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lands, so as to get the personal decree, which alone the Munsif could give him. But it appears to us that the facts as to plaintiff's conduct in the former suit cannot bear that construction. So far from relinquishing that part of his claim relating to the land he sued for enforcement of the mortgage by sale of the mortgaged lands, and persisted in his claim until the hearing when it was disallowed. He had a right to sue the mortgagor for the mortgage debt in the Court within whose jurisdiction the mortgagor resided, and the fact that he erroneously claimed in that suit relief against the lands which that Court had no jurisdiction to give him does not, in our opinion, bring him within the bar of section 43 of the Code.

We must reverse the decrees of the Lower Courts and remand the suit to the Court of first instance for disposal on the issues which have not been tried. Respondent must pay appellant's costs of this second appeal and the Lower Appellate Court. Costs in the Court of first instance to be dealt with in the revised decree.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Wilkinson.

TIRUGNANA SAMBANDHA PANDARA SANNADHI AND
OTHERS (DEFENDANTS NOS. 1, 3 AND 5—7), APPELLANTS,

v.

NALLATAMBI AND OTHERS (PLAINTIFFS NOS. 1, 2, 4 AND 5),
RESPONDENTS.*

*Transfer of Property Act—Act IV of 1882, ss. 60, 62 (a)—Mortgage with possession
—Time for redemption of mortgage—Provision for discharge of debt out of income.*

In 1885 the plaintiffs mortgaged certain land to the defendants, and placed them in possession under a mortgage-deed, which provided that the profits of the land should be taken towards the discharge of the mortgage-debt, and that when it was so discharged, possession should be surrendered to the mortgagor. In a suit in which the plaintiffs asked for an account and for a decree for redemption on payment by them of the balance that might be found due on the mortgage it appeared on accounts being taken of the proceeds of the land, that the principal and interest had not been discharged thereby :

* Second Appeals Nos. 1481 to 1483 of 1891.

Held, that the right to redeem had not accrued to the plaintiffs, and that the suit should be dismissed.

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SECOND APPEAL against the decree of S. Gopalachariar, Subordinate Judge of Madura (East) in appeal suits Nos. 468, 207 and 446 of 1890, modifying the decree of T. Sadasiva Ayyar, District Munsif of Madura, in original suit No. 490 of 1887.

Suit to redeem a mortgage, dated 5th May 1885, executed by the plaintiffs in favor of a temple committee, of which defendants were members, to secure a sum of Rs. 356-5-5. The provisions of the mortgage relating to the discharge of the debt were as follows :—

“As this sum of Rupees three hundred and fifty-six, annas five and pies five are, under particulars mentioned above, received from the temple as loan, with a mind to pay up the said sum, and interest therefor at 6 per cent. per mensem from this day, the said two villages are left under the management of the temple. Collect money, &c.; pay out of funds of the said village the amount which may be spent therefor, the Government poruppus and road cess of the said villages and obtain receipt. Deducting this sum if there were a sum of remainder, pay to us in each month at Rs. 57-1-0 for salaries of ourselves and others of the establishment and for establishment appointed by us for the remaining $\frac{5}{16}$ pangu and obtain receipt. Moreover, for the remaining sum, settle account of receipts, &c., and disbursements with us. Thereupon give credit towards the sum of debt abovenamed due from us to the said temple and interest therefor. After discharging the said debt in full, deliver the said villages in our possession, pay to us if there were any sum remaining, and obtain receipt. We have executed this with our consent, agreeing that we shall make good as mentioned above from the funds of the said village all expenses which may be incurred in respect of the said villages.”

The plaintiffs asked that an account be taken of the net income derived from the mortgage premises and that it be ascertained what sum, if any, remain payable by them to the mortgagees, and for a decree for redemption on payment of such sum. The District Munsif took the account for which the plaintiffs asked, whereby it appeared that the sum of Rs. 676-9-4, inclusive of the principal, was then due on the mortgage, and he made a declaration accordingly, in other respects he dismissed the suit on

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the view that the mortgage could be redeemed by the usufruct of the land only, and that the mortgagees were entitled to retain possession until the mortgage debt had been discharged in that manner.

On appeal the Subordinate Judge held that the plaintiffs were entitled to redeem on payment by them of the amount due upon the mortgage, and he passed a decree accordingly.

Defendants preferred this second appeal.

Sundara Ayyar for appellants.

Bhashyam Ayyangar and *Krishnasami Ayyar* for respondents.

JUDGMENT.—It is urged that upon the finding that the mortgage debt was not wholly satisfied from rents and profits, the suit should have been dismissed on the ground that no right of redemption had accrued at the date of the suit, and that no decree for redemption ought to have been made. In support of this contention, reliance is placed on section 62, clause (a) of Act IV of 1882. That clause is in these terms:—“where the mortgagee is authorized to pay himself the mortgage-money from the rents and profits of the property, the mortgagor has a right to recover possession of the property when such money is paid.” The real question is whether the words “when the money is paid,” mean when the money is paid from rents and profits, or include a payment by the mortgagor. The context lends weight to the contention that the payment is contemplated to be made in the mode indicated by the contract; clause (b) also supports this contention. It premises a case in which the mortgagee is authorized to pay himself from rents and profits the interest of the principal money and provides for redemption when the term, if any, prescribed for payment of the mortgage-money has expired and the mortgagor pays or tenders to the mortgagee the principal money or deposits it in Court. Again section 60 declares that the mortgagor is entitled to redeem, after the principal money has become payable under the contract of mortgage. These provisions of the law point to the conclusion that the right of redemption accrues, when, according to the contract of the parties, the mortgage-money has become payable, and is paid or tendered, or when it is satisfied from rents and profits, when such is the mode of payment indicated by the contract. Prior to the date when Act IV of 1882 came into force, it was held in several cases in this Presidency that when a day

is fixed for the payment of the debt by a contract of mortgage, and nothing more appears, the presumption is that the day is fixed for the convenience of the debtor, and that the mortgagor may pay the debt at an earlier date, see *Doreppa v. Mallikarjunulu*(1), *Keshava v. Keshava*(2), and *Mashook Ameen Suzada v. Marem Reddy*(3). On the other hand, it was held by the Bombay High Court in *Vadju v. Vadju*(4), and in the cases cited therein, that the general principle as to redemption and foreclosure is that in the absence of any stipulation, express or implied to the contrary, the right to redeem and the right to foreclose are co-extensive, and that where there is a stipulation to pay a mortgage debt in ten years, the mortgagor could not redeem at an earlier date. The English Law on the subject is explained in Fisher on Mortgages, vol. II, 3rd Edition, page 729. The observations of the Privy Council in *Prannath Roy Chowdry v. Rookea Begum*(5) are to the same effect. In *Brown v. Cole*(6) it was laid down that a person could not redeem before the time appointed in the mortgage-deed, although he tenders to the mortgagee both the principal and interest due up to that time. Having regard to section 60 and section 62 of the Transfer of Property Act, the Legislature appears to have adopted the principle that in the absence of a stipulation to the contrary, the presumption is that the right to redeem and the right to foreclose arise at the same time, and that when a date is fixed for payment of the mortgage debt and the mortgagee cannot foreclose earlier, the mortgagor also cannot redeem before the appointed time.

Looking to the terms of the instrument of mortgage in the case before us, they provide for the mortgagee paying himself the debt from the rents and profits of the estate and for the surrender of possession when the debt is so paid off. The event on which the obligation to surrender is made by the parties to depend, is the realization of the principal money and interest by the mortgagees themselves from the rents and profits of the mortgaged property and the possession by the mortgagees until that event occurs is of the essence of the transaction. The transaction then is a *viuum vadium* in which no time is fixed for

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(1) 3 M.H.C.R., 363.

(2) I.L.R., 2 Mad., 45.

(3) 8 M.H.C.R., 31.

(4) I.L.R., 5 Bom., 22.

(5) 7 M.I.A., 323.

(6) 14 Sim., 427.

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redemption, but the party is left to pay himself the sum for which the estate is pledged out of the rents and profits* of the estate. The result is that upon the facts found no right to eject or redeem had accrued at the date of the suit.

The decrees of the Subordinate Judge must be reversed and that of the District Munsif restored. The respondents will pay appellants' cost in this and the Lower Appellate Court.

PRIVY COUNCIL.

RAMALINGAM PILLAI (PLAINTIFF),

v.

VYTHILINGAM PILLAI (DEFENDANT).

P. C.*
1898.
June 21.
July 15.

[On appeal from the High Court at Madras.]

*Law applicable to religious institutions—Succession to the office of dharmakarta—
Act XX of 1863—Religious endowments—Custom and usage.*

On a question of the right of succession to the office of dharmakarta of a devasthanam or temple at Rameswaram in Madura, and in such cases the only law applicable is the custom and practice, which are to be proved by evidence.

Both the Courts below found that, according to the established usage, the succession was provided for by each successive dharmakarta initiating a pandaram; and, whilst in office, appointing him as his successor. It followed that the appointment of a dharmakarta by one who had already ceased to hold the office (having been removed under Act XX of 1863, s. 14) was not in accordance with usage, and was therefore invalid.

The person whom the displaced dharmakarta had attempted to appoint was head of the mutt from which preceding dharmakartas, as it appeared, had been taken. Besides the above cause of invalidity in the appointment in question, the evidence supported the finding that the displaced dharmakarta made his attempt to appoint the head of the mutt to succeed him in office in furtherance of his own interests, and did not *bonâ fide* exercise his powers, if any. This finding invalidated the whole appointment and applied to the headship of the mutt as well as to the office of dharmakarta.

APPEAL from a decree (8th November 1888), affirming a decree (10th September 1886) of the Subordinate Judge of East Madura.

This appeal arose out of a suit brought by the appellant against two defendants to obtain a declaration that he was the

* *Present*: Lord HOBHOUSE, Lord MORRIS and Sir RICHARD COOK.