# APPELLATE CIVIL.

*Before Mr. Justice Candy and Mr. Justice Crowe.*

RAMDAS AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* VAZIRSA'HEB AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.* 1901. *February 14*

*Res judicata—Civil Procedure Code (Act XIV of 1882), section 13, explanation II—Relief not claimed in former suit.*

A sued B as his agent and trustee in possession of certain lands, complaining that B had been dealing with the lands as if he (B) were the owner, and had mortgaged them to C. C was made a defendant in the suit. B pleaded that he was the owner of the land and not merely agent of A. C also pleaded that B was owner, and he produced the mortgage deed and stated that if he were paid his debt he would not dispute A's claim. The term in C's mortgage deed was one year, at the end of which if the debt were not paid C was to be at liberty to enforce his charge. A prayed merely for possession, and no issue was raised or relief asked in respect of C's mortgage. The Court held that B was agent, not owner, and gave A a decree for possession. Subsequently on the expiration of the year allowed in the mortgage deed, C sued A and B to enforce his mortgage, alleging that even though B might not be owner A had allowed B to deal with the land and to hold himself out as owner and that thus the mortgage was valid. Both the lower Courts held that the suit was *res judicata* under explanation II of section 13 of the Civil Procedure Code, on the ground that C's present claim might and ought to have been made a ground of defence in the former suit brought by A.

*Held*, reversing the decisions of the lower Courts, that the suit was not barred, as no relief was asked or granted as against C in the former suit, though he was a party to it.

SECOND appeal from the decision of B. C. Kennedy, Assistant Judge, F.P., of Bijápur, confirming the decision of Ráo Sáheb H. S. Phadnis, Second Class Subordinate Judge at Bijápur.

Suit on a mortgage executed to the plaintiff by defendants 1 to 5.

The case of defendants 6 to 15 was that the mortgaged property belonged to them and that defendants 1 to 5 were merely their agents and trustees in possession and had no right to mortgage it.

It appeared that the mortgage in question was executed on 24th November, 1892. Before the expiration of the mortgage term,

* Second appeal No. 271 of 1900.

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defendants 6 to 15 brought suit No. 204 of 1893 against the plaintiffs and defendants 1 to 5 to recover possession of the property comprised in the mortgage; alleging that defendants 1 to 5 were their agents and trustees in possession and had no right to mortgage their property. They did not, however, pray in that suit to set aside the mortgage or for a declaration that it was invalid.

Defendants 1 to 5 denied in that suit that they were the agents of defendants 6 to 15 and set up their own proprietory title and the present plaintiffs supported their claim. They, however, failed in this contention, and a decree was passed in that suit awarding absolute and unconditional possession to the plaintiffs therein (defendants 6 to 15 in this suit).

Plaintiffs thereupon brought the present suit to recover the debt due to them on the mortgage and to enforce their charge on the mortgaged property. They contended that defendants 6 to 15 were estopped from disputing the validity of the mortgage, having allowed defendants 1 to 5 to deal with the land and to hold themselves out as owners.

The chief defence now raised was that the suit was barred under section 13, explanation II, of the Civil Procedure Code (XIV of 1882) as the matter ought to have been decided in the previous suit.

The Subordinate Judge held that the claim was *res judicata* as against the land and against defendants 6 to 15, but he passed a decree for the amount of the mortgage debt against defendants 1 to 5 personally.

This decree was confirmed in appeal by the District Judge.

Plaintiffs thereupon preferred a second appeal to the High Court.

*Setlur* (with *N. V. Gokhale*) for appellants (plaintiffs):—The only point for consideration is whether the present suit is barred against defendants 6 to 15 and against the land under section 13 of the Civil Procedure Code (Act XIV of 1882). We submit it is not. The plaintiffs in the former suit merely claimed possession of the land, but did not seek to free it from the mortgage. They asked no relief in respect of the mortgage which therefore continued in force. This is clear from the pleadings in

the case. There was no issue on this point. The matter was therefore not heard and decided in the former suit. The question is whether explanation II of section 13 applies. The validity of the mortgage might, no doubt, have been raised in the former suit, but can it be said that it *ought* to have been raised? Looking to the pleadings in the former suit and the real contentions between the parties, we submit that the parties were not bound to go into the question of the present mortgage and that section 13, explanation II, does not apply.

*Branson* (with *B. A. Bhagvat*) for respondents 6 to 12 and 14 (defendants):—Plaintiffs who were defendants in the former suit in which possession was sought ought to have set forth their claim as mortgagees and ought to have raised the question as to the validity of the mortgage. They were made parties to the suit, and the only reason why we made them parties was to obtain complete relief, *i.e.* relief against them (the plaintiffs) who claimed as mortgagees and against the other defendants who had mortgaged the land to them. The plaintiffs therefore were bound to set up their title which was under the mortgage. They were bound therefore to rely upon the validity of the charge in their favour, and not having done so they are estopped by section 13 of the Code of Civil Procedure.

CANDY, J.:—The point for decision in this second appeal may be succinctly shown thus: A sued B as his agent and trustee in possession of certain lands, complaining *inter alia* that B had been dealing with the lands as if he (B) were the owner, and had hypothecated the same to C. Though both B and C were defendants in that suit, A's prayer was confined to recovery of possession of the lands. He did not ask for any declaration that the hypothecation by B in favour of C was invalid.

B's defence was that he was owner of the lands and not merely agent of A. C also pleaded that B was owner of the lands, and he produced the hypothecation-bond, stating that if he was paid his debt he had no objection to the claim. The term in the bond was one year, at the end of which time, if the debt was not paid, C was to be at liberty to enforce his charge. The year had not then expired.

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The Court raised no issue as to the hypothecation-bond, but simply held that B was agent, not owner, and gave A an unfettered decree for possession.

B appealed, urging that he was owner to the lands. C did not join in the appeal; but pending the appeal, the year to the hypothecation-bond having expired, he sued A and B to recover the debt, and enforce his charge, pleading that even though B might not be owner, still A had allowed B to hold himself out to the world as owner, so the hypothecation-bond created a valid charge against the property.

Both the lower Courts have held that this suit is barred under section 13 explanation II of the Civil Procedure Code, on the ground that C's present plea might and ought to have been made a ground of defence in A's suit.

That is the question for our decision. The answer is that C was not a necessary party to A's suit as framed. He could have been dismissed from the suit. He was not a defendant in possession defending his title. He was a third party holding an hypothecation-bond from the person in possession. Though he was made a defendant by A, no relief was sought against him. The initial mistake was made by A, who though he joined C as a defendant, asked for no relief against him, and made it no ground of attack that the hypothecation was invalid, notwithstanding section 41 of the Transfer of Property Act (IV of 1882). If A is harassed by this litigation he was only himself to blame.

Applying the above principles to this suit we see that A represents defendants 6 to 15, B represents defendants 1 to 5, and C the plaintiffs.

In this view the decree of the lower Courts on the preliminary issue must be reversed, and the case remanded for trial on the merits. Costs will abide the result.

*Decree reversed.*