

APPELLATE CIVIL.

Before Mr. Justice Aston and Mr. Justice Jacob.

HASSANBHAI VALAD BUDHANBHAI (ORIGINAL DEFENDANT 2), APPELLANT, v. UMAJI BIN HIRAJI AND CHIMNAJI BIN MANAJI (ORIGINAL PLAINTIFF AND DEFENDANT 1), RESPONDENTS.*

1903.
September 3.

Transfer of Property Act (IV of 1882), sections 75, 85, 86, 91—Prior mortgagee—Subsequent mortgagee—Rights to redeem inter se—Foreclosure decree.

In 1859 C and his brothers mortgaged certain lands with possession to H. Subsequently, on the 26th May, 1897, C alone mortgaged the same lands to U. Shortly after this C and his brothers brought a redemption suit against H and U was not made a party to it. In that suit the usual redemption decree was passed; but as C and his brothers failed to redeem within the time allowed, the order for foreclosure was made absolute in favour of H. U then brought a suit against C to recover his mortgage debt by sale of the mortgaged property; to this suit H was joined as the person in possession. The lower Court allowed U to redeem the property from H (defendant 2) on payment of the money due to him (defendant 2) under the foreclosure decree:

Held, reversing the decree, that H, the prior mortgagee, had a right to redeem superior to that of U, the subsequent mortgagee.

SECOND appeal from the decision of F. C. O. Beaman, District Judge of Poona, confirming the decree passed by K. R. Jalihal, Subordinate Judge at Khed.

Chimnaji (defendant 1) and his brothers mortgaged with possession the lands in dispute to Hassanbhai (defendant 2) in 1859 for Rs. 300.

Subsequently, on the 26th May, 1897, Chimnaji alone mortgaged the lands to Umaji (plaintiff) for Rs. 100.

Shortly after this, *i. e.*, on 2nd June, 1897, Chimnaji and his brothers brought a redemption suit (Suit No. 155 of 1897) against Hassanbhai. To this suit Umaji was not made a party. On the 29th March, 1898, a redemption decree was passed, ordering Chimnaji and his brothers to pay Rs. 300 to Hassanbhai within seven months, and in default to be for ever foreclosed. Chimnaji and his brothers failed to pay the sum within the time allowed; and on the 17th February, 1899, the foreclosure order was made absolute in favour of Hassanbhai.

* Second Appeal No. 76 of 1903.

1903.

HASSANBHAJ
 v.
 UMAJI.

On the 14th June, 1899, Umaji sued Chinnaji and Hassanbhai to recover his Rs. 100 and interest by sale of the mortgaged property, and the deficiency, if any, from defendant 1 personally.

Defendant 1 admitted execution of the mortgage to plaintiff and prayed for an instalment decree.

Defendant 2 contended that he was originally a mortgagee, but that under the decree in suit 156 of 1897 he had become full owner and was in possession of the lands as such.

The Subordinate Judge ordered that "plaintiff do redeem and recover possession of the property in suit from defendants 1 and 2 by payment of Rs. 300 to defendant 2." The grounds of this order were expressed as follows:—

"Plaintiff, a mortgagee at date of old Suit No. 156 of 1897, was not made a party to it by defendant 2 and so plaintiff has a right of redemption, being a subsequent mortgagee. Defendant 2 has become full owner against defendant 1 only and not against plaintiff who was not a party. Plaintiff is willing to redeem by payment of Rs. 300, amount of the foreclosure decree. Defendant 2 objects to this redemption, but plaintiff having a right of redemption he is allowed to redeem."

On appeal, this decree was confirmed by the District Judge.

Defendant 2 appealed to the High Court.

B. N. Bhajekar for the appellant (defendant 2):—Chinnaji, when he brought Suit No. 156 of 1897, was fully aware of the second mortgage, and he ought to have made Umaji a party to that suit as he was required to do under section 85 of the Transfer of Property Act (IV of 1882). Hassanbhai was not bound to make Umaji a party in that suit, as he was not aware of the mortgage in favour of Umaji. We concede that the puisne mortgagee has generally the right to redeem and the right to sell (*Debendra Narain Roy v. Ramtaran Banerjee*⁽¹⁾), but we contend that these rights are subject to the rights of the first mortgagee. In Suit 156 of 1897 Chinnaji failed to redeem within the time allowed: and on application of Hassanbhai the Court passed a foreclosure order in his favour. Hassanbhai thenceforth became the owner of the property in suit and his old mortgage rights merged into the right of ownership that he thus acquired. The case of *Perumal v. Kaveri*⁽²⁾ is in our favour, and the remarks of Muttusami Iyyar, J., seem conclusive. In the case of *Maganlal v.*

(1) (1903) 30 Cal. 599.

(2) (1892) 16 Mad. 121.

Shakra ⁽¹⁾ Farran, C. J., held that in a foreclosure suit the rights of mortgagor and mortgagee pass to the purchaser; and we are in this case in the position of such purchaser. Again, the Privy Council case of *Umes Chunder v. Zahur Fatima* ⁽²⁾ is in our favour. It settles the question in the present case, and Hassanbhai, who has become owner and is willing to pay off Umaji, is not liable to pay the money due to Umaji on the second mortgage. Further, the case of *Radhabai v. Shamrao* ⁽³⁾ supports our contention: and the case of *Mohan v. Togu* ⁽⁴⁾ is really not opposed to *Radhabai v. Shamrao*, ⁽⁵⁾ for it will be found in the statement of the facts of the case that the first mortgagee was in that case unwilling to pay off the second mortgagee. The case of *Mohxn v. Togu* ⁽⁴⁾ was followed in *Desai Lallubhai Jethabhai v. Mundas Kuberdas*, ⁽⁵⁾ but it does not eliminate the point of the unwillingness of the first mortgagee to pay off the second mortgagee. If any other view is taken then the case of *Mohan v. Togu* ⁽⁴⁾ seems directly in conflict with the earlier case of *Radhabai v. Shamrao*. ⁽³⁾ The judgment in *Mohan v. Togu* cited *Wasudev Balaji v. Narayan Krishna* ⁽⁶⁾ and *Mansukh Pitambar v. Tarbhovan Parshotam*. ⁽⁷⁾ These cases as reported in the Printed Judgments do not contain statements of facts; but a reference to the paper books in both of them makes it clear that the first mortgagee in either case was unwilling to pay off the amount of the second mortgage and it was therefore that the redemption by second mortgagee was ordered. Section 75 of the Transfer of Property Act (IV of 1932) does not come in our way, as it relates to the rights of mortgagees *inter se*. In the present case Hassanbhai has ceased to be a mortgagee and has become an owner. The case of *Shaik Abdulla Saiba v. Haji Abdulla* ⁽⁸⁾ decides that a purchaser in a foreclosure suit buys the interest of the mortgagor as it existed at the date of mortgage and not as it existed at the date of sale. The case of *Damodar*

1908.

HASSANBHAJ

v.
UMAJI.

(1) (1897) 22 Bom. 945.

(2) (1890) 18 Cal. 164.

(3) (1881) 8 Bom. 168.

(4) (1885) 10 Bom. 224.

(5) (1895) 20 Bom. 390.

(6) (1882) P. J. 21.

(7) (1882) P. J. 213.

(8) (1880) 5 Bom. 8.

1908.

HASSANBHAI
v.
UMAJI.

Devchand v. Naro Mahadev⁽¹⁾ is not in point, as it does not state which of the mortgagees was entitled to redeem *inter se*. The question, as to who, as between the Court-purchaser under the prior mortgage decree and a second mortgagee, is entitled to pay off the other, was not settled. In that case the purchaser by pulling down the house in suit had practically refused to recognize the second mortgagee's claim for money. The cases of *Naran Parshotam v. Dolatram Virchand*⁽²⁾ and *Shivram v. Genu*⁽³⁾ are silent on the point raised in this suit. The head-note of *Sankana Kalana v. Virupakshapa Ganeskapa*⁽⁴⁾ is rather misleading; and the case has been dissented from in *Perumal v. Kaveri*.⁽⁵⁾

Our next contention is that Umaji in this suit originally sued only for the recovery of his mortgage debt by sale of the property mortgaged. He did not seek to redeem Hassanbhai, the prior mortgagee. The Court of first instance suggested that course to him; and even then all that Umaji did was to state through his pleader that if the Court allowed him to redeem the prior mortgagee he was willing to do so. The plaintiff was not amended and no alternative prayer was made at any time. And although the Court ordered Umaji to redeem by paying Rs. 366 to Hassanbhai, in spite of his original claim for Rs. 146, he has as yet paid no additional Court-fees over the increased amount. Hence, in any view of the case, Umaji is precluded from claiming redemption from Hassanbhai, who is himself willing to redeem Umaji.

G. S. Mulgaonkar, for respondent No. 1 (plaintiff):—The first point we have to meet is whether the order of redemption made by the Courts below is right when our suit related only to the recovery of the mortgage amount by sale of the mortgaged property. Section 53 of the Civil Procedure Code (Act XIV of 1882) applies to cases of inconsistent causes of action. In this case the cause of action is one; the remedies are different. An alteration in relief does not alter the character of the suit: *Kashinath Das v. Sadashiv Patnaik*,⁽⁶⁾ *Parshotam v. Rupal*,⁽⁷⁾ *Ibra-*

(1) (1881) 6 Bom. 11.

(4) (1883) 7 Bom. 146.

(2) 1882) 6 Bom. 538.

(5) (1892) 16 Mad. 121.

(3) (1882) 6 Bom. 515.

(6) (1893) 20 Cal. 305.

(7) (1895) 20 Bom. 196.

1903.

HASSANBHAI
v.
UMAJI.

himbhai v. Fletcher,⁽¹⁾ *Damodar v. Naro Mahadev*.⁽²⁾ The puisne mortgagee has two remedies open to him: (1) sale and (2) redemption. He can claim the one or the other in the same suit in the alternative: *Debrendra Narain v. Ramtaran Banerjee*,⁽³⁾ *Umes Chundar v. Zakur Fatima*,⁽⁴⁾ and *Damodar v. Naro Mahadev*.⁽²⁾ That it was not necessary to amend the plaint is shown by the above Bombay cases. The lower Courts have exercised their discretion and the High Court cannot in second appeal interfere with it.

The second point raised by the appellant is as to who, as between the prior and puisne mortgagee, has the superior right of redeeming the other. We submit that a long course of decisions of all the High Courts affirm the right of the puisne mortgagee to redeem the prior mortgagee who has foreclosed his mortgage in a suit to which the puisne mortgagee was not a party. *Desai Lalubhai v. Mvndas*⁽⁵⁾ distinctly lays down the principle. See also *Baldeo Singh v. Jaggu Ram*,⁽⁶⁾ *Alla Bakhs v. Madho Ram*,⁽⁷⁾ *Wasudev Balaji v. Narayan Krishna*,⁽⁸⁾ *Mansukh Pitambar v. Tarbhovan Parshottam*.⁽⁹⁾ These cases lay down that, as between prior and puisne mortgagees, it is the puisne mortgagee's right to redeem the prior one. It will be denying that right if the prior mortgagee is allowed to redeem him. Section 75 of the Transfer of Property Act (IV of 1882) lays down the same rule. See Snell's Principles of Equity, pp. 336-337; Ghose on Mortgage, pp. 298, 299 (3rd Edn.). We redeem up and foreclose down. It was no fault of ours that we were not parties to the foreclosure suit: and the order in that suit is not binding on us. If no such suit had been brought, and if there had been no foreclosure decree, we would, under section 75 of the Transfer of Property Act (IV of 1882), have the right to redeem. Why then should that suit affect our rights? The prior mortgagee is, in spite of the foreclosure order, so far as we are concerned, still a mortgagee. The mortgagor's equity of redemption against

(1) (1896) 21 Bom. 827.

(5) (1895) 20 Bom. 390.

(2) (1881) 6 Bom. 11.

(6) (1900) 23 All. 1.

(3) (1903) 30 Cal. 599.

(7) (1900) 23 All. 22.

(4) (1889) 18 Cal. 164.

(8) (1882) P. J. p. 21.

(9) (1882) P. J. p. 213.

1908.

H. ASSANBHAI

U. MAJI.

the prior mortgagee may have been extinguished: but so far as our mortgage is concerned the mortgagor has still the right to redeem us, though he may have lost his right to redeem the prior mortgagee. But if we redeemed the prior mortgagee then the right of redeeming the prior mortgage in our hands would revive in favour of the mortgagor: see Ghose on Mortgage, pp. 741, 742 (3rd Edn.). The case of *Maganlal v. Shakra Girdhar*⁽¹⁾ is in our favour, as showing that defendant No. 3, who stood in the shoes of the puisne mortgagee, was allowed to redeem the prior mortgagee. The case of *Perumal v. Kaveri*⁽²⁾ is not followed by the later Madras cases. Besides, the learned Judges in that case have relied upon *Ayyavayyar v. Rahimansa*⁽³⁾ to show that each case depends upon its own peculiar facts. In *Radhabai v. Shamrav*⁽⁴⁾ the prior mortgagee was no doubt given an opportunity to redeem the puisne mortgagee, but that was under the peculiar circumstances of the case, as pointed out in *Daloba v. Damodar*⁽⁵⁾. The case of *Radhabai v. Shamrav*⁽⁴⁾ is distinguished in *Baldeo Singh v. Jaggu Ram*⁽⁶⁾. The decision in *Sankana v. Virupakshapa Ganeshapa*⁽⁷⁾ says nothing about the prior mortgagee's option to redeem the puisne mortgagee. In *Shivram v. Genu*⁽⁸⁾ the puisne mortgagee was held entitled to redeem the prior mortgagee. The case of *Umes Chunder v. Zahur Fatima*⁽⁹⁾ is not against us. It affirms the rule that we have the right to redeem the prior mortgagee. No doubt the prior mortgagee is allowed to redeem the puisne mortgagee; but that is not allowed him *quod* prior mortgagee, since the properties are not identical. The positions of the parties became changed. The prior mortgagee was allowed the right to redeem in the capacity of a puisne mortgagee with respect to the second redemption. The decisions of the lower Courts are, therefore, on principle and authority, correct.

ASTON, J. :—The facts in this case are simple. One Chinnaji and his three brothers mortgaged the plaint land with possession

(1) (1897) 22 Bom. 945.

(2) (1892) 16 Mad. 121.

(3) (1890) 14 Mad. 170.

(4) (1881) 8 Bom. 168.

(5) (1891) 16 Bom. 486 at p. 491.

(6) (1900) 23 All. L.

(7) (1888) 7 Bom. 146.

(8) (1882) 6 Bom. 515.

(9) (1890) 18 Cal. 164.

to Hasan for Rs. 300. After that Chimnaji alone mortgaged the same property, of which he had become sole owner, to Umaji for Rs. 100.

Still later Chimnaji and his three brothers brought a redemption suit against Hasan to redeem the prior mortgage without joining the subsequent mortgagee, Umaji. A decree was passed ordering the mortgagors to pay Rs. 300 to Hasan within seven months or to be for ever foreclosed. The mortgagors failed to pay, and Hasan, the prior mortgagee, who was and is in possession, obtained an order absolute for foreclosure.

Then Umaji, the subsequent mortgagee, brought this suit against Chimnaji, defendant 1, as his mortgagor, and against Hasan, defendant 2, as a person said to have some interest in the plaint land. The relief sought in the plaint was to recover Rs. 147-13-0 as principal and interest to date of suit and costs and future interest by sale of the mortgaged property and the deficiency, if any, from Chimnaji, defendant 1, personally. The Subordinate Judge held that Umaji as a subsequent mortgagee was entitled to redeem Hasan who, he held, occupied the position merely of prior mortgagee towards Umaji, because Umaji was not a party to the suit in which the prior mortgage became foreclosed. He treated the suit to recover by sale of the mortgaged property the debt, Rs. 147-13-0, due under the subsequent mortgage as if it were a suit to redeem the prior mortgage and decreed as follows: "Plaintiff to redeem and recover possession of the property in suit from defendants 1 and 2 by payment of Rs. 300 to defendant 2 within two years from this date, and on failure to do so plaintiff do stand barred of all right to redeem. Each party to bear his own costs."

Hasan appealed against this decree, and in his grounds of appeal raised the contentions that he had become absolute owner in virtue of the previous foreclosure decree absolute, that as he was ready to pay Rs. 147-13-0 to plaintiff a decree should have been made accordingly, and that it was an error to award relief beyond the terms of the plaintiff's prayer which was that Rs. 147-13-0 should be awarded by sale of the mortgaged property or from defendant 1 personally.

The District Judge, holding that plaintiff has a right to treat his suit as against Hasan, defendant 2, as though it were a suit

1903.

HASANSHAI

v.

UMAJI.

1908.
 HASSANBHAI
 v.
 UMAJI.

for redemption, because plaintiff was not a party to the suit which the mortgagors brought to redeem the prior mortgage to Hasan, confirmed the decree without discussing the question whether the suit brought to recover the money due on the subsequent mortgage by sale of the mortgage property ought to have been treated as a suit to redeem the prior mortgagee, Hasan, and merely to redeem Hasan.

Hasan brings this second appeal, repeating the contentions already mentioned.

The first point for decision is whether it was wrong to treat this suit of Umaji, plaintiff and present respondent No. 1, as one brought to redeem Hasan. Hasan's plea in defence to this suit was from the outset that he had, in virtue of the decree absolute for foreclosure in the Suit No. 156 of 1897 brought by the mortgagors against himself for redemption, become full owner and was in possession. The issues upon which the parties went to trial were (1) has defendant 2 (*i. e.*, Hasan) become full owner of the land in suit as against plaintiff as alleged by him? (2) what relief, if any, is plaintiff entitled to against defendant 1 and against defendant 2?

There is thus no room for contending that the decree contravenes the general rule that "relief not founded on the pleadings should not be granted:" see the Privy Council decision in *Sri Mahant Govindrao v. Sita Ram Kesho*.⁽¹⁾ It is contended, however, for Hasan, appellant, that what the lower Courts have done amounts practically to allowing the suit to be converted into a suit of another and inconsistent character which is forbidden by section 53 of the Civil Procedure Code (Act XIV of 1882).

Looking to the substance and not to the form of the suit, the plaintiff was clearly seeking relief on the basis of the right of a mortgagee. When the pleadings were complete it appeared that his mortgage was subsequent in date to that which Hasan had taken of the same lands and had foreclosed. The contest thus became one between, on the one hand, a prior mortgagee in possession who had obtained a decree absolute for foreclosure and, on the other hand, a subsequent mortgagee who had not

(1) (1898), 21 All. 53 p. 69.

been made a party to the redemption suit in which that final decree for foreclosure was made.

The issues were framed in such terms as to afford full opportunity of bringing forward appropriate evidence, and the parties had by the pleadings been made fully alive to the questions that had to be argued. These essentials, pointed out in *Sayad Muhammad v. Faltch Muhammad*⁽¹⁾, therefore, are not wanting. The relief decreed was appropriate in a degree to the decision arrived at under these issues. Whether all the equities covered by those issues were sufficiently provided for in the decree is another matter altogether. There was, in my opinion, no greater inconsistency in the character of the suit as disclosed in the plaint and as treated in the issues framed than exists between a suit for ejectment and a suit for redemption where a relation of mortgagor and mortgagee is established.

It would be difficult after the decree passed by the Privy Council in *Nilakant v. Sures Chunder*⁽²⁾ to hold that the Court cannot in its discretion pass a decree for redemption in a case in which the plaintiffs have sued in ejectment. Per Sargent, C. J., in *Parshotam Bhaishankar v. Rupal Zunjar*.⁽³⁾

In *Kashinath Das v. Sadashiv Patnaik*,⁽⁴⁾ decided by the Calcutta High Court it was remarked :—“The law prohibits any such amendment as would change the fundamental character of the suit; for example, a plaint cannot be so amended as to convert a claim based upon contract into an action on tort. But an alteration in the relief does not alter the character of a suit.”

It appears to me, therefore, that the contention that the lower Courts had no discretion to decree redemption of Hasan instead of the relief prayed in the plaint, must fail.

The next and main point for decision is whether, looking to the equities on both sides, Hasan, the prior mortgagee, who had already obtained a final decree for foreclosure against the mortgagors and was in possession, ought to have been given an opportunity to redeem Umaji, the subsequent mortgagee.

When a mortgagor executes a second mortgage he charges his equity of redemption to the extent of that subsequent mortgage :

(1) (1894) 22 I. A. 4; 22 Cal. 324.

(2) (1885) 12 I. A. 171.

(3) (1895) 20 Bom. 196.

(4) (1893) 20 Cal. 805 at p. 808.

1903.

HASSANBHAI
v.
UMAJI.

Damodar v. Naro,⁽¹⁾ *Radhabai v. Shamrao*.⁽²⁾ The puisne mortgagee is, under section 75 of the Transfer of Property Act (IV of 1882) as well as a long course of decisions of this Court (*Desai Lallubhai v. Mandas*⁽³⁾ and the cases there cited), entitled to redeem a prior mortgage, and must be joined to a redemption suit, section 85 of the Transfer of Property Act, because a puisne mortgagee represents the equity of redemption to the extent of his own mortgage and as such is entitled to have an opportunity to redeem the prior mortgage and cannot be deprived of that right by proceedings to which he was not a party: *Damodar v. Naro*.⁽¹⁾

If a mortgagee "puts the Court in motion to sell, he is held to be estopped from denying that his interest as mortgagee has passed under the sale of the right, title and interest of the mortgagor or his heirs to the purchaser:" per Westropp, C. J., in *Shaik Abdulla Saiba v. Haji Abdulla*.⁽⁴⁾

When such a sale has been effected under a decree obtained by a mortgagee it is usually said that "the right, title and interest of the mortgagor as it stood when he was making the mortgage (and not merely as it stood at the time of the Court-sale) is what passes under the certificate of sale to the purchaser:" *ibid* at page 13, *Kasundas Laldas et al v. Pranjivan Asharam*,⁽⁵⁾ *S. B. Shringarpure v. S. B. Petha*⁽⁶⁾ and *Ravji Narayan v. Krishnaji Lakshman*,⁽⁷⁾ and that the purchaser at a sale in execution of a decree on a mortgage acquires the estate of the mortgagor as it existed when he executed the mortgage (*Dadoba Arjunji v. Damodar Raghunath*)⁽⁸⁾ free from all subsequent incumbrances subject only to the right of a puisne mortgagee to redeem him if he so desire: *Desai Lallubhai Jethabhai v. Mudas Kuberdas*.⁽⁹⁾ Also where the decree is for foreclosure, not for sale, the prior mortgagee who forecloses the mortgagor is liable to be redeemed by any puisne mortgagee who might have been but was not made a party to his suit: *Sanhana v. Virupakshapa*.⁽⁹⁾

(1) (1881) 6 Bom. 11.

(2) (1881) 8 Bom. 168.

(3) (1895) 20 Bom. 390.

(4) (1880) 5 Bom. 8 at p. 13.

(5) (1870) 7 Bom. H. C. R., A. C. J. 146.

(6) (1878) 2 Bom. 662.

(7) (1874) 11 Bom. H. C. R. 139.

(8) (1891) 16 Bom. 486.

(9) (1883) 7 B m. 146.

It follows from the authorities already cited that when the equity of redemption vested in the mortgagor has become charged by a subsequent mortgage before the suit on which foreclosure is decreed the estate acquired by the prior mortgagee who forecloses behind the back of the puisne mortgagee is subject to that charge on the equity of redemption so long as the subsequent mortgage remains unredeemed. The charge is limited to the extent of the subsequent mortgage and the right to redeem which that charge on the equity of redemption gives to the puisne mortgagee is not defeated by proceedings to which the puisne mortgagee is not made a party. But it does not follow that the mortgagor's interest in the equity of redemption cannot be acquired by the prior mortgagee in proceedings to which the puisne mortgagee is not a party as effectively as it could be acquired by, say, a purchase for valuable consideration. No principle of law or equity has been advanced to show why a prior mortgagee who forecloses behind the back of a puisne mortgagee should be treated as less entitled to redeem the puisne mortgage than a prior mortgagee who becomes owner by purchase of his mortgagor's interest in the equity of redemption, in other words, the equity of redemption burdened with the charge created by the puisne mortgage to the extent of the subsequent mortgage.

The mortgagor's interest in the equity of redemption was fully represented in the Suit 156 of 1897, and if Hasan in virtue of his acquisition of that interest is entitled to redeem the puisne mortgagee Umaji and entitled to exercise that right whether in preference to, or subsequent to the exercise of, the right of a puisne mortgagee to redeem him when viewed merely as a prior mortgagee, then, upon such redemption by Hasan taking place, the second mortgage to Umaji would become extinguished and with such extinction would disappear any right to redeem which Umaji might otherwise be able to set up as vesting in him under section 75 or section 91 of the Transfer of Property Act so long as his mortgage may subsist.

It must be borne in mind that the equity of redemption vested in the mortgagor or his representatives or assignees is an absolute indefeasible right which cannot be resisted by a mortgagee,

1903.

 HASSANBHAI
 v.
 UMAJI.

1903.

HASSANBHAI

v.
UMAJI.

for the mortgagor is "absolute owner,"⁽¹⁾ the interest in the equity of redemption acquired by a puisne mortgagee is part of his title as a puisne mortgagee and is subject therefore to the infirmities of a mortgagee's title, one of which is the liability to be redeemed.

Mr. Mulgaonkar's argument amounted to this, that as his client was not made a party to the redemption Suit 156 of 1897 he is entitled to ignore the order absolute passed in that suit foreclosing the mortgage to Hasan : that his client Umaji as a puisne mortgagee is entitled to redeem Hasan, the prior mortgagee, and, if Umaji himself is liable to be redeemed, that can be done only by the mortgagor Chinnaji whose interest in the equity of redemption has not according to the argument passed to Hasan because Umaji was not a party to the redemption suit in which Hasan's mortgagors were foreclosed. Mr. Mulgaonkar did not contend that the right of the mortgagor to redeem is not paramount if still subsisting.

There appears to me to be some unreality about this argument, seeing that the mortgagor Chinnaji is a party to the present suit, and the rights of Chinnaji and Hasan *inter se* have been finally adjudicated in Suit 156 of 1897. Mr. Mulgaonkar relies upon section 75 of the Transfer of Property Act (IV of 1882) as declaring his right to redeem and on the numerous decisions of this Court in which the right of the puisne mortgagee to redeem a prior mortgagee notwithstanding foreclosure of the mortgagor behind a puisne mortgagee's back has been affirmed, and he also relies upon a passage in Ghose on the Law of Mortgage to which reference will be made later on.

Section 75 of the Transfer of Property Act (IV of 1882) provides that "every second or other subsequent mortgagee has, so far as regards redemption, foreclosure and sale of the mortgaged property, the same rights against the prior mortgagee as his mortgagor has against such prior mortgagee or mortgagees, and the same rights as against the subsequent mortgagees, if any, as he has against his mortgagor." Mr. Mulgaonkar relied specially on *Desai Lallubhai v. Mundas*⁽²⁾ and the cases there

(1) *Pugh v. Heath* (1862) 7 App. Cas. 235 at p. 238.

(2) (1895) 20 Bom. 390.

cited, though it must be noted that in *Desai Lallubhai's case* the prior mortgagee was unwilling to redeem the second mortgagee and the Court ruled he was not compelled to redeem. Mr. Bhajekar for appellant Hasan contends that mere affirmation in section 75 of the Transfer of Property Act or in decided cases of the right of a puisne mortgagee cannot be treated as deciding that a prior mortgagee, who obtains a foreclosure decree absolute in a suit to which a subsequent mortgagee is not joined, has no right to redeem the subsequent mortgagee if he so choose instead of submitting to be redeemed himself by the subsequent mortgagee, or if he must submit first to be redeemed that he cannot in such circumstances, in virtue of his having acquired the mortgagor's interest in the equity of redemption, redeem in his turn the subsequent mortgagee by paying whatever may be the debt.

It is necessary therefore to take a wider view of the authorities. Section 91 of the Transfer of Property Act enacts that: "Besides the mortgagor, any of the following persons" (amongst others) "may redeem or institute a suit for redemption of the mortgaged property:—(a) any person (other than the mortgagee of the interest sought to be redeemed) having any interest in, or charge upon, the property; (b) any person having any interest in, or charge upon, the right to redeem the property."

The redemption by Umaji of Hasan would not extinguish the owner's interest in the land which must be somewhere and cannot be in abeyance. The position of the title as long as the mortgage is redeemable is described by Lord Hardwicke in the leading case of *Casborne v. Scarfe* ⁽¹⁾: "An equity of redemption has always been considered as an estate in the land, for it may be devised, granted, or entailed with remainders and such entail and remainders may be barred by fine and recovery, and therefore cannot be considered as a mere right only, but such an estate whereof there may be a seisin. The person therefore entitled to the equity of redemption is considered as the owner of the land."

"The interest in the land must be somewhere and cannot be in abeyance; but it is not in the mortgagee and therefore must remain in the mortgagor."

1903.

HASSANBHAI

UMAJI.

(1) 2 White & Tudor's L. C. 6, 7th Ed.

1903.

HASSANBHAI

v.
UMAJI.

What then is the position of the title after an order of foreclosure absolute?

"The effect of an order of foreclosure absolute is to vest the ownership of, and the beneficial title to, the land, for the first time, in the person who previously was a mere incumbrancer. The equitable estate of the mortgagor is then forfeited and transferred to the mortgagee. It is transferred as effectually as if it had been conveyed or re-leased. "A foreclosure" (said Lord Hardwicke) "is considered as a new purchase of the land." "The mortgage being foreclosed" (said Sir Wm. Grant) "the estate became absolutely his." "By the order made in the foreclosure suit" (said Sir Lancelot Shadwell) "he became the absolute owner;"—per Lord Selborne, L. C., in *Heath v. Pugh*.⁽¹⁾ "The decree absolute gave a new right, confirmed a new estate," per Lord O'Hagan in the same case on further appeal (L. R. 7 A. C. at p. 239).

Thus looking to principle it would appear that the fact that the second mortgagee Umaji's interest in the equity of redemption was not represented in the suit in which Hassan the prior mortgagee obtained an order absolute for foreclosure can no more prevail to save Umaji from being redeemed as to his charge on the equity of redemption than if there had been no foreclosure but some third person had bought the right, title and interest of the mortgagor (that is, the property subject to the mortgages to Hasan and Umaji) and were now suing to redeem Umaji.

Turning next to decided cases, *Umes Chunder Sircar v. Zakur Fatima*⁽²⁾ may be cited to show that their Lordships of the Privy Council (*see* at page 178) did not question the proposition that at any time before actual sale the mortgagor himself and anybody to whom he may have transferred the property can come in and redeem the property by paying the debt.

In the present case the appellant Hasan, as already pointed out, has added to his rights the mortgagor's interest in the equity of redemption.

In the respondent No. 1, Umaji, we have a second mortgagee who was not a party to the redemption suit and has therefore still

⁽¹⁾ (1881) 6 Q. B. D. 345 at p. 360.

⁽²⁾ (1890) 13 Cal. 164.

a right to redeem Hasan so long as his own charge on the equity of redemption subsists. That charge can be got in by redeeming Umaji. The question then is why should not the right of Hasan to redeem the puisne mortgagee be enforced in this suit even if it be held that Hasan must first submit to be himself redeemed by Umaji ?

In *Radhabai v. Shamrao* ⁽¹⁾ a prior mortgagee, Sitabai, obtained a decree for sale against the mortgagor Anandrao behind the back of a puisne mortgagee and Shamrao was the Court purchaser. The puisne mortgage was with possession. In a suit between Shamrao as plaintiff and Radhabai this Court allowed Shamrao to redeem Radhabai, the puisne mortgagee, and Westropp, C. J., said : " No doubt the decree in Sitabai's suit bound the mortgagor Anandrao Bapuji (who was a party to Sitabai's suit), so far as his right to redeem is concerned, and, therefore, the plaintiff has a good title to the interest of Anandrao Bapuji and is accordingly entitled to redeem the lands from Radhabai's mortgage." ⁽²⁾

In *Dadoba Arjunji v. Damodar Raghunath* ⁽³⁾ Sargent, C. J., observed that the circumstances in *Radhabai v. Shamrao* ⁽¹⁾ were of a special nature and it may perhaps be open to doubt whether the decision is reconcilable with the ruling in *Kasandas Lalidas et al v. Pranjivan Asharam* ⁽⁴⁾, *Shaik Abdulla v. Haji Abdulla*, ⁽⁵⁾ and *Rupchand v. Darlatrav* ⁽⁶⁾ that a purchaser at a sale in execution of a decree on a mortgage acquires the estate of the mortgagor as it existed when he executed the mortgage.

Mr. Mulgaonkar, for respondent No. 1, Umaji, argued that the above observation should be treated as casting doubt on the proposition that when the equity of redemption so charged to the extent of a second mortgage has become merged in the title acquired by the Court purchaser at a sale effected in the suit of the prior mortgagee the Court purchaser cannot get in that charge and complete his title if he so pleases by redeeming the second mortgage ; but it is not apparent why such a construction should be put upon that observation.

1903.

 HASSANBAI
 v.
 UMAJI.

(1) (1881) 8 Bom. 163.

(2) (1881) *Ibid.* p. 173.

(3) (1891) 16 Bom. 456 at p. 491.

() (1870) 7 Bom. H. C. R. A. C. J. 146.

(5) (1880) 6 Bom. 8.

(6) (1882) 6 Bom. 495.

1903.

HASSANBHAI
v.
UMAJI.

The case of *Shivram v. Genu* ⁽¹⁾ is instructive. In that case one Genu had mortgaged property to one Hanmantrao for a sum less than Rs. 100 by an unregistered deed. At a later date Genu executed a mortgage for less than Rs. 100 of the same land to one Pandu by a registered deed. Hanmantrao obtained a decree upon his mortgage and having caused the property to be put up to sale by the Civil Court became its purchaser. He did not make Pandu a party to the suit on the mortgage. Subsequently the assignee of Pandu brought a suit to enforce the mortgage to Pandu. In that case Westropp, C. J., said (at page 519): "Assuming, however, that Pandu had not, at or before the execution of his mortgage, notice of Hanmantrao's unregistered mortgage, and, therefore, that Pandu's mortgage by virtue of its registration is entitled to priority over that of Hanmantrao, the latter (Hanmantrao) will in that event be entitled, as owner of what was Genu's equity of redemption under the judicial sale to Hanmantrao, to redeem the mortgage of Pandu." What is to be specially noticed here is that Pandu was not represented in the suit in which Hanmantrao became purchaser and thus owner of what was the mortgagor Genu's interest in the equity of redemption.

The principle here followed is the same as that in the later case of *Radhabai v. Shamrao*, ⁽²⁾ namely, that in a suit between the prior mortgagee and the mortgagor on the prior mortgage, the mortgagor's interest in the equity of redemption is fully represented and passes under the decree for foreclosure or sale to the mortgagee or to the Court purchaser even though a puisne mortgagee who has an interest in, or charge upon, the right to redeem the property has not been made a party to such suit.

In *Unes Chunder Sircar v. Zahur Fatima*, ⁽³⁾ a case decided, as already noted, by the Privy Council, a prior mortgagee who had acquired the equity of redemption of the mortgagors, charged to the extent of a subsequent mortgage, was allowed to redeem the subsequent mortgagee in a suit in which the latter sued to redeem prior encumbrances so as to make his own charges the first on the property.

(1) (1882) 6 Bom. 515.

(2) (1881) 8 Bom. 168.

(3) (1890) 18 Cal. 164.

1908.

HASSANBHAI

UMAJI.

Mr. Mulgaonkar argued that this decision may also be interpreted as supporting his contention because it decreed a preliminary redemption by the puisne mortgagee of the prior mortgage and then upon the terms stated in the decree the redemption of the puisne mortgagee by the prior mortgagee, but it is unnecessary to discuss the reasons appearing from the judgment for the decree taking this form, for the fact remains that the decree as worked out gave the prior mortgagee the option to redeem the puisne mortgagee.

In *Rangasamy Naiken v. Jelli Bodi Naiken* ⁽¹⁾ the liability of a second mortgagee to be redeemed by a first mortgagee who had got a decree for sale on his mortgage and purchased the mortgaged property is affirmed.

In *Anundo Moyee Dossee v. Dhondro Chunder* ⁽²⁾ it was pointed out that a foreclosure suit binds subsequent mortgagees of the equity of redemption.

Mr. Mulgaonkar has relied upon the following remark in Ghose on the Law of Mortgage (3rd Ed., p. 741):—"It should be here noticed that where a mortgage is redeemed by a puisne incumbrancer who was no party to the suit for foreclosure, the mortgagor will acquire a new right of redemption which he may exercise notwithstanding the previous decree for foreclosure. Thus, if the first mortgagee forecloses the mortgage without making the second mortgagee a party to the action, the latter may redeem the first mortgage; but he will be liable in his turn to be redeemed by the mortgagor." No authority is mentioned supporting this view that in the circumstances stated a right to redeem is revived in the mortgagor who has already been foreclosed. It is a view opposed to section 60, paragraph 2, of the Transfer of Property Act (IV of 1882) and to the decisions of this Court in *Shivram v. Genu* ⁽³⁾ and *Radhabai v. Shamrao* ⁽⁴⁾ and to the principle underlying the decree passed by the Privy Council in *Umes Chunder Sircar v. Zahur* ⁽⁵⁾, but may be reconciled with those decisions and with the remarks quoted from *Heath v. Pugh* (*sup.*) if the word mortgagor in the above passage is read as meaning

(1) (1902) 26 Mad. 484.

(3) (1882) 6 Bom. 515.

(2) (1871) 14 Moo. I. A. 101.

(4) (1851) 8 Bom. 161.

(5) (1899) 18 Cal. 164.

1903.

HASSANBEHAI

v.

UMAJI.

the person who has acquired the mortgagor's interest in the equity of redemption. Even as it stands the passage does not help the respondent Umaji as it recognizes that a second mortgagee does not in the circumstances stated escape his liability to be redeemed.

Thus on principle and authority the conclusion to be drawn is that when an order absolute for foreclosure has been made in a suit between a mortgagor and a prior mortgagee, the fact that a second mortgagee was not made a party to that suit does not deprive the prior mortgagee (who has by such order absolute acquired what was the mortgagor's interest in the equity of redemption) of his right to redeem the second mortgagee ; and this right must at his option prevail ultimately even though the equities of the suit between him and the second mortgagee may require that the decree should allow the second mortgagee to exercise in the first instance his own right to redeem the first mortgage—a right which notwithstanding the foreclosure survives to the second mortgagee until he is himself redeemed by reason of his charge on the equity of redemption not having been represented in the former suit which was therefore insufficiently constituted as to parties.

The puisne mortgagee Umaji cannot be allowed to both reprobate and approbate the proceedings in the previous redemption suit (156 of 1897). If he exercise his right to redeem Hasan he will remain liable to be redeemed himself by the owner of what was the mortgagor's interest in the equity of redemption, that is, by Hasan. The only practical question which remains is whether such ultimate redemption by Hasan should be provided for by the decree in the present suit or whether the decree should only provide for the redemption by Umaji of the prior mortgage and Hasan be left to bring another suit to redeem Umaji. Umaji has sued on his own (second) mortgage and Hasan has expressed his willingness in the Lower Court to pay off the second mortgage and thus redeem Umaji. There is therefore no reason why all proper relief should not be given in the present suit.

Umaji, respondent No. 1, has not asked that in the event of its being decided that Hasan, appellant, may ultimately redeem him, our decree should provide that he (Umaji) may in the first instance redeem Hasan.

1903.

HASSANBHAI

v.
UMAJI.

The decrees of the Lower Courts must be varied by making the relief awarded conditional on the appellant Hasan, defendant No. 2, not redeeming the plaintiff's mortgage of 26th May, 1897, within the period allowed to Umaji to redeem Hasan which we alter to six months from this date by paying to plaintiff Rs. 147-13-0 with interest on Rs. 100 at the rate stipulated in the mortgage bond from date of suit till date of payment. In default of such payment within the said six months the appellant Hasan to be absolutely debarred of all right to redeem. Costs in the Court of first instance as ordered in that Court's decree. Costs in the Lower Appellate Court each to bear his own. But respondent No. 1 to pay the costs of appellant in this Court.

JACOB, J. :—This suit was instituted by the plaintiff Umaji to recover principal and interest due on a mortgage bond executed by defendant No. 1, Chimnaji, on the 6th May, 1897, by sale of the mortgaged property. Defendant No. 2, Hasanbhai, was added, because being in possession he appeared to have an interest in the property.

Defendant No. 1 pleaded want of consideration, and asked for a decree for payment by instalments.

Defendant No. 2 claimed to have an absolute title to the land. He had been in possession as mortgagee under a prior mortgage, and defendant No. 1 having failed in pursuance of a decree for redemption brought by him in 1897 to pay the money within the prescribed time, had been foreclosed by an order absolute on 17th February, 1899.

The plaintiff was not a party to the redemption suit. At one time in the course of the hearing before us it was understood that plaintiff's mortgage was taken *pendente lite*, but it turned out that it was executed a week before the institution of the redemption suit by defendant No. 1. In the redemption suit there were others joined as co-plaintiffs, and a question was raised before the District Court as to whether Chimnaji (defendant No. 1) had a complete title at the date of his mortgage to plaintiff. An issue on this point was tried and was decided in the affirmative.

It is true, as pointed out by the Subordinate Judge in his judgment on remand, that the question whether the mortgage by Chimnaji to plaintiff carried the whole, or only a share, of the

1903.

HASSANBHAI

v.
UMAJI.

equity of redemption would not have affected the plaintiff's right to redeem a prior mortgage. The fact, however (had it been a fact) that Hasanbhai (defendant No. 2) had acquired by the foreclosure the title of other co-sharers besides Chimnaji might have materially affected the question whether Hasanbhai in his turn was not entitled to redeem the plaintiff's mortgage.

Upon the pleadings the Subordinate Judge framed a second issue in general terms, as follows, *viz.*: What relief, if any, is plaintiff entitled to against defendant No. 1 and against defendant No. 2? And on this issue he held that plaintiff was entitled to redeem the property from defendants Nos. 1 and 2 on payment of Rs. 300 within two years to defendant No. 2.

This decree on appeal was confirmed with costs.

The suit as originally framed was for realisation of the mortgage debt against the mortgagor, while the decree was for redemption against the mortgagee. The prior mortgage however was not referred to in the plaint, and the question of the necessity for redeeming it arose out of the pleadings, and as no objection was taken in the Lower Courts to the change of the nature of the suit, we should not, I think, be justified in second appeal in enforcing a technical objection of this sort against the plaintiff. Point No. 5 in the first appeal does not appear to have been pressed at the hearing. The Lower Courts should however have required the plaint to be amended and the deficiency in Court fee to be made up. In the Subordinate Court Hasanbhai stood only on his claim as absolute owner. He made no offer to redeem the plaintiff's mortgage, or, in other words, to pay off the claim as presented in the plaint. The Subordinate Judge states that he had actually refused to do so, but of this there is no indication on the record. In his first appeal Hasanbhai in point No. 9 put forward that he had been ready to pay what might be found due to plaintiff, but although when the remanded issue was under trial before the Subordinate Judge a formal offer to pay off the plaintiff's claim was made, this offer was not renewed before the District Judge when finally disposing of the appeal. Under these circumstances it does not appear that as the case comes before us the appellant is entitled to any more indulgence than the plaintiff.

The question which is before us is concerned strictly with their legal rights *inter se*.

There can be no doubt upon the authorities that a puisne mortgagee, who was not made a party to a suit on a prior mortgage, does not lose his right to redeem that mortgage by sale or foreclosure in that suit.

The further question however whether the prior mortgagee who had foreclosed, or purchased under a sale in such a suit, is in his turn entitled to the option of redeeming such a puisne mortgagee is one that is not so free from doubt.

It is true that the interest of the mortgagor was acquired by proceedings in a suit to which the present plaintiff was not a party, and by which he is not therefore bound, but it appears to me that it can only be for the protection of his rights, and not for their enlargement, that the puisne mortgagee under such circumstances can claim to disregard the effects of the previous litigation.

If there had been no such former suit for redemption of the prior mortgage, there can be no doubt that the plaintiff would have been liable to be redeemed by the mortgagor. Can he then be allowed to say in reply to the prior mortgagee that the foreclosure operates to extinguish the rights of the mortgagor as against him?

Mr. Mulgaonkar was not indeed prepared to go to this length. He admitted, referring to a dictum at page 742 of Ghose's Law of Mortgage, that after redeeming the prior mortgagee he might still be subject to redemption at the instance of the mortgagor.

The dictum just noticed is not supported by reference to any authority. Its acceptance would involve the reopening of the mortgagor's right to redeem the first mortgage, which had been already foreclosed as against the first mortgagee.

It involves in fact the assumption that a puisne mortgagee who was not made a party to suit on a prior mortgage is entitled for all purposes to treat that suit as a nullity, leaving his rights as against the mortgagor and the prior mortgagee individually entirely unaffected. I cannot find that this has been affirmed in any of the cases which have been cited before us, or in other cases to which I have referred.

1903.

HASSANBHAI
v.
UMAJI.

190 .

HASSANBHAI

v.

UMAJI.

On the contrary in his order of reference to the Full Bench in the case of *Deendra Narain Roy v. Ramtaran Banerjee* ⁽¹⁾, Maclean, C. J., says : " It seems to me we ought to look, not at what his (the puisne mortgagee's) rights would have been, had he been made a party to the first mortgagee's suit, but what his rights as second mortgagee are as he was not made a party," that is to say, his rights are unaffected as to his security, but the persons against whom those rights may be enforced may have been changed by the previous litigation.

If the puisne mortgagee would still be liable to be redeemed, then it is no hardship on him that he should be redeemed at the instance of the prior mortgagee, who has by foreclosure acquired the title of the mortgagor, rather than by the mortgagor himself or any other private assignee of the mortgagor's interest.

If, as held by the Calcutta Full Bench in the case just cited (I. L. R., 30 Cal., 599), the puisne mortgagee is under such circumstances entitled not only to redeem but also to bring the property to sale subject to the prior mortgage, such a right must surely involve the correlative liability to be redeemed. The right to bring the property to sale involves the right of foreclosure with which the right to redeem is always co-extensive. Whether the decision of the Calcutta Full Bench is in all points reconcilable with the decisions of the Bombay High Court laying down that the purchaser at a sale in execution of a decree on a prior mortgage stands in the place of the prior mortgagee, subject only to redemption at the hands of a puisne mortgagee who was not a party to the decree (see *Desai Lallubhai Jethabhai v. Mundaas Kuberdas* ⁽²⁾ and the previous authorities there cited), may perhaps be open to question. It may be noted however that what was held in that suit was that the subsequent mortgagee could not *compel* the purchaser (*who was not the prior mortgagee himself*) to pay off his mortgage.

I find on referring to the paper book of the case of *Vasudev v. Narayan* ⁽³⁾ that the learned Judges who decided that appeal proceeded on the assumption that " the plaintiff having bought

⁽¹⁾ (1908) 30 Cal. 599 at p. 601. ⁽²⁾ (1895) 20 Bom. 300.

⁽³⁾ (1832) P. J. p. 21.

under his own decree obtained without making defendant a party is in no better position than that of a mortgagee and cannot rely on the sale under the decree as a third party could do."

This circumstance may afford a basis for reconciling the decision in *Radhabai v. Shamrav* ⁽¹⁾ with the other Bombay decisions, as to which doubt is expressed by Sargent, C. J., in *Dadoba Arjunji v. Damodar Raghunath* ⁽²⁾. In this connection it is to be borne in mind that the foreclosure with which we are now dealing was the result of a suit for redemption brought by the mortgagor, and that it was the mortgagor (who had executed his second mortgage only a week before filing his plaint), and not the prior mortgagee, who was responsible for the omission to make the present plaintiff a party to that suit. There can probably be little doubt that the present plaintiff had notice of that suit, and that it was for the purpose of raising funds for that suit that the mortgage to him was executed. Apart however from any such means that may be available for differentiating the present suit from those above referred to, it is clear that the theory that a purchase under a decree on a mortgage has the effect of shutting out all puisne incumbrances, so as in any way to affect the rights or liabilities of persons who were not bound by that decree, has been rejected by the Judicial Committee of the Privy Council: see *Umcs Chunder Sircar v. Zahur Fatima* ⁽³⁾.

This case also in my opinion affords direct support to the contention of the respondent as to his right to redeem. The suit having been brought for sale, subject to other incumbrances, it became necessary to determine the question of the plaintiff's right to redeem a certain share in the hands of Zahur in order to clear the way for an adjustment of their respective rights in the purchase money. The case however did not rest there; it was found that plaintiff having redeemed that share, was in his turn liable to be redeemed by Zahur as purchaser at a sale under a decree on her mortgage, *subject to the plaintiff's mortgage or mortgages* (the plaintiff not having been a party to that suit), in respect of another subordinate share. The necessity for providing

1903.

HASSANBHAI

v.

UMAJI.

(1) (1831) 8 Bom. 168.

(2) (1891) 16 Bom. p. 491.

(3) (1890) 18 Cal. p. 179.

1903.

HASSANBHAI
v.
UMAJI.

for such a double transaction by way of mutual redemption appears to have been due to the fact that the properties held in mortgage by each were not identical (see page 181).

I therefore concur in holding that under the circumstances of the present case the appellant is entitled to redeem on the terms stated by my learned colleague, and that the decree of the lower Court should be modified accordingly. I also concur in the order as to costs.

Decree varied.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Aston.

1903.

September 16.

SHIDLINGAPPA BIN IRAPPA AND OTHERS (ORIGINAL DEFENDANTS),
APPELLANTS, v. SHANKARAPPA BIN KARABASAPPA ITTIGHI
(ORIGINAL PLAINTIFF), RESPONDENT.*

Partnership—Dissolution of partnership—Appointment of Receiver—Debt of the firm—Decree against one partner—Satisfaction of the decree by the partner—Suit by the partner against his co-partners for contribution—Court—Practice and procedure.

The plaintiff and defendants traded in partnership from 1884 to 1894. In 1894 a suit for dissolution of the partnership was instituted with the result that on the 11th June, 1897, a decree was passed appointing a Receiver with the usual directions for accounts and inquiry. In the meanwhile, J, a creditor of the partnership, sued the plaintiff and defendants for the debt due to him, but the Court passed a decree against the plaintiff alone, leaving his rights against the defendants to be settled in the accounts under the decree dated the 11th June, 1897. The plaintiff satisfied J's decree, which was for Rs. 5,561-5-9, by means of a *havadu* under which S. and K. paid on his account Rs. 5,400 to J. The balance Rs. 161-5-9 due under the decree was paid to J. by plaintiff himself. The plaintiff then instituted a suit to recover from the defendants their share of the decretal debt. The Subordinate Judge awarded the plaintiff's claim. On appeal,

Held, (1) that as J's decree had been satisfied by the plaintiff becoming liable to S. and K., he was entitled to call upon the defendants to enable him to meet their share of the liability;

(2) that it was open to any creditor of the partnership to sue the partners and obtain a decree for the recovery of his debt, but no creditor, after the appointment of a Receiver, could execute any decree, obtained after that

* First Appeal No. 35 of 1903.