
(1963) 04 MP CK 0018

In the Madhya Pradesh High Court

Case No : Letters Patent Appeal No. 4 of 1961

Ramrao Govindrao Akolkar

APPELLANT

Vs

Pahumal Peshuram Sindhi

RESPONDENT

Date of Decision : 08-04-1963

Acts Referred:

Madhya Bharat Interest Act, 1956 — Section 2(1)
Transfer of Property Act, 1882 — Section 111, 60

Citation : AIR 1963 MP 296 : (1963) JLJ 641

Hon'ble Judges : Shivdayal, J;A.H. Khan, J

Bench : Division Bench

Advocate : B.D. Gupta and Naokar, for the Appellant; Inamber, for the Respondent

Final Decision : Partly Allowed

Judgement

Shivdayal, J.—The main question in this Letters patent Appeal is whether a tenant who accepts from his landlord a pure usufructuary mortgage of the same house, in which he is the tenant, is entitled to continue in its possession even after the mortgage is redeemed. The learned single Judge has answered this question in the affirmative.

2. Rama Rao appellant mortgaged the suit house on September 8, 1951 in favour of Pahumal. This was a pure usufructuary mortgage. Pahumal was already in possession of the suit house as Rama Rao's tenant. The present suit was resisted by Rama Rao for redemption. (It is not necessary to state the facts relating to proceedings u/s 83 of the Transfer of Property Act, prior to the suit). In the present suit a decree for redemption has been passed in favour of Rama Rao, but at the same time it has been directed that the defendant Pahumal would continue in possession as tenant, in as much as his tenancy has revived simultaneously with the redemption.

3. Three decisions have been relied on by the learned single Judge: Jagmohan Ahir v. Ram Kishen Misir AIR 1936 Oudh 322, Kallu v. Diwan ILR All 487 and

Kashi v. Durga 12 Ind Cas 734 (Nag). All these cases support the view taken by the learned single Judge, although they were cases relating to agricultural tenancies.

4. It is urged by Mr. Gupta that under Clause (b) of Section 60, Transfer of Property Act, the mortgagee is, in every event, entitled to return the possession of the property to the mortgagor. This does not carry the matter any further.

5. It is then argued that Section 101 of the Transfer of Property Act is exhaustive of the cases where there would be no merger, so that where a tenant accepts a mortgage, tenancy rights merge in the mortgagee rights. We cannot accept this to be the negative aspect of Section 101 of the Transfer of Property Act.

6. However, it seems clear to us that the relationship of landlord and tenant came to an end when the usufructuary mortgage was effected. It is stated in the mortgage deed that the mortgagor is in possession and occupation of the house (Qabiz wa Mutasarrif), that he is delivering possession to the mortgagee, that the mortgage is possessory (Rahan-bil-Qabz), that the mortgagee will not be entitled to any interest nor will the mortgagor be entitled to rent, and that on redemption only the principal amount of Rs. 1000/- will be repaid by the mortgagor to the mortgagee, it is, therefore, clearly a pure usufructuary mortgage.

7. When the defendant agreed to be the usufructuary mortgagee he necessarily accepted to alter the nature of his possession. This new relationship was not thrust on the tenant, nor did it come into being by operation of law. It was by the mutual will and consent of both the parties. The transaction was bilateral, in our judgment, physical possession of the mortgagee, qua a pure usufructuary mortgagee, was inconsistent with the continuance of his earlier possession as tenant of the mortgagor. The two could not go together, as they could in the case of a tenant accepting a simple mortgage. This position coupled with the recitals in the mortgage deed leave no manner of doubt that Pahlumal impliedly surrendered his tenancy rights to the landlord, who then became free to mortgage the house with possession. To put it differently, when the usufructuary mortgage was effected, the pre-existing tenancy came to an end.

It is urged by Shri Inamdar that the tenancy did not extinguish, but merely remained in abeyance or dormant during the period of mortgage. We are unable to accept this contention. There is no covenant in the mortgage deed to that effect. Nor is there anything in the mortgage deed to show that the parties contemplated to review, in the event of redemption, the pre-existing relationship of landlord and tenant.

8. Section 111 of the Transfer of Property Act enumerates the modes of determination of tenancy. Remarkably "express surrender" and "implied surrender" are separately named in Clauses (e) and (f). A surrender is an yielding up of the lessee's interest. If the tenant had expressly said in the mortgage deed that he was giving up his interest as a tenant it would have been

a case of express surrender. Implied surrender occurs (1) by the creation of a new relationship, or (2) by relinquishment of possession. Such surrender can only be implied from the consent of the parties or from such facts as may be inconsistent and incompatible with the relationship of landlord and tenant. The principle of implied surrender which is based on English law has for its foundation the rule of estoppel. In *Velu v. Lekshmi* AIR 1953 Trav-Co. 584 this principle was stated thus :

"The principle is that whenever a certain relationship exists between two parties in respect of a subject-matter and a new relationship arises as regards the identical subject-matter, if the two sets of relationship cannot coexist as being inconsistent and incompatible, that is to say, if the latter came into effect only on termination of the earlier, that would be deemed to have been terminated in order to enable the latter to operate."

See also *Meenakshi Amma Vs. Kizhakke Valath Narayani and Others*, , *Venkayya v. Venkata SubDarao* AIR 1957 AP 619 and *Godasankara Valia Raja Vs. Tharappan Vareed*, . The decision in ILR All 487 has been fully discussed by Ramaswamy J. In *Meenakshi Amma's* case (supra). I am in entire agreement with the learned Judge and it is unnecessary to retravel the premises already covered in the last mentioned case, the *Oudh* case AIR 1936 Oudh 322 is based on a local Revenue Law. The case reported in 12 Ind Cas 734 is clearly distinguishable on facts. There the mortgagee took, on the same day, perpetual lease of certain khudkasht fields and also mortgage of the proprietary rights. It was observed:

"By taking a lease of certain fields on the very day he took a mortgage of proprietary rights, the plaintiff clearly indicated his intention of continuing as lessee of the fields on redemption of the mortgage."

No such transaction took place between the parties here.

9. As pointed out above the possession of the person as a pure usufructuary mortgagee is inconsistent and incompatible with his possession as a tenant of the mortgagor. It is stated in *Woodfall on Landlord and Tenant* (25th Edition) at page 966 :

"The term "surrender by operation of law" or "implied surrender" (there being no distinction) is the expression. used to describe all those cases where the law implies a surrender from unequivocal conduct of both parties which is inconsistent with the continuance of the existing tenancy. Thus it is properly applied to cases where the owner of a particular estate has been party to some act having some other object than that of a surrender, but which object cannot be effected whilst the particular estate continues, and the validity of which act he is by law estopped from disputing."

10. In conclusion, we are of the view that in the absence of a contract to the contrary, the relationship of landlord and tenant ceases as soon as the tenant

accepts a pure usufructuary mortgage of the tenanted premises and, on redemption, the mortgagor is entitled to get back actual possession from the mortgagee and the pre-existing tenancy does not revive. If the tenant desires to revive his pre-existing tenancy, he must have the landlord-mortgagor to enter into such a covenant. When bilateral transaction determines the defendant's tenancy by implied surrender, it cannot be revived unilaterally.

11. It is next contended for the appellant that the mortgagee was not entitled to appropriate the whole amount, and the rent, which he paid to himself as tenant because it was in excess of the maximum rate of interest allowed under that Act. The Madhya Bharat Interest Act should have been applied to the present case. The original rent was Rs. 13/- per month. The mortgagee was not entitled to interest, exceeding Rs. 5/- p.m. This contention is without merit and, in our opinion, misconceived.

Firstly, the definition of "interest" in the M. B. Interest Act is wholly inapplicable to the case of a pure usufructuary mortgage; because in such a mortgage the mortgagor has no concern with the usufruct. It is entirely left to the mortgagee to earn from the property whatever he can. After putting the mortgagee in possession, the mortgagor is not liable to pay any interest to the mortgagee. Thus, the Interest Act is not attracted at all. Secondly, we have taken the view that the tenancy came to an end on the coming into being of the usufructuary mortgage. Thereafter the mortgagee had no liability to pay Rs. 13/-p.m., or any other rent, either to the mortgagor or to himself.

12. This appeal is partly allowed. Decree passed by the learned single Judge is set aside. The plaintiff is held liable to pay to the defendant the whole of the principal mortgage money, Rs. 1000/-, which he shall deposit in the trial Court on or before July 1, 1963, if not already deposited. On the amount being so deposited the defendant shall deliver actual possession of the suit house as also the mortgage deed to the plaintiff. In the circumstances of the case, the parties shall bear their own costs throughout.

A.H. Khan, J.

13. I agree.