

CHANDRAKANT SHANKARRAO MACHALE

v.

PARUBAI BHAIRU MOHITE  
(Civil Appeal No. 1957 of 2008)

MARCH 13, 2008

[S.B. SINHA AND V.S. SIRPURKAR, JJ.]

*Transfer of Property – Mortgage by a registered deed – Mortgagee getting possession of the property – Redemption of mortgage sought – Mortgagee stating to be in possession of the property as a lessee by virtue of a subsequent unregistered agreement whereby right as a mortgagee was extinguished – Held: Transferee could not prove his possession as a lessee – Mortgage deed being a registered deed could not have been altered by a subsequent unregistered document.*

*Deeds and Documents – Registered deed – Alteration of – Held: Alteration of a registered document can be done only by another registered document.*

The predecessor of the respondent had executed a registered mortgage deed in favour of the appellant. The mortgage was for seven years. The possession of the mortgaged property was delivered to the appellant. After expiry of seven years, since his predecessor had expired, respondent issued notice to the appellant seeking redemption of the mortgage. As the same was not acted upon, he filed a suit for redemption of mortgage. Appellant contested the suit on the ground that by a subsequent unregistered agreement between the parties, right of the appellant as a mortgagee had been extinguished and by virtue of that document appellant acquired interest in the suit property as a tenant. Trial Court dismissed the suit, relying on the subsequent agreement. First appellate court decreed the suit. Second appeal was dismissed by

A High Court. Hence the present appeal.

Dismissing the appeal, the Court

B HELD: 1. The Deed of Mortgage was a registered document. The terms of a registered document could be varied or altered only by another registered document. A finding of fact has been arrived at that the appellant could not prove his possession as a tenant. The appellant was put in possession as a mortgagee. It was, therefore, impermissible in law to change his status from a mortgagee to that of a lessee by reason of an unregistered deed of lease (even if it is assumed that the same had been executed). [Para 11] [1008-G, H; 1009-A, B]

D *S. Saktivel (dead) by LRs. v. M. Venugopal Pillai and Ors.* AIR 2000 SC 2633– relied on.

*Gopalan Krishnakutty v. Kunjamma Pillai Sarojini Amma and Ors.* (1996) 3 SCC 424– distinguished.

E 2. The case as to whether the interest of a lessee merged with the interest of a mortgagee would depend upon facts and circumstances of each case. There cannot be any hard and fast rule for arriving at only one decision as the decision thereupon will depend upon the terms of the document. [Para 15] [1010-F]

F CIVILAPPELLATE JURISDICTION : Civil Appeal No. 1957 of 2008.

From the final Judgment dated 28.11.2006 of the High Court of Judicature at Bombay in S.A. No. 722/2000

G S.N. Bhat, N.P.S. Panwar and D.P. Chaturvedi for the Appellant.

H.L. Tiku, Yashmeet Kaur and Ashok K. Mahajan for the Respondent.

H The Judgment of the Court was delivered by

**S.B. SINHA, J.** 1. Leave granted.

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2. Appellant was the owner of a house property situated in Taluka Gandhinglaj, District Kolhapur. On 28.2.1983, Bhairu Rama Mohite and Krishna Rama Mohite (the predecessor of the first respondent herein) executed a registered deed of mortgage in favour of the appellant. The possession of the said property was delivered in favour of the mortgagee. The period prescribed in the said Deed of Mortgage was seven years. The amount of mortgage was Rs.20,000/-. It was agreed that upon expiry of the said period, the property would revert back to the mortgagor.

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3. Allegedly, an unregistered agreement was entered into by and between the parties herein, stating :

“This agreement in writing executed by us in respect of land C.S. No.1943 admeasuring 252 Sq. meters situated Mouje Gadhinglj which includes house and open space belongs to us absolutely. Earlier the house admeasuring East West 39 feet i.e. 11 meters 89 centimeters and South-North 49 feet i.e. 14 meters 94 centimeters, totally adm.177.63 59 meters house as also the open space in front of the house East West 21.89 meters and South-North 6.10 meters totally adm.72.52 sq. meters from out of which house and the open space on the Western side admeasuring 36.26 meters was given to you by way of mortgage by conditional sale for Rs.20,000/- under registered document No.229 dated 1.3.1983 and the same is recorded in your name.”

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Some other terms and conditions were also laid down therein.

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4. Respondents, being the predecessors in interest of the mortgagor filed a suit for redemption of the mortgage. Krishna died during the pendency of the suit. As the period specified in the said Deed of Mortgage was to expire on 28.2.1990, the plaintiff served with a notice dated 17.2.1990 for redeeming

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A the suit property. As the same was not acted upon, a suit for redemption of mortgage was filed.

B 5. Contention of the appellant, inter alia, was that he has been put in possession of the said property as a tenant. It was urged that by reason of the said mortgage, his right to occupy the premises as a tenant was not extinguished.

In view of the aforementioned rival contentions of the parties, the learned Trial Judge framed the following issues :

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1. Do the plaintiff prove that Bhairu Rama Mohite and the defendant No.10 Mortgaged the suit property to the defendant by conditional sale on 1.3.1983?
  2. Does the defendant prove that he is in possession of the suit property as a monthly tenant?
  - D 3. Are the plaintiffs entitled to redeem the mortgage by obtaining reconveyance of the suit property from the defendant?
  - E 4. Are they entitled to possession of the suit property?
  5. What order and decree?"
  6. On issue No.1, learned Trial Court opined :

F "Now we have to see what was intended by the parties to these three documents. It may be noted that parties to these documents are the same. The defendant claims tenancy rights by virtue of agreement dated 24.2.1983 (Exh.52). On the other hand according to the plaintiff the property comprising this agreement is not the subject matter of the mortgage the controversy has to be solved by going through the contents of the document. From the recitals it appears that the Municipal House No.1440 was agreed to be let for the period of 7 years on lease by accepting Rs.20,000/-. It also appears from the recitals that the plaintiff received Rs.1,000/- on the day of agreement. I do not come across recitals of the defendant

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having been put in possession of the property. On the contrary, the recitals do show that the agreement was executor (*sic*) in nature and the intended transaction was to be completed within 15 days. Therefore, I do not subscribe to the submission of the defendant that the lease was created by Exh.52 on 24.2.1983. It is true that if we peruse the description of the property given in the mortgage deed Exh.62, it does not correspond with the description given in Exh.52. However, the plaintiff has failed to prove that on the day of execution of the mortgage deed there were two Municipal House numbers viz., 1440 and 1440-A. However, since I have already observed document Exh.52 to be an agreement of the lease to be created within 15 days, I do not wish to rely strongly on that document since the fate of the suit is rest on subsequent document Exh.53 and Exh.62.”

The suit, however, was dismissed opining that the plaintiff has leased the suit property in favour of the defendant.

7. An appeal preferred thereagainst by the plaintiff was allowed by the Court of Appeal, holding :

“After going through terms and conditions of deed of lease styled as Karapatra (Exh.53) it reveals that it is not fresh contract of lease but, under that document, the right created by plaintiffs, in favour of the defendant in the immovable property for Rs.20,000/- as a mortgagee, has been extinguished. By the terms and conditions of this agreement, parties, intended to change the right created in favour of defendant, under registered deed of mortgage, which was admittedly executed for the mortgage amount of Rs.20,000/-. Therefore, U/s. 17(1)(b) of the Indian Registration Act, this second agreement dated 1.3.1983 (Exh.53) requires registration. Admittedly, this document is not registered document. Therefore, under this second agreement (Exh.53) the relations created in between the plaintiffs and defendant as mortgagor and mortgagee, cannot be extinguished. I hold that, the Karapatra (Exh.53)

A cannot extinguish the right created in favour of the  
defendant as mortgagee in the suit property. So also when  
under deed of mortgaged deed (Exh.62) in lieu of amount  
of Rs.20,000/- interest has been created in favour of the  
B defendant, after execution of this deed of mortgage,  
plaintiffs had no right to lease out the same property to the  
defendant by canceling this registered deed of mortgage  
under unregistered agreement of lease (Exh.53) I hold  
C that, the learned trial court, totally ignored the legal position  
that, by unregistered agreement (Exh.53) the contract of  
mortgage (Exh.62) cannot be extinguished or cancelled.  
Therefore, the agreement (Exh.53) is of no help to the  
defendant to prove that under that document he acquired  
interest in the suit property as a tenant of the plaintiff."

D 8. As regards the contention that the appellant became a  
tenant under the plaintiffs, the Court of First Appeal held that the  
relationship between the parties were that of a mortgagor and  
mortgagee and the defendant-appellant had failed to prove that  
he was in possession of the suit property as a tenant. The appeal  
was, thus, allowed and the suit was decreed.

E 9. A second appeal preferred by the appellant herein has  
been dismissed by the High Court opining that no substantial  
question of law arose for its consideration.

F 10. Mr. S.N. Bhat, learned counsel appearing on behalf of  
the appellant, would, in support of the appeal, contend that the  
transactions of mortgage and the lease were separate and  
independent transactions.

G The Court of First Appeal as also the High Court, thus,  
committed a serious error in passing the impugned judgment.  
The learned counsel furthermore urged that although a decree  
for redemption could be granted but in execution of the said  
decree, only symbolical possession could be directed to be  
issued.

H 11. The Deed of Mortgage dated 28.2.1983 was a  
registered document. The terms of a registered document could

be varied or altered only by another registered document. A finding of fact has been arrived at that the appellant could not prove his possession as a tenant. We have noticed hereinbefore that the appellant was put in possession as a mortgagee. It was, therefore, in our opinion, impermissible in law to change his status from a mortgagee to that of a lessee by reason of an unregistered deed of lease (even if we assume that the same had been executed):

The learned Court of Appeal may not be entirely correct in taking recourse to Section 92 of the Indian Contract Act or holding that the deed of lease required registration even for the purpose of month to month tenancy, but, as indicated hereinbefore, we have considered the question from a different angle.

12. Furthermore, the only question of law which was pressed before the High Court was :

“The lower appellate court ought to have held that the respondents and appellant executed an agreement dated 28.2.1983 i.e. Exh.62 and immediately on the next day, i.e., on 1.3.1983 executed the agreement for tenancy which is a subsequent agreement. Hence it ought to have been held that the parties have by their conduct agreed to treat the transaction as a lease and hence suit filed by respondents for redemption of mortgage is not maintainable in law and ought to have been dismissed with costs.”

No substantial question of law, thus, had been raised.

13. The deed of mortgage was a registered one. It fulfilled the conditions of a valid mortgage. Its terms could not have been varied or altered by reason of an unregistered document so as to change the status of the parties from mortgagee to a lessee. [See *S. Saktivel (dead) by L.Rs. v. M. Venugopal Filla: & Ors.* [AIR 2000 SC 2633 para 67]

14. Our attention has been drawn to a decision of this Court

A in *Gopalan Krishnakutty v. Kunjamma Pillai Sarojini Amma & Ors.* [(1996) 3 SCC 424] wherein upon taking into consideration some of its earlier decisions, this Court held :

B "The High Court, in the present case, proceeded on the erroneous assumption in law that surrender of the lease by the lessee (defendant) must be implied from the fact of execution of the usufrucuary mortgage in his favour by the lessor (plaintiff). As indicated, this is an erroneous assumption in law. This question has to be decided on the contents of the deed since there is no other evidence of surrender of the lease by the defendant on execution of the mortgage. We find nothing in the mortgage deed (Annexure A-1) dated 18.7.1974 read with the release deed of the same date to prove either an express or an implied surrender of the lease by the defendant in favour of the plaintiff on execution of the mortgage deed. Since there is no automatic merger of the interest of a lessee with that of a mortgagee when the same person is the lessee as well as the mortgagee, in absence of proof of surrender of the lease by the defendant, on redemption of the mortgage, the plaintiff is not entitled automatically to recover possession of the leased premises. The defendant's right to continue in possession as a lessee, therefore, continues to subsist."

F 15. We are concerned here with a converse case. The case as to whether the interest of a lessee merged with the interest of a mortgagee would depend upon facts and circumstances of each case, as indicated in *Gopalan Krishna Murti*. There cannot be any hard and fast rule for arriving at only one decision as the decision thereupon will depend upon the terms of the document.

G 16. For the aforementioned reasons, there is no merit in the appeal. The same is dismissed accordingly. In the facts of the case, there shall, however, be no order as to costs.

H K.K.T.

Appeal dismissed.