

## APPELLATE CIVIL.

*Before Mr. Justice Munro and Mr. Justice Abdur Rahim.*

1908  
September  
3, 7.

RADHAKRISHNA IYER AND OTHERS (PLAINTIFFS),

APPELLANTS,

v.

MUTHUSAWMY SHOLAGAN AND OTHERS (DEFENDANTS),  
RESPONDENTS.\*

*Mortgage, decree, form of—Decree for sale subject to prior usufructuary mortgage of plaintiff.*

A person having a usufructuary and two subsequent simple mortgages on the same property is entitled in a suit on the two latter mortgages to a decree for sale of the property subject to the prior usufructuary mortgage.

SUIT to recover money on two simple mortgage bonds. Prior to the execution of these mortgages the properties mortgaged had been usufructuarily mortgaged to plaintiffs. The plaintiffs prayed for sale subject to the first mortgage.

Both the lower Courts held that they were not entitled to such a decree.

The plaintiffs appealed to the High Court.

The Hon. The Advocate-General for appellants.

*B. Panchapagesa Sastriar* for seventh respondent.

JUDGMENT.—Certain property was usufructuarily mortgaged to the plaintiffs in 1890. The plaintiffs subsequently got two other mortgages on the same property. They brought the present suit on the two subsequent mortgages and asked for sale subject to their prior usufructuary mortgage. Both the Courts below held that the suit was not maintainable. That in a case like the present, the plaintiff could have a decree for sale on the subsequent mortgages, free of the prior mortgage, is clear from *Rengasami Nadan v. Subbaraya Iyer*(1). The plaintiffs are willing to accept such a decree if the decree they asked for cannot be granted. But we see no good reason why there should not be a decree for sale subject to the prior mortgage, and there is direct authority for

\* Second Appeal No. 1039 of 1905, presented against the decree of F. D. P. Oldfield, Esq., District Judge of Tanjore, in Appeal Suit No 962 of 1904, presented against the decree of M. R. Ry. C. G. Kuppusawmy Aiyar, Subordinate Judge of Tanjore, in Original Suit No. 23 of 1904.

granting such a decree in *Ram Shankar Lal v. Ganesh Prasad* (1). We therefore reverse the decree of the District Judge and remand the appeal for disposal on the merits. Costs will abide the result.

RADHA-  
KRISHNA IYER  
v.  
MUTHUSAWMY  
SHOLAGAN.

## APPELLATE CIVIL.

*Before Mr. Justice Munro and Mr. Justice Pinhey.*

SOMASUNDARUM CHETTY (PLAINTIFF), APPELLANT,

v.

VADIVELU PILLAI (DEFENDANT AND HIS LEGAL REPRESENTATIVE), RESPONDENT.\*

1908  
September  
24.  
October 7.

*Pleadings - Declaratory decree—Suit on title - No relief on the ground of adverse possession.*

A declaration cannot be given on a title neither stated in the plaint nor raised on the issues. A plaintiff who comes into Court alleging title without more, cannot be allowed to succeed on the basis of title by adverse possession.

SUIT for a declaration of title to property under a sale-deed executed in favour of plaintiff in 1890. The plaintiff, having failed to establish the sale to him, tried to obtain a declaration of his right to the suit property on the strength of his possession for more than twelve years. Both the lower Courts refused to grant him a declaration on his adverse title.

The plaintiff appealed to the High Court.

*K. Ramachendra Ayyar* for appellant.

The respondent was not represented.

JUDGMENT.—We think that the District Judge, having found that the sale set up by the plaintiff was not true, was justified in refusing to give the plaintiff a declaration of his right to enjoy the suit property on the strength of possession for more than twelve years. It is argued that the District Judge has misconstrued the plaint. We do not think he has. In the plaint the plaintiff alleges that he bought the property in 1890, and that he

(1) I. L. R., 29 All., 385.

\* Second Appeal No. 161 of 1906, presented against the decree of H. Woberly, Esq., District Judge of Tanjore, in Appeal Suit No. 114 of 1905, presented against the decree of M. R. Ry. G. Kolhandaramannjulu Naidu District Munsif of Kumbakonam, in Original Suit No. 233 of 1904.