

(1949) 05 BOM CK 0004

In the Bombay High Court

Case No : Civil Appeal No's. 2 and 3 of 1948

Thota China Subha Rao

APPELLANT

Vs

Mattapalli Raju

RESPONDENT

Date of Decision : 10-05-1949

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 9
Transfer of Property Act, 1882 — Section 53A

Citation : (1950) 52 BOMLR 181

Hon'ble Judges : Mukherjea, J;Mahajan, J;Harilal Kania, J;Fazl Ali, J

Bench : Full Bench

Final Decision : Allowed

Judgement

Harilal Kania, Kt., C.J.—These are two appeals from one judgment of the High Court of Madras, disposing of two appeals brought to it from two suits filed in the Court of Coconada. In the High Court the appeals were heard together. The material facts lie in a small compass. As the parties in the two suits and appeals are differently arrayed, it will be convenient to refer to them as the mortgagor, the mortgagees and the lessees

2. On January 2, 1914, the mortgagor acting for himself and as the guardian of his undivided minor son granted a mortgage of 51.20 acres of Inam lands along with other lands (which need not be hereafter referred to as they were later on disposed of by consent of parties) to secure a sum of Rs. 30,000 lent by the mortgagees. In respect of the suit lands it was a non-possessory mortgage. On November 27, 1915, he executed another mortgage with possession of the suit lands for Rs. 4,000, but as the lands were in the occupation of the lessees under a lease for 15 years from F. 1320 to 1331 (1910-11 to 1924-25) at an annual rent of Rs. 1,000, it was stipulated that the mortgagees were to receive the rent from the lessees and to take possession of the lands on the expiry of the lease. On July 31, 1916, there was a further mortgage of the suit lands along with two other properties to the mortgagees for Rs. 4,000. In that deed it was provided,

inter alia, that on the expiry of the lease at the end of ff. 1834 (30th June, 1925), the mortgagees should take possession of the suit lands and pay a rent of Rs. 4,000 per annum from F. 1335. It was further provided that after payment of the revenue and taxes payable in respect of the lands, the balance should be applied first in reduction of the debt due under the mortgage of 1915, next in discharge of the principal and interest due under the bond of 1916 and thereafter towards the interest due under the first mortgage of 1914. The mortgagees were however to relinquish the lands irrespective of the terms of the lease, whenever the mortgagor paid the amounts due under all the mortgages.

3. As provided in the mortgage of 1915, the lessees paid the rent to the mortgagees till 1922 when the mortgagor alleging that the mortgages had all been discharged demanded rent from the lessees for himself. The lessees accordingly paid rent for the subsequent period to the mortgagor till the expiry of the lease in June 1925. The lease was thereafter renewed by the mortgagor at first for one year and thereafter for 10 years by a registered document. In view of the repudiation of their rights, the mortgagees brought a suit against the lessees in 1926 to recover possession and arrears of rent from 1922 till 1925 and for mesne profits thereafter till possession was given. They contended that the mortgages had not been fully discharged and they were entitled to possession under the mortgages of 1915 and 1916. In this suit several interlocutory orders were passed under one of which the mortgagor was added as a party. The litigation appears to have taken an unduly long time and ultimately a preliminary decree for sale was passed on October 31, 1942. The mortgagees filed an appeal against that decree to the High Court.

4. As a counter-move to the mortgagees' suit, in 1929 the mortgagor filed a suit to redeem and to recover possession of the mortgaged properties, offering to pay what was due under the mortgages. After the hearing of the suit had proceeded to some extent, it was dropped as it was thought that the parties had settled their disputes. The compromise is now contended by the mortgagees to be evidenced by two documents dated November 7, 1932. The first document executed by the mortgagor is an agreement in favour of the mortgagees. It stated that having regard to the fact that the debts due to the mortgagees under the different mortgages executed by the mortgagor cannot be fully satisfied from the properties and to prevent the mortgagees from recovering the balance from the other properties of the mortgagor and as the mortgagees not agreed to pay Rs. 100 at the time of the registration of the sale deed, the mortgagor had agreed to execute and give to the mortgagees at their cost a proper sale deed in respect of the said properties within three months from that date, so that it may not be necessary for the mortgagees to realise the amounts of their mortgage claims by instituting a suit to enforce the same. The second document, which is passed in favour of the wife of the mortgagor and is signed by the mortgagee, recites that all properties of the mortgagor had been mortgaged to the mortgagees with or without possession and the debts due to the mortgagees had remained unpaid. They were requesting the mortgagor to sell the properties to

them as the value of the properties was not sufficient even to satisfy the mortgage debts. The wife of the mortgagor pleaded that having regard to the large amounts paid towards the mortgage debts, if the properties were sold to others, some amount would remain in the hands of the mortgagor. Since however she had caused an agreement to be executed by her husband to sell the properties to the mortgagees, the mortgagees agreed to execute in her favour for her maintenance and residence, immediately upon the mortgagor executing a sale deed in favour of the mortgagees, a gift deed of the properties mentioned in the schedule (which was one of the properties and a house covered by one mortgage) and deliver possession thereof to her, so that she may enjoy the same fully. Following the execution of these two agreements, the suit filed by the mortgagor was allowed to be dismissed with cost on November 9, 1932, and possession of the plot of land agreed to be gifted to the mortgagor's wife was given over. No registered deeds were ever executed as provided in both these two documents, nor was the sum of Rs. 100 paid to the mortgagor. As nothing was mentioned in those two documents about the possession of the suit lands, they continued to remain in the occupation of the lessees. It appears that notwithstanding these agreements, the mortgagor continued to receive from the lessees the rent reserved under the original lease, and in 1984 when the mortgagees alleged that no such agreement had been made, he applied to be made a party to the mortgagees' suit against the lessees. Strangely enough, a consent order was taken in that suit confining the trial to those issues which were originally framed on November 11, 1926, before the mortgagor was added as a party to the suit. Thereafter the mortgagor instituted original suit No. 11 -of 1938 praying for redemption and claimed the benefit of the provisions of the Madras Agriculturists Relief Act; 1938. In that suit a decree for redemption on payment of Rs. 2,655-13-0, which was found due on the mortgages with interest and costs, was passed by the trial Court. From this also the mortgagees preferred an appeal to the High Court. We shall deal with the appeal arising out of the redemption suit first, because both the appeals were allowed by the High Court on the ground that the mortgagor had lost his right of redemption.

5. In the High Court the decree for redemption was challenged on the ground that the suit was barred under Order XXIII, Rule 1, of the Code of Civil Procedure, because the previous Suit No. 53 of 1929 brought for the same relief was abandoned, without obtaining leave to file a second suit in respect of the same subject matter. It was argued that the equity of redemption was therefore extinguished. It was contended that the subject matter of the later suit was the same as the subject matter in the previous suit. In the alternative, it was contended that the mortgagor having agreed under the document of November 7, 1932, to sell to mortgagees the mortgaged properties (including the suit lands) in satisfaction of the mortgagor's liabilities under the different mortgages and for an additional sum of Rs. 100, the equity of redemption was extinguished by the act of parties and it was immaterial if the parties had carried out or not the terms of the compromise. In the further alternative it was contended that the

compromise having been partly performed the same should be enforced u/s 53(A) of the Transfer of Property Act and therefore the mortgagor was not entitled to claim redemption, although no sale deed in fact had been executed in favour of the mortgagees. The High Court accepted the first contention and allowed the appeals of the mortgagees. It did not consider it necessary to deal with the other two alternative contentions.

6. The relevant portion of Order XXIII, Rule 1, of the Code of Civil Procedure, on which the mortgagees relied, runs as follows :

Order 23.1(1) At any time after the institution of a suit the plaintiff may...withdraw his suit or abandon part of his claim.

(2) Where the Court is satisfied?

* * * * * it may...grant the plaintiff permission to withdraw from such suit or abandon such part of a claim with liberty to institute a fresh suit in respect of the subject matter of such suit or such part of a claim.

(3) Where the plaintiff withdraws from a suit or abandons part of a claim, without the permission referred to in Sub-rule (2), he...shall be precluded from instituting any fresh suit in respect of such subject matter or such part of the claim.

7. The Judges of the Madras High Court, in their judgment, considered the decision of the Privy Council in (1934) L.R. 61 I.A. 362 (Privy Council) but came to the conclusion that Section 60 of the Transfer of Property Act was not exhaustive and the right to redeem can be extinguished by other provisions of law, including the provisions of the Civil Procedure Code. They held that Order XXIII, Rule 1, was one such provision and therefore the mortgagor could not get a decree for redemption.

8. The question whether a mortgagor can file a second suit for redemption after a previous suit for redemption filed by him had not ended in actual redemption has come for consideration of different High Courts and also by the Judicial Committee of the Privy Council. Strong reliance was placed on behalf of the mortgagees on the decision of the Privy Council in (1887) L.R. 15 I.A. 66 (Privy Council) There, one Bhoop Singh had mortgaged the property by way of conditional sale. As the lands were entered in the Taluqdari sanad in the name of the mortgagee, Bhoop Singh filed a suit to redeem the under-proprietory right in the lands only. He alleged that he had paid to the mortgagee Rs. 3,000 and was ready and willing to pay the balance, but the mortgagee wrongfully refused to allow him to redeem. That suit was dismissed for default of appearance of the plaintiff, and the Privy Council held that it was dismissed u/s 114 of the CPC of 1859, which corresponds to Order IX, Rule 8, of the CPC of 1908. Section 119 of the CPC of 1853, which corresponded to Order IX, Rule 9, of the CPC of 1908, provided that no second suit would lie on the same cause of action. Bhoop Singh's heirs filed a second suit in 1888 for redemption of the superior

proprietary right in the land. It was argued on behalf of the mortgagee that as the mortgagor, after his suit was dismissed, had taken steps for the re-hearing of the suit and failed in his attempts, no second suit for redemption lay. On behalf of the mortgagor it was argued that as the second suit was for the redemption of the superior proprietary rights, the cause of action was different and the suit was not barred. The Privy Council rejected this contention. That decision is not applicable to the facts here. The mortgage was in 1853 and the first suit was filed in 1864. At that time the Transfer of Property Act was not even enacted and there were no provisions like Section 60 of the Transfer of Property Act applicable to Oudh, where the litigation started and the lands were situated. It was contended on behalf of the mortgagee that as the mortgagor had failed to carry out his covenant to pay according to the mortgage bond, his right to redeem had gone. Some reliance was put on Section 6 of Act I of 1869. It was pointed out that the section could not be considered so as to affect retrospectively, a decree between the parties existing at the time of the enactment and re-establish relations which by the decree (dismissal of the suit by default) had been held to have ceased. A form of decree in a redemption suit which provided for the extinguishment of the right to redeem if the money was not paid as provided in the decree, appears to be in use at the time. Throughout the judgment there is no reference to the principle now embodied in Section 60 of the Transfer of Property Act. That decision therefore is no authority against the contention that after the enactment of Section 60 of the Transfer of Property Act as substantive law, the equity of redemption is not extinguished by a dismissal of a redemption suit for default of the plaintiff's appearance, or that if the first suit was dropped for any such reason, a second suit for redemption was barred because it was on the same cause of action. The Privy Council rejected the only contention urged before them that as in the earlier suit redemption was claimed of under-proprietary rights and in the later suit of superior proprietary rights, the cause of action was different. The latest decision of the Privy Council on the point is in *Raghunath Singh v. Hansraj Kunwar*. (1931) L.R. 61 IndAp 362 : 67 M.L.J. 813 36 Bom. L.R. 1189 In that case a decree for redemption, made in 1896 in respect of a mortgage by way of conditional sale, provided that if the mortgagor failed to pay the amount mentioned in the decree in accordance with the terms thereof, his "case will be dismissed." u/s 92 of the Transfer of Property Act, 1882, the decree should have provided that upon default, the mortgagor should be absolutely debarred of his right to redeem." No payment of the mortgage money was made. The mortgagee remained in possession but did not apply for an order u/s 93 of the Transfer of Property Act debarring the mortgagor's right to redeem. In 1924 a fresh suit to redeem the property was brought by the mortgagor. It was held that the decree of 1896, properly construed, did not extinguish the right of redemption and consequently u/s 60 of the Transfer of Property Act that right still existed. Before the Board, three contentions were raised. The first was that the second suit, though in a form a redemption suit, was in reality an application to enforce an old decree of September 25, 1896. A suit could not be maintained for that, because of Section 47 of the Code of Civil

Procedure, and the execution of the old decree was barred by limitation. The Judicial Committee rejected this contention and observed that if a second suit for redemption is maintainable, the answer to the contention was that the second suit was a redemption suit and not an application to enforce the old decree. Section 47 of the CPC cannot therefore defeat the claim to redeem. The second contention was that the decision in the former suit operated as *res judicata* and Section 11 of the CPC prohibited the Courts from trying the second suit. Their Lordships rejected this contention also. They pointed out that the issues decided in the former suit were (i) whether the mortgagors were then entitled to redeem : (ii) and the amount then to be paid if redemption then took place. The issues in the second suit were (i) whether the right to redeem now existed; and (ii) the amount now to be paid if redemption now took place. They observed that if the mortgagor's right to redeem was extinguished, that was a separate question which may overlap the question of *res judicata*, but if it was held that the right to redeem was not extinguished, there was no ground for saying that the old decree operated as *res judicata* u/s 11 of the Code. The structure of the issues noticed by the Board shows clearly that in each redemption action, the cause of action will be different, because the claim will be (1) whether the mortgagor had the right to redeem "when he claimed to do so"; and (2) what amount was due by him "when he made that claim." Both the contentions will be different when advanced at different times. The third contention was that no payment having been made under the old decree the former suit stood dismissed on November 15, 1896, with the result that the mortgagor's right to redeem became extinguished u/s 60 of the Transfer of Property Act. On this question their Lordships noticed that the provisions of the Transfer of Property Act were applicable to that part of India from which the appeal arose. It was impossible to say (as might be said under English law) that the dismissal of a redemption action operated as a foreclosure, unless the justification of that statement was found in the language of the Transfer of Property Act. Their Lordships held that the Transfer of Property Act did not justify such a conclusion. They examined in detail the provisions of Section 60 of the Transfer of Property Act which conferred upon the mortgagor the right to redeem at any time after the principal money had become payable, That right was limited only by the proviso which was in these terms :

Provided that the right conferred by this section has not been extinguished by act of the parties or by order of n Court.

9. It was pointed out that in that case there was no question of extinguishment of the right to redeem by act of the parties. Therefore, if it had been extinguished, an order of the Court had to be produced to that effect. It was noticed that the decree in the first suit had departed from the recognised form in which decrees in redemption suits were prescribed to be passed because in default of payment it simply provided that "his case will stand dismissed." Their Lordships refused to construe those words as equivalent to debarring the plaintiff from all right to redeem. They observed as follows (p. 869):

The right to redeem is a right conferred upon the mortgagor by an enactment, of which he can only be deprived by means and in manner indicated for that purpose, and strictly complied with.

Their Lordships examined the case cited before them and held that by the order made in that suit the right to redeem had not been extinguished. The decision in (1887) L.R. 15 I.A. 66 (Privy Council) was not even cited as relevant to the decision of the case.

10. By an amendment of the Transfer of Property Act made by Act, XX of 1929, the word "order" has since been substituted by the word "decree."

11. In *Bombay, in Bamchandra Kolaji v. Hanmanta* ILR (1920) Bom. 939 : 22 Bom. L.R. 939 a suit for redemption was brought but permission was granted to withdraw the same on condition that a fresh suit be brought within two years and on the further condition that the defendant's costs were paid. A second suit was brought by the mortgagor to redeem, but eight years after the order of withdrawal was made. It was argued that the suit was time-barred, and as the condition was not fulfilled, no second suit for redemption could be permitted. Macleod C.J. held that the law allowed a particular period to the mortgagor within which he can redeem the mortgage. He observed (p. 942) :

The mere fact that he files a suit to redeem and then either abandons or withdraws it will not deprive him of his right to redeem.

12. Heaton, J. did not go to that length but held that the period of limitation for redemption cannot be curtailed by agreement. In *Shridkar Sadba v. Ganu Mahadu* ILR (1927) Bom. 111 a suit for redemption was filed but was dismissed under Order IX, Rule 8, of the Code of Civil Procedure. The mortgagor brought a second suit for redemption and it was contended that it was barred under Order IX, Rule 9, of the Code. Marten C, J. and Crump J. rejected this plea. They relied on the previous decisions of the Bombay High Court including *Bamchandra Kolaji Patils* case ILR (1920) Bom. 989 : 22 Bom. L.R. 939 and pointed out that the decision of the Privy Council in (1887) L.R. 15 I.A. 66 (Privy Council) was not against the view taken by them as it was; decided on a different state of law. Recently, in *Bajaram Vithal v. Ramachandra Pandu* (1947) 50 Bom. L.R. 45 a full bench of the Bombay High Court held that the general terms of Order XXII, Rule 9, of the Code of Civil Procedure, 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 that the CPC dealt with the procedure relating to all suits. There was a special law which dealt with the rights of mortgagors and raortgajees and that substantive law was to be found in the Transfer of Property Act. That substantive law provided only two ways in which the right of redemption can be extinguished and they were : (i) by act of the parties, (ii) by decree of the Court. Disagreeing with the view of the Madras High Court in the present appeal under consideration they held that the provisions of Order XXII,

Rule 9, did not extinguish the right of redemption and a second suit for redemption was therefore permissible.

13. In our opinion, the view of the Madras High Court is incorrect. We prefer the view taken by the Bombay High Court on this point. The right of redemption is an incident of a subsisting mortgage and it subsists so long as the mortgage itself subsists. As held by the Privy Council in (1934) L.R. 61 I.A. 362 (Privy Council) the right of redemption can be extinguished as provided in Section 60 of the Transfer of Property Act, and when it is alleged to have been extinguished by a decree, the decree should run strictly in accordance with the form prescribed for the purpose. Unless the equity of redemption is so extinguished, a second suit for redemption by the mortgagor, if filed within the period of limitation, is not therefore barred. The Board expressly held that if the appellants failed to establish that the old decree extinguished the right to redeem, there was no ground for saying that the old decree operated as *res judicata* and the Courts were prevented from trying the second suit u/s 11 of the Code of Civil Procedure. They therefore held that the right to redeem was not extinguished by the procedural provisions contained in the Civil Procedure Code.

14. It was next argued on behalf of the respondents that although the right to redeem may not be extinguished, the remedy was barred. In support of that contention, the learned Counsel relied on the words of Order XXIII, Rule 1, of the Procedure Code. In our opinion, the High Court did not properly appreciate the effect of the termination of the former suit of 1929. When that suit reached hearing on November 9, 1932, the Subordinate Judge wrote a judgment in which, after reciting that the suit in *forma pauperis* to redeem the three mortgages was filed and four issues were raised, he stated as follows :

The plaintiff has been examined and a number of documents have been marked and suit stands posted to this day for arguments. But today plaintiff's vakil reports that he got intimation not to proceed with the case and Wed the letter which he got from his client. This is not a case of withdrawal of a suit but an abandonment of it. Suit is dismissed with costs. Plaintiff shall pay the Court-fees to Government.

The letter from the mortgagor to the vakil is not on the record, but the terms thereof are not material as they will contain only the instructions of a lay client to his pleader. The record shows that the Court was informed that the plaintiff was not proceeding with the case. The Court interpreted it as a case not of withdrawal but of abandonment and "dismissed the suit with costs." The circumstances under which that litigation ended show that the case did not fall under the provisions of Order XXIII, Rule 1, at all. There was no question of a formal defect, or withdrawal of a suit, or abandonment of a part of the claim. Order XXIII, Rule 1, does not provide for a Court's order dismissing the suit. Order IX, Rule 8, of the Code of Civil Procedure, is more properly applicable to the facts. The question then is whether a fresh suit for redemption is barred under the provisions of Order IX, Rule 9, of the Civil Procedure Code. The

material part of that rule runs as follows :

Order 9, Rule 9(1). Where a suit is wholly or partly dismissed under Rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action.

It will be noticed that the words used in the rule are "on the same cause of action". The question therefore is whether the first suit, which was dismissed under Order IX, Rule 8, was based on the same cause of action as the suit from which the present appeal arises. As pointed out by the Judicial Committee of the Privy Council in Raghunath Singh's case ILR (1934) All. 561 : S.C.L.R. 61 IndAp 362 : 36 Bom. L.R. 1189 the issues in the two suits for redemption are quite different. The questions are : (i) whether the plaintiff (mortgagor) had the right to redeem when he filed the second suit, and (ii) what amount he was now liable to pay to redeem? The Board held in that case that the trial of these issues was not barred u/s 11 of the Civil Procedure Code. It follows therefore that if the right of redemption is not extinguished, provisions like Order IX, Rule 9, or Order XXIII, Rule 1, will not debar the mortgagor from filing a second suit, because, as in a partition suit, the cause of action in a redemption suit is a recurring one. The cause of action in each successive action, until the right of redemption is extinguished or a suit for redemption is time barred, is a different one.

15. The High Court decided both the appeals against the mortgagor on the footing that the mortgagor was debarred from claiming redemption, because of the way in which his suit filed in 1929 had ended. They did not express any opinion on the two alternative contentions urged before us on behalf of the respondents. The first contention was that the right of redemption was extinguished by the act of the parties in arriving at the compromise evidenced by the two documents of November 7, 1932. It was contended that this position was covered by the proviso to Section 60 of the Transfer of Property Act. We are unable to accept this argument because, in our opinion, on a true construction of the two documents, the right of redemption of the mortgagor was not extinguished thereby. The document passed in favour of the wife of the mortgagor can be described as a reward promised to her for bringing about the willingness of her husband to agree to convey the mortgaged lands to the mortgagees. That can in no event be considered as extinguishing the equity of redemption. The mortgagor was not even a party to that document. The second document executed by the mortgagor is an agreement to convey the lands after three months. There is however no document or evidence to show that the mortgagees agreed to accept these lands in full satisfaction of their claims or promised to pay the sum of Rs. 100 mentioned therein. This was only an agreement to convey the lands after three months, and, if at all the question of extinction of the equity of redemption could arise on the conveyance being executed but not before. The evidence on record shows that soon after the dismissal of the mortgagor's 1929 suit, the mortgagees repudiated the agreement and thereafter the parties adopted from time to time such attitude in respect of the said

agreement as it suited them for the moment. The trial Judge has held that the two documents were executed, but there was no bona fide compromise at all. In the absence of proper evidence we are unable to hold that there was an enforceable compromise, much less a compromise under which the right of redemption of the mortgagor was extinguished.

16. The second argument advanced on behalf of the respondents in this connection was that although there was no sale deed by the mortgagor as provided under his writing of November 7, the Court should specifically enforce it u/s 53-A of the Transfer of Property Act. The words of Section 53-A negative this contention completely. The relevant portion of the section is as follows :

Section 53-A. Where any person contracts to transfer for consideration any Immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty,

and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract....

and the transferee has performed or is willing to perform his part of the contract....

The section clearly requires that the transferee (the mortgagees) had either to be put into possession or had to continue in possession in part performance of the agreement, which was sought to be enforced under the section. It is admitted that the mortgagees had never been in possession. It was argued on their behalf that constructive possession was sufficient for the section. Even so, in the case the mortgagees had not even constructive possession of the lands. Under the mortgages of 1915 and 1916 they were entitled to receive possession of the lands from the lessees on the termination of the previous cove at the end of Fasli 1334. Before the end of that period they were entitled to receive rent from the lessees. The mortgagor had however given notice to the lessees not to pay rent to the mortgagees and in fact the mortgagor had recovered the rents from the lessees. The mortgagees claimed that they were entitled to possession but they were never in constructive possession, because the lessees did not pay them rent. The suit filed by the mortgagees in 1925 was to recover from the lessees possession and rent for the unexpired period of the lease and for mesne profits thereafter. It is therefore clear that the mortgagees as such were never in actual or constructive possession of the suit lands. It is still more clear therefore that they were never put in possession or allowed to continue in possession, actual or constructive, "in pursuance of the agreement" of November 7, 1932, The section therefore has no application. The result is that the conclusion of the Madras High Court that the mortgagor's right of redemption had been extinguished or was not enforceable cannot be supported.

17. Appeal No; II arises out of the mortgagee's suit filed in 1926 to secure

possession of the lands and receive payment of rent and mesne profits from the lessees. At a later stage the mortgagor was made a party to the suit. In that suit a decree for possession was passed by the High Court on the footing that the mortgagor was not entitled to redeem. That conclusion of the High Court is now held to be incorrect. The matter will have therefore to go back to the High Court for its decision on the footing of our conclusion.

18. We therefore allow the appeals with costs and remit the oases to the High Court at Madras with a direction to substitute, in its decree in Civil Appeal No. Ill of 1948, the words that the mortgagor has a right to redeem in the suit filed by him and pass the appropriate decree on that footing. In the mortgagees' suit also, apart from technicalities, the trial should proceed on the footing that the mortgagor had a right to redeem and, if so, it will have to determine whether the mortgagees had any right now to the possession of the lands or payments of the rents or mesne profits. If they were held entitled to receive any money from the lessees the High Court will determine how they have to account for the same in the account between themselves and the mortgagor. Having regard to the inordinate delay in the disposal of these two suits we trust that the matter will be desalt with very expeditiously so as to end these two litigations at an early date.