tions, be regarded as the law laid down by the Smruti Chandrika. It is rather the law propounded by an objector, from whom the author dissents. Of course the point of law determined by the Munsif is not *res judicata*. No merely subjective ground of decision ever is so. It lay, in our judgment, clearly upon the plaintiffs to show the circumstances which prevented these parcels Nos. 3, 4, 5, from being in fact, as they are in appearance, the property of the 1st defendant. The mere fact of the acquisition during coverture is not enough. As to Nos. 3, 4, 5, we therefore reverse the decree of the Civil Judge. There will be no costs of this appeal.

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Decree modified.

APPELLATE JURISDICTION (*a*)

Regular Appeal No. 80 *of* 1866.

CHITHRAYIL *alias* KUNATH AHMED KOYA.....*Appellant*,

and

IRUMANOM VITTIL KANHAMATH HAJI and others..... } *Respondents.*

Though the distribution of costs is, under the Civil Procedure Code, a matter within the discretion of the Court, yet there may be circumstances which will justify an appeal upon a mere question of costs.

THIS was a regular appeal from the decree of G. R. Sharpe, the Acting Civil Judge of Calicut, in Original Suit No. 9 of 1866.

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The Advocate General for the appellant, the defendant.

Miller for the first respondent, the first plaintiff.

The facts sufficiently appear in the following.

JUDGMENT :—This was a suit by a mortgagor against the mortgagee for redemption and there has been a decree for redemption. In the course of the suit there were various questions raised. The preliminary questions as to the form of the suit and the valuation of the subject-matter were given up by the plaintiffs, who amended their plaint so as to meet the objections taken by the defendant. The

(*a*) Present :— Collett and Ellis, J. J.

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substantial issue whether the plaintiffs had, prior to the bringing of the suit, duly tendered to the defendant the amount due upon the mortgage was found against them, and it futher appears that even up to the date of the decree they had not produced the money in Court. Another material issue as to what was the purappád or net rent to which the plaintiffs were entitled, was also found in favor of the defendant. But the Civil Court has, for certain reason stated, directed the defendant to pay all the costs of the suit.

The present appeal has been brought by the defendant against the order in the decree as to the costs, and it was objected that there can be no appeal upon a question of costs alone ; but we are of opinion that, though the distribution of costs is, under the Code, a matter within the discretion of the Court, yet there may be circumstances which will justify an appeal upon a mere question of costs. There is a case reported in I Moo. I. A. 470 in which such an appeal was admitted, but the case is peculiar, as the regulation law was then imperative as to how costs were to be distributed and there is an obiter dictum in the course of the judgment (p. 479) that " if there had been a discretion " with respect to the costs vested in the Zillah Court, their " Lordships would not, I think, have allowed an appeal against " the exercise of that discretion, because no appeal against " a decree merely as to costs would be allowed." This judgment was delivered in 1837, and the dictum, which is quite general in its terms, was in accordance with the general rule then prevailing in the Courts of Chancery. But, in more modern times it has been observed, that this rule as to there being no appeal on the subject of costs alone is practically not now in force (per Kinght Bruce, L. J., in *Collard* v. *Roe* (28 L. J., ch. 560). In the prior case in the same Court of *Horn* v. *Coleman* (26 L. J., ch. 544) there was an appeal for costs merely. But even the former general rule was subject to well recognised exceptions. Thus it was held that there might be an appeal for costs merely where a question of principle is involved in the allotment of costs, or where, without going into the evidence in the case, all the materials necessary for considering and determining the

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question are apparent upon the face of the proceeding or order appealed from. There are numerous cases on this point, but a reference to the two cases of *the Corporation of Rochester* v. *Lee* (2 DeG. M. and G. 427) and *Angell* v. *Davis* (4 Myl. and Cr. 360) will serve as a guide to all of them. The present case is, we think, within the exceptions to the general rule, even if it is assumed that the rule in question prevails in our Courts. There has been a recent decision of this Court upon an appeal for costs only, now reported in III M. H. C. Reps. 113 ; but that was certainly a very strong case, as there the defendant had been made by the Lower Court to pay the plaintiff's costs, though the plaintiff's suit had been dismissed ; it was thus a case precisely similar to one referred to by their Lordships of the P. C. in I Moo. I. A. 480, as being " rather too strong a case to be an authority," and as "a most extraordinary decision."

We will now proceed to examine the grounds upon which the Court below has directed the defendant to bear all the costs of the suit. The general rule is that a mortgagor coming to redeem must pay the costs of the mortgagee, unless the mortgagee has been guilty of improper and oppressive conduct, when the Court would make him pay the costs or refuse him his costs, according to the degree of his misconduct. For this we may usefully refer to the case of *Norton* v. *Cooper* (5 DeG. M. and G. 728), the more so as that is another instance of an appeal for costs only. So if there has been a sufficient tender by the mortgagor before suit, the mortgagee may be made to pay the costs of the suit to redeem. According therefore to the general principle as to the allotment of costs in suits to redeem, the defendant in this case would be entitled to his costs.

The Civil Judge gives three grounds for charging the defendant with costs. The first is " a consideration of the " animus which defendant has shown before me against " coming to any compromise and settling the matter among " themselves." But as the plaintiffs were not up to the date of the decree in a position to settle the matter in the only possible manner of settling it, namely, by paying the money due to the defendant, it is not surprising that the defendant

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should have declined a settlement. Moreover, the plaintiffs have failed in proving any prior offer of the money to the defendant and have also failed on every other question in the suit, except an alleged understanding to settle for the purappád on payment of the rent. The same observations equally apply to the second ground stated by the Civil Judge, namely, "the fact that defendant has clearly got a bargain "which he was unwilling to give up except under com- "plusion."

The third ground stated is "the fact that, had defend- "ant been so inclined, he could have got the whole matter "set forth in his own plaint in Original Suit No. 4 and dis- "posed of therein." On examining the judgment in that suit we find that it was a suit by this defendant to eject the then defendants, who were holding under him as tenants of the mortgaged property, and for arrears of rent due by them. He entirely succeeded in that suit. No doubt he might instead of bringing that suit have brought another and different suit to realise his mortgage, but if he was contended with getting into possession he was entitled to do so, and a mortgagee who has his money advantageously invested, is not to be blamed because he brings no suit to foreclose, nor is his not doing so a ground for charging him afterwards with the costs of a suit by the mortgagor to redeem.

Taking the facts therefore to be as set forth in the judgment of the Court below, we are quite clear that the defendant ought not to have been charged with the plaintiffs' costs; and we see nothing amounting to such vexatious or improper conduct on the part of the defendant, as to justify a deviation from the ordinary rule that, in a suit to redeem, the mortgagor should pay the mortgagee's costs. We shall therefore modify the decree of the Court below, and direct that the plaintiffs bear their own costs and pay the costs of the defendant in the Court below and here.

Appeal allowed.