

GOPALAN KRISHNAN KUTTY

v.

KUNJAMMA PILLAI SAROJINI AMMA & ORS.

MARCH 13, 1996

[J. S. VERMA, S.P. BHARUCHA AND K. VENKATASWAMI, JJ.]

Mortgage :

Mortgage in favour of Lessee—Lease not surrendered—On expiry of Mortgage suit for redemption and recovery of possession—Allowed by Trial Court and Affirmed by High Court—On appeal—Held, No automatic merger of interest in the absence of proof of surrender—Not entitled to recover possession of leased lands—Restoration order set aside.

The Defendant (appellant) was a lessee. The Respondent (Plaintiff) executed a mortgage in favour of defendant (appellant). On expiry of the period of mortgage, the defendant filed a suit for redemption and recovery of possession of the premises. The Trial court passed preliminary decree granting redemption and directing recovery of possession from the defendant. The High Court dismissed the appeal of the defendant. Hence the present appeal.

Allowing the appeal, this Court

HELD : 1. The mere fact that the owner creates a mortgage in favour of the lessee is not by itself decisive to hold that the prior lease was surrendered and the possession of the earlier lease is only that of a mortgage on creation of the mortgage. The nature of possession is a question of fact in each case. [357-E]

2. Unless there was a surrender of the lessor's rights at the time of execution of the mortgage, the mortgagor would not be entitled to obtain delivery of physical possession upon redemption. The question whether there was surrender of the lease by the lessee at the time of execution of the mortgage in his favour by the lessor - mortgager is a question of fact to be answered on the evidence. [357-G; 358-B]

3.1 The High Court proceeded on the erroneous assumption that surrender of the Lease by the lessee (defendant) must be implied from the

fact of execution of the usufructuary mortgage in his favour by the lessor (plaintiff). It has to be decided on the contents of the deed since there is no other evidence of surrender of the lease by the defendant on execution of the mortgage. There is nothing in the mortgage to prove either an express or implied surrender of the lease by the defendant in favour of the plaintiff on execution of the mortgage deed. [358-C-D]

3.2. There is no automatic merger of the interest of the lessee with that of the mortgagee when the same person is a lessee as well as the mortgagee, in absence of proof of surrender of the lease by the defendant, on redemption of the mortgage the plaintiff is not entitled automatically to recover possession of the leased premises. The defendant's right to continue as a lessee therefore continued to subsist. [358-E]

Shah Mathuradas Maganlal & Co. v. Nagappa Shankarappa Malage & Ors., [1976] 3 SCC 660; *Gambangi Appalaswamy Naidu & Ors. v. Behara Venkataramanayya Patro & Ors.*, [1984] 4 SCC 382 and *Narayan Vishnu Hendre & Ors. v. Baburao Savalaram Kothawale*, [1995] 6 SCC 608, referred to.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4192 of 1994.

From the Judgment and Order dated 30.9.86 of the Kerala High Court in A.S. No. 100 of 1981.

S. Balakrishnan and S. Prasad for the Appellants.

P.S. Poti, Ms. Malini Poduval and K.M.K. Nair for the Respondents.

The Judgment of the Court was delivered by

J.S. VERMA, J. This appeal by special leave is by the defendant and it arises out of a suit for redemption of a mortgage. The appellant was the lessee in the premises which is a shop in which he was carrying on his bakery business from 1965. The plaintiff later executed a mortgage in favour of the defendant on 18.7.1974 for a consideration of Rs. 13,000. On expiry of the period of mortgage, the plaintiff filed a suit for redemption and recovery of possession of the premises. The defendant contested the claim for recovery of possession, *inter alia*, on the ground that his possession was that of a lessee, independent of the mortgage and even after

redemption of the mortgage the defendant was entitled to continue in possession under the lease. The Trial Court passed a preliminary decree granting redemption and directing recovery of possession from the defendant. The first appeal by the defendant has been dismissed by the High Court. Hence, this appeal by the defendant.

The High Court has held that there was surrender of the prior lease by the defendant on execution of the mortgage by the plaintiff in his favour; and that the defendant's possession of the premises at the time of mortgage being only as mortgagee, the defendant was bound to restore possession to the plaintiff on redemption of the mortgage.

In *Shah Mathuradas Maganlal & Co. v. Nagappa Shankarappa Malage & Ors.*, [1976] 3 SCC 660, the distinction between the rights of a lessee and a mortgagee was pointed out and the conditions for the merger of the two rights were indicated. It was held that surrender of a lease takes effect like a contract by mutual consent on the lessor's acceptance of the act of the lessee; and that there must be a taking of possession, not necessarily a physical taking, but something amounting to a virtual taking of possession. Whether this has occurred is a question of fact. Thus, the mere fact that the owner creates a mortgage in favour of the lessee is not by itself decisive to hold that the prior lease was surrendered and the possession of the earlier lessee is only that of a mortgagee on creation of the mortgage. The nature of possession, is a question of fact in each case.

In *Gambangi Appalaswamy Naidu & Ors. v. Behara Venkataramanayya Petro & Ors.*, [1984] 4 SCC 382, it was reiterated that the answer to the question whether upon redemption of usufructuary mortgage a tenant-mortgagee was required to deliver actual or physical possession of the mortgage property to the lessor-mortgagor must depend upon whether there was surrender of the lessee's right when the usufructuary mortgage was executed in his favour by the lessor-mortgagor; and this depends upon the intention of the parties at the time of execution of the mortgage deed in favour of the sitting tenant. Thus, unless there was a surrender of the lessor's rights at the time of execution of the mortgage, the mortgagor would not be entitled to obtain delivery of physical possession upon redemption.

Recently in *Narayan Vishnu Hendre & Ors. v. Baburao Savalaram Kothawale*, [1995] 6 SCC 608, these decisions have been followed and it has

been held that the doctrine of merger does not apply where tenanted premises are mortgaged in favour of the lessee. It has been held that implied surrender of the lease would not be readily inferred. It was reiterated that unless surrender of the lease was proved, the only effect of the mortgage was that the lessee's rights were kept in abeyance and it would revive upon redemption of the mortgage. It is, therefore, clear that in a case like this, the question whether there was surrender of the lease by the lessee at the time of execution of the mortgage in his favour by the lessor-mortgagor is a question of fact to be answered on the evidence.

The High Court, in the present case, proceeded on the erroneous assumption in law that surrender of the lease by the lessee. (defendant) must be implied from the fact of execution of the usufructuary mortgage in his favour by the lessor (plaintiff). As indicated, this is an erroneous assumption in law. This question has to be decided on the contents of the deed since there is no other evidence of surrender of the lease by the defendant on execution of the mortgage. We find nothing in the mortgage deed (Annexure A-1) dated 18th July, 1974 read with the release deed of the same date to prove either an express or an implied surrender of the lease by the defendant in favour of the plaintiff on execution of the mortgage deed. Since there is no automatic merger of the interest of a lessee with that of a mortgagee when the same person is the lessee as well as the mortgagee, in absence of proof of surrender of the lease by the defendant, on redemption of the mortgagee, the plaintiff is not entitled automatically to recover possession of the leased premises. The defendant's right to continue in possession as a lessee, therefore, continues to subsist.

Accordingly, the appeal is allowed. The judgments and decrees of the Courts below to the extent they direct restoration of possession by the defendant to the plaintiffs are set aside. The defendant-appellant would get his corresponding costs throughout from the plaintiff-respondents.

Appeal allowed.