

(1967) 08 AP CK 0008

In the Andhra Pradesh High Court

Case No : Second Appeal No. 862 of 1962

Official Receiver, Kurnool

APPELLANT

Vs

Vale Pedda Mounamma and Others

RESPONDENT

Date of Decision : 29-08-1967

Acts Referred:

Civil Procedure Code, 1882 — Section 13
Civil Procedure Code, 1908 (CPC) — Order 22 Rule 9, Order 23 Rule 1, Order 34 Rule 1, Order 34 Rule 10, Order 34 Rule 11
Evidence Act, 1872 — Section 115
Transfer of Property Act, 1882 — Section 100, 60, 67, 91, 92

Citation : AIR 1968 AP 336

Hon'ble Judges : P. Jaganmohan Reddy, C.J;Venkatesam, J

Bench : Division Bench

Advocate : R.V. Subba Rao, for the Appellant; F. Subrahmanvam, for the Respondent

Final Decision : Dismissed

Judgement

Venkatesam, J.—This second appeal comes before us on a reference by our learned brother, Chandrasekhara Sastry, J., in view of the question of general importance involved. The facts relevant for determination of the question in controversy are as follows:--

The second appeal is directed against the decision of the learned Subordinate Judge, Kurnool, in A.S No. 54/1961 on his file, affirming the decision of the District Munsif, Kurnool, in O. S. No. 34 of 1960. The suit was filed by two persons. Vale Pedda Mounamma and Yasamuguru Lingamma for recovery of Rupees 1,500 due on the foot of a simple mortgage. Ex. A-1, dated 23-1-1950 executed by defendants 4 and 5 in their favour for Rs. 4,000 mortgaging items 1 to 3 of the plaint schedule. They prayed for a decree for sale of items 1 and 3 and right to proceed against Rs. 1,232 14-0, the balance of sale-proceeds of item 2 (house in Kurnool Municipality), which was sold in execution of a prior mortgage decree in O. S. No 91 of 1954 on the file of that Court. Items 1 and 3 of the plaint

schedule belonged to the 4th defendant, Karnan Chidambara Rao, while item 2 belonged to his wife, the 5th defendant, K. Adi Laxamma Defendants 4 and 5 executed the mortgage deed, Ex. A-1, mortgaging all the items 1 to 3 for the discharge of Rs. 4,000 borrowed there under Item 2 was already mortgaged to one Rule Venkatarao under mortgage bond dated 14-11-1946 On the foot of that mortgage Venkatarao filed O. S. No. 91 of 1954 for sale of the hypotheca on the file of District Munsif Kurnool. To that suit he impleaded the present defendants 4 and 5 as defendants 1 and 2 (hereinafter referred to as mortgagors), and the present plaintiffs as defendants 3 and 4 (herein after referred to as puisne mortgagees). The mortgagors remained ex parte

The puisne mortgagees filed a written statement putting the plaintiff in that suit to strict proof, and alleged that the mortgagors executed in their favour a subsequent mortgage on 23-1-1950, (Ex. A-1) and that the sale proceeds remaining after the satisfaction of the first mortgage may be paid towards their mortgage debt. In that suit, the only issue framed was about the truth and validity of the first mortgage, and whether it is binding on the puisne mortgagees. That was found in the affirmative and the suit was decreed, granting six months time for redemption (Ex B-1). The preliminary decree (Ex B-6) drafted pursuant to the judgment, provided that the money realised by sale shall be paid to the plaintiff or other persons entitled to the same. The final decree Ex. B-7, passed on 5-10-1955, provided that the money realised by sale shall be paid into Court, and shall be duly applied in payment of the amount payable to the plaintiff under the preliminary decree, and under any further orders that may have been passed in this suit, and in payment of any amount which the Court may adjudge due to the plaintiff for costs of the suit and the costs of the application, and such costs, charges and expenses as are payable under Rule 10 together with subsequent interest as may be payable under Rule 11 of Order 34 Civil P. C., and that the balance, if any, shall be paid to the defendants or other persons entitled to the same.

2. Pursuant to the final decree, the mortgaged house was brought to sale, and the first mortgagee himself became the purchaser on 4-6-1956. Deducting the amount due to him, he deposited the balance of Rs. 1232-14-0 into Court.

3. The mortgagors having been adjudicated insolvents, the Official Receiver addressed a letter to the District Munsif to make over the balance of sale proceeds to him. The puisne mortgagees filed E. A. No. 257 of 1956, Ex. B-2, on 10-11-1956 under Order 34, Rules 1 and 4, and Sections 151 and 73(c), Civil P. C., for payment of the balance of the sale amount on the ground that they were entitled to the same. Notice of that E. A. was ordered to the Official Receiver as well as the advocate for the decree-holder. The application was opposed by the Advocate for the first mortgagee (decree-holder) on the ground that the decree did not in terms provide for payment of the balance to the puisne mortgagees, though it should have contained such a term, and that contention was upheld by the District Munsif in his order dated 10-11-1958, wherein he observed that the

puisne mortgagees were at liberty to apply for an amendment of the decree, but that as the decree stood, it did not recognise their rights and the cheque petition was not maintainable.

Thereupon the puisne mortgagees tiled L.A. No. 198/1957 under Sections 151 and 132 Civil P.C., for amendment of the preliminary decree in O. S. No. 91/54 and I. A. No. 199/ 57 under Sections 151 and 152, Civil P. C., for amendment of the final decree. The District Munsif, by his order dated 19-6-1957, held, on a consideration of the circumstances of the case, that the omission to give a direction for payment of the balance of the sale proceeds to the puisne mortgagees was an inadvertent slip or error, and ordered the amendment of the judgment and the preliminary and final decrees which followed it, and provided for the payment of the balance of sale proceeds to the puisne mortgagees, petitioners in I. As. 198 and 199 of 1957.

4. Thereafter, on 22-8-1957, the Official Receiver filed I. As. 478 and 479 of 1957, for a review of the order dated 19-6-57 on the ground that he was not made a party to I. As. 198 and 199 of 1957, and that he was aggrieved by the order as he represented the general body of creditors, and that the order was vitiated by an error apparent on the face of the record. That was opposed by the puisne mortgagees, but, nonetheless, the review petitions, I. As. 478 and 479 of 1957, were allowed, and the order dated 19-6-1957 on I. As 198 and 199 of 1957 was set aside. Following this order, the petition for issue of a cheque, E. A. No. 255 of 1957, was also rejected.

5. Thereupon, the puisne mortgagees, as plaintiffs 1 and 2, filed the present suit (O. S. No. 34 of 1960) impleading the Official Receiver as the 1st defendant, the alienee of item 1 as the 2nd defendant, the purchaser of item 3 as the 3rd defendant, and the mortgagors as defendants 4 and 5.

6. Items 1 and 3 are not of any appreciate value, and as the balance realised from sale of item 2 deposited in Court is only Rs. 1,232-14-0, the plaintiffs confined their claim only to Rs. 1,500, and gave up the rest of the amount due under the mortgage.

7. The suit was resisted only by defendants 1 and 2, defendants 3 to 5 having remained ex parte. Defendants 1 and 2 contended that the plaintiffs had to prove that the mortgage was true and valid, and supported by consideration, and that the suit was Barred on the principle of constructive res judicata, by reason of the decree in Order Section 91/54, and the order in I. As. 198 and 199 of 1957, which become final. It was also contended that the balance of sale proceeds became vested in the Official Receiver for the benefit of the general body of creditors. The learned District Munsif framed appropriate issues. He found that the mortgage bond, EX. A-1, dated 23-1-1950, in favour of the plaintiffs, was true, valid and sup-ported by consideration and binding on the defendants and that the 2nd defendant (purchaser of item 1) is not entitled to a direction that item 3 should be sold first on the principle of marshalling. The learned District

Munsif further held, that the plaintiffs were not barred by the principle of res judicata, and granted a decree against the sum of Rs. 1,232-14-0.

8. On appeal, the learned Subordinate Judge, Kurnool, in A. S. No. 64 of 1961, upheld that decision, and hence this appeal by the Official Receiver.

9. The contention of Sri Chelapathi, on behalf of Mr. Rule V. Subbarao, the learned counsel for the appellant, is that the suit is barred by res judicata. He relied on Order 34, Rule 4 (4), Civil P. C., the relevant portion of which is to the effect that in a suit for sale in which sale is ordered, subsequent mortgagees or persons deriving title from, or subrogated to the rights of any such mortgagees are joined as parties, the preliminary decree referred to in Sub-rule (1) shall provide for the adjudication of the respective rights and liabilities of the parties to the suit in the manner and form set forth in Form No. 9 of Appendix "D" with such variations as the circumstances of the case may require. Sub-paragraphs (2) and (3) of Paragraph 4 Form No. 9 provide that in default of payment of the amount due to the plaintiff, the plaintiff shall be at liberty to apply to the Court for a final decree that the mortgaged property or a sufficient part thereof shall be sold in payment of the amount payable to the plaintiff under that decree, and under any further orders that may have been passed in the suit, and in respect of such costs charges etc., as may be payable under Rule 10 together with subsequent interest as may be payable under Rule 11 of Order 34 of the First Schedule to the Code of Civil Procedure, and that the balance, if any, shall be applied in payment of the amount due to defendant No. 2 (puisne mortgagee), and that if the balance be left, it shall be paid to defendant No. 1, the mortgagor, or other persons entitled to receive the same.

10. The argument is that these provisions of the Civil Procedure Code, read with Order 34, Rule 1, make it obligatory that a puisne mortgagee should be impleaded as a party to any suit relating to the mortgage, and that the preliminary decree in a suit for sale passed in favour of the first mortgagee itself should provide for the determination of the amount due to the puisne mortgagee, and the payment of the same out of the surplus proceeds remaining after the satisfaction of the debt due to the first mortgagee. In the instant case, the puisne mortgagees not having availed themselves of that right are precluded from filing a second suit for sale of the mortgaged properties for the realisation of that debt. In other words, the contention of the teamed counsel is, that though the relationship of mortgagor and mortgagee may be subsisting in the case of puisne mortgage on the date of the second suit, if he did not avail himself of the rights provided for by Order 34, Rule 4, which he might and ought to have done, the principle of res judicata enunciated in Section 11, Explanation IV, would come into play.

11. The question whether the provisions of the Civil Procedure Code, like Section 11, Order 9, Rule 9 and Order 23, Rule 1, override the provisions of the Transfer of Property Act, is not res integra in the case of a second suit for redemption, and there are binding authorities on that question. But there is no authority on

the question, whether a second suit for sale on the foot of a simple mortgage will lie or not. Hence, the question will have to be examined at some length.

12. It is as well that a reference is made to the relevant provisions of the Transfer of Property Act (hereinafter called the Act). Section 60 of the Act provides that at any time after the principal money has become due, the mortgagor has a right, on payment or tender of the mortgage money, to redeem the mortgage, and the proviso lays down: "Provided that the right conferred by this section has not been extinguished by the act of parties or by decree of Court".

13. Section 67 enacts that in the absence of a contract to the contrary, the mortgagee has, at any time after the mortgage money has become due to him, and before a decree has been made for the redemption of the mortgaged property, or the mortgage money has been deposited, a right to obtain from the Court a decree that the mortgagor shall be absolutely debarred from the right to redeem the property, or a decree that the property be sold. Section 91 lays down that besides the mortgagor, any person who has any interest in or charge upon the property mortgaged or upon the right to redeem the same, may institute a suit for redemption of the mortgaged property. Section 92 provides that any of the persons referred to in Section 91, other than the mortgagor, or co-mortgagor, on redeeming the property subject to the mortgage, so far as regards redemption, foreclosure or sale of such property have the same rights as the mortgagee whose mortgage he redeems may have against the mortgagor, or any other mortgagee.

14. The other provisions of the CPC may also be noted. It may be mentioned at the outset that Order 34, C.P.C., specifically deals with suits relating to mortgages of immovable property. Rules 2 and 3 relate to suits for foreclosure; Rules 4 and 5 deal with suits for sale; and Rules 7 and 8 with suits for redemption. Rule 4 enacts that a preliminary decree has to be passed in the same terms as a decree for foreclosure, that is to say, the amount payable should be ascertained as on the date of the decree, the time for payment should be fixed, and provision should be made for redemption on payment within that time, and the only difference in the form of the decrees is that in the event of default in payment by the mortgagor, the mortgagee in a suit for sale has to apply for a decree for sale, and not for foreclosure.

Thus, whatever be the nature of the suit on a mortgage, whether it be for foreclosure, or for sale, or for redemption, the preliminary decree to be passed therein is substantially the same. The amount due to the mortgagee has to be ascertained, A time has to be fixed for payment of the amount with a power vested in the Court to extend the same, and redemption has to be decreed on payment by the mortgagor. Thus, a preliminary decree in all the three cases runs on the same lines, but in the event of default in payment of the amount, the final decree that has to be passed will be different, namely, it will be a foreclosure decree in some cases, and a decree for sale in some others. This difference in

the form of the final decree arises out of the difference in the nature of the mortgages but it has no relation to the nature of the suit filed thereon, whether it be for foreclosure, sale, or redemption. The forms in Appendix "D" are in conformity with the rules under Order 34.

15. It is clear from the provisions of Order 34, Rules 1 and 4 that a puisne mortgagee is a necessary party to a suit on a mortgage by a first mortgagee, and that in a decree for sale, he is entitled to be paid the balance of the sale proceeds after the prior mortgagee (decree-holder) has been paid up. The question now mooted is whether this right of a puisne mortgagee for sale of the mortgaged property or for a decree against the balance of the sale proceeds remaining after the payment of the first mortgagee is in any way effected by Section 11. Civil P. C.

16. It may be pedantic if we make a reference to all the decisions prior to the pronouncement of the Privy Council in AIR 1934 205 (Privy Council) for the proposition that a second suit for sale by a simple mortgagee would lie. It is sufficient to note that in *Debendra Nath Sen v. Mirza Abdul Samed Seraji* 1 Ind cas 284 , a Bench of the Calcutta High Court held that in a -suit for sale by a first mortgagee, where there are successive mortgagees, puisne mortgagees may be allowed to have their claim satisfied out of the surplus sale proceeds if any; and if an order of this description is made, a separate suit will not lie at the instance of the puisne mortgagee for the enforcement of his security, because, if the junior mortgagee is in a position to have his claim satisfied from the surplus sale proceeds, he cannot be allowed to maintain another action to reach that very surplus, and his remedy is to follow the surplus in the Court which made the previous judgment.

If in such a suit, the decree does not provide for the realisation of the claim of a puisne mortgagee from the surplus sale proceeds, although it reserves to him liberty to ask for the administration of the estate of his mortgagor's father, then he may maintain an action for recovery of his money due on his security, and his action will not be barred by the doctrine of *res judicata*, under Explanation III of Section 13 of the Civil Procedure Code, 1882, even if in his written statement in the suit the first mortgagee expressly asked that provision might be made for payment of his dues, and no such provision was made.

17. In *B. Venkata Lakshmi Narayana Row v. A. Venkayya* AIR 1919 Mad 63, a Bench of the Madras High Court held that where, in a suit on a mortgage to realise the amount of the security, the puisne mortgagee was impleaded as a party and a decree was passed directing the sale of the property and the application of the proceeds in satisfaction of the decree and payment of the surplus to the defendant or whoever was entitled to it, the puisne mortgagee was not barred either by the provisions of Section 11, or Section 47 from enforcing his mortgage by sale of the property. It was further held that, where a decree does not provide for the working out of the rights of the puisne encumbrancer without additions to it which the executing Court has no power to make, such

rights are not barred of enforcement by a separate suit by the provisions of Section 47. C.P.C.

18. We shall now examine whether that view has in any way been altered subsequently.

19. In AIR 1934 205 (Privy Council) decided under the provisions of the Transfer of Property Act, 1882, prior to its amendment in 1929, a decree for redemption made in 1896 in respect of a mortgage by conditional sale provided that if the mortgagor failed to pay in accordance with the decree, his "case will stand dismissed". But it had not provided that the mortgagor would be absolutely debarred of all right to redeem, as required by Section 92. The mortgage money was not paid, and mortgagee remained in possession but did not apply for an order u/s 93 debarring the right to redeem. The mortgagor filed a fresh suit to redeem the property, and the suit was resisted on the ground that it was barred by res judicata. The Judicial Committee repelled that contention, holding that the decree of 1896, properly construed, did not extinguish the right to redeem and consequently, by Section 60 of the Act that right still existed, and that the right was not barred by res judicata because the former suit related to the right at a different date.

The issues decided in the former suit, it was held, were; (1) whether the mortgagors were then entitled to redeem; and (2) the amount then to be paid if redemption then took place; while the issues in the second suit before the Privy Council were: (1) whether the right to redeem now exists, and (2) the amount now to be paid if redemption now takes place. Before the Board the plea of res judicata was dealt with as point No. 2 in the judgment, and the question whether by reason of the non-payment under the decree of 1896 the mortgagor's right to redeem became extinguished u/s 60, was dealt with as point No. 3. The observations of Lord Russell of Killowen, who spoke for the Judicial Committee, are apposite:

"If it could be said that the old decree involved a decision that the mortgagor's right to redeem was extinguished, that matter would indeed be res judicata, but this very question of the meaning and effect of the old decree arises for consideration under the third point. To that extent the second and third points overlap. It is sufficient to say in regard to the second point, that if the appellants fail to establish under their third point that the old decree extinguished the right to redeem, there is, in their Lordships' opinion, no ground for saying that the old decree operated by way of res judicata so as to prevent the Courts, u/s 11 of the Code of Civil Procedure, from trying the present suit."

As regards the third point, the Judicial Committee held that the relevant sections are Sections 60, 92 and 93 and that the answer depended upon a correct appreciation of the joint effect of those sections. His Lordship observed:

"The right to redeem is a right conferred upon the mortgagor by enactment, of which he can only be deprived by means and in manner enacted for that

purpose, and strictly complied with. In the present case the only basis for the claim that the right to redeem has been extinguished is Section 60, but in their Lordships view the old decree cannot properly be construed as doing that which it does not purport to do, viz., as extinguishing the right to redeem."

This decision, therefore, is an authority for the position that the right to redeem is not extinguished so long as the decree for redemption is not strictly in accordance with the form prescribed, and that in such a case the second suit for redemption is not barred u/s 11, Civil P.C.

20. In Polpakara Manakkal Viroopakshan Nambudripad Vs. Pulipre Tarwad Karnavan and Others, it was held, following this decision of the Privy Council, that unless, as contemplated by Section 60 of the Transfer of Property Act, the right of redemption has been extinguished in one of the modes contemplated by the statute, the mere fact that a decree for redemption obtained on a former occasion had not been executed will not prevent the mortgagor from maintaining a subsequent suit, for redemption. That was a case where a second suit was filed for redemption notwithstanding the fact that a decree for redemption was passed previously, though it was not executed for certain reasons.

21. In Vedapuratti v. Vallabha Valiya Raja 1902 ILR 25 Mad 300, the opinion of the Full Bench was that even assuming that after a decree for redemption the relationship of mortgagor and mortgagee continues, a second suit for redemption did not lie on the principle of res judicata. Varadachariar, J., who spoke for the Court, held that after the expression of opinion of the Privy Council it was not possible to maintain that the decision of the Full Bench of the Madras High Court in ILR (1902) Mad 300 was any longer available.

22. The next case which may be noticed is a decision of the Federal Court in T.C. Subba Rao v. M. Raju 1950 1 M LJ 752 : AIR 1950 FC 1. That was an appeal against the decision of the Madras High Court in Mattapalli Raju and Others Vs. Challa Venkata Raghavayya and Others, which held that a second suit for redemption was barred by Section 11, C.P.C., on the ground that Section 60 of the Transfer of Property Act could not have the effect of overriding Order 23, Rule 1, C.P.C., and that in ILR 56 All 561 : AIR 1934 PC 205 (supra), that question was not considered. That view of the High Court was reversed by the Federal Court, which held that the right of redemption is an incident of a subsisting mortgage, and it subsisted so long as the mortgage itself subsisted, and as held by the Privy Council in Raghunath Singh's case. ILR 56 All 561 : AIR 1934 PC 205 (supra), the right of redemption can be extinguished only as provided in Section 60 of the Transfer of Property Act, and, unless the equity of redemption was so extinguished, a second suit for redemption by the mortgagor, if filed within the period of limitation, is not barred. The contention that the previous suit for the same relief was abandoned without obtaining leave of the Court to file a second suit under Order 22, Rule 1, Civil P. C., was repelled by Kania, C. J., who spoke for the Court,

The learned Chief Justice referred to the decision of a Full Bench of the Bombay High Court in *Rajaram Vithal Sutar Vs. Ramchandra Pandu*, which held that the general terms of Order 22, Rule 9, Civil P. C., which provided that, where a suit abated or was dismissed under the order, no fresh suit shall be brought on the same cause of action, cannot override the specific terms of Section 60 of the Transfer of Property Act. It was pointed out by the Full Bench that while the CPC dealt with the procedure relating to all suits, there was a special law which dealt with the rights of mortgagors and mortgagees and that substantive law was to be found in the Transfer of Property Act, which provided only two ways in which the right of redemption can be extinguished, viz., (1) by act of parties, and (2) by a decree of Court. The Full Bench disagreeing with the view of the Madras High Court in *Mattapalli Raju and Others Vs. Challa Venkata Raghavayya and Others*, held that the provisions of Order 22, Rule 9, did not extinguish the right of redemption and a second suit for redemption was, therefore, permissible. Kania, Chief Justice, held that in the opinion of the Federal Court the view taken by the Madras High Court was incorrect, and that they preferred the view of the Bombay High Court, and, that, as held by the Privy Council in AIR 1934 205 (Privy Council), the right of redemption can be extinguished only as provided by Section 60 of the Transfer of Property Act, and unless so extinguished, a second suit for redemption by the mortgagor, if filed within the period of limitation is not barred,

23. The next case which needs to be referred is a decision of the Madras High Court in *Ammenumma Vs. Chelampiriyarath Beeviamma and Others*, . It is not necessary to state the many facts in that case. It is enough to state for our purposes that the plaintiff in that suit obtained a compromise decree for payment of a certain sum or money which was charged on certain properties. The amount not having been paid, the charge holder filed a suit in 1938 for recovery of the amount then due, and it resulted in preliminary decree for sale. But that decree did not contain the usual clause for redemption, that on payment of the mortgage amount the mortgagee shall deliver the title-deeds, and, if necessary, retransfer the property to the mortgagor and put him in possession of the same. A petition for passing of the final decree was filed, but not successfully prosecuted.

Thereafter, a second suit was filed by the charge-holder in 1945 for the recovery of the amount due under that compromise charge decree, after giving credit to certain payments. The defendant-judgment-debtor contended that the suit was barred by *res judicata*. The argument was repelled by Venkatarama Ayyar, J. (as he then was), who spoke for the Court. After referring to the relevant sections and reviewing the entire case-law, his Lordship held that a mortgagee has a right u/s 67 of the Transfer of Property Act to file a suit for sale subject only to the conditions prescribed therein, and, of course, subject to the law of limitation, and that a second suit was not barred under the CPC merely by reason of a decree for sale passed on the same mortgage in a prior suit when there was neither a payment nor deposit of the mortgage amount as provided by Section

87. The conclusion of their Lordships is stated thus:

"In conclusion we are of opinion that a mortgagee has a right u/s 67 of the Transfer of Property Act to file a suit for sale subject only to the conditions prescribed there in and, of course, subject to the law of limitation and that such a suit is not barred u/s 11 of the CPC by reason of a decree for sale passed on the same mortgage in a prior suit and that u/s 100 of the Transfer of Property Act the same principle applies to a second suit for sale to enforce a charge."

24. In so far as that decision laid down that the provisions of the Transfer of Property Act govern a suit on the foot of a charge created by a compromise decree, as in that case, we cannot agree. A Full Bench of our High Court, of which one of us (Jaganmohan Reddy, J.) (as he then was) was member in *Sri Rajah Mommadevara Naganna Naidu Bahadur Jamindar Garu (died) and Others Vs. Sri Rao Janardhana Krishna Rangarao Bahadur Jamindar Garu and Others*, had to consider that very question. The facts in that case were as follows: The plaintiff and first defendant were brothers, the second defendant being their step-mother. In a suit for partition of joint family properties, to which the step-mother was impleaded as a party entitled to maintenance, a maintenance decree was passed in her favour with a charge on two sets of properties in Schedule A and B. To avert the sale of some of the properties in B Schedule in execution of the maintenance decree, the plaintiff made certain payments towards the decree amount. He later on filed the suit contending that as every item in A and B Schedules was liable to contribute to the maintenance, the owners of the A Schedule properties were liable to make contributions pro rata, calculated on the basis of the values of the respective items of the properties on the date of the maintenance decree.

That contention was rejected by the Full Bench, holding that the rules relating to charges are contained in Section 100 of the Transfer of Property Act, and that all the provisions applicable to simple mortgages are attracted to charges within Section 100, but in order to fulfil the definition of "charge in Section 100 it must be one created by "act of parties or operation of law". It was also held that Section 100 may be regarded as exhaustive of all charges, and it does not contemplate a charge provided by a decree which may be regarded as a "judicial lien". Both on the language of the section as well as preponderance of judicial authority, the Full Bench held that Section 100 is restrictive in its operation to the two categories of charges mentioned therein, and cannot be extended to charges created by decrees of Courts. Accordingly, it was held that the plaintiff before them was not entitled to the benefit of Section 82 read with Section 100 of the Transfer of Property Act, and could not claim any contribution from the defendants.

25. In view of this Full Bench decision, we are unable to follow the decision of a Bench of the Madras High Court taking a contrary view in this regard.

26. Even so, the question remaining for consideration is, whether in a case of

mortgage or a charge other than a charge created by a compromise decree, the decision of the Divisional Bench of the Madras High Court in *Sri Rajah Mommadevara Naganna Naidu Bahadur Jamindar Garu (died) and Others Vs. Sri Rao Janardhana Krishna Rangarao Bahadur Jamindar Garu and Others*, , should be followed or not. Venkatarama Ayyar, J. (as he then was), referred to the decision in *Sami v. Somasundaram* ILR 1883 Mad 119, *Periandi v Angappa* (1884) 7 Mad 423; *Karuthasami v. Jaganatha* ILR 1885 Mad 478; and *Ramunni v. Brahma Dattan* ILR 1892 Mad 366, all of which were suits for redemption of mortgages, and held that according to the decision of the Judicial Committee in AIR 1934 205 (Privy Council) , Section 60 of the Transfer of Property Act is a paramount provision under which the question is, whether the right to redeem has been extinguished by act of parties Or decree of Court. Where there has been no such extinguishment, his Lordship held an action for redemption will be available to the mortgagor, notwithstanding that there was a prior action, and that the issues involved in the two suits for redemption were different because the right of redemption and the amount to be paid for redemption would be different on me two dates, or, in other words, that the cause of action is not the same, and the principle of *res judicata* would be inapplicable. The Divisional Bench followed the decision of the Federal Court in 1950 1 M LJ 752 : AIR 1950 FC 1, and stated that a second suit for redemption will not be barred by the provisions of Order 9. Rule 9; Order 21, Rule 9; Order 23, H, 1, Civil P. C.

27. It was further held by the Bench that Section 67 dealt with suits both for fore closure and for sale, and the provisions contained therein must be read distributively in relation to those two subjects. So read, it was held. Section 67 enacted that a suit for foreclosure can be filed after the mortgage amount has become due and before a decree for redemption has been passed, and that a suit for sale can be filed after the amount has become due and before it has been paid or deposited.

28. Adverting to the contention that there is nothing in Section 67 corresponding to the proviso in Section 60, on which the decision of the Privy Council in ILR 56 All 581 :AIR 1934 PC 205 (*supra*) and of the Federal Court in 1950 1 M LJ 752 : AIR 1950 FC 1 were based, it was hew that what was enacted in the form of a proviso to Section 60, was enacted as a part of Section 67 itself, and in substance the position is not different. It was observed that the difference in the draftsmanship was due to the fact that while Section 60 deals with only the right to redeem, Section 67 deals with both the right to foreclosure and the right to sale and the language had to be adopted to cover both the rights. His Lordship stated:

"When once it is held, as now it has been, that a second suit for redemption is maintainable so long as it is not barred u/s 80 of the Transfer of Property Act, it should logically follow that a second suit For sale should likewise be maintainable so lone as it is not barred by Section 67 of the Transfer of Property Act. If Section 11 of the CPC cannot operate to curtail or abridge the rights conferred by

Section 60 of the Transfer of Property Act, on principle, it cannot operate to cut down the rights u/s 67 of the Transfer of Property Act either and the second suit for sale must accordingly be held to be not barred as *res judicata*."

Venkatarama Ayyar, J., also observed that the reasoning in ILR All 561 : AIR 1934 PC 205 (*supra*) for holding that there was no bar of *res judicata* in a second suit for redemption also applies to a second suit for sale on the ground that the amount payable by the mortgagor has to be ascertained and declared in a preliminary decree which is to be passed under Rules 2 and 4 of Order 34 in suits for foreclosure and sale.

29. We respectfully follow the cases referred to by the learned Judges, and their reasoning for the aforesaid conclusion, though, as already observed, that was a case of charge created by a compromise decree.

30. The decisions cited by the learned counsel for the Official Receiver in *Sripada Venkata Jagannadharao and Others Vs. Kannepalli Venkatachalamayya Sastry and Others*, and *Shiv Kumar Prosad v. Trustees for the Improvement of Calcutta* (1947) 51 CWN 798, do not touch the question in controversy, and are distinguishable

31. The mortgage in the instant case is dated 23-1-1950, and the suit was filed in 1960. It cannot be, and has not been, argued that the suit for sale is barred by limitation. As the jural relationship of mortgagor and mortgagee subsists, it follows from the foregoing discussion that the second suit for sale of the mortgaged property is not barred by *res judicata*, or principles of constructive *res judicata*.

32. Yet another contention raised on behalf of the respondent is that the appellant is precluded from resisting the suit on the principle that a party cannot approbate and reprobate. As already noticed, the Official Receiver opposed the petition for the issue of a cheque filed by the puisne mortgagees, E.A. No. 255/57 (Ex. B-3), and that was dismissed on 22-1-1958 by the District Munsif following his order on I. As. Nos. 478 and 470 of 1957, dated 12-10-1957. The contention raised was that the Court had no jurisdiction to amend the judgment granting a preliminary decree, or the preliminary decree, and the final decree passed pursuant to it, and that the order of amendment passed in the first, ordering the payment of the surplus proceeds to the puisne mortgagees was vitiated by an error apparent on the face of the record. That contention was upheld, and the Court also held that there was no provision of law under which it could give directions to the puisne mortgagees under Order 34, Rule 4, Civil P. C., and allowed the petitions for review.

It is because of that order that the puisne mortgagees were obliged to file the present suit, and in paragraph 4 of the written statement the Official Receiver now contends that the plaintiff-puisne mortgagees are not entitled to recover the balance of sale proceeds in O.S. No. 91 of 1954, and that the suit is barred by *res judicata*. It was also contended that the puisne mortgagees, as defendants in

that suit, expressly prayed that they might be granted the balance of sale proceeds, and that even irrespective of the above prayer they were entitled in law to the above relief under Order 34, Rule 4 (4), Civil P. C., but since the plaintiffs deliberately refrained from proving the suit mortgage bond, and getting a provision made in the preliminary decree, which they allowed to become final, the present suit is barred by res judicata or principles of constructive res judicata.

33. It is really incomprehensible how, having contended in the proceedings in O.S. No. 91 of 1954 that the decree had not provided for payment of the surplus proceeds to the puisne mortgagees, and the decree could not be amended, it is open to the Official Receiver to contend that the decision in that suit operated as res judicata. It is well settled that a party litigant cannot be permitted to assume inconsistent positions in Court, to play fast and loose, to blow hot and cold, to approbate and reprobate, to the detriment of his opponent. This doctrine applies not only to successive stages of the same suit, but also to another suit, other than the one in which the position is taken up, provided that the second suit grown out of its judgment in the first suit; vide *Dwijendra Narain Roy v. Joges Chandra* AIR 1924 Gau 600; *Hemanta Kumari Devi Vs. Prasanna Kumar Datta*, and *Nagubai Ammal and Others Vs. B. Shama Rao and Others*, . We, therefore, hold that the Official Receiver is precluded from raising the plea of res judicata.

34. Another argument advanced by the learned counsel for the appellant is that the puisne mortgagees may only be entitled to ask for sale of the mortgaged properties, but not for a decree in respect of Rs. 1,232-14-0, the surplus sale proceeds in Court deposit. We are unable to accept this contention. The second item of the plaint schedule was sold, and the balance remaining in Court after payment to the first mortgagee represents the substituted security against which he is entitled to proceed, and in order to reach that amount the necessity for a preliminary and final decree would not arise. In (1909) 1 Ind Gas 264 already cited, It was held that the rights of a mortgagee are not destroyed by the mere transmutation of the subject-matter of the security into a different form without his consent, We agree with the lower Courts that the puisne mortgagees are entitled to proceed against the said amount.

35. For all these reasons, the second appeal fails, and is dismissed with costs.