Subba Rao and *Gopalasami Ayyangar* for appellants.

Mr. *Smith* for respondent.

JUDGMENT.—The terms of the will read in the light of the deed of partition referred to therein clearly indicate that the intention of the testator was to confer on his daughters an absolute, and not a limited, estate, in so far as the moveable property which was at his absolute disposal was concerned. There is nothing in the instrument or in the surrounding circumstances, which could lead one to think that the intention was to limit the gift to a daughter's estate, or in, other words, simply for their lives. The daughters thus having taken an absolute estate, the alienation sought to be impeached was within their rights. We must, therefore, overrule the view taken by the District Judge, and in reversal of his decree we dismiss the suit with costs throughout. This involves the dismissal of the memorandum of objections also.

APPELLATE CIVIL.

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

THILLAI CHETTI (DEFENDANT No. 1), APPELLANT,

v.

RAMANATHA AYYAN AND OTHERS (PLAINTIFFS), RESPONDENTS.*

1896. November 24, 27.

Mortgage to a co-owner—Suit to redeem—Right of one or more co-owners to redeem in absence of partition.

When several owners of undivided shares in immovable property mortgage their share with possession to another undivided sharer, a smaller number than the whole body of co-mortgagors cannot sue to redeem the mortgage until there has been a partition of the property mortgaged among the several co-owners. *Mamu* v. *Kuttu*(1) followed; *Naro Hari Bhave* v. *Vithalbhat*(2) distinguished.

SECOND APPEAL against the decree of W. Dumergue, District Judge of Madura, in Appeal Suit No. 803 of 1894, confirming the decree of S. Authinarayana Ayyar, District Munsif of Mana Madura, in Original Suit No. 58 of 1894.

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* Second Appeal No. 1008 of 1895.

(1) I.L.R., 6 Mad., 61. (2) I.L.R., 10 Bom., 648.

THILLAI CHETTI v. RAMANATHA AYYAN.

The plaintiff and defendants were the undivided co-sharers of a Dharmasanam village. The predecessors in title of the plaintiff and of defendants 2 to 44 had mortgaged with possession their shares to the predecessors in title of the first defendant on the 20th August 1840. The plaintiff now sued to redeem the mortgage and deposited in Court the full amount of the mortgage, and he also prayed for a decree directing the first defendant to deliver up possession of the land to the plaintiff on behalf of all the sharers.

The first defendant contended that the plaint lands appertained to 120 pangu samuthayam. Out of the said 120 pangus, 28-8-6 pangus belonged to him, 1½ and odd pangus to the plaintiff, and the rest to the other defendants. That the plaintiff, who owned only a few pangus, had no right to redeem the mortgage of the plaint lands for the village samuthayam from the first defendant who owned more pangus. That the other pangalis had not given the plaintiff permission to redeem the mortgage, and that though it should be found that the plaintiff had a right to redeem the mortgage, the plaintiff had no right to pay the share due for the first defendant's pangu, and to demand possession from the first defendant so far as the first defendant's share of the pangu was concerned.

Of the remaining 43 defendants, four supported the plaintiff's claim and 30 applied to be made plaintiffs, seven did not enter an appearance, and the remaining two entered an appearance, but did not contest the suit at the hearing.

The Munsiff passed a decree that, "on receipt of the mortgage "money deposited in Court (Rs. 75-4-0), first defendant do put "plaintiffs in possession of the mortgaged property with all title-"deeds in his possession relating to the mortgaged property "described in the plaint."

The first defendant appealed to the District Judge who dismissed the appeal, saying "with regard to the appeal it is con-"tended that, under section 60, clause 4 of the Transfer of Property "Act, the plaintiffs were entitled to sue for redemption of their "shares only and not of the whole property. As the first defend-"ant has not acquired the share of a mortgagor, the argument is "clearly opposed to the law."

The first defendant appealed to the High Court on the following grounds:—

"The decrees of the Courts below are against the provisions of "section 60, Transfer of Property Act.

"The Courts below erred in law in drawing a difference "between a co-mortgagee and a co-owner.

"The Courts below failed to notice that the first defendant "owned 28 shares out of the total number of 120 shares and he "could not, therefore, be ousted from possession.

"The first defendant's ownership is distinctly raised in the "second paragraph of his written statement and plaintiffs have not "denied it.

"Even if the said right were disputed, the Courts below ought "to have ascertained the extent of the shares belonging to the "first defendant.

"The plaint has not been properly framed, and the Courts "below ought to have dismissed the plaintiffs' suit."

Mahadeva Ayyar for appellant.

Natesa Ayyar for respondents.

JUDGMENT.—In this case the plaintiffs and defendants are the owners in shares of a certain village.

In 1840 the owners of the village mortgaged it to the first defendant's ancestor for Rs. 75-4-0. The plaintiffs sued to redeem the mortgage. The first defendant claimed to own the largest share of the village and objected to plaintiff's right to redeem the mortgage without the consent of the co-mortgagors. He specially objected to the plaintiff's right to redeem his (first defendant's) share of the mortgage. The District Munsif found that it could not be satisfactorily decided in the present suit to what share the first defendant was entitled, and on the strength of *Naro Hari Bhave* v. *Vithalbhat*(1) decided that plaintiffs had a right to redeem the mortgage. He, therefore, decreed that, on payment of the mortgage money into Court, the first defendant should put the plaintiffs into possession of the mortgaged property with its title-deeds. In appeal before the District Court it was argued that, under clause 4 of section 60 of the Transfer of Property Act, the plaintiffs were entitled to redeem their own shares only, but not to redeem the whole property. The District Judge, however, held the argument to be invalid, "as "the first defendant had not acquired the share of a mortgagor," and dismissed the appeal.

(1) I.L.R., 10 Bom., 648.

THILLAI CHETTI v. RÂMANATHA AYYAN.

Against this decree the first defendant now urges this second appeal, and we think his plea is well founded. The decree is manifestly wrong and unjust since it requires the first defendant, who is not only the mortgagee, but also one of the chief owners of the property, to give up his possession of the property, including his own share, to the plaintiffs on payment of the mortgage money. No provision is made for securing to the first defendant or the other sharers of the village possession of their shares on their paying the plaintiff's their shares of the mortgage money, nor could any such provision be made in the present suit since their respective shares have not been ascertained and could not be conveniently ascertained in the suit. Thus the result of the decree would be to compel the first defendant and other co-owners and co-mortgagors to bring suits for the ascertainment of their shares and for the recovery of the same from the plaintiffs on payment of their contribution towards the mortgage money. This is the very evil which was pointed out and guarded against by the learned Judges who decided the case of *Mamu* v. *Kuttu*(1). There the fifth defendant was the purchaser of a share of the equity of redemption and was also the mortgagee in possession, and it was held that "to allow plaintiff "to redeem the whole would enable him to get possession of the "property to the exclusion of fifth defendant. Now, as fifth "defendant is already in possession as assignee of the mortgagee "and has also a share in the right to redeem, he cannot be "required to surrender possession of the whole against his consent "until plaintiff has, by a proper suit for partition, ascertained "definitely to what shares in the property he and fifth defendant "are, respectively, entitled.

"We cannot, therefore, allow a decree for redemption of the "whole. A decree for redemption of a portion is equally impos-"sible, for that would be to convert the suit into a suit for "partition, which, without the consent of all the parties, could not "be permitted."

That case is exactly on all fours with the present case and indicates the proper course for the plaintiffs to take if they desire to redeem the mortgage on their shares of the property. It is only necessary, in conclusion, to point out that the case *Naro Hari Bhave* v. *Vithalbhat*(2) relied on by the District

(1) I.L.R., 6 Mad., 61. (2) I.L.R., 10 Bom., 648.

Munsif proceeded on entirely different grounds. In that case the plaintiffs had a clear right to redeem the whole property at the time when they brought their suit, and the Court refused to allow that right to be defeated by the action of the defendants in purchasing a share in the equity of redemption *post litem motam*, but intimated that, if the defendants had acquired the share before suit, it would have been necessary to consider whether the ruling in *Mannu* v. *Kuttu*(1) should not have been followed. The District Judge also in the present case appears to have been under some misapprehension. He apparently thought that it was necessary for the first defendant to show that he had acquired the share of a mortgagor subsequent to the date of the mortgage. But that is not so. It is the possession of the twofold interest as mortgagee and mortgagor (prior to the plaintiffs' suit) that is of importance. First defendant had such twofold interest from the date of the mortgage, and the rule laid down by this Court in the case already quoted is clearly applicable.

We must, therefore, reverse the decrees of the Courts below and dismiss the plaintiffs' suit with costs throughout.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.

VENKATANARASIMHA NAIDU (PLAINTIFF), APPELLANT,

v.

DANDAMUDI KOTAYYA (DEFENDANT), RESPONDENT.*

1897. July 22. August 20.

Landlord and tenant—Zamindar and raiyat—Relation between —.

A raiyat cultivating land in a permanently-settled estate is *primâ facie* not a mere tenant from year to year, but the owner of the kudivaram right in the land he cultivates.

SECOND APPEAL against the decree of G. T. Mackenzie, Acting District Judge of Gódávari, in Appeal Suit No. 253 of 1895, modifying the decree of S. Pereira, Acting District Munsif of Ellore, in Original Suit No. 100 of 1892.

The plaintiff was the Zamindar of Vallur, a permanently-settled estate, and the defendant cultivated land in that zamindary.

(1) I.L.R., 6 Mad., 61.

* Second Appeal No. 766 of 1896.