

# Shah Mathuradas Maganlal & Co vs Nagappa Shankarappa Malage & Ors on 23 March, 1976

**Equivalent citations: 1976 AIR 1565, 1976 SCR (3) 789, AIR 1976 SUPREME COURT 1565, 1976 3 SCC 660, 1976 3 SCR 789, 1976 RENCRA 865, 1976 UJ (SC) 389**

**Author: A.N. Ray**

**Bench: A.N. Ray, Jaswant Singh**

PETITIONER:

SHAH MATHURADAS MAGANLAL & CO.

Vs.

RESPONDENT:

NAGAPPA SHANKARAPPA MALAGE & ORS.

DATE OF JUDGMENT 23/03/1976

BENCH:

RAY, A.N. (CJ)

BENCH:

RAY, A.N. (CJ)

SINGH, JASWANT

CITATION:

1976 AIR 1565                      1976 SCR (3) 789

1976 SCC (3) 660

CITATOR INFO :

R                      1984 SC1728 (5)

RF                    1988 SC 375 (24)

F                    1991 SC2046 (6)

ACT:

Mortgage-Tenant in occupation taking a possessory mortgage of the building with powers to sublet w.e.f. 7-11-1953 by a Deed of mortgage dt. May 21st 1953-Whether the tenancy revives on redemption of mortgage-Interpretation of-The Transfer of Property Act, 1882 Ss. 62, 11(d)(e) and (f)-Doctrine of surrender and Doctrine of Merger distinguished.

HEADNOTE:

In the suit, for redemption of mortgage and recovery of possession, the appellant mortgagee in possession of the

suit house w.e.f. 7-11-1953 by virtue of the Deed of Possessory mortgage dt. 21-5-1953 contested on the ground that, in view of the fact that he was a tenant prior to the mortgage, he was entitled to retain the possession even after the redemption. The trial court accepting the contention decreed only symbolical possession. On appeal by respondent No. 1 the mortgagor, the first appellate court reversed the decree and ordered recovery of possession of the property on deposit of the expenses towards repairs being a "clog on redemption". The High Court on Second Appeal confirmed the said orders holding that the Deed of Mortgage shows that the relationship between the appellant and the respondent was that of a mortgagee and mortgagor.

Affirming the judgment of the High Court and dismissing the appeal by special leave, the court

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HELD : (i) Ordinarily the doctrine of merger applies to extinction of mortgage security occurring by the merger of a lower in a higher security and by the merger of a lesser estate in a greater estate. Where the capacity in which a person in possession of the mortgagee's rights is something quite different from the capacity in which he is in possession of the equity of redemption, the mere fact that the two capacities are united in the same physical person cannot result in a merger. For a merger to arise it is necessary that a 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 outside. In the case of a lease the estate that is in the lessor is the reversion. In the case of a mortgage the estate that is outstanding being the equity of redemption of the mortgagor, there cannot be a merger of lease and mortgage in respect of the same property since neither of them is a higher or lesser estate. [793B-D]

Narayan v. Ramchandra 65 Bom. L.R. p. 449 (approved)

(ii) A surrender under clauses (e) and (f) of the Transfer of Property Act is an yielding up of the term of the lessee's interest to him who has the immediate reversion or the lessor's interest. Implied surrender by operation of law occurs by the creation of a new relationship or relinquishment of possession, if the lessee accepts a new lease that in itself is a surrender. Surrender can also be implied from the consent of the parties or from such facts as the relinquishment of possession by the lessee and taking over possession by the lessor. Relinquishment of possession operates as an implied surrender. There must be taking of possession, not necessarily a physical taking, but something amounting to a virtual taking of possession. Whether this has occurred is a question of fact. [793H, 794A-B]

(iii) (a) In the instant case, on the redemption of the mortgage the respondent had a right to record possession both on the terms of the mortgage deed and u/s 62 of the Transfer of Property Act (b) The provision for subletting in

the Mortgage Deed, contrary to section 15 of the Bombay, Rents, Hotel and Lodging House. Rates Control Act, 1957 as it stood in 1953 shows that the character of tenant is lost; (c) Continuing the tenancy till 7-11-1953

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and confirming the possession of the appellant as mortgagee w.e.f. that date is an unequivocal conduct showing that no tenancy was to exist from 7-11-1953, but the relationship was that of a mortgagor and mortgagee and (d) there would be no question of the tenancy being kept in abeyance or the tenancy reviving on the expiration of the period of mortgage. [792F, G, 793A-B, & 794D]

#### JUDGMENT :

CIVIL APPELATE JURISDICTION : Civil Appeal No. 450 of Appeal by Special Leave from the Judgment and Order dated the 6th February, 1970 of the Bombay High Court in Second Appeal S. T. Desai, K. Raj Choudhary and Veena Sharma (Mrs.) for the Appellant.

M. V. Tarkunde, V. N. Ganpule for the Respondents. The Judgment of the Court was delivered by RAY, C.J.-This appeal by special leave is from the judgment dated 6 February, 1970 of the High Court at Bombay. The Respondent No. 1 obtained a decree for redemption of mortgage dated 21 May, 1953 for possession of mortgaged property consisting of a shop and house premises at Sangli.

The appellant was mortgagee in possession of the property by a Deed of Mortgage dated 21 May, 1953. The property was mortgaged for Rs. 10,000/-. No interest was to be paid. Instead possession of the property was agreed to remain with the mortgagee. The period for redeeming the mortgage was fixed for 10 years from 7 November, 1953.

The respondent mortgagor by notice dated 1 October, 1963 informed the appellant that he was ready and willing to redeem the mortgage. The appellant replied that he should be paid Rs. 30,000/- being the expenses for repairs and other incidental expenses. The appellant also claimed that even after the redemption he was entitled to retain possession because his previous tenancy right subsisted.

The Trial Court held that the tenancy of the appellant would revive on redemption of the mortgage. The Trial Court further decreed that the respondent was entitled to get only symbolical possession from the appellant and thereafter get rent of the suit property from the appellant.

On appeal the District Judge came to the conclusion that under the Mortgage Deed the appellant ceased to be a tenant with effect from 7 November, 1963 possession of the appellant thereafter was only as a possessory mortgagee and not as a tenant. On redemption of the mortgage the respondent was entitled to recover possession of the property forthwith. The District Judge passed a decree for the principal mortgage amount and a sum of Rs. 4458 24 on account of repairs in favour of the appellant. The District Judge further gave the respondent a decree for actual possession of the

property from the appellant after the respondent deposited the smount in the Court.

The High Court on second appeal held that the Deed of Mortgage shows that the relationship between the appellant and the respondent was that of a mortgagor and mortgagor and confirmed the decree in favour of the respondent.

Counsel for the appellant contended that in case of a tenant in possession who takes a possessory mortgage the effect of such mortgage is that the tenant's rights remain in abeyance during the term of mortgage and the parties revert to their former position on redemption. It was also said that the mortgagor respondent could not take possession from the appellant without actual eviction. The mortgage according to the appellant was usufructuary mortgage with the result that at the end of 10 years being the period of mortgage possession the mortgagee acquires the statutory protection given to the tenants.

The mortgage Deed is described as a Possessory Mortgage Deed of the house-site and was for a sum of Rs. 10,000/-. The respondent mortgagor stated, inter alia, as follows:-

"I have given you the house-site in possessory mortgage in consideration of the aforesaid amount. The said property is in your possession as the last tenant by the date 6 November, 1953. The possession thenceforth is confirmed by this Deed of Possessory Mortgage. Hence you are to either use the house-site and shop premises for home (personal) purpose or let it to anybody. The income that may be received by giving the property on rent is to be appropriated by you towards the interest on the said amount. I shall not pay you any interest separately. I shall not ask for the accounts in respect of the income of the house-site from you. I am to pay all the Government dues. I am also to carry out repairs of all sorts to the house premises, and I shall do so. If I fail to pay Government dues and if I do not defray the costs of the repairs you are to pay all the said Government dues and defray the costs of the repairs. The aforesaid amounts which you may have to pay and spend will be paid by me to you together with interest at the rate of Rs. 0- 12- 0 annas twelve per cent per month. The above mortgaged property is charged with the liability of repaying the aforesaid amounts. The period of this document is 10 years from 7 November, 1953. I shall pay you the aforesaid amount within the said period and redeem the housesite from the mortgage. If I fail to do so you are to carry on the 'vahiwaat' of the housesite under the above agreement. If you do not wish to keep the amount with me beyond the above period, you are to sell the said mortgaged property through Court and recover the entire amount due and payable to you."

The appellant's contentions were these: First, the defendant was a tenant of the suit building prior to the execution of the mortgage on 21 May, 1953 and the tenancy could either exist concurrently with the usufructuary mortgage or be in abeyance during the currency of the mortgage but could never be extinguished as a result of the mortgage. Second, once the tenancy of the appellant continued after the execution of the mortgage deed then there would be no question of either express or implied surrender of his tenancy rights during the subsistence of the mortgage. Third, the fact of a

tenant taking a mortgage from his landlord does not itself extinguish the tenancy and the effect of such a mortgage on the tenant's rights is merely that they are in abeyance and when the landlord redeems the mortgage, the parties revert to their former position, and the landlord is not entitled to get actual possession. Fourth, that the existence of possessory mortgage does not necessarily terminate the tenancy.

The respondent contended as follows:-

First, the conduct of the mortgagee along with the terms made it clear that the appellant mortgagee surrendered his tenancy rights at the time of execution of Mortgage Deed. Second, on the expiry of the period of 10 years the appellants mortgagee could not insist upon retaining possession on the ground of the previous right of lessee, and the lease could not be revived on the expiration of the period of the mortgage. Third, on the terms of the Deed of Mortgage, there was an express or implied surrender of the lease. Fourth, the tenancy in question was to be continued till 6 November, 1953 though the mortgage was executed on 21 May, 1953. The possession of the mortgage was confirmed from 7 November, 1963 amounting to unequivocal conduct showing that the relationship became that of a mortgagor and mortgagee only.

The Deed of Mortgage shows these features indicating that there was surrender of tenancy and the appellant was only a mortgagee. The High Court found that there was a surrender of tenancy right. No particular form of words is essential to make a valid surrender. A surrender may be oral. A surrender may be express although delivery of possession is necessary for surrender in the facts and circumstances of a given case. In the present case, delivery of possession was immediately followed by a redelivery of possession of the appellant as mortgagee. The Mortgage Deed establishes beyond doubt that the effect of the Deed was inconsistent with the continuance or subsistence of the lease because the parties themselves stipulated that the lease was to exist only upto 6 November, 1953. On the redemption of the mortgage the respondent had a right to recover possession both on the terms of the mortgage deed and under section 62 of the transfer of Property Act.

The second feature in the Mortgage Deed is that the appellant was given power to sub-let. Section 15 of the Bombay, Rents, Hotel and Lodging House Rates Control Act, 1947 as it stood in 1953 forbade any sub-letting. In 1959 the words 'but subject to any contract to the contrary' were introduced into the said section 15, with the result that in the absence of the contract to the contrary, the tenant is not to sub-let or transfer. Before 1959 there could be no subletting. In the Mortgage Deed, there is provision for sub-letting. The provision for sub-letting shows that the character of tenant is lost.

Third, the mortgagor is to do repair works and is also to undertake repairs.

Fourth, the possession was to be under the agreement. Though the Mortgage Deed was made on 21 May, 1953, the tenancy was continued till about 7 November, 1953. The possession of the appellant as mortgagee was confirmed from 7 November, 1953. This is rightly held to be unequivocal conduct showing that no tenancy was to exist from 7 November, 1953 but the relationship was that of

mortgagor and mortgagee. If the intention of the parties was to revive the tenancy there was no necessity of a term that the appellant might let out the property to any one.

The contention of the appellant was that there was no surrender and there was merger of the interest of the mortgagee and the tenant. Ordinarily, the doctrine of merger applies to extinction of mortgage security. This occurs by the merger of a lower in a higher security and by the merger of a lesser estate in greater estate. Where the capacity in which a person is in possession of the mortgagee's rights is something quite different from the capacity in which he is in possession of the equity of redemption, the mere fact that the two capacities are united in the same physical person cannot result in a merger.

For a merger to arise, it is necessary that a 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 in the lessor is a reversion. In the case of a mortgage the estate that is outstanding is the equity of redemption of the mortgagor. Therefore, there cannot be a merger of lease and mortgage in respect of the same property since neither of them is a higher or lesser estate than the other. The view expressed in *Narayan v. Ramchandra* (1) is correct.

Section 111 of the Transfer of Property Act is clauses

(e) and (f) deal with surrender, and in clause (d) with merger. Clause (d) states that lease in movable properties determines in case the interest of the lessee or the lessor in the whole of the property becomes vested at the same time in one person in the same right. When a leasehold and a reversion coincide there is a merger of a lesser estate in the greater. The leasehold is the lesser estate, for it is carved out of the estate of the owner, which is the reversion. The lesser estate is merged in the greater. The lease determines and merges in the reversion. If the lessor purchases the lessee's interest, the lease is extinguished, as the same man cannot be at the same time both landlord and tenant. The interests of the lessor and of the lessee must be in the whole of the property, otherwise there is no merger. The interest of the lessor and the lessee in the whole of the property should become vested at the same time in one person in the same right. Thus a lease is not extinguished because the lessee purchases a part of the reversion.

A surrender under clauses (e) and (f) of section 111 of the Transfer of Property Act, is an yielding up of the term of the lessee's interest to him who has the immediate reversion or the lessor's interest. It takes effect like a contract by mutual consent on the lessor's acceptance of the act of the lessee. The lessee cannot, therefore, surrender unless the term is vested in him; and the surrender must be to a person in whom the immediate reversion expectant on the term is vested. Implied surrender by operation of law occurs by the creation of a new relationship, or by relinquishment of possession. If the lessee accepts a new lease that in itself is a surrender. Surrender can also be implied from the consent of the parties or from such facts as the relinquishment of possession by the lessee and taking over possession by the lessor. Relinquishment of possession operates as an implied surrender. There must be a taking of possession, not necessarily a physical taking, but something amounting to a virtual taking of possession. Whether this has occurred is a question of fact. In the

present case if the mortgagor was not able to redeem the appellant mortgagee was to enjoy the property in accordance with the terms of the mortgage and also to sell the property for recovery of debts. This feature shows that appellant surrendered the tenancy from 7 November, 1953.

In the present case the terms of the deed show that the mortgagee undertook to deliver possession of the property to the mortgagor on the expiry of a period of 10 years. The Mortgage Deed shows that the tenancy was surrendered on 7 November, 1963 and thereafter the possession was only that of mortgagor. There would be no question of the tenancy being kept in abeyance or the tenancy reviving on the expiration of the period of mortgage.

For these reasons the judgment of the High Court is affirmed and the appeal is dismissed with costs.

S.R.

Appeal dismissed.