

## APPELLATE CIVIL.

*Before Mr. Justice Kernan and Mr. Justice Parker.*

PACHAMUTHU (DEFENDANT No. 5), APPELLANT,

and

CHINNAPPAN (PLAINTIFF), RESPONDENT.\*

1887.  
Feb. 22,  
March 9.

*Indian Limitation Act—Act XV of 1877, Sch. II, arts. 91, 120—Suit for declaration of title—Incidental relief—Setting aside instrument.*

The period of limitation for suits to declare title is six years from the date when the right accrued, under Indian Limitation Act, 1877, Sch. II, art. 120; and this period is not affected by art. 91, though the effect of the declaration is to set aside an instrument as against the plaintiff.

APPEAL from the decree of S. Gópalácháry, Acting Subordinate Judge of Madura (East), in appeal suit No. 239 of 1885, reversing the decree of T. Venkata Rámayya, District Múnsif of Paramagudi, in original suit No. 523 of 1884.

This was a suit for a declaration that the plaintiff was owner of certain land.

In October 1880 the plaintiff brought an action against the defendants, Nos. 1-4, and in November 1880, the plaintiff land was attached before judgment. In the interval, defendant No. 1, the father of defendants Nos. 2-4, mortgaged the plaintiff land to defendant No. 5 under Exhibit J. The same land was subsequently sold in execution of a decree obtained by another creditor against defendant No. 1, and in December 1882, the plaintiff became the purchaser and entered into possession under a certificate dated 26th June 1883. The plaintiff now sued for a declaration as above, alleging that the mortgage to defendant No. 5 was fraudulent and without consideration.

Defendants Nos. 1-4 did not appear.

The District Múnsif dismissed the suit on the ground that it was barred under Indian Limitation Act, 1877, Sch. II, art. 91.

The Subordinate Judge reversed his decree and granted the declaration prayed for.

Defendant No. 5 appealed.

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\* Second Appeal 287 of 1886.

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v.  
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*Subramanya Ayyar* and *Rangacháryár* for appellant argued that art. 91 was applicable since the plaintiff in fact sought to have the appellant's mortgage (Exhibit J) set aside.

*Mr. K. Brown* for respondent relied on (*inter alia*), *Uma Shankar v. Kalka Prasad* (I.L.R. 6, All., 75) and *Ikrám Singh v. Intizam Ali* (I.L.R. 6, All., 260) and referred to *Raj Bahadoor Singh v. Achumbit Lal* (L.R. 6, I.A., 110).

The further arguments adduced on this second appeal appear sufficiently for the purpose of this report from the judgment of the Court (Kernan and Parker, JJ.)

JUDGMENT.—The appellant's principal ground of appeal is that the respondent's cause of action was, at the time of filing of this suit, the 18th of March 1884, barred by limitation.

The plaintiff prays for a declaration "that the 5th defendant has no right whatever to the plaint lands valued at Rs. 300, and that the plaintiff is the owner thereof by right of auction purchase." The appellant contends that art. 91 of the Limitation Act applies. The plaintiff contends that art. 120 applies, but that if art. 91 applied still the suit is not barred.

The facts necessary to refer to and found by the Subordinate Judge are as follows :—

The plaintiff filed a suit No. 632 of 1880 on the 8th of October 1880 against defendant No. 1, and his sons defendants Nos. 2, 3, and 4, on two hypothecation bonds for Rs. 1,040 to recover the amount due, and on the 19th October 1880 served the defendants with notice for an attachment before judgment, and on the 21st November 1880 attached the plaint lands. In the meantime defendant No. 1 executed a mortgage to the defendant No. 5 with possession for 20 years for Rs. 1,000, dated 16th October 1880, which was duly registered (Exhibit J). Suit No. 147 of 1881 was brought against defendant No. 1. by another creditor of his, and judgment having been obtained, the plaint lands were attached in that suit, and the plaintiff became the purchaser thereof on the 6th December 1882 and got a certificate dated 26th June 1883 (Exhibit E). The plaintiff obtained possession from the Court under s. 318 of the Code of Civil Procedure in August 1883 and has since been in possession. After the execution by defendant No. 1 of the mortgage to defendant No. 5 (Exhibit J), the plaintiff's son on behalf of the plaintiff and with his knowledge

presented a petition to the Registration officer not to register that mortgage, alleging that it was executed with fraudulent intent as suit No. 632 of 1880 was pending. PACHAMUTHU  
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The Subordinate Judge differing from the Múnsif has found that the 5th defendant's mortgage (Exhibit J) was not executed for valuable consideration and was executed to defeat and delay execution by his creditors.\*

It is true, as argued by the plaintiff's Vakil, that fraud must be proved not presumed. But the evidence in this case being believed by the Subordinate Judge, we cannot say that, on the facts, he was wrong in holding that fraud was proved. It has not been made ground of appeal that, if the fraud was correctly found, still the action would not lie, nor was this question raised in the Lower Courts.

It is not clear when the facts that entitled the plaintiff to sue became known to him, within the meaning of Indian Limitation Act, Sch. II, art. 91, and if we were of opinion that the case came within that section we should direct further inquiry. But we think that art. 91 does not apply as the plaintiff does not and did not seek to cancel or set aside the mortgage of the 16th of October 1880. No doubt a declaration that defendant No. 5 has no title to the plaint land would be to that extent equivalent to setting aside that mortgage. But such declaration would still leave the deed to operate as between the parties thereto, and therefore would not amount to cancelling or setting aside that deed. Moreover the plaintiff has no title or interest to set aside the deed as between the parties thereto. Assuming that the plaintiff had a right to file a suit for the declaration prayed, is that right barred under any other provision of the Limitation Act? The only article, which it appears to us, affects plaintiff's right is art. 120 which prescribes the period of six years from the date when the right accrued. The plaintiff purchased in December 1882, and he relies on his right as a purchaser to have the declaration. No doubt the plaintiff had information before his purchase, and probably in November 1880, that the deed to the defendant No. 5 was executed without consideration and was fraudulent, and he purchased the interest of the defendant at auction, but we do not think these matters should be now considered as the plaintiff's right to maintain this suit, subject to the questions of limitation, is not

PACHAMUTHU made a ground of appeal, and as the deed of mortgage to the defend-  
 CHINNAPPAN. <sup>v.</sup> dant No. 5 is found to be fraudulent.

This second appeal is dismissed with costs.

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## APPELLATE CRIMINAL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice, and  
 Mr. Justice Parker.*

QUEEN-EMPRESS

against

BAODUR BHAI AND OTHERS.\*

*Madras District Municipalities Act—Act IV of 1884, ss. 191, 192, 193, 198—  
 Butchers' licenses—Private market, meaning of.*

A Municipal Council, under the Madras District Municipalities Act, refused to give licenses to certain persons keeping butchers' shops not used as slaughter-houses, except on the condition that they should remove to a fixed market:

*Held*, that butchers' shops are not "private markets" within the meaning of the Act, and that the action of the Municipal Council was *ultra vires*.

THIS was a petition under ss. 435 and 439 of the Code of Criminal Procedure praying the High Court to revise an order of the District Magistrate of Bellary dismissing the complaint in case No. 43 of 1886 on the file.

The *Acting Government Pleader* (Mr. E. B. Powell) for the Crown.

The accused were not represented.

The facts and arguments sufficiently appear for the purpose of this report from the Judgment of the Court (Collins C.J., and Parker, J).

JUDGMENT.—The Prosecuting Inspector to the Municipal Council of Bellary laid a complaint before the District Magistrate against four persons for failing to take out licenses for their shops, under s. 191, cl. 2 of the District Municipalities Act. The accused are keepers of butchers' shops in Cowle Bazaar, and have never hitherto been called on to take out licenses for their shops. They are willing to take out licenses, but the Municipal Councillors require them to remove their shops to the municipal market in

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\* Criminal Revision Case 456 of 1886.