

## APPELLATE CIVIL.

*Before Mr. Justice Madhavan Nair and Mr. Justice Jackson.*

KALASIPUDI SUBBA RAO AND FOUR OTHERS (PLAINTIFF  
DECEASED AND HIS LEGAL REPRESENTATIVES), APPELLANTS,

1933,  
March 29.

v.

PALAKURTHI BHIMALINGAM AND TWENTY-ONE OTHERS  
(DEFENDANTS), RESPONDENTS.\*

*Code of Civil Procedure (Act V of 1908), sec. 11—Court competent to try subsequent suit—Possession—Suit in Munsif's Court for—Dismissal of—Affirmance of, by District Judge on appeal, latter holding that redemption of mortgage was condition precedent to plaintiff obtaining possession—Subsequent suit by plaintiff for redemption of mortgage and for possession—Maintainability—Munsif who disposed of first suit not competent to entertain second one.*

The owners of A and B schedule lands executed first a usufructuary mortgage over both of them in favour of the predecessor-in-title of defendants 1 to 5, then a simple mortgage in favour of one P, and afterwards a simple mortgage in favour of L and V, L having a two-thirds share in the mortgage and V a third share. P transferred his second mortgage to the first mortgagee. Subsequently plaintiff's father purchased the equity of redemption in both sets of lands in execution of a money decree which he had obtained against the mortgagors and obtained symbolical delivery. Defendants 1 to 5 then sued on their second mortgage and obtained a decree. That decree amount was paid off by the plaintiff's father. Thereupon the plaintiff got an assignment from L of his two-thirds share in the third mortgage. V, the owner of the remaining third share in that mortgage, then obtained a decree which was transferred to the sixth defendant and he purchased the A and B schedule lands in execution of that decree, plaintiff's father being a party to the suit. The A schedule lands being Mazumdar service inam were inalienable and their sale was therefore invalid. The plaintiff, who was subsequently given a patta for the A schedule lands by the Government, sued defendants 1 to

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5 and the sixth defendant for recovery of possession of those lands. The District Munsif dismissed that suit holding that the patta granted to the plaintiff had not the effect of cancelling the sale of the lands in favour of the sixth defendant. On appeal, the District Judge concurred in dismissing the suit, but he held that the plaintiff was entitled to redeem defendants 1 to 5 and that a suit should be brought for that purpose if he wanted to recover possession. In a suit subsequently instituted by the plaintiff against defendants 1 to 5 and the sixth defendant for redemption and for possession of the A schedule lands,

*Held* that the suit was not barred by *res judicata* by virtue of the decision in the prior suit of the plaintiff.

In the previous suit the District Munsif did not decide that the plaintiff was not entitled to get possession as against the sixth defendant, nor was it decided that defendants 1 to 5 were entitled to remain in possession against the plaintiff. The final decision in the prior suit, that of the District Judge, was that to get possession plaintiff must pay off the mortgage of defendants 1 to 5 and the present suit had been brought in conformity with that decision.

APPEAL against the decree and judgment of the Court of the Additional Subordinate Judge at Vizagapatam, dated the 7th day of March 1927, in Original Suit No. 11 of 1925.

*V. Govindarajachari and B. V. Ramanarasu* for appellants.

*Y. Suryanarayana and P. Somasundaram* for respondents.

*Cur. adv. vult.*

#### JUDGMENT.

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MADHAVAN NAIR J.—Plaintiff is the appellant. The plaintiff's suit was for the redemption of the mortgage over the lands in A and B schedules of the plaint and for possession of the same. A schedule lands are Muzumdari service inam and the B schedule lands are quit-rent inam. These lands were originally held by the members of Kasiraja family. In 1885 the holders executed a

usufructuary mortgage over both the A schedule and B schedule lands in favour of the predecessor-in-title of defendants 1 to 5 for Rs. 6,000. In 1886 a simple mortgage of these lands was executed in favour of one Putta Audenna for Rs. 1,500. In the same year a third mortgage, which was also a simple mortgage, was executed in favour of two persons, K. Latchayya and M. Venkata Rao, Latchayya having a two-thirds share in the mortgage and Venkata Rao a one-third share. This mortgage was for Rs. 1,200. The second mortgagee transferred his mortgage to the first mortgagee. In execution of the decree in Original Suit No. 27 of 1887 the plaintiff's father who had obtained a money decree against the mortgagors purchased the equity of redemption over these lands and obtained symbolical delivery on the 14th October 1892. In 1893 defendants 1 to 5 brought Original Suit No. 34 of 1893 on the second mortgage and obtained a decree. This decree amount was paid off by the plaintiff's father. On the 17th of July 1894 the plaintiff got an assignment of the two-thirds share of the third mortgage owned by K. Latchayya. In Original Suit No. 303 of 1896 Venkata Rao the mortgagee of one-third share of the third mortgage obtained a decree which was transferred to the sixth defendant who got the lands sold at Court auction and purchased them. The plaintiff's father was a party to the suit. It may here be observed that the sale and purchase of the A schedule lands was invalid as the lands are Muzumdari service inam and hence inalienable; but the sale of the B schedule lands was not open to this objection. However, the plaintiff being bound by the decree must be deemed to

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have lost his rights over both the properties ; but in 1902 he was given a patta for the A schedule lands by the Government. In *Venkata Jagannadha v. Veerabhadrayya*(1) it was held that the grant of patta constitutes a fresh grant. The plaintiff must therefore be deemed in consequence of the grant to have obtained an absolute title to the property for which he was given a patta. On the strength of the title thus obtained the plaintiff instituted Original Suit No. 280 of 1903 for possession of the A schedule properties against the present defendants 1 to 5 and the sixth defendant who was the nineteenth defendant in that suit. The first issue in the suit was whether the patta granted to the plaintiff had the effect of cancelling the sale of the lands in favour of the nineteenth defendant. On this issue the District Munsif found against the plaintiff and dismissed the suit (See Exhibit IV). On appeal the District Judge confirmed the District Munsif's decision holding that to get possession the plaintiff must first pay off the mortgage of defendants 1 to 4 and that the grant of the patta in his favour did not affect the rights of the nineteenth defendant (i.e., the sixth defendant) in the suit lands (See Exhibit V). As a result of this decision the plaintiff instituted the suit out of which this appeal arises for redemption and for possession of the suit lands. The suit is admittedly confined to the lands for which the plaintiff has obtained a patta from the Government as already mentioned in 1902.

Besides raising the contentions relating to the merits of the case, the contesting defendants raised, at the very outset, various legal objections

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(1) (1921) I.L.R., 44 Mad. 643 (P.C.).

to the suit, as preliminary points for decision. These points were that the plaintiff's rights in the lands have been extinguished in consequence of some of the previous proceedings, that his rights, if any, were barred by limitation, that the suit was barred under Order II, rule 2, of the Code of Civil Procedure and that it was also barred by *res judicata* by reason of the decision in Original Suit No. 280 of 1903. On these preliminary points, the learned Subordinate Judge upheld the contentions of the defendants and in consequence the plaintiff's suit was dismissed without an enquiry into its merits.

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In appeal Mr. Govindarajachari on behalf of the plaintiff-appellant contended before us that the decision on all these points is wrong and that the case should be sent down for a decision on the merits. Mr. Somasundaram on behalf of the sixth defendant attempted to support before us the lower Court's decision only on the point of *res judicata*. The only point, therefore, for us to decide is, "Is the plaintiff's suit barred by *res judicata* by reason of the decision in Original Suit No. 280 of 1903?" It may here be mentioned that the plaintiff is willing to redeem defendants 1 to 5, but they support the sixth defendant's plea which, if successful, would entail dismissal of the plaintiff's suit.

The lower Court's decision on the question of *res judicata* is contained in paragraph 13 of the judgment which is as follows :

" . . . The sixth defendant was the nineteenth defendant in the previous suit. There was a specific issue raised therein as to whether the patta to plaintiff had the effect of cancelling the sale in favour of nineteenth defendant. This

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issue was found against the plaintiff. This finding was confirmed in appeal. This decision is conclusive there being no second appeal by the plaintiff."

Mr. Govindarajachari contends that, assuming that a previous decision on a question of law, though erroneous, can be treated as *res judicata* in a subsequent suit—a proposition which he is not willing to concede though, we think, the decisions are against him—the decision of the appellate Court in the previous suit should not be accepted as *res judicata* in the present suit inasmuch as the District Munsif in whose Court the previous suit was instituted is not competent to try the present suit which has been instituted in the Sub-Court. According to section 11 of the Civil Procedure Code, to constitute a previous decision *res judicata* in a subsequent suit it is necessary amongst other things that the Court which tried the previous suit must have been a Court "competent to try the subsequent suit". In the case before us the Court of the District Munsif was competent to try the previous suit, that suit being one for possession; but admittedly the present suit being one for redemption of a mortgage of Rs. 6,000 it was not competent for the District Munsif's Court to try it. It must therefore follow according to section 11, Civil Procedure Code, that the previous decision cannot operate as *res judicata* in the present suit. But Mr. Somasundaram for the respondent argues that the nature of the previous and the present suits remains the same and that the plaintiff should not be allowed by merely tacking on to the prayer for possession a prayer for redemption to get rid of the effect of the decree in the previous suit. In support of his contention he strongly relies on the decision in *Pathuma*

v. *Salimamma*(1), followed and explained in *Thekkamamengath Raman alias Kochu Poduval* v. *Kakkasseri Pozhiyot Manakkal Karnavan*(2) and *Patrachariar v. Alamelumangai Ammal*(3), but on examination it will be found that decision does not support him. In that case it was held that the decision of a District Munsif with regard to the validity of a gift of a *shop and a warehouse* which was only one of the items in a deed of gift which comprised various other properties also was *res judicata* in a subsequent suit as it was within his competency to decide it ; but his decision as to the validity of the deed of gift which was a larger question was not *res judicata* in a subsequent suit as his Court was not competent to decide this larger issue which involved title to the rest of the properties comprised in the gift. Applying this principle to the present case the position will be this. If the District Munsif had held in the previous suit that the plaintiff could not recover possession from the nineteenth defendant (that is, the present sixth defendant), then that decision which fell within the competency of his Court to decide would be *res judicata* in the present suit and the plaintiff will be precluded from raising the same question again ; and, if the District Munsif gave any decision with regard to the redemption of the mortgage, that decision would not be *res judicata* as his Court could not try a suit for redemption and may therefore be disregarded. In the previous case it was not decided that the plaintiff was not entitled to possession as against the nineteenth

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(1) (1884) I.L.R. 8 Mad. 83.

(2) (1915) 28 M.L.J. 184.

(3) (1924) 25 L.W. 11.

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defendant. As between the nineteenth defendant and the plaintiff the only issue raised in that suit was whether the patta granted to the plaintiff had the effect of cancelling the sale of the lands in favour of the nineteenth defendant. On this point the decision was against the plaintiff. That decision not only did not say that the plaintiff is not entitled to possession against the nineteenth defendant but it did not involve any finding that the defendants 1 to 4 were entitled to remain in possession, for the final decision was the decision of the District Judge and he held that the plaintiff is entitled to redeem defendants 1 to 4 and that a suit should be brought for that purpose if he wanted to recover possession. The present suit has been instituted in consequence of that decision. The nature of the decision in the prior suit being as described above, I do not think the contention of the appellants' learned Counsel in the present case in any way goes against the decision in *Pathuma v. Salimamma*(1). Various decisions, such as *Misir Ragho-bardial v. Sheo Baksh Singh*(2), *Run Bahadur Singh v. Lucho Koer*(3), *Sheoparsan Singh v. Ramnandan Prasad Singh*(4), etc., were brought to our notice, but, as they have only a general bearing on the question under discussion, I do not think it is necessary to deal with them. The case relied on by the lower Court in support of its decision, *Bhugwanbutti Chowdhraani v. Forbes*(5), has no application to the present case. In that case the previous suit was brought in the Munsif's Court where it was held that the plaintiff was not entitled

(1) (1884) I.L.R. 8 Mad. 83.

(2) (1882) I.L.R. 9 Calc. 439 (P.C.).

(3) (1884) I.L.R. 11 Calc. 301 (P.C.).

(4) (1916) I.L.R. 43 Calc. 694 (P.C.).

(5) (1900) I.L.R. 28 Calc. 78.



to road and public work cesses. In the subsequent suit instituted by him against the same defendant in the Sub-Court he claimed to recover the road and public work cesses and also embankment and dak cesses. It was rightly held that the plaintiff cannot be allowed to enlarge the scope of the suit by adding reliefs to it to get rid of the effect of the decree in the previous suit. The present case is clearly not one of that class. The plaintiff now seeks to redeem the suit mortgage. Such a suit cannot be tried in a District Munsif's Court. If in the suit before him the District Munsif expressed any opinion about redemption such opinion may be disregarded; but his decision about possession which he was competent to decide would be binding; see *Pathuma v. Salimamma*(1). In the present case, as already pointed out, the District Munsif did not decide in the previous suit that the plaintiff was not entitled to possession as against the nineteenth defendant, nor was it decided that defendants 1 to 4 are entitled to remain in possession against the plaintiff. What was finally decided was that the plaintiff may redeem. In no way does the present suit therefore go against the decisions of this Court in *Pathuma v. Salimamma*(1), *Thekkamannengath Raman alias Kochu Poduval v. Kakkasseri Pozhiyot Manakkal Karnavan*(2) and other cases of a similar nature. For the above reasons I would hold that this suit is not barred by *res judicata* by virtue of the decision in Original Suit No. 280 of 1903.

In the result we set aside the decision of the lower Court and remand the case for disposal according to law after hearing the case on the

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BHIMALINGAM. remaining issues on which we express no opinion. The appellant is entitled to the costs of this appeal. We may say there is no liability in respect of the court-fee as the appeal was allowed to be filed *in forma pauperis*.

JACKSON J. JACKSON J.—A mass of authority has been cited upon the question of *res judicata*, but the case is very simple and runs on all fours with *Pathuma v. Salimamma*(1). In both cases plaintiff was suing a defendant in ejection and a third party intervened claiming paramount title. — *Pathuma v. Salimamma*(1) “an issue as to the title derived under the gift was framed” and it might run in this fashion,

Whether the title set up by plaintiff had the effect of cancelling the gift in favour of Salimamma, the third party.

In our case we have the issue whether the patta granted to plaintiff had the effect of cancelling the sale in favour of nineteenth defendant (the third party).

In *Pathuma v. Salimamma*(1) the Munsif's Court found in favour of the plaintiff, and in our case against him. That makes no difference. The point is that when a larger question was agitated in the superior Court, the opinion of the Munsif who was not competent to deal with this larger question was not treated as *res judicata*.

Salimamma sued for all the property under her alleged deed of gift, and the gift was upheld.

In the same way when plaintiff sues in our case for his right to redeem as mortgagor—a matter beyond the competence of the Munsif—his right can be upheld regardless of the Munsif's opinion that he had no right.

But what cannot be disregarded, and this is the main import of *Pathuma v. Salimamma*(1), although it is mere common sense which hardly requires a ruling, is the competent decision of the Munsif within the bounds of his jurisdiction. The Munsif decreed that plaintiff must have the shop and warehouse for which he sued, and that decree cannot be upset on any theory of its not being *res judicata*. Section 11 of the Civil Procedure Code contemplates "matter in issue" which no one except out of sheer perversity could suppose to mean "matter already decreed". And so too in our case if the Munsif within his competence had decreed that plaintiff could not eject the nineteenth defendant, it would be idle for plaintiff to reopen the matter. He might get a decree in redemption against defendants 1 to 4 but defendant 19 would be irremovable under the prior decree.

But nineteenth defendant never claimed possession in Original Suit No. 280 of 1903. He claimed (see paragraph 5 of the judgment, Exhibit IV), as was set forth in the issue, that his title by sale was superior to plaintiff's title by patta just as Salimamma had claimed that her title by gift was superior. The Munsif found in favour of nineteenth defendant and if in consequence of that finding it had been held that plaintiff could not eject defendants 1 to 4, defendants 1 to 4 could retain their possession just as in *Pathuma v. Salimamma*(1) plaintiff retained his shop and warehouse. But that was not the final finding; for the District Judge held that to get possession plaintiff must first pay off first defendant's

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(1) (1884) I.L.R. 8, Mad. 83.

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mortgage (Exhibit V) in conformity with which finding the present suit is brought. An attempt to shake the authority of *Pathuma v. Salimamma*(1) by reference to an *obiter dictum* of the Privy Council in *Gokul Mandar v. Pudmanand Singh*(2) was repelled by a Bench of this Court in *Thekkamannengath Raman alias Kochu Poduval v. Kakkasseri Pozhiyot Manakkal Karnavan*(3). But in the present suit the question there is academic. If the dictum of the Privy Council is given the literal interpretation which was attempted to be applied to it, not even the decree of the Munsif's Court would be *res judicata* in the superior Court—the whole proceeding of the Court not competent to try such subsequent suit would be a nullity. But, for the appellant, Mr. Govindarajachari does not carry his argument so far, and is content to rest it upon *Pathuma v. Salimamma*(1) leaving the respondents entitled to whatever they got by the decree in the Munsif's Court. Of course if the decree also is ruled out, respondents are worse off than they were before. It seems hardly necessary to add that in my opinion the dictum does not carry this meaning and has been correctly interpreted in *Thekkamannengath Raman alias Kochu Poduval v. Kakkasseri Pozhiyot Manakkal Karnavan*(3).

A.S.V.

(1) (1884) I.L.R. 8 Mad 83.

(2) (1902) I.L.R. 29 Calc. 707 (P.C.).

(3) (1915) 28 M.L.J. 184.