Consequently the order under which the sale in the present case took place was passed with jurisdiction and, if the sale be impeachable, it can be impugned only in a suit instituted within one year from the date mentioned in Article 12 of the Limitation Act. This action, having been brought long after expiry of that period, was clearly barred. It is therefore unnecessary to consider the other questions urged.

The appeal fails and must be dismissed with costs.

BENSON, J.—I am clearly of opinion that the appellant cannot succeed without setting aside the revenue sale, and this can only be done by suit brought within one year.

No such suit having been brought, the sale stands good.

I agree that the appeal fails and must be dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Davies.

1896. August 14. September 7, 8, 29.

MUTHU VIJIA RAGHUNATHA RAMACHANDRA VACHA MAHALI THURAI (SON AND LEGAL REPRESENTATIVE OF THE DECEASED DEFENDANT No. 3), APPELLANT,

v.

VENKATACHALLAM CHETTI AND OTHERS (PLAINTIFF AND DEFENDANTS Nos. 1, 2 AND 4 TO 10), RESPONDENTS.*

Transfer of Property Act—Act IV of 1882, s. 86—Suit by sub-mortgagee—Decree for sale.

A sub-mortgagee is entitled to a decree for the sale of the original mortgagor's interest in cases and in circumstances which would have entitled the original mortgagee on the date of the sub-mortgage to claim such relief.

APPEAL against the decree of P. Narayanasami Ayyar, Subordinate Judge of Madura (East), in original suit No. 14 of 1893.

The plaintiff was the trustee of a temple, and he sued to enforce his mortgage right on certain property which originally belonged to defendants Nos. 2 and 3 jointly. On the 9th of August 1886, those defendants, respectively, borrowed Rs. 3,000 and Rs. 4,825 from defendant No. 1 on the security of the land under a

* Appeal No. 13 of 1895.

MUTHU VIJIA RAGHUNATHA RAMACHANDRA VACHA MAHALI THURAI *v.* VENKATACHALLAM CHETTI.

registered mortgage deed. On the following day defendant No. 1 on the security of this mortgage borrowed Rs. 7,300 from one Avichi Chetti under a registered mortgage deed. On 23rd November 1889, Avichi Chetti assigned to the plaintiff his rights under the mortgage of 10th August 1886 for Rs. 10,898-4-8.

The Subordinate Judge passed a decree as follows :—

"It is ordered that the first defendant do pay plaintiff Rs. " 9,372-10-0 within six months from this day together with subse- " quent interest at six per cent. per annum, and in default the " interest of the third defendant in items 1 to 7 be sold for Rs. " 8,294-4-0 with subsequent interest at six per cent. per annum " on Rs. 4,825 from date of plaint up to date of payment; as the " plaintiff is entitled to recover only the sum paid by him for the " assignment with interest from date of payment to date of decree " and the incidental expenses of sale (*Nilakanta* v. *Krishnasami*(1) " and *Ramachundra* v. *Venkatarama*(2)), the said sum represents " third defendant's proportionate share of the debt which he should " pay under exhibit A, item No. 4, will be sold subject to eighth " defendant's mortgage right in $\frac{5}{8}$ chey therein as admitted by " plaintiff, and items Nos. 1, 5, 6 and 7 will be sold subject to " first defendant's mortgage right therein as stated in the plaint. " The parties are ordered to bear their own costs."

The representative of defendant No. 3 preferred this appeal.

Krishnasami Ayyar for appellant.

Bhashyam Ayyangar and *Rangaramanujachariar* for respondents Nos. 11 and 12.

Rangachariar for respondent No. 3.

SUBRAHMANIA AYYAR, J.—The late third defendant, father of the appellant, on the 9th August 1886, executed to the first defendant a simple mortgage on the security of the third defendant's moiety of eight villages attached to the Zamindari of Elayathakudi in Madura. The first defendant on the 10th idem sub-mortgaged his mortgage interest to one Avichi Chetti. This man assigned his rights to the plaintiff who instituted this suit upon the sub-mortgage transferred to him.

In the court below the Subordinate Judge took an account of the amount due by the third defendant to the first and by the latter to the plaintiff, and among other reliefs, granted the usual order

(1) I.L.R., 13 Mad., 225. (2) I.L.R., 13 Mad., 516.

MUTHU VIJIA RAGHUNATHA RAMACHANDRA VACHA MAHALI THURAI v. VENKATACHALLAM CHETTI.

for the sale of the third defendant's interest in the property originally mortgaged, if payment of the amount, due by him, be not made within the time fixed.

The first question for decision is whether a sub-mortgagee is entitled to an order for sale of the original mortgagor's interest, if other circumstances justifying such a decree exist.

In contending that the sub-mortgagee was not so entitled the vakil for the appellant urged that there is no warrant whatever in the Transfer of Property Act, for an order like the one in question being passed. This argument seems to be quite opposed to the express provisions of section 86 of the Act, since the words "where the plaintiff claims by derived title," which are to be found therein distinctly cover such a case as this. It was said, however, that the clause just quoted refers only to an assignee or other person in whom the whole of the interest of the mortgagee has become vested, but not to a sub-mortgagee who has only a qualified right therein. But I am at a loss to understand how it can possibly be denied that a sub-mortgagee does claim by title derived from the original mortgagee and it is scarcely necessary to point out that "derivative mortgage" is a term used in text books and in decided cases as synonymous with "sub-mortgage." I am, therefore, unable to see any adequate ground for putting the restricted construction suggested on behalf of the appellant and to exclude, from the operation of the section referred to, the case of a sub-mortgagee, which the words, in question, naturally and grammatically comprehend.

If we turn to the English law, we find there also, from section 12 of chapter 47 of "Seton on decrees" and *Hobart* v. *Abbot*(1) cited for the respondents, that the point has long been settled in favour of the sub-mortgagee.

Nor is the above view unsupported by principle. It is true that in the case of a simple mortgage, the mortgagor's ownership in the property mortgaged is not, even in form, transferred to the mortgagee. Nevertheless it is impossible to doubt that the mortgagee, so far as the recovery of the debt owing to him is concerned, is treated in law, as an assignee of the mortgagor. This becomes quite evident in the case of a second mortgage. Referring to it, an American author of high repute writes: "Thus a second

(1) 2 Peere Williams, 642.

MUTHU VIJIA RAGHUNATHA RAMACHANDRA VACHA MAHALI THURAI v. VENKATACHALLAM CHETTI.

"mortgage is as to the second mortgagee, but an assignment of "the mortgagor's interest . . . . As an assignee of the mortgagor the second mortgagee may insist upon all the rights of a "mortgagor against the first mortgagee, such as that of calling "him to account, redeeming from him and the like" (Washburn on Real Property, 5th edition, vol. II, pp. 116 and 117). This way of looking at the matter is not peculiar to any particular system of law, but seems well established in jurisprudence, as treatises on the Civil law show. In Salkowski's work on Roman Private Law, it is pointed out that a party who holds a hypothecation acts, in selling the hypotheca, as "the representative of the "pawnor or owner, although by virtue of his own right and in his "own interest." (Whitfield's Translation at page 491.) Further, it is a recognised rule under that law, that when what is hypothecated is a claim, the hypothecatee may alienate it or enforce it in action instituted in his own name (Mackeldey's Roman Law, Special Part, Book I, section 336, paragraph 2.

There is another argument in favour of the view that a sub-mortgagee has the right in dispute. The original mortgagor and the sub-mortgagee, as the holders of different interests in one and the same specific property, stand to one another in a relation that gives rise to certain rights and duties *inter se*. It is admitted that a mortgagor whose right to redeem originally existed as against the mortgagee alone, becomes by virtue of the sub-mortgage, entitled to exercise that right as against the sub-mortgagee also, who consequently must be made a party to redemption proceedings. Now, as the sub-mortgagee may be redeemed by the original mortgagor, it ought to be held that the former may foreclose the latter, where that relief can be claimed or, where such relief cannot be granted, he may obtain an order for sale and thereby put an end to the other party's right to redeem. For it is only just and reasonable that, whilst the law, on the one hand, recognises a right in the original mortgagor to redeem the sub-mortgage, it should give the latter, as against the former, the generally correlative right (Daniel's Chancery Practice, 6th edition at page 1412) to foreclose or sell.

I confess I am not impressed with the suggestion, made on behalf of the appellant, that to allow a sub-mortgagee to sue the original mortgagor, as was done here, would be productive of general inconvenience to litigants in the position of the present

parties. On the contrary I think that to permit such a course to be adopted would prevent multiplicity of suits and the possibility of conflicting decisions being pronounced in respect of the same matter; since, at all events, the accounts, between the original mortgagor and the original mortgagee on the one hand and the latter and the sub-mortgagee on the other, would be taken once for all and the respective claims of the three parties adjusted and settled at the same time. (See *Narayan Vittal Maval* v. *Ganoji*(1).)

The Allahabad cases of *Mata Din Kasodhan* v. *Kazim Husain*(2) and *Ganga Prasad* v. *Chunni Lal*(3) relied on on behalf of the appellant, cannot be followed here, inasmuch as they proceed upon the supposition that the term "property" as used in chapter IV of Act IV of 1882, means an actual physical object; and does not include mere rights relating to physical objects—a view which, so far as I am aware, has hitherto not been accepted as correct in this court and in which I am myself unable to agree. As to *Padgaya* v. *Baji*(4), it is difficult to believe that the learned Judges who decided it, held that there was no sort of legal relation between the original mortgagor and the sub-mortgagee. The actual decision there is itself supportable on the clear ground that the representative of the deceased original mortgagee, as a person interested in the redemption there sought for, was a necessary party to the litigation which could not, therefore, proceed further owing to the omission, on the part of the original mortgagor, to bring on to the record, the legal representative of the original mortgagee who had been made a defendant when the suit was filed. The statement made in the course of the judgment of PARSONS, J., that there was no privity between the original mortgagor and the sub-mortgagee, if intended to lay down that absolutely none of any kind subsisted between those parties, would be totally inconsistent with the unquestionable fact, already referred to, viz., the existence of that relation between them, from which springs the original mortgagor's right to redeem from the sub-mortgagee also.

I am, therefore, of opinion that the appellant's contention, under consideration, is unsound and that a sub-mortgagee can ask for a sale of the original mortgagor's interest in cases and in

(1) I.L.R., 15 Bom., 692.
(2) I.L.R., 13 All., 432.
(3) I.L.R., 18 All., 113.
(4) I.L.R. 20 Bom., 549.

MUTHU VIJIA RAGHUNATHA RAMACHANDRA VACHA MAHALI THURAI v. VENKATACHALLAM CHETTI.

circumstances which would have entitled the original mortgagee, on the date of the sub-mortgage, to claim such relief.

The second and the only remaining question for decision is, whether the discharge, set up on behalf of the third defendant, is true. I agree with the Lower Court that the evidence, called in support of the plea, is unsatisfactory and unreliable. Nor do I see any reason for discrediting the statement of the first defendant that no portion of the debt due to him was liquidated by the collections made by him from the tenants of two out of the eight mortgaged villages, under the power of attorney, exhibit II, dated 9th August 1886, and that when the said power was revoked, a few months afterwards by exhibit F, he accounted to the third defendant's father-in-law, with that defendant's knowledge, for the comparatively small amount that had been collected by him under the power. The decree of the Lower Court is in my view right. I would confirm it and dismiss the appeal with costs. The appellant will also pay the costs of the second defendant who was unnecessarily brought in.

DAVIES, J.—I concur.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Davies.

1896. November 3, 5, 24.

PARVATHI AMMAL (PLAINTIFF), APPELLANT,

v.

SAMINATHA GURUKAL AND OTHERS (DEFENDANT), RESPONDENTS.*

Limitation Act—Act XV of 1877, sched. II, art. 118—Suit for possession by Hindu widow as heiress—Defendant in possession under an alleged adoption—Limitation.

A Hindu died in 1884, leaving the plaintiff, his widow, and certain landed and other properties. The defendant claimed, to the knowledge of the plaintiff in 1885, to have been adopted by the deceased, and from that date he had claimed as an adopted son to be entitled to the estate of which the plaintiff never enjoyed

* Appeal No. 88 of 1895.