
(2007) 09 DEL CK 0142
In the Delhi High Court
Case No : C.M. (M) No. 845 of 2005

Smt. Raj Rani

APPELLANT

Vs

Shri Ved Prakash (Deceased) and Others

RESPONDENT

Date of Decision : 27-09-2007

Acts Referred:

Delhi Rent Control Act, 1958 — Section 14(1)(e), 25, 25B
Transfer of Property Act, 1882 — Section 100, 111, 58, 62

Citation : (2007) 7 ILR Delhi 75

Hon'ble Judges : Anil Kumar, J

Bench : Single Bench

Advocate : Sarat Chandra and Sachin Chandra, for the Appellant; A.P.S. Ahluwalia and Hemant Malhotra for Respondent No. 1 and Ajit Singh, for the Respondent

Final Decision : Dismissed

Judgement

Anil Kumar, J.—The Petitioner has impugned the order dated 17th March, 2005 passed by Rent Control Tribunal dismissing the appeal of the petitioner against the order dated 17th February, 2005 passed by the Additional Rent Controller dismissing the objections of the petitioner against the order of eviction dated 15th October, 1996 passed against petitioner u/s 14(1)(e) of Delhi Rent Control Act, 1958.

2. To comprehend the controversy, the following facts are relevant. Shri Ved Prakash, predecessor of the respondents, filed an eviction petition being E-32/85 titled Ved Prakash v. Smt. Raj Rani u/s 14(1)(e) of Delhi Rent Control Act 1958 contending that he is the owner/landlord of the premises No. WZ-40/A, Krishna Puri, New Delhi, which was let out to Shri Ajit Ram at a monthly rent of Rs. 15/- and a rent deed dated 26th August, 1984 was executed. Shri Ved Prakash s/o Shri Kunj Lal, landlord was in financial difficulties and Therefore he had taken a loan of Rs. 1700/- from Shri Ajit Ram and executed an agreement to execute the mortgage deed on 22nd September, 1972. Under the agreement it was

categorically stipulated that the possession is not being given to mortgagee. Shri Ajit Ram had agreed to give a loan of Rs. 2000/- and since only Rs. 1700/- was given, he had to pay another amount of Rs. 300/-.

The original sale deed of the house and original mortgage deed was alleged to be handed over to Shri Ajit Ram who, however, continued to be a tenant in the house. According to late Shri Ved Prakash, though an amount of Rs. 1700/- was returned to Shri Ajit Ram, who was suffering from Cancer, even after paying the mortgage money he could not get the documents back. Shri Ajit Ram, the tenant who had given a loan of Rs. 1700 to his landlord, ultimately died in 1977. After his death, the premises was let out or continued to be under the tenancy of his widow at the rate of Rs. 25/- per month. The widow of Late Shri Ajit Ram also left for U.K. in 1979 and thereafter, the tenancy was transferred in the name of the petitioner who is the daughter of late Shri Ajit Ram. The tenancy was transferred in her name and rent was increased to Rs. 40/- per month.

3. Since late Shri Ved Prakash, owner/landlord of the premises, predecessor of respondent Nos. 1 to 3 had retired from a Government office and he did not have suitable residential accommodation available to him for his residence and his family members, Therefore, he filed an eviction petition on the ground of bonafide requirement. The petition filed by Shri Ved Prakash, deceased, was contested by the petitioner contending that her brother is also a legal heir of late Shri Ajit Ram and a necessary party and there is no relationship of landlord and tenant between them. The petitioner contended in the earlier eviction petition that Shri Ved Prakash had mortgaged the premises with possession in favor of her father, Shri Ajit Ram for Rs. 2000/- out of which Rs. 1700/- was paid to late Shri Ved Prakash on 27th September, 1972 and Rs. 300/- remained to be paid which was to be given to late Shri Ved Prakash at the time of registration of the mortgage deed. However, Shri Ved Prakash did not get the mortgage deed executed and registered in favor of her father. It was also contended that a sum of Rs. 300/- was sent to Shri Ved Prakash by money order which was received, however, the mortgage deed was not got registered.

4. In the earlier eviction petition, the petitioner alleged that she and her brother, Mr. Ashok Kumar Aggarwal, are in occupation of the demised premises. The Additional Rent Controller after considering the contentions of the parties and that there has been a relationship of landlord and tenant between the petitioner and late Shri Ved Prakash, son of Shri Kunj Lal, had held that the premises was required bona fide by Late Shri Ved Prakash. It was further held by the Additional Rent Controller in his order dated 10th January, 1989 in eviction petition No. E-32/85 that after the demise of Shri Ajit Ram, his widow and his two daughters and one son became co-tenants and, Therefore, the eviction petition was bad for non-joinder of parties as the son and other daughter of deceased Shri Ajit Ram were also necessary parties. It was also held that by virtue of alleged mortgage deed neither late Shri Ajit Ram nor the petitioner, her daughter, became owner of the disputed premises. After the dismissal of the earlier eviction petition Shri Ved

Prakash, son of Shri Kunj Lal and predecessor of the present respondents, did not impugn the order dated 10th January, 1989 nor the petitioner challenged the order dated 10th January, 1989 holding that the petitioner and her father had not become the owner of the property.

5. Late Shri Ved Prakash son of Shri Kunj Lal filed another eviction petition being E-170 of 1989 against the petitioner, Ashok Kumar Punj, her brother and Mrs. Kole, her sister, on the ground of his bonafide requirement after his earlier eviction petition was dismissed on the ground of non joinder of necessary parties. The eviction petition was contested by the petitioner. After hearing the parties, learned Additional Rent Controller passed an order of eviction dated 15th October, 1996 in favor of late Shri Ved Prakash, son of Shri Kunj Lal, and against the petitioner and her brother and sister.

6. The Additional Rent Controller dispelled the contention of the petitioner and her brother and sister that Shri Ajit Ram became owner of the suit property by virtue of mortgage of the house for Rs. 2,000/- and had held that there was relationship of landlord and tenant between the petitioner, her brother and sister and Late Shri Ved Prakash.

7. Thereafter aggrieved by the order of the Rent Controller passing an order of eviction dated 15th October, 1996 in favor of Late Shri Ved Prakash and against the petitioner and her brother and sister, the petitioner filed a Civil Revision Petition being CR No. 394 of 1994. During the pendency of the revision petition, Shri Ved Prakash died on 28th November, 1998 and his legal representatives, the respondents were substituted. The revision filed by the petitioner was dismissed by order dated 11th September, 2000 in default. An application for restoration was also filed on behalf of petitioner which was also rejected on 13th September, 2001. Against the dismissal of revision petition by this Court against the eviction order dated 15th October, 1996, a SLP was also filed by the petitioner which was also dismissed by order dated 25th January, 2002.

8. As the order of eviction passed against the petitioner and her brother and sister had become final, Therefore, an execution petition for recovery of possession from the petitioner was filed by the respondents almost after 16 or 17 years of initiating the litigation against them. In the execution petition, the petitioner filed objections u/s 25 of Delhi Rent Control Act raising the same pleas which were raised before the Additional Rent Controller in the eviction petition filed against the petitioner and her brother and sister u/s 14(1)(e) read with Section 25B of Delhi Rent Control Act, 1958.

9. Learned Additional Rent Controller considered the objections of the petitioner and dismissed the same by an order dated 17th February, 2005. The Additional Rent Controller in execution petition No. 18 of 2004 while deciding the objections of the petitioner u/s 25 of Delhi Rent Control Act, 1958 held that the objections could be filed only by the person other than the tenant who claimed to have independent rights in the demised premises. Since the petitioner was one of the

respondents in the eviction petition and an order of eviction was passed against her and the revision petition filed against the order of eviction was dismissed and SLP was also dismissed, in the circumstances, the petitioner could not contend that the order of eviction was a nullity or non-est.

10. The petitioner had also filed a suit for possession and she sought stay of execution proceedings. The interim application by the petitioner had been disposed of on the statement made on behalf of Late Shri Ved Prakash that he will not transfer the premises in dispute till the petitioner acquires legal ownership right from any court of law or through any instrument in any other manner. Thereafter, petitioner filed an application under Order 39 Rule 2A on the ground that Late Shri Ved Prakash had violated the order passed in the suit which application was dismissed. An appeal filed by the petitioner was also dismissed.

11. The Additional Rent Controller in his order dated 17th February, 2005 while dismissing the objections of the petitioner had held that since the finding that there is a relationship of landlord and tenant between the respondents and the petitioner has become final, the executing court cannot go behind eviction decree passed in favor of respondents. While dismissing the objections of the petitioner various other contentions of the parties were also considered.

12. Aggrieved by the dismissal of her objections, the petitioner filed an appeal being RCA No. 137 of 2005 titled Smt. Raj Rani v. Shri Ved Prakash (since deceased) through his LRs. The Tribunal considered the provision of Section 111(d) of Transfer of Property Act and in absence of any decree of foreclosure had held that the decree of eviction passed u/s 14(1)(e) of Delhi Rent Control Act which was affirmed by dismissal of the revision petition and thereafter dismissal of SLP of the petitioner, the same has become executable. The Tribunal considered various judgments cited by the petitioner.

13. The learned Counsel for the Petitioner has contended that the eviction order passed against the petitioner which was confirmed by the High Court and the Supreme Court is a nullity and can be challenged u/s 25B of Delhi Rent Control Act, 1958. According to him only the Civil Court can decide about the mortgage which was created in favor of the father of the petitioner by Late Shri Ved Prakash, landlord of the premises. The plea of the petitioner is that the tenancy rights of her father got merged in his rights as mortgagee and Therefore, the tenancy did not survive and consequently there was no relationship of tenant and landlord between Shri Ajit Ram, her father and Late Shri Ved Prakash.

14. The petitioner had relied on Kiran Singh and Others Vs. Chaman Paswan and Others, in which case it was held that a decree passed without jurisdiction is a nullity. It was held by the Apex Court that it is a fundamental principle that a decree passed by a court without jurisdiction is a nullity and that this plea that it is invalid, should be set up whenever and wherever it is sought to be enforced or relied upon even at the stage of execution and even in collateral proceedings. It

was further held that a defect of jurisdiction, whether it is pecuniary or territorial, or whether it is in respect of subject matter of the action, strikes at the very authority of the court to pass any decree and such a defect cannot be cured even by the consent of the parties. In case of the petitioner, the question about the jurisdiction of the Rent Controller was considered and it was held that on account of the mortgage without possession and the mortgage deed being unregistered, Shri Ajit Ram and after his demise the petitioner and his brother and sister continued to be tenant in the property and tenancy did not merge with their rights as mortgagee. It was established that there was a relationship of tenant and landlord which was affirmed in the revision petition filed by the petitioner and the SLP filed before the Apex Court was also dismissed. After adjudication of the plea about the jurisdiction where it has been held that there is a relationship of landlord and tenant, the petitioner cannot contend that a decree is a nullity though a competent court has held that the decree of eviction is valid.

15. The petitioner has relied on *Shah Mathuradas Maganlal and Co. Vs. Nagappa Shankarappa Malage and Others*, to contend that the tenancy in favor of Shri Ajit Ram extinguished on creation of mortgage by the predecessor of respondents in favor of Shri Ajit Ram. In this case relied on by the petitioner, the landlord had executed a mortgage deed in favor of the tenant and no interest was to be paid to the landlord, instead possession of the property was agreed to remain with the tenant. The period for redeeming the mortgage was fixed for 10 years and after notice for redemption of mortgage was served, the tenant claimed that after redemption he was entitled to retain possession because his previous tenancy right subsisted. It was held by the Apex Court that in case, delivery of possession was inconsistent with the continuance or subsistence of the lease, Therefore, on redemption of the mortgage, the landlord will have a right to recover possession both on the basis of the terms of mortgage deed and u/s 62 of Transfer of Property Act. The mortgage deed in this case had indicated that there was surrender of tenancy and the tenant was only a mortgagee. The court in *Mathuradas (supra)* had also found that a surrender of tenancy may be expressed through delivery of possession and in the circumstances of the case it was held that the plea of the continuance of tenancy rights was inconsistent and there was merger of interest of mortgagee and the tenant. Apparently, the cases relied on by the petitioner are distinguishable. In the case of the petitioner, the agreement for mortgage was not registered, rather it was contemplated that the mortgage deed will be got registered before the sub registrar which was not done. The agreement for mortgage rather categorically stipulated that property was pledged without possession and an amount of Rs. 1700/- had been received by the mortgagor/landlord towards mortgage amount of Rs. 2,000/-. The relevant portion of the agreement which is construed as a mortgage between Shri Ajit Ram and late Shri Ved Prakash predecessor of respondents is as under:

I, we Shri Parkash s/o Shri Kunj Lal r/o, Quarter No. 11, Block No. 5, Railway station Daya Basti, Delhi 2) Ajeet Ram s/o, Shri Puran Chand R/o, WZ/40-A, Krishna Puri, New Delhi-18. That the executant No. 1 is owner and occupier of

House No. WZ/40A, in which two rooms, kitchen, open court yard has been built at plot No. 130, measuring 133 1/3 sq.yds khasra No. 1, situated Rakba at Moza Nangli Jalib, Delhi province and abadi known as krishna puri and the said plot has been purchased from Shri Sukh Lal by virtue of Bainama registered document No. 1387 dated 17.3.60 registered with depts. of Jt. Sub Registrar, Delhi and the executant has built the house from his own costs, the executant has built the house from his own costs, the executant is in need of money so the executant wants to pledge the said property against the amount of Rs. 2000/- sold to executant No. 2 pledged without possession and Rs. 1700/- has been received in cash by the executant No. 1 from executant No. 2 and remaining amount of Rs. 300/- is produced before the Sub Registrar for registry by executant No. 1 in favor of executant No. 2 and shall get the pledge deed registered and the period of pledge is settled for five years and if the executant No. 1 failed to get executed the pledge deed under the stipulated period in favor of executant No. 2 then the executant No. 2 is entitled to get executed the document through court of law and the total expenses of the court shall be borne by the executant No. 2.

16. The petitioner herself in the earlier eviction petition had pleaded that though the mortgage deed required registration and it was also agreed between late Shri Ajit Ram and late Shri Ved Prakash that on payment of the balance Rs. 300/-, the deed shall be got registered, however, late Shri Ved Prakash avoided to get the mortgage deed registered. On avoidance of late Shri Ved Prakash to get the mortgage deed registered, Shri Ajit Ram, predecessor-in-interest of the petitioner, did not take any steps and the mortgage deed remained unregistered. Consequently, neither the possession was given to late Shri Ajit Ram, father of the petitioner, as a mortgagee nor the mortgage deed was got registered and consequently it is inevitable to infer that the possession of late Shri Ajit Ram continued as a tenant and his tenancy rights did not merge with his rights as mortgagee as the mortgage was without possession. So the tenancy of Late Shri Ajit Ram and after his demise his legal representative/heirs continued in respect of demised premises.

17. Reliance has also been placed by the petitioner on Sambangi Appaswamy Naidu and Others Vs. Behara Venkataramanayya Patro and Others, where it was held that in the facts and circumstances of that case there was no merger of lease and mortgage in respect of same property. It was held that it is well settled that for a merger to arise, it is necessary that lesser estate and a higher estate should merge in one person at one and the same time and no interest in the property should remain outstanding. The Apex Court had held that in case of a lease, the estate outstanding in the Lesser is of the reversion and in the case of a mortgage the estate that is outstanding is the equity of redemption of the mortgagor. In the circumstances it was held that the lease and mortgage in respect of same property cannot be merged as neither of them is a higher or lesser estate than the other. It was further held that even if the right of the lessee and rights of the mortgagee in respect of the same property are to be

united in one person, the reversion in regard to the lease and the equity of redemption in regard to the mortgage, would be outstanding in the owner of the property and accordingly there would not be a complete fusion of all the rights. Regarding the question as to whether or not upon redemption of a usufructuary mortgage, a tenant mortgagee could be directed to deliver actual or physical possession of the mortgaged property, it was held that it depends upon whether there was an implied surrender of the lessee's rights when the usufructuary mortgage was executed in favor of the lessee by the Lesser/mortgagor.

18. The learned Counsel for the respondents have relied on AIR 1930 76 (Privy Council) holding that agreement to mortgage cannot constitute mortgage or charge. In this matter, relied on by the learned Counsel for the respondent Mr.Ahluwalia, an agreement executed between A and B provided that the executant A would give a regular mortgage of his immovable property for money advanced by B and in these circumstances it was held that the agreement did not constitute a mortgage or charge upon such property within the meaning of Section 58 and 100 as the agreement merely created a right in B to obtain another document that is a regular deed of mortgage of the said immovable property.

19. In Gopal Sattu Tippe Vs. Dnyanu Maruti Khade, relied on by the respondent it was held that a mere agreement to mortgage cannot create any interest in the mortgaged property in favor of the party to whom the property is agreed to be mortgaged nor does it create any charge because an agreement to mortgage gives rise only to a personal obligation which does not constitute either a mortgage or a charge. The Apex Court in 1995 (2) All RCJ 401, Parmar Kanaksinh Bhagwansinh (dead) by LRs v. Makwana Shanabhai Bhikhabhai had held that leasehold of a tenant in a property does not merge in mortgage security of that property even if it is given to him by the landlord on a mortgage by a conditional sale as would debar the tenant from desisting the suit of the landlord/mortgagor for recovery of possession of such property by obtaining decree for redemption of the mortgage. It was held that if a lessee of a property takes a mortgage of the same property from the landlord it would be unreasonable to attribute to a tenant the intention to surrender the tenancy and to invoke the sophisticated doctrine of implied surrender.

20. Perusal of the agreement dated 22nd September, 1972 between Sh. Ved Prakash and Sh. Ajit Ram, predecessor of the petitioner it is apparent that Rs. 1700/- was given by Sh. Ajit Ram to Sh. Ved Prakash and it was agreed that Rs. 300/- shall be given before the sub Registrar for registration of the document by executant No. 1 that is Ved Prakash in favor of executant No. 2 Ajit Ram, predecessor in interest. There was no usufructuary mortgage/pledge as the agreement categorically stipulated that the mortgage was without possession. If the agreement was for mortgage without possession, then there will not be merger of rights of a mortgagee with the rights of the lessee nor the tenancy of the mortgagee who was not given possession as a mortgagee, will merge with

the tenancy rights so as to result in extinguishment of tenancy.

21. The respondents have also contended that agreement by Sh. Ved Prakash with Sh. Ajit Ram executed on 22nd September, 1972 was an agreement to execute the mortgage deed and it does not create a mortgage. The learned Counsel for the respondent has also contended that in any case there is no merger of the rights of late Sh. Ajit Ram as a lessee with his rights as a mortgagee. In any case these pleas and propositions were raised by the petitioner in the eviction petition filed against her u/s 14(1)(e) read with Section 25B of the Delhi Rent Control Act, 1958 and have been negated and the order of the Rent Controller negating the pleas and contentions of the petitioner, has been upheld in the revision petition filed in the High Court and the SLP filed by the petitioner which was dismissed.

22. The learned Counsel for the respondents have also contended that after the determination and rejection of the plea regarding the mortgage and the alleged rights of the lessee as a mortgagee to continue in possession on account of alleged merger and extinguishment of tenancy rights by the Additional Rent Controller in the eviction petition u/s 14(1)(e) of Delhi Rent Control Act, the petitioner does not have a right to file the objection u/s 25 of Delhi Rent Control Act.

23. Perusal of Section 25 of Delhi Rent Control Act reveals that the said provision contemplates that an eviction order which is passed against a tenant in respect of any premises is binding on all persons who may be in occupation of the premises and vacant possession thereof is to be given to the landlord by evicting all such persons there from. However, a proviso has been carved out which contemplates that the eviction order passed against a tenant shall not be applicable to a person who has some independent title to such premises. Consequently, the impact of the eviction order is clear even on persons who claim through the tenant either as sub tenants, licensees or otherwise who have been illegally inducted into the premises by such tenant because such persons would not have protection of the proviso against them as they have claimed through the tenant and, Therefore, would be bound by the eviction order passed against the tenant. The word "occupation" in Section 25 indicates physical occupation of the premises. Consequently, it does not indicate or imply any interest in or title to the premises or the lack of it in the occupant. The proviso is carved out only in respect of those persons who have interest or right to property independent of the title of the landlord himself and against whom the eviction order is not passed.

24. In the case of the petitioner the eviction order is passed against her and her plea that she had the rights as mortgagee and entitled to continue in possession was negated and the eviction order was passed and the revision petition filed by the tenant has been dismissed and even the SLP filed against the dismissal of her revision petition was also dismissed. Consequently, it cannot be held that the right of the petitioner is of such a person who has an independent title to said

premises. A fortiori the petitioner could not sustain petition u/s 25 of Delhi Rent Control Act in the present facts and circumstances as has been rightly held by the Rent Controller. The appeal of the petitioner against the dismissal of her objection was also dismissed by the Rent Control Tribunal.

25. Whether on account of alleged mortgage, the petitioner is entitled to retain possession or not has already been determined by the competent Court against the petitioner and, Therefore, the same point cannot be reagitated by the petitioner.

26. Considering the facts and circumstances the inevitable inference is that the decisions of the Additional Rent Controller and Rent Control Tribunal holding that the objections of the petitioner u/s 25 against whom an order of eviction had already been passed after hearing and deciding her plea to continue in possession on account of being a mortgagee, were not maintainable does not suffer from an error of law apparent on the face of the record nor the orders of the Rent Controller and the Rent Control Tribunal can be termed to be arbitrary, capricious or perverse or based on no material and suffer from patent or flagrant error resulting into any manifest injustice.

27. The petition is, Therefore, without merit and it is dismissed.