APPUHAMY AND ANOTHER

v.

MENIKE AND OTHERS

COURT OF APPEAL.
U. DE Z. GUNAWARDENA. J.,
C.A 455/89(F).
D.C. AVISSAWELLA 12779.
09TH JULY, 1999.
09TH SEPTEMBER, 1999.

Declaration of title - Declaration to be entitled to possession - Ande cultivators - Usufructuary mortgage - Assignment of interest - Tenancy rights - Surrender - Merger.

The 1st to 7th Plaintiff Respondents instituted action seeking a declaration (i) that they are entitled to 1/4 share of the land and (ii) that the 1st Plaintiff Respondent was entitled to possession of the entire land during Yala and Maha seasons in 1969. The position taken up by the 1st and 2nd Appellants is that they are ande cultivators in respect of the 1/4 share.

The 1/4 share originally belonged to one S who in 1948 gave a usufructuary mortgage to one A who had assigned same to the 1st Defendant Appellant and one M. S. had in 1966 transferred her share to H who had discharged the usufructuary mortgage.

It was contended by the 1st Defendant Appellant that, he was a tenant cultivator prior to taking of the usufructuary Mortgage Bond and the tenancy rights revived, upon the mortgage been redeemed.

The District Court held with the Plaintiff Respondent, observing that the 1st Defendant Appellant was a usufructuary mortgagee;

Held :

(1) There is no evidence to show that the 1st Defendant Appellant was a cultivator prior to the taking of the usufructuary mortgage bond.

(2) Even assuming that the 1st Defendant Appellant had worked as a tenant cultivator under S, after the assignment of the usufructuary mortgage in favour of the 1st Defendant-Appellant, the tenancy rights (if

any) had suffered extinction through surrender or through both "surrender and Merger."

(3) Surrender takes place when 'parties to the contract of tenancy do some act which is so inconsistent with the subsisting relation of landlord and tenant.

(4) Usufructuary Mortgage and a tenancy cannot co-exist.

(5) If the tenancy rights had continued and had not been surrendered, if not of volition at least by operation of law valid inception of a usufructuary mortgage would have been made impossible for the two rights are mutually inconsistent and destructive and cannot exist side by side.

(6) Merger occurs when qualities of creditor and debtor or when two incompatible rights become united in the same person. A right that had suffered extinguishment through surrender or merger cannot be revived unless there was an agreement to that effect.

APPEAL from the Judgment of the District Court of Avissawella.

Cases referred to :

1. *Grootchwaing Salt Works vs Van Tonder* (1920) AD 492
2. *Bowhay vs Ward* (1908) TS pg. 779
3. *Cape Times Ltd., vs Goldsmid* (1913) WLD 17
4. *Foster vs Robinson* (1950) 2 ALL ER 342
5. *Metcalfe vs Boyce* (1927) KB 78
6. *Peter vs Kendal* 6 B and C 703
7. *Lyon vs Reed* (1844) 13 M & W 285 13 LG Ex 377

Rohan Sahabandu with *Ms Dilhani Perera* for 1st and 2nd Defendant Appellants.

N.R.M. Daluwatte, P.C. with *Gamini Perera* for Plaintiff Respondents.

Cur. adv. vult.

January 12, 2000.

U. DE Z. GUNAWARDENA, J.

The 1st to 7th plaintiffs-respondents have filed this action as long ago as 03. 07. 1969 against the 1st-4th defendants-

appellants seeking: (i) a declaration that the aforesaid plaintiffs-respondents and the 3rd and 4th defendants-respondents are entitled to 1/4th share of the land called Kurundane Kumbura morefully described in the schedule to the plaint and (ii) also a declaration that the 1st plaintiff-respondent was entitled to possession of the entire land (paddy field) during the Yala and Maha seasons 1969.

The 1st and 2nd defendants-appellants have filed, so far as I can ascertain, three answers, that is, they have filed the original answer on 2. 2. 1970 and had amended it twice on 5. 4. 1973 and 11. 12. 1974 respectively. The position taken up, albeit, somewhat vaguely, by the 1st and 2nd defendants-appellants is that they are the ande cultivators in respect of the 1/4th share of the land which admittedly belong, as at present, to the plaintiffs-appellants and the 3rd and 4th defendants-respondents.

At the commencement of the trial i.e. on 25. 11. 1981, it was admitted that the said plaintiffs-respondents and the 3rd-4th defendants-respondents were entitled to 1/4th share of the land as stated in the plaint and further that it was the turn of the said plaintiffs-respondents and the 3rd-4th defendants-respondents to work the said field during the Yala and Maha seasons of the year 1969. The admissions-admission No. 03 in particular, are somewhat imprecise and crudely recorded but sense of admission is fairly clear for it says that during Maha and Yala 1969 the turn had arrived for the 1st-7th plaintiffs and the 3rd to 4th defendants to work the land on Tattumaru basis. But the question as to whether the 1st and 2nd defendants-appellants were, in fact, the tenant-cultivators under the plaintiffs and the 3rd-4th defendants-respondents and as such had a right to cultivate on behalf of the plaintiffs and 3rd and 4th defendants-respondents during the aforesaid seasons was a matter or rather the only matter left be decided by the Court. In other words, the solitary point of any worth or substance that demands consideration on the issues is as to whether or not the 1st and 2nd defendants-appellants are Ande Cultivators in respect of 1/4th share that admittedly belong to the plaintiffs-respondents and the 3rd and 4th

defendants-respondents and as such were entitled to cultivate the land, on behalf of the said plaintiffs-appellants and the 3rd and 4th defendants-respondents in the capacity of tenant cultivators, under them. And virtually all the facts relevant to that decision are common-ground the relevant facts being borne out mostly by admissions and documentary evidence.

It is significant to note that the point of contest No. 7 raised on behalf of the 1st and 2nd defendants on 25. 11. 1981 and subsequently amended on 10. 03. 1982, had been raised on the factual basis that one W.P. Jayawardana, who was the father of the 1st defendant, was the tenant cultivator from the year 1948 and that the 1st and 2nd defendants-appellants were the tenant cultivators commencing from the year 1963. It may be pointed out, in passing, that these facts were not pleaded in the answers filed by the 1st and 2nd defendants appellants and, strictly speaking, those issues did not arise on any of the answers filed by the 1st and 2nd defendants-appellants. It is worth observing that, apart from stating, that Wiyalagoda Mudiyanselage Paramparawa or persons of that pedigree or of that line of descent, were the tenant-cultivators of the entire land, nowhere in the several answers filed by the 1st and 2nd defendants-appellants had they stated that they were tenant-cultivators in respect of 1/4th share of the land under Somawathi which was the case they sought to prove at the trial. Somawathi had sold her 1/4th share to Hendirick who died leaving the 1st plaintiff-appellant (Widow) and the children 2nd-7th plaintiffs-appellants and 3rd and 4th defendants-respondents. Strictly speaking, the case enunciated by the 1st and 2nd defendants-appellants at the trial did not accord with their pleadings. Be that as it may, it has to be borne in mind that even in the Petition of Appeal filed by the 1st and 2nd defendants-appellants it is admitted that the 1st defendant-appellant had taken a usufructuary mortgage in the year 1950; although, they had further stated that his i.e. 1st defendant-appellant's Ande rights revived on 18. 8. 1966, that is, sixteen years later, on the said mortgage being redeemed. Excessive length of the period during which the 1st defendant-appellant had cultivated on the basis of a usufructuary mortgage, even assuming that he had

been cultivating in the capacity of an Ande cultivator before that is, of some significance-however-marginal that significance may be in regard to the question of surrender, of Ande rights by the 1st defendant-appellant, which aspect will be found discussed in the sequel.

It may be pointed out at once that it is difficult, if not impossible, to hold that the 1st defendant-appellant became a tenant-cultivator in respect of this field in the year 1963 - that being the factual position on which, as stated above, issue No. 07 had been raised by the learned Counsel appearing for the 1st and 2nd defendants-appellants at the trial. In this regard it is worth noticing that the 1st defendant had been cultivating this field, if at all, on a usufructuary mortgage from 8. 12. 1950 - that being the date on which Degoaratchige Appuhamy had assigned the usufructuary mortgage bond (that he had obtained from the original owner of 1/4th share viz. Somawathi) to the 1st defendant-appellant and Madurawathi. And it was only 16 years later, i.e. on 18. 8. 1966 that the said usufructuary mortgage bond was discharged. Since the usufructuary mortgage bond in favour of the 1st defendant-appellant was discharged on the aforesaid date i.e. 18. 8. 1996, one cannot comprehend, nor has it been explained, how it was open to the 1st defendant-appellant, in any event, to contend that he became the tenant cultivator three years earlier i.e. in 1963. The facts of this case demand consideration from two stand-points; (a) Were the 1st and 2nd defendants-appellants or either of them, in fact, tenant-cultivators in respect of the 1/4th share which was, admittedly, originally owned by Somawathie and now, by the plaintiffs and the 3rd and 4th defendants-respondents: (b) In any event, assuming that the 1st defendant-appellant was a tenant-cultivator in respect of the relevant share, before he took by bond No. 33290 dated 8. 12. 1950 an assignment of the interest of a usufructuary mortgagee, did he (the 1st defendant-appellant) cease to be such, in consequence of admittedly becoming a usufructuary mortgagee on the aforesaid assignment (in his favour) in virtue of the operation of the principle of merger or even surrender or of both.

Before considering the question as to whether the 1st and 2nd defendant-appellants were, in fact, tenant cultivators, it is pertinent to note, at the trial in the District Court, that it is the 1/4th share that originally belonged to W.G. Somawathie, that the 1st and 2nd defendants-appellants claimed to have worked as tenant-cultivators. The said Somawathi had on bond No. 8732 dated 25. 2. 1948 admittedly given a usufructuary mortgage to one Degoaratchilage Appuhamy who had assigned the same to the 1st defendant-appellant and one Madurawathi. It is also common ground that the said Somawathi had transferred her 1/4th share of the land on the said deed No. 6415 dated 18. 08. 1966 to one Hendrick who had discharged the aforesaid usufructuary mortgage bond. Hendrick who thus became entitled to 1/4th share of the soil had died leaving as his heirs, his widow the 1st plaintiff and the children 2nd to 7th plaintiffs and the 3rd and 4th defendants-appellants. The case of the plaintiffs and the 3rd and 4th defendants-appellants is that the 1st defendant had worked as the usufructuary mortgagee on an assignment, as explained above, whereas the 1st and 2nd defendants-appellants, although they had not admitted that position in the answer that they had filed, had in their evidence, yet admitted that position, that is, that the 1st defendant-appellant worked as a usufructuary mortgagee, whilst seeking to show, rather clumsily, that they worked as tenant cultivators as well. It is to be observed that the 1st and 2nd defendants-appellants in their joint answer had admitted that the relevant usufructuary mortgage bond was discharged by Hendrick (who was the deceased husband of the 1st and the father of the 2nd-7th plaintiffs and 3rd and 4th defendants-respondents) which carries with it the necessary implication that the 1st defendant-appellant had taken a usufructuary mortgage of Somawathie's interests, more accurately half of the said interests, thereby, ipso facto, suggesting the inference, somewhat strongly, that the 1st defendant-appellant, in fact, had worked or cultivated the land as a usufructuary mortgagee and not as a tenant-cultivator. As pointed out above, it is worthy of note that even the petition of appeal filed by the 1st and 2nd defendants-

appellant is rested on the basis that although the 1st defendant-appellant had worked as a usufructuary mortgagee for 16 years, during the currency of the mortgage, yet the tenancy rights revived upon the mortgage being redeemed. Even assuming for the sake of argument that tenancy rights can revive in that manner, they can so revive only if the 1st defendant-appellant had proved that he (personally) was a tenant-cultivator prior to the taking of the usufructuary mortgage bond a fact which he had failed to prove. In his evidence, the 1st defendant-appellant never said he was a tenant-cultivator prior to the taking of the usufructuary Mortgage Bond. It is overwhelmingly significant to note that issue No. 07 had been raised at the trial on the factual basis that the 1st defendant-appellant started cultivating as a tenant cultivator from the year 1953. The 1st defendant-appellant had taken the usufructuary bond three years prior to that i.e. on 08. 12. 1950. In fact, in his oral evidence the 1st defendant-appellant had admitted in the clearest terms that he was entitled to, if not, enjoyed the interest of a usufructuary mortgagee. To quote from his evidence:

ප්‍ර: ඒ අවස්ථාවේදී තමාට තිබුණා පොළී මරා උගසකට බිම් අයිතියක්?

උ: 1950 සිට ඒ අයිතිය තිබුණා?

උ: ඔව්.

it is to be observed that, as pointed out above, it was on 08. 12. 1950 that the 1st defendant-appellant obtained an assignment of the usufructuary mortgage on deed No. 33290 from Degoaratchilage Appuhamy who had taken the same from Somawathi who was admittedly entitled to 1/4th share of the land, as stated above. However, it is relevant to note that the assignment was not solely in favour of the 1st defendant-appellant but that there was a co-assignee viz. Madurawathi. The 1st defendant-appellant's evidence also clearly shows that he had, in fact, possessed or cultivated the land as a usufructuary mortgagee. To cite an excerpt from the 1st defendant-appellant's evidence touching that aspect,

"ඊට පසු ඒ උගස මටත් මදුරාවතී, සෝමාවතීගේ නංගිට පැවරුනා. ඒ කාලයේදී මදුරාවතීගේ කොටස මම දුන්නා. මදුරාවතී ඒ කාලයේ කුඹුරුවලට එන්නේ නැහැ. ගුණවර්ධන තමයි ඒවා අරන් යන්නේ. ගුණවර්ධන කියන්නේ මදුරාවතීගේ නාත්තා".

(The evidence shows that Madurawathi is the step-sister and that Gunawardane referred to in the above excerpt of the evidence, was the step-father of Somawathi)

The import of the above excerpt from the evidence of the 1st defendant-appellant himself is significant for it reveals in no uncertain terms that the 1st defendant-appellant had cultivated the land in no other capacity than as a usufructuary mortgagee from the date or time he took an assignment of the interest of a usufructuary mortgage upto the date that the bond creating the interest of a usufructuary mortgage was discharged on a date necessarily subsequent to 18. 08. 1966, for it was on that date that the aforesaid Somawathi transferred her 1/4th share of the soil, to Hendrick who discharged the usufructuary mortgage bond after he acquired title to that 1/4th share. It would be seen that, according to the excerpt from the evidence of the 1st defendant-respondent-reproduced above, a share of the produce had been given to Madurawathi. There was no need to give a share of the produce to Madurawathi unless the usufructuary mortgage had been acted upon and unless the possession of both the 1st defendant and Madurawathi had been on the basis of usufructuary mortgagees. It is to be remembered that assignment of the usufructuary mortgage bond by deed No. 33290 dated 03. 12. 1950 was in favor of both the 1st defendant-appellant and Madurawathi and it is well to remind oneself that it is the right of a usufructuary to take the fruits of the property as the owner but not to fundamentally alter its character. There is no evidence even remotely suggesting that Madurawathi was a tenant cultivator or that she had any proprietary interest other than the interest of a usufructuary mortgagee, which usufructuary mortgage or interest Madurawathi obtained, along with the 1st defendant-appellant, on the assignment of the usufructuary mortgage from Degoaratchilage Appuhamy.

It is also to be observed that the 2nd defendant-appellant (who had filed a joint answer with the 1st defendant) also claiming to be the tenant-cultivator, under Somawathi (original owner of 1/4th share) who sold to Hendirik, had both, (i.e. the 1st and 2nd defendants-appellants) stated, in the course of their evidence at the trial, that Madurawathi got a share of the produce of the land after the assignment of the Mortgage in favour of Madurawathi and 1st defendant which evidence of the 1st and 2nd defendants-appellants is confirmed by that of Somawathi. To quote from Somawathi's evidence,

"පැවරීම කළේ දෙදෙනෙකුයි. මදුරාවතීට සහ ඩබ්ලිව්. කේ. අප්පුහාමිට. අප්පුහාමි මේ නඩුවේ විත්තිකරුය." (page 276 of the brief). Then at page 277 Somawathie had stated as follows: "නංගිට බිම් අඳය ලැබෙන බව මම දන්නවා. මාගේ බාප්පා තමයි අරගෙන ආවේ." According to the evidence, Madurawathi was a step- sister of Somawathi. Somawathi, who had been called, (be it noted as a witness in support of the case of the 1st and 2nd defendants-appellants) had also stated (at pages 275-276 of the brief) that she took a share of the produce of the land before she gave the usufructuary mortgage and that the usufructuary mortgage was given to Degoaratchilage Appuhamy who, it will be recalled, assigned the mortgage to the 1st defendant-appellant and Madurawathi. Somawathi had also admitted in her evidence (page 276 of the brief) that after she gave the usufructuary mortgage of her share in the land-she ceased to collect or was not paid or given any share of the produce of the land. If 1st defendant or both the 1st and 2nd defendants cultivated the land as the tenant cultivators even after the 1st defendant-appellant took on 08. 12. 1950 an assignment of the usufructuary mortgage bond that was given by Somawathi originally to Degoaratchilage Appuhamy, that is, on 25. 2. 1948 - then Somawathi should have continued to collect a share of the produce by way of rent. The facts referred to above viz. the admission by Somawathi that Somawathi did not receive a share of the produce by way of rent after she gave a usufructuary mortgage of her 1/4th share had come to light in the course of Somawathi's own evidence. To cite the relevant

excerpts from her evidence: "ඒ පැවරීම කළේ එහි පොළී මරා බුක්තියට අරගෙන තිබුණ දිගෝ ආරච්චිලාගේ අප්පුහාමි . . . මම මේ කුඹුරේ අයිතිය තිබෙන කාලයේදී උගස් කරන්න කලින් බිම් අඳය ගත්තේ." Somawathi had stated in the above excerpt of her evidence that she took a share of the produce, by way of rent, only before she gave a usufructuary mortgage, which carries with it the necessary implication that she had not taken or received a share thereafter.

Somawathi had thus admitted that she did not get any share of the produce of the land after she gave a usufructuary Mortgage of her rights in the land. She had given the usufructuary mortgage to Degoaratchilage Appuhamy in the year 1948. Usufructuary mortgage was redeemed by Hendrick to whom Somawathi had sold on deed No. 6415 dated 18. 8. 1966 her 1/4th share. It is clear on the evidence of Somawathi herself that she never got any produce (by way of rent) from the 1st defendant, or for that matter from anyone else, after she gave a usufructuary mortgage and the relevant piece of evidence to that effect had been quoted above verbatim. That is quite understandable on the basis that Degoaratchilage Appuhamy who initially took the usufructuary mortgage, and the 1st defendant-appellant and Madurawathi- (the latter two being the assignees to whom Degoaratchilage Appuhamy assigned the usufructuary mortgage) had all cultivated the land not as tenant-cultivators under Somawathi but as usufructuary mortgagees in respect of the share of Somawathi. The evidence in this case had been elicited in a sort of ham-handed, amateurish way and one can only get a foggy view of things. The 2nd defendant-appellant also had stated that Madurawathi i.e. the co-assignee (along with the 1st defendant-appellant) of the usufructuary mortgage took 1/2 share of the produce and that Appuhamy (1st defendant) took the balance 1/2. To quote the relevant excerpt from the evidence of the 2nd defendant-appellant. "ආයෙත් 65 අවුරුද්දේ අප්පුහාමි බිම් අඳය 1/2 ක් ගත්තා. ඒ 1/2 මදුරාවතීගේ පංගුව කීර්තිරත්න මහත්තයා ගෙන ගියා." (page 323 of the brief). (The person referred to as Appuhamy in the above excerpt of the evidence is the 1st

defendant-appellant) Thus the evidence of the 2nd defendant-appellant was to the effect that 1/2 share of the produce was taken by Appuhamy i.e. the 1st defendant-appellant in the year 1965 and that balance 1/2 of Madurawathi was taken away by Keertiratna. This evidence of the 2nd defendant-appellant is significant in three directions. It nails down the 1st defendant-appellant to the position that he (the 1st defendant) was never a tenant-cultivator in relation to this land in respect of Somawathi's share whilst at the same time, that piece of evidence shows that the 1st defendant-appellant had acted or cultivated the land upon the assignment of the usufructuary mortgage to himself and Madurawathi and that possession of the 1st defendant-appellant in particular, and that of Madurawathi, who was the co-assignee, was rooted in that assignment of the usufructuary mortgage that the 1st defendant-appellant and Madurawathi had taken from Degoaratchilage Appuhamy who in turn had taken the usufructuary mortgage, as stated above, from Somawathi-the owner of 1/4 share. The said piece of evidence (of the 2nd defendant-appellant) also serves as final proof of the fact or as an admission by the 2nd defendant-appellant himself that he was not a tenant-cultivator in respect of the share of the Somawathi or for that matter of anyone else.

To expand on the three points condensed above: The 1st defendant-appellant also had stated in his evidence (page 421 of the brief) that after he took (as explained above) an assignment of the usufructuary mortgage of the 1/4 share of the land that belonged to Somawathi, he (the 1st defendant-appellant) took only 1/2 share of the produce of that 1/4 share of the land. To quote: මම පොලී මරා උගස මා වෙත පවරා ගත්තාට පසු ඒ අයිතිය සම්බන්ධයෙන් බිම් පංගුව සම්පූර්ණයෙන් මම ගත්තේ නැහැ. 1/2 කොටසක් මම ගත්තා. එනම්, 1/4 න් 1/2 ක සම්පූර්ණ අස්වැන්න මම ගත්තා." Further, the 1st defendant-appellant, too, as the 2nd defendant-appellant also had done, admitted that the balance half-share of the produce, of the relevant 1/4 share of the land was taken by the co-assignee. viz. Madurawathi. To quote from the 1st defendant-appellant's evidence: ඊට පසු ඒ උගස මටත්

මදුරාවතී කියන සෝමාවතීගේ නංගිට පැවරුනා. ඒ කාලයේදී මදුරාවතීගේ කොටස මම දුන්නා. . . . ගුණවර්ධන තමයි ඒවා අරන් යන්නේ. ගුණවර්ධන කියන්නේ මදුරාවතීගේ තාත්තා."

Thus, evidence of both the 1st and 2nd defendants-appellants and that of Somawathi (who was called to support the case of the 1st and 2nd defendants-appellants) all unerringly point to the fact that the possession of the 1st defendant-appellant was on the basis of his rights as a usufructuary mortgagee and not as a tenant-cultivator. That is why he the (1st defendant-appellant) admittedly took only 1/2 share of the produce of the 1/4 share of the land of which Somawathi was originally the owner. That is why 1/2 share of the produce (of 1/4 share of the land) was admittedly taken by Madurawathi-the co-assignee, along with the 1st defendant, of the usufructuary mortgage. If the 1st defendant-appellant had worked as a tenant-cultivator under Somawathi, he would not have shared the produce with the co-assignee of the usufructuary mortgage viz. Madurawathi. If, after taking the usufructuary mortgage too, the 1st defendant-appellant had cultivated the 1/4 share of Somawathi as her tenant-cultivator- then the 1st defendant-appellant would have continued to make payment of rent to her i.e. to Somawathi. In the excerpt of her evidence reproduced at page 12 of this judgment Somawathi had stated that after she gave a usufructuary mortgage of her 1/4 share of the soil she never got a share of the produce of the land. The evidence of the defendant-appellant himself (an excerpt from whose evidence is reproduced above at page 13 hereof) shows that he (the 2nd defendant-appellant) too was not a tenant cultivator-on the 2nd defendant's own showing. Because as stated by himself (that is, by the 2nd defendant) (In the excerpt above quoted), as had been stressed above, the evidence of the 2nd defendant-appellant too was that (after the 1st defendant-appellant took the assignment of the usufructuary mortgage along with Madurawathi) the produce was shared equally as between - the 1st defendant-appellant and Madurawathi only - 1/2 share of the produce being taken by the 1st defendant - the balance 1/2 share of the produce being taken by Madurawathi, which

evidence corresponded exactly with that of the 1st defendant-appellant with whom the 2nd defendant-appellant had filed a joint answer. So, that, on his (2nd defendant's) own evidence and on the evidence adduced by the 1st and 2nd defendants-appellants, as a whole, he (the 2nd defendant-appellant) had not got, nor had he even expected to get a share of the produce of the land, which wouldn't have been the case, if he i.e. the 2nd defendant-appellant, too, had been a tenant-cultivator, which was the basis on which issue No. 07 had been raised on behalf of the 1st and 2nd defendants-appellants at the trial of the action. The fact that the two assignees of the usufructuary mortgage had divided the produce equally between them can be explained only on the basis that both of them treated or conducted themselves as usufructuary mortgagees who possessed the land as such, recognizing no, landlord. The evidence of the 1st and 2nd defendant-appellants to the effect that the 1st defendant-appellant and Madurawathi shared as between themselves the produce of the land, (in the proportion of 1/2 share each, confirmed or borne out, as it was by the evidence of Somawathi, who stated, as pointed out at page 12 hereof, that she received no produce by way of rent after she gave a usufructuary mortgage of her share) rules out any rent being paid to a landlord. And the fact that there was admittedly no such payment serves to show, the non-existence of any landlord-tenant relationship between the 1st defendant-appellant and Somawathi in respect of whose 1/4 share the 1st and 2nd defendant-appellants claimed to be the tenant-cultivators.

Although the doctrine of estoppel by deed, in its technical sense, cannot be said to be part of our law, yet, the fact that the 1st defendant-appellant had taken a usufructuary mortgage could, at least, be treated, for certain, as an admission by him (the 1st defendant) that he cultivated Somawathi's 1/4 share in that capacity i.e. as a usufructuary mortgagee, at least, from the date he took the mortgage on 08. 12. 1950, till it was discharged by Hendirick after he purchased Somawathi's 1/4 share. In fact, as pointed out above, even in the course of his oral evidence, the 1st defendant-appellant had admitted

not only that he took an assignment of a usufructuary mortgage in respect Somawathi's 1/4 soil share but also that after doing so - 1/2 share of the produce in respect of that share, was given to. Madurawathi-the co-assignee of the usufructuary mortgage. It is also worth observing that the 1st defendant-appellant himself had got his name entered, in the cultivation committee register, as the owner of this land in question in respect of the year 1965 whilst the name of the 2nd defendant-appellant appears (in the said register) as the tenant cultivator, remarkably enough, under the 1st defendant-appellant himself, for that year. What is significant is that the 1st defendant-himself had been directly instrumental in getting this data or information inserted in the register, as had been revealed in his (1st defendant's) own evidence which was as follows:

ප්‍ර: මම යෝජනා කරන්නේ රණවීරගේ නම් 1965 අඳ ගොවියෙක් හැටියට ඇතුලත් කලා තමා හා රණවීර විසින් කියා?

උ: අපි දෙන්නා තමයි ඇතුලත් කලේ? (page 422 of the brief)

If, as admitted above by 1st defendant-appellant, he got his own name entered as the owner (not as tenant-cultivator) of the land in question in respect of the year 1965 and also got the 2nd defendant's name entered, as the tenant-cultivator (not under Somawathi) but under himself, that is, under the 1st defendant-appellant himself, that must necessarily be because neither of them was a tenant-cultivator in respect of Somawathi's share of which the owners, as at present, are the 1st-7th plaintiffs-appellants and the 3rd-4th defendants-respondents. Perhaps, the 1st defendant-appellant was conscious of the legal position that a usufructuary mortgagee was included in the definition of "owner cultivator" and was treated as such under the Paddy Lands Act No. 01 of 1958, and that more than explains why he (the 1st defendant-appellant) thought it best to get himself registered as the owner as, in fact, he had done. This fact also unerringly points to the fact that the 1st defendant-appellant cultivated this land as a usufructuary-mortgagee.

Even assuming for the sake of argument that the 1st defendant-appellant had worked as a tenant-cultivator under Somawathi-he that is, the 1st defendant-appellant, cannot, in any event, be held to have done so, after, the assignment of the usufructuary mortgage in favour of the 1st defendant-appellant or rather taking over by him of the interest of the usufructuary mortgage in respect of Somawathi's share. Upon the taking over of the interest of usufructuary mortgage, the tenancy rights (if any) of the 1st defendant-appellant had suffered extinction through "surrender" or more precisely through both "surrender" and "merger" in conjunction-the surrender, so to say, coming in aid of merger-in the factual matrix of this case. Ordinarily, in the generality of cases, a mortgage operates as a conveyance of the legal title to the mortgagee, but such title is subject to defeasance on payment of the debt or performance of the duty by the mortgagor. As pointed out above, at page 9 hereof the 1st defendant-appellant had explicitly admitted, that he took from Degoaratchilage Appuhamy a usufructuary mortgage, or rather an assignment thereof, in respect of Somawathi's share. The effect of an assignment (novation) is that the lessor and assignee or the mortgagor and the assignee stand to each other in the same relation, as did the original mortgagor and mortgagee, so far as the rights and obligations affecting the property are concerned. It would seem that the question, whether a valid assignment or novation of a lease or mortgage could be made without the consent of the lessor or the mortgagor respectively, is somewhat unsettled. In fact, that point does not call for consideration here for it is the lessor or the mortgagor, if at all, who has the right to complain if the lease or mortgage had been assigned without his consent. Yet, it may be pointed out, in passing, that the tenor of Somawathi's evidence does not even remotely suggest that the assignment of, the usufructuary mortgage in favour of the 1st defendant and Madurawathi was without her (Somawathie's) knowledge and consent. Somawathie had not said so. It is very revealing, in this context, that when Somawathi sold her 1/4 share on deed No. 6415-dated 18. 08. 1966 to Hendrick, the vendee i.e. the

said Hendrick had paid (as evidenced by the terms of the said deed of transfer No. 6415) only Rs. 600/= although the agreed consideration was Rs. 1500/= for Rs. 1,000/= had been retained by the vendee (Hendrick) to pay off Rs. 1,000/= due and owing to the usufructuary mortgagees viz. the 1st defendant and Madurawathi who had taken, as stated above an assignment of the usufructuary mortgage on deed No. 33290-dated 7. 12. 50 (There is confusion in the marking given to deeds at the trial so that they have to be referred to by their number) The fact that Somawathi had agreed to permit the said Hendrick to retain Rs. 1,000/= which amounted to 2/3 of the consideration was another pointer although not decisive to the fact that the assignment of the usufructuary mortgage to the 1st defendant-appellant and Madurawathi was with the concurrence of Somawathi. This amount i.e. Rs. 1,000/= was retained by Hendrick to discharge the usufructuary mortgage in favour of the defendant-appellant and Madurawathi. If the assignment of the usufructuary mortgage in favour of the 1st defendant and Madurawathi was contrary to the wishes of Somawathi, it was unlikely that she would have agreed to permit Hendrick to retain Rs. 1,000 to be paid to the 1st defendant and Madurawathi in discharge of the usufructuary mortgagee. To set out the explanation of this, rather, elusive concept viz. surrender as given in a Standard Work.

> "Any acts which are equivalent to an agreement on the part of the tenant to abandon and on the part of the landlord to resume possession of the demised premises amount to a "surrender by operation of law", the rule may be said to be that a Surrender is created by operation of law, when parties to a lease do some act so inconsistent with the subsisting relation of landlord and tenant as to imply that they have both agreed to consider the Surrender as made."

However, it has to be emphasized that surrender differs from abandonment inasmuch as the latter is simply an act on the part of lessee alone, whereas Surrender is a contractual act and occurs only though consent of both parties or rather in

consequence of a consensual act of both reflected in a consensual act. It is well settled that to show a surrender, a mutual agreement between lessor and lessee that the lease is terminated must be clearly proved.

Assuming as was sought or attempted to show by the 1st defendant-appellant that he was the tenant cultivator in respect of the 1/4 share that originally belonged to Somawathi, even at the date that he took the assignment of a usufructuary mortgage from Degoaratchilage Appuhamy (which is a claim lacking in honesty and conscience) there was a clear surrender on the part of the 1st defendant-appellant of the rights of tenancy to Somawathi consequent upon the 1st defendant-appellant taking over the usufructuary mortgage upon an assignment from Degoaratchilage Appuhamy who had, in the first instance, taken a usufructuary mortgage from Somawathi the owner of 1/4 share of the soil. It is to be observed that the evidence in the case is overwhelming that the assignment of the usufructuary mortgage in favour of the 1st defendant-appellant and Madurawathi was with the consent of Somawathi. At least, it is more probable than not-there being nothing to suggest the contrary. Once an assignment is taken the lessor or the mortgagor on the one hand and the assignee on the other, stand to each other as did original mortgagor and the original usufructuary mortgagee, so far as the rights and obligations were concerned. The effect of the assignment, which is tantamount to a novation, of the usufructuary mortgage was that the two assignees, viz. the 1st defendant-appellant and Madurawathi were substituted for the original usufructuary mortgagee viz. Degoaratchilage Appuhamy, who completely dropped out. Degoaratchilage Appuhamy, the original usufructuary mortgage lost all his rights and was relieved of all obligations under the usufructuary mortgage-the two assignees taking his place and becoming the new usufructuary mortgagees but under the terms and conditions of the original usufructuary mortgage. Surrender takes place as, has been explained above, when "parties to the contract of tenancy do some act which is so inconsistent with the subsisting relation of landlord and tenant."

When the 1st defendant-appellant took an assignment of the usufructuary mortgage on bond No. 33290 dated 2. 12. 1950, assuming that he was a tenant-cultivator till that date, the entire basis of his possession underwent a transformation. One cannot possess as the tenant-cultivator and concurrently possess as a usufructuary mortgagee. A cardinal feature or a signal quality of any tenancy is the obligation of payment of rent by the tenant. Usufructuary mortgage arises when property is mortgaged with a *pactum antichresis (antichresios)* that is, with a pact or condition which allows the mortgagee to use and take the fruits of the mortgaged property in lieu of interest due on the mortgage. Usufructuary mortgage means an agreement whereby the debtor gives to the creditor the income from the property mortgaged (by the former) in lieu of the interest on his debt; whereas the tenant cultivator, upon renting land, possesses it by paying for it, usually in part of the crop or its equivalent in money. Usufructuary mortgage and a tenancy cannot co-exist and if, in fact, the tenancy rights continued to exist, they i.e. those rights of tenancy could have continued to exist only if the contract of tenancy also continued, and the usufructuary mortgage would not have been valid or constituted, if the tenancy had not lapsed by surrender or cession. Granting or taking of a usufructuary mortgage is so utterly inconsistent with the relation of landlord and tenant as to necessarily imply that both the former landlord and tenant (assuming there had been such a relationship) had agreed to consider the surrender as made.

The assignment (novation) of the usufructuary mortgage, which must be held to be proved, on the facts stated above, and to have been given with the consent of Somawathi, also works or brings about a merger at the same time as it effects a surrender. In fact, the facts of this case, are such that one may say that surrender had come or worked in aid of merger. The concept of merger is not a rigid one and seems to be, so to speak, elastic and adaptable. In *Grootchwaing Salt Works Vs. Van Tonder*[1] juridicial foundation of the principle of merger was explained by Innes C.J. thus ". . . concurrence of two

qualities or capacities in the same person which mutually destroy one another". For example, if the tenant acquires title to the leased premises, that is, if he becomes the owner, the contract of tenancy would be wiped out. Another example of merger would be where the qualities of debtor and creditor become united in the same person or individual leading to a confusion (equivalent of confusio in Roman Law) thereby causing an extinguishment of both qualities, for a person cannot be his own creditor or debtor. What is deducible from these examples is that two irreconcilable capacities or rights cannot reside in the same person. Needless to say, the right of a usufructuary cannot be integrated with that of a tenant. In the case of property interests, it is a general principal of law that where a greater estate and less coincide and meet in one and the same person, the less is immediately annihilated or, in the phrase of the law, merged, that is "sunk or drowned in the greater". For instance, when lessee purchases the property, the lesser interest of the lessee merges into the greater interest of the owner. When the tenant becomes the owner of the leased premises ownership survives although the tenancy and landlordship both disappear or suffer extinction. Similarly, when the tenant acquires the rights of a usufructuary mortgagee his rights as a usufructuary mortgagee survives although obligation on the part of the tenant-cultivator and the right of the landlord to collect or receive the rent are both extinguished. The extinction of the duties and rights under the contract of tenancy in consequence of the inception of the usufructuary mortgage brings out or shows clearly the incompatible nature of the rights and duties under a contract of tenancy and a usufructuary mortgage. The concurrence, in the 1st defendant-appellant, of the two opposing capacities of tenant-cultivator and usufructuary mortgagee renders it impossible for the obligations and rights to continue under the contract of tenancy-assuming, of course, that there had been such a contract earlier.

Neither the question of surrender nor that of merger had been either raised or considered in the District Court which

had been quite oblivious of those aspects, quite understandably, as no issues had been raised with regard to those concepts. In the written submissions filed in the Court of Appeal, the argument of merger (but not surrender) had been raised lackadaisically, for it has not been explained as to how merger works or comes into play in the factual set up of this case. The facts of this case more strongly prove a surrender than a merger although, as stated above, the self-same act on the part of the 1st defendant-appellant in taking an assignment of a usufructuary mortgage operates at the same time to cause, respectively, a surrender and merger- although the surrender must, perhaps, technically speaking, precede (in the circumstances of this case) the merger, in the order in which they occur. As explained above, if the tenancy rights had continued and had not been surrendered, if not of volition, at least, by operation of law, valid inception of a usufructuary mortgage would have been made impossible for the two rights are mutually inconsistent and destructive and cannot exist side by side. It is well to remind oneself, as had been stated above, that surrender arises or occurs by operation of law "when parties to a lease do some act so inconsistent with the subsisting relation of landlord and tenant as to imply that they have both agreed to consider the surrender as made". (Vide page 1295-Black's Law Dictionary-5th Edition). At the same page, therein it had been explained that implied surrender takes place even when the lessee takes a new lease of the same lands. Wille has explained the position thus: **Such relocation is not continuation of the old lease but a new lease formed by a fresh (tacit) agreement of the parties which succeeds to the previous lease".** As Innes C. J. said in *Bowhay Vs. Ward*[2] "Tacit relocation depends on the fact that both parties adopt and continue the position which the termination of the lease found them .... in other words, that the lessor is content that the lessee should remain, and the lessee is content to remain".

What I am seeking to explain is this, that is, that if taking a new lease involves or is preceded by a surrender of the old

lease, as had been explained above, even when the nature of the legal relation in both leases is identical, the taking of a usufructuary mortgage by the lessee or tenant, which altogether metamorphoses the legal relation and which brings about an extinction (as explained above) of the contract of tenancy must, of necessity, involve a surrender of the tenancy, more so, as the two legal relations respectively of tenancy and usufructuary mortgagee, to repeat what has been emphasized above, cannot co-exist. Lee in his treatise, "Introduction to Roman Dutch Law", had pointed out that in the case of a usufruct one of the ways in which it (usufruct) is determined or terminated is by merger that is when the usufructuary becomes the owner of the property or usufruct reverts to the owner by cession or surrender or even abandonment. In the later situation, merger takes place in consequence of the surrender or cession of the usufruct (by the usufructuary) to the owner. So that it is the act of surrender or cession in consequence of taking a usufructuary mortgage that results in the merger. I have given the above example of surrender of a usufruct to the owner, consequently, resulting in a merger, by way of illustrating a general rule that the self-same act can result in both surrender and merger simultaneously.

But in the light of the facts of this case it is the self-same act-the act being the taking of the usufructuary mortgage by the lessee (assuming that the 1st defendant was in fact, a tenant-cultivator) that operates to result in a surrender and merger simultaneously. There are no distinct or separate acts-separated in point of time. For instance, if the tenant had ceded or surrendered his tenancy rights first, and after the lapse of some time taken a usufructuary mortgage-then it couldn't have been said that the taking of a usufructuary mortgage had worked to produce the dual result of a surrender and merger contemporaneously. So that there is justification for holding that the 1st defendant-appellant's tenancy rights had been extinguished not by surrender alone but by merger as well-both events necessarily occurring at the same time-because it is one and the same act that produces both results.

The learned counsel for the 1st and 2nd defendants-appellants, resourceful as ever, contended that, in any event, the tenancy rights of the 1st defendant-appellant ought to be held to be in suspense or in a state of temporary cessation, during the currency of the usufructuary mortgage and to have revived once the usufructuary mortgage was discharged. I have made a reasoned finding that the 1st defendant-appellant had never cultivated the land in question in the capacity of a tenant-cultivator for, to repeat what had been stated above, he could not have commenced possession of this land, as a tenant-cultivator, in the year 1963 for at that time, the usufructuary mortgage was in force-the 1st defendant-appellant having taken an assignment of the mortgage in the year 1950. It has to be pointed out, even at the risk of repetition, that issue No. 07 had been raised, on behalf of the 1st and 2nd defendants-appellants, on the factual basis that the 1st defendant-appellant started cultivating as a tenant-cultivator from the year 1963. When a right is suspended its existence is preserved although it cannot be presently asserted in the Courts. A right which is in suspense is susceptible of being revived which is not the case where it is extinguished as had happened in this case through surrender. Suspension which is partial extinguishment for a time, when the right is dormant or is in abeyance, stands in contrast to complete extinguishment or extinction where the right is absolutely dead. Abandoned right or a surrendered right cannot be said to be in suspense. The surrender was not conditional. It is a well known principle of law that a merger occurs when qualities of creditor and debtor or when two incompatible rights become united in the same person. There arises a confusion (merger) of rights which extinguishes both qualities. It would appear that a right that had suffered extinguishment through surrender or merger cannot be revived unless there was an agreement to that effect. For instance in the case of *Cape Times Ltd. Vs. Goldsmid*[3], it was held that a surety who becomes the creditor in respect of the debt for which he stood surety discharges his own obligation. A surety's obligation which had been discharged in that way cannot be revived by

cession of the principal obligation to a third party-unless the surety expressly or tacitly agrees to that effect. This serves to show that extinction of obligations brought about through merger or surrender is not suspensive but, so to speak, permanent. In this context, it would be instructive to refer to the case of *Foster Vs. Robinson*[4], where the statutory tenancy was held to have been surrendered by operation of law as it had been verbally agreed, in that case, between the defendant's father and the landlord that the defendant's father owing to his age and infirmity need not pay any further rent but could continue to live in the cottage for the rest of his life, rent free. Earlier the defendant's father had worked for the landlord on the farm and paid an annual rent to the landlord who was the owner of both the farm and the cottage. Thereafter, rent was neither demanded nor tendered and defendant's father continued to live in the cottage without any payment of rent till he died. It was held that the agreement between the defendant's father and the landlord was effectual to produce a surrender of the tenancy by operation of law and the defendant was estopped from asserting that the old tenancy still existed.

Some other cases may be referred which are enlightening. In *Metcalfe Vs. Boyce*[5], the facts were: In 1910 the defendant, who was a county Police Constable became a quarterly tenant of a house. Later, that is, in 1912, the county Police authority which had till then made a grant in aid of the rent of houses occupied by Police Constables, decided that for the future the Chief Constable should be the tenant of those houses and that Constables should occupy them as servants and that the Chief Constable should pay all rent, rates and taxes and that a deduction should be made in respect thereof from the men's pay. The defendant knew of, and made no demur to, this new arrangement. No demands for rates and taxes were made from the defendant. This course of business continued for 14 years, the defendant continuing to occupy the house and his name remaining in the books as tenant. There was no written surrender or assignment of the tenancy either. Yet, on the above facts it was held that there was evidence from which the

inference of fact could be drawn that in 1912 the defendant had agreed with the landlord he would surrender his tenancy and that the landlord had further agreed to accept the Chief Constable as his tenant and that the defendant would in future occupy the house as a servant of the Chief Constable and not as a tenant and that on those facts there had been a surrender of the tenancy by operation of law and further that the defendant was in the circumstances estopped from denying that he had surrendered or assigned the tenancy.

It is to be observed that, in the above case, although, in consequence of the new arrangement, the Chief Constable was constituted the Landlord's tenant-he thereafter being responsible for paying rent-the actual occupation continued as before, in the Policeman. That there was no formal surrender by the Policeman calls for remark. It was held that, notwithstanding the continuity of occupation, there had been a surrender by act and operation of law-the defendant i.e. the Policeman, having ceased to occupy as tenant and begun to occupy as servant of his master viz. the Chief Constable.

In deciding the above case Salter, J. had largely followed *Peter Vs. Kendal*[6], where it was pointed out that it is not essential to a valid surrender by operation of law that there should be a physical change of occupation; it is sufficient if there is a change in the nature of the occupation. In *Peter Vs. Kendal(supra)* the owner of a ferry demised it to a person by parol at a certain annual rent. That person, at the end of a few weeks, finding it unprofitable, proposed to become the servant of the owner as a boatman and to account to him for all money received from passengers, upon being allowed fixed daily wages. This was assented to by owner of the ferry and the person who originally took the ferry on rent, became his servant and received stipulated wages. Those being the facts, Bayley, J. in his judgment said: "A new relation which, in regard to this property, was wholly inconsistent with that of landlord and tenant, then took place, with the consent of both parties. That operated as a surrender by operation of law of the tenant's interest in the property".

In the case in hand too, when the 1st defendant-appellant took an assignment of the usufructuary mortgage in respect of the soil share of Somawathi, (assuming that the 1st defendant-appellant had been a tenant cultivator till that time) an inference could legitimately and properly be drawn that a new relation was created and 1st defendant's interest in the property as a tenant was surrendered and extinguished for good.

It does not matter that neither the 1st defendant-respondent nor Somawathi (under whom the 1st defendant-respondent claimed to have cultivated as a tenant-cultivator) had ever intended that there should be a surrender of the interest of tenant-cultivator-assuming of course, that the 1st defendant-respondent was, in fact, a tenant-cultivator under the said Somawathi for as Parke B had explained in *Lyon Vs. Reed*[6] (1844), referred to at page 205 in Spencer Bower in his treatise on estoppel, it is the act itself that amounts to a surrender. To quote: "In such a case there can be no question of intention. The surrender is not the result of intention. It takes place independently and even inspite of intention. Thus, in the cases which we adverted to . . . it would not at all alter the case to show that there was no intention to keep it unsurrendered. In all these cases, the surrender would be the act of the law, and would prevail inspite of the intention of the parties".

For the aforesaid reasons I do hereby dismiss the appeal of the 1st and 2nd defendants-appellants and affirm the judgment of the District Court.

The 1st and 2nd defendants-appellants are ordered to pay Rs. 10050/= as costs of this appeal to the 1st-7th plaintiffs-respondents-in addition to what had been awarded by the District Court. (This frivolous appeal had delayed the plaintiffs-respondents getting the relief they sought for well over a decade).

Appeal dismissed.