

there was no duty cast upon them by law to preserve the old dam for the benefit of the owners of the adjoining land which was situated on a lower level. They were under no legal obligation to prevent the flow of the surface water from their land to the plaintiffs' property either by percolation or gravitation. In *Rylands v. Fletcher*<sup>(1)</sup> Lord Cairns observes, "If, in what I may term the natural user of that land, there had been any accumulation of water, either on the surface or underground, and if, by the operation of the laws of nature, that accumulation of water had passed off into the close occupied by the plaintiff, the plaintiff could not have complained that that result had taken place. If he had desired to guard himself against it, it would have lain upon him to have done so, by leaving, or by interposing, some barrier between his close and the close of the defendants in order to have prevented that operation of the laws of nature." These observations apply to the present case.

On these grounds I would reverse the decree and dismiss the plaintiffs' suit with costs.

*Decree reversed and suit dismissed.*

G. B. R.

(1) (1868) L. R. 3 H. L. 330 at p. 338.

## APPELLATE CIVIL.

*Before Mr. Justice Chandavarkar and Mr. Justice Hayward.*

MAHOMED IBRAHIM VALAD ABDUL RAHIMAN (ORIGINAL PLAINTIFF),  
APPELLANT, v. SHEIKH-HAMJA VALAD MAHOMEDALLI (ORIGINAL  
DEFENDANT), RESPONDENT.\*

*Civil Procedure Code (Act V of 1908), section 11, Explanation IV—Res judicata—Redemption suit—Second suit in ejectment—Court—Discretion—In ejectment suit a decree for redemption can be passed—Practice and procedure.*

Where a person brings a redemption suit and fails, his second suit in ejectment against the same defendant is not barred by *res judicata*.

The question whether any matter might and ought to have been made a ground of defence or attack in a previous suit must depend on the facts of each

\* See Appeal No. 861 of 1910.

1911.

MUNICIPALITY OF  
HUBLI  
v.  
LUCAS  
EUSTRATTO  
BALLI.

1911.

July 24.

1911.

MAHOMED  
IBRAHIM  
v.  
SHEIKH  
HANJA.

case. One important test is, whether the matters in the two suits are so dissimilar that their union might lead to confusion. The matter involved in a suit in ejectment is essentially different from that involved in a suit for redemption. In the first place where a person sues to eject he sues as owner of the property; where he sues to redeem, he sues as owner of an interest in it, namely, the equity of redemption, and the defendant as mortgagee is sued as holding the property as security for the debt. Secondly, in a suit for redemption, no question of title to the property is necessarily involved, because if the mortgage set up by the plaintiff is proved and alive, the mortgagee cannot deny the mortgagor's title but must allow him to redeem and sue him separately on the question of title. If the mortgage is not proved, the suit fails independently of the question of title.

It is the practice of the Bombay High Court to pass a decree for redemption in a case in which the plaintiff has sued in ejectment. That is purely in the exercise of the Court's discretionary power; and it can hardly be maintained that the plaintiff failing in an ejectment suit ought to pray for the alternative relief by way of redemption, when the Court is not bound to grant it as a matter of right.

SECOND appeal from the decision of J. D. Dikshit, Assistant Judge of Thana, confirming the decree passed by N. G. Chapekar, Subordinate Judge at Mahad.

Suit to recover possession of land.

The plaintiff purchased the land in dispute from one Dhondrao who had mortgaged it with the defendant with possession before the date of the sale. The plaintiff next obtained a redemption decree against the defendant. Some time after, the plaintiff brought a suit (No. 760 of 1906) against the defendant, alleging that he had given to the defendant the land in dispute for enjoyment till the expiration of the time in the mortgage deed under which defendant held another land and that the term of the mortgage being over he was entitled to the possession of the land in suit. The suit was dismissed on the ground that the agreement alleged was not proved. In 1903, the plaintiff brought the present suit against the defendant, to recover possession of the property from him.

The Subordinate Judge dismissed the suit on the ground that it was barred as *res judicata*. This decree was confirmed on appeal by the Assistant Judge.

The plaintiff appealed to the High Court.

H. C. Coyaji, with P. B. Shingne, for the appellant.

S. S. Patkar and D. C. Virkar, for the respondent.

The following cases were referred to: *Guddappa v. Tirkappa*<sup>(1)</sup>; *Naro Balvant v. Ramchandra Tukdev*<sup>(2)</sup>; *Bapuji Narayan Sane v. Bapujirao bin Subhanrao*<sup>(3)</sup>; *Narayan Khandu Kulkarni v. Kalgaunda Birdar Patel*<sup>(4)</sup>; *Tarachand v. Bai Hansli*<sup>(5)</sup>.

CHANDAVARKAR, J.:—In holding the present suit barred as *res judicata* by the previous Suit No. 760 of 1906, the Courts below have misapprehended the nature of the two suits. The previous suit was for the redemption of a mortgage; the present is one in ejectment. In the former the plaintiff alleged that the defendant had taken the property now in dispute in exchange for another property held by him as mortgagee; and he sought to redeem it. The exchange by way of mortgage was held not proved and the suit was dismissed. It was a decision that the plaintiff had not proved the mortgage set up by him, and that, therefore, his suit for redemption did not lie. Now he sues on his title as owner to eject the defendant as trespasser. "The relative rights and duties of owner and trespasser on the one hand and of mortgagor and mortgagee on the other are wholly different, and failure in a suit of simple ejectment does not in our opinion in any way bar the plaintiff in a subsequent suit to enforce his right to redeem as mortgagor": *Shridhar Vinayak v. Narayan valad Babaji*<sup>(6)</sup>. The converse of it was held by Westropp, C. J., and Nanabhai Haridas, J., in *Goviinda valad Shivaji v. Gannu valad Balaji*<sup>(7)</sup>. To the same effect is the Full Bench decision of this Court in *Ravji Shivram Joshi v. Kaluram*<sup>(8)</sup>. These were no doubt decisions under the Code of Civil Procedure of 1859, which did not contain such a provision as Explanation II to section 13 of the Code of 1882. But this Court followed *Shridhar Vinayak v. Narayan valad Babaji*<sup>(6)</sup> in *Naro Balvant v. Ramchandra Tukdev*<sup>(2)</sup>, a case under the latter Code. And the same provision is reproduced as Explana-

1911.

MAHOMED  
IBRAHIM  
v.  
SHEIKH  
HAMJA.

(1) (1900) 25 Bom. 189.

(2) (1888) 13 Bom. 320.

(3) (1873) P. J. 49.

(4) (1889) 14 Bom. 404.

(5) (1904) 6 Bom. L. R. 594.

(6) (1874) 11 B. II. C. R. 221 at p. 230.

(7) (1876) P. J. 186.

(8) (1873) 12 B. II. C. R. 160.

1911.

MAHOMED  
IBRAHIM  
v.  
SHEIKH  
HANJA.

tion IV to section 11 of the present Code (Act V of 1908), which applies to the suit in this second appeal.

The lower Courts would appear to have proceeded on the decision of this Court in *Guddappa v. Tirkappa*<sup>(1)</sup> in applying the rule of *res judicata* to the present case. But that decision rests on a different principle. There the first suit had been for possession claimed by the plaintiff as the surviving coparcener in a joint family as against the defendant treated as a trespasser. Failing in that suit, the same plaintiff sued as reversionary heir, treating again the same defendant as trespasser. It was held that the second suit was barred, because, having regard to Explanation II to section 13 of the Code of Civil Procedure (Act XIV of 1882), in the previous suit he not only *might* but *ought* to have alleged his title as reversionary heir. Both the suits were in ejectment; in both the claim or title was that of owner; the only difference, as pointed out by Jenkins, C. J., at the conclusion of his judgment, was in the source of the title alleged. That made no difference as to the nature of the two actions.

As observed by the Judicial Committee of the Privy Council in *Kameswar Pershad v. Rajkumari Ruttun Koer*<sup>(2)</sup>, the question whether any matter might and ought to have been made a ground of defence or attack in a previous suit must depend on the facts of each case, and one important test is, whether the matters in the two suits are so dissimilar that their union might lead to confusion. The matter involved in a suit in ejectment is essentially different from that involved in a suit for redemption. In the first place, where a person sues to eject he sues as owner of the property; where he sues to redeem, he sues as owner of an interest in it, namely, the equity of redemption, and the defendant as mortgagee is sued as holding the property as security for the debt. Secondly, in a suit for redemption, no question of title to the property is necessarily involved, because, if the mortgage set up by the plaintiff is proved and alive, the mortgagee cannot deny the mortgagor's title but must allow him to redeem and sue him separately on the question of title. That was held to be the

(1) (1900) 25 B.m. 189.

(2) (1892) L. R. 19 I. A. 234.

law by this Court in *Bapuji Narayan Sane v. Bapujirao bin Subhanrao*<sup>(1)</sup> and in *Santaji bin Pallu v. Bhayaji bin Raghun*<sup>(2)</sup>. Nor can the mortgagor dispute his own right to mortgage and that for the reason that in a mortgage the mortgagor covenants that at all events he has a good title : per Lord Kenyon in *Cripps v. Reads*<sup>(3)</sup>; see also *Narayan Khandu Kulkarni v. Kalgaunda Birdar Patel*<sup>(4)</sup>. If the mortgage is not proved, the suit fails, independently of the question of title.

It is true that it has been the practice of this Court to pass a decree for redemption in a case in which the plaintiff has sued in ejectment. That, as remarked in *Parshotam Bhaishankar v. Rupal Zunjar*<sup>(5)</sup>, is purely in the exercise of the Court's discretionary power; and it can hardly be maintained that the plaintiff failing in an ejectment suit ought to pray for the alternative relief by way of redemption, when the Court is not bound to grant it as a matter of right.

For these reasons the decree is reversed and the suit remanded to the Subordinate Judge's Court for trial on the merits according to law. All costs to be costs in the cause.

*Decree reversed.*

R. R.

(1873) P. J. 49.

(3) (1796) 6 T. R. 606.

(2) (1876) P. J. 17.

(4) (1889) 14 Bom. 404.

(5) (1895) 20 Bom. 196.

## APPELLATE CIVIL.

*Before Mr. Justice Chandavarkar and Mr. Justice Hayward.*

CHHAGAN CHUNILAL BHAI GUJARATI (ORIGINAL PLAINTIFF),  
APPELLANT, v. SUKA VALAD BARKU AND ANOTHER (ORIGINAL  
DEFENDANTS), RESPONDENTS.\*

1911.

July 24.

*Contract—Instalments—Default in payment—Waiver—Effect of the waiver.*

The plaintiff agreed to sell certain lands to the defendants for Rs. 1,000 in 1901 and put the latter in possession thereof the same day. The material stipulations in the contract were as follows:—(1) that the purchase money

\* Second Appeal No. 290 of 1910.