(1979) 04 BOM CK 0006

In the Bombay High Court

Case No : A.F.A.D. No. 1120 of 1972

Mahadeo Maruti Bhagwat APPELLANT

Vs

Kantilal Khemchand Gujar and Others RESPONDENT

Date of Decision : 19-04-1979

Acts Referred:
Transfer of Property Act, 1882 — Section 111, 76

Citation : AIR 1980 Bom 79

Hon'ble Judges : Jahagirdar, J

Bench : Single Bench

Advocate : M.D. Gangakhedkar and Ajit P. Shah, for the Appellant; V.B. Rege, for the Respondent

Judgement

1. An interesting question of law which I thought had been settled by series of decisions of this Court as well as of the Supreme Court has been resurrected by Mr. Ajit P. Shah appearing in support of this second appeal. That question is whether a lease created by a mortgagee in possession is binding upon the mortgagor after the mortgage is redeemed. This question arises because the appellant who was defendant No. 7 in the suit details of which will be given shortly has been inducted in a part of a house bearing No. 650, situate in Ganpati AH in Wai town of Satara District by a sub-mortgagee. The entire house originally belonged to one Moti Bhiwa who mortgaged the same to one Narayan Janardhan Dhone who will hereinafter be referred to as "defendant No. 1". Defendant No. 1 in turn sub-mortgaged two different parts of the property to two different persons. One part was mortgaged to one Khemchand Rajaram Gujar who will hereinafter be referred to as "defendant No. 6."

Defendant No. 6 let out a portion of the property mortgaged to him to defendant No. 7 in the year 1946. The plaintiff having purchased the property in 1967 from Moti Bhiwa, filed a suit being Regular Civil Suit No. 221 of 1968 for redemption and possession of the entire property part of which as mentioned above was let out by defendant No. 6 to defendant No. 7. That suit was decreed in terms of the compromise arrived at among the parties except defendant No. 7 and defendant No. 8. That decree in terms of the compromise was passed by the learned Civil Judge, Junior Division of Wai on 24th of December 1970. Defendant No. 7 had resisted the suit by contending that he being a tenant inducted by defendant No. 6 who had authority to induct both under the provisions of Section 76 of the Transfer of Property Act and under the deed of mortgage, he continued to be the tenant of the part of the house in his possession and he could not be evicted in the suit for redemption filed by the purchaser of the house. On the contention raised by defendant No. 7 an issue, being issue No. 10 was raised in the following terms:--

"Whether Defendant No. 7 is statutory tenant in two Khans in suit property?"

Following the law laid down by this Court in Kamlakar and Company Vs. Gulamshafi Imambhai Musalman, the learned trial Judge rejected the plea raised by defendant No. 7 and held that he was liable to be evicted at the time of the redemption of the mortgage. Defendant No. 7 preferred an appeal, being Civil Appeal No. 44 of 1971 which was heard and dismissed by the learned Assistant Judge of Satara by his judgment and order dated 30th of September 1972. The learned Assistant Judge also naturally followed the judgment of this Court in Kamalakar and Company''s case. It is this decree of eviction passed against him that is challenged by the original defendant No. 7 in this second appeal.

2. Mr. Ajit P. Shah, the learned Advocate appearing for the appellant, could not assail the reasoning contained in the judgments of the two Courts below which itself is based upon the law laid down by this Court in Kamalakar and Company''s case. He however relied upon certain observations of the Supreme Court to be referred to hereinafter and proceeded to contend that the question whether he is protected by the provisions of the Rent Act or not may be kept out of consideration for the time being. He says that irrespective of the availability of the protection of the Bombay Rent Act if he is held to be a tenant then he cannot be evicted unless the tenancy is brought to an end by a notice of termination issued by the mortgagor or the purchaser of the property from the mortgagor. Towards the end of showing that defendant No. 7 must be held to be a tenant whose tenancy is binding upon the mortgagor Mr. Shah referred to a judgment of the Supreme Court in the The All India Film Corporation Ltd., and Others Vs. Sri Raja Gyan Nath and Others, . In order to gain support from the said judgment of the Supreme Court Mr, Shah pointed out the recitals contained in the two relevant mortgage deeds. The original mortgage executed by Moti Bhiwa in favour of defendant No. 1 mentions that the mortgagee was free to take the rent of the suit property and appropriate the same towards the interest. The sub-mortgage executed by defendant No. 1 in favour of defendant No. G also makes a similar provision namely that the mortgagee was free to appropriate the rent of the house towards the interest on the loan. According to Mr. Shah, the authority contained in these two mortgage deeds necessarily implies that the mortgagor of the sub-mortgagor concurred with the lease that was to be created by the

mortgagee and the sub-mortgagee. Then he referred to the judgment of the Supreme Court in All India Film Corporation''s case. The facts of that case in so far as they are relevant to the present discussion are that the original owner of the property which was a cinema house had mortgaged the same in favour of two persons hereinafter referred to as the mortgagees. By a subsequent document executed, the owner-mortgagor had specifically authorised the mortgagee to give the cinema house on lease to anybody else. Thereafter the lease was executed by the mortgagees in favour of the appellant before the Supreme Court. There the question was whether this lease was binding upon the mortgagor. The Supreme Court proceeded to refer to two previous decisions of its own in Mahabir Gope and Others Vs. Harbans Narain Singh and Others, and Asaram v. Ram Kali 1958 SCR 986 and pointed out that the normal rule was that no person can confer on another a better title than he himself has. A necessary corollary of this rule is that the mortgagee''s interest lasts only as long as the mortgagee has not been paid off and therefore on redemption of mortgage the title of the mortgagee comes to an end. A derivative title from the mortgagee must ordinarily come to an end with the termination of the mortgagee''s title. The provision contained in Section 111(c) of the Transfer of Property Act was also noticed and it was held that when the mortgagee''s interest is determined the lease created by the mortgagee also comes to an end. In specific words the Supreme Court pointed out:

"The relationship of lessor and lessee cannot subsist beyond the mortgagee''s interest unless the relationship is agreed to by the mortgagor or a fresh relationship is recreated."

The general rule that a lease created by the mortgagee cannot survive beyond the period of mortgage was said to have one exception:--

"That flows from Section 76(a) which lays down liabilities of a mortgagee in possession. It was provided there that when during the continuance of the mortgage, the mortgagee takes possession of the mortgaged property he must manage the property as a person of ordinary prudence would manage it if it were his own. From this it is inferred that acts done bona fide and prudently in the ordinary course of management, may bind even after the termination of the title of the mortgagee in possession. This principle applies ordinarily to the management of agricultural lands and has seldom been extended to urban property so as to tie it up in the hands of lessees or to confer on them rights under special statutes. To this again there is an exception. The lease will continue to bind the mortgagor or persons deriving interest from him if the mortgagor had concurred to grant it."

Mr. Shah laid considerable emphasis on the two sentences occurring in this judgment He said that the Supreme Court has mentioned that the relationship of the lessor and the lessee cannot subsist beyond mortgagee''s interest unless the relationship is agreed to by the mortgagor. He also pointed out that even in respect of non-agricultural property or urban property the lease will continue to bind the mortgagor if the mortgagor had agreed to grant it. According to Mr. Shah, the authority contained in the mortgage deed and the sub-mortgage deed to appropriate the rent of the property implies an authority to let out the property and this authority to let out must be deemed to be an act of concurrence with lease that was created by defendant No. 6 in his favour. According to Mr. Shah, in the All India Film Corporation''s case also there was an authority given to the mortgagee to lease the property but the Supreme Court held on the facts of that case that the lease created by the mortgagee was not an act of prudent management as mentioned in Section 76(a) of the Transfer of Property Act. It must be understood says Mr. Shah, that the Supreme Court impliedly held that the lease could be upheld on the ground that there was concurrence to the lease by the mortgagor,

3. In my opinion a proper reading of the decisions of the Supreme Court as well as of this Court upto the time the Supreme Court gave the judgment in the All India Film Corporation''s case will show that the basic rule laid down in the earliest of the decision that the lease created by the mortgagee in possession cannot last beyond the period of the mortgage has not been altered at all despite the observations contained in the judgment in the All India Film Corporation''s case which according to Mr. Shah lays down a new proposition of law. According to Mr. Shah, this judgment says that in the case of urban property if the mortgagor concurred in granting a lease, that lease will be binding upon the mortgagor. In my opinion, this is not a correct reading of the series of the decisions ending with the one in All India Film Corporation''s case,

4. The earliest of the decisions is in Mahabir Gope and Others Vs. Harbans Narain Singh and Others, wherein it was pointed out that the general rule is that person cannot by transfer or otherwise confer a better title on another than he himself has. A mortgagee cannot, therefore, create an interest in the mortgaged property which will endure beyond the termination of his interest as a mortgagee. If however, a mortgagee creates a lease, acting as a person of ordinary prudence in managing the property mortgaged to him, that lease may be valid but it cannot extend beyond the period of mortgage. Any lease granted by him must come to an end on redemption. It was however mentioned that a permissible settlement by a mortgagee in possession in the course of prudent management and the springing up of rights in the tenant conferred or created by statute based on the nature of the land and possession for the requisite period is a different matter altogether. In other words, under the Transfer of Property Act itself a mortgagee''s tenant cannot become the tenant of the mortgagor but another statute may confer upon such a tenant a special status as a result of which the lease in his favour may become binding upon the mortgagor.

5. In Harihar Prasad Singh v. Deonarain Prasad, AIR 1956 SC 305 this law was reiterated in the following words:--

"The law is that a person cannot confer on another any right higher than what he himself possesses, and therefore, a lease created by a usufructuary mortgagee would normally terminate on the redemption of the mortgage. Section 76(a) enacts an exception to this rule. If the lease is one which could have been made by the owner in the course of prudent management, it would be binding on the mortgagors, notwithstanding that the mortgage has been redeemed. Even in such a case, the operation of the lease cannot extend beyond the period for which it was granted."

From the paragraph extracted above it is clear that even a lease which has been created by a mortgagee in exercise of the prudent powers of management cannot extend beyond the period for which it was granted. Such a lease therefore will not be binding for all time to come on the mortgagor. The next judgment in the series is Asa Ram and Another Vs. Mst. Ram Kali and Another, . What has been mentioned in Mahabir Gope''s case was reiterated and the validity of the lease was tested on the ground whether the lease involved in the Asaram''s case was one which a prudent owner would create in the management of his properties. The judgments in both Mahabir Gope''s case and Hari Prasad Singh''s case were explained and commented upon by the Supreme Court itself in Prabhu Vs. Ramdev and Others, . In this case it has been explained as to how a lease created by the mortgagee in possession in certain circumstances may be binding upon the mortgagor. That the rights of tenants inducted by mortgagee in possession under the provisions of the Transfer of Property Act may conceivably be improved by statutory provisions which may meanwhile come into operation. In other words, a tenant inducted by a mortgagee in possession may become protected not under the provisions of the Transfer of Property Act but by the provisions of some other law which may step in and protect his possession. In Prabhu''s case Section 15 of the Rajasthan Tenancy Act provided that subject to the provisions of Section 16 of the said Act every person who at the commencement of this Act was a tenant of the land shall, subject to the provisions of the Act, be entitled to all the rights conferred and be subjected to all the liabilities imposed on Khatedar tenants under the Act. It was held that by virtue of the mortgage the persons who were inducted into the agricultural land as tenants by usufructuary mortgagee and who had become entitled to the rights of Khatedar tenants by virtue of Section 15 could not be ejected by the mortgagor on the ground that mortgage of land had been redeemed. It may not be inappropriate to refer to another judgment of the Supreme Court in Dahya Lal and Others Vs. Rasul Mohammed Abdul Rahim, where the question of the status of a tenant of the mortgagee in relation to the provisions contained in the Bombay Tenancy and Agricultural Lands Act, 1948, was examined The relevant provisions of the Bombay Tenancy Act provided that the person who was lawfully cultivating the land was a tenant of the suit land. A tenant inducted by a mortgagee in possession was a person who was lawfully cultivating the land and therefore by virtue of the definition contained in the Bombay Tenancy Act he was deemed to be a tenant and therefore he was entitled to the protection of the Tenancy Act.

6. The principles reiterated by these six authorities which I have taken the

opportunity of mentioning clearly show that a tenant inducted by a mortgagee in possession must cease to be a ten-ant on redemption irrespective of whether the property is agricultural or urban. It is only when some law other than the Transfer of Property Act steps in and gives protection de hors the Transfer of Property Act that such a tenant cannot be evicted by the mortgagor on the ground that the mortgage has been redeemed. Merely because a lease has been created by a mortgagee in possession in the exercise of the powers of a prudent manager u/s 76(a) of the Transfer of Property Act it cannot endure beyond the period of mortgage. Section 111(c) of the Transfer of Property Act provides that a lease of an Immovable property determines, inter alia, when the interest, of the lessor terminates on, or his power to dispose of the same extends only to, the happening of any event by the happening of such event. The mortgagee''s interest would necessarily terminate on the redemption of the mortgage and therefore the lease of an Immovable property created by such a mortgagee must come to an end with the redemption of the mortgage. In my opinion, the summary of the law made by the Supreme Court in paragraphs 7 and 8 of the judgment in All India Film Corporation''s case does not modify or run counter to the law that is laid down by the series of decisions which I have just now reviewed. This is so irrespective of the question whether the property mortgaged is agricultural land or urban Immovable property. Even if Section 76(a) of the Transfer of Property Act allows a mortgagee to lease the property, as any man of prudence would do in the course of such management, the lease must, as I have already mentioned above, come to an end with the mortgage. If, however, the mortgagee gives a lease which may enable a tenant to acquire permanent or occupancy rights in the land thereby defeating the mortgagor''s right to possession that act would be an act falling within the mischief of Section 76(e) (see paragraph 6 of the judgment in Mahabir Gope''s Case). A lease which is created beyond the period of mortgage is not an act in exercise of the prudent powers of manager and therefore the question of such a lease being binding upon the mortgagor cannot arise at all. It is only in the case of a lease which is bona fide created by the mortgagee in prudent exercise of the powers of management as mentioned in Clause (a) of Section 76 of the Transfer of Property Act that the question of the binding nature of the lease arises. That question has been answered by the decisions to which I have already made reference above. Such a lease under the provisions of the Transfer of Property Act cannot become binding upon the mortgagor after redemption; the binding nature, if any, will have to be found in some other law which may have been enacted for the purpose of protecting such a tenancy created by the mortgagee. In my opinion, therefore, the lease which has been created in favour of defendant No. 7 by defendant No. 6 who was himself a sub-mortgagee is not binding upon the mortgagor or a person deriving his title from the mortgagor who in the instant case is the plaintiff.

7. I may also add that mere mention of the authority in the mortgage deed to lease Immovable property and to appropriate rent derived from such a lease

towards the satisfaction of the interest due on the mortgage does not amount to concurrence in the execution of the lease as mentioned in All India Film Corporation''s case. Section 76(a) itself gives power to the mortgagee to execute a lease of the mortgaged property; a mention of such an authority in the mortgage deed does not amount to a consent in advance to whatever the mortgagee may decide to do in exercise of that authority. The question of concurrence arises when the mortgagor is confronted with a particular lease in favour of a particular person and for a particular period. If these facts are known to him and thereafter he concurs in the execution of the lease the possibility of such a lease being binding upon him may arise. Concur means "to act together to a common end or to produce a single effect" (See Webster''s 3rd International Dictionary, 1971 Edition), It is only when the mortgagee executes a lease deed and the mortgagor joins him in the said execution that it can be said with some semblance of plausibility that the mortgagor has concurred in the lease executed by the mortgagee. Even on the test adopted by the Supreme Court therefore defendant No. 7 cannot be said to have been inducted as a lessee in the suit property with the concurrence of the mortgagor. Looked at from either way therefore the present appellant (defendant No. 7) has no right to remain in the suit property after the redemption of the mortgage upon the decree passed in the suit.

8. Before parting with this case however I may refer to Full Bench decision of Allahabad High Court in Tajammul Husain Vs. Mir Khan and Others, wherein it has been held that if during the subsistence of the mortgage a mortgagee like an ordinary prudent man lets out mortgaged premises and enters into bona fide transaction in connection therewith, a person so let in would be entitled to be in possession as a tenant of the mortgagor after redemption. The Allahabad High Court has gone further in the said judgment by observing that this would be so irrespective of whether the property is agricultural land or urban Immovable property. In the light of the law laid down by the Supreme Court as understood by me above, I respectfully disagree with the Full Bench decision of the Allahabad High Court. On the other hand, I respectfully broadly agree with the law as explained by the Full Bench of the Gujarat High Court In Lalji Purshottam Vs. Thacker Madhavji Meghaji, . In view of the fact that I have independently reviewed all the relevant decisions of the Supreme Court, I have not thought it necessary to refer in any detail to these two Full Bench decisions which themselves in turn have referred to the judgments of the Supreme Court.

9. In the result, this appeal must fail and is dismissed with costs.

10. Appeal dismissed.

