

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**  
**CIVIL APPELLATE JURISDICTION**  
**SECOND APPEAL NO. 650 OF 2022**  
**WITH**  
**INTERIM APPLICATION NO. 18607 OF 2022**  
**IN**  
**SECOND APPEAL NO. 650 OF 2022**

Shri. Ramesh Anandrao Shirke  
(Since Decd. Thr. Lrs)  
Smt. Kusum Ramesh Shrike And Ors 6 .. Appellants

**Versus**

Shri. Kashinath Anna Jaigude .. Respondent

**AND**  
**SECOND APPEAL NO. 651 OF 2022**  
**WITH**  
**INTERIM APPLICATION NO. 18610 OF 2022**  
**IN**  
**SECOND APPEAL NO. 651 OF 2022**

Shri. Ramesh Anandrao Shirke  
(Since Decd. Thr. Lrs)  
Smt. Kusum Ramesh Shrike .. Appellant

**Versus**

Shri. Kashinath Anna Jaigude .. Respondent

...

**Mr. Surel Shah** a/w Mr. Ishaan Kapse i/b Mr. Swaroop Karade for the Appellants in both Appeals.

**Mr. Vishwanath S. Talkute** for Respondent in both Appeals.

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**CORAM** : **SANDEEP V. MARNE J.**  
**RESERVED ON** : **26 FEBRUARY 2024.**  
**PRONOUNCED ON** : **5 MARCH 2024.**

**JUDGMENT :-**

1) Appellants call in question legality of the common Judgment and Order dated 13 April 2022 passed by Ad-hoc District Judge - 01 Satara in Regular Civil Appeal Nos. 384 of 2012 and 385 of 2012. The First Appellate Court has allowed both Appeals and has set aside the common Judgment and Decree dated 29 June 2012 passed by Joint Civil Judge Junior Division, Wai in Regular Civil Suit Nos. 228 of 1994 and 273 of 1995. The First Appellate Court has declared that possession of the Appellants over the suit property is unlawful and it has directed the Appellants to hand over vacant and peaceful possession of the suit property to the Respondents. Further direction is issued for enquiry into mense profit as per Order 20 Rule 12 of the Code of Civil Procedure.

2) Since cross suits were filed by the contesting parties, Ramesh Anandrao Shirke is referred to as Plaintiff (whose heirs are Appellants in these Appeals) and Kashinath Anna Jaigude is referred to as the Defendant (whose heirs are Respondents in these Appeals).

3) Briefly stated, facts of the case are that the property bearing City Survey No. 2463 admeasuring 275.9 sq. mtrs. along with the constructed house thereon at Siddhantwadi Wai, Tal. Wai, District Satara (**suit property**) was originally owned by Babaji Dattatraya Devkule. It is Plaintiff's case that Grandmother Radhabai Bhiku More was a tenant of Babaji Dattatraya Devkule on the monthly tenancy of Rs. 10. Radhabai had a daughter named

Shantabai and Plaintiff - Ramesh Anandrao Shirke is the son of Shantabai. This is how Plaintiff claims tenancy in respect of the suit property, which includes a house constructed thereon.

4) It is Plaintiff's case that while he was repairing the house on 1 July 1994, the Defendant - Kashinath Anna Jaigude obstructed claiming ownership in respect of the suit property. Plaintiff accordingly filed Regular Civil Suit No. 228 of 1994 seeking injunction against Defendant from obstructing Plaintiff's possession over the suit property. During the pendency of the said suit, Plaintiff filed two more suits bearing Nos. 97 of 1995 and 343 of 1999 seeking permission of the Trial Court to carry out repairs in the house situated on the suit property. Defendant filed his own suit bearing Regular Civil Suit No. 273 of 1995 seeking recovery of the possession of the suit property including the constructed house thereon. Defendant's claim of ownership over the suit property stems out of Sale deed executed on 29 December 1993 in his favour by one Mr. Gangadhar Mahadev Khage. It is Defendant's case that the original owner by Babaji had executed a mortgage on 4 August 1971 in favour of Piraji Bin Bhivaji Naik @ Khage @ Patharvat. After Piraji's death, one Ramchandra claimed to be the beneficiary of the mortgage deed and on his death, the rights were transferred in the name of his wife Chandrabhaga. That after Chandrabhaga's death, the mortgage rights were transferred in the name of Gangadhar Mahadev Khage, who in turn sold the property to the Defendant. This is how the Defendant claims ownership in respect of the suit property. Plaintiff contested Defendant's claim of ownership before the Trial Court.

5) By common Judgment and Order dated 29 June 2012, the Trial Court decided all four suits. It held that Plaintiff could not prove the tenancy rights in respect of the suit property. Regular Civil Suit Nos. 97 of 1995 and

343 of 1999 seeking repairs to the suit house were dismissed holding that the suit house was beyond repairs. The Trial Court however held that Plaintiff was in settled possession of the suit property and therefore granted injunction in Plaintiff's favour by decreeing Regular Civil Suit No. 228 of 1994 injunctioning Defendant from obstructing Plaintiff's possession over suit property. The Trial Court did not accept the Defendant's claim of ownership and therefore rejected Regular Civil Suit No. 273 of 1995 filed by Defendant - Kashinath Anna Jaigude.

6) Defendant filed Regular Civil Appeal Nos. 384 of 2012 and 385 of 2012. The Appeals were restricted to the decree of Plaintiff's Regular Civil Suit No. 228 of 1994 and the dismissal of Defendant's Regular Civil Suit No. 273 of 1995. The First Appellate Court has allowed both the Appeals filed by Defendant. It has dismissed Plaintiff's Regular Civil Suit No. 228 of 1994 by lifting the injunction granted in his favour. The First Appellate Court has decreed Defendant's suit i.e. Regular Civil Suit No. 273 of 1995. The First Appellate Court has held Plaintiff's possession of the suit property as unlawful and has directed him to hand over possession of the suit property to Kashinath Anna Jaigude. Aggrieved by the common Judgment and Order dated 13 April 2022 passed by the First Appellate Court, the original Plaintiff Ramesh Anandrao Shirke, through his legal heirs has filed the present Appeal.

7) Both Ramesh Anandrao Shirke and Kashinath Anna Jaigude are no more and the legal heirs of parties are before me in the present Appeals.

8) By Order dated 26 February 2024, this Court has admitted the Appeals by formulating the following substantial questions of law:

- i) In the light of finding of the First Appellate Court that respondent is not the owner of the suit property, whether he is entitled to seek a decree for recovery of possession of the suit property from the Appellant?
- ii) Whether mere mortgagee is entitled to seek recovery of possession from a gratuitous licensee or trespasser?
- iii) Whether in a suit filed by Respondent for recovery of possession from Appellant in his capacity as gratuitous licensee, what would be the extent of inquiry into the Respondent's title in the suit property ?
- iv) Whether possession of property by a mortgagee is a prerequisite for seeking possession thereof from a licensee or a trespasser ?
- v) Whether First Appellate Court is justified in reversing the decree passed by the Trial Court and directing recovery of possession of the suit property from Appellant in favour of the Respondent who has failed to prove his ownership in respect of the suit property?

9) Mr. Shah, the learned counsel appearing for the Appellants would submit that the First Appellate Court has committed an error in reversing the well-reasoned judgment of the Trial Court granting injunction in favour of Plaintiff and dismissing Defendant's suit for recovery of possession. That Plaintiff's settled possession over the suit property is proved whereas Defendant has not been able to prove ownership over the suit property. That even the First Appellate Court has rejected Defendant's claim of ownership over the suit property. That once the claim of ownership is rejected, a decree for recovery of possession could not have been passed against Plaintiff. Since Defendant is not the owner, he cannot seek recovery of possession from Plaintiff, who is in settled possession of the suit property for several years.

10) Mr. Shah would further submit that Defendant's claim of ownership flows out of mere mortgage deed. That Gangadhar Mahadev Khage did not have the authority to sell the suit property to the Defendant as Gangadhar himself was never an owner thereof. That therefore no rights were created in favour of Defendant under the strength of the Sale deed dated 29 December 1993. That Plaintiff is entitled to question the title of Defendant, who was seeking recovery of possession from Plaintiff. He would rely upon the judgment of the Apex Court in *Vinay Eknath Lad Vs. Chiu Mao Chen*<sup>1</sup> in support of his contention that a tenant is entitled to question the title of the landlord when recovery of possession is sought from such tenant.

11) Mr. Shah would further submit that the Defendant can at the highest be treated as mortgagee and he does not have a right to seek recovery of suit property from someone who is in settled possession thereof. That the mortgage was not a usufructuary mortgage as possession of the suit property was not handed over to the mortgagee. Referring to the sale deed dated 29 December 1993, Mr. Shah would submit that the covenant in the sale deed specifically admits the position that the vendor never had possession of the suit property and that it is an admitted position that the possession of the suit property was always with the Plaintiff. That therefore since the Defendant was not a mortgagee in possession, he did not have the right to seek a decree for recovery of possession against the Plaintiff. Mr. Shah would therefore submit that the Order passed by the First Appellate Court deserves to be set aside.

12) *Per contra* Mr. Talkute, the learned counsel appearing for the Respondent would oppose the Appeals and support the common judgment

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<sup>1</sup> (2019) 20 SCC 182

passed by the First Appellate Court. Mr. Talkute would invite my attention to the findings recorded by the Trial Court about the Plaintiff not being the tenant of the suit property. He would submit that dismissal of Regular Civil Suit Nos. 97 of 1995 and 343 of 1999 was not challenged by the Plaintiff before the First Appellate Court. That therefore the finding of Plaintiff not being tenant in respect of the suit property has attained finality. Mr. Talkute therefore submits that once the claim of tenancy is rejected, the capacity of the Plaintiff would be that of gratuitous licensee. That Defendant is therefore entitled to recover possession from a gratuitous licensee. Mr. Talkute would further submit that even if Respondent is treated as mortgagee in respect of the suit property, he has the right to seek recovery of possession from a gratuitous licensee. Mr. Talkute would rely upon provisions of Section 76 (a) of the Transfer of Property Act, 1882, under which the mortgagee has right to manage the property as a man of ordinary prudence would manage it if it was his own. He would submit that every mortgagee has the right to seek recovery of possession from a gratuitous licensee and that for recovering possession, it is not necessary to establish ownership over the suit property. In support of his contentions, Mr. Talkute would rely upon the Judgment of the Apex Court in *S. B Abdul Aziz (By Lrs.) Vs. M. Maniyappa Setty and Others*<sup>2</sup> and of Division Bench of this Court in *Barjorji Shapurji Vs. Shripatprasadji Viharilalji Acharya*<sup>3</sup>. He would pray for the dismissal of the Appeals.

13) Rival contentions of the parties now fall for my consideration.

14) Four suits were filed by parties against each other concerning the suit property, which had a house constructed thereon. It is common ground

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<sup>2</sup> (1988) 4 SCC 727

<sup>3</sup> 1926 SCCOnLine Bom 134

that the house no longer stands on the suit property which broke down during pendency of suits. Original Plaintiff - Ramesh Anandrao Shirke was admittedly residing in the house when the Regular Civil Suit No. 228 of 1994 was filed by him. Thus, it is Ramesh Anandrao Shirke, who triggered the litigation by filing Regular Civil Suit No. 228 of 1994 pleading the cause of action in the form of obstruction by Kashinath Anna Jaigude, when roof of the house was being repaired. The Defendant in that suit viz Kashinath Anna Jaigude claimed ownership over the suit property. He therefore filed his own Regular Civil Suit No. 273 of 1995 seeking recovery of possession of suit property from Ramesh Anandrao Shirke. During the pendency of both the suits, Ramesh Anandrao Shirke filed two more suits bearing Regular Civil Suit Nos. 97 of 1995 and 343 of 1999 for repair of the suit house. The Trial Court has rejected the claim of Ramesh Annadrao Shirke as a tenant of the suit property. The relevant finding in this regard is to be seen in para 45 of the Trial Court's Order, which is reproduced thus:

*"वरील चर्चेलेल्या पुराव्यावरून एक बाब स्पष्ट होत आहे की, शिर्के हे दावा मिळकतीत भाडेकरु होते हे दाखविण्यासाठी कोणताही ठोस पुरावा नाही. ते केवळ त्या मिळकतीत गेले अनेक वर्षांपासून रहात आहेत एवढेच सिध्द होते. परंतु म्हणून ते तेथे भाडेकरी आहेत असे म्हणता येणार नाही. त्यासाठी ठोस पुरावा येणे गरजेचे आहे जो अभिलेखावर आलेला नाही. वादी शिर्के यांच्या एकट्याच्या तोंडी पुराव्यावरून ही बाब सिध्द होत नाही."*

15) Plaintiff-Ramesh Anandrao Shirke did not challenge the Trial Court's decree and accordingly, the finding that he is not a tenant of the suit property has attained finality. Thus, possession of Ramesh Anandrao Shirke in respect of the suit property is not in the capacity as tenant and will have to be assumed in the capacity of a gratuitous licensee or a permissive user. It is settled law that an owner is entitled to seek recovery of possession from a gratuitous licensee or from a person, who is in mere permissive possession of suit property and can never seek an injunction against the true owner. The

law in this regard is well settled by three Judge Bench decision of the Apex Court in *Maria Margarida Sequeria Fernandes Vs. Erasmo Jack de Sequeria*<sup>4</sup>. The issue here however is whether Defendant is the owner of the suit property.

16) Before I go into the issue of the right of Defendant-Kashinath Anna Jaigude to recover possession of the suit property from the Plaintiff, it is necessary to make a quick reference to the dismissal of Regular Civil Suit Nos. 97 of 1995 and 343 of 1999. As observed above, the Trial Court held that Plaintiff-Ramesh Anandrao Shirke was not a tenant of the suit property. The Trial Court also noted the factual position that the house was beyond repairs and had broken down during pendency of the Suit. Accordingly, the Trial Court dismissed Regular Civil Suit No. 97 of 1995 and 343 of 1999 which were filed by Ramesh Shirke for seeking permission to repair the house. Dismissal of the said two suits was not questioned by Ramesh Shirke and the decree dated 29 June 2012 *qua* Regular Civil Suit Nos. 97 of 1995 and 343 of 1999 has attained finality.

17) Now I turn to the hotbed of controversy between the parties about Defendant's right to recover possession of suit property from Plaintiff. After the claim of tenancy of Ramesh Shirke being rejected by the Trial Court, his possession would remain as that of a gratuitous licensee or a permissive user. However, Defendant's right to seek recovery of possession is questioned by the Appellants by casting doubts about his ownership claim. Though the Defendant's Appeals are allowed by the First Appellate Court, his claim of ownership over the suit property is repelled. The Respondent is held to be merely a mortgagee in respect of the suit property. These findings

rejecting ownership claim and holding him to be a mere mortgagee are not questioned by the Defendant and have accordingly attained finality.

18) Thus, the factual position that stands as today as a result of the Orders passed by Trial Court and the First Appellate Court is as under:

- i) Plaintiff/his heirs remain in possession of the suit property as a gratuitous licensee or as a permissive user.
- ii) Defendant/his heirs are not owner(s) of the suit property.
- iii) Defendant/his heirs are merely mortgagee in respect of the suit property.

19) Now the moot point that remains for determination is whether a mortgagee is entitled to seek recovery of possession from a permissive user. Mr. Talkute has relied upon provisions of Section 76 of the Transfer of Property Act, 1882, which reads thus:

***"76. Liabilities of mortgagee in possession.-*** *When, during the continuance of the mortgage, the mortgagee takes possession of the mortgaged property,-*  
*(a) he must manage the property as a person of ordinary prudence would manage it if were his own;*  
*(b) he must use his best endeavours to collect the rents and profits thereof;*  
*(c) he must, in the absence of a contract to the contrary, out of the income of the property, pay the Government-revenue, all other charges of a public nature [and all rent] accruing due in respect thereof during such possession, and any arrears of rent in default of payment of which the- property may be summarily sold;*  
*(d) he must, in the absence of a contract to the contrary, make such necessary repairs of the property as he can pay for out of the rents and profits thereof after deducting from such rents and profits the payments mentioned in clause (c) and the interest on the principal money;*  
*(e) he must not commit any act which is destructive or permanently injurious to the property;*  
*(f) where he has insured the whole or any part of the property against loss or damage by fire, he must, in case of such loss or damage, apply any money which he actually receives under the policy or so much thereof as may be necessary, in reinstating the property, or, if the mortgagor so directs, in reduction or discharge of the mortgage-money;*

*(g) he must keep clear, full and accurate accounts of all sums received and spent by him as mortgagee, and, at any time during the continuance of the mortgage, give the mortgagor, at his request and cost, true copies of such accounts and of the vouchers by which they are supported;*

*(h) his receipts from the mortgaged property, or, where such property is personally occupied by him a fair occupation-rent in respect thereof shall, after deducting the expenses [properly incurred for the management of the property and the collection of rents and profits and the other expenses] mentioned in clauses (c) and (d), and interest thereon, be debited against him in reduction of the amount (if any) from time to time due to him on account of interest and, so far as such receipts exceed any interest due, in reduction or discharge of the mortgage-money; the surplus, if any, shall be paid to the mortgagor;*

*(i) when the mortgagor tenders, or deposits in manner hereinafter provided, the amount for the time being due on the mortgage, the mortgagee must, notwithstanding the provisions in the other clauses of this section, account for his receipts from the mortgaged property from the date of the tender or from the earliest time when he could take such amount out of Court, as the case may be [and shall not be entitled to deduct any amount therefrom on account of any expenses incurred after such date or time in connection with the mortgaged property].*

***Loss occasioned by his default.***—*If the mortgagee fail to perform any of the duties imposed upon him by this section, he may, when accounts are taken in pursuance of a decree made under this Chapter, be debited with the loss, if any, occasioned by such failure."*

20) Thus, under Section 76 (a) of the Transfer of Property Act, a mortgagee in possession is entitled to manage the property as a man of ordinary prudence would manage as it was his own. The Apex Court has held in ***S. B. Abdul Azeez*** (supra) that a mortgagee in possession stands on par with the owner of the building to seek eviction of a tenant. The Apex Court has held in para 1, 2, 7, and 8 as under:

***"1. Does a mortgagee with possession stand on a par with an owner of a building to seek the eviction of a tenant under Section 21(1)(h) of the Karnataka Rent Control Act, 1961 (for short the Act' hereinafter) for his bona fide requirement of the tenanted premises for residential or business needs is the question for determination in this appeal by special leave by a tenant. The Trial Court, the Appellate Court and the High Court in revision have answered the question in the affirmative and the aggrieved tenant, now represented by his legal representatives is before us in appeal.***

2. The tenanted shop to one Nanjappa and the appellant had taken the same on rent for running a cycle shop. On the foot of an usufructuary mortgage executed in their favour, the respondents, who are partners, sought the eviction of the appellant under Section 21(1)(h) of the Act. Their case was that they were also running a cycle shop in a rented premises but since their landlord had obtained an order of eviction against them they were bona fide in need of another building to run their business. In such circumstance they had advanced a sum of Rs.25,000 to the appellant's landlord Nanjappa and obtained a usufructuary mortgage of the tenanted premises and thus having stepped into the shoes of the landlord, they were seeking the eviction of the appellant. The appellant's defence was that the usufructuary mortgage was a sham and nominal translation created by the landlord with an oblique motive because he had refused to pay higher rent for the premises and secondly the mortgagees were not bona fide in need of the petition premises for their business. The Trial Court rejected both the defences and ordered eviction and the said order has been affirmed by the Appellate Court and the High Court.

7. The definition of 'landlord' in Section 3(h), as we have already seen in 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 Section 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 Section 3 (h) had realised the need to limit the operation of the definition in so far as eviction petitions under Section 21 (1) (h) are concerned. Section 21 (1) 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 clause (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 Clause 4 of Section 21 in the following terms:

*"For the purpose of clause (h) of the proviso to sub- section (1), expression 'landlord' shall not include a 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 Section 21 (1) (h) the Legislature would have undoubtedly categorised a mortgagee with possession also as one of the excluded class of landlord lords for the Purposes of Section*

21 (1) (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 Section 21 (1) of the Act. Thirdly, a mortgagee with possession is enjoined by Section 76 (a) of the Transfer of Property Act 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 *Mathuralal v. Keshar Bai*). 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 Section 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 PG NO 512 that the view taken by the single judges in the cases referred to above and the Full Bench in *R. Vijendra* case (*supra*) is the correct view to be taken.

8. As regards the contention of Mr. Datar that a scheming landlord can adopt the devious method of creating a sham deed of usufructuary mortgage in order to have a tenant evicted, when he himself cannot sustain such an action, the argument fails to note that an order of eviction under Section 21 (1) (h) would not be passed by the Court for the mere asking because, the mortgagee with possession has first get to prove that the premises are reasonably and bona fide required by him for occupation by himself. Without the reasonable and bona fide requirement being proved to the satisfaction of the Court, no order for eviction will be passed. Next, even if the mortgagee with possession satisfies the above test, he has to pass the further test laid down by sub-section 4 of Section 21 which provides that a tenant shall not be evicted under Section 21(1)(h) if the Court is satisfied that the tenant would be put to greater hardship by an order of eviction being passed than the hardship that would be caused to the landlord by refusal to pass an order of eviction in his favour. These things apart, it is inconceivable every landlord who would not be able to evict his tenant by resort to Section 21 (1) (h) would be able to readily find a willing accessory who will be prepared to play the role of a usufructuary mortgagee and institute eviction proceedings against the tenant in order to secure the possession of the leased premises and then hand over possession to the owner of the building."

(emphasis supplied)

21) Mr. Shah has attempted to distinguish the judgment of **S. B. Abdul Azeez** (*supra*) by contending that the mortgagee in the case before the Apex Court was in possession and the case involved a usufructuary

mortgage, whereas the Defendant in the present case was not put in possession of the suit property and this is not a case of usufructuary mortgage. He has relied upon a covenant in the Sale Deed dated 29 December 1993 which clearly records that the vendor himself was never in possession of the suit property. Mr. Talkute on the other hand contends that even a mortgagee, who is not in possession of the suit property is entitled to seek recovery of possession under Section 76 of the Transfer of Property Act. Mr. Talkute has relied upon the Division Bench judgment of this Court in ***Barjorji Shapurji*** (supra), in which this Court has held as under:

*"1. The plaintiff in this case gave notice to the defendant to vacate the lands in suit in November, 1920. According to that notice, he was required to give up the lands on March 31, 1921. **The plaintiff claimed to be a mortgagee from the original Inamdars. The defendant was on the land as a tenant of the mortgagors.** The defendant pleaded that he was a permanent tenant; that the mortgagors were necessary parties; and that the plaintiff was neither entitled to possession nor to enhance the rent. The first issue raised was whether the plea that the defendant was a permanent tenant was res judicata in consequence of the finding in the previous litigation between the same parties in Suit No. 48 of 1915.*

*12. As regards the second question that a mortgagee cannot determine the tenancy of an annual tenant in respect of land which forms part of the mortgaged property without the consent of the mortgagor, no authority has been cited. On principle the contention seems to be untenable. **A mortgagee in possession has his own right of managing the lands; and he is not in any sense dependent upon the consent of the mortgagor in determining as to what rent he should reasonably seek from an annual question was left open in the previous litigation, it seems to me that contention of the defendant must be disallowed.**"*

*(emphasis supplied)*

22) In ***Barjorji Shapurji*** Defendant therein was a tenant of the mortgagor and plaintiff therein was a mortgagee. Thus before the mortgage was created, defendant was already in occupation of the premises as tenant of the mortgagor. Thus, the mortgagee was not put in physical possession of the suit premises, which were being occupied by the tenant. In the light of

this factual position, the division bench upheld the right of the mortgagee to file suit to recover possession from the tenant. In my view therefore for asserting the right to recover possession of the property, it is not necessary for the mortgagee to prove that he was put in possession of the mortgaged property at the time of execution of the mortgage deed. On the same principle, the submission of Mr. Shah that the mortgagee can seek recovery of possession only from the mortgagee's tenant and not the mortgagor's tenant deserves rejection.

23) Upon a query being asked by the Court about the extent of enquiry to be conducted by a Court into the title of Defendant/Respondent at the behest of someone who is merely a gratuitous licensee or permissive user, Mr. Shah has relied upon the judgment of the Apex Court in **Vinay Eknath Lad** (supra) to contend that tenant is entitled to challenge the title of a landlord who claims a derivative title. He has placed reliance on para 11 and 13 of the judgment which reads thus:

*"11. We accept the plaintiffs' stand that the principle of estoppel bars a tenant from questioning the title landlords. This is incorporated in Section 116 of the Evidence Act. But this principle cannot be made applicable in the present case straightaway as the main defence set up by the tenant is that he had acknowledged the said partnership firm as the landlord but questioned the locus standi of the plaintiffs, who operated under the same trade name. In absence of attornment or public notice of dissolution, the defendant had no way of having knowledge of change of landlord of the subject-premises from partnership firm to a co- ownership concern. The co-ownership firm admittedly was not the defendant's landlord at the time of commencement of the lease. Thus, identity of the landlord stood altered, though the seventeen individuals continued to operate under the same trade name. For this reason, the very fact that rent was continued to be paid to Sri Sabari Corporation cannot constitute acceptance of the original plaintiffs as the landlord by the defendant. On the question of attornment, learned counsel for the appellants have argued before us that title could be acquired in terms of Section 109 of the Transfer of Property Act and in such a situation, attornment would not be necessary. The said provision reads:-*

*"109. Rights of lessor's transferee.--If the lessor transfers the property leased, or any part thereof, or any part of his interest therein, the*

*transferee, in the absence of a contract to the contrary, shall possess all the rights, and, if the lessee so elects, be subject to all the liabilities of the lessor as to the property or part transferred so long as he is the owner of it; but the lessor shall not, by reason only of such transfer cease to be subject to any of the liabilities imposed upon him by the lease, unless the lessee elects to treat the transferee as the person liable to him:*

*Provided that the transferee is not entitled to arrears of rent due before the transfer, and that, if the lessee, not having reason to believe that such transfer has been made, pays rent to the lessor, the lessee shall not be liable to pay such rent over again to the transferee.*

*The lessor, the transferee and the lessee may determine what proportion of the premium or rent reserved by the lease is payable in respect of the part so transferred, and, in case they disagree, such determination may be made by any Court having jurisdiction to entertain a suit for the possession of the property leased."*

**13.** *This authority has been followed in a later case, Apollo Zipper (India) Ltd. v. W. Newman & Co. Ltd. It has been held in this case: (SCC p. 754, para 42)*

*"42... Similarly, the law relating to derivative title to the landlord and when the tenant challenges it during subsistence of his tenancy in relation to the demised property is also fairly well settled. Though by virtue of Section 116 of the Evidence Act, the tenant is estopped from challenging the title of his landlord, yet the tenant is entitled to challenge the derivative title of an assignee of the original landlord of the demised property in an action brought by the assignee against the tenant for his eviction under the rent laws. However, this right of a tenant is subject to one caveat that the tenant has not attorned to the assignee. If the tenant pays rent to the assignee or otherwise accepts the assignee's title over the demised property, then it results in creation of the attornment which, in turn, deprives the tenant to challenge the derivative title of the landlord."*

24) However, in para 16 of the judgment, the Apex Court has quoted a passage from its judgment in ***Apollo Zipper (India) Ltd. Vs. W. Newman & Co. Ltd.***<sup>5</sup> and has held as under:

**"16.** *The Plaintiffs' argument on law is that in an eviction suit, title need not be proved in a manner required in a suit for declaration of title. On this count, the following passage from Apollo Zipper has been cited: (SCC p. 754, para 40)*

**"40.** *---- It is a settled principle of law laid down by this Court that in an eviction suit filed by the landlord against the tenant under the rent*

***laws, when the issue of title over the tenanted premises is raised, the landlord is not expected to prove his title like what he is required to prove in a title suit."***

*Two earlier authorities, Sheela v. Firm Prahlad Rai Prem Prakash and Boorugu Mahadev & Sons v. Sirigiri Narasing Rao broadly lay down the same principle of law. It is not the law that in a landlord-tenant suit the landlord cannot be called upon at all to prove his ownership of a premises, but onus is not on him to establish perfect title of the suit property."*

*(emphasis supplied)*

25) Thus even in a Suit for recovery of possession from a tenant, the extent of inquiry into title of landlord cannot be on par with a inquiry between competing claims of two persons claiming ownership. In the present case, the Plaintiff is not even a tenant in respect of the suit property, and he is merely a gratuitous licensee/ permissive user. In my view therefore the Trial Court was not expected to institute a detailed enquiry into the title of Defendant while deciding the suit for recovery of possession from Plaintiff. Plaintiff has lost in his claim of tenancy. He does not claim ownership of the suit property. He does not have a legal authority to defeat a decree for possession. Defendant on the other hand is armed with a Sale Deed in his name. Plaintiff questioned acquisition of title by Defendant through the Sale Deed. The Appellate Court, though did not hold Defendant to be the owner, upheld his claim of being a mortgagee. Thus to some extent, interest in the property is established by Defendant as against absence of legal authority of Plaintiff to continue in possession. His long-settled possession may entitle him to the limited relief against dispossession by use of force. This is the reason why Defendant filed suit for recovery of possession by lawful means. In a litigation of this nature, in my view, the extent of inquiry into the title of Defendant and his right to seek recovery of possession need not be extensive.

26) I accordingly proceed to answer the substantial questions of law as under:

- i. Even in absence of ownership, Defendant is entitled to seek a decree for recovery of possession of suit property from the Plaintiff.
- ii. A mortgagee is entitled to seek recovery of possession from gratuitous licensee or a trespasser.
- iii. In a suit filed by the Defendant for recovery of possession from Plaintiff in his capacity as gratuitous licensee, the Court can conduct enquiry into Defendant's title in respect of the suit property, but that inquiry would not be on par with inquiry into contesting claims of two persons claiming ownership.
- iv. It is not necessary for the mortgagee to prove prior possession of the suit property for the purpose of seeking a decree of recovery of possession from a licensee or a trespasser.
- v. The First Appellate Court was justified in reversing the decree passed by the Trial Court and in directing recovery of possession of the suit property from Plaintiff in favour of Defendant even though the Defendant failed to prove his ownership in respect thereof.

27) After having answered the questions formulated as above, I do not see any valid ground to interfere in the Order passed by the First Appellate Court. Second Appeals are accordingly dismissed with costs.

28) In view of disposal of Second Appeals, Interim Application No. 18607 Of 2022 and Interim Application No. 18610 Of 2022 do not survive, the same also stand disposed of.

**[SANDEEP V. MARNE J.]**

After the Judgment is pronounced, Mr. Shah the learned counsel appearing for Appellant would pray for stay of the decree of the First Appellate Court. The request is opposed by Mr. Talkute, the learned counsel appearing for Respondent submitting that the suit house no longer exists on the suit property as the same was beyond repairs at the time when the suits were decided. In that view of the matter, request for stay to the decree is rejected.

**[SANDEEP V. MARNE J.]**