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The facts here are entirely different. The existence at any time of an hereditary office held on service tenure was disputed and Government by the Resolution announcing the settlement admitted that the grants of the villages had been made Jivak Badal which was the contention of the Desais as to all the lands and the cash allowances. The settlement was in fact arrived at before the extension to the Panch Mahals of the provisions of the Watan Act but such settlements were confirmed by clause 2 of section 15 of that Act assuming that the Watan Act would apply.

We hold, therefore, on the first question that the property in suit was not Service Inam to which the Watan Act applies.

[The judgment proceeded further with the determination of plaintiff's share and concluded.]

The plaintiff, therefore, has not fully proved her case and her claim as to 1¼ annas fails.

Decree modified.

J. G. R.

APPELLATE CIVIL.

FULL BENCH.

Before Sir Basil Scott, Kt., Chief Justice, Mr. Justice Macleod and Mr. Justice Shah.

1918. *August* 28.

RAMJI VALAD BAPUJI PATIL (ORIGINAL PLAINTIFF), APPELLANT *v.* PANDHARINATH VALAD RAVJI AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Mortgage—Suit for redemption—Decree nisi—Failure to apply to make the decree absolute—Execution time-barred—Second suit for redemption, maintainability of—Civil Procedure Code (Act V of 1908), sections 11, 47 and Order XXXIV, Rules 7 and 8—Transfer of Property Act (IV of 1882), section 60.

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A question having been referred whether a mortgagor, who has brought a suit for redemption and obtained a decree *nisi* which neither the mortgagor nor the mortgagee has applied to be made absolute, can after the execution of that decree is time-barred bring a fresh suit for redemption;

Held (Shah J. dissenting), that the mortgagor could bring a second suit for redemption and the same would not be barred by section 11 or section 47 of the Civil Procedure Code, 1908.

SECOND appeal against the decision of R. B. Gogte, First Class Subordinate Judge., A. P., at Nasik, confirming the decree passed by D. T. Chaubal, Second Class Subordinate Judge at Sinnar.

Suit for redemption.

The property in suit originally belonged to one Lakshman Kachu. On the 23rd December 1865, it was mortgaged with possession to Narayana and Hari Sonar, ancestors of the defendants for Rs. 351.

In 1907, the plaintiff as a purchaser of the equity of redemption from an assignee of the original mortgagor Lakshman, brought a suit No. 875 of 1907 for a redemption of the mortgage of 1865. The suit was filed under the Dekkhan Agriculturists' Relief Act on the ground that the plaintiff was an agriculturist. A decree in the said suit was passed on the 30th September, 1908 directing that the plaintiff should pay Rs. 117 and costs within 12 months and redeem the property, or in default the defendant should recover the amount by sale of the property.

The plaintiff filed an application No. 742 of 1909 for payment of the money, but failed to pay by due date, and his application was struck off on the 25th January, 1910.

The mortgagee took no steps under the decree to obtain a decree absolute, and on the 12th December 1913, the plaintiff paid the money into Court. The mortgagee, however, objected to take it,

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The plaintiff, thereupon, brought a second suit No. 827 of 1914 for redemption of the mortgage of 1865.

The Subordinate Judge dismissed the plaintiff's suit as barred by *res judicata*.

On appeal, the First Class Subordinate Judge, A. P., confirmed the decree.

The plaintiff appealed to the High Court. The appeal was heard on the 11th April 1918 by Beaman and Heaton JJ., when their Lordships made the following order of reference to the Full Bench.

BEAMAN, J.:—This appeal raises the question: whether a mortgagor, who has brought a suit for redemption and obtained a decree *nisi*, which neither the mortgagor nor the mortgagee has applied to be made absolute, can, after the execution of that decree is time-barred, bring a fresh suit for redemption? The principle of the decision in *Rama* v. *Bhagchand*[1], appears to me to require an affirmative answer, although in that case the first suit was brought not by the mortgagor but by the mortgagee. In the later case of *Bapuji* v. *Guja*[2], although the facts may have been different, the leaning of the Court, or certainly of one of the learned Judges, was plainly in the opposite direction. Shah J. felt the necessity of distinguishing the case of *Rama* v. *Bhagchand*[1] and attempted to do so. I do not think he succeeded. I do not think that the principle of that case is in any way affected by the plaintiff in the first suit being the mortgagee. It remains the same whether the mortgagor or the mortgagee brings the first suit for redemption or for sale. The Privy Council decision, upon which great reliance was placed by Shah J. in the case of *Bapuji* v. *Guja*[2], has nothing, in my opinion, to do with the principle with which I am now concerned.

(1) (1914) 39 Bom. 41. (2) (1917) 42 Bom. 246.

In these circumstances, it seems to me that the question is one which ought to be capable of a single and uniform answer, and as it is a question of considerable importance and cases of the kind may frequently occur, it seems to me eminently desirable that it should be authoritatively answered, and the subordinate judiciary left in no doubt in the future as to what the law is. In the present state of the authorities there can be very little doubt, and that, I think, is indicated in the judgment of the learned Judge of first appeal in this case, but that the question still remains uncertain and that the Courts of the Mofussil are quite likely to decide precisely similar cases in different ways.

I would, therefore, refer the question I have stated above to a Full Bench.

HEATON, J.:—I agree. Having regard to the great importance of the point stated, to the plainly discernible tendency to differences of opinion, and to the undoubted possibility that the judgment in the case of *Rama* v. *Bhagchand*[1] may be differently interpreted by the Mofussil Courts, I think, that it would be much better that the point should be settled once and for all by a Full Bench.

THE reference was heard by a Full Bench consisting of Scott C. J., and Macleod and Shah JJ., on the 31st July 1918.

S. R. Bakhle, for the appellant:—I submit I can bring a fresh suit for redemption. The decree was passed on the 30th September 1908 and it provided that on plaintiff failing to make the payment as directed, the defendant was to recover the amount by sale of the mortgaged property. The plaintiff failed to make the payment. The defendant should have, thereupon, applied for sale of the property or should have obtained an order for making the decree

[1] (1914) 39 Bom. 41.

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absolute which it was necessary for them to do under Order XXXIV, Rule 8 of the new Civil Procedure Code, 1908. No such order was, however, obtained by the defendant nor was the right extinguished by the act of the parties. I, therefore, submit, the right to redeem still subsists and a second suit for redemption will not be barred under section 11 or section 47 of the Civil Procedure Code, 1908: see *Sita Ram* v. *Madho Lal*[1].

The Madras High Court in *Vedapuratti* v. *Vallabha Valiya Raja* [2] holds that a second suit for redemption on the same mortgage would not be maintainable. They proceed upon the ground that although the right to redeem still subsisted the remedy was barred by operation of the rule laid down in section 13 of the Civil Procedure Code, 1882. According to them the matter in issue in subsequent suit is the same as in the previous suit, viz., whether the mortgagor is entitled to a decree for redemption and no new point, right or question is involved in the second suit.

[SCOTT C. J.:—The Madras Judges treat the right of redemption as a cause of action, but it is not so treated in the Full Bench case of the Allahabad High Court, where the amount due on the mortgage is treated as a cause of action.]

I submit the view taken by the Allahabad High Court is the correct one as the real question involved in the suit for redemption is what is done on the mortgage and this question would not be *res judicata*.

The case of *Ranga Ayyangar* v. *Narayana Chariar*[3] proceeds on the same ground as laid down in *Vedapuratti* v. *Vallabha Valiya Raja*[2].

(1) (1901) 24 All. 44. (2) (1902) 25 Mad. 300.
(3) (1915) 39 Mad. 896.

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P. B. Shingne, for the respondent:—I submit no second suit is maintainable. Apart from the question of *res judicata* the decree of September, 1908, was in itself complete and required nothing further to be done for completion.

[SCOTT C. J.:—The question assumes that it was a decree *nisi* and not a final decree.]

On the question of *res judicata*, I submit the relationship of mortgagor and mortgagee may exist in the second suit, but what is the remedy the mortgagor is to pursue is the point to be considered.

[SCOTT C. J.:—See proviso to section 60 of the Transfer of Property Act.]

This means provided the mortgagor's remedy is not barred under the Civil Procedure Code. The Transfer of Property Act is to be read along with the Code: see section 2 of the Transfer of Property Act. No doubt the mere passing of the decree *nisi* will not extinguish the relationship between the mortgagor and mortgagee, but if the mortgagor does not abide by the decree *nisi*, it will not be open to him to expunge the whole situation and file a second suit. The point for controversy in the second suit will be substantially the same as in the first, viz., whether the plaintiff mortgagor will be entitled to a decree for redemption. On what conditions redemption is to be allowed will be a matter of subordinate consideration and will depend upon the direction of the Court.

[SCOTT C. J.:—See Order XXXIV, Rule 7 and Schedule I, Appendix D, Form No. 5 in Civil Procedure Code, 1908. The fact that a mortgagor is entitled to redeem would not enable the Court to draw up a decree in Form No. 5. The Court must also ascertain the amount.]

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The amount will not be arrived at unless the right to redeem is first decided. It is the right to redeem that is in controversy and afterwards when the order is to be made the amount on which redemption to be allowed is mentioned.

[SHAH J.:—It shows that both questions are necessary issues to be decided. You cannot contend that the other issue relating to the determination of the amount is not part of the suit.]

No doubt, I cannot, but that is a subordinate point, quite ancillary to the main point, viz., redemption.

[SCOTT C. J.:—With regard to the fact of mortgage, the decision in the first suit would prevent going into the question again but it would not bar the second suit.]

I submit, it would bar the second suit, because the point of redemption is settled by the passing of the decree. It is no more in controversy. So far as the amount is concerned, it may be settled in execution. The error in allowing a second suit is discussed and explained by Davies J. in *Vedapuratti* v. *Vallabha Valiya Raja*[1], so also *Ranga Ayyangar* v. *Narayana Chariar*[2].

[SCOTT C. J.:—Supposing a decree is passed under section 15D of the Dekkhan Agriculturists' Relief Act and nothing further is done. What would prevent the mortgagor from bringing a fresh suit for redemption. The section is also useful in indicating what is the essential thing in a suit on a mortgage.]

If a suit for redemption is possible in such a case, that is because of a statutory provision, but for which the second suit would have been barred by *res judicata*.

(1) (1902) 25 Mad. 300 at p. 307. (2) (1915) 39 Mad. 896.

Lord Selbourne in *Lockyer* v. *Ferryman*[1] observes "where there is *res judicata* the original cause of action is gone and can only be restored by getting rid of *res judicata*."

Even if the suit be regarded as based on the decree in the previous suit, it is barred: see *Hari Ravji Chiplunkar* v. *Shapurji Hormasji*[2]: see also remarks of Aikman J. in *Sita Ram* v. *Madho Lal*[3].

Even prior to the Transfer of Property Act, it was held that a second suit for redemption will not lie: see *Gan Savant Bal Savant* v. *Narayan Dhond Savant*[4]; *Ravji Shivram Joshi* v. *Kaluram*[5]; *Tani Bagwan* v. *Hari*[6]. As a result of these decisions it is incumbent upon the Court to look to the terms of the decree and not to mere form. The terms of the decree in the present suit show that it is final and the only remedy of the mortgagee was to apply in execution under section 47 of the Civil Procedure Code, 1908. He had as a fact applied to execute the decree and the application was dismissed as time-barred.

Bakhle, in reply:—If the relationship subsists there must be something to show that it is at an end by the act of parties or by the order of the Court. Till then the mortgagor will be entitled to bring a suit, otherwise mortgagee by inaction will be entitled to something to which he is not entitled.

In *Sita Ram* v. *Madho Lal*[3], the earlier suit was one of redemption and the second suit was also for redemption and it was held that the second suit would lie. The case was decided on broad grounds, though the decree in the earlier suit was peculiarly worded.

(1) (1877) 2 App. Cas. 519.
(2) (1886) L. R. 13 I. A. 66.
(3) (1901) 24 All. 44 at p. 62.
(4) (1883) 7 Bom. 467.
(5) (1873) 12 Bom. H. C. R. 160.
(6) (1887) P. J. 315.

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The case of *Vedapuratti* v. *Vallabha Valiya Raja*[1] is no doubt against my contention, but the first proviso to section 60 of the Transfer of Property Act was not noted in the case.

[SCOTT C. J.:—The essential point in a suit for redemption will be clearly observed on reference to *Nawab Azimut Ali Khan* v. *Jowahir Sing*[2].]

Marshall v. *Shrewsbury*[3] also shows that the principal question in the second suit relates to accounts, there being no dispute regarding the debt due. *Jagu Babaji* v. *Balu Laxman*[4] is also in my favour.

Siva Pershad Maity v. *Nundo Lall Kar Mahapatra*[5] is inconsistent with *Roy Dinkur Doyal* v. *Sheo Golam Singh*[6].

C. A. V.

SCOTT, C. J.:—The question referred for the decision of the Full Bench is whether a mortgagor, who has brought a suit for redemption and obtained a decree *nisi* which neither the mortgagor nor the mortgagee has applied to be made absolute, can, after the execution of that decree is time-barred, bring a fresh suit for redemption?

It is desirable, before discussing this question, to state shortly how it arises in the present case. The plaintiff filed a suit for redemption of a mortgage with possession and obtained a decree on the 30th September 1908 that the plaintiff should pay Rs. 117 and costs within twelve months and redeem the property, or in default the defendant should recover the amount by sale of the property. The plaintiff filed an application No. 742 of 1909 for payment of the money, but failed to pay by the

(1) (1902) 25 Mad. 300.
(2) (1870) 13 Moo. I. A. 404.
(3) (1875) L. R. 10 Ch. 250.
(4) (1912) 37 Bom. 307.
(5) (1890) 18 Cal. 139.
(6) (1874) 22 W. R. 172.

due date, and his application was struck off on the 25th January 1910. The mortgagee took no steps under the decree to obtain a decree absolute, and on the 12th December 1913, the plaintiff paid the money due into Court. The mortgagee, however, objected to take it. The plaintiff's pleader argued that it should be treated as an application to enlarge time for payment under Order XXXIV, Rule 8, clause (4) of the Civil Procedure Code. The learned Judge, however, thought that the law of limitation governed such cases and that the application was out of time. He therefore dismissed the same.

The plaintiff in the present suit recites the decree and the payment of decretal amount into Court, the dismissal of his application as time-barred, the fact that the defendants had not applied for sale or for making the decree absolute, and asserts that the plaintiff has still the right to redeem the mortgage. The suit was filed a month after the dismissal of the plaintiff's application in the first suit.

The right of a mortgagor to redeem is stated in section 60 of the Transfer of Property Act and is said to exist at any time provided that the right conferred by the section has not been extinguished by act of the parties or by order of a Court.

Rule 7 of Order XXXIV of the Civil Procedure Code provides for the passing of a decree *nisi* in a redemption suit, and Rule 8 provides where the money declared to be payable under the decree *nisi* is not paid on or before the date fixed, the Court shall, on application made by the defendant, pass a decree that the plaintiff and all persons claiming through or under him be debarred from all right to redeem the mortgaged property.

No such order has been obtained by the defendant in this suit, nor has the right of redemption been

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extinguished by the act of the parties. The right to redeem, therefore, still exists.

Whether the remedy by a redemption suit can now be pursued is the question which we have to determine. In *Gan Savant Bal Savant* v. *Narayan Dhond Savant*[1] a suit was brought and a decree obtained by a manager of a joint family in 1858 for redemption of certain property, but the decree was not executed. Subsequently a suit was brought for redemption in respect of the same property by another member of the joint family who was a minor when the former suit was instituted and the question was whether the second suit was maintainable. Mr. Justice Kemball held that by reason of the default in payment of the money declared to be due within the time prescribed by law for execution of decrees (no time having been fixed in the decree), the order for redemption must be taken to have operated as a judgment of foreclosure. The decree declared the mortgagor entitled to obtain possession of the mortgaged property on payment of a particular sum, and if he failed to discharge that debt, he could not be allowed to harass the mortgagee by another suit for the same purpose. Mr. Jutice West was of the same opinion saying that it followed from the leading principle of *res judicata* that the same matter should not be adjudicated again on the original ground so as to imperil the stability of the decision formerly given. Under the Anglo-Indian law it had long been recognized that a decree-holder must obtain satisfaction of his decree by execution, and not by another suit, and a suit could not be brought either on the original cause of action, or, save in special case, on the decree in which that cause had become merged. That decision was followed in another judgment of this Court in *Maloji* v. *Sagaji*[2]

(1) (1883) 7 Bom. 467. (2) (1888) 13 Bom. 567.

on the ground that under the ruling in that case the decree made in the defendants' suit was practically a foreclosure decree, if not executed within three years, and therefore, effectually determined the rights under the mortgage, both of the mortgagee and mortgagors who not having redeemed within three years would be for ever foreclosed. Those decisions were before the application of the Transfer of Property Act to Bombay, and the dicta above referred to regarding foreclosure could hardly have been given if the Transfer of Property Act had applied in view of the provisions of section 93 which have now been transferred to Order XXXIV, Rule 8 of the Civil Procedure Code.

Those decisions were not followed in the Madras High Court. In that Court a series of judgments, *Periandi* v. *Angappa*[1], *Karuthasami* v. *Jaganatha*[2], *Ramunni* v. *Brahma Dattan*[3], affirmed the right of a mortgagor to bring a second redemption suit after the working out of the decree *nisi* in his first suit had become barred by limitation, and in the Full Bench case of *Vallabha Valiya Rajah* v. *Vedapuratti*[4], the majority of Judges contemplated the possibility of a second redemption suit. Sir Charles Turner in *Periandi* v. *Angappa*[1] observed: "As there was no foreclosure he can still assert his right to redeem which may be conditional on the payment of a larger or a less sum than was requisite when the former decree was pronounced," and in *Karuthasami* v. *Jaganatha*[2], the same learned Judge said: "The relation then still exists, and the right to redeem is inseparable from the relation so long as it exists. An unexecuted decree for partition would not alter the relation of the members of a joint family. The estate would still be joint and the right to obtain

(1) (1884) 7 Mad. 423.
(2) (1885) 8 Mad. 478 at p. 481.
(3) (1892) 15 Mad. 366.
(4) (1895) 19 Mad. 40 at p. 50

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a partition would attach to it whenever a fresh demand for partition was made and refused."

In 1870 at a time when the law of *res judicata* was regulated by the Civil Procedure Code, Act VIII of 1859, section 2, which runs: "The Civil Courts shall not take cognizance of any suit brought on a cause of action which shall have been heard and determined by a Court of competent jurisdiction in a former suit between the same parties or between parties under whom they claim," a series of decisions shows that the second redemption suit by a usufructuary mortgagee under Bengal Regulation XV of 1793, section 10, would not be barred by a decree in a prior redemption suit between the same parties which did not put an end to the mortgage debt, their Lordships of the Privy Council in *Nawab Azimut Ali Khan* v. *Jowahir Singh*[1] observed that the whole argument was based on a misconception of the nature and effect of a decree of the 1st of August 1843. "That decree, in fact, did nothing but dismiss the then pending suit for redemption, on the ground that the full and entire amount of the mortgage money had not been deposited (the sums tendered being only Rs. 26,400 and Rs. 400). According to the course and practice of the Court in India, the only point to be determined in such a suit is whether the mortgage debt has been fully satisfied after taking into account the sum tendered or deposited; nor is the finding of any particular amount as still due conclusive against the mortgagee in a subsequent suit." That statement of the practice of the Court was derived from *Mussamut Motee Soonderee* v. *Maharanee Indrajit Kowaree*[2] where it was decided that in a suit to recover possession of land in the possession of the mortgagee under a usufructuary mortgage, the only question in issue was whether the plaintiff was entitled to enter into

[1] (1870) 13 Moo. I. A. 404 at p. 412. [2] (1862) 1 Marsh. 112.

possession, and that the finding of the Judge that a specific sum was still due was not conclusive between the parties, but might be disproved in another suit, and such finding, therefore, was not the subject of appeal.

In 1872 the decision in *Mussamut Moteé Soonderee's case*[1] was dissented from by Sir Richard Couch and Mr. Justice Ainslie in *Baboo Kullyan Dass* v. *Baboo Sheo Nundun Pursad Singh*[2], in which the Chief Justice said: "We are unable to concur in that view of the nature of a suit of this description. The suit is in reality, in our opinion, a suit between the mortgagor and mortgagee for an adjustment of the account between them. If, upon taking the account, it appears that the mortgagee has been fully satisfied, the plaintiff, the mortgagor, is entitled to have back the property, and the Court would make a decree for that purpose; but we think that the question in the suit is not simply whether the plaintiff is entitled to have the property back, and that the Court being a Court of Equity and acting upon the principle that it is always the aim of a Court of Equity to finally determine as far as possible all questions concerning the subject of the suit, the account should be taken up to the time of the decree, and the account so taken should be considered to be binding, and the parties should not be at liberty, *except under peculiar circumstances, to re-open it in another suit.*" In concluding his judgment the Chief Justice continued: "It appears to us, therefore, upon such evidence as there is before us that the defendant is entitled to be repaid the principal sum; but that no decree can be made declaring him to be entitled to any further sum. The decree of the lower Court will be altered by declaring that there is still due to the defendant the principal sum secured by the mortgage, namely, Rs. 41,476-9-3, and that on payment of that the plaintiff may redeem the property;

(1) (1862) 1 Marsh 112. (2) (1872) 18 W. R. 65 at pp. 66, 69.

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but if there is any delay in making that payment, then the plaintiff would be liable to pay interest upon the money from this time, and in taking an account of the interest which may be found due from him from the date of this decree, allowance will have to be made for the revenue or profits of the estate which the defendant may receive. The account must be considered as settled up to this time, and it will only be necessary, if the plaintiff hereafter seeks to redeem the property, to take a further account of the interest on the one side and of the revenue on the other. *In that way, so far as is possible in the present suit*, a decision is come to with regard to the rights of the parties." The result would appear to be that the learned Chief Justice found what was due up to the date of the decree, and settled the mode in which account should be taken thereafter if the plaintiff thereafter sought again to redeem the property. But the judgment does not suggest that there cannot be a second suit for redemption if the amount found due by the first decree is not paid.

In *Roy Dinkur Doyal* v. *Sheo Golam Singh*[1], in a redemption suit filed by a usufructuary mortgagor for redemption, or recovering of possession, the Court considered what was the meaning of "cause of action" and "heard and determined" in section 2 of Act VIII of 1859. The judgment says: "What then was the cause of action which was heard and determined between the present parties in the former suit, and what is the cause of action which is put forward by the plaintiffs in this present suit, and which they ask to have now heard and determined. It seems to us plain that the principal cause of suit is the relation which subsists between the parties as mortgagor and mortgagee, and the consequent right on the part of the mortgagor at all reasonable times to ask for an account from the

(1) (1874) 22 W. R. 172 at p. 173.

mortgagee. The suit is brought for the purpose of obtaining an adjustment of accounts or adjudication of the state of the accounts between the parties, and for such relief at the hands of the Court as the plaintiff may be entitled to upon that adjustment or adjudication of the accounts. Now the former suit effected an adjustment of accounts up to the date of 18th April 1868. The substantial cause of action within the meaning of section 2, Act VIII of 1859, in the present suit, that which the plaintiff desires to have heard and determined, is the state of accounts which has arisen since the 18th April 1868,—obviously an entirely fresh cause of action. The matter which the Court is asked in this suit to hear and determine, is a matter which has arisen and come into being since the matter of the last suit was heard and determined. It has arisen since the date of the decree of April 1868. And consequently the section 2 of Act VIII of 1859 does not bar the Courts from entertaining this suit. It appears to us that it would be hard upon the mortgagor if the law were otherwise. The decree which was passed in April 1868 was simply a declaration that at that time a certain sum of money was due from the mortgagor to the mortgagee accompanied by a decretal order; that upon that sum being paid by the mortgagor, he should have possession of the property delivered over to him. That decree did not put an end to the relation of mortgagor and mortgagee. The Court did not in that suit pretend to foreclose the plaintiff's right of redeeming in the event of his not paying the money then declared to be due. ..... and it would be hard upon him therefore that his equity of redemption should nevertheless be indirectly foreclosed by the effect which the Subordinate Judge has given to section 2, Act VIII of 1859, without any period of grace or any terms being attached to this foreclosure".

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The only reported case in the Indian Law Reports, Calcutta Series, to which we have been referred, which appears to be inconsistent with the Bengal decisions above quoted is *Siva Pershad Maity* v. *Nundo Lall Kar Mahapatra*[1] in which it was said at page 142 : "Even if there is no order absolute, the decree *nisi* directing the sale is in existence ; and if the right to redeem be still alive, it cannot be enforced by a separate suit... We must hold that the suit is not maintainable, and that the plaintiff's proper course was to have the matter brought before the Court and disposed of under section 244 of the Code of Civil Procedure ".

The application of section 244 of the Code of 1882 and of section 47 of the present Code to mortgage suits will be discussed later in this judgment.

In *Dondh Bahadur Rai* v. *Tek Narain Rai*[2], the Court considered that the matter directly and substantially in issue in the redemption suit there under consideration within the meaning of section 13 of the Civil Procedure Code of 1882 was not the existence of the plaintiff's right to redeem on payment of the mortgage money, but what the amount payable actually was. That matter was decided in a former suit adversely to the defendant in the first Court, but the appeal Court did not decide it at all, but dismissed the suit on another ground. The Court held that section 13 of the Code did not bar a second suit for redemption, and referred in support of its conclusion to the judgment of the Privy Council above quoted in *Nawab Azimut Ali Khan* v. *Jowahir Sing*[3].

There was, however, in the Allahabad decisions up to that date some conflict of opinion as to the right of a mortgagor whose power of payment of the amount

[1] (1890) 18 Cal. 139. [2] (1899) 21 All. 251.
[3] (1870) 13 Moo. I. A. 404 at p. 412.

found due in the mortgage suit was barred by limitation to file a second redemption suit, and curiously enough the conflict of decisions was considered by a Full Bench in Allahabad and decided in accordance with the line of cases in Madras already referred to shortly before a Full Bench in Madras had considered those Madras cases and came to the conclusion that they were wrongly decided and should be overruled: see *Sita Ram* v. *Madho Lal*[1]. In that case the plaintiffs brought a suit for redemption of a usufructuary mortgage and obtained a decre for redemption, conditioned on their paying a certain sum within a time specified in the decree. This decree, however, instead of going on to direct that in default of payment on due date, the property should be sold, directed that if payment was not made within the time fixed, the judgment should be deemed to be non-existent. The plaintiffs did not pay the decretal amount within the time fixed, but some years afterwards brought a second suit for redemption. It was held that the suit was not under the circumstances barred, either by reason of anything contained in the Transfer of Property Act of 1882, or by section 13 or section 244 of the Code of Civil Procedure.

On the other hand the Madras High Court in *Vedapuratti* v. *Vallabha Valiya Raja*[2], where in a previous suit for redemption of a usufructuary mortgage the decree did not provide for foreclosure of the plaintiff's right to redeem in default of payment within the time fixed in the decree, but contained a direction for sale in default of payment, and the mortgagor had not redeemed, while the defendant had not applied for an order absolute for sale, it was held that a subsequent suit was not maintainable for the redemption of the

(1) (1901) 24 All. 44.

(2) (1902) 25 Mad. 300.

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same mortgage. The Chief Justice held that although the right to redeem still subsisted the remedy was barred by operation of the rule of law embodied in section 13 of the Code of Civil Procedure. He said: "the Legislature has laid down what is 'the matter in issue' in a redemption suit. In order to succeed the mortgagor has to show that he is entitled to a decree ordering that if he pays off the mortgage debt in pursuance of the order of the Court, the mortgagee shall re-transfer the property and if necessary put him in possession. The matter in issue is—aye or no—is the mortgagor entitled to the decree which, if he succeeds, the Court is required by section 92 to make?" With all respect, it appears to me, that this is not the matter in issue in a redemption suit. The question propounded by the learned Chief Justice "Is the mortgagor entitled to the decree which, if he succeeds, the Court is required by section 92 to make?" can only be answered in the affirmative, for it is prescribed by law that the Court shall make such a decree. The substantial matter in issue in a redemption suit is not the existence of the mortgage, for the filing of the suit is in itself an admission of the mortgage and of the original mortgage debt: see *Marshall* v. *Shrewsbury*[1]. The substantial question is how much must be paid by the mortgagor to the mortgagee in order to entitle him to recover possession and a reconveyance of the property in cases where the title has been transferred. This view is supported by the decisions in *Nawab Azimut Ali Khan* v. *Jowahir Sing*[2], *Baboo Kullyan Dass* v. *Baboo Sheo Nundun Purshad Singh*[3], *Roy Dinkur Doyal* v. *Sheo Golam Singh*[4], *Dondh Bahadur Rai* v. *Tek Narain Rai*[5], and the Allahabad Full Bench

(1) (1875) L. R. 10 Ch. 250.
(2) (1870) 13 Moo. I. A. 404.
(3) (1872) 18 W. R. 65.
(4) (1874) 22 W. R. 172.
(5) (1899) 21 All. 251.

case of *Sita Ram* v. *Madho Lal*[1]. It is to be observed that the Chief Justice of Madras did not base his decision upon the provisions of section 244, for he had on the same day delivered judgment in another Full Bench case,—see *Mallikarjunadu Setti* v. *Lingamurti Pantulu*[2]. Holding that an order passed upon an application made under section 89 of the Transfer of Property Act was not an order made in proceeding in execution. Sir Bhashyam Aiyangar, however, in *Vedapuratti* v. *Vallabha Valiya Raja*[3], held that the right of a mortgagor to file a second redemption suit was barred by the provisions of section 244 of the Code of Civil Procedure inasmuch as applications under sections 89 and 93 were applications in execution.

The question whether applications for absolute orders in mortgage suits after decree *nisi* are applications in execution has now been settled by the provision that the mortgagor or mortgagee, as the case may be, must apply not for an order absolute in his favour but for a decree absolute,—see Order XXXIV, Rules 5 and 8 of the Civil Procedure Code of 1908. The reason of the change is thus described by Sir Lawrence Jenkins in *Amlook Chand Parrack* v. *Sarat Chunder Mukerjee*[4]: "One object in view when the present Code was passed was to end, as far as possible, the conflict of decisions which embarrassed the Courts, and among those conflicting decisions were those which dealt with two points:—*First*, whether an application for an order under section 89 of the Transfer of Property Act was an application in execution or not; and, *Secondly*, whether, if it was not an application in execution, Article 181 constituted a bar on the ground that the application was one not contemplated by the Code of Civil Procedure. And so it is now provided that the

(1) (1901) 24 All. 44.
(2) (1902) 25 Mad. 244.
(3) (1902) 25 Mad. 300.
(4) (1911) 38 Cal. 913 at p. 921.

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application which follows a preliminary decree for sale, is not for an order for sale, but for a decree for sale. And with the same end in view the provisions as to mortgage suits have been removed from the Transfer of Property Act to the Civil Procedure Code, so that it is no longer possible to contend that these applications are not under the provisions of the Civil Procedure Code."

It follows, therefore, that the mortgagor is not limited in his remedy by the terms of section 47 of the Civil Procedure Code which has taken the place of section 244 in the Code of 1882. If, then, it can be shown that the mortgagor in his second suit raises in issue a substantially different matter to that decided in the first suit, such, for example, as the amount payable by him at the date of the second suit as distinct from that payable at the date of the first suit, such second suit would be maintainable. In this connection reference may be made to *Nasrat-ullah* v. *Mujib-ullah*[1], a case of a second partition suit, where Sir John Edge delivering the judgment of the Court said: "We have no doubt that if the plaintiff had drawn his plaint alleging the decree of 1860, and showing how he and the defendants were bound by it, that is, that they were representatives of the parties to it, and alleging that the state of things of 1860 continued up to the present, and alleging that the defendants or some of them resisted his right of partition, and asked for a declaration of his right to partition, that would be a claim to which even this Subordinate Judge would not have applied section 13 of the Code of Civil Procedure. The present claim is in effect such a claim as I have referred to, although not so in form."

A second redemption suit must recognise the binding effect of the previous redemption decree *nisi* in so far as it settles the accounts up to the date of that decree, and the duty of the Court in the second suit would be

(1) (1891) 13 All. 309 at p. 314.

limited to the ascertainment of the amount due at the date of the second suit or decree and to give such consequential relief as the law permits. There is reason to believe that the suit in which this reference was made and the previous redemption suit filed by the plaintiff fell under the provisions of the Dekkhan Agriculturists' Relief Act. Whether that be so or not, the reasoning of this judgment would be applicable. A suit for redemption under the Dekkhan Agriculturists' Relief Act is substantially a suit to have an account taken in accordance with the provisions of section 13, and a decree for foreclosure is never passed in the first instance, or until the mortgagor has had ample opportunity of paying the sum found to be due. But in such cases section 47 of the Civil Procedure Code might affect the plaintiff's right of suit as Chapter XXXIV of that Code would not be applicable.

MACLEOD, J.:—The question referred for the decision of the Full Bench is whether a mortgagor, who has brought a suit for redemption and obtained a decree *nisi* which neither the mortgagor nor the mortgagee has applied to be made absolute, can, after the execution of that decree is time-barred, bring a fresh suit in redemption. In equity as long as the relationship of mortgagor and mortgagee continues the right to redeem exists. That right is recognised by section 60 of the Transfer of Property Act and is said to exist at any time provided it has not been extinguished by act of the parties or by order of a Court. It is admitted that in the case before us it has not been extinguished either by act of the parties of by order of a Court. The Indian Legislature has deliberately refrained from enacting that the failure of a mortgagor to pay the amount found due in a suit for redemption should operate as a foreclosure. It is now contended that the Court is bound to apply the provisions of either section 11 or section 47 of

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the Civil Procedure Code with the result that though the mortgage is still in existence the same effect is produced as if there had been a foreclosure. Sitting here as a Court of Equity, in my humble opinion, we should endeavour as far as the law allows us to oppose this contention rather than devote our ingenuity to finding some way whereby we may hold that the law supports it. I have had the opportunity of reading the judgment of the learned Chief Justice and I agree entirely with the conclusions he has arrived at on a review of the numerous conflicting decisions of other Indian High Courts. In this High Court there is no direct decision on the point since the Transfer of Property Act became applicable. I need only say with all respect that the reasoning of Aikman J. in *Sita Ram* v. *Madho Lal*[1] appears to be far sounder and more in conformance with the principles of equity than that of the Chief Justice in *Vedapuratti* v. *Vallabha Valiya Raja*[2]. It seems to me to make little difference whether the decree *nisi* directs that if payment be not made within the time fixed the judgment should be deemed to be non-existent, or whether the decree has become dead by failure by both parties to execute it within the time prescribed by the Indian Limitation Act. A decree *nisi* in a redemption suit does not bring about a merger of the mortgage, it merely directs that if the amount due be paid within a fixed time the mortgagor can compel the mortgagee to return the mortgaged property. If the mortgagor does not pay within the time fixed or within such further time as the Court may allow, the mortgagee may apply for a decree absolute for sale or foreclosure.

The right to redeem on payment of the amount due at any time, while the mortgage is in existence, is a

(1) (1901) 24 All. 44.

(2) (1902) 25 Mad. 300.

continuing right and the only question in issue, when the assistance of the Court is invoked, is the amount due at that time. It may be more or less than or even the same as the amount found due in a previous suit, but, as far as I can see, that in no way affects the real issue which can never be the same. We should, if possible, try to avoid holding that section 11 of the Civil Procedure Code bars the second suit instead of endeavouring to force it within the section, while once the decree is dead section 47 cannot be applied.

No attention need be paid to the appeal *ad misericordiam* in favour of the mortgagee that he should not be liable to be harassed by successive suits for redemption by the mortgagor. The mortgagor in the first place pays all the costs of litigation, all that the mortgagee is concerned with is to see that a correct decision is arrived at as regards the amount due. If he does not choose to exercise the right given to him, if the amount due is not paid, to apply for a decree absolute, then one can only infer that it suits him to keep the mortgage alive, and as long as the mortgage remains alive it is the duty of the Court to see that no obstacle is placed in the way of the mortgagor's right to redeem except what is provided by the Acts of the Legislature.

SHAH, J. :—The question referred to us is whether a mortgagor, who has brought a suit for redemption and obtained a decree *nisi*, which neither the mortgagor nor the mortgagee has applied to be made absolute, can, after the execution of that decree is time-barred, bring a fresh suit for redemption.

In my opinion the answer to the question in the form stated above must depend upon the terms of the decree *nisi* and the facts and circumstances of each case. I would say, however, that ordinarily in the case of a properly framed decree *nisi* for redemption,

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in which the subsequent proceedings are by way of execution of that decree, and the execution whereof is time-barred, no fresh redemption suit would lie.

I shall state my reasons for the answer to the question referred to us dealing first with the statutory provisions bearing on this question and then with the reported cases. I may state generally that the reported cases show that this point has struck different Judges in different ways. My conclusion is indicated in the answer which I have formulated after a careful consideration of the conflicting rulings on the point and the conflicting reasons suggested by the statutory provisions.

All redemption decrees under the Dekkhan Agriculturists' Relief Act and under section 92 of the Transfer of Property Act can be executed and the subsequent proceedings by either party are by way of execution of such decrees. For the present I leave out of consideration preliminary decrees in redemption suits under Order XXXIV, Rule 7, and subsequent proceedings for final decrees under Rule 8 of the same Order. As these proceedings may not be in execution of the preliminary decrees, the question referred to us would not cover such cases. The question relates to a decree *nisi* capable of execution and the execution whereof is time-barred. I shall deal with this point separately.

It has been held that proceedings for an order absolute under section 93 of the Transfer of Property Act would be by way of execution of the redemption decree passed in accordance with the provisions of section 92. Whatever doubt may have existed on the point at one time, it is now clear from the decisions of the Judicial Committee of the Privy Council in *Abdul Majid* v. *Jawahir Lal*[1], *Batuk Nath* v. *Munni Dei*[2]

(1) (1914) 36 All. 350 (2) (1914) L. R. 41 I. A. 104.

and *Munna Lal Parruck* v. *Sarat Chunder Mukerji*[1] that the further proceedings are in execution of the decree *nisi*. Thus after a decree *nisi* is passed in a redemption suit the further rights of the parties as determined must be given effect to in execution according to the terms of the decree and not by a separate suit. It would be contrary to the provisions of section 47 of the Code to entertain a second suit for redemption in which substantially the same relief as that allowed in the first suit could be given, and which could be and ought to be secured by executing the decree *nisi* in the first suit.

The provisions of section 11 of the Code would ordinarily bar a second suit for redemption of the mortgage, which forms the subject matter of the decree *nisi* in the first suit, if the conditions laid down in the section are satisfied. Treating the questions relating to the mortgage to have been heard and decided when the decree *nisi* for redemption is passed, the subsequent suit in relation to the same mortgage would be a suit in respect of the same matter within the meaning of section 11 of the Code. I do not think that the circumstance that it is possible for the mortgagor to claim further accounts with reference to the period after the decree *nisi* can make any difference. In a properly framed decree *nisi* for redemption where the mortgagee remains in possession after the decree, it is always possible to provide for the subsequent profits received by the mortgagee to be taken into account. As to the decrees under the Dekkhan Agriculturists' Relief Act, section 15B, sub-section (1), expressly provides that the Court can give directions, "where the mortgagee is in possession, as to the appropriation of the profits and accounting therefor, as it thinks fit." The subsequent suit on the same mortgage

[1] (1914) L. R. 42 I. A. 88.

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would substantially relate to the same matter and the fact of the mortgagor being able to claim accounts for the period between the decree *nisi* and the date of the second suit cannot change the matter. It is in substance a suit for the redemption of the same mortgage with this difference that the period for taking accounts is extended to the date of the second suit. The Dekkhan Agriculturists' Relief Act, in my opinion, contemplates only one redemption suit in respect of a mortgage and the taking of accounts under section 13 only once. If in the second suit the decree *nisi* is to be taken as the starting point for taking accounts, and the further account is to be taken with reference to the subsequent period, in effect it becomes a suit based on the decree *nisi* and would relate to what could be and should be determined in execution of the decree *nisi*. Viewed in this light the suit cannot be maintained as pointed out in the case of *Hari Ravji Chiplunkar* v. *Shapurji Hormusji* [1] and therefore the plaintiff has necessarily to fall back upon the mortgage. On the whole I think it is clear that ordinarily the matter in the second redemption suit based on the original mortgage would be the same as that directly and substantially in issue in the first suit between the same parties, within the meaning of section 11 of the Code.

It is urged, however, that unless there is an order absolute either under section 93 of the Transfer of Property Act or a final decree under Rule 8 of Order XXXIV, the mortgage debt cannot be deemed to be discharged, that the relationship of the mortgagor and mortgagee continues and that therefore the mortgagor has the right to file a second redemption suit. It is also urged that unless there is an order absolute there is no order of the Court extinguishing the mortgage

[1] (1886) L.R. 13 I. A. 66.

contemplated by section 60 of the Transfer of Property Act and that the mortgagor's right of redemption subsists. It is contended that a right safeguarded by such statutory provisions becomes illusory if no second suit for redemption is permitted. These are weighty considerations and do create some difficulty in the way accepting the conclusion that no second suit for redemption can lie where there is a decree *nisi* and where its execution is time-barred. These considerations have led to much diversity of judicial opinion. After giving my best consideration to these provisions, I have come to the conclusion that without reference to any second suit, these provisions have ample scope and justification with reference to the first suit. Section 60 provides for the substantive right of the mortgagor and is not directly concerned with the procedure. Sections 92 and 93 of the Transfer of Property Act and Rules 7 and 8 of Order XXXIV of the Code provide what the decree *nisi* or the preliminary decree shall contain, and safe-guard the rights of the parties by giving the Court power to extend the time and by providing that the debt shall be deemed to be discharged when an order for sale or foreclosure is made. On the whole I am of opinion that they contemplate only one suit for redemption, and in their natural and plain sense cannot be interpreted as indicating the possibility of more redemption suits than one in respect of the same mortgage. The power to enlarge time involves the possibility of the Court refusing to extend the time for payment in proper cases; and there would be no meaning in the Court refusing to extend the time, if immediately after such refusal the mortgagor could file a second suit for redemption before any order for sale is made. These clauses, however, do not in terms provide for one redemption suit only and may be consistent with the

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right of the mortgagor to file a fresh redemption suit. I am clearly of opinion, however, that like all other suits the second redemption suit would be subject to the provisions of sections 11 and 47 of the Code. I think that the scheme and the provisions of the Code are generally speaking against the maintenance of a second suit for redemption where there is a proper decree *nisi* for redemption and where its execution is barred by limitation.

As to the preliminary decrees under Rule 7 and the final decrees under Rule 8 of Order XXXIV it is suggested that the intermediate proceedings are not in execution, and that until a final decree is passed under Rule 8 there is strictly speaking no decree for execution. No doubt as pointed out by Sir Lawrence Jenkins C. J. in *Amlook Chand Parrack* v. *Sarat Chunder Mukerjee*[1] the Code contemplates a final *decree* and not an *order* absolute for sale as provided in the Transfer of Property Act. It is not necessary to deal with this aspect of the point at any length. In the first place we are not concerned with such a decree in this case. Secondly, even if the preliminary decree under Rule 7 is not to be treated as a decree capable of execution before a final decree is made, it will only have the effect of removing the bar, which section 47 of the Code might otherwise create, when a second suit is brought after the preliminary decree in case no final decree can be made owing to lapse of time, and in case a final decree is not made in fact on the ground of limitation or on any other ground. The preliminary decree may, however, operate as *res judicata* in all proper cases. And lastly, it is by no means clear that where a party has obtained a preliminary decree he is not bound to follow it up with taking proper steps for a final decree,

[1] (1911) 38 Cal. 913 at pp. 921, 922.

if he wants to have the benefit of the adjudication. It is a point to be considered whether it is open to a party to start a redemption suit and carry it up to the stage of a preliminary decree and leave it there without jeopardising his right to file a fresh suit in respect of the same mortgage. As these points in relation to the preliminary and final decrees have not been argued and as the question does not strictly arise in the present case, I do not desire to express any definite opinion on the question whether a second redemption suit can be brought, where the party has already obtained a preliminary decree and there has been no final decree in the case.

As to the reported cases, I desire to point out that much of the apparent conflict disappears when due regard is had to the terms of the decree in each case and the decision is read with reference thereto. The Full Bench decision in *Vedapuratti* v. *Vallabha Valiya Raja*[1] is against the view that a second suit can lie, and the terms of the first decree in that case resemble very closely the terms of the decree *nisi* in the present case. In the earlier Madras cases, there were no proper redemption decrees as contemplated by section 92 of the Transfer of Property Act, and in any case it is clear that the view now accepted by that Court is to be found in the decision of the Full Bench.

In Allahabad no doubt there has been some conflict of decisions. But taking the judgment in *Sita Ram* v. *Madho Lal*,[2] as supporting the opposite view, it is clear that the decision relates to a prior decree the terms of which were of an unusual character. The learned Judges in that case were not dealing with a decree *nisi* under section 92 of the Transfer of Property Act. In that case Knox, Acting C. J., observed: "I need not

(1) (1902) 25 Mad. 300. (2) (1901) 24 All. 44.

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consider here what would be the result if, in the case under appeal, the decree had been made in strict accordance with law and had provided that the property was to be sold. This point does not arise." It is conceded by Banerji and Aikman JJ. in their judgments that if the decree *nisi* provided for foreclosure in the event of non-payment, without any further order under section 93 of the Transfer of Property Act, the second redemption suit would be barred. No doubt where the property is to be sold in the event of non-payment, the learned Judges hold that the right of redemption subsists until an order for sale is made under section 93 and that the mortgagor could enforce that right in another suit. I fully recognise that the *ratio decidendi* in *Sita Ram's case* is against my view.

Coming to the Calcutta High Court, there is apparently a conflict between *Roy Dinkur Doyal* v. *Sheo Golam Singh* [1] and *Siva Pershad Maity* v. *Nundo Lall Kar Mahapatra* [2]. The former case favours the view that a second suit can lie. But if the decision be read with reference to the terms of the prior decree it is clear that as a decision it is not clearly against the applicability of section 11 of the Code to the second suit. The learned Judges point out that the decree did not pretend to foreclose the plaintiff's right of redeeming in the event of his not paying the money then decreed to be due. They doubted whether the civil Courts had jurisdiction to foreclose in that way the mortgagor's right to redeem, so long as his right of suit was not barred by the Statute of Limitation. There can be no doubt of the Court's power, either under the Dekkhan Agriculturists' Relief Act or the provisions of the Transfer of Property Act or the Code of Civil Procedure, to pass a decree adjudicating once for all

(1) (1874) 22 W. R. 172. (2) (1890) 18 Cal. 139 at p. 142.

the rights of the parties to be secured by executing the decree *nisi* or by proceeding to obtain a final decree and then executing it. In this case the learned Judges did not consider the effect of section 11 of Act XXIII of 1861, which would correspond to section 47 of the present Code.

In the latter case the opinion is expressed by Macpherson and Banerjee JJ. that "even if there is no order absolute, the decree *nisi* directing the sale is in existence; and if the right to redeem be still alive, it cannot be enforced by a separate suit."

The case of *Baboo Kullyan Dass* v. *Baboo Sheo Nundun Purshad Singh*[1] does not touch the present point; and the observations in that case, as I read them, show that it is desirable to determine finally all questions concerning the mortgage in the same suit. No doubt the possibility of another suit is recognised.

In *Gan Savant Bal Savant* v. *Narayan Dhond Savant*,[2] it was held that a second suit for redemption would not lie. This was prior to the Transfer of Property Act; and among the reported cases of this Court I have not been able to find any case, in which a second suit for redemption has been allowed where the first decree was passed in the mortgagor's suit for redemption. The Full Bench decisions in *Ravji Shivram Joshi* v. *Kaluram*[3] and *Tani Bagwan* v. *Hari*[4] are fairly illustrative of the necessity of looking to the terms of the decree. In both these cases the prior decree was obtained by the mortgagee and the right to redeem was held to be reserved under the terms of the decree. I do not consider it necessary to

(1) (1872) 18 W. R. 65.
(2) (1883) 7 Bom. 467.
(3) (1873) 12 Bom. H.C. R. 160.
(4) (1887) P. J. 315. S. C. 16 Bom 659 (*n.*) F.B.

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refer to the other Bombay cases mentioned in these judgments or in the arguments before us. I do not think that any of these cases except the case *Rama* v. *Bhagchand* [1] is inconsistent with my view.

The *ratio decidendi* in *Rama* v. *Bhagchand* is inconsistent with my view, though I do not think that if the decision be taken with reference to the facts of the case, it can be properly said to be inconsistent with it.

As regards the judgment of the Privy Council in *Nawab Azimut Ali Khan* v. *Jowahir Sing* [2], I do not think that the judgment of their Lordships touches the present point. The objections raised and considered in that case have been set forth at p. 410 of the report, and there was no point there that the second suit was not maintainable. The nature of the decree in the first suit made such a contention practically impossible. "That decree, in fact, did nothing but dismiss the then pending suit for redemption, on the ground that the full and entire amount of the mortgage money had not been deposited" as pointed out by their Lordships of the Privy Council at p. 412. I need not quote the further observations with reference to the nature and effect of the decree which their Lordships had to consider in that case. I think the case cannot be properly treated as a precedent for allowing a second suit for redemption, where the mortgagor has obtained a proper decree for redemption capable of execution.

The case of *Hari Ravji Chiplunkar* v. *Shapurji Hormusji* [3] has been already referred to. Their Lordships do not express any opinion in that case on the question whether the plaintiff could fall back on the

[1] (1914) 39 Bom. 41. [2] (1870) 13 Moo. I. A. 404 at p. 412.
[3] (1886) L. R. 13 I. A. 66.

original mortgage; and no assistance can be derived from that case in answering the question as to whether a subsequent redemption suit on the same mortgage may be barred by section 11 of the Code. But if in the subsequent suit the decree is accepted, and the suit is practically based upon the decree coupled with the subsequent events, I think, that it would be barred by section 47 of the Code on the authority of *Hari Ravji Chiplunkar* v. *Shapurji Hormusji*[1]. The fact of the relationship of mortgagor and mortgagee not having been extinguished would not be sufficient to save the suit, as the right of the mortgagor in the subsequent suit would be treated as a right to execute the decree and not the right to sue for the redemption of a mortgage.

With reference to this point, I may add a word as to the case of *Nasrat-ullah* v. *Mujib-ullah*[2]. That was a case of partition and the learned Judges had to consider the effect of a previous decree. But that would not apply, in my opinion, to a subsequent redemption suit where there is already a decree *nisi* for redemption capable of execution. If the plaint in a subsequent redemption suit were drawn up in the manner, in which the learned Judges in *Nasrat-ullah's case*[2] suggest the plaint in that case could have been drawn without laying it open to the defence based on section 13 of the Code, it seems to me that the plaintiff in the redemption suit would at once bring the case within the principle of *Hari Ravji Chilunkar's case*[1], though he might be able to get over the plea based on section 11 of the present Code.

On the whole, therefore, I am of opinion that the second redemption suit would ordinarily be open to the objection based on either section 11 or section 47 of the Code. But it must depend upon the actual terms

(1) (1886) L. R. 13 I. A. 66. (2) (1891) 13 All. 309.

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of the decree *nisi* and must be determined with reference to the terms of the decree and the facts of the case. The point is by no means free from difficulty; and there is a clear conflict in the decisions bearing on the point, even when due allowance is made for the facts of each particular case. Personally I should have been glad to hold that the second redemption suit would be always maintainable, where the execution of the decree *nisi* for sale of the property in the event of non-payment has been barred by limitation; and where there has been no order absolute for the sale of the property. My view would involve some hardship to the mortgagor in some cases but I do not think that any such consideration can afford a good ground for ignoring what I hold to be the clear effect of sections 11 and 47 of the Code.

J. G. R.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice and Mr. Justice Macleod.

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August 28.

MAY GERALDINE DUCKWORTH (ORIGINAL PLAINTIFF), APPELLANT *v.* GEORGE FRANCIS DUCKWORTH (ORIGINAL DEFENDANT), RESPONDENT.*

Army Act (St. 44 & 45 Vic. c. 58), sections 145 and 190—Army (Amendment) No. 2, Act 5 & 6 Geo. V. c. 58, section 4—First Class Warrant Officer of the British Army—Soldier—Decree for alimony and maintenance—Order by Commander-in-Chief for payment of alimony and maintenance——Civil Court cannot attach salary in execution of decree—Civil Procedure Code (Act V of 1908), sections 4, 60 (2) (b), Order XXI, Rule 48—Repeal of section 60 (2) (b) by the Repealing and Amending Act (X of 1914).

In a suit for dissolution of marriage the defendant, who was a First Class Warrant Officer of the British Army, was ordered to pay permanent alimony to his wife (plaintiff) and maintenance to his children by her. Later, the Court

* First Appeal No. 235 of 1917.