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CHERIYAN SOSAMMA AND ORS.

v.

SUNDARESAN PILLAI SARASWATHY AMMA AND ORS.

JANUARY 20, 1999

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[S. SAGHIR AHMAD AND M.B. SHAH, JJ.]

Transfer of Property Act, 1882 :

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Usufructuary mortgage—Execution of—In favour of wife of lessee of same property—Merger of lease and mortgage—Arising of—Lease agreement intended to be continued despite execution of mortgage deed—Lessee and mortgagee lived together as husband and wife—Held : There is no automatic merger of interest of lessee with that of the mortgaged property upon redemption of mortgage—There is no automatic surrender of lease and, therefore, mortgagor is not entitled to delivery of physical possession of property upon redemption of mortgage—Implied surrender of the lessee's rights would depend upon the intention of parties at the time of execution of the mortgage deed—Lessee was the husband of the mortgagee and were living together—Reasonable inference that the transaction was really entered into by the deceased -lessee, though in the name of his wife.

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The respondent-owner leased his property in favour of the husband of the appellant by executing lease deeds. Thereafter, usufructuary mortgage deed was executed in favour of the appellant. Both the appellant and her husband were living together and continued to do so till the death of the husband. From the recitals in the mortgage deed it was apparent that the parties unequivocally and without any reservation intended that the leasehold rights of the husband were kept alive despite execution of the usufructuary mortgage. The respondent, after the death of the husband, filed a suit for redemption of the mortgaged property. A preliminary decree for redemption under Order 34 Rule 7 of the Code of Civil Procedure, 1908 was passed by the Court of Munsiff on the ground that the lessee's right would merge at the time of execution of the mortgage deed. The appellate court allowed the appeal by holding that there was no merger of the lease and the mortgage. However, the High Court allowed the second appeal by restoring the preliminary decree for redemption of the mortgage. Hence this appeal.

Allowing the appeal partly, this Court

HELD : 1.1. The question whether upon redemption of usufructuary mortgagee a tenant-mortgage was required to deliver actual or physical possession of the mortgaged property to the lessor-mortgagor depends upon the intention of the parties at the time of the execution of the mortgage deed. 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 the absence of proof of surrender of the lease. Unless there is merger of both rights on redemption of the mortgage the plaintiff is not entitled to recover physical possession of the property. The right of lessee to continue in possession would survive even after redemption. [178-A-B]

1.2. The implied surrender of the lessee's right when the usufructuary mortgage was executed would depend upon what was the intention of the parties at the time of execution of the mortgage deed in favour of the sitting tenant and the same has to be gathered from the terms and conditions of the mortgage transaction in the light of the surrounding circumstances of the case. Unless there was surrender of leasehold rights at the time of execution of the mortgage, mortgagor would not be entitled to obtain delivery of physical possession of property on redemption of mortgage. [178-G-H; 179-B]

2. There can be no merger of a lease and a mortgage, even where the two transactions are in respect of the same property, 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 in the same right and no interest in the property should remain outstanding. In the case of a lease, the estate that is outstanding in the lessor is the reversion; in the case of a mortgage, the estate that is outstanding is the equity of redemption of the mortgagor. Accordingly, there cannot be a merger of a lease and a mortgage in respect of the same property since neither of them is a higher or lesser estate than the other. Even if the rights of the lessee and the rights of the mortgagee in respect of a property were 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 of ownership in one person. [178-C-F]

A *Sambangi Applaswamy Naidu v. Behara Venktaramanayya Patro*, [1985] 1 SCR 651; *Shah Mathuradas Maganlal & Co. v. Nagapa Shankarappa Malage*, [1976] 3 SCC 660; *Nemi Chand v. Onkar Lal*, (1991) 3 JT 106 and *Gopalan Krishnamurthy v. Kunjamma Pillai Sarojini Amma*, [1996] 3 SCC 424, relied on.

B *Narayana Dogra Shetty v. Ramachandra Shivram Hingne*, 65 Bom LR 449 (Bom), approved.

3.1. In the present case the recitals in the documents are unambiguous and leave no doubt that the lease has continued, the parties expressly saved their leasehold rights. The lessee was not a party to the mortgage deed and there is no evidence on record from which it can be inferred or implied that the lessee surrendered his leasehold rights. The contention that as the mortgage deed provides that the possession of the property is handed over to the mortgagee, wife of the lessee, impliedly leasehold rights are surrendered is without any substance. Whether deceased-lessee was an actual party to the mortgage transaction was not much material as it was impossible in the circumstances to contend that transaction was entered into behind the back of the deceased-lessee. The deceased-lessee and his wife were living together and reasonable inference in the circumstances would be to conclude that the transaction was really entered into by the deceased-lessee himself though in the name of his wife. Hence, the lease prior to the suit transaction in favour of the deceased-lessee would not survive. In the mortgage deed it is mentioned that the properties were entrusted for pattom to the deceased-lessee and at present were in the possession, enjoyment and occupation of the appellant. Therefore, it is apparent that the deceased-lessee and the mortgagee were the same persons. However there is no question of drawing any inference that husband of mortgagee surrendered his tenancy rights at the time to mortgagee. There is no merger of pre-existing rights unless there is express or implied surrender. In the facts of the present case, there is no question of implied surrender of leasehold rights by the deceased-lessee. Further, there is no question of drawing any inference that the deceased-lessee has surrendered the leasehold rights as it would be totally inconsistent with the recitals and terms of the mortgage deeds. [179-C-D; 177-F]

3.2. The Judgment and decree passed by the High Court is modified to the extent that on the redemption of mortgage, leasehold rights of the

deceased would survive as there is no surrender or implied surrender of the tenancy rights by the deceased-lessee. The judgment and the decree passed by Trial Court, which is confirmed by the High Court, would stand modified to the aforesaid extent. [180-B] A

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1435 of 1981. B

From the Judgment and Order dated 29.1.79 of the Kerala High Court in S.A. No. 995 of 1975.

Ms. Lily Thomas and R. Satish for the Appellants. C

T.L.V. Iyer, K.M.K. Nair and Vipin Nair for the Respondents.

The Judgment of the Court was delivered by

SHAH, J. The short question involved in this appeal is whether the lease executed in favour of Abraham Cherian, Husband of the mortgagee would survive after the execution of the mortgage deed. In our view from the evidence on record, it is apparent that parties expressly saved the lease hold rights. The lessee was not party to the mortgage deed and there is no evidence on record from which it can be inferred or implied that the lessee surrendered his lease hold rights. It is well established law that unless there was a surrender or lease hold rights at the time of execution of the mortgage, mortgagor would not be entitled to obtain delivery of physical possession of property on redemption of mortgage. D E

The relevant facts for deciding the aforesaid question are as under : F

By a document dated 12th June, 1932 for the suit property, the owner executed a lease deed in favour of Abraham Cherian. Thereafter on 21st September, 1935 (5th Kanni 1109) (Exb. 2) usufructuary mortgage deed was executed in favour of Smt. Sosamma, wife of Abraham Cherian. Additional mortgage deeds were executed on 30th August, 1935 (Exb. P.10) and 8th February, 1939 (Exb. P.1). Lessee, Abraham Cherian died on 29th June, 1946. O.S. Civil Suit No. 60 of 1968 was filed before the Munsiff's Court Chenganacherry for redemption of the mortgage property. A preliminary decree for redemption under Order 34 rule 7 of the Code of Civil Procedure was passed on 3rd December, 1971 by the Court of Munsiff. The Court arrived at the conclusion that lessee's right would G H

A merge at the time of execution of the mortgage deed. Appeal A.S. No. 100 of 1972 was allowed by the Additional Sub-Judge by a judgment and decree dated 5th July, 1973 by holding that the finding given by the trial court that lease in favour of Abraham Cherian merged when mortgage deed was executed in favour of the first defendant cannot be upheld. Against that judgment and decree, Second Appeal No. 995 of 1975 was filed before the High Court of Kerala. By a judgment and decree dated 29th June, 1979, the learned Single Judge allowed the said appeal by holding that Exb. P-1, P-2 and P-10 create mortgagor and mortgagee relationship between the parties. The Court held that the lease arrangement in favour of the first defendant's husband Abraham Cheriyan would not survive after execution of the mortgage deed for the said property. The Court considered that though the deceased Abraham Cheriyan was not an actual party to the mortgage transaction yet a reasonable inference could be drawn that the transaction was really entered into by Abraham Cherian himself through his wife and, therefore, the lease prior to the suit transaction in favour of Abraham Cherian will not survive and the defendants cannot claim any right of fixity of tenure on the basis of the lease. The Court, therefore, restored the preliminary decree under Order 34 rule 7 of the Code of Civil Procedure for redemption of the mortgage.

E At the time of hearing of this appeal, learned counsel appearing for the appellants referred to the mortgage deed and additional mortgage deeds to show that by the said deeds rights of lessee are expressly saved.

F We would first refer to Exb. P-2 mortgage dated 21st September, 1935 (5th Kaanni 1109) in favour of Smt. Sosamma wife of Abraham Cherian. The said document, *inter alia*, specifically recites as under :

"The above said properties were those that were entrusted for pattom to your husband Abraham Cherian on 26th Edavam 1109 and at present were those in your possession, enjoyment and occupation."

G After aforesaid narration in the last para, it is specifically provided as under :

H "The pattom on the properties as it is agreed to include the rent for the building the sum of Rs. 120 per year should be paid regularly every month as it is being paid at present to me without

fail and the pattom amount should not be adjusted either in the principle amount of mortgage or the interest." A

The next document is Exb. P-10 additional mortgage deed dated 30th August, 1935 (4.1.1111). The said deed also provides as under :

"As per the conditions in the mortgage agreement you have agreed to pay a sum of Rs. 120 per year as pattom for the properties included in this and after excluding pattom amount which I have received up to this date you have got right to adjust the future rent due for the future interest due to you as per the said mortgage agreement and under this additional mortgage agreement and the balance pattom (rent) shall be received by me every year and within the stipulated period." B C

Same is the position in the further second additional mortgage deed dated 8th February, 1939 (Exb. P-1). This document provides as under :

"You are made to believe that there is no encumbrance on this property except the melvaipa lease arrangement to your husband Abraham Cherian (item No. 2) No. 203 dated 30 Chingam 1112 M.E., and the encumbrances which you have as stated earlier." D

From these documents it is apparent that parties unequivocally without any reservation continued the lease agreement after execution of the mortgage. The recitals in the documents are unambiguous and leave no doubt that the lease has continued, and, therefore, in our view, it survives. E

The first document itself provides that the mortgagee would be required to pay Rs. 120 per year regularly as rent and that rent amount could not be adjusted either in the principal amount of mortgage or interest. Similarly, by the additional mortgage deeds aforesaid right to recover the rent is continued. The last additional mortgage deed specifically recites that there are no encumbrances on the property except lease arrangement with the mortgagee's husband Abraham Cherian. These documents clearly reflect the intention of the parties that lease hold rights of Abraham Cherian was kept alive despite execution of usufructuary mortgage. F G

This Court, in a series of cases has concluded the question by holding H

- A that 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 depends upon the intention of the parties at the time of the execution of the mortgage deed. 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 the absence of proof of surrender of the lease. Unless, there is merger of both rights on redemption of the mortgage, the plaintiff is not entitled to recover physical possession of the property. The right of lessee to continue in possession would survive after redemption.
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- C The learned counsel for the appellants rightly referred to the decision of this Court in the case of *Sambangi Appaswamy Naidu & Others v. Behara Venkataramanayya Patro and Others*, [1985] 1 SCR 651 wherein the Court has held that there can be no merger of a lease and a mortgage, even where the two transactions are in respect of the same property, 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 in the same right and no interest in the property should remain outstanding. In the case of a lease, the estate that is outstanding in the lessor is the reversion; in the case of a mortgage, the estate that is outstanding is the equity of redemption of the mortgagor. Accordingly, there cannot be a merger of a lease and a mortgage in respect of the same property since neither of them is a higher or lesser estate than the other. Even if the rights of the lessee and the rights of the mortgagee in respect of a property were 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 of ownership in one person. This position in law as explained by the Bombay High Court in *Narayana Dogra Shetty v. Ramachandra Shivram Hingne* reported in 65 Bom. LR 449 has been fully approved by this Court in *Shah Mathuradas Maganlal & Co. v. Nagappa Shankarappa Malage*, [1976] 3 SCC 660. The Court also held that with regard to the implied surrender of the lessee's rights when the usufructuary mortgage was executed would depend upon what was the intention of the parties at the time of execution of the mortgage deed in favour of the sitting tenant and the same has to be gathered from the terms and conditions of the mortgage transaction in the light of the surrounding circumstances of the case. The aforesaid decision is relied upon by this Court in the case of
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Nemi Chand v. Onkar Lal, (1991) 3 J.T. 106.

Further, in the case of *Gopalan Krishnankutty v. Kunjamma Pillai Sorojini Amma*, [1996] 3 SCC 424, the Court after considering earlier decisions held that on execution of mortgage in favour of the the lessee, 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 the absence of proof of surrender of the lease by the defendant. Hence, on redemption of the mortgage, the plaintiff is not entitled automatically to recover possession of the lease premises.

Hence, the contention of the learned counsel for the respondents that as the mortgage deed provides that the possession of the property is handed over to the mortgagee, wife of the lessee, impliedly lease hold rights are surrendered is, in our view, without any substance. The High Court arrived at the conclusion that whether Mr. Cherian was an actual party to the mortgage transaction, was not much material as it was impossible in the circumstances to contend that transaction was entered into behind the back of Mr. Cherian; Mr. Cherian and his wife were living together and reasonable inference in the circumstances would be to conclude that the transaction was really entered into by Mr. Cherian himself though in the name of his wife. Hence, the lease prior to the suit transaction in favour of Cherian would not survive. We agree with the finding that husband and wife, that is, lessee and mortgagee, were living together. As quoted above in the mortgage deed, it is mentioned that the properties were entrusted for pattom to Abraham Cherian and at present were in her possession, enjoyment and occupation. Therefore, it is apparent that lessee and the mortgagee were the same persons. However, there is no question of drawing any inference that husband of mortgagee surrendered his tenancy rights at the time of mortgage. As stated earlier, by mere execution of the usufructuary mortgage, there is no merger of pre-existing tenancy rights unless there is express or implied surrender. In the facts of the present case, there is no question of implied surrender of lease hold rights by the deceased Abraham Cherian. Further, there is no question of drawing any inference that deceased lessee has surrendered the lease hold rights as it would be totally inconsistent with the recitals and terms of the mortgage deeds. There was no necessity of providing in all the aforesaid three documents that there was a lease arrangement with regard to the mortgage property and that mortgagee was required to pay a rent of Rs. 120 per

A year. On the contrary, mortgage deeds expressly saved the tenancy rights.

In the result, the appeal is allowed, judgment and decree passed by the High Court is modified to the extent that on the redemption of mortgage, leasehold rights of the deceased would survive as there is no surrender or implied surrender of the tenancy rights by the deceased

B Abraham Cherian. The Judgment and the decree passed by the Trial Court which is confirmed by the High Court would stand modified to the aforesaid extent.

The appeal is partly allowed with no order as to costs.

V.S.S.

Appeal partly allowed.