APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Boddam.

1897. October 14, 18, 20, 27.

NAINAPPA CHETTI (DEFENDANT No. 1), APPELLANT,

v.

CHIDAMBARAM CHETTI AND OTHERS (PLAINTIFF AND DEFENDANTS NOS. 2 TO 9), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, ss. 12, 13—'Res judicata'—Transfer of Property Act—Act IV of 1882, ss. 91, 95—Redemption—Ejectment suit by mortgagor—Subsequent suit for redemption.

A zamindar mortgaged his estate under four successive instruments to the same creditor who was subsequently placed in possession. On the death of the mortgagor, his son, claiming to have succeeded by the law of primogeniture to the zamindari as an impartible estate, sued to eject the mortgagee; and a decree was passed declaring what was the sum due on a date named and how far it was binding on the estate, and decreeing that, on payment of what might be due on taking an account, the mortgagee should give up possession. Many years later the zamindar applied to the Court to carry out this decree, and a like application was put in by the present plaintiff to whom seven-eighths of the equity of redemption had been assigned. Both of these applications were rejected in the High Court as barred by limitation, and the applicants applied for leave to appeal to the Privy Council against the order of the High Court. Meanwhile the plaintiff brought the present suit to redeem the mortgages of the late zamindar:

Held, (1) that the suit was not barred under Civil Procedure Code, section 12, by reason of the pendency of the application for leave to appeal to the Privy Council;

(2) that, as there was no decree for foreclosure passed in the previous suit which had been treated as a suit for redemption, the present suit was not precluded by the decree therein;

(3) that the findings in the previous suit as to the amount of the debt and the extent to which it bound the estate were *res judicata*;

(4) that the plaintiff was entitled to redeem the whole mortgages, although he was assignee of only seven-eighths of the equity of redemption, as the owner of the remaining one-eighth was joined as defendant and did not apply to be made plaintiff.

APPEAL against the decree of C. Gopalan Nayar, Subordinate Judge of Madura (East), in Original Suit No. 45 of 1895.

Suit for redemption. The Subordinate Judge's statement of the facts giving rise to the litigation, which is referred to by the High Court was to the following effect:—

On the 1st December 1862, the then Zamindar of Varapur, who was the father and predecessor in title of defendant No. 4, mort-

* Appeal No. 75 of 1896.

gaged his estate to the father of defendant No. 1 for Rs. 32,000 under an instrument filed as exhibit A, by which "it was stipulated," as the Subordinate Judge said, "that all the incomes "from the village should be paid to the mortgagee after collecting "money in the presence of his men; that the mortgagee should "deduct Rs. 1,895-14-6 for peishcush, as also Rs. 360 for the "mortgagor's domestic expenses and the salary as per mohini list "furnished of the establishment of his Karaivasal; and that he "should, out of the amount left, pay towards interest for each "fasli on the amount of this bond and enter payment on the "same of the remainder towards the principal due thereunder. "It was further provided that counter-interest would be allowed "on the principal so paid and that, when payment was made in "the manner aforesaid, if income fell short to meet the interest "of each year, the balance should be made good by the mortgagor "out of his private funds." On 10th September 1863, the mortgagor by exhibit B further charged the estate in favour of the same mortgagee to secure Rs. 3,000 and interest, and on 11th August 1864, the mortgagor, by exhibit C, further charged the estate in favour of the same mortgagee to secure Rs. 7,397-7-0 with interest. "This was followed," as the Subordinate Judge said, "by a simple bond (exhibit D) between the same parties, "dated 25th June 1867, whereby fourth defendant's father bound "himself to pay, with the same rate of interest a sum of "Rs. 1,767-5-8 being balance of interest on the first three bonds "after deducting payment towards interest out of the income "from the village and sundry other sums received. First defendant's father was never put in possession of the zamindari "under any of the above documents; but on the 3rd December "1868 he and fourth defendant's father entered into an agreement (exhibit E), whereby in consideration of the amount of "the four bonds and for the interest settled therefor, he was "allowed to enjoy all the villages incurring certain specified "expenses for the fourth defendant's father and for the up-keep "and improvement of the village."

The mortgagor having died in 1870, his son and successor, the present defendant No. 4, instituted Civil Suit No. 118 of 1874 against the son of the mortgagee, the present defendant No. 1, for possession of the estate with mesne profits alleging that the zamindari was impartible, that he had succeeded to it under the

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law of primogeniture on the death of his father who had merely a life interest, that the mortgages were not necessary for the family and that the late zamindar had been induced to execute them by the fraud of the mortgagee, and that they had been discharged.

Issues were framed in that suit as to the amount of the debt and as to "the extent, if any, to which the estate is liable."

In the result the estate was found to be impartible and the High Court in Appeal No. 98 of 1880 passed a decree declaring that there was due to the defendant on the 24th March 1880 a sum of Rs. 54,697-4-6 and that the defendant was, on the one hand, entitled to further interest and was, on the other hand, liable to account and ordering that on the plaintiff paying to the defendant the balance so found to be due on the taking of the accounts, the defendant should deliver up possession of the estate.

During the pendency of these proceedings, viz., on 27th March 1896, the zamindar mortgaged the estate for Rs. 4,000 and interest to the present defendant No. 2. The estate was afterwards brought to sale in execution of the decree in Original Suit No. 24 of 1879, and purchased by V. R. Alagappa Chetti. This sale was made subject to the mortgage of 1876, and the mortgagee brought a suit on his mortgage against the zamindar and his son (the present defendant No. 5) and the purchaser, and obtained a decree for Rs. 7,828-14-4 in Original Suit No. 20 of 1884.

The zamindar then leased the estate on 1st March 1892 for 15 years to Mari Chetti, the present defendant No. 6, who applied to the District Court on 29th June 1892 by Civil Revision Petition No. 100 of 1892 to enforce the decree of the High Court, abovementioned offering to pay the balance, if any, which might be found due to the mortgagee in possession. On 30th July 1892 the zamindar made a like application "without prejudice to the lessee's rights" alleging that the claim of mortgagee in possession had been satisfied by the rents and profits. These applications were resisted on the ground that the zamindar had no further interest in the estate which had been sold in execution of the decree in Original Suit No. 20 of 1884 and purchased by the decree-holder, viz., the present defendant No. 2. This objection was overruled, because the holder of the decree of 1884 had no *locus standi* in these proceedings. "Commissioners were then appointed," said the Subordinate Judge, "to investigate the accounts, and the

"present District Judge, hearing the objections thereto, passed an "order (exhibit No. 4), on the 2nd May 1893, declaring that the "sum of Rs. 1,339–7–3 was due to the first defendant on the 1st "July 1892, and that, on payment of the said amount, the fourth "defendant was entitled to recover possession of the zamindari "and all its appurtenances. First defendant appealed against this "order to the High Court in Civil Miscellaneous Appeal No. 58 of "1893, and it was held that the decree, being a final one so far as "it went, was capable of immediate execution and that no steps "having been taken by the decree-holder since the passing of the "decree in 1882, its execution was time-barred. They accordingly "allowed the appeal and dismissed the original application for "execution. During the pendency of the second defendant's "appeal against order No. 8 of 1893, he and his son, third defend-"ant herein, conveyed to the present plaintiff their seven-eighth "share in the zamindari purchased by second defendant in execu-"tion of the decree in Original Suit No. 20 of 1884 on the file of "this Court and the latter was, therefore, allowed to join as a "supplemental appellant with that defendant, and the present first "defendant had also made him a respondent in his appeal against "the order of the District Court in No. 58 of 1893. The High "Court's order on the latter petition being adverse to the claim of "both the plaintiff and the fourth defendant, he has also joined "the fourth defendant in applying to the High Court for leave to "appeal against it to the Privy Council (exhibit 11) and while "that application was pending, the present suit was brought by him "praying judgment (1) that, on payment to the first defendant "of the sum of Rs. 1,339–7–3 found due to him by the District "Judge's order (M4), dated 2nd May 1893, and now deposited in "Court or such further or other sum as may be found payable to "the first defendant, the defendants do deliver up to the plaintiff "all documents in their possession or power relating to the mort-"gaged property, and do transfer the mortgaged property free "from the mortgage and from all encumbrances created by the "defendants or any person claiming under them, and put the "plaintiff in possession of the property, (2) for mesne profits from "the date of the suit till the date of plaintiff being put in pos-"session, (3) for costs of the suit, and (4) for such other relief "as, upon the facts, the plaintiff may be entitled to. The plaint "refers to the various documents A, B, C, and D and states that,

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"as purchaser of the seven-eighth share of the properties, he was "entitled to redeem the mortgage and to recover possession of the "said properties on payment of Rs. 1,339-7-3 or such further or "other sums as may be found due to the first defendant on taking "an account, and the defendants Nos. 6 to 9 are impleaded as "they set up a right to hold possession of the properties in suit "under leases alleged to have been executed in their favour by "the fourth defendant."

Defendant No. 1 defended the suit on the ground *inter alia* that it was not maintainable by reason of Civil Procedure Code, section 12. This plea was dealt with by the Subordinate Judge in paragraph 9 of his judgment, which is referred to in the judgment of the High Court as follows:—

"The first objection is that, the plaintiff having joined the fourth "defendant in making an application to the High Court for leave "to appeal to the Privy Council against the decree in Civil Miscel- "laneous Appeal No. 58 of 1893 on the file of that Court, he is "not entitled to prosecute the present suit under section 12 of "the Civil Procedure Code. But, in the first place, the mere apply- "ing for, or obtaining, leave to appeal to the Privy Council cannot "of itself amount to the pendency of an appeal till such appeal "is actually filed, for it may happen that the parties, who obtain "such leave, may never appeal at all against such decree or order. "In the next place, that order of the High Court was in an "execution case and refused execution of the decree on the ground "that the application was barred under Article 179 of the Limita- "tion Act, while the present is a suit for redemption based on the "original relation of mortgagor and mortgagee; and since there "is no previously instituted suit or appeal now pending nor is the "Court asked to try any suit in which the matter in issue is also "directly and substantially in issue in a previously instituted suit "between the same parties, section 12 of the Code of Civil Pro- "cedure can be no bar to its trial. Thirdly, the present plaintiff "or second defendant never joined in those proceedings, except "with a view of preventing the fourth defendant from executing "the decree and took no steps to execute it for themselves, and "the High Court has also refused to allow them to intervene in "those proceedings to execute the decree, as they were no parties "thereto, and also because no application has been made on the "ground that they were assignees by operation of law and as such

"entitled to execute the decree, and the zamindar had, therefore, "no subsisting right. On all these grounds, I overrule the first "objection."

The Subordinate Judge passed a decree for the plaintiff, against which five appeals were preferred. Of these, the above appeal by defendant No. 1 was determined by that portion of the judgment of the High Court which is given below.

Sankaran Nayar, *Narayana Rau* and *Subramania Ayyar* for appellant.

The Acting Advocate-General (Hon. *V. Bhashyam Ayyangar*), *Krishnasami Ayyar*, *Sundara Ayyar*, and *Sesha Chariar* for respondent No. 1.

Seshagiri Ayyar for respondent No. 4.

Tirumalaisami Chetti for respondent No. 6.

JUDGMENT.—Plaintiff, as purchaser of the equity of redemption of a certain village, sued to redeem on payment of the mortgage money.

Various objections were raised by the contesting defendants, but they were disallowed by the Subordinate Judge, who gave plaintiff a decree for redemption. Against this decree the first, sixth, fifth, and fourth defendants separately appeal in Appeal Suits Nos. 75, 92, 145 and 146 of 1896. The plaintiff also appeals (Appeal Suit No. 62) against a small part of the decree.

The facts, out of which the litigation has arisen, are complicated, but they are fully stated in paragraph 1 of the Subordinate Judge's judgment and need not be repeated here.

The main appeal is that of the first defendant. His chief contention before us is that the only remedy of the mortgagor, or of the plaintiff, as assignee of the equity of redemption, was to have executed the decree in Appeal Suit No. 98 of 1880, and that, as execution of that decree is now barred, he has lost the right to redeem and cannot fall back on the original mortgages (A, B, C and E) and sue to redeem them. He contends that those mortgages are merged in the decree in Appeal Suit No. 98 of 1880. He further contends that, as the plaintiff in the present suit claims to redeem on payment of the sum of Rs. 1,339-7-3, which was the sum found to be due to first defendant up to 1st July 1892 on the basis of that decree, the suit is really one based on that decree not on the prior mortgages, and that it is therefore not sustainable. He relies on the decision of the Privy Council in

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the case reported as *Hari Ravji Chiplunkar* v. *Chapurji Hormasji Shet*(1).

We do not think that these contentions are valid, or that the case is in point. By the decree in Appeal Suit No. 98 of 1880 the fourth defendant was to recover the mortgaged property provided he discharged the mortgage, but there was no foreclosure clause in the decree. It is a well settled rule of law in this Presidency that such a decree does not of itself operate to foreclose the right of redemption (*Sami* v. *Somasundara*(2), *Periandi* v. *Angappa*(3), *Karuthasami* v. *Jaganatha*(4), and *Ramunni* v. *Brahma Dattan*(5)), nor does it alter the previously existing legal relation of mortgagor and mortgagee. If the decree-holder fails to exercise the right of redemption given to him by the decree, he, in effect, declines to put an end to the relation, and in time his right to execute the decree becomes barred, but the legal relation of mortgagor and mortgagee continues; and the mortgagor may, in a fresh suit, again assert his right to redeem on payment of such sum as may then be due, which sum may, on taking an account, be greater or less than the sum which was requisite under the former decree. There is nothing in the Privy Council case of *Hari Ravji Chiplunkar* v. *Chapurji Hormasji Shet*(1) to overrule the established course of decisions in this Presidency. In that case the plaintiff deliberately brought his suit, not on the prior mortgage, but 'on the new basis' of the decree in which he declared that the prior transactions had 'merged,' and the date of the cause of action was stated to be that of the decree. That decree was in accordance with an award of arbitrators, and that was, no doubt, the reason why the plaintiff was particular to base his suit on the decree not on the mortgages. In fact, as their Lordships remark, "he treated the decree as the mortgage which "he sought to redeem" and they therefore held that he could not in the course of the appeal fall back on the prior mortgage since that "would be making a different case from that which he made "in the Lower Courts, and on which the case had been tried and "decided." In the present case it is not suggested that the plaintiff's case in appeal is not that set up in the Lower Court. His suit was, and is, to redeem the prior mortgages, and this he is undoubtedly entitled to do in accordance with the settled

(1) I.L.R., 10 Bom., 461. (2) I.L.R., 6 Mad., 119. (3) I.L.R., 7 Mad., 423.
(4) I.L.R., 8 Mad., 478. (5) I.L.R., 15 Mad., 366.

course of decisions in this Presidency. Their Lordships refer to the Madras rule without disapproval, merely remarking that the plaintiff could not take advantage of it owing to the form in which his suit had been framed and put forward in the Lower Courts. In the present case the plaintiff no doubt proposed to pay and deposited in Court Rs. 1,339-7-3, the sum due up to July 1892 on the basis of that decree, but he added that he was "ready and willing to pay such further or other sum as may be "found payable to the first defendant." The Subordinate Judge, finding that the order (of the District Court on Civil Miscellaneous Petition No. 107 of 1892, which fixed the sum at Rs. 1,339-7-3) had been set aside by the High Court (Civil Miscellaneous Appeal No. 58 of 1893), gave no effect to it. The decree, however, in Appeal Suit No. 98 of 1880 (in execution of which that order had been made), had never been set aside, and the decision in that suit was held by the Subordinate Judge to be a binding adjudication between the parties as to the matters then properly in issue and finally decided between them. In that suit there was a contest as to the validity of the mortgages (A, B, C and E) now sued on, and the binding character of the debts, and, after due enquiry, it was found that only portions of the mortgages were valid and binding on the zamindari. The Subordinate Judge adopted those findings as *res judicata*, and directed that the mortgage money now due should be calculated accordingly. The first defendant objects to this course, and pleads that if the plaintiff now sues not on that decree, but on the original mortgages, the findings in that suit should be wholly ignored, and there should be an enquiry and decision *de novo* as to the validity and binding character of the mortgage debts. The reason for his urging this is that some of the debts which were then held to be not binding on the zamindari would now, under the law as subsequently explained by the Privy Council in *Sartaj Kuari* v. *Deoraj Kuari*(1), be held to be binding; but we agree with the Subordinate Judge that a change in the law or a different interpretation of it by the appellate authorities cannot operate to re-open matters which had previously become *res judicata*. The former suit, though originally framed as a suit in ejectment, was treated as a suit to redeem the mortgages and was essentially such, as shown by the Subordinate Judge in

(1) I.L.R., 10 All., 272.

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paragraphs 11 to 13 of his judgment. The issues in that suit were :—

(1) In what sum was fourth defendant's father indebted to first defendant's father and what portion if any remains due ?

(2) To what extent, if at all, is the estate liable for the sum so remaining due ?

It would be contrary to all principle to ignore the findings then arrived at finally between the parties by the decision of the High Court. We think, therefore, that the Subordinate Judge was right in accepting that decision not only as declaring the legal relation between the parties, but also as determining on what conditions redemption should be decreed, and the principles on which the accounts should be taken on foot of the mortgages and the sum due thereunder up to the date of that decree.

It remains to briefly notice some minor contentions of the first defendant.

It is contended that, as the plaintiff purchased only seven-eighths of the equity of redemption, he cannot sue for redemption without giving the owner of the remaining one-eighth the option of joining as plaintiff. The plaintiff sues to redeem the whole mortgage, and he is entitled to do so under sections 91 and 95, Transfer of Property Act. By so doing, he puts himself in the place of the mortgagee redeemed, and may himself be redeemed by his co-mortgagor in respect of the proportionate share (*Asansab Ravuthan* v. *Vamana Rau*(1) and *Moidin* v. *Oothumanganni*(2)). In the present case we may add that neither in the Lower Court nor before us did the second and third defendants, who hold the remaining one-eighth share, apply to be joined as plaintiffs. For both reasons the objection fails. Lastly, it is contended that the steps taken by the plaintiff with a view to appeal to the Privy Council against the order in Civil Miscellaneous Appeal No. 58 of 1893 constitute a bar to the present suit under section 12 of the Civil Procedure Code. This plea is invalid for the reasons stated by the Subordinate Judge in paragraph 9 of his judgment.

* * * *

We have now dealt with all the matters urged before us in these appeals. The result is that we confirm the decree of the Subordinate Judge and dismiss these appeals with costs.

(1) I.L.R., 2 Mad., 223. (2) I.L.R., 11 Mad., 416.