

## APPELLATE CIVIL.

*Before Sir S. Subrahmania Ayyar, Officiating Chief Justice, and  
Mr. Justice Sankaran Nair.*

NANNUVIEN AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

MUTHUSAMI DIKSHADAR AND OTHERS (DEFENDANTS

Nos. 1, 2, 4 AND 5 AND LEGAL REPRESENTATIVES

OF THIRD DEFENDANTS), RESPONDENTS \*

1905  
August  
16, 29.

*Transfer of Property Act IV of 1892, s. 99—Not merely declaratory of old law—  
Purchase by mortgagee of equity of redemption in execution of decree not  
based on mortgage—Effect of on the rights of sons of mortgagor.*

Section 99 of the Transfer of Property Act is not merely declaratory of what was accepted and enforced as law before the passing of the Act and effect ought not to be given to the new restrictions imposed by that section so as to give them retrospective operation.

*Muthuraman Chetty v. Ettappasami*, (I.L.R., 22 Mad., 372), distinguished.

When the mortgagee, at a Court-sale perfected before the passing of the Act, and brought about in respect of a claim independent of the mortgage, purchases the right of redemption in the mortgaged property, such purchase passes to him the whole interest as effectually against the sons of the judgment-debtor as against the judgment-debtor himself and the sons cannot sue to redeem the property so sold, or their share therein.

THE plaintiffs and defendants Nos. 4 and 5 formed an undivided family, the plaintiffs and the fifth defendant being the sons of the fourth defendant. The lands in dispute were mortgaged in 1855 by the fourth defendant to the deceased father of defendants Nos. 1 and 2. Subsequently the father of defendants Nos. 1 and 2 sued the fourth defendant on a claim independent of the mortgage in Original Suit No. 98 of 1866, and in execution of the money decree in such suit attached item I of the plaint properties and purchased the right of redemption at Court-sale in November 1870.

Similarly item II was brought to sale in execution of a money decree against the fourth defendant in favour of the uncle of the third defendant and purchased by the third defendant's brother in August 1870.

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\* Second Appeal No. 731 of 1903, presented against the decree of F. D. P. Oldfield, Esq., District Judge of Tanjore, in Appeal Suit No. 1000 of 1901, presented against the decree of M.R. Ry. A. N. Annantarama Ayyar, District Munsif of Mannargudi, in Original Suit No. 286 of 1900.

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The third defendant is impleaded as being in possession of item No. 2.

The plaintiffs alleging that the two Court-sales were void sued to redeem the lands on payment of the mortgage amount.

The suit was dismissed by the Court of first instance and by the lower Appellate Court.

Plaintiffs preferred this second appeal.

*V. Krishnaswami Ayyar* for appellants.

The Hon. Mr. *P. S. Sivaswami Ayyar* for first respondent.

JUDGMENT.—A usufructuary mortgage for two years of two plots of land, items Nos. 1 and 2 of the plaint schedule, for Rs. 170, was made in 1855 by the present fourth defendant, the father of the plaintiffs, to the deceased father of defendants Nos. 1 and 2. In execution of a money decree obtained by the father of defendants Nos. 1 and 2 in respect of a claim against the fourth defendant arising independently of the mortgage, the fourth defendant's equity of redemption in item No. 1 was brought to sale and purchased by the father of defendants Nos. 1 and 2 in 1878. The equity of redemption in item No. 2 was sold in execution of another decree against the fourth defendant, obtained by the third defendant's uncle and was purchased by the third defendant's undivided brother. The third defendant redeemed item No. 2 from defendants Nos. 1 and 2 on payment of what was decided in the suit brought by him for the redemption to be the amount properly chargeable on that item out of the mortgage amount of Rs. 170. The plaintiff's present claim to redeem both items was dismissed by the lower Courts. As regards item No. 2 the appeal has not been pressed.

As regards item No. 1 it was urged for the appellants that they were entitled to redeem their share, at least of that item, with reference to the decisions in *Muthuraman Chetti v. Ettappasami*(1) and *Martand Balkrishna Bhat v. Dhando Damodar Kulkarni*(2). The former rests entirely upon the ground that the sale under which the purchaser claimed in that case was one brought about by the purchaser in violation of the provisions of section 99 of the Transfer of Property Act. That section is not merely declaratory of what was previously accepted and enforced as law. Though the necessity for such an enactment was occa-

(1) I.L.R., 22 Mad., 372.

(2) I.L.R., 22 Bom., 624.

sioned among other causes by the practice of mortgagees bringing the properties which formed the subject of their mortgages to sale without actual decrees for sale, yet the obligation or restriction imposed by the section was strictly new. Consequently to follow *Muthuraman Chetti v. Ettappasami*(1) in cases like the present would virtually be to give a retrospective operation to section 99 of the Transfer of Property Act. Even assuming that the principle of the section is itself one to which a mortgagee may, as a matter of equity, be subjected apart from any statutory provisions, as apparently was the view taken in *Martand Balkrishna Bhat v. Dhandu Damodar Kulkarni*(2), still, it is clear, we ought not to extend it to cases like the present inasmuch as the purchase of a mortgagor's right of redemption by the mortgagee at a Court-sale brought about by the latter in respect of a claim independent of the mortgage was, prior to the passing of the Transfer of Property Act, so far as we know understood in this Presidency to pass to the purchaser, the whole interest as effectually against the sons of the judgment-debtor as against the judgment-debtor himself. Our attention has not been drawn to any decision to the contrary, and we have no hesitation in saying that we would be unsettling innumerable well-established titles if, as urged on behalf of the appellant, we were to attach to judicial sales perfected before the Transfer of Property Act came into force the consequences which may rightly be annexed to a breach of the provisions of section 99 of that Act in proceedings governed thereby.

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The second appeal is dismissed with costs.

(1) I.L.R., 22 Mad., 372.

(2) I.L.R., 22 Bom., 624.