

made previously by the plaintiff to the defendant. This the District Munsif has found to be the fact but the District Judge has reversed the decree of the District Munsif without considering the facts on the ground that the case is on all fours with *Pothi Reddi v. Velayudasivan*(1).

YARLA-
GADDA
VERRA
RAGAVAYYA
v.
GORANTLA
RAMAYYA.

No facts are found which in our opinion make the case identical with *Pothi Reddi v. Velayudasivan*(1). We therefore set aside the decree of the District Judge and remand the appeal to the lower Appellate Court for disposal according to law.

Costs will abide and follow the event.

APPELLATE CIVIL.

*Before Sir S. Subrahminia Ayyar, Officiating Chief Justice,
and Mr. Justice Boddam.*

MANJAPPA ROI (FIFTH DEFENDANT), APPELLANT,

1905
July 24

v.

KRISHNAYYA (PLAINTIFF), RESPONDENT.*

Transfer of Property Act IV of 1922, s. 43—Mortgagor acquiring the mortgaged property cannot use the mortgage right as a shield against subsequent mortgages executed by himself.

The doctrine that a person paying off a mortgage or purchasing the mortgage property in execution of a decree on the mortgage can set up such mortgage as a shield against puisne incumbrancers will not, on the principle embodied in section 43 of the Transfer of Property Act, apply when the person so paying or purchasing is the mortgagor himself. The effect of the payment or purchase in such cases so far as the mortgagor and those claiming under him are concerned will be simply to extinguish the mortgage, and the rights of subsequent incumbrancers will be determined as if such prior mortgage never existed.

SUIT by the plaintiff to recover the amount due on a mortgage bond executed by the first defendant in 1882 and assigned to him by the mortgagee in 1893. Defendants Nos. 1 to 4 were undivided brothers and the first defendant was the manager. The

(1) I L.R., 10 Mad., 94.

* Second Appeal No. 508 of 1903, presented against the decree of L. G. Moore, Esq., District Judge of South Canara, in Appeal Suit No. 303 of 1901, presented against the decree of M.R.Ry. T. V. Anantan Nair, District Munsif of Mangalore in Original Suit No. 254 of 1900.

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fifth defendant was in possession under a mortgage executed by defendants Nos. 1 to 4 in 1891.

The properties forming the subject-matter of the suit were mortgaged in 1877 by the first defendant to one Appayya. On that mortgage a suit was instituted and a decree for sale passed in 1879. The property was sold in 1889 and was purchased by one Ganapa and was ultimately purchased by defendants Nos. 1 to 4 in 1891.

The fifth defendant contended that he was the assignee of a purchaser on the footing of a mortgage prior to that of the plaintiff. The sixth defendant held a mortgage on the same properties dated 1884.

The District Munsif passed a decree in favour of the plaintiff directing a sale of the mortgaged properties subject to the prior mortgage of 1877 and the rights under such mortgage. The fifth defendant appealed to the District Court on the ground that the Munsif having decided that the mortgage of 1877 and all rights created under it were valid, ought not to have directed a sale of the property.

The District Judge dismissed the appeal. The fifth defendant preferred this second appeal.

K Narayana Rau for appellants.

K. P. Madhava Rau and *A. Srinivasa Poi* for respondents.

JUDGMENT.—We are unable to agree with the lower Courts that the fifth defendant had no *locus standi* if, as contended by him, he has any rights as assignee of the mortgage interests purported to be created by exhibits IV and V. No doubt the mortgages relied on by the plaintiff and the fifth defendant were executed after a decree had been obtained against the mortgagor under a previous mortgage of 1877. No doubt also that a sale took place under that decree and the mortgaged property was purchased by the mortgagee at such sale, but the right acquired by such purchase has eventually devolved upon the mortgagor. On the principle embodied in section 43 of the Transfer of Property Act the mortgagor cannot use this subsequently-acquired interest to invalidate his own mortgages to the plaintiff or the mortgages under exhibits IV and V if they really created mortgage rights, and the fifth defendant as claiming through the mortgagor would be equally precluded from raising any question as to the validity of the plaintiff's mortgage. As the result of what has happened the sale of the mortgaged property should be on the footing that the

mortgage of 1877 is now existent if the fifth defendant establishes any rights under exhibits IV and V.

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T.
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AYYA.

The decree therefore in directing that the sale should be subject to the mortgage which, as stated above, had already ceased to exist is wrong. The decree is therefore set aside and the suit remanded to the Court of First Instance for fresh disposal after due enquiry into the alleged rights of the several claimants, viz., the plaintiff and the fifth and sixth defendants.

Costs in this and in the lower Appellate Court will be provided for in the revised decree.

APPELLATE CIVIL.

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

KRISHNA AYYANGAR AND OTHERS (PLAINTIFF AND
HIS LEGAL REPRESENTATIVES), APPELLANTS,

1905
August
18, 29.

v.

VENKATARAMA AYYANGAR AND ANOTHER (DEFENDANTS),
RESPONDENTS.*

Hindu Law—Succession—Bandhus—Father's sister's daughter's son entitled in preference to paternal grandfather's sister's son.

It is a cardinal principle of Hindu Law that the nearer line excludes the more remote and the ground of distinction in favour of a party who is able to trace his descent with less intervention of females will not apply where he competes with one of a nearer line. The father's sister's daughter's son, being an *atmabandhu*, is entitled to succeed in preference to the paternal grandfather's sister's son—a *pitirbandhu*.

Balasami Pandithar v. Narayana Rau, (I.L.R., 20 Mad., 342), referred to.

SUIT by the plaintiff to recover properties as the nearest reversioner of the last male holder.

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

A. S. Balasubrahmania Ayyar for second to sixth appellants.

R. Sivarama Ayyar for respondents.

* Second appeal No. 745 of 1903, presented against the decree of M.R.Ry. S. Dorasami Ayyangar, Subordinate Judge of Tinnevely in Appeal Suit No. 203 of 1902, presented against the decrees of M.R.Ry. M.R. Narayanasami Ayyar, District Munsif of Ambasamudram, in Original Suit No. 601 of 1901.