

Considering, then, that the history of this family shows that, whereas appointments have been made in numerous instances—so numerous indeed that we are almost justified in inferring that they were made in every case—no single appointment is shown to [566] have been made on the ground of seniority alone: considering also, that eldest sons have not invariably been appointed, but that, on the contrary, in no less than five cases, eldest sons have been passed over: and seeing that no claim to succeed, or to be appointed, on the ground of being the eldest son, has ever before been raised, even in cases of dispute in which we should certainly have expected that it would have been raised had the right or custom existed, we are unable to hold that the custom that the plaintiff contends for is proved. We concur, therefore, with the Subordinate Judge in rejecting the plaintiff's claim to the religious offices and to the management of the *wakf* property.

There is no dispute at present existing as to the private property. The prayer, however, of the plaintiff for mesne profits of the immovable property was rejected, having apparently been overlooked by the lower Court, and this rejection has been made one of the grounds of appeal. We think that he ought to obtain such mesne profits, subject to a deduction on account of debts and such funeral expenses as may have been defrayed by the executors, and we amend the decree by awarding them to him from the 17th September, 1881, (the date of the father's death) to delivery of possession, or until the expiration of three years from the date of this decree, whichever event first occurs, the net amount to be determined in execution. It has also been made a ground of appeal that the lower Court did not observe the provisions of s. 208 of the Code and state the amount of money to be paid, as an alternative, if delivery of the moveables awarded could not be had. There is no evidence on the record as to the value of these moveables, although such evidence ought to have been furnished by the plaintiff. We need not, however, order that evidence to be taken, as the parties agree that the amount so to be paid shall be Rs. 70; we, therefore, amend the decree by inserting that provision. In all other respects we confirm the decree, and we order that the plaintiff-appellant bear all the costs of this appeal. We also order, under s. 412 of the Code that the plaintiff-appellant pay the Court-fess that would have been paid by him if he had not been permitted to appeal as a pauper.

*Decree confirmed.*

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[567] APPELLATE CIVIL.

*Before Mr. Justice Birdwood and Mr. Justice Jardine.*

MALOJI (Original Plaintiff), Appellant v. SAGAJI AND ANOTHER  
(Original Defendants), Respondents.\* [3rd December, 1888.]

*Mortgagor and mortgagee—Redemption suit—Decree for redemption without proviso for foreclosure or payment within a fixed time—Limitation—Subsequent suit by mortgagee for sale—Res judicata—Civil Procedure Code (Act XIV of 1882), s. 13, expl. II.*

A decree for redemption which does not provide for payment of the mortgage-debt within a fixed time, or for foreclosure in case of default, operates of itself as

\* Second Appeal, No. 146 of 1887.

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a foreclosure decree, if not executed within three years. After such a decree is passed, it is not open to the mortgagee to file a suit to recover the mortgage-money by sale of the mortgaged property, his right of sale being barred under s. 13, expl. II of the Code of Civil Procedure.

On 12th November, 1883, A obtained a decree for redemption on payment of a certain sum of money to B (the mortgagee). The decree contained no direction as to foreclosure, or as to the time within which the payment was to be made. On 26th November, 1884, B, the mortgagee, sued to recover the mortgage-debt by sale of the property mortgaged. On 8th April, 1885, A. paid into Court the sum directed to be paid by the redemption decree. B. refused to accept the payment, and insisted upon his right of sale.

*Held*, that no time having been fixed by the decree for redemption, A, had three years within which to execute the decree; and as he has paid the money within the three years, A. was entitled to recover the property.

*Held*, also, that the decree for redemption would, if not executed within three-years, operate as a foreclosure decree, and, therefore, effectually determined the rights under the mortgage, both of the mortgagor and the mortgagee.

*Held*, further, that the mortgagee having neglected to obtain a provision for sale in the redemption suit, as he might and ought to have done, if he wished to preserve the right of sale, that right must be held, under expl. II of s. 13 of the Code of Civil Procedure, to have been a matter directly and substantially in issue in the former suit, and to have been in effect negated by the judgment.

[Diss., 93 P.R. 1908=164 P.L.R. 1908=133 P. W. R. 1908: N.F., 15 M. 366; F., 19 A. 202 (204); 23 B. 592 (594); Rel., 10 C. L. J. 115=1 Ind. Cas. 71; Appr., 125 M. 300 (334); 3 O. C. 371 (380); R., 24 A. 44 (63) 16 B. 243 (249); 26 B. 661 (668); 13 Bom. L.R. 162=10 Ind. Cas. 748; 10 Ind. Cas. 187=14 O.C. 100; 43 P.R. 1907=169 P.L.R. 1908=101 P.W.R. 1907.]

SECOND appeal from the decree of C. H. Jopp, Assistant Judge of Satara, in appeal No. 164 of 1885 of the District File.

On 12th November, 1883, Sagaji and his brother obtained a decree for redemption of certain property mortgaged to Maloji bin Santaji, on payment to him of Rs. 117-7-10. This decree was confirmed, on appeal, on 24th September, 1884. The decree [568] did not contain any direction either as to foreclosure, or as to the period within which the payment was to be made.

On 26th November, 1884, Maloji filed the present suit to recover the mortgage-debt by sale of the mortgaged property, or from the mortgagors personally.

On 8th April, 1885, the mortgagors paid into Court Rs. 117-7-10, the sum ordered to be paid in the redemption suit.

The defence to the present suit was that it was barred under s. 13 of the Code of Civil Procedure.

The Subordinate Judge held that as the defendants had not made the payment before the institution of the suit, and as the plaintiff was not entitled, under the decree in the redemption suit, to recover this sum from the defendants, the present suit was not barred as *res judicata*. He, therefore, decreed the plaintiff's claim.

This decree was reversed, on appeal, by the Assistant Judge. The following extract from his judgment gives his reasons:—

“An order for redemption without any direction as to foreclosure, or as to the period within which payment was to be made, is equivalent to a judgment of foreclosure, if payment is not made within the period allowed by the law of limitation for execution of the decree (*Gan Savant Bal Savant v. Narayan Dhond Savant*(1)). The mortgagee, therefore, if he

wished for a sale, could not allow the decree to be given as asked for in the plaint in the redemption suit, for such a decree was equivalent to one of foreclosure if the mortgagor failed to redeem within three years. He ought to have asked that a period within which payment should be made should be fixed, and that, on default, the property should be sold. As he both could and ought to have asked for the sale of the property in the redemption suit, the present claim is barred as *res judicata*."

Against this decision the plaintiff appealed to the High Court.

*Ganesh R. Kirloskar*, for appellant:—The decree for redemption does not fix the time for payment of the debt, nor does it provide [569] for foreclosure. Such a decree operates as a foreclosure decree if it is not executed within three years. At the end of that period, the mortgagee becomes the owner. Till then the relation of mortgagor and mortgagee continues, and so long as that relation lasts, the mortgagor has a right to ask for sale. The present suit was filed before execution of the former decree was barred. He referred to Macpherson on Mortgage, p. 684; *Periandi v. Angappa* (1); *Karuthasami v. Jaganatha* (2).

*M. B. Chowbāl*, for respondents:—The present suit is based on the original contract of mortgage, which is now merged in a decree. That decree now governs the rights of the parties—*Navlu v. Baghu* (3). The decree confers on the mortgagor the right to redeem within three years. He has paid the mortgage-debt into Court within the prescribed period, and is, therefore, entitled to redeem. The present suit is, moreover, barred under s. 13 of the Code of Civil Procedure. The mortgagee might and ought to have asked the Court in the former suit to insert in the decree a direction for sale. Having omitted to assert his right of sale in that suit, he is estopped from setting up the same right in the present suit. Refers to *Gan Savant Bal Savant v. Narayan Dhond Savant* (4); *Tatya Vithoji v. Babu Balaji* (5).

*Ganesh R. Kirloskar*, in reply:—The question as to the mortgagee's right of sale was not in controversy in the former suit. The only issue in that suit was, what was the amount of the mortgage-debt? Our right of sale is, therefore, not *res judicata*.

*Cur. adv. vult.*

#### JUDGMENT.

The judgment of the Court (Birdwood and Jardine, JJ.) was delivered by

BIRDWOOD, J.—The plaintiff sues to recover the amount of his mortgage-debt from the defendants personally, and by sale of the mortgaged property. The defendants obtained on 12th November, 1883, a decree for redemption, which was confirmed, on appeal, on the 24th September, 1884; and on the 8th April, 1885, they paid into Court the amount due under the decree. [570] The present suit was filed on the 26th November, 1884; and the Subordinate Judge has awarded the claim, on the ground that the decree for redemption contained no provision by which the mortgagee could recover the debt due to him, and that the debt had not been paid at the date when the suit was filed. The redemption decree simply declared the amount of the debt due under the mortgage, and provided no time within which it should be paid, or the mortgage foreclosed.

(1) 7 M. 423.

(2) 8 M. 478.

(3) 8 B. 303.

(4) 7 B. 467.

(5) 7 B. 330.

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We think that the Subordinate Judge's decree has been rightly reversed by the Assistant Judge. In the former suit, it was open to the present plaintiff, the mortgagee, to ask the Court that a provision should be inserted in the decree for the payment of the debt within a fixed time, and for foreclosure, or sale, if the payment were not made in such time. He neglected to do this, and the decree, in which the mortgage was thenceforward merged, must be held as now alone regulating the relations of the parties. See *Tatya Vithoji v. Bapu Balaji* (1); *Navlu v. Raghu* (2). No time having been fixed for redemption, the defendants, the mortgagors, who obtained the redemption decree, had, under the Limitation Act, 1877, three years within which they could execute it. If they had not redeemed within that time, they would for ever have been foreclosed, as was held in *Gan Savant Bal Savant v. Narayan Dhond Savant* (3). Under the ruling in that case, (which, however, has been dissented from by the Madras High Court—*Karuthasami v. Jaganatha* (4)), the decree made in the defendants' suit was practically a foreclosure decree, if not executed in three years, and, therefore, effectually determined the rights under the mortgage, both of the mortgagee and the mortgagors: see also *Ladu Chimaji v. Babaji Khanduji* (5). The defendants, having paid the money within the prescribed period of limitation into Court, are now entitled to recover the property. The plaintiff, the mortgagee, having failed to obtain a provision for sale in the decree in the former suit, as he might and ought to have done if he wished to preserve the right of sale, that right must be held, [571] under expl. II of s. 13 of the Code of Civil Procedure, to have been a matter directly and substantially in issue in the former suit within the meaning of that section, and to have been in effect negatived by the judgment. A matter of defence omitted to be pleaded cannot afterwards be set up in answer to the judgment—*Ellis v. M'Henry* (6); see also *Srimut Rajah Mootoo Vijaya v. Katama Natchiar* (7). And a judgment implies the judicial determination of a point contested either directly or by implication. See *per* Lord Romilly in *Jenkins v. Robertson* (8); *Langmead v. Maple* (9); *Balak Tewari v. Kausil Misr* (10). And where a question has been necessarily decided in effect, though not in express terms, between parties to a suit they cannot raise the same question in another suit in any other form—*Soorjomonee Dayee v. Suddanand* (11); *Man Gobind Doss v. Jankee Ram Mohunt* (12); *Ram Kirpal v. Rup Kuari* (13).

The question as to the plaintiff's right of sale is, therefore, *res judicata*; and we must confirm the decree of the Assistant Judge, with costs.

*Decree confirmed.*

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| (1) 7 B. 330.                      | (2) 8 B. 303.                | (3) 7 B. 467.           |
| (4) 8 M. 478.                      | (5) 7 B. 532.                | (6) L.R., 6 C.P. 238.   |
| (7) 11 M.I.A. 50 (73).             | (8) L.R. 1 H L C. 117 (121). | (9) 18 C.B. (N.S.) 255. |
| (10) 4 A. 491.                     | (11) 12 B.L.R. 304.          |                         |
| (12) W.R. Suppl. Vol. (1864), 211. |                              | (13) 6 A. 269 (272).    |