(1987) 09 DEL CK 0001

In the Delhi High Court

Case No : Election First Appeal No. 3 of 1977

Puran Chand and Co. APPELLANT

Vs

Ganesh Lal Tara Chand and Others RESPONDENT

Date of Decision : 11-09-1987

Acts Referred:

Delhi Rent Control Act, 1958 — Section 2
Transfer of Property Act, 1882 — Section 68

Citation : AIR 1988 Delhi 1 : (1987) RLR 626

Hon'ble Judges : Sunanda Bhandare, J;S.S. Chadha, J;Gian Chand Jain, J

Bench : Full Bench

Advocate : Arun Mohan, B.B. Aggarwal, O.N. Vohra, P.S. Saxena, L.R. Gupta, Anil Kumar, P.C. Khanna, Reva Khetrapal and Bikram Singh, for the Appellant;

Judgement

G.C. Jain, J.

(1) "WHETHER a tenant inducted by a mortgagee in possession can claim the benefit of the protection afforded by the Rent Control Legislation after, the redemption of the mortgage ? Is the question which has been referred to this Full Bench for decision.

(2) In Amar Prakash & Another v. Om Prakash Execution Case No. 83/73 decided on May 10, 1974 (1), a learned single Judge had held that the mortgagee in possession could not transfer a voter title than he himself had. He could not create an interest in the mortgaged property which may ensure beyond the termination of the interest as mortgagee. The tenancy created by the mortgagee terminates with the extinction of the mortgage Right of mating prudent management was co-terminus with his mortgagee rights. The tenant of the mortgagee in possession was little to vacate the mortgaged property on redemption. The decision was upheld in appeal by a Division Bench of this Court in Prakasi Singh v. Amar Prakasi & others (EFA (OS) 6/74) decided on January 27, 1975(2). However, in Tara Chard & Another, v. Ganga Ram and others (Ex. Case No. 28/69 decided on March 10, 1977(3), out of which this reference has

arisen same learned single Judge who decided Amar Prakash''s case without notice his own earlier judgment and the Division Bench decision upholding the said judgment, took a contrary view. While the appeal against the said decision was pending disposal, the said decision of the learned single Judge in Tara Chard''s case was noticed and approved by a Division Bench of this Court in Rameshwar Das etc. v. Prem Narain Aggarwal and another (S F.A. (OS) 4178) linked with E.F.A.7, 8 and 9 of 1978) decided on 21-12-1979 (4). The Division Bench at the time of hearing the appeal against the judgment in Tara Chand''s case noticed the said two conflicting D. B. decisions. and consequently, referred the above mentioned question of law for decision by a larger Bench to resolve the conflict. This is how the matter has come before us.

(3) ownership denoted the relation between a person and the property forming subject matter of ownership, ownership has the characteristic of being in determinate in duration .It consists of a complex of rights such as the Tight of possession, right of exclusive use and enjoyment, right of destruction and alienation These rights are conceived not as separately existing but as merged in one general right of ownership. Nevertheless these are divisible to some extent. One or more of the fasciculus of rights conning ownership may be detached.

(4) One of the instances where a partial transfer of ownership rights comes into existence is where the owner creates a mortgagee. "A mortgagee is the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced byway of loan. an existing or future debt, or the performance of an engagement which may given rise to a pecuniary liability "Where the mortgagor delivers possession or expressly or by implication binds himself to deliver possession of the mortgaged property to the mortgagee and authorizes him to retain such possession until payment of the mortgage- money, and to receive the rents and profits accruing from the property or any part of such rents and profits and to appropriate the same in lieu of interest, or in payment of the mortgage-money, or partly in lieu of interest or partly in payment of mortgage-money, the transaction is called an usufructuary mortgage and the mortgagee an usfructuary mortgagee. (See Section 58 of the Transferor of Property Act). The usufructuary mortgage is, thus, a transfer of some interests in the specific immovable property. Distinguished from a sale, where of the rights of ownership which the transferor has pass to the transferee, in an unufructuary mortgage only some of the ownership rights are transferred and the rest remain with the mortgagor. What is transferred is the right to get the mortgage property sold to realise mortgage-money and the rights of possession and enjoyment of usufruct. The other rights remain with the owner mortgagor. He is the owner of the equity of redemption. As provided in section 6 of the Transfer of Property Act, on payment of the mortgaged money-after it has become due, the mortgagor has the right to recover the possession of the mortgaged property. All the rights of the usufructuary mortgagee are wiped out on redemption.

(5) Clauses (a) & (e) and last para of Section 76 of the Transfer of Property Act read as under :- Liabilities c.f mortgagee in possession. 76. When, during the continuance of the mortgage, the mortgagee takes Possession of the mortgaged property :-

(A)he must manage the property as a person of ordinary prudence would manage it if it were his own :

(C)he must not commit any act which is destructive or permanently injurious to the property: If the mortgagee fails to perform any of the duties imposed upon him by this Section he may, when accounts are taken in pursuance of a decree made under this chapter, he debited with the loss. if any occasioned by such failure.

(6) Clause (a) imposes an obligation on the mortgagee in: possession to act as a prudent owner in the management of the mortgaged property. Under the last para of Section 26 he is liable to be debited with the loss .if ho fails to perform this duty. By reason of these statutory provisions the mortgagee in possession, in our opinion, is competent to grant a lease by way of act of prudent management files, of course, there is a prohibition to do so under "he mortgage contract. ''''

(7) Though the mortgagee in possession, in discharge of the statutory obligations to manage the property as a prudent owner can create a lease such a lease, however, cannot be created for a period exceeding beyond the period of mortgage unless the mortgage contract authorises the mortgagee to crate a lease which may ensure after redemption, the principle being that a person cannot transfer a larger estate that he has himself. Every subordinate interest must perish with the superior interest on which it is dependent. This principle has statutory recognition in Section 111(c) of the Transfer of Property Act which provides that "a lease of immovable property determines where the interest of the Lesser in the property terminates on, or his power to dispose of extends only to, the happening of any event-by the happening of such event"

(8) As seen above, the interests of a mortgagee in possession the Lesser terminates on redemption. It . follows that the lease'' of the immovable property created by him will also determine on redemption. It has been so held by the Supreme Court, in various decisions. The first decision on this point in Mahabir Gope and others v. Harbans Narain Singh and others , It was held :-

"THE general rule is that a 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 ensure beyond the termination of his interest as mortgage. Further, the mortgagee, who takes possession of the mortgaged property, must manage it has a person of ordinary prudence would manage it if it were his own: & he must not commit any act which is destructive or permanently injurious to the property, see S. 76 sub-clauses (a) & (e) of the Transfer of Property Act It follows that he may grant leases not extending beyond the period of the mortgage; any lasts granted by him must come to an ended redemption A mortgagee cannot during the subsistence of the mortgage act in a manner detrimental to the mortgagor''s interest such as by giving a lease or occupancy rights in the land thereby defending the mortgagor''s right to ''khas'' possessions it would be an act which would fall within the provisions of 76, Sub-clause (e) of the Transfer of Property Act.

(9) Same view was take in Asa Ram and another v. Mast Ram Kali and another (6). The relevant observation read.

"THE law undoubtedly is that no person can transfer property so as to confer on the transferee a title better than what he possesses. Therefore, any transfer of the property mortgaged, by the mortgages must cease, when the mortgage is redeemed. Now S.76(a), T. P. Act. provides that a mortgagee in possession "must manage the property as a person of ordinary prudence would manage it if it were his own." Though on the language of the statute, this is an obligation cast on the mortgagee, the authorities have held that an agricultural lease created by him would be binding on the mortgagor even though the mortgage has been redeemed provided it is of such a character that a prudent owner of property would enter into it in the usual course of management. This being in the nature of an exception, it is for the person who claims the benefit thereof, to strictly establish it." .

(10) Similarly ,in The All India Film Corporation Ltd., and Others Vs. Sri Raja Gyan Nath and Others, it was held :

"THE first question to consider is this ; Did the tenancy created by the mortgagee in possession survive the termination of the mortgage interest so as to be binding on the purchaser? A general proposition of law is that no person can confer on another a better title than he himself has. A mortgage is a transfer of an interest in specific immovable property for the purpose of securing repayment of a loan. A mortgagee''s merest lasts only as long as the mortgage has not been paid off. Therefore, on redemption of the mortgage the title of the mortgagee comes to an end. A derivative title from has must ordinary come to an end with the termination of the mortogageis''s title. The mortgage by creating a tenancy becomes the Lesser of the property, but his interest as Lesser is coterminous with his mortgagee interest. Section 111(c) of the Transfer of Property Act provides that a lease of immovable property determines where the interest of the Lesser in the property 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 duration of the mortgagee''s interest determines his position as the Lesser. The relationship of Lesser and lessee cannot Subsist beyond the mortgagee''s interest unless the relationship is agreed to by the. mortgagor, or a fresh relationship is recreated. This the mortgagor or the person succeeding to the mortgagor''s interest may elect to do. But if he does not, the lessee cannot claim any rights beyond .the term of his original Lesser''s interest. These propositions are well understood and find support in two rulings of this Court in Mahabir Gope and Others v. Harbans Narain Singh and Asa Ram and others v. Mst. Ram Kali."

(11) Following these decisions we hold that the general rule is that every subordinate interest must perish with the superior Interest on which it is dependent. A mortgagee in possession may grant a lease but he cannot create a lease of the mortgaged property which may ensure beyond the termination of his own interest as a mortgagee unless he has been empowered to do so under the mortgage contract. The relationship of landlord and tenant between the mortgagee in possession and his tenant, comes to an end on redemption ''unless, he relationship is agreed by the mortgagor or afresh relationship is recreated.

(12) There is, however well established exception to this general rule. The general rule will not apply if a tenant, inducted by a mortgagee in possession in the process, of prudent management is given any protection or certain rights are conferred on him by a statute enacted in. the meantime. Mortgagor''s rights to obtain actual possession of the mortgaged property on redemption would be affected to that extent. This exception, obviously, is the creation of the statute concerned and not the Transfer of Property Act. This principle was recognized by the Supreme Court in Mahabir Gope''s case (supra) It was held :

"A permissible settlement by a mortgagee in possession with a tenant 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. It is an exception to the general rule. The tenant cannot be ejected by the mortgager even after the redemption of the mortgage. We may become as occupancy ''raiyat in some cases and a non-occupancy ''raiyat in other cases. But the settlement of the tenant by the mortgagee must have been a ''bona fide one. This exception will not apply in a case where the terms of the mortgage prohibit the mortgagee from making any settlement of tenants on the land either expressly or by necessary implication."

(13) In Prabhu v. Ramdeo & others 8 noticing the law laid down in Mahabir Gopy''s case (supra).. Supreme Court observed :

"IT will thus be seen that while dealing with the normal position under the Transfer of Property Act, this Court specifically pointed out that the rights of the tenants inducted by the mortgagee may conceivably be improved by virtue of statutory provisions which may meanwhile come info operation.

(14) relevant statute in the preset it case is the Delhi, Rent Control Act, 1958 (hereinafter to be referred as ''the Act''). Does the Act'' create any rights or grant any protection to the tenant of a mortgagee in possession? The ''Act", as is clear from its preamble was enacted ''to provide, for the control of rents and evictions and rotes, of hotels and lodging houses, and for the lease of vacant premises to Government in certain areas in the Union Territory of Delhi''. One of the objects of ''the Act" is to prevent unreasonable evictions. ''The Act'' however, does not confer any rights on the tenants, as such, based on the duration of the

possession as a tenant or the nature of demised property or the rate of rent etc.

(15) As for as giving protection is concerned, reliance can be placed only on Section 14(i) of ''the Act'' It reads:-- Pre-election (i) of tenant against eviction.

"NOTWITHSTANDING anything to the contrary contained in any other law or contact ,no order or decree for the recovery of possession of any premises shall be made by any court or Controller in favor of the landlord against a tenant : Provided that the Controller may, on an application made to him in the prescribed manner, make an order for'' the recovery of possession of the premises on one or more of the following grounds only, namely .....,...........".

There cannot be any doubt that this Section imposes a disability on the landlord. His right to recover possession under the contract of lease, on determination of the lease, is controlled and restricted. He cannot recover possession of the premises only of the ground that lease has come to an end. He can claim eviction only on one or more of the grounds given in the proviso to Section 14(i). To this extent, the provisions contained in Section 14(i) give protection to the tenants and impose disability on, the landlords.

(16) To invoke these provisions, however, it must be proved hat the person seeking possession, i.e. the mortgagor after redemption, is ''Landlord'' and the person seeking protection, i.e. the mortgagee''s tenant is ''tenant'' as defined, under ''the Act''.

(17) Section 2(e) of ''the Act'' defines landlord" as under :-

"LANDLORD" means a person who, for the time being is receiving, or is entitled to receive, the rent of any premises, whether on his own account or on account of or on behalf of, or for the benefit of, any, other person or as a trustee, guardian or receiver for any other person or who would so receive the rent or be entitled to receive the rent, if the premises were let tea tenant."

A mortgagor on redemption, in our view, is not covered by this definition. He is not a person, who, for the time being is either receiving rent, or is entitled to receive rent because there is no privity of contract between him and his mortgagee''s tenant. Relationship of landlord and tenant does not come into existence by operation of jaw. Provisions contained in Section 109 of the Transfer of Property Act, as we would presently discuss, are not attracted. The disability imposed by Section 14(i) of ''the Act'' on a landlord would, Therefore, not apply to a mortgagor seeking possession of of bin property on redemption.

(18) The relevant portion of the definition of ''tenant'' given in Section 2(1) of the Act'' reads :-

"TENANT" means any person by whom or on whose account or behalf the rent of any porpoises is, or, but for a special contract, would be payable, and includes:- (i) a sub-tenant ; (ii) any person continuing in possession, after the termination of his tenancy ; and (iii) in the event of the death of the person continuing in possession after the termination of his tenancy. object to the order of succession and conditions specified, respectively, in Explanation I aad Explanation Ii to this Clause, such of the aforesaid person''s- (a) spouse, (b) son or daughter, or where there are both son and daughter, both of them. (c) parents, (d) daughter-in-law, being the widow of his predeceased son,

as had been ordinarily living in the premises with such person as a member or members of his family up to the date of his death, but does not include.-

(A)any person against whom an order or decree for eviction has been made, except where such decree or order for eviction is liable to here-opened under the proviso to section 3 of the Delhi Rent Control (Amendment). Act, 1976; (B) any person to whom a license, as defined by Section 52 of the Indian Easement Act, 1882, has been granted."

The tenant of a mortgages whose mortgage has been redeemed is not covered by his definition. As observed above, there exists no relationship of landlord and tenant between him and the mortgagor. He is, Therefore, not liable, to pay rent to the mortgagor.

(19) , Sh. L.R. Gupta, learned counsel appearing for some of the tenants commended that only two categories of persons, namely, (a) any person against whom a order or decree for .eviction leas been made; and (b)any person to whom a license defined by Section 52 of the Indian Easement Act has been granted, have been excluded from the definition of ''tenant given in Section 2(1). A mortgagee''s tenant has not been excluded and would, Therefore, fall within the definition of the word "tenant This submission has no substance. Question of exclusion would arise only if the person concerned is included in the definition of the ''tenant. Mortgagee''s tenant is not so included. Therefore ,his non-exclusion has no relevancy.

(20) This question came for consideration before the Supreme Court in The All India Film Corporation Ltd. & Ors (supra). If was held:

"THIS brings us to the next question. It is whether the tenants could take advantage of the provisions of the East Punjab Urban Rent Restriction Act, 1949? The answer to this question depends on whether we can say that there was a tenancy to protect. We have shown above that the lease came to an end with the mortgagee''s interest in the property. Although this was not a case of a redemption plain and simple because a straight redemption was refused, the property was put to sale and the purchaser paid off the mortgage m full The interests of the mortgagor and mortgagee united in the person of the purchaser and the mortgage ceased to subsist. In this view of the matter the purchaser, speaking in his character as a mortgagor, could claim that the mortgager''s action case to an and and there did not subsist any relationship between him and the tenants. The respondents attempted to argue that the Rent Restriction Act defines landlord and tenant with reference to the payment of rent. A landlord means person entitled to receive rent and a tenant means any person by whom or on whose account rent is payable. These definition apply if the tenancy ,either real or statutory, could be said to survive after the termination of the mortgage."

(21) This decision was followed by the Supreme Court in M/s. Bachalmal Parasram v. Mst, Ratanbai & Others which was a case-under the Madhya Pardesh Accommodation Control Act (1961). The decisions of Bombay High Court in Kamlakar & Co. v. Gulamshafi Imam Bhai Musalman and Bhanshsli Kushal Chand Ramji & Another v.Sha Shamji Jivraj & Others where similar view has been taken were ''approved. The definitions of the words tenant'' and landlord'' in ''the Act" are similar.

(22) Now, we proceed to examine the contention raised by Mr. L.R. Gupta, learned counsel for some of the tenants, that the relationship of landlord and tenant between the mortgagor and his mortgagee''s tenant would come into existence by operation of law. In support of his contention, he relied on the provisions contained in Section 109 read with Section 60 of the Transfer of Property Act. The relevant portion of Section 109 of the Transfer of Property Act reads as under :

"IF the Lesser transfers the property leased, any or part thereof, or any part of his interest therein, the transferee, in the absence of a contract to the contrary, shall possess all the rights, and, if the lessee so elects be subject to. all the liabilities of the Lesser as to the property or part transferred so long as he is the owner of it, but the Lesser shall cot, by reason only of such transfer, ceases to bo subject to any of the liabilities imposed upon him by the lease, unless the lessee elects to treat the transferee as the person liable to him."

(23) Provisions contained in ''Section 109 of the Transfer of property Act apply in the case of a transfer of leased property by the Lesser. According to the definition given in Section 5 of the Transfer of Property Act, "transfer of property" means, "an Act .be which a living person conveys property, in'' present or in future,, to one or more other living persons, or to himself, , and one or more other living persons and "to transfer property" is to perform inch act." It is clear from this definition that the performance of an act by a person will not operate as a "transfer of property" unless .by such act he conveys property to another. Does the act of redemption of a usufructuary mortgage involve conveyance of any property ? Reply, in our opinion, must be in the negative. Redemption is the act of redeeming which in its ordinary meaning is equal to bringing off charge or obligation by payment. Redemption is the action of clearing off the charge by payment of the mortgage money. Nothing is conveyed in the act of redemption.

(24) u/s 60 of the Transfer of Property Act, on payment of the mortgage money the mortgagor has a right, "to require the montage (a) to deliver to the mortgagor the mortgage-deed and all documents relating to the mortgaged property which are in the possession or power of the mortgagee, (b) where the mortgage is in possession of the mortgaged property, to deliver possession thereof to the mortgagor, ami (c) at the cost of the mortgagor either to re-

transfer the mortgaged property to him or to such third person as he may direct, or to execute and (where the mortgage has been effected by a registered instrument) to have registered an acknowledgement m writing that any light to derogation of his interest transferred to the mortgagee has been extinguished." One of the right? conferred on the mortgagor by this Section is to get the mortgage property re-transferred. in view of this right, the learned counsel for the tenants contended that the redemption was a transfer of Property as it involved re-transfer of the property to mortgagor.

(25) We do ret agree with this submission. As to clear from the provisions contained in Section 58 of the Transfer of Property Act there are several types of mortgages, namely, simple mortgage, mortgage by conditional sale, usufructuary mortgage, English mortgage, mortgage by deposit of title deeds and anomalous mortgage. Provisions contained in section 60 of the Transfer of Property Act provide for the rights of the mortgagor on redemption in all these mortgages. Question of re-transfer, in our view, may arise only in mortgage by conditional sale and English mortgage. There is no question of re-transfer in a simple mortgage, or usufructuary mortgage or mortgage by deposit of title deeds. Against the right is re-transfer or acknowledgement. Thus, retransfer is not necessary in every case. In some cases acknowledgment only is required. We have no doubt that in an usufructuary mortgage only acknowledgment is sufficient .An act of redemption in an usufructuary mortgage will, Therefore, not operate as a transfer of property as no property is conveyed to the mortgagor by the mortgagee.

(26) Learned counsel for the tenant then contended that irrespective of the provisions contained Delhi Rent Control Act 1958 there was mother exception to the general rule created, by and lowing from the provisions contained in Section 76(3) of the Transfer of Property Act. The submission is that mortgagee in possession by virtue of the obligation right u/s 76(e) of the Transfer of Property Act can grant a lease, unless there is a specific prohibition ,in the course of the prudent management. Such a lease is one which could have been made by the owner and shall be binding on the "mortgagor on redemption irrespective of any statute intervening or otherwise conferring rights and protections under Reliance was placed on. a number of authorities .

(27) On a careful consideration we have not been able to persuade ourselves to accept this broad proposition of law.

(28) The exception, canvassed on behalf of the tenant, runs counter to the well established principle of law that Do person can confer on other a better title then he himself has. This principle as seen earlier, has statutory recognition in Section 111(c) of the Transfer of Property Act'' and has also been recognised by the Supreme Court.

(29) Secondly, Section 76(a) imposes an obligation to manage the property as a prudent owner. This obligation does not and cannot empower a mortgagee in

possession, who is a transitory transferee, to confer rights on a lessee which may ensure beyond the period of mortgage. The obligation of prudent management is co-terminus with mortgagee''s right. A mortgagee has no right to manage the property after redemption. In Mahabir Cope''s case (supra) the Supreme Court held in clear words "A mortgagee cannot, Therefore, create an interest in the mortgaged property which will ensure beyond the termination of his interest as mortgagee. Further the mortgagee who takes possession of the mortgaged property, must manage it as a person of ordinary prudence would manage it if it were his own; and he must not commit any act which is destructive or permanently injurious to the property. It follows that he may grant leases not extending beyond the period of the mortgage; any leases granted by him must come to an end at redemption."

(30) Thirdly, this exception would be vocative of the statutory provisions contained in Sections 60 and 62 of the Transfer of Property Act. Section 60 confers a right on the mortgagor to require the mortgagee in possession to deliver possession of the mortgaged property to the mortgagor, on payment of the debt. Similar right is conferred on the mortgagor by the provisions contained in Section 62. These rights would be taken away if the contention of learned counsel for the tent act ,was accepted .Provisions contained in Section 76(a) cannot be interpreted in a way as to make the provisions contained in Sections 60 and 62 nugatory.

(31) Mr. L. R.Gupta, learned counsel fur the tenants relied or various authorities. The decision which supports his decision is Chinnapra Thevan and others v, Pazaniappa Pillai wherein it was held, "tenancies thus created by a mortgagee in possession are binding on the mortgagor after redemption of the mortgage, in so far that the relationship of landlord and tenant continues, and that if the mortgagor desires to bring the tenancy to a close ,he must do so by a regular suit under the Tenancy Act" Similar view was taken in Baldev Rai v. Ram Ekbal Singh,Bajendra Nath Chandra and another v. Dinu Prodhan and others Hemandra Nath and others v. Tulshi Singh and others , Mahesh Prasad v. Jaganath Choube and others , Mahto and others v. Doman Mahto and others 97 I C 152. I would like to note here that in the last case the distinction was made between Zerait land and Raiyati land. 7 he law laid down in these decisions, however, cannot be accepted as it runs counter to the decision of the Supreme Court noticed earlier. Moreover, ail these decisions related to agricultural lease to which the exertion, in question has been extended as we would presently discuss,

(32) This exception, as mentioned above, has been made applicable in cases of lease of agricultural land, on the strength of authorities In Asa Ram''s case (supra) the Supreme Court after holding

"THE law undoubtedly is that no person can transfer property so as to confer on the transferee a title better than what be possesses. Therefore, any transfer of the property mortgaged, by the mortgagee must cease, when the mortgage is redeemed." Further held "Now S. 76(a) provides that a mortgagee in possession

" must manage the property as a person of ordinary prudence would manage it if it were his own" Though on the language of the statute, this is an obligation cast on the mortgagee,. the authorities have held that an agricultural lease created by him would be binding on the mortgagor, even though the mortgage has been redeemed, provided it is of such a character that a prudent owner of property would enter into it in the usual course of management. This being in nature of an exception, it is for the person who claims the benefit thereof, to strictly establish it"

(33) In the All India Film Corporation Ltd. (supra) after laying down general principle of law that a derivative title from the mortgagee comes to an end on redemption, the Supreme Court said.

"TO the above propositions there is, however, one exception. That flows from Section 76(a) which lays down liabilities of a mortgagee in possession. It is provided there that when during the continuance of the mortgage, the mortgages takes possession of the mortgaged property, he must manage the property as a person of ordinary prudence would in mage it if it were his own.. From this it is inferred that acts done bona fide and prudently in the ordinary course of mangement, 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"

(Underlining by ixs.)

(34) The underlined observations in the above judgment indicate that ''the-exception, on which the tenant''s entire case depends, ordinarily i.e. usually or commonly or is most cases, applies to the leases created by a mortgagee in possession in the bona fide and prudent management of the mortgaged agricultural land. This principle has seldom, i.e. rarely been extended to the management of the urban mortgaged property.

(35) Leaned counsel appearing for the tenants contended that this exception was the creation of Section 76(a) of the Transfer of Property Act. This section made no distinction between Agree cultural land and urban property, It was applicable to all kinds of mortgaged properties, in the circumstances, argued the learned counsel," this exception was applicable to leases of urban properties as well the other hand, learned counsel for the mortgagor submitted that this exception was not at all applicable to urban property. The second part of the underlined observation made by the Supreme Court, urged the learned counsel, was a mere statement. It was just a turn of the phrase and had no binding effect.

(36) In the lease, of mortgaged property created by a mortgagee in possession, during the course of prudent management, binding on the mortgaging on redemption by virtue of the provisions contained in Section 76(a)? This answer,

in our opinion, must be in the negative. Section 76(a) imposes an obligation on the mortgagee to manage the mortgaged property as a prudent owner. It nowhere provides for the effect or consequence of such a prudent management. It does not may, even by implication, that a tenant inducted by mortgagee in the discharge of the obligation u/s 76(a) would become a tenant of the mortgagor on redemption. Section 76(a) would not create or confer any right or a tenant indicated by a mortgage. To hold so would be to violate the statutory rights conferred on the mortgagor to obtain back the possession of the mortgager property on redemption under Sections 60 and 62 of the Transfer of Property Act It would also be vocative of the law laid down in Section 111(c) of the Transfer of Property Act and the general principle that no person can confer a title better than what he possesses. A mortgagee''s tenant inducted in the course of prudent management, Therefore, does not become the mortgagors tenant on redemption on the strength of Section 76(a).

(37) In Harihar Prasad Singh and Another Vs. Must. of Munshi Nath Prasad and Others, the Supreme Court no doubt, held, "The law is that a person cannot confer on another by 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 would 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." It was, however, a'' case relating to agricultural land. Moreover, as held by the Supreme Court in Prabhu v Ramdeo & Others case (supra), "the said decision turned inevitably upon the relevant provisions."

(38) What, then, is the source and strength of exception noticed and approved by the Supreme Court. The answer is available in the decision of the Supreme Court in Asa Ram''s case .(supra) where it was stated that

"........ .v. the authorities have held that an agricultural lease created by him would be binding on the mortgagor even though the mortgagee has been redeemed ....,........".

It is clear from these observations that this exception is derived from the judicial precedents. The Supreme Court, in its decision in The All India Film Corporation''s case in the earlier part of para 8 observed that this exception flows from Section 76(a) of the Transfer of Property Act. In the later part of the same para, however, it was observed, "it has seldom been extended to urban property". Extended by whom? Obviously, by the authorities. It is apparent from the observation in the said para that the application of the expectation was not uniform. It usually applies to agricultural land and rarely to urban property. The observations read as'' a whole, indicate that this exception was the creation of authorities though the condition precedent for its application was bona fide prudent management as envisaged in Section 76(a).

(39) We are conscious of the remark contained in the decision in the Ah India Film Corporation''s case (supra) that this exception "has seldom been extended to urban property". We have, however, not been shown any decision prier to the decision of the Supreme Court in the said case except a decision by the Allahabad High Court in Hardei Vs. Wahid Khan and Another, where the tenant of an urban property, inducted by the mortgagee was held to have become the tenant of the mortgagor on redemption. In support of its view, the Allahabad High Court relied on the decision of the Supreme Court in Mahahir Gope''s case (supra). The Supreme Court, in that case, however, was not .at all concerned with the application of this exception. The only exception recognised by the Supreme Court in that case was where some rights were conferred or created on tenants by same statute enacted in the meantime. Moreover, one single decision is not sufficient to give the principle contained in that decision the force of law. It cannot be said that this decision has been acquiesced in for long. The remark by the Supreme Court, with respect, is not a. full exposition of the law on the question. The question about the applicability of the exception was left open as is clear from the observations in para 9. There is another difficulty. We find it very difficult to law down the criteria to deduct rare cases of urban property where the courts could extend this exception. In any case, the decision of the Supreme Court in Asa Ram''s case (supra) which is a decision by three Judges clearly says that this exception applies to agricultural lease. .

(40) In the judgment under appeal, out of which this reference has arisen. Avadh Behari, J. observed, :

"TIMES change and we change in them. If S. 76(a) can apply to a rural nation it ought to apply to an industrialized society equally. Those who are change with the high duty of administering the law should be alert to observe whether in its principles and precedents it satisfies the ever changing needs of the people. If there is no precedent, let it be made. Let justice be done." In Rameshwar Das etc. v. Prem Narain Aggarwal & Another (EFA 4/78) decided on 21st December 1979 (29). Division Bench of this Court said. "The crowding of cities in India and particularly the industrial and Metropolitan Centres have created such uncaused shortage of the lands in cities, that possession of small piece of land in the cities has become an invaluable a set to a city dweller"

(41) Relying on these observations, learned counsel for the tenants Strenuously urged that this exception must also be extended to urban property. There was no justification argued the learned counsel for making a distinction between agricultural lease and lease of urban property.

(42) Division Bench of this Court in Rameshwar Dass case (supra) recognised that agricultural land is a distinct category It said, "No doubt, the agricultural properties are treated as a separate category by the Constitution itself while providing for certain exceptions in Articles 31-A, 31-B and 31-C for purposes of agrarian reforms. There are separate agrarian reforms laws for protection of agricultural tenancies and making the tillers of the soil and owners of the land."

Tenant farm''s need security of tenure to encourage them to spend money on improving the land and buying stock and other capital equipment''. (See Cheshire''s Modern Law of Real Property, page 507). Besides this exception cannot be extended to urban property in the absence of any statutory provisions and non-applicability of principle of .stare decisis. For these reasons, we are of the considered view that the exception on which the learned counsel appearing on behalf of the tenants rely apply only to agricultural lease.

(43) Similar view was taken by the Bombay High Court in Lhanshali Kaushal ChandRamji& Another v. Shah Shamji Jivraj & Others and Mahadeo Maruti Bhagwat v. Kanti Lal Khem Chand Gujar & Others .These were approved by the Supreme Court in M/s. Sachalmal Parasram v. Mst Rataribai & Others . Same view was taken by Punjab, Gujrat. Madha Pradesh, Rajasthan, Kerala and Madras High Courts in Lalji Purshottam Vs. Thacker Madhavji Meghaji, . Ram prasad MadhuLal Vaishya v. BadnLal Paima Lal & Another 1981 26 MPLJ 132. Devkinandan and Another etc. Vs. Roshan Lal and Others etc., , Ayyappan Vs. Karthiayani Amma and Others, and S.V. Venkatarama Reddiar Vs. Abdul Ghani Rowther and Others, .

(44) The Full Bench of the Madras High Court after holding that the exception contained in Section 76(a) of the Transfer of Property Act could not be readily and automatically invoked by a tenant let into possession of urban property by a mortgagee with possession further held that "it maybe open to a tenant inducted upon urban property by a mortgagee with possession to rely upon Section 76(a) to claim tenancy right for the full term of the tenancy notwithstanding the redemption of the mortgage earlier." For the reasons indicated, respectfully, we do not agree with this last proposition In our opinion, so far as the urban property is concerned, this exception does not apply at all .

(45) A contrary view has been taken by a Full Bench of the Allahabad High Court in Tajammul Husain Vs. Mir Khan and Others, . With respect to the learned Judges of the Allahabad High Court we are unable to agree with their concision ,for the reasons already given.

(46) In conclusion, our answer to the reference is that the tenant, inducted by a mortgagee in possession cannot claim the benefit of the protection afforded by the Rent Control Legislation alter the redemption of the mortgage, unless the mortgagor had permitted the mortgagee to induct a tenant even beyond the" term of the mortgage or has concurred to the creation of the lease or has adopted it. Case would now go to the Division Bench for decision of the appeal in the light of the answer given by us.

