

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

TUESDAY, THE 11TH DAY OF AUGUST 2015/20TH SRAVANA, 1937

RSA.No.728 of 2007 (C)

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AGAINST THE JUDGMENT IN AS 15/2003 of ADDL.SUB COURT, NORTH  
PARAVUR DATED 31-10-2006

AGAINST THE JUDGMENT IN OS 355/1999 of MUNSIF COURT, ALUVA  
DATED 19-11-2002

APPELLANT/APPELLANT/DEFENDANT:

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E.P.PAULOSE, AGED 47 YEARS,  
S/O.INJAKKA PAULO, THAVALAPPARA KARA,  
MANJAPPARA VILLAGE, KALADI.

BY ADVS.SRI.C.KHALID  
SRI.R.O.MUHAMED SHEMEEM  
SRI.N.GOPINATHA PANICKER  
SRI.T.P.SAJID

RESPONDENT/RESPONDENT/PLAINTIFF:

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DEVASI, S/O.PAULO,  
PADAYATTI, KALADI KARA, KALADI VILLAGE,  
ALUVA TALUK.

BY ADV. SRI.PAUL K.VARGHESE

THIS REGULAR SECOND APPEAL HAVING BEEN FINALLY HEARD ON  
11-08-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

**P.BHAVADASAN, J.**

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**Regular Second Appeal No.728 OF 2007**  
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**Dated this the 11<sup>th</sup> day of August, 2015.**

**J U D G M E N T**

The defendant in O.S.No.355/1999 before the Munsiff Court, Aluva who suffered a decree for redemption is the appellant.

2. Shorn of unnecessary details, essential facts required for the purpose of disposal of this appeal are as follows:

The appellant claimed to be a tenant under the respondent. While so, Ext.A1 mortgage deed was executed. The case put forward by the plaintiff was that as per Ext.A1, relationship between the parties changed into one of mortgagor and mortgagee and thereafter the defendant in the suit could not claim the status of a tenant. The mortgage amount was Rs.3,000/- and redemption was possible at any moment of time. On the allegation that in spite of demand of surrender of property after receiving the mortgage amount, the defendant did not heed to the demand and therefore the suit was laid.

3. The defendant resisted the suit. It is contended that the mortgage deed is not supported by consideration and he had no intention to execute a mortgage deed. The plaintiff had executed an agreement in favour of the defendant after receiving an advance amount of Rs.1,000/- on 15.04.1995. The plaintiff had received further advance amount of Rs.64,000/- from the defendant on 27.07.1993. The defendant was put in possession of the property as a lessee and while he was continuing so, the so called mortgage deed was executed. The contention taken was that the status of the defendant as lessee continued even after the execution of Ext.A1 and the plaintiff is not in law entitled to get physical possession of the property. As the defendant is a lessee, he can be evicted only under Act 2 of 1965. It is also contended in the written statement that initially rent was Rs.650/- per month which was enhanced to Rs.750/- per month since 01.12.1994, and till 31.10.1995 the defendant has been regularly paying rent. Pointing out that the leasehold right of the defendant continues to exist, he prayed for dismissal of the suit.

4. On the above pleadings, issues were raised and the

parties went to trial. Evidence consists of the testimony of PW1 and the documents marked as Exts.A1 to A5 on the side of the plaintiff. The defendant examined DW1 and had Exts.B1 to B4 marked.

5. On appreciation of the material before them, both the courts came to the conclusion that the parties are governed by the terms of Ext.A1 mortgage deed and the plaintiff is entitled to redeem the property. The suit was accordingly decreed. That was confirmed in appeal.

6. At the time of admission of the appeal, the following question of law has been formulated for consideration:

“1) When respondent admitted that appellant was put in possession of the building on lease under Ext.B3 lease agreement on 15/4/1993 and in the absence of pleading that lease arrangement was terminated or lease was surrendered before execution of Ext.A1 mortgage, whether on redemption, respondent is entitled to get vacant possession of the building”.

7. Sri.C.Khalid, learned counsel appearing for the appellant, contended that it is an admitted fact that prior to the execution of Ext.A1 document, property had been taken on lease by the

defendant in the suit and even assuming that Ext.A1 deed was executed, that did not put an end to the lease arrangement. There is nothing in Ext.A1 to indicate that there has been either express or implied surrender of the leasehold right and that continued to exist. It is pointed out by the learned counsel that in the written statement it was specifically averred that the lease arrangement started in 1993 and initially the rent was fixed at Rs.650/- per month which was enhanced to Rs.750/- per month from 01.12.1994. The defendant had paid the rent upto 31.10.1995. There was no replication on the side of the plaintiff for denying the above contentions in the written statement.

8. Learned counsel appearing for the appellant drew the attention of this Court to the evidence of DW1 and pointed out that the defendant in his evidence had specifically stated that he was continuing in the premises as lessee and he had paid rent upto 31.10.1995. It was also pointed out by the learned counsel that Ext.B4 would show that rent was sent by money order and was received by the plaintiff which is subsequent to the execution of Ext.A1 document. That would further fortify the contention

that lease arrangement continued to exist and did not get merged in the mortgage transaction entered into between the parties. Learned counsel relied on the decisions in **Gopalan Krishnankutty vs. Kunjamma Pillai Sarojini Amma and others** ((1996) 3 SCC 424), **Cheriyar Sosamma and others vs. Sundaressan Pillai Saraswathy Amma and others** (AIR 1999 Supreme Court 947), **Dr.Thakar Singh (D) by Lrs. and another vs. Sh. Mula Singh (D) thr. LR and others** (2014 KHC 4664) and in **Nirmal Chandra vs. Vimal Chand** (2001 (2) KLT S.N.85 Case No.106) to contend for the position that even after the mortgage deed is executed during the subsistence of the leasehold arrangement, unless there is concrete evidence to show that lease arrangement has been surrendered or given up, it could not be said that on redemption, lessee is bound to hand over physical possession of the property. Learned counsel went on to point out that both the courts below have erred in law in decreeing the suit.

9. Sri.Paul K. Varghese, learned counsel appearing for the respondent, on the other hand, pointed out that both the courts

below have appreciated the evidence in the proper perspective and have come to the conclusion that the relationship between the parties is governed by Ext.A1 document and that relationship is one of mortgagor and mortgagee. Even assuming that there was a leasehold arrangement between the parties, on execution of Ext.A1, that had been put an end to. At any rate lease came to an end by implied surrender and thereafter the relationship was that of mortgagor and mortgagee. Learned counsel went on to point out that once mortgage deed is executed, the defendant could not be heard to say that he continued as a lessee and there is no indication to that effect either in the document or by any other evidence adduced in the case.

10. In support of his contentions, learned counsel appearing for the respondent relied on the decisions in **S.R. Sripathi** vs. **Narayana Kanginaya** (2011 KHC 2678), **Shah Mathuradas Maganlal and Co.** vs. **Nagappa Shankarappa Malaga** (1976 KHC 879), **Tara Chand** vs. **Sagarbai @ Chaiyalibai** (2007 KHC 3590), **Bharat Petroleum Corporation Ltd., Mumbai and others** vs. **T.S. Kalyanaraman and others**

(2014 (1) KHC 263) and in **Bhawanji Lakhamshi and others vs. Himatlal Jamnadas Dani and Others** (1972 KHC 385). It was very vehemently contended that the above decisions clearly show that when mortgage deed is executed, leasehold right has been treated as either expressly or impliedly surrendered and the relationship thereafter is governed by the document of mortgage and the defendant is only a mortgagee. The courts below were perfectly justified in coming to the conclusion that the defendant was liable to surrender the property to the plaintiff on redemption of mortgage.

11. From the above contentions, one fact becomes very clear. The issue that arises for consideration is whether by execution of Ext.A1 mortgage deed, earlier leasehold arrangement was put an end to either impliedly or expressly and thereafter the relationship between plaintiff and defendant is that of mortgagor and mortgagee. Both the courts below have held that the elements of leasehold does not survive after the execution of Ext.A1 document and thereafter the relationship of plaintiff and defendant is that of mortgagor and mortgagee and

on redemption of mortgage, defendant is liable to surrender the property.

12. There is a catena of decisions regarding the question of redemption on the above lines. The principle appears to be that if, from a document of mortgage, one could infer that there is implied or express surrender of leasehold right, then, after the execution of mortgage deed, leasehold right does not survive. On the other hand, if there is nothing to show that there was any indication or intention on the part of the lessee to surrender his leasehold right and while lease subsists if a mortgage is executed, on redemption, lessee is not bound to surrender the physical possession of the property. Each case depends upon the terms of the document that comes up for consideration.

13. But, before going into that aspect, one or two facts need to be noticed. In the written statement filed by the defendant, he had specifically pointed out that from 01.11.1993, after having received Rs.1,000/- as advance on 15.04.1993 and Rs.64,000/- on 27.07.1993, the defendant has been entrusted with the key of the plaint schedule property and thereafter he has

been conducting business in ready made garments. It is while continuing that arrangement that Ext.A1 came to have been executed and it is pointed out that even thereafter leasehold arrangement continued and the plaintiff continued to receive rent from the defendant. The specific case put forward by the defendant is that initially rent was Rs.650/- per month and it was enhanced to Rs.750/- per month on 01.12.1994 and according to the defendant, rent upto 31.10.1995 had been paid. This specific contention in the written statement is not seen answered by the plaintiff at all. Even assuming that replication is not filed, at least when plaintiff is examined as PW1, there should have been a denial from the side of the plaintiff and stating that defendant was not speaking the truth.

14. As already stated, the question that arises for consideration is whether there is merger of leasehold right in the mortgage deed. Mulla, on the Transfer of Property Act - 9<sup>th</sup> edition - Page 1206 observes as follows:

“There can be no merger of lease and mortgage, even where the two transactions are in respect of the same property. Merger postulates

that there should not remain any outstanding interest in the property and that one of the interests should be higher than the other. A mortgage is not a higher or a lower interest than a lease. Even if the rights of the lessee and the mortgagee are vested in one person, the reversion (in regard to the lease) and the right of redemption (in regard to the mortgage) would be outstanding in the owner of the property, and accordingly, there would not be a complete fusion of all the rights of ownership in one person".

15. In the decision in **Cheriyā Sosamma and others** vs. **Sundaressan Pillai Saraswathy Amma and others** (AIR 1999 Supreme Court 947), it was held as follows:

"10. This Court, in a series of cases has concluded the question by holding that the question whether upon redemption of usufructuary mortgage a tenant-mortgagee was required to deliver actual or physical possession of the mortgage property to the lessor-mortgagor depends upon the intention of the parties at the time of the execution of the mortgage deed. 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 the absence of proof of surrender of the lease. Unless there is merger of both rights on redemption of the

mortgage, the plaintiff is not entitled to recover physical possession of the property. The right of lessee to continue in possession would survive after redemption”.

16. In the decision in **S.B Abdul Azeez (by Lrs.) vs. M. Maniyappa Setty and another** (AIR 1989 Supreme Court 553), the question that was considered was whether the mortgagee is entitled to seek recovery of possession as a landlord who had executed a mortgage deed in favour of mortgagee. It was held in paragraph 7 as follows:

“7. The definition of 'landlord' in S. 3(h), as we have already seen is 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 S. 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 S. 3(h) had realised the need to limit the operation of the definition in so far as eviction petitions under S. 21(l)(h) are concerned. Section 21(l) 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 Cl. (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 Cl. (4) of S. 21 in the following terms :-

"For the purpose of Cl. (h) of the proviso to sub-sec. (1), expression 'landlord' shall not include a Rent 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 S. 21(l)(h), the Legislature would have undoubtedly categorised a mortgagee with possession also as one of the excluded class of landlords for the purposes of S. 21(l)(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 S. 21(l)(h) of the Act. Thirdly, a mortgagee with possession is enjoined by S. 76(a) of the Transfer of Property Act to manage the property as a man of ordinary prudence would manage it if it were his own. As such the mortgagee's acts, if 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 *Mathura Lal v. Keshar Bai*, 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

S. 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 that the view taken by the single Judges in the cases referred to above and the Full Bench in R. Vijendra's case (AIR 1988 Kant 285) (supra) is the correct view to be taken”.

17. To the same effect is the decision in **Narpatchand A. Bhandari** vs. **Shantilal Moolshankar Jani and another** (AIR 1993 Supreme Court 1712). In the decision in **Gambangi Appalaswamy Naidu and others** vs. **Behara Venkataramanayya Patro** (AIR 1984 Supreme Court 1728), an identical question was considered and it was held as follows:

“5. In our view there can be no merger of a lease and a mortgage, even where the two transactions are in respect of the same property. It is well-settled that for a merger to arise, it is necessary that 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 outstanding in the lessor is the reversion; in the case of a mortgage, the estate that is outstanding is the equity of redemption of the

mortgagor. Accordingly, there cannot be a merger of a lease and a mortgage in respect of the same property since neither of them is a higher or lesser estate than the other. Even if the rights of the lessee and the rights of the mortgagee in respect of a property were to be united in one person the reversion in regard to the lease and the equity of redemption in regard to the mortgage, would be outstanding in the owner of the property and accordingly, there would not be a complete fusion of all the rights of ownership in one person. This position in law as explained by the Bombay High Court in *Narayana Dogra Shetty v. Ramchandra Shivram Hingne*, (1963) 65 Bom LR 449, has been fully approved by this Court in *Shah Mathuradas Maganlal and Co. v. Nagappa Shankarappa*, AIR 1976 SC 1565.

6. In our view the answer to the question raised in this appeal must depend upon whether there was an implied surrender of the lessee's rights when the usufructuary mortgage was executed in his favour by the lessor-mortgagor. And this obviously depends upon what was the intention of the parties at the time of the execution of the mortgage deed in favour of the sitting tenant to be gathered from the terms and conditions of the mortgage transaction in the light of the surrounding circumstances of the case. It may be stated that in both the decisions of

the Andhra Pradesh High Court on which reliance was placed by the respective counsel of the parties in support of his own contention the question was ultimately decided on proper construction of the terms and conditions of the mortgage transactions; in the earlier decision the Court took the view that there was nothing in the mortgage deed to suggest that there was an implied surrender of the lessee's rights while in the later case the court held that the terms of the mortgage deed showed that the lessee had implicitly surrendered his rights. In other words, it all depends upon whether by executing a possessory or usufructuary mortgage in favour of a sitting tenant the parties intended that there should be a surrender of lessee's rights or not, and only if an implied surrender of lessee's rights could be inferred then the mortgagor would be entitled to have delivery of physical possession upon redemption but not otherwise".

18. In the decision in **Nirmal Chandra** vs. **Vimal Chand** (2001 (2) KLT S.N.85 Case No.106), it was held as follows:

"There is no automatic merger of two rights where mortgage is executed in favour of a tenant and on redemption of mortgage, the tenancy rights kept in abeyance would revive and entitle the tenant to continue in possession even after the redemption of the mortgage. On execution of mortgage, tenancy

rights would terminate only if it is clear expressly or implied by conduct or other related circumstances that the parties had intended so which would be a question of fact. Thus as a normal rule except in the intention being to the contrary, mortgage and lease operate independent of each other and on mortgage coming to an end by redemption, tenancy would revive”.

19. In the decision in **Nemi Chand** vs. **Onkar Lal** (AIR 1991 Supreme Court 2046), same question was considered and it was held as follows:

4. The deed shows that the appellant was in possession of the property as a lessee. This is clear from the words "the upper storey is on rent to you". It is not disputed that this was the position. The document further shows that during the period of the mortgage, which was to last 5 years, neither interest nor rent was payable by the parties, both amounts being equal. This shows that the rent was kept alive and it was to be adjusted against the interest. The lease subsisted, though the parties entered into a new relationship of creditor and debtor on the security of the property already in the possession of the appellant as a lessee. The mortgage was usufructuary in character, the possession being already with the appellant. He held the property both

as a lessee and a mortgagee.

5. The Courts below misconstrued the document to read that no rent accrued during the period of the mortgage and that there was a symbolic surrender of possession by the appellant upon execution of the mortgage deed. This was not the correct position and it was a wrong reading of the document resulting in an error of law. The words "there shall be no interest of amount to you and no rent of the house. The interest of the amount and the rent of the house are equal". Show that both interests and rent accrued, but both being in equal sums, neither was payable. That was an adjustment of one liability against another. In other words the relationship between the parties as lessor and lessee subsisted. There was no merger of the lease and the mortgage. No such merger could take place in law.

6. The decree for redemption only redeemed the mortgage and did not determine the lease. That is a relationship which still subsists and is determinable according to law. See the principle stated by this Court in *Nand Lal v. Sukh Dev*, 1987 (Supp) SCC 87, *Shah Mathuradas Maganlal and Co, v. Nagappa Shankarappa Malage*, (1976) 3 SCR 789 : (AIR 1976 SC 1565) and *Gambangi Applaswamy Naidu v. Behara Venkataramanayya Patro*, (1985) 1 SCR 651 : (AIR 1984 SC 1728)".

20. The above decisions relied on by the learned counsel for the appellant no doubt says that on execution of mortgage deed, lease arrangement does not come to an end.

21. In the decision in **Bharat Petroleum Corporation Ltd., Mumbai and others vs. T.S. Kalyanaraman and others** (2014 (1) KHC 263) relied on by the learned counsel for the respondent, it is observed as follows:

"15. There was implied surrender of Ext.B1-lease as a new lease deed Ext.B2 was executed by the tenant. The learned counsel for the plaintiffs/respondents has also relied upon the decision of the Supreme Court in *Shah Mathuradas Maganlal and Co. v. Nagappa Shanakarappa Malaga and Others*. There it was held:

"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 of 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."

16. The decision in *Kamala Bai and Others v. Mangilal Dulichand Mantri* has been relied upon by the learned counsel for the plaintiffs in support of his submission that even if it is assumed that physical possession was not handed over still, when the parties surrendered the tenancy and substituted it by a fresh arrangement the parties are bound by the terms of the second tenancy arrangement entered into between them. In the case cited *supra* the question was whether the old contractual tenancy was determined and was it determined as the result of surrender by operation of law. The Courts below found that there was surrender of tenancy. It was held that when the parties surrendered the tenancy and substituted by it by a fresh arrangement, merely because physically the possession was not handed over is not of much consequence. By the creation of the new tenancy agreement (Ext.B2) the parties did not continue the old tenancy but started a new one. This substitution of new arrangement and the determination of the old tenancy by mutual agreement did clearly indicate that the erstwhile

tenant surrendered its tenancy rights. Therefore, the contention raised by the appellants that Ext.B2 was only an extension of the earlier lease is found to be devoid of any merit.

17. The decision of the Division Bench in *Sulaikha Beevi v. Mathew* has also been referred to here. In that case it came out in evidence that the first defendant took out the premises in 1120 M.E. from the original owner. He constructed a shed for installing a Saw Mill and was conducting business there. That was stipulated in Ext.B9 lease deed. The next document (Ext.A1 marked therein) was of the year 1962. There it was stated that the building and the land were in the possession and enjoyment of the lessor and it was also stated that the first defendant had surrendered the land which he had taken on lease after the expiry of the term specified in the earlier lease. It was argued that the lease deed would show that the lessee had surrendered his right and a new lease had come up as per Exts.A1 and B9 (marked therein) and hence the first defendant was not entitled to the benefit of Section 106 of the Kerala Land Reforms Act. Ext.A1 and B9 marked therein were not registered documents. Referring to Mulla's Transfer of Property Act Seventh Edition it was held that implied surrender or surrender by operation of law occurs by the creation of a new relationship or by relinquishment of

possession. It was held that if the lessee accepts a new lease, that in itself is a surrender of the old lease, for the new lease could not be granted unless the old was surrendered.

18. The Division Bench has followed the decision of the Apex Court in *Mangilal Dulichand's case (cited supra)*. It was found that as per the lease deed of 1962 the tenant had admitted that the buildings therein belonged to the landlord. Eventhough it was stated that the lease was for commercial purpose there was no construction of any building pursuant to the lease. Thus, the learned counsel for the respondents would submit that the facts dealt with therein are almost identical to the facts of this case. Here also, even if any construction had been made by the erstwhile tenant, that Company had surrendered the tenancy and a new lease deed was created after about three years. In the new lease deed (Ext.B2) there is no mention that any building was constructed by the lessee pursuant to the so called lease which commenced on 01/06/1966. In other words, there is nothing on record to show that the lease had commenced on 01/06/1966 or that lessee had constructed any building prior to 20/05/1967. Since Ext.B2 would only show that the lease had commenced by virtue of that document (Ext.B2 executed in 1968) alone the contention that there was a lease prior to

20/05/1967 cannot be sustained at all. When the former lessee has surrendered its leasehold interest and a new rent deed was executed after about three years, it cannot be contended that the new lease deed was only a continuation or extension of the earlier lease. The construction must be pursuant to the lease and if it was already in existence it cannot be said to have been constructed by a lessee. Here there is nothing in Ext.B2 lease deed to show that there was any building or constructions existing at the time of Ext.B2, put up after 01/06/1966 and before 20/05/1967.

It refers to a passage in Mulla's Transfer of Property Act and there would be an implied surrender by creation of a new relationship and learned counsel for the respondent took aid of the same and pointed out that on the execution of Ext.A1 mortgage deed, a new relationship came into existence and the old relationship even if there was any, came to an end.

22. In the decision in **Tara Chand** vs. **Sagarbai @ Chaiyalibai** (2007 KHC 3590), facts show that initially there was a tenancy arrangement but subsequently the parties altered their position as mortgagor and mortgagee. It was held in paragraph 14 as follows:

“14. Whether the rights of a tenant would give way to rights of a mortgagor would essentially depend upon the terms and conditions of the mortgage. If the tenant surrenders the tenancy either explicitly or by necessary implication, the terms of the deed of mortgage shall prevail. Having surrendered the tenancy, it would not lie in the mouth of a mortgagor to contend that as he had been a tenant, he would be entitled to the rights of a tenant”.

23. In the decision in **Shah Mathuradas Maganlal and Co. vs. Nagappa Shankarappa Malaga** (1976 KHC 879), it was held as follows:

“11. 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 S.62 of the Transfer of Property Act”.

24. In the decision in **S.R. Sripathi vs. Narayana Kanginaya** (2011 KHC 2678), it was held as follows:

“13. Even taking the stand of the respondent into consideration, since there was a lease earlier to the mortgage, lease revives on redemption cannot be accepted on the ground of conduct of the respondent himself. He never made prompt attempt to make payment of the rentals to the plaintiff. The lower appellate Court having misread and without understanding the implications of the redemption of mortgage, has allowed the appeal by setting aside the order of the trial Court opining that lease hold rights of the plaintiff do not automatically get vanished after mortgage and has given a finding that the lease hold rights of plaintiff get revived after the redemption of the mortgage”.

25. In the decision in **Bhawanji Lakhamshi and others vs. Himatlal Jamnadas Dani and Others** (1972 KHC 385), it was held in paragraph 9 as follows:

"9. The act of holding over after the expiration of the term does not create a tenancy of any kind. If a tenant remains in possession after the determination of the lease, the common law rule is that he is a tenant on sufferance. A distinction should be drawn between a tenant continuing in possession after the determination of the term with the consent of the landlord and a tenant doing so without his consent. The former is a tenant at sufferance in English Law and the latter a tenant holding over or a tenant at will. In view of the concluding words of Section 116 of the Transfer of Property Act, a lessee holding over is in a better position than a tenant at will. The assent of the landlord to the continuance of possession after the determination of the tenancy will create a new tenancy. What the section contemplated is that on one side there should be an offer of taking a new lease evidenced by the lessee or sub-lessee remaining in possession of the property after his term was over and on the other side there must be a definite consent to the continuance of possession by the landlord expressed by acceptance of rent or otherwise. In *Kai Khushroo Bezonjee Capadia v. Bai Jerbai Hirjibhoy Warden*, 1949 FCR 262 = (AIR 1949 FC 124), the Federal Court had occasion to consider the question of the nature of the tenancy created under Section 116 of the Transfer of Property Act and Mukherjea, J. speaking for the

majority said, that the tenancy which is created by the "holding over" of a lessee or under lessee is a new tenancy in law even though many of the terms of the old lease might be continued in it, by implication; and that to bring a new tenancy into existence, there must be a bilateral act. It was further held that the assent of the landlord which is founded on acceptance of rent must be acceptance of rent as such and in clear recognition of the tenancy right asserted by the person who pays it. Patanjali Sastri, J., in his dissenting judgment, has substantially agreed with the majority as regards the nature of the tenancy created by Section 116 of the Transfer of Property Act, and that is evident from the following observations:-

"Turning now to the main point, it will be seen that the section postulates the lessee remaining in possession after the determination of the lease which is conduct indicative, in ordinary circumstances, of his desire to continue as a tenant under the lessor and implies a tacit offer to take a new tenancy from the expiration of the old on the same terms so far as they are applicable to the new situation, and when the lessor assents to the lessee so continuing in possession, he tacitly accepts the latter's offer and a fresh tenancy results by the implied agreement of the parties. When, further, the lessee in that situation tenders rent and the lessor accepts it, their

conduct raises more readily and clearly the implication of an agreement between the parties to create a fresh tenancy".

Mere acceptance of amounts equivalent to rent by a landlord from a tenant in possession after a lease had been determined, either by efflux of time or by notice to quit and who enjoys statutory immunity from eviction except on well defined grounds as in the Act, cannot be regarded as evidence of a new agreement of tenancy. In (1961) 3 SCR 813 = (AIR 1961 SC 1067), this Court observed as follows :-

"By the Rent Restriction Statutes at the material time, Statutory immunity was granted to the appellant against eviction and acceptance of the amounts from him which were equivalent to rent after the contractual tenancy had expired or which were fixed as standard rent did not amount to acceptance of rent from a lessee within the meaning of Section 116. Transfer of Property Act. Failure to take action which was consequent upon a statutory prohibition imposed upon the Courts and not the result of any voluntary conduct on the part of the appellant did not also amount to "otherwise assenting to the lessee continuing in possession". Of course, there is no prohibition against a landlord entering into a fresh contract of tenancy with a tenant whose right of occupation is determined and who remains in occupation by virtue of the statutory immunity. Apart from an express contract, conduct of the

parties may undoubtedly justify an inference that after determination of the contractual tenancy, the landlord had entered into a fresh contract with the tenant, but whether the conduct justifies such an inference must always depend upon the facts of each case. Occupation of premises by a tenant whose tenancy is determined is by virtue of the protection granted by the statute and not because of any right arising from the contract which is determined. The statute protects his possession so long as the conditions which justify a lessor in obtaining an order of eviction against him do not exist. Once the prohibition against the exercise of jurisdiction by the Court is removed, the right to obtain possession by the lessor under the ordinary law springs into action and the exercise of the lessor's right to evict the tenant will not unless the statute provides otherwise, be conditioned".

26. The appellant and the respondent rely on a set of decisions to contend for their respective positions. The appellant would contend that there is no merger of right of the lessee as the leasehold arrangement does not come to an end on execution of mortgage deed and two remain distinct and separate. The only exception to that rule can be when the document of mortgage spells out that the lessee has surrendered

leasehold right.

27. Learned counsel appearing for the respondent, on the other hand, pointed out that after the execution of mortgage deed, there is implied surrender of leasehold right and the leasehold right no longer survives. That is evident from the decisions relied on by him, it is contended.

28. From the rival contentions, it is very evident that one has to look on the terms of the document and also the surrounding circumstances to ascertain the real state of affairs. It is here that the contention taken by the defendant in the written statement assumes importance. He has specifically contended that even after the execution of Ext.A1, leasehold arrangement continued and he continued to pay rent at Rs.650/- per month initially and thereafter Rs.750/- per month. He specifically pointed out in the written statement that he had paid rent till 31.10.1995 at the enhanced rate of Rs.750/- per month since 01.12.1994.

29. It is true that the appellant relied on Ext.B3 to claim the status of tenant. That is an unregistered document. But,

though unregistered, it is well settled that it is important to ascertain the nature of possession of the person concerned. Even though the terms could not be culled out from the document as it is an unregistered document, the nature of possession of the person concerned can be discerned from Ext.A1. It is significant to notice that when the plaintiff was examined as PW1, he did not deny the allegation in the written statement that even after the so called execution of Ext.A1 document there was leasehold arrangement in existence or in other words, in spite of the specific contention in the written statement that leasehold arrangement continued, the tenant continued to pay rent and even though the defendant had produced Ext.B4 money order receipt for Rs.750/- sent in the name of the plaintiff in the suit, he did not either deny of having received the same nor he denied the statement in the written statement as follows:

“തുകത്തിൽ 650/- രൂപയായിരുന്ന വാടക 1.12.94 മുതൽ 750/- രൂപയായി വർദ്ധിപ്പിച്ചിട്ടുള്ളതും ടി കണക്കനുസരിച്ച് 31.10.95 വരെ വാടക മുടക്കം കൂടാതെ വാദി പറ്റിയിട്ടുള്ളതുമാണ്”.

30. Even more surprising is the statement of DW1 in the proof affidavit which reads as follows:

“650/- രൂപ തുടക്കത്തിൽ വാടകയുണ്ടായിരുന്നത്  
1.12.94 മുതൽ 750/- രൂപയായി വർദ്ധിപ്പിച്ചിട്ടുള്ളതു് ഈ  
കണക്കനുസരിച്ച് 31.10.95 വരെ തുടക്കം കുടാതെ വാദി  
പറ്റിയിട്ടുള്ളതുമാണ്”.

31. In the proof affidavit in chief, it is categorically stated that he continued as tenant even after the execution of Ext.A1 document. There is no challenge to the above claim made by the defendant in the suit in his cross examination or in other words, he is not even disputing that what the tenant claims is false and untrue and it is well settled that when there is no cross examination with regard to question put to witness, it is deemed to have been admitted.

32. Faced with the above situation, learned counsel appearing for the respondent pointed out that the mere fact that there was no denial of the claim of leasehold right in the written statement and the fact that there was no cross examination with reference to that aspect will not change the character of Ext.A1

document. It spells out a clear case of mortgage and in all respects leasehold right even if enjoyed by the tenant will be deemed to have been surrendered.

33. It is difficult to accept the above contention. When a question is raised with regard to the relationship between the parties, one has to look at the document in question and the conduct of the parties and the attending circumstances. The fact that the defendant in the suit had occupied the premises as lessee for a considerable period is not disputed. It is also not disputed that it is during the subsistence of leasehold right that Ext.A1 was executed. If, as a matter of fact, there is an indication that the leasehold right was given up and the defendant has dawned the character as mortgagee, position would have been different. There is nothing in Ext.A1 to show that the leasehold right was given up and the defendant had entered into a new arrangement and the decisions referred to above also say that there is no automatic surrender of leasehold right on execution of mortgage deed. True, the decisions relied on by the learned counsel for the respondent indicate that when a

mortgage deed is executed, there may be a change of character of lessee. In such case, there must be a clear indication that leasehold right has been given up and new arrangement has been entered into between the parties. In some of the cases, it was renewal of lease and the question considered was whether earlier lease subsisted or not. In those cases, on the terms of the document, it was held that new arrangement has been entered into between the parties and earlier arrangement did not subsist. In the case on hand, there is nothing in Ext.A1 to indicate that leasehold right the defendant was enjoying over the property had been put an end to especially when the specific contention taken in the written statement is not replied by the plaintiff and also there is no challenge to the statement made in the proof affidavit of the defendant that he is occupying the premises as lessee and not as a mortgagee.

34. Learned counsel for the respondent then pointed out that both the courts below have considered the matter in considerable detail and have come to the conclusion that the relationship is that of mortgagor and mortgagee. It is essentially

a finding on fact and this Court exercising its jurisdiction under Section 100 of the Code of Civil Procedure may not interfere with the findings of the courts below.

35. It is well settled that if the court finds that the findings are not supported by evidence and are perverse or contrary to law, interference under Section 100 of the Code of Civil Procedure is fully justified and warranted. In the case on hand, both the courts below have failed to consider the contentions in the written statement and also the statement made by the defendant while in box. Apart from the above findings, there is nothing in Ext.A1 to show that leasehold arrangement which was being enjoyed by the defendant had been surrendered either expressly or impliedly and it put an end to the leasehold arrangement between the parties and also the character of the defendant.

36. For the above reasons, this Court is unable to agree with the finding of the courts below that the defendant is liable to surrender the property. Even assuming that the plaintiff is entitled to redeem mortgage, physical possession cannot be

handed over by the defendant except by resorting to provisions of Rent Control Act.

This appeal is allowed. The order directing the defendant to hand over physical possession of the property is set aside but this will not preclude the respondent from getting vacant possession of the property by resorting to provisions under the Rent Control Act.

Sd/-

**P.BHAVADASAN  
JUDGE**

smp

// True Copy //

P.A to Judge