

**(1936) 11 MAD CK 0078**  
**In the Madras High Court**

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| Maramittath Theruvil Moothachettiam Veetil Kelu | APPELLANT  |
| Vs                                              |            |
| Kuttiyil Machikandy Chekkara Cheppan and Others | RESPONDENT |

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**Date of Decision :** 10-11-1936

**Acts Referred:**

**Citation :** AIR 1937 Mad 451 : (1937) 45 LW 300

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**Judgement**

1. In 1853, the karnavan of the Mootha Chettiam Veetil tarwad executed a usufructuary mortgage-deed in favour of one Kuttiassan. In 1871 the assignee of the mortgagee executed a surrender deed, Ex. 3, in favour of one Chappan, who claimed to be the karnavan of the M tarwad. It appears however that two bodies of people claimed to constitute the M tarwad and two rival karnavans (the plaintiffs and defendant 1) claimed the equity of redemption of the mortgage on behalf of those two bodies. In the suit it has been established by evidence to the satisfaction of the trial Court and the first appellate Court that the present plaintiff has the rights of the mortgagor and that defendant 1, who actually purported to redeem the mortgage, had no right at all to do so. It has also been established that as long ago as 1878 the plaintiff was aware of the fact that defendant 1 was holding the land, not merely as one who had acquired rights from the original mortgagee, but as the full owner of the property. In second appeal, Wadsworth, J. agreed with the lower appellate Court that although defendant 1 had no right to redeem, his long possession over a period greater than 12 years had established his title to the property by adverse possession. In this Letters Patent appeal, the plaintiff contends that although defendant 1 was eventually found not to be the owner of the equity of redemption, yet his act in paying off the mortgagee entitled him to be subrogated to the rights of the mortgagee, that the plaintiff was not entitled to possession without redeeming the mortgage, and that as the plaintiff was allowed 60 years to redeem the mortgage, his suit was in time.

2. The principal points raised in this appeal were scarcely discussed at all before our learned brother, and so we have not been given the benefit of his considered finding on the matters argued before us. He was however of opinion that the act

of defendant 1 extinguished the mortgage, as it was clear that it was not his intention to keep the mortgage alive, and that as soon as the mortgage was extinguished adverse possession began to run. The first case quoted for this purpose in Second Appeal was *Bijai Bahadur v. Parameshwari Ram* AIR 1924 All 834, where this question receives no discussion at all and is disposed of in these few words:

It cannot be said by their redemption effected by means of the award, they became transferees or assignees of the mortgagee's rights.

3. There can be no doubt that this statement is correct; but it does not follow that because defendant 1 is not a transferee or assignee of a mortgage right, he is not entitled in equity to be subrogated to those rights. The only other case quoted in second appeal on this point was *Peria Aiya Ambalam v. Shanmugasundaram* AIR 1914 Mad 334, a case in which a trespasser dispossessed the mortgagee in possession and continued in possession himself, asserting a title adverse to the mortgagor also; and it was held that time began to run against the mortgagor from the time that he came to know that the trespasser was setting up a claim adverse to the mortgagor. Mr. Kuttikrishna Menon for the appellant at first argued that any person who pays off the mortgage is entitled to be subrogated to the rights of the mortgagee; but so wide a proposition has nowhere found support. It is true that in *Syamalarayudu v. Subba Rayudu* (1898) 21 Mad 143, the proposition that a person paying off a mortgage was entitled to be subrogated to the mortgagee's rights was laid down very broadly; but there was no discussion as to the circumstances under which such a right would accrue to a person paying off a mortgage debt. That case was rather an extreme one in which the person who paid off the debt acted fraudulently, and it has nowhere been followed without qualification. *Syamalarayudu v. Subba Rayudu* (1898) 21 Mad 143 was approved in *Chamaswami v. Padala Anandu* (1908) 31 Mad 439; but it was pointed out that a trespasser or volunteer was not entitled to the rights of subrogation. That a trespasser or volunteer who pays off the mortgage debt is not entitled to the rights of subrogation has been laid down consistently in a very large number of cases in England, America and India: see for example *Gurdeo Singh v. Chandrika Singh* (1909) 36 Cal 193, *Pichaiyappa Chetti and Another Vs. Govindaraju Mudaly and Others*, and *Narayana Kutti Goundan v. Pachiammal* (1913) 36 Mad 426; but even in the cases quoted on behalf of defendant 1, it is assumed that if a person believes in good faith that he is entitled to redeem the mortgage, either under the belief that he is the mortgagor or that he has some other right in the property which would entitle him to redeem, he would be entitled to the rights of the mortgagee by way of subrogation or a like equitable principle.

4. In *Nasiruddin v. Ahmad Hussain* AIR 1926 PC 109, a sale of property took place, and it was found that such a sale was invalid owing to the existence of a prior contract of sale; but it was held by their Lordships that as the purchaser of the property, in the belief that the property belonged to him, redeemed the

mortgage, he was entitled to stand in the shoes of the mortgagee whom he had paid off. In *Ramadharan Lonia v. Bhagwan Das Maheshri* AIR 1926 PC 68, where a purchaser from a manager of a joint Hindu family paid off a simple mortgage but the sale was subsequently set aside by some other members of the family, their Lordships held that the purchaser was entitled in equity to the rights of a usufructuary mortgagee although the mortgage that he redeemed was only a simple mortgage. That the rights of a mortgagee can be acquired by those who purport to obtain the equity of redemption by a void transaction as well as by a voidable one by the principle of subrogation is made clear in *Nasiruddin v. Ahmad Hussain* AIR 1926 PC 109 just quoted and in the judgment of Sundara Ayyar, J. in *Narayana Kutti Goundan v. Pachiammal* (1913) 36 Mad 426. The question as to how far rights can be acquired in India by subrogation was very fully discussed by this learned Judge. At p. 434, he clearly recognises the rights to subrogation of one claiming under a void or voidable transaction who bona fide believing himself to have a title to the property, discharges an encumbrance on it and claims a charge as against the owner. The argument put forward before our learned brother that the mortgage became extinguished by the act of defendant 1 seems never to have been accepted, although *Mohesh Lal v. Bawan Das* (1883) 9 Cal 961 has been quoted to us in support of that proposition. In that case, the person who paid off the mortgage was he who had created it, and the question whether his act extinguished the mortgage or not arose only because he had acted in two capacities, as an owner of the property and as an agent of another to whom the property really belonged.

5. Their Lordships held that it must be assumed that when he paid off the mortgage debt he intended to discharge it, i.e., he acted in the capacity in which he had created the mortgage. This in effect means that the mortgage debt was paid off by the mortgagor himself, which, unless an intention to keep alive the mortgage is expressed, causes the mortgage to be extinguished. 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 rights of mortgagor or mortgagee. Whatever therefore might have been the intention of defendant 1, 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. Mr. K. Kuttikrishna Menon contends that the appellant plaintiff is entitled to succeed whether the transaction was mala fide or bona fide. If it was mala fide, then it was impossible for him to acquire rights adverse to the mortgagor, on the principle that a mortgagee or one who gets into possession through him cannot set up a title adverse to the mortgagor unless he first surrenders the mortgage. In *Hillayya v. Narayanappa Timayya* (1912) 36 Bom 185, a reversioner, to support his title to property mortgaged by a widow and sister of the last male holder, got into possession from the successors-in-interest to the mortgagee. It was held that even though he set up a paramount title to the

property, yet since he had got into possession through the mortgagee, he could not be allowed to claim the property adversely to the mortgagor. In *Pasupati v. Narayana* (1890) 13 Mad 335, defendant 1 held as a tenant from the plaintiff and had attorned to him; and it was held that defendant 2, who had come into possession by collusion with defendant 1, was precluded from denying the plaintiff's title and was liable to the plaintiff for the rent collected by him from defendant 1. In this case the principle enunciated by Mr. Kuttikrishna Menon is clearly expressed as follows:

The principle is that he came in by collusion with the tenant who could not deny the landlord's title, and that unless he was also precluded from denying the landlord's title, the tenant would have only to part with the property to another person in order to bring the landlord's right in dispute.

6. It is not necessary however to pursue the discussion of this point further because we are clearly of opinion that the transaction between the mortgagee and defendant 1 was a bona fide one. We feel that it is not open to defendant 1, who has all along, even before he paid off the mortgage, been claiming the property as his own and leading evidence to show that all his acts were those of a person entitled to the property, to now contend that he was acting mala fide; and there is moreover no justification on the evidence for such a contention. If defendant 1 was subrogated to the rights of the mortgagee, the further question arises whether the plaintiff is barred by limitation from being allowed to redeem. The most authoritative decision of this Court is that of the Full Bench in *Peria Aiya Ambalam v. Shanmugasundaram* AIR 1914 Mad 334. There, a person trespassed on the property in 1898 and dispossessed a usufructuary mortgagee. In 1908, when he erected some buildings on the land, the mortgagor came to know of the trespass and remonstrated with the trespasser, who denied the mortgagor's rights. It was held that from 1908 the trespasser was holding adversely not merely to the mortgagee who had a right to possession but to the mortgagor also, because he was ousting the mortgagor by erecting the buildings on the property, which only the mortgagor had a right to do. A passage from the judgment of Batty, J. in *Tarubai v. Venkatrao* (1903) 27 Bom 43, was approved as setting out the law on the question as to how far possession by a trespasser could be held to be adverse to the mortgagor when the mortgagor had no right to possession. It is:

No doubt, as long as the mortgagee is in possession, he and all those 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 possession immediately.

7. In that case, it was found that the mortgagor had no knowledge of the dispossession of the mortgagee and so the latter part of the above passage was an obiter dictum. Batty, J. in his very elaborate judgment, has discussed scores of cases, but we have been unable to find in his judgment any justification for the contention that a mere assertion by a person in possession of the property, when the mortgagor has no immediate right to possession, which is not coupled with some act definitely interfering with the rights of the mortgagor, would amount to an ouster of the mortgagor which would force him to take some immediate action under pain of losing rights to the property by adverse possession. In most of the cases quoted, as in the Full Bench case, *Peria Aiya Ambalam v. Shanmugasundaram* AIR 1914 Mad 334 the mortgagee was ousted from possession, and it was held that such a dispossession would entitle the mortgagor to bring a suit to have the mortgagee restored to possession, and Batty, J. in the passage above quoted states that it is the duty of the mortgagor to do so. In none of the very many cases referred to by Batty, J. does 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. Although there are a few passages in the judgment of Batty, J. one of which has been quoted above, which might suggest that a mere assertion by a person in possession denying the rights of the mortgagor, amounted to an ouster of the mortgagor, yet in none of the cases was it so held. On the other hand, there are passages in the judgment of Batty, J. which suggest that a mere assertion of title would not be sufficient. For example, at page 65, he says:

And according to the case put by Lord Redesdale in *Havenden, v. Lord Annesley* (1806) 2 Sch & Let 624 of a tenant disavowing the landlord's title and attorning to another, if the landlord, being apprised of it acquiesces, the possession of his tenant becomes adverse and the Statute of Limitation will run against him. This however would not under the rulings which follow *Womesh Chunder v. Raj Narain Roy* (1868) 10 WR 15 above cited, apply in India apparently in the case of a suit for possession against a trespasser when the owner is not entitled to immediate possession. Thus the owner could have no power to sue for possession, during the currency of an *ijara*, and time would run against him therefore only on its termination though prior to that he might possibly have had a right to bring a suit for declaration of title, which it would be discretionary with the Court to give or refuse.

8. After discussing another batch of cases he states at the bottom of page 66:

The result is, as above indicated, if there has been no ouster by "open and notorious act of taking possession" then the person relying on his possession to defeat title, must show that it was of such a nature, and involved the exercise of rights so irreconcilable with those claimable by the plaintiff, as to give the plaintiff occasion to dispute that possession (or, in other words, that it was such as to give a cause of action or right to sue for possession) throughout the twelve years next preceding suit. The mere existence of the claim without possession, actual or constructive, will not suffice as a bar to a title proved or admitted. And even where there is possession, if it has commenced without any act of dispossession, and is susceptible of explanation by reference to a title not inconsistent with the rights of the person against whom it is set up, or of one holding on behalf of such person or temporarily entitled to exercise his rights there can be no necessity to call that possession in question, unless and until interference with the right of the person against whom it is alleged has been manifested by acts affecting his existing right, or has otherwise been brought to his knowledge.

9. In a case like the present, it is difficult to see what the plaintiff could have done. As we have found that defendant 1 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 same right or putting forward an adverse claim. No suit would lie for an injunction. It is true that the plaintiff could have brought a suit for a declaration of his title, which the Court might or might not have granted; but even that would not prevent the running of time against him if an assertion by defendant 1 of his paramount rights amounted to adverse possession. It would therefore appear that the correct test to apply to a case of this kind is whether the possession and acts of the person claiming adversely can be referred to any legal right that he possesses. If so, then the true owner is not bound to sue (indeed he cannot sue except for a declaration) merely because adverse assertions of title are being made.

10. It has been further argued by Mr. O.T.G. Nambiar that if the defendant acquired a right to be paid off the mortgage debt, such a right as he had was nothing more than a charge on the property. In the two cases quoted in support of his contention one mortgagor redeemed the mortgage, and it was held that after twelve years" possession adverse to the joint mortgagor, the right of the joint mortgagor became barred. Section 95, T.P. Act, gives a mortgagor who pays off the entire mortgage debt only a charge on the property against a co-mortgagor, and so obviously such a charge would not be the same as the rights of a mortgagee by subrogation. Mr. O.T.G. Nambiar has been unable to refer us to any case in which it has been held that anyone who has acquired the rights of

a mortgagee by subrogation or similar equitable principle acquired only a charge. Mr. Nambiar has also referred us to (Kode) Atchayya Vs. Kosaraju Narahari, in which a mortgagee purported to transfer not merely his mortgage rights but the full rights of ownership. It was there held that the transferee immediately began to hold the property adversely to the mortgagor and that the rights of the mortgagor against the mortgagee were barred after twelve years. The reason for this is clear from Article 134, Limitation Act, which states that where a mortgagee or a trustee in breach of his trust purports to transfer the property to another person, the period of limitation is twelve years from the date of the transfer. A transfer of a mortgage has here been assimilated to a breach of trust, and time begins to run even when the mortgagor has no knowledge of the transfer. Obviously that decision has no application to a case like the present and can be applied only to cases which are hit by Article 134, Limitation Act. We therefore hold that the claim of the plaintiff is not barred by limitation.

11. Another point seems to have been raised by defendant 1 in Second Appeal, which our learned brother found it unnecessary to consider, in his view of the effect of the transaction between defendant 1 and the mortgagee. Defendant 1 claimed that the plaintiff was not entitled to redeem the kanom or first mortgage without also redeeming the second mortgage. Wadsworth, J. however held that this argument was not sustainable; and Mr. Nambiar has not raised the contention in this appeal that in any event the plaintiff could not succeed, even though we hold that defendant 1 was subrogated to the rights of the mortgagee and the plaintiff's suit to redeem is in time. In the result we allow the appeal; but in view of the fact that no attempt was made to argue the case fully before our learned brother and the case here argued has been on entirely different grounds, we order both parties to bear their own costs both in this appeal and in Second Appeal. The respondents will bear their own costs and those of the appellant in the lower appellate Court. The suit is remanded to the trial Court for the passing of a suitable decree after taking account of the improvements.