

Jadavji Purshottam vs Dhami Navnitbhai Amaratlal & Ors on 9 September, 1987

Equivalent citations: 1987 AIR 2146, 1988 SCR (1) 76, 1987 RAJLR 580, 1987 4 JT 523, AIR 1987 SUPREME COURT 2146, (1988) 1 GUJ LH 146, (1988) 1 GUJ LR 52, (1987) 3 JT 523 (SC), (1987) 2 RENCJ 466, (1987) 2 RENCJ 403, (1987) 3 SCJ 308, 1987 (4) SCC 223, (1987) 2 ALL RENTCAS 387

Author: Sabyasachi Mukharji

Bench: Sabyasachi Mukharji

PETITIONER:
JADAVJI PURSHOTTAM

Vs.

RESPONDENT:
DHAMI NAVNITBHAI AMARATLAL & ORS.

DATE OF JUDGMENT 09/09/1987

BENCH:
NATRAJAN, S. (J)
BENCH:
NATRAJAN, S. (J)
MUKHARJI, SABYASACHI (J)

CITATION:
1987 AIR 2146 1988 SCR (1) 76
1987 SCC (4) 223 JT 1987 (3) 523
1987 SCALE (2) 535
CITATOR INFO :
F 1989 SC 436 (42,45,51)
R 1989 SC 1110 (12,18)

ACT:

Saurashtra Rent Control Act, 1951: Lease of mortgaged premises by mortgagee beyond the term of the mortgage-Mortgagee not authorised to create such tenancy-Whether mortgagors entitled to possession on redemption-Tenant whether necessary party to execution application-Whether tenancy rights protected under the Rent Act.

Transfer of Property Act, 1882: s. 98-Anomalous mortgage-Rights of parties.

HEADNOTE:

The respondents mortgaged a house property in Bhavnagar with ID possession to a business firm in July, 1947. The ground floor of the house was already in the occupation of a tenant and hence the mortgagors endorsed the rent deed to the mortgagee for the remaining period of the lease. Clause 5 of the mortgage deed gave option to the mortgagee to give the house property on rent to anyone and made the mortgagors accountable for loss of rental income. Clause 7 empowered the mortgagee to keep the property in his possession till the mortgage debt was repaid. Clause 10 entitled the mortgagors to redeem the mortgage at any time and stated that as soon as redemption took place, the mortgagee should return the documents of title and re-deliver possession of the house to the mortgagors. Notwithstanding the mortgage purporting to be possessory the deed provided for payment of interest, and for the mortgagee to demand repayment of the mortgage amount at any time it deemed fit.

When the existing tenant vacated the portion occupied by him, in November, 191;6, the mortgagee inducted the appellant as a tenant. The Saurashtra Rent Control Act, 1951 had in the meantime come into force. This was replaced by the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 with effect from 1.1.1964. The ejectment proceedings initiated by the mortgagee against the tenant-appellant were pending when the mortgage was discharged in October, 1972 in terms of the memo of compromise, which stated that the ground floor of the house had been given on rent to the appellant, that the mortgagee had filed a case against him, that in such circumstances the

77

vacant possession of the ground floor could not be delivered, and that the mortgagors were entitled to obtain vacant possession of the said portion from the appellant. In the execution proceedings taken out by the mortgagors thereafter the executing court held that they were entitled to get only symbolic delivery and not physical possession of the leased property.

The High Court held that as the mortgage was an anomalous mortgage, the rights of the mortgagee have to be determined with reference to the terms of the mortgage deed, that though the mortgage deed permitted the mortgagee to create tenancies, the said permission did not extend to granting lease beyond the term of the mortgage and it was subject to the stipulation in the mortgage deed that the mortgagee should deliver possession whenever the mortgage was redeemed, and hence when the mortgagee's right to possession came to an end, he ceased to be a lessor and the appellant was bound to surrender possession and he had no right to invoke the provisions of the Rent Acts to continue his tenancy, and that the appellant was not a necessary party to the suit or the execution application, as his possession was akin to that of a sub-lessee and the

execution application was therefore legally maintainable against him.

In this appeal by certificate it was contended for the appellant-tenant that his tenancy rights were protected under the Saurashtra Rent Act and the Bombay Rent Act, that the mortgagors had given an unrestricted power to the mortgagee to create a tenancy for any length of time, and were therefore, bound to accept the lease transaction even after the redemption of the mortgage deed, that his tenancy rights became enlarged by the subsequent legislation enacted for affording protection to tenants, and that by reason of the authority given to the mortgagee to create tenancy the mortgagors had constituted the mortgagee as their agent and hence they as principals were bound by the acts of their agent.

Dismissing the appeal,

^

HELD: 1.1 A tenancy created by a mortgagee in possession may be binding even after the termination of the title of the mortgagee in possession if the mortgagors had concurred to the grant of the lease. [88B]

1.2 In the instant case, the mortgagors had not empowered the mortgagee to create a tenancy which would be binding on them after the

78

redemption of the mortgage. The authorisation given to the mortgagee was not an unconditional and absolute one. It was circumscribed by the stipulation that the mortgagee should re-deliver the possession of the property whenever the mortgage was redeemed. The lease granted by the mortgagee could not thus enure beyond the term of the mortgage. [91E, 90A, 91BC]

1.3 This was not a case where the mortgagee was put in possession of the mortgaged property in order to appropriate the usufructs in lieu of interest. The mortgagors had agreed to pay interest to the mortgagee at mercantile rate and also as per contractual rate. Furthermore, the mortgage deed absolved the mortgagee of any liability for loss of income from the mortgaged property due to fall in rent or non-payment of rent or due to non-leasing of the property and keeping the house vacant. On account of these guarantees the mortgagee was under no compulsion to lease out the property just because of the permission given to him to grant lease, either to secure rental income in lieu of interest or on grounds of prudent management. The mortgagee should have realised that by inducting the appellant, he was running the risk of being unable to deliver possession of the house to the mortgagors when the mortgage was redeemed and thereby he would be contravening clauses 7 and 10 of the mortgage deed. [90D-E]

1.4 The mortgage in the instant case was an anomalous mortgage and not an usufructuary one. The rights of the parties to the mortgage therefore would be governed by s. 98

of the Transfer of Property Act, which provides for determination of the rights of the parties in accordance with the terms of the mortgage deed. Consequently, the appellant could claim tenancy rights only as against his landlord viz. the mortgagee and not against the mortgagors. As soon as the mortgagee's rights became extinguished by redemption of the mortgage, neither he nor anyone inducted by him had a right to be in possession of the mortgaged property. [85CE, 91F]

Film Corporation Ltd. v. Gyan Nath, [1970] 2 SCR 581; Purshottam v. Madhavaji Meghaji, AIR 1976 Gujarat 161; 17 G.L.R. 497; SV Venkatarama Reddiar v. Abdul Gani Rowther & Ors. AIR 1980 Madras 276; and Devkinandan v. Roshan Lal, AIR 1985 Rajasthan 11, referred to.

2. No question of imprudence can arise where the rights of the tenant were enlarged by tenancy legislation enacted after the tenant was put in possession by the mortgagee. In the instant case, the appellant's rights, as a tenant, did not become enlarged by means of any tenancy

79

legislation which came to be enacted after the lease was granted. The Saurashtra Rent Control Act, 1951 was already in force when the appellant was inducted into possession from December 4, 1956. It cannot be claimed that the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 which had replaced the Saurashtra Act from January 1, 1964, was a subsequent tenancy legislation that had enlarged the tenancy rights of the appellant, since the second appeal pertaining to the standard rent application and the suit for ejectment filed by the mortgagee were instituted in 1963 before the repeal of the Saurashtra Act. [88A, 91E, 88F,H, 89AB,DE]

Mahabir Gope v. Harbans Narain, [1952] SCR 775; Asa Ram v. Ram Kali, [1958] SCR 986; Dahya Lal v. Rasul Mohammed Abdul Rahim, [1963] 3 SCR 1; Prabhu v. Ram Dev, [1966] 3 SCR 676 and Mula's Transfer of Property Act, 7th Edn. p. 514, referred to.

3. The relationship between the parties to the mortgage was always one of debtor and creditor. There was, thus, no question of the mortgagors constituting the mortgagee as their agent. [91D] D

4. The appellant had no independent rights and hence it was not necessary that he should have been made a party to the suit filed by the mortgagors after the redemption of the mortgage. His position was akin to that of a sub-tenant whose rights were co-terminus with those of the tenant himself. The mortgagors were, therefore, entitled to seek ejectment of the mortgagee and the tenant inducted by him. The execution application taken against the mortgagee would be binding on the appellant. [91G-H]

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 47(N) of 1978.

From the Judgment and Decree dated 4.7.1977 of the Gujarat High Court in F.A. No. 152 of 1974.

K.N. Bhatt, P.H. Parekh and P.K. Manohar for the Appellant.

T.U. Mehta, and S.C. Patel for the Respondents. The Judgment of the Court was delivered by NATARAJAN, J. This appeal by certificate under Article 133 of the Constitution is directed against a judgment of the High Court of Gujarat in an appeal arising from the execution proceedings. The appellant is a tenant inducted to the ground floor of a building in Bhavnagar by a mortgagee in possession and the question for consideration is whether the mortgagors are entitled to dispossess him by reason of the redemption of the mortgage debt.

For a full and effective understanding of the issues involved in the case a maze of details have to be gone through and we will, there fore, advert ourselves to that task. In July 1947 Dhami Navnitbhai Amaratlal, the first respondent, acting for himself and his minor son mortgaged a house property with possession to a business firm known as Bhagwan Das Chagan Lal to secure repayment of a loan of Rs.21,000. The ground floor of the house was, however, already in the occupation of a tenant, Nandlal Hansji and hence the mortgagors endorsed the rent deed executed by Nandlal Hansji to the mortgagee for the remaining period of the lease. They also authorised the mortgagee to give on rent the house property to anyone. Under clause 10 of the mortgage deed it was provided that the mortgage could be redeemed whenever the mortgagors paid the mortgage amount and on redemption the mortgagee should return the title deeds and deliver possession of the mortgage property to the mortgagors. Notwithstanding the mortgage purporting to be a possessory mortgage, the mortgage deed provided for payment of interest and for the mortgagee to demand repayment of the mortgage amount at any time it deemed fit and if the demand was not met, to file a suit and bring the mortgage property for sale and also to proceed against the person and other items of properties of the mortgagors for recovery of the balance amount, if any. By a further mortgage deed dated 21.3.1950 the mortgagors obtained another loan of Rs.16,000 from the mortgagee on the same security.

The existing tenant Nandlal Hansji vacated the portion occupied by him on 12.11.1956. Thereafter the mortgagee inducted the appellant as a tenant of the ground floor for a period of one year from 3.12.56 to 2.12.57 on a monthly rent of Rs.125. The lease deed, how ever, came to be executed only after one year, i.e., on 9.12.1957. On 13.7.1958 the mortgagee issued a notice to the appellant terminating the tenancy and calling upon him to surrender possession on the ground he had failed to pay the rent. The appellant did not surrender possession and instead filed Civil Misc. Application No. 40 of 1958 for fixation of standard rent. It is relevant to mention here that the Saurashtra Rent Control Act, 1951 governed the leases of buildings in Saurashtra region including Bhavnagar. The mortgagee filed Civil Suit No. 46 of 1958 against the appellant for recovering the arrears of rent and possession of the leased premises. On 13.4.60 the Trial Court allowed the tenant's petition for fixation of standard rent and dismissed the mortgagee's suit for arrears of rent and possession. The Trial Court fixed the standard rent at Rs.52.10 as against the contractual rent of Rs.125. The mortgagee filed successive appeals before the District Judge and the High Court against the

judgments of the Trial Court in the Standard Rent Petition and the suit for ejectment but failed in both the appeals before both the Appellate Courts.

During the pendency of the ejectment proceedings, the mortgagee filed Special Civil Suit No. 8/62 against the mortgagors for recovery of the mortgage amounts under the two mortgages and a consent decree was passed stipulating that the mortgagors should pay Rs.18,000 in six months, i.e., by 20.5.63 with running interest at 6% p.a. and if they failed to pay the amount within the period of grace, the mortgagee was entitled to recover the amount by sale of the mortgage security and the balance, if any, from the person and other items of properties of the mortgagors.

As the mortgagors failed to pay the decree amount in terms of the consent decree, the mortgagee took out execution proceedings in Special Darkhast No. 7/72. Therein the parties once again compromised and the compromise was recorded on 7.10.72 and in the memo of compromise it was stated that the ground floor portion of the house had been given on rent to the appellant, that the mortgagee has filed a case against him, that in such circumstances the vacant possession of the ground floor cannot be delivered and that the mortgagors were entitled to obtain vacant possession of the ground floor portion of the house from the appellant. As regards the decree amount the compromise memo stated that the full amount of Rs.18,000 had been paid and no further amount was payable to the mortgagee.

After the compromise memo was recorded the mortgagors took out execution application No. 3/73 for the issue of a warrant of possession for obtaining possession of the ground floor. The Executing Court issued a warrant of possession even though the appellant was not impleaded as a party in the suit or the execution application. The appellant preferred Appeal No. 190 of 1973 to the High Court and the High Court revoked the warrant of possession and remitted the matter to the Executing Court for going into the question whether the consent decree and final decree to which the mortgagors and mortgagee were alone parties would be binding on the appellant-(tenant) and furthermore whether the mortgagors would be entitled to delivery of physical possession of the leased premises or only symbolic delivery. The Executing Court considered the matter afresh and held that the mortgagors were entitled to get only symbolic delivery and not delivery of physical possession of the leased property. The mortgagors preferred First Appeal No. 152 of 1974 before the High Court. A Division Bench of the High Court allowed the appeal and directed the Executing Court to issue a warrant of possession for ejecting the appellant and placing the mortgagors in possession of the leased premises. The High Court however granted a certificate of leave to the appellant to prefer an appeal to this Court and that is how the matter is before us.

The main contention of the appellant before the High Court was that though the lease was given by the mortgagee, the lease was binding on the mortgagors even after they had redeemed the mortgage because they had authorised the mortgagee to create tenancies over the mortgage property and secondly because his tenancy rights became protected under the Saurashtra Act XXII of 1951 which came to be later replaced by the Bombay Rents, Hotel and Lodging House Rates P Control Act No. LVII of 1947 (for short the Bombay Rent Act) and as such he cannot be evicted by the mortgagors merely by reason of their repayment of the mortgage debt. The second contention was that the consent decree and the final decree on the basis of which the execution application was taken to

dispossess him were not binding on him since he was not a party to the proceedings. The High Court repelled both the contentions. In so far as the first contention is concerned, the High Court held that as the mortgage was an anomalous mortgage the rights of the mortgagee have to be determined with reference to the terms of the mortgage deed, that though the mortgage deed permitted the mortgagee to create tenancies, the said permission did not extend to granting leases beyond the term of the mortgage and it was subject to the stipulation in the mortgage deed that the mortgagee should deliver possession whenever the mortgage was redeemed and hence when the mortgagee's right to possession came to an end he ceased to be a lesser and the appellant also ceased to be a lessee and therefore the appellant was bound to surrender possession and he has no right to invoke the provisions of the Rent Act to continue his tenancy. As regards the second contention, the High Court held that the appellant was not a necessary party to the suit or the execution application as his possession was akin to that of a sub-lessee and the execution application was therefore legally maintainable against him.

Arguing for the appellant, Mr. Bhatt, learned counsel advanced the following contentions to assail the judgment of the High Court:

1. The appellant constituted a tenant as per the definition of tenant in the Saurashtra Act and the Bombay Rent Act and therefore the fact that the lease was granted by a mortgagee with possession and not by the mortgagors themselves would not affect his tenancy rights under the Acts in any manner;
2. The High Court, in spite of holding that the mortgage dated 19.7.1947 was an anomalous mortgage has erred in referring to Section 76(a) of the Transfer of Property Act and going into the question whether the granting of a lease of urban immovable property so as to tie up the property beyond the term of the mortgage was a prudent act or not of the mortgagee.
3. The High Court has failed to consider that the induction of the appellant as a tenant was fully in accordance with the authority given to the mortgagee under the mortgage deed and consequently the lease granted to the appellant was a lawful one. The appellant's right to invoke the provisions of the Saurashtra Act XXII of 1951 and the Bombay Rent Act to protect his tenancy rights is a conferment by the statutes and not due to any grant by the mortgagee. Hence there was no need or necessity for the High Court to invoke the Full Bench decision of the Gujarat High Court in *Purshottam v. Madhavaji Meghaji*, (AIR 1976 Gujarat 161: 17 G.L.R. 497) and take the view that the tenancy created by the mortgagee would not extend beyond the term of the mortgage as the lease property was urban immovable property and not agricultural land;
4. The High Court ought to have followed the consistent view taken by this Court in numerous decisions that the rights of a tenant inducted by a mortgagee with possession would enure even beyond the period of mortgage if by reason of legislative enactments subsequently made the tenant's rights had been given statutory

protection (vide the decisions in Mahabir Gope v. Harbans Narain, [1952] SCR 775;

Asa Ram v. Ram Kali, 11958] SCR 986 and Dahya Lal v. Rasul Mohammed Abdul Rahim, [1963] 3 SCR 1 and Prabhu v. Ram Dev, [1966] 3 SCR 676).

5. The observations in Film Corporation Ltd. v. Gyan Nath, [1970] 2 SCR 581/that the general principle of the bona fide and prudent acts of the mortgagee in possession being binding on the mortgagor even after the title of the mortgagee comes to an end would ordinarily apply to management of agricultural lands and would seldom extend to urban property was by way of an obiter. Indeed the very same decision has recognised that even if the lease granted by the mortgagee is of urban immovable property, it will be binding on the mortgagor if he had concurred with the granting of the lease. Even in Sachmal Parasram v. Ratan Bai, AIR 1972 SC 673 where the view taken in Film Corporation's case has been followed, the observations would only constitute obiter because the decision there too had been rendered in acceptance of the finding of the District Judge that the tenancy created by the mortgagee was not a prudent act.

6. The Full Bench decision in Purshottam's case relied upon by the High Court and the Full Bench decisions rendered in SV Venkatarama Reddiar v. Abdul Gani Rowther & Ors., AIR 1980 Madras 276 and Devkinandan v. Roshan Lal, AIR 1985 Rajasthan 11 do not affect the appellant's case in any manner since all these decisions have been rendered in observance of the obiter dicta of this Court in Film Corporation's case and Sachmal Parasram's case.

7. If for any reason this Court is of the view that the judgments in Film Corporation's case and Sachmal Parasram's case have enunciated a law differentiating between agricultural land on the one hand and urban immovable property on the other and holding that any lease granted by a mortgagee with possession of urban immovable property would not constitute a bona fide and prudent act and as such the tenancy will not be binding on the mortgagor after the redemption of the mortgage, this Bench should refer the appeal to a larger Bench for resolving the conflict between the law laid down in the earlier cases and the view taken in the two cases mentioned above.

Replying to the arguments of the appellant's counsel, Mr. T.U. Mehta, learned counsel for the respondents submitted that the High Court has rightly found that the mortgagee had no authority to create a tenancy beyond the term of the mortgage because the mortgagors had given only a limited authority to the mortgagee to create tenancies over the property and had specifically stipulated that the mortgagee should re-deliver possession of the property whenever the mortgage was redeemed. Hence the permission given to the mortgagee to grant lease of the mortgage property was subject to the requirement that he should surrender possession of the property as soon as the mortgage was redeemed. The learned counsel, therefore, stated that the appellant had no right to claim tenancy rights as against the mortgagors and that he cannot claim protection under the Saurashtra Act XXII of 1951 or the Bombay Rent Act because the mortgagee ceased to be a lessor when the mortgage was redeemed and the tenant (appellant) also ceased to be a tenant eo instanti the mortgagee ceased to be a lessor.

Alternatively, the learned counsel submitted that even if the observations contained in Film Corporation's case and Sachalmal Parasram's case are to be viewed as obiter dicta. the Full Bench decisions rendered by the Gujarat High Court in Purshottam v. Madhavji Meghaji and by the Madras High Court in SV Venkatarama Reddiar v. Abdul Gani Rowther & Ors. have given succinct and adequate reasons for a differentiation being made between a lease of agricultural land and a lease of urban immovable Property leased by a mortgagee with possession and hence those decisions merit acceptance by this Court and therefore it must be held that the grant of lease of an urban immovable property by the mortgagee was not a prudent act and would not, therefore, bind the mortgagors.

Before taking up for consideration the various contentions of the appellant's counsel it is necessary that the basic factors governing the rights of the parties are identified and kept in the forefront. The High Court has held the first mortgage dated 19.7.1947 was an anomalous mortgage and not an usufructuary mortgage. This finding of the High Court is un-assailable and indeed neither of the parties controverts the finding. The legal consequence of the finding is that the rights of the parties to the mortgage would not be governed by Section 76 of the Transfer of Property Act but by Section 98 of the said Act. Section 98 provides that in the case of anomalous mortgages the rights of the parties have to be determined in accordance with the terms of the mortgage deed. Looking into the mortgage deed the first sentence in the text of the deed and clauses 2, 3, 4, 5, 7, & 10 have relevance and they reads as under:-

"To wit we have borrowed the below mentioned amount of Rs.21,000 in words rupees twenty one thousands, from you, with an interest at a rate of six annas per hundred per month, under the business method of Diwali and under the remaining method by compound interest under this agreement in respect of interest.

2. According to the decision we have to pay to you an amount of interest accruing due every month. And you are entitled to demand interest on the interest on any Diwali period if any interest remain claimable.

3. In respect of the said house other repairing charges or taxes of the Government or the Municipality all these expenses shall be paid by us. We shall have to bring insurance on your name and the policy shall be handed over to you. And if in any circumstances we do not incur such expenses or we make delay therein you are entitled to make such expenses and to pay the amounts at our cost. And if you pay the amount in the said manner, you are entitled to recover all these amounts as a portion of amount claimable under mortgage as an amount claimable under this mortgage with compound interest at a rate of six annas per month on all the aforesaid paid by you. But you are not bound to do any such expense. If you do not make such expenses and if any damage is occurred thereby or by any other reason, no responsibility in respect of the same shall lie on you. We have given assurance that insurance has been taken(?).

4. Some portion of the said house has been given on rent to Patel Nandlal Hodaji under joint conditions. Under the said conditions we have executed a rent deed in favour of you from the said Nandlal Hodaji for the remaining period.

5. You are entitled to give on rent the said house to anybody under the aforesaid clauses number 3-4. You have to give the clear amount of rent in consideration of the same. If under any reason any amount of rent is not given or the rent is given less or any of the portion of the house is left vacant, the responsibility thereof does not lie on you. (Rest omitted).

7. You are entitled to obtain this property or to keep this property in your possession till any kind of amount claimable remains to be paid under this mortgage.

10. We are entitled to pay the amount at any time. And the mortgage shall be redeemed when we pay up the amounts and the same shall be given to us and other documents and possession shall be returned to us. And if we require the documents of redemption of mortgage and in respect of handing over possession etc. the same shall be executed and the same shall be got registered."

From a reading of these clauses it may be seen that although the mortgagors had delivered possession to the mortgagee they had bound themselves to pay interest for the mortgage amount, that they had undertaken the liability to keep the house in good repair and meet all public charges and pay the insurance premium and that they had endorsed the lease deed executed by the tenant Nandlal Hansji (referred to as Patel Nandlal Hodaji in clause 4) in favour of the mortgagee so that he could collect the rent from the tenant and credit the same towards interest. In clause 5 the mortgagee is given permission to give the house on lease to anyone subject to the terms contained in clauses 3-4. The authorisation, however, gives an option to the mortgagee to lease out the house to anyone or not to grant any lease. This is made clear by the fact that the mortgagors have further stated in clause 5 that if the house is given for a lesser rent or the tenant does not pay the stipulated rent or even if the mortgagee keeps the house vacant, the mortgagee will not be held liable for any loss meaning thereby that the mortgagee will not be held accountable for loss of rental income. This is obviously because of the undertaking by the mortgagors in clause 2 that they hold themselves liable to pay interest to the mortgagee "at the rate of six annas per month under the business period of Diwali and under the remaining method by compound interest under the agreement." Under clause 7 the mortgagors have empowered the mortgagee to keep the property in his possession till the mortgage debt is fully repaid. Under clause 10 the mortgagors have stated that they are entitled to redeem the mortgage at any time and that as soon as redemption takes place the mortgagee should return the documents of title and re-deliver possession of the house. Clauses 7 and 10, therefore, stipulate that the mortgagee is entitled to retain possession of the mortgage property only till such time the mortgage debt is outstanding and that as soon as the mortgage is redeemed the mortgagee is bound to re-deliver possession of the property to the mortgagors. It is with reference to these terms the question whether the mortgagee had authority to give tenancy rights to the appellant so as to enable him to claim tenancy rights beyond the term of the mortgage has got to be determined .

Leaving the facts aside for a moment we will turn our attention to the decision of this Court upon which the appellant's counsel has placed considerable reliance. For the purpose of the present-case the pronouncement of law in *Mahabir Gope v. Harbans Narain*, *Asa Ram v. Ram Kali*, *Dahya Lal v. Rasul Mohammed Abdul Rahim*, and *Prabhu v. Ram Dev*, (supra) does not call for mention with reference to each decision. Suffice it to say that the general principle which has been recognised in all these cases has been aptly summarised in Mulla's Transfer of Property Act. Seventh Edition, page 514 in the following manner:-

"No question of imprudence can arise where, as in *Prabhu v. Ram Dev*, the rights of the tenant were enlarged by tenancy legislation enacted after the tenant was put in possession by the mortgagee. It is submitted that this statement of the law is consistent with all the Supreme Court decisions quoted above."

The other proposition of law which has found acceptance with this Court is that a tenancy created by a mortgagee in possession may be binding even after the termination of the title of the mortgagee in possession if the mortgagors had concurred to the grant of the lease (vide *Film Corporation's case*.) It now behoves us to consider whether the appellant's case falls under one of the two categories set out above i.e., (1) whether his tenancy rights came to be enlarged by tenancy legislation after he was put in possession by the mortgagee, or (2) whether the tenancy created in his favour by the mortgagee had the concurrence of the mortgagors 1) so as to entitle the appellant to claim tenancy rights even after the redemption of the mortgage. In so far as the first question is concerned, the appellant was not inducted into possession soon after the mortgage deed was executed and the mortgagee was put in possession of the property but long thereafter. In fact there was already a tenant on the mortgage property when the mortgagee was put in possession in July 1947. During the period of tenancy of that tenant (*Nandlal Hansji*) the Saurashtra Act XXII of 1951 came to be enacted and it gave protection to the tenants from paying exorbitant rent and from unreasonable eviction. Despite the enlargement of his tenancy rights by the Act, *Nandlal Hansji* vacated the lease premises in 1956 and it was thereafter the mortgagee inducted the appellant in possession. This is, therefore, a case where the Saurashtra Act was already in force when the appellant was inducted into possession. By no stretch of imagination can the appellant contend that his tenancy rights became enlarged after the mortgagee granted him the lease by subsequent legislation enacted for affording protection to tenants. The fact that the mortgagee had granted lease only for a period of one year will not alter the situation in any manner because not only had the mortgagee executed the lease deed after the expiry of the lease period of one year but also because the restriction of the lease period to one year was of no consequence in view of the provisions contained in the Saurashtra Act XXII of 1951. The learned counsel for the appellant placed reliance on the fact that the Bombay Rent Act had come to be enacted after the appellant was inducted into the property and hence it is a subsequent tenancy legislation which has enlarged the tenancy rights of the appellant. This argument overlooks the fact that Saurashtra Act XXII of 1951 was already in force when the mortgagee granted the lease to the appellant and the said Act continued to be in force till 31.12.1963 and it was only from 1.1.1964 the Bombay Rent Act came to replace Saurashtra Act XXII of 1951. In the second appeals pertaining to the standard rent application and the suit for ejectment filed by the mortgagee the High Court has observed as follows:-

"Now, it is not in dispute that the civil suit as well as the standard rent application were instituted at the time when the Saurashtra Act was in operation in Bhavnagar area. It is not disputed that the present appeals are governed by the said Act. However, I may say that the Saurashtra Act was repealed by Section 5 1 of Gujarat Act 57 of 1964 and the Bombay Rent, Hotel and Lodging House Rates Control Act, 1947 (Bombay Act LVII of 1947), it will hereafter be referred to as "the Bombay Act" was extended to the area comprised in the former State of Saurashtra which includes Bhavnagar where the suit premises are situate. The repeal is with effect from December 31, 1963. The present two second appeals have been instituted some time in February 1968 (sic for 1963) before the repeal of the Saurashtra Act. Thus the present second appeal will have to be decided on the footing that the Saurashtra Act is applicable to the suit premises.

It is, therefore, futile for the counsel to contend that the tenancy in favour of the appellant was created when no tenancy legislation was in force and the appellant's rights became enlarged by reason of tenancy legislation enacted subsequently viz. the Bombay Rent Act. Hence, the reliance of the appellant's counsel on the four earlier decisions of this Court, including the two decisions rendered by Benches of five Judges cannot be of any avail to the appellant.

We are then left with the question whether the lease granted to the appellant by the mortgagee had the approval or concurrence of the mortgagors so as to entitle the appellant to claim tenancy rights even as against the mortgagors after they had redeemed the mortgage. The bedrock for the appellant's contention that the mortgagors had given express authority to the mortgagee to create tenancy over the mortgage property is the first sentence contained in clause 5 of the mortgage deed which says that "you are entitled to give on rent the said house to anybody under the aforesaid clauses no. 3-4".

Viewed from any angle the authorisation given to the mortgagee to give on lease the mortgage property cannot be said to be an unconditional and absolute one. In the first place it has to be remembered that the mortgage deed came into existence in July 1947 which was long prior to the Saurashtra Act XXII of 1951 being enacted. Neither the mortgagors nor the mortgagee could have anticipated a tenancy legislation like Saurashtra Act XXII of 195 1 being enacted by the Government so as to enlarge the rights of the tenants. In such circumstances the appellant cannot legitimately contend that the mortgagors had given an unrestricted power to the mortgagee to create a tenancy for any length of time and are therefore bound to accept the lease transaction even after the redemption of the mortgage deed. Secondly even without reference to the absence of any tenancy legislation when the mortgage deed came to be executed, there are a host of materials in the mortgage deed itself to show that the permission given to the mortgagee to induct tenants was of a very limited and qualified nature. We have already pointed out that in spite of the mortgagee being given possession, the mortgagors had agreed to pay interest to the mortgagee at mercantile rate and also as per contractual rate. This was not, therefore, a case where the mortgagee was put in possession of the mortgage property in order to appropriate the usufructs in lieu of interest. The

position stands further clarified by the recitals in clause S which absolve the mortgagee of any liability for loss of income from the mortgage property due to fall in rent or non-payment of rent or even due to non-leasing the property and keeping the house vacant. On account of these guarantees the mortgagee was under no compulsion to lease out the property, just because of the permission given to him to grant leases, either to secure rental income in lieu of interest or on grounds of prudent management. The mortgagee should have realised that by inducting the appellant, he was running the risk of being unable to deliver possession of the house to the mortgagors when the mortgage was redeemed and thereby he would be contravening clauses 7 and 10 of the mortgage deed. In such circumstances there is no scope at all for the appellant to contend that the mortgagee had leased out the property in the belief that he was well within the authority given to him by the mortgagors to lease out the property and therefore the mortgagors are bound by the lease transaction.

In the light of these findings it follows that there is neither need nor necessity for us to go into the question whether the pronouncements made in *Film Corporations's* case constitute a deviation from the ratio laid down in the earlier cases of *Mahabir Gope*, *Asa Ram*, *Dahya Lal* and *Prabhu* (supra) and as such the appeal should be referred to a larger Bench for decision. For the same reason we are of the view that there is no need to go into the question whether the judgments rendered in *Purshottam v. Madhavji Meghaji*, *SV Venkatarama Reddiar v. Abdul Gani Rowther & Ors.* and *Devkinandan v. Roshan Lal*, (supra) require consideration by this Court. The High Court, we may observe, has not held against the appellant because the lease granted by the mortgagee pertained to an urban immovable property but because the mortgagors had not given authority to the mortgagee to create a lease which would enure beyond the term of the mortgage, and secondly the authority given to the mortgagee to lease out the property was circumscribed by the stipulation that the mortgagee should re-deliver the possession of the property whenever the mortgage was redeemed.

In the course of the arguments Mr. Bhatt also sought to contend that by reason of the authority given to the mortgagee to create tenancies over the mortgage property, the mortgagors had constituted the mortgagee their agent and hence the mortgagors as principals were bound by the acts of their agent. We cannot countenance this argument because the relationship between the parties to the mortgage was always one of debtor and creditor and there was no question of the mortgagors constituting the mortgagee as their agent.

Since it has been found that the mortgagors had not empowered the mortgagee to create a lease which would be binding on them after the redemption of the mortgage and since the appellant's rights, as a tenant, did not become enlarged by means of any tenancy legislation which came to be enacted after the lease was granted, the appellant can claim tenancy rights only as against his landlord viz. the mortgagee and not against the mortgagors. As soon as the mortgagee's rights became extinguished by the redemption of the mortgage, neither he nor anyone inducted by him has a right to be in possession of the mortgage property. Consequently, the mortgagors were entitled to seek ejectment of the mortgagee and the tenant inducted by him. The appellant had no independent rights and hence it was not necessary that he should have been made a party to the suit filed by the mortgagee or the execution application taken out by the mortgagors after the redemption of the mortgage. His position was akin to that of a sub-tenant whose rights were co-terminus with those of

the tenant himself. As such the execution application taken against the mortgagee will be binding on the appellant having no independent rights of his own, the appellant cannot contend that the decrees and the execution application are not binding on him as he was not made a party to the proceedings.

For all the reasons aforesaid we are of the view that the appeal deserves to fail. Accordingly the appeal stands dismissed with costs to the contesting respondents.

P.S.S.

Appeal dismissed.