married woman and having no separate property. Thereupon the plaintiff obtained a rule calling upon the defendant to show cause why the order should not be set aside and why the Sheriff should not be directed to re-take her, or why the plaintiff should not be at liberty to issue execution afresh against her. The considered judgment of the Court was ultimately delivered by Pollock, C.B., who after discussing the matter at length said: "The consequence is, that the rule discharging my brother Rolfe's order, and directing the Sheriff to re-take the defendant, must be made absolute." Here, however, a second warrant of arrest has actually been issued, and nothing would be gained by substituting an order to re-take in its place. I, therefore, would confirm Mr. Justice Starling's order with costs.

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CROWE, J.:—I concur in the judgment of my Lord the Chief Justice.

Decree confirmed.

Attorneys for plaintiff—*Messrs. Mulla and Mulla.*

Attorneys for defendant—*Messrs. Malvi, Hiralal and Mody.*

APPELLATE CIVIL.

Before Sir L. H. Jenkins, Chief Justice, and Mr. Justice Crowe.

VINAYAK SHIVRAO DIGHE AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* DATTATRAYA GOPAL AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

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AND

DATTATRAYA GOPAL AND OTHERS (ORIGINAL DEFENDANTS), APPELLANTS, *v.* VINAYAK SHIVRAO DIGHE AND ANOTHER (ORIGINAL PLAINTIFFS), RESPONDENTS.†

Mortgage—Decree for redemption—Payment of the amount of decree of lower Court and recovery of possession by mortgagors—Subsequent enhancement in appeal of amount ordered to be paid by decree—Subsequent suit by the mortgagee to recover profits of the mortgaged property for period between recovery of possession by mortgagor and payment of amount of appellate decree—Res judicata—Civil Procedure Code (XIV of 1882), section 13, explanation II.

On the 25th September, 1893, a decree in a redemption suit directed the plaintiffs (mortgagors) to pay to the defendant (mortgagee) Rs. 8,200 and costs

* Second Appeal No. 527 of 1901. † Second Appeal No. 548 of 1901.

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within six months from its date, and to redeem the mortgaged property. The plaintiffs paid Rs. 8,200 and costs on 4th December, 1893, *i. e.*, within the six months, and obtained possession in March, 1894. In the meanwhile the defendant preferred an appeal, and the judgment in appeal, dated the 2nd September, 1895, varied the decree by substituting Rs. 9,809-9-9 for Rs. 8,200, and directed that the six months' time should run from its date. The balance of Rs. 1,609-9-9 was paid by the mortgagors in March, 1896. Subsequently the legal representatives and heirs of the mortgagee brought the present suit against the representatives of the mortgagors to recover the profits of the mortgaged property for the period intervening between the date at which they obtained possession (March, 1894) and the date at which they paid the full amount ordered by the appellate decree (March, 1896). The first Court allowed the claim, but on appeal by the defendants the Judge varied the decree by reducing the amount awarded. On second appeal,

Held, that the matter was *res judicata* and the suit was barred, the question raised being one arising directly out of the mortgage transaction which was the subject-matter of the litigation in the former suit.

CROSS second appeals from the decision of Ráo Bahádur V. V. Phadke, Additional First Class Subordinate Judge of Thána, with Appellate Powers, modifying the decree of Ráo Sáheb R. B. Chitale, Second Class Subordinate Judge of Pen.

On the 8th October, 1844, one Daudkhan Janglikhan mortgaged the property in suit with possession to Shivrao Govind for Rs. 8,200. The mortgagee was to pay Government assessment and to recover rents and profits in lieu of interest, and the time for redemption was to be between 1849 and 1851.

Daudkhan (the mortgagor) died and his widow Tambibi, on the 5th February, 1862, executed a fresh mortgage to the same mortgagee of the same property, the consideration being the mortgage-debt already existing and further advances made to her deceased husband and to herself. All the moneys so advanced were to be repaid before redemption, the time for which was extended to twenty-one years.

On the 5th September, 1881, Tambibi mortgaged her equity of redemption in the same property to one Gopal Ramchandra, father of defendant 1. The mortgage-deed contained an agreement by Gopal that he would redeem the prior mortgages and obtain possession. He accordingly and the representatives of the original mortgagors (Tambibi and Daudkhan) filed a redemption suit (No. 250 of 1890) against the mortgagee Shivrao Govind

in the Court of the First Class Subordinate Judge at Thána, who, on the 25th September, 1893, passed a decree for redemption on payment by the plaintiffs in that suit to the defendants of Rs. 8,200 and costs within six months from the date of the decree, and in default foreclosure.

The defendant (mortgagee) was not satisfied with the amount found due and he filed an appeal (No. 136 of 1893) to the High Court. On the 4th December, 1893, while this appeal was pending, Gopal Ramchandra paid the amount ordered by the lower Court and in March, 1894, obtained possession of the property.

On the 2nd September, 1895, the mortgagee's appeal was heard, and the High Court varied the decree by ordering redemption of the mortgaged property on payment of Rs. 9,809-9-9, with proportionate costs, within six months from the date of the appellate decree.

The further sum (*i. e.*, Rs. 1,609-9-9) awarded by the High Court was not paid until March, 1896, and the plaintiff, who was the heir and representative of the mortgagee Shivrao Govind, deceased, now brought this suit to recover the profits of the mortgaged property from the date at which it had been handed back to the mortgagors under the decree of the lower Court, viz. March, 1894, until the full amount of the mortgage-debt was paid off in March, 1896, as awarded by the High Court. They claimed that until complete redemption they were entitled to the profits of the land, and they prayed for an account.

The defendants, amongst whom were included the representatives of the original mortgagors, contended *inter alia* that they were not liable to the plaintiffs' claim, and that the plaintiffs' remedy, if any, lay in execution proceedings under the redemption decree, and not by a fresh suit.

The Subordinate Judge found that the plaintiffs were entitled to bring the suit, and passed a decree in their favour for Rs. 4,147-7-1 with costs. He also awarded interest at 9 per cent. per annum on the decretal amount from the date of suit till satisfaction.

On appeal by the defendants, the Judge modified the decree and reduced the amount awarded to Rs. 681-2-0 on the following grounds. In his judgment he said:

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It is urged, however, that in extending the time for redemption, the High Court clearly held that the mortgage was not to be redeemed till payment of the entire sum of Rs. 9,809. That is not the proper way to interpret the decree of the High Court. There is nothing to show that at the time of passing the decree the High Court had been made aware of the fact that the mortgage had already been satisfied according to the decree of the lower Court. Had that fact been brought to the notice of the High Court, the decree passed by it would certainly have been differently framed. The High Court was all along ignorant of the fact of the redemption, and so passed a decree for redemption in the usual form. It cannot be said that the High Court meant to undo the redemption of which it had no knowledge. What, then, is to be done here? Before answering the question I must put a hypothetical case. The mortgage in the present case is based on one principal mortgage-deed and on another document creating additional charges. Let us suppose that after the death of the mortgagee his heirs had, through ignorance of the existence of the second document, agreed to the redemption of the mortgage on payment of the money due on the first mortgage, and subsequently found out their mistake. What remedy would they have obtained? It is plain that the Court would not have allowed them to treat the redemption as null and void and to obtain possession of the property. They would have been allowed only to recover the additional amount with reasonable compensation for the loss of proportionate profits. The same course must evidently be followed in this case, and plaintiffs should be allowed to recover only a proportionate share in the profits for the two years. In my opinion, it would not be unfair to hold that when plaintiffs accepted the payment of Rs. 8,200, they and defendants became jointly entitled to the mortgage to the extent of Rs. 1,609 and Rs. 8,200, respectively. That being so, plaintiffs are to get only a proportionate portion of the profits. The profits for the two years have been found above to have been Rs. 3,352-11-1, and the proportionate share of plaintiffs therein comes to Rs. 550-2-0. I therefore find that that is the amount due to plaintiffs.

* * * * *

As regards the eighth issue, it is evident that as defendants have had use of the plaintiffs' money they must pay interest. It is not a question of paying interest on interest as the pleader for appellant argues. The lower Court has allowed interest at 9 per cent. I think the rate is a reasonable one and allow interest at that rate. The interest comes to Rs. 131 and the total amount due to plaintiffs thus amounts to Rs. 681-2-0 up to date of suit. I decide to award future interest at 6 per cent. from the date of suit, as also interest at 6 per cent. on the amounts of costs to run from this date.

The parties filed cross second appeals.

Mahadeo B. Chaubal for the appellants (plaintiffs) in second appeal No. 527 and respondents in second appeal No. 548 :—The

Judge erred in apportioning the mesne profits in the way he has done. According to the terms of the mortgage, we were entitled to all the profits of the mortgaged property until the entire debt was paid off. The payment of Rs. 8,200 under the redemption decree clearly did not satisfy the mortgage, as the High Court in appeal held that the property should not be redeemed until the larger amount awarded by it was paid. The defendants had no right to take possession until they had paid the amount awarded by the High Court. We were thus wrongfully kept out of the profits of the land, and we are entitled to the whole amount awarded to us by the first Court.

Daji A. Khare for the respondents (defendants) in second appeal No. 527 and appellants in second sppeal No. 548 :—The plaintiffs in this suit are mortgagees and claim the profits of the land from March, 1894 to 1896. That claim can only be based on the terms of the mortgage-deed, under which they are to take the profits in lieu of interest. This is therefore a suit upon the mortgage. But the former suit was also a suit upon the mortgage and in that suit the High Court passed a decree. There cannot be two suits on the same mortgage : Civil Procedure Code (XIV of 1882), section 13. If the plaintiffs are entitled to any relief, their remedy is in execution proceedings under the decree already passed : see section 583 of the Civil Procedure Code (XIV of 1882).

Chaubal in reply :—It is the modification of the original decree by the High Court that gave us the right to bring the present action. When we filed the redemption suit, the present cause of action had not arisen. Our suit, therefore, can lie. The point is covered by authorities : *Shama Pershad Roy* v. *Hurro Pershad Roy*,(1) *Balvantrav Oze* v. *Sadrudin*,(2) *Shurnomoyee* v. *Pattarri Sirkar*,(3) *Rohni Singh* v. *Hodding*,(4) article 109, schedule II of the Limitation Act (XV of 1877).

JENKINS, C.J. :—In 1844, Daudkhan, an ancestor of defendants 5 and 6, executed in favour of Shivrao Govind, the plaintiff's

(1) (1865) 10 Moore's I. A. 203.
(2) (1887) 13 Bom. 485.
(3) (1878) 4 Cal. 625.
(4) (1893) 21 Cal. 241.

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father, a mortgage with possession to secure Rs. 8,200. Daudkhan died, and on the 5th February, 1862, his widow executed in favour of Shivrao Govind the document Exhibit 73 in this case. It recites the mortgage of 1844 and other documents and the existence of debts, and then proceeds as follows :

Therefore, after requesting you to show us some indulgence by way of extending the period still further, I pass the following agreement to you in writing :—That you should not demand from us for twenty-one years from this date the whole of the debt inclusive of the mortgage and the various debts on *khatas*, &c. We shall not pay (it) nor should you take it. For twenty-one years you should enjoy the profits of the estate in lieu of interest ; (whether there is) profit or loss, (it) is yours ; and if it becomes necessary to make embankments to the salt pans, we are not responsible for the expenses thereof. After twenty-one years expire, we shall pay in one sum, at some time between the beginning of Margshirsh and the end of Falgun, the whole of the aggregate amount made up of the sums in all the various documents aforesaid, and then take back our estate. If perchance after twenty-one years we fail to pay the amount, then you should enjoy the profits in accordance with your *vahivat* as before till the year we pay off your amount. We shall have nothing to do with that (*vahivat*).

In 1890 a suit for redemption was brought by Gopal Ramchandra Limaye, Janglikhan and Fatekhan, the persons then interested in the equity of redemption, and it was found by the first Court, that the plaintiffs were entitled to redeem on payment of Rs. 8,200 and costs, and the judgment concludes as follows :

For these reasons I do order that plaintiff No. 1 do pay to the defendant Rs. 8,200 and his costs within six months from this date and redeem the property in suit excepting a two-anna share in the village of Silur now in the possession of Haidarkhan. In default of payment as aforesaid the plaintiffs' equity of redemption is hereby forever foreclosed. Plaintiffs to bear their own costs.

On the 4th December, 1893, Gopal Ramchandra paid the Rs. 8,200 and costs, and in 1894 he took possession. An appeal was preferred to this Court against the decree, and in the judgment dated the 2nd September, 1895, it is said : " We amend the decree by substituting Rs. 9,809-9-9 for Rs. 8,200 in the decree and direct the six months' time to run from this date." Nothing was said as to the profits from 1894 to the date of payment of the Rs. 9,809-9-9, and it is to recover them that this suit is brought.

The balance of the Rs. 9,809-9-9 was actually paid in March, 1896, and the amount of the profit claimed is Rs. 3,352-11-1 according to the finding of the first Court in this suit; so that, if the plaintiff is right, the defendants are now liable to pay that sum simply because, in accordance with a decree of the Court in the former suit, they paid Rs. 8,200 instead of Rs. 9,809-9-9, the sum awarded on appeal from that decree. The question is whether that claim can now be advanced.

Now, the question is one which arises directly out of the mortgage transaction, which was the subject-matter of the litigation in the former suit. But the decree in a suit for redemption must be such as to enable the Court to do complete justice: *Jennings* v. *Jordan*[1]; and, "as far as it is possible, the Court endeavours to make a complete decree that shall embrace the whole subject and determine upon the rights of all the parties interested in the estate": *Palk* v. *Clinton*.[2] So in this case the claim on which we are now asked to adjudicate is one that could and ought to have been advanced in the former suit. Without a determination on it, there was not a complete adjustment of the right of the parties. It furnished, if well founded, a good ground of defence to the claim of redemption, and so must be deemed to have been a matter directly and substantially in issue in such suit (section 13, explanation II, Civil Procedure Code).

It has been urged that it makes a difference that the claim was not in existence when the redemption suit was commenced, but this, in my opinion, does not assist the plaintiff. "Where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject

(1) (1881) 6 A. C. 698 at p. 704. (2) (1806) 12 Ves. 48.

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of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time" : *Henderson* v. *Henderson*.[1] The claim that the plaintiff urges in this suit in our opinion falls precisely within the principle laid down by Vice-Chancellor Wigram. Even in a common law action it was said by Blackburn, J. : " I incline to think that the doctrine of *res judicata* applies to all matters which existed at the time of giving of the judgment, and which the party had an opportunity of bringing before the Court " : *Newington* v. *Levy*.[2] Beyond doubt must this be so in a redemption suit, which has for its purpose the complete adjustment of the rights of the parties, and the decree in which, when properly framed, provides for matters even up to the time when it is ultimately carried into effect.

The comprehensive character of suits relating to mortgages and the obligation incumbent on litigants to see that the decree in them covers all their rights has been repeatedly recognized by the Courts, and in illustration of this we may refer to *Baloji* v. *Tamangouda*,[3] *Maloji* v. *Sagaji*,[4] *Mahabir Pershad* v. *Macnaghten*,[5] and *Kameswar* v. *Rajkumari Rutton*.[6]

The case now before us is one, which from its circumstances strongly invites the application of this principle, and in accordance with it I would dismiss the appeal and allow the cross-appeal, with the result that this suit must be dismissed with costs throughout.

Suit dismissed.

(1) (1843) 3 Hare 110 at p. 115.
(2) (1870) L. R. 6 C. P. 180.
(3) (1869) 6 B. H. C. A. C. J. 97.
(4) (1888) 13 Bom. 567.
(5) (1889) L. R. 16 I. A. 107.
(6) (1892) L. R. 19 I. A. 234.