

APPELLATE CIVIL.

*Before Mr. Justice Wallace and Mr. Justice
Madhavan Nayar.*

1926,
October 8.

MAMILLAPALLI KOTAPPA AND 2 OTHERS (DEFENDANTS),
APPELLANTS,

v.

PAMIDIPATI RAGHAVAYYA AND 4 OTHERS (PLAINTIFFS),
RESPONDENTS.*

Mortgage—Puisne mortgagee paying off decree on prior hypothecation—Suit thereafter for redemption of puisne mortgage—Lapse of twelve years from date of hypothecation on date of suit—Right of puisne mortgagee to be paid the decree amount.

When a puisne mortgagee pays off a decree on a prior hypothecation, he is subrogated to the right of the prior hypothecatee. He is not entitled to enforce the decree as such but can only enforce his charge arising by subrogation. The period within which he should enforce it is 12 years from the date on which a suit on the hypothecation should have been brought and not 12 years from the date of payment. Hence, if in a suit for redemption by the mortgagor to redeem the puisne mortgage, more than 12 years had elapsed from the date on which a suit on the hypothecation should have been brought, the puisne mortgagee cannot resist redemption by claiming also the amount he had paid in addition to the amount due on his mortgage. *Parvati Ammal v. Venkatarama Iyer*, (1924) 47 M.L.J., 316, considered; *Mahomed Ibrahim Hossain Khan v. Ambika Pershad Singh*, (1912) I.L.R., 39 Calc., 527 (P.C.), *Gopi Narain Khauna v. Bansidhar*, (1905) I.L.R., 27 All., 325 (P.C.), applied.

SECOND APPEAL against the decree of the Court of the Subordinate Judge of Bapatla in Appeal Suit No. 61 of 1923 preferred against the decree of the Court of the District Munsif of Ongole in Original Suit No. 608 of 1921.

* Second Appeal No. 1808 of 1923.

The facts of the case are given in the judgment of
MADHAVAN NAYAR, J.

KOTAPPA
v.
RAGHAVAYYA.

B. Somayya for appellants.

A. Venkatachalam for respondents.

JUDGMENT.

WALLACE, J.—I agree generally with the judgment WALLACE, J.
just read by my learned brother. I only wish to add
some remarks chiefly with reference to my judgment in
Parvati Ammal v. Venkatarama Iyer(1).

In that judgment I have dealt with most of the cases
which have been cited before us. It has been strongly
and with reason relied upon by the appellant in this
case, but has also been quoted in support of a view
which has never been expressed therein, though I must
now concede that the main position which I took up
there requires reconsideration. In that case the
question arose of the rights of a puisne mortgagee who
had paid up an execution sale amount for which the
property had been brought to sale on a prior mortgagee's
decree. The proposition for decision in that case I
state at page 318:

“The point for decision is whether, when she paid it off,
she is to be subrogated to it (the charge which she paid off), in
its original form as a mortgage charge, or to it in the form into
which it had developed, namely, the right to sell the property
in discharge of the mortgage decree. I think the latter view is
the correct one.”

Then at page 319 I went on to say that, since the
mortgage charge had become unenforceable as such
“because it has developed into a decree charge,” I
could not see why the puisne mortgagee should be
relegated to the unenforceable charge and denied the
enforceable one. The appellant's contention here now
is that in using the words “decree charge” I intended

(1) (1924) 47 M.L.J., 316.

KOTAPPA
2.
RAGHAVAYYA
WALLACE, J.

to lay down that some sort of new mortgage charge was created which could somehow be enforced in some other way than the decree could be enforced, and was somehow exempt from the incidents and conditions under which the decree must be enforced, and that particularly therefore the limitation period within which it can be enforced would be 12 years from the date of the decree although the decree itself must be enforced within three years. This interpretation of the words "decree charge" is, I should have thought, obviously untenable on the whole trend of that judgment. The mortgage charge had become merged in a decree and was inseparable from it and was subject to the conditions which govern the enforcement of the decree. The "decree charge" is simply the right which the decree gave to sell the property in discharge of the prior mortgagee's debt. At page 320 of that judgment I went on to say:

"I hold therefore that plaintiff is subrogated to the decree charge held by the prior mortgagee, i.e., the right to hold the property to sale to discharge the decree debt; and that right is free of any restriction that it should be worked out within the period of limitation for the enforcement of the original mortgage."

That is all I then said on the question of the puisne mortgagee's rights. Of the manner in which these rights should be worked out I indicated that in view of the Privy Council ruling in *Gopi Narain Khanna v. Bansidhar*(1), the proper method for the puisne mortgagee in that case was by suit. But the period of limitation within which these rights should be worked out did not arise in that case.

In the present case the important questions are: what is the method by which the puisne mortgagee should work out his rights as subrogee under the first

(1) (1905) I.L.R., 27 All., 325 (P.C.).

mortgage which has become merged in a decree, and what is the period of limitation within which he should do so? The obvious straightforward method would be to allow him to take over the execution of the decree. This was the old view taken by this Court in *Bavanna v. Balaguruvi*(1); but this view has been overruled by the Privy Council in *Gopi Narain Khanna v. Bansidhar*(2), where it was pointed out that such a method is impossible when the decree itself does not provide for such a substitution of the original decree-holder, and the Committee further indicated that the proper course was to ensure that the decree will provide for such substitution. That is easy when the puisne mortgagee is a party to the prior mortgage suit; then it will be his business to ensure that the decree properly provides for his rights, if he pays up the auction amount in order to prevent the property being brought to sale. But when he is not a party, he cannot influence the form of the decree. Probably in all cases whether the puisne mortgagee is a party to the suit or not, the Court would be well advised to adopt the form of decree recommended by the Privy Council. In the present case, however, that form has not been adopted, and the only remedy open is by way of suit.

KOTAPPA
v.
RAGHAVAYYA.
WALLACE, J.

What then is the nature of that suit? Is it to be a suit to enforce the original mortgage now merged in a decree, or is it a suit declaring the puisne mortgagee's right to execute that decree? In my judgment in *Parvati Ammal v. Venkatarama Iyer*(3), I indicated my view rather tentatively that the suit should be a suit to declare the right of the puisne mortgagee to sell the property, in discharge of the mortgage decree, that is, a right to execute the decree, and such right, I think,

(1) (1899) 9 M.L.J., 177.

(2) (1905) I.L.R., 27 All., 325 (P.C.).

(3) (1924) 47 M.L.J., 316.

KOTAPPA
v.
BAGHAVAYYA.
WALLACE, J.

I indicated plainly enough, would in my view be subject to the conditions which otherwise govern the execution of the decree; that is, it would only be possible under the conditions and subject to the law of limitation under which the decree itself was enforceable; the charge being merged in the decree and inseparable from it, would, for the very reason that it is merged in the decree, be unenforceable when the decree itself is unenforceable as a decree. Even on this view, the present appellant would be out of Court, since on the date of the plaintiff's suit, the prior mortgagee's decree was over three years old. But on further consideration I must admit that the technical difficulties in the way of this view are harder to surmount than those in the way of the view that the charge which the puisne mortgagee is entitled to enforce is the original mortgage charge in its form of a mortgage charge which must be enforced in that form although it has become merged in a decree. This, I think, is the logical result of the decision of the Privy Council in *Gopi Narain Khanna v. Bansidhar*(1), which becomes clear when the case is closely studied. On the facts of that case the position was reduced to this. The first and second defendants were the original prior mortgagees and the second defendant's right passed somehow—it is not quite clear—to the first defendant; so that he remained the sole prior mortgagee. He and the plaintiff were in the position of the second mortgagee. First defendant on the footing of the prior mortgage had got a decree for foreclosure, plaintiff being a party to that decree. In order to prevent a decree absolute for foreclosure in that suit against him, plaintiff paid up the decree amount. He and the first defendant on their

(1) (1905) I.L.R., 27 All., 325 (P.C.).

own second mortgage had also got a decree for foreclosure which became absolute so far as the mortgagor and a third mortgagee were concerned. Thus these two became the owners of the property subject to the first defendant's right to foreclose them by virtue of his own foreclosure decree on the first mortgage which the plaintiff had paid up. Then the question was how the plaintiff was to enforce the charge which he had acquired by virtue of his payment. Although he was a party to the first mortgagee's suit, he had neglected to get a proper form of decree permitting him to execute that decree. So he filed a fresh suit for foreclosure on the footing of the first mortgage, he being subrogated under that mortgage by virtue of section 74 of the Transfer of Property Act. The Privy Council sustained that action and permitted him thus to sue, not to establish a right to execute the first mortgagee's decree but to establish the right to enforce the charge under the original first mortgage, even though it had at that stage become merged in a decree; and the plaintiff was given a decree,—he and the first defendant being equal owners by virtue of the second foreclosure decree absolute, subject to the plaintiff's right under section 74 to enforce the first mortgage for his payment of Rs. 15,000,—that, if the first defendant did not pay up a half of that amount within a specific time he was debarred from redeeming his share. Thus the plaintiff's remedy was held to be a suit on his subrogated rights under the first mortgage charge. So far as the first mortgagee was concerned, the charge was satisfied. So far as the mortgagor was concerned, the charge had only been transferred from the first mortgagee to the second mortgagee, who had now put himself in the proper legal position to enforce it. No question of limitation arose in that case since the mortgages were

KOTAPPA
v.
RAGHAVAYYA.
WALLACE, J.

KOTAPPA
v.
RAGHAVAYYA
WALLACE, J.

in 1889 and the plaintiff's second foreclosure suit was in 1898. But it is clear from what my learned brother has said that the charge is enforceable only within the period of limitation for such a charge, that is, the usual twelve years.

In the present case also it does not appear to be open to the appellant to resist redemption until the sum of Rs. 623 is paid, on the ground that he is entitled on the terms of the original contract to remain on the land until redeemed, as the original mortgage rights to which he has succeeded by virtue of section 74 were not those of a usufructuary mortgagee, but only those of a simple mortgagee. This appeal will be dismissed and the memorandum of cross objections allowed as provided for in my learned brother's judgment.

MADHAVAN
NAYAR, J.

MADHAVAN NAYAR, J.—This second appeal arises out of a suit filed by the plaintiffs for the redemption of two items of property. Plaintiffs Nos. 1 to 3 are the owners of the property and the plaintiffs Nos. 4 and 5 are their lessees. The suit properties had been mortgaged by the predecessors of the plaintiffs usufructuarily to the first defendant on 19th September 1901. The defendants contended that the plaintiffs are not entitled to redeem Item No. 1 as they have parted with it and that they are entitled to remain in possession of Item No. 2 till they are paid in addition to the mortgage amount the sum of Rs. 623-8-3, which they were compelled to pay in order to save the property from sale in execution of the hypothecation decree in Original Suit No. 336 of 1903. As regards the first item the lower Appellate Court agreeing with the District Munsif upheld the plea of the defendants and dismissed the plaintiffs' suit. As regards the second item the plaintiffs were given a decree for its redemption, but it was held by the lower Appellate Court differing from the District Munsif that

they were not bound to pay the first defendant the additional amount claimed by him as in its view the first defendant's right to recover that amount was barred by limitation on the date of the suit. As regards the second item the defendants have filed a second appeal, while as regards the first item the plaintiffs have filed a memorandum of objections. The entire case is thus before us in second appeal.

KOTAPPA
v.
BAGHAVAYYA.
—
MADHAVAN
NAYAR, J.

I shall deal with the case of the parties as regards each item separately.

Item No. 1.—This item is the northern half of survey No. 47. The first defendant is admittedly in possession of this half and he obtained possession as a mortgagee from the plaintiffs' predecessors. The plaintiffs sold the northern half to plaintiff's witness No. 2 under Exhibit B in 1912, but the sale did not take effect and plaintiffs' witness No. 2 is now in possession of the southern half. It is alleged that on account of this sale the plaintiffs have lost the right to redeem this property. The plea is clearly unsustainable. The ineffective sale of the northern half to plaintiffs' witness No. 2 does not in any way affect the plaintiffs' right to redeem this item. As already observed, the first defendant is a mortgagee. The sale to plaintiffs' witness No. 2 has not affected his possession of this item in any way and the plaintiffs have not lost their title to it. As the mortgagee of this item he cannot dispute the right of the mortgagors to redeem it. The decree of the lower Appellate Court has provided for the payment of the full mortgage amount. Setting aside the lower Court's decree I would allow the memorandum of objections and give the plaintiffs a decree for the redemption of this item.

Item No. 2.—To understand the points involved in deciding the appeal as regards this item, it is necessary to state a few facts. Before the mortgage to the first

KOTAPPA
v.
RAGHAVAYYA.
MADHAVAN
NAYAR, J.

defendant this item had already been mortgaged to another person in 1897. The first defendant is the second mortgagee. The prior mortgagee instituted a suit, Original Suit No. 336 of 1903, on his mortgage and brought the property to sale, but it was not sold as the first defendant herein paid up the decree amount, Rs. 623-8-3 with interest. This amount was paid on 23rd October 1915. The plea of the first defendant now is that the plaintiffs are not entitled to redeem this item unless he is paid this amount in addition to the amount of his own mortgage. The payment by him of the sum that he now claims is not disputed. The lower Appellate Court disallowed the first defendant's claim as it held that his right to recover it was barred by limitation on two alternative grounds: Ground No. (1): The first mortgage came into existence in 1897. The present suit was instituted in 1920. It is admitted that a suit by the first mortgagee to recover the amount of his mortgage in 1920 would be barred by limitation. The first defendant has the right to enforce the security by virtue of subrogation. As the prior mortgagee's suit to enforce the security is barred by limitation, the present first defendant's right, viewing it as a claim to enforce the security by virtue of subrogation, is also barred by time. In support of this ground the learned Judge relies on *Mahomed Ibrahim Hossain Khan v. Ambika Pershad Singh*(1) and *Sibanand Misra v. Jagmohan Lal*(2). Ground No. (2): if the first defendant is entitled to sustain an action for reimbursement as distinguished from his right to enforce his security by virtue of subrogation, the learned Judge was of opinion that the cause of action for such a suit was the date of payment, i.e., 23rd October 1915. As more than three years

(1) (1912) I.L.R., 39 Calo., 527 (P.C.).

(2) (1922) 68 I.C., 707.

had elapsed from that before the present suit was filed, the first defendant could not claim the amount in 1920. This view is supported by the decision in *Sibanand Misra v. Jagmohan Lal*(1). (See the closing portion of the judgment.)

KOTAPPA
v.
RAGHAVAYYA,
MADHAVAN
NAYAR, J.

The appellants argue that the first ground is untenable and that the first defendant's right to recover the amount is not barred as when he paid the amount on 23rd October 1915 he must be considered to have obtained a charge on this item of property and that this charge can be enforced at any time before the expiry of twelve years from the date of payment. This view is supported by the decision in *Shib Lal v. Munni Lal*(2). The appellants quote *Parvati Ammal v. Venkatarama Iyer*(3) also in their favour.

A subsequent mortgagee has the right to pay off the prior mortgagee. By making such payment he acquires in respect of the property all the rights and powers of the mortgagee whom he has paid off. One of such rights is this power to enforce his charge against the property subject to the law of limitation. If, therefore, at the time when the subsequent mortgagee seeks to enforce the security by virtue of subrogation, a suit by the first mortgagee is barred by time, the subsequent mortgagee's right is also barred. This principle was laid down in the decision in *Mahomed Ibrahim Hossain Khan v. Ambika Pershad Singh*(4). If this decision is applied to the present case, then the first defendant's right to recover the amount by enforcing the charge must be held to be barred because the first mortgage was in 1897 and the present suit was instituted in 1920. But it is argued that the decision is inapplicable because the first mortgage in this case had ripened into a decree

(1) (1922) 68 I.C., 707.

(2) (1922) I.L.R., 44 All., 67.

(3) (1924) 47 M.L.J., 316.

(4) (1912) I.L.R., 39 Calc., 527 (P.C.).

KOTAPPA
v.
RAGHAVAYYA.
MADHAVAN
NAYAR, J.

when the payment was made by the second mortgagee; and that from this follows the consequence that he gets a charge over the property which can be enforced within the usual period of limitation for the enforcement of a charge, the period of limitation being calculated from the time when the payment was made. The argument seems to be that, after the decree, a new charge comes into existence and that the puisne mortgagee subrogates himself into the position of the decree-holder and obtains this charge over the property on the date when he paid off the amount on the prior mortgage. This argument is supported, as already observed, by the decision in *Shib Lal v. Munni Lal*(1) and by the observations of my learned brother in *Parvati Ammal v. Venkatarama Iyer*(2).

Does the fact that payment was made by the second mortgagee after the first mortgage had ripened into a decree make any difference as regards the date from which the period of limitation for enforcing the charge thus obtained by the payment is to be calculated? I think not. The question presents two aspects for consideration: Does the second mortgagee, when he pays the amount of the first mortgage after a decree had been obtained on it by the first mortgagee, get a charge over the properties by virtue of section 74 of the Transfer of Property Act just as in an ordinary case of subrogation, or does he get it by subrogating himself into the position of the decree-holder as distinguished from the position of the first mortgagee? Whether the payment by the puisne mortgagee is made after obtaining a decree by the first mortgagee or before, if the puisne mortgagee gets his right to enforce the security by virtue of section 74 of the Transfer of Property Act, then it seems to me that he is bound to enforce his right within the period

(1) (1922) I.L.R., 44 All., 67.

(2) (1924) 47 M.L.J., 316 at 319.

of limitation allowed to the first mortgagee. The decision in *Gopi Narain Khanna v. Bansidhar*(1) though it is not directly relevant as it does not deal with the question of limitation, gives us considerable help in answering both aspects of the question above mentioned. Briefly stated, in that case, the second mortgagee, who had paid off the first mortgagee the amount due to him after a decree on the first mortgage, instituted a suit to enforce the charge which he had acquired by virtue of his payment. The Privy Council held that he was entitled to establish by a suit his right to enforce the charge under the first mortgage, even though it had by that time become merged in a decree. In the course of the judgment, their Lordships made the following remarks:—

KOTAPPA
v.
RAGHAVAYYA,
MADHAVAN
NAYAR, J.

“It is true that Gaya Prasad (the puisne mortgagee) having made that payment (as he had the right to do) acquired under section 74 of the Transfer of Property Act all the rights and powers of the mortgagees as such. But this would not have the effect of reviving or giving vitality to a decree which, by its terms, had become discharged.”

The learned Judges also pointed out that on payment by the second mortgagee of the amount due to the first mortgagee into Court and acceptance of that sum by him

“the decree was spent and became discharged and satisfied”

and consequently the second mortgagee does not obtain the status of a decree-holder. It cannot therefore be said that he subrogated himself into the position of the decree-holder. If the second mortgagee thus gets his right by subrogation under section 74 even in a case where the first mortgage has been paid off after a decree, then it follows that he as subrogee can exercise the rights of the prior mortgagee only within the period of limitation allowed to him. The fact that a decree has

(1) (1905) I.L.R., 27 All., 325 (P.C.).

KOTAPPA
v.
BAGHAVAYYA.
MADHAVAN
NAYAR, J.

been passed and the mortgage has become merged in a decree does not therefore make any difference. The obtaining of a decree does not put an end to the charge on the property; after the passing of the decree the charge attaches itself to the decree and the puisne mortgagee by making the payment gets entitled by virtue of section 74 of the Transfer of Property Act to enforce that charge. It is conceded in *Shib Lal v. Munni Lal*(1) that the puisne mortgagee obtains the charge under section 74 of the Transfer of Property Act. If so, there is no justification for the conclusion that the period of limitation should be calculated from the date of payment as if a new charge had come into existence by such payment. In view of the observations of their Lordships of the Privy Council in *Gopi Narain Khanna v. Bansidhar*(2) the arguments advanced on behalf of the appellants cannot be accepted. My conclusion is supported by the decision of Courts and Das, JJ., in *Sibanand Misra v. Jagmohan Lal*(3). For these reasons I hold that the Privy Council decision in *Mahomed Ibrahim Hossain Khan v. Ambika Pershad Singh*(4) applied to the present case also and that the first defendant's right to claim the additional amount, viewed as a claim to enforce the security, is consequently barred by limitation.

If his right to recover the amount is considered merely as a right for the reimbursement of the money (ground No. 2), then the three years' period under article 61, schedule I, of the Limitation Act during which the right may be exercised having admittedly passed he is now precluded from claiming the amount in this case. See *Shib Lal v. Munni Lal*(1) and *Sibanand Misra v. Jagmohan Lal*(3).

(1) (1922) I.L.R., 44 All., 67.

(3) (1922) 68 I.C., 707.

(2) (1905) I.L.R., 27 All., 325 (P.O.).

(4) (1912) I.L.R., 39 Cal., 527 (P.O.).

I would therefore confirm the decree of the Appellate Court as regards this item and dismiss the second appeal with costs.

KOTAPPA
v.
RAGHAVAYYA.
—
MADHAVAN
NAYAR, J.

The memorandum of objections is allowed with costs throughout. As we have allowed the memorandum, the lower Appellate Court's direction as regards the mesne profits with reference to item 2 will apply to item 1 also. The first Court will hold an enquiry and pass a decree accordingly.

N.R.

APPELLATE CIVIL.

*Before Mr. Justice Wallace and Mr. Justice
Madhavan Nayar.*

MUTHUKUMARASWAMI PILLAI, APPELLANT (PETITIONER),

v.

1926,
September
29.

MUTHUSWAMI THEVAN, RESPONDENT (RESPONDENT).*

Execution—Sale of property not belonging to judgment-debtor and purchase by decree-holder and satisfaction—Art. 166, Limitation Act (IX of 1908)—Application by decree-holder to set aside sale and for further execution, after thirty days after sale—Maintainability of.

A decree-holder got the properties of some one other than the judgment-debtor sold in execution of his decree, purchased them himself and entered up satisfaction. More than thirty days after the sale, he found out his mistake and applied for further execution by setting aside the sale.

Held, that the application for further execution was unsustainable as the sale though of a stranger's property was not void and as the prayer for setting it aside, which was a necessary preliminary for further execution, could not be granted, being barred by article 166 of the Limitation Act. *Thakur Barmha v. Jiban Ram Marwari* (1914) I.L.R., 41 Cal., 590 (P.C.) and

* Appeal against Appellate Order No. 94 of 1924.