# APPELLATE CIVIL.

*Before Mr. Justice Muttusámi Ayyar and Mr. Justice Brandt.*

1887.
Jan. 11.

VENKATA SHETTI AND OTHERS (DEFENDANTS), APPELLANTS,

and

RANGA NÁYAK (PLAINTIFF), RESPONDENT.*

*Merger of securities—Civil Procedure Code, ss.* 43, 373

On the 5th September 1874 R., a Hindú, and his sons borrowed Rs. 5,000 from V. and mortgaged to him certain land, items 1, 2 and 3. On the 7th September 1874, V. borrowed Rs. 5,000 from R. N. and mortgaged his rights in items 1 and 2 and land of his own to R. N. In 1877 R. N. bought at a sale in execution of a decree against R. the share of R. in the said items 1 and 2 subject to the mortgage created by R., on 5th September 1874, and to another mortgage created by R., dated 11th January 1875. In 1880, R. N. sued V. and the sons of R., for arrears of interest due under his mortgage bond.

This suit was withdrawn with liberty to bring a fresh suit for the principal and interest due under the bond.

In 1885, R. N. sued V. and the sons of R., to recover principal and interest due under his mortgage bond.

V. pleaded that, as R. N. had bought R.'s share in items 1 and 2, subject to the mortgages created by him, R. N.'s rights as mortgagee were merged in his rights as purchaser.

R.'s sons pleaded, *inter alia*, that the suit was barred by the provisions of ss. 43 and 373 of the Code of Civil Procedure:

*Held* that the claim of R. N. was neither merged nor barred.

APPEAL from the decree of C. Venkobácharyár, Subordinate Judge of South Canara, in suit 3 of 1885.

The facts necessary for the purpose of this report appear from the judgment of the Court (Muttusámi Ayyar and Brandt, JJ.).

*Bháshyam Ayyangár* and *Náráyana Ráu* for appellants.

*Rámachandra Ráu Saheb* and *Gopala Ráu* for respondent.

JUDGMENT :—This is an appeal preferred on behalf of defendants Nos. 1, 2 and 4, in original suit 3 of 1885, on the file of the Subordinate Court of South Canara. The interests of the defendants Nos. 1 and 2 are not identical with those of defendants

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Nos. 3 and 4; the interests of the two latter are identical, but defendant No. 4 alone is before us as an appellant.

On the 5th September 1874 defendant No. 3, Krishna Shetti, appellant No. 3, Narasayya Shetti and Náráyana Shetti (deceased), brothers, and their father Rámá Shetti borrowed of the appellant No. 1, Venkata Shetti, a divided brother of the said Rámá Shetti, Rs. 5,000 and executed in favor of the lender an instrument hypothecating landed property, items 1 and 2 in this suit, and another parcel not included in this suit, Exhibit B. On the 7th of the same month appellant No. 1, Venkata Shetti, and his son, appellant No. 2, Devappa Shetti, borrowed of the respondent, Ranga Náyak, Rs. 5,000 (the bond states the consideration as Rs. 6,000, but it is admitted that only Rs. 5,000 were advanced) and gave their mortgagee a bond hypothecating the land constituting items 1 and 2 in this suit and another parcel of land, the jenm title to which the mortgagors hold in their own right, Exhibit A.

The suit was brought for the recovery of the principal and interest due under Exhibit A.

In the year 1850 Malappa Shetti, a brother of Rámá Shetti, obtained a personal decree against Rámá Shetti in a partition suit, and in 1876 Malappa's son Ganapathi took out execution of that decree, and in 1877 the respondent in this suit purchased Rámá Shetti's share in items 1 and 2 now in suit, subject to the incumbrances created by Rámá Shetti under Exhibit A, and under another instrument, dated the 11th January 1875, whereby as security for a further loan of Rs. 8,500 borrowed of appellant No. 1, Venkata Shetti, Rámá Shetti hypothecated his share in items 1 and 2 now in suit, and also three other parcels of land. The share which the auction-purchaser the respondent was eventually held to have purchased consists of $\frac{1}{4}$th of plaint item No. 1 and $\frac{1}{6}$th of plaint item No. 2.

The respondent filed a suit 164 of 1880 against his mortgagors, appellants Nos. 1 and 2 and against defendant No. 3, and appellant No. 3 for arrears of interest only, then accrued due under Exhibit A: that suit was by permission withdrawn with leave to institute a fresh suit for recovery of the principal (then due) and interest. Defendant No. 5, Venkatesa Mala, was made a party to the suit by the respondent, on the ground that the purchase of Rámá Shetti's share in execution of the suit of 1850

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was in fact made by Defendant No. 5, but the finding is that the respondent is the real purchaser, and no appeal has been preferred against this finding and nothing turns upon it in appeal.

Appellants Nos. 1 and 2 pleaded that by the purchase of Rámá Shetti's share in items 1 and 2 in suit subject to the incumbrances created by Exhibit A and by the mortgage of 1875, the respondent's mortgage rights under Exhibit A were lost, by merger of the latter in the right acquired by him under his purchase.

Defendant No. 3 and appellant No. 3 pleaded that in no circumstances can they be held liable in respect of either principal or interest due under A; they further raised the objection taken by the appellants Nos. 1 and 2 on the ground of merger of the securities in the hands of the respondent, and appellants Nos. 1, 2 and 3, and defendant No. 3 all contended that, notwithstanding the permission given to the respondent to withdraw his suit No. 164 of 1880 with leave to institute a fresh suit as above stated, the present suit is barred by the provisions of sections 43 and 373 of the Code of Civil Procedure.

The Subordinate Judge framed issues intended to meet the contention of the said defendants as to the character and effect of the respondent's purchase in execution of Rámá Shetti's share in items 1 and 2, and held that what was purchased was the equity of redemption subject to his own incumbrance under the mortgage instrument A, and to the charge in favor of appellant No. 1 under the mortgage of 1875, but that "he did not purchase his mortgagor's right of redemption nor the right of the mortgagors of appellant No. 1, but only the interest of one of them," and that the plea as to merger was therefore untenable: he held that appellants Nos. 1 and 2 are primarily (and personally) liable, and that the respondent is entitled to recover the principal and interest due under A "by sale of the properties mortgaged" under A; the decree is thus worded "that the plaintiff do recover" the amount decreed and costs "from 1st and 2nd defendants and from the mortgaged properties described below, unless the said sums be paid within six months" from date of the decree; and the several properties are then specified in a schedule appended to the decree.

The Subordinate Judge disallowed the objection that by reason of the provisions of ss. 43 and 373 of the Code of Civil

Procedure, the suit is not maintainable, on the ground that the permission to withdraw from the suit of 1880 was given by the District Múnsif in the exercise of his discretion and that that discretion was not improperly exercised.

The first ground of appeal argued at the hearing was that the respondent should have sued appellants Nos. 1 and 2 alone, and for sale of their mortgage right in items 1 and 2 and of their jenm right in item No. 3, and that they had no cause of action against the original mortgagors, defendant No. 3 and appellant No. 3, but it was subsequently conceded that to a suit for realization of respondent's security under A, the original mortgagors, as having an interest in the property items 1 and 2, were not improperly made parties, and the contention was confined to the terms of the decree; it was then admitted on behalf of the respondent that so far as items 1 and 2 are concerned the interest which the appellants Nos. 1 and 2 have therein under Exhibit B, and nothing more, can be sold in satisfaction of the respondent's claim under Exhibit A. The decree of the lower Court will accordingly be amended by substituting for the words "by sale of items 1 and 2" the words by sale of the mortgage rights of the 1st and 2nd defendants in items 1 and 2:" the order for the sale of "the mortgaged property" as regards item 3 is correct. It was contended for the respondent that the allowing of the appeal to this extent is a matter of form only; but this is not so; and by consent, for the purpose of assessing costs in this appeal only, the value in respect of which the appellants must be taken to have succeeded is assessed at Rs. 1,500.

But, in respect of the second ground of appeal that there was merger of the securities, by reason of which the respondent is barred from enforcing his mortgage lien, we must hold that the appellants fail. The doctrine of merger applies in cases in which a higher security is given between the same parties; but this alone is not sufficient; the remedy given by the higher must be co-extensive with that given by the original lower security; the rights which unite must be in respect of the same property; but here the property mortgaged and the property sold are not identical; all that was sold was Rámá Shetti's interest in, that is, the right of one of several sharers to redeem part of the property mortgaged. The respondent's purchase then has not the effect of

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depriving him of his right to put up to sale the mortgage rights of appellants Nos. 1 and 2 in plaint items 1 and 2.

As to the third and only remaining argument in appeal that the statutory bar to a second suit brought in respect of a portion of a claim, a portion of which a party has omitted to sue in respect of in a former suit, subsists, notwithstanding that such former suit has been withdrawn by permission of the Court with leave to institute a fresh suit founded on the same cause of action; if this construction be put upon the two sections it is not possible for them to stand together, but the sections must be reasonably construed together so that they may if possible both stand, and we are of opinion that it is not necessary to hold that s. 43 applies in the case of a suit withdrawn by permission under s. 373, but that the effect of such an order is to leave matters in the position in which they would have stood had no such suit been instituted. The obvious intention of the Court which made the order was to allow the respondent to sue for principal and interest, instead of compelling him to proceed with his claim for interest alone, in which case any second suit for the principal would have been met by the plea that the suit is barred by s. 43 of the Code; and if the contention now raised were to prevail, the anomaly would be presented of an order made by a competent Court as to a matter within its discretion to which order no legal effect could be given.

Section 373 was presumably intended to allow of mistakes or omissions being corrected, within the discretion of the courts concerned, and we do not think it necessary to hold that section 43 is a bar to the entertainment of the present suit.

The result is that the appellants fail in respect of the main grounds of appeal argued before us, but succeed in so far as the decree is amended in the manner hereinabove provided.

The appellants will then pay the proportionate costs of the respondent in respect of the amount in regard to which they fail, and the respondent will pay the appellants' proportionate costs in respect of the amount in which the latter succeed, and these amounts are, for the purpose of estimating such costs only, by consent taken as Rs. 7,500 and Rs. 1,500 respectively.