

SUNITA JUGALKISHORE GILDA

v.

RAMANLAL UDHOJI TANNA (DEAD) THR. LRS. AND
OTHERS

(Civil Appeal No. 6966 of 2013)

AUGUST 21, 2013

[K.S. RADHAKRISHNAN AND A.K. SIKRI, JJ.]

Transfer of Property Act, 1882 - s.52 - Mortgagor inducing tenant in a mortgaged property, to the prejudice of the mortgagee, pendente lite - Permissibility - On facts, mortgagor (respondent no.2 & 3) inducted respondent no.1 as a tenant without consent of the mortgagee (appellant) - Induction of respondent no.1-tenant was during subsistence of the mortgage and also subsistence of various legal proceedings pending before various courts between the mortgagor and the mortgagee - Suit of appellant-mortgagee against respondents for recovery of possession, and damages for use and occupation - Held: Rule of lis pendens applies to suit by a mortgagee as well - s.52 of the TPA prevents a mortgagor from creating any lease during the pendency of mortgaged suit so as to effect the right of a mortgagee - However, in view of s.52, if the mortgagor grants such a lease during the pendency of a suit for sale by the mortgagee, the lessee is bound by the result of litigation and if the property is sold in execution of the decree, the lessee cannot resist a claim for possession by auction purchaser - Tenant inducted during subsistence of the mortgage is not entitled to get protection of the Rent Act - The courts below erred in non-suiting the appellant - Appellant entitled to get decree, as prayed for, since respondent no.1 was inducted illegally by respondent nos. 2 & 3 and to the prejudice of appellant-mortgagee - Suit of appellant decreed, however, without any mesne profits - Maharashtra Rent Act.

A *Doctrines - Doctrine of lis pendens - Rationale for - Held: The doctrine is intended to prevent one party to a suit making an assignment inconsistent with the rights which may be decided in the suit and which might require a further party to be impleaded in order to make effectual the court's decree.*

B 'G', the grand mother-in-law of the appellant, became a mortgagee of the property in question in 1953 by a registered mortgage deed executed by one 'V', father of Respondent Nos.2 and 3 for himself and as guardian of Respondent No.2. Suit was filed by 'G' for enforcing the mortgage, which was decreed by the civil court on 01.09.1956 and preliminary decree later became final as against the share of 'V'. 'G' purchased ½ share in the mortgaged property from 'V' on 02.03.1960 which was confirmed in her favour by the civil court and was placed in joint possession by the executing court on 25.11.1960. Respondent no.1 was inducted as a tenant while all these proceedings were pending before the court. The entry of respondent no.1 into the suit property was not with the consent and knowledge of 'G' even though she was a mortgagee of a portion of the property from 1953 onwards.

F Several civil suits were also pending between the mortgagor and the mortgagee and it is during the course of those proceedings, evidently, respondent no.1 was inducted as a tenant. 'G' filed civil suit against the respondents for recovery of possession, damages for use and occupation. The trial court dismissed the suit on the ground that Respondent Nos.2 and 3 being mortgagors were entitled to induct Respondent No.1 as a tenant. Appeal before the District Judge was dismissed. 'G' later bequeathed the suit property in favour of the appellant. Subsequently the appellant filed Second Appeal, which was dismissed by the High Court and therefore the instant appeal.

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The question that arose for consideration in the instant appeal was whether the mortgagor can induct a person as tenant in a mortgaged property, to the prejudice of the mortgagee, pendente lite, in violation of Section 52 of the Transfer of Property Act, 1882.

Allowing the appeal, the Court

HELD: 1.1. The induction of respondent no.1 was during the subsistence of the mortgage and pendency of court proceedings. Rule of lis pendens applies to suit on mortgagee as well. The doctrine is intended to prevent one party to a suit making an assignment inconsistent with the rights which may be decided in the suit and which might require a further party to be impleaded in order to make effectual the court's decree. Law is well settled that a mortgagee, who has purchased a mortgaged property in execution of his mortgage decree is entitled to avoid a transfer on the ground that it was mortgaged by the mortgagor during the pendency of a mortgage suit. Section 52 of the TPA prevents a mortgagor from creating any lease during the pendency of mortgaged suit so as to effect the right of a mortgagee or the purchaser. [Para 12 and 13] [224-E-H; 225-A]

1.2. Section 65-A of the TPA deals with the mortgagee's powers to lease. However, in view of Section 52, if the mortgagor grants such a lease during the pendency of a suit for sale by the mortgagee, the lessee is bound by the result of litigation and if the property is sold in execution of the decree, the lessee cannot resist a claim for possession by auction purchaser. Section 52 deals with cases of transfer of anything otherwise dealing with any immovable property after any suit or proceeding in which any right to such immovable property is directly and specifically in question has been filed. Section 65-A of the TPA deals with the powers of the mortgagor to grant a lease of mortgaged property, while the mortgagor

A remains in lawful possession of the same. If the mortgagor grants a lease during the pendency of a suit for sale by the mortgagee, the lessee is bound by the result of the litigation. [Paras 14, 15] [225-E-H; 226-A-B]

B 1.3. On facts, it is found that the induction of the first respondent was during the subsistence of the mortgage and also subsistence of the various legal proceedings pending before various courts. A plea was raised by the counsel for the respondent that he is entitled to get the protection of the Maharashtra Rent Act. This plea has no basis in the facts of this case. A tenant who is inducted during the subsistence of the mortgage is not entitled to get the protection of the Maharashtra Rent Act. The courts below have not appreciated the various legal issues and committed an error in non-suiting the appellant. The appellant is entitled to get a decree, as prayed for, since the original first respondent was inducted illegally and to the prejudice of the original mortgagee. Consequently, the judgments of the courts below are set aside and the suit is decreed, however, without any mesne profits. [Paras 16, 17] [226-B-D, E-G]

F *Mangru Mahto and Others vs. Thakur Math AIR 1967 SC 1390; Dev Raj Dogra and Others vs. Gyan Chand Jain and Others (1981) 2 SCC 675: 1981 (3) SCR 174; Om Prakash Garg vs. Ganga Sahai and Others AIR 1988 SC 108: 1987 (3) SCC 553 and Carona Shoe Co. Ltd. And another vs. K.C. Bhaskaran Nair AIR 1989 SC 1110: 1989 (1) SCR 974 - relied on.*

G *Smt. Gangabai vs. Vijay Kumar and Others (1974) 2 SCC 393: 1974 (3) SCR 882 - referred to.*

Bellamy vs. Sabine (1857) 1 De G J 566 - referred to.

Case Law Reference:

H 1974 (3) SCR 882 referred to Para 6

SUNITA JUGALKISHORE GILDA v. RAMANLAL UDHOJI 219
TANNA (DEAD) THR. LRS.

AIR 1967 SC 1390	relied on	Para 10	A
(1857) 1 De G J 566	referred to	Para 13	
1981 (3) SCR 174	relied on	Para 15	
1987 (3) SCC 553	relied on	Para 15	B
1989 (1) SCR 974	relied on	Para 16	

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6966 of 2013.

From the Judgment and Order dated 13.03.2007 of the High Court of Judicature at Bombay in Second Appeal No. 548 of 2003.

V.A. Mohta, J.K. Gilda, Nilkanta Nayak, Rameshwar Prasad Goyal for the Appellant.

D.K. Pradhan, Shashibhushan P. Adgaonkar for the Respondents.

The Judgment of the Court was delivered by

K.S. RADHAKRISHNAN, J. 1. Leave granted.

2. The question that arises for our consideration is whether the mortgagor can induct a person as tenant in a mortgaged property, to the prejudice of the mortgagee, pendente lite, in violation of Section 52 of the Transfer of Property Act, 1882.

3. Gangabai, the grand mother-in-law of the appellant, was a mortgagee in respect of a three storied building, popularly known as Gowardhandas Mathurdas Mohta, along with the suit premises and open space situated at Nazrul Plot Nos. which was executed by one Vijaysingh Mohta, father of Respondent Nos.2 and 3 for himself and as guardian of Respondent No.2 on 24.03.1953. A partition deed was executed by Mohta and Respondent Nos.2 and 3 on 11.1.1956.

A 4. Gangabai, on 01.09.1956, filed a civil suit No.3-A/1956
 for enforcing the mortgage in the court of the First Additional
 District Judge, Amravati. On 02.03.1960, Gangabai also
 purchased the ½ share in the property belonging to Mohta, with
 the leave of the court in auction. The auction was confirmed by
 B the court on 21.09.1960 in favour of Gangabai after rejecting
 the objections raised by Respondent Nos.2 and 3. On
 25.11.1960 Gangabai was placed in joint possession of the
 mortgaged property in execution by the civil court.

C 5. Gangabai then filed a SCS No.1109 of 1961 and 1110
 of 1961 against two tenants for recovery of ½ share in rent,
 which suits were, however, dismissed by the trial court.
 Gangabai, later, filed a revision before the High Court, which
 was allowed decreeing her claim for ½ share in the rent.
 Gangabai, on 05.01.1963, filed a SCS No.33 of 1963 against
 D all the tenants including Respondent Nos.2 and 3 for a
 declaration and injunction that she was the owner of ½ share
 in the property and entitled to 1/2 share in the rent thereof from
 each of the tenants. SCS No.33 of 1963 was later decreed by
 the civil court, Amravati on 23.03.1983 in favour of Gangabai,
 E granting the reliefs sought for. Thereafter Respondent Nos.2
 and 3, without the consent of Gangabai, however, started
 recovering rent from Respondent No.1 on the strength of some
 alleged rent receipts. Brij Lal, the real brother of Respondent
 No.1, who was also one of the tenants/defendants in the above-
 F mentioned suit, left the decreed premises, without raising any
 claim.

G 6. The First Appeal No.40 of 1959, filed by Gangabai, was
 later withdrawn on 20.03.1967 since final decree had already
 been passed. The First Appeal No.72 of 1959 filed by
 Respondent Nos.2 and 3 was, however, allowed setting aside
 the preliminary decree dated 20.09.1958. Gangabai then
 preferred civil appeal No.582 of 1969 before this Court against
 that order, which was allowed on 09.04.1974, the judgment of
 which is reported in *Smt. Gangabai vs. Vijay Kumar and*

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Others (1974) 2 SCC 393. This Court set aside the judgment of the High Court and restored that of the trial court. A

7. Respondent Nos.2 and 3 then filed SCS No.76 of 1974 in October 1974 for setting aside the preliminary decree dated 20.09.1958 before the Civil Judge, Senior Division, Amravati. The suit was, however, dismissed with costs by the civil court on 31.01.1980. Respondent Nos.2 and 3 then filed RCA No.234 of 1980 before the District Court, Amravati. Before the District Court, Amravati, Gangabai and Respondent Nos.2 and 3 filed a compromise application on 21.08.1987 and agreed to partition the suit property. District Judge, Amravati vide its order dated 12.10.1988 passed a compromise decree disposing of RCA No.234 of 1980 in view of the compromise application filed on 21.08.1987. In view of the compromise arrived at between Gangabai and Respondent Nos.2 and 3, the suit property was partitioned and the area occupied by Respondent No.1 came to the share of Gangabai. Respondent Nos.2 and 3, however, filed Second Appeal No.57 of 1989 challenging the compromise order dated 12.10.1989 before the Bombay High Court, Nagpur Bench. The second appeal was, however, dismissed by the High Court vide its judgment dated 31.08.1989. B
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8. Gangabai then issued legal notice to Respondent No.1 on 05.10.1989 asking him to vacate the suit property contending that he was a trespasser and had been occupying the suit property without her consent and the transfer of interest made by Respondent No.2 and 3 in favour of Respondent No.1 was hit by doctrine of *lis pendens*. Gangabai following the above-mentioned notice, preferred SCS No.6 of 1990 against the respondents for recovery of possession, damages for use and occupation before the Civil Judge, Senior Division, Amravati. Respondent No.1 filed his written statement claiming that he was a tenant of the original owners, namely, Respondent Nos.2 and 3. The trial court vide its judgment dated 26.10.1994 dismissed the suit filed by Gangabai on the ground that F
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A Respondent Nos.2 and 3 being mortgagors were entitled to induct Respondent No.1 as a tenant. The Court also recorded the finding that Respondent No.1 was not a trespasser when he was initially inducted into suit property. Gangabai then preferred RCA No.7 of 1995 before the District Judge, B Amravati, which was also dismissed on 21.07.2003 on the ground that Section 44 of the Transfer of Property Act (for short the TPA) did not debar a co-owner from inducting a tenant and Section 65 of the Act was inapplicable as there was no relationship of mortgagor-mortgagee.

C 9. Gangabai later bequeathed the suit property in favour of the appellant. Consequently the appellant filed Second Appeal No.548 of 2003 challenging the findings recorded by the trial court as well as by the District Court. The High Court by the impugned judgment found no substantial question of law D which arose for its consideration and dismissed the appeal on 13.03.2007 against which this appeal has been preferred by special leave.

E 10. Shri V.A. Mohta, learned senior counsel appearing for the appellant submitted that the courts below have committed a serious error in not answering various substantial questions of law which were raised for their consideration. Learned senior counsel submitted that it was during the pendency of the F litigation that Respondent No.1 was inducted into the property in question without consent and to the detriment of Gangabai as well as appellant's interest and that Respondent No.1 had full knowledge of the pending litigation between Gangabai, on the one hand, and Respondent Nos.2 and 3, on the other. G Gangabai had issued a notice to the tenant on 05.01.1989 calling upon him to vacate the suit premises and he did not vacate the premises consequently Gangabai had to file a civil suit for possession and damages for use and occupation against the first respondent. Learned senior counsel also submitted that the premises in possession of Brij Lal were got H vacated and thereafter in or about year 1965-66 first respondent entered into possession without the knowledge and

consent of Gangabai. Learned senior counsel submitted that in view of the provisions of Section 52 of the TPA a mortgagor cannot be permitted to induct any person as a tenant in the mortgaged property which is the subject matter of litigation between the mortgagor and the mortgagee, to the prejudice of the mortgagee. In support of his contention, reliance was placed on the Judgment of this Court in *Mangru Mahto and Others v. Thakur Math* AIR 1967 SC 1390. Learned senior counsel submitted that the questions of law raised were not properly appreciated or considered by the courts below and hence calls for interference by this Court.

11. Shri D.K. Pradhan, learned counsel appearing for the respondents, on the other hand, submitted that first respondent was occupying the premises as a legally inducted tenant peacefully for over 40 years from the mortgagor and the mortgagor and the mortgagee being co-owners, there is no bar in one co-owner, inducting a tenant in the property. Learned counsel also submitted that rent receipts produced by the first respondent would indicate that he was a legally inducted tenant. Learned counsel also submitted that by virtue of Section 65 of the Code of Civil Procedure, though sale of the joint ½ share of the property in favour of Gangabai became absolute on 09.04.1974 yet it would be deemed that joint ½ share of the property vested in her only in the year 1960. Learned counsel also submitted that even though sale in question became absolute at a later date by assumption of law, the right in property purchased was deemed to be vested in the purchaser only from the date of sale. Learned counsel also submitted that all these aspects and legal issues were considered by all the courts below and they have concurrently found that the plaintiff Gangabai or the appellant could not establish her right over the property in question. Learned counsel, therefore, prays that the appeal be dismissed with costs.

12. We have narrated the facts in detail to indicate as to when the rights had been accrued to Gangabai. Gangabai, as

A already stated, became a mortgagee of the property as early as in 1953 by a registered mortgage deed and the suit filed by Gangabai for enforcing the mortgage was decreed by the civil court on 01.09.1956 and that preliminary decree later became final as against the share of Vijaysingh Mohta.

B Gangabai purchased ½ share in the mortgaged property from Mohta on 02.03.1960 which was confirmed in her favour by the civil court and was placed in joint possession by the executing court on 25.11.1960. Facts would clearly indicate that the first respondent was inducted as a tenant while all these

C proceedings were pending before the court and that the entry of the first respondent into the suit property was not with the consent and knowledge of Gangabai even though she was a mortgagee of a portion of the property from 1953 onwards. Several civil suits were also pending between the mortgagor and the mortgagee and it is during the course of those

D proceedings, evidently, first respondent was inducted as a tenant. The question is whether such induction was in violation of Sections 52 and 65 of the TPA and to the prejudice of the mortgagee Gangabai. On facts, we are convinced that the induction of the respondent was during the subsistence of the

E mortgage and pendency of court proceedings and the legality of that action has to be tested on the touchstone of above statutory provisions and the precedents set by this Court.

13. Rule of *lis pendens* applies to suit on mortgagee as well. Lord Justice Turner has succinctly dealt with this principle in the leading case of *Bellamy v. Sabine* (1857) 1 De G J 566 (Courtesy Mulla on T.P. Act). The doctrine is intended to prevent one party to a suit making an assignment inconsistent with the rights which may be decided in the suit and which might require

G a further party to be impleaded in order to make effectual the court's decree. Law is well settled that a mortgagee, who has purchased a mortgaged property in execution of his mortgage decree is entitled to avoid a transfer on the ground that it was mortgaged by the mortgagor during the pendency of a

H mortgage suit. Section 52 of the TPA prevents a mortgagor

from creating any lease during the pendency of mortgaged suit so as to effect the right of a mortgagee or the purchaser. This Court in *Mangru Mahto and Others* (supra) had an occasion to consider the scope of Section 52 of the TPA in that very context and held as follows:

".....But in view of Section 52 of the Transfer of Property Act, if the mortgagor grants such a lease during the pendency of a suit for sale by the mortgagee, the lessee is bound by the result of the litigation. If the property is sold in execution of the decree passed in the suit, the lessee cannot resist a claim for possession by the auction-purchaser. The lessee could apply for being joined as a party to the suit and ask for an opportunity to redeem the property. But if he allows the property to be sold in execution of the mortgage decree and they have now lost the present case, the lessees allowed the suit lands to be sold in execution of the mortgage decree and they have now lost the right of redemption. They cannot resist the claim of the auction purchaser of recovery of possession of the lands."

14. Section 65-A of the TPA deals with the mortgagee's powers to lease. However, in view of Section 52, if the mortgagor grants such a lease during the pendency of a suit for sale by the mortgagee, the lessee is bound by the result of litigation and if the property is sold in execution of the decree, the lessee cannot resist a claim for possession by auction purchaser.

15. Section 52 deals with cases of transfer of anything otherwise dealing with any immovable property after any suit or proceeding in which any right to such immovable property is directly and specifically in question has been filed. Section 65-A of the TPA deals with the powers of the mortgagor to grant a lease of mortgaged property, while the mortgagor remains in lawful possession of the same. In *Dev Raj Dogra and Others v. Gyan Chand Jain and Others* (1981) 2 SCC 675,

A following the judgment in *Mangru Mahto and Others* (supra), this Court held that if the mortgagor grants a lease during the pendency of a suit for sale by the mortgagee, the lessee is bound by the result of the litigation

B 16. Above legal proposition, in our view, will squarely apply to the facts of this case. On facts, we have already found that the induction of the first respondent was during the subsistence of the mortgage and also subsistence of the various legal proceedings pending before various courts. A plea was raised by the counsel for the respondent that he is entitled to get the protection of the Maharashtra Rent Act. In our view, this plea has no basis in the facts of this case. A tenant who is inducted during the subsistence of the mortgage is not entitled to get the protection of the Maharashtra Rent Act. This legal position has been settled by this Court in *Om Prakash Garg v. Ganga Sahai and Others* AIR 1988 SC 108. In this connection reference may also be made to the Judgment of this Court in *Carona Shoe Co. Ltd. and Another v. K.C. Bhaskaran Nair* AIR 1989 SC 1110.

E 17. In the above-mentioned circumstances, we are of the view that the courts below have not appreciated the various legal issues and committed an error in non-suiting the appellant. We answer those questions in favour of the appellant and hold that the appellant is entitled to get a decree, as prayed for, since the original first respondent was inducted illegally and to the prejudice of the original mortgagee. Consequently, the judgments of the courts below are set aside and the suit is decreed, however, without any mesne profits. The appeal is allowed, but without any order as to costs.

B.B.B.

Appeal allowed.