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**(1963) 03 AP CK 0001**

**In the Andhra Pradesh High Court**

**Case No :** Letters Patent Appeal No. 103 of 1961

Bheema Reddi Jeedikanti Ram Reddi

APPELLANT

Vs

Salla Venkat Reddy

RESPONDENT

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**Date of Decision :** 13-03-1963

**Acts Referred:**

Transfer of Property Act, 1882 — Section 53A, 58

**Citation :** AIR 1963 AP 489

**Hon'ble Judges :** P. Chandra Reddy, C.J.;Gopalakrishnan Nair, J

**Bench :** Division Bench

**Advocate :** A. Raghuvir, for the Appellant; G.V.V.S. Ramachandrarao, for Sadasiv Rao, for the Respondent

**Final Decision :** Allowed

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## Judgement

Chandra Reddy, C.J.—In this appeal presented against the judgment of our learned brother, Srinivasachari J., under Clause 15 of the Letters Patent, the short point for determination is whether Section 53A of the Transfer of Property Act could be invoked by a usufructuary mortgagee.

2. The suit brought by the respondent on the foot of a registered sale deed for possession of the property, which was usufructuarily mortgaged to the appellant under an unregistered document, was resisted by the appellant on the basis of his possession obtained in part performance of the mortgage.

3. While the trial court decreed the suit overruling the defence, the lower appellate court on appeal by the aggrieved defendant dismissed the suit upholding the plea of the defendant. In second appeal brought by the plaintiff against the judgment of the District Judge our learned brother, Srinivasachari J., reversed the lower appellate Court's judgment in the view that Section 53A of the Transfer of Property Act is inapplicable to the case of a usufructuary mortgage. It is this view of the learned Judge that is challenged before us by the defendant.

4. Section 53A of the Transfer of property Act reads as follows :

"Where any person contracts to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty,

and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract,

and the transferee has performed or is willing to perform his part of the contract,

then, notwithstanding that the contract, though required to be registered, has not been registered, or, where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefore by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferees and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract:

Provided that nothing in this section shall effect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof".

5. It is clear from this section that a transferee for consideration is entitled to invoke this section provided that he has performed his part of the contract and he is put in possession of the property. It is not in dispute that the transferee has fulfilled his part of the contract and is also in possession of the property. The only point debated is whether a usufructuary mortgage falls within the ambit of this section.

6. Whether a mortgage is a "transfer of consideration" has to be judged with reference to the definition of "mortgage" underlying Section 58 of the Transfer of Property Act. Section 58 enacts :

"(a) A 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.

The transferor is called a mortgagor, the transferee a mortgagee; the principal money and interest of which payment is secured for the time being are called the mortgage-money and the instrument (if any) by which the transfer is effected is called a mortgage-deed."

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7. It is manifest from Section 58 that a mortgage transfers an interest in specific

immovable property. It may be that the aggregate of rights constituting an absolute ownership is not transferred by the mortgage but some of the rights in the immovable property are conveyed by the mortgage and that would, amount to transfer within the terms of Section 53A. To attract Section 53A, the transfer need not be a bundle of rights making up the ownership of the property. A transfer of some of the rights in the property is sufficient to come within the purview of the section. It cannot be disputed that the mortgage is executed for consideration. Consequently we fail to see why a usufructuary mortgage is not attracted by Section 53A of the Transfer of Property Act.

8. In this connection, we may look at the terms of Section 49 of the Indian Registration Act, the proviso of which says :

"Provided that an unregistered document affecting Immovable property and required by this Act or the Transfer of Property Act, 1882, to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act 1877, or as evidence of part performance of a contract for the purposes of Section 53A of the Transfer of Property Act, 1882, or as evidence of any collateral transaction not required to be effected by registered instrument."

9. In our considered opinion, a mortgage creates a transfer of property (though of subordinate rights) to the mortgagee and for consideration and as such Section 53A, which is based on equitable considerations, applies to the usufructuary mortgagee.

10. This opinion of ours derives support from the judgment of the Supreme Court in *Sheth Maneklal Mansukhbhai Vs. Hormusji Jamshedji Ginwalla and Sons*, which has extended Section 53A to the case of a lease. Their Lordships of the Supreme Court observed at page 5 as follows :

"It is in pursuance of this agreement of lease that all the subsequent acts above-mentioned were done. It may also be observed that an agreement of lease creating a present demise but not registered is admissible u/s 49 of the Registration Act as evidence of part performance and Ex. 181 is secondary evidence of that agreement. A formal lease is not necessary to attract the application of Section 53A, of the Transfer of Property Act. All that is required is that an agreement in writing signed by the transferor can be gathered from the evidence. The correspondence mentioned in Ex. 181 fully establishes that fact."

11. In these circumstances, we accept the appeal, set aside the judgment of our learned brother and restore that of the District Judge, Warangal, The appellant will get his costs both here and in the second appeal.