

APPELLATE CIVIL.

Before Sir S. Subrahmanya Ayyar, Officiating Chief Justice,
and Mr. Justice Russell.

IKKOTHA (PLAINTIFF), APPELLANT,

v.

CHAKKIAMMA AND SIX OTHERS (DEFENDANTS), RESPONDENTS.*

Transfer of Property Act—Act IV of 1882, s. 99—Mortgage of land—Subsequent sale of equity of redemption in execution of decree in favour of third party—Purchase of equity of redemption by mortgagee—Subsequent suit by mortgagor to redeem—Maintainability.

In 1882, plaintiff's father mortgaged certain immovable property belonging to the tarwad now represented by plaintiff; and, subsequently, the mortgagee purchased the equity of redemption of the lands at a sale which was held in execution of a decree in favour of a third party. Both the mortgage and the sale were binding on the tarwad. Plaintiff now sued to redeem the lands contending that she was entitled to do so inasmuch as the sale of the equity of redemption had not been effected in a suit for sale by the mortgagee on his mortgage :

Held, that plaintiff was not entitled to redeem.

Erusappa Mudaliar v. Commercial and Land Mortgage Bank, Limited, (I.L.R., 23 Mad., 377), not followed.

STRE to recover land. Plaintiff and defendants Nos. 1 to 3 were the sons and daughters, respectively, of one Kittu, deceased. In 1882, Kittu gave a usufructuary mortgage over the land to sixth defendant for Rs. 200, retaining possession of the land as lessee under the mortgagee. Kittu died and, subsequently, a third party caused the land to be sold by auction in execution of a decree in Small Cause Suit No. 235 of 1883, which he had obtained against Kittu. The equity of redemption was purchased by sixth defendant. Plaintiff now sought to redeem the mortgage, on payment to sixth defendant of the Rs. 200. Sixth defendant contended that plaintiff was not entitled to redeem. The other defendants remained *ex parte*, except first defendant, who supported plaintiff's claim. The District Munsif held that the sale in execution of the decree in Small Cause Suit No. 235 of 1883 was binding on plaintiff and dismissed the suit. Plaintiff appealed to the Acting District Judge,

* Second Appeal No. 130 of 1902, presented against the decree of A. Venkataramana Poi, Acting District Judge of South Malabar, in Appeal Suit No. 391 of 1901, confirming the decree of V. Raman Menon, District Munsif of Chowghat, in Original Suit No. 161 of 1900.

who upheld the finding as to the execution sale being binding on plaintiff. He held that plaintiff was not entitled to redeem and dismissed the appeal. IKKOTHA
2.
CHAKKIAMMA.

Plaintiff preferred this second appeal.

J. L. Rosario for appellant.

P. R. Sundara Ayyar for sixth respondent.

JUDGMENT.—We must take it that the mortgage under which the sixth defendant claims as well as the sale of the equity of redemption under the money decree obtained by a third party against the Karnavan, purchased by the sixth defendant are binding on the tarwad now represented by the plaintiff. Nevertheless it is contended on the authority of *Erusappa Mudaliar v. Commercial and Land Mortgage Bank, Limited*(1) that the plaintiff is entitled to redeem inasmuch as the sale of the equity of redemption was not in a suit for sale brought by the sixth defendant on his mortgage. That decision, however, has been dissented from in *Sesha Ayyar v. Krishna Ayyangar*(2) and in *Kuttan Nayar v. Krishnan Mussad*(3). These latter rest on the authority of the Privy Council decision (*Raja Kishendatt Ram v. Raja Mumtaz Ali Khan*(4)), the principle of which is in conflict with the ground on which the decision in *Erusappa Mudaliar v. Commercial and Land Mortgage Bank, Limited*(1) rests.

We cannot, therefore, follow the last decision. The plaintiff is not entitled to redeem.

The second appeal fails and is dismissed with costs.

(1) I.L.R., 23 Mad., 377.

(3) S.A. No. 641 of 1901 (unreported).

(2) I.L.R., 24 Mad., 96.

(4) I.L.R., 5 Calc., 198.