

## APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and  
Mr. Justice Handley.

NARASINGA RAU (PLAINTIFF), APPELLANT,

v.

VENKATANARAYANA AND OTHERS (DEFENDANTS),  
RESPONDENTS.\*

1892.  
October  
20, 26.

*Civil Procedure Code—Act XIV of 1882, ss. 13 and 43—Res judicata—Suit by mortgage for personal remedy in one Court—Subsequent suit against mortgaged property in another Court—Latter suit not within jurisdiction of former Court—Transfer of Property Act, s. 99.*

A bond, whereby certain immovable property was hypothecated as security for a debt, was executed at the place of residence of the obligor, which was within the jurisdiction of a Court other than that within the jurisdiction of which the property hypothecated was situate. The obligee brought a suit in the former Court to recover the principal and interest due on the bond against the obligor personally, on the covenant to pay contained in the bond, and prayed also for sale of the property hypothecated. That Court dismissed that suit so far as it related to the property, and also so far as the claim for principal was concerned, but awarded the plaintiff the interest claimed against the defendant personally. Subsequently the obligee brought a suit in the Court within the jurisdiction of which the property was situate for recovery of the principal money due on the bond by sale of the hypothecated property :

*Held*, that the latter suit was not barred by reason of the former suit, either under section 13 or under section 43, Civil Procedure Code.

SECOND APPEAL against the decree of J. Kelsall, District Judge of Vizagapatam, in appeal suit No. 40 of 1889, confirming the decree of K. Ramalinga Sastri, Principal District Munsif of Vizagapatam, in original suit No. 109 of 1888.

The facts of the case appear sufficiently for the purposes of the report from the following judgment of the High Court.

Mr. *Michell* for appellant.

None of the lands comprised in the mortgage are situate within the jurisdiction of the Court of the District Munsif of Vizianagram, in which the former suit No. 116 of 1884 was brought, and therefore that Court was not a Court of jurisdiction competent

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to "try" the present suit, within the meaning of section 13, Civil Procedure Code, at all events so far as the present suit is a suit to enforce the mortgage against the mortgaged property (compare *Misir Raghobardial v. Sheo Baksh Singh*(1). Nor is the present suit barred under section 43, Civil Procedure Code. It was impossible for the plaintiff to obtain relief by way of enforcing his security in the former suit, because the Vizianagram Court had no jurisdiction to grant such relief, and he was therefore not bound to include in that suit a claim for such relief along with his claim for relief against the defendant personally. It is true that he did, as a matter of fact, ask for a decree against the property as well as against the defendant personally in that former suit; but the fact that he so prayed for relief which the Court had no jurisdiction to grant cannot bar him from afterwards suing for such relief in a competent Court. Nor would it have been possible for him to have included both claims, that for relief against the property and that for relief against the person, by bringing his suit in the Vizagapatam District Munsif's Court, because, though that Court had jurisdiction in respect of the claim against the land, it had no jurisdiction in respect of the claim against the defendant personally, inasmuch as the defendant resided in Vizianagram and the mortgage was executed there. Therefore this is a much stronger case than the cases where it has been held that a person who could, by obtaining the leave of the Court, have brought a single suit in one Court in respect of lands situate in the jurisdiction of different Courts, but instead of doing so has brought a suit only in respect of the land situate in the jurisdiction of the Court in which such suit was brought, is not barred from afterwards suing in respect of the lands situate in the jurisdiction of another Court or other Courts—*Subba Rau v. Rama Rau*(2), *Pattarawy Mudali v. Audimula Mudali*(3), *Bungsee Singh v. Soodist Lalb*(4). But, further, the mortgagee (plaintiff) is exempted from the operation of section 43 of the Code by section 99 of the Transfer of Property Act, and entitled to obtain a money decree against the mortgagor on his personal liability, and afterwards to sue for a decree against the mortgaged property. Section 99 of the Transfer of Property Act does apply to this case, because, although

(1) I.L.R., 9 Cal., 441.

(3) 5 M.H.C.R., 419.

(2) 3 M.H.C.R., 376.

(4) I.L.R., 7 Cal., 739.

the mortgage was executed in 1879, the decree in the former suit (original suit No. 116 of 1884) was subsequent in date to the date of the coming into force of that Act, and the question whether section 99 of that Act applies or not depends not on the date of the mortgage, but the date of the decree in the former suit (*Kaveri v. Ananthayya*(1)).

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The *Advocate-General* (Hon. Mr. *Spring Branson*) for respondent.

*Kaveri v. Ananthayya*(1) is distinguishable from the present case. In that case the holder of a decree for arrears of interest due on a mortgage executed before the passing of the Transfer of Property Act applied to have the mortgaged property attached and sold in satisfaction of the decree which was obtained after the passing of that Act. The High Court held that the mode of enforcing the decree was a matter of procedure, and that that procedure was governed by the Transfer of Property Act. Therefore section 99 of that Act excluded the operation of section 43 of the Code of Civil Procedure. In the present case the plaintiff sues on the cause of action, and to obtain the relief which formed the foundation of and the object sought in suit No. 116 of 1884. He does not seek to enforce the decree for interest which he obtained. Therefore section 99 of the Transfer of Property Act does not apply, and the operation of section 43 of the Code of Civil Procedure is not excluded. With regard to section 43 the test is that laid down in *Moonshee Buzloor Ruheem v. Shumsoonnissa Begum*(2).

The District Munsif had no jurisdiction in suit No. 116 of 1884 over the mortgaged property. It was open to the plaintiff to withdraw that suit with the leave of the Court, or for the Court to dismiss the suit as framed on the ground of want of jurisdiction. In either case plaintiff could have filed his suit on the mortgage in a Court competent to try it. He elected to abandon his right as a mortgagee in order to obtain the decree for money which the Court could give him. Section 43 of the Civil Procedure Code precludes a suit based on the abandoned right—*Gumani v. Ram Padarath Lal*(3), *Ukha v. Daga*(4).

If the Court had power to give the plaintiff a decree for principal and interest, and gave him a decree for interest alone, the

(1) I.L.R., 10 Mad., 129.

(3) I.L.R., 2 All., 838.

(2) 11 M.L.A., 551, 606.

(4) I.L.R., 7 Bom., 182.

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plaintiff should have appealed if he was dissatisfied with the decree. He cannot now seek to rectify the mistake, if it was a mistake, by filing another suit on the mortgage. The decree for interest alone appears to have been agreed to by the plaintiff's vakil, who apparently abandoned the other claims made in the plaint in that suit. Section 43 of the Code of Civil Procedure was intended to prevent multiplicity of suits that is to prevent the very course which the plaintiff has chosen to take.

If the question of hardship were open to discussion, it might fairly be urged for the second defendant that it would be unfair to deprive him of the benefits of a purchase made possibly on the strength of the plaintiff's abandonment of his rights as mortgagee in suit No. 116 of 1884.

*Mr. Michell*, in reply.

If in execution of his decree in original suit No. 116 of 1884, the plaintiff had attempted to bring the mortgaged property to sale, he could have been met with the objection under section 99, Transfer of Property Act, that he could only do so by instituting such a suit as the present suit, and that he was entitled to do so, notwithstanding section 43, Civil Procedure Code.

If the plaintiff had withdrawn his suit in the Vizianagram District Munsif's Court in order to bring a suit in the Vizagapatam Court, he would not have been able to sue on his personal remedy in the latter Court, which had no jurisdiction in respect of that remedy; while, on the other hand, the former Court had no jurisdiction in respect of his remedy against the property. He was not bound to give up his personal remedy.

Whether the plaintiff could have appealed or not against the decree in the Vizianagram Munsif's Court, is a question which is not, it is submitted, material in the present suit, for such appeal could only have been in respect of the personal claim, which alone was open to him in the suit in that Court, but the present claim is against the property only.

The cases cited on behalf of the respondent do not apply, because they were not cases in which the Court which decided the former of the two suits had not jurisdiction to try the subsequent suit.

JUDGMENT.—In 1879 first defendant hypothecated to plaintiff the lands in question in this suit by registered deed (exhibit A) for Rs. 1,000. In default of payment within four years the deed

provides that plaintiff "shall take possession and enjoy the lands, "this very bond being taken as a sale deed." The deed contains a direct covenant by first defendant for payment of the mortgage debt, principal and interest. Plaintiff sued first defendant in original suit No. 116 of 1884 in the Vizianagram Munsif's Court for recovery of the mortgage debt from first defendant personally and by means of the mortgaged property. It is admitted that none of the mortgaged lands are within the territorial jurisdiction of the Vizianagram Munsif. As against the land, therefore, plaintiff could have obtained no relief in that suit, and the District Munsif accordingly dismissed his suit so far as it related to the lands mortgaged. He also dismissed the suit for the principal of the mortgage debt, apparently on the ground that the mortgage was one by conditional sale and therefore no suit would be for the mortgage debt, but he gave plaintiff a personal decree for the interest due on the ground that the bond expressly provided for it. He appears to have overlooked the fact that the bond contained an express covenant for payment of principal as well as interest.

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In the present suit plaintiff prays in the alternative for possession of the mortgaged lands or for recovery of the principal of the mortgage debt (Rs. 1,000) by sale of the mortgaged property. Second defendant is in possession of part of the mortgaged property under an alienation by first defendant. Defendants 3 and 4 are in possession of other parts of the lands claimed. Third defendant sets up a title to the lands in his possession as belonging to his Karnam's mirasi. Fourth defendant disclaims all interest in the plaint lands and asks for costs. Both the Lower Courts agree in dismissing the suit on the preliminary ground that it is barred by sections 13 and 43 of the Civil Procedure Code. Plaintiff appeals.

In our opinion the Lower Courts are in error in throwing out the suit on this preliminary ground. Clearly the matter is not *res judicata* within the meaning of section 13 of the Code, for the District Munsif's Court of Vizianagram was not a Court of jurisdiction competent to try the suit so far as it relates to the mortgaged lands. Neither do we think does section 43 bar the present suit. It is pressed on us by the learned Advocate-General for second defendant that plaintiff must be taken to have intentionally relinquished that portion of his claim relating to the

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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.

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## 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 :

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\* Second Appeals Nos. 1481 to 1483 of 1891.