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ancestral estate by establishing the existence of those circumstances. Sir C. Petheram, C. J., and Tyrrell, J., acted upon this presumption against the sons in *Sita Ram v. Zalim Singh* (1) where the suit was by a mortgagee against the son after the father's death, and the loan was found to have been contracted to meet the father's expenses, but there was no evidence given by the son to show that it was for an immoral purpose; and the Court held that the mortgage was enforceable against the entire estate. And it is to be remarked that it was on this ground alone, after referring to *Suraj Bunsii's case* and the ruling of Sir M. Westropp, and not because a decree had been obtained against the father in execution of which the defendant had purchased, that the Privy Council in *Bhagbut Pershad v. Musummat Girja Koer* (2) threw the *onus* on the sons of proving that their father's debt had been contracted for an immoral purpose. We think, therefore, that the Subordinate Judge was right in holding that the *onus* lay on the defendant of proving that the loan to the father secured by the mortgage-hold in suit was for an illegal or immoral purpose, and so gave rise to a debt for which he was not liable.

[327] It has, however, been contended before us that the burden of proof was discharged by the defendant when he had established that his father was an extravagant man who kept a mistress and delighted in nautches, and that the *onus* was then shifted to the plaintiff of proving that this particular transaction was not for an illegal or immoral purpose. This is inconsistent with the rulings in *Hanuman Singh v. Nanak Chand* (3) and *Sadashiv Dinkar v. Dinkar Narayan* (4), which are to the effect that some connection must be shown between the debt and the father's immoralities. This evidence was wanting, although it might perhaps be to some extent inferred from the evidence as a whole that the loan was used to minister to the father's extravagant habits.

We must, therefore, confirm the decree, with costs, except as to the allowance of Rs. 109-8-0, as to which no certificate from the Collector having been produced as required by the Pensions Act XXIII of 1871, the claim must be disallowed. Costs in proportion.

Decree confirmed.

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APPELLATE CIVIL.

Before Mr. Justice Scott and Mr. Justice Jardine.

NARSINHA MANOHAR (*Original Defendant*) Appellant v. BHAGVAN-
TRAV (*Original Plaintiff*), Respondent.* [8th July, 1889.]

Mortgage—Usufructuary mortgage—Redemption—First suit by mortgagee for possession—Decree for possession—Second suit by mortgagor for redemption—Second suit not barred by the first.

In 1864 the lands in dispute were mortgaged under an agreement that the mortgagee should hold the lands and apply the profits towards the satisfaction of the mortgage debt.

* Second Appeal No. 732 of 1887.

(1) 8 A. 231.
(3) 6 A. 193.

(2) 15 C. 713=15 I.A. 99 (105).
(4) 6 B. 520.

In 1869 the mortgagor having obstructed the mortgagee, the latter filed a suit for removal of the obstruction and for confirmation of his possession. He obtained a decree ordering that he should retain possession till the debt was paid off from the usufruct.

[328] In 1885 the mortgagor filed a suit for redemption. The defence to this suit was that it was barred by the decree in the former suit.

Held, that the suit was not barred, the relative rights of mortgagor and mortgagee not having been adjudicated upon in the former suit.

[Appr., 20 A. 506=18 A. W. N. 139.]

SECOND appeal from the decision of R. S. Tipnis, acting Assistant Judge of Solapur, in appeal No. 325 of 1885.

In 1864 the property in dispute was mortgaged by the plaintiff and his father to the defendant's father, to secure an advance of Rs. 4,000. The mortgage-bond provided that the mortgage-debt should be paid by annual instalments of Rs. 200 each; that the mortgagee should be put in possession of the property mortgaged, and that he should take the rents and profits of the property in satisfaction of the instalment of each year. In accordance with this arrangement the mortgagee entered into possession of the property in dispute.

In 1869 the mortgagors having caused obstruction to the mortgagee's possession, the latter filed a suit for removal of the obstruction and for confirmation of his possession. In this suit the Court passed a decree directing that the mortgagee should retain possession till the mortgage-debt was paid off out of the usufruct.

In 1885 the mortgagors filed the present suit for redemption of the mortgaged property.

The defendant contended (*inter alia*) that the decree in the former suit of 1869 was a bar to the present suit, and that a sum of Rs. 7,124-4-3 was still due on the mortgage.

The Subordinate Judge held that the present suit was not barred by the decree in the former suit, and that the whole of the mortgage-debt was paid off out of the usufruct. He, therefore, passed a decree awarding possession of the lands in suit to the plaintiff.

This decree was confirmed on appeal by the Assistant Judge.

Against this decision the defendant (mortgagee) appealed to the High Court.

Ghanasham Nilkanth, for appellant.—The mortgagor cannot now sue for redemption of the mortgage, inasmuch as the mortgage no longer exists. It was merged in the decree passed in [329] the former suit—*Navlu v. Raghu* (1); *Gan Savant v. Narayan Dhond Savant* (2); *Hari Ravji v. Shapurji* (3).

Ganesh R. Kirloskar, for respondent.—The cases cited do not apply. In the former suit there was no adjudication on the relative right of mortgagor and mortgagee. The decree did not put an end to the relation subsisting between them. The Full Bench ruling in *Ravji v. Kaluram* (4) is conclusive on the present question.

JUDGMENT.

The judgment of the Court was delivered by SCOTT, J. —This is a redemption suit. The chief point which has been argued is the effect of the decree in the previous litigation between

(1) 8 B. 303.

(2) 7 B. 467.

(3) 10 B. 461.

(4) 12 B. H. C. R. 160.

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the parties. In 1869 the mortgagee, the present defendant, sued plaintiff and others to set aside their obstruction to the mortgaged property and for confirmation of his possession. The ultimate decree passed in appeal 101 of 1870 by the District Court ordered that the mortgagee should remain in possession until the debts due under two mortgage-bonds were satisfied. The lower appellate Court in the cause before us distinguishes in the following terms the earlier suit from the ordinary suit which a mortgagee brings for recovery of the mortgage-debt, and in default of payment, for foreclosure or sale. "It will be noticed that the mortgagee did not claim payment of his debt or in default possession, of the property until satisfaction. The Courts took no accounts and fixed no sums as being due, and no opportunity was given to the mortgagor to pay off the debt. In fact the suit and the decree were directed to the relief of possession only. The claim was essentially in the nature of an ejection suit, and the limitation as to the period of enjoyment was inserted in the decree to signify the title of the mortgagee by which he retained possession and nothing more. The decree did not create any new relationship, or get the original mortgage merged in it. Such a decree is no bar to a redemption suit based upon the mortgage." For these reasons, the learned Assistant Judge Mr. Tipnis, held that the cases—*Hari Ravji v. Shapurji* (1) and *Navlu v. Raghu* (2)—did not apply.

[330] We are of opinion that these cases are inapplicable, as the reports show that the decrees in the earlier suits described in them were the usual decrees passed on the suit of a mortgagee after taking account. It was, therefore, held that the right of the mortgagor must be treated as a right to execute the decree, and not a right to sue as for the redemption of a mortgage.

This *ratio decidendi* does not conflict with that adopted by this Court in other cases resembling the present which were cited before the Judicial Committee in *Hari Ravji v. Shapurji*. The Assistant Judge has followed the Full Bench ruling in *Ravji v. Kaluram* (3) where the earlier suit is described as "being really nothing more than a suit in the nature of an ejection, by an unpaid mortgagee, of the mortgagor from the mortgaged premises." The decree having, in the opinion of the Full Bench, been fully executed when the mortgagee was put in possession, it was ruled that the mortgagor's means of getting an account and redemption was, not by application in execution, but by separate suit. *Ramchandra v. Baba* (4) followed the Full Bench ruling. The matter submitted to the adjudication of the Courts in the earlier suits was not held to be the relationship arising out of the mortgage. Thus the contracts of mortgage did not become merged in the decrees, and so the reasons of the decisions in *Tatya Vithoji v. Bapu Balaji* (5), *Gan Savant v. Narayan Dhond Savant* (6) and *Navlu v. Raghu* (2) about the effect of decrees in superseding the terms of contracts, do not govern such cases.

We agree, however, with the Court below in holding that the award of costs of suit specified in the decree in the earlier suit was a matter for execution of decree.

We now confirm the decree.

Decree confirmed.

(1) 10 B. 461.

(2) 8 B. 303.

(3) 12 B.H.C.R. 160.

(4) 12 B.H.C.R. 163.

(5) 7 B. 330.

(6) 7 B. 467.