(2014) 11 KAR CK 0285

In the Karnataka High Court

Case No : Regular First Appeal No. 1502/2011

Sabira Janu APPELLANT

Vs

N.N. Venkataramanaswamy RESPONDENT

Date of Decision : 14-11-2014

Acts Referred:

Limitation Act, 1963 — Section 27
Transfer of Property Act, 1882 — Section 58(a), 58(d), 60, 62

Citation : (2015) ILR 274

Hon'ble Judges : P.D. Waingankar, J

Bench : Single Bench

Advocate : G. Nataraj, Advocate for the Appellant; Srivatsa, Senior Counsel for K. Shivashankar, Anees Ahmed, Advocates for Saan Law Assts. and Venkataswamy Gowda, Advocate for G.J. Assts, Advocate for the Respondent

Judgement

P. D. Waingankar, J.—By judgment and decree dated 09.10.2010 in O.S. No. 5/2008 on the file of the Senior Civil Judge and J.M.F.C., Chintamani, suit filed by the plaintiff for declaration and injunction came to be decreed. Questioning the legality and correctness of the judgment and decree, this appeal is preferred by the legal representatives of deceased-defendant No. 6-Hussain Beig.

2. The case of the plaintiff before the trial Court is briefly stated as under:

The deceased-defendant No. 6-Hussain Beig was the original owner of suit schedule property, a building used for commercial purpose. He inducted the plaintiff as tenant in the schedule property on a monthly rent of Rs. 100/-. The plaintiff was running a cloth business in the schedule property under the name "MITHRA CLOTH EMPORIUM". Hussain Beig sold the schedule property to one Obaiah, the husband of defendant No. 1 and father of defendant Nos. 2 to 5 under registered sale deed dated 18.12.1965 subject to the condition that Obaiah shall reconvey the property if Hussain Beig is ready to purchase within a period of 10 years. In view of the purchase of property by Obaiah, the plaintiff became tenant under Obaiah. Due to financial difficulties, Obaiah mortgaged the schedule property in favour of plaintiff/tenant for Rs. 7,000/- by registered mortgage deed dated 19.01.1971. The plaintiff invested an amount of Rs. 5,000/- to put up construction of the first floor of the schedule building. As agreed, Obaiah reconveyed the schedule property to Hussain Beig by reconveyance deed dated 15.12.1975 and thereby Hussain Beig became the owner and mortgagor and plaintiff mortgagee of the schedule property. During the course of business, the plaintiff inducted defendant No. 7-V.R. Narayanamurthy as one of the partners in his business. In due course of time, the plaintiff retired from the partnership. But the business was being carried out by defendant No. 7 who in turn inducted one Mruthyunjayan as partner in his business. The defendant No. 7 went on paying rent of the schedule premises to the plaintiff at the rate of Rs. 200/- per month. It appears that Hussain Beig executed mortgage deed dated 03.9.1977 in respect of schedule property in favour of defendant No. 7-V.R. Narayanamurthy by obtaining loan amount of Rs. 20,000/- without redemption of earlier mortgage, behind the back of the plaintiff. Hussain Beig filed a suit for redemption of mortgage against defendant No. 7 and one Mruthyunjayan in O.S. No. 613/1992 on the file of Civil Judge, Junior Division, Chintamani, without impleading the plaintiff. Suit came to be decreed directing the defendants to redeem the schedule property in favour of Hussain Beig by judgment and decree dated 06.08.1997. Ultimately, in R.S.A. No. 327/2000 the judgment and decree in O.S. No. 613/1992 was set aside and the suit came to be remanded for fresh disposal. When the suit was remanded for fresh disposal, the suit was withdrawn. In the meanwhile, Hussain Beig died. His legal representatives, the appellants herein filed O.S. No. 120/2004 against defendant No. 7-V.R. Narayanamurthy and Mruthyunjayan for ejectment and delivery of possession of the schedule property without the knowledge of the plaintiff though defendant No. 7 was tenant under plaintiff and there was no jural relationship of landlord and tenant between Hussain Beig and defendant No. 7. Suit came to decreed. R.A. No. 4/2010 filed by defendant No. 7 against the judgment and decree came to be dismissed. R.S.A. No. 2739/2010 filed against judgment and decree in R.A. No. 4/2010 also came to be dismissed by granting two months time to the tenant-defendant No. 7 to deliver the vacant possession. Accordingly, the possession was obtained from defendant No. 7 by the appellants herein who are the legal representatives of Hussain Beig. After coming to know of the evil design, the plaintiff/mortgagee N.N. Venkatramanaswamy filed O.S. No. 5/2008 against legal representatives of Hussain Beig defendant Nos. 6(a) to (k) (hereinafter referred to as ''appellants'') to declare that the plaintiff/ mortgagee in possession of the property ever since 1971 became the full owner of the schedule property, that the proceedings in O.S. No. 120/2004 on the file of Civil Judge, Junior Division, Chintamani, between defendant Nos. 6(a) to (k) legal heirs of Hussain Beig and defendant No. 7-V.R. Narayanamurthy and Mruthyunjayan for possession of the schedule property are not binding upon the plaintiff and to restrain defendant Nos. 6(a) to (k) from alienating the schedule property to third person.

3. Defendant No. 2 (son of Obaiah) filed written statement which has been adopted by defendant No. 1 his mother and defendant Nos. 3, 4 and 5, his brothers. The sum and substance of the written statement filed by defendant Nos. 1 to 5 legal heirs of deceased-Obaiah is that deceased-Obaiah had purchased schedule property from defendant No. 6-Hussain Beig under registered sale deed dated 18.12.1965 and ever since then, Obaiah was in possession of the schedule property. On 19.07.1971, Obaiah had mortgaged the schedule property in favour of plaintiff by obtaining a loan of Rs. 7,000/-. Obaiah died on 09.12.2004 leaving behind defendant Nos. 1 to 5 as his legal heirs. Defendant Nos. 1 to 5 being the legal heirs of deceased-Obaiah-mortgagor approached the plaintiff for redemption of the mortgage, but there was no response from the plaintiff. Thereafter, defendant Nos. 1 to 5 came to know that original defendant Nos. 6-Hussain Beig and defendant No. 7 colluded and created some fraudulent documents to knock off the property belonging to defendant Nos. 1 to 5.

4. Legal heirs of defendant No. 6-Hussain Beig defendant Nos. 6(a) to (k) in their written statement have contended that defendant No. 6-Hussain Beig was the original owner of the schedule property which he sold to Obaiah by a registered sale deed dated 18.12.1965 with a condition that Obaiah shall convey the property to defendant No. 6 within a period of 10 years if defendant No. 6 is ready to repay the sale consideration. Accordingly, reconveyance deed came to be executed in favour of defendant No. 6 by Obaiah and thereby defendant No. 6 became the owner and mortgagor of the schedule property in favor of the mortgagee (the plaintiff). It is the case of legal representatives of defendant No. 6 that the plaintiff was called upon to redeem the schedule property in their favour on receipt of mortgage money of Rs. 7,000/-. But the plaintiff did not come forward to execute a redemption deed, instead continued in possession of schedule property and filed instant suit to declare him as full owner of the schedule property contending that the mortgagor failed to exercise their right of redemption within prescribed period of 30 years and thereby their right of redemption is extinguished. Hence, legal heirs of defendant No. 6 have sought for dismissal of the suit.

5. Defendant No. 7, the tenant in his written statement contended that the legal representatives of defendant No. 6 had filed a suit in O.S. No. 613/1992 against defendant No. 7 and one Mruthyunjayan which ultimately came to be withdrawn. It is contended that the schedule property was taken by defendant No. 7 on monthly rent of Rs. 200/-, defendant No. 6-Hussain Beig being the owner used to collect the rent from defendant No. 7, that defendant No. 6 executed simple mortgage deed in favour of defendant No. 7 and Mruthyunjayan on 08.09.1977 upon receipt of Rs. 20,000/- as token of advance amount. Further, it is contended that defendant No. 7 has been continued in possession as tenant of the schedule property wherein he was running cloth business under the name "Mithra Cloth Emporium". Defendant No. 6-owner of the schedule property filed O.S. No. 120/2004 on the file of Civil Judge (Jr. Dn.) Chintamani, for ejectment

of defendant No. 7 and delivery of possession. Upon merits, suit came to be decreed and possession of the schedule property has been delivered to legal representatives of defendant No. 6 as ordered by the Court. Hence, defendant No. 7 sought for dismissal of the suit.

6. Upon going through the pleadings of the parties and documents placed on record, the trial Court framed the following issues:

1) Whether the plaintiff proves that he is the absolute owner of the suit schedule property by way of adverse possession against the interest of defendants 1 to 6?

2) Whether the plaintiff proves the interference by the defendants?

3) Whether the defendants prove that the husband of the 1st defendant by name P. Obaiah mortgaged the property in favour of the plaintiff for Rs. 7,000/- by executed registered mortgage deed?

4) Whether the defendants prove that the plaintiff is in unauthorized possession of the schedule property?

5) Whether the present suit is not maintainable?

6) Whether the plaintiff is entitled for the relief claimed?

7) What order or decree?

Additional Issue:

1) Whether the plaintiff is entitled for the alternative relief as sought for?

7. Plaintiff in order to prove his case examined himself as PW-1 and relied upon Exs. P1 to P4. Defendant No. 6(k)-Wajid Beig got himself examined as DW-1 apart from marking Exs. D-1 to D-21. The trial Court, upon appreciation of the evidence, decreed the suit declaring that the plaintiff is the owner of the suit schedule property, that proceeding between defendant No. 6 and defendant No. 7 and Mruthyunjayan in O.S. No. 120/2004 on the file of Civil Judge (Jr. Dn.) Chintamani, not binding upon him and consequently, the legal heirs of deceased-defendant No. 6 have been restrained by means of injunction order from alienating the schedule property to third parties.

8. Aggrieved by the judgment and decree passed by the Court below, this appeal is preferred by legal representatives of defendant Nos. 6 (referred as ''appellants'').

9. I have heard the submissions made by Sri G. Nataraj, learned counsel appearing for the appellants and Sri. Srivatsa, learned Senior counsel appearing for respondent No. 1 (plaintiff). Perused the records.

10. The main contention urged by Sri G. Nataraj learned counsel for the appellants is that the mortgage in question is usufructuary mortgage and right to redemption in case of usufructuary mortgage commences on payment of

mortgage money out of usufructs or partly out of usufructs or partly on payment or deposit of mortgage money by the mortgagor. In a case of usufructuary mortgage, mere expiry of period of 30 years as prescribed under Article 61(a) of the Limitation Act, 1963 from the date of creation of mortgage does not extinguish the right of mortgagor under Section 62 of the Transfer of Property Act. In other words, usufructuary mortgagee is not entitled to file a suit for declaration to declare him as full owner of the property merely on the expiry of period of 30 years from the date of mortgage, the mortgagor has not paid mortgage money so far, the Court below ought not to have entertained the suit and granted relief. Learned counsel placing reliance on the following decisions of the Apex Court would submit for reversal of the judgment and decree passed by the Court below and dismissal of the suit.

1) Harbans Vs. Om Prakash and Others,

2) Full bench decision of the Supreme Court dated 21.08.2014 in Civil Appeal No. 5198/2008 (Singh Ram (D) Thr. L.Rs. vs. Sheo Ram & Ors.)

11. Sri. Srivatsa, learned Senior counsel appearing for plaintiff/respondent No. 1 on the other hand supports the view taken by the trial Court in decreeing the suit. Relying upon the decision of the Supreme Court reported in Prabhakaran and Others Vs. M. Azhagiri Pillai (Dead) by LRs. and Others, , he would submit that Article 61(a) of the Limitation Act, 1963 provides the period of limitation for redemption of mortgaged property as 30 years and in case of usufructuary mortgage, which does not fix any date for repayment of the mortgage money, but merely stipulates that the mortgagee is entitled to be in possession till redemption, the right to redeem would accrue immediately on creation of the mortgage deed and the mortgagor having failed to file a suit within a period of 30 years from the creation of the mortgage deed, his right to property is extinguished and therefore, the trial Court is justified in decreeing the suit filed by the plaintiff/mortgagee, that there is no merit in the appeal filed by the appellants. Hence, learned counsel sought for dismissal of the appeal.

12. Having heard the submissions made by both the learned counsel and upon perusal of the entire material on record, the following points would arise for my determination:

i) Whether the finding of the trial Court that the right of mortgagor to redeem the property from mortgagee extinguish on the expiry of period of 30 years from the date of creation of mortgage?

ii) Whether the trial Court is justified in granting a decree for foreclosure to the plaintiff/mortgagee?

13. Before consideration of rival submissions and appreciation of evidence on record, it would be relevant to state in brief the undisputed facts of the case which are as follows.

14. The schedule property is the building used for commercial purpose. Hussain

Beig original defendant No. 6 was the owner of the schedule property. He let out the schedule property to the plaintiff on a monthly rent of Rs. 100/- somewhere in the year 1960. The plaintiff was running cloth business in schedule property under the name "MITHRA CLOTH EMPORIUM". Under Ex. P2 the sale deed dated 18.12.1965 defendant No. 6 sold the schedule property to one Obaiah husband of defendant No. 1 and father of defendant Nos. 2 to 5 subject to the condition that if defendant No. 6 is ready and willing to re-pay sale consideration amount within 10 years, Obaiah shall reconvey the property to defendant No. 6 and thereby plaintiff became the tenant of schedule property under Obaiah. On account of financial difficulties, Obaiah mortgaged the schedule property to the plaintiff for Rs. 7,000/- under Ex. P1 registered mortgage deed dated 19.01.1971 and thereby the plaintiff became a mortgagee and Obaiah, the mortgagor. By reconveyance deed dated 15.12.1975 (Ex. P3) Obaiah reconveyed the property to defendant No. 6. Thus, the position is that, plaintiff is the mortgagee of the schedule property and defendant No. 6 the mortgagor.

15. When such being the case, plaintiff inducted defendant No. 7-V.R. Narayanamurthy as partner in the business carried out by him in the schedule premises. In due course of time, plaintiff retired from partnership. The business was carried out by defendant No. 7 who used to pay to the plaintiff/mortgagee rent at the rate of Rs. 200/- per month. To defeat the right of the plaintiff/ mortgagee over the schedule property, defendant No. 6 executed another mortgage deed Ex. D10 dated 03.09.1977 for Rs. 20,000/- in favour of defendant No. 7 the tenant. To take possession of the property, defendant No. 6 filed a suit for redemption of mortgage against defendant No. 7 without impleading the plaintiff. Later on, the suit for redemption was withdrawn. After withdrawal of redemption suit, defendant No. 6 filed suit for ejectment and delivery of possession against defendant No. 7 without impleading the plaintiff and succeeded in getting delivery of possession of schedule property in pursuance of the Court decree behind the back of the plaintiff. It is at this stage, the plaintiff/mortgagee filed the instant suit to declare that plaintiff became the full owner of the schedule property since defendant No. 6 failed to redeem the property within a period of 30 years prescribed under Article 61(a) of the Limitation Act. Plaintiff also sought for declaration that proceedings in O.S. No. 120/2004, a suit filed by defendant No. 6 against defendant No. 7 for redemption are not binding upon plaintiff and consequential relief of injunction restraining defendant No. 6 from alienating schedule property to the third party. The suit came to be decreed. All these facts are supported by the documentary evidence. Therefore, there is no necessity to dwell upon the oral evidence led by the parties.

16. Originally, the plaintiff occupied the schedule property as monthly tenant. By virtue of mortgage deed dated 19.01.1971, he became mortgagee and his possession as that of mortgagee. The mortgagor never paid or deposited mortgage money. Nor the mortgagor filed suit for redemption of mortgage against plaintiff. Nor he obtained possession of the property from the plaintiff at

any point of time. Instead, the mortgagor created another mortgage deed in favour of defendant No. 7 behind the back of the plaintiff to obtain possession of the property directly from defendant No. 7.

17. It is the case of plaintiff that the limitation to file a suit for redemption of mortgage under Article 61(a) of the Limitation'' Act is 30 years. Defendant No. 6 mortgagor having failed to bring suit within a period of 30 years from the date of creation of mortgage deed, his right to property is extinguished. Knowing fully well defendant No. 6 resorted to illegal procedure to obtain possession of the property behind the back of the mortgagee.

18. It is the case of defendant No. 6 that mortgage in question is usufructuary mortgage, no time limit is fixed to seek redemption, in that case right to seek redemption would not arise on the date of creation of mortgage but will arise on the date when the mortgagor pays or tenders to the mortgagee or deposits in Court the mortgage money or the balance thereof. Once mortgage always a mortgage and is always redeemable. But the Court below has held that even in case of usufructuary mortgage a period of limitation for redemption of mortgage is 30 years. It is to be seen whether the trial Court is justified in holding that even in case of usufructuary mortgagee the limitation is 30 years from the date of creation of mortgage. To answer this question it will be appropriate to refer to the statutory provisions of Transfer of Property Act, Limitation Act, contents of the mortgage deed and the decisions cited at the Bar.

19. Section 58(a) of Transfer of Property Act defines a mortgage as under:

"A mortgage is the transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt or the performance of an engagement which may give rise to a pecuniary liability.

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

20. There are various types of mortgage viz., Simple mortgage, Mortgage by conditional sale, Usufructuary mortgage, English mortgage, Mortgage by deposit of title deeds, Anomalous mortgage. But we are concerned with usufructuary mortgage.

21. Section 58(d) of the Transfer of Property Act "defines usufructuary mortgage as under:

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

22. In order to ascertain the nature of mortgage involved in this case, it is necessary to reproduce the contents of mortgage deed (Ex. P1), which are as under:

23. Reading of the contents of the mortgage deed between lines, it is evident that under the deed, possession has been handed over to retain the same till the repayment of mortgage money. It is stated that in lieu of payment of interest on Rs. 7,000/- mortgage money, the mortgagee is authorised to appropriate a rent derived from the property. No time limit: as such has been fixed in the deed for redemption of mortgage. Thus, Ex. P-1 - mortgage deed fulfils all the ingredients of usufructuary mortgage.

24. Section 60 of the Transfer of Property Act, speaks about rights of mortgagor to redeem. It runs as follows:

"60. Right of mortgagor to redeem:- At any time after the principal money has become (due), the mortgagor has a right, on payment or tender, at a proper time and place, of the mortgage-money, to require the mortgagee (a) to deliver (to the mortgagor the mortgage-deed and all documents relating to the mortgaged property which are in the possession or power of the mortgagee), (b) where the mortgagee is in possession of the mortgaged property, to deliver possession thereof to the mortgagor, and (c) at the cost of the mortgagor either to re-transfer the mortgaged property to him or to such third person as he may direct, or to execute and (where the mortgage has been effected by a registered instrument) to have registered an acknowledgment in writing that any right in derogation of his interest transferred to the mortgagee has been extinguished:

Provided that the right conferred by this section has not been extinguished by act of the parties or by (decree) of a Court.

The right conferred by this section is called a right to redeem and a suit to enforce it is called a suit for redemption.

Nothing in this section shall be deemed to render invalid any provision to the effect that, if the time fixed for payment of the principal money has been allowed to pass or no such time has been fixed, the mortgagee shall be entitled to reasonable notice before payment or tender of such money."

25. Section 62 of the Transfer of Property Act, speaks about the right of usufructuary mortgagor to recover the possession. It runs as follows:-

"62. Right of usufructuary mortgagor to recover possession;-

In the case of a usufructuary mortgage, the mortgagor has a right to recover possession of the property, (together with the mortgage-deed and all documents relating to the mortgaged property which are in the possession or power of the mortgagee),-

(a) where the mortgagee is authorized to pay himself the mortgage money from the rents and profits of the property, when such money is paid;

(b) where the mortgagee is authorized to pay himself from such rents and profits (or any part thereof a part only of the mortgage-money), - when the term (if any) prescribed for the payment of the mortgage money, has expired and the mortgagor pays or tenders to the mortgagee (the mortgage-money or the balance thereof) or deposits it in Court as hereinafter provided."

26. Article 61(a) of the Limitation Act, 1963 provides for limitation to institute a suit to redeem or recover the possession of immovable property mortgaged as 30 years from the date when the right to redeem or to recover possession accrues.

27. Article 63(a) of the Limitation Act, 1963 provides a period of limitation of 30 years to institute a suit for foreclosure by a mortgagee when the money secured by the mortgage becomes due.

28. Thus, from the reading of Sections 60 and 62 of the Transfer of Property Act, it is obvious that under Section 62, the right of mortgagor in case of usufructuary mortgage to recover possession is specially dealt with. In other words, Section 62 is applicable only to usufructuary mortgage and not to any other mortgage. The right of mortgagor in case of any other mortgage is governed by Section 60 of the Transfer of Property Act. Under Section 62, the right of usufructuary mortgagor to recover the possession commences on payment of mortgage money out of usufructs or partly out of usufructs and partly on payment or deposit by the mortgagor. In the instant case, it is nobody''s case that mortgagor paid or deposited mortgage money and thereby the right to recover the possession has commenced. When the right to recover the possession is not commenced, the extinguishment of right to recover the possession does not arise. At this juncture, it is relevant to state that mortgagor''s right of redemption and the mortgagee''s right of foreclosure are co-extensive. In other words, when the right to seek redemption comes to an end, right to seek foreclosure begins.

29. Though this is a suit filed by the plaintiff/mortgagee to declare that the plaintiff became full owner of the schedule property, it is a suit for foreclosure. Therefore, it is suffice to say that there was no cause of action for the plaintiff/ mortgagee to institute suit for foreclosure.

30. Coming to the decisions cited by the learned counsel for appellants reported in Harbans Vs. Om Prakash and Others, the two judge bench of the Supreme Court following the earlier three bench decisions of the Supreme Court reported in Seth Ganga Dhar Vs. Shankar Lal and Others, , has held as under:

"Transfer of Property Act (4 of 1882). S. 60 - Redemption of mortgage - Limitation - No evidence to show that mortgage was for fixed period - No limitation applies to rigid of mortgagor to redeem property - Property can be redeemed at any time."

31. In the subsequent two judge bench decision of the Supreme Court relied upon by the plaintiff reported in Prabhakaran and Others Vs. M. Azhagiri Pillai (Dead) by LRs. and Others, , in Head Note "C", the Supreme Court held as under:

"C. Limitation Act, 1963 - Art. 61(a) -Usufructuary mortgage - Redemption suit - Limitation period for - When commences - Held, said period commences immediately on execution of the mortgage deed and mortgagor has to file redemption suit within 30 years from the date of the execution of the mortgage - Transfer of Property Act, 1882 - Ss. 58(d), 60 and 62."

In para 13 of the judgment, the Supreme Court observed as follows:-

"13. Article 148 of the Limitation Act, 1908 (referred to as "the old Act") provided a limitation of 60 years for a suit against a mortgagee to redeem or to recover possession of immovable property mortgaged. The corresponding provision in the Limitation Act, 1963 ("the new Act" or "the Limitation Act" for short), is Article 61(a) which provides that the period of limitation for a suit by a mortgagor to redeem or recover possession of the immovable property mortgaged is 30 years. The period of limitation begins to run when the right to redeem or to recover possession accrues. In the case of a usufructuary mortgage which does not fix any date for repayment of the mortgage money, but merely stipulates that the mortgagee is entitled to be in possession till redemption, the right to redeem would accrue immediately on execution of the mortgage deed and the mortgagor has to file a suit for redemption within 30 years from the date of the mortgage. Section 27 of the Limitation Act provides that "at the determination of the period hereby limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished". This would mean that on the expiry of the period of limitation prescribed under the Act, the mortgagor would lose his right to redeem and the mortgagee would become entitled to continue in possession as the full owner."

32. Relying upon the decision of the Supreme Court reported in Prabhakaran and Others Vs. M. Azhagiri Pillai (Dead) by LRs. and Others, , the trial Court decreed the suit holding that the limitation starts from the creation of the mortgage deed and since the mortgagor failed to bring the suit within a period of 30 years from the date of creation of the mortgage, the right of mortgagor is extinguished and the plaintiff/mortgagee became the full owner of the property.

33. In the aforesaid decision relied upon by the plaintiff, there is no reference to the earlier two judge bench decision of the Supreme Court reported in AIR 2006 Supreme Court 686 rendered on 10.11.2005 (in case off Harbans v. Om Prakash & Ors.,) or three judge bench decision of the Supreme Court reported in Seth Ganga Dhar Vs. Shankar Lal and Others, . It is apparent that the Supreme Court took conflicting views with regard to limitation to file a suit for redemption in case of usufructuary mortgage. But finally three judge bench of the Supreme

Court headed by Hon''ble Justice T.S. Thakur in a decision rendered on 21.08.2014 in Civil Appeal No. 5198/2008 and batch of cases pending before the Supreme Court after elaborate discussion and referring to all the earlier decisions on the subject, laid down the correct position of law in para 15 of the judgment which reads thus:-

"15. We, thus, hold that special right of usufructuary mortgagor under Section 62 of the T.P. Act to recover possession commences in the manner specified therein, i.e., when mortgage money is paid out of rents and profits or partly out of rents and profits and partly by payment or deposit by mortgagor. Until then, limitation does not start for purposes of Articles 61 of the Schedule to the Limitation Act. A usufructuary mortgagee is not entitled to file a suit for declaration that he had become an owner merely on the expiry of 30 years from the date of the mortgage. We answer the question accordingly."

34. In view of the law laid down by the three judge bench decision of the Apex Court (supra), the judgment and decree passed by the trial Court declaring the plaintiff/mortgagee as full owner of the schedule property is liable to be set aside.

35. At this stage, it is necessary to state that the appellants/legal representatives of defendant No. 6-mortgagor filed O.S. No. 120/2004, a suit for ejectment on the file of Civil Judge (Junior Division), Chintamani against defendant No. 7-tenant and obtained the possession in pursuance of the decree passed in the said suit without redemption of mortgage. In that event, plaintiff/mortgagee is at liberty to take recourse to law for restoration of his possession. Since suit is liable for dismissal for want of cause of action, this Court cannot grant relief that the proceeding in O.S. No. 120/2004 are not binding on the plaintiff/mortgagee. In the result, I proceed to pass the following:

ORDER

The appeal is allowed. The judgment and decree dated 09.10.2010 in O.S. No. 5/2008 on the file of the Senior Civil Judge and J.M.F.C., Chintamani, is set aside. The suit is dismissed.