

**(1952) 03 KAR CK 0003**  
**In the Karnataka High Court**  
**Case No : Second Appeal No. 12 of 1949-50**

|                                        |            |
|----------------------------------------|------------|
| Ramachandra Rao Ganesh and Another     | APPELLANT  |
| Vs                                     |            |
| Sarvajana Vardhini Co. Ltd. and Others | RESPONDENT |

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**Date of Decision :** 27-03-1952

**Acts Referred:**

Transfer of Property Act, 1882 — Section 67, 67 (a)

**Citation :** AIR 1952 Kar 125

**Hon'ble Judges :** Balakrishnayya, J

**Bench :** Single Bench

**Advocate :** M.K. Narayana Iyengar and V. Krishna Murthy, for the Appellant; B.T. Ramaswamy and M.S. Ranganathan, for the Respondent

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## Judgement

1. The suit out of which this appeal arises was filed for the sale of the mortgaged property of the plaint schedule in enforcement of the mortgage and for declaration that the 8th defendant was in no way entitled to any interest therein. The Munsif dismissed the suit while the learned Subordinate Judge decreed the suit.

2. The facts so far as are necessary for the determination of issues involved in the case may be briefly adverted to. Defendants 1 and 2 are father and son respectively and the schedule property was ancestral to them. The said property was mortgaged with possession by defendant 1 in favour of defendant 4 on 12-9-1928 under a registered deed of mortgage (Ex. A) for a sum of Rs. 1000/- both on his own behalf and as guardian of defendant 2. It is alleged that the said mortgage was for legal necessity and in consequence binding on defendant 2. Besides, it is also stated that the 2nd defendant had not been born at the time of the earlier mortgage dated 23-8-22, to discharge which the suit mortgage under Ex. A came into existence and that on that ground also the 2nd defendant cannot question the alienation. Under the terms of the said mortgage, the mortgagee was authorised to take possession of the schedule property. It is also agreed under the deed that the usufructuary mortgage property should be adjusted

towards the interest on the mortgage amount and a period of 8 years was fixed for redemption by payment of the principal amount. Defendants 3 and 4 are two out of the four undivided brothers and it is stated that the mortgage debt referred to above in favour of defendant 4 was their family property. Defendant 4 got into possession of the property and later, on 10-7-32 defendant 3 is said to have released his interest in the joint family properties in favour of defendant 4 and his other brothers and in return thereof taken the right, title and interest under the suit mortgage deed towards his share. Defendant 3 thus became the full owner of the suit mortgage interest and got into possession and enjoyment of the property. Prior to the said release, defendant 4 is said to have hypothecated his alleged right in the suit mortgage in favour of his own wife Saroja Bai (defendant 5) on 16-5-1929 under a nominal document not intended to be acted upon by the parties. Nevertheless defendant 4 continued to be in possession of the suit property. The plaintiff sued defendant 3, obtained a decree and got his interest in the suit mortgage deed attached, and sold on 16-7-1940 and purchased it himself in court auction. The said sale having been duly confirmed, the plaintiff thus became the absolute owner of the mortgagee's interest in the suit property.

3. The only contesting defendant in the suit is defendant 1 (2?), who objected to the plaintiff's claim on the ground that he had a right to question the suit alienation on the plea that he was born in 1920. He admitted that the mortgage in favour of defendant 4 is true but that the consideration under it was left with the mortgagee to discharge the prior mortgage dated 23-8-1922 and to effect certain repairs to the property, that defendant 4 has not furnished accounts and he puts the plain-tiff to strict proof of the exclusive title of defendant 3 to the property and his (plaintiff's) claim to it. Defendant I further alleged that he was ready to redeem the suit mortgage even in November 1936 but was not allowed to do so; that he demanded an account of the usufruct of the mortgage and urged that the plaintiff will be entitled to the suit amount if he is able to put this defendant in possession of the property and deliver the relevant documents. The two courts below held on a consideration of the evidence in the case that the plaintiff is entitled to sue defendant 3, who had become the exclusive owner of the mortgagee's right in question having purchased" the same in court sale and that the mortgage deed was partly supported by consideration. None of these findings are seriously challenged before us.

4. The main point raised in this Second Appeal is regarding the maintainability of the suit. It is urged by Mr. V. Krishnamurthi, the learned counsel for the appellant, that the transaction under the original of Ex. A is an out-and-out usufructuary mortgage and as such the plaintiff who has purchased the mortgagee's interest is only entitled to obtain possession of the property and appropriate the usufruct thereof towards interest and retain possession of the property till the principal amount is paid but he has no right to sue for sale of the mortgaged property for the recovery of the principal amount. An examination of the recitals in Ex. A, the suit document, shows that it is not strictly an

usufructuary mortgage, since it also contains a personal covenant to pay the mortgage amount after the stipulated period of eight years. It is thus a composite mortgage usually styled as "simple mortgage usufructuary." The facts of the present case are almost exactly similar to those described in 13 Mys. C.C.R. 45 where it was held that where in a usufructuary mortgage of Immovable properties there is a stipulation for redemption of the mortgage money within a specified period, such a mortgagee is not prevented from bringing a suit for the recovery of the mortgage money after the expiry of the stipulated period and put the mortgaged property to sale. The same view is also taken in the cases reported in "Dattambhat Rambhat v. Krishnabhat Goyindbhat" 34 Bom. 462 and "Ponnambala Pillai v. Annamalai Chettiar". 55 Ind.Cas 666 (Mad) (FB) and the latter case goes to the length of laying down that even where the mortgagee is in possession he can sue for the money or for the sale of the mortgaged property when the fixed period has been stipulated in the mortgage deed for the payment of the mortgage amount.

5. A typical instance of the combination of a simple with a usufructuary mortgage came up before the Privy Council in "Narsing Pratab Bahadur Singh v. Yakub Khan" AIR 1929 P.C. 139, Lord Tomlin observed:

"Their Lordships are of opinion that u/s 63, T.P. Act, the money has been payable and the plaintiff is entitled to a money decree for the same, but if the money has become payable u/s 68, their Lordships are further of opinion that under Sec. 67 a decree for sale can be made."

6. If the power of sale is clearly conferred or there is a clear hypothecation of the property the remedy of judicial sale is available. "Ramayya v. Guruva" 14 Mad. 232; "Sivakami v. Gopala" 17 Mad. 131 (FB). Where there is only a personal covenant in a composite mortgage without any provision that in default of payment the hypothec may be sold, the question arises whether the mortgagee can sue for the sale of the hypotheca. On this point, there is a conflict of judicial opinion. The Allahabad High Court holds that a suit for sale does not lie in such circumstances. Thus in "Kashiram v. Sardar Singh". 28 All. 157 the Allahabad High Court held that where a mortgage is in other respects a usufructuary mortgage the insertion therein of a personal covenant to pay the mortgage debt, on demand, unaccompanied by any hypothecation of the property, the subject of the mortgage, cannot alter the character of the mortgage and give the mortgagee a right to sell the mortgaged property in the event of non-payment of the mortgage debt. The same view is reiterated in Hakim Kanhaiya Prasad Vs. Mt. Hamidan and Others, . The Bombay High Court has also taken a similar view vide "Krishna Bhaichand v. Hari Janardhan" 10 Bom. L.R. 615. On the other hand, the Madras High Court has taken a contrary view; vide 14 Mad. 232 17 Mad. 131 and "Kangaya Gurukul v. Kalimuthu Annavi" 27 Mad. 526 (FB). In Jagsahu v. Ram Sakhi 1 Pat. 350 at p. 355, the Court quoted with approval the following passage from the judgment in a Calcutta case reported in "Pitambar v. Madhu Sudan" 6 Ind. Cas. 153 (Cal.).

"It is well settled that where an instrument of mortgage gives a right to possession and also contains a covenant to pay, thus presenting a combination of a usufructuary and a simple mortgage, the two rights are independent and the mortgagee may sue for sale although he may have given up possession and the right accrues immediately after the due date is passed."

The view taken by the Madras High Court has been followed by this Court in 13 Mys CCR 45. The Patna and Calcutta High Courts have adopted similar views. Thus the view taken by the Madras, Patna and Calcutta High Courts is preferable in view of the decision of the Privy Council in "Narsing's Case" (AIR 1929 PC 139); according to which when money became payable u/s 68 a decree for sale can be made u/s 67.

7. The question may also be looked at from another stand-point. Section 67(a) of the Transfer of Property Act at the time of the transaction is slightly different from the then corresponding provision in India. The said section of the Transfer of Property Act as in Mysore provides that nothing in that section shall be deemed to authorise any mortgagee, other than a mortgagee by conditional sale or a mortgagee under an anomalous mortgage by the terms of which he is entitled to foreclose, to institute a suit for foreclosure, or an usufructuary mortgagee as such to institute a suit for foreclosure or sale, where he is authorised to appropriate the rents and profits in payment of the principal money or partly in lieu of the interest and partly in payment of the principal money or a mortgagee by conditional sale as such, to institute a suit for sale. This section does not contemplate a case of a mortgage which authorises the mortgagee to appropriate the usufruct towards the interest only of the amount advanced under the mortgage-deed. It is only in other cases that Section 67(a) of the Mysore Act prohibits a suit for sale by the mortgagee. But such a case as the one on hand is not hit by that provision of law and hence is outside the mischief of Section 67(a) of the Mysore Transfer of Property Act. In any view of the matter. I am of the opinion that the mortgagee can sue for the recovery of the mortgage money in view of the personal covenant to pay contained in the mortgage deed.

8. It was next contended that the full consideration under the original of Ex. A had not been proved. The recitals in Ex. A show that out of the consideration amount of Rs. 1000/- a sum of Rs. 800/- was left with the mortgagee to discharge the prior mortgage debt of Rs. 800/- due to one Seetharama Sastry and the balance was to be utilised for the repairs and improvements of the house. The evidence on record sufficiently proves that the previous debt of Seetharama Sastry has been paid up and the two Courts below have correctly come to the same conclusion. With regard to the balance of Rs. 200/- that was left with defendant 4 for purposes of effecting repairs and improvements to the suit property the evidence adduced is very meagre and unsatisfactory and there is no reason to disturb the concurrent findings of the Courts below, that the original of Ex. A is supported by consideration only to the extent of Rs. 800/-.

9. It is seen from the records that defendant 5 Saroja Bai remained ex parte

throughout the proceedings before the Courts below and finally she died. Besides her husband defendant 4 who continued to be on record has neither contested the suit himself nor has he raised any objection on behalf of Saroja Bai. The argument that the legal representatives of the said Saroja Bai have not been brought on record and that that is a serious omission is therefore belated and untenable. Even otherwise, the ends of justice will be sufficiently met by the provision made by the Courts to take an indemnity bond from the plaintiff to indemnify the legal representatives of the deceased Saroja Bai in the event of any claim being preferred by them.

10. In the result the appeal is dismissed and the directions with regard to the preliminary decree etc. given by the learned Sub ordinate Judge are hereby confirmed. The parties will bear their own costs in this appeal. Cross-objection is also dismissed but without costs.

11. Appeal and cross-objection dismissed.