do not lapse to her tarwad but they descend to her tavazhi; if she has issue, the tavazhi is composed of that issue; if she has no issue, her mother and her descendants form her tavazhi." SUNDARA AYYAR and BENSON, JJ., did not understand the referring order as raising any third question and SUNDARA AYYAR, J., uses the expression "nearest heirs" and "tavazhi" indiscriminately to mean the same thing. The decrees of the lower Courts therefore so far as item 1 of schedule B is concerned, must be reversed and the case remanded to the lower Appellate Court for a fresh decision in Appeal No. 429 of 1912 on the other questions arising in the case with reference to the above property. Costs will abide.

NAPIER, J.—I agree. The decision in *Antamma* v. *Kaveri*(1) has remained unchallenged for thirty years as representing the custom of the district of South Canara and I think that it would be most mischievous to reopen this question and institute a fresh enquiry as to custom after the elapse of such a period.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Tyabji.

VIJAYABHUSHANAMMAL AND TWO OTHERS (DEFENDANTS Nos. 1, 2 AND 13), APPELLANTS,

1914. July 22.

v.

C. N. EVALAPPA MUDALIAR AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

Mortgage—Decree of Court splitting up mortgagee's rights—Transfer of Property Act (IV of 1882), sec. 67, cl. (d), analogy of.

The principle of the rule embodied in section 67, clause (*d*) of the Transfer of Property Act enabling one of several mortgagees to enforce by suit the payment of his portion of the mortgage money, when the mortgagees sever their interests with the consent of the mortgagor, is applicable to a case where the severance is effected by a decree of Court binding on the mortgagor.

SECOND APPEALS against the decrees of P. A. BOOTY, the acting District Judge of Chingleput, in Appeals Nos. 428 and

(1) (1884) I.L.R., 7 Mad., 575.

* Second Appeals Nos. 2601 and 2118 of 1912.

VIJAYA-BHUSHA-NAMMAL v. EVALAPPA MUDALIAR.

499 of 1911, preferred against the decrees of K. KRISHNAMA ACHARIYAR, the District Munsif of Poonamallee, in Original Suits Nos. 693 and 695 of 1910, respectively.

The facts of the case appear from the judgment of the lower Appellate Court a portion of which is extracted below :—

"This was a suit to recover on a mortgage deed and the lower Court has decreed in part.

"The plaint mortgage was executed by the first defendant's late father on the 14th November 1870, to two undivided cousins, Kandaswami Mudali and Giribalu Mudali, these two cousins apparently representing their respective branches. In Original Suit No. 4 of 1886 on the file of this (District Judge of Chingleput) Court, it was decided that the two branches were each entitled to a half share of the mortgage amount. The plaintiff in this suit is an undivided brother of Kandaswami Mudali now deceased. In Original Suit No. 456 of 1894 on the file of the District Munsif of Poonamallee, the representative of Giribalu Mudali sued to recover his half share of the mortgage debt without joining the representative of the other branch as a party and his suit was dismissed. That suit was of course not sustainable in view of section 85 of the Transfer of Property Act. The defendants in this suit have pleaded discharge together with other pleas. The District Munsif has allowed certain items of payment and has decreed for half share of what he finds to be due. The plaintiff has appealed in Appeal No. 474 of 1911 in respect of the portions disallowed and the first and the second defendants have appealed in Appeal No. 449 of 1911 against the portion allowed. Both appeals have been heard together . . . .

"The second objection is that the plaintiff cannot sue for a part only of the mortgage money, but that he should have joined the other sharer and sued for the whole. Also that the effect of the previous suit which failed, namely, Original Suit No. 456 of 1894, is to bar the present suit. There can be no doubt that Original Suit No. 456 of 1894 will operate as *res judicata* against Giribalu's branch, even though it was an irregular suit unsustainable in law. What ought to have been done in 1894 was of course to amend the plaint by joining the other branch as co-plaintiffs and to sue for the whole, or else to have obtained permission then to file a fresh suit and have done so. Plaintiff

or his branch was not a party to that suit and he is not bound by it. He cannot lose his rights because some independent person does something wrong; should then the two branches have sued now for the whole while admitting that one half was not recoverable? I do not think Giribalu's branch could be expected to act in such a futile manner. The plaintiff has made the present representative of Giribalu's branch a party to the suit as fourteenth defendant, so that the whole mortgage may be adjudicated upon. It is further objected that a suit for a half share is not sustainable and various rulings such as *Parsotam Saran* v. *Mulu*(1), *Kalidas Kevuldas* v. *Nathu Bhagvan*(2) and *Ramsebuk* v. *Ramlall Koondoo*(3) have been cited. I have perused all these and can find no parallel to the present case. I consider the objection is answered by saying that the plaintiff has sued for everything that is legally recoverable under the mortgage, and that when this suit is decided nothing will remain which might form the subject of another suit. I therefore agree with the District Munsif in answering the issues on this point in the negative."

In the result the District Judge dismissed the appeal of the plaintiff and allowed the appeal of the defendants in part by disallowing Rs. 140 out of the amount claimed by the plaintiff.

The defendants Nos. 1 and 2 preferred this Second Appeal.

S. T. Srinivasagopalachariyar for the appellants.

T. Narasimha Ayyangar for the respondents.

SADASIVA AYYAR AND TYABJI, JJ.

JUDGMENT.—There are no merits in this Second Appeal. Some technical objections are raised but the only arguable objection is that section 67 (*d*) of the Transfer of Property Act prohibits a suit by one of several co-mortgagees who is interested in part only of the mortgage money from suing for sale of a corresponding portion of the mortgaged property, "unless the mortgagees have with the consent of the mortgagor severed their interests under the mortgage" and that the present suit is such a suit.

The rather unhappy wording of the section no doubt lends some colour to this contention; but we do not think that the legislature intended to enact that if the severance of the interests of the mortgagees has taken place in any other lawful

(1) (1887) I.L.R., 9 All., 68 (F.B.). (2) (1883) I.L.R., 7 Bom., 217. (3) (1881) I.L.R., 6 Calc., 815.

VIJAYA-BHUSHA-NAMMAL *v.* EVALAPPA MUDALIAR.

SADASIVA AYYAR AND TYABJI, JJ.

mode legally binding on the mortgagor (as for instance by the decree of a Court of justice in a suit to which the mortgagor is a party and which has become binding on him, though he has not given his consent to the passing of the decree which has the legal effect of causing the severance) the mortgagor may still resist a suit for sale for recovery of a portion of the mortgage money on the basis of such severance. The legislature merely intended to protect the mortgagor from being harassed by a multiplicity of suits where the severance of the interests of the mortgagees has taken place without his consent. The decision of a Court of justice effecting such a severance if binding on the mortgagor must be at least as effective legally as the mortgagor's consent to the severance. In the present case, there was a decree in a suit brought by the plaintiff's co-mortgagee to which suit the mortgagor was a party and it was declared that there had been a severance of the mortgage binding on the mortgagor. That decree might be erroneous but it was not appealed against and has become final. The plaintiff's claim for recovery of his share of the mortgage money on the basis of such severance cannot therefore be resisted by the mortgagor.

This Second Appeal fails and is dismissed with costs. The connected Second Appeal No. 2118 of 1912 follows.

As regards the memorandum of objections in Second Appeal No. 2601, the District Judge was right in crediting the amount paid by the sale of a portion of the mortgaged property towards the principal of the mortgage debt, in the absence of any specific appropriation by either party. The principal amount is the earlier debt and though by indication from circumstances a payment might in some cases more appropriately be credited towards interest in the first instance. See section 60 of the Indian Contract Act and section 76, clause (*b*) of the Transfer of Property Act IV of 1882. There might be circumstances indicating the other way; and we think that the learned District Judge was right in holding that there were such circumstances in this case.

The memorandum of objections is dismissed with costs.

N.R.