2025:KER:48550

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE EASWARAN S.

FRIDAY, THE 4TH DAY OF JULY 2025 / 13TH ASHADHA, 1947

RSA NO. 974 OF 2011

AGAINST THE COMMON JUDGMENT DATED 03.06.2011 IN AS NO.135 OF 2007 OF SUB COURT, NEYYATTINKARA ARISING OUT OF THE COMMON JUDGMENT DATED 13.10.2006 IN OS NO.441 OF 2004 OF II ADDITIONAL MUNSIFF COURT, NEYYATTINKARA

APPELLANTS/APPELLANTS/PLAINTIFFS:

1 SIVANANDAN (*DIED)
AGED 64 YEARS
S/O. AYYAPPAN, LAKSHMI BHAVAN,
MARUTHOOR DESOM,
PERUMPAZHUTHOOR VILLAGE,
NEYYATTINKARA.

(LHRS IMPLEADED AS ADDITIONAL A3 TO A5)

2 VIMALA BAI, AGED 55 YEARS
D/O. REMA BAI, MARUTHOOR DESOM,
PERUMPAZHUTHOOR VILLAGE,
NEYYATTINKARA.

*ADDL. A3 SUSHACIVI
AGED 39 YEARS
D/O. VIMALA BAI,
RESIDING AT ANI BHAVAN, POOZHIKUNNU,
CHENKAL VILLAGE,
CHENKAL P.O. NEYYATTINKARA TALUK,
THIRUVANANTHAPURAM – 695 121.

*ADDL. A4 REMYA V.S.
AGED 37 YEARS
D/O. VIMALA BAI, RESIDING AT ANI BHAVAN,
POOZHIKUNNU, CHENKAL VILLAGE,
CHENKAL P.O.
NEYYATTINKARA TALUK,
THIRUVANANTHAPURAM – 695 121.

*ADDL. A5 PRAVEEN SIVAN
AGED 35 YEARS
S/O. VIMALA BAI, RESIDING AT ANI BHAVAN,
POOZHIKUNNU, CHENKAL VILLAGE, CHENKAL P.O.
NEYYATTINKARA TALUK,
THIRUVANANTHAPURAM – 695 121.

*LEGAL HEIRS OF DECEASED 1ST APPELLANT ARE IMPLEADED AS ADDITIONAL APPELLANTS 3 TO 5 AS PER THE ORDER DATED 08.12.2017 IN I.A. 2523/2017.

BY ADVS.
A2 - SRI. K.RAJESH KANNAN
- SRI. A.S.SHAMMY RAJ
- SRI. P.SHANES METHAR
A2 TO A5 – SRI. G.S REGHUNATH

RESPONDENTS/RESPONDENTS/DEFENDANTS:

1 ANI, AGED 36 YEARS
S/O. SADASIVAN
RESIDING AT ANI BHAVAN, POOZHIKUNNU,
CHENKAL VILLAGE, CHENKAL P.O.,
NEYYATTINKARA, TRIVNADRUM – 695 132.

2 GIRIJA, AGED 48 YEARS
D/O.REMA BAI
RESIDING AT ANI BHAVAN, POOZHIKUNNU,
CHENKAL VILLAGE, CHENKAL P.O.,
NEYYATTINKARA, TRIVANDRUM - 695 132.

BY ADV SRI.B.KRISHNA MANI

THIS REGULAR SECOND APPEAL HAVING COME UP FOR HEARING ON 19.06.2025, ALONG WITH RSA.975/2011 AND CONNECTED CASES, THE COURT ON 04.07.2025 DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE EASWARAN S.

FRIDAY, THE 4TH DAY OF JULY 2025 / 13TH ASHADHA, 1947

RSA NO. 975 OF 2011

AGAINST THE COMMON JUDGMENT DATED 03.06.2011 IN AS NO.136 OF 2007 OF SUB COURT, NEYYATTINKARA ARISING OUT OF THE COMMON JUDGMENT DATED 13.10.2006 IN OS NO.441 OF 2004 OF II ADDITIONAL MUNSIFF COURT, NEYYATTINKARA

APPELLANTS/APPELLANTS/PLAINTIFFS:

1 SIVANANDAN (*DIED)
AGED 64 YEARS
S/O. AYYAPPAN,
LAKSHMI BHAVAN,
MARUTHOOR DESOM,
PERUMPAZHUTHOOR VILLAGE,
NEYYATTINKARA.

(LHRS IMPLEADED AS ADDITIONAL A3 TO A5)

2 VIMALA BAI,
AGED 55 YEARS
D/O. REMA BAI,
MARUTHOOR DESOM,
PERUMPAZHUTHOOR VILLAGE,
NEYYATTINKARA.

*ADDL. A3 SUSHACIVI
AGED 39 YEARS
D/O. VIMALA BAI,
RESIDING AT ANI BHAVAN,
POOZHIKUNNU,
CHENKAL VILLAGE,
CHENKAL P.O.
NEYYATTINKARA TALUK,
THIRUVANANTHAPURAM – 695 121.

*ADDL. A4 REMYA V.S.
AGED 37 YEARS
D/O. VIMALA BAI, RESIDING AT ANI BHAVAN,
POOZHIKUNNU, CHENKAL VILLAGE,
CHENKAL P.O. NEYYATTINKARA TALUK,
THIRUVANANTHAPURAM – 695 121.

*ADDL. A5 PRAVEEN SIVAN
AGED 35 YEARS
S/O. VIMALA BAI, RESIDING AT ANI BHAVAN,
POOZHIKUNNU, CHENKAL VILLAGE, CHENKAL P.O.
NEYYATTINKARA TALUK,
THIRUVANANTHAPURAM – 695 121.

*LEGAL HEIRS OF DECEASED 1ST APPELLANT ARE IMPLEADED AS ADDITIONAL APPELLANTS 3 TO 5 AS PER THE ORDER DATED 08.12.2017 IN I.A. 2110/2017.

BY ADVS.
A2 TO A5 - SRI.G.S.REGHUNATH
A2 - SRI.K.RAJESH KANNAN
- SRI.A.S.SHAMMY RAJ
- SRI.P.SHANES METHAR

RESPONDENTS/RESPONDENTS/DEFENDANTS:

1 ANI, AGED 36 YEARS
S/O. SADASIVAN
RESIDING AT ANI BHAVAN, POOZHIKUNNU,
CHENKAL VILLAGE, CHENKAL P.O.,
NEYYATTINKARA, TRIVNADRUM – 695 132.

2 GIRIJA, AGED 48 YEARS
D/O.REMA BAI
RESIDING AT ANI BHAVAN, POOZHIKUNNU,
CHENKAL VILLAGE, CHENKAL P.O.,
NEYYATTINKARA, TRIVANDRUM - 695 132.

BY ADV SRI.B.KRISHNA MANI

THIS REGULAR SECOND APPEAL HAVING COME UP FOR HEARING ON 19.06.2025, ALONG WITH RSA.974/2011, 1241/2011, THE COURT ON 04.07.2025 DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE EASWARAN S.

FRIDAY, THE 4TH DAY OF JULY 2025 / 13TH ASHADHA, 1947

RSA NO. 1241 OF 2011

AGAINST THE COMMON JUDGMENT DATED 03.06.2011 IN AS NO.134 OF 2007 OF SUB COURT, NEYYATTINKARA ARISING OUT OF THE COMMON JUDGMENT DATED 13.10.2006 IN OS NO.216 OF 2004 OF II ADDITIONAL MUNSIFF COURT, NEYYATTINKARA

APPELLANT/APPELLANT/DEFENDANT:

VIMALA BAI
AGED 54 YEARS, D/O.REMA BAI,
RESIDING AT LEKHMI BHAVAN, MARUTHOOR DESOM,
PERUMPAZHUTHOOR VILLAGE, NEYYATTINKARA.

BY ADVS.
SRI.G.S.REGHUNATH
SRI.K.RAJESH KANNAN
SRI.A.S.SHAMMY RAJ
SRI.P.SHANES METHAR

RESPONDENT/RESPONDENT/PLAINTIFF:

ANI, AGED 36 YEARS, S/O. SADASIVAN,
RESIDING AT ANI BHAVAN, POOZHIKUNNU,
CHENKAL VILLAGE, CHENKAL P.O,
NEYYATTINKARA TALUK,
TRIVANDRUM – 695 132.

SRI. B.KRISHNA MANI

THIS REGULAR SECOND APPEAL HAVING COME UP FOR HEARING ON 19.06.2025, ALONG WITH RSA.975/2011 AND CONNECTED CASES, THE COURT ON 04.07.2025 DELIVERED THE FOLLOWING:

“C.R.”

EASWARAN S., J

R.S.A Nos.974, 975 & 1241 of 2011

Dated this the 4th day of July, 2025

JUDGMENT

These appeals arise out of the common judgment and decree passed by the II Addl. Munsiff’s Court, Neyyattinkara, in OS Nos.216/2004 and 441/2004 dated 13.10.2006 and also a counterclaim for partition. OS No.216/2004 is a suit for injunction, whereas OS No.441/2004 is a suit for redemption of mortgage and partition.

2. The brief facts necessary for the disposal of the appeals are as follows:-

OS No.441 of 2004 is instituted by Vimala Bai and Ayyappan Sivanandan seeking for redemption of mortgage. OS No.216 of 2004 is instituted by one Ani, the sibling of Vimala Bai, seeking for a decree of injunction restraining his sister from trespassing into the

plaint schedule property. For consideration of the issues raised in these appeals, it will suffice the cause if the facts leading to the filing of OS No.441 of 2004 are stated. The plaint A schedule property belonged to the 2nd plaintiff's father, late Sadasivan, as per document No.425 of 1961. Late Sadasivan mortgaged the property in favour of one Krishna Pilla Raghavan Pillai by a registered mortgage deed No.2918/69 dated 17.09.1969. It is contended that although the property was under mortgage, Raghavan Pillai did not get possession and Sadasivan continued possession of the property. Later, when the 2nd plaintiff in OS No.441 of 2004 was married off, her father Sadasivan executed a gift deed bearing No.1169/76 dated 07.04.1976 wherein 10 cents of land described as B schedule out of the 25 cents comprising in plaint A schedule property was gifted to her. After the said transfer, Sadasivan had kept the balance 15 cents in his possession described as plaint C schedule. While so, the mortgage in the year 1969 was redeemed for and on behalf of the 1st defendant by Sadasivan by executing a

registered deed No.2056 dated 30.07.1986. Going by the said deed, the 1st defendant was entitled to hold the property under mortgage and was obliged to get the release deed executed from the erstwhile mortgagors as and when the mortgage is redeemed by them. According to the plaintiffs, the execution of the deed on 30.07.1986 is a valid acknowledgment of the mortgage by Raghavan Pillai in favour of Sadasivan, and therefore, it constitutes a valid acknowledgment of the mortgage and therefore the suit for redemption of mortgage is maintainable. Thus, it is prayed that the plaintiffs be permitted to redeem the mortgage and the plaint C schedule be partitioned giving 1/3rd share to the plaintiffs. The defendants in OS No.441 of 2004 entered appearance and contested the suit, by denying the execution of the gift deed stating that it is a void document. It was further contended that the suit for redemption of mortgage was time barred. Along with the suit, a counter claim was raised by the defendants seeking for a partition of the property covered by the gift deed and included as counter

claim schedule property. The aforesaid suit was tried along with OS No.216 of 2004 wherein, the 1st defendant had sought for a decree of injunction restraining the defendants/plaintiffs in OS No.441 of 2004 from interfering with the peaceful possession of the plaintiff over the property. Both the suits were tried together. Exts.A1 to A9 were marked on behalf of the plaintiffs in OS No.441 of 2004. Exts.B1 to B5 were marked on behalf of the defendants. PW1 to PW3 were examined on behalf of the plaintiffs. DW1 and DW2 were examined on behalf of the defendants. On the basis of the pleadings and documentary evidence, the trial court framed separate issues in OS Nos.216 of 2004 and 441 of 2004. The issues framed in OS No.216 of 2004 are as follows:-

> "1. Whether plaintiff has got possession over plaint schedule property?
>
> 2. Whether plaintiff is entitled for a decree of injunction as prayed for?
>
> 3. Reliefs and costs?"

The issues framed in OS No.441 of 2004 are as follows:-

> "1. Whether plaintiff is entitled for a decree for

redemption of mortgage as prayed for?

2. Whether the plaintiff is entitled for a recovery of possession of B C schedule property?

3. Whether plaintiff is entitled for a partition of plaint C schedule as prayed for?

4. If so what is the share to be allotted to plaintiff?

5. Whether the defendants are entitled for a decree of partition over property scheduled in the written statement?

6. Reliefs and costs?"

3. On appreciation of the oral and documentary evidence, the trial court found that, Ext.A3 gift deed is void inasmuch as the mandatory requirement of Section 123 of the Transfer of Property Act, 1882 (for short, 'the Act, 1882') was not met. As regards the prayer for redemption of mortgage, the trial court held that the suit is barred by limitation and Ext.A4 does not constitute a valid acknowledgment. Accordingly, OS No.216 of 2004 was decreed and the defendants were restrained by an order of injunction from trespassing into the plaint schedule property therein and OS No.441 of 2004 was dismissed and the counter-claim was allowed and the

counter-claim schedule property was ordered to be partitioned and the defendants/counter-claim petitioners were allotted 2/3 share over the scheduled properties. Aggrieved by the judgment and decree, the plaintiffs in OS No.441 of 2004 preferred AS Nos.135 of 2007, 136 of 2007 and 134 of 2007 before the Sub Court, Neyyattinkara. By a common judgment dated 03.06.2011, these appeals were dismissed, and thus the appellants are before this Court.

4. While the appeal was admitted to file on 13.01.2012, separate questions of law were framed in R.S.A Nos.974, 975 and 1241 of 2011 respectively, which are as follows:-

> “1) When it is proved by PW2 that he was a witness to execution of Ext.A3 by the executant Sri.Sadasivan is the court justified in holding that the signature in Ext.A3 is not attested by two witnesses.
>
> 2) Has not the lower court mislead and misinterpreted Ext.A4 in not considering the effect of the recital:
>
> "ജന്മി നേർപ്പെട്ട ആധാരം വാങ്ങി കൊള്ളതാകുന്നു"
>
> 3) Is not the finding of lower court that Ext.A2 is barred by limitation, illegal and wrong?”

> 4. Is not the lower court bound to hold that the counter claim raised in the suit is not maintainable as it is not regarding plaint schedule property and not in respect of a cause of action accruing to the defendant against the plaintiff either before or after the filing of the suit as the suit and the cause of action are regarding an entirely different property?"
>
> 5. If the predecessor of the plaintiff asserted that he is in possession of the plaint schedule property and excluded a registered document transferring possession of a portion of plaint schedule property as per Ext.A3 to defendant and her husband, can the plaintiff claim possession of the entire plaint schedule property and get a decree of injunction as prayed for?"

5. Heard Sri.G.S.Raghunath, the learned counsel appearing for the appellants and Sri.B.Krishna Mani, the learned counsel appearing for respondents 1 and 2.

6. Sri.G.S.Raghunath, the learned counsel appearing for the appellants raised the following submissions:

(a) The suit for redemption of mortgage is not barred. Both the courts failed to notice that Ext.A2 is a mortgage in favour of Raghavan Pillai and that it is a usufructuary mortgage. The period of limitation prescribed for filing a suit for redemption of mortgage is provided in Article 61

of the Limitation Act, 1963 (for short, 'the Act, 1963).

(b) The defendants had no cause of action for preferring a counterclaim, inasmuch as the counter-claim was sought for in respect of a property which was not subject matter of OS No.441 of 2004. The cause of action for preferring the counter-claim would arise immediately on execution of Ext.A3 gift deed in the year 1976.

(c) The trial court as well as the first appellate court erred egregiously in holding that Ext.A3 gift deed is void under Section 123 of the Transfer of Property Act, 1882. The evidence of PW2 was sufficient to hold that the signature affixed by the Sub Registrar had the necessary animus for the purpose of complying with the mandate of Section 123 of the Act, 1882.

(d) Going by the proviso to Section 68 of the Indian Evidence Act, 1872 (for short, 'the Act, 1872'), the defendants could not have disputed the execution of the gift deed because it is a registered document. The requirement to examine an attesting witness would arise only if the execution is denied by the executant.

7. Per contra, Sri.B.Krishna Mani, the learned counsel appearing for the respondents, would counter the submissions of Sri.G.S.Regunath, the learned counsel for the appellants, by raising the following submissions.

(a) The suit for redemption of mortgage ought to have been filed within a period of 30 years when the right to redeem or to recover possession accrues. In the present case, the mortgage was created in the year 1969 and therefore, the suit ought to have been filed within 30 years from the date of execution of the mortgage deed.

(b) Execution of Ext.A4 mortgage in favour of the 1st defendant by itself will not constitute a valid acknowledgment since there is no admission of the mortgage in the aforesaid deed. In order to constitute a valid acknowledgment under Section 19, the learned counsel would submit that there should be sufficient ingredients and that Ext.A3 does not contain these ingredients. In support of his contentions, relied on the decisions of this Court in **Padmanabhan Narayanan v. Padmanabha Pillai Gopalapillai** [1968 KLT 451] and

Savithri Kunjamma v. Narayanan [1989 (2) KLT 628].

(c) Both the trial court and the first appellate court concurrently found that Ext.A3 gift deed does not fulfill the mandate of Section 123 of the Act, 1882 and therefore, the counter-claim for partition was perfectly maintainable, and thus the decree cannot be interfered with.

8. I have considered the rival submissions raised across the Bar and have perused the records and the judgments rendered by the courts below.

Whether the suit for redemption of the mortgage is barred.

9. A perusal of Ext.A2 shows that late Sadasivan had executed an usufructuary mortgage in favour of Raghavan Pillai. The conditions required for executing a usufructuary mortgage are contained under Section 58(d) of the Act, 1882. Section 58(d) of the Act, 1882 reads as under:-

> **58. "Mortgage", "mortgagor", "mortgagee", "mortgage-money" and "mortgage-deed" defined.**-- (a) xxxxx
>
> (b) xxxxx

(c) xxxxx

(d) 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 [or] partly in payment of the mortgage-money, the transaction is called an usufructuary mortgage and the mortgagee an usufructuary mortgagee."

10. The terms of the mortgage as discernible from Ext.A2 show that the mortgage money will become due when demanded. During the subsistence of the mortgage, the mortgagee, namely Raghavan Pillai, executed a mortgage assignment deed No.2056 of 1986 dated 30.07.1986. Pertinently, the 1st defendant at the time of execution of Ext.A4 was a minor. Therefore, a presumption is to be drawn that the mortgage was redeemed for and on behalf of the minor by his natural guardian, who is the father. No evidence adduced by the parties to show that the minor had independent capacity

to redeem the mortgage. Though the evidence of DW2, the 2nd defendant, points out that the 1st defendant was earning sufficient money at the time of the assignment by cultivation, the oral testimony of DW2 alone is not sufficient to conclude that the 1st defendant possessed sufficient means to redeem the mortgage.

11. It must be noticed that, in terms of Ext.A4 mortgage assignment deed, what is conferred on the 1st defendant is the right of the mortgagor. Therefore, prima facie it is difficult to hold that the right of redemption is lost because of Ext.A4. Moreover, the assignment deed specifically mentions that, the 1st defendant is bound to get documents executed by the Jenmi. Therefore, what is assigned in favour of the 1st defendant was nothing but an equity of redemption.

12. The courts below found that the suit was barred since the period of 30 years had expired by the time the suit was instituted. In arriving at the said conclusion, reliance was placed on the decision of the Hon'ble Supreme Court in **Prabhakaran and Others v.**

M.Azhagiri Pillai (Dead) By LRs And Others [2006 (4) SCC 484].

13. The view expressed by the trial court as well as the first appellate court falls short of the mandate of Article 61 of the Act, 1963, especially since both the courts below failed to notice the fact that the limitation period starts only from the date on which the right to redeem or recover possession accrues.

14. Let us see, whether the trial court was correct in applying the ratio decidendi laid down in **Prabhakaran and Others** (supra). In the aforesaid decision, the Hon'ble Supreme Court held that a mere reference or description of a jural relationship in a subsequent document is not sufficient to constitute a valid acknowledgment under Section 18 of the Act, 1963. But it must be noted that in paragraph 24, the Supreme Court held as follows:-

> "24. We may illustrate as to what is mere reference or description of the jural relationship and what constitutes an intention to admit the jural relationship. If the relevant portion of the deed of assignment, sought to be relied on as an

> acknowledgment merely stated that "X mortgaged the schedule property in my favour under the deed of usufructuary mortgage dated (date) and I hereby assign the said mortgage in your favour", it will not be an "acknowledgment" under Section 18 of the Act. This is because it refers only to the jural relationship, but does not show an intention to admit the jural relationship with the mortgagor or admit his subsisting liability as mortgagee of being redeemed. But the position will be different, if the assignment deed further stated: "The said mortgage is subsisting" or "The rights and obligations under the said mortgage are enforceable", or "The assignee is entitled to all benefits under the said mortgage", or "The assignee is entitled to receive the amount advanced under the said mortgage", or "The assignee is entitled to all rights and liable for all obligations under the said mortgage", or "The assignee is entitled to continue in possession until the mortgage is redeemed". The use of any such words (which are illustrative and not exhaustive) would show an intention to admit the jural relationship, and therefore, amount to acknowledgment, though they may not refer to the mortgagor's right of redemption. Ultimately, it is not the form of the words, but the intention to admit the jural relationship with the mortgagor, that will determine whether a statement is an acknowledgment."

If Ext.A4 is tested in the light of the principles discernible from the reading of paragraph 24 of the decision, it is evident that, there is a clear acknowledgment of the mortgage.

15. In **Singh Ram (D) Thr. L.Rs. v. Sheo Ram**

and Others [2014 (9) SCC 185], a three Judge Bench of the Hon'ble Supreme Court held that the views expressed in **Prabhakaran and Others** (supra) may not be correct proposition of law. It was held that the right of redemption of a mortgagor being a statutory right can be taken away only in terms of the proviso appended to Section 60 of the Act, 1882 it is either extinguished by a decree or by act of the parties. Paragraph 22 of the decision reads as under:-

> "22. We, thus, hold that special right of usufructuary mortgagor under S.62 of the TP 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 Art.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."

16. In **Rashbehary Ghose, Law of Mortgage seventh Edition, (Tagore Law Lecture)** it is opined by the learned Author, a possessory mortgage, in which a mortgagee is to obtain possession of the property in lieu

if a fixed sum with a superadded condition that the redemption will take place as soon as the mortgage money is paid, is a usufructuary mortgage. In an usufructuary mortgage, a period of redemption need not be fixed.

17. **In Fisher and Lightwood's Law of Mortgage, Nineth Edition,** it is stated that" Where no date for redemption is specified and the debt is repayable on demand by the mortgagee, the mortgagor may, it seems, redeem at any time. And thus, is apparently so even where the mortgagee has covenanted not to call the mortgage until a specified date.

18. No doubt, the period of limitation for redemption of mortgage is governed by Article 61 of the Limitation Act 1963. However, the said provision must be read along with Section 60 of the Transfer of Property Act, 1882. The right of redemption is a statutory right and can be extinguished only by the stipulations contained under the proviso to Section 60. Proviso to Section 60 says that the right conferred under the section can be extinguished by

the act of the parties or decree of a court. It must be remembered that when the right of redemption is curtailed on the ground that the suit is not filed within 30 years from the date of mortgage, then the same will be in conflict with proviso to Section 60 of the Act of 1882.

19. Admittedly, the 1st defendant did not file a suit for foreclosure of mortgage based of Ext.A4. Therefore, until and unless the mortgagor tender's money in usufructuary mortgage and sues for recovery of possession, it cannot be said that the suit is barred by limitation.

20. Coming back to Ext.A4, it could be seen that it is nothing but a subrogation of rights under Section 92 of the Transfer of Property Act, 1882. It will be difficult to hold that merely because the mortgage was assigned, the right of redemption is lost. This is more so because, in a case of subrogation, the rights of the mortgagee alone is transferred to the assignee and in turn he will have the same rights that of the assignor which he had against the mortgagor.

21. The rights of a assignee of a mortgage came up

for consideration before the Full Bench of this Court in **Lakshmi Pilla Subhadra Amma v. Easwara Pillai Velayudhan Pillai** [**1977 KLT 464**]. It was held that Section 92 of the Act, 1882 does not provide that the redeeming co-mortgagor shall be deemed to be a mortgagee or shall be substituted to the full rights of the mortgagor for all purposes.

22. It is beyond doubt that the 1st defendant was a person interested in the property when the redemption took place in the year 1986. That apart, the evidence adduced in the present case is insufficient to hold that the 1st defendant had possessed sufficient funds for redemption of the mortgage and therefore the necessary corollary is that Sadasivan, the father of the 2nd plaintiff had redeemed the property but of course in the name of the 1st defendant. It will be altogether an incorrect proposition of law to hold that on execution of Ext.A4 mortgage assignment deed, the 1st defendant came into possession of the right, title and interest over the property. Therefore, the plaintiffs were perfectly entitled

to maintain a suit for redemption of the mortgage.

23. In the absence of any suit for foreclosure, going by the principle, once a mortgage is always a mortgage, the right to redeem the mortgage continues until a decree for sale is passed in a suit for foreclosure and that the property is put for sale upon a final decree being passed. Therefore, the trial court as well as the first appellate court erred egregiously in holding that the suit for redemption of mortgage was time barred.

Whether Ext.A3 is a valid gift deed

24. The most contentious issue raised before this court is regarding the validity of the gift deed. The defendants in their written statement contended that Ext.A3 is a void document. On behalf of the plaintiffs, one of the attesting witnesses in Ext.A3 was examined, and he deposed that late Sadasivan executed Ext.A3 and that he had affixed the signature after late Sadasivan had signed the gift deed. Normally, the examination of the attesting witness would have sufficed the cause, but on a close examination of Ext.A3, the trial court found that the

second attesting witness has not signed Ext.A3 and thereby the mandate of Section 123 of the Act, 1882, was violated. Section 123 of the Act, 1882 reads as under:-

> "**123. Transfer how effected**.—For the purpose of making a gift of immovable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses.
>
> For the purpose of making a gift of movable property, the transfer may be effected either by a registered instrument signed as aforesaid or by delivery.
>
> Such delivery may be made in the same way as goods sold may be delivered."

A reading of the aforesaid provision shows that the transfer by a gift must be effected through a registered instrument signed by or on behalf of the donor and attested by at least two witnesses. If a literal construction of the above provision is made, then Ext.A3 falls short of the mandate.

25. However, the further question before this Court is, can PW2, the Registrar, who witnessed the execution of Ext.A3, be construed as an attesting witness. Though the precedent on the point is multiple in numbers, this

Court does not deem it appropriate to refer to all the precedents on the point. Suffice to say, there is no bar under Section 123 of the Act, 1882, for a Registrar to be an attesting witness, provided he has signed the gift deed with the required animus. In this context, it is pertinent to note the evidence of PW2. When PW2 was examined, he specifically admitted that he had put his signature as a witness with sufficient animus. The question reads as under:-

> "താങ്കൾ ഒപ്പിട്ടത് ഒരു witness എന്ന animus-ഓടു കൂടിയാണോ? (Q) അതേ (A)"

26. However, in the cross examination, PW2 stated as follows:-

> "Ext.A3 യിൽ ഞാൻ ഒപ്പിട്ടത് ഔദ്യോഗിക കൃത്യനിർവ്വഹണത്തിന്റെ ഭാഗമായാണ്. അതല്ലാതെ വേറെ ഒപ്പ് Ext.A3 യിൽ ഇട്ടിട്ടുണ്ടോ? (Q) ഇല്ല (A)"

This perhaps weighed on the minds of the trial court in holding that PW2 had not signed the document with the required animus. This Court is afraid that, the aforesaid finding is completely perverse. The courts below could

not have ignored the evidence of PW2 since there is a clear admission that the signature of PW2 in Ext.A3 was as a witness with sufficient animus and thus constituting a valid gift deed which complied the mandate of Section 123 of the Act, 1882. The evidence of PW2 in the cross examination can only be construed with one meaning - affixture of the signature of PW2 was in his official capacity. The presence of animus having already spoken by him, there was no necessity for him to speak again on this issue. Therefore, it is clear that the trial court clearly went wrong in appreciating the evidence of PW2.

27. There is yet another reason why this Court should hold that the courts below erred in declaring that Ext.A3 gift deed to be a void document. The proviso to Section 68 of the Act, 1872, mandates the requirement of examining the attesting witness, if the gift deed is denied by the executant.

28. In **Surendra Kumar v. Nathulal and Another** [**2001 (5) SCC 46**], the Hon'ble Supreme Court held that the requirement under proviso to Section 68 of the Act,

1872, arises only if the executant has denied the execution. In the present case, the executant, late Sadasivan, during his life time had not denied the execution of the gift deed. Therefore, the denial of execution of the gift deed by the defendants is of no consequences. Further, Ext.A3 is a registered document and therefore, it operates as a constructive notice on the defendants. Even if it is assumed that the defendants could have disputed the gift, except a vague and evasive denial, no further evidence supporting the claim is seen adduced. Therefore, the courts below could not have held that Ext.A3 is a void document. Similarly, it has come out in evidence that the property covered by Ext.A3 gift deed was the subject matter of mortgage in favour of a Cooperative Bank in the year 1986. If as contended by the 1st defendant, the possession of the property covered by the gift deed was not transferred to the 2nd plaintiff, the Bank would not have accepted the mortgage. Still further, the right of 2nd plaintiff for equity of redemption was reserved in Ext A3. That be so, both the courts below

erred egregiously in finding that Ext.A3 is not a valid gift.

Whether counter-claim is maintainable

29. It is argued by the learned Counsel for the appellants that the counter claim was not maintainable inasmuch as it was not in respect of the cause of action accruing to the defendants. The provisions dealing with the counter-claim are found under Order VIII Rule 6A of the Code of Civil Procedure (CPC), which reads as under:-

> "6A. Counter-claim by defendant.—(1) A defendant in a suit may, in addition to his right of pleading a set-off under rule 6, set up, by way of counter-claim against the claim of the plaintiff, any right or claim in respect of a cause of action accruing to the defendant against the plaintiff either before or after the filing of the suit but before the defendant has delivered his defense or before the time limited for delivering his defense has expired, whether such counter-claim is in the nature of a claim for damages or not:
>
> Provided that such counter-claim shall not exceed the pecuniary limits of the jurisdiction of the court.
>
> (2) Such counter-claim shall have the same effect as a cross-suit so as to enable the Court to pronounce a final judgment in the same suit, both on the original claim and on the counter-claim.
>
> (3) The plaintiff shall be at liberty to file a written statement in answer to the counter-claim of the defendant within such period as may be fixed by the court.

> (4) The counter-claim shall be treated as a plaint and governed by the rules applicable to plaints."

A reading of sub-Rule (1) of Rule 6A of the CPC shows that a counter-claim ought to be in respect of a cause of action accruing to the defendants against the plaintiff either before or after filing of the suit but before the defendants have delivered their defense. The latter part of the sub-Rule 1 which prescribed the time limit for preferring the counter-claim is not attracted in the present case, but the former part wherein it provides that the counter-claim shall be in respect of a cause of action accruing to the defendants either before or after filing of the suit is attracted in the present case.

30. In **Jag Mohan Chawla VS Dera Radha Swami Satsang [(1996) 4 SCC 699]**, the Supreme Court held as follows:-

> "5. The question, therefore is; whether in a suit for injunction, counter-claim for injunction in respect of the same or a different property is maintainable? Whether counter-claim can be made on different cause of action? It is true that preceding CPC Amendment Act, 1976, Rule 6 of Order 8 limited the remedy to set off or counter

claim laid in a written statement only in a money suit. By CPC Amendment Act, 1976, Rules 6A to 6G were brought on statute. Rule 6A(1) provides that a defendant in a suit may, in addition to his right of pleading a set off under rule 6, set up by way of counter-claim against the claim of the plaintiff, any right or claim in respect of a cause of action accruing to the defendant against the plaintiff either before or after the filing of the suit but before the defendant has delivered his defence or before the time limited for delivering his defence has expired, whether such counter-claim is in the nature of a claim for damage or not. A limitation put in entertaining the counter-claim is as provided in the proviso to sub-rule (1), namely, the counter claim shall not exceed the pecuniary limits of the jurisdiction of the Court. Sub-rule (2) amplifies that such counter-claim shall have the same effect as a cross-suit so as to enable the Court to pronounce a final judgment in the same suit, both on the original claim and on the counter-claim. The plaintiff shall be given liberty to file a written statement to answer the counter-claim of the defendant within such period as may be fixed by the Court. The counter-claim is directed to be treated, by operation of sub-rule (4) thereof, as a plaint governed by the rules of the pleadings of the plaint. Even before 1976 Act was brought on statute, this Court in Laxmidas Dahyabhai Kabarwala v. Nanabhai Chunilal Kabarwala, (1964) 2 SCR 567 : (AIR 1964 SC 11), had come to consider the case of suit and cross suit by way of counter-claim. Therein, suit was filed for enforcement of an agreement to the effect that partnership between the parties had been dissolved and the partners had arrived at a specific amount to be paid to the appellant in full satisfaction of the share of one of the partners in the partnership and thereby decree for settlement of accounts was sought. Therein the legal representatives of the deceased partner contended in the written statement, not only denying the

settlement of accounts but also made a counter-claim in the written statement for the rendition of accounts against the appellant and paid the court-fee as plaint. They also sought a prayer to treat the counter-claim as a cross suit. The trial Court dismissed the suit and the counter-claim. On appeal, the learned single Judge accepted the counter-claim on a plaint in a cross suit and remitted the suit for trial in accordance with law. On appeal, per majority, this Court had accepted the respondents' plea in the written statement to be counter-claim for settlement of their claim and defence in written statement as a cross suit. The counter-claim could be treated as a cross suit and it could be decided in the same suit without relegating the parties to a fresh suit. It is true that in money suits, decree must be conformable to Order 20, Rule 18, C.P.C. but the object of the amendments introduced by Rules 6A to 6G are conferment of a statutory right to the defendant to set up a counterclaim independent of the claim on the basis of which the plaintiff laid the suit, on his own cause of action. In sub-rule (1) of Rule 6A, the language is so couched with words of wide width as to enable the parties to bring his own independent cause of action in respect of any claim that would be the subject matter of an independent suit. Thereby, it is no longer confined to money claim or to cause of action of the same nature as original action of the plaintiff. It need not relate to or be connected with the original cause of action or matter pleaded by the plaintiff. The words "any right or claim in respect of a cause of action accruing with the defendant" would show that the cause of action from which the counter-claim arises need not necessarily arise from or have any nexus with the cause of action of the plaintiff that occasioned to lay the suit. The only limitation is that the cause of action should arise before the time fixed for filing the written statement expires. The defendant may set up a cause of action which has accrued to him even after the institution of the

suit. The counter-claim expressly is treated as a cross suit with all the indicia of pleadings as a plaint including the duty to aver his cause of action and also payment of the requisite court-fee thereon. Instead of relegating the defendant to an independent suit, to avert multiplicity of the proceeding and needless protection (Sic protraction), the legislature intended to try both the suit and the counter-claim in the same suit as suit and cross suit and have them disposed of in the same trial. In other words, a defendant can claim any right by way of a counter-claim in respect of any cause of action that has accrued to him even though it is independent of the cause of action averred by the plaintiff and have the same cause of action adjudicated without relegating the defendant to file a separate suit. Acceptance of the contention of the appellant tends to defeat the purpose of amendment. Opportunity also has been provided under Rule 6-C to seek deletion of the counter-claim. It is seen that the trial Court had not found it necessary to delete the counter-claim. The High Court directed to examine the identity of the property. Even otherwise, it being an independent cause of action, though the identity of the property may be different, there arises no illegality warranting dismissal of counterclaim. Nonetheless, in the same suit, both the claim in the suit and the counter-claim could be tried and decided and disposed of in the same suit. In Mahendra Kumar v. State of Madhya Pradesh, (1987) 3 SCC 265 : (AIR 1987 SC 1395), where a Bench of two Judges of this Court was to consider the controversy, held that since the cause of action for the counter-claim had arisen before filing of the written statement, the counter-claim was maintainable. The question therein was of limitation with which we are not concerned in this case. Thus considered we find that there is no merit in the appeal."

31. Going by the ratio decidendi culled out from the

above decision it is clear that the cause of action need not be one having nexus with the claim in the suit. But the restriction is the cause of action should arise before filing of the written statement or time prescribed for delivering the statement has expired.

32. In the present case, going by the claim in OS No.441 of 2004, the plaintiffs have sought partition of the plaint C schedule property and a separate possession of 1/3rd share after permitting redemption of mortgage. The 2nd plaintiff had shown that an extent of 10 cents of property is in her possession by virtue of the gift deed executed by her father in the year 1976. Therefore, the suit basically being one for redemption of mortgage, the defendants set up a separate plea for partition as regards the 2/3rd share over the counter-claim schedule property which is covered by the gift deed. Pertinently, the 1st defendant did not mount the box to adduce evidence as regards his entitlement to question the gift deed but only the 2nd defendant had mounted the box. Even if it is assumed that the 2nd defendant could have given oral

evidence for and on behalf of the 1st defendant, the significant part of the counter-claim is against the property which is subject matter of a registered gift deed.

33. Pertinently, the gift deed was executed in the year 1976 by a registered document. The registration of the document operated as constructive notice under Section 3 of the Transfer of Property Act, 1882. If at all the defendants had any grievance as regards the execution of the gift deed, it ought to have been agitated within the period of limitation. The silence on the part of the defendants from 1976 to 2004 in not questioning the gift deed is also a crucial factor to be considered by this Court. It must be noted that the defendants claim possession under late Sadasivan, who asserted that he was in possession of the property covered by the gift deed and later transferred the same to the hands of the plaintiffs. That be so, it passes one's comprehension how the trial court could have entertained the counter claim, since the cause of action was entirely different and the plaint schedule property was also different. This crucial

aspect has been completely oversighted by the first appellate court while dismissing the appeals. Therefore, it is inevitable for this Court to conclude that the counterclaim preferred by the defendants does not relate to the cause of action arisen before or after filing of the suit and thus is not maintainable.

Whether the plaintiff is entitled for an injunction in OS No.216 of 2004.

34. The finding on this issue is basically a consequence of the finding of this Court in the above mentioned questions which have been answered. It follows that once the plaintiffs in OS No.441 of 2004 are found to be entitled to maintain a suit for redemption of mortgage and also consequential partition of 1/3rd share, and also in the light of the fact that the counter-claim preferred does not relate to the cause of action for filing of the suit, it necessarily follows that the plaintiff in OS No.216 of 2004 is not entitled to seek injunction in respect of entire plaint schedule property, especially since the possession of the plaintiff is excluded by execution of

a registered document of gift by late Sadasivan, the father of the plaintiff. Therefore, it follows that the plaintiff in OS No.216/2004 is not entitled to injunction as prayed for.

35. Read in cumulative and on the basis of the discussion which has preceded above, this Court finds that the judgments rendered by the trial court as well as the first appellate court are wrong inasmuch as the evidence and the point of law have been thoroughly misappreciated. The consequence is that the judgments of the courts below are liable to be interfered with.

Accordingly, these appeals are allowed as follows:-

1. RSA No.974 of 2011 is allowed reversing the judgments of the Sub Court, Neyyattinkara in AS No.135 of 2007 and that of the 2nd Additional Munsiff's Court, Neyyattinkara in OS No.441 of 2004.

2. OS No.441 of 2004 will stand decreed and the plaintiffs are permitted to redeem the mortgage by payment of 1/3rd of the mortgage amount as

Rs.1,200/-. Consequentially, the plaintiffs will be entitled for a preliminary decree of partition and plaint C schedule property is divided into metes and bounds by allowing the plaintiffs to take 1/3rd share over the plaint C schedule property.

3. The judgment and decree, decreeing the counter- claim in OS No.441 of 2004 is reversed and the counter-claim is dismissed as not maintainable.

4. The judgment and decree in OS No.216 of 2004 as confirmed in AS No.134 of 2007 is set aside and the suit will stand dismissed.

5. The plaintiffs in OS No.441 of 2004 are entitled to cost throughout the proceedings.

Sd/-

EASWARAN S.
JUDGE

SPR