

(1984) 09 GUJ CK 0006
In the Gujarat High Court

Soni Amratlal Govindji and Another	Vs	APPELLANT
Soni Premchand Popatlal		RESPONDENT

Date of Decision : 27-09-1984

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 15, 15

Citation : (1985) 1 GLR 266

Hon'ble Judges : R.A. Mehta, J

Bench : Single Bench

Judgement

R.A. Mehta, J.—These two Second Appeals arise out of the common judgment in two Civil Appeals Nos. 55 and 56 of 1976 which arose out of the common judgment in Regular Civil Suits Nos. 136 and 137 of 1972 which were consolidated.

2. The respondent is the auction purchaser of the two suit premises (equity of redemption) which were mortgaged by the original, owner, Prabhatsinh with the present appellant No. 1 Amratlal Govindji, in the years 1962 (ex. 24) and 1964 (ex. 25). The plaintiff contended that he had paid the mortgage debt to the defendant No. 1, the mortgagee and the mortgage has been redeemed and inspite of such redemption the defendants have continued in possession without any right, title or interest and hence he prayed for a decree for possession against them.

3. The defendants contended that they were the tenants of the suit premises (western and eastern portion respectively) prior to the creation of the mortgage in favour of defendant No. 1 and, therefore, they continued to be the tenants even after the redemption of the mortgage and they cannot be required to hand over their possession as tenants except in accordance with the provisions of the Bombay Rent Act. The trial court dismissed both the suits, However, the lower appellate court has decreed both the suits.

4. In Second Appeal No. 477 of 77 the following substantial questions of law

have been formulated at the time of admission of the Second Appeal:

1. Whether upon redemption of the usufructuary mortgage the first appellant was entitled qua tenant (as he was prior to the creation of the mortgage) to the statutory protection and whether the respondent was therefore entitled in law to get only symbolical possession from him (the first appellant) and no decree could be passed for actual possession from him?

2. Whether upon the creation of the new relationship of a mortgage between the first appellant and the owner the tenancy rights of the first appellant were surrendered by operation of law or whether they were simply held in abeyance entitling the appellant to claim protection of his possession qua tenant upon redemption of the mortgage?

5. In Second Appeal No. 478 of 1977 the following substantial questions of law have been formulated at the time of admission of the Second Appeal:

1. Whether appellant inducted on the property by a previous mortgagee with possession and continued as such by the mortgage upon redemption is entitled to protection qua tenant upon the redemption of a subsequent mortgage under the provisions of the Bombay Rent Hotel and Lodging House Rates Control Act, 1947?

2. Whether on the facts and in the circumstances of the case the Second appellant's lease is binding on mortgagor after redemption of the first appellants mortgage entitled him to protection qua tenant.

6. The above questions arise on the following facts found by both the courts:

The first appellant took western portion of the suit premises on lease as a tenant from the original owner Prabhatsinh and he resided therein with his mother and brother (defendant No. 2). Thereafter on 4th October, 1949 the owner Prabhatsinh created a usufructuary mortgage in respect of the entire building in favour of one Chhotalal Premji for Rs. 2500/-. On 2nd December, 1954 Prabhatsinh redeemed the mortgage and created another usufructuary mortgage of the entire building in favour of Koli Jadav Megha for Rs. 2500/- (Rs. 150/- in respect of the eastern portion and Rs. 1000/- in respect of western portion). On 16th November, 1955 the widow of Jadav Megha sub-mortgaged the entire building for Rs. 2500/- by way of usufructuary mortgage to one Keshavlal Bhaishanker by mortgage deed ex. 64. Keshavlal Bhaishanker inducted appellant No. 2 Kantilal Govindji as a tenant in respect of the eastern portion at a monthly rent of Rs. 5/-.

7. On 22nd January 1962 the entire mortgage was redeemed by Prabhatsinh. At that time the first appellant was a sitting tenant in the western portion and the second appellant was the sitting tenant in the eastern portion. On the same day i.e. 22nd January, 1962, the owner, Prabhatsinh executed a third deed of usufructuary mortgage in respect of the western portion only, in favour of the first appellant for Rs. 650/-, by ex. 24. Therein it is stated that out of the

consideration of Rs. 650/-, Rs. 600/- has been paid directly for redeeming the property from Keshavlal Bhaishanker a sum of Rs. 30/- was already due to the tenant from the owner and, therefore only a sum of Rs. 20/- was paid in cash to the owner, who created the mortgage. The rent of this premises was Rs. 61- per month.

8. After 2 1/2 years on 6th August 1964 the owner Prabhatsinh created another usufructuary mortgage in favour of the first respondent in respect of the eastern portion for a sum of Rs. 500/-. At that time the second appellant Kantilal Govindji was continuing as a sitting tenant who was inducted as a tenant by the earlier mortgagee Keshavlal Bhaishanker.

9. It appears that there was a decree for partition against the owner Prabhatsinh in a suit between the family members and the entire building came to be sold in auction and the present plaintiff-respondent purchased the same on 29th August, 1970 subject to all the existing incumbrances.

10. The learned Counsel for the respondent had tried to show that Kantilal Govindji-appellant No. 2, was not a sitting tenant at the time of the execution of the mortgage of 1964 (ex. 25); because that document does not refer to any existing tenant. However, both the courts below, have found on evidence that he was a sitting tenant. The earlier mortgagee Keshavlal Bhaishanker has been examined at ex. 58 and he has stated that appellant No. 2 was the tenant inducted by him. Appellant No. 2 Kantilal Govindji is examined at ex. 59. He has also stated, that he was inducted by Keshavlal and even after the redemption of mortgage from Keshavlal by Prabhatsinh in 1962 he continued to be the tenant of Prabhatsinh and he was the sitting tenant in August 1964 when Prabhatsinh created the new mortgage by ex. 25. Prabhatsinh is also examined at ex. 62 and he has also admitted the tenancy of Kantilal Govindji. He has admitted that Kantilal Govindji being the sitting tenant at the time of creation of the mortgage ex. 24. Therefore the findings of facts recorded by the lower courts in this respect are supported by evidence and cannot be disputed in the present Second Appeals.

11. Thus it is clear that both the appellants were the tenants prior to the creation of the two mortgages. The question which arises is whether on: redemption of mortgage these tenants, who were already residing, can be required to hand over possession of the suit premises?

12. So far as the second appellant Kantilal Govindji is concerned, there is no question of his tenancy having been merged, surrendered or extinguished because of the creation of the mortgage in favour of the first appellant. Even though the second appellant Kantilal who was inducted on the property by a previous mortgagee with a possession he was continued as such by the mortgagor Prabhatsinh upon redemption of the mortgage of Keshavlal and therefore he is a tenant of Prabhatsinh and he is entitled to protection as a tenant on redemption of the subsequent mortgage created in 1964. Therefore,

answer to question No. 2 in S.A. No. 478 of 1977 is in the affirmative that, he is entitled to the protection of the Rent Act and he is not liable to be evicted in the present suit for possession. Since the tenancy of the second appellant was there existing prior to the mortgage it continues to be binding even after the redemption of the mortgage; because the second appellant-tenant is not concerned with the mortgage at all because he is not a mortgagee; he is not inducted by the present mortgagee and the original owner Prabhatsinh himself had continued him as a tenant from January, 1962 to August, 1964. Therefore, there is no question of he having liable to hand over possession on the redemption of the mortgage with the first appellant. Therefore, the Second Appeal No. 478 of 1977 deserves to be allowed and the suit against Kantilal Govindji for possession deserves to be dismissed.

13. As regards Second Appeal No. 477 of 1977, in so far as it concerns the mortgages himself, different questions arise. Here again the finding of the lower court and the admitted position is that he was the sitting tenant Since decades at monthly rent of Rs. 6/- in respect of the western portion and his tenancy was from the original landlord Prabhatsinh. In 1949 usufructuary mortgage was created in favour of Chhotalal Premji; in 1954 it was redeemed and again it was mortgaged to Koli Jadav Megha whose widow had sub-mortgaged to one Keshavlal Bhaishanker. The owner Prabhatsinh redeemed the entire mortgage from Keshavlal and Bai Uji on 22nd January, 1962. For, all these years for more than 25 years the first appellant had continued in possession as a tenant at a monthly rent of Rs. 6/-. This mortgage in favour of Keshavlal and Bai Uji was redeemed by paying Rs. 600/- and on the same day it was mortgaged to the tenant Amratlal himself for a sum of Rs. 650/-.

14. The learned District Judge held that in view of the judgment of the Supreme Court, in the case of Shah Mathuradas Maganlal and Co. Vs. Nagappa Shankarappa Malage and Others, the tenancy rights of defendant Amratlal were surrendered when he became mortgagee in possession of the demised premises, in that case the Supreme Court in para 11 observed that the deed of mortgage shows these features indicating that there was surrender or tenancy and the appellant was only a mortgagee. The High Court had also found that there was surrender of tenancy rights. The Supreme Court had observed that no particular form of words is essential to make a valid surrender which may be even oral-and the surrender may be immediately followed by a redelivery of possession of the mortgagee, but the Supreme Court held that delivery of possession by the tenant is the essential requirement. The Supreme Court held that in consideration of that mortgage deed tenancy was inconsistent with the continuance or subsistence of the lease and the Supreme Court based its conclusions on four circumstances : (i) the parties had them-selves stipulated that the lease was to exist only upto 6th November, 1953 (the mortgage deed was dt. 21st May, 1953). At the end of para 19 the Supreme Court observed that this feature shows that the appellant surrendered the tenancy from 7th November, 1952 and from that date onwards his possession was only as a mortgagee and not as a

tenant".; (ii) The second feature which appealed to the Supreme Court was that the mortgagee was given power to sub-let and the Bombay Rent Act as it stood in 1953 absolutely prohibited sub-letting and that led the Supreme Court to hold that the tenant is prohibited from sub-letting u/s 15 of the Bombay Rent Act and the Supreme Court held that the provision for sub-letting showed that the character of tenant was lost. After the amendment of Section 15 of the Bombay Rent Act in 1959 the absolute prohibition is gone and the provision is made for "subject to the contract to the contrary." Thus by an express contract I to the contrary even the tenant can be authorised to sub-let./

15. Therefore, merely because that power to let or sub-let is given, to the tenant who became mortgagee in possession cannot now be construed to show that the tenant has ceased to be a tenant because of such provision, for sub-letting in the mortgage deed, (iii) The third circumstance relied by the Supreme Court was that the mortgagor has to do repair work and also to undertake repairs. In the present case also the mortgagor is responsible for repair works but the mortgagee is also entitled to undertake the repair work but mortgagor is liable to pay all the costs of such repairs and improvements. Therefore this condition is similar in the present case as well as the case before the Supreme Court, (iv) The fourth, circumstance relied by the Supreme Court is that the possession was to be under the agreement. This circumstance has to be read along with the first circumstance, namely, that the lease itself stipulated that it was to exist only upto 6th November, 1953 and from 7th November, 1953 the tenancy stood surrendered and the possession became that of the possession of the mortgagee in possession under the deed of mortgage, From the Supreme Court judgment if is very clear that the mortgage was created on 21st May, 1953 yet the mortgagee continued to be tenant till 6th November, 1953 and there was neither merger nor surrender of the tenancy rights on execution of the usufructuary mortgage. Therefore, the Supreme Court judgment cannot be construed to mean that in every case of tenant becoming mortgagee, in possession there is surrender of his tenancy rights and his possession is only that of mortgagee in possession and the character of tenant is lost. In the present case, there is no stipulation whatsoever that lease was to exist upto a particular date or that on the date of the mortgage the tenant had surrendered his possession as a tenant and accepted possession as a mortgagee only. In view of the fact that he was a tenant at monthly rent of Rs. 6/- only since more than 25 years it is impossible to come to the conclusion that he had surrendered possession as a tenant and became only the mortgagee. Since he was the tenant of the western portion right from the time of Prabhatsinh since 25 years it is not possible to uphold the finding of the lower appellate court that the tenancy rights of the defendant Amratlal were surrendered when he became the mortgagee with possession; and therefore he is entitled to continue as a tenant and entitled to statutory protection of the Bombay Rent Act and the mortgagor or his successor in interest (the auction purchaser) is entitled to get only symbolic possession and not the actual possession and no decree can be given for actual possession. It is thus

clear that even though a new relationship of mortgagor and mortgagee was created, the tenancy rights of the first appellant were not surrendered by operation of law or by his entering into the transaction of mortgage and on redemption of that mortgage he continued to be the tenant protected by the Rent Act. Therefore, both substantial questions of law are required to be answered in favour of the appellant. Therefore, Second Appeal No.vl77 of 1977 is also required to be allowed and the suit is required to be dismissed.

16. In the result both Second Appeals are allowed and the judgments and the decrees of the lower appellate court are reversed and both suits of the respondents are dismissed. Second Appeals allowed with costs.