

is evidence to warrant the finding that the respondent is not liable to be ejected except under Act VIII of 1865. We think that the conclusion arrived at by the Judge that the respondent is not liable to be arbitrarily ejected is warranted by the evidence on record, and dismiss this appeal with costs.

NOTES.

[The ryot has a heritable and alienable interest :—22 Mad., 39, at 43 ; but not the sole interest, so that the Zamindar can intervene if fruit trees are cut down :—(1906) 30 Mad., 155.

On the nature of the relative rights of the ryot and the melvaramdar in a permanently settled estate, see (1897) 20 Mad. 299.]

[178] APPELLATE CIVIL.

The 21st July and 21st September, 1881.

PRESENT :

MR. JUSTICE MUTTUSAMI AYYAR AND MR. JUSTICE TARRANT.

Venkata Narasiah.....(Plaintiff), Appellant
and
Subbamma.....(Defendant), Respondent.*

Suit to recover land sold in execution of a decree—Limitation.

V having bought lands from A, whose husband (deceased) acquired them at a Court sale, sued S in ejectment in 1879.

S pleaded Limitation on the ground that B (her deceased husband) had purchased the lands in question at a Court sale in 1876.

Held, that as A was no party to the decree or the execution proceedings under which B purchased, it was not necessary for V to set aside the sale to B in this suit.

THE facts and arguments in this case appear in the Judgment of the Court (MUTTUSAMI AYYAR and TARRANT, JJ.).

Subba Rao for Appellant.

Ramachandrayyar for Respondent.

Judgment.—The suit out of which this appeal arises was brought to recover certain lands, which, as alleged by the plaintiff, were purchased by him on the 29th December 1878 from one Adamma, whose husband, Chabati Narasinga Rao, had acquired them under a decree passed against one Timmaiya, the son of Chelamaya, the defendant in Suit No. 8 of 1864 on the file of the Subordinate Court of Cuddapah. The plaintiff, which was filed on the 17th November 1879, further stated that the defendant prevented the plaintiff from cultivating the lands, and unlawfully dispossessed him of the same on the 28th October 1879. The defendant's case was that the decree obtained by Narasinga Rao was collusive, that her husband purchased the property in suit at the Court sale held in execution of the decree in Suit No. 8 of 1864, and that neither the plaintiff nor his vendor was ever in possession. The Lower Courts held that, as the claim could not be decreed without setting aside the sale set up by the defendant, the suit was substantially brought to set aside a sale, held in

* Second Appeal No. 83 of 1881 against the decree of J. Wallace, Acting District Judge of Cuddapah, confirming the decree of Kurnool Lakshmana Rau, District Munsif of Nundalur, dated 22nd October 1880.

execution of a decree of a Civil Court, and was, as such barred by Clause 12 of the 2nd schedule of the Limitation Act.

[179] The plaintiff has appealed. In this appeal it is only necessary to decide the question of Limitation. Adamma's husband, under whom the plaintiff claims, was no party the decree or the execution proceedings which resulted in the Court sale at which the defendant's husband became purchaser; and the plaintiff's title, if any, could not therefore be affected by them. We do not concur with the District Judge in thinking that the real object and purpose of the suit could be taken to be to avoid or set aside the sale within the meaning of Clause 12 of the 2nd schedule of the Limitation Act; because that is *not the only means* by which the defendant's title could be defeated and the plaintiff could recover possession. It is not enough that the party in possession is a purchaser at a Court sale, but it must also appear that the plaintiff is bound to set aside that sale before he could recover. If Timmaiya was entitled to the lands in question as against the defendant in Suit No. 8 of 1864, the plaintiff in the present suit is entitled to recover them on proof of such title and of its transfer first to Narasinga Rao and then to himself, and has no reason to set aside the sale set up by the defendant. Following the decision of this Court in R. A. 31 of 1880, we reverse the decrees of the Courts below and remand the suit for disposal on the merits. The costs of this appeal will be costs in the cause.

NOTES.

[Art. 12 does not apply to suits in which the plaintiff was not a party to, nor bound by, the sale sought to be set aside:—(1882) 5 Mad. 54;

This case was explained away in (1883) 7 Mad., 258, as based on the principle that the Court did not profess to sell the plaintiff's property and not on the fact of his not being a party to the suit. But 7 Mad., 258, was doubted in (1895) 18 Mad., 478 and was overruled in (1896) 20 Mad., 118 F. B; (1897) 19 All., 308.

See also (1886) 9 Mad., 460.]

[4 Mad. 179.]

APPELLATE CIVIL—FULL BENCH.

The 5th April and 22nd September 1881.

PRESENT:

SIR CHARLES A. TURNER, K.T., CHIEF JUSTICE, MR. JUSTICE
INNES, AND MR. JUSTICE MUTTUSAMI IYYAR.

Ramasami Sastrigal.....(Defendant), Appellant

and

Samiyappanayakan and others.....(Plaintiffs), Respondents.*

Mortgage by way of conditional sale executed since 1858—Construction, rule of.

Per CURIAM (INNES, J., dissenting).—In the Madras Presidency, where contracts of mortgage by way of conditional sale have been entered into subsequent to the year 1858, redemption after the expiry of the term limited by the contract must be allowed as suggested in *Thumbasawmy Moodelly v. Hossain Rowthen* (L. R., 2 I. A., 341; s... I. L. R., 1 Mad., 1).

* Second Appeal Nos. 361, 362, 363 of 1879 against the decrees of F. Brandt, District Judge of Trichinopoly, reversing the decrees of A. Chendrayar, District Munsif of Kulitalai, dated 26th March 1879.