

## **S.B. Abdul Azeez (By Lrs.) vs M. Maniyappa Setty & Anr on 14 October, 1988**

**Equivalent citations: 1989 AIR 553, 1988 SCR SUPL. (3) 505, AIR 1989 SUPREME COURT 553, 1988 26 REPORTS 518, 1988 SCFBRC 645, 1988 HRR 702, (1988) 2 APLJ 81, 1988 RAJLR 629, (1988) 4 JT 133 (SC), ILR 1989 KANT 314, 1988 (4) SCC 727, (1988) 2 RENCRA 493**

**Author: R.S. Pathak**

**Bench: R.S. Pathak**

PETITIONER:

S.B. ABDUL AZEEZ (BY LRS.)

Vs.

RESPONDENT:

M. MANIYAPPA SETTY & ANR.

DATE OF JUDGMENT 14/10/1988

BENCH:

NATRAJAN, S. (J)

BENCH:

NATRAJAN, S. (J)

PATHAK, R.S. (CJ)

CITATION:

1989 AIR 553

1988 SCR Supl. (3) 505

1988 SCC (4) 727

JT 1988 (4) 133

1988 SCALE (2) 1009

ACT:

Karnataka Rent Control Act, 1961--Section 3(h)--  
Definition of Landlord--Whether includes usufructuary  
mortgagee who is entitled to be in possession of the  
mortgaged property and/or to receive the rents and profits  
in lieu of interest or in payment of the mortgage money.  
Held--Yes.

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Karnataka Rent Control Act, 1961--Section 21(1)(h)--  
Whether usufructuary mortgagee with possession stands on a  
par with owner of building to seek eviction of tenant.  
Held--Yes.

HEADNOTE:

The appellant, now represented by his legal representatives, had taken on rent certain premises and was in occupation thereof. On the basis of a usufructuary mortgage executed by the landlord in their favour, the respondents who are the partners, sought the eviction of the appellant under section 21(1)(h) of the Karnataka Rent Control Act, 1961 on the ground that they were bona fide in need of the premises to run their business. The appellant's defence was that the usufructuary mortgage was a sham and nominal transaction created by the landlord with an oblique motive because he had refused to pay higher rent for the premises and secondly the mortgagees were not bona fide in need of the premises for their business. The Trial Court rejected both the defences and ordered eviction and the said order was affirmed by the appellate court and the High Court. Hence this appeal.

Dismissing the appeal, this Court,

HELD: The definition of landlord' in Section 3(h), is an inclusive definition and would take within its fold any per. who for the time being is receiving or is entitled to receive the rent in respect of the leased premises. The person receiving or entitled to receive the rent may do so either on his own account or On account of or on behalf of or for the benefit of any other person or as a trustee, guardian or receiver for any other person. A mortgagee with possession undoubtedly falls under the first category as under Sec. 58(d) of the Transfer of property Act, he is

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entitled to receive the rent on his own account and this factor makes the usufructuary mortgagee stand on a higher and different footing than other persons accorded the status of a landlord under Section 3(h) because their entitlement to receive rent is on behalf of or for the benefit of others and not on their own account. [510F-H]

V. Baluswamy Servai v. N. Raju Servai, [1966] 2 MLJ 4; T. Ezhumalai v. Padmavathi Ammal, [1971] J 2 MLJ 121 Aswatharamiah v. Special Deputy Commissioner, [1977] 1 Karnataka Law Journal 332; S. Subramanayaswamy v. Deputy Commissioner, Bangalore, AIR 1981 Karnataka 190; R. Vijendra v. H.R. & A.C., ILR 1988 Kar. 1591, referred to.

If the legislature so wanted, it would have undoubtedly categorised a mortgagee with possession also as one of the excluded class of landlords for the purpose of sec. 21(1)(h) of the Act. Obviously the legislature has not done so as would appear from the explanation to clause 4 of sec. 21. [511D-E]

A mortgagee with possession, steps into the shoes of the mortgagor and becomes entitled to all the rights of the mortgagor and the only right left with the mortgagor is the redemption. A mortgagee with possession is entitled to be in possession of the mortgage property as long as it is not

redeemed. If the mortgagee with possession leases back the property to the mortgagor, he acquires the rights of a lessor and is entitled to enforce the terms of the lease against the mortgagor. [511F-G]

Mathur Lal v. Keshar Bai & Anr., AIR 1971 SC 310, referred to.

There can be no doubt that a mortgagee with possession stands very differently from other kinds of landlords envisaged under section 3(b) of the Act. He is therefore entitled, as much as the owner himself, to seek recovery of possession of the leased premises from a tenant for his own bona fide requirement of use. [511g-H]

V. Baluswamy Servai v. N. Raju Servai [1966] 2 MLJ 4; R. Vijendra v. H. R. & A. C., ILR 1988 Kar. 1591, approved.

The appellant's argument that a scheming landlord can adopt the devious method of creating a sham deed of usufructuary mortgage in order to have a tenant evicted has no force because it fails to note that an order of eviction under sec. 21(1)(h) would not be passed by the court for the

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mere asking because, the mortgagee with possession has first got to prove that the premises are reasonably and bona fide required by him for occupation by himself. [512B-C]

#### JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 1006 of 1980.

From the Judgment and Order dated 13.2.1980 of the Karnataka High Court in C.R.P. No. 1287 of 1977.

R.B. Datar for the Appellant.

S.S. Javali and Ravi P. Wadhvani for the Respondents. The Judgment of the Court was delivered by NATARAJAN, J. Does a mortgagee with possession stand on a par with an owner of a building to seek the eviction of a tenant under Section 21(1)(h) of the Karnataka Rent Control Act, 1961 (for short the Act' hereinafter) for his bona fide requirement of the tenanted premises for residential or business needs is the question for determination in this appeal by special leave by a tenant. The Trial Court, the Appellate Court and the High Court in revision have answered the question in the affirmative and the aggrieved tenant now represented by his legal representatives is before us in appeal.

The tenanted shop to one Nanjappa and the appellant had taken the same on rent for running a cycle shop. On the foot of an usufructuary mortgage executed in their favour, the respondents, who are partners, sought the eviction of the appellant under Section 21(1)(h) of the Act. Their case was that they were also running a cycle shop in a rented premises but since their landlord had obtained an order of eviction against them they were bona fide in need of another building to run their

business. In such circumstance they had advanced a sum of Rs.25,000 to the appellant's landlord Nanjappa and obtained a usufructuary mortgage of the tenanted premises and thus having stepped into the shoes of the landlord, they were seeking the eviction of the appellant. The appellant's defence was that the usufructuary mortgage was a sham and nominal translation created by the landlord with an oblique motive because he had refused to pay higher rent for the premises and secondly the mortgagees were not bona fide in need of the petition premises for their business, The Trial Court rejected both the defences and ordered eviction and the said order has been affirmed PG NO 508 by the Appellate Court and the High Court.

In this appeal there is no challenge to the findings that the respondents were bona fide in need of another shop to run their business and that they had obtained an usufructuary mortgage of the tenanted premises from the owner Nanjappa. However, the contention of the appellants is that a usufructuary mortgagee cannot be equated with the mortgagor/landlord for seeking the tenant's eviction under Section 21(1)(h) on the ground of bona fide requirement of the leased premises for his own use. The argument of Mr. Datar, learned counsel for the appellant was that the Act is a beneficial piece of legislation intended to protect the tenants from unreasonable evictions and as such the provisions of Section 21 have to be construed in such a manner that the right of the tenants are not taken away beyond the limits of the Section. It was urged by the learned counsel that if Section 21(1)(h) is to be liberally construed so as to equate a usufructuary mortgagee with the owner of a building and enable him to seek eviction of a tenant under Section 21(1)(h), then it would give a handle for scheming landlords, who cannot themselves obtain an order of eviction against their tenants under Section 21(1)(h), to crate a nominal deed of usufructuary mortgage and have their tenants evicted with the help of the mortgagee and then secure possession of the leased premises for themselves. In this context it was pointed out by Mr. Datar that the usufructuary mortgage in favour of the respondents was only for a period of 30 months and therefore the mortgage should be treated as a colourable transaction.

Before we examine the merit of these contentions, we may refer to the relevant provisions of the Act. The term 'landlord' is defined in Clause (h) of Section 3 of the Act as under:

"Landlord-- 'Landlord means any person who is for the time being, receiving or entitled to receive, rent in respect of any premises whether on his own account, or on account, or on behalf of, or for the benefit of any other person or as a trustee, guardian or receiver for any other person or who would so receive the rent or be entitled to receive the rent if the premises were let to a tenant; and includes any person not being a tenant who from time to time derives title under a landlord; and further includes in respect of his sub-tenant who has sub-let any premises;"

Section 21(1)(h) under which the eviction-petition was filed reads as under:

PG NO 509 "21( I)(h)--that the premises are reasonably and bona fide required by the landlord for occupation by himself or any person for whose benefit the premises are held or where the landlord is a trustee of a public charitable trust, that the premises are required for occupation for the purpose of the trust.

On a reading of Section 3(h) it may be seen that it is an inclusive definition and takes within the fold of 'landlord not only the owner of the premises but any person who for the time being is receiving or is entitled to receive the rent, whether on his own account or on account of, or on behalf of or for the benefit of any other person or as a trustees, guardian or receiver for any other person etc. A usufructuary mortgagee, as per Section 58(d) of the Transfer of Property Act is entitled to be in possession of the mortgage property or to receive the rents and profits, either in full or in part, accruing from the property and appropriate the rents and profits in lieu of interest or in payment of the mortgage money or partly in lieu of interest or partly in payment of the mortgage money. By reason of his entitlement to receive the rent of the mortgage property, a mortgagee with possession will undoubtedly constitute a landlord within the meaning of Section 3(h) of the Act. The appellant's counsel did not dispute this position. He would however say that even so, Section 21(1)(h) should be read down so as to restrict the meaning of the word "landlord" in that clause to the owner of the premises alone and not to a usufructuary mortgagee. Before considering the matter, we may refer to some of the decisions where the same question has been considered.

A learned single judge of the Madras High Court has held in *V. Baluswamy Servai v. N. Raju Servai*, [1966] 2 MLJ 4 that a usufructuary mortgagee of a building in the occupation of a tenant would undoubtedly constitute a landlord within the meaning of Section 2(6) of the Madras Buildings (lease & Rent Control) Act, 1960, as he is entitled to receive the rent of the building on his own account and therefore he would be entitled to evict a tenant under Section 10(3)(a)(i) of the Act on the ground of bona fide requirement of the premises for his personal occupation. This ratio was followed in *T. Ezhumalai v. Padmavathi Ammal*, [1971] 2 MLJ

121. The same view was taken by a learned single judge of the Karnataka High Court also in a case arising under the Karnataka Rent Control Act in *Aswatharamiah v. Special Deputy Commissioner*, [1977] 1 Karnataka Law Journal 332. However, a Division Bench of the Karnataka High Court took a different view in *S. Subramanayaswamy v. Deputy Commissioner*, PG NO 510 Bangalore, AIR 1981 Karnataka 190 and held that though a mortgagee with possession may satisfy the definition of 'landlord' under Section 3(h) of the Karnataka Act, he would not be entitled to claim priority in the matter of allotment of the mortgage premises to himself under Section 5 as the benefit of the Section could be availed of only by the owner/landlord.

As the decision in *S. Subramanayaswamy* (supra) conflicted with some of the earlier decisions of the High Court, a reference was made to a Full Bench in *R. Vijendra v. H.R. & A.C.*, ILR 1988 Kar. 1591 for settlement of law on the question formulated as under:

"Whether an usufructuary mortgagee is a landlord for purposes of Part II of the Karnataka Rent Control Act, 1961."

The Full Bench answered the reference in the affirmative and held that since delivery of possession is a necessary concomitant of a usufructuary mortgage and since the concomitant entitles the usufructuary mortgagee to claim possession of the property to the exclusion of all other, including

the mortgagor, the mortgagee is for all intents and purposes the owner himself, as he steps into the shoes of owner, and by reason of it he acquires the status of a landlord under Section 3(h) as well as the provisions in Part II for claiming possession of the mortgage premises for is personal occupation. On a consideration of the matter we find ourselves in agreement with the view taken by the Full Bench. We may now give the reasons for our view.

The definition of 'landlord' in Section 3(h), as we have already seen in an inclusive definition and would take within its fold any person who for the time being is receiving or is entitled to receive the rent in respect of the leased premises. The person receiving or entitled to receive the rent may do so either on his own account or on account of or on behalf of or for the benefit of any other person or as a trustee, guardian or receiver for any other person. A mortgagee with possession undoubtedly falls under the first category as he is entitled to receive the rent on his own account and this factor makes the usufructuary mortgagee stand on a higher and different footing than other persons accorded the status of a landlord under Section 3(h) because their entitlement to receive rent is on behalf of or for the benefit of others and not on their own account. Secondly it is of significance that the legislature being alive to the expansive nature of the definition of the term 'landlord' in Section 3(h) had realised the need to limit PG NO 511 the operation of the definition in so far as eviction petitions under Section 21(1)(h) are concerned. Section 21(1) sets out various grounds on which the eviction of a tenant can be sought for. The grounds may pertain to the omissions or commissions of the tenant or to the bona fide requirement of the premises by the landlord in various situations. The legislature has taken care to see that in so far as clause (h) is concerned viz the premises being reasonably and bona fide required by the landlord for his own occupation or for the benefit of any person for whom the premises are held, the status of a landlord should be denied to a Rent Collector or an Estate Manager. The exclusion is to be found in the Explanation to Clause 4 of Section 21 in the following terms:

"For the purpose of clause (h) of the proviso to sub-section 1, expression 'landlord' shall not include a Collector or Estate Manager."

It therefore follows that if the legislature had wanted that a mortgagee with possession should not be equated with the owner of the premises and should be denied the benefit of seeking a tenant's eviction under Section 21(1)(h), the Legislature would have undoubtedly categorised a mortgagee with possession also as one of the excluded class of landlord lords for the Purposes of Section 21(1)(h) of the Act. Obviously therefore the legislature has not wanted a mortgagee with possession to be excluded of his right to seek eviction of a tenant from the mortgaged premises under Section 21(1) of the Act. Thirdly, a mortgagee with possession is enjoined by Section 76(a) of the Transfer of Property Act manage the property as a man of ordinary prudence would manage it if it were his own. As such the mortgagee's acts, it prudently done, could bind the mortgagor even after the redemption of the mortgage. A mortgagee with possession, steps into the shoes of the mortgagor and becomes entitled to all the rights of the mortgagor and the only right left with the mortgagor is the right of redemption. A mortgagee with possession is entitled to be in possession of the mortgage property as long as it is not redeemed. If the mortgagee with possession leases back the property to the mortgagor, he acquires the rights of a lessor and is entitled to enforce the terms of the lease against the mortgagor (vide Mathur Lal v. Keshar Bai & Anr., AIR 1971 SC 310). On account of all these

factors there can be no doubt that a mortgagee with possession stands very differently from other kinds of landlords envisaged under Section 3(h) of the Act. He is therefore entitled, as much as the owner himself, to seek recovery of possession of the leased premises from a tenant for his own bona fide requirements of use. For all these reasons we hold PG NO 512 that the view taken by the single judges in the cases referred to above and the Full Bench in R. Vijendra's case (supra) is the correct view to be taken.

As regards the contention of Mr. Datar that a scheming landlord can adopt the devious method of creating a sham deed of usufructuary mortgage in order to have a tenant evicted, when he himself cannot sustain such an action, the argument fails to note that an order of eviction under Section 21(1)(h) would not be passed by the Court for the mere asking because, the mortgagee with possession has first get to prove that the premises are reasonably and bona fide required by him for occupation by himself. Without the reasonable and bona fide requirement being proved to the satisfaction of the Court, no order for eviction will be passed. Nextly, even if the mortgagee with possession satisfies the above test, he has to pass the further test laid down by sub-section 4 of Section 21 which provides that a tenant shall not be evicted under Section 21(1)(h) if the Court is satisfied that the tenant would be put to greater hardship by an order of eviction being passed than the hardship that would be caused to the landlord by refusal to pass an order of eviction in his favour. These things apart, it is inconceivable every landlord who would not be able to evict his tenant by resort to Section 21(1)(h) would be able to readily find a willing accessory who will be prepared to play the role of a usufructuary mortgagee and institute eviction proceedings against the tenant in order to secure the possession of the leased premises and then hand over possession to the owner of the building.

For all these reasons, the appeal deserves to fail and will accordingly stand dismissed. The appellant is, however, given six months time from today to vacate the leased premises subject to the appellant filing an undertaking in the usual terms within four weeks from today. There will be no order as to costs.

H.S.K.

Appeal dismissed.