

been made out by the plaintiff in the present instance, and we must, in consequence, reverse the decree of the Subordinate Judge in appeal, and restore that of the Court of first instance, with costs throughout on the respondent.

Decree reversed.

1884
RÁMCHANDRA
APÁJI
v.
BÁLÁJI
BHÁURÁV.

APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Nánábháí Haridás.

RAMCHANDRA KOLATKAR (ORIGINAL DEFENDANT), APPELLANT, v.
MAHA'DAJI KOLATKAR (ORIGINAL PLAINTIFF), RESPONDENT.*

1884
September 22.

Mortgage—Sale by mortgagor of part of mortgaged property pending redemption suit—Sale by mortgagor of rest of mortgaged property after decree for redemption—Application by purchasers for execution of decree—Subsequent suit for redemption by one purchaser—Sale pendente lite.

One Moro sued the defendant Rámchandra for partition. The defendant pleaded a prior partition, and alleged that the property, which Moro now sued to recover, had been mortgaged by Moro to him (the defendant).

Pending the suit, Moro sold to the plaintiff a portion of the property claimed from the defendant. Subsequently to this sale a decree was passed in the suit, by which it was declared that the mortgage alleged by the defendant had been proved, and that Moro should redeem within six months from the date of the decree. Subsequently to this decree, viz., on 25th November, 1879, Moro sold the remainder of the mortgaged property to one Hari Sakháram.

The two purchasers (viz., the plaintiff and Hari Sakháram) then made a joint application for execution of the decree for redemption. The Subordinate Judge held as to the plaintiff, that the plaintiff, having purchased *pendente lite*, and having become Moro's assignee prior to the decree, was not entitled to come in under section 232 of the Civil Procedure Code (Act X of 1877) to get the decree enforced, and on 6th March, 1880, an order was made that Hari Sakháram should redeem the whole property on payment of Rs. 100 and costs.

Hari Sakháram subsequently sold his interest to the mortgagee Rámchandra.

In 1880 the plaintiff brought the present suit for redemption against Moro (the mortgagor) and the defendant Rámchandra (the mortgagee), alleging (*inter alia*) that Moro having sold the property had not sought to execute the former decree for redemption.

The defendant Rámchandra in his written statement alleged that the sale by Moro to the plaintiff was fraudulent; that the plaintiff as purchaser from Moro had not applied to be made a party to the former suit; that Moro having failed to redeem as ordered by the said decree within the period specified, neither he nor the plaintiff was now entitled to sue.

* Second Appeal, No. 89 of 1883

1884

RÁMCHANDRA
KOLATKAR
v.
MÁHÁDÁJI
KOLATKAR.

Held, that the plaintiff's suit was unsustainable. By the sale to the plaintiff the rights of Moro came to the plaintiff subject to the result of the suit then pending in which he did not choose to get himself made a co-plaintiff. When the decree was passed it was only through a right derived from Moro that the plaintiff could have a *locus standi* in the further proceedings, and he applied for execution as assignee and, therefore, as representative of Moro under section 244 of the Code of Civil Procedure (X of 1877). As such representative he might have appealed, but did not, against the order of the 6th March, 1880, passed on the application made by him jointly with Hari Sakhárám. He had this right of appeal as representative of Moro, but he could not bring a fresh suit. If he was not a representative of Moro, then he was a stranger to the proceedings under the decree, and as Moro took no steps to fulfil the decree, the right to redeem was foreclosed in six months from the date of the decree, i.e. in May, 1881. The plaintiff could not, by any step, prevent the right of the defendant, as mortgagee, against Moro from growing and perfecting itself during the six months allowed for redemption.

THIS was a second appeal from the decision of C. E. G Crawford, Assistant Judge of Ratnágiri.

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Pending the suit, Moro sold to the plaintiff a portion of the property claimed from the defendant. Subsequently to this sale a decree was passed in the suit by which it was declared that the mortgage alleged by the defendant had been proved, and that Moro should redeem within six months from the date of the decree. Subsequently to this decree, *viz.*, on 25th November, 1879, Moro sold the remainder of the mortgaged property to one Hari Sakhárám.

The two purchasers (*viz.*, the plaintiff and Hari Sakhárám) then made a joint application for execution of the decree for redemption. The Subordinate Judge held, as to the plaintiff, that the plaintiff having purchased *pendente lite*, and having become Moro's assignee prior to the decree, was not entitled to come in, under section 232 of the Civil Procedure Code (Act X of 1877) to get the decree enforced, and on 6th March, 1880, an order was made, that Hari Sakhárám should redeem the whole property on payment of Rs. 100 and costs.

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1884

RÁMCHANDRA
KOLATKAR
v.
MÁHÁDÁJÍ
KOLATKAR.

In 1880 the plaintiff brought the present suit for redemption against Moro, and the defendant Rámchandra (the mortgagee), alleging (*inter alia*) that Moro, having sold the property, had not sought to execute the former decree for redemption.

The defendant Rámchandra alleged that the sale to the plaintiff was fraudulent; that the plaintiff had not applied to be made a party to the former suit; that Moro having failed to redeem as ordered by the said decree, within the period specified, neither he nor plaintiff was now entitled to sue.

The Subordinate Judge of Ratnágiri rejected the plaintiff's claim.

The plaintiff appealed, and the Assistant Judge reversed the decree of the Court of first instance, and held the plaintiff entitled to redeem the property on payment of Rs. 195 within six months from the date of the decree.

The defendant appealed to the High Court.

Yashwant Vásudev Athlye for the appellant.—The assignment to the plaintiff having been made *pendente lite*, and he not having been made a party to the suit by Moro (the assignor), he is bound by the decree against his assignor, and has no right to bring a separate suit. Moreover, the plaintiff and his assignor having failed to redeem, as ordered by the decree, within six months, both are foreclosed. An assignee *pendente lite* is bound by the decree that may be passed against the assignor—*Garth v. Ward*⁽¹⁾; *Bishop of Winchester v. Pain*⁽²⁾; *Báláji Ganesh v. Khusháljí*⁽³⁾; Coote on Mortgages (4th ed.), p. 1025, *Ibid.* p. 1060. It was not competent for the District Judge to go behind the decree. The principle of merger does not apply—*Tátia v. Bápu*⁽⁴⁾. The plaintiff was perfectly aware of the pendency of the suit at the time of his purchase, and did not claim to be a party. If the decree is allowed to be split up, the appellant should be

(1) 2 Atkins at p. 175.

(2) 11 Ves. at p. 199.

(3) 11 Bom. H. C. Rep. at p. 24.

(4) Printed Judgments for 1883, p. 161

1884

RÁMCHANDRA
KOLATKAR
v.
MÁHÁDÁJI
KOLATKAR.

allowed to demand full costs of the former litigation from the plaintiff.

Dáji Abdáji Kháre for the respondent.—The question of *lis pendens* was not raised in the Court below, and cannot now be raised here—*Kisan Sing v. Moreswar Joshi*⁽¹⁾. The meaning of the word representative in section 244 of the Civil Procedure Code should be held to be that which the Calcutta High Court put on it—*Rash Behary Mookho Padhya v. Maháráni Surnomoyee*⁽²⁾.

WEST, J.—In this case Moro sued Rámchandra for partition. Rámchandra pleaded a prior partition, and alleged that he held the portions of certain lands sought by Moro as mortgagee. This the Subordinate Judge found to be true, and he decreed for redemption, on payment by Moro, of the amount due under the mortgages and costs. Pending the litigation Moro's agent Krishnáji sold to Máhádáji, the present plaintiff, Moro's interest in one of the properties mortgaged. After the decree his interest in the other property mortgaged was sold to one Hari Sakhárám. These two purchasers came forward, and in a joint application offered to pay their quotas of the amount decreed on condition of the respective properties being given up to them by the mortgagee Rámchandra. This application the Subordinate Judge rejected on the ground that Máhádáji having become Moro's assignee before the decree, not after the decree, had no right to get it enforced. He directed that Hari Sakhárám, if so disposed, should be allowed to redeem on paying the whole sum awarded as due on the mortgages.

Hari Sakhárám, it appears, then sold his interest to the mortgagee Rámchandra. Moro thus acquired a right, as against Rámchandra, to redeem the other property on paying the amount properly attributable to it under the decree, and this right of Moro's centred in Máhádáji as purchaser of Moro's interest. Máhádáji, however, instead of again offering to redeem under the decree the property included therein, in which Rámchandra had not acquired the equity of redemption as well as the mortgage right, filed a separate suit. He lodged the amount found to be due on account of the mortgage of the equity of redemption of which

(1) I. L. R., 7 Bom., 91.

(2) I. L. R., 7 Calc. at p. 403.

he had become assignee from Moro's agent, and, relying on this as a sufficient tender, claimed restoration of the land from Rámchandra.

Now, if the rights of Moro centred in Máhádáji by the sale to the latter, they came to him subject to the event of the suit then pending in which he did not choose to get himself made a co-plaintiff. When the decree was passed it was only through a right derived from Moro that Máhádáji could have any *locus standi* in the further proceedings, and he applied as assignee, and, therefore, as representative under section 244 of the Code of Civil Procedure. The alternative is that he was a stranger to the proceedings under the decree, and then as Moro took no step to fulfil the decree, the right to redeem was foreclosed in six months from the decree, *i.e.*, in May, 1880. But as representative in interest of Moro failing in the application made by him jointly with Hari Sakhárám in March, 1880, Máhádáji had an appeal open to him of which he did not avail himself. He could not bring a separate suit. He did not seek to redeem his own portion when the mortgagee had acquired the rest of the property embraced in the decree, and thus, too, he became barred. As a non-representative of Moro he could not, by any step, prevent the right of the mortgagee against Moro from growing and perfecting itself during the six months allowed for redemption. In every aspect of the case his present suit is unsustainable. We must, therefore, reverse the decree of the District Court, and restore that of the Subordinate Judge, with costs throughout on the plaintiff Máhádáji.

Decree reversed.

1884

RÁMCHANDRA
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