

That being so, we have little hesitation in coming to the conclusion that the appellant's contention upon this point is sound and must prevail. It becomes, therefore, unnecessary to go into the second equally interesting point of limitation upon which the appellant has relied.

We think that the appeal must be allowed and the plaintiff's suit dismissed with all costs on him throughout.

Appeal allowed.

R. R.

APPELLATE CIVIL.

*Before Sir Stanley Batchelor, Kt., Ag. Chief Justice and
Mr. Justice Shah.*

RAMCHANDRA DHONDO KULKARNI (ORIGINAL PLAINTIFF), APPELLANT
v. MALKAPA BIN NARSAPA DEVARE AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

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August 18.

Civil Procedure Code (Act V of 1908), section 11—Prior suit to set aside alienation made by minor's mother—Mortgage created by alienee before suit—Mortgagee not made party to the suit—Partial representation by mortgagor—Subsequent suit by mortgagee to support alienation—Privity between parties—Subsequent suit not barred by res judicata—Meaning of words "claiming under."

The property in suit originally belonged to one Devare. In 1883, during the minority of Devare, his mother sold it to the Bhojes from whom one Bavachi received it in exchange for another parcel of land. In 1891, by a simple mortgage Bavachi mortgaged the property to the plaintiff. In 1898 a suit was brought by Devare against his mother, Bavachi, and the Bhojes in order to set aside the sale by his mother to the Bhojes. That suit was successful and the result was that the sale to Bhojes was set aside. In 1901, the plaintiff obtained a decree on his mortgage against Bavachi. The property was put to sale and was purchased by the plaintiff with permission. But

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when the plaintiff endeavoured to get possession he was resisted by Devare. The plaintiff, therefore, brought a suit in 1909 against Devare, Bavachi and the Bhojes to recover possession. The defendant Devare contended that the plaintiff's suit was barred by *res judicata* as he was bound by the decree obtained against his mortgagor Bavachi in the suit of 1898.

Held, that as a mere mortgagee the plaintiff would not be bound by the earlier decision, because his title arose prior to the suit in which the decree against his mortgagor was obtained, and the mortgagor possessing only the equity of redemption had not in him any such estate as would enable him sufficiently to represent the mortgagee in the suit instituted after the mortgage.

Sita Ram v. Amir Begam,⁽¹⁾ followd.

SECOND appeal against the decision of F. W. Allison, Assistant Judge of Belgaum, reversing the decree passed by S. S. Phadnis, Subordinate Judge at Chikodi.

Suit to recover possession.

The property in suit (Survey No. 177) originally belonged to one Narsappa Devare, father of Malkapa Devare (defendant No. 1). On Narsappa's death his widow Ganga sold it to one Jivapa Bhoje, the ancestor of defendants Nos. 7-9 in the year 1883 during the minority of defendant No. 1. Subsequently in 1890 Bhoje transferred the land to Bavachi, the ancestor of defendants Nos. 2-5 in exchange for another piece of land (Survey No. 13).

In 1891, Bavachi mortgaged Survey No. 177 to the plaintiff.

In 1898, Devare (defendant No. 1) filed a suit (No. 1102 of 1898) against his mother, Bavachi and the Bhojes for setting aside the alienation by his mother and he got a decree in his favour. To that suit the present plaintiff was not a party.

In 1901, the plaintiff filed a suit against his mortgagor Bavachi and obtained a decree for sale. In

⁽¹⁾ (1886) 8 All. 324 at p. 338.

execution of that decree the plaint property was sold by auction and the plaintiff himself became the purchaser. But when he endeavoured to get possession, he was resisted by Devare.

In 1909, the plaintiff filed the present suit against Devare, Bavachi and the Bhojes to recover possession of Survey No. 177 by showing that the sale made by Devare's mother to the Bhojes was for recognised necessity; he also made an alternative claim against the Bhojes for getting possession of Survey No. 13 which was alleged to have been given by his mortgagor Bavachi to the Bhojes in exchange for Survey No. 177.

Defendant No. 1 contended that Survey No. 177 belonged to him; that his mother had no right to pass the sale deed and in suit No. 1102 of 1898 it was decided that the sale was not binding on him; that in consequence of the decision in that suit plaintiff's present suit was barred by *res judicata*.

Defendants Nos. 2 to 5 did not appear.

Defendant No. 6 contended that he had no interest in the property.

Defendants Nos. 7 to 9 contended that Survey No. 13 belonged to them. It was not given in exchange for Survey No. 177.

The Subordinate Judge held that the plaintiff was not bound by the result of suit No. 1102 of 1898; that the sale by defendant No. 1's mother was partly for necessary purposes but was not binding on defendant No. 1. He, therefore, passed a money decree against defendant No. 1 in respect of part of the purchase money devoted by his mother to necessary purposes.

The Assistant Judge reversed the decree and dismissed the suit holding that the plaintiff was bound by the decree in suit No. 1102 of 1898.

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The plaintiff preferred a second appeal.

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K. H. Kelkar, for the appellant :—We submit that we are not bound by the result of the suit No. 1102 of 1898. In that suit, our mortgagor Bavachi was represented but whatever interest we had as mortgagee was not represented. If at all there was a partial representation : see *Sita Ram v. Amir Begam* ;⁽¹⁾ *Abdul Alli v. Mia-likhan Abdul Husein* ;⁽²⁾ *Joy Chandra Banerjee v. Sreenath Chatterjee*⁽³⁾.

A. G. Desai for respondent No. 1 :—We submit that the appellant's mortgagor Bavachi having been made a party to suit No. 1102 of 1898, the decision in that suit is binding on the appellant. The case of *Sita Ram v. Amir Begam*⁽¹⁾ does not apply to the facts of this case. Here we are concerned with one in whom the rights of the mortgagor and mortgagee are vested. The moment the appellant became the purchaser, no distinction is to be made between his rights as mortgagor and mortgagee. He becomes the full owner : see *Bhawani Kuwar v. Mathura Prasad Singh*.⁽⁴⁾ He cannot say that he is bound so far as his equity of redemption is concerned but not so far the mortgage rights are concerned. Here it cannot be denied that the estate was properly represented as the mortgagor Bavachi was in possession and contested the suit. We have thus to ascertain whether at the time of this suit the plaintiff does or does not "claim under" his mortgagor. If he does, he is bound by the decree obtained against that mortgagor in the suit of 1898.

J. G. Rele, for respondent No. 6.

G. R. Desai, for respondents Nos. 7 to 9.

BATCHELOR, Ag. C. J. :—The facts in this second appeal are somewhat complicated, but we propose to

⁽¹⁾ (1886) 8 All. 324 at p. 338.

⁽³⁾ (1904) 32 Cal. 357.

⁽²⁾ (1911) 35 Bom. 297.

⁽⁴⁾ (1912) 40 Cal. 89.

refer only to such of them as are necessary for the decision of the point with which we are now concerned. The original owner of this property was the first defendant Devare. In 1883, during the minority of Devare, his mother purported to sell it to the Bhojes, from whom Bavchi in 1890 received it in exchange for another parcel of land. In 1891, by a simple mortgage Bavchi mortgaged the property to the present plaintiff, who is the appellant before us. In 1898, a suit was brought by Devare against his mother, Bavchi and the Bhojes, in order to set aside the sale by Devare's mother to the Bhojes. That suit was successful, and the result was that the sale to the Bhojes was set aside. In 1901, the plaintiff obtained a decree on his mortgage against Bavchi and the others. The property was put to sale and was purchased by the plaintiff with permission. But when the plaintiff proceeded to endeavour to get possession, he was resisted by Devare. Hence the present suit to recover possession.

The only question now before us is whether, in spite of the result of Devare's suit of 1898, it is open to the plaintiff now to show, if he can show, that the alienation by Devare's mother to the Bhojes was good in law, as, for instance, it would be, if the plaintiff could succeed in proving that the sale was for recognised necessity. It is contended against the plaintiff that it is not open to him to lead evidence in this sense for that he is bound by the decree against his mortgagor in 1898 by virtue of the provisions of section 11 of the Civil Procedure Code. It is admitted that all the provisions of that section imposing the application of the doctrine of *res judicata* are satisfied against the plaintiff, except the provision which requires that the former suit must have been either between the same parties, or between parties under whom they or any of them claim. Admittedly the suit of 1898 was not

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between the same parties. The question, therefore, is whether the present plaintiff can properly be said to be claiming under his mortgagor Bavchi.

The argument against him is that since he became the auction purchaser in 1894, the title to the whole estate rests in him without reference to any original distinction as to his position as mortgagee; that since, at the time of this suit, he was the owner of the property, he in this suit must be held to be claiming under the former owner, namely his mortgagor Bavchi. The answer, however, to this argument seems to us to be afforded by a rather closer consideration of the principle upon which section 11 is based. As we understand it, that principle is that there must be between the parties in the earlier and the later suit some privity. In the particular case before us that privity would be privity of estate: in other words the principle comes into operation only if in the earlier litigation the estate in controversy was efficiently represented.

That being so, we must consider how far this estate was efficiently represented by the mortgagor Bavchi at the time of Devare's suit in 1898. At that time the present plaintiff was a mere mortgagee, and Mr. Justice Mahmood's decision in *Sita Ram v. Amir Begam* is authority for the view that as a mere mortgagee the plaintiff would not be bound by the earlier decision, because his title arose prior to the suit in which the decree against his mortgagor was obtained, and the mortgagor possessing only the equity of redemption had not in him any such estate as would enable him sufficiently to represent the mortgagee in the suit instituted after the mortgage. So in *Bonomalee Nag v. Koylash Chunder Dey*⁽¹⁾ it was held that a mortgagee not in possession, suing for a declaration that a right of way did not exist, was not bound by a decision in a suit between the mortgagor and a third party of which

⁽¹⁾ (1886) 8 All. 324 at p. 338.

⁽²⁾ (1878) 4 Cal. 692.

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he had no knowledge. The ground of the decision was that the mortgagor did not represent the entire estate. It is true that the learned Judges in this latter case reached their conclusion with some hesitation. But Mr. Justice Mahmood in his fully reasoned judgment in *Sita Ram v. Amir Begam*⁽¹⁾ succeeds, we think, in showing that the decision was based upon sound principle. If that is so, and if, as Mr. Justice Mahmood said, adopting the words of the American text-writer, Bigelow, the ground of the privity is property and not the personal relation, then we do not understand how the present plaintiff is in any worse position merely because in 1904 he altered his original position of mortgagee to that of auction purchaser. For, notwithstanding that alteration, the question would still be, not what was the plaintiff's position in 1904, but whether in 1898 the mortgagor possessed sufficient estate to represent and bind his mortgagee. Now at that time the estate vested in the mortgagee and it seems to us difficult to hold that that estate was sufficiently represented in the absence of the party in whom in law it vested. It might no doubt be a different thing if the plaintiff's mortgage had been taken after the suit of 1898. But here the fact is that the plaintiff's title arose prior to the litigation in which the mortgagor was defeated. There are apparently no other decisions exactly in point, but *Joy Chandra Banerjee v. Sreenath Chatterjee*⁽²⁾ and *Abdul Alli v. Miakhan Abdul Husein*⁽³⁾ may be referred to as cases of a simpler type where the decisions lend support to the view which we are taking. Those were cases, one of a sale and the other of a gift, and it was held that the alienee was not estopped by a judgment in a suit against the alienor, the suit having been commenced after the alienation. And the ground

⁽¹⁾ (1886) 8 All. 324 at p. 338.

⁽²⁾ (1904) 32 Cal. 357.

⁽³⁾ (1911) 35 Bom. 297.

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upon which these judgments were based is that stated by Mr. Justice Romer (as he then was) in *Mercantile Investment and General Trust Company v. River Plate Trust, Loan, and Agency Company*⁽¹⁾ that is to say, "a prior purchaser of land cannot be estopped as being privy in estate by a judgment obtained in an action against the vendor commenced after the purchase."

These decisions go so far at least as to show that some restriction must be placed on the apparent ambit of the words "claiming under" used in section 11. In those cases no doubt the estate in litigation was wholly unrepresented in the earlier suits, while here it must be admitted that the estate was in the suit of 1898 partially represented. The consequence, however, seems to us to be the same. For in either class of cases you have the absence of the legal requirement that the estate shall in the former litigation have been efficiently represented.

On these grounds we are of opinion that the question argued must be decided in favour of the plaintiff, that the lower appellate Court's decree must be set aside, and the appeal must be remanded for decision on the merits. Costs will be costs in the appeal. As to the respondents Nos. 7 to 9, we have heard the learned pleader for the appellant, but we agree with the judgment of the lower appellate Court that no claim for Survey No. 13 can be made in this suit. This finding will be taken into account by the lower appellate Court when the final decree is passed. As against respondent No. 6, the suit is dismissed with costs, he having disclaimed all interest in the property.

Decree reversed.

J. G. R.

(1) [1894] 1 Ch. 578 at p.595.