

going to refer to." The learned Judge adjudicates upon this very question in his order, although it is true that the actual words of his final order are "That however does not interfere with the finding to which I now come, that Palaniappa Chetti is in possession of the property mortgaged to him by exhibit C." I think that must be taken as an adjudication upon the question as to whether he was in possession, as the party entitled to possession, that is to say, in possession by reason of the mortgage which he set up as the basis of his claim. I think, therefore, the points which have been taken by the appellant fail

As regards the merits Mr. Anantakrishna Ayyar did not think it necessary to contest the findings of the lower Court.

The result would be that the appeal is dismissed with costs.

AYLING, J.—I agree.

WHITE, C.J.,
AND
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CHETTY.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Abdur Rahim.

KOVVURI BASIVI REDDI AND ANOTHER (PLAINTIFFS), APPELLANTS, .

1910.
October 21.

v.

TALLAPRAGADA NAGAMMA *alias* BHUSHAMMA AND
OTHERS (DEFENDANTS), RESPONDENTS.*

Civil Procedure Code, Act XIV of 1882, s. 28—Test for misjoinder—No misjoinder where claims against several defendants in respect of same matter—Limitation Act, sch. II, art. 62—Suit to recover purchase money where sale ab initio void governed by art. 62.

A suit to recover the consideration paid for a sale, which is *ab initio* void is governed by article 62 of schedule II of the Limitation Act and must be brought within three years from the date when the purchase-money was paid.

Hanuman Kamat v. Hanuman Mandur, [(1892) I.L.R. 19 Calc., 123], followed.

Krishnan Nambiar v. Kannan, [(1898) I.L.R., 21 Mad., 8], not followed.

A purchased some land from B and paid the purchase-money. On proceeding to take possession, he was obstructed by C and he got a sale-deed from C paying consideration for the sale. When the second sale was concluded, D undertook to get back the purchase-money from B, which was not done.

A who had paid the purchase money twice brought a suit against B, C, and D to recover from B the amount paid to him, if he should be found not to be the owner or in the alternative, if B should be the true owner, to recover from C and D the amount paid for the second sale:

* Second Appeal No. 1503 of 1909.

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 NAGANMA.

Held, that the suit was not bad for misjoinder.

Section 28 of the Civil Procedure Code authorises the joinder in one suit of several defendants where the relief claimed is sought in the same matter, although the causes of action against them may be different.

Aiyathurai Rowthen v. Santem Meera Rowthen, [(1908) I. L. R., 31 Mad., 252], followed.

SECOND APPEAL against the decree of T. Gopalakrishna Pillai, Subordinate Judge, Kistna at Ellore, in Appeal Suit No. 167 of 1908, presented against the decree of S. Nilakantam Pantulu, District Munsif of Tanuku, in Original Suit No. 9 of 1908.

Suit to recover Rs. 507-8-0 being the amount of sale of one acre of land bearing D No. 3 and situated in the village of Nidadavole with interest thereon paid by first plaintiff to defendants Nos. 2 to 5 under a sale-deed, dated 10th June 1902, executed by the defendants Nos. 2 to 4 in favour of second plaintiff, the fifth defendant having failed as promised to take the necessary steps at his own costs on first plaintiff's behalf to recover back the amount paid by him (first plaintiff) to first defendant in respect of the same land under another prior registered sale-deed, dated 6th December 1901, executed by the latter in favour of the former; or in the alternative in case the defendants Nos. 2 to 5 establish their right to the said land to recover the amount from the first defendant.

The first defendant and defendants Nos. 2 and 3 are sisters. The land in question admittedly belonged to their father. The first plaintiff first obtained a sale-deed in respect of it from the first defendant. He is the owner of a rice mill at Nidadavole and he stood in need of the suit land to erect a factory thereon and he, therefore, purchased the same from the first defendant under the registered sale deed, dated 6th December 1901. He got possession of the land and when constructing a factory thereon the defendants Nos. 2 and 3 began to raise objections. He then obtained a fresh sale-deed from them in respect of the same property.

Both the lower Courts held that the suit against first defendant was barred as the sale by first defendant was on 6th December 1901 and the plaint was presented only on 13th June 1905.

The suit was also held by both the lower Courts to be bad on the ground of misjoinder of parties and causes of action and was dismissed.

Plaintiffs appealed.

P. Narayanamurti for appellants.

T. Prakasam for second to fifth respondents.

A. Ramachandra Ayyar for first respondent.

BENSON AND
ABDUR
RAHIM, JJ.
—
KOVVURI
BASVI
REDDI
—
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JUDGMENT.—We agree with the Subordinate Judge that the plaintiff's claim as against the first defendant is barred. The Privy Council case of *Hanuman Kamat v. Hanuman Mandur* (1) makes it clear that the article of the Limitation Act applicable is article 62 of the second schedule and the period of limitation is three years from the date when the first defendant received the purchase money. The present suit was not brought within three years from that date. The appellant's pleader relies on the case of *Krishnan Nambiar v. Kannan* (2) but in that case no reference was made to (1). It appears to have been assumed that either article 115 or 116 applied, and the only question discussed was as to which of these two articles was applicable. Article 62 was not referred to at all.

The Second Appeal therefore must be dismissed with costs so far as the first defendant is concerned.

But we think that there is no ground for holding, as the Courts below have held, that the suit is bad as against all the defendants on account of misjoinder of defendants and causes of action. Section 28, Civil Procedure Code, allows all persons to be joined together as defendants against whom the right to any relief is alleged to exist whether jointly, severally, or in the alternative, in respect of the same matter. In the present suit there is but one relief claimed against all the defendants, viz., the repayment of the purchase money paid twice over, and it is claimed in respect of the same matter, viz., the transaction or series of transactions by which the plaintiff has, wrongfully, as he alleges, been obliged to pay twice over for the same land. The Courts below have not at all referred to that section. For the respondents Nos. 2 to 5 it is argued that section 28 does not apply because the cause of action against defendants Nos. 2 to 4 is not the same as the cause of action against the fifth defendant. The test as to whether section 28 of the Civil Procedure Code applies is not whether the causes of action against the

(1) (1892) I. L. R., 19 Calc., 123.

(2) (1898) I. L. R., 21 Mad., 8.

(3) I. L. R. 19 Calc., 123.

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several defendants are the same, but whether the relief is sought in the same matter (*Aiyathauri Ravuthan v. Santhu Meera Ravuthan* (1)).

Applying this test, we are of opinion that section 28 authorises the present suit.

We therefore set aside the decrees of the Courts below as regards defendants Nos. 2 to 5, and remand the suit as against them to the District Munsif for disposal according to law. Costs hitherto incurred will abide the result.

APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Boddam.

KUTTISSERI ILLATH RAMAN NAMBOODRI (PLAINTIFF),
APPELLANT,

v.

ACHUTHA PISHURODI AND OTHERS (DEFENDANTS NOS. 1 to 4,
6 AND 7) RESPONDENTS.*

Mortgage—Right of assignee of mortgagor to redeem first mortgage after a decree for redemption obtained by a puisne mortgagee had become inoperative.

A mortgaged certain properties to B and afterwards mortgaged the same with other properties to C. C. obtained a decree for redemption against B, but the decree was allowed to become inoperative by not being executed. D obtained an assignment of the right of A in the mortgaged properties and also the rights of C therein.

A sued to redeem the mortgage in favour of B.

Held that although the suit by D as the assignee of C was not maintainable still it was competent to him as assignee of A to bring the suit after the decree obtained by C had become inoperative.

SECOND APPEAL against the decree of N. S. Brodie, District Judge of South Malabar, in Appeal Suit No. 726 of 1901, presented against the decree of V. Kelu Eradi, District Munsif, of Kutnad, in Original Suit No. 69 of 1910.

(1) (1908) I. L. R., 31 Mad., 252.

* Second Appeal No. 1219 of 1902 (directed to be reported by Munro and Abdur Rahim, JJ., on 10th March 1911).