

Habeeb Khan and Others Vs. Valasula Devi and Others

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Court : Andhra Pradesh

Decided On : Apr-25-1996

Reported in : AIR1997AP53

Judge : Krishna Saran Shrivastav, J.

Acts : [Evidence Act, 1872](#) - Sections 91, 92(2), 101, 104, 108 and 114; [Indian Contract Act, 1872](#) - Sections 16; [Code of Civil Procedure \(CPC\), 1908](#) - Order 1, Rules 9 and 10 - Order 6, Rule 2 - Order 34, Rule 1; [Transfer of Property Act, 1882](#) - Sections 54, 58 and 91; Andhra Pradesh Court-fees and Suits Valuation Act, 1956 - Sections 31

Appeal No. : Appeals Nos. 2612, 2702 and 2703 of 1989

Appellant : Habeeb Khan and Others

Respondent : Valasula Devi and Others

Advocate for Def. : Mr. B.V. Bakshi, Adv.

Advocate for Pet/Ap. : Mr. P.S. Murthy, Adv.

Judgement :

1. The defendants in OS No. 24/84 on the file of the Additional District Judge, Adilabad, are the appellants in this appeal. A preliminary decree for redemption of anomalous mortgage of a double storeyed building bearing No. 4-3-3 (old) and 3-

7-68 (new) situated in Adilabad (hereinafter called as 'Amba Bhavan') and the adjoining plot as also a decree for cancellation of the decree passed in OS No. 49/78 have been passed against them.

2. This appeal shall govern also the disposal of the appeal AS 2702/89 arising out of OS 11/84 and the appeal AS 2703/89 arising out of OS 5/89 because all the three suits have been disposed by the common judgment passed by the Additional District Judge, Adilabad. In OS No. 5/89, suit of the 2nd defendant for permanent injunction has been dismissed and in OS No. 11/89, suit of the 3rd defendant for specific performance of the contract of the upper storey of Amba Bhavan has been dismissed.

3. It is an admitted fact that one K. Ramankutty alias Lingam is the husband of the 1st plaintiff Smt. Valsula Devi and father of the remaining 5 plaintiffs of OS No. 24/84. Similarly, the 1st defendant was the husband of the 2nd defendant and father of the remaining defendants Nos. 3 to 7 of the suit. It is also an admitted fact that the 1st defendant Habeeb Khan expired during the pendency of the suit and before the commencement of evidence in this case.

4. It is no longer in controversy before me that in OS No. 2/ 72, one Chinna Manyamma and K. Ramankutty alias Lingam were declared co-owners having equal share in Amba Bhavan and in appeal before the High Court Chinna Manyamma transferred her half share in Amba Bhavan for a consideration of Rs.29,000/- (Rupees Twenty Nine Thousand only) in favour of K. Ramankutty alias Lingam vide a compromise decree passed by the High Court on 14-4-1978.

5. The plaintiffs in OS 24/84 have alleged that in order to pay Rs.29,000/- to Chinna. Manyamma, the 1st plaintiff and her husband K. Ramankutty alias Lingam were in need of money and the 1st defendant agreed to advance a loan of Rs. 30,000/- to them on condition that they should execute an agreement to sell Amba Bhavan in favour of the defendants 3 and 4 and handover the possession to him. The loan amount would carry interest at the rate of 18% per annum. After a period of five years accounts would be settled and after satisfying the loan and interest, if remaining due, the 1st defendant would re-convey and re-deliver the possession of Amba Bhavan to them. Because they had no other alternative and

they were in dire need of money, on 31-3-1978 the 1st defendant obtained the agreement to sell (Ex. A-1) in favour of his aforesaid sons by K. Ramankutty alias Lingam and paid a loan of Rs.35,000/- to him and obtained possession of Amba Bhavan. They again needed an amount of Rs.5,000/- and therefore they again approached the 1st defendant for further loan whereupon the 1st defendant agreed to advance the loan of Rs. 5,000/- on condition that they should execute a sale deed in his favour in respect of the ground floor of Amba Bhavan showing a consideration of Rupees 40,000/- and this amount would also carry interest at the rate of 18% per annum for 5 years. K. Ramankutty alias Lingam executed a receipt (Ex.A-2) for a total loan amount of Rs. 40,000/- on 5-5-1978 and on 8-5-1978/9-5-1978, the 1st defendant succeeded in obtaining the sale deed, Ex. B-3, of the ground floor of Amba Bhavan. it is further alleged that on 7-8-1978, the 1st defendant got an agreement to sell the 1st floor of Amba Bhavan (Ex. B1) executed by the 1st plaintiff and her husband in favour of his son -- 3rd defendant -- to secure the interest and the loan amount of Rs.40,000/- showing wrongly the consideration as Rs.35,000/- and payment of advance as Rs.33,000/-, but without making any payment to them. The 1st plaintiff and her husband needed an amount of Rs.7,000/- for their hotel business and when approached for loan, the 1st defendant agreed to pay Rs.7,000/- to them on their executing a sale deed of their land measuring 35 ft. X 60 ft. 'adjoining to Amba Bhavan (in short the suit land) in favour of his wife -- the 2nd defendant -- and again succeeded in obtaining a registered sale deed Ex. B2 of the suit land in favour of the 2nd defendant on 30-3-1980. The 1st defendant being a creditor was in dominating position and by practising undue influence and fraud, he succeeded in obtaining the agreement to sell Ex. A1, the sale deed Ex. B3, the agreement to sell Ex. B1 and the sale deed Ex. B2, though the 1st plaintiff and her husband K. Ramankutty alias Lingam had mortgaged Amba Bhavan and the suit land to the 1st defendant for a total loan amount of Rs. 47,000/- on interest at the rate of 18% per annum and handed over the possession of Amba Bhavan and the suit land for a period of 5 years and it was agreed that after completion of 5 years the usufruct of the, Amba Bhavan would be adjusted against the loan amount and interest and after payment of the remaining amount, if any, the 1st defendant would re-deliver Amba Bhavan and the suit land to them. The value of Amba Bhavan at the relevant time was Rupees

3,00,000/- and the value of the suit land was Rs. 25,000/- and, therefore, all the aforesaid agreements and sale deeds are unconscionable and hence they are void. In the meantime, the 3rd defendant had filed a suit for permanent injunction against the 1st plaintiff and her husband K. Ramankutty alias Lingam bearing No. OS 49/78 and obtained their signatures on blank papers and blank Vakalat and misrepresented that the suit had been filed only to restrain them for a period of 5 years from disturbing his possession in the balcony of the 1st floor of Amba Bhavan and, therefore, they did not contest the suit for there was no dispute for a period of 5 years and thus the 3rd defendant by practising fraud had obtained a decree for permanent injunction which is void. The defendants when called upon to do the accounts refused to do so and instead of that the 2nd defendant filed a suit bearing No. 5/89 for permanent mandatory injunction against the plaintiffs making false allegations that they have illegally opened a door in the common wall. Similarly, the 3rd defendant instituted a suit for specific performance on the strength of the agreement to sell Ex. B1 falsely alleging that the plaintiff have failed to perform their part of the contract. The plaintiffs prayed for a decree for redemption of the mortgage, for accounts and redelivery of possession as also for setting aside or cancellation of the decree of permanent injunction passed in OS No. 49/78.

6. The defendants through their joint written statement denied the claim of the plaintiffs. They have denied that the loan of Rs.40,000/- was advanced by the 1st defendant to the 1st plaintiff and her husband on interest at the rate of 18% per annum or they had created usufructuary mortgage. They have pleaded that the agreement to sell (Ex. A1) is a fabricated document. The 1st plaintiff-respondent has no right title or interest in Amba Bhavan or the suit land. Her husband had voluntarily sold the ground floor of Amba Bhavan for a valid consideration of Rs. 40,000/- through registered sale deed (Ex. B3)-and handed its vacant possession to the defendant No. 1. He had voluntarily entered into an agreement to sell the 1st floor of Amba Bhavan for a consideration of Rs. 35,000/- to the 3rd defendant after receiving an advance of Rs.33,000/- and had agreed to execute the sale deed after a period of 5 years in his favour and handed over vacant possession of the 1st floor of Amba Bhavan in pursuance of the agreement to sell, Ex. B-1. The 1st plaintiff and her husband started demanding the balance amount of

consideration 'of Rs. 2,000/- immediately thereafter and tried to disturb the possession of the balcony of the 1st floor of Amba Bhavan. Therefore, he had filed a suit for permanent injunction bearing No. 49/78 against them' in which they filed written statement admitting the claim of the 3rd defendant whereupon a decree for permanent injunction had been passed in that suit against them. They further denied that the agreement to sell, Ex. B-1, was obtained against the alleged amount of interest. They further denied that the 1st defendant had advanced a loan of Rs.7,000/- on 30-3-1980, and had obtained a sale deed Ex. B-2 in favour of the 2nd defendant. They pleaded that K. Raman-kutty alias Lingam voluntarily executed the sale deed Ex. B-2 in favour of the 2nd defendant for a valid consideration of Rs.7,000/- and had handed over its possession to her. The husband of the 1st plaintiff and the father of the remaining plaintiffs namely K. Ramankutty alias Lingam is alive and he was the exclusive owner of Amba Bhavan and the suit land and, therefore, the plaintiffs have no cause of action in the suit. They also pleaded that the 4th defendant is not necessary or proper party to the suit and, therefore, the suit is bad for misjoinder of the party. They also pleaded that the suit is not within limitation and the Court has no jurisdiction to try the suit. They pleaded that the suit is liable to be dismissed with costs.

7. The 3rd defendant filed a suit bearing No. OS 11/84 against the 1st defendant and her husband for specific performance of the contract Ex. B-1 dated 7-8-1978 alleging that he was ever ready and was still ready and willing to pay the balance amount, of consideration of Rs.2,000/- to them and got the sale deed executed and registered, at his expense and in his favour. But, the 1st plaintiff and her husband have not performed their part of the contract and, therefore, a decree for specific performance of the contract should be passed against them.

8. The 2nd defendant also filed a suit OS No. 5/89 for permanent mandatory injunction against the 1st plaintiff alleging that she is trying to interfere with her possession over the suit land and had broken the common wall and had fixed a door in it and, therefore, she is entitled for a permanent mandatory injunction for removal of the door and construction of the broken wall.

9. The plaintiffs in the aforementioned suits bearing OS 11/84 and 5/89 filed written statements denying the claim of the 2nd and the 3rd defendants in their respective suits and took almost similar pleas as defence which had been taken by them in their suit OS 24/84.

10. The trial Court consolidated all the suits and recorded evidence in OS 24/ 84 and through common judgment decreed the suit of the respondents as prayed for and dismissed the suit OS No. 11 / 84 instituted by the 3rd defendant and the suit OS 5/89 filed by the 1st defendant.

11. Feeling aggrieved by the decree passed against them and the decree for dismissal of their suits, the appellants have preferred the aforementioned three appeals.

12. Relying on K. Kanakarathnam v. A. Perumal, : AIR1994 Mad247 , Afsar Shaikh v. Soleman Bibi, : [1976]2SCR327 and Govinda Naik v. Gururao, AIR 1971 Mysore 330, it has been contended on behalf of the appellants that the respondents have not given the particulars of fraud and misrepresentation and undue influence in their plaint and therefore no amount of evidence can be looked into for considering whether the documents had been obtained by practising fraud or undue influence on the 1st plaintiff and her husband as also regarding the alleged misrepresentation. It is further submitted on behalf of the appellants that oral mortgage is not permissible by virtue of the provisions of Section 59 of the Transfer of Property Act and on the basis of the alleged oral mortgage suit for redemption is not maintainable. Reliance has been placed on the cases of B. Ramulu v. G. Ramaswamy, AIR1971 Orissa 58 and Ramprasad v. Smt. Kalyani, . On the authority of Martand Trimbak v. Amritrao, AIR 1925 Bombay 501, Belapur Co. v. State Farming Corporation, : AIR1969 Bom231 , Firm Bolumal v. V. Rao, : AIR 1959 AP612 and Raj KumarRajindra Singh v. State of Himachal Pradesh, : [1990]3SCR469 , it has been argued by Sri P. S. Murthy, the learned Advocate of the appellants that oral evidence cannot be adduced to invalidate a sale deed vide S. 92 of the Indian Evidence Act and by virtue of S. 91 of the Indian Evidence Act, the evidence adduced by the respondents to explain the terms of the documents in question should be excluded. It is also urged on behalf of the appellants that all

the mortgagors are necessary parties in mortgage suit. There is no evidence on record that K. Ramankutty alias Lingam was dead at the time of the institution of the suit. He was not made a party to the suit, therefore, the suit for redemption of mortgage is not maintainable vide A. Gangadhara Rao v. G. Gangarao, : AIR 1968 AP291 and Nalla Venkateshwarlu v. Porise Pullamma, : AIR 1994 AP87 .

13. On the other hand, relying on Tyaga-raja v. Vedathanni, AIR 1936 PC 70; Sukumar Bysack v. S. K. Banerjee, : AIR1972 Cal207 ; Gangabhai v. Chhabubai, : [1982]1SCR1176 and Gaffer v. Sha Jehan Begum, 1980 (2) APLJ (SN) 32, it has been contended by Sri B. V. Bakshi, the learned Advocate of the respondents that in order to show that the sale deed and the agreement to sell are in reality mortgage deeds, oral evidence can be adduced and it should be received in evidence. Market value of Amba Bhavan at the relevant time was Rs. 3,00,000/- and the suit plot was valued at Rs.25,000/- and, therefore, the alleged consideration shown in the sale deed Ex.B-3, agreement to sell Ex.B-1 and sale deed Ex.B-2, is inordinately low and hence are not conscionable in nature and, therefore, burden lies on the appellants to prove that undue influence was never practised on the 1st respondent and her husband on or at the time of execution of these documents. Actually there was no need to get the decree for mandatory injunction cancelled because it is a void document and, therefore, no Court-fees for cancellation of the said decree was required to be paid vide the case of Adam Ibrahim v. A. Simruthmall, AIR 1970 Mad 107. It is further submitted on behalf of the respondents that one mortgagor is competent to redeem the mortgage through a suit for redemption of mortgage because S. 91 of the Transfer of Property Act is the substantive law and the provision of O. 34, R. 1 of the Code of Civil Procedure is a procedural law and therefore there was no need to implead K. Ramankutty alias Lingam, particularly in the light of the fact that he had disappeared from Adilabad and his whereabouts were not known to the appellants at the time of institution of the suit and they do not know his whereabouts even up to this date. The 1st plaintiff being a party to certain documents had an interest in getting the mortgage redeemed and, therefore, she has got a right to file a suit for redemption of mortgage. In the alternative, it has been contended on behalf of the respondents that, even if it is assumed that the suit for redemption does not lie because it is based on oral usufructuary mortgage which is void, the proper relief

for possession can be granted vide the case of Kaushal Singh v. Chanshiam Singh, : AIR1956 All639 . The appellants have not examined the material witness namely Abdul Ahed who was in the service of the appellants and, therefore, adverse inference should be drawn for withholding the important witness. The lower Court has assessed the evidence of the parties rightly and no interference is called for in the finding of facts and all the appeals are liable to be dismissed.

14. The main question that falls for determination is whether the sale deed Ex. B-3, agreement to sell, Ex.B-1 dated 7-8-1978 and the sale deed Ex.B-2 dated 30-3-1980 were out and out sale deeds and agreement to sell respectively or nominal documents and in reality they are anomalous mortgage deeds?

15. Before I proceed to decide the aforesaid question, it is to be examined if on the face of the apparent tenor of the documents, and the bar against oral evidence contained in Ss. 91 and 92 of the Indian Evidence Act, it is possible to do so?

16. In the case of Martand Trimbak v. Amritrao (supra), a Division Bench of the Bombay High Court has held that it is not permissible to consider the surroundings with a view to hold that document which on the face of it is a sale deed was intended to operate as a mortgage deed with the aid of proviso 6 of S. 92 of the Indian Evidence Act. In Belapur Co. v. State Farming Corporation (supra), a single Bench of the Bombay High Court has held that when the terms of the contract have been reduced to writing, extrinsic evidence as to what transpired subsequent to the contract is not admissible for ascertaining the terms in view of the provisions of S. 91 of the Indian Evidence Act and if there is some doubt as to what the words mean or how they are to apply to the circumstances of the writer or to the facts existing at the time when the document was executed extrinsic evidence is admissible under Proviso 6 of S.92 of the Indian Evidence Act. The case of Martand Trimbak v. Amritrao (supra) has been referred in this case and the learned single Judge observed that the decision of the Privy Council in the case of Balkishn Das v. W. E. Legge, (1900) 27 Ind App 58, has not been referred to in this judgment of the Division Bench wherein it is held that the intention of the parties is the first determining factor and in view of S. 92 of the Indian Evidence Act oral evidence can in no event be admitted to contradict, vary,

add or subtract from the terms of the document as far as the parties to that document are concerned. Similarly, it is held in the case of *Firm Bolumal v. V. Rao* (supra) that Proviso 6 to S. 92 of the Evidence Act can be called only in cases where the terms of a document are ambiguous. When a document creates a doubt as to the meaning and the intention of the parties, oral evidence bearing on the surrounding circumstances can be looked into but extrinsic evidence is inadmissible to alter the legal character of an instrument. In the case of *Raj Kumar Rajindra Singh v. State of Himachal Pradesh* (supra), the Apex Court has also held that if the terms of the document are clear and unambiguous, extrinsic evidence to ascertain the true intention of the parties is inadmissible because S. 92 mandates that in such a case the intention must be gathered from the language employed in the document. But if the language employed is ambiguous admits of a variety of meanings, 6th Proviso to Sec, 92 can be invoked which permits tendering of extrinsic evidence as to acts, conduct and surrounding circumstances to enable the Court to ascertain the real intention of the parties. In such a case such oral evidence may guide the . Court in unravelling the true intention of the parties.

17. In the case of *Sukumar Bysack v. S. K. Banerjee* (supra), it is held that Ss. 91 and 92 of the Evidence Act do not preclude the defendant from showing by evidence that though the document was executed in the form of an agreement for sale, the real nature of the transaction was a loan for which the document was a security. In this case reliance has been placed on *Tyagaraja v. Veddathanni* (supra) decided by Privy Council, wherein it is held that oral evidence is admissible to show that document executed was never intended to operate as agreement, but was brought into existence solely for creating evidence of some other matter.

18. The case of *Tyagaraja v. Vedathanni* (supra) was quoted with approval in the case of *Gangabhai v. Chhabubai* (supra) and it is held by the Apex Court :

' . . .the bar imposed by sub-sec. (1) of S. 92 applies only when a party seeks to rely upon the document embodying the terms of the transaction. In that event, the law declares that the nature and intent of the transaction must be gathered from the terms of 'the document itself and no evidence of any oral agreement or

statement can be admitted as between the parties to such document for the purpose of contradicting or modifying its terms. The sub-section is not attracted when the case of a party is that the transaction recorded in the document was never intended to be acted upon at all between the parties and that the document is a sham. Such a question arises when the party asserts that there was a different transaction altogether and what is recorded in the document was intended to be of no consequence whatever. For that purpose oral evidence is admissible to show that the document executed was never intended to operate as an agreement but that some other agreement altogether not recorded in the document, was entered into between the parties.'

(Underlining is mine)

19. Again, in the case of *Gaffer v. Sha Jehan Begum* (supra), it is held that S. 92 of the Indian Evidence Act does not bar a party to adduce evidence to show that what ostensibly is a sale deed was a non est factum and was intended a mortgage deed. The doctrine requires to be enforced in India as a common place defence due to various factors.

20. Section 92 of the Evidence Act does not prevent evidence being let in to show the sham or nominal nature of the sale transaction vide *Ratanlal v. Bandulal*, AIR 1953 Hyderabad 174.

21. In the case of *Tirupathi v. Lakshmana*, : AIR1953 Mad545 , the Madras High Court held (at page 547):

' whether a sale deed was a sham and simulated one not intended to convey any title or whether it was a real one intended to pass title to the transferee thereunder depends upon the animus transferendi at the time when the parties entered into the transaction and each case has to be decided with reference to the documents and the surrounding circumstances.'

22. The case of *Gangabhai v. Chhabubai* (supra) has been relied upon a decision by the Division Bench in the case of *A. Madhava Rao v. P. Rukmini Bai*, : 1995(3)ALT61 , wherein it is held that it is open to establish by evidence that the

consideration was really different from the consideration cited in the deed and S. 92 of the Evidence Act does not prevent evidence being let in to show the sham or nominal nature of the sale transactions. In this case, the cases of Ratanlal v. Bandulal (supra) and Tirupathi v. Lakshmana (supra) have been quoted with approval.

23. The position of law that emerges from the dictum of the aforesaid cases is that overall evidence can be taken into consideration to find out the real nature of the transaction and S. 92 of the Evidence Act is not a bar to the admission of oral evidence to prove that the transaction was intended to be something other than what it purports to be.

24. Smt. Valasula Devi, PW-1, has deposed that she and her husband K. Raman-kutty alias Lingam had contacted 4 to 5 persons for loan, but she could not succeed. Therefore, she and her husband approached the 1st defendant who agreed to advance loan of Rs.35,000/- on condition that it would carry interest at the rate of 18% per annum, that possession of Amba Bhavan would be delivered to him for a period of 5 years and an agreement to sell Amba Bhavan would have to be executed in favour of his sons that is the 3rd and 4th defendants showing an amount of Rs. 60,000/- as consideration and receipt of Rs. 35,000/- as advance. As she was badly in need of money, she and her husband agreed to the aforesaid terms and they obtained a loan of Rs.35,000/- on 31-3-1978 and an agreement to sell in favour of the 3rd and 4th defendants was executed which is at Ex.A-1 and possession of Amba Bhavan was delivered to him. Abdul Ahed and Umapathi PW-2 attested the document Ex.A-1. Out of this amount, they paid Rs. 29,000/- to their aunt Chinna Manyamma as per the terms of the compromise with her. She further stated that a month later, they required an amount of Rs.5,000/- and therefore they again approached the 1st defendant for loan who agreed to advance the loan of Rs. 5,000/- on condition that they should execute a registered sale deed of the ground floor of Amba Bhavan in his favour. On 5-5-1978, she and her husband received Rs. 5,000/- from the 1st defendant and executed a receipt Ex.A-2 in his favour and on 8-8-1978 they executed a registered sale deed of the ground floor of Amba Bhavan for a consideration of Rs.40,000/- though no amount was paid to them on that day. The sale deed is at Ex.B-3. She has further deposed that the 1st

defendant obtained an agreement to sell in respect of the 1st floor of Amba Bhavan in favour of the 3rd defendant showing a consideration of Rs. 35,000/- and an advance of Rs. 33,000/- and the remaining amount of Rs. 2,000/- to be paid within 5 years from the date of the agreement which is at Ex. B-1. The 1st defendant had obtained this agreement to sell Ex.B-1 in order to secure the amount of interest on Rs. 40,000/- which was paid to them as loan. At the relevant time, the market value of the ground floor of Amba Bhavan was Rs. 1,50,000/- and the amount shown in the sale deed Ex.B-3 was very low.

25. Smt. Valasula Devi, PW-1, has stated on oath that in the year 1980 she and her husband required another amount Rs. 7,000/- for their hotel business. They again approached the 1st defendant for the loan of Rs. 7,000/- and he agreed to advance the loan of Rs. 7,000/- on condition that they would have to execute a registered sale deed for the adjacent plot measuring 35 ft. x 60 ft. in favour of his wife, that is the second defendant. They were in need of money and they were indebted to the 1st defendant and, therefore, they had to execute the sale deed Ex.B-2 in favour of the 2nd defendant though it was not a real transaction. The market value of the suit plot was Rs.25,000/- at the relevant time.

26. The statement of Smt. Valasula Devi has been corroborated on material particulars by the evidence of Umapathi, PW-2, who has deposed that on 31-3-1978 the 1st defendant paid the loan of Rs. 35,000/- to K. Ramankutty alias Lingam on condition of his executing an agreement to sell which is at Ex.A-1 which bears the signature of K. Ramankutty alias Lingam. Mahmood Khan was the scribe of Ex. A-1 and Abdul Ahed and he himself had attested the document. The market value of the Amba Bhavan at the relevant time was Rs. 30,000 / -. He has stated that the actual understanding between the parties was only to mortgage Amba Bhavan for the loan amount. Interest was settled at the rate of 18% per annum for a period of five years and the possession of Amba Bhavan was agreed to be handed over to the 1st defendant for a period of five years after which it was agreed that they would settle accounts. He has also stated that the value of the plot was Rs. 25,000/- in the year 1980,

27. In cross-examination, Valasula Devi, PW-1, has admitted that by virtue of the compromise decree, Ex, A-11, Amba Bhavan became the property of her husband only. At the time of talks about loan, Mahmood Khan, Shahbaz Khan and Umapathi, PW-2, were present. She has denied that the ground floor of Amba Bhavan was sold to the 1st defendant for a valid consideration of Rs. 40,000/-. True that she has wrongly stated that it is mentioned in the document Ex.A-1 that the property has been mortgaged for a period of five years. But, it appears to be inconsequential because she has also stated that the said agreement was not read over and explained to her and, therefore, it can be inferred that under the impression that the mortgage deed was executed through document Ex.A-1 she has stated so. The document, A-1, does not bear her signature though she has claimed so. But it appears to be a bona fide mistake because she had signed on the sale deed Ex.B-3 and the agreement to sell Ex.B-1 and her name also appears in the receipt Ex.A-2. Therefore, it appears that under that impression she has by mistake claimed to have signed Ex.A-1 also. She has reiterated in her cross-examination that the agreement to sell the 1st floor of Amba Bhavan was obtained by the 1st defendant towards the interest on loan of Rs.40,000/-and also towards the expenses incurred in purchasing the stamps and meeting registration charges. She denied that the 1st defendant had paid the consideration of Rs.40,000/- on 8-5-1978 and not on 31-3-1978.

28. It is true that the compromise decree was passed by the High Court, a certified copy of which is at Ex. A-11, on 14-4-1978 while the sale deed Ex.B-3 was executed on 8-5-1978/9-5-1978. But, Valasula Devi, PW-1, and Umapathi, PW-2, have deposed that the amount was paid in the month of March only and, therefore, merely on this ground that the sale deed Ex.B-3 was executed on 8-5-1978, it cannot be said that the agreement Ex.A-1 was not executed on 31-3-1978.

29. It is an admitted fact that the scribe of the agreement Ex.A-1 died before the commencement of evidence. The whereabouts of K. Ramankutty alias Lingam were not known at the time of evidence. The 1st defendant also expired before recording of evidence in this case. As noted above, Umapathi, PW-2, has testified that the agreement, Ex.A-1, was executed on 31-3-1978 which was in reality a mortgage deed and through which a loan of Rs. 35,000/- was advanced to K.

Ramankutty alias Lingam and his wife on the terms stated above. The 2nd witness to this document is Abdul Ahed who was an employee of the 1st defendant at the relevant time and at the time of evidence also he was admittedly in the employment of the defendants. The 4th defendant did not enter into witness box. The 3rd defendant, Mahmood Khan, DW-3, has admitted in cross-examination that Abdul Ahed had prepared the documents which are Exs.A-1, A-2 and A-4. He has stated that Abdul Ahed is the scribe of the agreement to sell Ex.B-1. He had also attested the sale deed Ex.B-2 and Ex.B-3. He has also admitted the signature of Abdul Ahed on the document Ex.A-1. He has admitted in cross-examination that the possession of the entire Amba Bhavan building was handed over to the defendants on 9-5-1978 or on 10-5-1978. When questioned, whether he would examine Abdul Ahed, on his behalf, he asserted that he would not examine Abdul Ahed on his behalf.

30. In the case of Gopal Krishnaji v. Mohd. Haji Latif, : [1968]3SCR862 , it is held that even if the burden of proof does not lie on a party the Court may draw an adverse inference if he withholds important documents in his possession which can throw light on the facts in issue. It is not in our opinion a sound practice for those desiring to rely upon a certain state of facts to withhold from the Court, the best evidence which is in their possession which could throw light upon the issues in controversy and to rely upon the abstract doctrine of onus of proof.

31. Again in the case of Patel Naranbhai v. Dhulabhai, : [1992]3SCR384 , the best evidence namely the notification to conduct sale for arrears, the sale proceedings and the certificate of sale had not been placed on record. Under these circumstances, it observed by the Apex Court that the material evidence which clearly established that the said sale was withheld by the appellant and, therefore, had drawn adverse inference against them. Thus, the effect of withholding the best evidence available to a party is that adverse inference should be drawn against that party for withholding the same.

32. In view of what is stated above, it is a fit case in which adverse inference against the defendants-appellants should be drawn for withholding the important and material witnesses namely the 4th defendant Shahbaz Khan and their

employee, Abdul Ahed.

33. Mamood Khan, DW-1, has testified that the sale deed Ex.B-3 was registered on 8-5-1978. The market value of the ground floor of Amba Bhavan was about Rs.40,000/- or Rs. 45,000/- at that time. In cross-examination, he has stated that K. Ramankutty alias Lingam had purchased the stamps on which the sale deed Ex.B-3 was written. The amount of Rs. 40,000/- was paid by his father before the Sub-Registrar at the time of registration of the sale deed in his presence. Abdul Ahed and one Syed Khaja were the witnesses to Ex.B-3. His brother Shahbaz Khan, Ramankutty alias Lingam and Valasula Devi were present during the negotiation of the ground floor of Amba Bhavan. He was also present. His statement is belied by the fact that the sale deed Ex.B-3 was actually registered on 9-5-1978. There is no endorsement of the Sub-Registrar on the sale deed Ex.B-3 that the amount of Rs.40,000/-was paid to K. Ramankutty alias Lingam in his presence. On the other hand, in the sale deed Ex.B-3 it is mentioned that the vendors have already received the amount of Rs. 40,000/- from the vendee and the receipt of which the vendors have acknowledged. The scribe of Ex.B-3 is dead.

34. The witness to Ex.B-3 Syeed Khaza DW-2 firstly stated that the sale deed Ex.B-3 was executed in favour of Mahaboob Khan, then he changed his version and stated that it was executed in favour of Habeeb Khan. According to him the sale consideration was Rs. 44,000/-. He has further stated that Abdul Ahed had also signed as a witness. The document Ex.B-3 was written in the office of the Sub-Registrar which was already written before he reached there. During the relevant time this witness was employed as an attender in the Court of District Munsif. He has stated that he was not aware about the talks that preceded the execution of the document Ex.B-3. Thus, from his evidence it appears that he does not know anything about the sale deed Ex.B-3, that is to say about the nature of the transaction and he had simply signed as a witness to do the formality on the mere asking.

35. Mamood Khan, DW-1, has testified that he had entered into an agreement to purchase the 1st floor of Amba Bhavan because the only way to reach the 1st floor

was from its ground floor. He further stated that he had purchased the 1st floor of Amba Bhavan for a consideration of Rs.35,000/-out of which he paid Rs. 33,000/- at the time of the agreement to sell Ex.B-1. He was having only Rs. 15,000/- at that time and, therefore, he borrowed Rs.10,000/- from one Kaleemuddin of Nirmal village and Rs.8,000/- from one Akhtar Hussain. He repaid the loan amounts to them in the month of December, 1978 only. It is pertinent to note that according to Mamood Khan, DW-1, his only source of income at the relevant time was from agriculture and the net income per year was Rs. 10,000/- only. If that was so, it was impossible for him to have repaid the amount of Rs. 18,000/- in the month of December, 1978 which was alleged to have been taken by him in the month of August, 1978, The financial position of the 1st defendant at that time appeared to be very good. There appears to be no reason as to why he did not take money from his father rather than borrowing it from others. The only reason which appears probable is that he did not want to involve his father in this transaction so as to make an attempt to establish that his father was in no way connected with this transaction. Mamood Khan, DW-1, has further stated that he had no money to pay the balance amount of Rs. 2,000/- as also to meet the expenses for purchasing stamps for sale deed and to pay the registration charges and, therefore, he had taken a period of five years for payment of the balance amount of Rs. 2,000/- to be paid to the 1st plaintiff and her husband. This appears to be a wholly wrong statement because as per the terms of Ex.B-1, it was the vendors who had agreed to pay for the stamp duty as also to meet the registration charges. If he could pay from his agricultural income an amount of Rs. 18,000/- within four months how can it be accepted that he could not arrange for a meagre amount of Rs.2,000/- particularly when the financial position of his father appeared to be sound. The other reason which impairs the testimony of Mamood Khan, DW-1, is that he has claimed to have a scooter and a car at the relevant time for his personal use. A man who was capable of affording a scooter and a car at the relevant time cannot be believed when he says that he had no money to pay an amount of Rs.2,000/- only to the vendors. Thus, taking five years of time for payment of Rs. 2,000/- on the ground of paucity of funds is not worthy of reliance. As noted above, at one stage he has stated that he obtained the possession of the 1st floor of Amba Bhavan after execution of the agreement of sale Ex.B-1, but in

cross-examination he has stated that the possession of the entire Amba Bhavan was handed over to his father on or about 9-5-1978.

36. Smt. Valasula Devu PW-1, has deposed that on receiving summons from the Munsif Court in O.S. No. 49/78, she and her husband visited the Advocate, Sri Chandra-kanth Rao along with the 3rd and 4th defendants. Sri Chandrakanth Rao obtained their signatures on blank white papers and told them not to enter into the 1st floor of Amba Bhavan for a period of five years because they had mortgaged Amba Bhavan to the defendants for that period and had delivered its possession also. They did not engage any Advocate to defend that suit. They were also told by Sri Chandrakanth Rao, Advocate, that they need not appear in the Court. The certified copy of the plaint is at Ex.A-5 and the certified copy of the written statement is at Ex.A-6 and the certified copy of the decree is at Ex.A-8. She came to know about the judgment and decree only after receiving summons in O.S. No. 11/84 which had been filed by the 3rd defendant for specific performance of the agreement to sell.

37. As against that Mamood Khan, DW-1, has stated on oath that within two months from the date of execution of the agreement, Ex.B-1, the 1st plaintiff and her husband started demanding payment of Rs. 2,000/- and also tried to encroach on the balcony of the 1st floor of Amba Bhavan and, therefore, he filed a suit against them in which they filed a written statement admitting the claim as set out in the plaint and a decree in his favour was passed by the Court. He denied that signatures of the 1st plaintiff and her husband had been taken on blank white papers as also on the Vakalat.

38. In cross-examination, Mamood Khan, DW-1 had stated that he could not say as to how many days or how many months or how many years after the date of agreement of sale Ex.B-1, he had instituted the suit O.S. No. 49/78. He has admitted to have filed a suit for permanent injunction restraining the plaintiff and her husband from disturbing his possession from a portion of the 1st floor of Amba Bhavan. He has stated that he does not remember who was the Advocate who appeared on his behalf in O.S. No. 49/78. He further stated that he does not remember how much Court-fee he had paid on the plaint or how much amount he

has spent to contest that suit. He also does not remember whether he had entered into the witness box in that case.

39. On perusal of the certified copy of the plaint Ex.A-5 and the certified copy of the written statement Ex.A-6, it appears that both these documents had been typed in English. The written statement does not bear the signature of the Advocate of the defendant in that suit, that is to say, the 1st plaintiff and her husband. The case of the plaintiffs is that they did not want to contest that suit because they were told that for five years they could not disturb the possession for they had mortgaged the property for that period and believing that, they put their signatures on blank papers. The certified copy of Ex. A-8 shows that a decree for permanent injunction had been passed against the 1st plaintiff and her husband in the light of the consent written statement.

40. I had the occasion to deal with the question whether a decree can be set aside on the allegation of fraud on the basis of extrinsic evidence in the case of Hurmathunnisa Begum v. Shamim Fatima Sultana in A.S.No.512/1983, dated 26-9-1995 wherein I have held:

' that although fraud vitiates the most solemn proceedings of Courts of justice and avoids all judicial acts, yet fraud to be a ground for vacating a judgment must be extrinsic or collateral to the adjudications involved in the judgment and not been, or deemed to have been, dealt with by the Court in the impugned judgment and a decree cannot be set aside merely on proof that it was obtained by perjury or that the suit document is a forged document. But, this principle is equally true that if by the conduct of the defendant in keeping the plaintiff out of Court by practising a fraud on him, or by not serving a notice upon him, or by false declaration, inducing the Court to believe that the notice had been served and proceeded the suit ex parte or by some other act by which the plaintiff is prevented from placing his case before the Court, as fully as he would do, but for the act of the defendant by playing a trick upon the Court and also upon the plaintiff and the witnesses to prevent the truth being discovered, or by misrepresentation preventing the plaintiff from conducting his case properly in the previous suit against him, the decree should be set aside.'

41. It is well settled that in order to establish undue influence in a case of nature of inter vivos transactions as is embodied in S. 16 of the [Indian Contract Act, 1872](#), two important things must be proved; one, that the relation between the parties was such that the vendee or the donee was in a position to dominate the Will of the vendor or the donor and he has used that position to obtain an unfair advantage over the vendor or the donor and it is insufficient for a person seeking the relief to show that the relations of the parties have been such that one naturally relied upon for the advice and the other was in a position to dominate the Will of the first in giving it.

42. So far as the question of practising the undue influence or fraud on the 1st plaintiff and her husband by the 3rd appellant is concerned, it is to be remarked that at the outset neither the 1st respondent has pleaded specifically that the 3rd appellant was in a dominating position to dominate the Will of the 1st respondent and her husband or he had used that position to obtain unfair advantage over them within the meaning of S. 16 of the Contract Act. Actually speaking, the case of the 1st respondent appears to be that by practising trick, the 3rd appellant succeeded in obtaining the decree for permanent injunction against her and her husband and had utilised the signed blank papers as written statement wherein the pleading that suited him had been made.

43. As noted above, the case of the 1st respondent is that she and her husband had mortgaged Amba Bhavan for a period of five years and had handed over its possession to the 1st defendant. Therefore, on their own showing, they had no right to interfere with the possession of the 1st defendant for a period of five years. There is evidence on record that the 1st respondent did not know English language. There is no evidence that her husband knew English language, The written statement, a certified copy of which is at Ex.A-6, is typed in English language. No Advocate has signed as the counsel of the 1st respondent and her husband. Mampod Khan, DW-1, has given an evasive reply that he does not remember the name of his Advocate in the suit. Under these circumstances, there appears to be no reason to disbelieve Smt. Valasula Devi, PW-1, that she was given to understand not to disturb the possession of the 1st floor of Amba Bhavan for a period of five years because it was mortgaged for that period and her

signatures were obtained on blank papers that were later utilised in that suit and thus it appears that by practising a trick, the 1st respondent and her husband were prevented from contesting the suit. It would not be out of place to mention that the plaint, a certified copy of which is at Ex.A-5, had also been drafted and typed in English and she and her husband had no knowledge about the contents of these documents and, therefore, the decree for permanent injunction appears to have been obtained by practising trick on the 1st respondent and her husband and, therefore, it is liable to be set aside. Even otherwise, the 1st respondent-isentitled to explain the admission made in the written statement Ex.A-6 in which the plaint allegation regarding the execution of the agreement to sell Ex.B-1 has been mentioned particularly because the decree for declaration Of title had not been passed against her and her husband and she has explained under what circumstances the admission was made in the written statement Ex.A-6.

44. Mamood Khan, DW-1, has admitted in cross-examination that the ground floor of Amba Bhavan was let out for arrack depot on a monthly rent of Rs. 1,000/- by them, but he has given an evasive reply in cross-examination that he does not remember when it was leased out and for how many years it was leased out for arrack depot. Thus, from his evidence it is established that the annual letting of the ground floor of Amba Bhavan was Rs. 12,000/- at the relevant time, from which it can be safely inferred that the market value of the ground floor of Amba Bhavan at the relevant time was much more than Rs. 40,000/- as mentioned in the sale deed Ex.B-3. The amount of consideration shown in the sale deed Ex.B-3 appears to be very low.

45. The agreement to sell Ex.A-1 bears the signature of Abdul Ahed who had also purchased the stamp on 5-5-1978 for K. Ramankutty alias Lingam which is at Ex.A-2 and in which it is mentioned that an amount of Rs. 40,000/- in two instalments was received by K. Ramankutti alias Lingam from the 3rd and the 4th defendants. The scribe of Ex.A-1 and one of the witnesses of the receipt Ex.A-2 namely Mamood Khan had expired before the evidence was recorded in this case. Abdul Ahed who was in the service of the defendants as also the 4th defendant Shahbaz Khan have not been examined in this case. Mamood Khan DW-1 has stated that in the year 1983 Abdul Ahed left their services due to some difference

between them and colluded with the respondents, but again he joined his services in the year 1986 and he is continuing his services as their Munim.

46. It is well settled that evidence has to be tailored strictly according to the pleadings and cannot be a probing adventure in the dark lings surprise to the opposite party. Noextraneous evidence can be looked into in the absence of specific pleadings of the parties.

47. It is noteworthy that the defendants have nowhere pleaded in their written statements that Abdul Ahed had left the job for three years due to certain difference and had colluded with the respondents. Therefore, the evidence of Mamood Khan, DW-1, that during the break in service for three years Abdul Ahed had colluded with the plaintiffs, should be excluded from consideration.

48. It is true that the respondents have not explained as to how they had come in possession of the agreement to sell Ex.A-1 and the receipt Ex.A-2 when it should have betn in possession of the appellants because they were in their favour. It is not that the defendants had signed on them and a copy was handed over to them. It is common experience that when a sale deed is executed and registered, the agreement to sell and the receipt showing the receipt of advance loose importance and ordinarily either these documents are destroyed or they are returned to the vendors because they are of no use to the vendees. Therefore, the possibility of handing over those documents by the 1st defendant to the husband of the 1st respondent cannot be ruled out. The other possibility that appears is that the appellants would have somehow managed to obtain these documents from the said Abdul Ahed and that appears to be the reason for Mamood Khan, DW-1, to say that Abdul Ahed had colluded with the respondents. Be that as it may, the fact remains that the documents Exs.A-1 and A-2 cannot be said to be fabricated for two reasons. The 1st reason is that there is no allegation made in the written statement by the appellants The 2nd reason is that admittedly the stamps were purchased in the month of 28th March and 11th April, 1978 and not in the year 1983 when there was an alleged break of service of Abdul Ahed. Abdul Ahed was the best person to speak about the transaction, but as noted above, the appellants have Withheld his evidence.

49. For the foregoing reasons, agreeing With the learned lower Court, I reach the conclusion that the documents Ex.A-1 and Ex.A-2 are genuine documents. The value of the ground floor of Amba Bhavan as mentioned in the Ex.B-3 appears to be very low. The 1st respondent and her husband K. Ramankutty alias Lingani were badly in need of money. K. Ramankutty bore the expenses for purchasing the stamps as also the registration charges. Possession of the ground floor as also the 1st floor of Amba Bhavan was handed over to the 1st defendant with the execution of the agreement Ex.A-1 because there was no access to the 1st floor except through the ground floor of Amba Bhavan. Therefore, it cannot be said that possession of Amba Bhavan was delivered in the month of May, 1978 only. The name of the 1st defendant was mutated in the municipal records. The name of the 1st defendant was recorded not only regarding the ground floor as well as the 1st floor. The interest at the rate of 18% per annum on Rs. 40,000/- for a period of five years comes approximately to Rs. 35,000/-. The agreement to sell Ex.B-1 does not appear to be the real transaction because the evidence of the 1st respondent is preferred to the evidence of Mamood Khan, DW-1, that no consideration was paid at the time of the execution of the agreement to sell Ex.B-1 and, therefore, it is established that it was a document for security for repayment of the loan amount.

50. In view of the facts stated in the preceding paragraphs, I hold that the sale deed Ex.B-3 is in reality an anomalous mortgage and the agreement to sell Ex.B-1 is in reality a supplement to the anomalous mortgage and it was agreed between the 1st respondent and her husband on one side and the 1st defendant on the other that the amount of loan of Rs. 40,000/- would carry interest at the rate of 18% per annum and in pursuance of which agreement, possession of Amba Bhavan was delivered to him and it was further agreed between them that after completion of five years the accounts would be settled and on payment of the balance amount, if any, the appellants would re-convey and re-deliver the possession of Amba Bhavan to them.

51. Smt. Valasula Devi, PW-1, has not stated in her deposition that on the amount of Rs. 7,000/- interest was agreed to be paid at any rate to the 1st defendant. She has stated that an amount of loan of Rs. 7,000/- for hotel business

was obtained from the 1st defendant who had obtained the sale deed Ex.B-2 in favour of his wife and the 2nd defendant which was in reality not a transaction for sale. The price of the suit land at the relevant time was Rs. 25,000/-. It is hard to digest that any person would lend money without interest.

52. Umapathi, PW-2, has not stated about the loan transaction of Rs. 7,000/-. He has stated that the value of the suit land in the year 1980 was approximately Rs.25,000/-. But, in cross-examination he has admitted that he has no personal knowledge about the market value of the suit plot. Ulhas, PW-4, has stated in his examination-in-chief that the measurement of the plot on which Amba Bhavan is standing is 30 ft. x 60 ft. and the value of this plot was Rs. 7,000/- or Rs.8,000/- in the year 1978. He has also admitted that Chinna Manyamma had sold the plot measuring 30 ft. x 60 ft, with foundation for a consideration of Rs. 8,000/- on 2-7-1977. Though he has stated that there was some cross in that plot and therefore it was sold for Rs. 8,000/-, but has admitted in the next sentence that the fact that there was some cross in the plot has not been mentioned in the sale deed in question. This plot is situated at a distance of about 165 ft. from the plot sold by Chinna Manyamma. He had further stated that on 19-2-1980, Chinna Manyamma sold a plot measuring 30 ft. x 60ft. with a flour mill for Rs.26,500/- and this plot is situated opposite to Amba Bhavan separated by a road. Thus, from the evidence of Ulhas, PW-4, it appears that the value of the suit plot was Rs. 7,000,- or Rs. 8,000/- in the year 1980, particularly because he has stated that he has no data on the basis of which he has stated that the value of the suit plot was Rs. 20,000/- in the year 1978.

53. On the other hand, from the evidence of Mamood Khan, DW-1, it is revealed that the value of the suit plot was about Rs. 7,000/- at the time of the execution and registration of the sale deed Ex,B-2, There is evidence on record and it is an admitted fact that an amount of Rs, 7,000/- in cash was paid to the 1st respondent and her husband at the time of the execution of the sale deed Ex.B-2 before the Sub-Registrar.

54. The document Ex. A-4 evidence that a further amount of Rs. 35,000/ - was paid to K. Ramankutty alias Lingam in cash on 31-3-1980. This document was

executed by Shah-baz Khan, the 4th defendant. A perusal of this document also reveals that with this payment of Rs.35,000/- no dispute remained to be decided, and they were in possession of Amba Bhavan. This document was signed by the 4th defendant and witnessed by Abdul Ahed and Umapathi, PW-2. This document is an admission in favour of the 4th defendant himself and therefore this admission in his own favour is of no help to the defendants and nothing turns out from this document in favour of the defendants. Similarly, this document is of little assistance to the respondents. PWs 1 and 2 have stated that Shahbaz Khan, DW-4, telling that it is a document evidencing agreement to reconvey the mortgaged property and handed it over to K. Ramankutty alias Lingam. But, there is no pleading in the plaint to that effect and, therefore, this part of their evidence cannot be looked into.

55. Thus, there is evidence on record that a cash consideration of Rs. 7,000/- which appears to be the market value of the suit plot was paid to the 1st respondent and her husband before the Sub-Registrar and the possession of the suit plot was also delivered to the 2nd defendant after the execution of the sale deed and there was no agreement either to pay interest on that amount or reconvey or redelivery of that property after the period of five years.

56. In view of the aforesaid discussion, disappearing with the learned lower Court, I am not prepared to accept the self-serving statement of Smt. Valasula Devi, PW-1, that the sale deed Ex.B-2, is in reality a document for the security of loan amount of Rs, 7,000/-.

57. In *B. Ramulu v. G. Ramaswamy* (supra), a single Bench of the Of is as High Court has held that the weight of authority seems to be in support of the proposition that on the basis of an oral mortgage a suit for redemption is not maintainable. On the other hand, in the case of *Mahabal Singh v. Ram Raj*, : AIR1950 All604 , the Full Bench of the Allahabad High Court has held that in cases of void mortgages which under the law could not be mortgaged, the mortgagor is entitled to recover possession subject to payment of the money received from the mortgagees and no question of limitation arises in the case. The possession of the mortgagee is permissible possession and the only right he has is to be allowed to claim the

money which the mortgagor has received from him and in this view of the matter, the plaintiff is entitled to get back possession of the property. This case has been followed in the case of Kaushal Singh v. Ghansham Singh (supra). In this case, the mortgagor instead of bringing a suit for possession brought a suit for redemption though the mortgage was void. A single Bench of the Allahabad High Court has held that there can be no good ground for refusing the plaintiff relief asked for or strictly speaking the relief to which he is entitled. It has always been open to the Court to grant the party entitled to a relief other than what he has asked for, any appropriate relief to which he might be entitled. The form of suit is of no consequence unless it has the effect of prejudicing the opposite party in his defence.

58. I have found that the sale deed Ex.B-3 is not out and out sale deed and the agreement to sell Ex.B-1 is a document supplementary to it, which follows that the title to Amba Bhavan remained with K. Ramankutty alias Lingam and the possession of the appellants is permissible and therefore, the appellants are not entitled to retain the possession of the property on payment of their loan and interest, if any, remained to be paid. Under these circumstances, I am in complete agreement with the law laid down in Mahabal Singh v. Ram Raj (supra) and Kaushal Singh v. Ghansham Singh (supra) and I am in respectful disagreement with the view expressed by the learned single Judge in the case of B. Ramulu v. G. Ramaswamy (supra). As noted above, the document Ex.B-3 is a registered document and the agreement to sell Ex.B-1 is a document supplementary to the document Ex.B-3 and in reality these documents are anomalous mortgage. The document Ex.B-3 is a registered document and therefore the contention of the learned counsel of the appellants cannot be accepted that the suit is based on oral usufructuary or anomalous mortgage. The suit is based on usufructuary mortgage which is in fact an anomalous mortgage evidenced by the duly registered document Ex.B-2 though styled as a sale deed is in reality an anomalous mortgage deed.

59. The upshot of the aforesaid argument is that the mortgagors are entitled to get the anomalous mortgage redeemed on fulfilment of the terms of the said mortgage.

60. In the case of *A. Gangadhara Rao v. G. Gangarao* (supra), it is held that the language of Rule 1, Order 1 says that all such persons may be joined as plaintiffs in one suit where they are jointly entitled to any relief. In the case of *Nalla Venkateshwarlu v. Porise Pullamma* (supra), it is held that the provisions of Order 1, Rule 9 say that no suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it, the proviso makes it clear that this rule does not apply to nonjoinder of necessary parties. Therefore, if necessary party is not impleaded in a suit or an appeal, it will have to be dismissed on that ground.

61. On the authority of the aforementioned two decisions, it is urged on behalf of the appellants that by virtue of Order 34, Rule 1 of the Code of Civil Procedure, all persons having an interest either in the mortgage-security or in the right of redemption should be joined as parties to any suits relating to the mortgage. The respondents should have impleaded K. Ramankutty alias Lingani because he was a necessary party and not impleading him as a party is fatal to the case of the respondents. It is also urged on behalf of the appellants that actually K. Ramankutty alias Lingam is the exclusive owner of Amba Bhavan and, therefore, the other respondents are not entitled to bring a suit for redemption of mortgage because he was alive at the time of the institution of the suit and no presumption under S. 108 of the Evidence Act could be drawn that he was dead at the time of the institution of the suit.

62. A Division Bench of the Rajasthan High Court in the case of *Dwaraka Prasad v. Gopi Nath*, has held that Order 34, Rule 1 is a rule of mere procedure and it is controlled by the provisions of Order 1, Rule 9 of the Code of Civil Procedure. A suit for enforcement of the mortgage security or the redemption of mortgage is not necessarily liable to dismissal if all persons having interest either in the mortgage security or in the right of redemption have not been made parties. If an effective decree can be passed and the rights of those parties not before the Court can be properly safeguarded even in the absence of some of the parties, suitable relief shall not be denied to the plaintiff. It is not the law in India that one of several mortgagors cannot redeem more than his share unless the owners of the other

shares consent or do not object. Subject to proper safeguarding of the right to redeem, which these owners may possess, one of several mortgagors can redeem the entire mortgage. The case of Dwaraka Prasad v. Gopi Nath (supra) has been quoted with approval in the case of Lachmi Narain v. Kalyan, . The contention of the defendants was rejected that the plaintiffs were not entitled to redeem the disputed share because the heirs of rightful mortgagors were not brought on record. In the case of Gudarmal v. Bansilal, AIR 1971 Raj 175, it is held that there is a fundamental distinction between S. 91(a) of the Transfer of Property Act and Order 34, Rule 1 of the Code of Civil Procedure and it would not be proper to interpret S. 91(a) of the Transfer of Property Act in the light of the language used in Order 34, Rule I of the Code of Civil Procedure which is merely procedural and does not create substantive right and the right to redeem mortgage is to be determined by true construction of S. 91(a) of the Transfer of Property Act.

63. Smt. Valasula Devi, PW-1, has testified that her husband K. Ramankutty aliasLingam has disappeared and his whereabouts are not known since 1980. This witness has been examined on 7-7-1988. The suit has been instituted in the month of October, 1984. Her statement remains unchallenged during her cross-examination on this point, it is pertinent to note that the defendants in their suit also could not personally serve the said K. Ramankutty alias Lingam and, therefore, substituted service was effected.

64. If a person is continually absent from home for a period of seven years unheard of by persons who would have naturally received communication from him, he is presumed to be dead vide Ramrati v. Dwaraka, : [1967]1SCR153 . The burden of proving that he is alive is shifted to the person who affirms that he is not dead. It is a rebuttal presumption.

65. There is no evidence in rebuttal therefore presumption of fictional death or civil death of K. Ramankutty alias Lingam under S. 108 of the Evidence Act can be safely drawn after the year 1987 and this presumption tantamounts to physical death in the eye of law for giving the heirs of K. Ramankutty alias Lingam right to file the suit.

66. It is true that on the date of the institution of the suit, it could not be presumed that K. Ramankutty alias Lingam was dead. But during the pendency of the suit, the period of 7 years has elapsed and the right to file the suit for redemption of the mortgage accrued to the respondents. Even if it is presumed that only K. Ramankutty alias Lingam had got the right to file the suit for redemption of mortgage this subsequent event cannot be lost sight of and it would be unfair to non-suit the respondents on the technical ground that the suit was premature at the time of institution after a period of long 12 years of litigation and to drive them to file a fresh suit for redemption of mortgage. Under the aforementioned peculiar circumstances of the case, the procedural ponderables and technical troubles such as the case in hand should not be permitted to obstruct the path of justice and deprive rightful claim even though the law, justice and equity all demand otherwise.

67. In view of what is stated above, the contention of the learned counsel of the appellants cannot be accepted that the respondents have no right to institute the suit and, therefore, is liable to be dismissed on this count only. Even otherwise, Smt. Valasula Devi, PW-1, was a party to the main document Ex.B-3 and she was also a borrower and thus she had an interest in the mortgage security as also in the right of redemption. As held in the cases of Gudarmal v. Bansilal (supra), Lachmi Narain v. Kalyan (supra) and Dwaraka Prasad v. Gopi Nath (supra), all the mortgagees are not necessary parties to the suit for redemption of mortgage and, therefore, by virtue of Order 1, Rule 9 of the Code of Civil Procedure, the respondents cannot be non-suited merely on the ground that K. Ramankutty alias Lingam was not impleaded as a party to the suit instituted in the year 1984. As I have found that K. Ramankutty alias Lingam was not a necessary party, the cases of A. Gangadhara Rao v. G. Gangarao (supra) and Nalla Venkateshwarlu v. Porise Pullamma (supra) are of no help to the appellants because in those cases it is held that a suit is bad for non-joinder of necessary parties.

68. Section 31 of the A. P. Court-Fees and Suits Valuation Act, 1956 provides for valuation of the suit for the purposes of court fees only. The respondents have valued the suit for the purposes of jurisdiction at the loan amount and have paid the Court fees as per the provisions of S. 31 of the said Act and, therefore, it

cannot be said that the suit should have been instituted in the Court of the District Munsif on the mere basis of valuation for the purposes of court fees only. Even otherwise, the jurisdiction of the District Munsif had been limited to try the suits valued at Rs. 20,000/- only, but there was no restriction for a District Judge to try a suit valued for any amount and, therefore, it cannot be said that the District Judge has no inherent jurisdiction to try the suit.

69. In the case of *Adam Ibrahim v. A. Simruthmall* (supra), a Division Bench of the Madras High Court has held that when it is alleged in the plaint that the document in question though executed as a sale deed operated only as a mortgage, there was no need for cancellation of the sale deed and, therefore, payment of court fees on that basis was not necessary. Therefore, the submission made on behalf of the appellants that the respondents should have valued and paid the court fees for cancellation of the sale deeds has no force. So far as the relief of cancellation of the decree is concerned, the allegation in the plaint was that it has been obtained by practising fraud and misrepresentation and, therefore, it is not binding on the 1st respondent and her husband. The relief of cancellation of the sale deed and/or setting it aside was an ancillary relief to the main relief of redemption of mortgage and, therefore, there appears to be no need for payment of court fees for cancellation or setting aside the decree passed in O.S. No. 49 /1978.

70. In the case of *Mhadagonda Ram-gonda Patil v. Shripal Balwant Hainadc*, : [1988]3SCR689 , it is held that even in the case of mortgage interest amount cannot exceed the principal amount because the rule of 'Damdup' is an equitable rule debarring the creditor to recover interest amount which is more than the principal amount and it cannot be recovered by the creditors.

71. It is interesting to note that the respondents themselves have pleaded in para 9 of the plaint that they are willing to pay an interest amount of Rs. 41,475/- on the loan amount of Rs. 35,000/- at the rate of 18% per annum up to 31-10-1984 and an amount of Rs. 5,837.50 P. on the loan amount of Rs. 5,000/- at the same rate and for the same period. Thus, they have pleaded that they shall pay an amount of Rs. 40,000/- as loan amount and Rs. 47,312.50 P. towards interest totalling to Rs. 87,312.50 P. upto 31-10-1984, that is, up to the date of institution of the suit for

redeeming Amba Bhavan. They have also claimed that the usufruct of Amba Bhavan up to this period should stand adjusted against the said amount of Rs. 87,312.50 P. and they shall pay the balance amount, if any, after adjustment whereupon the appellants should reconvey and redeliver Amba Bhavan. Under these circumstances, on the principle of Damduput the amount of interest cannot be restricted to Rs. 40,000/- only.

72. I have found the sale deed Ex. B-2 as an out and out sale deed. But, agreeing with the lower Court I hold that the 2nd appellant has failed to establish that the respondents have broken a portion of the common wall and have fixed the door in it and, therefore, the 2nd appellant is not entitled for a decree of mandatory permanent injunction.

73. It is noteworthy that the respondents have pleaded in Para 9 of the plaint that after adjusting the usufruct for a period of six years and seven months, they are liable to pay an amount of Rs. 5287.50 to the appellants and in Para 10 of the plaint they have pleaded that the appellants are liable to account for the income received by them and on taking accounts and appropriating the income towards principle and interest, if any amount is found due, they are ready to pay the same and the appellants are liable to reconvey and redeliver the possession of the mortgaged property. But, it is not alleged that after the accounts in case any amount remains in balance after adjustment of the loan amount and interest, the same may be paid to them by the appellants. Neither the suit has been valued on tentative claim nor the relief for payment of the excess amount, if any, has been claimed.

74. For the foregoing reasons, disagreeing with the lower Court. I hold that the respondents are not entitled to claim any amount that may be found to be in excess after payment of Rs. 87,312.50 out of the usufruct of the mortgaged property upto the date of decree passed by the trial Court. But in view of the stay in appeal, equities may be worked out.

75. In result, the appeal bearing No. AS 2702/89 and the appeal AS 2703/89 are dismissed and the decree of dismissal of the suit No. OS 11/84 is maintained. Similarly though holding that the 2nd appellant is the owner of the suit land in OS

No. 5/89, the judgment and decree of dismissal of that suit is hereby maintained. The appeal No. 2612/ 89 is partly allowed. Modifying the decree for redemption of the mortgaged property, that is Amba Bhavan, it is declared that only Amba Bhavan was mortgaged with possession to the 1st defendant, since dead, and a preliminary decree is passed in favour of the respondents, and against the appellants for redeeming the anomalous mortgage, that is Amba Bhavan, by making payment of the mortgage amount with interest at the agreed rate amounting to Rs. 87,312.50 upto the date of institution of the suit and pendente lite interest at the rate of 12% per annum on the amount of Rupees 40,000/- till the date of decree. It is further ordered that the net income of Amba Bhavan will be assessed from the date of Mortgage, that is 31-3-1978, till the date of the decree passed by the lower Court after deducting the expenses that might have been properly incurred by the appellants in maintaining Amba Bhavan as also the payment of all taxes etc., upto the date of decree and the net income will then be adjusted towards the loan amount and interest and thus account would be taken of what was due to the appellants at the date of the decree and it is directed that if the respondents pay into the Court the amount so found or declared on or before three months from the date on which the lower Court confirms and countersigns the account taken as stated above and, thereafter pays such amount, if any, as may be adjudged due in respect thereof, the appellants shall deliver the vacant possession of Amba Bhavan to the respondents as also all the documents in their possession or power relating to Amba Bhavan and shall retransfer Amba Bhavan to the respondents at their cost free from mortgage and all encumbrance created by them. It is also ordered that if the payment of the amount found or declared due under the preliminary decree is not made on or before three months from the date of the aforesaid confirmation and counter signature by the trial Court, the respondents shall be debarred from all rights to redeem the mortgaged property, that is Amba Bhavan. It is further ordered that similarly further account shall be taken from the date of the decree of the trial Court till today and if it is found that the decretal amount of the appellants stands satisfied by the net income of Amba Bhavan from the 1st mentioned net income, then, the net income from the date of the decree passed by the trial Court upto the date of delivery of possession shall be paid by the appellants to the respondents with interest at the rate of 12% per

annum subject to their paying the Court-fees on it. In the circumstances of the case, the parties to these appeals shall bear their own costs of the appeals. Counsels' fees as per the scale if certified.

76. Order accordingly.

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