MATHURALAL

v.

KESHAR BAI AND ANOTHER

February 20, 1970

[S. M. SIKRI, V. BHARGAVA AND G. K. MITTER, JJ.]

Mortgage—Mortgagee given possession of mortgaged house—Leasing house to mortgagor under rent note executed simultaneously with mortgage deed—Preliminary decree passed in suit for enforcement of mortgage—Application for final decree time barred—Subsequent suit for ejectment of mortgagor filed by mortgagee whether maintainable—Rights of mortgagee whether merged in preliminary decree—Relevance of Limitation Act, 1908, *s.* 28.

On July 29, 1945 the predecessor-in-interest of the appellant mortgaged his house in Ratlam to K for a sum of Rs. 3,100 with possession. According to the deed of mortgage interest would run on the said sum at Rs. 0-10-0 per cent per annum till realisation. The period of redemption was two years. Simultaneously with the mortgage a rent note was executed by and between the parties under which the mortgagor was to continue to occupy the premises at a rental of Rs. 20/- per month. The rent note provided *inter alia* that if the executant (*i.e.* mortgagor) made default in payment of two months' rent the mortgagee would be entitled to get him evicted. The mortgagee was also entitled to increase or decrease the rent and the executant was to vacate the house whenever asked to do so. K filed a suit on his mortgage in 1954 and a preliminary decree was passed in his favour. On his death his legal representatives were substituted in his place on record. For some reason no application for a final decree for sale of the property was made within the period fixed under the Limitation Act. The application for this purpose made by the executors to the estate of K was dismissed on July 29, 1960 as barred by limitation. On December 27, 1960 the said executors filed a suit for ejectment of the appellant alleging that the rent for the premises had remained unpaid from September 19, 1957 till November 28, 1960. The trial judge dismissed the suit. In first appeal the plaintiff's claim was allowed in full. The High Court in second appeal maintained the decree of the appellate court. Appeal by special leave was filed in this Court against the High Court's judgment. It was contended by the appellants that : (i) The rent note executed simultaneously with the mortgage was a mere device to secure payment of interest and did not represent an independent transaction. Further it did not create any relationship of landlord and tenant; (ii) The plaintiffs' right as mortgagee merged in the decree and execution thereof being barred by the laws of limitation the plaintiffs had lost all their rights; (iii) The mortgage being extinguished the mortgagor could not bring a suit for redemption on account of s. 28 of the Limitation Act, 1908.

HELD : The appeal must be dismissed.

(1) The contents of the documents executed by the parties showed that the relationship between the parties was not simply that of a mortgagee and mortgagor—the creditor also had the rights of a landlord *qua* his tenant besides other rights conferred on him which were greater than those possessed by an ordinary landlord. [728 F]

In all such cases the leasing back of the property arises because of the mortgage with possession. It cannot however be held that the mortgagee

A does not secure to himself any rights under the deed of lease but must proceed on his mortgage in case the amount secured to him under the deed of lease is not paid. If the security is good and considered to be sufficient by the mortgagee there is no reason why he should be driven to file a suit on his mortgage when he can file a suit for realisation of the moneys due under the rent note. The position of the creditor is strengthened where as in the present case, the interest on the amount of the B mortgagee is not the same as the rent fixed. If during the continuance of the security the mortgagee wanted to sue the mortgagor on the basis of the rent note and take possession himself or to induct some other tenant thereby securing to himself the amount which the mortgagor had covenanted to pay, there could be no legal objection to it. Under the provisions of O.34 r. 4 of the Code of Civil Procedure he could deprive the mortgagor of his right to redeem excepting by proceeding on his mortgage. It may be (without a final opinion being expressed on the point) that a mort- C gagee who secured decree for payment of rent cannot put the property to sale for realisation of the amount decreed, but there cas be no objection to his suing for possession if the rent note entitles him to do so. So long as the mortgagor has a right to redeem the mortgage he can always pay off the mortgagee and get back possession. This position would continue so long as the property is not sold under a final decree for sale under the provisions of O. 34 C.P.C. [732 D-G]

D *Lalchand* v. *Nenuram,* I.L.R. 12 Rajasthan, 947, approved.

Harilal Bhagwanji v. *Hemshanker,* A.I.R. 1958 Bombay 8, *Ramnarain* v. *Sukhi,* A.I.R. 1957 Patna 24, *Umeshwar Prasad* v. *Dwarika Prasad,* A.I.R. 1944 Patna 5, *Ganpat Ruri* v. *Mad. Asraf Ali,* A.I.R. 1961 Patna 133 and *Jankidas* v. *Laxminarain,* I.L.R. 7 Rajasthan 268, referred to.

(ii) Since the mortgagee had only lost his right to recover the money E by sale of the mortgaged property, his security otherwise remaining intact, and the mortgagor also continued to have his right to redeem the property, the contention on behalf of the appellant that the rights of the mortgagee merged in the preliminary decree could not be accepted. [732 H]

(iii) If the mortgagee had an independent right on the strength of the rent note which continued to be in force notwithstanding that the period for a final decree for sale had expired, there could be no extinc- F tion of his right to sue for possession because of s. 28 of the Limitation Act. [733 C]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 774 of 1967.

Appeal by special leave from the judgment and order dated February 6, 1970 of the Madhya Pradesh High Court in Second G Appeal No. 327 of 1963.

D. N. Mukherjee, for the appellant.

Janardan Sharma, for the respondents.

The Judgment of the Court was delivered by

H **Mitter, J.** This is an appeal by special leave from a judgment of the Madhya Pradesh High Court dated 6th February 1967 dismissing a Second Appeal by the appellant before this Court against

a decree passed by the Additional District Judge of Ratlam for ejectment of the appellant from a house mortgaged by the predecessor-in-interest of the appellant to one Kesharimal for Rs. 3,100 and further decreeing a claim for arrears of rent amounting to Rs. 731-35 and mesne profits at the rate of Rs. 20 per month until eviction. A

The relevant facts are as follows. On July 29, 1945 Mathuralal, predecessor-in-interest of the appellant, mortgaged his house in Ratlam to Kesharimal for a sum of Rs. 3,100 with possession. The deed of mortgage contained the following terms :— B

1. That interest would run on Rs. 3,100 at Rs. 0-10-0 per cent per mensem till realisation. C

2. The period of redemption would be two years.

3. During the period of mortgage "the tenant as may be shall execute the rent notes in favour of the mortgagee and whatever rent shall be realised will be credited in lieu of interest and if the amount of rent shall exceed the amount of interest, the difference shall be deducted from the original sum due, but if the amount of interest shall exceed the amount of interest, the difference shall be deducted from the original sum due." But if the amount of interest shall exceed the amount of rent, then the mortgagor shall pay it. D

4. Notwithstanding any vacancy during the period of the mortgage the rent would continue. E

5. During the period of the mortgage an account of the rent and interest shall be settled after every six months.

6. The mortgagor undertook to keep the house in repairs during the period of the mortgage and in default of repairs by him the mortgagee was to be entitled to execute the necessary repairs and add the cost to his dues. F

7. "The burden of the mortgage money shall be on the mortgaged house. In case the amount is not realised from the house, the moragagee shall have a right to take steps to realise his money" from the mortgagor and his property of every kind. G

On the same day the mortgagor executed another document in favour of the mortgagee reciting that his house in Ratlam was mortgaged with possession to the creditor who was "having its possession" and the mortgagor had taken the same on rent at Rs. 20 per month on the following terms :—

1. The executant would pay the rent every month regularly and in default of payment of two months' rent the mortgagee would be entitled to get him evicted. H

A 2. The executant would white-wash and repair the house and keep it in good condition.

3. Kesharimal would be entitled to increase or decrease the rent.

4. The executant would vacate the house whenever asked to
B do so.

5. The executant would hand over possession of the house in the same condition in which he had received it.

Kesharimal filed a suit on his mortgage in 1954 and a preliminary decree for sale for the amount of Rs. 5,637-6-0 besides inte-
C rest at the rate of Rs. 0-10-0 per cent per mensem for six months on the sum of Rs. 3,600 was duly passed. The defendant was directed to pay the full amount of the decree before the 24th May 1955 and in case of his doing so the property was to be released from the mortgage and the plaintiffs were to hand over all the documents which they had in their possession, but in case of failure
D to pay the plaintiffs would be entitled to file an application for the execution of the decree and get the property auctioned; and in case of non-satisfaction of the decree by the sale, the plaintiffs were to be at liberty to recover the balance of the decretal claim by a personal decree against the defendant.

E It appears that Kesharimal had died during the pendency of the suit and his legal representatives were brought on record and the preliminary decree passed in their favour. Whatever be the reason no application for a final decree for sale of the property was made within the period fixed under the Limitation Act. The application for this purpose made by the executors to the estate of Kesharimal was dismissed on July 29, 1960 as barred by limitation. On
F December 27, 1960 the said executors filed a suit for ejectment against the appellant alleging that the rent for the premises had remained unpaid from September 29, 1957 till November 28, 1960. An amount of Rs. 731-75 was arrived at by totalling the rent for the period mentioned and mesne profits from 29th November 1960 to 26th December 1960 at the same rate and incidental charges and
G expenses and deducting therefrom the rent for two months which was barred by the lapse of time the plaintiffs asked for a decree for ejectment and further mesne profits. The trial Judge dismissed the suit. But on appeal this was set aside and the plaintiffs' claim allowed in full. The High Court in Second Appeal maintained the decree of the appellate court.

H The points urged by counsel for the appellant before us were :

1. The rent note executed simultaneously with the mortgage was a mere device to secure payment of interest and did not record

an independent transaction. Further it did not create any relationship of landlord and tenant. A

2. The plaintiffs' right as mortgagee merged in the decree and execution thereof being barred by the laws of limitation the plaintiffs had lost all their rights.

3. The mortgage being extinguished the mortgagor could not bring a suit for redemption. B

Before examining the contentions urged we propose to note the substance of the two documents and what the parties sought to achieve thereby. It is clear that the mortgage was with possession of the house and that the mortgagee wanted to make sure of Rs. 20 per month irrespective of the fact as to whether the mortgagor or some other person occupied the house and notwithstanding any vacancy during the period of the mortgage. The sum of Rs. 20 per month which the mortgagee wanted to ensure payment of every month exceeded the interest stipulated for by Rs. 0-10-0 per month. There was to be no decrease in this amount even if the mortgagor were to repay a portion of the principal. The mortgagee had further the right to increase or decrease the rent and the mortgagor covenanted to vacate the property whenever the mortgagee asked for possession. In other words if the mortgagee chose to go into possession himself, the mortgagor would be entitled to have Rs. 20 p.m. credited towards the dues on the mortgage so long as he continued in possession. Even during the period of redemption when the mortgagee could not have sued for the mortgage money he still had a right to evict the mortgagor in case the latter defaulted in payment of Rs. 20 a month for two months. C D I

It would appear that the relationship between the parties was not simply that of a mortgagee and mortgagor : the creditor also had the rights of a landlord *qua* his tenant besides other rights conferred on him which were greater than those possessed by an ordinary landlord. There can be no doubt that by leasing the property back to the mortgagor in the way mentioned above the mortgagee tried to ensure the regular payment of interest but his rights were not limited to that alone. In case he decided to go into possession himself the only remedy left to the mortgagor was to sue for redemption. This right under the Limitation Act of 1908 was to enure for 60 years from the date of the mortgage and the mortgagor had not lost his right to redeem notwithstanding the passing of the preliminary decree in the mortgage suit. The mortgage security continued even after the passing of the said decree : if the mortgagee had continued in possession of the property after the passing of the preliminary decree and did not apply for a final decree, he would only lose his right to recover the mortgage money F G H

A by sale of the property unless he applied for that purpose within the period of limitation fixed by the Limitation Act. After the mortgagee had lost his right to apply for a final decree for sale, he did not lose his status as a mortgagee : he only lost his remedy to recover the mortgage money by sale. The mortgagor did not lose his right to redeem.

B

We may now examine the authorities which were cited at the Bar in aid of the respective contentions. In aid of his first proposition Mr. Mukherjee relied principally on the decisions of the Bombay High Court in *Harilal Bhagwanji* v. *Hemshanker*(1) and *Ramnarain* v. *Sukhi*(2). The facts of the Bombay case were as C follows. The defendant-appellant mortgaged with possession the house in suit for Rs. 7,500/- on August 23, 1952. Under the deed of mortgage the principal amount was to carry interest at 9% and both principal and interest were charged on the mortgaged property. A portion of the house was already in the occupation of the plaintiff as the defendant's tenant on a monthly rental of Rs. 15 and D another portion was let out to one Mansukhlal at the rate of Rs. 17 p.m., the defendant himself occupying the remaining part of the house. Simultaneously with the mortgage a rent note was executed on the same day in respect of the portion of the house in the defendant's occupation which was leased back to him by the plaintiff for a term of six months at the rate of Rs. 24-4-0 per month. The plaintiff sued the defendant for possession of the said portion E and for arrears of rent on the strength of the rent note. The defence was that the rent note was a nominal document executed for securing payment of interest and that no relationship of landlord and tenant was created. It was contended that the principal money and interest were to be realised from the mortgaged property and a suit for rent alone which was in reality interest would not lie. It F was held by the High Court that the fact that the two documents had varying periods of operation would not make any difference in the determination of the question as to whether they formed part of the same transaction or not. Further the rent to be realised from the tenant Mansukhlal was to be credited towards interest and the significant circumstance was that the rent payable by the defendant G under the rent note was fixed with a view to making up the interest on the mortgage sum at 9%. Although the mortgage deed recited that the plaintiff could let out the property to anyone he liked but as the property was already wholly occupied, the High Court took the view that the question of leasing it out to another tenant was not in contemplation of the parties. As a result of the above findings the court held that the rent note was a mere device for securing H payment of interest. Reliance was placed on *Ramnarain* v. *Sukhi*(2) and it was held that although the decree for eviction of

(1) A. I. R. 1958 Bombay 8. (2) A.I.R.1957 Patna 24.

the defendant from the suit property could not stand, that awarding arrears of rent was to be maintained. A

In *Ramnarain* v. *Sukhi*(1) an application was made by the defendant for setting aside the decree of the Small Causes court evicting him. The defendant had executed a usufructuary mortgage in favour of the plaintiff and by a *kerayanama* executed on the same day had taken back the house on a rent of Rs. 6 per month from the plaintiff. He had not paid any rent for over three years and the suit was brought for recovery of arrears of rent for the said period. It was his contention that the agreement between the parties was not for execution of a usufructuary mortgage but one of a simple mortgage. It was further contended on his behalf that the mortgage and the *kerayanama* were one and the same transaction and no relationship of landlord and tenant was created and the *ijara* term having expired the plaintiff's remedy to recover the house rent which represented the interest the mortgage money could only lie under s. 68 of the Transfer of Property Act. The High Court referred to several decisions and came to the conclusion that the intention of the parties was that the mortgagee would not get possession of the mortgaged property but would only get interest on the amount advanced in the shape of rent so long as the lease continued and the amount payable under the *kerayanama* was interest on the mortgage money and not rent for use and occupation of the mortgaged property. The mortgage bond and the *kerayanama* being part of the same transaction the mortgagee in execution of his decree for money obtained in respect of the so-called rent of the house against the mortgagor would not be entitled to execute the decree for arrears of rent by sale of the property, as such a case would be governed by O. 34 R. 14 Civil Procedure Code. In the result the claim of the creditor in excess of 9% p.a. was rejected but as the defendant had been in occupation of the house, although under an invalid lease, he was directed to pay compensation to the plaintiff for use and occupation of the house for the period of his occupation. B C D E F

Reference may also be made to the case of *Umeshwar Prasad* v. *Dwarika Prasad*(2). In this case the mortgagor executed a usufructuary mortgage of certain properties for Rs. 14,400 for a period of seven years. Soon thereafter the mortgagee leased back the entire property to the mortgagor for a period of about seven years at the annual rent of Rs. 432 which was equal to the interest on the sum advanced. It was held by the Patna High Court that the mortgage bond and the lease deed were parts of the same transaction and the fact that the periods of the two deeds were not identical was immaterial and the case was governed by O. 34 r. 14 G H

(1) A.I.R. 1957 Patna 24. (2) A.I.R. 1944 Patna 5.

A and as such the mortgagee could not execute the decree for arrear of rent by sale of equity of redemption.

In *Ganpat Ruri* v. *Md. Asraf Ali*(1) the plaintiff had filed a suit claiming arrears of rent at the rate of Rs. 20 per month in respect of a house which had been given to him by the defendant in B usufructuary mortgage by a registered document, the property being let out to the defendant on lease on the same day at the monthly rent of Rs. 20. Applying the test as to whether on a reasonable construction of the two documents the property given in security was not only for the principal amount secured under the bond but also for the interest accruing thereupon, the court held that the C transactions were two different transactions and for this reliance was placed on the fact that no rate of interest was prescribed in the bond and Rs. 20 p.m. could not possibly be treated as interest due on the principal amount of Rs. 500.

In contrast with the above cases reference may be made to the D case of *Jankidas v. Laxminarain*(2). In this case the plaintiffs who were usufructuary mortgagees of a house gave a lease of it to the defendant mortgagor on rent and put the lessee in possession thereof on the same day. The rent remaining unpaid the plaintiff filed a suit for arrears of rent and ejectment. Ultimately however the High Court of the former State of Marwar granted a decree for arrears of rent but refused the prayer for ejectment. The E plaintiff thereupon filed the suit in 1953 claiming arrears of rent amounting to Rs. 126/- for three years preceding the date of the suit. The suit was resisted by the defendant who, among other pleas, contended that the suit was barred by O. II r. 2 C.P.C. There was said that although the mortgage and the deed of lease represented one transaction that would not mean that no tenancy F came into existence by the execution of the deed of lease. It was held that the right which arose to the mortgagees to sue for rent was an independent obligation though it might be part of the same transaction in the sense that it was brought into existence by an arrangement made at the same time for a common purpose.

G In *Lalchand* v. *Nenuram*(3) the defendants had executed a mortgage in favour of the plaintiffs agreeing to pay interest at 8% p.a. which came to Rs. 27-8-0 per month. The mortgagors had delivered possession to the mortgagees and a registered *qabuliat* reciting that they were taking on lease the property described at a monthly rental of Rs. 27-8-0. The lower courts took the view that the mortgage deed was a rent note and part and parcel of the same H transaction and the plaintiffs were not entitled to get a decree for

(1) A.I.R. 1961 Patna 133. (2) I.L.R. 7 Rajasthan 268.
(3) I.L.R. 12 Rajasthan 947.

ejectment on the basis of the rent note. Rejecting this the Rajasthan High Court observed at p. 952 : A

> "Whether the two documents represent one transaction or two different transactions, a court of law should be anxious to give effect to the terms in both the documents instead of being unduly critical about them. . . . Having secured the possession of the mortgage, the mortgagee is further entitled to lease it out even to the mortgagor. It is in the interest of the mortgagor that the property is leased out to him as he can better look after it. There is nothing objectionable in this, nor is there any statutory prohibition for such transactions. Now if the parties do this by executing proper documents, it is the duty of the court of law to give effect to them." B C

The reasoning of the Rajasthan judgment seems to be logical and commends itself to us. In all such cases the leasing back of the property arises because of the mortgage with possession but we find ourselves unable to hold that the mortgagee does not secure to himself any rights under the deed of lease but must proceed on his mortgage in case the amount secured to him under the deed of lease is not paid. If the security is good and considered to be sufficient by the mortgagee there is no reason why he should be driven to file a suit on his mortgage when he can file a suit for realisation of the moneys due under the rent note. The position of the creditor is strengthened where as in this case the interest on the amount of the mortgage is not the same as the rental fixed. If during the continuance of the security the mortgagee wants to sue the mortgagor on the basis of the rent note and take possession himself or to induct some other tenant thereby securing to himself the amount which the mortgagor had covenanted to pay, there can be no legal objection to it. Under the provisions of O. 34 r. 4 he cannot deprive the mortgagor of his right to redeem excepting by proceeding on his mortgage. Although we express no final opinion on this point it may be that a mortgagee who secures a decree for payment of arrears of rent cannot put the property to sale for realisation of the amount decreed but there can be no objection to his suing for possession if the rent note entitles him to do so. So long as the mortgagor had a right to redeem the mortgage he can always pay off the mortgagee and get back possession. This position would continue so long as the property is not sold under a final decree for sale under the provisions of O. 34 C.P.C. D E F G

In our opinion the second contention put forward on behalf of the appellant has no force. The rights of a mortgagee do not merge in his rights under the preliminary decree for sale. As already mentioned, the mortgagee lost his right to recover the money H

A by sale of the mortgaged property; otherwise his security remained intact and the mortgagor continued to have his right to redeem the property.

As regards the third point the only statutory provision to which a reference was made was section 28 of the Limitation Act of 1908 B which provided that :

> "At the determination of the period hereby limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished."

If the right of the mortgagee arose on the strength of the rent note C which continued to be in force notwithstanding that the period for applying for a final decree for sale had expired, there could be no extinction of his right to sue for possession because of s. 28 of the Limitation Act.

In the result the appeal fails and is dismissed with costs.

G.C. *Appeal dismissed.*