APPELLATE CIVIL

FULL BENCH

Before Mr. M. C. Chagla, Chief Justice, Mr. Justice Dixit and Mr. Justice Shah.

PATEL BHIKABHAI NANABHAI (ORIGINAL PLAINTIFF), APPELLANT *v.* SHAH CHIMANLAL MAGANLAL (ORIGINAL DEFENDANTS), RESPONDENTS.* 1953 *Jan.* 6

Transfer of Property Act (IV of 1882), ss. 54, 60—Sale of equity of redemption—Immoveable property mortgaged worth less than one hundred rupees—Vendee already in possession as mortgagee—Whether either further delivery of possession or registered sale-deed necessary for conveying title to the Vendee.

The delivery of property to the intended vendee contemplated by s. 54 of the Transfer of Property Act, 1882, is not constructive or symbolic delivery but actual or real delivery. In a case where the intended vendee is already in possession and no further possession can be given, then the only way by which title can be transferred is by a registered instrument.

Tukaram v. *Atmaram*,[1] distinguished.

Sohan Lal v. *Mohan Lal*,[2] *Sibendrapada Banerjee* v. *Secretary of State for India in Council*,[3] *Biswanath Prashad* v. *Chandra Narayan Chowdhari*,[4] *Puran Mahaton* v. *Bhogo Mahton*,[5] and *Sheik Dawood* v. *Moideen Batcha*,[6] referred to.

Kulachandra Ghosh v. *Jogendrachandra Ghosh*,[7] *Pheku Mian* v. *Syed Ali*,[8] dissented from.

Quaere: Whether equity of redemption is tangible immoveable property.

SECOND APPEAL from the decision of N. C. Vakil, District Judge, Kaira, confirming the decision of M. M. Hakim, Civil Judge (Junior Division), at Umreth.

One Venidas mortgaged the suit-land for Rs. 400 to one Kishordas in 1880. Kishordas sub-mortgaged it to one Shah Chhaganlal Mulji for Rs. 261 and there was a further sub-mortgage on May 13, 1886, for Rs. 560. Patel Bhikabhai Nanabhai (plaintiff) acquired the right of Venidas in the property by a registered document on February 8, 1945. The plaintiff filed the present suit for accounts of the mortgage of 1880

* Second Appeal No. 993 of 1948.

(1) (1938) 40 Bom. L. R. 1192.
(2) (1928) 50 All. 986, F. B.
(3) (1907) 34 Cal. 207.
(4) (1921) L. R. 48 I. A. 127.
(5) [1946] A. I. R. Pat. 81.
(6) [1925] A. I. R. Mad. 566.
(7) (1932) 60 Cal. 384.
(8) (1936) 15 Pat. 772.

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under s. 15D of the Dekkhan Agriculturists' Relief Act, 1879 and for redemption.

Defendants Nos. 1 to 6, the representatives of the sub-mortgagees contended, *inter alia,* that the representatives of the original mortgagor had sold to them the equity of redemption by a sale deed dated January 2, 1908. The deed was not registered and the original also was lost.

Defendants Nos. 7 and 8, representatives of the original mortgagor Venidas, submitted that they had no interest left in the land as they had sold the equity of redemption to defendants Nos. 1 to 6.

The trial Court held that the mortgage of 1880 was extinguished by the sale of the equity of redemption made by the representatives of the original mortgagor in favour of defendants Nos. 1 to 6 and the plaintiff had acquired no title to the property. The plaintiff's suit was therefore, dismissed.

On appeal, the learned District Judge confirmed the decision of the trial Court.

The plaintiff appealed to the High Court.

The appeal was referred to a Full Bench.

D. V. Patel, for the appellant.

S. M. Shah and *R. N. Shah* with *N. C. Shah,* for respondents Nos. 1 to 5.

Chagla C. J. This is a second appeal referred to this Full Bench. The facts briefly are that the land in question belonged to one Venidas and in 1880 he mortgaged this land for a sum of Rs. 400 to one Kishordas Jethabhai. Kishordas Jethabhai sub-mortgaged the land to one Shah Chaganlal Mulji for Rs. 261, and there was a further sub-mortgage on May, 13, 1886, for a sum of Rs. 560. The plaintiff in the suit from which this appeal arises acquired the right of Venidas in this property by a registered document on February 8, 1945, and he filed the suit for redemption under the Deccan Agriculturists' Relief Act. Defendants Nos. 1 to 6 are the representatives of the sub-mortgagee and defendants Nos. 7 and 8 are the representatives of Venidas. Both the trial Court and the lower appellate Court concurred in dismissing the suit.

Now, in the written statement the contesting defendants alleged that there was a sale deed executed by defendants Nos. 7 and 8 in respect of the equity of redemption of this

property and this sale deed was executed on January 2, 1908. They further contended that the sale deed was lost. There was no allegation in the written statement that delivery was given of the property and therefore the sale could be effected without a registered document. It is clear that if the sale of the equity of redemption relied upon by defendants Nos. 1 to 7 could only be effected by a registered document, then the defendants must fail as no registered document has been proved before the Court below. In the trial Court no attempt was even made either to give secondary evidence of the document on which reliance was placed, nor was any attempt made to suggest that delivery of the property was given and therefore no registration was necessary. The learned District Judge, however, took the view that reading between the lines of the written statement it may be said that the defendants relied upon delivery of the property. With respect to the learned District Judge, one should first look at the lines of the written statement themselves and not try and read between the lines, and when we look at the actual lines we find that there is no plea whatever of delivery of possession as now contended before us. Therefore it would be possible to dispose of this appeal on the ground that as delivery of the property has not been alleged by the defendants and there is no registered document conveying the interest of the mortgagor to the sub-mortgagee, the plaintiff is entitled to succeed. But we are prepared to take the same lenient view that the learned District Judge took of the pleadings and consider the matter on merits. The value of the property admittedly is less than Rs. 100, and the sale of an immoveable property can only be effected in the manner laid down in s. 54. Section 54 in the first place defines what a sale is, and that is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised. Then the section goes on to lay down the mode in which a transfer can be effected. If the property is tangible immoveable property of the value of Rs. 100 and upwards or an intangible thing, then the sale can only be effected by a registered instrument. When property is tangible immoveable property of a value less than Rs. 100, the transfer can be effected in one of two modes; it may be either by a registered instrument or by delivery of the property.

The first question that arises in this case is whether the sale by the mortgagor of the equity of redemption in favour of the

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sub-mortgagee was the sale of tangible immoveable property because if the sale was not of tangible immoveable property then it is not disputed that it could only be effected by a registered instrument. The contention of Mr. Shah before us is that what the mortgagor transferred to the sub-mortgagee was tangible immoveable property and not intangible immoveable property, and therefore it was open to him to bring about a transfer of ownership not merely by a registered instrument but also by delivery of the property. One possible view seems to be that when a mortgagor sells the equity of redemption he does not sell the property, but he sells his right in that property which remains after the mortgage has been executed. It may be said that ownership is constituted by the totality of attributes attaching to a property. It is only when all these attributes are vested in one person that he can be called the owner of that property. When a mortgage is executed, an interest in property is transferred to the mortgagee, and therefore after the mortgage what is left in the mortgagor is not the totality of rights, but the totality of rights less the interest that is transferred to the mortgagee. Therefore when a mortgagor sells the equity of redemption, he sells not the property, but a right in that property and the right in that property is the right given to the mortgagor under s. 60 which is the right to redeem, and it is difficult to understand, if that be the correct position, how a right to redeem can be tangible immoveable property. On the other hand, Mr. Shah has relied on some eminent authors on jurisprudence for the contention that the owner of a property continues to remain the owner although he creates various interests in favour of third parties and even though his ownership is denuded of many of its valuable attributes, and Mr. Shah's contention is that when a mortgagor sells a property which is already mortgaged, he does not sell merely a right in property, but he sells the property itself as the owner and therefore what is transferred is tangible immoveable property. Mr. Shah points out that the rights of a mortgagor, after he has executed the mortgage, are not necessarily those confined to s. 60. He gives the instance of a simple mortgage. He says that in the case of a simple mortgage the mortgagor continues in possession and he would be entitled to sell the property subject to the mortgage and give possession to the vendee. That is a right not contemplated by s. 60, but that would be a right which would go with the ownership of the property

of the mortgagor. Mr. Shah also points out that a distinction must be made between the position in law in England and the position here. In England a mortgage is brought about by the conveyance of the property by the mortgagor to the mortgagee. The mortgagee becomes the legal owner, and at its inception the doctrine of equity of redemption was evolved by the Courts of Chancery which came to the rescue of the mortgagor, and notwithstanding the legal title being in the mortgagee it gave a relief to the mortgagor who was prepared to pay the debt and redeem the property. But Mr. Shah is right that as far as our Indian law is concerned, a mortgage does not mean the conveyance of the property in favour of the mortgagee. As the very definition of a "mortgage" shows a mortgage is nothing more than a transfer of an interest in immoveable property, and all that the mortgagee gets is not the legal ownership of the property, but merely an interest in immoveable property. Therefore there is force in Mr. Shah's contention that when a mortgagor sells the interest left in him after he has executed a mortgage, he is transferring his ownership and that he continues to be the owner of the property and what he is selling is not merely an interest in the property but the property itself, although in selling that property the property may be encumbered by the mortgage which the mortgagor has created.

But there is still a very serious difficulty in the way of Mr. Shah. Even assuming that a sale by a mortgagor of (to use the well known expression) equity of redemption constitutes a transfer of tangible immoveable property and even where the value of the property is less than Rs. 100, if the transfer is not made by a registered instrument it must be made by delivery of the property. In this particular case the mortgage in favour of the original mortgagee was a usufructuary mortgage and when the sub-mortgage was created the sub-mortgagee went into possession. Therefore when the mortgagor sold the equity of redemption to the sub-mortgagee, admittedly no possession was given to the sub-mortgagee as he was already in possession, and the question that arises for our determination is whether on these facts it could be stated that delivery of possession was given by the mortgagor to the sub-mortgagee as required by s. 54. Mr. Shah relies on one fact as constituting delivery of possession, and the fact he relies on is that there was a mutation in the Record of Rights at the instance of the mortgagor in favour of the

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sub-mortgagee, and Mr. Shah's contention is that where the mortgagee is himself in possession and where possession could not be given to him, a declaration by the mortgagor of the right of the mortgagee to the property is sufficient delivery of possession within the meaning of s. 54. Apart from any authorities, turning to s. 54 itself and the principle underlying that section, it seems to us that the delivery contemplated by s. 54 is not constructive or symbolic delivery, but actual or real delivery. The law requires that title to property can be transferred by two modes, and the reason why the law has laid down these two modes is that there should be sufficient publicity and sufficient notice to the world when a title is transferred. Registration itself is sufficient notice, but where registration is dispensed with in the case of property of small value, the law requires that there should be delivery of property. In the case of a tangible immoveable property, delivery can only be given by transfer of possession. In the case of registration, the transfer of possession would constitute sufficient notice, and therefore in our opinion it would not be proper, looking to the principle underlying s. 54, to give a wide or loose interpretation to the expression "delivery" used by the Legislature. In its own context used as it is in s. 54 along with "registration", "delivery" can only mean actual or real delivery. Mr. Shah says that that would be perfectly all right where the mortgagor or the transferor was in possession of the property; then the Court would be right in insisting upon possession being given to the transferee. But Mr. Shah says that the position is different where the transferee himself is in possession and no possession could be given to him. In our opinion, in a case like this, where no possession can be given, the law insists upon registration. In this particular case the sub-mortgagee was in possession, the mortgagor sold the property to him, as the sub-mortgagee was already in possession no further possession could be given to him, and therefore the law requires that in order that the sub-mortgagee could acquire title to the property he should obtain a registered instrument. Mr. Shah says that although possession was not given to the sub-mortgagee the nature of his possession was altered; from being in possession as a sub-mortgagee he went into possession as a vendee and as the owner of the property. But what s. 54 contemplates is not change in the nature of possession. What it requires in order that delivery should be constituted is the transfer of actual

possession, and if transfer of actual possession is not possible then the only way title can be transferred is by registration. Therefore in this particular case, even assuming that Mr. Shah is right and that what was sold by the mortgagor to the sub-mortgagee was tangible immoveable property, in our opinion the sub-mortgagee acquired no title to the property because no delivery of the property was given to him.

Turning to the authorities, we have a decision of our Court on which reliance has been placed by Mr. Shah, and that is a judgment of Mr. Justice Broomfield and Mr. Justice Macklin reported in *Tukaram* v. *Atmaram*.[1] That was a case of a usufructuary mortgage and the Court held that the equity of redemption in the case of a usufructuary mortgage was tangible immoveable property and it could be transferred by an unregistered deed where the value of the property did not exceed Rs. 100. In holding that it was a tangible immoveable property the Court followed the decision of a Full Bench of the Allahabad High Court in *Sohan Lal* v. *Mohan Lal*,[2] We shall presently deal with that case. But what has been strongly relied upon by Mr. Shah is the observations of Mr. Justice Broomfield with regard to the proper construction to be placed upon the expression "delivery" used in s. 54. Mr. Justice Broomfield at p. 1195 notices the argument that was advanced before him:

> "The next point taken by the appellant was that even if the property be regarded as tangible property, since there is no registered deed, delivery is necessary to complete the transfer and there could be no delivery by the vendor because the mortgagee was in possession."

and Mr. Justice Broomfield rejects this contention. But what must be borne in mind is that in that particular case the sale by the mortgagor was to a third party and the vendee under the agreement of sale was to pay off the mortgagee and take possession of the property. The vendee in fact paid off the mortgagee and he took possession, and therefore Mr. Justice Broomfield relies on the definition of "delivery" in s. 54 and points out that the case he was considering fell within the decision of *Sibendrapada Banerjee* v. *Secretary of State for India in Council*.[3] Therefore on the facts of that case what was held was that possession was given by the mortgagee to the vendee and Mr. Justice Broomfield holds that that possession was given on the direction of the

[1] (1938) 40 Bom. L. R. 1192. [2] (1928) 50 All. 986, F. B.
[3] (1907) 34 Cal. 207.

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vendor. Therefore far from that being a case where no delivery was given, delivery was given by the mortgagee to the vendee, and in the judgment of Mr. Justice Macklin, who concurred with the decision of Mr. Justice Broomfield, the position is made even clearer. At p. 1198 the learned Judge points out:

".....I have no doubt that the vendee did in the end get possession by virtue of his purchase; and the manner in which he obtained it shows, I think, that it was by delivery of possession within the meaning of s. 54 of the Transfer of Property Act as interpreted in that respect by *Sibendrapada Banerjee* v. *Secretary of State for India in Council.*"[1]

Therefore although this decision follows the decision of *Sohan Lal* v. *Mohan Lal*,[2] in holding that in the case of a usufructuary mortgage the equity of redemption is tangible immovable property, it follows both *Sohan Lal* v. *Mohan Lal*[2] and *Shibendrapada Banerjee* v. *Secretary of State for India in Council*[1] in holding that actual real delivery must be given in the case of tangible property where the value is less than Rs. 100 if there is no registered document transferring title.

Turning to *Shibendrapada Banerjee's* case[1] which is the basis of the decision both of *Tukaram* v. *Atmaram*[2] and *Sohan Lal* v. *Mohan Lal*[3] the learned Judges Mr. Justice Mookerjee and Mr. Justice Holmwood who decided that case point out at p. 210:

"The language of s. 54 is quite clear. It speaks of a transfer by delivery of the property, so that the delivery is the essence of the transaction. We are not prepared to put any loose construction upon this section, because the consequences of such a construction might be far reaching and injurious in many instances."

They further point out that the essence of a transfer by delivery of the property is that possession is changed. Mr. Shah has pointed out to us that the Calcutta High Court in a more recent decision in *Kulachandra Ghosh* v. *Jogendrachandra Ghosh*,[4] has taken a different view. That is a judgment of Mr. Justice Mukerji and the learned Judge doubts the decision in *Shibendrapada Banerjee's case*[1]. With very great respect, it is difficult to understand how a single Judge of the Calcutta High Court can differ from or doubt the decision of a division bench. The decision of the division bench was not overruled and that decision presumbably would be binding upon Mr. Justice Mukerji.

[1] (1907) 34 Cal. 207.
[2] (1928) 50 All. 986, F. B.
[3] (1938) 40 Bom. L. R. 1192.
[4] (1932) 60 Cal. 384.

Then our attention has also been drawn to the judgment of the Patna High Court in *Pheku Mian* v. *Syed Ali*[1]. In that case the Patna High Court held that where the property sold is already in possession of the vendee, renunciation of all his rights therein by the vendor and mutation of the vendee's name in the record-of-rights made at the instance of the vendor were sufficient compliance with the provisions of s. 54 of the Act, and in coming to that conclusion Mr. Justice Khaja Mohammad Noor and Mr. Justice Madan followed an earlier decision of the Patna High Court and also followed the decision in *Kulnchandra Ghosh* v. *Jogendrachandra Gosh.*[2] It is rather significant to note that the learned Judges did not refer to *Shibendrapada Banerjee's case*[3] at all, nor did they refer to the decision of the Privy Council in *Biswanath Prashad* v. *Chandra Narayan Chowdhuri,*[4] to which a reference will be presently made. Even with regard to the Patna High Court, a more recent decision in *Puran Mahton* v. *Bhogo Mahton,*[5] which is a judgment of Mr. Justice Agarwala has followed the principle laid down in *Shibendrapada Banerjee's case.*[3] The Madras High Court has also taken the same view as the Division Bench of the Patna High Court in *Pheku Mian* v. *Syed Ali*[1] and that decision is reported in *Sheikh Dawood* v. *Moideen Batcha,*[6] This judgment of the Madras High Court also does not refer to the decision of the Privy Council.

Turning to the decision of the Privy Council in *Biswanath Prasad* v. *Chandra Narayan Chowdhuri*[4] their Lordships were called upon to construe s. 54 and they have placed upon that section a clear and definite interpretation. At p. 132 their Lordships observed:

> "Their Lordships cannot accept the suggestion made on behalf of the appellants that, for the purposes of s. 54 some sort of constructive possession resulting from the delivery of the alleged instrument of transfer might be sufficient. For this purpose there must be a real delivery of the property."

Therefore the Privy Council rejected the suggestion that a constructive or symbolic delivery was sufficient for the purposes of s. 54. What s. 54 required was real or actual delivery.

(1) (1936) 15 Pat. 772.
(2) (1932) 60 Cal. 384.
(3) (1907) 34 Cal. 207.
(4) (1921) L. R. 48 I.A. 127.
(5) [1946] A. I. R. Pat. 81.
(6) [1925] A. I. R. Mad. 566.

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Turning to the decision in *Sohan Lal* v. *Mohan Lal*,[1] on which the judgment of this Court in *Tukaram* v. *Atmaram*[2] was based the judgment of the majority, Mr. Justice Mukerji and Mr. Justice Kendall, first held at p. 989 that:

> "the property, professed to be sold, was already in the possession of the proposed transferee; it follows that, in the circumstances, there could be no delivery of the property. If a party be already in possession of the property, you cannot deliver the property to him again, without first asking him to vacate the property".

In coming to this conclusion the learned Judges followed the decision in *Shibendrapada Banerjee's case*.[3] Having held this they went on to consider whether the equity of redemption was tangible or intangible property and in holding that it was tangible property they relied on various authorities on jurisprudence and at p. 992 they quote Salmond on Jurisprudence.

> "The right of the owner of a thing may be all but eaten up by the dominant rights of lessees, mortgagees and other encumbrancers. His ownership may be reduced to a mere name rather than a reality. Yet, he nonetheless remains the owner of the thing, while all others own nothing more than 'rights' over it.....He, then, is the owner of a material object, who owns a right to the general or residuary uses of it, after the deduction of all special and limited rights of use vested by way of encumbrance in other persons."

These are undoubtedly weighty observations and they strongly support Mr. Shah's contention that where an owner of a property executes a mortgage, although he is deprived of some of the rights in that property, he still continues to be the owner of that property, and that if he disposes of that property he would be disposing of a tangible immoveable property.

In the case before us, even assuming that the mortgagor sold a tangible immoveable property when he sold the equity of redemption, we have still to consider whether delivery of that property was given to the purchaser. As there is no registered document, it is only by delivery of possession as laid down in s. 54 that title could be transferred to the purchaser. As we have already pointed out, the sub-mortgagee was the purchaser of the equity of redemption and the sub-mortgagee was already in possession of the property. Therefore, no delivery was given to the sub-mortgagee, as indeed no delivery could be given, as he was already in possession, and therefore in our opinion even assuming that the equity of redemption constitutes tangible immoveable property, no valid title was created in favour of the sub-mortgagee because no delivery of the property was given to him.

[1] (1928) 50 All. 986, F. B. [2] (1938) 40 Bom. L. R. 1192.
[3] (1907) 34 Cal. 207.

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We will, therefore, set aside the decision both of the trial Court and of the lower appellate Court and send the matter down to the trial Court with a direction to the learned Judge to take accounts under s. 15D of the Dekkhan Agriculturists' Relief Act of the mortgage which the plaintiff wants to redeem. The appellant will get the costs of the second appeal in this Court and the costs of the lower appellate Court, and the costs of the trial Court will be costs in the cause.

Appeal allowed.

K. B. S.

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FULL BENCH

Before Mr. M. C. Chagla, Chief Justice, Mr. Justice Dixit, and Mr. Justice Shah.

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Jan. 7

THE STATE OF BOMBAY (ORIGINAL DEFENDANT), APPELLANT *v.* THE MUNICIPAL CORPORATION OF AHMEDABAD (ORIGINAL PLAINTIFF), RESPONDENT.*

Civil Procedure Code (V of 1908), s. 11—Res judicata—*Actual decision of Court and not reasons behind it which become conclusive—Decision on question of law when operates as* res judicata—*Distinction between* res judicata *and precedent.*

The first and the primary consideration in applying s. 11 of the Civil Procedure Code, 1908, is to decide what is the *res* which has been determined, for it is only *res* so determined that becomes *res judicata.* Where the *res* is a question of law, it may become *res judicata;* where the *res* is a finding of fact or facts, then what becomes *res judicata* is only the fact or facts so found, and not the interpretation of the law which led the Court to find the fact or facts.

Only the material facts necessary for the party to allege in order to establish his right in the suit can become a matter directly and substantially in issue, and the decision of the Court with regard to that matter becomes *res judicata.* What constitutes *res judicata* is the matter which is decided and not the reason which leads the Court to decide the matter. But it is not that a question of law can never operate as *res judicata.* If certain facts had to be determined on an application of the law to those facts or on an interpretation of the law with regard to those facts, then the law applied to or interpreted with regard to those particular facts would constitute *res judicata* and it would not be open to a party to say that the law was different either in its applicability or in its interpretation with regard to those facts from what had been decided in the earlier suit. But if law is interpreted as a mere reasoning which leads ultimately to the final decision, then that decision of

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* Letters Patent Appeal No. 36 of 1948.