APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

1892.
March 24.
April 25.

RAMUNNI (DEFENDANT No. 4), APPELLANT,

v.

BRAHMA DATTAN (PLAINTIFF), RESPONDENT.*

Transfer of Property Act—Act IV of 1882, ss. 58, 67, 92, 93—Mortgagor and mortgagee—Second redemption suit—Kanom.

The jenmi of land in Malabar sued in 1886 to redeem a kanom of 1849, to which it was subject, and obtained a decree which merely directed the surrender of the and to the plaintiff, on payment of the kanom amount and the value of improvements, within three months of the date of the decree. This decree remained unexecuted, the money not being paid. The jenmi now brought another suit to redeem the same kanom:

Held, that the present suit was not barred by the former decree.

The nature of a *kanom* discussed.

SECOND APPEAL against the decree of V. P. deRozario, Subordinate Judge of South Malabar at Palghat, in appeal suit No. 901 of 1890, affirming the decree of J. F. Pereira, District Munsif of Angadipuram, in original suit No. 215 of 1890.

Suit for redemption. The facts of the case appear sufficiently for the purposes of this report from the judgments of the High Court. The Lower Courts decreed for the plaintiff.

Defendant No. 4 preferred this second appeal.

Sankaran Nayar for appellant.

Govinda Menon for respondent.

MUTTUSAMI AYYAR, J.—This was a suit to redeem a kanom dated September 1849. Respondent is the present jenmi and appellant is the assignee of the kanom right. In original suit No. 493 of 1886, the former sued the assignor of the latter for redemption of the kanom, and obtained a decree which directed surrender of the property under kanom on payment of the kanom amount and the value of improvements within three months from the date of the decree, *i.e.*, 28th June 1887. Respondent, however, failed to pay into Court the amount he was ordered to pay within the appointed time, and his application to execute the

* Second Appeal No. 1236 of 1891.

decree afterwards was held barred. The decree however, contained no declarations that on default of payment on or before the due date, the mortgage be foreclosed or the property be sold. In January 1890 respondent brought the present suit for redemption and his claim was resisted on the ground that it was barred by the former decree. Both the Courts below decreed redemption and relied on the decisions of the High Court in *Sami* v. *Somasundram*(1), *Periandi* v. *Angappa*(2) and *Karuthasami* v. *Jaganatha*(3). It is contended for appellant that respondent's right to redeem became extinct when the former decree ceased to be enforceable, and reliance is placed on the decision in *Gan Savant Bal Savant* v. *Narayan Dhond Savant*(4), *Maloji* v. *Sagaji*(5) and *Anrudh Singh* v. *Sheo Prasad*(6).

There is a conflict between the decisions of the Madras High Court and those of the Bombay and Allahabad High Courts. The principle on which the former rest was explained by the late Chief Justice in *Karuthasami* v. *Jaganatha*(3) in the following terms :—

"In our judgment, the relation in which the mortgagor and "mortgagee stood to one another was not terminated by the decree. "It was intended by the decree that it should be terminated on "the happening of a certain event which event has not occurred. "The relation then still exists and the right to redeem is inseparable from the relation so long as it exists. An unexecuted "decree for partition would not alter the relation of the members "of a joint family."

The principle on which the Bombay cases proceed was explained by Mr. Justice West in *Gan Savant Bal Savant* v. *Narayan Dhond Savant*(4). He observes :—"Where there is *res judicata*, the "original cause of action is gone and can only be restored by getting rid of the *res judicata*." After stating that under the Roman and English law, a second suit might lie in certain cases, though there was a former decree, the learned Judge says that, "under "the Anglo-Indian law it has long been recognized that a decree-holder must obtain satisfaction of his decree by execution, *not* "by another suit. A new suit cannot be brought either on the "original cause of action or, save in special cases, on the decree

(1) I.L.R., 6 Mad., 119. (2) I.L.R., 7 Mad., 423. (3) I.L.R., 8 Mad., 478.
(4) I.L.R., 7 Bom., 467. (5) I.L.R., 13 Bom., 567. (6) I.L.R., 4 All., 481.

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"in which that cause has become merged. The object of the legis-
"lature has been to prevent litigation on the same grounds and
"this would obviously be defeated by allowing a decree-holder
"to abstain from putting his decree in force and proceed again
"on the same cause as before." It must be noted here that the decisions of the Bombay High Court save that in *Maloji* v. *Sagaji*(1) were cited in *Karuthasami* v. *Jaganatha*(2), and the allusion to an unexecuted decree in a partition suit was apparently made in answer to the objection resting on the doctrine of *res judicata*.

Turning to the practice of the Court of Chancery in England, it was observed in the *Bishop of Winchester* v. *Paine*(3), decided in 1805, that it was established that if a bill filed by a mortgagor for redemption was dismissed, the money not being paid at the time, such dismissal operated as a foreclosure, and was equivalent to a decree for a foreclosure. In *Hansard* v. *Hardy*(4) decided in 1812 it was ruled, however, that the dismissal for want of prosecution was not the same as a decree of dismissal for non-payment of the mortgage money at the day appointed. Again in *Faulkner* v. *Bolton*(5) decided in 1835 the Vice-Chancellor held that if the plaintiff in a suit for redemption did not pay the principal and interest at the time appointed, he should not be allowed to redeem, although before the motion to dismiss was made, he had tendered the amount due with subsequent interest. Until 44 and 45 Vict., Cap. 41, the practice in England was for the decree to direct that on failure of the plaintiff to pay the amount on the due date, the suit should be dismissed (Seton on Decrees, 5th edition, p. 1040), and such dismissal was held to operate as a judgment of foreclosure; but by section 25 of 44 and 45 Vict., Cap. 41, the Court was empowered to order a sale in a suit for redemption.

Passing on to the Transfer of Property Act—Act IV of 1882, and reading sections 58 to 93 in the light thrown upon them by the practice of the Court of Chancery in England, it seems to me necessary to keep in view certain important features of the scheme embodied in the Act. In the first place no suit for foreclosure is allowed by that Act in the case of a simple mortgage, and no suit is permitted either for foreclosure or sale to the holder of an

(1) I.L.R., 13 Bom., 567. (2) I.L.R., 8 Mad., 478. (3) 11 Ves., 199.
(4) 18 Ves., 460. (5) 7 Sim., 319.

usufructuary mortgage (see section 67). The mortgagor, however, is at liberty to sue for redemption, and in such suit, the Court is directed to pass a decree which is first, to ascertain the amount payable prior to redemption, next to fix a day for its payment within six months, and further direct when the mortgage is simple or usufructuary that in default of payment on the due date, the mortgaged property shall be sold (section 93). It is thus observed that according to Act IV of 1882 an usufructuary mortgagee is not entitled to sue either for foreclosure or for sale, and that a simple mortgagee may sue for sale but not for foreclosure, but that the Court is to order a sale in the case of a simple or an usufructuary mortgage when the mortgagor sues for redemption.

Another point to be borne in mind is that section 58 which defines the several kinds of mortgage, as simple mortgage, usufructuary mortgage, mortgage by way of conditional sale and English mortgage, has reference to their pure forms, and that a transaction which forms the subject of a particular suit may combine in it one or more of such forms. Thus a simple mortgage contains a covenant to pay the mortgage-debt at the appointed time and provides that in the event of failure to pay according to the covenant, the mortgagee shall have a right to cause the mortgaged property to be sold. The essence of an usufructuary mortgage, however, is defined to consist in the mortgage being accompanied with transfer of possession and in a covenant therein to the effect that the mortgagee shall retain such possession until payment of the mortgage money, and receive the rents and profits accruing from the property and to appropriate them in lieu of interest or in payment of the mortgage money, or partly in lieu of interest and partly in payment of the mortgage money. A kanom which is the transaction before us combines in it the ingredients of both a simple and an usufructuary mortgage. According to the usage of Malabar, it is a mortgage with possession for twelve years, with a right in the kanomdar to appropriate the usufruct in lieu of interest, or both of principal and interest, and the jenmi is also bound, under the contract, to pay the kanom amount on the expiration of twelve years. It is clear from paragraph 34 of the Report of the Law Commissioners of 15th November 1879 that there may be a combination of a simple and an usufructuary mortgage or of an usufructuary mortgage and of mortgage by conditional sale. In such cases, the intention was that the

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mortgagor and mortgagee should have the rights and liabilities as are created by the Act with reference to each of the forms so combined. Such being the case, the kanom-holder may, as the holder of a simple mortgage, sue for the sale of the kanom property, but he cannot claim foreclosure either as a simple or an usufructuary mortgagee.

Another feature of the Transfer of Property Act is, that in a suit for redemption, as the former suit brought by the respondent was, the decree could only have contained a direction under section 92 that in default of payment the property shall be sold. The decree passed under that section is only in the nature of a decree *nisi* and does not of itself extinguish the right of redemption until it is made absolute by an order made under section 93 that the property be sold. Between the dates of the order for sale and that of the actual sale the position of the plaintiff is that of a judgment-debtor whose property has been ordered to be sold in execution, and he may pay the money as a judgment-debtor and thereby obviate the necessity for the sale (see Macpherson on Mortgages, p. 698). Assuming that all the directions contained in Act IV of 1882 are duly complied with, the right of redemption exists until an order for sale is made, and the mortgagor's right of property subsists until there is an actual sale. The English practice of dismissing the suit when the mortgagor fails to pay the mortgage money on the due date so as to make the dismissal operate as a judgment for foreclosure, is superseded in the cases of simple or usufructuary mortgages by section 92 which substitutes instead an order that the property shall be sold. The result is that in a suit for redemption the mortgagee can never insist on an order for foreclosure when the mortgage is simple or usufructuary, and that the order for sale on which he can insist under section 93 does not operate to divest the mortgagor of his ownership in the property until the sale has actually taken place.

Such being the scheme of the Transfer of Property Act, the Madras decisions are more consistent with it, while the Bombay decisions introduce in this country a doctrine of constructive foreclosure founded on the plea of *res judicata*.

Assuming that what sections 92 and 93 direct have been done, still the ownership would vest in the mortgagor until there is a sale, and the processual law must be construed so as not to defeat the provisions of the substantive law. I am, therefore, of opinion

that I must adhere to the Madras decisions until the Full Bench overrules them. I would dismiss this second appeal with costs.

BEST, J.—The question is whether the present suit by the mortgagor's assignee for redemption of the mortgaged property is barred as *res judicata* by reason of a decree for redemption of the same property having been previously obtained by the present plaintiff's assignor under the same kanom deed, which decree is no longer executable in consequence of a period exceeding three years from its date having been allowed to pass without any step having been taken to execute it.

The former decree, it must be observed, contained no direction that the mortgage should be foreclosed in default of the mortgagor exercising the right of redemption thereby decreed to him.

It has been held by this Court in *Sami* v. *Somasundram*(1), *Periandi* v. *Angappa*(2) and *Karuthasami* v. *Jaganatha*(3), that a decree, such as the above, is no bar to a subsequent suit for redemption; and both the Courts below have held, in accordance with those rulings, that the present suit is not barred and have given the plaintiff a decree.

Hence this appeal by the defendant who relies on *Gan Savant Bal Savant* v. *Narayan Dhond Savant*(4), *Maloji* v. *Sagaji*(5) *and Anrudh Singh* v. *Sheo Prasad*(6).

These decisions are no doubt in conflict with those of this Court; but having considered them, I see no reason to doubt the correctness of the decisions of this Court.

The latest of the above decisions of this Court, *Karuthasami* v. *Jaganatha*(3), was in 1885, *i.e.*, subsequent to the coming into force of the Transfer of Property Act, to which appellant's vakil referred as a reason for reconsidering the rulings of this Court, and in it both *Anrudh Singh* v. *Sheo Prasad*(6), and *Gan Savant Bal Savant* v. *Narayan Dhond Savant*(4) were considered. As was then remarked, the relation of mortgagor and mortgagee was intended by the former decree to be terminated only on the redemption of the property, an event which did not occur. Further, under section 92 of the Transfer of Property Act, there can be no decree for foreclosure in the case of a simple or usufructuary mortgage; and a kanom is in fact a usufructuary mortgage for a

(1) I.L.R., 6 Mad., 119. (2) I.L.R., 7 Mad., 423. (3) I.L.R., 8 Mad., 478.
(4) I.L.R., 7 Bom., 467. (5) I.L.R., 13 Bom., 567. (6) I.L.R., 4 All., 481.

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period of twelve years, at the end of which it becomes redeemable as a simple mortgage. The only decree that could have been made in the former suit was therefore that in default of payment within a time to be fixed (no such time appears, however, to have been fixed in the former decree) the property be sold. It was admittedly never sold and consequently the relation of mortgagor and mortgagee still subsists. There is no reason why the assignee of the former plaintiff should not be allowed now to redeem.

I agree, therefore, in dismissing this second appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Handley.

1891. May 5, 8.

VIRARAGHAVA AND OTHERS (PETITIONERS),

v.

PARASURAMA (RESPONDENT).*

Civil Procedure Code, ss. 295, 622—Rateable distribution—Vesting order in insolvency.

A debtor against whom several decrees had been passed, filed his petition in the insolvent Court at Madras, and the usual vesting order was made. One of the decree-holders had already attached property of the insolvent and had obtained an order for sale in a District Court, and now another decree-holder applied to the same Court in execution of his decrees for the attachment of other property, and for rateable distribution of the proceeds of the sale to be held in execution of the attachment already made. The District Judge held that the vesting order was a bar to both of these applications:

Held, (1) that the order rejecting the application for fresh attachments was right;

(2) that the order rejecting the application for rateable distribution was wrong, and that the High Court had power to set it aside on revision under Civil Procedure Code, s. 622.

APPEALS against the orders of J. D. Irvine, District Judge of Coimbatore, made on Civil Miscellaneous petition No. 29 of 1888, and execution petition No. 27 of 1888, and petitions under Civil Procedure Code, s. 622, praying the High Court to revise his orders made on execution petitions Nos. 28 and 30 of 1888.

The facts of the case appear sufficiently from the following order which was made by HANDLEY and WEIR, JJ.

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* Civil Miscellaneous Petitions Nos. 708 and 710 of 1890.