Privy Council Appeal No. 5 of 1931.

Kodoth Ambu Nair, since deceased (now represented by Kodoth Kannan Nair) - - - - - - - - *Appellant*

v.

Echikan Cherekere Kelu Nair, since deceased - - - *Respondent*

FROM

THE HIGH COURT OF JUDICATURE AT MADRAS.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 10TH APRIL, 1933.

Present at the Hearing:

LORD BLANESBURGH.
LORD MACMILLAN.
SIR GEORGE LOWNDES.

[*Delivered by* SIR GEORGE LOWNDES.]

The only question in this appeal is whether the respondent is entitled to redeem a certain mortgage. If this right, which has been affirmed by both courts in India, is exercisable, it is not disputed that the decree passed by the Subordinate Judge on the 16th August, 1924, is correct.

The mortgage in question was dated the 8th December, 1892, and was executed by members of the Beloor Maloor Tarwad in favour of the appellant. On the 13th September, 1897, the appellant brought a suit on the mortgage which was compromised, and a decree dated the 2nd January, 1899, was passed in accordance with the compromise. The terms of this decree were in effect that the mortgagors should pay to the appellant within three years a sum of Rs. 31,000, together with a yearly rent in kind: that in default of payment of the Rs. 31,000, or of the rent, the appellant should be entitled to obtain, by process of execution, possession of the property, and to retain the same as usufructuary mortgagee, the mortgagors having the right to redeem in any year thereafter on payment of the Rs. 31,000,

and to obtain delivery of the property " by taking out execution."

No rent was paid and in March of the following year possession was taken by the appellant under the decree. It is not disputed that the appellant remained in possession as mortgagee, but it is said that the mortgagors' only remedy was by execution of the compromise decree, and that remedy is long since barred.

On the 7th December, 1901, the appellant made a further advance of Rs. 1675 to the mortgagors on the security of a simple mortgage of the same properties.

On the 20th December, 1909, the equity of redemption of the mortgagors was sold in execution of a money decree which had been passed against them in other proceedings and was purchased by one Subbaraya Kamthi, who on the 22nd April, 1913, assigned his rights to the respondent.

On the 18th September, 1912, the appellant sued on the simple mortgage of the 7th December, 1901. He joined as defendants the *karnavan* of the mortgagor *tarwad* and Subbaraya Kamthi, who was described as having purchased the equity of redemption subject to the mortgage in suit and to the usufructuary mortgage for Rs. 31,000, which obviously meant the mortgage under the compromise decree. The prayer of the plaint was for payment of the sum due under the simple mortgage and that in default the property should be sold and the sale proceeds " applied in payment of what may be found due to the plaintiff subject to or free from the previous usufructuary mortgage in favour of the plaintiff's *tarwad*, as the court deems fit."

On the 22nd November, 1912, a decree was passed in this suit in favour of the appellant providing for sale, in default of payment, subject to the usufructuary mortgage, and a final decree for sale on these terms was made on the 12th September, 1914.

On the 17th December, 1918, after two separate applications had been made by the appellant for sale of the property, the respondent applied to pay off the decree in right of his assignment from Subbaraya Kamthi. In his petition, of which notice was given to the appellant, he referred to the decree as having been passed subject to the payment of the Rs. 31,000 due under the compromise decree of January, 1899, and made it clear that his object in making the payment was to redeem the earlier mortgage. By consent of both parties the sum claimed as due under the simple mortgage, which amounted to Rs. 6,115-12-0, was brought into court and was paid out to the appellant on the 18th December, 1918, in full satisfaction of the decree.

The respondent then applied in execution of the compromise decree to redeem the usufructuary mortgage. His application was resisted by the appellant as out of time. It was rejected on this ground by the Subordinate Judge and his decision was

confirmed on appeal, the courts holding that the remedy by execution was barred on the expiry of three years from the date of the decree, *i.e.*, in January, 1902.

The respondent then instituted the suit out of which the present appeal has arisen praying for redemption, and was met by the plea that his only remedy was in execution, and that this remedy had already been held to be time barred.

This contention was rejected by both Courts in India. Upon an examination of the authorities they came to the conclusion that the remedy by suit was still open to the respondent. The Subordinate Judge was also of opinion that having regard to the proceedings in the suit on the simple mortgage the appellant was estopped from asserting the contrary. The learned Judges of the High Court came to no specific conclusion on the question of estoppel, basing their judgment on other grounds, but they affirmed the facts upon which the Subordinate Judge had relied. They say :—" It is clear therefore from these proceedings that in 1912, *i.e.*, about 20 years after exhibit A, the deed of mortgage, and over 12 years after the *rajinama* decree, the mortgagee treated the first mortgage as subsisting and got a decree on the second mortgage on that basis."

In the event a decree was passed by the Subordinate Judge in the respondent's favour on the 16th August, 1924, providing for redemption on the terms therein set out, and this was affirmed in the High Court by the dismissal of the appeal.

Their Lordships while not disagreeing with the view taken by the learned Judges of the High Court, are of opinion without going further into this question that the defence raised by the appellant was not open to him. On the terms of the compromise decree of 1899 they think that it was not the intention of the parties that the remedy by execution should alone be open to the mortgagors. Seeing that it would, as the Courts have held, be barred after three years, such a construction would manifestly defeat the main object of the compromise which was to leave the mortgagors in possession for three years, and if after the expiry of that period the mortgage debt was not paid to allow the appellant to take possession, and again if and after he had so done to entitle the mortgagors to redeem. That the appellant understood this to be the intention is clear from the proceedings in the suit on the simple mortgage, which was based upon the right of redemption being still alive ; the prayer of the plaint would on the face of it have allowed both mortgages to be paid off on a sale. It is, their Lordships think, equally clear that it was upon the same understanding that the respondent came in and paid off the decree in this suit, and that the appellant accepted the payment. On no other view of the facts could he have realised the decretal amount.

Having thus, almost in terms, offered to be redeemed under the usufructuary mortgage in order to get payment of the other

mortgage debt, the appellant, their Lordships think, cannot now turn round and say that redemption under the usufructuary mortgage had been barred nearly 17 years before he so obtained payment. It is a well accepted principle that a party cannot both approbate and reprobate. He cannot, to use the words of Honeyman J. in *Smith* v. *Baker*, L.R. 8 C.P. 350,357, " at the same time blow hot and cold. He cannot say at one time that the transaction is valid and thereby obtain some advantage to which he could only be entitled on the footing that it is valid, and at another say it is void for the purpose of securing some further advantage." See also *per* Lord Kenyon C.J. in *Smith* v. *Hodson*, 2 " Smith's Leading Cases," 140, 146, where the same expression is used.

It is objected for the appellant that this view of the case is not admissible inasmuch as no estoppel was pleaded and no issue was framed with regard to it. It is clear, however, that the question was raised before the trial Judge and that the appellant had a sufficient opportunity then of meeting it. Nor is it suggested now that there are any other material facts which could have been proved had the issue been formally raised. Their Lordships therefore think that this objection has no weight.

For the reasons given they think that this appeal fails and should be dismissed with costs, and they will humbly advise His Majesty accordingly.

In the Privy Council.

KODOTH AMBU NAIR, since deceased (now represented by KODOTH KANNAN NAIR)

v.

ECHIKAN CHEREKERE KELU NAIR, since deceased.

DELIVERED BY SIR GEORGE LOWNDES.

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