**(1955) 08 MAD CK 0005**

**In the Madras High Court**

**Case No :** Appeal No. 683 of 1950

Venkitasubramania Ayyar — APPELLANT

Vs

Vadasseri Tarwad Karnavan and manager Itti Chathar Valiya Mannadiar and others — RESPONDENT

**Date of Decision :** 05-08-1955

**Acts Referred:**
Stamp Act, 1899 — Section 2
Transfer of Property Act, 1882 — Section 100, 58(g), 61, 67, 67A

**Citation :** (1955) 08 MAD CK 0005

**Hon'ble Judges :** Ramaswami, J;Govinda Menon, J

**Bench :** Division Bench

**Advocate :** T.R. Sangameswaran, for the Appellant; U. Gopala Menon, T.K. Raman Nambisan and K.S. Sankara Iyer, for the Respondent

**Final Decision :** Dismissed

# Judgement

Govinda Menon, J.—Defendant 1 in O.S. No. 15 of 1947 on the file of the Sub Court, Palghat, has appealed against the preliminary decree

whereby redemption, was ordered of a mortgage for Rs. 35,000 without a direction for payment of the major portion of the amount claimed by

him in the suit, as a condition precedent to redemption. There is very little dispute with regard to the facts of the case and the point for

determination is mainly one of law.

2. An usufructuary mortgage Ex. A. 1 dated 14-4-1932 is by plaintiffs 1 and 2 in favour of the father of defendant 1 who then represented a joint

Hindu family and it is an admitted fact now that defendant 1 is the representative of the mortgagee family. Defendants 2 to 5 are the tenants

claiming fixity of tenure and we are not concerned with their claims in the present appeal. The third plaintiff is the executor under the will of one

Raman Nair.

Plaintiffs 1 and 2 executed a puisne usufructuary mortgage on 4-4-1946 in favour of this Raman Nair and his wife authorising them to redeem and

recover possession of the properties mortgaged under Ex. A. 1. The mortgage under Ex. A. 1 was in respect of three items, a residential building

in the town of Palghat, item 2 consisting extensive paddy fields expected to fetch an annual pattom of 6300 paras of paddy and item 3 is a

bungalow at Ootacamund.

The terms of the mortgage were that the mortgagee should hold the properties, cultivate or cause to be cultivated or lease out the same for pattom

pay government revenue and municipal taxes from the income and should appropriate the remaining usufruct towards interest due on the mortgage

amount. It was further stated that the sum of Rs. 35,000 if paid in any year during the ''kalappad'' (15th January to 12th April) should be received

by the mortgagee and the properties released.

There was also a covenant that the mortgagee was at liberty to recover the mortgage amount by sale of the rights belonging to the mortgages .

There was already a mortgage on these items to the Maharani Gaekwar of Baroda and the balance due on the date of Ex. A. 1 was Rs. 20,000.

Therefore Ex. A. 1 was only a second mortgage.

On the same date under Ex. B 1 the mortgagors took back the mortgaged properties on lease agreeing to pay rent of Rs. 4200 which represented

interest on the mortgage amount at the rate of 12 per cent per annum with a stipulation that the arrears of rent could be recovered by the sale of the

equity of redemption of the mortgage properties. In other words there was a charge for arrears of rent on the mortgagors'' rights. The mortgagors

lessees agreed to surrender possession of the properties before 12-4-1933, without raising any disputes whatever.

In addition to this, the document stated that the mortgagors were agreeable to the mortgagee recovering the usufructuary mortgage amount of Rs.

35,000 and the arrears of rent due under the lease deed together or any one of them alone in whatever manner the mortgagee may deem fit by

causing the mortgaged properties to be sold by other means, by instituting legal proceedings or otherwise. It is not necessary to refer to tire other

clauses in the deed.

 

At the very outset it may be remarked that Ex. B. 1 is in explicit terms and is in essence a lease for one year without any provision for the lessees,

holding over at all and the charge created on the equity of redemption was only for rent for one particular year.

3. Accordingly the mortgagors-lessees continued in possession of the properties and after the lapse of one year nothing was done. Neither did the

mortgagee claim the mortgage money and rent for one year and recover possession of the properties nor was there any attempt to recover the

amount by legal proceedings. Nearly three years had elapsed when the mortgagee lessor caused a lawyer''s notice to be sent for obtaining

surrender of the properties.

4. Under. Ex B. 2 dated 25-1-1935, the mortgagors surrendered items 1 and 2 to the mortgagee. The rent of item 1 was fixed at Rs. 30 per

mensem as it was occupied by a tenant. In regard to item 2 being lands held by the cultivating tenants it was stipulated that the annual rent of 6300

paras of paddy should be commuted at the rate of Rs. 30 per cart load of paddy, and the amount arrived at was Rs. 2700.

This commutation was irrespective of the decrease or increase in the value of paddy. By this method towards Rs. 4200 due to the mortgagee a

sum of Rs. 3060 was satisfied and the document stated that the balance amount to make up Rs. 4200 would be paid every year. The document is

said to contain a further stipulation that arrears of rent due till then as well as the amount necessary to make Rs. 4200 after crediting Rs. 3060

would also be made a charge on the equity of redemption.

Accordingly possession of items 1 and 2 were given over to the mortgagee-lessor. In 1939 an assignee of the mortgage right in favour of the

Maharani of Baroda brought a suit for recovery of the balance due under the mortgage & got a decree. When the properties were about to be

sold defendant 1''s father paid Rs. 3200 and got the sale adjourned but with no purpose.

Finally items 1 and 3 were sold and even then the decree was not satisfied. Faced with this situation defendant 1 got an assignment of that

mortgage decree for Rs. 6500 under Ex. B. 4 dated 18-3-1941. As stated already on 4-4-1946 a possessory mortgage was executed by plaintiffs

1 and 2 in favour of one Raman Nair and his wife with authority to redeem Ex. A.

 

1 and thereafter under O.P. No. 20 of 1946, Sub Court

Palghat, Rs. 35,000 was deposited under S. 83, Transfer of Property Act and notices were taken out to defendant 1 and since the mortgagees

refused to accept the amount and surrender the mortgaged properties, that petition was dismissed.

Thereafter the present suit for redemption was filed with a prayer for redemption of the mortgage and for directing delivery of possession of item 2

free from mortgage to plaintiff 3 on payment of Rs. 35,000. There was a further prayer for payment of mesne profits on that item from 1945-46 to

the date of recovery of possession of the properties at the rate of 6300 paras of paddy per annum and interest thereon.

5. Defendant 1 contested the suit by claiming various sums of money to be paid over as a condition precedent to a decree for redemption.

Six schedules were annexed to. his written statement, According to schedule I he was entitled to arrears of rent due upto the date of Ex. B 1 with

interest thereon making a total of Rs. 33,012; under schedule 2 he claimed the balance due every year after crediting Rs. 3060 towards the rent of

Rs. 4200 from the date of Ex. B. 2 with interest thereon making a total of Rs. 37,092.

Under schedule 3 he claimed a sum of Rs. 2549-8-6 in respect of expenses incurred to protect title of item No. 2 in a litigation with a third party.

Schedule 4 dealt with a sum of Rs. 18503 paid by him to ward off a sale in execution of the decree on the mortgage of Maharani of Baroda as

well as the amount paid for getting the assignment Ex. B. 4. Under schedule 5 Rs. 8972-1-0 was claimed by way of value of improvements and

under schedule 6 the kattakanom amount paid by defendant 1 amounting to Rs. 2000 was also claimed.

Under the six schedules the total amount claimed by defendant 1 was Rs. 102129-5-6. In paragraph 17 of his written statement defendant 1

further claimed compensation for the loss of items 1 and 3 as well as lands fetching a rent of 560 paras paddy under item 2.

6. The learned Subordinate Judge found that there should be a preliminary decree for redemption of the mortgage on payment of the principal

amount of Rs. 35,000 and a further sum of Rs. 6263-9-8 made up of Rs. 3,200 paid to the decree holder under the first mortgage with interest thereon at nine per cent per annum from the respective dates of payment as well as Rs. 918 towards value of improvements making in all a sum of

Rs. 42181-9-8. Accordingly a preliminary decree for that amount under O. 34, R. 11, C.P.C., was passed.

7. The appeal is by the first defendant claiming a higher sum than what has been awarded to him.

8. Mr. T.R. Sangameswaran, learned counsel for the appellant in a clear argument has put forward the case of the appellant in the best manner

possible. He did not press such portions of the claims under Schs. 3 to 6 of the written statement as were disallowed by the trial Court. He also

conceded that the amounts mentioned by way of damages in para. 17 of the judgment of lower Court need not be made the subject-matter of

consideration. His arguments were confined only to pressing the claim with respect to two amounts stated in Schs. l and 2 of the written statement

of the first defendant, namely, arrears of rent for a period of three years prior to Ex. A2 with interest thereon and the accumulated interest, and the

balance due towards interest after crediting a sum of Rs. 2700 being the rent for item 2. We shall now discuss the legal points raised in that

connection.

9. That Ex. A1 is not an usufructuary mortgage simpliciter but is a combination of two different kinds of mortgages by one of which the mortgagee

is allowed to remain in possession and by the other he is allowed to realise the amount advanced as mortgage money by sale of the mortgaged

property, is not disputed. By S. 58(g), Transfer of Property Act, a mortgage which is not a simple mortgage, a mortgage by conditional sale, an

usufructuary mortgage, an English mortgage or a mortgage by deposit of title deeds within the meaning of the section, is called an anomalous

mortgage. That is, where there is a combination, as in the present case, of two different kinds of mortgages the transaction amounts to an

anomalous mortgage in which case the rights and liabilities of the parties shall be determined by the contract as evidenced by the mortgage deed

and so far as such a contract does not extend to local usage.

One of the component parts of Ex. A1 is a simple mortgage by which the mortgagee is authorised to realise the sum of Rs. 35,000 by sale of the

mortgaged properties. There is, therefore, either explicitly or by implication no charge created either for interest or for rent. As we have already

stated the contemporaneous lease back specifically mentions that the rents for one year will be a charge on the equity of redemption. Power is

given to the mortgagee to sue for recovery of the principal and the rent for the year by sale of the mortgaged property or to realise the two

amounts separately.

It is clear from the recitals herein that the equity of redemption has not been made security, for any rent due from the mortgagors-lessees, when

there is a holding over of the tenancy. In other words, the rent due for a period of two years after the expiry of one year mentioned in Ex. B1 is not

made a charge on the equity of redemption. The learned Subordinate Judge was of the opinion that no such charge was created and we agree with

him. It is doubtful whether under Ex. B2 there was any intention to create a charge for arrears of rent till then due and for the proportionate rent

chargeable on items 1 and 3 from the date of sale in the suit by the assignee from the Maharani of Baroda.

The learned Subordinate Judge says that the learned counsel for the first defendant conceded before him that by the recital in the surrender deed a

valid charge has not been created in law in respect of the balance of the amounts as it only amounted to an oral contract and there was no

registered contract creating a charge as such. Mr. Sangameswaran does not abide by the concession made by his client''s counsel in the trial Court

because it is stated that the concession should not be taken as an abandonment by the first defendant of the contention that there was a charge.

10. We have, therefore, to see whether there is a charge in fact. Exhibit B2 is not stamped in the manner in which a document creating a charge

should be stamped. Nor has it been registered as such. Under S. 2, Cl. 17, Indian Stamp Act ""mortgage deed"" includes every instrument whereby

for the purpose of securing money advanced or to be advanced by way of loan, or an existing or future debt or the performance of an engagement

one person transfers or creates, to or in favour of another a right over or in respect of specified property. In view of this definition, a document

creating a charge is deemed to be a mortgage deed under the Stamp Act.

Article 32 of the First Schedule of the Indian Stamp Act and Art. 27 of the Madras Amendment provide that on such documents the duty payable is the same as for a conveyance for a consideration equal to the amount due of the further charge secured by such instrument. That being the case,

there can be no doubt whatever that it was far from the intention of the parties to create a further charge on the equity of redemption. That a charge

can be created only by a registered document after the amendment of S. 100, Transfer of Property Act, is evident from the decisions in Tenneti

Viswanadham Vs. M.S. Menon, Official Liquidator of the Swarajya Printing and Publishing Company Limited and Another, and Sathiya Nathan v.

Venkatarama Iyer, 1955 1 Mad LJ 399 (B). See also Pandit Shiva Rao and Another Vs. D.A. Shanmughasundaraswami (Official Liquidator) and

Others, .

In regard to Ex. B2 another point to be noted is that when items 1 and 2 are surrendered to the mortgagee there can be no further question of a

lease subsisting and any amount being due on the lease; for the legal relationship created by Ex. B1 has ceased to exist with Ex. B2 and therefore if

the intention had been to create a further charge for what was considered as a portion of the interest payable by the mortgagor it is essential to

embody the same specifically in the document, stamp it as a mortgage and have it registered as a mortgage.

According to the appellant''s point of view the relative legal position of the parties is in the following manner; By virtue of the combined operation

of Exs. A1 and B1 the mortgagors should be deemed to be in possession of the properties until 21-1-1935 which means that till then the rent due

on the mortgage should be deemed to be interest on the principal sum and both the amounts are a charge on the mortgaged properties.

From 25-1-1935 till sometime in 1939 the mortgagee had possession of items 1 and 2 while item 3 remained with the mortgagors. During that

period the mortgagors are bound to pay proportionate interest calculated after deducting the Income from items 1 and 2. This will be a charge on

the mortgaged property. After 1930 the mortgagee lost item No. 1 as well and therefore the interest due will be enhanced by the addition of

income from item No. 1 as well.

11. The legal position according to the plaintiffs respondents is that Ex. A1 is an usufructuary mortgage and there can be no charge for the interest

due thereon. Under Ex. B1 there is no doubt a charge for one year''s rent on the equity of redemption. This should be deemed to be a second

mortgage for that amount on the equity of redemption and under Ex. B2 no charge whatever is created either for two years'' arrears of rent or for

the proportionate rent payable on items 1 and 3. There is, therefore, an usufructuary mortgage for Rs. 35,000 with a puisne simple mortgage on

the equity of redemption for Rs. 4200/-. In these circumstances the mortgagors plaintiffs are entitled to redeem the usufructuary mortgage without

paying off the subsequent simple mortgage.

12. We have come to the conclusion that under Ex. B1 the charge created, was only for one year''s rent and therefore, the subsequent mortgage is

only for that purpose. On the concession made in the lower Court, three can be no charge created under Ex. B-2.But even supposing for the sake

of argument that under Ex. B-2 a charge is created for the two years'' arrears of rent till then due and also for proportionate rent in respect of items

1 and 3, still there is no obligation on the part of the plaintiffs to redeem this mortgage even accepting the plaintiffs'' contention as correct that in

addition to the usufructuary mortgage there is a second mortgage created under Ex. B-1 and a third mortgage under Ex. B-2 all of which in our

opinion are distinct and separate. If that is so, under S. 61, T.P. Act it is open to the mortgagor to redeem the mortgages separately.

As the section stood before the amendment in 1929 a mortgagor seeking to redeem any one mortgage shall, in the absence of a contract to the

contrary, be entitled to do so without paying any money due under any separate mortgage made by him, or by any person thorough whom he

claims, on property other than that comprised in the mortgage which he seeks to redeem, under the present section in the absence of a contract to

the contrary a mortgagor who has executed two or more mortgages in favour of the same mortgagee shall when the principal money or any two or

more of the mortgages has become due, be entitled to redeem any one such mortgage separately or any two or more of such mortgages together.

In other words there is a right conferred upon the mortgagor to redeem the mortgages in any manner he pleased. He need not redeem all of them

together but can exercise an option to redeem one or more of them at the same time.

13. It is urged on behalf of the appellant that the provision in Ex. B-1 by which it

 

was stated that the mortgagee can sue for recovery of principal

and one year''s rent either together or separately amounts to a contract to the contrary within the meaning of S. 61, T.P. Act. For one thing Ex B-1

provides for a suit by the mortgagee for sale of the properties and not a suit for redemption by the mortgagor.

In addition, we cannot say that this provision is a contract to the contrary as contemplated in S. 61. What is meant by a contract to the contrary in

those circumstances is that when the law gives an option to the mortgagor to redeem one or more of the mortgages separately, if it should be held a

contract to the contrary, it should state that the mortgagor is prevented from exercising the right conferred under S. 61 of the Act and should be

obliged to redeem all the mortgages together.

We do not think that there is any such contract in Ex. B-1. It may also be useful to compare S. 67A with S. 61 and to note the antithesis. Whereas

under S. 61 liberty is given to the mortgagor where there are two or more mortgages on one and the same property in favour of the same

mortgagee to redeem any one of them separately or all of them together, under S. 67A a mortgagee who holds two or more mortgages executed

by the same mortgagor in respect of each of which he has a right to obtain the same kind of decree under S. 67 and who sues to obtain such

decree on any one of the mortgages shall, in the absence of a contract to the contrary, be bound to sue on all the mortgages in respect of which the

mortgage money has become due.

The result, therefore, is that the mortgagee is compelled to sue on all the mortgages together, whereas the mortgagor is given latitude to redeem

one or more of the mortgages separately. Such being the case even if separate mortgages are created under Exs. A-1, B-1 and B-2 since this is a

suit for redemption by the mortgagors there is no legal impediment to the redemption of any one of the mortgages. If on the other hand the

mortgagee had brought a suit for realisation of the amounts due under the several mortgages he has to combine them together and file a suit for the

total amount.

There is, therefore, no objection to the plaintiffs'' suit on that basis. By the amendment of S. 61, T.P. Act, the situation has been completely

charged. Therefore if by implication under the unamended section it was obligatory on the part of the mortgagor to redeem all the mortgages

together if they were in favour of the same mortgagee and in respect of the same property, this as been now made unnecessary.

14. Learned counsel for the appellant attempted to get over the situation by contending that the mortgage and the lease back namely, Exs. A-1 and

B-1 should be deemed to be parts of one and the same transaction and that in a suit for redemption of the mortgage, the mortgagee is entitled to

insist on payment of not only the mortgage amount but the other sums due under the lease such as arrears of rent etc., to be added on to the

mortgage money for the period during which the mortgagor was in possession. To substantiate this argument various cases were cited which we

shall presently note in detail.

15. In - ''Imdad Hasan Khan v. Badri Prasad'', 20 All 401 (D), there was a mortgage and a lease back both being understood as one transaction

because the lease was conterminous with the mortgage. That is the mortgagee-lessor was not entitled to eject the mortgagor-lessee until the expiry

of the term mentioned in the mortgage.

It was contended in that case that at the time of redemption not only the principal amount on the mortgage but also the amount of profits payable

under the lease taken by the mortgagor and not paid by him should be paid over to the mortgagee and the basis for this argument was that the

mortgage and the lease back constituted one and the same transaction and that the relationship between the parties should be regarded so far as

the two documents are concerned, as that of the mortgagor and the mortgagee.

The learned Judges held that among the circumstances which indicated the oneness of the transaction was the fact that the lease was terminable

with the mortgage and could not be surrendered so long as the mortgages subsisted. For this and other reasons they held that the relationship

between the parties is that of a mortgagor and mortgagee by a combination of both the documents, namely, the mortgage and the lease and any

rights and liabilities arising under the lease must be considered as arising out of that relation. At p. 407 it was observed as follows:

The lease money qua lease money was undoubtedly not a charge on the mortgaged property but qua interest it is a charge on the property and the

mortgagee is entitled to hold the property as security not only for his principal mortgage money but also for interest. We are of opinion that the

plaintiffs must pay to the mortgagee the arrears of interest due to him in addition to the principal and that the court below has erred in holding the

contrary.

16. It has to be remembered that this decision was long before the amendment of S. 61, T.P. Act which by implication is said to compel a

mortgagor to redeem all the mortgages on one and the same property at the same time. It was also on the looting that the rent under the lease was

interest on the mortgage. In the present case for one thing the mortgage and the lease back are not coferminable.

Under Ex. A-1 the redemption could only be during particular periods, namely ''kalappad'' in the year. If no redemption takes place during the

''kalappad'' it will not be possible for the mortgagor to otter to redeem the property until another year when the ''kalappad'' comes in but under Ex.

B-1 the lease was only for a period of one year and thereafter the lessee must be deemed to be holding over and can be ejected at any time.

This significant circumstance distinguishes the facts of the present case from the decision in - 20 All 401 (D), apart from the fact that subsequent

decisions not only of this court but of other High Courts as well have not affirmatively approved 20 All 401 (D). There is also the amendment of S.

61. T.P. Act.

17. Our attention was next invited to the observations of the Privy Council in AIR 1927 32 (Privy Council) , which was an appeal from Panaganti

Ramarayanimgar Vs. Sri Rajah Velugoti Govinda Krishna Yachendra Bahadur Varu, Maharajah of Venkatagiri and Others, . This Court in the

latter case was of the opinion that the mortgagor has a statutory right to redeem one mortgage on his property without at the same time paying off

the entire mortgage on the same and other properties as well.

Seshagiri Aiyar J. held that whatever may be the lights of a mortgagee in India, to compel a mortgagor to consolidate the mortgages upon the same

property, the rule is not applicable against purchasers of equity of redemption. But the Privy Council on appeal took a different view and held that

since the lease back was of the same date as the mortgage on a true construction that upon default in payment of the rent reserved it should be a

charge upon the property included in the mortgage deed and therefore in a suit for redemption and possession by the assignee of the mortgagee''s

interest against the assignee of the mortgagee the mortgagee was entitled to have the arrears of rent included in the sum to be paid as a condition of

possession.

Mr. K.S. Sankara Aiyar, learned counsel for the respondents contended that after the amendment of S. 61, T.P. Act, the observations in AIR

1927 32 (Privy Council) , are no longer good law. Learned counsel urged that it was to obviate the consequences arising from the decision in AIR

1927 32 (Privy Council) , that the section was amended. We are of the opinion that this contention is well founded.

Even if there is a mortgage and lease back and a charge is created on the equity of redemption for arrears"" of rent still the two transactions cannot

be treated as one and the same mortgage compelling the mortgagor to redeem the same as such. It may be for the purpose of O. 34, R. 14,

C.P.C. that the rent under a lease deed may be considered to be a claim arising under the mortgage but that would not be enough to show that it is

part of the same mortgage.

Though in N.C. Lakshmikutti Ammal Vs. V. Mariathummal alias Thithumma and Others, , Jackson J. held that a mortgage with possession and a

lease back on the same date should be deemed to be part of one and the same transaction and though the mortgagee in such a case might obtain a

decree for rent on the lease document alone, his claim would nevertheless be one arising under the mortgage and a sale by him of the mortgaged

property in execution of that decree would be within the mischief of O. 34, R. 14, C.P.C. It has also been held that there is no prohibition against

the mortgagee lessor bringing a suit for the sale of the equity of redemption and thereby getting over the provisions of O. 34, R. 14, C.P.C.

The observations of the Privy Council in - ''Abdullah Khan v. Sasharat Hussain'', 35 All 48 (PC) (H), to the effect that where there is a mortgage

and lease back of even date the two should be deemed to be parts of one and the same transaction were also relied upon. Lord Macnaghten in

enunciating that principle did not say that the sent under the lease deed was interest on the mortgage amount. It may also be that the lease deed is a

machinery for collecting interest on the mortgage but all that would not be sufficient for holding that the two amounts constitute one indivisible whole.

We do not find anything in Parasurama Pattar v. Venkatachalam Pattar'', 25 Mad LJ 561 (I), which would support the contention of the appellant.

Nor do we find that the observations of the learned Judges in - ''Mangeswar Narina Rao v. Shiva Rao'', AIR 1919 Mad 59 (J), to the effect that in

the case of a contemporaneous lease with an usufructuary mortgage the mortgagee-lessor sued the mortgagor as lessee for arrears of rent and

obtained a decree and the same has become barred he is not entitled to insist that at the time of redemption the mortgagor should pay that amount

as well.

Learned counsel for the appellant cites this as authority by implication holding that if no decree had been obtained then the mortgagor would be

obliged at the time of redemption to add rent also to the mortgage amount. The decision in Karankattil Haji Thambilava Ismal Rowthen''s son

Chinnappayan alias Muhammad Rowthen (dead) and Others Vs. Karumannasseri Gramam Parasurama Pattar''s son Narayana Pattar, , related to

the applicability of O. 34, R. 14, C.P.C. and so does not carry the case of the appellant any further.

So also the observations of Chandra Reddi J. in Kuttyal and Others Vs. P. Sanjiva Rao, , where the learned Judge held that a decree for rent in

respect of a lease back which is part of an usufructuary mortgage is a claim arising under the mortgage and under O. 34, R. 14, C.P.C. In exercise

of his power to bring the mortgaged properties to sale in execution of the decree under O. 34, R. 14, C.P.C. the mortgagee cannot bring the

properties to sale in enforcement of the claim arising under the mortgage except by instituting a suit for sale in enforcement of the mortgage.

All claims arising under a mortgage should be adjudicated by the court either at the time of redemption of the mortgage or when the mortgagee

brings a suit on his mortgage. Here also the mortgage was dated 7-9-1916 long before the amendment. The learned Judge nowhere says that the

rent arising under the lease deed is part and parcel of the mortgage money.

18. In M.S. Kalyanasundaram Ayyar Vs. M.S. Subramanya Ayyar and Others, , a Bench of this court to which one of us was a party, held that

where a mortgage and a lease back to the mortgagor are part and parcel of one and the same transaction a decree for arrears of rent will be one for payment of money in satisfaction of the claim arising under the mortgage. A sale in execution of such a decree is in contravention of O. 34, R.

14, C.P.C. and is voidable and not void.

This proposition cannot be doubted but the whole question is whether the charge is created for the rent in the usufructuary mortgage itself or by the

rent deed. In the present case we have held that the usufructuary mortgage does not create any charge for payment of interest at all.

Our attention was also drawn to the observations in - ''Madha Sidhanta Onahini Nidhi v. Venkataramanujulu Naidu'', 26 Mad 662 (N), at pp. 666

and 667 where it was held that under similar circumstances the intention of the parties was that the two documents should be read together and the

character of the transaction determined with reference to the provisions of both.

It is of course the intention of the parties irrespective of the mere form of the instruments executed between them that determines their rights. They

further held that the two instruments point to the view that what purports to be a mortgage is not distinct from what purports to be a lease. No one

questions the correctness of these general principles but what we have to decide is whether the facts of the present case Justify their application.

The observations of Somayya J. in - ''Nachappa Goundan v. Samiappa Goundan'', AIR. 1947 Mad 18 (O), at p. 33

that if the mortgagee has a right to insist upon the redemption of all the mortgages which have become united in him, he can hold on to the

property and claim that the mortgagor when redeeming the one must redeem all"" were also relied on. The learned Judge there held that the

amended section by the Act of 1929 which came into force on the first of April 1930 did not apply to the mortgage in question which was of 15-

4-1921. The observations of the learned Judge at p. 33 wherein he has extracted side by side S. 61, T.P. Act before the amendment and as

amended and the discussion regarding the scope of the amendment would show that after the amendment there is no such consolidation and the

mortgagor cannot be compelled to redeem an the mortgages together.

19. If, therefore, defendant 1 has to succeed in his contention it should be affirmatively proved that Exs. A-1 and B-1 taken together form a

composite mortgage of a simple nature containing all express covenant to pay the principal with interest on the mortgage money in which case there can be no doubt that rent due under Ex. B-1 can be recovered by sale of the mortgaged property.

The authorities to which the plaintiffs-respondents'' counsel referred negative the proposition aforesaid and therefore we shall refer to them. Kutti

Umma v. Madhava Menon'', 11 Mad LJ 186 (P), the facts of which are very similar to what we have to decide is one on which strong reliance has

been placed. There, as here, after the usufructuary mortgage was executed there was a contemporaneous lease back in favour of the mortgagor

and in a suit for redemption, it was held that the mortgagor is not bound at the time of redemption to add to the mortgage money the rent due under

the lease deed.

The decision in 20 All 401 (D), was referred and distinguished by the learned Judges. The case might have been different if the mortgagee in

pursuance of the covenant contained in the deed for recovery of the amount by sale of the Property brings a suit for that purpose and probably in

such a case under special circumstances as held in Erath Unikkat Tarwad Karnavan and Manager Eressa Menon Vs. Abdul Rahiman alias

Kunhutti and Others, , may be entitled to claim interest as well but in such a case it would be necessary that the lease should in truth be intended to

be one from year to year or contemporaneous with the mortgage transaction itself and that the two documents should form one composite whole.

But that is not the case here. A recent case decided by the Travancore-Cochin High Court repeated in - ''Beevathuma v. Lakshmi Ammal'', AIR

1952 TC 92 (R), is illustrative. The facts of that case are more or less similar to those in the present case. An usufructuary mortgage was

accompanied by a lease back of even date which provided that the lessee should pay the net pattom of a certain sum of money.

The mortgage deed provided that the mortgagee could demand the mortgage money in the month of Kumbum of any year (15th February to 15th

March) and that the mortgagor could likewise seek to redeem only during the Kumbam of any year. The learned Judges held that the usufructuary

mortgage and the lease did not form part and parcel of one and the same transaction and that the mortgagee could not demand interest being rent

due.

The learned Judges relied upon the dicta of Krishnaswami Aiyangar C.J., Cochin in - '' 37 Cochin L.R. 147 (S) to the effect that

there is no justification for treating pattom (rent) as interest on the mortgage because it is fixed in a lease back of property comprised in an

usufructuary mortgage. The learned Chief Justice further held that the parties have the right to decide what shall be the nature of the contract

between them and what shall be its terms and so long as there is nothing illegal or against public policy in it, it is not open to a court of law to ignore

it and spell out a transaction totally different in character and incidents.

We do not think that there is sufficient justification for not following those observations with which we are in agreement.

20. A few more cases of our High Court require consideration - ''Athan Kutti v. Sutarjanam'', AIR 1918 Mad 1332 (T), was a case which

contains certain relevant observations. What was contended there was that where there were two mortgages on the same property the earlier of

which was an usufructuary one and the later a simple one and the right to enforce the remedy under the simple mortgage become barred under Art.

132, Limitation Act in a suit to redeem the usufructuary mortgage whether it was necessary to pay the amounts due on the simple mortgage as well.

The learned Judges held that there is no such obligation. At p. 1335 Spencer J. has discussed this question. The other learned Judge also

considered the matter and held that it is not necessary to redeem the later mortgage as a condition precedent to redeem the earlier usufructuary

mortgage.

The decision in - ''Ramakrishna Kunkilaya v. Nekkar Kuppanna'', AIR 1919 Mad 1188 (U), also related to an allied topic. There, it was held that

even assuming that all the mortgages over the same property and in favour, of one and the same person ought to be simultaneously redeemed, the

rule should be confined to cases where the mortgages insisted on being redeemed are enforceable and are not such as are barred by limitation or

any other cause from being enforced by a suit. The learned Judges refer to AIR 1918 Mad 1332 (T). Spencer J. at p. 1188 observes:

So far as this presidency is concerned it must be taken as settled law that a mortgagee having more than one mortgage on the same property can

treat each as a separate cause of action and can bring a suit for recovery of his debt by sale of the mortgaged property subject to his interest in a prior mortgage.

Though there are observations that as S. 61, T.P. Act as it stood at that time, the mortgagor seeking to redeem the mortgages over the same

property should be compelled simultaneously to redeem all the existing mortgages, we do not think that the two cases '' AIR 1918 Mad 1332 (T)'',

and '' AIR 1919 Mad 1188 (U)'', relied on by the counsel for the respondents can support his contention.

Mr. Sankara Iyer brought to our notice certain observations contained in K. Gnanadesikam Pillai and Others Vs. Antony Benathu Boopalarayar, .

The facts of that case show that there was an usufructuary mortgage repayable in two years and as part of the same transaction a lease back was

executed fixing the annual rent for a period of two years. The mortgagor-lessee did not redeem the mortgage and continued in possession of the

mortgaged property.

In a suit by the mortgagee lessor to recover arrears of rent for 12 years before the date of the suit it was held that although the mortgage and the

lease back should be construed together and the lease deemed to be also for a period of two years, that in respect of arrears of rent for the first

two years it was secured by a charge on the property, that in respect of subsequent periods there was no charge on the land for the rent due and

as such the arrears of rent for this period for more than three years prior to the date of the suit was barred.

The discussion regarding this aspect of the case is ''at p. 460'' where the decision in 11 Mad LJ 186 (P),'' was followed. It may be mentioned that

the suit was one by the mortgagee-lessor to recover arrears of rent and not by the mortgagor to redeem. Even so, the observations regarding the

absence of a charge for a period of more than one year are helpful. The case in 11 Mad LJ 186 (P)'', was referred to and followed in - ''Makbul

Ali v. Ali Ahmed'', 40 Cal 514 (W), which was precisely on all fours with the Madras case.

The learned Judges interpreted '' 11 Mad LJ 186 (P)'', as laying down two propositions of law, namely, where no interest is stipulated for in the

mortgage deed no interest is recoverable and secondly that a charge in the nature of a mortgage whether for principal or for interest must be

expressed in writing and registered and cannot be raised by implication. It was stated that certain decisions of the Allahabad High Court are in

favour of the view contended for on behalf of the respondents.

21. In - ''Shankur Sarup v. Mejomal'', 23 All 313 (X), there was a mortgage with a lease back and the lease deed stated that the rent should be a

charge on the property leased. Though it was not executed and registered on the same date as the mortgage nor were the terms of the two

instruments coincident the learned Judges held that the two transactions must be treated as separate and the mortgagor could not be compelled as

a condition precedent to redeem the mortgage to pay the charge created by the lease deed following - ''Tajjo Bibi v. Bhagwan Prasad'', 16 All

295 (Y), where also a similar proposition of law has been laid down.

These authorities make it clear that when a mortgagee brings a suit for sale of the mortgaged properties he has to claim all the amounts under

separate mortgages.

The same principle cannot be applied when a mortgagor brings a suit for redemption. The case directly in point is that of Wadsworth and Patanjali

Sastri JJ., in Abdul Khadir and Others Vs. V. Subramanya Pattar, , where the facts of the case were very similar. Patanjali Sastri J. in delivering

the judgment of the court stated that though the mortgage and the lease back were intended to be parts of one and the same transaction the rent

due under the lease cannot be considered as interest on the mortgage.

An argument put forward that the two documents should be read together as farming a composite simple mortgage was not accepted. Most of the

earlier cases on the subject were referred to in that judgment. The decision in ''Ex parte, Isherwood; In re, Knight (1883) 22 Ch. 384 (Z1)'', and

the observations of Jessel M.R. were specifically considered. The ''ratio decidendi'' of Abdul Khadir and Others Vs. V. Subramanya Pattar, , is

that a mortgage with possession and a lease back cannot be construed as a simple mortgage but the terms of each must rule the transaction. The

relationship between the two parties cannot be considered to be entirely that of mortgagor and mortgagee but for certain purposes it was that of a

lessor and lessee also. It seems to us therefore that we cannot accede to the appellant''s contention that Exs. A. 1 and B. 1, if taken together would

amount to a transaction of a simple mortgage in which case alone the mortgagee can compel the mortgagor to pay interest as well at the time of redemption.

As we have already remarked, there was no covenant to pay interest in Ex. A. 1, that B. 1 creates a charge for interest for one year only and that

it was stated that under Ex. B. 2, there was no valid charge created for arrears of rent and proportionate future rent. Even if under Ex. B. 2, there

is such a charge still it cannot form part and parcel of the mortgage deed, Ex. A. 1, as such.

A point which ought not to be forgotten in-dealing with a case like the present one is that even if there is a unity of transactions evidenced by Exs.

A. 1 and B. 1, still the same has been completely broken up when a surrender is made under Ex. B. 2. Thereafter there can be no question of a

mortgage and lease back in one transaction, as the lease has completely disappeared and the mortgage alone remained.

The result is that even granting a charge was created for arrears of rent & proportionate future rent under Ex. B. 2 still that would only be a

separate mortgage which under the terms of the amended S. 61, T.P. Act the mortgagor cannot be compelled to redeem without redeeming the

usufructuary mortgage. As already stated Ex. B. 1 creates a charge for one year and if this is dissociated from Ex. A. 1 the same should also be

considered as a separate mortgage.

We are, therefore, of the opinion that the plaintiffs are entitled to redeem the mortgage under Ex. A. 1 by payment of the principal amount of Rs.

35,000. The learned Subordinate Judge has discussed the question regarding the accountability of defendant 1 & has come to the conclusion that

during these periods on an average he would have realised interest at the rate of Rs. 15 per cent, per annum on the mortgage money by enjoying

the profits from item 2 alone. He found that if the mortgagee is entitled to interest at 12 per cent, per annum on the principal sum, he has enjoyed

much more than what he is entitled to.

Therefore, if Exs. A. 1 and B. 1 are read together as creating a simple mortgage with interest payable at the rate of 12 per cent, per annum the

mortgagee has received much more than 12 per cent, interest. He is, therefore, not entitled to anything more than the principal amount. We agree

with what the learned Subordinate Judge has held.

It is further argued by Mr. Sangameswaran that since the application under S.

 

83, T.P. Act was dismissed and it was found that defendant I was

entitled to Rs. 42,000 and odd, the learned Subordinate Judge should have awarded costs to defendant 1. But it must be remembered that

defendant 1 claimed a large sum of money which was disallowed.

If he is entitled to cost of redemption he will have to pay proportionate costs on the amount disallowed. We do not think that there is anything

inequitable in the direction of the learned Subordinate Judge that the parties should bear their respective costs in the court below.

22. For the reasons stated above we are of the opinion that the appeal must be dismissed with costs.

 