

of 1886 to enforce a claim which their judgment-debtor had, and this claim which they derived from their judgment-debtor existed, notwithstanding the decree in original suit No. 10 of 1886, and was not extinguished by it inasmuch as the father was no party to it. This being so, the only other question for decision is whether the finding of the Judge that the money attached really belonged to the father is correct. I agree with my learned colleague that it is fully supported by the evidence recorded at the subsequent enquiry held in connection with petition No. 100 of 1886.

I would also dismiss the appeal and the petition with costs.

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APPELLATE CIVIL.

Before Mr. Justice Muttasami Ayyar and Mr. Justice Best.

PERUMAL (DEFENDANT No. 2), APPELLANT,

v.

KAVERI AND OTHERS (PLAINTIFFS AND DEFENDANT No. 1),
RESPONDENTS.*

1892.
May 6.
September 1.

*Mortgagor and mortgagee—Purchase by first mortgagee—Suit by second mortgagee—
Inconsistent cases set up in the alternative—Relief not asked for—Practice.*

Defendant No. 1 mortgaged certain premises to defendant No. 2 in 1884 and to the plaintiff in 1885. The mortgage to the plaintiff was a usufructuary mortgage. In 1887 defendant No. 2 obtained a decree on his mortgage, and in execution brought to sale and himself became the purchaser of the mortgage premises. The plaintiff, who was in possession under the mortgage of 1885, prayed in this suit that the prior mortgage be declared fraudulent and void, and the sale in execution be set aside, and in the alternative that she be declared entitled to redeem the prior mortgage. The plaint was stamped as in a redemption suit and the Court of first appeal passed a decree for redemption :

Held, that the suit should be dismissed, since after the sale of the mortgage premises in execution of the decree obtained by defendant No. 2, the only right which remained to the puisne mortgagee was the right to retain possession until her mortgage should be redeemed.

Semble per BEST, J.—It is open to a plaintiff who is not a party to the transaction in respect of which allegations are made to come into Court seeking relief in the alternative, dependent upon what may be found by the Court to be the true facts of the case.

Quære: Whether the Court can pass a decree for redemption when the plaintiff seeks only a declaration of the right to redeem.

* Second Appeal No. 1262 of 1891.

PHRUMAL
KAVERJ.

SECOND APPEAL against the decree of C. Venkobachariar, Subordinate Judge of Madura, West, in appeal suit No. 348 of 1891, reversing the decree of T. Sadasiva Ayyar, District Munsif of Madura, in original suit No. 222 of 1889.

Plaintiff No. 1 (whose son, plaintiff No. 2, was brought on to the record in the course of the suit) claimed as a usufructuary mortgagee in possession under a mortgage, dated 24th April 1885, and executed in her favour by defendant No. 1. This mortgage was filed as exhibit E: it provided that the mortgagee should enjoy the mortgage premises in lieu of interest and should "continue to enjoy them as mortgagee until the amount is paid." Defendant No. 2 claimed title to the premises comprised in the above mortgage on the grounds that the mortgagor had executed in his favour a prior mortgage for Rs. 350, which was filed as exhibit II, and that he had brought a suit on this mortgage in 1887 and obtained a decree, in execution of which he had brought to sale and himself become the purchaser of the mortgage premises.

The plaintiff prayed that the prior mortgage be cancelled as fraudulent and not binding on the plaintiff, and the sale to defendant No. 2 be set aside; and in the alternative prayed the Court if the prior mortgage "is held genuine and valid to declare the plaintiff's right to redeem the property on payment of Rs. 350 with interest." The plaintiff was stamped as in a suit for redemption.

The District Munsif held that the plaintiff's mortgage was fraudulent and not supported by consideration and that the prior mortgage was valid, and accordingly dismissed the suit.

The Subordinate Judge held that both mortgages were valid and passed a decree for redemption of the prior mortgage by the plaintiff.

Defendant No. 2 preferred this second appeal.

Ramachandra Rau Saheb for appellant.

Desikachariar for respondents.

Best, J.—The following are the facts of this case:—

First defendant mortgaged the plaintiff's house to second defendant in 1884 under exhibit II for a sum of Rs. 350. II was written on the 28th July 1884, but was not signed by first defendant till 5th December of that year after criminal proceedings had been instituted against first defendant by second defendant for cheating (see exhibit W). On the 6th December 1884 first

defendant's vakil put in a statement (exhibit VI) admitting that first defendant had executed the document for Rs. 350, but pleading that she had only been paid Rs. 304-8-0. The complaint of second defendant was thereupon dismissed on the ground that the dispute between the parties was of a civil nature (exhibit T). Second defendant then presented the document for registration; but first defendant denied its execution and the District Registrar, after inquiry, declined to register it. This was on the 23rd April 1885. On the following day first defendant executed to the first plaintiff the document E, mortgaging to the latter, with possession, a portion of the same house and several lands for a sum of Rs. 1,000.

In consequence of the District Registrar's refusal to register II, second defendant instituted a suit (No. 181 of 1885) for a decree, directing its registration (under section 77 of the Registration Act), and, though he failed in the Court of First Instance, he succeeded in the Appellate Court (see exhibit XII). The document II was accordingly registered in December 1886; and original suit No. 89 of 1887 was subsequently instituted thereon and resulted in a decree in favour of second defendant, who caused the house in question to be sold in execution of the decree and himself purchased it at that sale on the 21st January 1889. First plaintiff was not made a party to the suit No. 89 of 1887. Hence her suit, out of which this second appeal has arisen, in which, claiming to be in possession as mortgagee under exhibit E, she prays (i) for cancellation of exhibit II as fraudulent; (ii) for cancellation of the sale in execution of the decree obtained by second defendant in original suit No. 89 of 1887, as not binding on her "even if it be held that the mortgage deed of 28th July 1884 (exhibit II) is genuine;" (iii) for a declaration that she is entitled to redeem the said mortgage on paying the said mortgage amount with interest up to date; and (iv) for costs "and such other and further relief as the nature of the case may require."

Second plaintiff, who is son of the first plaintiff, was added as a party in consequence of second defendant's allegation in his written statement that the suit was really brought by this second plaintiff in the name of his mother, but on behalf of his junior aunt, the first defendant. It is further explained in the second defendant's written statement that the reason of his not making first plaintiff a party to his suit No. 89 of 1887 was, because the

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document E under which she claims was "executed fraudulently and without consideration;" and it is added that her son, the second plaintiff, who contested that suit on behalf of his aunt, the first defendant, "did not ask that plaintiff (*i.e.*, first plaintiff) should be made a party thereto, nor did he say that he would pay the sum due to this defendant."

The following issues were recorded by the District Munsif:—

(i) Is the first plaintiff a *bona fide* mortgagee for valuable consideration from first defendant?

(ii) Is the mortgage in favour of second defendant, on which decree has been passed in original suit No. 89 of 1887, a true and valid transaction for valuable consideration?

(iii) To what relief, if any, are plaintiffs entitled?

The District Munsif's finding on the first issue was in the negative and on the second in the affirmative. He consequently dismissed the suit with costs.

On appeal the Subordinate Judge has found both exhibits E and II to be genuine and valid, and, on the ground that first plaintiff not having been made a party to original suit No. 89 of 1887 is not bound by the decree passed in that suit, he has set aside the decree of the original Court and given one in favour of the plaintiffs, "allowing them to redeem the second defendant's mortgage by paying him what is due to him under his decree until his purchase." He has also directed second defendant to pay plaintiffs' costs.

In this second appeal by second defendant it is contended, firstly, that the plaint ought to have been rejected on the ground of inconsistency, seeking, as it did, to avoid the mortgage evidenced by exhibit II, or to confirm the same and declare plaintiffs' right to redeem. It has been held that it is open to "a defendant who is a stranger to the transaction to raise inconsistent pleas as to matters not necessarily or properly within his knowledge"—*Narayanasami v. Ramasami*(1). Similarly it must, I think, be open to a plaintiff, who is not a party to the transaction in respect of which the allegations are made, to come into Court seeking relief in the alternative, dependent upon what may be found by the Court to be the true facts of the case.

(1) I.L.R., 14 Mad., 172.

It is next contended that as the suit was brought for a declaration merely, the Appellate Court was not justified in giving a decree for redemption. The Subordinate Judge has referred as authority for his procedure to *Sankana Kalana v. Virupakshapa Ganeshapa*(1). It is to be observed, however, that the procedure was acceded to even in that case by Pinhey, J., one of the two Judges who took part in it, with an expression of disapproval, and only because "the thing had been allowed so often in the Bombay High Court" that he did "not consider it either necessary or advisable to formally differ" from his brother Judge on the point in that case. In this Court, however, the only authority that I have been able to find is against the indulgence allowed to the plaintiffs by the Subordinate Judge. See *Venkatamarsamma v. Ramiah*(2).

It has, however, been further contended on behalf of the appellant that as only a portion of the plot house is included in first plaintiff's mortgage deed E, the Subordinate Judge is in error in giving to plaintiffs a decree for redemption of the whole of the house. Further, stress is laid on the circumstance that second defendant has by reason of his purchase at the Court sale acquired, in addition to the interest possessed by him as mortgagee under II, also the right of redemption, which includes the right to redeem the mortgage to first plaintiff under E.

Although in consequence of first plaintiff not having been made a party to original suit No. 89 of 1887 (as required by section 85 of the Transfer of Property Act), she is not affected by the decree in that suit, yet second defendant, as purchaser of the right of redemption which belonged to the mortgagor, is entitled to all the equities that belonged to the said mortgagor. If the mortgagor had by private sale transferred his interest in the property to second defendant, first plaintiff could not have maintained a suit for redemption against the latter, and I am of opinion that she is equally unentitled to maintain a suit for redemption against second defendant, the purchaser at the Court sale, who now stands in the shoes of the mortgagor. All that first plaintiff is entitled to is to retain possession of the share of the house mortgaged to her till it is redeemed by second defendant, *Raghunath Prasad v. Jurawan Rai*(3).

(1) I.L.R., 7 Bom., 146.

(2) I.L.R., 2 Mad., 108.

(3) I.L.R., 8 All., 105.

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I would, therefore, allow this appeal, and, setting aside the decree of the Lower Appellate Court, restore that of the District Munsif, and direct plaintiffs to pay second defendant's costs throughout.

MUTTUSAMI AYYAR, J.—I am also of opinion that upon the facts found the declaratory decree for redemption cannot be supported. Ordinarily, a second mortgagee has a right to redeem the first mortgage, but this right ceases when the first mortgage ceases. When the right arising from the first mortgage is united with the mortgagor's equity of redemption by purchase at a Court sale, a confusion of the two rights arises by their vesting in one and the same individual. The doctrine that a purchaser who pays off a pre-existing mortgage can use it as a shield only keeps the security alive for his protection. Again the second mortgagee's right to redeem the prior mortgage is in its nature a right to consolidate the two securities into one as against the mortgagor and to hold them together until they are redeemed, and there can be no right to consolidate when the first security ceases to exist by payment or by a Court sale which extinguishes the first mortgage. At the date of the Court sale in original suit No. 89 of 1887, three distinct rights were in existence, those founded on the first and second mortgages and the mortgagor's equity of redemption. The interest which passed by the Court sale was whatever the mortgagor and the first mortgagee could convey together, and the result is that the rights that survived the actual sale are only two, viz., the equity of redemption vested in the original owner against the second mortgagee and the latter's right to be redeemed by him. Otherwise, there would be this anomaly: if the second mortgagee is allowed to redeem the first mortgagee and purchaser by paying him the purchase money, there would be no one entitled afterwards to redeem the second mortgage. The original mortgagor cannot redeem, because as between him and the first mortgagee he ceases to be the owner by the sale of his whole interest in the property. If the purchaser can redeem the second mortgage, the latter can have no right to redeem the former. The sale under the order of the Court extinguishes the first mortgage and the only right which survives it in the second mortgagee is the right to be redeemed. The case should be treated as if the original mortgagor conveyed his whole interest in the property by a voluntary sale in extinction of the first mortgage.

Moreover, the plaintiff is a usufructuary mortgagee in possession of the house and, as such, she is not entitled to redeem after the extinction of the first mortgage. For these reasons I concur in the decree proposed by my learned colleague.

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APPELLATE CIVIL.

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

GOPALA AND ANOTHER (PLAINTIFF AND DEFENDANT No. 2),
APPELLANTS,

1892.
March 25, 28

v.

FERNANDES (DEFENDANT), RESPONDENT.*

Civil Procedure Code, ss. 264, 328, 331—Obstruction to execution of decree—Obstruction offered by a tenant—Dismissal of decree-holder's petition—Appeal.

Obstruction was offered to the execution of a decree for partition of certain property, by one claiming to be entitled to occupy part of the land in question as a mulgeni tenant. The decree-holder presented a petition to the court under Civil Procedure Code, s. 328: this petition was rejected and the claim was not numbered and registered as a suit:

Held, (1) that an appeal lay against the order rejecting the petition;

(2) that the decree for partition was a decree for possession of property within the meaning of Civil Procedure Code, s. 328;

(3) that that section was not rendered inapplicable by the fact that the obstructor claimed to be a mulgeni tenant.

APPEAL against the order of S. Subba Ayyar, Subordinate Judge of South Canara, in miscellaneous petition No. 246 of 1890.

The petitioners had obtained a decree in original suit No. 43 of 1885 in the file of the Subordinate Court of South Canara for the partition of certain moveable and immoveable property and now sought to execute it. The respondent was in possession of part of the land: he claimed to be entitled to occupy it as a mulgeni tenant and obstructed the execution of the decree. The decree-holders' petition was preferred under Civil Procedure Code, s. 328, but the Subordinate Judge held that that section was not applicable to the case, and he rejected the petition without numbering and registering the claim as a suit.

* Appeal against orders Nos. 117 of 1890 and 29 to 34 of 1891.