

for the purpose of settlement and for other reasons and it may well have been that the District Munsif thought that he should put a stop to these tactics and have the parties before him personally. I think that he was perfectly right in proceeding to undertake his rule. With regard to the provisions of Order X on which the learned vakil for the appellants relied, I think that they relate primarily to the ascertainment of points in dispute and may point out that they do not refer to the administration of an oath or provide for the examination or cross-examination of parties. I must respectfully dissent from the decision in *Satu v. Hanmantrao*(1). With regard to the merits of the case, the plaintiff set up a possessory title under which she and all the defendants claimed the property as owners in common, and I think the evidence was sufficient to support the plaintiff's claim. I agree that this second appeal should be dismissed with costs.

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VALLIAMMAN.
BAKEWELL, J.

S.V.

APPELLATE CIVIL—FULL BENCH.

*Before Sir John Wallis, Kt., Chief Justice, Mr. Justice Ayling and
Mr. Justice Kumaraswami Sastriyar.*

MARTURU SUBBAMMA (DEFENDANT), APPELLANT,

v.

GADDE NARAYYA (PLAINTIFF), RESPONDENT.*

*Transfer of Property Act (IV of 1882), ss. 58 (a) and (d), 67 and 68 (c)—
Usufructuary mortgage—Failure of mortgagor to deliver possession—Right of
mortgagee to sue for sale.*

Held, by the Full Bench :—Where a mortgagor fails to deliver possession to his mortgagee, the mortgage is not a usufructuary mortgage within the meaning of section 58 (d) of the Transfer of Property Act, and the mortgagee is entitled to bring a suit for sale of the mortgaged property.

Sections 58 (a) and (d), 67 and 68 (c) of the Transfer of Property Act referred to.

Ram Narayan Singh v. Adhindra Nath Mukherji (1917) I.L.R., 44 Calc., 388 (P.C.), followed.

Arunachalam Chetti v. Ayyavayyan (1898) I.L.R., 21 Mad., 476 (F.B.), overruled.

1917,
April,
4 and 11
and
October,
8, 9 and 12

(1) (1899) I.L.R., 23 Bom., 318.

Second Appeal No. 1672 of 1915 (F.B.).

SUBRAMMA
v.
NARAYYA.

SECOND APPEAL against the decree of J. C. FERNANDEZ, the District Judge of Guntūr, in Appeal No. 339 of 1913, preferred against the decree of L. NARAYANA AYYAR, the District Munsif of Tenali, in Original Suit No. 45 of 1913.

This was a suit brought in 1912 for sale of property usufructuarily mortgaged by the defendant to plaintiff on 15th March 1902, for Rs. 75, on the allegation that the defendant did not give him possession. The defendant pleaded *inter alia* that plaintiff was put in possession of the mortgaged property and was therefore not entitled to sue for sale and that the mortgage amount was discharged from the usufruct. The Court of first instance held on the authority of *Arunachalam Chetti v. Ayyavayyan*(1) that the plaintiff being a usufructuary mortgagee, pure and simple, was not entitled to sue for sale and was also barred by article 120 of the Limitation Act from suing for sale, more than six years having elapsed from the time when defendant failed to give possession. On appeal by the plaintiff, the District Judge held that the mortgage deed did not contain a covenant to pay that the defendant never put the plaintiff in possession, and that the plaintiff was entitled to sue for sale. The defendant preferred this second appeal to the High Court.

The mortgage document ran as follows :—

“EXHIBIT A.

The mortgage deed of immoveable property executed on the 15th of May, 1902, by Subbamma . . . in favour of Gadde Narasayya Garu

I borrowed from you for my own necessities. . . . Rs. 75. I have borrowed seventy-five rupees and the interest upon it is at the rate of Rs. 1-9-0 (one rupee nine annas, per cent). For the principal and interest upon this, you shall, out of the mortgaged property detailed below, deduct from the income upon my half share in the Sngupalam inam after meeting the expenses, the interest first and then, if anything remains, it shall go to reduce the principal. The mortgage for this is the inam land of acres 3 and 73 cents I have not as yet mortgaged or otherwise alienated the aforesaid property. I herewith give to you the said inam sale-deed, which was executed in my favour by Dhanikonda Ramaswamy

(1) (1898) I.L.R., 21 Mad., 476 (F.B.).

Garu. Therefore, as soon as the said debt is discharged I shall take back the said sale-deed. This deed of mortgage of dry inam and backyard compound is executed with my consent.

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(Signed) Maruturu Subbamma."

V. Ramadoss for the appellant.

K. V. L. Narasimham for the respondent.

This Second Appeal coming on for hearing in the first instance before SESHAGIRI AYYAR and KUMARASWAMI SASTRIYAR, JJ., the following ORDER OF REFERENCE TO A FULL BENCH was made by

KUMARASWAMI SASTRIYAR, J.—As regards the contention that there is a covenant to pay in respect of the mortgage of item No. 1, we must overrule it, having regard to *Ram Narayan Singh v. Adindra Nath Mukherji*(1) and *Hakeem Patte Muhammad v. Shaik Davood*(2). Consequently section 68, clause (a) of the Transfer of Property Act, is not applicable. The further question is whether in the events which have happened, the mortgagee is not entitled to bring item No. 1 to sale. The mortgagor covenanted to put the mortgagee in possession, and the finding is that he has broken the covenant. Therefore section 68, clause (c) of the Transfer of Property Act, applies.

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Mr. Ramadoss argued that the failure to give possession, although it may give a right to the mortgage money, would not enable the mortgagee to sue for the sale of the property. He is supported in his contention by *Arunachalam Chetti v. Ayyavayyan*(3) and by the cases following that decision. On the other hand the recent decision of the Judicial Committee in *Ram Narayan Singh v. Adhindra Nath Mukherji*(1) seems to suggest that the failure to fulfil the conditions mentioned in clauses (b) and (c) of section 68 would ensure the same legal consequences as may be enforced under clause (a).

The right to sue for sale under a covenant to pay the mortgage money is provided for by section 67 of the Transfer of Property Act. As at present advised, we fail to see why that section should not be appealed to where there is a default under

(1) (1917) I.L.R., 44 Calc., 388.

(2) (1916) I.L.R., 39 Mad., 1010.

(3) (1898) I.L.R., 21 Mad., 476 (F.B.).

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clauses (b) and (c) of section 68. *Arunachalam Chetti v. Ayyavayyan*(1) seems to proceed on the footing that the ordinary right of a usufructuary mortgagee to realize the monies due to him is to claim possession. In other words, notwithstanding the fact that the mortgagor refuses to perform his part of the contract, the mortgagee is only entitled to specific performance of the contract and is precluded from claiming any other relief. We think this position requires reconsideration. The Judicial Committee by saying that accounts might have to be taken in the case already referred to implicitly recognize the mortgagee's right to sue for the sale of the property and we think that the restriction on the mortgagee's right enunciated in *Arunachalam Chetti v. Ayyavayyan*(1) is not justifiable.

Under these circumstances, we must refer the following question for the decision of the Full Bench:—

“Whether a usufructuary mortgagee is not entitled to sue for the sale of the property mortgaged to him when the mortgagor fails to deliver possession of the said property to him and has consequently to sue for the money.”

ON THIS REFERENCE—

V. Ramadoss for the appellant.—The mortgage does not contain any covenant to pay and it is purely a usufructuary mortgage and as there is no contract to the contrary, the mortgagee has no right to sue for sale; see *Arunachalam Chetti v. Ayyavayyan*(1) and section 67 (a) of the Transfer of Property Act. The mortgagee has also no charge; *Ram Narayan Singh v. Adhindra Nath Mukherji*(2). Reference was also made to *Lazaranessa Bibi v. Mahomed Jaffer*(3), *Luchmeshar Singh v. Dookh Mochan Jha*(4), *Kangaya Gurukul v. Kalimuthu Annavi*(5), *Perianna Servaigaran v. Marudainayagam Pillai*(6) and *Samayya v. Nagalingam*(7).

K. V. L. Narasimham for the respondent.—As possession was not given, the plaintiff was not a usufructuary mortgagee, but is only a simple mortgagee; see the definition of ‘usufructuary mortgage’ in section 58 (d) of the Act. Section 67 (a)

(1) (1898) I.L.R., 21 Mad., 476 (F.B.).

(2) (1917) I.L.R., 44 Calc., 368.

(3) (1912) 13 I.C., 336.

(4) (1897) I.L.R., 24 Calc., 677.

(5) (1904) I.L.R., 27 Mad., 526 (F.B.).

(6) (1899) I.L.R., 22 Mad., 332.

(7) (1892) I.L.R., 15 Mad., 174.

cannot apply as the restriction therein contained refers only to a usufructuary mortgagee 'as such.' The words 'as such' must be given their due meaning. The property has been secured for the money; see the definition of 'mortgage money' in section 58 (a) of the Act. On failure to give possession the mortgage money has become payable according to section 68 (c) of the Act; and the mortgagee is entitled to sue for sale and realize his money by sale of the property: see *Venkatarao v. Mahableshwar*(1) and *Bihari Lal v. Deoki Nandal Lal*(2).

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The Court expressed the following OPINIONS:—

WALLIS, C.J.—I agree with the referring Judges and answer the question in the affirmative. A mortgagee does not become a usufructuary mortgagee within the meaning of section 58 (d) until the mortgagor has given him possession of the mortgaged property and so put him in a position to realize his security out of the accruing rents and profits. It is because the intention is that the security shall be realized in this manner that by section 67, proviso (a), a usufructuary mortgagee as such is debarred from suing for foreclosure or sale under the section. A mortgagee to whom possession has not been given is not a usufructuary mortgagee. Consequently he does not come within the proviso and is entitled to sue for foreclosure or sale under the section, in the absence of a contract to the contrary, "at any time after the mortgage money has become payable to him." Section 68 entitles the mortgagee to sue the mortgagor for the mortgage money,

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"where, the mortgagee being entitled to possession of the property, the mortgagor fails to deliver the same to him, or to secure the possession thereof to him without disturbance by the mortgagor or any other person."

The first of these events having happened, the mortgagee has become entitled to sue for the mortgage-money, or in other words, the mortgage-money has become payable to him, and he is entitled under section 67 to sue for foreclosure or sale, in the absence of a contract to the contrary which cannot be implied. On the contrary the fact that the mortgagor was unable to put the mortgagee in a position to realize his security out of the rents and profits makes it only reasonable that he should be

(1) (1902) I.L.R., 26 Bom., 241.

(2) (1914) 24 I.C., 867.

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remitted to the ordinary remedies of a mortgagee by foreclosure or sale, and the legislature has recognized this by making the mortgage money payable in this event. He has advanced his money on the security of the mortgagor's interest in the property, and mortgagor has failed to perform his part of the contract by putting him in possession and enabling him to realize his security in that manner, and there is no reason why he should not be allowed to realize it by bringing the mortgagor's interest to sale if he so desires or for requiring him to undergo the expense and trouble of litigation with third parties unless he is content to lose his security. These aspects of the question appear to have been overlooked in *Samayya v. Nagalingam*(1) and *Arunachalam Chetti v. Ayyavayyan*(2). In *Ram Narayan Singh v. Adhindra Nath Mukherji*(3) the Judicial Committee observed :

"It must also be borne in mind that if the mortgagor be in the first instance under no personal liability, such liability may arise under section 68 (b) or (c) of the Transfer of Property Act."

As pointed out in the Order of Reference, once the mortgage-money becomes payable under any clause in section 68, there can be no reason for refusing to give effect to section 67 which allows of a suit for foreclosure or sale "at any time after the mortgage money has become payable" except in certain cases of which this is not one.

I accordingly answer the question in the affirmative.

AYLING, J.

AYLING, J.—I concur.

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KUMARASWAMI SASTRIYAR, J.—I agree and have nothing useful to add to what I have said in the ORDER OF REFERENCE.

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(1) (1892) I.L.R., 15 Mad., 174. (2) (1898) I.L.R., 21 Mad., 476 (F.B.).

(3) (1917) I.L.R., 44 Calc., 388 at p. 400.