third share in the present suit [*Jagat Narain* v. *Qutub Husain*(1) and *Chagandas* v. *Gansing*(2)]. And, so long as the equities in the matter of contribution as between these parties are thus unaffected by the act of the plaintiff, the latter's right to be paid the whole of his debt from whatever portion of the mortgaged properties he wishes to comprise in his suit cannot be questioned.

The decision of the Subordinate Judge is therefore right and the appeal is dismissed with costs.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Moore.

1905. October 26, 30. December 5.

KOYYANA CHITTEMMA AND ANOTHER (DEFENDANTS NOS. 2 AND 3), APPELLANTS,

v.

DOOSY GAVARAMMA AND OTHERS (PLAINTIFFS NOS. 1 AND 2, FOURTH DEFENDANT, LEGAL REPRESENTATIVES OF THE DECEASED, FIRST RESPONDENT), RESPONDENTS.*

Civil Procedure Code Act XIV of 1882, *ss.* 13, 283—*Order 'in investigation' under Section* 283, *what is—Payment of decree amount more than one year after order, effect of—Decision on question of mixed law and fact* res judicata—*Voluntary payments not recoverable.*

A claim to attached property by A was dismissed by the following order:—"The sale seems collusive. Claim rejected." The order was apparently made on a consideration of the sale deed alone and there was nothing to show that any evidence was gone into. More than a year after the order B, claiming the properties under a sale by A subsequent to the order, paid the decree amount and the attachment was raised. In a suit by A to redeem the lands on the strength of his title under the sale dealt with by the order:

Held, that as the order on the claim by A, purported to be made on the merits, it was valid as one made after an 'investigation' of the claim within the meaning of the word as used in the Code.

Held further, that the order was conclusive between A and the defendants and that the payment of the decree debt by B, having been made more than a

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(1) I.L.R., 2 All., 807. (2) I.L.R., 20 Bom., 615.

* Second Appeal No. 1008 of 1903, presented against the decree of E. B. Elwin, Esq., District Judge of Ganjam, in Appeal Suit No. 199 of 1902, presented against the decree of M.R.Ry. P. Lakshmenarasu, District Munsif of Chicacole, in Original Suit No. 45 of 1901.

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year after the date of the order did not relieve A from the obligation to bring a suit within a year to set aside the order.

A judgment in a previous suit between the same parties not based on a misapprehension as to a general rule of law but deciding a question of mixed law and fact is binding as *res judicata* in a subsequent suit.

Sardhari Lal v. *Ambika Pershad*, (I.L.R., 15 Calc., 521), followed.

Umesh Chunder Roy v. *Raj Bullubh Sen*, (I.L.R., 8 Calc., 279), distinguished.

Krishna Prosad Roy v. *Bipin Behary Roy*, (I.L.R., 31 Calc., 228), distinguished.

Gopal Purshotam v. *Bai Divali*, (I.L.R., 18 Bom., 241), distinguished.

Parthasaradi v. *Chinna Krishna*, (I.L.R., 5 Mad., 304, at p. 309), distinguished.

THE facts necessary for this report are fully set out in the judgment.

P. R. Sundara Ayyar and *R. Kuppuswami Ayyar* for *V. Ramesam* for appellants.

K. Srinivasa Ayyangar for *V. Krishnasawmi Ayyar* for second and fourth respondents.

K. S. Ramaswami Sastry for *S. Gopalasawmi Ayyangar* for third respondent.

P. Nagabhushanam for sixth and seventh respondents.

JUDGMENT.—For the purposes of the questions we have to consider in this appeal, the material facts are as follow :—

In July 1890 the father of the plaintiffs mortgaged certain lands to certain parties whose interest is now vested in the defendants. In July 1895 the father executed and registered a sale deed by which he purported to sell the lands in question to the plaintiffs, the lands being in possession of the defendants under the mortgage of July 1890 In Original Suit No. 407 of 1895, a suit against the father, the lands were attached. The plaintiffs preferred a claim to the attached property. This claim was rejected by an order dated the 22nd February 1896 made under section 283 of the Code of Civil Procedure. In July 1898 the father purported to sell the lands to the defendants. In October 1898 when the property was put up for sale in execution of the decree in Original Suit No. 407 of 1895, the late first defendant paid off the amount due under the decree and the attachment was raised.

The present suit is a suit by the plaintiffs to redeem the lands in question.

The Court of First Instance held that the plaintiff's claim was barred by article 11 of the second schedule to the Limitation Act, the plaintiffs not having brought a suit to establish their right to the property in dispute within one year from the date of the order made under section 283 of the Code of Civil Procedure. The Lower Appellate Court was of opinion that the claim was not

barred inasmuch as there had been no "investigation" of the plaintiff's claim within the meaning of that word as used in the Code. We do not think the judgment of the Lower Appellate Court can be supported upon the ground that there has been no "investigation" of the plaintiff's claim. The actual order was "The sale seems to be collusive. Claim rejected." The District Judge observes: "The sale in question was one by a father to his daughters and the Munsif may have thought from a glance at the sale deed that it was probably collusive."

Assuming this to have been so, we think it must be taken that there was an "investigation" within the meaning of this word used in the sections.

It is not possible to define the amount of inquiry which constitutes an "investigation." If the order purports to deal with the claim on the merits, we think it must be taken that there has been an investigation.

In the case of *Sardhari Lal* v. *Ambika Pershad*(1) the Privy Council observe: ". . . The Code does not prescribe the extent to which the investigation should go; and though in some cases it may be very proper that there should be as full an investigation as if a suit were instituted for the very purpose of trying the question, in other cases it may also be the most prudent and proper course to deliver an opinion on such facts as are before the Subordinate Judge at the time, leaving the aggrieved party to bring the suit which the law allows to him."

In the case of *Munisami Reddi* v. *Arunachala Reddi*(2) in which the Court held there has been no investigation and consequently no order within the meaning of the section, the claim was "practically withdrawn." In the case of *Pullamma* v. *Pradosham*(3) the order was "there is nothing to show that the petitioner's lands have been attached," and it was held there was no order within the meaning of the section. In that case the Court held, in effect, that there was no occasion to investigate since there was nothing to show the lands had been attached. There does not appear to be any case in which an order which purports to be an adjudication on the merits of the case has been held to be not an order made after investigation within the meaning of the section.

(1) I.L.R., 15 Calc., 521. (2) I.L.R., 16 Mad., 265.
(3) I.L.R., 18 Mad., 316.

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It was argued on behalf of the respondents that the decree of the Lower Appellate Court could be upheld upon the ground that the property not having been sold in execution of the decree, and the decree having been satisfied, the order was not conclusive as between the plaintiffs and the defendants. The argument was that the decree having been eventually satisfied there was no reason for the plaintiffs to bring a suit, and the fact that it was not satisfied until after the expiration of a year from the date of the order was immaterial. The contention was that the order was only conclusive against the plaintiffs, if they failed to bring a suit so as to bar them from denying the right of the judgment-creditor to sell the land which he had attached and the right of a purchaser claiming under a sale in execution proceedings. The respondents relied on the observation in the judgment in the case of *Umesh Chunder Roy* v. *Raj Bullubh Sen*(1); observation is as follows :—

"The finding of the Court in the execution department that the sale was invalid, only meant that the sale was invalid as against the judgment-creditor, and as against any purchaser who might purchase at a sale held in execution following that attachment. When the judgment creditor was paid off, he had no further claim."

This observation must, of course, be read by the light of the facts of the case with which the learned Judges were dealing *secundum subjectam materiam*. The facts in that case are distinguishable from those in the present case first, on the ground that in the Calcutta case the decree amount was paid off by the judgment-debtor in the suit in which the decree was obtained and not, as in the case before us, by a third party to whom the lands were subsequently conveyed. Further there is nothing to show that in the Calcutta case the payment off was not made within a year from the date of the order dismissing the claim.

Our attention was called to other cases where an order under section 283 of the Code of Civil Procedure dismissing a claim has been held to be not conclusive against the claimant. It seems to us that all these cases are distinguishable.

In the case of *Krishna Prosad Roy* v. *Bipin Behary Roy* (2) certain lands of which the plaintiff was in possession were attached under a decree. He preferred a claim in the execution proceedings

(1) I.L.R., 8 Calc., 279. (2) I.L.R., 31 Calc., 228.

under section 278 and the claim was dismissed by an order under section 283 of the Code of Civil Procedure. He at once paid off the decree amount and the attachment was raised. It was held that when the attachment was removed after the payment of the decretal amount there was no longer any attachment or proceeding in execution in which the order could operate to the prejudice of the plaintiff, and therefore there was no necessity for him to bring a suit to set aside the order. In that case the plaintiff by his own act, within a year from the making of the order, got the attachment removed. This being so, he could not be held to be under any obligation to bring a suit to secure the object which he had already secured by paying off the amount of the decree. The principle of that decision is not applicable to the present case. In the case of *Ibrahimbhai* v. *Kabulabhai*(1) the amount of the decree was paid off by the judgment-debtor In the case of *Gopal Purushottam* v. *Bai Divali*(2) the attachment was removed by the act of the judgment-creditor who was the plaintiff in the suit. Having removed the attachment by his own act, he could not be heard to say as against the claimant—(the defendant in the suit)—because you did not bring a suit when your claim was dismissed you are concluded from setting up a title as against me.

In the three cases just referred to, it is clear that the decree amount was paid off within a year from the making of the order under section 283 of the Code of Civil Procedure. In the first case *Umesh Chunder Roy* v. *Raj Bullabh Sen*(3) the report does not state when the decree amount was paid off, though there is nothing to suggest it was paid off more than a year after the making of the order. In all the cases the decree was paid off by a party to the execution proceedings—not as in the case before us, by a third party. It is not necessary for us to decide whether the fact of the money having been paid off by a third party, would be a good ground for distinguishing the present case from the cases to which we have referred. We are of opinion, however, that the payment off not having been made within a year after the date of the order, the order is conclusive as between the claimants (the plaintiffs) and the defendants. To hold otherwise would lead to uncertainty of title and would be inconsistent with

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(1) I.L.R., 13 Bom., 72. (2) I.L.R., 18 Bom., 241.
(3) I.L.R., 8 Calc., 279.

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the policy of the legislature in prescribing a short period of limitation for suits by parties against whom an order has been made in claim proceedings. To hold that the right of an unsuccessful claimant to bring a suit remains in a state of suspended animation for an indefinite period after the expiration of a year from the date of the order against him liable to be revived at any moment by the payment off of the amount of the decree, would lead to great inconvenience. On the facts of the case we are of opinion that the order under section 283 was conclusive as between the plaintiffs and the defendants, and the order of the lower Appellate Court cannot be supported on the ground that it was not.

There remains the question of *res judicata*. If the plaintiffs' claim in the present suit is *res judicata* we are of course precluded from giving effect to the view indicated above and we must dismiss the appeal. The respondents (plaintiffs) say that their claim in the present suit is *res judicata* by reason of the decree in Original Suit No. 39 of 1899. As regards this question, the view of the District Judge was that the claim in the present suit was *res judicata* in the plaintiffs' favour but he did not discuss the question at any length as it was unnecessary for him to go into it since he allowed the appeal on other grounds. The parties to Original Suit No. 39 of 1899 were the present plaintiffs and the present first and second defendants. The first defendant is dead. The present third defendant is the adopted son and the present fourth defendant is a party who claims as alienee from the third defendant. For the purpose of the question of *res judicata* we are of opinion that the parties are the same. In Original Suit No. 39 of 1899 the plaintiffs obtained a decree for redemption of plaint items Nos. 1 and 2 in that suit. As regards items Nos. 3 to 5 in that suit, the suit was dismissed on the ground that on the construction of the mortgage deed the plaintiffs were not entitled to redeem these lands before the 18th July 1900. Items Nos. 3 to 5 in the suit of 1899 are the items which the plaintiffs seek to redeem in the present case. The appellants contend that the decree in Original Suit No. 39 of 1899 does not operate as *res judicata* since it is an erroneous decision on a point of law, they rely on the judgment of this Court in the case of *Parthasaradi v. Chinna Krishna*(1). It seems to us that that case may be

(1) I.L.R., 5 Mad., 304 at p. 309.

distinguished on the ground that the parties were not the same in the two suits ; but, however this may be, the judgment in that case appears to have proceeded on the ground that the decree relied on as *res judicata* was based on a misapprehension as to a general rule of law.

In giving the plaintiffs a decree in Original Suit No. 39 of 1899 as regards items Nos. 1 and 2 of the lands in question we do not think it can be said that the District Munsif was under any misapprehension as to any general rule of law applicable to the case. The question he had to determine was a question of mixed law and fact [as in the case of *Priya Choudhurani* v. *Bhaba Sundari Debi*(1)]. The question was, on the facts, whether there had been an "investigation" within the meaning of the word as used in section 283 of the Code of Civil Procedure. He was of opinion that there had not been and because he was of this opinion he gave a decree for the plaintiffs. The investigation was with reference to the lands amongst others which the plaintiffs seek to redeem in the present suit. We are of opinion that the question of the plaintiffs' right to redeem the lands which they seek to redeem in the present suit is *res judicata* by reason of the decree in Original Suit No. 39 of 1899.

The appellants have contended that if the respondents are entitled to redeem the lands in question they can only do so on payment, in addition to the amount due under the mortgage, of a sum of Rs. 187-15-7. This was a sum paid by the appellants (defendants) in order to raise the attachment in Original Suit No. 407 of 1895. This payment was made by the defendants after the alleged sale to them and it was made for the purpose of clearing their title under the sale deed to them. It was a voluntary payment and was not made on behalf of or for the benefit of the plaintiffs. We are of opinion that the plaintiffs cannot be called upon to pay this amount in their suit to redeem. We dismiss the appeal but without costs.

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(1) I.L.R., 28 Calc., 318.