earlier rent note was taken back. Likewise the contention raised on the basis of Section 13 of the Act was also denied.

6. In this view of the pleading various issues were framed, and the present controversy relates to issue Nos. 1, 4 and 2.

7. The substantial questions of law formulated in the memo of appeal, *inter alia* are as to whether the learned lower Appellate Court was justified in ordering eviction from the suit shop without recourse to the provisions of the Act, whether the protection against eviction under the Act can be taken away by mortgage deed Ex. 3 when the rent was only suspended during subsistence of the mortgage. The third question framed is as to whether the learned first Appellate Court was justified in coming to the conclusion that the appellants had surrendered tenancy rights by execution of the mortgage deed in favor of the plaintiff mortgagor, another question framed was regarding mesne profits. Various other questions have also been framed but then the stress of the learned counsel for the appellant during the course of arguments was only on these questions.

8. Having heard learned counsel for the parties, in my view, so far as the questions framed which have a bearing on the question as to whether the plaintiff is entitled to delivery of actual physical possession of the suit shop or not, the matter was rightly been decided by the learned lower Appellate Court, and thus the appeal does not involve these substantial questions of law. On the other hand the basic factual matrix available on record and appreciated by the learned lower Appellate Court, as a finding of fact, is sufficient to decide these questions against the appellant.

9. Various judgments of this Court and of Hon'ble Supreme Court have been cited by learned counsel for the both the sides to show that, in the circumstances like the present one, where the property is in possession of tenant and that property is mortgaged to the tenant by the landlord by way usufructuary mortgage, then on redemption of that mortgage, the mortgagor is entitled only to redeem the mortgaged property, or is also entitled to recover actual physical possession of the property ? The answer to this question, according to the judgments, initially depended on the question as to whether effecting a usufructuary mortgage during subsistence of tenancy, by itself has the effect of implied surrender of tenancy right by the tenant mortgagee in favor of the landlord mortgagor, with the result that, on redemption, the mortgagee is liable to deliver actual physical possession, then later on the view developed that with effecting such mortgage the tenancy rights may only get suspended as the two nature of estates could co-exist, with the result that on redemption of mortgage the tenancy rights revived. Then still later the matter was considered in further detail and the legal position that has emerged is, that it would depend upon the terms of the mortgage deed, as to whether at the time of effecting mortgage the tenancy rights were saved or protected in the sense that they were suspended, or as to whether they were surrendered by the mortgagee in favor of the mortgagor ? If they are surrendered, then the view that has been taken by the Hon'ble Supreme Court is, that on redemption the tenancy rights do not revive and the mortgagor is entitled to actual physical possession. While if from the terms of the mortgage deed those rights are saved, then with redemption, obviously those rights revived and the plaintiff is not entitled to actual physical possession. It is in this sequence that the matter rested in various cases upon construction of precise terms of the mortgage deed whereby the property was mortgaged.

10. In the judgment of this Court reported in *Bhanwarlal v. Hibtullah*,¹ this Court had

gone into this question, and considering the legal position it was held that the two types of relationship viz. mortgagor and mortgagee, and that of landlord and tenant get merged. Consequently simply because at the time of effecting usufructuary mortgage the tenant does not actually physically walk out of the premises, and does not immediately re- enter the premises as a mortgagee, it cannot be said that there is not the surrender of tenancy rights. *Inter alia* on this basis it was held that by effecting a usufructuary mortgage, the tenancy rights are deemed to have been surrendered. Thereafter the same view was approved by Hon'ble the Supreme Court in *Shah Mathurdas Maganlal & Co. v. Nayappa Shankarappa Malave*, ², wherein similar question arose before Hon'ble the Supreme Court. In this case after quoting the relevant portion of the mortgage deed, it was held that, after scrutinizing the terms and conditions of the mortgage deed it is established that the effect of the deed was inconsistent with the continuance or subsistence of the lease, and that on redemption of mortgage the mortgagor had a right to recover possession, both on terms of the mortgage deed and under Section 62 of the Transfer of Property Act. These two cases were subsequently followed by this Court in *Nand Lal v. Subhas Dev, reported in*³ In Nand Lal's case the only recital was that redemption of the property would be responsibility of the mortgagee, the mortgagee if required to incur any 'Lagat', he will be able to do it after informing mortgagor. It was also stipulated that whenever the mortgagor redeems then he will have to pay the entire mortgage amount, and it was also mentioned that the mortgaged property was in tenancy of the mortgagee which has been mortgaged. Thus like Bhanwarlal's case in this case also there was no express stipulation about the surrender of the tenancy rights. After the judgment, there came another judgment of Hon'ble Supreme Court arising from Andhra Pradesh, being *Gambangi Appalaswamy Naidu v. Behara Venkataramanayya Patro, reported in*⁴, where after referring to the judgment rendered in *Shah Mathuradas Maganlal & Co.* (supra), the Hon'ble Supreme Court took a view that there cannot be any merger, of a lease and a mortgage, even when two transactions are in respect of same property. It was held that for merger to arise it is necessary that 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. With this it was held that in case of 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 mortgage". Accordingly there cannot 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. It was also held that 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 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 of one person. With laying down this law, the Hon'ble Supreme Court further held that the answer to the question, as to whether upon redemption of usufructuary mortgage a tenant mortgagee could be directed to deliver actual or physical possession of the mortgaged property to the lessor mortgagor must depend upon whether there was an implied surrender of the lessee's rights when the usufructuary mortgage was executed in his favor by the lessor mortgagor must depend upon whether there was an implied surrender of the lessee's rights when the usufructuary mortgage was executed in his favor by the lessor mortgagor. And this obviously depends upon what was the intention of the parties at the time of the execution of the mortgage deed in favor of the sitting tenant to be gathered from the terms and conditions of the mortgage transaction in the light of the surrounding circumstances of the case. It all depends upon whether by executing a possessory or usufructuary mortgage in favor of a sitting tenant the parties intended that there should be a surrender of lessee's rights or not, and only if an implied surrender of lessee's rights could be inferred then the mortgagor would be entitled to have the delivery of physical possession upon redemption but not otherwise."

11. It is with laying down this law that the Hon'ble Supreme Court proceeded to consider the terms of the mortgage deed in that particular case, and came to the conclusion that the effect of the execution of usufructuary mortgage deed in that case was, that tenants right are kept in abeyance and they were revived on redemption of mortgage deed. The judgment of this Court in Nand Lal's case, 1980 Raj LW 490, was carried in appeal in Hon'ble the Supreme Court which was decided vide judgment reported in *Nand Lal v. Sukh Dev*,⁵ wherein the judgment of this Court was reversed. Referring to the judgment in Gambangi (supra) and on construction of mortgage deed it was held that there is nothing to warrant an inference of relinquishment of the rights of the tenant by obtaining this mortgage deed. In that view of the matter the appeal was allowed. Thus from the judgment of Hon'ble the Supreme Court in Nand Lal's case, the relevant consideration for deciding the legal question is the construction of the terms of the document so as to infer the intention of the parties. The various cases referred to by the learned counsel of either of the parties are judgments subsequently rendered by Hon'ble Supreme Court and mortgage deeds in those individual cases had been considered, and construed. Different conclusions have been arrived at, and both the learned counsel on either side referred to various judgments and tried to stress

their language interpretation and asked for consideration of the mortgagee deed in favor of their respective clients.

12. However, the fact remains that the question is to be decided only on the basis of construction of the terms of the mortgage deed inasmuch as if on reading or construction of the mortgage deed the plaintiff is able to show, as found by the learned Court below, that the tenancy rights were surrendered then the defendant has to deliver actual physical possession and not otherwise.

13. In this background, the learned lower Appellate Court has also read the subsequent mortgage deed Ex. 3 dated 30.3.83 and with the assistance of the learned counsel for the parties I have also closely read the said document. The document Ex. 3 is a registered mortgage deed dated 30.3.83 and it clearly recites :

(Vernacular matter omitted)

Likewise in para 6 it has again been stipulated that

(Vernacular matter omitted)

then still more significant stipulation is contained at portion A to B in para 9 which reads as under :

(Vernacular matter omitted)

Then it has also been mentioned that

(Vernacular matter omitted)

Thus, in my opinion the recitals in the document clearly and unequivocally rescind the contrary stipulation contained in the earlier mortgage deed dated 7.3.72 (Ex. 1), which had stipulated revival of tenancy rights according to the terms (of Ex.3), that stipulation will be deemed to have been cancelled, and on payment of mortgage amount actual physical possession shall have to be delivered by the mortgagee to the mortgagor.

14. Faced with this, two fold arguments have been advanced on the side of the learned counsel for the appellant. First being on the basis of para 1 of the mortgage deed stipulating that, the mortgage money will not carry any interest, and during subsistence of the mortgage no rent will be payable for the suit shop. On the basis of this stipulation it is sought to be contended that since during subsistence or mortgage deed, no rent would be payable, it obviously means that on redemption the loan was

payable and thus tenancy would revive, reliance has been placed on the judgment of Hon'ble the Supreme Court in *Nemi Chand v. Onkar Lal*,⁶. I am unable to accept this contention, for the simple reason that when in later part of the document contrary stipulation is clearly there, that on redemption actual physical possession will have to be handed over and this stipulation is further supported by the other stipulation rescinding the contrary stipulation contained in the earlier mortgage deed (Ex. 1), this stipulation in para 1 cannot be construed as attempted by the learned counsel for the appellant. Stipulation about non-livability of rent during the subsistence of the mortgage may have been a consideration mutually agreed between the parties, as a *quid pro quo* for non-livability of interest, but then in view of the stipulation contained in later part of the document this stipulation cannot be construed to be having the effect of indicating non-surrender of tenancy rights and of only suspension of tenancy rights. In the judgment cited by the learned counsel this type of stipulations, as are contained in the later part Ex. 3 and which have been quoted above did not exist, hence the judgment relied does not help the appellant.

15. The second contention in this regard that has been raised is, that for spelling out surrender there should be a surrender by defendant, and for such surrender the mortgage deed should have been a bilateral document, and should have been signed by the appellant also. Since the document is not signed by the appellant, the recitals cannot have the effect of surrender of tenancy rights.

16. True it is that the learned trial Court has noticed and accepted this contention on the basis of admission of the learned counsel for the plaintiff that the document does not bear the signatures of the appellant. But then the learned Appellate Court after appreciating the attending circumstances has found that the document does bear the signature (thumb mark) of the appellant Bhanwarlal below the entry of the registration and in view of the attending circumstances has held the defendant to be bound by the terms of the mortgage deed.

17. Having considered the submissions in conjunction with the perusal of Ex. 3 and the findings of the learned lower Appellate Court I find the submissions to be not tenable for variety of reasons.

18. True it is that the document does not bear the signature of the mortgagee as an executant of the document, but then it is also true that the document does bear the signatures (thumb mark) of the mortgagee below the endorsement of registration.

Likewise admittedly after registration, the original document was taken by the mortgagee from the Sub-Registrar, obviously way back in the year 1983, and admittedly the original is in possession of the mortgagee. Before the learned trial Court the original was requisitioned from the mortgagee, and on failure to produce, the certified copy was produced by the plaintiff, and proved as Ex. 3. In this document, what is significant to note is that since the document is in possession of the mortgagee and, the endorsement of the Sub-Registrar recites that the document was read over and explained and this endorsement does bear the thumb mark of the mortgagee, it has to be assumed that the mortgagee had noted all contents of the document. Admittedly, till filing of the suit which was filed as late as on 30.7.1992, mortgagee did to take any step, not even a notice to the plaintiff to show that, he did not agree to the stipulation of rescinding the conditions of the mortgage deed dated 7.3.1972. Not only this, even in the written statement, the only plea taken was that, in view of the provisions of Section 13 of the Act, any contract to the contrary is void, and unless requirements of Section 13 are established actual physical possession cannot be delivered to the plaintiff from the mortgagee. As against this, it is during the course of evidence only that the mortgagee has come forward with the story about the mortgaged document having not been shown by the Advocate Rishabh Kumar. Suffice it to say that in absence of the pleadings and in view of the above mentioned attending circumstances, this story cannot be believed. Since, the document clearly stipulates that on redemption, mortgagee will have to deliver actual physical possession of the premises to the plaintiff, and also stipulates that the contrary stipulation about tenancy contained in the earlier mortgage deed dated 7.3.1972 is rescinded, on the face of the language of the document, it is clear that tenancy rights were surrendered, and in view of the above circumstances including the terms of the mortgage deed, mere absence of signature of the mortgagee as one of the executant's of the document is of no significance. Thus, the contention of the learned counsel for the appellant is negated.

19. Another objection raised in the appeal is with regard to Section 13 of the Act. Suffice it to say that in view of the judgment of this Court in Bhanwarlal's case, 1973 Raj LJ 69 where this aspect has been expressly considered and decided against the present appellant, so also in view of the other judgments of Hon'ble the Supreme Court dealing with this controversy, the point is not available to the appellant. It is established law that tenancy right can always be surrendered by the tenant, obviously the provisions of Section 13(1) of the Act do not prevent the tenant from voluntarily surrendering the tenancy. Since, as a fact, it has been found that, tenancy has been

surrendered vide Ex. 3 and the possession continued to be, not as a tenant but only as a mortgagee, the contention is negated. Consequently, I do not find any error in the judgment of the learned appellate Court so far as it decides issue Nos. 1 and 4 and orders delivery of actual physical possession of the suit shop to the plaintiff, consequent upon redemption.

20. The another contention raised is with regard to substantial question No. 5 framed in the memo of appeal. The learned appellate Court while deciding issue No. 2 has held that learned trial Court did not award mesne profits because the plaintiff was not found entitled to obtain actual physical possession, but since he has been so found, the plaintiff is entitled to mesne profits from the date of suit. P.W. 1 has deposed that suit shop can yield a monthly return of Rs. 2000/- to Rs. 2500/- which evidence is materially corroborated by the statement of P.W. 3 while there is no sufficient evidence in rebuttal and therefore, issue No. 2 has been decided against the appellant as above.

21. In my view, the present appeal does involve this substantial question of law viz. :-

Whether learned appellate Court was justified in decreeing the suit of the plaintiff respondent for mesne profits at the rate of Rs. 2000/- per month from the date of the suit till delivery of actual physical possession ?

22. Having gone through the record and having considered the mortgage deed so also in view of the findings that I have recorded above, it is clear that the plaintiff is not entitled to mesne profits at the rate claimed from the date of suit.

23. As pointed out by the learned counsel for the appellant, in condition No. 1 of the mortgage deed Ex. 3, it was stipulated that during subsistence of the mortgage, there will be no liability of rent, so also there will be no liability of interest. Obviously, meaning thereby that whatever liability of the person in possession (appellant) was stipulated to arise was to be only after cessation of the mortgage of redemption. A look at Section 60 of the Transfer of Property Act does show that the right of redemption of the mortgagor comprises of to require the mortgagee : (a) to deliver to the mortgagee, the mortgage deed and all documents relating to mortgaged property which are in possession or power of the mortgagee, (b) where the mortgagee is in possession of the mortgaged property, to deliver the possession thereof to the mortgagor, and (c) at the

cost of mortgagor either to re-transfer the mortgaged property to him or to such third person as he may direct or to execute and (where the mortgage has been effected by a registered instrument) to have registered an acknowledgement in writing that any right in derogation of his interest transferred to the mortgagee has been extinguished.

24. It is established law that this right of redemption survives till it is extinguished, by act of parties, or by decree of the Court, or by lapse of time, whereby getting time barred. Thus, till a decree for redemption is passed, it has to be assumed that mortgage subsists, and since during subsistence of the mortgage even the liability of payment of rent does not exist, it cannot be said that the plaintiff is entitled to any mesne profits. Decree of redemption does not relate back to the date of the suit, as it relates back in the case of winding up petition, or insolvency petition, or the like. Therefore, till the date of decree, the plaintiff cannot be, and could not have been, held entitled to any mesne profits at whatever rates. Since, the appeal is a continuation of the suit, and since the judgment of the lower Court of appeal merges into the judgment of the appellate Court, therefore, it is the decree of this Court being hereby passed, that it can be said that a decree for redemption has been passed, and consequently, even on the findings of the learned lower Appellate Court, if the plaintiff is held to be entitled to the mesne profit at the rate of Rs. 2000/- per month, it can be, only from the date of passing of this decree and is accordingly held entitled. So far as the quantum of mesne profit is concerned, the learned lower Appellate Court, on appreciation of evidence, has arrived at the figure of Rs. 2000/- p.m. which finding is not vitiated on any of the grounds available under Section 100 CPC.

25. Thus, this substantial question of law is answered in the manner that the plaintiff is entitled to mesne profits at the rate of Rs. 2000/- p.m. but he is entitled from today till recovery of actual physical possession.

26. As a result of the above discussion the present appeal partly succeeds, in the sense that the preliminary decreed for redemption as passed by the learned Appellate Court giving directions Nos. 1, 2, 3 and 5 are upheld, the direction No. 4 is modified to the effect that the plaintiff shall be entitled to mesne profits at the rate of Rs. 2000/- per month from the date this decree (today) till recovery of actual physical possession from the appellant.

27. The last and alternative submission made by the learned counsel for the appellant,

that since the appellant is carrying on established business in the suit shop for the last about decades, he should be granted reasonable time to vacate the premises is now required to be considered. Having considered the submissions, one year's time is granted to the appellants from today, to remain in possession over the suit property, on the condition that the appellants shall deposit the mesne profits at the above rate on 15th day of each succeeding month in the learned trial Court. The appellants are further directed to execute an undertaking before the learned trial Court within two months, to the effect that after remaining in possession over the disputed premises for the aforesaid period of one year, they will also hand over the vacant possession to the decree holder, and in the meantime will not in any manner part with the possession of whole or any part of the suit shop in favor of any one. Parties are directed to bear their own costs.

Appeal partly allowed.

Cases Referred.

1. 1974 R.C.R. (Rent) 537: 1973 Raj LW 69
2. 1976 R.C.R. (Rent) 866
3. 1991(2) RCR (Rent) 425 (SC):1980 Raj LW 490
4. 1984(2) R.C.R. (Rent) 455
5. 1987(Supp) SCC 87
6. 1991(2) RCR (Rent) 425 (SC)