

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 20.01.2015

Pronounced on : 23.01.2015

CORAM

THE HON'BLE MR.JUSTICE S.NAGAMUTHU

Second Appeal Nos.958 and 959 of 2014

Dharani Ammal ...Appellant in S.A.No.958 of 2014/
Plaintiff

-Versus-

Arayee ...Respondent in S.A.No.958 of 2014/
Defendant

This second appeal is filed against the common judgment and decree dated 09.04.2014 made in A.S.No.12 of 2013 by the learned Subordinate Judge, Chidambaram, confirming the common Judgment and decree dated 17.01.2013 made in O.S.No.10 of 2010 by the learned District Munsif cum Judicial Magistrate, Portonovo.

Muniyan ...Appellant in S.A.No.959 of 2014/
Defendant

-Versus-

Arayee ...Respondent in S.A.No.959 of 2014/
Plaintiff

This second appeal is filed against the common judgment and decree dated 09.04.2014 made in A.S.No.13 of 2013 by the learned Subordinate Judge, Chidambaram, confirming the common Judgment and decree dated 17.01.2013 made in O.S.No.61 of 2009 by the learned District Munsif cum Judicial Magistrate, Portonovo.

For Appellant (s) : Mr.S.Prabhakaran for
Mr. K.Balakrishnan for Appellant
in both Second Appeals

For Respondent (s) : Mrs.Hema Sampath, Senior Counsel
for Mrs.R.Meenal for respondent
in both Second Appeals

COMMON JUDGMENT

These second appeals have arisen out of a common judgment and the decrees passed by the learned Subordinate Judge, Chidambaram, in A.S.Nos.12 and 13 of 2013 dismissing the appeals and confirming the decrees and common judgment of the learned District Munsif-cum-Judicial Magistrate, Portonovo, in O.S.Nos.61 of 2009 and 10 of 2010. The appellant in S.A.No.958 of 2014 is the defendant in O.S.No.61 of 2009 and the respondent in the said second appeal is the defendant in the suit. The appellant in S.A.No.958 of 2014 is the plaintiff in O.S.No.10 of 2010 and the respondent is the defendant in the said suit. The plaintiff in O.S.No.61 of 2009 and the defendant in O.S.No.10 of 2010 are one and the same person namely, Mrs.Arayer. For the sake of convenience in this judgement, the parties shall be referred to in their respective name.

2. Admittedly, Mrs.Arayer [the respondent in both the appeals] is the owner of the suit property, which is one and the same in both the suits. According to Mrs.Dharani Ammal [the appellant in S.A.No.958 of 2014], Mrs.Arayer had mortgaged the suit property under a registered mortgage deed dated 21.05.1992 to one Mrs.Nagammal. Later on, Mrs.Arayer was not able to redeem the mortgage. Therefore, she decided to sell the suit property to Mrs.Dharani Ammal. They reached an agreement for sale on 03.07.1993, by which, the sale consideration was fixed at Rs.7,140/- [Rupees Seven Thousand One Hundred and Forty only]. At the time of agreement itself, the entire amount of Rs.7,140/- was paid, out of which Mrs.Arayer paid a sum of Rs.4,000/- [Rupees Four Thousand only] to Mrs.Nagammal and redeemed the mortgage. Evidencing the payment of Rs.4,000/- an endorsement was made on the mortgage deed itself. Evidencing the said sale agreement, an unregistered deed of sale agreement was also executed by Mrs.Arayer in favour of Mrs.Dharani Ammal on 03.07.1993 itself. As per the terms of the agreement for sale, there was no time fixed for performance. It is the further case of Mrs.Dharani Ammal that she was all along ready and willing to perform her part of contract to get sale deed executed in her favour. But, Mrs.Arayer

was evasive and she did not come forward to perform her part of contract and to sell the property in favour of Mrs.Dharani Ammal though Mrs.Arayerie had received the entire sale consideration already. There were also exchange of notices. Finally, seeking a decree for specific performance of contract based on the agreement of sale dated 03.07.1993, Mrs.Dharani Ammal filed the suit in O.S.10 of 2010.

3. Mrs.Arayerie in her written statement took the plea that it is true that she is the owner of the suit property. But, she had never entered into any such sale agreement on 03.07.1993, as it is claimed by Mrs.Dharani Ammal. According to her, her husband had approached the husband of Mrs.Dharani Ammal by name Mr.Muniyan for a loan of Rs.3,000/- . Mr.Muniyan [the appellant in S.A.No.959 of 2014 and the defendant in O.S.No.61 of 2009] was the then Thalayari of the Village. Mr.Muniyandi agreed and paid a sum of Rs.3,000/- as loan. In turn, he was permitted to enjoy the suit property towards the interest payable for the loan amount. Mr.Muniyan agreed and assured Mrs.Arayerie and her husband that he would handover the possession of the property to Mrs.Arayerie on repayment of the loan amount. At that time, as per the mutual agreement, the original title deed in the name of Mrs.Arayerie was also handed over to Mr.Muniyan along with the discharged mortgage deed mentioned herein above. According to her further case, during that transaction, whether she was forced to sign in blank stamp papers or not, could not be recollected by her. However, she took a specific stand that she never executed any such sale agreement as propounded by Mrs.Dharani Ammal. Subsequently, on mobilizing the funds, when Mrs.Arayerie approached Mr.Muniyan to settle the loan and to take back the possession of the property, he was evasive and he did not come forward to receive the loan amount and to handover the vacant possession of the property to Mrs.Arayerie. Therefore, Mrs.Arayerie issued a legal notice on 06.03.2009 demanding Mr.Muniyan to handover vacant possession. In view of these facts, according to Mrs.Arayerie, Mrs.Dharani Ammal is not entitled for a decree for specific performance of contract as prayed for in O.S.No.10 of 2010.

4. Even before O.S.No.10 of 2010 was filed by Mrs.Dharani Ammal, Mrs.Arayerie filed a suit in O.S.No.61 of 2009 for recovery of possession from Mr.Muniyan to whom possession was handed over by her for enjoyment towards interest for Rs.3,000/- which was taken as loan from Mr.Muniyan.

5. In the written statement filed in O.s.No.61 of 2009, Mr.Muniyan [the husband of Mrs.Dharani Ammal] denied the above facts stated in the plaint. Instead, he took a stand that his wife

Mrs.Dharani Ammal had entered into the sale agreement and therefore, Mrs.Dharani Ammal is entitled for specific performance of contract. He has further stated that Mrs.Dharani Ammal is in possession of the property by virtue of the said sale agreement and therefore, neither he nor Mrs.Dharani Ammal is bound to deliver possession to Mrs.Arayer.

6. Based on the above pleadings, the trial court framed appropriate issues. The parties were called upon by the trial court to let in both oral as well as documentary evidence. On the side of Mrs.Arayer, she was examined as P.W.1 and 2 documents viz., original title deed and the legal notice were marked as Exs.A.1 and A.2 respectively. On the side of Mr.Muniyan and Mrs.Dharani Ammal, 3 witnesses viz., Mr.Muniyan, Mrs.Dharani Ammal and one Mr.Rajaram were examined as D.W.1 to D.W.3 respectively and 7 documents were marked as Exs.B.1 to B.7. Ex.B.1 is the unregistered sale agreement dated 03.07.1993. Ex.B.4 is the original sale deed dated 29.04.1983, which according to Mrs.Dharani Ammal, was handed over by Mrs.Arayer in terms of the agreement for sale. D.W.3 is said to be an attesor to Ex.B.1 - Sale Agreement.

7. Having considered the above, the trial court found that the sale agreement [Ex.B.1] is not true and genuine. Accordingly, the trial court dismissed the suit for specific performance in O.S.No.10 of 2010. The trial court allowed the suit in O.S.No.61 of 2009 thereby directing Mr.Muniyan to deliver the vacant possession of the property to Mrs.Arayer on condition that Mrs.Arayer shall deposit a sum of Rs.3,000/- (Rupees Three Thousand only) in court within one month from the date of judgement and with a liberty to Mr.Muniyan to withdraw the same within a period of two months thereafter. This amount, according to the trial court, represents Rs.3,000/- which is stated to have been borrowed from Mr.Muniyan by Mrs.Arayer.

8. Aggrieved over the decree in O.S.No.10 of 2010 and the judgement, Mrs.Dharani Ammal filed A.S.No.12 of 2013 on the file of the learned Subordinate Judge, Chidambaram. As against the decree in O.S.No.61 of 2009 and judgement, Mr.Muniyan filed A.S.No.13 of 2013. Having heard both the above appeals together, by a common judgment dated 09.04.2014, the first appellate court dismissed both the appeals. Aggrieved over the same, Mr.Muniyan has come up with S.A.No.959 of 2014 and Mrs.Dharani Ammal has come up with S.A.No.958 of 2014. That is how, these two second appeals are now before this court for disposal.

9. When these two second appeals came up for admission on 30.09.2014, Mrs.Arayer made appearance in both the appeals through

her counsel. The counsel for both parties made a request to this court to dispose of the second appeals themselves. These second appeals, at the request of the counsel, were thereafter adjourned to 06.10.2014, 15.10.2014, 29.10.2014, 14.11.2014, 19.11.2014, 26.11.2014, 11.12.2014, 15.12.2014, 18.12.2014, 06.01.2015, 07.01.2015, 13.01.2015. Finally, both the second appeals were argued by the respective counsel on 19.01.2015 and at their request for making their further arguments, they were adjourned to 20.01.2015 and on that date, both the counsel completed their arguments.

10. Now, for the sake of convenience, let me take up S.A.No.958 of 2014 first. This second appeal has arisen out of the suit which has been filed by Mrs.Dharani Ammal for specific performance of contract based on the sale agreement dated 03.07.1993. The main issue before the trial court was as to whether the suit sale agreement is true and genuine. The trial court categorically found that there was no such agreement for sale at all and Ex.B.1 is a false document and the same has been concocted for the purpose of the suit. The trial court has given a number of reasons for arriving at such a conclusion. As a matter of fact, the judgment of the trial court is a well-written judgment free from any infallibility. The learned District Munsif has meticulously analyzed all the materials available on record to arrive at such a conclusion. These findings have been confirmed by the first appellate court as well. Some of the reasons mentioned by the courts below for disbelieving Ex.B.1 are as follows:-

(i) According to Mrs.Dharani Ammal for discharging the mortgage amount of Rs.4,000/- out of the sale consideration of Rs.7,140/- a sum of Rs.4,000/- was paid to Mrs.Arayer. Thus, after discharging the mortgage, the mortgage deed in the name of Mrs.Nagammal was also handed over to Mrs.Dharani Ammal. But, the so-called sale agreement states that the entire amount of Rs.7,140/- was paid on 03.07.1993 i.e., only on the date of agreement of sale.

(ii) According to Mr.Muniyan a sum of Rs.4,000/- was paid directly to the mortgagee viz., Mrs.Nagammal by Mrs.Dharani Ammal, whereas, according to Mrs.Dharani Ammal, the entire amount was paid by her husband-Mr.Muniyan. But, as per the sale agreement, the entire amount of sale consideration was paid only to Mrs.Arayer.

(iii) The agreement for sale has been engrossed on two Non-Judicial Stamp Papers for the value of Rs.5.00 and Rs.0.25 respectively. According to the case of

Mr.Muniyan as well as Mrs.Dharani Ammal, these stamp papers were purchased by Mr.Muniyan. During his evidence, Mr.Muniyan [D.W.1] has stated that he purchased two stamp papers of value of Rs.10.00 and Rs.5.00 from a stamp vendor at Parangipettai on the date of execution of the agreement of sale, but, as I have mentioned supra, the sale agreement shows that the stamp papers are in the denomination of Rs.5.00 and Rs.0.25 and not of Rs.10/- and Rs.5/- as deposed by D.W.1.

(iv) Apart from that, the stamp paper of value of Rs.5.00 has been purchased from one Sri.V.Ganapathy, a Stamp Vendor at Mayiladuthurai, whereas the stamp paper of value of Rs.0.25 has been purchased from a stamp vendor in Chidambaram whereas, according to D.W.1, both the stamp papers were purchased only at Parangipettai. This contradiction also has not been explained.

(v) It is quite unnatural that one would have gone to Mayiladuthurai to purchase one stamp paper and then, would have gone to Chidambaram to purchase another stamp paper for twenty five paise and finally to reach Parangipettai to get the sale agreement executed by Mrs.Arayer.

(vi) According to Mr.Muniyan [D.W.1] both the stamp papers were purchased on 03.07.1993, i.e., on the date of sale agreement, whereas the stamp paper of the value of Rs.5.00 shows that it was purchased on 19.06.1993 and the other stamp paper was purchased on 30.06.1993. This contradiction has also not been explained by Mr.Muniyan. It is not understandable as to why the stamp paper for Rs.5.00 was purchased as early as on 19.06.1993, that too, at Mayiladuthurai; whereas the agreement for sale was executed only on 03.07.1993. Similarly, it is not explained as to why the stamp paper for a meagre value for 25 paise was purchased on 30.06.2013 from a different stamp vendor at Chidambaram well in advance. These are all suspicious circumstances, which have been properly appreciated by the courts below.

11. Next, as observed by the trial court, the original sale deed Ex.B.4 and the original mortgage deed Ex.B.5 were handed over to Mrs.Arayer at the time when the sale agreement was executed on 03.07.1993. But, Mr.Muniyan [D.W.1] during his evidence has tacitly admitted that Mrs.Arayer had approached him previously for loan to

meet out the medical expenses of one Mr.Karthick. He has further admitted that in the year 1993, he paid money to Mrs.Arayer by way of loan. He has also admitted that as a security for the loan, these two documents were handed over to him by Mrs.Arayer. This tacit admission would clearly go against the case of Mr.Muniyan as well as Mrs.Dharani Ammal that these two documents were handed over only along with the sale agreement. This tacit admission made by Mr.M.Muniyan [D.W.1] would clearly support the case of Mrs.Arayer that the documents were handed over to Mr.Muniyan towards security for the purpose of loan of Rs.3,000/- . This piece of evidence has been duly appreciated by the courts below to hold that the sale agreement cannot be true.

12. Nextly, so far as the possession of the property is concerned, it is the case of Mrs.Dharani Ammal that possession was handed over to her under the agreement of sale, which means, until the execution of the sale agreement, the possession was with Mrs.Arayer. But, D.W.3, who has been examined to speak about the sale agreement, has categorically stated that possession was already in the hands of Mr.Muniyan as against the loan amount. This evidence clearly goes to support only the case of Mrs.Arayer, where she has stated that possession was handed over to Mr.Muniyan only for the purpose of enjoying the same as against the interest payable for the loan advanced. This evidence clearly falsifies the case of Mrs.Dharani Ammal and Mr.Muniyan that possession was handed over only at the time of sale agreement.

13. The courts below have further held that having paid the entire amount, Mrs.Dharani Ammal would not have waited for 17 years without demanding for execution of sale deed. All these factual aspects have been well considered by the courts below. The courts below have rightly come to the irresistible conclusion that the sale agreement is not true and, therefore, Mrs.Dharani Ammal is not entitled for a decree for specific performance of contract and that Mr.Muniyan is liable to handover vacant possession to Mrs.Arayer.

14. The learned counsel Mr.S.Prabhakaran, appearing for the appellants, is not in a position to place any material to frame any substantial question of law in S.A.No.958 of 2014. As I have already narrated, the courts below, on appreciating the evidences, both oral and documentary, have resolved the questions of fact and have held that the sale agreement is not true and the case of Mrs.Arayer that possession was handed over along with the original title deeds to Mr.Muniyan only as security towards the loan amount is true. These concurrent findings do not at all require any interference at the

hands of this court as I do not find any perversity or any illegality in the same. Above all, as I have already pointed out, absolutely there is no question of law, much less, a substantial question of law even to admit the second appeal in S.A.No.958 of 2014. Thus, S.A.No.958 of 2014 deserves only to be dismissed.

15. Now, turning to S.A.No.959 of 2014, this is a suit filed by Mrs.Arayer for recovery of possession. The courts below, on appreciating the evidence, have accepted the plea of Mrs.Arayer that the possession of the suit property was handed over to Mr.Muniyan by Mrs.Arayer with an understanding that Mr.Muniyan shall enjoy the property in lieu of the interest to be paid by Mrs.Arayer to Mr.Muniyan and reconvey vacant possession at the time when the principal amount is repaid. This factual finding is absolutely correct, more particularly, in view of the positive admission made by Mr.Muniyan during his evidence as referred to above and the other evidences available on record.

16. In this second appeal, Mr.Prabhakaran, the learned counsel for the appellant has raised a few substantial questions of law, which I deem it necessary to answer. The substantial questions of law are as follows:-

(1) Whether the suit in O.S.No.61 of 2009 as framed for a simple decree for recovery of possession is maintainable?

(2) Whether the suit for redemption of mortgage alone should have been filed by Mrs.Arayer?

17. The learned senior counsel Mrs.Hema Sampath contended that a suit to redeem an usufructuary mortgage is substantially a suit for possession and therefore, in the instant case, though this suit was for recovery of possession, it should be, for all purposes, treated as a suit for redemption and that the decree passed by the lower court should be treated as a final decree in terms of Order 34, Rule 7 of CPC. Thus, according to her, the decree passed by the lower court does not require any interference. Thus, the whole gamut of her argument is founded on the assumption that there has been a valid mortgage. At the out set, I should say, this argument does not persuade me, for, in my view, in this case, there did not come into being any valid usufructuary mortgage at any point of time. I made a small research of the legal position which made me to persuade myself that in this case, the suit as framed for recovery of possession is maintainable. Let us now analyze the reasons for my view.

18. Admittedly, in the plaint, Mrs.Arayerie has not specifically pleaded that the transaction by which Mr.Muniyan was inducted into possession in the year 1993 is a mortgage. But, it is immaterial because to know the nature of the transaction, one has to go by the pleadings. As early as in the year 1952, the Hon'ble Supreme Court, Kidar Lall Seal and another v.Hari Lall Seal, AIR 1952 SC 47 has held that it is actually the substance of the pleading that has to be seen and merely on technicality, the plaint should not be thrown out, however, artistically the drafting might have been made.

19. In this case, it is stated in the plaint that Mrs.Arayerie borrowed a sum of Rs.3,000/- from Mr.Muniyan and in lieu of interest, Mr.Muniyan was allowed to have possession and enjoy the property, until the principal amount is repaid. As per Section 58 of The Transfer of Property Act, 1882, mortgage is the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability. Where a mortgagor delivers possession or expressly or by implication binds himself to deliver possession of the mortgaged property to the mortgagee, as per Section 58 (d) of The Transfer of Property Act, it is known as "usufructuary mortgage". Sub-section (d) of Section 58 of the Transfer of Property Act, 1882, reads as follows:-

"58 (d) Usufructuary mortgage - Where the mortgagor delivers possession or expressly or by implication binds himself to deliver possession of the mortgaged property to the mortgagee, and authorises him to retain such possession until payment of the mortgage-money, and to receive the rents and profits accruing from the property or any part of such rents and profits and to appropriate the same in lieu of interest or in payment of the mortgage-money, or partly in lieu of interest or partly in payment of the mortgage-money, the transaction is called an usufructuary mortgage and the mortgagee an usufructuary mortgagee."

In the case on hand, keeping in mind the above definition of usufructuary mortgage if the pleadings are look into, there can be no doubt that the transaction by which the possession of the property was delivered to Mr.Muniyan by Mrs.Arayerie is an usufructuary mortgage.

20. Section 59 of The Transfer of Property Act, 1882, stipulates as to how a mortgage [other than a mortgage by deposit of title deeds] can be effected when the money secured is one hundred rupees or upwards. Section 59 of the Transfer of Property Act, 1882, reads as follows:-

"59. Mortgage when to be by assurance - Where the principal money secured is one hundred rupees or upwards, a mortgage other than a mortgage by deposit of title deeds can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses. Where the principal money secured is less than one hundred rupees, a mortgage may be effected either by a registered instrument signed and attested as aforesaid or (except in the case of a simple mortgage) by delivery of the property."

21. A reading of the above provision would make it ipso facto clear that if the money secured is less than one hundred rupees, mortgage can be effected by any means even without a registered instrument and in case of usufructuary mortgage, delivery of the property would suffice. If the money secured is one hundred rupees or upwards, a mortgage [other than a mortgage by deposit of title deeds] can be effected only by way of registered instrument. In the instant case, since money secured was Rs.3,000/- by delivery of possession of the property by Mrs.Arayer to Mr.Muniyan, the intended mortgage had not come to be effected since there was no registered instrument signed by mortgagor and attested by at least two witnesses.

22. Thus, in the instance case, though the possession of the property was also delivered by Mrs.Arayer to Mr.Muniyan, there was no legal relationship of mortgagor and mortgagee between Mrs.Arayer and Mr.Muniyan by virtue of the said oral transaction. Therefore, the right to recover possession as conferred in Section 62 of the Transfer of Property Act was not available to Mrs.Arayer. Thus, the nature of the possession of Mr.Muniyan from the date of delivery of possession was not that of a mortgagee. By virtue of the said transaction, Mr.Muniyan would not have acquired any interest in the immovable property in terms of Section 58 of The Transfer of Property Act. At the most, he could be termed only as an occupier of the property under the invalid mortgage.

23. As per Article 61 of The Limitation Act, 1963, the period of limitation for instituting a suit by a mortgagor to redeem or recover

the possession of the mortgaged property is thirty years from the date when the right to redeem or to recover possession occurs. In the case on hand, since there was no validly executed mortgage deed and since Mr.Muniyan had not acquired any interest of a mortgagee in respect of the suit property, the limitation provided in Article 61 of The Limitation Act is not applicable as Mrs.Arayerie could not file a suit for redemption or recovery of possession based on the above oral mortgage. To put it otherwise, the question of filing a suit for redemption of mortgaged property would arise if only had there been a valid mortgage satisfying Sections 58 and 59 of the Transfer of Property Act.

24. Now, the question is as to what is the remedy available for the so called mortgagor to recover the possession from the so called mortgagee to whom the possession was delivered under an invalid mortgage or void mortgage. This question depicts a complicated picture. Therefore, let us analyze as to how the courts have dealt with the same and resolved the conflicting views among various courts.

25. The earliest Judgment, upon which I could lay my hands, from this court is, Madhav v. Narayana, ILR 9 Mad 244. In that case, the question was whether the kanomdars who held the land under an invalid kanom for more than 12 years, acquired by adverse possession the limited interest for which they prescribed. This court answered this question affirmatively. Then, came the judgement in Sontyanagopala Dasee v. Kami, AIR 1921 Mad 410. That was also a case where the defendants remained in possession of the property between 1892 to 1914 under void usufructuary mortgage. This court reiterated that the defendants acquired title as usufructuary mortgagees by means of adverse possession. Later, in Appamma v. Chinnaveadu, AIR 1924 Mad 292, the Judges of the Division Bench could not concur with each other on this point. Spencer.J., who headed the Division Bench, held that plaintiff who sues for redemption on the strength of an unregistered mortgage deed can never succeed, because for obtaining a decree to redeem, it is necessary to prove the terms of the mortgage, and they cannot be proved by any other evidence than the document itself. This was the effect of Sections 17 and 49 of the Indian Registration Act read with Section 91 of the Indian Evidence Act. This conclusion arrived at by Spencer.J., did not persuade Venkatasubba Rao J. In a dissenting judgement, Venkatasubba Rao J. held that a suit for redemption was in substance for possession and thus, the defendants in that case had acquired mortgagee rights by adverse possession by being in possession for the statutory period. Since there was no consensus, the case was referred to a third Judge, who [Ramesam.J.] concurred with Venkata Subba Rao.J, and held that

the defendant had acquired limited interest of mortgagee by adverse possession.

"To prove the extent of interest acquired by the defendants by adverse possession, the terms of the mortgage asserted by them have to be and may be proved. Such proof cannot be regarded as an attempt to prove the mortgage of 1902 or to adduce secondary evidence of the terms of the unregistered deed of mortgage; for the asserted mortgage-deed need not necessarily be, though very often it will be, identical with the mortgage attempted to be created by means of the unregistered deed of mortgage."

Thus, the majority of this court in Appamma's case [cited supra] held that though by virtue of the invalid mortgage no interest is created on the so called mortgagee, by asserting the possession and also by proving that such possession was adverse possession, he could acquire the rights of a mortgagee on the expiry of twelve years period as provided in Article 65 of the Limitation Act. Thus, the view taken by this court was that of course, a mortgage can be created by a validly executed mortgage deed in terms of Section 59 of The Transfer of Property Act, apart from that, a mortgage can also be created by adverse possession.

26. Similar issue came up before a Division Bench of Rajasthan High Court in Sarwan Lal v. Gangadhar, Second Appeal No. 220 of 1949, decided on the 12th October, 1955 wherein concurring with the Full Bench Judgment of this Court in Appamma's case, the Division Bench of Rajasthan High Court held that mortgagee rights can be acquired by adverse possession even though the mortgage deed was unregistered. Subsequently, another Division Bench of Rajasthan High Court had occasion to consider the same issue in Hansia v. Bakhtawarmal, ILR (1958) 8 Raj 126: AIR 1958 Raj 102. Before the Division Bench, however, the Judgment in Sarawan Lal v. Gangadhar [cited supra] was not quoted. The Division Bench had the benefit of referring to Purusottamdas v. S.M.Desouza, decided by a Division Bench of Orissa High Court reported in AIR 1950 Orissa 213. The Orissa High Court had also concurred with the view expressed by the Madras High Court in Appamma's case and held that the mortgagee rights can be prescribed by adverse possession by the so called mortgagee under a void mortgage deed or an invalid mortgage deed. The Division Bench, in Hansia's case cited supra, did not agree with the Division Bench Judgment of the Orissa High Court in Purusottamdas's case cited supra. The Division Bench held that no such mortgagee rights could be acquired by means of adverse

possession. In para 8 of the said Judgment the Division Bench made the following observations:-

8. With all respect, we find it very difficult to understand how a mortgage, which is void under Section 59 of the Transfer of Property Act, can become a valid mortgage after twelve years' possession of the mortgagee under the invalid mortgage. This would be holding something directly against the statutory provision in Section 59 of the Transfer of Property Act which lays down that the only way in which a mortgage of immovable property of the value of one hundred rupees and upwards can be created is by means of a registered instrument. It would also amount to setting at nought Section 49 of the Registration Act, which makes unregistered mortgages inadmissible in evidence (this corresponds to Section 18 of the Marwar Registration Act of 1899) except for collateral Purposes."

27. The Division Bench then proceeded to refer to Article 144 of The Limitation Act, 1908 to say as follows:-

9. Article 144 of the Limitation Act certainly provides for a suit for possession of immovable property or of an interest therein. But can it be said that a mortgage, which is invalid from its very inception, creates any interest in, the mortgagee? We feel that it is not possible to say that there is any interest in the property in the mortgagee on the basis of an invalid mortgage in view of Section 59 of the Transfer of Property Act or Section 49 of the Registration Act."

28. The Division Bench, therefore, in the said judgment opined thus:-

"In these circumstances, there can, in our opinion, be no question of a suit for possession of a limited interest based on an invalid mortgage, for the interest contemplated under Article 144 is an interest which can arise in law. But if no interest can arise in law at all

of the character envisaged in Purusottam Das's case, there can, in our opinion, be no question of prescribing or that kind of limited interest."

Thus, according to the Division Bench Judgment of Rajasthan High Court in Hansia's case cited supra, mortgagee rights cannot be prescribed by means of adverse possession.

29. Similar issue came up before a Full Bench of Rajasthan High court in Lachmi Narain and another v. Kalyan and another, AIR 1960 Raj 1. This time, the Full Bench had a thorough survey of all the judgments from various High Courts including the Madras High Court in Appamma's case, the Division Bench Judgment of Orissa High Court in Purusottamdas's case and also a Judgment of the Allahabad High Court in Maha Mangal Rai and Co. v. Kishun Kandu, AIR 1927 All 311. The Full Bench of Rajasthan High Court did not agree with the view expressed by the Division Bench in Hansia's case and finally held that by means of adverse possession for a period of twelve years under an invalid mortgage deed, the so called mortgagee can prescribe mortgagee rights under the provisions of The Limitation Act and if once such mortgagee rights are perfected by means of adverse possession, then there comes into being a full-fledged valid mortgage and therefore, thereafter, the remedy for the mortgagor is to file a suit for redemption of mortgage and for recovery of possession.

30. Now, the question is as to when the possession of the so called mortgagee becomes an adverse possession for the purpose of The Limitation Act to prescribe the mortgagee rights. It is needless to say that it is not a mere continuous possession for twelve years that makes the possession as adverse possession for the purpose of prescribing the mortgagee rights. It is essential that the possession should be not an ordinary possession, but adverse possession.

31. For the purpose of acquiring the mortgagee rights by adverse possession, while holding possession under the invalid mortgage, the so called mortgagee should continue to have the intention [animus] of acquiring only the mortgagee rights. In other words, by having such intention, on the expiry of the statutory period, he can only acquire the mortgagee rights and he cannot prescribe any other higher right. The mortgagee under the invalid mortgage, who is in possession, acquires only the limited rights of mortgagee by operation of The Limitation Act. For his own reasons, if the so called mortgagee, before the expiry of the statutory period of twelve years, repudiates the rights of the so called mortgagor to recover the possession and sets up a different right to justify his possession,

then, his possession for the purpose of acquiring mortgagee right is discontinued and from the moment when he so repudiates, he loses the right to acquire the mortgagee rights. From the time of such repudiation, the character of his possession becomes different. For example, if he sets up a plea of ownership thereby repudiating the title of the so called mortgagor then, a fresh period of limitation commences from the said date of repudiation and if he continues to be in possession for twelve years, he will perfect title for the property. Thus, it is crystal clear that for the purpose of acquiring the mortgagee's right by adverse possession, the so called mortgagee, should continuously, uninterreputedly and to the knowledge of the so called mortgagor have the animus that he is in possession of the property only under the mortgage.

32. In this regard, we may refer to a Judgment of the Hon'ble Supreme Court in Virendra Nath through P.A. Holder R.R.Gupta v. Mohd. Jamil and others, [2004] 6 SCC 140 wherein, the Hon'ble Supreme Court was to deal with the possession under the invalid mortgage. After having referred to the facts of the case, the Hon'ble Supreme Court has observed as follows:-

"There is no evidence that the possession of Jan Mohammad as mortgagee ever became adverse to the knowledge of the original owner that is the mortgagor...."

33. In that case, under Uttar Pradesh Consolidation of Holdings Act, 1953 and Uttar Pradesh Zamindari Abolition & Land Reforms Act, 1950, the name of one Mr. Jan Mohammad, who came to be in possession under an invalid mortgage was recorded as a mortgagee in the records by the authority concerned. But, the authority treated him to have perfected his title by adverse possession. The Hon'ble Supreme Court held that recording of the name of Jan Mohammad as a mortgage was right and since he never repudiated the same to start setting up title in him, he did not perfect his title. In penultimate paragraph of the Judgment, the Hon'ble Supreme Court has held as follows:-

"... .. If his entry on the land was as mortgagee, nature of his possession would continue to be as mortgagee unless there is evidence to show that, at any point of time, he asserted his adverse title, by repudiating his possession as mortgagee and continued in adverse possession for the prescribed period of more than 12 years to the knowledge of the mortgagor...."

34. Thus, the Hon'ble Supreme Court has also affirmed the legal position that the so called mortgagor under the invalid mortgage can acquire the rights of a mortgagee on the expiry of twelve years of adverse possession and thereafter, notwithstanding anything stated in Section 59 of The Transfer of Property Act, there shall come into being a full-fledged mortgage giving all mortgagee rights.

35. In view of the above settled possession of law, one thing is crystal clear that from the date of entering into the invalid mortgage, if the so called mortgagor wants to recover the possession, he can file a simple suit for recovery of possession and not a suit for redemption of mortgage as there is no valid mortgage. If he fails to do so within twelve years, on the expiry of twelve years period, if the so called mortgagor becomes an actual mortgagee thereby acquiring all the rights of mortgagee by prescribing the same by adverse possession asserting mortgagee rights thereafter, the mortgagor can only file a suit for redemption of mortgage and for recovery of possession and not a simple suit for recovery of possession.

36. In the instant case, invalid mortgage was entered into in the year 1993 by which possession was given to Mr.Muniyan. Admittedly, Mrs.Arayeri did not file a suit for recovery of possession within this twelve years period of limitation prescribed under Article 65 of the Limitation Act. Mr.Muniyan continued to be in possession from the year 1993, but, he did not continue to be in possession asserting mortgagee rights so as to become a full-fledged mortgagee in the year 2005. According to the written statement, there was no such oral mortgage and thus, he never had the animus that he was in possession of the property to assert his mortgagee rights. Thus, his possession was not adverse for the purpose of asserting mortgagee rights. Therefore, in the year 2005, there did not come into being a full fledged mortgage and thus, Mr.Muniyan did not acquire mortgagee rights. Therefore, the remedy for Mrs.Arayeri is only to file a simple suit for recovery of possession, which she has rightly done in the instant case. Mr.Muniyan has not even pleaded adverse possession either for prescribing mortgagee rights or to prescribe title. Therefore, though he was in possession continuously from the year 1993, he has not perfected mortgagee rights neither has he perfected title by adverse possession. He has only pleaded that his wife Mrs.Dharani Ammal has been in possession under the sale agreement which has been found to be false.

37. In view of all the above, as per settled law, I have no difficulty in holding that the present suit filed by Mrs.Arayeri for

recovery of possession is certainly maintainable. Thus, I answer both the questions of law in favour of the respondent.

38. In view of the above discussions, I do not find any merit at all in S.A.No.959 of 2014 and the same also deserves only to be dismissed.

39. In the result, both the second appeals are dismissed. However, considering the facts and circumstances of the cases, there will be no order as to costs.

Sd/-
Deputy Registrar (J)

//True Copy//

Sub Assistant Registrar

kmk

To

1.The Subordinate Judge,
Chidambaram, Cuddalore District.

2.The District Munsif cum Judicial Magistrate,
Portonovo,
Cuddalore District.

2 CCs to Mrs.R.Meenal, Advocate SR.No. 3935

2 CCs to Mr. K.Balakrishnan, Advocate SR.No. 3605

सत्यमेव जयते

TEJ (CO)
PSI (05.03.2015)

Second Appeal
Nos.958 and 959 of 2014

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