

APPELLATE CIVIL.

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

ARUMUGAM PILLAI (PLAINTIFF), APPELLANT,

v.

PERIASAMI AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Mortgage in consolidation of prior mortgages—Want of registration—Secondary evidence—Extinction—Decree to redeem prior mortgages.

In a suit to redeem a mortgage of 1867 which had been lost and admittedly had not been registered it appeared that it had been executed in consolidation of two prior mortgages, dated 1856 and 1860, respectively :

Held, that the plaintiff was not entitled to a decree on the footing of the unregistered mortgage which could not be proved, but that he was entitled to redeem the two previous mortgages if they were found to be genuine and valid.

SECOND APPEAL against the decree of C. Gopalan Nayar, Subordinate Judge of Madura (East) in appeal suit No. 225 of 1894, reversing the decree of A. David, District Munsif, Tirumangalam, in original suit No. 434 of 1892.

Suit to redeem a mortgage dated 14th May 1867 and executed to secure repayment of Rs. 655.

The mortgage document was not produced having been lost and it was admitted that it had not been registered. It appeared that it had been executed in consolidation of two previous mortgages for Rs. 316 and Rs. 35, dated respectively, 1856 and 1860. The District Munsif passed a decree as prayed on the mortgage sued on and with regard to the plaintiff's title he said :

“ It is true that the mortgage of 1867 was not registered, but the admissions of the second defendant and of the first defendant's grandfather above noticed are, I think, sufficient to justify a finding in favour of the genuineness of the mortgage. On the principles laid down in *Madhava v. Narayana*(1), *Sankaran v. Periasami*(2) and *Maidin Saiba v. Nagapa*(3), I hold that the first defendant acquired by possession for more than twelve years the limited interest of a mortgagee and that his mortgage right has become valid.

* Second Appeal No. 163 of 1895. (1) I.L.R., 9 Mad., 244.
(2) I.L.R., 13 Mad., 467. (3) I.L.R., 7 Bom., 96.

Whatever defect there was at the inception of the mortgage was subsequently removed by lapse of time. I am of opinion that the mortgages set up by the plaintiff are genuine and valid as against the defendants.”

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The Subordinate Judge reversed his decree holding that the want of registration prevented the admission of secondary evidence and was fatal to the suit.

The plaintiff preferred this second appeal.

Bhashyam Ayyangar and *Krishnasami Ayyar* for appellant.

Mr. Parthasarathi Ayyangar for respondents.

JUDGMENT.—We agree with the Subordinate Judge that the mortgage of 1867 could not be proved inasmuch as it was not registered, but we do not consider that the previous mortgages of 1856 and 1860 were altogether extinguished by the mortgage of 1867. They were no doubt consolidated in that mortgage. But when that mortgage is found to be inoperative owing to non-observance of the registration law, the two previous mortgages can be revived for the purpose, at least, of showing that the possession of the defendants is that of mortgagees of the plaintiff, the mortgagor. If this relationship is established between the parties, the plaintiff has clearly a right to redeem the earlier mortgages as his right of redemption has not been lost through the sixty years' bar of limitation. This is the principle laid down in *Kunhi Kutti Nair v. Kutty Maraccar*(1), and followed again in *Unnian v. Rama*(2), and we do not think it has been departed from in the case of *Krishna Pillai v. Rangasami Pillai*(3). In this latter case, the learned Judges would not allow a mortgage that had not been pleaded and that had only been admitted in other proceedings to be set up in lieu of the plaintiff mortgage when that failed. But that is not the case here. The plaintiff pleaded the two previous mortgages, upon which he now wishes to rely, and the second issue had reference to their existence and genuineness and was accordingly framed in the plural number, showing that all the three mortgages were considered by the Court of First Instance. Indeed, the finding of the District Munsif is that the mortgages, again in the plural number, set up by the plaintiff were valid and binding as against the defendants. If then the Subordinate Judge should find that the two previous mortgages, viz., those of 1856 and 1860 are genuine and valid

(1) 4 M.H.C.R., 359.

(2) I.L.R., 8 Mad., 415.

(3) I.L.R., 18 Mad., 462.

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either by independent proof or by admissions of the defendants or their predecessors in title, we think the plaintiff is entitled to redeem them. We, therefore, reverse the decree of the Lower Appellate Court and remand the appeal for re-hearing on the issue above indicated and the other issues arising in the case. If a decree for redemption should follow, it will be left for the Subordinate Judge to determine what amount should be paid by the plaintiff to the defendants as the mortgage amount. The sums due on the mortgages of 1856 and 1860 are Rs. 316 and Rs. 35, respectively. But the amount due according to the inoperative mortgage of 1867 is Rs. 655, and we observe that the plaintiff has offered to pay this larger amount.

As we have allowed the second appeal on the ground stated, it is unnecessary for us to determine the other point raised as to the interest of the defendants in the property being in any case the limited interest of a mortgagee and therefore liable to redemption.

The costs hitherto incurred will abide and follow the result and be provided for in the revised decree.

APPELLATE CIVIL.

Before Mr. Justice Shephard.

RAJESWARA RAU AND OTHERS (PLAINTIFFS),

APPELLANTS.

v.

HARI BABANDHU AND OTHERS (DEFENDANTS),

RESPONDENTS.*

Decree payable by instalments—Default in payment—Waiver—Civil Procedure Code, s. 258.

A decree was passed for the payment of a sum of money in four annual instalments, the first payment to be made on 11th October 1888; and it was further provided that if default were made in the payment of any instalment then without reference to the other instalments the whole amount should be paid with interest. The decree-holder applied in October 1893 for execution in respect of the instalments for 1890 and 1891:

Held, that the application was not barred by limitation, if default in respect of the instalment of 1889 had been waived, and acceptance of part-payment was material as evidence of such waiver and should be considered, although payment had not been certified under Civil Procedure Code, s. 258.

* Appeal against Appellate Order No. 40 of 1895;