**(2000) 11 DEL CK 0040**

**In the Delhi High Court**

**Case No :** E.F.A. (OS) 3 of 1977 and CMS 483, 484 and 485 of 1997

Puran Chand and Co. APPELLANT

Vs

Ganeshi Lal Tara Chand and Others RESPONDENT

**Date of Decision :** 21-11-2000

**Acts Referred:**
Civil Procedure Code, 1908 (CPC) — Order 21 Rule 95, Order 21 Rule 96
Transfer of Property Act, 1882 — Section 65A

**Citation :** AIR 2001 Delhi 175 : (2000) 57 DRJ 300

**Hon'ble Judges :** Mukul Mudgal, J;Devinder Gupta, J

**Bench :** Division Bench

**Advocate :** Arun Mohan, A.P. Dhamija, for the Appellant; Shyamla Pappu and Ajay Kumar, for Respondents 2 and 16, Ravi Gupta, for Respondent 5, R.K. Ahuja, for Respondent 8, Ruchi Sindhwani, for Respondent 10, Ishwar Sahai and Asha Saxena, for Respondent 13 and Pradeep Dewan and Navin Kumar for Respondent 14, for the Respondent

## Judgement

Devinder Gupta, J.—Seeds for the litigation giving rise to this appeal were sown more than 70 years ago and yet there appears to be no end to it.

2. The point arising for consideration in this appeal is short though the parties have also tried to bring other points in controversy, which in our considered opinion, will not require any adjudication. The question to be answered by us is that whether the appellants are entitled to actual physical delivery of possession of various portions of the property in occupation of the respondents in accordance with Rule 95 of Order 21 of the CPC or would be entitled to only symbolic (constructive) possession, as provided in Rule 86 of Order 21 of the Code.

3. More than 72 years ago, to be exact, on 6-2-1928 the property bearing Nos. 391 to 399, 405 and 406, Chandni Chowk, Delhi were mortgaged with possession by Ganga Ram in favor of Ram Chand, Bengali Mal, Shyam Lal and Chote Lal for Rs. 80,000/-. On the same day Ganga Ram executed a leased deed

in favor of the mortgagees agreeing to pay Rs. 650/- p.m. as rent for the property. Another charge was created against the same properly when on 13-7-1928, another mortgage deed was executed by Ganga Ram in favor of the aforementioned mortgagees to secure Rs. 25,000/-. By the third deed of mortgage dated 19-7-1928 for Rs. 45,000/- in addition to the already secured property another properly, namely House No. 412, Chandni Chowk, Delhi was mortgaged with possession and on the same day, a lease deed with respect to the same property was executed by the mortgagor in favor of the mortgagee agreeing to pay rent @ Rs. 32/- p.m.

4. The mortgagees on 23-12-1930 filed suit No. 109/30 to enforce their rights under the mortgage against Ganga Ram, mortgagor impleading Bala Prasad and Alopi Prasad, the subsequent mortgagees of the property. On 27-2-1931 a compromise is stated to have been entered into between the mortgagor and the mortgagees. They agreed to have the suit disposed of on the terms that (a) decree for Rs. 1,63.254-53 in full and final settlement be passed in favor of the plaintiff mortgagees; (b) the defendant mortgagor would deliver possession of the mortgaged properties to the plaintiff mortgagees before 1-3-1931 and to get lease deeds executed by the tenants in favor of the plaintiff mortgagees. It was also agreed that the mortgagees will realise rent from all tenants w.e.f. 1-3-1931 and will maintain regular accounts. occur @ 9% p.a. on Rs. 1,63,254-53. The rent realised by the mortgagees was agreed to be adjusted towards interest and deficiency, if any, was agreed to be added to the decretal amount; (c) plaintiff mortgagees agreed to allow the mortgagor defendant to pay the decretal amount within a period of two and a half years with the condition that in case mortgagor would fail to pay the amount, plaintiff mortgagees will be entitled to execute the decree by sale of the mortgaged property; and (d) the compromise also provided that the plaintiff mortgagees shall have a right to increase or reduce the rent and induct and eject tenants.

5. It is not in dispute that pursuant to the compromise entered into between the plaintiff mortgagee and defendant mortgagor, constructive possession of the property was handed over to the mortgagees on 1 -3-1931. It further appears that Bala Prasad and Alopi Prasad did not agree to the compromise and thus it could not be recorded. On 28-4-1931 mortgagees'' suit was decreed ex parte, which decree was later on set aside on 27-6-1932 at the instance of defendant No. 2. Ultimately on 25-1-1935 a preliminary decree under Order 34 Rule 4 C.P.C. was passed for Rs. 2,55,839-4-0 with costs and future interest at the rate of 9% p.a., to be realised by sale of the mortgaged property.

6. An appeal was preferred before Lahore High Court against the preliminary decree by the Banaras Bank, one of the defendants in the suit. Judgment of Lahore High Court is reported as Banaras Bank Ltd., Saharanpur v. Har Prasad, AIR 1936 Lah 482. The security bond in favor of Banaras Bank was held to be mortgage and thus to have a property over the mortgage of defendant No. 2. We need not state the other facts since the same are not relevant for the purpose of

 

deciding the controversy arising before us except by staling that the decree of Lahore High Court was in terms of the compromise dated 27-2-1931 followed by decree dated 28-4-1931. As the mortgagor failed to pay, the amount due from him to the mortgagees, as adjudicated upon in the preliminary decree and as found by Lahore High Court, proceedings for final decree were initiated. Ultimately, final decree came to be passed on 23-5-1940 enabling and authorising the mortgagees to realise an amount of Rs. 2,10,076-13-10, which was due on 6-1-1936 together with interest @ 9% p.a. by sale of the mortgaged property, further directing that the money realised on sale, after deduction of the expenses shall be applied in payment of the amount payable to the mortgagees under the preliminary decree.

7. In order to reap the fruits under the final decree, the mortgagee-decree holders on 1-4-1952 filed an execution application praying that the mortgaged property be ordered to be sold for realisation of the amount of decree and on realisation, the amount be paid to them. On 21-7-1970 sale proclamation was issued wherein particulars of the property to be sold were mentioned and it was also stated that the property was free from encumbrances and the rental of the property was Rs. 1275-56 excluding water, tax, M/s Puran Chand and Company, the appellant (the appellant herein) through Puran Chand, its partner was declared to be the highest bidder in the public auction held on 25-9-1970. Objections were filed. After the objections were decided, the auction sale was confirmed on 22-8-1972 in favor of the appellant, auction purchaser. Certificate of sale (Exhibit APW/1) was issued in terms of Order 21 Rule 94 of the Code in favor of the appellant.

8. On 17-8-1973, the auction purchasers filed an application under Order 21 Rules 95 and 96 read with Section 151 C.P.C. Inter-alia it was alleged in the application that as per the compromise, which had been arrived at between the mortgagor and the mortgagee, possession of the property was delivered by the mortgagor to the mortgagee on 1 -3-1931 from which dale the mortgagees were to realise rent from the tenants and to keep regular accounts. Subsequent to the compromise, a preliminary decree was passed and when mortgagor did not satisfy the preliminary decree, mortgaged property was sold by public auction, to realise the amount under the decree, wherein the auction purchasers purchased the property. The auction purchasers thus alleged that they were entitled to take vacant possession of that part of the property which was in occupation of persons, who had been inducted by the mortgagees after 1-3-1931, which part of the property was shown in red in the plan (Annexure-B) attached to the application. With respect to the remaining part of the property, shown in the plan (Annexure-B) as green, the auction purchasers prayed that they were entitled only to symbolic possession since the same was in occupation of the tenants, who were in continuous possession prior to 1-3-1931. Accordingly, in the application, the auction purchasers prayed that:--

i. Warrants for possession with the direction that vacant physical possession of the part of the property shown as red in the plan Annexure ''B'' be delivered to the applicants, be issued and vacant physical possession of the said part of the property be granted to the applicants.

ii. In case the Hon''ble Court comes to the conclusion that the applicants are not entitled to vacant physical possession of any particular part of the property, symbolic possession of that parent of the property be granted to them.

iii. Symbolic possession of the part of the property in occupation of tenants referred to in para 18 above and shown as green in the plan Annexure ''B'' be granted to the applicants.

iv. Such other or further relief as the Hon''ble Court deems proper in the circumstances of the case, be also granted to the applicants.

9. The tenants in the property on being served with the application of the auction purchasers filed objections and thereby resisted the prayer for delivery of vacant possession. The objectors alleged that they cannot be dispossessed from the property in execution proceedings under Rule 95 of Order 21 of the Code as they are not in occupation of various portions of the property on behalf of the judgment debtor mortgagor, but were in occupation of the same as tenants. They pleaded that they were prepared to attorn in favor of the auction purchaser and were agreeable only for symbolic possession of the property to be delivered to the auction purchaser. Some of the objectors also raised a plea that they were old tenants prior to 1931 and were not liable to be dispossessed otherwise than in due course of law. The others pleaded that they were inducted by the mortgagees under the powers of the management conferred on them in terms of the compromise arrived at between the mortgagors and mortgagees on 27-2-1931 and were not liable to be dispossessed since the mortgagees acted in exercise of their power of prudent management under Clauses (a) and (e) of Section 76 of the Transfer of Property Act.

10. Learned Single Judge on the pleadings of the parties framed the following issues :--

1. Whether the auction purchaser is entitled to actual physical possession of the premises in occupation of the respondents ? (OPAP)

2. Whether the application under Order 21 Rules 95 and 96 (LA. No. 2066/73) is not maintainable? OPR

3. Were the mortgagees (decree-holders) acting for and on behalf of judgment-debtors? OPR

4. Whether the letting out of the property by the mortgagees (decree-holders) was an act of prudent and good management? If so with what effect ? OPR

5. Can the respondents be not ejected in view of the provisions of the Delhi Rent Control Act? OPR

 

6. Whether this Court has no jurisdiction to entertain the execution application under Order 21, Rules 95 and 96 of the C.P.C.? OPR.

7. Relief.

11. Some evidence was also recorded by learned Single Judge. The application of the auction purchasers was thus decided by learned Single Judge on 10-3-1977 and the judgment is reported as Tara Chand Vs. Ganga Ram and Others, . It was held that the auction purchaser was entitled only to symbolic possession; application under Order 21 Rules 95 and 96 was not maintainable; the act of letting out of the property by the mortgagees was held to be an act of prudent and good management and that the tenants could not be ejected in view of the provisions of Delhi Rent Control Act. Accordingly, learned Single Judge directed that symbolic possession be given to the auction purchasers under Rule 96 of Order 21 C. P.C. While coming to the conclusion aforementioned, learned Single Judge held that the compromise dated 27-2-1931 had conferred express power on the mortgagees to create leases, which for all intents and purposes amounted to the mortgagor consent that the leases would be binding on him after redemption. The mortgagor knew that if he did not pay the decretal amount within a period of two and a half months, the arrangement would continue and in fact it proved to be a long arrangement and thus the mortgagor was held to have concurred in it.

12. Feeling aggrieved against the decision of learned Single Judge, instant appeal was preferred by the auction purchaser on 19-5-1977 and against some of the findings in the impugned judgment, cross-objections were filed by the respondents on 27-5-1977. The appeal came up for hearing before Division Bench on 20-3-1987. During course of hearing, the following question of law was framed for being referred to a larger Bench:--

"Whether a tenant inducted by the mortgagee in possession can claim the benefit of protection offered by the Rent Control Legislation after redemption of the mortgage."

13. The Full Bench on 11-9-1987 answered the reference holding that the tenant inducted by a mortgagee in possession cannot claim the benefit of the protection offered by the Rent Control Legislation after the redemption of 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 lease or has adopted it. The Judgment of the Full Bench is reported as Puran Chand and Co. Vs. Ganesh Lal Tara Chand and Others, .

14. After answering the reference, the case came up for decision before Division Bench. In the meanwhile, Special Leave Petitions were filed In Supreme Court by the respondents against the decision of Full Bench. The leave prayed for was granted. The Supreme Court on 27-9-1994 disposed of civil, appeals after noticing what was contended before it by learned counsel for the appellants therein (respondents in this appeal) that this was not a case of redemption of

 

mortgage at all, but was a case where upon failure of mortgagor to pay mortgage debt in terms of the preliminary decree, mortgaged property had been sold in an auction sale, held by the Court in pursuance of the final decree and that the position of auction purchaser was totally different from that of the mortgagor, who had redeemed the mortgage. After noticing this contention, the appeal was disposed of by the Court observing :--

"we think it appropriate that the Division Bench should hear and dispose of the appeal in the light of the judgment of the Full Bench. It shall be open to the appellants to contend that the Full Bench judgment has really no application to the facts of their cases. It shall be open to all the parties to take such contentions as are available to them and, if necessary, to challenge the correctness of the decision of the Division Bench on that basis."

15. At the time of filing of appeal, 16 persons were imp leaded as party respondents from whom the appellant claimed possession. By an order passed in C.M. 102/95 on 25-1-1995, names of respondents No. 1, 3, 4, 7, 11 and 15 stood deleted since the appellants gave up claim against them. As such, only respondents No. 2, 5, 6, 8, 9. 10, 12, 13, 14 and 16 remained party respondents.

16. As noticed above, the suit was filed by the mortgagees against the mortgagor for enforcement of their rights under the mortgage deeds in which preliminary decree was passed on 25-1-1935 and when the amount becoming due and payable under the mortgage could not be paid by the mortgagor, proceedings for final decree were held and final decree was passed by the Court on 23-5-1940. In order to realise the amount, which had become due and payable and was not paid by the mortgagor, an application was tiled by the mortgagee decree holders so as to execute the decree. Prayer was made for sale of the mortgaged property. In the said execution, warrant of sale was issued on 21-7-1970 and the public auction was held on 25-9-1970. Sale in favor of the appellant was confirmed and the sale certificate (Exhibit A-PW/1) was Issued on 22-8-1972.

17. M/s Puran Chand and Co., the appellant is thus the auction purchaser. They were not parties to Suit No. 109/30 in which preliminary decree was passed or the proceedings in which final decree was passed. They are outsiders to the suit. They are also outsiders to the decree in execution of which the property was put to sale. Similarly the respondents also were not parties to the suit or to the decree like the appellants. The mortgagor and the mortgagees are not now in picture. The appellant is the auction purchaser. The respondents are the persons in occupation of the property, claiming to be tenants. Admittedly, the respondents were in possession of the property prior to the date of issuance of warrant of sale and obviously prior to the date of public auction or the date when sale was confirmed and sale certificate was issued. The short question thus will have to be decided in the aforementioned background that whether the auction purchasers would be entitled to recover actual possession of the property from the respondents in terms of the provisions of Order 21 Rule 95 C.P.C. or would

 

be entitled only to symbolic possession in terms of Order 21 Rule 96 of the Code.

18. On behalf of the appellants and the respondents, arguments were advanced on numerous prepositions of law, which in our view would not be arising for determination. However, in nutshell what was argued by them, is being noticed below :--

Mr. Arun Mohan vehemently contended that a mortgagee with possession has a right to create tenancies, but tenancies so created, are not binding on the mortgagor after redemption. The exception to this rule that where the mortgagor had empowered the mortgagee to create a lease, the same would be binding on the mortgagor after redemption of the mortgage and in exercise of such power in case a mortgagee grants a lease of that type, it will be binding on the mortgagor. It was submitted by him that the compromise dated 27-2-1931 did not empower the mortgagee to create tenancies, which even after redemption would be binding upon the mortgagor. Some of the objector-respondents were inducted by the mortgagees as tenants even after the final decree and even long after sale of the property had been ordered. Provisions of Section 52 of the Transfer of Property Act will apply and they will be liable to vacate. Mortgagee could not have impaired the value of the property by creation of such tenancies. Tenancies thus are not binding on the mortgagor and since auction purchasers have stepped into the shoes of the mortgagor, the appellants auction purchasers will be entitled to physical possession from those tenants, who were inducted by the mortgagees pursuant to the said compromise. He also urged that since the auction purchasers have been deprived of actual possession, mesne profits also deserves to be allowed in these proceedings besides directing the respondents to deliver vacant possession.

19. On behalf of the respondents while reiterating that the tenants were very old and they cannot be evicted pursuant to the warrants of possession in these proceedings at the behest of the auction purchaser, since auction purchasers will be deemed to have purchased the property subject to tenancies, it was further contended that the appellants at the most will be entitled to symbolic possession. The question whether the auction purchaser will be bound by the tenancies created by mortgagees or whether the tenants are otherwise entitled to continue in occupation being old tenants, will have to be adjudicated in some other proceedings and not in these proceedings.

20. Having considered the submissions made at the Bar, we are of the view that the question formulated by us has to be answered on the basis of and making reference to the date of acquiring title by the auction-purchaser, which is most crucial and a decisive factor. The auction-purchaser came into picture only after warrant of sale had been issued. They appeared on the scene when they offered their bid at the auction, which admittedly took place on 25-9-1970 and on which date they were declared to be the highest bidders. To the auction, objections were raised. It will also be necessary to make reference to the nature of the objections and the pleas taken therein by the appellants. Shri Dalak Ram Jain

 

and Smt. Mero Devi had filed objections separately under Order 21, Rule 90 of C.P.C. praying for setting aside the auction sale. One of the grounds on which auction sale was sought to be set aside in both the objection petitions was the inadequacy of the amount realised at the auction sale. In reply thereto, the auction-purchasers pleaded that there are old tenants in the property and the rents being very low, the property could not have been sold at a price higher than the price at which it was sold. The Executing Court took time to decide the objections and ultimately on rejection of the objections to the sale, an order was passed on 22-8-1972 in consonance with the provisions of Order 21, Rule 92 of C.P.C., confirming the sale. Only on such confirmation, the sale in favor of the auction-purchasers became absolute. On sale becoming absolute, requisite sale certificate was issued to the auction-purchasers in accordance with R. 94 of O. 21, C.P.C. Thus the auction-purchasers will be deemed to have derived right to obtain possession only after sale in their favor became absolute and on sale certificate having been obtained by them.

21. Rule 95 of Order 21 of the Code deals with delivery of possession of immovable property sold in an auction, which is in occupation of the judgment-debtor or some person on his behalf or some person claiming under a title created by the judgment-debtor subsequent to the attachment of immovable property, with respect to which a certificate under Order 21, Rule 94, C.P.C. has been issued. It reads :--

95. Delivery of property in occupancy of judgment-debtor-- Where the immovable property sold is in the occupancy of the judgment-debtor or of some person on his behalf or of some person claiming under a title created by the judgment-debtor subsequently to the attachment of such property and a certificate in respect thereof has been granted under Rule 94, the Court shall, on the application of the purchaser, order to delivery to be made by putting such purchaser or any person whom he may appoint to receive delivery on his behalf in possession of the property, and, if need be, by removing any person who refuses to vacate the same.

22. Rule 96 of Order 21 of the Code deals with those cases where the property sold is in occupation of the tenant or a person, who is otherwise entitled to occupy the same and it reads :--

96. Delivery of property in occupancy of tenant.-- Where the property sold is in the occupancy of a tenant or other person entitled to occupy the same and a certificate in respect thereof has been granted under Rule 94, the Court shall, on the application of the purchaser, order delivery to be made by affixing a copy of the certificate of sale in some conspicuous place on the property, and proclaiming to the occupant by beat of drum or other customary mode, at some convenient place, that the interest of the judgment-debtor has been transferred to the purchaser.

23. The appellant-auction-purchaser did move an application both under Rules

 

95 and 96, C.P.C. of Order 21 of the Code claiming physical and vacant possession of that part of the property, which was in occupation of the persons, who had been inducted by the mortgagees on or after 1-3-1931, which portion is shown in red in the plan (Annexure-B) and symbolic possession with respect to that part of the property in occupation of tenants, who were in continuous possession of the property prior to 1-3-1931, shown as green in the plan (Annexure-B). The auction-purchaser claimed that the tenancies, if any, created by the mortgagees from time to time after 1-3-1931 came to an end on the auction sale being confirmed and are not binding on the auction-purchasers. Thus the tenancies so created after 1-3-1931 do not give any right to the tenants to continue in possession of the property since the property in their occupation had been sold in execution case. All the persons thus inducted after 1-3-1931 are liable to hand over physical and vacant possession.

24. The above submission on the face of it cannot be accepted inasmuch as auction-purchaser cannot in these proceedings have adjudication of any rights inter se them and the occupants since their right to claim possession will arise only after the sale became absolute and sale certificate was issued and not prior thereto. Admittedly all the persons in occupation are claiming and have been held to be so in occupation prior to the date of auction. No person is claimed to have been inducted into the property after the date of the auction and to the facts and circumstances of the case, ratio of decision in Dev Raj Dogra and others Vs. Gyan Chand Jain and others, would squarely apply.

25. Learned counsel for the appellant contended that the decision in Dev Raj Dogra''s case (supra) relates to an auction sale by Court pursuant to execution of simple mortgage decree. He submitted that the ratio of the said decision cannot be made applicable to the instant case. He contended that the instant case relates to an auction sale held pursuant to the execution of a usufructuary mortgage decree, Therefore, the case will have to be decided according to the ratio of decision in The All India Film Corporation Ltd., and Others Vs. Sri Raja Gyan Nath and Others, . In the alternative, he contended that assuming the two decisions cannot be differentiated on this ground, the decision in Dev Raj Dogra''s case (supra) being per incuriam is not binding. There is a statutory difference in the position of a tenant inducted by a mortgagor on one hand as against the tenant inducted by a mortgagee on the other hand. As per his submissions, Sub-section (1) of Section 65-A, which was inserted in Transfer of Property Act in 1929, confers a statutory power on the mortgagor to make a lease and the lease so made by the mortgagor is binding on the mortgagee. Neither at that time when Section 65-A was inserted in the Transfer of Property Act nor at any later point of time. Legislature deemed it fit to make a similar provision in relation to a usufructuary mortgage or for a mortgagee in possession. The binding nature of the lease made by the mortgagor to be binding on the mortgagee is in case of a simple mortgage. Transfer of Property Act maintains a clear distinction. While it binds the mortgagee with a lease created by a mortgagor, it does not make the lease made by mortgagee binding on the

 

mortgagor to which Section 76 applies. He urged that Dev Raj Dogra''s case (supra) was a case of simple mortgage. In that case, the aspect of lease created by mortgagee in a usufructuary mortgage was not considered. For that reason alone in Dev Raj Dogra''s case (supra), it was observed that the decisions in All India Films Corporation''s case and Sachalmal Parasram Vs. Ratnabai and Others, are not applicable. He even tried to persuade us by making further submission that the rule laid down in All India Films Corporation''s case alone will have to be applied to the facts of the instant case and not that which has been laid down in Dev Raj Dogra''s case since in Dev Raj Dogra''s case, attention of their Lordships was not invited to the amendment to the Explanation to Section 47 of the Code as carried out firstly in 1956 and again in 1976. The statute deems a purchaser to be a party to the suit, but it appears that the statutory provision was not pointed out to the Court, Therefore the decision runs counter to the Statute. Decision of three-Judge Bench of Supreme Court in Harnandrai Badridas Vs. Debidutt Bhagwati Prasad and Others, was also not placed before the Hon''ble Judges. The procedure under Order 34 of the Code which deals with suits relating to mortgages of immovable property. Various forms prescribed Therefore and for the decrees as also the provisions of Order 21, Rule 102 which are direct in point--were apparently not placed before their Lordships. The Privy Council decision in AIR 1940 11 (Privy Council) and the High Court decisions following that, which had matured into Stare Decisis, were also not placed before their Lordships; and the three-Judge decision of Supreme Court in Sachalmal Parasram Vs. Ratnabai and Others, , (Mangru Mahto v. Shri Thakuar Tarakant ji Math), which had been reiterated in All India Film Corporation v. Raja Gian Nath (supra), also was not placed before their Lordships.

26. Facts as can be found from the first few paragraphs of the judgment of All India Films Corporation''s case (supra), do suggest that the original owner Azim Baksh had migrated to Pakistan and his property was declared an evacuee property. Before migration, he had mortgaged the building with possession to Malawa Ram and Gaindamal. The mortgagees had leased it out to All India Films Corporation Limited. On 26-7-1950 by a lease, the lessee was given full rights to use the property whether by itself or through agents or in partnership or by sub-leasing. After the mortgage charge had been determined under the Evacuee Interest (Separation) Act, 1951, the competent officer ordered sale of the building and land together with another plot. Raja Gian Nath purchased the property on 3-12-1955. Sale certificate was issued on 3-3-1956. The mortgage charge was paid off on 19-4-1958. Thus having acquired a title, Raja Gian Nath filed a separate suit for obtaining possession of the property. In the said subsequent suit, the question thus arose that whether the tenancy created by mortgagee in possession survives the termination of the mortgagee''s interest so as to be binding on the purchaser. The said question was answered holding :--

"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 interest lasts only as long as the mortgage has not been paid off. Therefore bn redemption of the mortgage the title of the mortgagee conies to an end. A derivative title from him must ordinarily come to an end with the termination of the mortgagee''s title. The mortgagee by creating a tenancy becomes the Lesser of the property but his interest as Lesser is conterminous 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 lessor. 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 lessor''s interest. These propositions are well understood and find support in two rulings of this Court in Mahabir Gope and Others Vs. Harbans Narain Singh and Others, and Asa Ram and Another Vs. Mst. Ram Kali and Another, .

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 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."

27. The said question, which arose in All India Films Corporation''s case (supra) will not and should not arise for consideration in these proceedings, which had arisen from out of a suit filed by mortgagee against mortgagor for recovery of the mortgage debt.

28. After the proclamation of sale had been Issued, an application was filed by the mortgagee decree-holder under Order 21, Rule 72 of C.P.C. (LA. 974/70) seeking leave of the Court to bid at the auction after notice to judgment-debtor mortgagor and considering his objection, permission was granted to decree-holder to make bid at the auction of the property subject to the condition that the first bid of the mortgagee decree-holder would start at Rs. 2 lakhs and decree-holder would be entitled to adjust the purchase money against the decretal amount.

29. Had the decree-holder been declared to be the highest bidder, consequently,

 

he would have been the auction-purchaser. Could after confirmation of the sale, such an auction-purchaser, namely the mortgagee in possession, who had created leases have prayed the Court for being put in actual possession of the property after dispossessing the tenants Inducted by him, more particularly in execution proceedings? The answer obviously will have to be in negative.

30. What the auction-purchasers are insisting for is the actual delivery for possession pursuant to the auction sale in their favour, which was conducted on issuance of warrant of possession in order to realise the mortgage debt. In All India Films Corporation''s case (supra), the auction-purchaser Raja Gian Nath had filed a separate suit for recovery of possession of the property against various occupants. We have given our due consideration to the submissions made at the Bar and are not persuaded to take a different view than the one which was taken in Dev Raj Dogra''s case (supra).

31. The principal question that had arisen in Dev Raj Dogra''s case (supra) was that whether an auction-purchaser, who was not a party to the suit would be entitled to recover actual physical possession of the portions of property purchased by him in auction from the persons in occupation claiming to be lessees in an application made by the auction-purchaser under Order 21, Rules 95 and 96 of C.P.C. On an analysis of various cases cited before it, it was held that the auction purchaser derives his right to obtain possession only after the sale in his favor has become absolute and sale certificate has been obtained by him. The mode and manner of obtaining such possession are regulated by Rules 95 and 96 of Order 21, C.P.C. The Court further observed that the persons in occupation of the property as tenants were not judgment-debtors. They were also not in occupation of the property on behalf of the judgment-debtors. They were also not claiming to be in occupation under a title created by the judgment-debtor subsequent to any attachment of the property since there was no question of any attachment. They were in occupation of their respective portions as tenants and they claimed to occupy the same as such. Therefore, the question of validity or otherwise of the tenancy may have to be considered and determined in appropriate proceedings. After sale certificate had been issued, the auction-purchaser, who is an outsider and not a party to the suit resulting In compromise decree in execution of which the property was put to sale, will not be entitled to recover physical possession from the occupants in view of the provisions contained in Order 21, Rule 95, C.P.C., but would be entitled to symbolic possession in terms of provisions contained in Order 21, Rule 96 of the Code.

32. In the instant case also, the appellants are the auction-purchasers. They were not parties to the suit. The persons in occupation from whom possession is sought to be obtained also were not parties to the suit and are thus not the judgment-debtors. They are also not in occupation of the property on behalf of the judgment-debtor. They are also not claiming to be in occupation under a title created by the judgment-debtor subsequent to attachment of the property. As a

 

matter of fact, there was no attachment of the property in the instant case. The respondents are in occupation of their respective portions claiming to be lawful tenants. Thus the question of validity or otherwise of their tenancies cannot be gone into in these proceedings and will have to be considered and determined in appropriate proceedings in accordance with law, which was the course adopted by the Supreme Court in Dev Raj Dogra''s case (supra).

33. In Dev Raj Dogra''s case (supra), the Apex Court also considered (he applicability of Section 52 and S. G5-A of the Transfer of Property Act and held (at page 990) :--

"It may be true that Section 52 and Section 65-A of the Transfer of Property Act operate in different spheres. Section 65-A, as we have earlier noticed, deals with the powers of the mortgagor to grant a lease of the mortgaged property, while the mortgagor remains in lawful possession of the same. Section 52 deals with cases of transfer of or otherwise dealing with any immovable property after any suit or proceeding in which any right to the said immovable property is directly and specifically in question, has been filed. It is also to be noted that Section 65-A which came to be inserted by the Amending Act, 1929, is neither made ''subject to'' nor ''notwithstanding the provisions'' contained in Section 52 of the Act. Section 52 will, however, be only applicable, if the requirements of the said section are satisfied."

The said requirement being;--

(1) A suit or a proceeding in which any right to immovable property must be directly and specifically in question, must be pending.

(2) The suit of the proceeding shall not be a collusive one.

(3) Such property during the pendency of such a suit or proceeding cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the right of any other party thereto under any decree or order which may be passed therein except under the authority of Court. In other words, any transfer of such property or any dealing with such property during the pendency of the suit is prohibited except under the authority of Court, if such transfer or otherwise dealing with the property by any party to the suit or proceeding affects the right of any other party to the suit or proceeding under any order or decree which may be passed in the said suit or proceeding."

34. While saying about non-applicability of the aforementioned provisions and holding about the right of the auction purchaser entitled only to symbolic possession, the Court said :--

"In the instant case, it does not become necessary for us to consider whether the grant of any lease by a mortgagor in conformity with the provisions of Section 65-A of the Transfer of Property Act during the pendency of a suit by the mortgagee to enforce the mortgage will attract the provisions of Section 52 of the Act or will be outside the mischief of the provisions of the said section on the ground that the creation of such a lease may not affect the rights of the mortgagee under any decree or order which may be passed in the suit. We have earlier quoted the observations of this Court in the case of Mangru Mahto and Others Vs. Shri Thakur Taraknathji Tarakeshwar Math and Others, and it will be noticed that the Supreme Court in the said case did not decide this question and left this question open. In the instant case an outside auction purchaser is seeking recovery of the physical possession of the property purchased by him at the auction from the appellants who are in possession of different portions of the said premises as tenants of the said portions. The auction purchaser in the instant case was not the mortgagee and he was no party to the suit in which the compromise decree was passed. Section 52 in clear terms speaks of the rights of the parties to the suit or proceeding. In this connection it may be noted that this Court in the case of Jayaram Mudaliar held at page 153 as follows :--

It is evident that the doctrine, as slated in Section 52, applies not merely to actual transfers of rights which are subject-matter of litigation but to other dealings with it ''by any party to the suit or proceeding, so as to affect the right of any other party thereto''. Hence, it could be urged that where it is not a party to the litigation but an outside agency, such as the tax collecting authorities of the Government, which proceeds against the subject-matter of litigation, without anything done by a litigating party, the resulting transaction will not be hit by Section 52. Again, where all the parties which could be affected by a pending litigation are themselves parties to a transfer or dealings with property in such a way that they cannot resile from or disown the transaction impugned before the Court dealing with the litigation, the Court may bind them to their own acts. All these are matters which the Court could have properly considered. The purpose of Section 52 of the Transfer of Property Act is not to defeat any just and equitable claim but only to subject them to the authority of the Court which is dealing with the property to which claims are put forward."

35. In the instant proceedings, the appellant-auction purchaser being an outsider and not a party to the suit Nos. 109/30 and 144/33, which resulted in a compromise, preliminary decree and final decree in execution of which the property was put to sale, will not be entitled to recover physical possession from the respondents in view of the provisions contained in Order 21, Rule 95. They will be entitled only to symbolic possession in terms of provisions of Order 21, Rule 96 of the Code and in that view of the matter, it will not be proper for us to make any adjudication on the question of the legal and binding nature of the tenancies created by the mortgagees pursuant to the compromise. We are also not considering the question raised by learned counsel for the appellant about the respondents liability, if any, to pay mesne profits.

36. By the impugned order learned single Judge had ordered symbolic possession to be given to the auction-purchaser as prescribed under Order 21, Rule 96, C.P.C. While maintaining that part of the order, present appeal is dismissed with no order as to costs making it clear that we are not making any

 

adjudication on the legality and validity of the tenancies since the said question, if raised in any appropriate proceedings, will have to be decided, therein, in accordance with law and for that reason alone, we further make it clear that findings recorded thereon by learned single Judge in the impugned judgment on the legality and validity of the tenancies of the surviving respondents will neither come in the way nor cause any prejudice to the appellant or the respondents in those proceedings. In view of this position, there is no need for us to make any adjudication on the questions raised in the cross-objections, which also stand disposed of along with this appeal.

 