KAVERIPATNAM SUBBARAYA SETTY ANNAIAH SETTY CHARITIES TRUST A

v.

S.K. VISWANATHA SETTY

JULY 22, 2004

B

[ASHOK BHAN AND S.H. KAPADIA, JJ.]

Rent Control and Eviction:

Karnataka Rent Control Act, 1961—Section 2(7)(bb)(iii)—Tenant vacated shop since landlord-trust desired to demolish old building to construct new one—Tenant's case that after reconstruction he requested that the shop in new building be re-let to him on payment of certain amount but not replied—Thereafter, he look possession of shop in new building as tenant on payment of advance rent for three years—On the other hand, landlord and tenant allegedly executing mortgage deed for three years in favour of tenant on payment of certain amount—Suit for possession on expiry of mortgage period—Tenant sought protection under 1961 Act—Suit decreed in favour of landlord—Lower appellate court set aside the decree—High Court dismissed landlord's appeal—On appeal, held: There is no evidence to show that mortgage deed was executed as security for the alleged loan—Circumstances prove that tenancy continued even after the tenant vacated the shop in the old building and as such High Court was right in holding that document executed was only a device to defeat the provisions of 1961 Act—Landlord did not take the plea in courts below that 1961 Act is not applicable to trust properties in view of amendment to section 2(7)(bb)(iii)—Hence, High Court rightly rejected the same in absence of any material available to substantiate the plea.

C D E F

Appellant-charitable trust let out one of the shops in the old building owned by them, to respondent-tenant in 1950. Respondent after receiving notice from the trustee that they intended to demolish the old building and construct a new building, vacated the shop in 1969. Thereafter, building was demolished and construction of new building was completed by 1975. It is respondent's case that he called upon the trustees to re-let the shop in the new building as a tenant and offered to pay certain amount and also enhanced rent but did not receive any

G H

A reply. Next year, on reconsideration of tenants offer, Managing trustee re-let the shop in the new building to respondent on payment of Rs. 16,200, advance rent for three years @ Rs. 450 per month. Respondent raised loan of Rs. 10,000 from the Managing Trustee's father in law for payment of rent. On the other hand it is alleged that appellant and B respondent entered into a mortgage deed whereunder respondent was given possession of shop for three years on payment of Rs. 16,200 which was to be repaid by trustee on expiry of mortgage period and respondent was to vacate the premises to the appellant. After the expiry of the mortgage period appellant filed suit for possession. Trial C Court decreed the suit in favour of appellant. Lower appellate court set aside the decree passed by trial Court and dismissed the suit. High Court held that respondent continued to be a tenant after 1969 duly protected under the 1961 Act and as such the redemption deed was only a device to defeat the provisions of the 1961 Act and dismissed D the appeal filed by the appellant. Hence the present appeal.

Appellant contended that the respondent had voluntarily surrendered the shop in the old building and as such his tenancy came to an end, consequently the provisions of 1961 Act were not applicable; that the deed executed was a self redemption deed which proves that E respondent was in possession of the shop as a mortgagee and on expiry of the mortgage period, he was required to vacate and hand over vacant possession of the shop to the trustees; and that by amendment to section 2(7)(bb)(iii), 1961 Act would not apply to the premises belonging to religious and charitable institution and as such respond- F ent was not entitled to protection under the 1961 Act.

Dismissing the appeal, the Court

HELD : 1. The evidence on record proves that the respondent was G a tenant of the shop in the old building from 1950. He continued to be a tenant of that shop till 1969. Furthermore, it shows that the old building was demolished around 1969 and by 1975 the new building stood constructed. Appellant has not brought on record the circumstances under which they claim that the original shop was voluntarily H surrendered by respondent. On the contrary, after re-construction,

respondent had specifically called upon the appellant to re-let the shop in the new building to him and offered to pay certain amount and also enhanced rent. However, no reply was given by appellant and the Managing Trustee has admitted in evidence receipt of letter from respondent requesting to re-let the shop in the new building. This circumstance proves that the respondent had not voluntarily surrendered his shop in the old building as alleged by appellant. The respondent has proved that in 1976 Managing Trustee offered to re-let the shop in the new building on respondent's advancing certain amount to the trustees for three years and Managing Trustee in his evidence, has admitted that respondent had raised a loan from his father-in-law. The amount of Rs. 16,200 represented three years advance rent calculated @ Rs. 450 per month. The High Court rightly held that there was no reason for voluntarily surrendering the tenancy. The entries in the Income-tax returns of respondent, proves that the amount paid by respondent was on account of rent. Furthermore, appellant has not produced its own accounts to show how they have accounted for Rs. 16,200 in their books. [128-E-H; 129-A-B]

2. The guidelines for deciding-whether a transaction is a lease or a mortgage contemplate that the name given to the document is not conclusive. The question has to be decided with reference to the predominant intention of the parties as gathered from the recitals and the terms of the documents and the surrounding circumstances including conduct of the parties. In the case of a mortgage, there is a transfer of interest to secure repayment of debt and in the case of a lease, there is a transfer of a right to enjoy the property. In the instant case, the suit property is a shop; the transferee was put in possession as he was to carry on his business, however, he had no power to lease or sell; no rate of interest was fixed, there is nothing to indicate as to how Rs. 16,200 was to be appropriated. There is no evidence to show that the mortgage deed was executed as security for the alleged loan. The tenancy of the respondent continued even after 1969 and in the above circumstances, High Court was right in holding that the deed was a device to defeat the Karnataka Rent Control Act, 1961. [129-C-D; 129G-H; 130-A]

***Sha Mathuradas Maganlal & Co.* v. *Nagappa Shankarappa Malaga & Ors.*, AIR (1976) SC 1565, distinguished.**

A *Fuzhakkal Kuttappu* v. *C. Bhargavi & Ors.*, **AIR (1977) SC 105, referred to.**

Transfer of Property Act by Mulla, **9th Edn. p. 621, referred to.**

3. Suit was filed in 1980. Section 2(7)(bb)(iii) of the 1961 Act was
B **amended in 1994 which states that the Act will not apply to any premises belonging to a religious or charitable institution. However, there is no material placed on record by way of pleadings to show whether the appellant is a religious or charitable institution. The plaint was never amended. Appellant sought exemption which needs to be**
C **alleged and proved. Opportunity is required to be given to the respondent to meet the plea of exemption. In the circumstances, the High Court rightly expressed the view that it was not open to the appellant at the stage of second appeal to plead that the 1961 was not applicable particularly in the absence of any material available to**
D **substantiate such plea. [130-F-H; 131-A]**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4122 of 1999.

From the Judgment and Order dated 4.8.98 of the Karnataka High
E Court in R.S.A. No. 352 of 1993.

S.N. Bhat for the Appellant.

N.D.B. Raju, Guntur Prabhakar, Ms. Bharathi and Ms. Prerna Kumari for the Respondent.
F

The Judgment of the Court was delivered by

KAPADIA, J. : This is an appeal by special leave filed by appellant-plaintiff against the judgment dated 4th August, 1998 of the High Court
G of Karnataka confirming the judgment and order dated 6th February, 1993 passed by the District Judge, Mysore dismissing the suit filed by the appellant-plaintiff holding *inter alia* that Ex.P5 dated 1.10.1976 was only a device to get over the provisions of the Karnataka Rent Control Act, 1961 (hereinafter referred to for the sake of brevity as "the said Act, 1961").

H The undisputed facts are as follows:

Appellant–Kaveripatnam Subbaraya Setty Annaiah Setty Charities Trust was the owner of an old building in which there were 8 to 9 shops situated in Rave Beedi. In 1950 one of the shops was let out to the respondent-defendant as a tenant. In the year 1969, the appellant conveyed to the respondent and other tenants of the old building its desire to demolish the old building and in its place to erect modern shops so that higher rent could be fetched. Respondent herein surrendered his shop in the old building on 27.8.1969 after receiving notice from the appellant indicating its intention to demolish the old building and to construct a new building. Some of the tenants refused to surrender. Appellant filed eviction petitions against those tenants under the said Act, 1961. They were evicted under the orders of the Court. Respondent herein and the trustees belonged to the same community and, therefore, he surrendered possession of his shop pursuant to the above mentioned notice. The old building was demolished in 1969 and the construction of the new building was completed by 1975. On 10.10.1975, the respondent called upon the appellant to re-let the shop in the new building as he was a tenant in the old building to which no reply was given by the appellant.

On 1.10.1976, Ex.P5 was entered into between the appellant and the respondent. In Ex.P5, it was recited that the appellant was in need of money and, therefore, a redeemable mortgage for three years had to be executed for Rs.16,200 in favour of respondent. Under Ex.P5, the said sum of Rs.16,200 was to be repaid in full by virtue of respondent being in possession and enjoyment of the shop for three years. On 4.10.1976, the respondent paid Rs.16,200 to the appellant against delivery of possession. The mortgage period expired on 1.10.1979.

On 12.3.1980, suit no.41 of 1980 was instituted by the appellant in the court of Principal Civil Judge, Mysore for possession, damages and *mesne* profits. The above facts were stated in the plaint. By his written statement, the respondent pleaded that he was a tenant from 1950 of the shop in the old building. In 1969, the trustees expressed their desire to demolish the old building and to construct a new building. He did not resist the eviction as he belonged to the same community as the trustees and as he was orally assured by the trustees that the shop in the new building would be re-let to him. He further pointed out that on 10.10.1975, he had called upon the trustees to re-let the shop in the new building to him as

A a tenant, to which no reply was received. He further alleged that he had offered to pay Rs. 6000 and that he had also offered to pay rent @ Rs.335 per month, to which no reply was given. According to the written statement, in 1976, a suggestion came from the trustees that they were ready and willing to consider his offer if he was ready to advance Rs.16,200 B and if he was ready to pay increased rent of Rs.450 to the appellant. The respondent pleaded his inability to raise Rs. 16,200 upon which he was assured by PW2 that one Anjaneya Gupta (father-in-law of PW2) would advance a loan of Rs. 10,000 against the promissory note. PW2 was the managing trustee. On 4.10.1976, Anjaneya Gupta advanced the said C amount to the respondent. On the same day, the respondent paid Rs. 16,200 to the appellant against delivery of possession. The respondent, therefore, submitted in his written statement that he had taken the possession of the shop in the new building as a tenant and not as a mortgagee. According to the written statement, Rs. 16,200 represented advance rent for three D years @ Rs. 450 per month. In the written statement, the respondent submitted that he was entitled to protection under the said Act, 1961. In the alternative, it was pleaded that Ex.P5 violated the provisions of the said Act, 1961 and consequently, it was void.

The trial Court found that the respondent was a tenant of the shop E in the old building from 1950; that in 1969 the respondent was asked to vacate the premises as the trustees desired to demolish the old building; that the respondent had voluntarily vacated the premises and consequently, the relationship of landlord and tenant ended on 27.8.1969, as there was no intention to continue the tenancy or to re-let the premises in the new F building. The trial Court further found that after 1.10.1976, the respondent did not pay rent; that no rent was fixed and, therefore, the respondent was in occupation of the shop as a mortgagee and not as a tenant. The trial Court in this connection placed reliance on the returns filed by the respondent under the Income Tax Act for the years 1977-78 up to 1980-G 81. The trial Court concluded that the respondent was not entitled to protection under the said Act, 1961. Consequently, the trial Court decreed the suit filed by the appellant.

Being aggrieved by the judgment and decree passed by the trial Court, H the respondent preferred Regular Appeal No.15 of 1985 before the District

Judge, Mysore (hereinafter referred to for the sake of brevity as "the lower appellate Court"). By judgment and order dated 6.2.1993, the lower appellate Court concluded that the respondent was a tenant of the shop in the old building from 1950 and in 1969 the respondent vacated the shop in the old building when he was assured by the appellant that the shop in the new building would be re-let to him after construction. The lower appellate Court believed the case of the respondent as the respondent had categorically called upon the trustees to re-let the shop in the new building vide notice dated 10.10.1975 to which no reply was given by the trustees. In this connection the lower appellate Court placed reliance on the evidence of PW2. The lower appellate Court also came to the conclusion that Rs.16,200 represented advance rent calculated @ Rs. 450 per month. The lower appellate Court on going through the entire evidence on record, both oral and documentary, concluded that the respondent had taken the premises after the construction as a tenant and not as a mortgagee. In the circumstances, the lower appellate Court allowed the appeal; set aside the judgment and decree passed by the trial Court and dismissed the suit instituted by the appellant.

Being aggrieved by the decision of the lower appellate Court dated 6.2.1993, the appellant carried the matter in the second appeal to the High Court under section 100 CPC.

At the time of admission, the following question of law was framed:—

> "Whether the finding of the appellate Court that the self redeeming mortgage deed executed by respondent in favour of the appellant, as a void document, as being opposed to the provisions of Rent Control Act, is sustainable without a plea and an issue in that behalf?"

On reading the terms and conditions mentioned in Ex.P5 in the light of the above-mentioned circumstances, including the conduct of the parties, the High Court held that the Ex.P5 was only a device to defeat the provisions of the said Act, 1961. Consequently, the High Court dismissed the appeal filed by the appellant. Hence, this civil appeal.

A Shri S.N. Bhat, learned counsel for the appellant submitted that the High Court had erred in holding that Ex.P5 was void. He submitted that in 1969, the respondent had voluntarily surrendered the shop in the old building and with the surrender, his tenancy came to an end. It was submitted that after 1969, the respondent was not a tenant. He submitted B that the surrender was voluntary and consequently, the provisions of the said Act, 1961 were not applicable. He contended that Ex.P5 in the light of the above circumstances conclusively proves that the respondent was in possession of the shop as a mortgagee and on expiry of the mortgage period, he was required to vacate and hand over vacant possession of the shop to the trustees. He submitted that Ex.P5 was a self-redeeming C mortgage. He further contended that the High Court erred in holding that the respondent continued to be a tenant after 1969 duly protected under the Rent Act, 1961. Lastly, he submitted that in view of the amendment to section 2(7)(bb)(iii) vide Amending Act No. 32 of 1994, respondent herein was not entitled to protection as the suit premises belonged to a D charitable institution and under the said Amending Act, the protection available to tenants of such institutions stood withdrawn on and from 18.5.1994.

We do not find any merit in this civil appeal for the following reasons: E *firstly,* the evidence on record proves that the respondent was a tenant of the shop in the old building from 1950. He continued to be a tenant of that shop till 1969, which is not disputed. The evidence brought on record further shows that the old building was demolished around 1969 and by 1975 the new building stood constructed. The appellant as plaintiff has not brought on record the circumstances under which they claim that the F original shop was voluntarily surrendered by the respondent. On the contrary, after reconstruction, the respondent had specifically called upon the appellant to re-let the shop in the new building to him. He offered Rs. 6000. He also offered enhanced rent. However, no reply was given by the appellant to his letter dated 10.10.1975. This circumstance proves that G the respondent had not voluntarily surrendered his shop in the old building as alleged by the appellant. *Secondly,* the respondent has proved that in 1976, PW2 offered to re-let the shop in the new building on the respondent's advancing Rs.16,200 to the trustees for three years. In this connection, PW2 has admitted, in his evidence, receipt of the letter dated H 10.10.1975 from the respondent calling upon the trustees to re-let the

premises. Further, in his evidence, PW2, has admitted that the respondent herein had raised a loan of Rs.10,000 from his father-in-law as suggested by him (PW2). *Thirdly,* as found by the Courts below, Rs.16,200 represented three years advance rent calculated @ Rs.450 per month. *Fourthly,* as rightly held by the High Court, there was no reason for voluntarily surrendering the tenancy by the respondent. *Lastly,* the entries in the Income-tax returns of the respondent, brought on record by the appellant, proves that the amount paid by the respondent was on account of rent. It is relevant to point out that the appellant has not produced its own accounts to show how they have accounted for Rs.16,200 in their books.

The guidelines for deciding — whether a transaction is a lease or a mortgage contemplate that the name given to the document is not conclusive. The question has to be decided with reference to the predominant intention of the parties as gathered from the recitals and the terms of the documents and the surrounding circumstances including conduct of the parties. In the case of a mortgage, there is a transfer of interest to secure repayment of debt and in the case of a lease, there is a transfer of a right to enjoy the property [See: *T.P. Act by Mulla,* 9th Edn. Page 621]. In the case of *Fuzhakkal Kuttappu* v. *C. Bhargavi & Ors.* reported in AIR (1977) SC 105, it has been observed that the nomenclature given to a document by the writer or even by the parties is not always conclusive. In construing a document, it is necessary to find out the intention of the parties executing such document. Such intention has to be gathered from the recital, the terms in the document and from surrounding circumstances. When there is a document of a composite character disclosing features of mortgage and lease, the Court will have to find out the pre-dominant intention of the parties executing the document viewed from the essential aspect of the reality of the transaction. In that case, it was further observed that the mortgages are not always simple, English, usufructuary as defined in T.P. Act. They may be anomalous. Even so, the essential feature of a mortgage, which is not there in a lease, is that the property transferred is a security for repayment of a debt in a mortgage whereas in a lease, it is transfer of a right to enjoy the property. In the instant case, the suit property is a shop; the transferee was put in possession as he was to carry on his business; however, he had no power to lease or sell; no rate of interest was fixed; there is nothing to indicate as to how Rs.16,200 was to be appropriated. In the present matter there

A is no evidence to show that Ex.P5 was executed as security for the alleged loan. As stated above, the tenancy of the respondent continued even after 1969 and in the above circumstances the High Court was right in holding that Ex.P5 was a device to defeat the said Act. The judgment of the Supreme Court in the case of *Shah Mathuradas Maganlal & Co.* v. B *Nagappa Shankarappa Malaga & Ors.* reported in AIR (1976) SC 1565 has no application to the facts of the present case. In that matter, the respondent-landlord executed a mortgage deed in favour of the appellant-tenant. The period for redeeming the mortgage was fixed for 10-years. The appellant claimed that after redemption he was entitled to retain possession because his previous tenancy right subsisted. On facts, it was found by C this Court that the delivery of possession by the tenant to the landlord was immediately followed by re-delivery of possession to the appellant as mortgagee. In the present case re-delivery is after almost five years. In the case cited, the deed of mortgage was executed on 21.5.1953 and it recited that the erstwhile tenancy shall continue only till 7.11.1953. That D under the deed the possession of the appellant was confirmed as a mortgagee on and from 7.11.1953. Further, under the mortgage deed it was provided that if the mortgagor was not able to redeem the mortgage, the mortgagee was entitled to sell the property for recovery of debts. In view of the above terms and conditions, it was held that on redemption of the E mortgage, the respondent had a right to recover possession. None of such terms exist in Ex.P5. In the circumstances, the judgment of this Court in *Shah Mathuradas Maganlal & Co.* (supra) has no application to the present case.

F Lastly, it may be pointed out that in the present case, the suit was filed in 1980. Section 2(7)(bb)(iii) was amended in 1994. Under the said Amendment, the expression "under the management of the State Government" stood deleted. Therefore, it was argued on behalf of the appellant that the Karnataka Rent Control Act, 1961 has no application. As held by the High Court, this plea was not taken by the appellant in the Courts G below. Further, section 2(7)(bb)(iii) states that the Act will not apply to any premises belonging to a religious or charitable institution. However, there is no material placed on record by way of pleadings to show whether the appellant is a religious or charitable institution. The plaint was never amended. The appellant seeks exemption. Exemption needs to be alleged H and proved. Opportunity is required to be given to the respondent to meet

the plea of exemption. In the circumstances, we are in agreement with the view expressed by the High Court that the said plea was not open to the appellant at the stage of second appeal, particularly in the absence of any material available to substantiate such plea. A

For the aforestated reasons, we do not find any merit in this civil appeal and the same is dismissed, accordingly, with no order as to costs. B

N.J. Appeal dismissed.