

a reasonable time within which to comply with the provisions of Act VII of 1889, failing which the suit must be dismissed.

MANASING  
v.  
AMAD KUNHI.

All questions of costs must stand over until a final decision is given.

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## APPELLATE CIVIL.

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

KRISHNAN (PLAINTIFF), APPELLANT,

v.

CHADAYAN KUTTI HAJI AND OTHERS (DEFENDANTS),  
RESPONDENTS.\*

1892.  
March 12.  
April 26.

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*Transfer of Property Act—Act IV of 1882, s. 85—Non-joinder of puisne mortgagee in a mortgage suit—Civil Procedure Code—Act XII of 1882, ss. 278-283—Mortgage decree—Claim in execution to mortgage premises.*

A mortgagee sued on his mortgage and obtained a decree against the mortgagor for the principal, together with the interest accrued due thereon, and for the sale of the mortgage premises in default of payment. A second mortgagee, who was not a party to the suit, intervened in execution, alleging that the land was not liable to be attached and sold by reason of his mortgage, and the Court made an order recognising the priority of the decree-holder's lien and giving to the second mortgagee the opportunity of discharging it. No suit was brought to question this order. The first mortgage was not paid off and the mortgage premises were brought to sale. The purchaser, who was the first mortgagee, now sued for possession of the land and his claim was resisted by the second mortgagee :

*Held*, (1) that the non-joinder of the present defendant in the suit on the mortgage constituted no bar to the present suit; (2) that the second mortgagee was estopped from now re-asserting his claim.

SECOND APPEAL against the decree of C. Gopalan Nayar, Subordinate Judge of North Malabar, in appeal suit No. 472 of 1887, reversing the decree of J. A. deRozario, District Munsif of Pynad, in original suit No. 178 of 1886.

Suit instituted in April 1886 to recover certain land with mesne profits.

In original suit No. 124 of 1875 one Koyotti obtained a decree for the redemption of a kanom on the land now in question. To enable him to effect the redemption, he borrowed Rs. 3,000 from

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\* Second Appeal No. 234 of 1891.

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the present plaintiff in 1879, and to secure this amount, executed in his favour a mortgage of the same land, undertaking to hand over possession, but possession was not delivered. Koyotti having redeemed the kanom, mortgaged portions of the land as security for various loans to defendant No. 1 and four others, and placed them respectively in possession. The plaintiff brought a suit (original suit No. 18 of 1883) against his mortgagor to recover the amount due on the mortgage and obtained a decree for the amount sued for and for sale of the mortgage premises. The subsequent mortgagees were not joined as parties to that suit. They intervened in execution and orders were made recognising the priority of the plaintiff's mortgage, but giving them the opportunity of discharging it. The plaintiff's mortgage, however, remained undischarged, and the land was brought to sale in execution of the decree and purchased by the plaintiff on 11th December 1884. The order made on the intervention of the present first defendant was dated October 1884 and no steps were taken by him to have this order vacated or the sale cancelled.

The District Munsif passed a decree for ejectment as prayed, holding, *inter alia*, that the claim of defendant No. 1 was barred by limitation. The Subordinate Judge on appeal reversed this decree on the ground that defendant No. 1 should have been made a party to the suit of 1883, holding that Civil Procedure Code, ss. 278 and 283 were inapplicable to the case on the authority of *Deefholts v. Peters*(1), and that the omission to join him in the suit of 1883 was fatal to the present case on the authority of *Venkata v. Kamam*(2).

The plaintiff preferred this second appeal.

*Bhashyam Ayyangar* and *Govinda Menon* for appellant.

*Ryru Nambiar* for respondent No. 1.

JUDGMENT.—There are two questions for determination in this second appeal, first, whether the provisions of sections 278—283 of the Code are applicable to the case, and, secondly, whether the failure of plaintiff to make first defendant, the puisne mortgagee, a party to his suit No. 18 of 1883 is fatal to his present suit.

The facts are as follows:—In July 1879 plaintiff advanced Rs. 3,000 to one Koyotti to enable him to pay off the kanom and

(1) I.L.R., 14 Cal., 631.

(2) I.L.R., 5 Mad., 184.

value of improvements which, by the decree in original suit No. 124 of 1875, he had been ordered to pay to the tenants in possession. As security Koyotti, executed in favour of the plaintiff a mortgage deed of the land, agreeing to pay interest at 12 per cent. until he put plaintiff in possession. Although Koyotti, in execution of his decree in original suit No. 124 of 1875, obtained possession early in 1880, he failed to put plaintiff in possession and mortgaged the lands with possession to first defendant and others. In 1883 plaintiff instituted a suit against Koyotti for the recovery of the Rs. 3,000 with interest from Koyotti personally and by sale of the property in the schedule. He obtained a decree and attached the properties. Thereupon the defendant No. 1 and the other subsequent encumbrancers advanced their claim to hold the land, alleging that they had enabled Koyotti to pay off the amount of the decree in original suit No. 124 of 1875 and that they had made improvements.

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The Subordinate Judge allowed their claim for improvements, but refused to reserve their mortgage right on the ground that the plaintiff's mortgage being prior in date must prevail. The property was then put up for sale and purchased by plaintiff, who now sues for possession.

The case relied on by the Subordinate Judge (*Deefholts v. Peters*(1), is not in point. There a decree had been obtained under sections 86-88 of the Transfer of Property Act and the Court held that proceedings by way of claim under section 278 only applied in cases of money decrees where the property of the judgment-debtor had been attached. But original suit No. 18 of 1883 was a suit brought by plaintiff under section 68 of the Transfer of Property Act to recover the money due to him by Koyotti who had failed to deliver the property to him. He obtained a decree for money recoverable either from Koyotti or by sale of the property in schedule. Koyotti having failed to satisfy the decree, plaintiff attached the land and a proclamation of sale was issued. Thereupon defendant No. 1 preferred a claim on the ground that the property was not liable to attachment, as he held it on mortgage. His claim was, after due inquiry, rejected under section 281, and that order not having been questioned in a regular suit, defendant No. 1 is now estopped from

(1) I.L.R., 14 Calo., 681.

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setting up the same claim in the present suit—*Velayuthan v. Laksmana* (1).

With reference to the second question, we do not think the case of *Venkata v. Kannam* (2) is an authority for holding that because defendant No. 1 was not a party to original suit No. 13 of 1883, plaintiff's suit must be dismissed. As he was no party to the decree obtained by the plaintiff, he is not bound by it. But all that he can ask as puisne mortgagee is that he shall be allowed an opportunity of redeeming—*Radha Pershad Misser v. Monchur Das* (3), *Naru v. Gulabsing* (4), and *Radhabai v. Shamrao Vinayak* (5). The first defendant's later-created right was subject to the right of the plaintiff, the prior mortgagee. The plaintiff had a right to maintain a suit for the sale of the land to satisfy his mortgage, but having notice of the first defendant's possession as mortgagee ought to have made him a party to the suit. It was competent to Koyotti to deal with the interest remaining in him after the mortgage to plaintiff and the result of the transfer to first defendant was that first defendant acquired as against plaintiff the rights of the mortgagor, in other words the right of redemption. As defendant No. 1 was no party to plaintiff's suit for sale, he would have been entitled to be afforded an opportunity to redeem had not his right been barred by his having taken no steps to set aside the order passed on his claim petition.

The decree of the Subordinate Judge must be reversed and the appeal remanded for the decision of the appeal on its merits. The appellant is entitled to his costs in this Court, and the costs in the Lower Appellate Court will abide and follow the result.

(1) I.L.R., 8 Mad., 506.

(3) I.L.R., 6 Cal., 317.

(5) I.L.R., 8 Bom., 168.

(2) I.L.R., 5 Mad., 184.

(4) I.L.R., 4 Bom., 83.