

APPELLATE JURISDICTION. (a)

Special Appeal No. 607 of 1861.

KOTTALE UPPI,Appellant.

KALLIYATT PANOLI KUNNI KUTTI and another. Respondents.

One of several co-mortgagors cannot appeal against a foreclosure decree when the equity of redemption has been sold before the institution of the suit.

THIS was a special appeal from the decree of W. Holloway, the Civil Judge of Tellicherry, in Appeal Suit No. 50 of 1861.

1862.
September 5.
R. A. No. 607
of 1861.

Mayne for the appellant, the plaintiff.

The Court delivered the following judgment.

The plaintiff held a mortgage on property belonging to the defendants from 1 to 9. He first brought his suit for recovery of the sum in which the mortgagees were indebted to him ; but the District Munsif of Tellicherry dismissed it on the ground that his remedy was to foreclose the mortgage by assumption of the mortgaged property, as provided for in the mortgage-bond. Upon this the present foreclosure-suit arose. It appeared from the answers of the first and tenth defendants that the equity of redemption had been sold to the latter before the institution of the second suit. The District Munsif, nevertheless, adjudged the property to the plaintiff in fulfilment of the penal condition of the mortgage-bond. Against this decision the first defendant appealed, whereupon the Civil Judge dismissed the suit, objecting to give effect to the condition in the mortgage-deed barring the mortgagor's right to redeem. (b).

(a) Present : Strange and Phillips, J. J.

(b) The decree of the Civil Judge was as follows :—" It has been ruled many thousand times [by the Madras Sadr ' Adalat] that no language in a mortgage-deed, however strong, can bar the equity of redemption, and that the mortgagee is entitled only to the repayment of the sum advanced, with interest. This of course may be paid by sale of the mortgaged property, should the mortgagor fail to comply with the terms of the decree. It is much to be regretted that when this plaintiff asked for what he was entitled to, the late Munsif of Tellicherry referred him to another suit. In this suit he appears asking for what the law cannot give him, and must bear his own costs, which each party will do."

1862.
 September 6.
 R. A. No. 607
 of 1861.

However sound the decision of the Civil Judge, we consider that he was not competent to pass it on an appeal preferred by the first defendant. The appellant's interest in the land has, by his own account, ceased; and the tenth defendant, to whom the title is alleged to have passed, has submitted to the decree of the District Munsif.

We consequently set aside the decision of the Civil Judge, and affirm that of the District Munsif.

Appeal allowed.

APPELLATE JURISDICTION. (a)

Civil Petition No. 284 of 1862.

CÆMMERER *against* BIRCH.

Ex parte BROOKS.

No one but a party to a suit can appeal under Section 11 of Act XXIII of 1861 against an order passed in such suit.

1862.
 September 8.
 Civ. P. No.
 284 of 1862.

IN this case Cæmmerer was proceeding to enforce a judgment against Birch who had become insolvent, when Brooks, the official assignee of Birch, who was not a party to the suit, interposed on the ground that all Birch's property had vested in him. E. W. Bird, the Acting Civil Judge of Negapatam, passed an order rejecting Brooks' application. Brooks now appealed against the order.

Miller for the appellant, relied on sec. 11 of Act XXIII of 1861, which enacts that "all questions regarding the amount of any mesne profits which by the terms of the decree may have been reserved for adjustment in the execution of the decree, or of any mesne profits or interest which may be payable in respect of the subject matter of a suit between the date of the institution of the suit and execution of the decree, as well as questions relating to sums alleged to have been paid in discharge or satisfaction of the decree or the like, and any other questions arising between the parties to the suit in which the decree was passed and relating to the execution of the decree, shall be

(a) Present : Strange and Frere, J.J.