

## APPELLATE CIVIL.

*Before Mr. Justice Benson and Mr. Justice Moore.*

RANGASAMY NAIKEN (PLAINTIFF), APPELLANT,

*v.*

JELLI BODI NAIKEN BY HIS MOTHER AND GUARDIAN KOMAR-AMMAL AND TWO OTHERS (DEFENDANTS), RESPONDENTS.\*

*Mortgage—Suit by first mortgagee on mortgage—Failure to join subsequent mortgagee—Decree—Sale in execution of decree—Purchase by first mortgagee of mortgagor's undivided interest in mortgaged property—Subsequent suit for partition and possession—Right of second mortgagee to redeem.*

In 1886, two defendants mortgaged certain property to plaintiff. In 1891, the same defendants executed a second mortgage over the same property in favour of the present third defendant. In 1894, plaintiff brought a suit on his mortgage document against the mortgagors, but he omitted to make the present third defendant a party, though the latter was in possession, at the time, as mortgagee under his document of 1891. Plaintiff obtained a decree and the undivided share of first defendant in the mortgaged property was sold at a Court auction, and was purchased by plaintiff, who now brought the present suit for partition and for the recovery of first defendant's share. Third defendant contended that he was entitled to redeem plaintiff:

*Held*, that plaintiff was not entitled to obtain possession without paying off the third defendant (second mortgagee), and it was immaterial whether plaintiff's failure to join the second mortgagee as a party to the previous suit was wilful or due to ignorance of the fact that a second mortgage existed.

**SUIT** for partition. Plaintiff had purchased, at a Court auction, the undivided share of first defendant in items 1 and 2 of the family properties of defendants Nos. 1 and 2, who were jointly interested in items 1 to 4 of the property which formed the subject-matter of the suit. The Court sale was held in execution of a decree obtained by plaintiff in Original Suit No. 232 of 1894, in which he sued on a mortgage deed dated 22nd October 1886, executed in plaintiff's favour by defendants Nos. 1 and 2, who admitted plaintiff's claim. On 25th August 1891, defendants Nos. 1 and 2 executed a second mortgage in favour of the present third defendant. Plaintiff now admitted the genuineness of this mortgage to third defendant,

\* Second Appeal No. 598 of 1901, presented against the decree of F. H. Hammett, District Judge of Coimbatore, in Appeal Suit No. 317 of 1900, presented against the decree of T. Sadasiva Ayyar, District Munsif of Coimbatore, in Original Suit No. 238 of 1899.

but he had omitted to make third defendant a party to his Original Suit No. 232 of 1894, though third defendant was in possession, as mortgagee, under his document of 1891, at the time. The contention now put forward by third defendant was that he, as subsequent mortgagee, was entitled to redeem plaintiff's mortgage of 1886, and issues were raised on that point. The District Munsif held that third defendant was entitled to redeem plaintiff's mortgage and gave judgment for plaintiff that, in the event of third defendant failing to redeem plaintiff's mortgage by paying the amount of it, with interest and costs within a month, plaintiff should recover possession in execution of one-half share in items 1 and 2, the said properties to be divided by metes and bounds in two equal shares. Plaintiff appealed to the District Judge, who, following *Venkata Somayazulu v. Kannam Dhora*(1) upheld the Munsif's decree and dismissed the appeal.

Against that decree, plaintiff preferred this second appeal.

*S. Kasturiranga Ayyangar* for appellant.

*T. R. Krishnaswami Ayyar* for third respondent.

JUDGMENT.—The case is exactly on all fours with that of *Venkata Somayazulu v. Kannam Dhora*(1). The plaintiff clearly could not obtain possession without paying off the second mortgagee who was in possession and the plaintiff's suit for possession might have been dismissed on that ground as the plaintiff did not offer to redeem. The second mortgagee, however, was willing to pay off the plaintiff's prior mortgage as he might have done if he had been made a party to the suit brought by the plaintiff on his mortgage. The second mortgagee is clearly not liable to suffer, because the plaintiff failed to make him a party to that suit, and it makes no difference to the second mortgagee whether the plaintiff's failure was wilful or due merely to ignorance of the existence of the second mortgage.

As to the amount which the second mortgagee has to pay we agree with the lower Courts in holding that it is the amount he would have had to pay if he had been made a party to the plaintiff's suit, as he ought to have been. He clearly cannot be made liable for more, because the plaintiff in ignorance of the second mortgage paid an excessive price for the equity of redemption.

The second appeal fails and is dismissed with costs.

(1) I.L.R., 5 Mad. 184.

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If the money has not been already deposited the time for the second mortgagee paying it is extended to two months from this date.

## APPELLATE CIVIL.

*Before Mr. Justice Benson and Mr. Justice Moore.*

AKATTI MOIDIN KUTTY AND TWO OTHERS  
(PLAINTIFFS), APPELLANTS,

v.

CHIRAYIL AMBU AND ANOTHER (DEFENDANTS), RESPONDENTS.\*

*Mortgage—Priority according to date of possession by two purchasers of the mortgaged property.*

On 7th October 1890, the proprietor of certain land mortgaged it to plaintiff; and on 30th October 1893, he also mortgaged it to first defendant. In 1895, first defendant sued on his mortgage, obtained a decree, got the property sold and purchased it himself, obtaining possession in July 1897. Plaintiff also sued, in 1897, on his mortgage and also obtained a decree and purchased the property at public auction, and obtained possession in November 1898. On the present suit being brought by plaintiff to recover possession:

*Held*, that as between the two purchasers the question of priority must be determined, not by reference to the date of the mortgage documents, but according to the dates of the sales and recovery of possession under them; and that, in consequence, plaintiff's suit, which was one to oust the second defendant from possession, must be dismissed. Any rights which plaintiff might have on the strength of his mortgage must be enforced in another suit.

*Suit to recover possession of land.* The property in question belonged, originally, to one Raman Nambiar, who, in 1888, hypothecated it (with other property) to P. A. Suppi. On 3rd October 1890, Raman Nambiar paid off that debt by borrowing from and hypothecating the same property (with another paramba) to Unnaman Nambiar. The document witnessing this hypothecation was filed as exhibit III. By a bond, dated 7th October 1890 (exhibit C), Raman Nambiar hypothecated the property to plaintiff. On 30th October 1893, Raman Nambiar again executed a bond in favour of Unnaman Nambiar (exhibit IV), by which

\* Second Appeal No. 501 of 1901, presented against the decree of M. J. Murphy, District Judge of North Malabar, in Appeal Suit No. 154 of 1900, presented against the decree of K. Imbichunni Nair, District Munsif of Cannanore, in Original Suit No. 531 of 1899.