

The plaintiffs appealed to the High Court on the ground, amongst others, that there was no prayer in Suits 123 of 1870 and 187 of 1878, which were simply suits to recover money lent, to make any immoveable property of defendants liable.

S. Gopalachari for the Appellants.

Mr. Johnstone for the Respondents.

The Court (TURNER, C.J., and MUTTUSAMI AYYAR, J.) delivered the following

Judgment:—Neither the bond dated July 30, 1870, nor the decree which was founded upon it created a charge on the property in the hands of the vendors; for neither a promise to pay out of the debtor's property indefinitely, nor an indefinite order [37] for the satisfaction of a decree out of the assets of a deceased person in whose hands soever they may be found, create any such charge on specific property as will bind it in the hands of a purchaser, unless he purchases it in fraud (I. L. R., 1 All. 275). The only point then to be considered in appeal is whether the sale was *bonâ fide*. The Judge has found it was so, and there is abundant evidence to show that the largest part of the purchase money was employed in discharging debts, including, among others, debts due to the respondents.

The circumstance that a small portion of the whole of the purchase money was not immediately paid is not necessarily a badge of fraud. Had the purchasers been required to pay at once, they might necessarily have been compelled to decline the purchase except at a less price than they were able to offer if a little time was given.

We allow the appeal with costs in both Courts, and, reversing the decree of the Judge, decree that it be declared the plaintiffs are entitled to the village in suit, and that it is not liable to attachment and sale in execution of the decree obtained by the first and second defendants in Original Suit No. 123 of 1870 and Original Suit No. 187 of 1878.

[3 Mad. 37.]

APPELLATE CIVIL—FULL BENCH.

The 29th April, 1881.

PRESENT:

SIR CHALES A. TURNER, KT., CHIEF JUSTICE, MR. JUSTICE
INNES AND MR. JUSTICE KERNAN.

Srinivasa Sastri.....(2nd Defendant) Appellant
versus
Seshayyengar.....(Plaintiff) Respondent.*

*Registration of Certificate of Sale—of Memorandum of Certificate of Sale—
Act VIII, 1859, Section 259, Act XX of 1866, Section 42.*

Under Act VIII of 1859, Section 259, and Act XX of 1866, Section 17 and Section 42, it was necessary to register the certificate of sale itself, and not merely the memorandum of the certificate of sale.

* Second Appeal No. 577 of 1878 against the decree of A. C. Burnell, District Judge of South Tanjore, confirming the decree of the Subordinate Judge of Tanjore, dated 23rd August 1878.

IN this case a memorandum of a certificate of sale issued by a Court under Section 259* of Act VIII of 1859 had been [38] registered under Act XX of 1866, Section 42,† but the certificate of sale itself had not been registered. The question referred to and argued before the Full Bench was whether the registration of the certificate of sale itself was necessary and the registration of the memorandum insufficient.

The facts of the case are fully set out in the judgment of TURNER, C.J.

T. Rama Rau for Appellant.

The Government Pleader (*Mr. Handley*), *Mr. Shephard* and *A. Ramachandarayyar* for Respondent.

The Court (TURNER, C.J., INNES and KERNAN, JJ.) delivered the following **Judgments** :—

Innes, J.—Under the Act of 1866, Section 17, the certificate of sale required to be registered. The registration of the memorandum of the order was not sufficient. This has been held in Bombay and in several cases in Madras which I recollect, but which are unreported. A ruling to this effect was made and is reported in the Appendix to the 6th Volume of Madras High Court Reports, p. 39, and that the matter was carefully considered is apparent from its being expressly mentioned that the Judges were induced by the general importance of the question to depart from their usual practice of declining to express an extra-judicial opinion.

The Act governing in this case is the Act of 1866. (*See* explanation, Section 50 of the Registration Act of 1877).

The certificate, therefore, is not admissible in evidence.

The question arises whether it is necessary for plaintiff to vouch the certificate to enable him to recover.

It appears to me that it is. Plaintiff has got possession under a decree of the Court on a sale of some portion, if not the whole, of the property enjoyed jointly by 1st defendant and his coparceners. He desires now to have his purchase defined and parted off from the rest of the property. The 2nd defendant would limit the plaintiff to the right, title and interest of the 1st defendant. This is less than what plaintiff seeks to recover. It is necessary, therefore, for him to show clearly what he purchased. He cannot do this without putting forward the best available evidence—the certificate of sale.

[39] I think plaintiff's case must fail from the want of registration of this document.

*[Sec. 259 :—After a sale of immoveable property shall have become absolute in manner aforesaid, the Court shall grant a certificate to the person who may have been declared the purchaser at such sale, to the effect that he has purchased the right, title and interest of the defendant in the property sold, and such certificate shall be taken and deemed to be a valid transfer of such right, title, and interest.]

† [Sec. 42 :—When any Civil Court shall, by a decree or order, create, declare, transfer, limit, or extinguish any right, title, or interest of any person to or in any immoveable property, situate in any part of British India in which this Act shall operate, such Court shall cause a memorandum of the said decree or order to be sent to the Registrar or to every Registrar within whose District the whole or any part of such immoveable property is situate, and such memorandum shall, so far as may be practicable, describe the property in manner required by Section 21.]

The judgment of the District Judge appears to be in other respects very questionable in the legal propositions it lays down, but the question of registration was the only question argued before the Full Bench, and I do not consider myself at liberty, therefore, to go into other matters.

Plaintiff's case fails, and the suit must be dismissed with costs.

Turner, C.J.—The respondent, having lent money to the 1st defendant Sivaramakristna Sastri in 1869, brought a suit and obtained a money decree, in execution of which he brought to sale and purchased in 1870 an undivided share in a plot of land held by Sivaramakristna with other coparceners.

The Court issued to him a certificate of sale and caused a memorandum of this certificate to be registered. It also placed the respondent in possession, and the respondent alleges he enjoyed profits until a short period before suit, when he was ousted by the 2nd defendant. Sivaramakristna had, at the time the debt was contracted, one son, the 2nd defendant, who was a minor in 1869, but two other sons, the 3rd and 4th defendants, were subsequently born to him.

Sivaramakristna has since the auction-sale executed a deed purporting to be a deed of partition whereby he conveyed the share in suit with other lands to his sons.

The respondent instituted the present suit for partition and possession. His claim was resisted by the second defendant on several grounds, and among others on the ground that the sale certificate was not registered, that the decree and sale were fraudulent inasmuch as the debt was not incurred for family necessity, and that the sale, if valid, affected only the interest which in partition with his sons would be taken by Sivaramakristna.

The Subordinate Judge allowed the claim. He held on the authority of *Narayanaacharya v. Narsokrishna* (I. L. R., 1 Bom., 262) which proceeds on the decision of the Privy Council in *Girdharee Lall v. Kantoo Lall* (L. R., 1 I. A., 321) that, in the absence of evidence to show the debt and proceedings were in any respect fraudulent, the respondent was only [40] bound to show and had shown there was a decree by a competent Court, that the sale was held by the proper authority having power to sell, and that having obtained possession, the respondent was entitled to partition.

On appeal the District Court held that inasmuch as a memorandum of the sale had been registered under the provisions of Section 42, Act XX of 1866—the Act at the time in force—the requirements of the Registration law had been sufficiently complied with and that the registration of the certificate itself under Section 17 was unnecessary. The Judge also held that, inasmuch as, at the time of the sale, Sivaramakristna was the managing member of the family, the interest sold was not his limited interest as a coparcener, and he found that there was no evidence to show the liability was void under Hindu Law, by which I understand him to mean there was no evidence that the debt had been contracted for an immoral purpose.

In second appeal the appellant urges that it was incumbent on the respondent to prove the debt had been incurred for family purposes, that the debt was not incurred for such purposes, and that his father was not at the time the debt was incurred the managing member of the family, that the sale affected only the interest of his father as coparcener and that the sale-certificate being inoperative for want of registration, the suit could not be maintained. Although Act VIII of 1859, Section 259, declares that the certificate issued by a Court

to the purchaser of immovable property at a sale held in execution of decree shall be taken and deemed to be a valid transfer of the right, title and interest purchased, and therefore may be regarded as an instrument operating to create or declare a right to immovable property, I cannot think that it was intended that such certificates should fall within the terms of Section 17. The Act declares that no document shall be registered unless the person executing such document shall appear before the registering officer and shall admit its execution. Section 36 and Part VII of the Act make provision for the enforcement of the attendance of executants. It could hardly have been intended that the Judges of the Civil Courts should on every occasion on which they issued a sale certificate attend at the office of the Registrar and be subject to the compulsory process provided by the Act if they failed to attend at an office [41] which might often be distant several miles from their offices; yet, if they did not attend, the Registrar could not register.

Immediately following Part VII follows Part VIII. There we find special provisions respecting the registration of the acts of the Civil Courts which, in order to obviate the necessity for the attendance of a Judge before the Registrar, provide for the transmission of a memorandum to the Registrar's office, and, although in terms a certificate of sale is not referred to, I should have considered that it was not an undue straining of the terms of Section 42 to hold that, in providing for the registration of decrees or orders, the Legislature intended to provide for the registration of all acts of a Civil Court creating or declaring any title to immovable property. The memorandum of the certificate issued to the respondent having been registered, I should have held that the provisions of the Registration law have been sufficiently complied with had I not been precluded from so doing by a long course of decisions.

Although the opinion of the High Court (6 M.H.C.R. App. xxxix), which is not a judicial ruling, was expressed in cautious terms and published rather to put auction-purchasers on their guard as to the view that would be probably adopted, it has been followed in subsequent decisions and accepted as law in this Presidency. The rulings in the Bombay High Court are to the same effect. Probably, in view of these rulings, the law has been recently altered. The 316th* section of the Civil Procedure Code of 1877 omits the words which afford ground for the contention that the certificate creates or declares an interest in immovable property and amendments have been made in the Registration law to enable the registration of copies of such certificates in the same manner as decrees (Act XII of 1879, Section 107¹).

Under the circumstances, I do not feel justified in dissenting from the decree proposed.

Kernan, J.—The judgment of the Chief Justice expresses the views that effect my decision. Except for the decisions referred to, I would hold that the registration of the memorandum was sufficient.

Certificate to purchaser of immovable property.
Certificate to state name of actual purchaser.

* [Sec. 316 :—When a sale of immovable property has become absolute in manner aforesaid, the Court shall grant a certificate stating the name of the person who, at the time of sale, is declared to be the purchaser and the date of such sale.]

† [Sec. 107 :— In Section 89 of the same Act, for the words " the certificate," the words " the copy " shall be substituted, and to the same section the following paragraph shall be added, (namely) :—

" Every Court granting a certificate under Section 316 of the Code of Civil Procedure shall send a copy of such certificate to the registering officer within the local limits of whose jurisdiction the whole or any part of the immovable property comprised in such certificate is situate, and such officer shall file the copy in his Book No. 1."]

NOTES.

[STATUTORY CHANGES—

Sec. 17, cl. (2), of XVI of 1908 :—

“(2) Nothing in clauses (b) and (c) of sub-section (1) applies to—
(xii) any certificate of sale granted to the purchaser of any property sold by public auction by a Civil or Revenue Officer.”

This clause was also inserted by Act VII of 1888. Before the passing of this Act, “doubts were entertained as to whether or not a certificate of sale required registration” and the addition of this clause puts an end to such doubts and the conflicting decisions thereon.—

See 7 B. H. C. A. C. J. 136; 10 B. H. C. R. 435, 6 M. H. C. R. Ap. xi; 3 Mad. 37; 4 B. om. 155; 2 All. 392.

For *Contra*, see 9 Cal. 82; 7 Mad. 418; 5 All. 84; 5 All. 568.]

[42] APPELLATE CIVIL.

The 30th April, 1881.

PRESENT :

MR. JUSTICE INNES AND MR. JUSTICE KERNAN.

Sangili Virapandia Chinnathambiar, Zamindar of
Sivagiri.....(Defendant) Appellant

versus

Alwar Ayyangar.....(Plaintiff) Respondent (in No. 389).
Thambu Chinnammal Janaki.....(Plaintiff) Respondent (in No. 390).
Minatchi Ammal.....(Plaintiff) Respondent (in No. 391).
Muttusamia Pillai.....(Plaintiff) Respondent (in No. 392).*

Liability of son to pay his father's debt under Hindu Law—under Section, 234 Civil Procedure Code— Ex parte order of attachment, appeal Against.

As the entire interest in an impartible Zamindari passes upon the death of the father to the son, there is nothing in the estate itself which can be attached as assets of the father under a decree against him or which can be made available in execution of the decree against his son as his representative.

Though a son is bound under Hindu Law to pay his father's just debts from any property he may possess, yet, when he is made a party to a decree as representative of his deceased father for the purpose of executing it, his liability is limited to the amount of assets of the deceased which may have come to his hands and has not been duly disposed of.

An appeal lies from an *ex parte* order directing attachment in execution of a decree.

THE facts and arguments in these miscellaneous appeals sufficiently appear in the following **judgment** of the Court (INNES and KERNAN, JJ.) :—

V. Bhashyam Ayyangar for Appellant.

*Civil Miscellaneous Appeals Nos. 389, 390, 391 and 392 of 1880 against the orders of the Subordinate Judge of Tinnevely, dated 31st March 1880.