

## **Krishna Pillai Rajasekharan Nair (D) By ... vs Padmanabha Pillai (D) By Lrs. & Ors on 15 December, 2003**

**Equivalent citations: AIR 2004 SUPREME COURT 1206, 2004 (12) SCC 754, 2004 AIR SCW 106, 2004 SCFBRC 82, (2004) 2 JCR 170 (SC), 2004 (2) SLT 178, 2003 (10) SCALE 956, (2004) ILR(KER) 2 SC 67, (2004) 13 INDLD 1100, (2004) 1 ALL WC 570, (2004) 2 KER LT 61, (2004) 3 LANDLR 209, (2004) 2 MAD LJ 103, (2004) 2 MAD LW 541, (2004) 2 PUN LR 779, (2004) 1 RENCJ 20, (2004) 96 REVDEC 376, (2004) 2 ANDHLD 21, (2004) 1 SUPREME 15, (2004) 3 RECCIVR 386, (2004) 2 ICC 89, (2003) 10 SCALE 956, (2004) 54 ALL LR 268, (2004) 2 CAL HN 42, (2004) 1 CIVLJ 907, (2004) 1 CURCC 98**

**Author: R.C. Lahoti**

**Bench: R.C. Lahoti, Ashok Bhan**

CASE NO.:

Appeal (civil) 13133 of 1996

PETITIONER:

Krishna Pillai Rajasekharan Nair (D) by Lrs.

RESPONDENT:

Padmanabha Pillai (D) by Lrs. & Ors.

DATE OF JUDGMENT: 15/12/2003

BENCH:

R.C. LAHOTI & ASHOK BHAN

JUDGMENT:

**J U D G M E N T** R.C. LAHOTI, J.

The facts relating to the property which forms subject-matter of suit are very many, spread over a period of almost a century by this time and so is the number of persons who have dealt with the property and amongst whom the property has changed hands. Shorn of unnecessary details, we would concentrate on bare essential facts, to the extent relevant for appreciating the legal issues arising for decision. For the sake of convenience we would be referring to the appellant and respondent no.1 respectively as the plaintiff and defendant No.1 as they were arrayed before the trial court. They are the principal contesting parties. Unfortunately, both of them have died and their legal representatives are on record. For the sake of brevity and convenience we are referring to original parties only.

There was a piece of land measuring 1.2 acres in area which belonged to 18 members of a family of Sripandarachetti Cult. It was mortgaged in 1902. There was a partition amongst different groups. The properties involved in partition were listed as Schedules 'A', 'B', 'C' and 'D'. The 'C' Schedule comprised of 30 cents. The property in dispute herein is referable to this Schedule 'C' land. Hereinafter, it is referred to as the 'property in suit'.

The property in suit was subject to an usufructuary mortgage of the year 1078 Malyalam Era. After the partition, 10 members out of the 18 to whom different portions of the mortgaged property were allotted filed the suit, bearing O.S. No.464 of 1117 of Malalyalam Era, for redemption. The suit was decreed in 1950. After the decree one Chellapan Pillai (who died during the pendency of these proceedings and in whose place defendant No.1 stands substituted) got the property Schedule 'C' redeemed by making full payment of mortgage money. He also entered into possession over the property in the year 1953. The appellant-plaintiff is the assignee from certain non- redeeming co-mortgagors of a share in 'C' Schedule property. His share in the property is stated to be 9/12th in 25 cents of 'C' Schedule property. In the year 1971, the plaintiff filed the present suit seeking relief of declaration of title with recovery of possession, and in the alternative, the relief of partition. On 7.12.1973, the trial court decreed the suit upholding the plaintiff's entitlement to 9/12 shares in the suit property but subject to payment of Rs.208/- to reimburse the first defendant by way of contribution towards the amount spent by him in redeeming the property. A preliminary decree determining the share of the plaintiff and his entitlement to partition was passed. The trial court's decree was upheld by the First Appellate Court dismissing the appeal preferred by defendant No.1. Defendant No.1 preferred a second appeal (No.1149 of 1976). Vide Judgment dated 10.2.1981, the High Court allowed the appeal and set aside the decrees of the two courts below. It was urged before the High Court on behalf of the defendant No.1 that the property being subject to mortgage and defendant No.1 having subrogated himself in place of original mortgagee, the suit filed by the plaintiff barely for declaration, partition and recovery of possession, was not maintainable and it was necessary for the plaintiff to have sought for the relief of redemption. Even if the relief of redemption of mortgage was not specifically sought for, it was submitted on behalf of the defendant No.1 that the suit in substance was one for redemption and construed so it was barred by time under Article 148 of the Limitation Act, 1908. The High Court formed an opinion that this aspect of the case did not appear to have engaged the attention of the courts below and, therefore, the case needed to be remanded for decision afresh. The High Court allowed the appeal, set aside the decree under appeal and remanded the case to the trial court with a direction to allow the parties an opportunity of amending the pleadings, so that the plaintiff could seek the relief of redemption and the defendant could raise the plea as to bar of limitation. Pursuant to the order of remand, the pleadings were amended. The suit was once again decreed by the trial court and the First Appellate Court.

In the second appeal preferred by the defendant no.1, it is interesting to note that the High Court has formed an opinion that defendant No.1 had redeemed the property on behalf of the entire family, and therefore, after the payment of mortgage money and recovering back the possession from the mortgagee, nothing had remained to be redeemed. The plaintiff was entitled to declaration of title and other reliefs prayed for by him. The learned Judge of the High Court entertained serious doubts about correctness of the view taken by the learned single Judge in the earlier order of the

High Court remanding the case to the trial court but felt bound (and helpless) by the observations and the directions made in the earlier judgment and rightly so. The learned Judge noted the submission of the learned counsel for the plaintiff that the question of limitation did not arise in the case and all that to which the first defendant was entitled to was to have reimbursement for whatever amount he might have spent on redemption. Having said so the learned Judge observed desperately, "I would have readily agreed with this submission of the learned counsel for the plaintiff if I were free to do so. In fact according to me, in this case, no question of further redemption of 1078 mortgage arises at all". The learned Judge held that "the first defendant was not required to claim the status of a redeeming co-mortgagor vis-à-vis the other members of the family on the facts and in the circumstances of the case. But, since I am bound by the earlier order of remand in S.A. 1194 of 1976, I am constrained to overrule the contention of the learned counsel for the respondent that the claim of the plaintiff could not be held to be barred by limitation." Consequently, the learned single Judge by the judgment dated March 22, 1993 allowed the appeal, set aside the judgments and decrees of the courts below and directed the suit to be dismissed. Feeling aggrieved by the judgment of the High Court the plaintiff has filed this appeal by special leave.

At the very outset, it may be stated that the learned counsel for defendant No.1 submitted that the parties in this case were of Sripandarachetti Cult of Kerala, governed by Hindu Mitakshra Law and as there had been a partition in family before 1941, the year in which the suit for redemption was filed, it cannot be said that defendant No.1 while redeeming alone the property was acting on behalf of the family or the joint family funds were utilized for payment of mortgage money. In our opinion, this controversy is wholly besides the point. Whether there was a partition in the family and whether Schedule 'C' property was also partitioned is not of any consequence for the present controversy inasmuch as we find that so far as the Schedule 'C' property is concerned it was subject to mortgage and the plaintiff and defendant No.1 both had share therein. They may be co-tenants or tenants in common but that would not make any difference so far as the status of the plaintiff and the defendant No.1 being co-mortgagors qua the suit property is concerned. We proceed on this factual premise that out of the co-mortgagors, more than one, and all having entitlement to a share each in the suit property, one of them had redeemed the property by paying the entire mortgaged money and had singularly entered into possession over the entire mortgaged property. Consequent upon redemption, it is the other co-owner of the property i.e. the plaintiff, who is now asking for the partition of the property commensurate with his share. We have to see what are the rights and obligations of the parties qua each other and whether a suit for partition filed by the plaintiff was maintainable. That would determine the question of limitation as well.

The learned counsel for the parties are agreed that the Transfer of Property Act has been applicable to the suit property at all the times material.

The learned counsel for the respondent heavily relied on the three-Judge Bench decision of this Court in Valliama Champaka Pillai Vs. Sivathanu Pillai and Ors. - (1979) 4 SCC 429, in support of his submission that a suit by a non-redeeming co-mortgagor against the redeeming co-mortgagor laying claiming for his share in the property, on payment of his proportionate share of the mortgage money, would be governed by Article 132 or 144 of the Limitation Act, 1908. Article 132 provided for

a suit to enforce payment of money charged upon immovable property wherein the period of limitation was 12 years calculated from the date when the money sued for becomes due. Article 144 contemplated a suit for possession of immovable property or any interest therein not otherwise specifically provided for and the limitation was 12 years from the date when the possession of the defendant became adverse to the plaintiff. In either case, the suit was barred by time, submitted the learned counsel for the respondent.

Prima facie, and on a first blush, the contention of the learned counsel for the respondent looks unexceptionable and on the authority of Valliama Champaka Pillai's case it appears as if the High Court has not erred in holding the suit barred by time and dismissing the same. However, as pointed out by the learned counsel for the appellant, the case needs a deeper analysis. Valliama Champaka Pillai's case refers to Ganeshi Lal Vs. Joti Pershad - 1953 SCR 243 and also places reliance thereon. We have come across a yet later decision of this Court in Variavan Saraswathi and Anr. Vs. Eachampi Thevi and Ors. (1993) Supple. 2 SCC 201 wherein both the decisions, namely, Ganeshi Lal and Valliama Champaka Pillai have been referred to. Unfortunately Variavan Saraswathi was not cited at the Bar, but in our opinion that is the most relevant decision. Any decision of this Court other than the three, referred to hereinabove, has not come to our notice. We would deal with all the three decisions to find out and lay down the correct law. Before doing so it would be appropriate to notice Section 92 of the Transfer of Property Act, 1882 which, as the learned counsel for the parties have conceded, is applicable to the present case. It provides :

"92. Subrogation. Any of the persons referred to in s 91 (other than the mortgagor) and any co-mortgagor shall, on redeeming property subject to the mortgage, have, so far as regards redemption, foreclosure or sale of such property, the same rights as the mortgagee whose mortgage he redeems may have against the mortgagor or any other mortgagor.

The right conferred by this section is called the right of subrogation, and a person acquiring the same is said to be subrogated to the rights of the mortgagee whose mortgage he redeems.

A person who has advanced to a mortgagor money with which the mortgage has been redeemed shall be subrogated to the rights of the mortgagee whose mortgage has been redeemed, if the mortgagor has by a registered instrument agreed that such persons shall be so subrogated.

Nothing in this section shall be deemed to confer a right of subrogation on any person unless the mortgage in respect of which the right is claimed has been redeemed in full."

A bare reading of the provision shows that the first part of this Section deals with subrogation by operation of law. Subrogation by agreement is dealt with in third para. The present one is not a case of subrogation by agreement. The relevant provision applicable would, therefore, be as contained in para I of Section 92. The provision statutorily incorporates the long-standing and settled rule of

equity which has been held to be applicable even in such territories where the Transfer of Property Act does not apply.

In Ganeshi Lal's case two plaintiffs sued for partition and possession of their two-fifths share in the suit properties alleging that the first defendant was alone in possession of the same, having redeemed the mortgage executed by the joint family of which the plaintiffs and defendants were members. On the date of the Trial Court's decree the two plaintiffs were held entitled to one-sixth share each. The findings of fact arrived at by the Trial Court and the High Court were that the original mortgage was a mortgage transaction of the joint family and that the defendant no.1 prima facie had redeemed the mortgage on his own account and for his own benefit at a time when there was no longer any joint family in existence. The plaintiffs were held entitled to their share in the property subject to payment of their proportionate share of the amount paid by the defendant no.1 to redeem the mortgage. The contention of the defendant no.1 that a suit for partition and possession was not maintainable without bringing a suit for redemption was repelled. One of the pleas urged before this Court was that the suit for partition without asking for redemption was not maintainable. This Court held that the original mortgagee had not assigned his rights in the mortgage to the defendant no.1. So long as the question of limitation was not involved, there was no objection to a claim for redemption and one for possession and partition being joined together in the same suit. The principal issue to which the Court addressed was that though Ganeshi Lal, the defendant no.1 had redeemed the prior mortgage and stood subrogated to the mortgagee's rights but the real question was about the extent of his rights as subrogee.

Having examined the issue from all possible angles and having referred to Sir Rashbehary Ghose on Law of Mortgage in India, Harris on Subrogation, Sheldon on Subrogation, Pomeroy on Equity Jurisprudence and a few English and Indian authorities available on the point, what their Lordships concluded in Ganeshi Lal's case may be summed up as under:-

1. When the co-debtor or co-mortgagor pays more than his share to the creditor for the purpose of redeeming a mortgage, the redeeming mortgagor is principal debtor to the extent of his share of the debt and a surety to the extent of the share in the debt of other co-mortgagors. The redeeming co-mortgagor being only a surety for the other co-mortgagors, his right is, strictly speaking, a right of reimbursement or contribution.
2. The substitution of the redeeming co-mortgagor in place of the mortgagee does not precisely place the new creditor (i.e. the redeeming co-mortgagor) in place of the original mortgagee for all purposes. If, therefore, one of several mortgagors satisfies the entire mortgage debt, though upon redemption he is subrogated to the rights and remedies of the creditor, the principle has to be so administered as to attain the ends of substantial justice regardless of form; in other words, the fictitious cession in favour of the person who effects the redemption, operates only to the extent to which it is necessary to apply it for his indemnity and protection. (Digambar Das Vs. Harendra Narayan Panday, 14 C.W.N. 617).

3. The doctrine of subrogation must be applied along with other rules of equity so that the person who discharges the mortgage is amply protected and at the same time there is no injustice done to the other joint-debtors. He who seeks equity must do equity.

4. There is a distinction between a third party who claims subrogation and a co-mortgagor who claims the right. The co-

mortgagors stand in a fiduciary relationship qua each other. The redeeming co-mortgagor can only claim the price which he has actually paid together with incidental expenses. Strictly speaking, therefore, when one of several mortgagors redeems a mortgage, he is entitled to be treated as an assignee on the security which he may enforce in the usual way for the purpose of reimbursing himself. The subrogation to the rights of the mortgagee by the redeeming co-mortgagor is confined only to the extent necessary for his own equitable protection. The redeeming co-mortgagor can, just as the surety would, ask to indemnify for his loss and he can invoke the doctrine of subrogation as an aid to right of contribution.

Undoubtedly, their Lordships have made it clear in their judgment that they were dealing with a case where Sections 92 and 95 of the Transfer of Property Act were inapplicable and the question was to be decided on the principles of justice, equity and good conscience. However, the judgment also makes it clear that even the applicability of Section 92 would not make any substantial difference inasmuch as the redeeming co-mortgagor who claims to be substituted in the mortgagee's place is only on the strength of general principles of equity and justice, and therefore, it is equally equitable that the other co-mortgagors should not be called upon to pay more than the redeeming co-mortgagor paid in discharge of the encumbrance.

In Valliamma Champaka Pillai's case the grand-daughter of the non-redeeming co-mortgagor instituted a suit for partition and possession of her one-half share of the suit property. She claimed possession on contribution of her share of the mortgage money that had been paid by the redeeming co-mortgagor to the mortgagee. The matter was heard by a Full Bench of the High Court of Karnataka which held that a non-redeeming co-mortgagor has two periods of limitation within which he may file his suit against the redeeming co-mortgagor for redemption for his share, namely, within 50 years provided for by the Travancore Limitation Act, starting from the date of the mortgage, or, if that period had already expired, within 12 years of the date of redemption by the redeeming co-mortgagor, under Article 132 of the Travancore Act corresponding to Article 144 of the Indian Limitation Act, 1908. The suit was held to be barred by time. The plaintiff appealed to the Supreme Court which was dismissed.

A perusal of the abovesaid decision shows that there also Section 92 of the Transfer of Property Act was not applicable and the case was held to be determinable by general principles of equity, justice and good conscience. However, the striking feature of the case (and that will distinguish the case from the present one) is that the Court has taken too strict a view of the pleadings and the manner in which the case was contested by the parties. This is noticeable from the two facts. Firstly, it was sought to be urged that the parties being members of joint-Hindu family, the redemption by one of

the co- mortgagors of the whole property could only be on behalf of and for the benefit of all the joint family members including the plaintiffs. In the alternative, it was urged that even if sometime after the mortgage, but before the redemption, the family had divided in status then also after the redemption the two branches of the family would be deemed to be holding the property as tenants-in-common or co- owners in defined shares. In either case, it was urged, no question of adverse possession or limitation would arise as the possession of the redeeming co-mortgagor would in, law, be the possession of the non- redeeming co-owners also. This Court refused to entertain this plea on the ground that such a plea was not agitated either before the learned Single Judge or the Letters Patent Bench of the High Court. Secondly, the suit though filed as a simple suit for partition it was assumed that it was a claim for redemption with regard to the properties which were under mortgage and had been redeemed in entirety by one of the co-mortgagors. In the courts below the claim was treated to have been fought by the parties as if it were one for redemption and this Court insisted on the suit being treated as one for redemption of mortgage only and did not permit the plaintiff to urge that it was a suit for partition. The Court re-affirmed the view taken in Ganeshi Lal's case on the nature and extent of a redeeming co- mortgagor's right to recover contribution from his co-debtor and agreed that the redeeming co-mortgagor's status was only that of a surety and when the surety had discharged the entire mortgage debt, he was entitled to be subrogated to the security held by the creditor, to the extent of getting himself reimbursed for the amount paid by him over and above his share to discharge the common mortgage debt. Having said so much this court went on to state that the redeeming co-mortgagor having discharged the entire mortgage debt, which was the joint and several liability of himself and his co-mortgagor, was in equity, entitled to be subrogated to the rights of the mortgagee redeemed and to treat the non-redeeming mortgagor as his mortgagor to the extent of the latter's portion or share in the hypotheca and to hold that portion or share as separate for the excess payment made by him. Thereafter, the Court proceeded on the reasoning that the right of the non-redeeming co-mortgagor is to pay his share of the liability and get possession of his property from the redeeming co-mortgagor which right subsists only so long as the latter's right to contributions subsists. This right of the 'non- redeeming' co-mortgagor is purely an equitable right, which exists irrespective of whether the right of contribution which the redeeming co-mortgagor has as against the other co-mortgagor, amounts to a mortgage or not.

It is pertinent to note that their Lordships deciding Valliamma Champaka Pillai's case have elevated the status of the redeeming co-mortagor's right after redemption on payment of entire mortgage debt, to the status of the original mortgagee's debts although there was no assignment of the mortgage debt in his favour. This observation is clearly beyond the law enunciated by this Court in Ganeshi Lal's case and followed in Valliamma Champaka Pillai's case. The only reason for this, which we can apparently find, is because the plaintiff in Valliamma Champaka Pillai's case throughout treated the suit as one for redemption and to which stand taken by the plaintiff, their Lordships held, that the plaintiff was bound and could not make a departure, and therefore, held that the suit being one for redemption the Article relevant to the suit for redemption of a mortgage would apply.

It is to be noted that the limitation for a suit for contribution would become relevant only when the redeeming co-mortgagor sues the non-redeeming co-mortgagor for enforcing the latter's obligation to make contribution; a suit filed by a co-owner-cum-co-mortgagor for partition and separate

possession against the redeeming co-mortgagor and subject to payment of contribution would remain a suit for partition though the defendant in possession of the property would be justified in insisting that property was not liable to be partitioned unless the plaintiff contributed his share of the money paid for redemption and incidental expenses. To the latter case, wherein the suit has been filed not by the party claiming contribution but the right to claim partition was being set up only as defence in equity, the limitation provided for filing a suit for contribution cannot apply.

In Variavan Saraswathi's case the law has been set out with precision and clarity and both the earlier decisions dealt with hereinabove have been referred. Their Lordships (vide para 6) have dealt with the contrast in two situations : (i) when a mortgagee assigns his interest in favour of another person (i.e. a stranger); and,

(ii) where a co-mortgagor or any one on behalf of mortgagor authorized under law pays the amount and brings to an end the interest the mortgagee had. It has been held that in the first case the assignee becomes holder of the same interest which the mortgagee had, i.e., he steps into the shoes of the mortgagee. In the latter case, once the mortgage debt is discharged by a person beneficially interested in equity of redemption the mortgage comes to an end by operation of law. Consequently, the relationship of mortgagor and mortgagee cannot subsist. A person paying off debt to secure the property either with the consent of others or on his own volition becomes, in law, the owner entitled to hold and possess the property. But in equity the right is to hold the property till he is reimbursed. Such right in equity either in favour of the person who discharges the debt or the person whose debt has been discharged, does not result in resumption of relationship of mortgagor and mortgagee.

Dealing with Section 92 of the Transfer of Property Act it has been held, in Variavan Sarswathi's case that the rights created in favour of a redeeming co-mortgagor as a result of discharge of debt are "so far as regards redemption, foreclosure or sale of such property, the same rights as the mortgagee whose mortgage he redeems". Posing a question does a person who, in equity, gets subrogated becomes mortgagee? their Lordships have held "A plain reading of the section does not warrant a construction that the substitute becomes a mortgagee. The expression is, 'right(s) as the mortgagee' and not 'right(s) of mortgagee'. The legislative purpose was statutory recognition of the equitable right to hold the property till the co-mortgagor was reimbursed and not to create relationship of mortgagor and mortgagee. The section confers certain rights on co- mortgagor and provides for the manner of its exercise as well. The rights are of redemption, foreclosure and sale. And the manner of exercise is as if a mortgagee. The word 'as' according to Black's Law Dictionary means 'in the manner prescribed'. Thus a co-mortgager in possession of excess share redeemed by him, can enforce his claim against non-redeeming mortgagor by exercising rights of foreclosure or sale as is exercised by mortgagee under Section 67 of the Transfer of Property Act. But that does not make him mortgagee." It was further observed that the abovesaid legal position does not alter either because during partition equity of redemption in respect of property redeemed was transferred or because in the plaint it was claimed that mortgage subsisted.

In our opinion, the law as stated in Variavan Saraswathi and Anr.'s case where Section 92 of the Transfer of Property Act has been specifically dealt with and which, as admitted at the Bar, applies to the mortgage in question, clinches the issue arising for decision in the present case.



A subrogation rests upon the doctrine of equity and the principles of natural justice and not on the privity of contract. One of these principles is that a person, paying money which another is bound by law to pay, is entitled to be reimbursed by the other. This principle is enacted in Section 69 of the Contract Act, 1872. Another principle is found in equity: "he who seeks equity must do equity". (See Rashbehary Ghose on Law of Mortgage, Seventh Edition, 1997, at p.461).

The present one is a case of subrogation by the operation of law and hence governed by the first para of Section 92 of the Transfer of Property Act. The provision recognizes the same equity of reimbursement as underlies Section 69 of the Indian Contract Act that "a person who is interested in the payment of money, which another is bound by law to pay, and who therefore pays it, is entitled to be reimbursed by the other". Such a payment made, carries with it, at times, an equitable charge. Section 92 of the Transfer of Property Act does not have the effect of a substitute becoming a mortgagee. The provision confers certain rights on the re-deeming co-mortgagor and also provides for the remedies of redemption, foreclosure and sale being available to the substitute as they were available to the substituted. These rights the subrogee exercises not as a mortgagee reincarnate but by way of rights akin to those vesting in the mortgagee. The co-mortgagor can be a co-owner too. A property subject to mortgage is available as between co-mortgagors for partition, of course, subject to adjustment for the burden on the property. One of the co-mortgagors, by redeeming the mortgage in its entirety, cannot claim a right higher than what he otherwise had, faced with a claim for partition by the other co-owner. He cannot defeat the legal claim for partition though he can insist on the exercise of such legal right claimed by the other co-owner-cum-mortgagor being made subject to the exercise of the equitable right vesting in him by subrogation.

In our opinion, the suit filed in the present case being a suit for partition primarily and predominantly and the relief of redemption having been sought for only pursuant to the direction made by the High Court in its order of remand, the limitation for the suit would be governed by Article 120 of Limitation Act, 1908. For a suit for partition the starting point of limitation is - when the right to sue accrues, that is, when the plaintiff has notice of his entitlement to partition being denied. In such a suit, the right of the redeeming co-mortgagor would be to resist the claim of non-redeeming co-mortgagor by pleading his right of contribution and not to part with the property unless the non-redeeming co-mortgagor had discharged his duty to make contribution. This equitable defence taken by the redeeming co-mortgagor in the written statement would not convert the suit into a suit for contribution filed by the non-redeeming co-mortgagor.

It was submitted that the earlier order of remand dated 10.2.1981 made by the High Court whereby the High Court had held that the suit filed by the plaintiff ought to have contained a prayer for redemption of the mortgage property and even if it did not contain such a prayer, it ought to be construed as a suit for redemption and the limitation for filing the suit should be calculated accordingly, has achieved a finality in view of not having been appealed against and, therefore, it is not any more open for the plaintiff to contend now that his suit was not a suit for redemption but only for declaration of title, partition and possession. We cannot agree.

Sub-Section(2) of Section 105 of the Civil Procedure Code, 1908 provides that where any party aggrieved by an order of remand from which an appeal lies does not appeal therefrom, he shall

thereafter be precluded from disputing its correctness. The provision is not without exceptions and limitation. First is, when the order of remand is illegal, and more so, if it is without jurisdiction (See Kshitish Chandra Bose Vs. Commissioner of Ranchi, (1981) 2 SCC 103. The High Court had in exercise of second appellate jurisdiction illegally reversed the concurrent findings of fact and ordered remand. It was held that in an appeal to Supreme Court from the final order of the High Court after remand, challenge even to the first order of the High Court making remand, and, all the proceedings taken thereafter as a result of the illegal order of remand, was available to be laid. When the matter reaches a forum, superior to one which had made the order of remand earlier, it can go into the question of legality or validity of the order of remand. The bar enacted by Section 105(2) applies upto the level of that forum which had remanded the matter earlier. Secondly, Section 105(2) has no applicability to the jurisdiction exercisable by this court by reference to Article 136 of the Constitution. This is for the reason that no appeal lies to this Court against an order of remand; an appeal under Article 136 of the Constitution is only by special leave granted by this Court. It is settled law that Section 105(2) has no applicability to the Privy Council and to the Supreme Court. (Satyadhyan Ghosal & Ors. Vs. Smt. Deorajin Debi & Anr., (1960) 3 SCR 590. In the present appeal preferred against the judgment and decree passed by the High Court in the proceedings held pursuant to the earlier order of remand dated 10.2.1981 the correctness of the order of remand can be examined and gone into by this Court.

It was also submitted by the learned counsel for the respondent that it would make a difference if the family to which the parties belong was joint at the time of mortgage and at the time of redemption. The learned counsel submitted that on account of partition in the family the parties had ceased to be co-tenants and were tenants-in-common qua each other and therefore the redemption by the respondent was not and cannot be deemed to be on behalf of the family. In our opinion, it is not necessary to deal with this submission at all. Whether joint-tenants or tenants-in-common the fact remains that the status of the plaintiff and defendant was that of co-mortgagors, one being a non-redeeming co-mortgagor and the other being a redeeming co-mortgagor. The law would remain the same and its applicability would not change whether the parties are treated as co-tenants or tenants-in-common.

For the foregoing reasons, the appeal is held liable to be allowed. The suit filed by the appellant is held as one within limitation. The plaintiff is held entitled to the preliminary decree for partition.

It was stated at the Bar that even during the pendency of this litigation the property has changed hands and substantial construction has come up on the property which is likely to create insurmountable difficulties in dividing the property by metes and bounds consistently with the entitlement of the parties. That aspect need not detain us at this stage. We have stated the correct position of law which should govern the suit and the parties. In spite of the preliminary decree having been passed it will be open for the court, at the state of passing a final decree, to see how the law and the equities are to be adjusted and whether instead of actually dividing the property it would be more appropriate to adopt some other mode of satisfying the claims of the parties as per their entitlement.

The appeal is allowed. The judgment of the High Court is set aside. The judgment and decree of the trial court are restored. No order as to the costs.