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Court : Rajasthan

Decided On : Dec-06-1962

Reported in : AIR1963Raj110

Judge : I.N. Modi, J.

Acts : [Transfer of Property Act, 1882](#) - Sections 60 and 111; ;Rent Control Act

Appeal No. : Second Appeal No. 219 of 1961

Appellant : Dhulilal

Respondent : Pannalal

Advocate for Def. : Chandmal, Adv.

Advocate for Pet/Ap. : C.L. Agrawal, Adv.

Disposition : Appeal dismissed

Judgement :

I.N. Modi, J.

1. This is a defendant's second appeal in a suit for redemption of mortgage and arises in circumstances presently to be mentioned.

2. The plaintiff's case was that he had made a usufructuary mortgage ;of the suit shop, the boundaries whereof have been fully described in paragraph one of the plaint, as a security for a loan of Rs. 1500/- taken by him from the defendant on the 3rd August, 1945, vide Ex. 1. I shall refer to the conditions of this mortgage at the proper place. Suffice it to state at this place that the plaintiff asked the defendant to give redemption of the suit property but without any avail, and, consequently, he instituted the suit, out of which the present appeal arises, on the 30th July, 1959, in the Court of the Musiff Kotah. The defendant admitted the mortgage but he denied that the plaintiff had ever offered the redemption money to him. His principal contention, however, was that the plaintiff was in no case entitled to get possession, of the shop because on the 3rd August, 1945, when it had been mortgaged to him, he was in occupation of it as a tenant from the plaintiff and that tenancy had never been terminated.

The trial Court held that the plaintiff was entitled to redeem the mortgage on payment of Rs. 1500/- into the Court but it further held that the plaintiff would not be entitled to get possession thereof inasmuch as there was a previous relationship of landlord and tenant between the parties and it having remained in abeyance during the subsistence of the mortgage was bound to revive and the parties would revert to their former status. The plaintiff then went up in appeal to the learned District Judge Kotah who allowed the appeal and held that the plaintiff shall be entitled to get back possession of the mortgaged shop as well. The learned District Judge acted on the principle that as soon as the parties entered into the transaction of mortgage in this case having regard to the terms of the mortgage, the old relationship of landlord and tenant between them was terminated by an implied surrender within the meaning of Clause (f) of Section 111 of the Transfer of Property Act, and thereafter the only relationship in which they stood with each other was that of a mortgagor and a mortgagee and on redemption of mortgage, therefore, the plaintiff should be held entitled not only to get back the documents relating to his title which he had handed over to the defendant at the time of the mortgage but he was also entitled to get back actual possession of the property under mortgage. Aggrieved by this decision, the defendant has come up in second appeal to this Court.

3. The only question which, therefore, falls for determination in this appeal is whether the finding of the learned District Judge that there was an implied surrender of tenancy rights on the part of the defendant as soon as he acquired the status of a mortgagee with respect to the property in question is well-founded. Learned counsel for the defendant appellant has strenuously contended that it is not, and places his chief reliance on a decision of the Allahabad High Court in *Kallu v. Diwan*, ILR 24 All 487. This decision in its turn relied on a decision of Burkitt J. of the same High Court in second appeal No. 122 of 1898 decided on the 20th December, 1898 (All), in which it had been held that no extinction of tenancy rights could take place upon the grant of a usufructuary mortgage to an occupancy tenant by his landlord. To use the words of Burkitt J., if the extinction of tenancy rights was brought about in such a case on the redemption of mortgage, the result would be that the occupancy tenant would be in a much worse position after his possession as mortgagee had ceased than before, and such a result could not be assented to. The point to be noted is that in the case before Burkitt J. the person in whose favour the mortgage came to be made was an occupancy tenant of the land under mortgage.

The learned Judges in *Kallu's* case. ILR 24 All 487 (*supra*) seem to have extended the doctrine upheld by Burkitt J. so as to govern cases of tenancies of even less durable character. With all respect, it is not quite easy to see any sound justification for such an extension. For, in my opinion, the case of occupancy tenants, or of tenants of a like category whose rights of tenancy are invested with a security of tenure under the revenue laws in force in our country does stand on a distinctly different footing from that of non-occupancy or like tenants inasmuch as the policy of our tenancy legislation, broadly speaking, is to grant protection from eviction to the former class of tenants and, therefore, the Courts do not look with favour upon loss or extinction of such tenancy rights except under clear and compelling provisions of law to that effect. But it is a question whether the same considerations should apply to tenancies of less durable character whether relating to agricultural or residential land. And in this connection, my attention has been drawn to a number of cases which I do not consider it necessary to discuss at length but the effect of which may be described somewhat as follows.

4. Whenever a certain relationship exists between two parties in respect of a certain property and thereafter a new relationship arises between them as respects that very property and if the two kinds of relationships are incompatible and therefore cannot co-exist, then it must be held that the prior relationship was impliedly surrendered when the latter came into operation. See *Velu v. Lekshmi*, AIR 1953 Trav-Co. 584. See also *Meenakshi Amma v. K.V. Narayani*, (S) AIR 1957 Mad 212 in which the decision in ILR 24 All 487 (*supra*) was adversely criticised and not followed, and *Venkayya v. Subbarao*, AIR 1957 Andh Pra 619 and *G. Valia Raja v. T. Vareed*, AIR 1961 Kerala 293. This rule seems to be subject to an exception, and that is that where a tenant possesses rights of a more or less permanent character, the loss or extinction thereof is not favoured in law, and in this type of case it has been held that there will be a suspension of such tenancy rights and no surrender thereof and the tenancy-right will, as it were, be re-vivified when the other relationship does come to an end. The case before *Burkitt, J.* referred to above aptly illustrates this exception.

5. If I may say so, with respect, I am in entire agreement with the principles propounded above.

6. The further question then is: how do these principles apply to the present case? In other words, whether the earlier relationship of landlord and tenant and the subsequent one of mortgagor and mortgagee were or were not compatible with each other in this case. On giving my careful and anxious consideration to this question, I have, on the whole, arrived at the conclusion that the enjoyment under the two relationships was not compatible to enable them to exist side by side as the following analysis of the two positions would show.

7. In the first place, under the contract of tenancy, it is admitted that the defendant was or would have to pay a sum of Rs. 8/8/- per month as rent to the plaintiff, while under the transaction of mortgage, which was subsequently entered into between the parties, it was agreed that the plaintiff would not pay any interest on the sum of Rs. 1500/- borrowed by him from the defendant (partly as balance of an old account and partly in cash) and the defendant was not required to pay any rent whatever. These two stipulations one under the contract of tenancy and the other

under the contract of mortgage would hardly coexist at one and the same time. In the second place, it was agreed in Ex. 1 that the mortgagor was mortgaging the property for a period of ten years and that he will have no right to redeem it before the limit of ten years. In other words, the defendant was given a right to remain in occupation of the shop for a period of ten years certain under the mortgage. But what was his right of occupation under the contract of tenancy? The property was situate in the town of Kotah and it was not governed by any Rent Control Act. The tenancy being an ordinary monthly tenancy was terminable at any time, and, as stated by the learned District Judge, no notice for the termination of the tenancy was even necessary as the Transfer of Property Act was not in force at the time of the commencement of the tenancy in the area from which this case has arisen. That being so, it is clear that while under the contract of tenancy, the defendant had no right to remain in occupation of the shop in question, save at the pleasure of the plaintiff, the defendant, under the contract of mortgage, acquired a right to remain in occupation of it for at least a period of ten years. It is obvious that these two positions are utterly inconsistent with each other.

8. In the third place, it was further stipulated in the deed that after the completion of ten years, the plaintiff would be entitled to redeem his shop on paying the entire redemption money to the defendant. The plain meaning of this stipulation is that on receiving the redemption money at the end of ten years, the defendant will hand over possession to the plaintiff. It was contended by learned counsel that this stipulation as to redemption did not necessarily involve the delivery of possession, and that it should stand satisfied even if the defendant gave symbolic possession by attorning and paying rent to him once again as he used to do before. I am unable to accept this contention as correct.

The right of a mortgagor to redeem is defined by Section 60 of the Transfer of Property Act, and a reference to that section will clearly show that the right to redeem means that on payment or tender of the mortgage money at a proper time and place to the mortgagee, the latter, among other things, shall return (1) all documents relating to the mortgaged property which may be in his possession or power and (2) where the mortgagee is in possession of the mortgaged property, shall deliver possession thereof to the mortgagor. In other words, the right of

redemption properly connotes getting back possession of the property where it was in the possession of the mortgagee. It seems to me therefore that this condition was and is also inconsistent with the right of the defendant to remain in possession of the mortgaged property even after it had been redeemed by the plaintiff.

9. No fault in these circumstances can be found, in my view, with the finding of the learned District Judge that the two relationships namely (1) of landlord and tenant and (2) of mortgagor and mortgagee, as analysed above could not stand side by side or co-exist and therefore the earlier relationship of landlord and tenant must be held to have been impliedly surrendered when the subsequent one of mortgagor and mortgagee arose for operation. I should also like to add that this is not a case where the tenant had any permanent right of occupation under the terms of the tenancy. indeed his right of tenancy was terminable by mere demand for possession, and, therefore, this case does not fall within the exceptional type of case exemplified in the decision of Burkit, J. to which I have made reference above.

10. Before I conclude this judgment, I should like to briefly deal with the decision of a learned Single Judge of the Madhya Pradesh High Court in Motilal v. Gopikrishna, 1961 MPLJ 66, which was submitted to me by learned counsel for the defendant appellant when I had almost finished dictating my judgment. Leaving aside the actual decision to which the learned Judge came, on the facts of the case before him, which was entirely his own concern, he seems to me to have clearly accepted the principle which I have enunciated in the foregoing part of my judgment, namely, 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 relationships cannot coexist as being inconsistent and incompatible and the latter can come into effect only on the termination of the earlier that would be deemed to have been terminated in order to enable the latter to operate. See page 68 of the Report. And as for the rest, if I may say so, with all respect, it will depend upon the facts and circumstances of each case whether the enjoyment under two such relationships is consistent with each other, and no hard and fast rule can be laid down which should be held

applicable to all cases.

I should further like to add that the correct test in such cases is not whether there is an inherent impossibility in a person occupying two positions at one and the same time, namely, a mortgagee in possession and a lessee but whether the enjoyment under the two contracts is inconsistent with each other or not. Where it is, having regard to the terms of both of them, then, to my mind, the only proper conclusion to come to would be that when the subsequent relationship arose, the earlier one must *ex necessitate rei* be treated as having come to an end on the doctrine of implied surrender as contained in Section 111(f) of the Transfer of Property Act. With all respect, therefore, I have not felt persuaded, having regard to the clearly inconsistent nature of enjoyment under the two positions between the parties as analysed above to hold that the decision in Motilal's case, 1961 MPLJ 66 (*supra*) should rightly govern the present one.

11. For the reasons mentioned above, this appeal fails and is hereby dismissed with costs. Leave to appeal is refused.

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