

Tulajappa and ors. Vs. Subhas and ors.

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Court : Karnataka

Decided On : Mar-06-2002

Reported in : AIR2003Kant118; ILR2002KAR4231

Judge : V. Gopala Gowda, J.

Acts : [Transfer of Property Act, 1882](#) - Sections 60; [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 11 and 20; [Registration Act, 1908](#) - Sections 17(1) and 49

Appeal No. : R.S.A. Nos. 865 of 2000 and 3 of 2001

Appellant : Tulajappa and ors.

Respondent : Subhas and ors.

Advocate for Def. : M. Rambhat, Adv. for Respondent 1 and ;S.R. Raviprakash, Adv. for Respondents 2 and 3

Advocate for Pet/Ap. : Prabhuling K. Navadgi, Adv.

Judgement :

V. Gopala Gowda, J.

1. This appeal is filed by defendants 1 and 11 questioning the correctness of the impugned judgment and decree dated 17-10-2000 passed by the learned Addl. Civil Judge Sr. Dn), Hubli, in R. A. No. 104/98 in confirming the judgment and

decree dated 6-6-1998 passed in R. S. No. 800/92 by the learned Prl. Civil Judge Sr. Dn.), Hubli, urging various grounds in support of the (sic) consideration and answer the same by this Court.

2. For the sake of convenience, parties are referred to in this judgment as per their ranking assigned in the plaint presented before the trial Court.

3. This court at the time of admission of this appeal on 5-12-2000 has framed the following substantial questions of law for its consideration and answer the same :--

i) Whether the Courts below have erred in law in relying upon the judgment and decree in O. S. No. 61/71 dated 18-2-1974 (Ex. P8) when there was a finding which was binding to the effect that the said judgment and decree were without jurisdiction?

ii) Whether the finding of the Courts below that Ex. D3 is not admissible in evidence for want of registration is correct in law?

iii) Whether the Courts below were right in law in granting a decree for redemption as prayed for in respect of the present suit property when in the previous suit i.e. in O. S. No. 67/75 the redemption was claimed in respect of two properties and the present suit property and no decree for redemption was granted in the previous suit in O. S. No. 67/75 in respect of the present suit property? (A relief claimed and not granted should be deemed to have been refused in view of Explanation V to Section 11 of the Code of Civil Procedure, 1908?)

3A. The relevant facts which are necessary for the purpose of considering and answering the substantial questions of law as framed by this Court are stated as hereunder :--

The plaintiff has filed the suit for redemption of mortgage, possession of the suit schedule properties and mesne profits contending that on 23-7-1965 the deceased 2nd defendant and others mortgaged the suit schedule properties bearing CTS No. 1015/ A/19 and 1028/2A-1 of Ward No. III for Rs. 2,000/- in favour of the first defendant therein; he has purchased those two properties and another property under a registered sale deed dated 15-10-1970 for Rs. 10,000/- and has paid Rs.

3,300/- towards the mortgage amount to the deceased Vasudev Pitambarasa Hemade; on the basis of the registered sale deed the plaintiff is entitled to get the redemption of the mortgaged suit schedule properties referred to supra; that the suit properties are the self acquired properties of deceased Defendant No. 2 and as such defendants 3 to 10 have no rights and interest over the suit schedule properties.

4. Defendant Nos. 2(A), 3 and 4 had filed O. S. No. 61/1971 on the file of the Principal Munsiff, Hubli, for grant of judgment and decree of cancellation of the immovable properties covered in the registered sale deed executed in favour of the plaintiff in the present suit by the deceased 2nd defendant, wherein the husband of 5th defendant and father of defendants 6 to 9 were parties to the mortgage deed and as such defendants 5 to 9 were made parties to the present suit. The 10th defendant was impleaded as a party as he was also a party to the mortgage deed. Defendants 11 to 15 were also made parties to the suit as they were claiming possession of the suit schedule properties through the deceased 2nd defendant. O. S. No. 67/75 filed by the plaintiff on the file of the learned II Addl Munsiff, Hubli, for grant of Judgment and decree for redemption of the said suit schedule properties and for possession was disposed of on 26-4-1992 by the trial Court by granting judgment and decree. As the suit properties were in possession of the first defendant, it was contended that he is liable to surrender the possession of the suit properties to the plaintiff. It is further urged that the 11th defendant has purchased the property from defendants Nos. 2(A), 3 and 4 during the pendency of the O.S. No. 4/72 filed by the deceased 2nd defendant questioning the legality of the sale deed executed by him in favour of the plaintiff on the ground of misrepresentation of facts and fraud played on him. The said O.S. No. 4/72 came to be dismissed on 19-3-1980 and R.A. No. 16/81 filed against the said judgment and decree was also rejected on 17-9-1984 against which R.S.A. No. 92/83 was filed before this Court and the same was dismissed by its judgment and decree dated 14-6-1985. O.S. No. 61/71 filed by the wife of the deceased second defendant and their children was also dismissed on 18-2-1974 and the regular appeal filed by them in R.A. No. 191/74 on the file of the Civil Judge, Hubli, also came to be dismissed as withdrawn by them. O.S. No.67/75 filed by the plaintiff came to be decreed only in respect of one of the said suit

schedule property bearing CTS No. 1015/A/20 and however no finding is recorded in the judgment and decree in respect of other properties even though the plaintiff had prayed for grant of decree for redemption of these properties also. It is further urged that the transaction between the 11th defendant and the wife and children of the deceased 2nd defendant is hit by Section 52 of the Transfer of Property Act and that the plaintiff is entitled for redemption of the mortgaged suit schedule properties and possession of the same by paying Rs. 2,000/- to the first defendant.

5. The first defendant filed written statement denying the plaint averments and urged the plea stating that on 6-8-1970 by paying the mortgage amount to the first defendant, the deceased 2nd defendant got the mortgaged properties redeemed and he has accordingly executed the receipt for having received the mortgage amount from him and that subsequently, the 11th defendant has got obtained the registered sale deed executed from the defendant Nos. 2(A), 3 and 4 in respect of the suit properties in the year 1975 and as such he prayed for dismissal of the suit.

6. The wife of the deceased 2nd defendant filed the written statement contending that the present suit filed by the plaintiff is not maintainable as the deceased 2nd defendant got redeemed the mortgaged property from the first defendant by paying mortgaged amount Rs. 2,000/- on behalf of defendants 2(A), 3 and 4.

7. 3rd defendant who is the son of the deceased 2nd defendant denied that the suit schedule properties are the self acquired properties of his father/deceased defendant No. 2 and the defendants 3 to 10 had no interest over the suit properties. He further contended that the deceased 2nd defendant got redeemed the suit properties and other properties by paying the mortgage amount to the first defendant on 6-8-70 and that thereafter defendants 2 to 4 have executed the sale deed in favour of the 11th defendant in the year 1975. It is further contended that the Civil Judge Court, Hubli, has held in its judgment passed in O.S. No. 4/72 filed by the deceased 2nd defendant in answer to issue No. 9 holding that the Principal Munsiff has no jurisdiction to decide the suit O.S. No. 61/71 and as such the findings recorded in O.S. No. 61/71 on the contentious issue that the said schedule properties are self acquired properties of the deceased 2nd defendant are not tenable and since the mortgage in respect of suit properties were

redeemed in the year 1910 and as such the suit filed by the plaintiff is not maintainable.

8. 11th defendant filed the written statement denying the plaintiffs right contending that he is not entitled for redemption of the suit schedule properties. He has further denied that the suit schedule properties were the self acquired properties of the deceased 2nd defendant and further contended that the suit schedule properties were the joint family properties of defendants 2 to 4; that the Munsiff Court has no pecuniary jurisdiction to try O.S. No. 61/71 filed by the wife and children of deceased 2nd defendant as such the finding recorded in the said suit is a nullity, to that extent the finding recorded on issue No. 9 in O.S. No. 4/72 has become final and conclusive and as such the judgment and decree passed in O.S. No. 61/71 is a nullity in the eye of law. Since the suit in O.S. No. 67/75 filed by the plaintiff was decreed only in respect of property bearing CTS No. 1015/A/20 the suit item No. 1, the present suit, is not maintainable in law as the same is hit by principles of res judicata under explanation V of C.P.C.

9. The written statements filed by other defendants are not referred to in this judgment as it is not necessary for this Court to consider the same and answer the substantial questions of law framed by this Court.

10. The trial Court on the basis of the pleadings of the parties, framed issues and additional issues at paragraph 11 of the impugned judgment. In support of the case of the plaintiff he got himself examined as P.W. 1 and produced and got marked Exs. P1 to P.22. First defendant got himself examined and produced and got marked one document in support of his case and the 11th defendant got examined and got marked 27 documents in support of his case. The other defendants neither adduced any oral evidence nor produced documentary evidence. On appreciation of the facts and the material evidence on record, the trial Court has answered issues 1 to 3 in the affirmative and the rest of the issues including the additional issues are answered in the negative and decreed the suit with costs payable by defendants 1 and 11.

11. Aggrieved of the said judgment and decree of the trial Court, the defendants 1 and 11 filed R.A. No. 104/98 on the file of the Addl. Civil Judge (Sr. Dn.), Hubli.

The First Appellate Court on the basis of the rival contentions urged by the parties has framed 17 points for its consideration and has answered the Points 1 to 3, 11 to 13 and 16 in the affirmative and points 4 to 6, 9 and 10 in the negative and on Point No. 7, it has held that the judgment and decree passed in O.S. No. 61/71 dated 18-2-1974 as per Ex.P 9 and the order passed in R.A. No. 191/74 dated 9-7-1976 as per Ex.P.9 are legally binding on defendants 2A, 3 and 4 and the aforesaid judgments and decrees do not render (sic) as nullity and are not void ab initio as contended by them for want of pecuniary jurisdiction of the trial Court which has tried that suit. On Point No. 8, it has held that, the sale deed as per Ex.P. 14 of defendant No. 11 dated 9-1-1975 will not bind the plaintiff and it does not come legally in the way for the Courts below to award reliefs as prayed in favour of the plaintiff. On point No. 11, it has held that the suit is tenable without the relief of declaration and Point No. 14 is answered application seeking mesne profits and in that regard separate enquiry will be held. The First Appellate Court on the basis of the appreciation of the facts and material evidence on record has dismissed the appeal. Aggrieved by the said judgment and decree, the defendants 1 and 11 have preferred this appeal.

12. Sri Prabhulingh K. Navadgi, learned Counsel for the defendants 1 and 11 contended that the mortgage of the suit schedule properties was redeemed by the defendant No. 1 in favour of the deceased 2nd defendant after receiving the mortgaged money as per Ex.DS and as such the suit filed for redemption of the mortgage by the plaintiff is not maintainable; that the earlier Original Suit No. 67/75 came to be decreed in favour of the present plaintiff in respect of CTS No, 1015A/20 suit item No. 1 and in respect of the other two items, the decree was neither granted nor refused in the said suit and as such the non-grant of the judgment and decree in respect of the other two items of the suit schedule properties in that suit would operate as res judicata in view of Explanation V to Section 11 of Civil Procedure Code, 1908 and as such he submits that the third substantial question of law framed by this Court would arise for consideration of this Court-13. In view of the above submission, the 3rd substantial question of law is taken up first for consideration and answer the same.

14. The learned Counsel for defendants 1 and 11 has placed strong reliance upon the judgment of the Supreme Court, reported in : [2000]1SCR1095 ; Sajjadanashin Sayed Md.B.E. EDR (D) by LRs. v. Musa Dadabhai Ummer at paragraph 28 and has also placed reliance upon the decision of the Madras High Court reported in AIR 1945 Madras 224 [Kilaparti Appalanarasamma v. Commissioner, Municipal Council Vizagapatam].

15. Per contra, Sri Rambhat, learned Counsel on behalf of the plaintiff has placed reliance upon the judgment of the Federal Court reported in AIR 1950 Federal Court 1 at paragraph 12, in support of the contention that the right of the mortgagor will be extinguished either by the act of the parties or by the judgment and decree passed by the competent Court in the prescribed Form under the CPC or by passing the Judgment and decree as contemplated under Section 60 of the T.P. Act and as such, it is submitted that the non-grant of the judgment and decree in the earlier suit O.S. No. 67/75 filed by the plaintiff does not operate as res judicata as contended by the learned Counsel for the defendants Nos. 1 and 11. It is further submitted by the learned Counsel that in the earlier original suit the trial Court has not granted the judgment and decree in respect of the suit schedule properties on the technical ground that the plaintiff did not produce the mortgage deed and that the decision of the Madras High Court upon which the learned Counsel for the defendants 1 and 11 has placed reliance has been referred to and overruled by the Federal Court after following the decision of the Privy Council reported in) in the case of Raghunath Singh v. Hansraj Kunwar and that the said judgment has been subsequently followed by the Supreme Court in the case reported in : [1988]3SCR689 in the case of Mhadagonda Ramgonda Patil v. Shripal Balwant Rainade and the Division Bench of this Court reported in 1990 (3) Kar LJ (Supp) 571 (Kalaiah alias Kalegowda v. Lingamma).

16. With reference to the above said legal contentions urged by the learned Counsel on behalf of the parties, this Court has to answer as to whether non-grant of judgment and decree in respect of the present suit schedule properties in the suit O.S. No. 67/75 and grant of redemption in the subsequent suit O.S. No. 800/92 operates as res judicata under Explanation V of Section 11, C.P.C.

17. To answer this question, it is relevant to refer to Section 60 of the Transfer of Property Act.

'Section 60. Right of mortgagor to redeem :--At any time, after the principle money has become due, the mortgagor has a right, on payment or tender, at a proper time and place, of the mortgage-money, to require the mortgagee (a) to deliver to the mortgagor the mortgage-deed and all documents relating to the mortgaged property which are in the possession or power of the mortgagee, (b) where the mortgagee is in possession of the mortgaged property, to deliver possession thereof to the mortgagor, and (c) at the cost of the mortgagor either to re-transfer the mortgaged property to him or to such third person as he may direct, or to execute and (where the mortgage has been effected by a registered instrument) to have registered an acknowledgment in writing that any right in derogation of his interest transferred to the mortgagee has been extinguished.'

The proviso to Section 60 clearly provides that the right conferred by this Section has not been extinguished by act of the parties or by decree of a Court.'

No doubt, O.S. No. 67/75 was filed by the plaintiff in respect of the suit schedule properties covered in the present suit filed by the plaintiff before the Principal Munsiff's Court at Hubli. The submissions made by the learned Counsel for defendants 1 and 11 placing reliance upon the judgment of the Supreme Court and Madras High Court referred to supra are untenable and cannot be accepted by this Court in view of the exposition of law laid down by the Federal Court in the case referred to supra at paragraphs 8 and 12, the relevant portion of which is extracted as hereunder (at page 4) :--

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 Sankar Baksh v. Daya Shankar, 14 I A 66 (15 Cal 422 PC). 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 them under proprietary 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 under Section 114, Civil P.C. of 1859, which corresponds to Order 9, Rule 8, Civil P. C. of 1908. Section 119, Civil P. C. of 1859, which corresponded to Order 9, Rule 9 of the Code of 1908 provided that no second suit would lie on the same cause of action. Bhoop Singh's heirs filed a second suit in 1883 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 1953 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, T.P. 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 accordingly to the mortgage bond, his right to redeem had gone. Some reliance was put on Clause 6 of Act I (1) 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. Again, no 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, T. P. Act. That decision, therefore, is no authority against the contention that after the enactment of Section 60, T. P. Act, as substantive law, the equity of redemption is not extinguished by a dismissal of a redemption suit for default of the plaintiffs 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*. 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'. Under Section 92, T. P. 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 under Section 93. T. P. 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 under Section 60, T. P. Act that right still existed. Before the Board, three contentions were raised. The first was that the second suit, though in form a redemption suit, was in reality an application to enforce an old decree of 25th September, 1896. A suit could not be maintained for that, because of Section 47, Civil P.C., 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 was 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, Civil P. C., 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, Civil P.C., 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. (1) 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 not extinguished there was no ground for saying that the old decree operated as *res judicata* under Section 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 15th November 1896 with the result that the mortgagor's right to redeem became extinguished under Section 60, T.P. 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, T. P. 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 a Court.' Further, at paragraph (11), it has referred to the decisions of the Bombay High Court in *Ramachandra Kolaji v. Hanmanta*, AIR 1920 Bombay 29; *Shridhar Sabda v. Ganu Mahadu* reported in AIR 1928 Bom 67 wherein the suit for redemption was filed but was dismissed under Order 9, Rule 8, CPC and the mortgagor brought a second suit for redemption contending that it was barred under Order 9, Rule 9, CPC and the Bombay High Court placing reliance upon its earlier decision in the case of *Ramchandra Kolaji Patil's case* AIR 1920 Bom 29 and the decision of the Privy Council in *Shankar Bakshas case*, 15 IA 66 : (15 Cal 422 PC) and *Rajaram Vithal v. Ramachandra Pandu*, AIR 1949 Bom 226; (50 Bom LR 45) has held that the provisions of Order 22, Rule 9 did not extinguish the right of redemption of mortgagor and a second suit for redemption was therefore permissible.

Further at paragraph (12) in the same judgment, it has held as follows :--

'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 Raghunath Singh's case the right of redemption can be extinguished as provided in Section 60 of T. P. 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 under Section 11 CPC. They therefore, held that the right to redeem was not extinguished by the procedural provisions contained in the Civil Procedure Code.

In view of the law laid down by the Federal Court, which judgment has been referred and approved by the Apex Court and the Division Bench Judgment of this Court in the case referred to in the earlier paragraph of this judgment referring to the contentions of the counsel for defendants 1 and 11, which has followed the judgment of the Federal Court and held that subsequent suit for redemption of the mortgaged properties do not operate as res judicata if in the judgment and decree passed in the earlier suit there is no order passed in the prescribed form in respect of the suit schedule properties. Accordingly, substantial question No. 3 answered against defendants 1 and 11.

18. The 2nd substantial question of law framed by this Court is answered as hereunder :--

In support of the above substantial question of law, the learned Counsel for defendants 1 and 11 submits that the case falls within Section 17 Sub-section (2) Clause (11) of the [Registration Act, 1908](#) and contended that the endorsement on the mortgage deed acknowledging the whole or any part of the mortgaged money in respect of the suit schedule mortgaged properties by executing receipt as per Ex.DS for payment of money due under the mortgage does not purport to extinguish the right to mortgage the suit schedule properties; that Ex.D.3 receipt is in consonance with the above said clause and as such the Courts below have

committed an error in law in holding that Ex.D.3 is not a registered document and therefore the same is inadmissible under the provisions of the Evidence Act and not accepting the said documentary evidence by the courts below in answering the contentious issues against defendants 1 and 11 and in favour of the plaintiff suffers from error in law and therefore he would submit and pray for dismissal of the impugned judgment and decree by placing reliance upon the judgments of the Court reported in AIR 1989 Kar 205 and AIR 1952 Mys 82, wherein it has held that the test therefore is whether the receipt purports to extinguish the mortgage in which case it requires registration, but not otherwise. It thus, depends upon the construction of the document. The above said contentions of the learned Counsel for defendants 1 and 11 are rebutted by the learned Counsel for the plaintiff Sri Ram Bhat, placing reliance upon the proviso to Section 49(1) of the [Registration Act, 1908](#) (for short 'Act. 1908') which deals with the effect of the non-registration of the document which requires to be registered under the provisions of the Act of 1908. The proviso to the said Section clearly states that every document of the kinds mentioned at clauses (a) to (e) of Section 17(1) of the Act, 1908 if duly registered takes effect as regards the property comprised therein against every unregistered document. Therefore, the learned Counsel for the plaintiff submits that the redemption of the mortgage by making an endorsement on the original registered mortgage deed and issuing the receipt thereof shall be compulsorily registerable as it amounts to extinguishment of the right of redemption in respect of the immovable property and as the said document falls within the purview of Section 17(1)(c) of the Act, 1908. It is an undisputed fact that the mortgaged suit schedule properties were for more than Rs. 100/-. The right of redemption is the statutory right conferred upon the mortgagor under Section 60 of the T. P. Act either by the act of the parties or by the decree of the Court. If Ex.DS is construed as the receipt without registering the same, the valuable right accrued in favour of the mortgagor for extinguishment of his right of redemption of the properties under Section 60 of the T. P. Act will be lost and as the value of the said property is more than Rs. 100/- the receipt would be non-testamentary document and the plaintiff who has purchased the properties in question is entitled for redemption of the mortgaged properties. Therefore, the learned Counsel would submit that Ex.DS was required to be compulsorily registerable in law as it falls under Section

17(1)(c) of the Act, 1908 and registration is a must under Section 49 of the Act, 1908 otherwise it will have no legal effect in view of Section 49(1)(cc) as such document cannot be received as evidence. In this view of the matter, the non-consideration of Ex.DS by the Courts below and finding recorded by the trial Court in this regard in answer to the contentious issue is in conformity with Section 17(1)(c) read with Section 49(c) of the Act, 1908. Hence, the 2nd substantial question of law is also required to be answered against defendants 1 and 11.

19. With regard to the first substantial question of law framed by this Court, the learned Counsel for defendants 1 and 11 has placed reliance upon the decision of the Supreme Court reported in : [1955]1SCR117 (Kiran Singh v. Chaman Paswan) at paragraph (6) wherein it is held that it is a fundamental principle that a decree passed by a Court without jurisdiction is a nullity in the eye of law and that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction, whether it is pecuniary or territorial, or whether it is in respect of the subject-matter of the action, strikes at the very authority of the Court to pass any decree, and such a defect cannot be cured even by consent of parties.

20. The learned Counsel for the plaintiff has placed reliance upon the very same judgment at paragraphs (12) and (17) in support of the case of the plaintiff wherein it is held as hereunder :--

'(12) the question, therefore, is, can a decree passed on appeal by a Court which had jurisdiction to entertain it only by reason of under-valuation, be set aside on the ground that on a true valuation that Court was not competent to entertain the appeal? Three High Courts have considered the matter in Full Benches, and have come to the conclusion that mere change of forum is not a prejudice within the meaning of Section 11 of the Suits Valuation Act. Vide 'Kelu Achan v. Cheriya Parvathi Nethiar' AIR 1924 Mad 6 (FB) (E); 'Mool Chand v. Ram Kishan : AIR1933 All249 . In our judgment the opinion expressed in these decision is correct.

Indeed, it is impossible on the language of the section to come to a different conclusion. If the fact of an appeal being heard by a Subordinate Court or District Court where the appeal would have lain to the High Court if the correct valuation

had been given, is itself a matter of prejudice, then the decree passed by the Subordinate Court or the District Court must, without more, be liable to be set aside, and the words 'unless the over valuation or under-valuation thereof has prejudicially affected the disposal of the suit or appeal its merits' would become wholly useless. These words clearly show that the decrees passed in such cases are liable to be interfered with in an appellate Court, not in all cases and as a matter of course, but only if prejudice such as is mentioned in the section results. And the prejudice envisaged by that Section therefore must be something other than the appeal being heard in a different forum.

A contrary conclusion will lead to the surprising result that the section was enacted with the object of curing defects of jurisdiction arising by reason of over-valuation or under-valuation, but that, in fact, this object has not been achieved. We are therefore, clearly of opinion that the prejudice contemplated by the section is something different from the fact of the appeal having been heard in a forum which would not have been competent to hear it on the correct valuation of the suit as ultimately determined.'

(17) There is considerable authority in the Indian Courts that Clauses (a) and (b) of Section 11 of the Suits Valuation Act should be read conjunctively, notwithstanding the use of the word 'or'. If that is the correct interpretation, the plaintiff would be precluded from raising the objection about jurisdiction in an appellate Court. But even if the two provisions are to be construed disjunctively, and the parties held entitled under Section 11(1)(b) to raise the objection for the first time in the appellate Court, even then, the requirement as the prejudice has to be satisfied, and the party who has resorted to a forum of his own choice on his own valuation cannot himself be heard to complain of any prejudice. Prejudice can be a ground for relief only when it is due to the action of another party and not when it results from one's own act. Courts cannot recognise that as prejudice which flows from the action of the very party who complains about it.

Even apart from this, we are satisfied that no prejudice was caused to the appellants by their appeal having been heard by the District Court. There was a fair and full hearing of the appeal by that Court; it gave its decision on the merits

on a consideration of the entire evidence in the case, and no injustice is shown to have resulted in its disposal of the matter. The decision of the learned Judges that there were no grounds for interference under Section 11 of the Suits Valuation Act is correct.'

21. The learned Counsel for the plaintiff has also placed reliance upon the decision reported in 1989 (1) Kar LJ 38 : (AIR 1989 NOC 103 (Kant) (Hanumegowda v. M. Sudarshanachar) at paragraphs 21 and 22 in support of the proposition that error, if any in earlier judgment will continue to bind the parties unless it is set aside or reversed by the Superior Court. In the aforesaid case, this Court at paragraphs 21 and 22 has held as follows :--

'21. I need hardly state that there cannot be a collateral attack on a finding concluded by an earlier judgment between the same parties unless it be the earlier judgment was null and void. But then it being nobody's case the judgment in O.S. No. 103/ 66 was null and void and in fact subsequently the decree having been executed and the plaintiff having received apparent satisfaction under the decree, could not have looked askance at all at the decree in O.S. No. 103/66 and nor could he have made any endeavour to escape the consequences thereof.

22. It would be useful in this connection to briefly notice the state of the law in regard to the plea of res judicata based on the bar arising out of earlier proceedings between parties by which they must be held bound by it by a decision or finding validly made and recorded by a Court of Competent Authority touching rights of parties. In the case of Gahan v. Mangay (1793) Ridg L & S 20 the distinction and relation to the method of collateral attack was clearly brought out by Lord Carleton as follows :-- 'It must be admitted that if the judgment were null and void it would not impede the plaintiffs' recovering; but mere matters of alleged error (which, if really would only render the judgment voidable by the proper judicature on appeal, and not actually void) cannot at the instance of a person, bound by the judgment, be a proper subject of discussion in this Court, not possessed of any direct appellate jurisdiction over the decision of sub-commissioners, and proceeding only in a collateral action, in which such appellate authority cannot be obliquely assumed.'

22. The reliance placed by the learned Counsel for defendants 1 and 11 upon the decision in : [1955]1SCR117 (Kiran Singh v. Chaman Paswan) is applicable to the facts of the present case having regard to the undisputed fact that the finding recorded on the contentious issues that the suit schedule properties were the self acquired properties of deceased 2nd defendant which finding was reversed by the Principal Civil Judge in O.S. No. 4/72 filed by the deceased 2nd defendant questioning the legality and validity of the sale deed dated 15-10-1970 in favour of the plaintiff on the ground of misrepresentation and playing fraud on him in answer to issue No. 9 holding that the Munsiff Court which has tried the original suit in O. S. No. 61/71 has no pecuniary jurisdiction. Therefore, the judgment rendered by the said Court is nullity in the eye of law and the said judgment and decree has become final as the Regular Appeal 16/81 and R.S.A. No. 92/85 filed by the deceased 2nd defendant were dismissed confirming the findings recorded in the original suit. By a careful reading of the exposition of the law laid down at paragraph (6) in Kiran Singh v. Chaman Paswan referred to supra, the defect of jurisdiction either pecuniary or territorial or whether it is in respect of the subject-matter of action, strikes at the very authority of the Court to pass any decree and such a defect cannot be cured even by consent of parties. Further in the judgment and decree passed in R.A. No. 104/92 between the plaintiff and defendants 1 to 4 and 11, it has been clearly held that the finding recorded in O.S. No. 61/71 on the contentious issues holding that the suit schedule properties are self acquired properties of the deceased 2nd defendant has been rightly set aside by the learned Civil Judge, Hubli by passing the judgment and decree In O.S. No. 4/72 wherein the finding is recorded by the said Court on Issue No. 9 holding that the suit schedule properties are not the self acquired properties and it has rightly held in answer to the said issue that the Munsiffs Court who has tried O.S. No. 61/ 71 filed by the defendants Nos. 2A, 3 and 4 has no pecuniary jurisdiction to try that original suit and further Ex.D4 the registered partition deed of the joint family property of the deceased 2nd defendant and his brothers pursuant to the said partition, the suit schedule properties came to the share of the deceased 2nd defendant and further finding of fact is recorded at paragraph 19 that all the suit properties were not purchased in the name of the mother of the deceased 2nd defendant but they were purchased in the names of different members of the joint

family. For the reasons stated supra, the reliance placed upon the judgment of this Court reported in 1989 (1) Kar LJ 38 : (AIR 1989 NOC 103 (Kant) referred to supra by the learned Counsel for the plaintiff is misplaced. In addition to the above said documentary evidence, further documentary evidence Exs. P1, P2 and P3 which are the Revenue records showing the mode of acquisition of the schedule properties wherein all the entries made in the said documents in respect of the suit schedule properties show that the suit schedule properties came to the share of the plaintiff by Ex.D4. Further, the learned Counsel for the defendants 1 and 11 has rightly placed reliance upon the Privy Council decision reported in AIR 1923 PC 57 wherein it is held that the members of the Joint family who have control over the joint estate can be blended with the property in which they have separate interest, the effect is that all the property so blended become joint family property. Further the first appellate Court has wrongly recorded the finding at paragraph 23 holding that even though the properties were the joint family properties, sale was made by the deceased 2nd defendant for legal necessity. The said issue of sale by legal necessity was neither pleaded nor proved. It is not the case of the plaintiff that the sale of the property by him in his favour was for legal necessity. Therefore, the finding recorded in the impugned judgment of the first appellate Court is erroneous as the same is contrary to the legal evidence and based on surmises and conjectures. In view of the above said finding, the Courts below have erred in granting the judgment and decree to the full extent of redemption of the suit schedule properties in favour of the plaintiff ignoring the important, aspect of the matter that the defendants 2A to 4 have got the share in the suit schedule properties. Therefore, the findings on the contentious issues and points answered by the Courts below against defendants 1 and 11 and in favour of the plaintiff are not only erroneous but suffers from error in law. To that extent, the judgment and decree of the Courts below required to be modified by granting the judgment and decree of 1/4th share to the deceased 2nd defendant in favour of the plaintiff and 3/4th share in favour of defendants 2A, 3 and 4, who are the wife and children of the deceased 2nd defendant. Accordingly, the judgment and decree of the Court below is modified. For the reasons stated supra, the first substantial question of law would arise in this case and the same is answered in favour of defendants 1 and 11.

23. For the reasons stated supra, this appeal is allowed in part with the above said modification.

24. In view of the findings recorded on the substantial questions 2 and 3 in favour of the plaintiff and against defendants 1 and 11, and further first substantial question of law is answered in favour of the defendants 1 and 11 for the reasons recorded in this judgment, the grounds urged in the cross-objection questioning the correctness of the findings holding that the suit schedule properties are the self acquired properties and the same were sold for legal necessity of the joint family is not tenable to the extent that the said properties were sold for legal necessity. The finding that they are joint family properties is based on the undisputed facts and the law laid down in answer to issue No. 9 in O.S. No. 4/72 produced at Ex. P. 10 which judgment and decree has been confirmed by this Court in the 2nd appeal. Therefore, there is no ground made out for allowing the cross-objection and accordingly, it is rejected.

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