
(1969) 06 MAD CK 0021

In the Madras High Court

Case No : Second Appeal No's. 1307, etc. of 1963, etc.

Lakshmanan Nadar and Others

APPELLANT

Vs

Appavu Nadar and Others

RESPONDENT

Date of Decision : 16-06-1969

Acts Referred:

Limitation Act, 1908 — Article 141, 144, 148, 28

Citation : (1970) ILR (Mad) 380

Hon'ble Judges : Natesan, J

Bench : Single Bench

Advocate : Sarvabhauman, P. Ananthakrishnan Nair and P. Mammen Philip, for the Appellant; R. Gopalaswamy Ayyangar and V. Ganapathi subramania Ayyar, for the Respondent

Final Decision : Allowed

Judgement

Natesan, J.—These four second appeals arise out of two suits, Original Suit Nos. 240 and 241 of 1960, on the file of the Additional District Munsif, Kuzhithurai, instituted by the common Plaintiff in the suits for redemption, of two others—Original Suit No. 240 of 1960 and an Othi and Kuzhikanam exhibit A-2 of the year 1894 (1069 M.E.) and Original Suit No. 244 on 1960, of another Othi and Kuzhikanam exhibit A-1 of the year 1892 (1068 M.E.). It is not disputed that the suits have been filed for redemption within sixty years from when the right to redeem arose. Both the suits have been tried together by consent of the parties, the same question arising in both the suits. The evidence has been marked in Original Suit No. 240 of 1960 and the array of parties is referred to with reference to that suit. Though the written statements do not elaborate the defence relied upon, the record of the case brings out a number of transactions with reference to the suit properties and several Court proceedings complicate the determination of the issues involved in the case. However, many of the questions raised, having regard to the character and nature of the evidence relating to them, do not call for re-consideration in the second Appeals. The

questions that ultimately call for consideration and analysis, as will be seen presently are few.

2. The suit properties admittedly belonged to one Kutti Kunchumadan his wife being Malavalli. He had two daughters Udayamma and Champakakutti. Kutti Kunchumadan died in or about 1052 M.E. that is, 1876. His daughter Udayamma died issueless and may be left out of account. His other daughter Champakakutti had three sons and one daughter. of the three sons, one son Devavaram died in 1920, before the death of Champakakutti in or about 1932. Her other two sons, Nallathampi and Chinnathampi, figure as Defendants 12 and 13 in Original Suit No. 240 of 1960. The parties are governed by Hindu Mithakshara Law and it may be taken that on the death of Kunchumadan, Malavalli had entered into possession of the properties as next heir. As Malavalli died in 1104 M.E. her daughter Champakakutti became heir to the properties and on her death in 1932, the right to the properties devolved on her two surviving sons, Defendants 12 and 13. Malavalli had three sons Kunju, Uminia and Ponnumuthan born to her after the death of Kunchumadan. During her life time, she had been attempting to put them forward as her sons by Kunchumadan. It is now a finding beyond challenge that these three sons of Malavalli were sons born to her by one Kumaran Padmanabhan after the death of her husband Kunchumadan. These three sons had, therefore, no right in the suit properties. Coming to the Othies and Kuzhikanams for redemption of which these suits have been filed, the first Othi Kuzhikanam exhibit A-1 was executed on 24th February 1068, by Malavalli in favour of one Narayanan Vellayan and others for a consideration of 501 Fanams. The property actually othied is an eastern portion of S. No. 4092 of a total extent of three acres 42 cents. The portion othied comes to about 90 cents, the documents giving the measurements in poles. The record shows that subsequently Malavalli executed another othi and Kuzhikanam over this bit under exhibit B-51 in favour of Narayanan Vellayan alone. He got release from his other mortgagees of the 4/5th share under exhibit B-52 of the year 1907. It is clear from the recitals in exhibit B-51 that the Othi and Kuzhikanam exhibit A-2 was not discharged by these transactions. In the redemption suit of exhibit A-1 Original Suit No. 244 of 1960, the legal representatives of Narayanan Vellayan are on record as Defendants 1 to 6.

3. The other Othi and Kuzhikanam, exhibit A-2 dated 22nd September 1969, was executed by Malavalli in favour of one Mottayan Kutti for a consideration of 500 Fanams. This Othi and Kuzhikanam was of the remaining portion of S. No. 4092. The first Defendant in Original Suit No. 240 of 1960, is the legal representative of the mortgagee Chottayan Kutti. The defence to these two suits for redemption filed within the period of limitation is put forward by Defendants 5 to 8 in Original Suit No. 240 of 1960 and the finding is that they are the only persons asserting interest in the properties. It is unnecessary to correlate, for the purpose of the judgment, the relevant positions of the parties in the two suits and it will be convenient for the purposes of the judgment to adopt their positions as in Original Suit No. 240 of 1960.

4. Defendants 5 to 7 form one group and the eighth Defendant stands by himself. As between them, they claim the entirety of the suit property S. No. 4092, Defendants 5 to 7 claiming the southern 2/3rd and the eighth Defendant, the northern 1/3rd therein. There is no dispute, as between them inter se about their respective shares. Defendants 3 to 8 claim title to the suit properties under the three sons of Malavalli through Kumaran Padmanabhan, The Plaintiff's title to the suit properties is through the children of Champakakutti who was the daughter of the owner Kunchumadan. The Plaintiff claims title to the entirety of the properties under exhibits A-3 to A-6 by his purchase from the two sons of Champakakutti (Defendants 12 and 13) and her daughter Marimuthu. If the question merely is whether Defendants 5 to 8 derived any title through the sons of Kumaran Padmanabhan to oppose redemption by the Plaintiff, there can be no difficulty in answering it straightaway in the negative. Neither side repudiates or questions the validity of the two othies and Kuzhikanams executed by Malavalli. It is also a concluded matter that exhibits A-1 and A-2 the othies and Kuzhikanams were not executed by Malavalli on behalf of her sons through Kumaran Padmanabhan. There can also be no question that the right of Defendants 12 and 13 arose only after the death of Champakakutti in 1932, Malavalli and Champakakutti having only the estates of Hindu women in the suit properties. Also Marimuthu, the daughter of Champakakutti, can lay no claim to a share in the properties as she was not a heir under the Hindu Mithakshara Law at the time succession opened. Defendants 10 and 11 in Original Suit No. 240 of 1960, are sons of Devavaram, another son of Champakakutti who predeceased her. These Defendants have also no right in the suit properties. In law beyond question the title to the properties vested ultimately only in Defendant 12 Nallathampi and Defendant 13 Chinnathampi.

5. The Plaintiff claims right to redeem the othie and Kuzhikanams under the sale deed exhibits A-3 to A-5. Under exhibit A-3, dated 8th August 1956 Defendants 12 and 13 sell a 1/3rd share in the suit properties to one Muthusamy. The 2/3rd share in the suit properties is of an extent of two acres 28 cents and it is described as southern 2/3rd share in S. No. 4092. Under exhibit A-4, dated 6th March 1959, this Muthuswamy conveys the 2/3rd share purchased from Defendants 12 and 13 to the Plaintiff. There can be no doubt that the Plaintiff thereby acquired title to the southern 2/3rd share in S. No. 4092. He claims another 1/3rd in S. No. 4092 by purchase of it from Marimuthu under exhibit A-5, dated 27th August 1956. Clearly Marimuthu had no title to convey this 1/3rd to the Plaintiff. The Plaintiff sought to perfect his title by securing a consent deed exhibit A-6, dated 9th August 1959, from Defendants 12 and 13. It is subsequent to the acquisition of title under exhibit A-5 from Marimuthu that he acquired the remaining 2/3rd from Muthuswami under exhibit A-4., exhibit A-6 contains no words of conveyance. On the strength of exhibit A-5 the present Plaintiff instituted the suit Original Suit No. 688 of 1956, on the file of the District Munsif's Court, Kuzhithuri, for redemption and recovery of possession. The Plaintiff who succeeded in the trial Court lost in appeal. Exhibit A-7 is the

judgment of the appellate Court holding that the Plaintiff had not obtained valid title to any portion of the plaint property on the date of the plaint to claim redemption. The Plaintiff attempted to rely in the appellate Court on the consent deed exhibit A-6 which he had obtained from the Defendants 12 and 13 in the present suit pending appeal. But the appellate Court pointed out the true nature of the document that exhibit A-6 was not a document of conveyance and no rights were conveyed under the document. The sale deed exhibit A-4 was also produced in the appellate Court. The Plaintiff's right to redeem by virtue of exhibit A-4 was not in issue in those proceedings. All the present contesting parties were parties in those proceedings. In the present suit the Plaintiff came forward with the case of an oral gift said to have been made by Defendants 12 and 13 in favour of their sister Marimuthu, in order to feed the title under exhibit A-5. This case of oral gift has been found against by the Court below. If there had been any truth in the oral gifts, it would have been put forward in Original Suit No 688 of 1956. Having regard to all the aspects of the matter, the Court below has found against the claim of the Plaintiff for the 1/3rd share under exhibit A-5 and exhibit A-6; rightly it has rejected the case of oral gift. It follows that the Plaintiff has made out his title only in respect of the 2/3rd share in S. No. 4092. On behalf of the contesting Defendants, it is argued faintly that even the right under exhibit A-4 must be deemed to be barred by res judicata by the decision in Original Suit No. 688 of 1956, as the document had been produced at the appellate stage in the earlier suit. But the title of the Plaintiff to the 2/3rd share was never put in issue or made the basis of the suit in the former proceedings and decided and the Plaintiff can certainly rely in the present proceedings on his title to the 2/3rd share under exhibits A-3 and A-4.

6. At the outset I may remark that there have been a number of alienations by Malavalli followed up by those by her sons through Kumaran Padmanabhan. There were also litigations arising out of these alienations. Defendants 5 to 7 claim the southern 2/3rd share in the suit properties. Their title to the 2/3rd share is based on a sale deed exhibit B-11, dated 3rd November 1918 executed by Kunju and Malavalli to Kali Narayani, the mother of Defendants 5 to 7. There is also another sale deed, exhibit B-14, dated 14th October 1929, executed by Ummini in respect of Ponnumuthan's share. Malavalli filed a suit. Original Suit No. 977 of 1083, in the District Munsif's Court, Kuzhithurai for redemption of the Othi and Kuzhikanams exhibit A-2. The learned District Judge in this case remarks that no delivery receipt had been produced and that it is seen from exhibit B-54, dated 2nd December 1083 that release has been obtained from the wife of Chottayankutti in favour of two younger sons of Malavalli. The learned District Judge, referring to exhibit B-11, points out that it comprises of 1/3rd extent of the suit properties, that it refers to a mortgage of 1/3rd of that extent in favour of one Boothanathan Narayanan of 1092 M.E. and that has also been redeemed and possession taken as evidenced by the delivery list exhibit B-17, dated 1st March 1943. He observes that so far as 1/3rd comprised under exhibit B-11 is concerned, the Plaintiff's claim is barred by limitation, as the alienation by the

life estate holder had not been questioned by the reversioners and since no suit had been filed to recover possession within 12 years of that alienation The trial Court decreed both the suits in entirety, observing thus:

No document has been produced that the mortgage under the original of Exhibits A-1 and A-2 has been redeemed by real owners of the equity of redemption.... There has been suits like Original Suit No. 1120, etc., in which redemption has been made and delivery also effected.... In those suits the real owners of the equity of redemption in the plaint schedule properties were not parties. So when Exhibits A-1 and A-2 had not been redeemed by the real owner and the right to redeem still is not barred by limitation, it has to be taken that the mortgagees under the original of Exhibits A-1 and A-2 and their legal representatives, and other Defendants who got rights under them and who are in possession of plaint schedule property in both the suits are in possession of the property covered under Exhibits A-1 and A-2 as mortgagees only.

The trial Court remarks that none of the exhibits marked by the Defendants in the trial of the suits show that mortgages covered under exhibits A-1 and A-2 have been redeemed by the heirs of Chempakakutti who are only entitled to redeem the mortgages concerned under the original of exhibits A-1 and A-2. With reference to the Plaintiff's claim to redeem the entire suit properties, claiming 1/3rd share from Marimuthu, the trial Court observed:

As the law now stands in the estate of Champakakutti, sons and daughters have got equal shares. So we can take it that Plaintiff has got valid title from the sons and daughters of Champakakutti under Exhibits A-3 to A-5.

It is needless to point out that the learned District Munsif has completely ignored the law when he hold that the daughter had also a share in the property under the law prevalent, evidently having in view the Hindu Succession Act of 1956. I am unable to conceive of a learned District Munsif ignoring the elementary fact that as the succession opened in or about 1932, on the death of Champakakutti and succession has to be traced to the last male owner there is no question of the daughter of Champakakutti inheriting her property along with the brothers. Coming to the substantial part of the question the trial Court was of the view that the mortgages have not been redeemed at all by the persons entitled thereto and so proceeded to decree the suits. Referring to the redemption suit, Original Suit No. 977 of 1083 and the release deed exhibit B-54, the appellate Court remarks:

The learned Advocate for the Plaintiff contends that this document has been executed in favour of Malavalli only as guardian of Kunchu and Ponnummuthu who is not the mortgagor who released the property. If at all they will stand in the shoes of the mortgagee and Defendants 5 to 7 do not claim under the mortgagors.

Substantially on the basis of these findings, the appellate Court finds that the Plaintiff has title only to a 1/3rd share in the suit properties. The Plaintiff does

not get title to the 1/3rd share by his purchase from Marimuthu. As regards 2/3rd share to which the Plaintiff obtained title by purchase from Defendants 12 and 13, the finding is that his title to 1/3rd has been lost by adverse possession, the reversioners, that is, Defendants 12 and 13, failing to question the alienation by the limited owner within 12 years of the succession opened.

7. The main submission of learned Counsel for the Plaintiff before me is that there has been no transference of possession of any portion of the suit properties within 12 years prior to the suit on the basis of any redemption suit and that, therefore, there is no bar to these two redemption suits. Learned Counsel points out that Defendants 5 to 7 acquired possession only in 1952, within 12 years prior to the suit, and the decree for redemption in favour of the eighth Defendant for 1/3rd share was only in 1957 in Original Suit No. 212 of 1955. On this premise it submitted that the suits for redemption is not barred and that there has been no question of adverse title against the Plaintiff in respect of the 1/3rd share found by the appellate Court. Contra it is argued for the Defendants that the proceedings evidenced by exhibit B-53 and B-54 bar the Plaintiff's claim to redeem the property covered by exhibit A-2, the mortgage.

8. Apart from this, the further defence which has been overruled by the Court below and pressed before me is the bar to the present action arising out of the Oodukur Award exhibit A-5 dated 7th April 1955. Both the Courts below have held that the Plaintiff is not bound by the award and it need not be set aside before filing the redemption suits.

9. The learned District Judge remarks in his judgment that exhibit B-12 to B-19 will show that title of Defendants 5 to 7 in respect of the 1/3rd share has been derived from the persons who had no right to the equity of redemption and for whatever rights acquired under those documents they stand in the shoes of the mortgagee. Before I can pronounce whether they stand in the shoes of the mortgagee at the time the present suits were filed, it is necessary in my view, to know whether, apart from mere transference of title, there has been transference of possession. Reliance has been placed by the learned District Judge on exhibit B-11, and with reference to the mortgage of 1092 M.E. mentioned therein a suit for redemption, Original Suit No. 70 of 110 had been filed and delivery is said to have been taken of the concerned property. The property therein is of an extent of 43-1/3 cents and it is said that after delivery Defendants 5 to 7 have put up houses. But what of the earlier othies-kuzhikanam? The legal representatives of the mortgagee were not made parties to that suit and this it is said necessitated the subsequent suit, Original Suit No. 1022 of 1120, delivery whereunder was in 1952.

10. So far as the eighth Defendant is concerned, his title is traced starting from exhibit B-41, an othi and kuzhikanam by the sons of Kumaran Padmanabhan to one Gnanappu of a 1/3rd share. Gnanappu is said to be the wife of Chottayan Kutti the mortgagee under exhibit A-2, One of the third mortgage amount is directed to be adjusted towards the amount due under the mortgage exhibit A-2.

Ummini, under exhibit B-43, dated 13th March 1909, sells the 1/3rd, share, in which she claimed right, to one Kali Ammal. It is clear from the recitals in the document itself that the othi kuzhikanam exhibit B-41 had not been redeemed.. Under exhibit B-45 of the year 1911 Kaliammal sells what she had purchased under exhibit B-43 to Karnam Kochappi. Even at this time, there has been no redemption. The eighth Defendant purchases his one-third share under exhibit B-46, dated 1st February 1928. The document, no doubt, purports to transfer possession to the vendee on the date of the document. But there is no evidence of redemption by the eighth Defendant or his predecessors-in-title of even the othi and kuzhikanam exhibit B-41. The actual suit for redemption by the eighth Defendant Original Suit No. 212 of 1955, is only in 1955 and therein he gets the release of the mortgage of 1069 (exhibit A-2) under exhibit B-49, dated 12th July 1960.

11. Having heard learned Counsel appearing for one several parties, I consider it necessary to have clear findings on certain aspects of the case. There are certain areas where the findings are not clear. The learned District Judge refers to the redemption under exhibit B-11 and possession pursuant thereto in 1118 M.E. as a bar to the recovery of one-third share. Was the redemption in those proceedings of one or other of the suit mortgages in part? The learned District Judge has earlier referred to a redemption of exhibit A-2 by Malavalli. It is unsafe in the absence of precise findings, to go to the law in the case. Findings, on the following questions will contribute for clear perception of the problem involved in this case for a satisfactory decision.

1. Whether the othies and kuzhikanams evidenced by Exhibits A-1 and A-2, one or other in whole or, in part were the subject of redemption prior to the institution of the present suits now under appeal?
2. Whether such redemption, if any, was by Malavalli and was there assumption of possession by her or her sons or alienees from her, consequent on such redemption? If there was assumption of possession, when?
3. If there was no redemption by Malavalli, did her sons or persons claiming title under them Defendants 5 to 7 or Defendant 8 redeem one or other of the suit mortgages in whole or in part?
4. Was actual possession obtained by persons so redeeming pursuant to the redemption?
5. If there was transference of possession under any redemption, when did possession pass under the redemption?

Though in part at least the answers to the questions are clear, I have not discussed the same lest any emphasis of mine should embarrass the lower Court where the position calls for deeper analysis of the records. The learned District Judge will submit findings on the questions above set out on the evidence on record. Findings will be submitted within eight weeks of the receipt of the records

by the lower appellate Court, Objections, if any, in 10 days after the receipt of findings.

[After submission of findings by the District Judge; Kanyakumari, His Lordship proceeded as follows:]

12. The learned District Judge has now given the necessary findings. To summarise them; there was a redemption suit, Original Suit No. 977 of 1083 in 1908, by the mortgagor Malavalli with reference to the Othi and Kuzhikanam exhibit A-2. Pending that suit, Malavalli brought about redemption of a 2/3rd share in the property mortgaged under exhibit A-2, in favour of two of her sons Kunju and Ponnumuthan, under a deed of release exhibit B-54 executed by the mortgagee in possession. It is found that the two sons were in Odukkur possession of the 2/3rd share in the property from 18th July 1908, as Jenmom owners, dealing with the property under exhibits B-42, B-44 and to some extent under exhibit B-11. As regards the remaining 1/3rd share in the property mortgaged under exhibit A-2, it was not the subject of any redemption by Malavalli or even her three sons. The 8th Defendant who claims title to this 1/3rd share, tracing title under a sale deed exhibit B-43, dated 13th March 1909 executed by Malavalli's son Ummini, redeemed it on 12th July 1960, as evidenced by the release deed exhibit B-49 of the year 1960. So far as the othi and Kuzhi. kanam exhibit A-1 is concerned, the finding is that there was no redemption of the same and the property covered by exhibit A-1 continued to be in possession of the mortgagee and his sons.

13. As pointed out already in the order calling for findings, Malavalli had been putting forward her three sons through Padmanabhan as heirs to her husband Kunchumadan's properties. In 1905, she had executed an othi and Kuzhikanam exhibit B-51 as mother and guardian of her three sons in favour of one Narayanan Vellayan, one of the mortgagees under exhibit A-1. Pending the suit Original Suit No. 977 of 1083, instituted by Malavalli for redemption of the othi and kuzhikanam exhibit A-2 against the minor son of the mortgagee represented by Gnanappoo his mother and guardian, a settlement was, entered between Gnanappoo as guardian of the minor son and Malavalli representing her two sons Kunju and Ponnumuthan. This is found recorded in the deed of release exhibit B-54, dated 18th July 1908. A reading of the document shows that it has been brought about by Malavalli herself and it is at her instance that the mortgagee surrendered possession of 2/3rd of the property mortgaged to the two sons of Malavalli. The other son Ummini did not join in that proceeding. Of his own, Ummini dealt with his undivided 1/3rd share in the entire property. The following recitals in the deed of release exhibit B-54, as given in the agreed translation, are vital for the determination of the case:

While the property was being enjoyed thereunder, the said Valli filed Original Suit No. 977 of this year in the Munsif's Court, Kuzhithurai, against me for surrender of the entire property on receipt of the amount due under the above mentioned othi and kuzhikanam deed executed by Valli. The suit is now pending. While so,

she has now asked me to surrender the remaining two shares excluding the 1/3rd share belonging to the said Kunchumadan Ummini. I have agreed to the same. I have vacated the surrendered 2/3rd share under the said Malavalli's registered document, duly freed of my enjoyment therein, from this day onwards.... The amount received towards the value of the 2/3rd share under the deed No. 2041 is Fanams 335-5/16.... A sum of Fanams 50 has been allowed to be adjusted towards the Court costs of Malavalli, the Plaintiff in the above suit Original Suit No. 977.... As I have filed the documents No. 2041 in the above suit Original Suit No. 977, the same could not be delivered to you. Since a sum of Fanams 50 has been paid to Valli towards costs in the above suit Original Suit No. 977, the parties will bear their respective costs and file a compromise in the said suit.

Evidently, the parties did not report the compromise to the Court, as we find in the records a decree in terms of the plaint on 21st December 1084. It is manifest from the very recitals in the deed that the redemption was brought about by Malavalli herself and at her instance possession surrendered and made over to her two sons. It may be that the two sons of Malavalli could get no title to the property by a mere release. The equity of redemption vested only in Malavalli as the widow of Kunchumadan, he having no sons and leaving only his daughter Champakkutti. So far as the mortgagee is concerned, it must be held that there has been a complete redemption to the extent of 2/3rd share in the property, the mortgagor being a party to and having brought about the redemption. He got his acquittance from the mortgagee. Law requires that, on redemption, the mortgagee in possession must deliver possession of the mortgaged property to the mortgagor and at the cost of the mortgagor either retransfer the mortgaged property to him or to such a third person as he may direct or to execute and have registered an acknowledgment in writing that any right in derogation of his interest transferred to the mortgagee has been extinguished. The mortgagee in this case has agreed to partial redemption and the redemption is evidenced by the release deed exhibit B-54 surrendering possession in favour of the two sons of Malavalli. There is clear evidence of actual possession and enjoyment in Oodukoor right of the 2/3rd extent redeemed by the two sons of Malavalli. It is seen from the Commissioner's report submitted in Original Suit No. 244 of 1960, that one of the buildings on the property, building No. 2, is about 25 years old and another building, building No. 3, is about 80 years old. Under exhibit B-11 of the year 1918, 1/3rd Oodukoor in the entire survey field is purchased by the mother of Defendants 6 and 7 from Kunju. The other son Ponnumuthan executed the othi exhibit B-12, of his 1/3rd in favour of the 5th Defendant, in the year 1919. Exhibit B-13 is the agreement for sale by Ponnumuthan of the said share in favour of the 5th Defendant, and exhibit B-14 of the year 1929, is the sale deed executed by Ummini in favour of the 5th Defendant of Ponnumuthan's 1/3rd share pursuant to exhibit B-13, Ponnumuthan having died in the meanwhile. Defendants 5 to 7, thus, claim title to 2/3rd Oodukoor in the entire survey field under exhibit B-11 to B-14.

14. The remaining 1/3rd Oodukoor which was claimed by the other son Ummini, was subject of an othi and kuzhikanam by Ummini under exhibit B-41, dated 24th April 1906, in favour of Esakki Gnanappoo, wife of Chottayan Kutti, the mortgagee under exhibit A-2. It must be noted that Esakki Gnanappoo as guardian of the minor son of Chottayan Kutti entered into the settlement and release under exhibit B-54 allowing redemption of a 2/3rd share in the mortgaged property. The othi and Kuzhikanam under exhibit B-41 in favour of the guardian for the minor son of Chottayan Kutti proceeded the release deed exhibit B-54 and so probably the 1/3rd Oodukoor of Ummini in mortgage was not the subject of redemption then There was no settlement of accounts and full payment in respect of Ummini's 1/3rd share in the property mortgaged under exhibit A-2 for the extinguishment of the mortgage by virtue of exhibit B-51. Manifestly the mortgage over this 1/3rd was left outstanding at the time of execution of exhibit B-41. At any rate, possession continued in the mortgagee and all that we have is an acknowledgement of the title of Ummini to this 1/3rd by the mortgagee. Under exhibit B-43, Ummini sells his 1/3rd to one Kaliaamma reserving funds with her for redemption of the othi and Kuzhikanam over the property. Ultimately, under exhibit B-46, dated 1st February 1928, the 8th Defendant became the vendee of the 1/3rd share, subject to the othi, and kutehikanam over the property. It is thus that, subject to the subsisting Othi and Kuzhikanam over the property, the whole field covered by exhibit A-1 and A-2 going under the name of Ambalathuvila stated to be an extent of 3 acres and 42 cents in S. No. 4092, came to be held by Defendants 5 to 8, Defendants 5 to 7 having 2/3rd Oodukoor in the property through the two sons Kunju and Ponnumuthan and the 8th Defendant, the remaining 1/3rd Oodukoor through the other son Ummini. As between Defendants 5 to 8, there was a suit for partition in 1951, and, in that partition suit, the 8th Defendant got allotted the northern 1/3rd share and Defendants 5 to 7, the southern 2/3rd share, in the property mortgaged under exhibit A-1 and A-2. Another fact of some relevance is the release given in the year 1911 by Malavalli and Champakakutti, her daughter through Kunchumadan and the next legal heir to the property, by exhibit B-6 in favour of Malavalli's three sons, Kunju, Ponnumuthu, and Ummini. On the findings, Malavalli was the heir of Kunchumadan to the property and, on her death in 1912, the legal title to the property devolved on Champakakutti. Champakakutti died in 1932.

15. Now Malavalli's three sons had no title to the property, though she had put forward her sons as Kunchumadan's heirs and got redemption of a 2/3rd share in the Othi and Kuzhikanam evidenced by exhibit A-2. Under the deed of release exhibit B-6, Chempakakutti, the heir of Kunchumadam, joined Malavalli and both of them acknowledged that the properties Kunchumadam had been in the possession of Malavalli as guardian of her three sons, Kunju, Ponnumuthan and Ummini. Reference is made in the document to dealings with the property by the sons. These two females declared that they had no right whatsoever in the property and would release whatever right that might be found in them in the

property. In the order calling for findings, it has been pointed out that, if the mortgages exhibit A-1 and A-2 are outstanding, the Plaintiff alone has right to redeem the same. But his title has been found only in the southern 2/3rd share in S. No. 4092. His claim to the remaining 1/3rd share in S. No. 4092 has been found against. The learned District Judge, in his judgment, points out that the 8th Defendant had subsequently obtained a sale deed from Defendants 12 and 13 in respect of the remaining 1/3rd share. Thus while the Plaintiff has acquired title to the southern 2/3rd share, the 8th Defendant has subsequently secured title to the northern 1/3rd share from the true owners Defendants 12 and 13 also. So far as the mortgagees exhibit A-1 and A-2 are concerned, exhibit A-1 relating to the eastern part of the property has not been the subject of any redemption and exhibit A-2 which covers the remaining part of the property has been redeemed in part. As regards possession, 2/3rd of the property covered by exhibit A-2 was taken from the mortgagee, with the assent and concurrence of the mortgagor Malavalli by her two sons Kunju and Ponnumuthu, under exhibit B-54 in 1908, as one redemption. The possession of the remaining 1/3rd as on redemption was taken over by the eighth Defendant only on 12th July 1960. Till the date, this 1/3rd in Oodukoor had remained in the possession of the successors of the mortgagee. As regards the property covered by exhibit A-1, possession of the property has always remained with the mortgagee and his successors.

16. On behalf of the contesting Defendants claiming under Malavalli's three sons, it is urged that there was redemption of the mortgage exhibit A-1 also when the othi and Kuzhikanam exhibit B-51 was executed by Malavalli on behalf of her minor sons who were then minors. Notwithstanding the observations as to the character of the transaction in my order calling for findings, having regard to the fact that this is a transaction brought about by the mortgagor herself, it is necessary to examine it somewhat in detail. Exhibit B-51 which recited that the property belonged to the minors, was in favour of Narayanan Vellayan, one of the five mortgagees under exhibit A-1. Reference was made in this document to the mortgagee exhibit A-1. Of the consideration of 1001 Fanams, Fs. 100-1/4 was stated to have been received by way of adjustments towards Narayanan Vellayan's own share of mortgage money due under exhibit A-1 and the sum of Rs. 4003/4 was reserved with Narayanan Vellayan for payment of the othi amount due to his four co-mortgagees. The balance of the consideration under exhibit B-51 was taken in cash. An important covenant in exhibit B-51 is the provision for the mortgagors to pay for the value of improvements at the time of redemption of exhibit B-51 from the year 1068 M.E. that is from the date of exhibit A-1. Narayanan Vellayan, as the puisne mortgagee, redeemed his co-mortgagees by exhibit B-52. The fact to be noticed is that Narayanan Vellayan continued in possession notwithstanding the adjustment of the othi amount due under exhibit A-1. No accounts were taken in respect of the improvements payable under mortgage exhibit A-1. When the liability of the mortgagors to pay for the improvements that could be claimed at the time of redemption of exhibit

A-1 has not been ascertained and discharged, it cannot be said that there has been extinguishment of that mortgage. The result of the transaction evidenced by exhibit B-51 is to enable Narayanan Vellayan to become the sole mortgagee under exhibit A-1, and taking further advances, have a subsequent mortgage for the total amount due, while keeping alive the mortgagor's liability under exhibit A-1. It is useful in this connection to refer to the remarks of St. Leonards in *Tenison v. Sweeny* (1814) 1 Jones and Lott. 718

Then another point was started, that, as the successive mortgages were for the sum secured by the prior mortgages and for the sums subsequently advanced, the old securities were merged in the new, and that the judgment-creditor had a right to come in before the last mortgage. That is a very novel view of the operation of the deeds.... It is clear that the former mortgages continued untouched and operative notwithstanding the new mortgages; and that the new mortgages were for the purpose of letting in the further advances upon the property. Nothing could be more alarming to creditors than that a doubt should be thrown out, whether, by taking a new security for their old debt and for further advances, they do not prejudice their original securities.

In *Miln v. Walton* 60 R.R. 184 it was held that a creditor having a mortgage on the funds of his debtor for part of his debt did not necessarily surrender that mortgage or lower its priority by taking a subsequent mortgage on the same funds of the whole of the debt. In the instant case, one glaring feature which runs counter to the plea of redemption is the provision regarding accounting for the improvements from the date of the original mortgage. This preserves the creditor-debtor relationship with reference to the security in respect of the earlier mortgage exhibit A-1.

17. To proceed to examine the defence to the claim for redemption: While the Plaintiff, to the extent he has failed, has preferred second appeals, Defendants 5 to 7 to the extent their defence has been over-ruled, have also filed second appeals. There is also memo of cross-objections. In the circumstances, the legal rights and liabilities of the parties could be fully dealt with and determined in the light of the findings submitted. The substantial defence has been that the Plaintiff's right of redemption has been lost by adverse possession, adverse acquisition of title by Defendants 5 to 8 claimed under the sons of Malavalli. For the Plaintiff, it is urged that, as the suits have been filed within 60 years from the dates of the mortgages, Article 148 of the Limitation Act, 1908, being the specific article applicable, the bar of limitation does not come in. Per contra, the argument is that there has been redemption of the property mortgaged and enjoyment by the contesting Defendants or their predecessors-in-title for over the statutory period in assertion of title hostile to the legal owners of the property. Even if the redemption has not been complete, right to the equity of redemption has been for over the statutory period adversely exercised and asserted. Judicial opinion is divided between various High Courts and even in the same High Court on the question whether during the subsistence of an

usufructuary mortgage, there can be in law any adverse possession at all as against the mortgagor who has no right to immediate possession. It will be unnecessary, for the purpose of this case, to examine the position at any length, as the instant case can be disposed of with discussion confined to narrow limits. The equity of redemption, the right retained by mortgagor after effecting a mortgage, has been held to be immovable property. Ownership in the ultimate is a bundle of rights-the bare title, the right to possess, the right to enjoy, the right to alienate and so on. It is the right to enjoy the property in several aspects that gives value to the property. When property is mortgaged and possession parted with, there is deprivation of some of the essential elements of ownership. But certain rights are left with the mortgagor. The title is still in the mortgagor. The mortgagor parts with a good part of his rights over the property in consideration of moneys received. The parting with, is not absolute and final. The mortgagor, in lieu of the full title, has a right to get rid of an encumbrance over the property, that is, he has what is referred to as the equity of redemption. In the present case, we are not concerned with a mortgage where, while parting with possession, the mortgagor retains some benefits arising out of the property by way of rent or otherwise. Article 144 of the Limitation Act, 1908, relates to suits for possession of immovable property or any interest in immovable property and the question of applicability of the article arises, when the possession of the Defendant becomes adverse to the Plaintiff. Section 28 of the Act provides that, at the determination of the period limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished. It could be contended, that if the equity of redemption is property and if it could be adversely possessed over the period of limitation, the right thereto could be got extinguished. The difficulty is in applying the concept of possession required for the requisite period with reference to the right of the mortgagor in the property, when the property itself is in the possession of the mortgagee. The owner has created a possessory mortgage over the property. A mortgage, in its nature, is an independent principal right over immovable property. As regards the mortgagee, the right is vested in him conditionally by way of security for the amount advanced. As Salmond, in his Jurisprudence, twelfth edition, at page 116, puts it, it will, or may, remain outstanding in the mortgagee even after the extinction of the debt. When thus left outstanding, it must be retransferred or surrendered to the mortgagor, and the right of the mortgagor to this re-assignment or surrender is called equity of redemption. While some of the essential and material elements of ownership get vested in the mortgagee in the case of a possessory mortgage, nonetheless the mortgagor remains equitable owner of the property. By virtue of the equity of redemption, the mortgagor has more than a personal right against the mortgagee to the re-transfer and surrender of possession of the property. Salmond states:

The mortgagee holds in trust for mortgagor, and has himself no beneficiary interest, save so far as is required for the purpose of an effective security. On the payment or extinction of the debt, the mortgagee becomes a mere trustee and

nothing more. The problem for consideration is, when the possession of a mere right of redemption which the mortgagor in a case like the one under consideration has, can be interfered with and acquired by another by prescription. How is this incorporeal right which the mortgagor possesses after parting with possession to the mortgagee without reserving any right to share in the profits from the property even partially, enjoyed adversely to the mortgagor? As against the mortgagee, the mortgagor can keep quiet for 60 years, and, on the last day, sue for redemption and secure possession of the property. The mortgagor has been left only with the equity of redemption and the manner in which he can exercise his proprietary right over the property is to redeem the property. He can, no doubt, encumber and transfer the right remaining in him over the property. Does a mere assertion by a stranger that he is the owner of the equity of redemption amount to dis-possession of the mortgagor? Can the stranger, by purporting to deal with the bare equity of redemption as owner, claim that he has dispossessed the mortgagor? Obviously he cannot. If several rival claimants without disturbing the possession of the mortgagee purported to deal with the equity of redemption which of them can be said to be holding the equity of redemption and that adversely to the mortgagor? The mortgagor, if he chooses, may file a declaratory suit to clear the cloud on his title. But the rival claimants cannot hustle him to redeem the mortgagee. He can choose his time within the period allowed by law. As between the mortgagor and mortgagee, the mortgagee cannot deny the right of the mortgagor to get back possession at the appointed time. The possession of the mortgagee is derivative and from the mortgagor. In law the possession of the mortgagor is that of the mortgagee. Adverse possession against an existing title must be actual and not constructive and it must exclude the owner. A person can be said to have adverse possession, if he does something which adversely affects the rights of the owner, that is, there is an effective intrusion of the owner's right to the property and he is excluded from such enjoyment as he could have of the property. An essential attribute of adverse possession is that it begins with disseisin or ouster of the owner. The owner is displaced. A mere paper disposition cannot amount to dispossession. In the case now under consideration, neither exhibit B-51 nor exhibit B-41 could amount to dispossession. They cannot be looked upon as assumption of hostile possession by the persons claiming title adverse to the mortgagor. What was being dealt with was merely a right in the abstract, a dealing with the right to redeem not an exercise of it nothing tangible affecting the mortgagor. The mortgagee in possession in spite of the dealings would have no answer to the claim for redemption by his mortgagor and cannot dispute the title of the mortgagor to redeem unless some equity or estoppel intervened. He cannot set up the title of the rival claimants to the equity of redemption. The possession in the present case except for an extent of 2/3rd of the property covered by exhibit A-2, has been throughout in the mortgagee or his successors-in-interest. To that extent, however, there has been a release of the mortgage and parting with possession by the mortgagee.

18. In *Vyapuri v. Sonamma Boi Ammani* ILR (1914) Mad. 811, 824, the question for consideration was whether the possession of a trespasser who had dispossessed a mortgagor, the mortgage being simple was adverse to the simple mortgagee. In answering the question in the negative, it is observed that it was difficult to establish the claim of acquisition of title by adverse possession of an incorporeal right. Srinivasa Ayyangar J., observed:

Even incorporeal property may be capable of possession in law, but such possession involves either actual possession of tangible property or the receipt of some tangible benefit therefrom.

The learned Judge remarks that if some tangible benefit (periodical or otherwise such as the right to receive rents and profits though not to get physical possession) is derivable by the owner of an incorporeal right and if he is prevented by the trespasser who obtains that benefit himself, a dispossession of such incorporeal right is conceivable.

19. The leading case of our High Court with reference to usufructuary mortgage is the Full Bench decision in *Periya Aiya Ambalam v. Shanmugasundaram* ILR (1913) Mad. 903, 914. It was held in that case that, where a trespasser dispossesses a mortgagee in possession and continues in possession asserting a title adverse to the mortgagor also, such dispossession will be adverse to the mortgagor from the time the mortgagor has knowledge of the assertion (though he may not then be entitled according to the terms of the mortgage to recover possession from the mortgagee) and that the onus is on the trespasser to prove not only that he asserted a right adverse to the mortgagor but also that the latter knew it. A question has been raised whether, in the light of the later decisions, the requirement of knowledge of the adverse enjoyment is necessary. On the facts of the instant cases, that problem, does not arise for consideration. In *Periya Aiya Ambalam v. Shanmugasundaram* ILR (1913) Mad. 903, 914 Sankaran Nair, J., with whom the other learned Judges agreed, summarising the case law in Madras, stated that, where a stranger dispossesses a mortgagee in possession, whether adverse possession will run against the mortgagor or not depends upon the fact whether there is dispossession of the mortgagor also. A mere dispossession of the mortgagee, it was said, will not amount to such adverse possession and there must be at least notice to the mortgagor that possession is held against him also. The following passage is better quoted:

When the owner of the property in possession is dispossessed, the trespasser's possession is clearly adverse to him from its inception, as, to his knowledge, the property is held against his will and he must assert his right within twelve years of his dispossession. But if his mortgagee, who has been placed in possession by him is followed by another person there is no presumption in law that such possession was taken without any right. He may be an assignee of the mortgagee, or one who purchases the mortgage as a mortgage; or he may be an adverse claimant to the mortgage right; where more than one inference may be drawn, that inference should not be drawn which imputes a wrongful act to a

person. The Defendant has therefore to show that he took possession of his property as an absolute property in contradistinction to mortgage property Nor is this sufficient; as his possession may be consistent with the mortgagor's title, the mortgagor must obviously have notice that he is holding it as absolute property in denial of any right in him. Otherwise no laches can be imputed to him and the possession cannot be said to be adverse.

Reference may usefully be made here to the decision of the Judicial Committee in *Khiarajmal v. Daim* ILR (1904) Cal. 296, 311, 312. The important issue in that case was whether the suit for redemption was barred by adverse possession for more than 12 years, by the purchasers at execution sales of the equity of redemption. It was established by evidence that the purchasers were nominees of the mortgagees and not independent third parties. Passages in the judgment show that the Judicial Committee was clearly of opinion that the equity of redemption was capable of being lost by adverse possession. It was observed by LORD DEAVEY who delivered the judgment:

If the purchasers had been independent third parties, and accounts had been rendered and payments made by the mortgagees to them instead of to the mortgagors, the circumstances relied on would have been cogent evidence of adverse possession of the equity of redemption in favour of such third parties.... Their Lordships are satisfied that the possession has been that of the mortgagees throughout, and the question at issue is exclusively one between mortgagor and mortgagee. At between them neither exclusive possession by the mortgagee for any length of time short of the statutory period of sixty years, nor any acquiescence by the mortgagor not amounting to a release of the equity of redemption will be a bar or defence to a suit for redemption if the parties are otherwise entitled to redeem.

In the instant cases, we have the finding that there has been release of the equity of redemption in respect of 2/3rd of the property with reference to the othi and kuzhikanam exhibit A-2 and possession and enjoyment of the same by strangers without any legal title to the property. With reference to the rest of the property covered by the mortgages, there has been no disturbance of the mortgagee's possession as such till 1960. The decision of the Supreme Court in *Padma Vithoba v. Mohd. Multani* AIR 1963 S.C. 70 is also pertinent. There it has been held that, if the mortgagor and the mortgagee in possession subsequently enter into a transaction under which the mortgagee is to hold the properties thereafter not as a mortgagee but as owner, that could be sufficient to start adverse possession against the mortgagor if the transaction is for any reason inoperative under the law. A change in the character of the possession with the consent of the mortgagor by the requisite passage of time can extinguish the equity of redemption.

20. Mr. Padmanabhan for the Plaintiff placed much reliance on the decision in *Maramittath Theruvil Moothachettiam Veetil Kelu Vs. Kuttiyl Machikandy Chekkara Cheppan and Others*, and urged on the basis of the decision that the

suits in the instant cases were not to any extent barred. Even if the possession of the rival claimants to title for the statutory period is found it was submitted it cannot defeat the Plaintiff's right to redeem. In *Maramittath Theruvil Moothachettiam Veetil Kelu Vs. Kuttiyil Machikandy Chekkara Cheppan and Others*, the Karanavan of a Tarwad executed a usufructuary mortgage. The mortgage was assigned by the mortgagee. Subsequently there came up two bodies of people, the Plaintiff and first Defendant, in the suit both claiming to be the Karanavans of the Tarwad entitled to the equity of redemption. It was established by evidence in the case that the Plaintiff was entitled to redeem and the first Defendant who actually purported to redeem the mortgage had no right at all to do so. It was found that the first Defendant paid off the mortgagee, bona fide believing in his right to do so, and then took possession of the mortgaged property. In the Letters Patent Appeal, this Court, overruling the claim of adverse possession put forward by the first Defendant observed that the correct test applicable in a case where a person pays off the mortgage debt in the bona fide belief of his right to do so, is whether the possession and acts of the person claiming adversely can be referred to any legal right that he possesses and, if so, then the true owner is not bound to sue merely because adverse assertions of title are being made. It was reasoned:

When a person who is not a mortgagor, under a mistaken claim, pays off a mortgage debt, he cannot extinguish it: for he has no right to do so. The only person who can extinguish a mortgage is the person who is entitled to redeem that mortgage and merge the mortgage in his own right of mortgagor or mortgagee. Whatever, therefore, might have been the intention of the first Defendant, he did not in fact extinguish the mortgage and was entitled, if he paid off the mortgage in the bona fide belief that he was entitled to do so, to subrogation of the mortgagee's rights.... If the 1st Defendant was subrogated to the rights of the mortgagee, the further question arises, whether the Plaintiff is barred by limitation from being allowed to redeem....

In a case like the present, it is difficult to see what the Plaintiff could have done. As we have found that the first Defendant was entitled by subrogation to the rights of the mortgagee, the Plaintiff could not have obtained possession without redemption. It has been argued that when an adverse claim was put forward the Plaintiff was bound to file a suit for redemption; but it seems preposterous that a person who has 60 years to redeem should be forced to redeem at an earlier date, merely because somebody is asserting some right or putting forward an adverse claim.

The learned Judges referred to the decision of the Full Bench in *Periya Aiya Ambalam v. Shanmugasundaram* ILR (1913) Mad. 903, as the most authoritative decision on the question of adverse decision, but left out of consideration as obiter the following passage quoted by the Full Bench as laying down the correct law from the weighty pronouncement of Batty J., in *Tarubai v. Venkatrao* ILR (1902) 27 Bom. 43, 68: -

No doubt, as long as the mortgagee is in possession, he and all, claiming under him represent the mortgagor's possession. If the mortgagee in possession is dispossessed on grounds affecting only his right, as, for instance, his right as heir to represent the original mortgagee, or his right, to possession, in spite of a third party's lien on the property, then the dispossession of the mortgagee obviously does not imperil or call in question any right of the mortgagor, and the mortgagor is not concerned or entitled to insist on being immediately restored to possession, and the possession taken is not adverse to him and cannot cause time to run against him. To give the mortgagor a right to insist on immediate possession, there must be an unequivocal ouster preventing the possession of the mortgagor from continuing altogether, by leaving no room for doubt that the person taking possession does not profess to represent the mortgagor, but to hold in spite of him. In such a case, the mortgagor is as effectually and unmistakably displaced as if there had been no mortgage at all. When an ouster takes place in that manner the mortgagor knows that no one is in possession who can represent or continue his possession, or who is entitled preferentially to possession, and, therefore, he becomes entitled (and it is necessary and his duty, if he does not want his right to be barred) to claim possession immediately.

In *Maramittath Theruvil Moothachettiam Veetil Kelu Vs. Kuttiiyl Machikandy Chekkara Cheppan and Others*, , the learned Judges observed that in none of the very many cases referred to by BATTY J., did it appear that a person entered into possession of the land with permission of the mortgagee and did nothing more adverse to the mortgagor than assert a title. The learned Judges proceeded as if in the case before them the 1st Defendant entered into possession of the land with the permission of the mortgagee. The learned Judges proceeded in the view that the 1st Defendant was entitled to subrogation and so his possession can be referred to a legal right. This decision as I view it, appears to proceed on the well-established principle enunciated by the Earl of Selborne in *Lyell v. Kennedy* (1889) 14 A.C. 437, 457, in these words: -

Lord Coke's doctrine as to the effect of entry by an unauthorized stranger on behalf of the true owner, seems to me applicable, in reason and principle, to such a receipt of rents as that of the Respondent in this case down to 1880: "If an infant, or any man of full age, have a right of entry into any lands, any stranger, in the name and to the use of the infant or man of full age, may enter into the lands; and this regularly shall vest the lands in them without any commandment, precedent or agreement subsequent."

The 1st Defendant in *Maramittath Theruvil Moothachettiam Veetil Kelu Vs. Kuttiiyl Machikandy Chekkara Cheppan and Others*, took the surrender from the mortgagee in the name and to the use of the Tarwad as the rightful owner of the property. The surrender of the mortgage was accepted in the title of the original mortgagor Tarwad and so the 1st Defendant was held entitled to hold the property giving him the right of subrogation *Maramittath Theruvil Moothachettiam Veetil Kelu Vs. Kuttiiyl Machikandy Chekkara Cheppan and*

Others, is clearly distinguishable on facts.

21. Counsel for the contesting Defendants would question the very basis of the decision in *Kelu v. Chekkara Cheppan* ILR (1904) Cal. 296 that the 1st Defendant got subrogated to the rights of the mortgagee. It is a case where a stranger volunteered and sought to extinguish the mortgage by redemption. The redemption may be invalid. But possession on redemption, it is submitted, when the possessor of the property is not the mortgagee but a total stranger, is adverse both to the mortgagor and mortgagee. It is urged that a person taking possession under the colour of redeeming a mortgage, cannot be considered to be holding permissively under the mortgagee when he redeems in the absence of collusion between the two. In *Khiarajmal v. Daim* ILR (1904) Cal. 296, cited already it was contended that there had been adverse possession for more than twelve years of the equity of redemption and the title so acquired could not be defeated. The Judicial Committee examined the circumstances and found them to be cogent evidence of adverse possession of the equity of redemption. Since the dates of the execution sales, no accounts had been demanded by, or rendered to, the mortgagors or their representatives as they were entitled to. Nor were payments of subsistence money made to them. Only as it was found that the purchasers were not independent third parties but were aliases of the mortgagees, the cogency of evidence of adverse possession was held entirely lost. Examining the question whether the equity of redemption was not only purported to be, but was in fact sold under the decrees, the Judicial Committee observed that the Court had no jurisdiction to sell the property of persons who were not parties to the proceedings or properly represented on the record. As against such persons, the decrees and sales purporting to be made would be a nullity and might be disregarded without any proceeding to set them aside. Notwithstanding that the sale of the equity of redemption was void, it is manifest from a reading of the judgment that their Lordships would have in the circumstances upheld the plea of adverse possession, if the purchasers were not just nominees of the mortgage. Much could be said for the contention that the decision in *Maramittath Theruvil Moothachettiam Veetil Kelu Vs. Kuttiyil Machikandy Chekkara Cheppan and Others*, , goes against the reasoning of the Judicial Committee. It is, however, unnecessary to embark on an examination of this question as *Maramittath Theruvil Moothachettiam Veetil Kelu Vs. Kuttiyil Machikandy Chekkara Cheppan and Others*, is distinguishable on facts from the present cases.

22. To emphasise the features of the instant cases, pending the suit for redemption, the mortgagor Malavalli manifestly negotiated for redemption of 2/3rd of the property covered by exhibit A-2 and got the same released under exhibit B-54 in favour of her two sons through Padmanaban. In substance and effect the redemption was by the mortgagor, and the mortgagee acted in perfect good-faith. She was bound by the redemption she brought about and the mortgage to the extent of redemption was extinguished. Payment and discharge of the mortgage need not necessarily be in writing. As a result of the

redemption, in law, the redeemed 2/3rd of the property covered by exhibit A-2 vested in Malavalli. The release deed exhibit B-54 did not by itself confer any right on Malavalli's two sons. But their possession from 1908, was not permissive under or for Malavalli but adverse to the title she had. Their possession was in their own right, so placed and so recognised by Malavalli: though there was no valid transfer of title. Malavalli in effect redeemed the mortgage and placed third persons to title in possession as owners. This possession in their own title and against her own right was accepted by the next limited owner Champakakutti. In *Soni Lalji Jetha and Others Vs. Soni Kalidas Devchand and Others*, the Supreme Court observed:

But it is a well settled proposition that a mortgagor can sell the mortgaged property to his mortgagee and thus put the mortgagee's estate to an end and thereafter all the right, title and interest in the property would vest in the mortgagee. Such a sale would be valid and binding as between them and henceforth the character of possession as a mortgagee would be converted into possession as an absolute owner. Even if such a sale is held to be voidable and not binding on a subsequent purchase the character of possession based on assertion of absolute ownership or mortgagee does not alter and if that possession continues throughout the statutory period it ripens into a title in the property.

Malavalli here secured possession of the mortgaged property to two individuals as persons entitled to possession of the property on redemption, extinguishing the mortgage as between her and the mortgagee. Even though the release deed did not transfer title, possession thereafter became adverse to the mortgagor and mortgagee. In this view, I do not consider it necessary to discuss the several other cases brought to my notice. However, the following among them may be noticed: *Gurunath Balwanth v. Suryakant Dhunderao* ILR [1940] Bom. 453, *Digamber Shridhar Dhekne Vs. Ramratan Raghunath, , Sarjug Devi and Others Vs. Dulhin Kishori Kuer and Others*, *Anantharaman v. Arunachalam* AIR 1952 T.C. 105, and *Cicily v. Sulaikha Beevi* [1968] K.L.T. 779. Special mention may be made of *Purshottam v. Sagaji* ILR (1903) 28 Bom. 87, noticed in the latest *Mulla's Transfer of Property Act*, fifth edition, as a case for the proposition that a right to redeem could be acquired by adverse possession by a mortgagor who had no title when the deed was executed. In that case, the widow of a deceased owner mortgaged with possession a certain land in 1875 to Godaji, the husband of her daughter Rau. On the death of the widow, the Plaintiffs, under a belief then prevalent that notwithstanding the daughter was alive they were entitled to the property to her exclusion, claimed the property as reversionary heirs and disputed the mortgage. The mortgagee, with the acquiescence of his daughter, settled the dispute and accepted a mortgage from the Plaintiffs for a lesser amount on 22nd June 1882. Subsequently, the daughter realised that she was the true heir, that the Plaintiff had no title and that she had acquiesced with their claim in ignorance of her rights. She sold her equity of redemption to one Savliaram who paid off the mortgage and recovered possession of the property in

July 1889. In September 1899, the Plaintiff brought the suit against the mortgagee and Savliaram to redeem the mortgage of 22nd June, 1882. It was held that the Plaintiffs were entitled to redeem, the daughter's claim to the equity of redemption having become time-barred.

23. Now, Malavalli had only a woman's estate in 2/3rd of the property covered by exhibit A-2. On her death, the property devolved on her daughter Champakakutti who died in 1932. The recognition of the title of the sons of Malavalli both by her and Champakakutti would not affect the right of the reversioners of Kunchumadan, Defendants 12 and 13, to the aforesaid property. They could have, within 12 years of the death of Champakakutti, sued for possession of the property held adversely by the two sons of Malavalli. The article of Limitation applicable to the instant cases is Article 141, and as more than 12 years have elapsed from the death of Champakakutti, the last female holder, the suit having been filed in 1960, the title of the rightful claimants to the 2/3rd extent of the property covered by exhibit-A-2 got extinguished u/s 28 of the Limitation Act, 1908. It follows that the Plaintiff is entitled to redeem the property covered by exhibit A-2 only to the extent there has been no redemption, that is, 1/3rd of the property. The Plaintiff's title having been found only to the southern 2/3rd share in S. No. 4092, he will be entitled to redeem in the south 1/3rd of the property covered by exhibit A-2 on depositing 1/3rd of the mortgage amount, due. There will be a decree accordingly in favour of the Plaintiff in modification of the decree of the lower appellate Court, for redemption of 1/3rd extent of the property in the south in Original Suit No. 240 of 1960.

24. As regards the property covered by exhibit A-1, there has been no redemption. The Plaintiff's title is found in respect of 2/3rd extent in the property covered by exhibit A-1. It is submitted by Counsel for the Plaintiff that the Plaintiff may be permitted to redeem the entirety of the property as part owner of the equity of redemption. But the 8th Defendant has obtained sale of the remaining 1/3rd share of the entire field from Defendants 12 and 13 on whom the equity of redemption ultimately devolved. The 8th Defendant claims to be in possession of the northern 1/3rd share in the property and his position is that of a co-mortgagor. While the partition among Defendants 5 to 8 does not bind the Plaintiff, still he cannot, in the circumstances, be allowed redemption of the entirety of the property covered by exhibit A-1. Therefore, the Plaintiff will be entitled to redeem only the southern 2/3rd in the property covered by exhibit A-1, on his depositing the proportionate mortgage amount. There will be a decree accordingly in favour of the Plaintiff in Original Suit No. 244 of 1960, in modification of the lower Court's decree. It is said that certain buildings have been constructed by Defendants 5 to 7 in the property covered by exhibit A-2. In the partition, the buildings and the necessary adjuncts will be allotted to the share of Defendants 5 to 7, to the extent possible without prejudice to the rights of the Plaintiff to a fair partition and possession of an 1/3rd extent in the south out of the property Mortgaged under exhibit A-2. It would be proper and convenient for a just and equitable division according to the respective rights,

that in effecting the partition for redemption and separate possession, the decree in the two suits are dealt with together. The question of value of improvements will be decided at the time of passing of the final decree, after the properties are partitioned and allotted. In these proceedings, no controversy was raised as between Defendants, 5 to 7 on the one hand and Defendant 8 on the other. The consequential adjustments, if any, between them are left out of consideration. Disputes between the Defendants, if any, inter se, as to sharing the mortgage moneys that may be deposited by the Plaintiff inclusive of the claim of Defendants 5 to 7 based on exhibits B-20 and B-21 shall also be resolved in independent proceedings. Learned Counsel stated that no point is made now as to the binding nature of the Oodukor award exhibit A-8, dated 7th April 1955, The second appeals and memorandum of cross objections are allowed to the extent indicated above. The parties will bear their respective costs in this Court and in the lower appellate Court. The Plaintiff will be entitled to half the costs in the trial Court.

24. Leave granted.