

(1967) 08 GUJ CK 0017

In the Gujarat High Court

Case No : Letters Patent Appeal No. 44 of 1963

Maganlal Jagjiwandas

APPELLANT

Vs

Lakhiram Haridasamal and Others

RESPONDENT

Date of Decision : 10-08-1967

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 34 Rule 5
Transfer of Property Act, 1882 — Section 52, 65

Citation : AIR 1968 Guj 193 : (1968) GLR 161

Hon'ble Judges : V.R. Shah, J;A.R. Bakshi, J

Bench : Division Bench

Advocate : N.R. Oza, for the Appellant; N.V. Karlekar, for the Respondent

Judgement

Bakshi, J.

(1) This appeal raises a question of some importance regarding the applicability of Section 52 and Section 65A of the Transfer of Property Act. A brief statement of some facts would be helpful in understanding the question. The appellant was a simple mortgagee of the property of respondent No. 2 and he filed Suit No. 80 of 1954 for the realization of his mortgage monies by sale of the mortgaged property. A preliminary decree was passed in that suit on 29th June 1955 and a final decree was passed on 27th January 1956. The appellant filed execution application No. 18 of 1956 to execute his decree and the property was sold by auction by the Court on 20th July 1959 and was purchased by the appellant. After the appellant had obtained the final decree on January 27, 1956, as stated above, respondent No. 2 gave a lease of the property to respondent No. 1 for a period of three years on 17th January 1957 and took in advance rent for the three years. The auction-purchaser filed an application for obtaining actual possession of the property which he had purchased at the Court sale. This application was resisted on the ground that the tenant of the mortgagor had taken possession of the suit property by virtue taken possession of the suit property by virtue of the lease dated 17th January 1957 and that since this lease

was binding on the mortgage by virtue of Section 65A of the Transfer of Property Act, actual possession of the suit property could not be given to the auction-purchaser and that the tenant was entitled to the protection of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947. The learned Civil Judge, Senior Division, Baroda, ordered that actual possession should be delivered to the plaintiff from the mortgagor and from his tenant. The learned Civil Judge held that Section 65A of the Transfer of Property Act was subject of the provisions of Section 52 of that Act and that the tenancy was created by the mortgagor after the final decree was passed and before the decree was completely satisfied and, therefore, Section 52 of the Transfer of Property Act came into operation and the tenant could not get the benefit of the lease. The learned Civil Judge, on this view, ordered actual possession to be given to the auction purchaser. Against this order, the tenant preferred Civil First Appeal No. 284 of 1961 in the High Court, which was heard and decided by Raju, J., who allowed the appeal, set aside the order of the learned Civil Judge and ordered that symbolical possession should be handed over to the auction-purchaser. It was held by Raju J., that Section 52 of the Transfer of Property Act did not apply to the present case and that the provisions of the Bombay Rents, Hotel and Lodging House Rates Control Act applied as between the auction-purchaser and the lessee of the mortgagor. Against this judgment and order, the present Letters Patent Appeal has been preferred by the auction-purchaser.

(2) It would be here necessary to set out the provisions of Section 65A of the Transfer of Property Act, which are as follows:-

(1) Subject to the provisions of sub-section (2), a mortgagor, while lawfully in possession of the mortgaged property, shall have power to make leases thereof which shall be binding on the mortgage..

(2) (a) Every such lease shall be such as would be made in the ordinary course of management of the property concerned, and in accordance with any local law, custom or usage.

(b) Every such lease shall reserve the best rent that can reasonably be obtained, and no premium shall be paid or promised and no rent shall be payable in advance.

(c) No such lease shall contain a covenant for renewal.

(d) Every such lease shall take effect from a date not later than six months from the date on which it is made.

(e) In the case of a lease of buildings, whether leased with or without the land on which they stand, the duration of the lease shall in no case exceed three years, and the lease shall contain a covenant for payment of the rent and a condition of re-entry on the rent not being paid within a time therein specified.

(3) The provisions of sub-section (1) apply only if and as far as a contrary intention is not expressed in the mortgage-deed; and the provisions of sub-

section (2) may be varied or extended by the mortgage-deed and, as so varied and extended, shall, as far as may be, operate in like manner and with all like incidents, effects and consequences, as if such variations or extensions were contained in that subsection."

The question that has been raised in the present matter is whether Section 65A would prevail in a case where the property leased out was the subject-matter of a suit for recovery of mortgage money by sale of the property where the suit has already been filed and a decree has been passed and where the lease has been made after the filing of the suit. The question, in other words, is whether Section 65A will be subject to the provisions of Section 52 of the Transfer of Property Act which deals with transfer of property pending a suit. Section 52 of the Transfer of Property Act reads as under:-

"During the pendency in any Court having authority within the limits of India excluding the State of Jammu and Kashmir or established beyond such limits by the Central Government, of any suit or proceeding which is not collusive and in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose.

Explanation.- For the purposes of this section, the pendency of a suit or proceeding shall be deemed to commence from the date of the presentation of the plaint or the institution of the proceeding in a Court of competent jurisdiction, and to continue until the suit or proceeding has been disposed of by a final decree or order and complete satisfaction or discharge of such decree or order has been obtained, or has become obtainable by reason of the expiration of any period of limitation prescribed for the execution thereof by any law for the time being in force."

It would be seen that Section 65A confers upon the mortgagor in possession a statutory power to lease the mortgaged property and the validity of a lease granted by the mortgagor would be determined with reference to the provisions of the section and the terms of the deed of mortgage. Section 65A refers to leases made by the mortgagor in possession in ordinary course of management and such a lease created by the mortgagor would be binding on the mortgage. The question of the exercise of rights in the ordinary course of management is different from the question of the right to deal with the property after a suit is filed. Such a question would be governed by Section 52 of the Transfer of Property Act which specifically deals with rights pending a suit. Section 65A is a general provision which deals with the ordinary rights of the mortgagor in possession; whereas Section 52 provides for dealing with property in a specific cases, i.e., when a suit is filed. The field of operation of Section 52 is entirely different and it is that section which would govern the case of any transaction affecting immovable property which is the subject matter of a suit.

(3) The question may be looked at from another aspect. The question whether the party to a suit had a right to lease does not affect the question of *lis pendens*. Before a suit is filed, the mortgagor could do all things which were permissible to him under the law, but once a suit is filed, the question of affecting the rights of the parties to the suit would come into prominence and the principle expressed in the maxim that "pending a litigation nothing new should be introduced" would come into operation. That principle is expressed in Section 52 of the Transfer of Property Act which, in effect, provides that *pendente lite* neither party to the litigation in which any right to immovable property is in question, can deal with such property so as to affect the opposite party. The section is thus intended to protect parties to a suit against alienations by the other parties during the pendency of a suit and makes the adjudication in the suit binding on transferees from parties pending suit. The broad purpose of the section seems to be to maintain a status quo, unaffected by the Act of any party to the litigation pending the adjudication of the subject-matter of the suit. The section requires that a suit must be noncollusive; that there must be a right to immovable property in question in the suit; that such a right must be directly and specifically in question; that the party other than the party making the transfer had some right under the decree that would be passed in the suit and that such a right must be affected by the transfer.

The section principally requires that a right to immovable property must be directly and specifically in question in the suit. A mortgage is a transfer of an interest in specific immovable property as security for the repayment of a debt and such an interest is itself immovable property. The nature of the right that is transferred would depend upon the form of the mortgage and in a simple mortgage, the transfer is made of a power of sale which is one of the component rights that make up the total right of ownership. But whatever the form of the mortgage, there is no doubt about the fact that there is some transfer of some interest in the immovable property. A suit on a simple mortgage to recover the mortgage money and to get the property sold is brought in the exercise of the right which is transferred to the mortgagee—a right which is one of the several rights of ownership of immovable property, and, therefore, is an interest in the immovable property. Such a suit is for the enforcement of the right which relates to immovable property and is thus a suit in which a right to or in relation to immovable property is in question. Moreover, the mortgagor has also, after the mortgage, some rights in his property left in him after the mortgage and these rights would be extinguished by the sale of the property, made in execution of the decree passed in a suit brought by the mortgagee in exercise of his rights of sale and whoever purchases the property at the auction sale would be entitled to the possession of the property along with the rights both of the mortgagor and the mortgagee. The right of sale of the property includes the right of possession of the property in sale and the purchaser at the auction sale in the execution of the decree passed in the suit would be entitled to apply for possession in the execution proceedings. The proceedings by way of sale, the purchase by the

auction-purchaser and the application by the auction-purchaser for actual possession of all the consequences of the suit for sale of immovable property which was the subject-matter of the mortgage and are, therefore, incidents of the suit in which a right to immovable property was directly and specifically in question. The auction-purchaser at a Court sale purchases the interest of the judgment-debtor and also the interest of the mortgagee and on a sale in such a suit, the whole mortgage is extinguished and the interest of the mortgagor also passes to the auction-purchaser. What thus passes to the auction-purchaser is the title of the property and also the right to have possession of the property. It is obvious that by the creation of a lease, the right to possession which, as stated above, was included in the right of sale of the mortgaged property and the right of the auction-purchaser to actual possession of the property which he had obtained in the course of proceedings which were started in execution of the decree obtained in a suit relating to immovable property, would undoubtedly, be seriously affected. If the lease was binding on the auction-purchaser, who has a right in consequence of the sale in the suit and execution of the decree obtained in a suit relating to immovable property, would undoubtedly, be seriously affected. If the lease was binding on the auction-purchaser, who has a right in consequence of the sale in the suit and execution of the decree to have all the rights of the mortgagee and the mortgagor including the right to possession of the property, he would not get the benefit of actual possession and if the lease created by the mortgagor after the suit was filed was valid and binding on the mortgagee and the auction-purchaser, the right in the suit would be adversely affected. It would also appear that by the making of the lease, the security of the mortgagee would also be, to some extent, affected because if the lease was also binding on him, it would mean that although he had an unqualified right of sale when he filed the suit, he would not get the same price of the property if the intending auction-purchaser knew that on the sale being knocked out in his favour, he was not likely to get actual possession of the property. The right of sale of the mortgaged property and the right to recover the mortgage monies out of the security and finally the right to get the title of the mortgagee as well as the mortgagor vested in the person who purchases the property, including the right to get actual possession of the property—all these rights are inextricable connected till the suit is finally brought to termination, i.e., till the termination of all the execution proceedings and that would arise out of the final decree that would be passed in the suit brought by the mortgagee for sale of the mortgaged property. We are, therefore, of the view that all these ingredients of Section 52 have been satisfied in the present case and although Section 65A gives a statutory power to the mortgagor in possession to lease the mortgaged property, that section would be subject to Section 52 of the Transfer of Property Act and when, as in the present case, the lease has been created after the decree was passed in the suit, the provisions of Section 52 of the Transfer of Property Act would come into operation, with the result that the lease would not be binding either to the mortgagee or to the auction-purchaser who has purchased all the rights to the property including the right to possession of the property. We are,

therefore, with respect, unable to agree with the reasoning of Raju J. And to hold that Section 52 would not be applicable to the present case.

(4) In view of the broad principles governing the application of Section 52 and Section 65A of the Transfer or Property Act, it would be unnecessary to refer to all the case-law in detail. We have already discussed the question whether the right to lease the property vested in the mortgagor in possession by Section 65A of the Transfer or Property Act would be subject to the doctrine of *lis pendens* expressed in Section 52 of the Transfer of Property Act. We have not accepted the argument of Mr. Karlekar, learned advocate appearing on behalf of the tenant that Section 65A gives an absolute right to the mortgagor in possession to let out his property irrespective of the fact whether a suit is filed or not. Mr. Karlekar had, in support of his argument, relied upon the case of *V. Subbaraju v. Seetharamaraju*, ILR 39 Mad 283 :(AIR 1916 Mad 323), in which it was held that the creation of a lease for one year after a suit and decree on mortgage was not affected by the doctrine of *lis pendens* enunciated in Section 52 of the Transfer of Property Act as such a lease was an ordinary incident of the beneficial enjoyment of a mortgagor allowed to remain in possession. We have seen above that if any alienation that is made by the mortgagor in possession after a suit is filed by the mortgagee was likely to affect the rights of the other party, that would not be binding as in such a case the provisions of Section 52 of the Transfer of Property Act would come into operation. Reference was also made to the case of *Ram Dayal Vs. Asghar Khan*, , in which it was held that where during the pendency of a mortgage suit or of the proceedings consequential upon a decree passed in such suit, the mortgagor in the ordinary course of the management of his property grants leases of the mortgaged property in whole, or in part for an adequate rent, the lease is not obnoxious to the provisions of S. 52. The lessee holds the property subject to the rights of the mortgagee-decree-holder. There is no detailed discussion of the question in the judgment. Reference was also made to the case of *Pandit Ram Chander Vs. Pandit Maharaj Kunwar and Others*, . In that cases, during the pendency of a suit by the mortgagee for enforcing a mortgage, the mortgagor executed a lease of the mortgage properties in favour of a third person and the mortgage properties were sold to the mortgagee at a private sale and the entire decretal amount was paid out of the sale consideration. On the facts of the case, the Court held that the lease of the properties by mortgagor was not invalid u/s 52 as the execution of that lease did not affect the rights of any party to the mortgage suit. In *Thakur Prasad v. Gaya Sahu* ILR(1898) All 349, the plaintiff Thakur Prasad was the mortgagee of a share in a certain village from one Chandi Prasad, under a mortgage executed in April, 1885. In January 1892, Thakur Prasad obtained a decree for sale on that mortgage. On the 9th of March 1893 Chandi Prasad, the mortgagor gave a lease of a portion of the mortgaged property to one Gaya Sahu. On 20th September 1893, Thakur Prasad executed his decree for sale, and having caused the mortgaged property to be sold, purchased it himself. He was however, unable to get possession of that portion of the property which had been subsequently

leased by Chandi Prasad. He accordingly brought a suit for cancellation of the lease and to obtain possession of the property which was the subject-matter of the lease. The Court of first instance dismissed the suit and the learned District Judge also dismissed the appeal of the plaintiff. On appeal to the High Court, it was held that a lease of property made by the judgment-debtor against whom a decree for sale had been passed for sale of the property came within the purview of Section 52 of the Transfer of Property Act. It was observed in that case at p. 351 that-

"It appears to me that a lease of property made by a judgment-debtor against whom a decree had been made u/s 88 of the Transfer of Property Act for sale of that property comes within the provisions of Section 52 of the latter Act. The lease executed by the judgment-debtor. Chandi Prasad, whatever be its object, cannot but have the effect of, to some extent, defeating the auction-purchaser of that property. I am, therefore, of opinion that the appellant here is entitled to my judgment." Reference may also be made to the case of *Girdharlal Harilal v. Lilladhar* 33 Bom LR 1123 : (AIR 1931 Bom 539), in which the following observations have been made at p. 1125 (of Bom LR) = (at pp. 540-542 of AIR):-

"The principal argument raised by the learned advocate for the applicant is that the lease to the defendant is dated June 24, 1925, at which time the execution proceedings in the suit of 1917, filed by the second mortgagee,, were pending. Therefore, the transaction is affected by S. 52 of the Transfer of Property Act and by the doctrine of *lis pendens*, and it is contended that the mortgagor cannot pass a lease during the mortgage to the detriment of the mortgagee or persons claiming under him. It is further contended that the doctrine of *lis pendens* is independent of notice, so that the lease is not binding on the plaintiff. The plaintiff does not ask for possession, but only for damages for failure to give him possession. It is further contended that independent of *lis pendens* the lease is bad. The mortgagor could not create a lease so as to bind the mortgagee, much less the auction-purchaser. The suit of the second mortgagee was previous to the lease, the decree being obtained in 1981, and the lease to the present defendant was on June 24, 1925, when the darkhast was pending to execute the decree. Section 52 of the Transfer of Property Act lays down that during the active prosecution in any Court of a contentious suit or proceeding in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except on the authority of the Court and on such terms as it may impose. It has been conceded by the learned counsel for the opponent that if the second mortgage had been one with possession or if the argument had been raised on behalf of the first mortgagee who was the mortgagee with possession, the position could not be disputed. But as the second mortgagee was only owner of the equity of redemption and not entitled to possession at all, the mortgagor does not lose the right to sub-let. There is a certain amount of

authority on the point. It was held in ILR(1898) All 349 , that a lease of property made by a judgment-debtor against whom a decree for sale had been made under S. 88 of the Transfer of Property Act for sale of that property, came within the purview of S. 52 of the Transfer of Property Act. That was a case of a mortgage of a four pies share in a village, and not a mortgage with possession. The learned Judge said (p. 360): "The lease was executed undoubtedly during the active prosecution of a contentious suit. . . . The transfer under this lease, which is for a period of no less than eleven years, undoubtedly must affect the rights of the auction-purchaser" It appeared to him that a lease of property made by a judgment-debtor against whom a decree had been made under S. 88 of the Transfer of Property Act for sale of that property comes within the purview of S. 52 of that Act. The lease executed by the judgment-debtor whatever its object, could not but have the effect to some extent of defeating the auction-purchaser of that property. A similar view was taken by the Calcutta High Court in *Kiran Chandra Bose Vs. Dutt and Co.*, , where a mortgage suit had been instituted and a Receiver appointed. During the pendency of the suit the mortgagor granted a lease of the premises to the defendant firm for a period of five years at a monthly rent of Rs. 175, taking an advance of seventeen months' rent. It was held that the lease was affected by the doctrine of *lis pendens* laid down in S. 52 of the Transfer of Property Act. The learned counsel for the opponent has referred to the case of ILR1939 Mad 283 = (AIR 1916 Mad 323), which holds a contrary opinion, as it lays down that the creation of a lease for one year after a suit and decree on mortgage is not affected by the doctrine of *lis pendens* enunciated in Section 52 of the Transfer of Property Act, as such a lease of the ordinary incident of the beneficial enjoyment of a mortgagor allowed to remain in possession. A reference is made in that case to the case already quoted ILR(1898) All 349, but states that the proposition is stated too broadly in that judgment as it ignores the ordinary incident of the beneficial enjoyment which a mortgagor who is allowed to remain in possession is entitled to have the benefit of. The view of the Madras High Court, therefore, appears to differ from that of the Allahabad and Calcutta High Courts. In this Court it was held in *Macleod v. Kissan* ILR(1906) Bom 250) that if a mortgagor left in possession grants a lease without the concurrence of the mortgagee, the lessee has a precarious title, inasmuch as, although the lessee is good as between himself and the mortgagor who granted it, the paramount title of the mortgagee may be asserted against both of them. This case was followed in the recent case, *Rustomji Dorabji Vs. Keshavji Damji*, , in which it was held that in the absence of any express power of leasing given in a mortgage deed or by other express agreement between the mortgagor and the mortgagee, the mortgagor has no power to grant a lease of the mortgaged property so as to be binding against the mortgagee, and a tenant under such a lease has no right as against the mortgagee to rent paid in advance to the mortgagor, and S. 50 of the Transfer of Property Act does not enable him to recover such rent from the mortgagee. The learned counsel for the opponent has referred to the case of *Green v. Rheinberg* (1911 104 LT 149), but the facts of that case are entirely different since the lease there was prior in date to the

execution of the mortgage, and was passed at a time when no mortgage was in existence. It is not, therefore, necessary to consider it. On the rulings of the Allahabad and Calcutta High Courts which have been followed in *Rustomji Dorabji Vs. Keshavji Damji*, , it appears that after the institution of the suit by the subsequent mortgagee and the obtaining of the decree, the grant of a lease by the mortgagor to the defendant would, under S. 52 of the Transfer of Property Act, be affected by the doctrine of lis pendens, and cannot affect the rights of the present plaintiff, who stands in the shoes of the second mortgagee." The case of *Muhammad Juman Mia Vs. Akali Mudiani and Others*, , is also in point. In that case, it was held that a sale held in execution of a decree for sale in a suit on a simple mortgage confers on the purchaser the right to the possession of the property; that the decree confers on the mortgagee the right to have the property sold so as to transfer the jus possidendi from its present holder to the purchaser and that the ultimate transference of the jus is a part of the rights of the mortgagee and is a part of the rights under the decree. As regards the application of the doctrine of lis pendens in relation to the right of the mortgagor in possession, to grant certain lease u/s 65A of the Transfer of Property Act, it was observed at p. 585 that-

"In my opinion the lease by defendants 3 to 6 in favour of defendant 2 was equally it by the rule of lis pendens. No doubt the mortgagor and, consequently, the purchaser at the sale in execution of the decree on the first mortgage will have the right to grant certain leases under S. 65A, Transfer of Property Act. But this power given by S. 65-A, Transfer of Property Act, will not affect application of the doctrine of lis pendens. A transaction is affected by lis pendens not because of any want of power in the parties in respect of the transaction but because the pendency of the litigation is made to affect the exercise of that power. Consequently, the fact that now S. 65A empowers the mortgagor to create certain leases will not protect lease granted by a mortgagor in exercise of this power from being affected by the rule of lis pendens if such a lease is given pending a suit by the mortgagee."

There is also a case in point decided by a Division Bench of the High Court of Bombay in 1985. That case is of *Ramdas Popat Patil Vs. Fakira Pandu Patil and Others*, . In that case it was held that any lease which is created by a mortgagor pending a suit which was filed by the mortgagee, would not be binding upon the mortgagee, or any person who has subsequently purchased the interest of the subsequently purchased the interest of the mortgagee along with that of the mortgagor in the property in suit and the lessee will have to take subject to the result of the suit. The following observations occurring in the judgment at p. 49 (of Bom LR) = (at pp. 20-21 of AIR) would clearly show the reasons for the above finding arrived at by the High Court of Bombay:-

"Now, Madhav had filed his suit upon the first mortgage in the year 1928. That suit was a properly constituted suit having as parties the second mortgagee as well as the mortgagor. Subsequently Rajmal having purchased the interred of the

mortgagor, the mortgagor of course went out of the suit for all practical purposes. But the result of the application of Section 52 of the Transfer of Property Act was that no lease could be created by Rajmal pending the suit filed by Madhav so as to affect Madhav's rights. Now, it is quite true that subsequently Madhav having brought to sale the mortgaged property, it has been purchased by the petitioner. But the argument that allowing the lease to hold good as against Madhav would not affect the rights of Madhav cannot for a moment be accepted. It is quite true that the petitioner purchased the interest of the mortgagor as well as the second mortgagee at the auction sale, and if that was all that he had purchased, then, it could be said that holding the lease good as against the petitioner would not affect the interest of the mortgagee. But what an auction purchaser purchases at a sale upon a mortgage is not only the interest of the mortgagor, or the interest of any subsequent mortgagees who have been made parties to the suit, but also the interest of the mortgagee who has brought the property to sale. The petitioner, therefore, had in him both the interests of the mortgagor and the mortgagee after his purchase, and if the lease in favour of opponent No. 1 is held good as against him, then, in that case, the result must necessarily be that Madhav's rights in the property, which were the subject matter of the suit, would be affected. Mr. Desai, who appears on behalf of the tenant, contends however that in this case there was power in the mortgagor u/s 65-A of the Transfer of Property Act to let the property in such a manner as the lease would be binding upon the mortgagee, and he says that this power the mortgagor had, whether a suit had been filed or not. The power would not come to an end by the mere fact that Madhav had filed a suit. Now, Section 65-A was enacted, because there was a difference of opinion between the different High Courts before it was enacted as to whether a mortgagor had got power to let the property to another in such a manner that the lease would be binding upon the mortgagee. This question is now set at rest by the decision of their Lordships of the Supreme Court in Raja Kamakshya Narayan Singh Bahadur Vs. Chohan Ram and Another, . But the question was undecided when Section 65-A was enacted, and the only effect of this enactment was to make it quite clear that a mortgagor had a right to lease the property, provided the condition mentioned in Section 65-A were satisfied. But it seems to us that that does not affect the question of lis pendens. The question whether one party to a suit had or had not got a right to enter into a transaction does not affect the question of lis pendens. A mortgagor, for example, may, pending a suit filed by the mortgagee, convey the equity of redemption to any body he likes. He may similarly create a second mortgage. The only thing which he cannot do is to do these things in such a manner as to affect the first mortgagee. If he does create a second mortgage, or if he conveys the equity of redemption, then the second mortgagee or the purchaser takes subject to the result of the suit. That is because once a suit is filed, Section 52 prohibits one party to the suit to effect a transfer which he could have done if the suit had not been filed, not absolutely, but in such a manner as to affect the rights of the other party to the suit. It seems to us, therefore, that if Section 52 is to be allowed to have full effect, it must be decided that any lease, which is

created by a mortgagor pending a suit which was filed by the mortgagee, would not be binding upon the mortgagee, or any person who has subsequently purchased the interest of the mortgagee along with that of the mortgagor in the property in suit, and the lessee will have to take subject to the result of the suit. There is authority for this proposition in the case of the Calcutta High Court in Muhammad Juman Mia Vs. Akali Mudiani and Others, ".

(5) For the reasons aforesaid, we are of the view that the present case would be governed by the provisions of Section 52 of the Transfer of Property Act and the lease would not be binding on the appellant who would be entitled to actual possession of the property that he had purchased at the auction sale. As the lease would not be valid against the appellant, the provisions of the Bombay Rents, Hotel and Lodging House Rates Control Act would not be applicable and the tenant would not be entitled to the benefit of these provisions. We, therefore, set aside the judgment and order passed by Raju J., in Civil first Appeal No. 284 of 1961 and restore the order of the Joint Civil Judge, Senior Division, Baroda passed by him in Miscellaneous Application No. 344 of 1959 on 27th July 1961. This Letters Patent Appeal is therefore, allowed with costs of this appeal as well as the costs of First Appeal No. 284 of 1961 both of which shall be paid by respondent No. 1.

(6) Appeal allowed.