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was not governed by their decision. I am, therefore, of opinion that the question referred to us must be answered in the affirmative.

RAMESAM, J.—I agree.

MADHAVAN NAIR, J.—I agree.

N.R.

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## APPELLATE CIVIL.

*Before Mr. Justice Phillips and Mr. Justice Devadoss.*

1928,  
February 27.

RAMACHANDRA DIKSHITAR AND THREE OTHERS  
(DEFENDANTS 5 TO 8), APPELLANTS,

v.

NARAYANASWAMI REDDIAR (PLAINTIFF), RESPONDENT.\*

*Mortgage—Sec. 95, Transfer of Property Act (IV of 1882)—*  
“One of several mortgagors”, meaning of—Two successive mortgages of two properties to two different persons—Decree in suit by second mortgagee and purchase by him in execution, of one property, effect of—Right to contribution against mortgagor.

The words “one of several mortgagors” in section 95 of the Transfer of Property Act, which enables one of them to redeem a mortgage and claim contribution from others, mean not only one of the original mortgagors, but also his heirs or assigns, such as purchasers of his interest in execution; *Nainappa Chetti v. Chidambaram Chetti*, (1898) I.L.R., 21 Mad., 18, followed.

If two properties are jointly mortgaged first to one person and then to another, and the second mortgagee buys the equity of redemption in one of them in execution of a decree on his mortgage, he becomes a co-mortgagor as regards the first mortgagee; if he thereafter buys the rights of the first mortgagee, he cannot sue the mortgagor to enforce the payment of the money due on the first mortgage but can only sue him for contribution, under section 95 of the Transfer of Property

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\* Appeal 150 of 1924.

Act, with reference to the amount paid by him for the purchase of the first mortgagee's rights and with reference to the values of the properties liable to contribute.

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APPEAL against the decree of the Court of Subordinate Judge of Chingleput in O.S. No. 1 of 1922.

The facts are given in the judgment.

*T. M. Krishnaswami Ayyar* (with *M. Subbaroya Ayyar* and *K. Balasubrahmaniam Ayyar*) for appellants.

*K. S. Krishnaswami Ayyangar* for respondents.

### JUDGMENT.

PHILLIPS, J.—One Pillayar Dikshitar and defendants 1 to 4, his sons, executed a mortgage deed for Rs. 7,000 in favour of one Venkatasubbier on 15th April 1909. Again on 24th May 1911 the said Pillayar Dikshitar and the second defendant executed a mortgage for Rs. 1,500 in favour of the same person. Lands of two villages were mortgaged under these documents, i.e., Parameswaramangalam and Koothavakkam. There was a third mortgage on 6th August 1912 in favour of the plaintiff's brother, Raghava Reddi. He filed a suit on his mortgage, obtained a decree and purchased Koothavakkam village. He is now dead and the plaintiff is the owner of the equity of redemption of Koothavakkam village. On 6th December 1920 the plaintiff obtained a transfer of the first two mortgages and has now brought a suit to enforce them. In the deed of assignment the amount due on the two mortgages is said to have been Rs. 18,718, but the price paid by the plaintiff for the assignment was only Rs. 6,000. The Subordinate Judge has given the plaintiff a decree against defendants 1 to 8, for half of the suit amount against Parameswaramangalam village, holding that the property in plaintiff's possession was equal in value to the remainder of the mortgage property. A number of defendants were impleaded in the suit as having an

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interest in the mortgage properties. The decree was passed only against defendants 1 to 8, members of the mortgagor's family, and now defendants 5 to 8 alone appeal.

PHILLIPS, J.

The appellants' contention is that the plaintiff's only remedy is under section 95 of the Transfer of Property Act for contribution, he having redeemed the mortgage and being one of the mortgagors. It has been held by the Privy Council in *Ahmad Wali Khan v. Shamsul Jahan Begum*(1), that section 95 is not applicable to usufructuary mortgages alone, but is also applicable to simple mortgages. Under section 101 of the Transfer of Property Act where the owner of a charge or other incumbrance on immovable property is or becomes absolutely entitled to that property, the charge or incumbrance shall be extinguished. When therefore the plaintiff as the owner of Koothavakkam village paid off all the encumbrances those mortgages became extinguished, unless it is a necessary implication that they should subsist for the plaintiff's benefit. His contention that he can bring a suit upon these mortgages is *prima facie* untenable, for under Order XXXIV of the Civil Procedure Code he would be bound to implead himself as a defendant, as being a person interested in the mortgage property as owner thereof. Such a position would be absurd and consequently the legislature has enacted section 95 of the Transfer of Property Act which gives to one of several mortgagors who redeems the mortgage property a charge on the share of each of the other co-mortgagors. It is contended for the respondent that the application of section 95 of the Transfer of Property Act must be restricted to mortgagors in the sense of persons who

(1) (1906) I.L.R., 28 All., 482 (P.C.),

have actually executed the mortgage deed and does not include their heirs or assigns. No authority is cited for such a proposition, whereas there is authority against it in *Vithal Nilkanth Pinjale v. Vishwasrao*(1), and *Nainappa Chetti v. Chidambaram Chetti*(2). The plaintiff therefore as the purchaser of a portion of the mortgage property must be deemed to be one of the mortgagors.

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It is further argued that section 95 does not preclude the mortgagor from suing on his mortgage, but as I have pointed out *prima facie* such a suit would be impossible and the only authority that can be suggested as being in favour of it is the decision of the Privy Council in *Ayya Reddi v. Gopalakrishnayya*(3). In that case the circumstances were somewhat peculiar and payments made to the second mortgagee, which were made after he had obtained a decree, were held not to be payments in discharge but payments in respect of the purchase of the mortgage right. In that case also the payments had been made by the defendants, who were allowed to put forward the rights under the mortgage as a shield against other encumbrancers. The right of a defendant to use a prior mortgage which he has discharged as a shield against *puisne* encumbrancers is well recognized and in the present case the plaintiff could use his charge under the two mortgages as a shield against *puisne* encumbrancers provided that there was no personal liability on his part to pay the subsequent encumbrancers. This is not an authority for holding that a suit can be brought upon the mortgages against the co-mortgagors. There are some remarks in the judgment of RAMESAM, J., in *Sundarammal v. Sundara*

(1) (1884) I.L.R., 8 Bom., 497.

(2) (1898) I.L.R., 21 Mad., 18 at 26.

(3) (1924) I.L.R., 47 Mad., 190 (P.C.).

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*Reddi*(1), which seem to support the appellants' proposition, but they are *obiter dicta* and the circumstances of that case were somewhat exceptional. If the learned Judge intended to hold that a mortgagor who had redeemed a mortgage is entitled to sue his co-mortgagor on the same, with all respect I must differ; and I am supported by the decision of this Court in *Iyathurai Ayyar v. Kuppanuthu Padayachi*(2). The argument that the plaintiff obtained a good bargain for himself by getting an assignment of the mortgages for one-third their value and should not be deprived of the benefit of his bargain cannot affect the question of law. It is questionable whether in the present suit the plaintiff should be allowed to obtain a decree for contribution, but as this is not seriously disputed the suit may be treated as one for contribution under section 95 of the Transfer of Property Act. As regards the amount of contribution to which he is entitled, the Subordinate Judge has treated the properties of which the plaintiff is the owner and the properties of which defendants 1 to 8 are the owners as equal in value, relying on a sale deed for the former, Exhibit XXXIX. He has, however, omitted to notice that that sale deed is only of seven-tenths of Koothavakkam lands which were to be sold for Rs. 10,500. This would make the total value of the lands Rs. 15,000. The description of the lands in Exhibit XXXIX is such that they are clearly the lands mortgaged. It has been found and is not now disputed that Parameswaramangalam lands are worth only Rs. 12,000. The plaintiff is therefore entitled to recover from the appellants four-ninths of Rs. 6,000 paid by him for redemption, namely Rs. 2,666-10-8. He also claims interest on the amount paid. In the

(1) (1926) 38 M.L.T., 148.

(2) (1918) 9 L.W., 120.

circumstances I think interest at 6 per cent on the sum of Rs. 2,666-10-8 may be allowed from the date of assignment till the date of suit.

So far as defendants 5 to 8 are concerned the lower Court's decree will be modified by giving a charge for the above amount alone on the Parameswaramangalam properties in their possession with six per cent interest up to the date of payment. Time six months.

The plaintiff will pay the costs of this appeal, and in the lower Court plaintiff and defendants 5 to 8 will pay and receive proportionate costs. As between defendants 1 to 8, defendants 5 to 8 are liable only for one-fifth of Rs. 2,666-10-8.

DEVADOSS, J.—I agree and have nothing to add.

N.R.

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## APPELLATE CIVIL.

*Before Mr. Justice Kumaraswami Sastri and  
Mr. Justice Reilly.*

MUTHUSWAMI KAVUNDAN AND 3 OTHERS  
(PLAINTIFFS), APPELLANTS,

1928  
March 13.

v.

PONNAYYA KAVUNDAN AND 6 OTHERS  
(DEFENDANTS), RESPONDENTS.\*

*Limitation—Death of propositus—Stepmother, entitled to maintenance and residence, taking possession—Payment of propositus's debts and expenses of her daughters' marriages—Limitation to recover same from reversioners—Sec. 69, Indian Contract Act (IX of 1872)—Arts. 61 and 120, Limitation Act (IX of 1908).*

A stepmother who was entitled to maintenance and residence took possession of her stepson's estate as soon as he died as an intestate bachelor, though she was not his heir.

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\* Appeal No. 456 of 1923.