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Act would not in our opinion deprive him. By Section 331 of that Act it is provided that it shall not apply to any intestacy occurring before the 1st of January 1866. The succession to the share of the deceased in any ancestral property, and to any self-acquired property of the deceased, would of course be governed by the Indian Succession Act.

The Subordinate Judge having dismissed the suit without investigating the facts, we remand the suit with the direction to add all members of the family who may have an interest in the result; and, guided by the observations which we have made, to raise and try the issue whether the property in dispute, or any part of it, was ancestral property as between the plaintiff and his father, and any other material issues which may arise between the parties, and to dispose of the suit on its merits. The costs of this appeal will be provided for in the decree of the Subordinate Court.

Suit remanded.

APPELLATE CIVIL.

Before Mr. Justice Kindersley and Mr. Justice Forbes.

1880.
September 29.

CHINNAYYA RAWUTAN AND TWO OTHERS (FOURTH AND FIFTH DEFENDANTS), APPELLANTS, v. CHIDAMBARAM CHETTI AND OTHERS (FIRST PLAINTIFF AND FIRST AND SECOND DEFENDANTS), RESPONDENTS.*

In India, as in England, a mortgagee may transfer his rights to a third person by way of assignment: but such transfer must be without prejudice to the rights of the mortgagor.

THIS was an appeal presented, under Section 561 of the Code of Civil Procedure, against the decree of the Subordinate Judge of South Tanjore in Original Suit No. 24 of 1877.

V. Bháshayam Áyyangár for the Appellants.

T. Ráma Ráu for the first Respondent.

W. Gopálacharri for the second Respondent.

The Court (KINDERSLEY and FORBES, JJ.) delivered the following

* Appeal No. 32 of 1879 against the decree of the Subordinate Court of South Tanjore, dated 21st March 1879.

JUDGMENT :—The plaintiff in this suit became indebted to one Arnáchellam Chetti in the sum of Rupees 38,000, which was secured by three simple bonds. On the 18th February 1872 the plaintiff executed in favor of the first defendant's late husband, Anamalai Chetti, a bond hypothecating certain villages for Rupees 30,000, which sum Anamalai undertook to pay to Arnáchellam Chetti, on account of plaintiff's debt to Arnáchellam Chetti. On the same day the plaintiff let some of the same villages to Anamalai at an annual rent of Rupees 4,400, by the receipt of which Anamalai was to recover his advance with interest within 15 years. Anamalai died 1873, having paid only a portion of the Rupees 30,000, which formed the consideration for the hypothecation of the villages to him. In 1874 Arnáchellam and his nephew brought Suits 75 and 76 to recover balances due on two of his three bonds, and recovered from the present plaintiff money amounting with interest to Rupees 21,132-3-9, which the plaintiff now sues to recover. In the meantime, on the 1st of September 1874, the first and second defendants, who are the widow and brother of Anamalai, assigned the mortgage, with possession of the rented villages, to the third defendant, Chinnaya Rawuthan, whose brothers are the fourth and fifth defendants.

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The Subordinate Judge found that Anamalai had paid Rupees 8,000 to Arnáchellam, for which the plaintiff had not given him credit. He therefore decreed for the plaintiff the sum of Rupees 14,690-1-10 against all the defendants. The third defendant had pleaded that he was not liable, because there was no privity of contract between him and the plaintiff. But the Subordinate Judge held that the third defendant was liable, because he was in possession, and had taken the place of the first and second defendants. The third, fourth, and fifth defendants appeal to this Court mainly on the ground that there was no privity of contract between them and the plaintiff.

This may be regarded as substantially a suit to recover damages for breach of contract; and there can be no question as to the general rule that no one can be bound by a contract, except those who are parties to it. We took time to consider whether the plaintiff had any remedy against the third defendant, who was in possession of some of the villages as assignee of the hypothecation. It is clear that in India, as in England, a

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mortgagee may transfer his rights to a third person by way of assignment. But such transfer must be without prejudice to the rights of the mortgagor. The mortgagee may put another into his own position, but he cannot create a title in a third party distinct from his own title (Macpherson on Mortgages, 122, Ed. 1877); and in a suit by a mortgagor for redemption, where an assignment has been made without the knowledge of the mortgagor, the assignee is bound by the state of the account between the mortgagor and the mortgagee, although he may have paid more. [*Mathews v. Walwyn* (1), *Chambers v. Goldwin* (2), *Walker v. Jones* (3)]. The present case is one of partial failure of the consideration for the hypothecation. The case of *Parker v. Clarke* (4) was one of total failure of consideration. A person named Cruchley, while he was imprisoned for debt, assigned all his interest under his father's will to one Thomas without consideration, and under a promise to release the mortgagor from prison, which was never performed. Thomas transferred this mortgage to the defendant, Clarke, who had notice of the circumstances under which it had been obtained; and Clarke deposited the mortgage and transfer with Philips to secure payment of a debt. Philips had no notice of the circumstances under which the mortgage had been obtained. The bill was filed against Clarke and Philips for a declaration that the mortgage was void, and for an order for its delivery up to be cancelled. For Philips it was argued that he was a purchaser for value without notice. But the Master of the Rolls was of opinion that Philips could only take what Clarke could give him, and that he could not stand in a better situation than Clarke. He must therefore deliver up the deeds; and his only remedy would be against Clarke. In the present case there has been only a partial failure of consideration; and we are of opinion that the third defendant is bound by the state of the account between the plaintiff and the representatives of the deceased mortgagee, and that the plaintiff is entitled to a declaration that, if the first and second defendants do not pay that which may be due to the plaintiff on account of the money which Anamalai failed to pay to

(1) 4 Ves. 118.

(2) 9 Ves. 264.

(3) L.R.P.C. 30.

(4) 30 Beav. 54.

Arnáchellam, the mortgage in the hands of the third, fourth, and fifth defendants will be good only for the amount actually paid for the mortgage with interest. It is admitted at the second hearing that the late Anamalai paid Rupees 22,000 and not only 14,000 to Arnáchellam on account of the mortgage of Rupees 30,000. The Subordinate Judge was therefore right in deducting that sum from the damages claimed by the plaintiff in respect of the suits brought against him by Arnáchellam. It further appears that the Subordinate Judge should have deducted the sum of Rupees 7,351 as counter-interest on the sum of 8,442 rupees from April 1872 to the date of the plaint. The counter-interest is due because of the debt of Rupees 38,000 due by plaintiff to Arnáchellam; Anamalai undertook to pay only Rupees 30,000. It was the plaintiff's duty to pay the odd 8,000, and therefore that amount with interest is fairly to be deducted from the sums which Arnáchellam recovered from the plaintiff. This sum mentioned as counter-interest includes interest on the Rupees 442 which plaintiff improperly collected as rent. Upon the evidence we do not think that the plaintiff is fairly chargeable with the grain rent, which he seems to have collected under the arrangement mentioned in his letter Exh. I, by which the operation of the lease was postponed to the commencement of Fasli 1282; but it was agreed that Anamalai was to take the produce for a few months of the preceding year on account of interest on certain sums which he had already paid. We shall modify the decree of the Subordinate Court by deducting from the sum of Rupees 12,690-1-10 the sum of Rupees 5,321 chargeable to the plaintiff on account of counter-interest. The first and second defendants will pay the balance, Rupees 7,369, to the plaintiff with costs in proportion with further interest on the principal sum of Rupees 7,369 at 6 per cent. from the date of plaint. The decree as against the third, fourth, and fifth defendants will be reversed, but it will be declared that the mortgage in their hands will be good only for the sum of Rupees 22,000 found to have been paid by Anamalai to Arnáchellam Chetti, and the plaintiff will be entitled to redeem after the lapse of eleven years from the commencement of Fasli 1282.

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