1883

ANUSUYABAI v. SAKHARAM PANDURANG.

as seeking both a declaratory decree as to his title and a particular relief for a specified infringement of his right. In such cases it is for the plaintiff to make the distinction clear, and, if the law allows it, to obtain the declaratory decree to which he is entitled. To deduce it from an incidental statement in a judgment for the defendant not admitting of an appeal by him, because there is no relief awarded to the plaintiff, seems opposed to sound principle as well as to high authority—see *per* Knight Bruce, V.C., in *Barrs* v. *Jackson*(1). In the case of *Jania Gaba* v. *Hulia Waru*(2) it was said that an incidental finding of a District Court on a question of title in a case not admitting of further appeal could not be *res judicata* as to that point in a future suit. The decision could not be appealed against, and, therefore, on the incidental question was not final. The same principle applies where an appeal is excluded by the decree: a point is not finally decided against any party who is not allowed the opportunity of questioning the decision, with the exception of the particular points, as in small causes, to the judgment on which a special finality is given by Statute.

The appeal is dismissed with costs.

Appeal dismissed.

(1) 1 Y. & C. (Ch. C), 585. See also *per* Lord Selborne in *Reg.* v. *Hutchings*, L. R., 6 Q. B. D. at pp. 304, 305.

(2) Printed Judgments for 1873, p. 170.

APPELLATE CIVIL.

Before Mr. Justice Kemball, Mr. Justice West, and Mr. Justice Pinhey.

1883
August 6.

GANSAVANT BAL SAVANT AND ANOTHER (ORIGINAL DEFENDANTS), APPELLANTS, *v.* NARAYAN DHOND SAVANT (ORIGINAL PLAINTIFF), RESPONDENT.*

Mortgage—Redemption suit—Omission to direct foreclosure—Neglect to redeem—Second suit to redeem—Res judicata—Hindu family—Suit by manager in his own name—Representative character—Practice—Parties—Civil Procedure Code Act XIV of 1882, *Sec.* 50.

In 1856, V., a member of an undivided Hindu family, sued the defendants, and obtained a decree for the redemption of certain immoveable property, but the

* Special Appeal, No. 261 of 1881.

1883

GAN SAVANT BAL SAVANT v. NARAYAN DHOND SAVANT.

decree was never executed. At the date of that suit, V. was the manager of the family, consisting of himself and the plaintiff N., who was then a minor. The decree did not provide for the foreclosure of the mortgage in the event of V. failing to redeem. In 1878, N. brought another suit to redeem the same property.

The lower Court held that as the former decree did not direct foreclosure, the relation of mortgagor and mortgagee continued between the parties, and that the plaintiff's suit was not barred by the former decree. The defendant appealed.

Held (Pinhey, J., *dissentinte*), reversing the decree of the lower Court, that the plaintiff's suit was barred.

A decree for redemption, on the default of the decree-holder to pay the money declared to be due within the time fixed by the decree, or if none be fixed, within the time allowed by the law for the execution of the decree, operates as a judgment of foreclosure, and debars the mortgagor from afterwards bringing a second suit to redeem the same property.

A Hindu family is regarded as a corporation whose interests are necessarily centred in the manager, the presumption being that the manager is acting for the family unless the contrary is shown. Before the introduction of the Civil Procedure Code this was so equally with regard to litigation as to other transactions, and it was not then obligatory, or even customary, for a Hindu manager to set forth that he sued in a representative character (as now required by the Code, sec. 50,) or to add the co-owners as parties to the suit (as required by English law). V.'s suit, therefore, being brought in 1856, and no fraud or collusion being alleged, bound the present plaintiff, though then a minor, and he could not now bring a second suit on the same cause of action.

THIS was a second appeal from the decision of C. B. Izon, Judge of Ratnagiri, amending the decree of L. G. Fernandez, Subordinate Judge of Devgad.

The facts, in so far as they are material, and the authorities cited in argument appear from the following judgments. The second appeal was at first heard by Kemball and Pinhey, JJ., who, having differed in opinion, referred the case to the Chief Justice, who referred it to West, J. Any irregularity there might be in this, under section 575 of the Code of Civil Procedure, was waived, the parties on either side having consented to abide by the decision of Mr. Justice West.

Manekshah Jehangirshah for the appellant.

Hon. *V. N. Mandlik*, Government Pleader, for the respondent.

March 21. KEMBALL, J.—It appears that a suit was brought, and decree obtained, by the manager of a joint family in 1858 for redemption of certain property, but the decree was not executed. Subsequently the present suit for redemption in respect of the very same property was brought by another member of the joint family

who was a minor when the former suit was instituted, and the question is, is this second suit maintainable? The District Judge found, as a fact, that the present plaintiff was duly represented in the former suit, but was of opinion that a new cause of action had arisen, as the decree in the former suit did not direct foreclosure; and the decree never having been executed, the *status* of mortgagor and mortgagee continued between the parties.

But I think the District Judge was wrong: see Full-Bench ruling—*Sheikh Golam Hossein* v. *Alla Rukhee Bebee* (1)—referred to in *Anrudh Sing* v. *Sheo Prasad* (2). By reason of the default in payment of the money declared to be due within the time prescribed by law for the execution of decrees (no time having been fixed in the decree), the order for redemption must be taken to have operated as a judgment of foreclosure. The decree declared the mortgagor entitled to obtain possession of the mortgaged property on payment of a particular sum, and if he failed to discharge that debt, he cannot be allowed to harass the mortgagee by another suit for the same purpose.

I would, therefore, reverse the decrees of the Courts below, and reject the claim with costs throughout.

PINHEY, J.—I am of opinion that the decree of the District Court is right, and should be confirmed. The present plaintiff was not a party to the former suit, and could not have executed the decree passed therein. The omission of the plaintiff in the former suit to execute the decree, which he obtained for himself and not for the present plaintiff, cannot affect the right of plaintiff to redeem the property.

The case was subsequently argued before West, J.

August 6.—Judgment was now delivered by

WEST, J.—In this case two questions arise for decision: the first is as to the effect of the judgment of 1856 on those subject to it; the second is, as to whether the plaintiff in this case is subject to it.

On the former question I agree with the view stated by Kemball, J. It follows from the leading principle of *res judicata* that the same matter shall not be agitated again on the original

(1) N. W. P. H. C. Rep., 1871, p. 62. (2) I. L. R., 4 All., 481.

1883

GAN SAVANT BAL SAVANT v. NARAYAN DHOND SAVANT.

ground so as to imperil the stability of the decision formerly given. "Where there is *res judicata* the original cause of action is gone, and can only be restored by getting rid of the *res judicata*"—(*per* Lord Selborne in *Lockyer* v. *Ferryman*(1). The existence of a decree in a plaintiff's favour may seem not to be a good reason for depriving him of a right to sue, and under the Roman law the plea of *res judicata* could be met by a replication of *res secundum se judicata* (Dig. Lib. 44, Ti. 2, Fr. 9., S. 1.) Under the English law also a judgment, it is said, is a bar only when it has negatived the right—*per* Bramwell, L. J., in *Poyser* v. *Minors* (2) ; but this holds generally only when the cause of action in the second suit has arisen on the same original right at a different time from the first, or the first action went off on a mere technical defect. Under the Anglo-Indian law it has long been recognized that a decree-holder must obtain satisfaction of his decree by execution, not by another suit—*Kisan Nandrám* v. *Anandrám Bachâji*(3) ; *Faikrápá* v. *Pandurangápá*(4). A new suit cannot be brought either on the original cause of action, or, save in special cases, on the decree in which that cause has become merged. The object of the Legislature has been to prevent continued litigation on the same grounds, and this would obviously be defeated by allowing a decree-holder to abstain from putting his decree in force, and proceed again on the same cause as before.

The second question is one of some difficulty. As the law stands now, a plaintiff suing in a representative character must set it forth, and show that he is qualified to fill it (Civil Procedure Code, sec. 50). When a right is claimed in common for the plaintiff and others, all persons interested may be deemed to be claimants, and thus bound by the result of the suit (Civil Procedure Code, sec. 13) ; but here there was no allegation of a representative character ; Visram was the eldest brother and manager for the family, of which the present plaintiff was an infant member, but he sued simply in his own name along with a representative of another branch. On the other hand, the present strictness and elaboration of procedure did not prevail in

(1) L. R., 2 Ap. Ca. at p. 528.
(2) L. R., 7 Q. B. D., at p. 338.
(3) 10 Bom. H. C. Rep., 433.
(4) I. L. R., 6 Bom., 7.

1856. It was a generally received doctrine that the acts of a manager bound a Hindu family so long as they were honestly intended for its benefit, or were such as might reasonably be deemed to have that character. The name of a single member of a Hindu family recorded in the land register of the Government might stand for all—*Jowala Buksh* v. *Dharum Singh*(1)—without affecting their rights *inter se*—*Mussumut Cheetha* v. *Baboo Miheen Lall*(2); *Umrithnath Chowdhry* v. *Goureenath Chowdhry*(3). A lessee from a managing member was obliged to account to him for the rent—*Dada valad Ravji* v. *Bhau valad Ganu*(4)—and conversely must be maintained in possession against other individual members. A purchase made under Act I of 1845 by a manager in his own name enabled the other members to sue to enforce their rights notwithstanding the provision in section 21 that no purchaser shall be ousted on the ground that the purchase was made on behalf of another—*Toondun Singh* v. *Baboo Pokhnarain Singh*(5). The Hindu family was, in fact, considered as a corporation whose interests were necessarily centred in the manager; while the manager, as the chief member of the family, was understood to represent the common interests whenever these were subject to be affected by transactions in which he engaged, even in his own sole name. Union and undivided interests being the rule, the presumption was that a manager was acting for the family, unless it were made out that he acted, and professed to act, for himself alone.

This was the case equally with regard to litigation as to other transactions. In a suit filed by, or against, a Hindu as manager it was seldom, or never, according to the former practice, set forth specifically that he sued, or was sued, both on his own behalf and on behalf of the family. The intimacy of union was such that this was taken for granted. The practice is recognized, and not condemned, in *Jogendro Deb Roy's* case(6) and many decisions, like those in *Mayaram Sevaram* v. *Jayvantrav Pandurang*(7) and *Narayan* v. *Pandurang*(8), have proceeded on an identification of the other members of a Hindu family with the one who has

(1) 10 Moo. I. A. at p. 530.
(2) 11 Moo. I. A., 369.
(3) 13 Moo. I A., 542.
(4) Printed Judgments for 1876, p. 11.
(5) 22 Cal W. R., Civ. Rul. 199.
(6) 14 Moo. I. A., 376.
(7) Printed Judgments for 1874, p. 41.
(8) I. L. R., 5 Bom., 685.

1883

GAN SAVANT BAL SAVANT v. NARAYAN DHOND SAVANT.

conducted a suit on their behalf. Where the other members are infants at the time of the suit, that, no doubt, is a reason for scrutinizing the matter with more than usual care in order to protect them against fraud, but here fraud is not suggested; the suit for redemption was, no doubt, brought by Visram in perfectly good faith, his own interests being concerned equally with that of his infant brother. His capacity to represent the family was not impaired by any collusive artifice to its prejudice, and the practice having been such as it was in 1856, the mere omission to specify the present plaintiff as a party did not prevent his being bound by the suit in which he was effectively represented by Visram. At present Visram would have to set forth the minor brother's name—*Vyankatrav* v. *Mahadev* (1), but the law of 1856 was less exacting in particulars.

It was contended that as Visram might sue alone to redeem the mortgage in 1856, it should not be assumed that he sued as a manager so as to make his infant brother a virtual plaintiff. But as a member and manager his acts in relation to the common estate should be presumed to be on behalf of the family rather than for the purpose of creating a distinct adverse interest for himself without partition. As part owner of the equity of redemption and manager for the co-owners, he would have an interest adverse to that which he would acquire by becoming *quasi* assignee of the mortgage. It does not appear that he desired this latter position, or had any funds with which to realize it; otherwise he would have redeemed in accordance with the decree. It is his omission to redeem which now stands in his and his brother's way.

Under the English law the co-owners must all usually join in a suit(2) with respect to their joint property. One joint tenant may recover the whole mortgaged property by paying the whole debt, but not his own share, and the same general principle must now be regarded as the law in India(3). This is so even in the case of assignees of a mortgagor suing to redeem (Story Eq. Pl., § 183). Visram before partition could not sue for his own part alone. He was bound to sue for redemption of the whole, and the whole

(1) Printed Judgments for 1882, p. 226.

(2) Co. Litt., 180*b*, 195*b*; Story Eq. Pl., § 159. (3) See L. R., 3 I. A., at p. 26.

having thus been put into litigation, it does not seem that, in the absence of collusion, the mortgagee should not be protected against another joint tenant suing on the same cause of action. Even after a partition it may be doubted whether on principle a mortgagee should be exposed to repeated suits by the individual separated co-sharers. The right to redeem is an indivisible jural object (1)—*Palk Clinton* (2)—on which any one of the family may proceed against the mortgagee; and as the whole can be sought in one suit, the mortgagee creditor would, according to the Roman law, be protected by one suit against any other (3). The English law prescribes generally that one having but a partial interest cannot redeem without making the others interested parties to the suit—*Henley* v. *Stone* (4), and if an exception was allowed in the case of a member of a joint Hindu family, that must have been either after the analogy of the English cases of joint tenants of the equity of redemption, or else (which is almost the same thing) on account of the assumed identity of interest amongst the several members of the united family (5), from neither point of view can a justification be seen for subjecting the mortgagee to repeated litigation on the same cause of action. However the matter be approached, it does not seem that while Visram was allowed to sue alone (allowed, that is, by the established practice, not by mere error or through fraud on his part), the other members of the family could sue afterwards on the same ground. It does not appear how there could be a different cause of action in the present suit from the one previously sued on. The right was in each case a right to recover the property on paying off the mortgage-debt. This became a judgment in favour of the family by the former suit, and the present plaintiff must needs have profited by the execution of the decree in that suit. Conversely, he is barred when he sues again; though the former decree has, through neglect, now become incapable of execution.

The decrees of the Courts below are, therefore, reversed. Costs on respondent throughout.

Decrees reversed.

(1) Fisher on Mortgages, § 1166.
(2) 12 Ves. at pp. 59, 60.
(3) Ev. Poth., Vol. I, 561; Sav. Obl., ss. 19, 35, 36.
(4) 3 Beav., 355; II Spence Eq., Jur., Ch. VIII, sec. 5.
(5) See Co. Litt., 186*a*.