

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Birdwood.

1886.
September 14.

BA'PU RAVJI AND OTHERS, (ORIGINAL DEFENDANTS), APPELLANTS, v. RA'MJI SVARUPJI AND OTHERS, (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Mortgage—Second mortgage of the same property to the same person—Foreclosure decree on the first mortgage—Second suit on second mortgage—Practice—Foreclosure, re-opening of.

On the 8th August, 1864, the defendant, Bāpu, mortgaged certain property to the plaintiff, Rāmji, and on the 8th April, 1873, he further mortgaged the same to secure a further advance from the plaintiff. In 1877 the plaintiff brought a foreclosure suit on the first mortgage, and obtained the usual foreclosure decree; and the defendant having made default in payment, his right in the property was foreclosed. The plaintiff sued, in 1882, on his second mortgage, which fell due in 1878. The lower Courts allowed his claim. On appeal by the defendant to the High Court,

Held, reversing the decree of the Court below, that the plaintiff could not foreclose in 1877 so as to vest the property absolutely in himself, without treating the entire mortgage-debt as satisfied. The defendant might have pleaded, in 1877, that the plaintiff could not foreclose, unless he abandoned his claim to be repaid the second advance when due. His omission to do so could not deprive him of his right to insist that the foreclosure decree, passed in 1878, either precluded the plaintiff from suing on the second debt, or that the foreclosure should be re-opened.

THIS was a second appeal from the decision of S. Tagore, District Judge of Sholāpur-Bijāpur.

The facts of the case, as stated in the judgment of the lower Appellate Court, are as follows:—

“ * * * Certain property was mortgaged by the defendant to the plaintiff, as security for certain debts, on the 8th August, 1864, and on the 8th April, 1873, the same property was mortgaged to secure an additional debt found due by the defendant. In 1877 the plaintiff brought a suit on the first mortgage for foreclosure and possession, and obtained a decree declaring that, in the event of the non-payment of the mortgage amount within a specified period, the mortgage was to be foreclosed. The mortgagor made default, and, consequently, lost his right to redeem. The property vested absolutely in the plaintiff, and he has, therefore, brought the present suit against the mortgagee per-

* Second Appeal, No. 519 of 1884.

sonally to recover the amount of the second mortgage." On these facts the Court of first instance made a decree in favour of the plaintiff, awarding him Rs. 1,000, to be paid by the defendant in five instalments, on failure of which the defendant was to be debarred from redeeming the property.

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The District Judge, on appeal, amended the decree "so far as it declared the defendant's right of redemption."

The defendant preferred a second appeal to the High Court.

Ganesh Rámchandra Kirloskar for the appellant :—By accepting the second mortgage the plaintiff treated the property as liable to the payment of the entire debt. The plaintiff cannot foreclose the first mortgage, and then sue for the debt upon the second mortgage. Such a procedure on the part of the plaintiff has the necessary effect of re-opening the foreclosure : see the case of *Káli Prosonno Ghose v. Kámini Soondurí*⁽¹⁾.

Mahádev Bháskar Chaubal for the respondent :—The defendant had been given an opportunity to redeem, and his failure to redeem disentitles him now to re-open the question of foreclosure. Refers to Act IV of 1882, sec. 68 ; Story's Equity Jurisprudence, p. 418, sec. 640. A mortgagee has optional remedies. He may foreclose and keep alive his remedy as to the personal liability of the mortgagor. At the time the present suit was brought, the relation of mortgagor and mortgagee had ceased to exist, in consequence of the default of the mortgagor under the first decree. The Court cannot go behind the decree.

SARGENT, C. J. :—In this case the defendant mortgaged the property in question to the plaintiff on the 8th August, 1864, and again on the 8th April, 1873, to secure a further advance. In 1877 the plaintiff brought a suit on the first mortgage for foreclosure, and obtained a decree, under which the defendant, having committed default in payment, the property became absolutely foreclosed. The plaintiff now sues the defendant on the second mortgage-debt, which did not fall due until 1878. It is plain, on general principles, that the plaintiff could not foreclose in 1877 so as to vest the property absolutely in himself without treating the entire mortgage-debt as satisfied : see Spence's Equity Jurispru-

(1) I. L. R., 4 Calc., 475.

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dence, p. 682. The defendant, no doubt, might have pleaded in 1877 that the plaintiff could not foreclose, unless he formally abandoned his claim to be repaid the second advance when due. His omission, however, to do so cannot now deprive him of his right to insist that the foreclosure decree, passed in 1878, either precludes the plaintiff's suing on the second debt, or, at any rate, that the foreclosure should be re-opened.

We must, therefore, reverse the decree, and dismiss the plaint, unless the plaintiff decide, within a month from date, to have the foreclosure re-opened, in which case the plaint should be treated as one for foreclosure, and decided as such. Plaintiff to pay defendant's costs throughout up to date.

Decree reversed.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Birdwood.

1886.
September 14.

SHIV'APA', (ORIGINAL DEFENDANT), APPELLANT, v. DOD NAGAYA,

(ORIGINAL PLAINTIFF), RESPONDENT.*

Res judicata—Civil Procedure Code (XIV of 1882), Secs. 13, 278, and 283—Suit by a judgment-creditor to establish his judgment-debtor's right to property so as to make it subject to attachment in execution of his decree—Dismissal of such suit—Judgment-debtor not represented by judgment-creditor in such suit—Subsequent suit by judgment-debtor to recover the same property—Such subsequent suit not barred—Second appeal, point taken for the first time on.

A judgment-creditor of the plaintiff having obtained a decree against the plaintiff, attached the house in dispute. The defendant intervened in 1878, and set up a previous purchase of the house by himself from the plaintiff. The attachment was removed. The judgment-creditor brought a suit against the defendant for declaration that the property belonged to the plaintiff, and, as such, was liable to be attached and sold in execution. At the hearing of this suit the judgment-creditor did not appear. The defendant appeared, and produced a sale deed, which the Court found proved, and dismissed the judgment-creditor's suit. The plaintiff now brought the present suit against the defendant to recover possession of the house. The defendant contended (*inter alia*) that the dismissal of the former suit, brought by the plaintiff's judgment-creditor, operated as res

* Second Appeal No. 406 of 1884.