

RAJASTHAN HIGH COURT

Shambhu Dayal

Vs.

Shivcharan Lal, (Rajasthan)

S.B. Civil Revision Petition No. 1473 of 1999

(A.C. Goyal, J.)

19.01.2004

JUDGMENT

A.C. Goyal, J.

1. This S.B. Civil Revision Petition is preferred against the order dated 17.9.1999, whereby learned Additional District Judge, *Dholpur* while setting aside the order of Civil Judge (Senior Division), *Dholpur*, passed on 20.2.1997, allowed Civil Misc. appeal and dismissed the application of the objector-tenant filed under Order 21 Rule 36 C.P.C.

2. The brief facts giving rise to the revision are that the shop in question is located in the town Badi. The non-petitioner/decreed-holder's (hereinafter referred to as the 'decreed-holder') grandfather Jhinguria Ram and father Chhidda Lal were owners of this shop. According to the decreed-holder, three shops including the shop in question were mortgaged by his grand-father and father with possession to Khacchi Lal Heera Lal (hereinafter referred to as 'the first mortgagee'), on 31.3.1928 by registered mortgage deed. Thereafter the shop was re-deemed and re-mortgaged on 27.4.1947 to Kalua Ram Badri Prasad (second mortgagee) and possession of the shop was handed over to them by the first mortgagee. Mortgage-deed was registered on 2.5.1947 in favour of second mortgagee. It is also the case of decreed-holder that ancestors of the petitioner/objector were inducted as tenants in this shop during the year 1946 by first mortgagee and on subsequent mortgage in favour of the second mortgagee, they became the tenants of the second mortgagee. Thereafter Civil Suit No. 38/1982 was filed for redemption of the mortgage against the judgment debtor-non-petitioner No. 2 Shri Ram Babu, who is son of second mortgagor Shri Badri Prasad. Final decree in

redemption suit was passed in favour of the decree-holder vide judgment dated 9.8.1991. An execution application was filed by the decree-holder and on issuance of warrant for possession in that execution case No. 3/91, the petitioner/objector filed objections under Order 21 Rule 36 C.P.C. with the averments that this shop was let out to his grand- father Murlidhar and father Bal Mukand by mortgagor Sri Jhinguria Ram and Chhida Lal at monthly rent of Rs. 2/- in Samvat Year 1996 (in the year 1939) and thereafter the rent was enhanced to Rs. 20/- p.m. and when this shop was mortgaged in favour of Kalwa Ram Badri Prasad on 27.4.1997 for a sum of Rs. 6500/-, Sarva Shri Murlidhar Bal Mukund were occupying the shop as tenants and after their death the petitioner became the tenant. It was also stated by the petitioner that the second mortgagee Kaluwa Ram Badri Prasad filed suit No. 88/47 for eviction against the tenants vis Murlidhar Bal Mukand wherein the mortgagors Jhinguria Ram Chhida Lal were also made as defendants making it clear that the shop was on rent prior to 27.4.1947 and thus in a final decree of redemption and possession obtained by the decree-holder against the judgment debtor, physical possession of the shop cannot be obtained from the tenant.

3. The decree-holder filed reply to the objections denying the possession of the objector/petitioner as a tenant of the decree-holder or his grand-father and father the mortgagors with a plea that the ancestors of the objector were inducted as tenants in the year 1946 by the first mortgagee and on redemption of the shop, the mortgage money was paid by second mortgagee to the first mortgagee and thus the grand-father and father of the objector-petitioner became the tenant of the second mortgagee. It was also stated that the second mortgagee had filed a suit bearing No. 88/1947 for eviction against the grand-father and father of the objector wherein Sri Bat Mukand father of the objector deposed that they were tenants of first mortgagee. That suit was dismissed by the trial court but was decreed on 11.9.1948 by Civil Judge, *Dholpur* in favour of second mortgagee holding the grand-father and father of the objector to be tenant of the mortgagee.

4. Learned Civil Judge (Senior Division), *Dholpur*, recorded the evidence of the objector as well as the decree-holder and thereafter vide order dated 20.2.1997, allowed the application of the objector filed under Order 21 Rule 36 C.P.C. with a direction that the decree-holder can obtain only symbolic possession of the suit shop.

5. The decree-holder filed Civil Misc. Appeal No. 40/98 (28/97) and the same was allowed vide impugned judgment dated 17.9.1999, and thus the present revision by the objector-tenant.

6. I have heard teamed counsel for the parties. As per Section 115 C.P.C. the High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto and if such subordinate Court appears-

(a) to have exercised a jurisdiction not vested in it by law; or

(b) to have failed to exercise a jurisdiction so vested; or

(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity;

the High Court may make such order in the case as it thinks fit.

7. The Provisions of Order 21 Rule 36 C.P.C. are as under:-

"36. *Decree for delivery of immovable property when in occupancy of tenant.* - Where a decree is for the delivery of any immovable property in the occupancy of a tenant or other person entitled to occupy the same and not bound by the decree to relinquish such occupancy, the Court shall order delivery to be made by affixing a copy of the warrant in some conspicuous place on the property, and proclaiming to the occupant by beat of drum or other customary mode, at some convenient place, the substance of the decree in regard to the property."

8. Now the question for consideration is whether the objector-tenant is entitled to retain the possession as tenant and not bound by the final decree of redemption passed on 9.8.1991 ?

It is not in dispute that second usufructuary mortgage was created on 27.4.1947 in favor of the second mortgagee and the mortgage deed was registered on 2.5.1947. It is also not in dispute that the grand-father and father of the objector were tenants in this shop prior to April, 1947. According to learned counsel for the objector-petitioner if it is proved that the petitioner-objector is tenant of the mortgagors, he can not be evicted in execution of this decree. He placed reliance upon *Gopalan Krishnakutty v. Kunjamma Pillai Sarojini Amma and others*, ¹, wherein it was held that in case of usufructuary mortgage of the leased premises created by lessor in favour of lessee, automatic merger of the interest of lessee with that of mortgagee and surrender of the lease can not be inferred so as to entitle the lessor- mortgagor to recover possession of the premises. Similar view was taken by Hon'ble Supreme Court in *Narayan Vishnu Herdre & Ors. v. Baburao Savalaram Kothawala since deceased by his heir Anant*

Baburao Kothawale,² and in *Nand Lal and others v. Sukh Dev and another*,³ It is significant to say here that according to the facts of these three cases the premises were mortgaged to the tenants and thus on redemption of mortgage, it was held that the tenancy rights of the mortgaged tenancy would continue and as such the owner is not entitled to recovery of physical possession. *Per contra*, learned counsel for the decree-holder contended that the Appellate Court has rightly held that the ancestors of the petitioner-objector were inducted as tenants by the first mortgagee and not by the mortgagors and thus the objector is bound by this decree and is liable to be evicted. He placed reliance upon *Jadavji Purshottam v. Dhami Navnitbhai Amaratlal and Others*,⁴ wherein it was held that the mortgagee in possession of the mortgaged property was not empowered to create lease which would be binding on mortgagor and after redemption of mortgage, the tenant inducted by mortgagee is liable to be evicted. While taking similar view, this Court in *Devkinandan and another etc. v. Roshan Lal and Others etc.*,⁵ held that a tenant of a mortgagee in possession is not entitled to the protection of the Rajasthan Premises (Control of Rent & Eviction) Act, 1950, against the mortgagor after the redemption of the mortgage.

9. Now the crucial point as to whether the grand-father and father of the objector were inducted as tenants by the mortgagors as claimed by the objector or by first mortgagee as pleaded by the decree-holder? In para 3 of the application under Order 21 Rule 36 C.P.C. it is pleaded by the objector that it were the mortgagors who let out the shop to Murlidhar Bal Mukand in Samvat 1996 (in the year 1936) at monthly rent of Rs. 2/-, and thereafter the rent was enhanced to Rs. 20/- p.m. In para 3 of its reply, it was admitted that the grand-father and father of the objector were admitted as tenants in the suit shop in the year about 1946 with a specific plea that in all four shops including the suit shop were usufructuary mortgaged on 31.3.1928 to Khichi Lal Heera Lal and on redemption of this mortgage this shop was re-mortgaged with possession in favor of second mortgagee and the tenancy continued.

10. Learned Civil Judge relying upon Ex.1 and Ex.2 rent-receipts, said to be issued by grand-father of the decree-holder in favor of tenants Murlidhar Bal Mukand came to this conclusion that they were tenants of the mortgagors. It was also held that the original mortgage deed dated 31.3.1928 has not been produced and its copy Ex.A.13, is not admissible in evidence and thus allowed the objections under Order 21 Rule 36 Civil Procedure Code. The First Appellate Court observed that both the receipts Ex.1 and Ex.2, said to be executed respectively on 15.5.1940 and 12.6.1942 are not reliable at all.

11. Having considered both the judgments as well as the evidence, I find no reasonable ground to interfere with the findings of the first appellate court on this point. According to the learned counsel for the objector-petitioner the decree-holder is not entitled to take physical possession of the shop even if execution of these two rent receipts is not proved as it is the case of the decree-holder that the ancestors of the objector were inducted as tenants by first mortgagee but the objector is being evicted in a decree not on the basis of redemption of first mortgage but in execution of the decree of redemption passed against the second mortgagee. It was also submitted that though a decree of eviction was obtained by the second mortgagee against the tenants but that decree was not put into execution. Learned counsel for the decree-holder contended that the second mortgage was created in April 1947 while it is the case of the objector himself that his ancestors were inducted as tenants in the year 1939 and at that time this shop was in possession of the first mortgagee and on redemption of the first mortgage the mortgage money was paid by the second mortgagee and this shop came to the possession of second mortgagee and thus the ancestors of the objector were first tenant's mortgagee and on redemption of first mortgage and creation of second mortgage, they became tenants of second mortgagee and at no point of time they were inducted as tenants by the mortgagors and thus the objector is liable to be evicted. It was also contended that Ex.A.13 is the certified copy of the earlier mortgage deed and since the original mortgage deed was not available the trial court granted permission to lead secondary evidence and no objection was raised at the time when Ex.A.13 was admitted in evidence. In the alternative, it was submitted that first mortgage has been admitted by Sri Bal Mukand father of the objector.

12. I have considered the rival submission in the light of the judgments cited hereinabove and the evidence. AW1 Shambhu Lal objector in his entire statement deposed about two receipts Ex. 1 and 2 only and the first appellate court rightly observed that he had no knowledge about execution of these two receipts. Regarding first mortgage he pleaded ignorance. He also pleaded ignorance about redemption of first mortgage. Similar is the passion of the statement of AW2 Vishva Nath Sharma. His statement was recorded on 19.1.1985 and at that time his age was 72 years and thus in the years 1940, 1941, his age was about 17 years and thus his statement that Murlidhar grand-father of the objector paid rent to Sri Jhinguria Ram mortgagor in the years 1940, 1941 in his presence was rightly disbelieved by the first appellate court. As a matter of fact, it is not reliable that he would remember these facts after a period of 55 years. AW3 Bhullu alias Bholu, whose statement was recorded on 19.1.1995, stated his age to be 65 years. Thus his statement that mortgagor Jhinguria Ram

demanded rent from Murlidhar about 40 years ago was rightly disbelieved. Similarly AW4 Ahmad also stated about the facts of payment of rent, in the year about 1940-45. NAW1 Ram Nath Bansal is an Advocate. He stated about some litigation regarding the shop between the parties and their ancestors. NAW2 Shiv Charan is decree-holder and son of mortgagor Chhida Lal. He supported his case as pleaded in reply to the application under Order 21 Rule 36 Civil Procedure Code. According to his statement the ancestors of the objector were inducted as tenants since 1946 i.e. prior to the second mortgage. He has also stated about earlier litigations with regard to the suit shop. NAW3 Ram Babu is the son of second mortgagee Badri Prasad. He stated that the shop in question was on rent with Murlidhar Bal Mukand prior to creation of second mortgage. The statements of NW4 Ram Nath and NAW5 Zille Hassan are not relevant on the point of tenancy. Now, documentary evidence is taken up. Ex.A.4 is copy of the plaint filed by second mortgagee against the tenants Murlidhar Bal Mukand and the mortgagors Jhinguria Ram Chhida Lal in the year 1947. The contents of Para No. 2 are relevant wherein it is pleaded that the shop in question was on rent prior to the creation of second mortgage and now the tenants have no concern with the earlier mortgagee as they are now the tenants of the second mortgagee and in Para 4 it has been pleaded that now the shop is required by the plaintiff as there is usufructuary mortgage in favour of the second mortgagee. Ex.A.1 is copy of the written statement of Ex.A.4 plaint filed by grand-father and father of the objector. Issue No. 1 was framed by the Court to this effect that as to whether the suit shop was let out to Firm Murlidhar Bal Mukand by Khichi Lal (the first mortgagee) and now on redemption of that mortgage the present plaintiff has become the mortgagee. Ex.A.2 is copy of the statement of Sri Bal Mukand father of the objector, wherein it was specifically admitted by him that this suit shop was given on rent by Shri Khichi Lal and rent note for a period of three years was executed and monthly rent agreed upon was Rs. 6/-. In view of this clear admission of the father of the objector, even assuming, that earlier mortgage-deed Ex.A 13 is not admissible in evidence, there is no doubt that the first mortgage was admitted by objector's father. It is also significant to say here that the question in dispute in the instant case is not the determination/creation or redemption of earlier mortgage. Rather question is whether the ancestors of the objector were inducted as tenants by Khichi Lal Heera Lal or by the mortgagors and this question has been answered by father of the objector in affirmative by admitting this fact that they were the tenants of Khichi Lal. Ex.A.8 is the copy of the statement of Sri Kaluwa Ram, the second mortgagee who also admitted the first mortgage in favor of Shri Khichi Lal. Ex.A.12 is the copy of statement of earlier mortgagee Shri Khichi Lal

recorded on 28.4.1947 in Civil Suit No. 88/1947 filed by the second mortgagee against the tenants wherein he stated that this shop was let out by him to father of the objector and thereafter this shop was redeemed and re-mortgaged in favor of the second mortgagee.

13. In view of the entire evidence as discussed here-in-above, the first appellate court rightly came to this conclusion that the objector failed to prove that his ancestors were the tenants of the mortgagors. This contention made by learned counsel for the petitioner objector has also no force that the objector cannot be evicted a final decree of redemption obtained against the second mortgagee as on redemption of the first mortgage and creation of second mortgage in favor of the second mortgagee the ancestors of the objector became tenants of the second mortgagee by virtue of redemption of first mortgage and in view of the judgments relied upon by learned counsel of the decree-holder, the objector being tenant inducted by mortgagee is liable to be evicted. No such case has been made out that the first appellate court has exercised a jurisdiction not vested in it by law or has failed to exercise jurisdiction so vested in it or has acted illegally or with material irregularity.

14. Vide one application it was prayed on behalf of the decree-holder that Rs. 1,000/- per month should be allowed as manse profits, but no order is required by this Court as suit for the same purpose has already been filed by the decree-holder.

Consequently, this revision petition is hereby dismissed with costs.

Petition dismissed.

Cases Referred.

1. 1996(2) RRR 134 (SC): (1996) 3 SCC 424
2. 1996(1) RRR 449: 1996(1) RCR (Rent) 150 (SC) : (1996) DNJ (SC)
3. 1987 (Supp) SCC 87
4. 1987(2) RCR (Rent) 403 (SC) : AIR 1987 SC 2146
5. AIR 1985 Raj 11