

## APPELLATE CIVIL.

Before Mr. Justice Best and Mr. Justice Subramania Ayyar.

1895.  
February 27.  
March 14.

RAMANADHAN CHETTI (DEFENDANT), APPELLANT,

v.

ALKONDA PILLAI (PLAINTIFF'S REPRESENTATIVE),  
RESPONDENTS.\*

*Mortgage of joint property—Subsequent mortgage of unascertained shares—Partition—Rights of purchasers in execution of decrees on the two mortgages.*

Joint property belonging to an undivided Hindu family constituted of five branches was mortgaged to A in 1876, and the share of one branch was mortgaged to B in 1880. A partition took place in 1881 when the mortgagors of B had their share allotted to them.

In 1888 A sued on his mortgage not joining B as a defendant and obtained a decree, in execution of which he brought to sale the property comprised in his mortgage and purchased it in September 1889. In 1889 B sued on his mortgage not joining A as a defendant and obtained a decree, in execution of which he brought his mortgagors' share to sale and purchased it and obtained possession in August 1889. A, in taking possession of the property purchased by him, was obstructed by B, but an order was made in his favour. B now sued for the cancellation of this order and for an injunction restraining A from taking possession of the property from him.

The Lower Courts decreed that the plaintiff might redeem the land on payment of one-fifth of the amount of the defendant's decree. The defendant appealed against this decree, the plaintiff taking no objections to it:

*Held*, on second appeal, that the decree was wrong and that a decree as asked for by the plaintiff should be substituted for it.

SECOND APPEAL against the decree of C. Venkobachariar, Subordinate Judge of Tanjore, in appeal suit No. 142 of 1893, confirming the decree of A. Kuppusami Ayyangar, District Munsif of Nega-patam, in original suit No. 128 of 1890.

The facts of the case are stated above sufficiently for the purpose of this report. The defendant preferred this second appeal.

*Pattabhirama Ayyar* for appellant.

*Sankaran Nayar* for respondent.

JUDGMENT.—It is found by both the Courts that the mortgage to plaintiff under exhibit A was *bond fide* and for consideration, and this is a finding of fact not open to question in second appeal.

\* Second Appeal No. 1499 of 1894.

RAMANADHAN  
CHETTI  
v.  
ALKONDA  
PILLAI.

The other facts of the case are :—Plaintiff obtained a decree on exhibit A against his mortgagor in original suit No. 18 of 1889, and in execution of that decree purchased the property on 29th June 1889 and was placed in possession on the 28th August 1889. See exhibits F, G and H. The property mortgaged to plaintiff was only his mortgagor's share which was unascertained till partition took place in June 1881 (exhibit B), the date of A being 9th January 1880. Defendant is the assignee of a prior mortgage (exhibit I, dated 28th October 1876), which comprised the whole of the family property including the portion subsequently mortgaged to plaintiff under exhibit A (by one of the branches of the undivided family). Defendant as such assignee sued in original suit No. 30 of 1888, and in execution of the decree obtained by him purchased the property of his mortgagor on 27th September 1889. Neither was plaintiff made a party to defendant's suit No. 30 of 1888, nor was defendant made a party to plaintiff's suit No. 18 of 1889.

On plaintiff's advertising the property for sale in execution of his decree, the defendant presented a petition objecting that the decree had been obtained collusively and that the sale notification made no mention of the prior mortgage. This petition was rejected on the 21st June 1889, see exhibit E.

After defendant purchased the property in execution of his decree, he filed a second petition complaining of plaintiff's obstruction to his taking possession of the plaintiff property, on which was passed the order J allowing his claim to possession of it.

It was in consequence of this order J (dated 21st March 1890) that the present suit was instituted by plaintiff (on the 23rd idem) for setting aside the order J and for an injunction restraining defendant from taking possession.

Both the Courts below have treated the suit as one for redemption and, have given a decree allowing plaintiff to redeem on payment of one-fifth of the defendant's decree debt and costs and interest.

Hence the present appeal by the defendant, in which objection is taken in the first place to the decree for redemption as being "a relief which was not prayed for;" and, secondly, to plaintiff being allowed to redeem a portion only of the mortgaged property.

RAMANADHAN  
CHETTI  
v.  
ALKONDA  
PILLAI.

The first of these objections must be held to be valid. Cf. *Venkatanarasammah v. Ramiah*(1); such being the case, it is unnecessary to consider the other objection.

The question then is, what should be our decree? It is contended on behalf of the appellant that, as plaintiff has not appealed, or filed objections, as respondent, under section 561 of the Code of Civil Procedure, the only course open to us is to dismiss the suit. But, in the circumstances, this does not appear to be the proper course to adopt. It is necessary for us to consider and decide what is the decree, if any, to which plaintiff is entitled with reference to the relief asked for in the plaint.

From the facts stated above, it will be seen that plaintiff purchased and got into possession of the plaint land prior to the sale to defendant. Consequently, at the date of this latter sale, there remained in the mortgagors no right or interest in the plaint land that could be sold. Therefore, defendant, as purchaser of the right and interest of the mortgagors, acquired no fresh right in this land over and above that already possessed by him as mortgagee. Cf. *Venkatanarasammah v. Ramiah*(1), *Nanack Chand v. Teluckdye Koer*(2), *Dirgopal Lal v. Bolukee*(3). As such mortgagee, defendant may be entitled to a decree against the plaint land for the balance remaining unpaid under his prior mortgage, after deducting the amount realized by sale of the portions purchased by him. But that is not a question for decision in the present suit.

For the purposes of this suit, the fact that, by reason of plaintiff's purchase of the plaint land, the mortgagors' interest therein had ceased to exist prior to the defendant's purchase is sufficient for holding that plaintiff is entitled to the declaration and injunction asked for in his plaint.

In lieu therefore of the decree appealed against plaintiff will be given a decree setting aside the Subordinate Judge's order J of 21st March 1890, and declaring plaintiff entitled to retain possession of the plaint land and enjoining defendant from disturbing such possession.

The decree now passed by us will not, however, affect the right of plaintiff to sue for redemption or of defendant to enforce his rights as prior mortgagee.

Plaintiff is entitled to his costs throughout.

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

(2) I.L.R., 5 Cal., 265.

(3) I.L.R., 5 Cal., 269.