

(1901) 07 AHC CK 0001

Allahabad High Court

Case No: None

Sita Ram and Others

APPELLANT

Vs

Madho Lal and Another

RESPONDENT

Date of Decision: July 11, 1901

Citation: (1902) ILR (All) 44

Hon'ble Judges: Knox, Acting C.J.; Banerji, J; Aikman, J

Bench: Full Bench

Final Decision: Dismissed

Judgement

Knox, Acting C.J.

1. The plaintiffs, who are now appellants, are the assignees of the equity of redemption over certain land situate in mauza Kopa, pargana Saidabad. They instituted the suit, out of which this appeal arises, and asked for a decree for enforcing the equity of redemption. Their suit has been dismissed, and the lower appellate Court has been guided to this decision by a precedent of this Court, David Hay v. Razi-ud-din I.L.R.(1897) All. 202. The Bench of this Court before which this second appeal first came for hearing, having doubts as to the soundness of the view held in David May v. Razi-ud-din and it having been pointed out to them that there was a conflict of authority in the decisions of this Court regarding the point in issue, asked that the case might be referred to a Full Bench. What we now have to consider and determine is whether a mortgagor who has obtained a decree for redemption, which does not contain a provision that if payment is not made on the date fixed by the Court, the mortgagor shall be absolutely debarred of all right to redeem tin property, and who has not enforced that decree and has not paid in the decretal amount within the time can subsequently bring a second suit for redemption of the mortgage in respect of which such first decree was obtained. According to the decision in David Hay v. Razi-ud-din he cannot bring such a second suit. According to rulings of this Court prior in point of time to David Hay v. Razi-ud-din he can.

2. It has been found that in 1869 the plaintiff-appellant, Lala Sita Ram, and the ancestor of the other plaintiffs-appellants, did institute a suit for redemption of this very mortgage, and that they did obtain a decree for redemption, but never put it in force. The mortgage was a usufructuary mortgage. In coming to a decision upon this point, I do not propose to go into the various precedents that are to be found in the reports. Those have been very carefully considered and fully discussed by my learned brother Aikman, and I concur in the views he holds about them. I think it sufficient to consider the provisions of Act No. IV of 1832, which seem to bear upon this point. To my mind they return a sufficient and conclusive answer to the question referred. The first provision is that contained in Section 60, which lays down that "at any time after the principal money has become payable the mortgagor has a right, on payment or tender at a proper time and place of the mortgage money, to require the mortgagee to deliver the mortgage-deed, if any, to the mortgagor, and where the mortgagee is in possession of the mortgage property, to deliver possession thereof to the mortgagor." No limitation is put upon this right, with the one exception that it must not have been extinguished by act of the parties or by an order of the Court. In the present case there is no question as regards the act of parties. The only point which will hereafter have to be considered is, whether the right has been extinguished by an order of a Court. As it is common ground that the mortgagee has not up to the present asked for an order that the mortgaged property be sold, it is not necessary to consider the provisions relating to such a circumstance, and I pass on to Section 92, which directs that "in a suit for redemption if the plaintiff succeeds the Court shall pass a decree ordering that an account be taken of what will be due to the defendant, and that upon the plaintiffs paying to the defendant, or into Court, the amount so due upon a day to be fixed by the Court, the defendant shall deliver up to the plaintiff, or to such persons as he appoints, all documents in his possession or power relating to the mortgaged property, and shall retransfer it to the plaintiff free from the mortgage and free from all incumbrances created by the defendant or any person claiming under him, and shall, if necessary, put the plaintiff into possession of the mortgaged property." Such a suit for redemption the plaintiffs did bring in the year 1869. A decree was passed in their favour, ordering very much as has been set out above. But whilst Section 92 of the Transfer of Property Act goes on to enact that the decree passed in a case for redemption should direct that if payment of the amount found due is not made on or before the day fixed by the Court, the property was to be sold, the decree referred to in place of this ordered that if payment was not made, the judgment should, after the expiry of the time fixed in the decree, be considered as *ma'adum* or annihilated. If the Court which passed it had followed the law, then according to Section 93 it was open to the mortgagee, when payment of the amount found due was not made, to apply for an order that the property or a sufficient part thereof be sold and the proceeds distributed as directed *u/s* 93." Section 93 goes on further to enact that on the passing of such an order the plaintiff's right to redeem and the security shall, as regards property affected by the order, both be

extinguished. Putting aside any other provisions of the law, the clear words of these sections would seem to be that until a mortgagee has applied for an order of sale u/s 93, the plaintiff's right to redeem exists, and can at any time be enforced. There is a further clause in Section 93, which seems to corroborate this view, and which permits a Court upon good cause shown and upon such terms, if any, as it thinks fit, from time to time to postpone the day originally fixed for payment. Every such postponement would prolong the existence of the plaintiffs' right to redeem. If it did not, it is difficult to assign any meaning or object to it, and this we cannot suppose of any piece of legislature.

3. As no application had been made by the mortgagees for an order for sale up to the 26th of May, 1896, when they filed the present suit, it would follow that unless the plaintiffs' right to redeem be barred by some provision of law other than that Contained in the Transfer of Property Act, his right to redeem was not extinguished. It was unimpaired, and could be enforced by suit. In *David Hay v. Razi-ud-din* where the opposite view was held, it was admitted that there are cases which support this contention, namely, the cases of *Sami Achari v. Somasundram Achari* I.L.R.(1882) Mad. 119 *Periandi. v. Angappa* I.L.R.(1883) Mad. 423 *Rammuni v. Brahma Dattan* I.L.R.(1802) Mad. 366 and also *Muhammad Sami-ud-din Khan v. Mannu Lal* I.L.R.(1889) All. 286. The learned Judges, however, who decided the case of *David Hay v. Razi-ud-din* held that it was the intention of the Legislature as expressed in Section 92 and Section 93 of the Transfer of Property Act that there should be one suit only for a redemption. They do not point out upon what portions of the sections above cited they held this view, and it must be remembered that in the case they then had to decide the decree under appeal did not specify what should take place in the case the mortgage money was not paid within the period limited in that respect. Otherwise it might be assumed that they based their judgment upon the concluding paragraph of Section 92. I need not 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. The learned Judges in *David Hay v. Razi-ud-din* seem to have based their decision upon the reading they put upon Sections 92 and 93 of the Transfer of Property Act, the principles contained in Section 244 of the Code of Civil Procedure, and the fact that, the failure by a mortgagor to comply, whatever that may mean, with his decree for redemption within time, cannot give him a fresh cause of action. His original cause of action, they considered, was extinguished. It is difficult to understand how they held this in the face of the words contained in Section 93--"the plaintiff's right to redeem shall be extinguished." These words would be pure surplusage if the cause of action merged in the decree, or if Section 13 of the CPC had any similar effect. On the contrary, it would appear that the words above quoted in Section 93 were purposely inserted in order to remove a particular case of a suit for redemption from objections which might be raised u/s 13 of the Code of Civil Procedure. Again, as regards the difficulty felt in connection with the principles

contained in Section 244 of the Code of Civil Procedure, it may be remembered that decrees in redemption suits differ from ordinary decrees, in that they contain provisions providing for a portion of them becoming incapable of execution under certain contingencies. By their own internal virtue, so to speak, they make it impossible for questions relating to the execution, discharge or satisfaction of the decree to arise, inasmuch as they provide that upon a decree-holder not making payment on a day fixed by the Court, all advantages which accrued to him, and which could be enforced by him under the decree, come to a complete end. In the present case, of course, the decree was of an extraordinary kind; but even so, the terms in which it was couched were of a nature which preclude any question arising of execution, discharge or satisfaction of that particular decree by the decree-holder. With due respect to the learned Judges who decided *David Hay v. Razi-ud-din* I cannot bring myself to believe that it was the intention of the Legislature as expressed in Sections 92 and 93 of the Transfer of Property. Act that there should be one suit only for redemption. The principles of Section 241 of the CPC appear to me to be excluded under the express words which allow the mortgagor's right to redeem to continue alive and operative until extinguished by an order u/s 93. It is true that, when a Court has once adjudicated upon a mortgagor's right to redeem, so many of the issues as bore upon that, and were heard and determined, become *res judicata* and cannot be reopened; but unless there has been a determination that the mortgagor has no right to redeem, there would still remain one other issue in a subsequent suit which would not be *res judicata*, and which would have to be heard and determined. In a second suit for redemption there would always be the question to be tried whether the plaintiff has or has not a right to redeem reserved to him by law until the mortgagee has applied for an order for sale. This issue would naturally not have been, and could, not have been, in issue in the former suit, and could not therefore have been heard and determined. The Court would not be by Section 13 debarred from trying that issue. It has not, been suggested that there is any other order of the Court which stands in the way of the mortgagor's right to redeem. I am therefore of the same opinion as my learned brothers, that in the present case the mortgagor could bring the second suit for redemption, and I concur with them in the order proposed.

Banbrji, J.

4. This appeal raises the question whether a mortgagor, who, has obtained a decree for redemption, and has failed to comply with the conditions imposed in it in regard to the payment of the mortgage money, is precluded from maintaining a second suit for the redemption of the same mortgage.

5. If the decree in the first suit provides in distinct terms, as it did in *Rasmasami v. Sami* I.L.R.(1893) Mad. 96 that in case of default in payment the mortgagor "will be debarred from redeeming" the mortgaged property afterwards, a second suit would be clearly barred under the rule of *res judicata*, no matter whether the decree was

or was not passed in accordance with law. It is conceded that the decree in the former suit in this instance was not of that description. The former suit was brought in 1869 by Sita Ram, one of the present plaintiffs, and Thakur Das, the predecessor in title of the other plaintiffs, to redeem a mortgage of the 10th May, 1848, made by Keshri Narayan for Rs. 308. It was found that the said mortgage had been superseded by a subsequent mortgage, dated the 15th of February, 1853, for Rs. 800. The decree of the Court of first instance made on the 18th of March, 1869, and affirmed on appeal on the 27th of July, 1869, provided for redemption upon "payment within one month of the amount of the mortgagee money alleged by the defendants;" and it farther provided that if payment was not made within the term fixed the "judgment should be deemed to be non-existent." As I read this decree the result of the nonpayment of the mortgage money within the period of one month fixed in the decree was, that the parties were relegated to the position in which they were before the decree was passed, that is to say, the relation of mortgagor and mortgagee was to subsist between them as before. It could not be said by any stretch of reasoning that the decree declared the right of redemption to be foreclosed, or that it had the effect of merging the mortgage in the decree. Having regard, therefore, to the terms in which the decree of 1869 was passed, I am unable to hold that the said decree is a bar to the maintenance of the present suit.

6. This suit was instituted in 1898 under the Transfer of Property Act. Section 60 of that Act confers on the mortgagor a right to redeem "at any time after the principal money has become payable," provided that the said right "has not been extinguished by act of the parties or by operation of law." It is admitted in this case that the plaintiff's right of redemption has not been put an end to by the act of the parties. Has it been extinguished by operation of law? This question has been fully dealt with by my brother Aikman, whose judgment I have had the advantage of reading. I "agree with him in all that he has said on this point. The rulings of the Madras High Court, which he was considered in detail, are consistently to the effect that in the case of a usufructuary mortgage the right to redeem is not extinguished, unless, upon default in payment on or before the day fixed, the Court passes an order that the mortgaged property or a sufficient part thereof be sold as provided in Section 93. The judgment of Muttusami Ayyar, J., in *Ramunni v. Brahma Dattan* I.L.R.(1892) Mad. 366 is instructive, and I entirely agree with the views of the learned Judge. It is clear from the provisions of the Transfer of Property Act that the only orders which under the Act extinguish the right to redeem are--(i) an order absolute for foreclosure u/s 87 in a suit for foreclosure, (ii) an order absolute for sale u/s 88, and (iii) an order for foreclosure or sale in a mortgagor's suit for redemption. This was clearly pointed out in *Dondh Bahadur Rai v. Tek Narain Rai* I.L.R.(1899) All. 251. u/s 93 an order for foreclosure can only be passed if the mortgage is not simple or usufructuary. In the case of such mortgages the only order which has the effect of extinguishing the right to redeem is the order for the sale of the mortgaged property or a sufficient part thereof. So long as such an order has not been applied

for and obtained the right to redeem is not extinguished, and therefore the mortgagor is entitled u/s 60 to bring a suit to enforce that right. This effect of Section 93 was evidently overlooked in the ruling of this Court in *David Hay v. Razi-ud-din* I.L.R.(1897) All. 202. With all deference to the learned Judges who decided that case, I am unable to agree with t Irani. Their view is in direct conflict with the provisions of the Transfer of Property Act. They have referred to "the law as administered in such matters in England," but they were oblivious of the fact that whereas in England " the dismissal of the action to redeem by reason of default in payment of the money, or for any other cause than for want of prosecution, operates as a judgment of foreclosure "(see Fisher's Law of Mortgage, 5th Edition, p. 965), there can be no decree of foreclosure under the Transfer of Property Act in the case of a usufructuary mortgage. The observation of the learned Judges that a mortgagee may be harassed by numerous suits if the mortgagor were permitted to institute repeated suits for redemption, has been fully answered by my brother Aikman, and in the judgment in *Vondh Bahadur Rai v. Tele Narain Bai* I.L.R.(1899)All. 251 referred to above. It will be entirely in the power of the mortgagee to prevent such suits by obtaining an order for the sale of the mortgaged property. As for the provisions of the CPC to which reference has been made by the learned Judges I am unable to hold that they have any bearing on the question. The operation of Section 13 of the Code would depend upon the nature of the decree made in the previous suit in each instance. If, for example, the first suit is dismissed on the ground that the plaintiff has no right of redemption, he will be precluded by the operation of that section from bringing a second suit for redemption. Again, if the decree declares that upon default being made in the payment of the mortgage money, the plaintiff will be foreclosed of his right of redemption, and that decree is allowed to become final, although it is not in accordance with law, the plaintiff will not be entitled to maintain another suit. But where the decree has been framed in the terms of Section 92 of the Transfer of Property Act the only order which can extinguish the mortgagor's right to redeem in the case of a usufructuary mortgage is an order for sale under the fourth paragraph of Section 93. That section leaves no room for doubt that the mere fact of the non-payment of the mortgage money on or before the date fixed does not extinguish the mortgagor's right of redemption, and vest the mortgaged property absolutely in the usufructuary mortgagee. The very fact that such a mortgagee can obtain an order for the sale of the mortgaged property shows that the ownership of the property, that is, the equity of redemption, is in the mortgagor until the order has been obtained, as the mortgagee could not apply for the sale of the property which had vested in himself. With reference to the contention of the learned advocate for the respondents, that after the mortgagor had obtained a decree for redemption his rights merged in the decree, and the only remedy available to him was the execution of the decree, it may be observed that this would be the case where the mortgage money has been discharged before suit, either by receipt of rent or by actual payment, and the decree passed is one for possession on the ground that the mortgage has already

been redeemed. This was the case in *Sheikh Golam Hoosein v. Musumat Alla Rukhee Beebee* N.W.P. H.C. Rep. 1871 p. 62. But where a conditional decree has been passed the right to redeem is not extinguished until the result of the failure to perform the condition comes into operation, either u/s 93 of the Transfer of Property Act, or under the terms of the decree. The learned Judges who decided the case of *David Hay v. Razi-ud-din* relied on the ruling referred to above as supporting their view; but the true scope of that ruling has been pointed out by my brother Aikman, and it does not, in my opinion, help the case of the respondents. I am unable to hold that, having regard to the provisions of the Transfer of Property Act, the case of *David Hay v. Razi-ud-din* was rightly decided.

7. It was lastly urged on behalf of the respondents that the decree of 1869 was passed before the Transfer of Property Act came into force, and that before the enactment of that Act, a decree dismissing a suit for redemption operated as a decree for foreclosure. That may have been the case in the Bombay Presidency; but so far as these Provinces are concerned, there is no authority for holding that the rule on the subject which obtains in England was ever applied to suits in this country. In *Chaita v. Purum Sookh* N.W.P. H.C. Rep. 1867 p. 256 decided by Morgan, C.J. and Spankie, J., in 1867, it was held that the omission to execute a decree for redemption does not cause the interest of the mortgagor to cease to exist, and that he may still maintain another suit for redemption. In *Nawab Azimut Ali Khan v. Jowahir Sing* (1870) 13 Moo. I.A. 404 their Lordships of the Privy Council did not consider the dismissal of a suit for redemption to be a bar to the maintenance of a subsequent suit for the same purpose. I may also refer to the decision of the Calcutta High Court in *Roy Dinkur Doyal v. Sheo Golam Singh* (1874) 22 W.R. C.R. 172 decided in 1874 and I may remark that no case has been cited to as in which, before the passing of the Transfer of Property Act, the view contended for by the respondents and approved in *David Hay v. Razi-ud-din* was held in these Provinces.

8. I am of opinion that neither the provisions of law nor the terms in which the decree of 1869 was passed preclude the plaintiffs from maintaining the present suit. I would therefore accept the appeal, and, setting aside the decree of the Court below, remand the case to that Court u/s 562 of the Code of Civil Procedure, allowing to the appellants the costs of this appeal. Other costs to follow the result.

Aikman, J.

9. This appeal arises out of a suit brought for the redemption of a mortgage. The plaintiff succeeded in the Court of first instance, but on appeal the learned Subordinate Judge reversed the decree of the Munsif and dismissed the suit. The plaintiffs have filed this appeal from the decree of the lower appellate Court. The learned Subordinate Judge relies on the judgment of this Court in the case of *David Hay v. Razi-ud-din* I.L.R.(1897)All. 202. That case undoubtedly supports the view taken by the Subordinate Judge. The plaintiffs, on the other hand, rely on an earlier judgment of this Court in the case of *Muhammad Sami-ud-din Khan v. Mannu Lal*

I.L.R.(1889) All. 386 which is as clearly in their favour as the other case is against them. Owing to this conflict of authority on a question of importance, the hearing of this appeal has been referred to a Full Bench of three Judges.

10. The following are the facts of the case:

On the 10th of May, 1848, one Kesri Narayan made a usufructuary mortgage of the property in suit in favour of Lekhraj, the predecessor in title of the defendants respondents, to secure a loan of Rs. 308. Sita Ram, plaintiff No. 1, and Thakur Das, father of the other plaintiffs, purchased Kesri Narayan's equity of redemption.

11. In 1869 Sita Ram and Thakur Das brought a suit against the defendants for redemption of the mortgage of 1848. In that suit the defendants pleaded that a later mortgage-deed for Rs. 800 had taken the place of the mortgage of 1848, and that the plaintiffs must pay that amount in order to redeem. This plea was sustained, and a decree was passed declaring the plaintiffs entitled to redeem, and to recover possession of the property on condition of payment by them of the full amount of the mortgage money within one month. The decree goes on to provide that if the mortgage money is not paid as directed, "this judgment shall, after expiry of the above-mentioned period, be considered as non-existent" (ma'adum). The plaintiffs failed to pay the money as directed. No further proceedings in connexion with the mortgage were taken until the 26th May, 1896, when the suit out of which this appeal arises was instituted. The plaintiffs alleged that the cause of action arose on the 12th of May, 1896, on which date the defendants refused to render an account and allow redemption of the mortgage. The plaintiffs prayed that accounts should be adjusted between the parties, and redemption decreed, without payment if it were found that the mortgage had been satisfied out of the usufruct, or on payment by them of such part of the mortgage money as might be found to be due.

12. The defendants pleaded that the suit was barred by Section 13 of the Code of Civil Procedure, and contended that, having regard to the result of the suit of 1869, the plaintiffs were not entitled to any relief now. They also raised other pleas, which it is unnecessary to consider in this appeal.

13. The Court of first instance, relying on the decision in Muhammad Sami-ud-din Khan v. Mannu Lal I.L.R.(1889)All. 386 repelled the plea that the suit was not maintainable owing to the previous litigation in 1869, and in the result gave the plaintiffs a decree for redemption on payment of Rs. 500.

14. On appeal the learned Subordinate Judge, following, as he was bound to do, the later ruling in the case of David Hay v. Razi-ud-din I.L.R.(1897)All. 202 sustained the plea that the previous suit barred the present suit, and set aside the Munsif's decree.

15. We have now to decide which of the conflicting views taken in the two cases referred to is correct.

16. I have no hesitation in coming to the conclusion that the decision in the earlier case is right. It is in accord with a long series of rulings of the Madras High Court, beginning with the case of Sami v. Somasundram I.L.R.(1882) Mad. 119 and ending with Nainappa Chetti v. Chidambaram Chetti I.L.R.(1897) Mad. 18. The learned Judges who decided the case in ILR 19 All., observed that the view of the law to be found in these Madras cases is not supported by the law as administered in such matters in England. That is quite true. In England dismissal of a suit to redeem by reason of the non-payment of the money or for any other cause than for want of prosecution, operates as a judgment of foreclosure (vide p. 1187, Coote's Law of Mortgage, Vol. II, edn. 1884, and the cases quoted there). But when the learned Judges go on to say that the Transfer of Property Act also shows that a second suit to redeem cannot be maintained, I must join issue with them. I think precisely the opposite lesson is to be learnt from the Transfer of Property Act. Section 60 of the Act provides that the mortgagor has a right to redeem at any time after the principal money has become payable, provided that that right has not been extinguished by act of the parties or by order of the Court. In a suit for redemption the Court (vide Section 92) makes a decree determining the amount to be paid for redemption and fixing the time within which that amount is to be paid, and if the mortgage be simple or usufructuary, ordering that the property be sold unless the amount be paid as directed. The sale of the property on the application of the defendant is the penalty provided by law for the failure of the plaintiff to pay within the time fixed. Now, if the view taken by the learned Judges who decided the case in I.L. R. 19 All. be correct, the penalty in the case of a decree which does not, as required by law, contain an order for sale, is the total loss of the property--a result which I have no hesitation in saying is not contemplated by the Act. Even if the decree be properly framed in terms of Section 92, the result would be the same, for the mortgagee has only to sit quiet and refrain from making an application u/s 93, with the result that the property becomes his own.

17. It may well happen that when an account is taken in a suit for redemption, the result is to show that an amount is due from the mortgagor, which he for the time being is quite unable to raise within the period fixed. The law never intended that in such a case the mortgagor should be punished by the total loss of his property. Even when, after a properly-framed decree, the mortgagee applies u/s 93 for sale, the order which the Court has to pass is that the property, or a sufficient part thereof, be sold. Any balance of the sale proceeds which is left after payment of the amount due to the defendant mortgagee, and the expenses of the sale, is paid to the plaintiff mortgagor, or other persons entitled to receive the same. And, as is clear from the fifth paragraph of Section 93, it is the passing of an order under that section which extinguishes the plaintiff's right to redeem. The inference is, that the right to redeem is considered to subsist until an order under that section has been passed.

18. The learned Judges who decided the case of David Hay v. Razi-ud-din observe that if the authorities which take an opposite view are good law, "a mortgagor is only limited as to the number of suits which he may bring by the length of his life, or by the sixty years provided by the Limitation Act." I think the fear here expressed is chimerical, for, as pointed out in the case of Dondh Bahadur Rai v. Tek Narain Rai I.L.R.(1899) All. 251 even if the liability to pay costs did not act as a deterrent to the mortgagor, the mortgagee could, by an application u/s 93 of Transfer of Property Act, put a stop to any further litigation under the mortgage.

19. The learned Judges who decided the case of David Hay V. Razi-ud-din rely on the Full Bench decision of this Court in Sheikh Golam Hoosein v. Musumat Alla Rukhee Beebee N.W.P. H.C. Rep. 1871 p. 62. The facts of that case are different from those of the present case and of the case in ILR 19 All. The plaintiffs, relying on their proprietary title/had brought a suit to recover possession of mortgaged property on the ground that the mortgage had been satisfied. They succeeded in establishing this, and got an unconditional decree for possession. They allowed the period of limitation to expire without taking any steps to obtain possession, and then brought another suit based on their old title, and asking substantially for the relief which was sought for and obtained in the first suit. Such a case is, I think, not to be distinguished from an ordinary action in ejectment, in which a plaintiff gets a decree for possession of the property. If he takes no steps to execute that decree within the time allowed by law, he cannot by a fresh suit based either on the decree, or on his title as it stood at the time the first suit was brought, evade the law of limitation. It was so held by a Full Bench of this Court in Doobee Singh v. Jowkee Ram N.W.P. H.C. Rep. 1868 p. 381 and the Judges who decided Sheikh. Golam Hoosein v. Musumat Alla Rukhee Beebee held that the decision in Doobee Singh's case governed the case before them.

20. It appears to me that when a Court by its decree pronounces a mortgage debt to be satisfied, and the mortgagor entitled to immediate possession, that is equivalent to a declaration that the relation between the parties of mortgagor and mortgagee has come to an end. The case is different when the decree declares that the mortgage debt is still unsatisfied. In that case the relation of mortgagor and mortgagee still subsists, and so long as that relation subsists, a mortgagor is entitled to claim redemption, provided his right to do so has not been extinguished by act of parties or by order of a Court.

21. In the present case it is not suggested that the mortgagor's right has been put an end to by the act of parties, and I fail to discover anything in the decree in the previous suit which would extinguish it. It is, of course, possible that in a suit for redemption of a mortgage, under which possession has been given to the mortgagee, the decree of the Court may be so framed as to have the effect of extinguishing the mortgagor's right to redeem. Such was the case in Ramasami v. Sami I.L.R.(1893) Mad. 96 relied on "by the respondent, where the decree declared

that on the plaintiff's paying the amount found due within three months, he would be entitled to possession of the properties mortgaged, "and in default he will be debarred from redeeming them thereafter." Such a decree is not a proper decree to pass in a suit for the redemption of a usufructuary mortgage under the Transfer of Property Act; but if passed, and allowed to become final, it is clear that on the plaintiff's failure to pay within the time fixed it operates as a foreclosure decree, and his right to redeem is extinguished.

22. In the present case, had the decree of 1889 declared that on the plaintiffs' failure to pay within the time fixed the amount found due their right to redeem would be barred, the present suit would necessarily fail. But no such declaration was made. As stated above, the only result of default on the plaintiffs' part which the decree of 1889 declared would ensue was the wiping out of the judgment. I do not think that it can with any show of reason be maintained that this was an order of Court extinguishing the right to redeem.

23. Reference is made both in *Muhammad Sami-ud-din Khan v. Mannu Lal* I.L.R.(1889)All. 386 and in the case in ILR 19 All, to the Full Bench decision of 1871. But neither of these judgments adverts to the peculiar circumstance noticed above, namely, that in the Full Bench case the decree in the first suit was not a decree declaring the mortgagor entitled to redeem, but an unconditional decree for possession. Had it been a decree for redemption, it is possible that the decision of the Full Bench would have been different, for in 1867, Morgan, C.J. and Spankie, J., both of whom were parties to the Full Bench decision of 1871, had held in the case of *Chaita v. Purum Sookh* N.W.P. H.C. Rep. 1687 p. 256 that the mere omission to execute a redemption decree does not cause the interest remaining in the mortgagor to cease to exist, and that in respect of such remaining interest he may maintain a fresh redemption suit, even if all rights under the old suit have been lost. "The inquiry," they say, "in the new suit, whether he is entitled to redeem, and on what terms, may not be the same as the inquiry in the former suit. A different state of circumstances may have arisen."

24. The learned Judges who decided the case of *David Hay v. Razi-ud-din* say that in their opinion it was the intention of the Legislature, as expressed in Sections 92 and 93 of the Transfer of Property Act, that there should be one suit only for redemption. With all deference to the learned-Judges, I am unable to find any indication in these sections of any such intention in the case of usufructuary mortgages. The language of Section 93 points to an opposite conclusion. The second paragraph of that section provides that if payment is not made within the time fixed, the defendant mortgagee may apply for an order that the plaintiff, and all persons claiming through or under him be debarred absolutely of all right to redeem, unless the mortgage is simple or usufructuary. Nor am I able to follow the learned Judges in their opinion that it would be in contravention of the principles of Section 244 of the CPC to allow a second suit for redemption to be maintained,

inasmuch as the question raised in the second suit is not a question relating to the execution, discharge, or satisfaction of the previous decree. The case would, of course, be different, were the second suit brought upon the decree in the first suit as a cause of action, as in *Doobee Sing v. Jowkee Ram* N.W.P. H.C. Rep. 1868 p. 381 and *Hari Ravji Chiplunkar v. Shapurji Hormasji Shet* I.L.R.(1886) 10 Bom. 461.

25. Nor am I able to see that Section 13 of the CPC would be any bar to a second suit for redemption. The decision in *Anrudh Singh v. Sheo Prasad* I.L.R.(1882) All. 481 merely followed the ruling of the Pull Bench in *Sheikh Golam Hoosein v. Musumat Alia Rukhee Beebee* and no facts are given.

26. The case of *Gan Savant Bal v. Narayan Dhond Savant* I.L.R.(1883) 7 Bom. 467 is in favour of the respondent. It follows the two cases last cited. *Kemball, J.*, says: "By reason of the default in payment of the money declared to be due within the time prescribed by law for the 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." This view, as shown above, is not in accord with the Transfer of Property Act, which, it should be noted, had not been extended to the Bombay Presidency when that case was decided. This case was followed in *Maloji v. Sagaji* I.L.R.(1888) 13 Bom. 567 where, however, the opinion was only an obiter dictum. The cases in which an opposite view has been taken may now be shortly referred to. In the case of *Roy Dinkur Doyal v. Sheo Golam Singh* (1874) 22 W.R. C.R. 172 the plaintiffs had brought a suit to recover possession of mortgaged property on (he allegation that the amount due under the mortgage had been discharged by the usufruct of the property. The Court found that a sum of Rs. 4,824-14-9 was still due under the mortgage, and gave the plaintiffs a decree for possession on condition of their depositing that amount. The plaintiffs failed to pay in tin"s amount. Four years after the decree had been passed they asked for possession in the execution department on the plea that the amount mentioned in the decree had by that time been satisfied out of the usufruct, but their application was rejected. They then filed a fresh suit for possession, which was dismissed by the Court of first instance on the ground that it was barred by Section 2, Act No. VIII of 1859, which precluded a Court from taking cognizance of a suit brought on a cause of action which had been previously heard and determined by a Court of competent jurisdiction in a former suit between the parties.

27. In appeal the decision of the Subordinate Judge was reversed by *Phear and Norris, JJ.* They say: "What 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 now to have 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 mortgagee. * * * The former suit effected an adjustment of

account up to the date of 18th April, 1868. The substantial cause of action 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 came into being since the matter of the last suit was heard and determined."

28. These observations, with which I agree, might, *mutatis mutandis*, be applied to the case before us. The learned Judges further point out that the first decree did not put an end to the relation of mortgagor and mortgagee, and that the Court by that decree did not pretend to foreclose the plaintiffs' right of redemption, in the event of his not paying the money then declared to be due.

29. In *Sami v. Somasundram* I.L.R.(1882) Mad. 119 Turner, C.J. and Muttusami Ayyar, J, held that the fact that the plaintiff had previously got a decree declaring him entitled to redeem and recover possession on making a certain payment, which payment he omitted to make, did not debar him from bringing another suit for redemption, the first decree not having declared that the mortgagor would be foreclosed if he did not exercise the right of redemption therein given him.

30. In a similar case *Periandi v. Angappa* ILR (1883) Mad. 423 decided by the same learned Judges, a similar view was taken. It was pointed out that, as the decree in the first suit did not create a foreclosure it did not alter the legal relation which had subsisted between the parties prior to the suit, and that the incidents of the relation exist so long as the relation exists.

31. In *Karuthasami v. Jaganatha* I.L.R.(1885) Mad. 478 Turner, C.J., and Hutchins, J. the same view was taken. Turner, C.J., had been a party to the Full Bench decision of this Court in 1871, and in this judgment it is pointed out that in the Full Bench case the original suit was not, strictly speaking, a suit for redemption, but a suit to recover property on which the mortgage debt had, it was alleged, been discharged, and the decree was absolute and unconditional.

32. These cases were followed in *Ramunni v. Brahma Dattan* I.L.R.(1892) Mad. 366 by Muttusami Ayyar and Best, JJ. In his judgment Muttusami Ayyar, J., points out the marked difference between the law of mortgage as administered in England and that contained in the Transfer of Property Act.

33. The question raised in this appeal did not directly arise in the case *Vallabha Valiya Rajah v. Vedapuratti* I.L.R.(1895) Mad. 40 but both Parker and Shephard, JJ., expressed an opinion that the failure of the mortgagor to pay in the amount found due on the mortgage within the time fixed by the decree did not of itself put an end to his right to redeem.

34. In the case of *Mainappa Chetti v. Chidambaram Chetti* I.L.R.(1897) Mad. 18 the same contentions were put forward on behalf of the mortgagee as are advanced in

this case. It was urged that the only remedy the mortgagor had was to have executed the decree in the first suit, that that decree being now barred, the mortgagor had lost his right to redeem, and could not fall back on the original mortgage and sue to redeem it, it having become merged in the decree. The learned Judges (Benson and Boddam, JJ.), repelled these pleas, holding that if the mortgagor failed to exercise the right of redemption given him by the decree, he, in effect, declined to put an end to the relation of mortgagor and mortgagee, that "though the decree may become barred, the legal relation of mortgagor and mortgagee continues, "and the mortgagor may in a fresh suit again assert his right to redeem on payment of such sum as then may be due, which sum may on taking an account be greater or less than the sum which was requisite under the former decree."

35. In the case last cited reliance was placed on behalf of the mortgagee on the decision of the Privy Council in *Hari Ravji Chiplunkar v. Shapurji Hormasji Shet* I.L.R.(1886)10 Bom. 461. That was a case in which a decree for redemption had been passed and not executed. After the period of limitation for execution of the decree had expired a second suit for redemption was brought, not upon the mortgage, but upon the decree. The Courts in India held that such a suit would not lie. That view was affirmed by the Privy Council. On behalf of the mortgagor it was contended that, if he could not succeed in his suit based on the decree, he was entitled to fall back on the mortgage and redeem that. The ground upon which their Lordships overruled this plea was, not that a second suit for redemption would not lie, but that in putting forward such a contention the plaintiff was setting up a different case from that which had been set up in the lower Court, and on which the case had been tried and decided. Their Lordships did not, it is true, express any opinion as to whether a second suit for redemption would lie, but they expressed no disapproval of the decision in ILR 7 Mad. 423, which was cited in support of the contention.

36. In the case of *Muhammad Sami-ud-din Khan v. Mannu Lal* I.L.R.(1889)All. 386 the mortgagors came into Court claiming possession of their property, which had been usufructually mortgaged, on the allegation that the amount due under the mortgage had been satisfied out of the usufruct. The Court found that a sum of Rs. 1,999-10-6 was still due to the mortgagees, and gave the plaintiffs a decree conditional on their paying this amount into Court within a time fixed, failing which payment the suit was to stand dismissed. The money was not paid in, and consequently the suit stood dismissed from the expiration of the period fixed. A second suit for redemption was dismissed by the lower Court on the ground that the right of redemption was extinguished by the order passed in the previous suit. The learned Judges (Straight and Brodhurst, JJ.), after a consideration of the previous rulings of this Court, and the provisions of the Transfer of Property Act, held that the right of redemption was not extinguished by what had taken place in the previous suit, and that the second suit was maintainable.

37. I think it has been shown above that the weight of authority is against the view taken by the learned Judges in the case of David Hay v. Razi-ud-din and further that that decision is not in consonance with the provisions of the Transfer of Property Act.

38. Dissenting, therefore, from that decision, I would allow this appeal, and, setting aside the decree of the lower appellate Court, would remand the case to that Court under the provisions of Section 562 of the Code of Civil Procedure, for decision of the remaining pleas raised in the memorandum of appeal to it. I would allow the appellants the costs of this appeal, and direct that the costs in the Courts below abide the event.

39. The order of the Court is, that the decree of the lower appellate Court is set aside, and the case remanded to the lower appellate Court under the provisions of Section 562 of the CPC for re-admission upon its file of pending appeals, and for decision of the remaining pleas raised in the memorandum of appeal. The appellants will get the costs of this appeal. The costs of the Courts below will abide the event.