

## Hardei vs Wahid Khan And Anr. on 4 August, 1953

Equivalent citations: AIR1954ALL16, AIR 1954 ALLAHABAD 16

**Author: V. Bhargava**

**Bench: V. Bhargava**

### JUDGMENT

Malik, C.J.

1. This case raises a very short point, that when a mortgage is redeemed, does the tenant, to whom the house had been let out by the mortgagee, become a trespasser from the date of redemption and can he be ejected as a trespasser, or must the mortgagor after redeeming the property take steps to eject him as a tenant? There is conflict of opinion on the point. It has been urged that the cases dealing with agricultural tenancies are distinguishable and do not apply to houses which have been let out to tenants. Piggott, J. however, in --'Collector of Basti v. Sarnam Charak', 8 All LJ 802 at p. 805 (A), held that there was no difference between an ordinary tenancy and an agricultural tenancy. In view of the conflict of decisions on the point it is desirable that this case may be decided by a larger Bench. I, therefore, refer it to a Bench for decision.

The cases which have been quoted and which appear to be relevant and in favour of the appellant are: -- 'Ram Chand v. Raj Hans', 3 All LJ 517 (B); -- 'Adjoodhya Singh v. Girdharee', 2 N. W. P. (H. C, R.) 199 (C); -- 'Alagiriswami Mudali v. Akkulu Naidu', AIR 1921 Mad 393 (D); and -- 'Jhagru Mian v. Raghunath Singh', AIR 1929 Pat 630 (E).

The cases in which the other view seems to have been taken, besides the case decided by Piggott J. which I have already mentioned are: -- 'Bhup Singh v. Sheo Shanker', AIR 1931 All 743 (1) (F); -- 'Pramatha Nath v. Sashi Bhusan', AIR 1937 Cal 763 (G); -- 'Chinnappa Thevan v. Pazhaniappa Pillai', AIR 1916 Mad 911 (H) and -- 'Barjorji Shapurji v. Shripatprasadji', AIR 1927 Bom 145 (I).

Malik, C.J.

This case has been referred to a Division Bench by reason of some difference of opinion, but on an examination of the cases cited at the Bar, we do not think that the exact point raised in this case in fact arose for decision in the cases cited. The plaintiff, Srimati Hardei, had mortgaged a house and a shop appertaining thereto to one Nandlal; the mortgage was with possession. During the continuance of the mortgage the mortgagee let out the shop and the room appertaining thereto to Wahid Khan, defendant 1, as a month to month tenant. Defendant 2 is his son. The mortgage was

redeemed in 1946. There is some dispute as to the date on which the mortgagor took possession of the property but the exact date of her having taken possession of the mortgaged property is not of much importance for the purpose of decision of this appeal. The mortgagor, treating defendant 1 as a trespasser, gave him a notice to quit on 13-3-1948. As the defendant did not comply with the notice she brought the suit No. 422 of 1943 in the Court of the Munsif, West Allahabad, out of which this appeal has arisen, for his ejectment from "the western shop and the room appertaining thereto in house No. 46 situate in Thatheri Bazar, Allahabad," and impleaded his son Shaukat as defendant 2, so that there may be no complication after she had obtained the decree. The plaintiff also claimed damages for use and occupation at the rate of Rs. 25/- per month from 27-11-1946, the date when she claimed to have got back possession of the property.

2. The defendants in their written statements raised various pleas which gave rise to ten issues which were framed by the learned Munsiff. The first issue was "Whether the tenancy of defendant 1 has terminated as alleged?"

The importance of this issue, according to learned counsel, lies in the fact that, if defendant 1 became a trespasser on the redemption of the mortgage by the plaintiff, the Rent Control and Eviction Act will not apply to him. That if, on the other hand, his position was not that of a trespasser but of a tenant on the date of the redemption of the mortgage, he was entitled to the benefit of the Rent Control and Eviction Act (U. P. Act 3 of 1947).

3. The learned Munsif held that the defendant was a tenant and that he did not become a trespasser on the date of the redemption of the mortgage and, on that finding, he dismissed the suit without recording any finding on the other issues raised in the case.

4. The lower appellate court agreed with the learned Munsif on the decision of the first issue but remanded the case under Order 41, Rule 23 Civil P. C., for decision of the other issues raised. It is against that order that this appeal has been filed under Order 43, Civil P. C.

5. The short point in the case is whether the mortgagee in possession had a right to let out the shop and the room appertaining thereto on a monthly tenancy and whether on the redemption of the mortgage the tenant ceased to have any tenancy rights and from the date of the redemption became a trespasser.

6. Under Section 76, T. P. Act, (4 of 1882) "when, during the continuance of the mortgage, the mortgagee takes possession of the mortgaged property (a) he must manage the property as a person of ordinary prudence would manage it if it were his own....."

If the property mortgaged is a shop which is let out to tenants, the mortgagee is not bound either to keep the shop vacant or to occupy it himself. He is authorised under the provisions quoted above to let it out to a tenant and in the case of a house or a shop a month to month tenancy, in the absence of a contract to the contrary, would be the usual tenure under Section 106, T. P. Act. If the mortgagee lets out the premises on a month to month tenancy it cannot be said therefore that he

was doing anything beyond the powers conferred on him by Section 76(a) quoted above.

7. Reliance is placed on Section 111(C), T. P. Act, which provides that "A lease of immoveable property determines -- (c) where the interest of the lessor in the property terminates on, or his power to dispose of the same extends only to, the happenings of any event -- by the happening of such event;

and it is urged that as the mortgagee's right to grant the lease extended only up to the period when the mortgage was in existence the tenant became a trespasser on the date the mortgage was redeemed.

8. No doubt, on the redemption of the mortgage, the mortgagor is not bound by the transfers made by the mortgagee or by contracts entered into by him unless his action can be supported on the ground that it was authorised by law or that he was empowered to act under some power or authority, express or implied, conferred on him by the mortgagor. The mortgagor in such a case may be entitled to claim back possession of the property free from any liability created by the mortgagee after the redemption of the mortgage, but this does not mean that, if in the exercise of his powers of due management as a person of ordinary prudence he has entered into an agreement of tenancy, on the mere redemption of the mortgage without the mortgagor exercising his option of putting an end to the tenancy the tenancy automatically and 'ipso facto' lapses on the date of the redemption.

9. Learned counsel have cited some cases relating to agricultural land and have urged that, though in cases of agricultural land by reason of the Tenancy Act those decisions may have been justified, the principle laid down in those cases does not apply. A number of rulings has also been cited for the proposition that a mortgagee has no right to create a title beyond the continuance of a mortgage and on the redemption of the mortgage the title of the transferee from the mortgagee ceases. In view of the recent decision of the Supreme Court in -- 'Mahabir Gope v. Harbans Narain Singh', AIR 1952 S. C. 205 (J), it is no longer necessary for us to discuss the cases relied on by learned counsel. Dealing with the question of a mortgagee creating a lease for a definite period and the lessee claiming that the mortgagor even after the redemption of the mortgage was bound and could not claim back possession of the property before the expiry of the period for which the mortgagee had granted the lease, their Lordships held that "A mortgagee cannot during the subsistence of the mortgage act in a manner detrimental to the mortgagor's interests such as by giving a lease which may enable the tenant to acquire permanent or occupancy rights in the land, thereby defeating the mortgagor's right to khas possession; it would be an act which would fall within the provisions of Section 76, Sub-clause (e)."

Their Lordships, however, pointed out that "A permissible settlement by a mortgagee in possession with a tenant in the course of prudent management and the springing up of rights in the tenant conferred or created by statute based on the nature of the land and possession for the requisite period is a different matter altogether. It is an exception to the general rule."

10. In the case before us, the mortgagee had created merely a tenancy from month to month in accordance with the provisions of Sections 76(a) and 106, T. P. Act. It could not be said that he had

done anything contrary to law or usage in letting out the shop, which he could not occupy himself and that he had not acted as a "person of ordinary prudence". On the redemption of the mortgage, the mortgagor no doubt has the right ordinarily to terminate the tenancy by giving 15 days' notice in accordance with the provisions of Section 108, T. P. Act. The Control of Rent and Eviction Act, 1947, it is urged, however, restricts the rights of a landlord to eject a tenant and a suit for ejectment can, therefore, be filed only in accordance with the provisions of Section 3 of the Act. The decision of the lower Courts, that the defendant did not automatically become a trespasser on the date of the redemption of the mortgage is correct. Whether in the circumstances the lower appellate Court should have remanded the case to the trial Court for decision of the other issues and whether in the circumstances the provisions of the Control of Rent and Eviction Act apply are not points that have been argued before us. All that we, therefore, need say is that, while dismissing the appeal, we make it clear that the trial Court will only decide such issues as may call for decision after the finding that defendant 1 did not automatically become a trespasser on the date of redemption of the mortgage.

11. The appeal has no force and is dismissed with costs.