

(2008) 03 SC CK 0126

In the Supreme Court Of India

Case No : Civil Appeal No. 1957 of 2008 (Arising out of SLP (C) No. 2491 of 2007)

Chandrakant Shankarrao Machale

APPELLANT

Vs

Parubai Bhairu Mohite

RESPONDENT

Date of Decision : 13-03-2008

Acts Referred:

Contract Act, 1872 — Section 92
Registration Act, 1908 — Section 17(1)

Citation : AIR 2008 SC 3255 : (2008) AIRSCW 5495 : (2008) 3 BomCR 5 : (2008) 3 CHN 21 Supp : (2008) 3 CLT 592 : (2008) 4 JT 309 : (2008) 3 KLT 744 : (2008) 105 RD 332 : (2008) 4 SCALE 197 : (2008) 6 SCC 745 : (2008) 1 UC 581

Hon'ble Judges : V. S. Sirpurkar, J;S. B. Sinha, J

Bench : Division Bench

Advocate : S.N. Bhat, N.P.S. Panwar and D.P. Chaturvedi, for the Appellant; H.L. Tiku Yashmeet Kaur and Ashok K. Mahajan, for the Respondent

Final Decision : Allowed

Judgement

S.B. Sinha, J.—Leave granted.

2. Appellant was the owner of a house property situated in Taluka Gandhinglaj, District Kolhapur. On 28.2.1983, Bhairu Rama Mohite and Krishna Rama Mohite (the predecessor of the first respondent herein) executed a registered deed of mortgage in favour of the appellant. The possession of the said property was delivered in favour of the mortgagee. The period prescribed in the said Deed of Mortgage was seven years. The amount of mortgage was Rs. 20,000/-. It was agreed that upon expiry of the said period, the property would revert back to the mortgagor.

3. Allegedly, an unregistered agreement was entered into by and between the parties herein, stating:

This agreement in writing executed by us in respect of land C.S. No. 1943

admeasuring 252 Sq. meters situated Mouje Gadhinglj which includes house and open space belongs to us absolutely. Earlier the house admeasuring East West 39 feet i.e. 11 meters 89 centimeters and South-North 49 feet i.e. 14 meters 94 centimeters, totally adm.177.63 59 meters house as also the open space in front of the house East West 21.89 meters and South-North 6.10 meters totally adm.72.52 sq. meters from out of which house and the open space on the Western side admeasuring 36.26 meters was given to you by way of mortgage by conditional sale for Rs. 20,000/- under registered document No. 229 dated 1.3.1983 and the same is recorded in your name.

Some other terms and conditions were also laid down therein.

4. Respondents, being the predecessors in interest of the mortgagor filed a suit for redemption of the mortgage. Krishna died during the pendency of the suit. As the period specified in the said Deed of Mortgage was to expire on 28.2.1990, the plaintiff served with a notice dated 17.2.1990 for redeeming the suit property. As the same was not acted upon, a suit for redemption of mortgage was filed.

5. Contention of the appellant, inter alia, was that he has been put in possession of the said property as a tenant. It was urged that by reason of the said mortgage, his right to occupy the premises as a tenant was not extinguished.

6. In view of the aforementioned rival contentions of the parties, the learned Trial Judge framed the following issues:

1. Do the plaintiff prove that Bhairu Rama Mohite and the defendant No. 10 Mortgaged the suit property to the defendant by conditional sale on 1.3.1983?

2. Does the defendant prove that he is in possession of the suit property as a monthly tenant?

3. Are the plaintiffs entitled to redeem the mortgage by obtaining reconveyance of the suit property from the defendant?

4. Are they entitled to possession of the suit property?

5. What order and decree?

7. On issue No. 1, learned Trial Court opined:

Now we have to see what was intended by the parties to these three documents. It may be noted that parties to these documents are the same. The defendant claims tenancy rights by virtue of agreement dated 24.2.1983 (Exh.52). On the other hand according to the plaintiff the property comprising this agreement is not the subject matter of the mortgage the controversy has to be solved by going through the contents of the document. From the recitals it appears that the Municipal House No. 1440 was agreed to be let for the period of 7 years on lease by accepting Rs. 20,000/-. It also appears from the recitals that the plaintiff received Rs. 1,000/- on the day of agreement. I do not come across

recitals of the defendant having been put in possession of the property. On the contrary, the recitals do show that the agreement was executor (sic) in nature and the intended transaction was to be completed within 15 days. Therefore, I do not subscribe to the submission of the defendant that the lease was created by Exh.52 on 24.2.1983. It is true that if we peruse the description of the property given in the mortgage deed Exh.62, it does not correspond with the description given in Exh.52. However, the plaintiff has failed to prove that on the day of execution of the mortgage deed there were two Municipal House numbers viz., 1440 and 1440-A. However, since I have already observed document Exh.52 to be an agreement of the lease to be created within 15 days, I do not wish to rely strongly on that document since the fate of the suit is rest on subsequent document Exh. 53 and Exh. 62.

The suit, however, was dismissed opining that the plaintiff has leased the suit property in favour of the defendant.

8. An appeal preferred thereagainst by the plaintiff was allowed by the Court of Appeal, holding:

After going through terms and conditions of deed of lease styled as Kararpatra (Exh.53) it reveals that it is not fresh contract of lease but, under that document, the right created by plaintiffs, in favour of the defendant in the immovable property for Rs. 20,000/- as a mortgagee, has been extinguished. By the terms and conditions of this agreement, parties, intended to change the right created in favour of defendant, under registered deed of mortgage, which was admittedly executed for the mortgage amount of Rs. 20,000/-. Therefore, u/s 17(1)(b) of the Indian Registration Act, this second agreement dated 1.3.1983 (Exh.53) requires registration. Admittedly, this document is not registered document. Therefore, under this second agreement (Exh.53) the relations created in between the plaintiffs and defendant as mortgagor and mortgagee, cannot be extinguished. I hold that, the Kararpatra (Exh.53) cannot extinguish the right created in favour of the defendant as mortgagee in the suit property. So also when under deed of mortgaged deed (Exh.62) in lieu of amount of Rs. 20,000/- interest has been created in favour of the defendant, after execution of this deed of mortgage, plaintiffs had no right to lease out the same property to the defendant by canceling this registered deed of mortgage under unregistered agreement of lease (Exh.53) I hold that, the learned trial court, totally ignored the legal position that, by unregistered agreement (Exh.53) the contract of mortgage (Exh.62) cannot be extinguished or cancelled. Therefore, the agreement (Exh.53) is of no help to the defendant to prove that under that document he acquired interest in the suit property as a tenant of the plaintiff.

9. As regards the contention that the appellant became a tenant under the plaintiffs, the Court of First Appeal held that the relationship between the parties were that of a mortgagor and mortgagee and the defendant-appellant had failed to prove that he was in possession of the suit property as a tenant. The appeal was, thus, allowed and the suit was decreed.

10. A second appeal preferred by the appellant herein has been dismissed by the High Court opining that no substantial question of law arose for its consideration.

11. Mr. S.N. Bhat, learned Counsel appearing on behalf of the appellant, would, in support of the appeal, contend that the transactions of mortgage and the lease were separate and independent transactions. The Court of First Appeal as also the High Court, thus, committed a serious error in passing the impugned judgment. The learned Counsel furthermore urged that although a decree for redemption could be granted but in execution of the said decree, only symbolical possession could be directed to be issued.

12. The Deed of Mortgage dated 28.2.1983 was a registered document. The terms of a registered document could be varied or altered only by another registered document. A finding of fact has been arrived at that the appellant could not prove his possession as a tenant. We have noticed hereinbefore that the appellant was put in possession as a mortgagee. It was, therefore, in our opinion, impermissible in law to change his status from a mortgagee to that of a lessee by reason of an unregistered deed of lease (even if we assume that the same had been executed).

The learned Court of Appeal may not be entirely correct in taking recourse to Section 92 of the Indian Contract Act or holding that the deed of lease required registration even for the purpose of month to month tenancy, but, as indicated hereinbefore, we have considered the question from a different angle.

13. Furthermore, the only question of law which was pressed before the High Court was:

The lower appellate court ought to have held that the respondents and appellant executed an agreement dated 28.2.1983 i.e. Exh.62 and immediately on the next day, i.e., on 1.3.1983 executed the agreement for tenancy which is a subsequent agreement. Hence it ought to have been held that the parties have by their conduct agreed to treat the transaction as a lease and hence suit filed by respondents for redemption of mortgage is not maintainable in law and ought to have been dismissed with costs.

No substantial question of law, thus, had been raised.

14. The deed of mortgage was a registered one. It fulfilled the conditions of a valid mortgage. Its terms could not have been varied or altered by reason of an unregistered document so as to change the status of the parties from mortgagee to a lessee. [See *S. Saktivel (dead) by Lrs. Vs. M. Venugopal Pillai and Others*, .

15. Our attention has been drawn to a decision of this Court in *Gopalan Krishnankutty Vs. Kunjamma Pillai Sarojini Amma and others*, wherein upon taking into consideration some of its earlier decisions, this Court held:

The High Court, in the present case, proceeded on the erroneous assumption in law that surrender of the lease by the lessee (defendant) must be implied from

the fact of execution of the usufructuary mortgage in his favour by the lessor (plaintiff). As indicated, this is an erroneous assumption in law. This question has to be decided on the contents of the deed since there is no other evidence of surrender of the lease by the defendant on execution of the mortgage. We find nothing in the mortgage deed (Annexure A-1) dated 18.7.1974 read with the release deed of the same date to prove either an express or an implied surrender of the lease by the defendant in favour of the plaintiff on execution of the mortgage deed. Since there is no automatic merger of the interest of a lessee with that of a mortgagee when the same person is the lessee as well as the mortgagee, in absence of proof of surrender of the lease by the defendant, on redemption of the mortgage, the plaintiff is not entitled automatically to recover possession of the leased premises. The defendant's right to continue in possession as a lessee, therefore, continues to subsist.

16. We are concerned here with a converse case. The case as to whether the interest of a lessee merged with the interest of a mortgagee would depend upon facts and circumstances of each case, as indicated in *Gopalan Krishna Murti*. There cannot be any hard and fast rule for arriving at only one decision as the decision thereupon will depend upon the terms of the document.

17. For the aforementioned reasons, there is no merit in the appeal. The same is dismissed accordingly. In the facts of the case, there shall, however, be no order as to costs.