

# RAJASTHAN HIGH COURT

Gopal Sharan

Vs.

Smt. Radha Devi

S.B. Civil Execution 1st Appeal No. 1 of 1984

(Shiv Kumar Sharma, J.)

15.12.2003

## JUDGMENT

**Shiv Kumar Sharma, J.**

1. Instant appeal impugns the judgment dated November 15, 1983 of Additional District Judge No. 2 *Jaipur City, Jaipur* in Execution Case No. 8/1983 (28/1981) whereby learned executing Court observed that the appellants were not entitled to actual physical possession of the property in question, however they could get symbolic possession.

2. Contextual facts depict that vide decree dated December 20, 1980 learned District Judge *Jaipur City* issued directions in favor of the appellants and against respondent No. 13 to the effect that on depositing by appellants Rs. 48999/- within two months of the date of decree a sale deed would be executed by respondent No. 13 in favor of appellants and possession of the property would be handed over to the appellants. Pursuant to the directions, the appellants deposited the amount. Since, respondent No. 13 avoided to execute the sale deed, it was executed and got registered by the Court. The appellants thereafter filed execution petition seeking possession of the property in question. When Nazir proceeded to execute the decree of the respondents No. 1 to 12 and 4 others resisted the delivery of possession. Upon the report of Nazir notices were issued to the obstructers, who jointly filed their objections. Learned Executing Court recorded evidence and decided objections as indicated above.

3. I have pondered over the rival submissions.

4. A close look at the material on record demonstrates that Nazir went to the site and submitted his report on 15th July, 1981. Thereafter the executing Court issued notices

to 19 obstructers. Only 14 obstructers filed objections. Out of them five had handed over possession, but nine persons (Respondents No. 1, 3, 4, 5, 7, 9, 10 and 12) locked the premises. All these respondents do not appear to reside in the premises. From the perusal of document Ex. P.1, it is evident on the face of it that it clearly purports to be a mortgage by conditional sale. There is nothing in the deed (Ex.1) that warrants the conclusion that the mortgagee could induct tenants who would continue beyond the term of the existence of the mortgage or who would be given rights even after the expiry of the mortgage.

5. Learned District Judge, *Jaipur City* in the decree dated 20th December, 1980 issued directions to the mortgagee to deliver actual physical possession and the executing court could not have gone behind the decree by interpreting the word 'possession' as symbolic possession.

6. Case law cited on behalf of the respondents is distinguishable. Ratio indicated in *Chunchun Jha v. Ebadat Ali*,<sup>1</sup> *Bhaskar v. Shri Narain*,<sup>2</sup> and *Vidhyadhar v. Manik Rao*,<sup>3</sup> does not help the respondents; on the contrary it fully supports the case of the appellants. Their Lordships of the SC in these cases interpreted Section 58(c) of the Transfer of Property Act, 1882. *Mushir Mohammed Khan v. Sajida Bano*,<sup>4</sup> was not the case related to one composite document. It was a case of three documents viz Sale Deed, Agreement of reconveyance and Rent Note. In *Tamboli Raman Lal Moti Lal v. Ghanchi Chimanlal Keshavlal*,<sup>5</sup> there was no relationship of debtor and creditor between the parties as is existed in the instant case. *Dev Raj Dogra v. Gyan Chand Jain*,<sup>6</sup> was the case related to mortgagor's tenants. The question in the case reported in AIR 1997 SC 208 was as to whether the mortgagee became tenant under the provisions of Kerala Land Reforms Act. Hence in the facts and circumstances of the case no physical possession was handed over on redemption. In *Sahadev Bale Botre v. Namdeo Bapuji*,<sup>7</sup> Landlord was mortgagor and the tenant was mortgagee hence it was held that on redemption of tenancy rights sprang up and the tenant could not be dispossessed physically. In *Mangru v. Taraknathji*,<sup>8</sup> the question was whether mortgagor in possession had power to leave the mortgage property, it was held that the said question must be determined with reference to the authority of the Mortgagor. In *Nemichand v. Onkar Lal*,<sup>9</sup> the mortgagee was existing tenant. *Cheriyar Sossamma v. Sundaressan Pillai S. Amma*,<sup>10</sup> was the case where lease existed in favor of the husband of mortgagee. It was held that after redemption tenancy will survive as husband and wife are one.

7. In my opinion, ratio of *Carona Shoe Co. v. K.C. Bhaskaran Nair*,<sup>11</sup> is squarely

applicable to the facts of the instant case. Their Lordships of the SC in the said case propounded that under mortgage deed mortgagee was not entitled to induct tenants who would continue beyond the term of existence of mortgage or who would be given rights even after expiry of mortgage. As no landlord and tenant relationship existed between tenant and mortgagor, tenant was not entitled to protection of Rent Act.

8. For these reasons, I allow the appeal and set aside the impugned order dated 15th November, 1983. I direct the executing Court to execute the decree by delivering actual physical possession of the property in question. The appellants shall also be entitled to costs of the appeal.

Appeal allowed.

Cases Referred.

1. AIR 1954 SC 345
2. AIR 1960 SC 301
3. AIR 1999 SC 1441
4. AIR 2000 SC 1085
5. AIR 1992 SC 1236
6. AIR 1981 SC 981
7. AIR 1996 SC 1658
8. AIR 1967 SC 1390
9. AIR 1991 SC 2046
10. AIR 1999 SC 947
11. AIR 1989 SC 1110