

PRIVY COUNCIL.

AMBU NAIR (SINCE DECEASED), APPELLANT,

v.

KELU NAIR (SINCE DECEASED), RESPONDENT.

[ON APPEAL FROM THE HIGH COURT AT MADRAS.]

J.C.*
1933,
April 10.*Estoppel—Mortgage—Right to redeem—Mortgagee approbating and reprobating.*

In 1912 a mortgagee sued on a simple mortgage, joining as a defendant the assignee of the equity of redemption of an earlier usufructuary mortgage, and praying that in default of payment the property should be sold and applied thereto either subject to the usufructuary mortgage or free from it, as the Court thought fit. A decree was made for sale subject to the usufructuary mortgage. The assignee of the equity, having paid off the decree, sued to redeem the usufructuary mortgage. The mortgagee contended that by the terms of a compromise decree of 1899 redemption could be effected only by execution of the decree, and that under article 181 of the Limitation Act that remedy was barred at the expiration of three years from the date of the decree.

Held, that the terms of the compromise decree did not appear to show an intention that the remedy by execution should alone be open to the mortgagor, and that the mortgagee was estopped from contending that it did so, as in the suit of 1912 he had recognized that the right to redeem was then subsisting, and thereby had obtained payment under the simple mortgage; he could not both approbate and reprobate the existence of the right.

Decree of the High Court, (1929) I.L.R. 53 Mad. 805, affirmed on a different ground, but without disagreeing with the judgments in the High Court.

APPEAL (No. 5 of 1931) from a decree of the High Court (October 3, 1929) affirming a decree of the Subordinate Judge of South Kanara (August 16, 1924).

The respondent (since deceased), as purchaser of the equity of redemption of a usufructuary mortgage

* Present: Lord BLANESBURGH, Lord MACMILLAN and Sir GEORGE LOWNDES.

of 1892, instituted in 1921 a suit for redemption. The rights of the mortgagor and mortgagee had been the subject of a compromise decree made in 1899, and the mortgagees contended that under that decree redemption could be effected only by execution of the decree which, as had been held, was barred by the Indian Limitation Act, 1908, Schedule I, article 181.

The material facts appear from the judgment of the Judicial Committee.

The High Court, affirming the trial Judge, directed redemption. The learned Judges (KUMARASWAMI SASTRI and PAKENHAM WALSH JJ.) held that the compromise decree did not put an end to the relationship of mortgagor and mortgagee, which carried the right to redeem, but perpetuated it; if the decree was to be construed as excluding the right to redeem otherwise than by execution proceedings, that would be a clog upon the equity of redemption, and therefore unenforceable. Upon the latter point reference was made to the judgments in *G. & J. Kreglinger v. New Patagonia Meat and Cold Storage Company Limited*(1) in the House of Lords, passages from which have since been applied by the Board in an Indian appeal, namely, *Mehrban Khan v. Makhna*(2). The appeal to the High Court is reported at (1929) I.L.R. 53 Mad. 805.

DeGruyther K.C. and *Narasimham* for appellant.—The rights of the mortgagor and mortgagee under the mortgage of 1882 were embodied in the compromise decree of 1899, and by section 47 of the Code of Civil Procedure they could be determined only in execution proceedings, which were barred by article 181 of the Limitation Act. The present case cannot be distinguished from *Hari Ravji Chiplunkar v. Shapurji Hormasji Shet*(3). The decision in *Sri Raja Papamma Rao v.*

(1) [1914] A.C. 25.

(2) (1930) I.L.R. 11 Lah. 251 (P.C.); L.R. 57 I.A. 188.

(3) (1886) I.L.R. 10 Bom. 461 (P.C.); L.R. 13 I.A. 66.

Sri Vira Pratapa Ramachandra Raju(1), relied on by the High Court, is distinguishable as there there was no decree which could be executed. Although a mortgage cannot by its terms fetter the right to redeem given by section 60 of the Transfer of Property Act, 1882, that section provides that the right can be extinguished by the act of the parties. The law in that respect is the same in India as in England. Upon the suit to enforce the mortgage of 1882 it was competent to the parties to enter into a compromise, one term of which was that the right of redemption should be exercised only by execution of the compromise decree. The proceedings in the suit of 1912 do not estop the appellant from contending that the compromise decree had that effect, because there was no representation made by him and acted on by the respondent so as to make section 115 of the Indian Evidence Act apply: *Gopee Lall v. Mussamat Chundraolee Buhoojee*(2), *Fatimatulnissa Begum v. Sunder Das*(3), and *Mitra Sen Singh v. Janki Kunwar*(4).

AMBU NAIR
v.
KELU NAIR.

Appa Row and *Nambyar* for respondent were not called upon.

The JUDGMENT of their Lordships was delivered by Sir GEORGE LOWNDES.—The only question in this appeal is whether the respondent is entitled to redeem a certain mortgage. If this right, which has been affirmed by both Courts in India, is exercisable, it is not disputed that the decree passed by the Subordinate Judge on the 16th August 1924 is correct.

SIR GEORGE
LOWNDES.

The mortgage in question was dated the 8th December 1892, and was executed by members of the Beloor Meloor tarwad in favour of the appellant. On the 13th September 1897, the appellant brought a suit on the mortgage which was compromised, and a decree dated the 2nd January 1899 was passed in accordance with the compromise. The terms of this decree were in effect that the mortgagors should pay to the appellant

(1) (1896) I.L.R. 19 Mad. 249 (P.C.); L.R. 23 I.A. 32.

(2) (1872) L.R. I.A. Supp. Vol. 131.

(3) (1900) I.L.R. 27 Calc. 1004 (P.C.); L.R. 27 I.A. 103.

(4) (1924) I.L.R. 46 All. 728 (P.C.); L.R. 51 I.A. 326.

AMBU NAIR within three years a sum of Rs. 31,000, together with a
 KEDU NAIR. yearly rent in kind : that in default of payment of the
 SIR GEORGE Rs. 31,000, or of the rent, the appellant should be
 LOWANDES. entitled to obtain, by process of execution, possession
 of the property, and to retain the same as usufructuary
 mortgagee, the mortgagors having the right to redeem
 in any year thereafter on payment of the Rs. 31,000,
 and to obtain delivery of the property "by taking out
 execution".

No rent was paid and in March of the following year possession was taken by the appellant under the decree. It is not disputed that the appellant remained in possession as mortgagee, but it is said that the mortgagors' only remedy was by execution of the compromise decree, and that remedy is long since barred.

On the 7th December 1901, the appellant made a further advance of Rs. 1,675 to the mortgagors on the security of a simple mortgage of the same properties.

On the 20th December 1909, the equity of redemption of the mortgagors was sold in execution of a money decree which had been passed against them in other proceedings and was purchased by one Subbaraya Kamthi, who, on the 22nd April 1913, assigned his rights to the respondent.

On the 18th September 1912, the appellant sued on the simple mortgage of the 7th December 1901. He joined as defendants the *karnavan* of the mortgagor *tarwad* and Subbaraya Kamthi, who was described as having purchased the equity of redemption subject to the mortgage in suit and to the usufructuary mortgage for Rs. 31,000, which obviously meant the mortgage under the compromise decree. The prayer of the plaint was for payment of the sum due under the simple mortgage and that in default the property should be

sold and the sale proceeds "applied in payment of what may be found due to the plaintiff subject to or free from previous usufructuary mortgage in favour of the plaintiff's *tarwad*, as the Court deems fit."

AMBU NAIR
v.
KELU NAIR.
—
SIR GEORGE
LOWNDES.

On the 22nd November 1912, a decree was passed in this suit in favour of the appellant providing for sale, in default of payment, subject to the usufructuary mortgage, and a final decree for sale on these terms was made on the 12th September 1914.

On the 17th December 1918, after two separate applications had been made by the appellant for sale of the property, the respondent applied to pay off the decree in right of his assignment from Subbaraya Kamthi. In his petition, of which notice was given to the appellant, he referred to the decree as having been passed subject to the payment of the Rs. 31,000 due under the compromise decree of January 1899, and made it clear that his object in making the payment was to redeem the earlier mortgage. By consent of both parties the sum claimed as due under the simple mortgage, which amounted to Rs. 6,115-12-0, was brought into Court and was paid out to the appellant on the 18th December 1918, in full satisfaction of the decree.

The respondent then applied in execution of the compromise decree to redeem the usufructuary mortgage. His application was resisted by the appellant as out of time. It was rejected on this ground by the Subordinate Judge and his decision was confirmed on appeal, the Courts holding that the remedy by execution was barred on the expiry of three years from the date of the decree, *i.e.*, in January 1902.

The respondent then instituted the suit out of which the present appeal has arisen praying for redemption,

AMBE NAIR
v.
KELU NAIR
SIR GEORGE
LOWNDES.

and was met by the plea that his only remedy was in execution, and that this remedy had already been held to be time-barred.

This contention was rejected by both Courts in India. Upon an examination of the authorities they came to the conclusion that the remedy by suit was still open to the respondent. The Subordinate Judge was also of opinion that having regard to the proceedings in the suit on the simple mortgage the appellant was estopped from asserting the contrary. The learned Judges of the High Court came to no specific conclusion on the question of estoppel, basing their judgment on other grounds, but they affirmed the facts upon which the Subordinate Judge had relied. They say :

“ It is clear therefore from these proceedings that in 1912, i.e., about twenty years after Exhibit A, the deed of mortgage, and over twelve years after the *rajinama* decree, the mortgagee treated the first mortgage as subsisting and got a decree on the second mortgage on that basis.”

In the event a decree was passed by the Subordinate Judge in the respondent's favour on the 16th August 1924 providing for redemption on the terms therein set out, and this was affirmed in the High Court by the dismissal of the appeal.

Their Lordships, while not disagreeing with the view taken by the learned Judges of the High Court, are of opinion without going further into this question that the defence raised by the appellant was not open to him. On the terms of the compromise decree of 1899 they think that it was not the intention of the parties that the remedy by execution should alone be open to the mortgagors. Seeing that it would, as the Courts have held, be barred after three years, such a construction would manifestly defeat the main object of the compromise which was to leave the mortgagors

in possession for three years, and if after the expiry of that period the mortgage debt was not paid to allow the appellant to take possession, and again if and after he had so done to entitle the mortgagors to redeem. That the appellant understood this to be the intention is clear from the proceedings in the suit on the simple mortgage, which was based upon the right of redemption being still alive; the prayer of the plaint would on the face of it have allowed both mortgages to be paid off on a sale. It is, their Lordships think, equally clear that it was upon the same understanding that the respondent came in and paid off the decree in this suit, and that the appellant accepted the payment. On no other view of the facts could he have realised the decretal amount.

AMBU NAIR
v.
KELU NAIR.
—
SIR GEORGE
LOWNDES.

Having thus, almost in terms, offered to be redeemed under the usufructuary mortgage in order to get payment of the other mortgage debt, the appellant, their Lordships think, cannot now turn round and say that redemption under the usufructuary mortgage had been barred nearly seventeen years before he so obtained payment. It is a well accepted principle that a party cannot both approbate and reprobate. He cannot, to use the words of HONYMAN J. in *Smith v. Baker*(1),

“ at the same time blow hot and cold. He cannot say at one time that the transaction is valid, and thereby obtain some advantage to which he could only be entitled on the footing that it is valid, and at another say it is void for the purpose of securing some further advantage.”

See also *per* Lord KENYON C.J. in *Smith v. Hodson*(2) where the same expression is used.

It is objected for the appellant that this view of the case is not admissible inasmuch as no estoppel was

(1) (1873) L.R. 8 C.P. 350, 357.

(2) (1790) 2 Sm. L.C. 13th Edn. 140, 146.

AMBU NAIR
 v.
 KELU NAIR.
 SIR GEORGE
 LOWNDES.

pleaded and no issue was framed with regard to it. It is clear, however, that the question was raised before the trial Judge and that the appellant had a sufficient opportunity then of meeting it. Nor is it suggested now that there are any other material facts which could have been proved had the issue been formally raised. Their Lordships therefore think that this objection has no weight.

For the reasons given they think that this appeal fails and should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitors for appellant: *Hy. S. L. Polak & Co.*

Solicitor for respondent: *Harold Shephard.*

A.M.T.

APPELLATE CIVIL.

*Before Sir Owen Beasley, Kt., Chief Justice, and
 Mr. Justice Bardswell.*

1933,
 March 14.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL,
 REPRESENTED BY THE COLLECTOR OF TANJORE
 (NIL), PETITIONER,

v.

RAGHUNATHAN AND TWO OTHERS (PLAINTIFFS),
 RESPONDENTS.*

Court-fee—Order in favour of plaintiff in regard to—Revision against—Competency of, under sec. 115 of Code of Civil Procedure or sec. 107 of Government of India Act—Government not a party to suit—Revision by—Right of.

Neither under section 115 of the Code of Civil Procedure nor under section 107 of the Government of India Act has the High Court power to interfere in revision with an order in regard to court-fee which is in favour of the plaintiff.

* Civil Revision Petition No. 1280 of 1932.