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to obtaining a money decree capable of execution against the general property of a judgment debtor other than the property comprised in his mortgage.

We are of opinion that the decision of the District Judge was right and dismiss this second appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Muttusámi Ayyar and Mr. Justice Parker.

1886. Nov. 4, 11.

VARATHAYYANGÁR (PLAINTIFF), APPELLANT,

and

KRISHNASÁMI (DEFENDANT), RESPONDENT.*

"Res judicata"—Estoppel.

V. sued to eject K. from certain land, alleging that K., having entered under a lease, held as a trespasser. K. pleaded that he held as mortgagee. It was found that K. obtained possession under a mortgage deed for Rs. 1,000, which had not been registered, and that he held also a second mortgage for Rs. 50, and it was held on second appeal that K. was entitled to defend his possession by virtue of the mortgage for Rs. 50 and, as V. had not offered to redeem the charge but had sued on false averments, the suit was dismissed.

V. then sued K. to recover the land on payment of Rs. 50.

In his plaint V. stated that, though the mortgage deed for Rs. 50 was fabricated, the High Court had decided that he was bound to pay Rs. 50 before recovering the land from K. The District Court on appeal dismissed the suit on the ground, *inter alia*, that as V. denied the genuineness of the mortgage, he could not sue for redemption:

Held that V. was entitled to redeem.

APPEAL from the decree of D. Irvine, District Judge of Trichinopoly, reversing the decree of C. G. Kuppusámi Ayyar, District Múnsif of Trichinopoly, in suit 95 of 1884.

The facts necessary for the purpose of this report are set out in the judgment of the Court (*Muttusámi Ayyar* and *Parker*, JJ.).

Mr. *Shephard* for appellant.

Bháshyam Ayyangár for respondent.

JUDGMENT:—The appellant Varathayyangár is the owner of one pangu of land now in litigation. It is in respondent's possession and has been in the possession of his family from August

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*Second Appeal 394 of 1886.

1865. On the 22nd July 1865 the appellant executed two documents in favor of Rámáyyangár, the respondent's grandfather. One of those documents purported to be a mortgage for Rs. 1,000 and the other to be a loan bond for Rs. 50. Exhibit II, which is the loan bond, contains the following provision: "I shall repay the principal, Rs. 50, within 30th Ani Vibhava, the time fixed for the redemption of my one pangu which I have mortgaged to you this day and redeem the said pangu and this bond." Shortly after the execution of these documents a disagreemet arose between the appellant and Rámayyangár. The former refused to register the mortgage bond for Rs. 1,000 and the latter applied to the District Registrar, who referred him to a regular suit under Act XVI of 1864, which contained the registration law then in force.

Thereupon Rámayyangár instituted O.S. 373 of 1866 on the file of the District Múnsif of Perambalur, but the plaint in that suit as originally framed prayed for a declaration of his right as mortgagee. According to his own statement he was then in possession as mortgagee and he was not therefore in a position under the Code of Civil Procedure then in force to maintain a suit for a declaratory decree. He then asked leave to convert that suit into one to compel the appellant to register the instrument of mortgage for Rs. 1,000. The District Múnsif considered that this could not be done, but the District Judge held that it might be done. It was, however, held in special appeal that the suit was unsustainable on the ground that the then plaintiff was in possession. The special appeal was decided in 1877. Meanwhile the respondent's grandfather died and the respondent, a minor, passed under the guardianship of his mother, Janaki Ammál. The appellant brought O.S. 259 of 1877 in the District Múnsif's Court of Trichinopoly, and grounded his right to reject the respondent on the averment that part of the land was let to Rámayyangár in 1865 on lease for a year or two only, and that the remainder was usurped by him. The respondent denied the alleged lease and trespass and referred his possession to the mortgage of 1865. The second issue framed in that suit was whether the lease or mortgage was true and which should prevail. The District Múnsif considered the lease proved and held that the instrument of mortgage which was unregistered was not admissible in evidence and that the other oral and documentary evidence which tended to prove the mortgage was the secondary evidence of the contents of a docu-

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ment which was not admissible in evidence under the Registration Act then in operation. On appeal the District Judge reversed the decree of the District Múnsif and remanded the suit for re-trial on certain issues, one of which was whether Exhibit II was duly executed by the appellant and the statement contained in it constituted in law and in fact an admission of existence of the mortgage set up by the respondent within the purview of s. 65, cl. 6, of the Evidence Act, and if so, whether the mortgage actually took place. At the re-trial the District Múnsif found this issue in respondent's favor and held that the lease set up by the appellant was not proved. From this decision an appeal was preferred and the District Judge dismissed the appeal; but he observed that Exhibit II was not admissible for the purpose for which it was used, but that the lease and the trespass alleged by the appellant were not proved, and that, unless the appellant, then plaintiff, made out his case, he was not entitled to succeed. In the concluding paragaraph of his judgment he remarked, "the result will be, I think, that plaintiff can at any time have his land on redeeming the mortgage which I have not the slightest doubt he created on this land. It may seem incongruous and illogical to say this when proof of the mortgage is inadmissible, but proof of the defendant's admissions of the mortgage would certainly be admissible, and I see nothing in the judgment illogical or otherwise than in strict accordance with the ordinary rule that the plaintiff must prove his case and succeed on the cause or causes of action set fourth in the plaint and not otherwise, and it is satisfactory at the same time to think, as I do think, that substantial justice will also have been done." From this decision second appeal 151 of 1882 was preferred. The High Court observed that the averments on which the appellant then came into Court were untrue; that the respondent obtained possession in virtue of a mortgage for Rs. 1,000 and of a second mortgage for Rs. 50; that the first mortgage was not registered and could not be admitted in evidence; that the original instrument not having been registered, the secondary evidence of its existence and contents was practically valueless for the purpose of sustaining a charge on immovable property exceeding in value Rs. 100; and that, although the language of Act XVI of 1864, s. 13, "no instrument..... shall be received in evidence in any civil proceedings or any Court or shall be acted on by any public officer" was not so

explicit as the language of the subsequent Act of 1866 in which there are added the words "or shall affect any property comprised therein," yet its effect was not less prejudicial to the person claiming under the instrument; for the Courts were prohibited from acting on an instrument which should have been, but has not been registered. The learned Judges then concluded that the respondent was unable to defend his possession in virtue of the original mortgage for Rs. 1,000, but that he might rely on the further charge of Rs. 50, which was proved by an instrument of which the registration was optional, and, inasmuch as the appellant had not offered to pay that charge but had come into Court on averments which were not true, they affirmed the decrees of the Courts below and dismissed the second appeal. This decree was passed on 30th October 1882 and the present suit was commenced by the appellant in August 1883. In his plaint he stated that the High Court set aside the mortgage for Rs. 1,000; that though document II was fabricated by the respondent's ancestor, the High Court decided that he should pay the sum of Rs. 50 due under it and redeem the land, and prayed for a decree directing the respondent to receive Rs. 50 and make over the land to him. The respondent contended, *inter alia*, that the claim was barred by limitation and that the appellant could only be declared entitled to redeem on payment of Rs. 1,050, but not Rs. 50 alone. The District Múnsif decreed the claim, but on appeal the Judge reversed the decree on the ground that the present suit was without any cause of action at all, and if it were held that he could rest his suit on the bond for Rs. 50, then he should consider that the suit was barred by ss. 13 and 43 of the Civil Procedure Code. He observed that, as a matter of fact, the land was really mortgage not for Rs. 50 but for Rs. 1,050 and referred to the remarks of the District Judge in his judgment in the previous suit for ejectment. The Judge also drew attention to the averments in the present plaint and remarked that, inasmuch the appellant denied the second mortgage, he could not sue for redemption. He also considered that the remark in the judgment of the High Court could not give the appellant any fresh cause of action and that it only declared that the respondent might rely on the charge for Rs. 50 and that it did not declare that the appellant could recover the land by paying that amount.

It is argued in second appeal that the effect of the High

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Court's judgment has been misapprehended, that the suit is barred neither by s. 13 nor by s. 43 of the Code of Civil Procedure; that the Judge omitted to refer to the suit brought by the respondent's grandfather and the decree therein; and that inasmuch as the land is admittedly held as a security for the sum of Rs. 50, the appellant was entitled to the decree he claimed. I do not consider that the decree appealed from can be supported. The appellant is admittedly the owner of the land in dispute and he is entitled to recover possession in virtue of such ownership unless the respondent is able to defend his possession by referring it to some valid transaction. In S.A. 151 of 1882, the High Court referred to two such transactions as named by the respondent, viz., the first mortgage for Rs. 1,000 and the second mortgage for Rs. 50 and proceeded to consider whether they operated to create a charge on the land and a right to retain possession until the charge was satisfied.

After discussing the effect of the Registration Act of 1864 upon the mortgage for Rs. 1,000, the learned Judges held that the respondent was unable to defend his possession in virtue of that mortgage. They next referred to the second mortgage for Rs. 50 and considered that it was proved by an instrument of which the registration was optional and that the respondent might rely on the charge created by it for Rs. 50 in support of his possession. They then referred to the fact that the appellant came into Court on averments which were untrue and concluded that the second appeal should be dismissed.

The decision that the respondent could not defend his possession in virtue of the mortgage for Rs. 1,000 but could only defend it in virtue of the second charge for Rs. 50 was a decision on an issue the determination of which was material to the purposes of that suit. It was an action of ejectment, and the appellant being the admitted owner, would be entitled to a decree for possession, unless the respondent showed a special right to remain in possession, even though the former failed to prove the specific lease and trespass mentioned in his plaint. The learned Judges therefore proceeded to determine whether he might defend his possession as contended by him under the mortgage for Rs. 1,000 and if not under any other and what transaction. They determined that the mortgage for Rs. 1,000 was inoperative and that Exhibit II made the payment of Rs. 50 a con-

dition precedent to redemption of the land and thereby created a valid charge for that amount. Having arrived at this conclusion they next held that they should not treat a suit to eject as a suit for redemption, especially as the appellant came into Court with untrue averments and accordingly dismissed his suit. The decision of the question, however, whether respondent could defend his possesion under the mortgage for Rs. 1,000 and if not under document II was conclusive and binding upon the parties to that suit and the respondent is therefore estopped from now alleging the contrary.

The conclusion we come to then is that the appellant was entitled to redeem on payment of Rs. 50. As to the objection to the frame of the plaint we consider that it ought to be construed as a whole. It should be remembered that the appellant alleged in the former proceedings that document II was not true and that he might have feared that if he departed from his former statements except to the extent that document II was decided by the High Court to have created a charge for Rs. 50 and that he was bound to pay that amount before he could lawfully claim possession, he might render himself liable to prosecution for perjury. In the view we take of the effect of the decision of the High Court in S.A. 151 of 1882, the suit can be barred neither by limitation nor by s. 43 of the Code of Civil Procedure. As to the observation that the mortgage for Rs. 1,000 was true, we have only to observe that the respondent's grandfather failed to comply with the provisions of the Registration Act or pursue the remedy provided by it for enforcing compulsory registration, and that we are precluded from ignoring the policy of the Registration Act. We set aside the decree of the District Judge and restore that of the District Múnsif and direct in the special circumstances of the case that each party do bear his own costs.