

MUTTUSAMI AYYAR, J.—I am of the same opinion. From the order appealed against, section 588 provides no appeal. Every decree passed by a Civil Court is presumed to be valid so long as it is in force. Section 244 accordingly presupposes that there is a decree and that it is valid, and then declares that certain questions shall be dealt with by an order in execution and not by a regular suit. The question whether the decree under execution is valid for the purposes of execution is not within the purview of that section. It may be that the decree is liable to be set aside in a fresh suit or on an application for review of judgment. It may also be, when execution is refused on the ground that the decree is illegal on the very face of it or of the proceedings mentioned therein, an appeal will lie. The order might then be regarded as substantially setting aside a subsisting decree and consequently as being in the nature of a decree as defined by section 2 of the Code of Civil Procedure. But it is not necessary to determine that question for the purposes of this appeal, and it would suffice to state that the order before us did not refuse execution.

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CHELLAM  
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I would also dismiss this appeal with costs.

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## APPELLATE CIVIL.

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

ADAKKALAM AND OTHERS (DEFENDANTS), APPELLANTS,

v.

THEETHAN (PLAINTIFF), RESPONDENT.\*

1888.  
October 20.  
1889.  
April 2.

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*Registration Act—Act III of 1877, s. 17 (c)—Unregistered agreement by mortgagor to sell to mortgagee—Subsequent assignment of equity of redemption to third person for value, but with notice of agreement.*

In a suit for redemption filed by an assignee for value of the equity of redemption against a mortgagee in possession, it was found that the mortgagor had agreed with the defendant to sell the mortgage premises to him, that part of the purchase-money had been acknowledged as paid and that the balance had been tendered in pursuance of the agreement. It was further found that the plaintiff had taken his assignment with notice of the above agreement and tender. The agreement was in writing, but not registered :

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\* Second Appeal No. 88 of 1888.

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*Held*, that though the agreement was not admissible in evidence as creating an interest in land, still it might be used for the purpose of obtaining specific performance, and the plaintiff having purchased the equity of redemption with notice as above was not entitled to redeem.

*Per cur* :—The plaintiff having knowledge of the agreement was put upon enquiry to ascertain whether the tender had been made and whether there was any objection to his purchase on that ground.

SECOND APPEAL against the decree of J. A. Davies, Acting District Judge of Tanjore, in appeal suit No. 872 of 1886, reversing the decree of T. Kanagasabai Mudaliar, Subordinate Judge of Tanjore, in original suit No. 38 of 1885.

Suit by the assignee of the equity of redemption to redeem mortgages, dated 1874 and 1881, and executed by Narayana Ayyar (deceased) and his widow, Latchmi Ammal, to the late father of the defendant and to defendant No. 1, respectively. The assignment to the plaintiff took place on 15th June 1885; on 22nd July the plaintiff called on defendant No. 1 to surrender the mortgage premises on payment of the amount due on the mortgages, and on his refusal this suit was filed.

The defendant pleaded that the mortgagor entered into a contract with him in writing on the 28th May 1885 to sell him the whole of the plaint properties for Rs. 1,200 exclusive of the amounts of the mortgage, &c., due to him; that she received in advance Rs. 400 and promised to receive the balance and execute a deed of sale on the 11th June; that she refused to fulfil the contract when he went to her with money and stamped paper; that the plaintiff's sale-deed was brought to existence by deliberate fraud, notwithstanding his protest against it at the time and that the deed of sale sued on is not valid in law. He denied the plaintiff's allegation of his offer to redeem and the defendant's refusal.

The agreement set up by the defendant was not registered. Its terms are recited sufficiently for the purpose of this report in the following order of the High Court.

The Subordinate Judge dismissed the plaintiff's suit; on appeal the District Judge reversed his decree and passed a decree for redemption as sought.

The defendant preferred this second appeal.

*Bhashyam Ayyangar* for appellants.

*Rama Rau* and *Pattabhiramayyar* for respondent.

The further facts of the case and the arguments adduced on this second appeal appear sufficiently for the purpose of this report from order of the High Court (Collins, C.J., and Parker, J.).

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ORDER.—The land in suit was in possession of defendant No. 1 under mortgages executed to him by Narayana Iyer and his widow, Latchmi Ammal. On 28th May 1885 Latchmi Ammal settled accounts with defendant No. 1 and executed to him exhibit I. By that document she stated that the price settled in full satisfaction of all claims in respect of sale, mortgage, &c., was Rs. 1,200, of which sum she admitted receipt of Rs. 400. The balance Rs. 800 was to be paid by 11th June 1885, on which payment being made Latchmi Ammal was to execute a sale-deed. One-eighth pangoo, which was under mortgage to defendant No. 1, was to be restored to Latchmi Ammal's possession.

Notwithstanding this agreement, Latchmi Ammal sold the equity of redemption of the plaint property to plaintiff on 15th June 1885. Plaintiff on 22nd July 1885 sent a notice by post, calling on defendant No. 1 to accept the mortgage amount and deliver up the land and, on his refusal, brought this suit to recover. Defendant No. 1 pleaded in answer the agreement exhibit I given to him by Latchmi Ammal and resisted plaintiff's suit for possession as plaintiff had bought with notice of that agreement.

The District Judge held that exhibit I was compulsorily registrable under clause (c), section 17 of the Registration Act, under the ruling in *Ramasami v. Ramasami*(1), but held further—following the ruling in *Burjorji Cursetji Panthaki v. Muncherji Kuverji*(2), and *The Bengal Banking Corporation v. Mackertich*(3)—that the document would be admissible as proving an agreement to convey. The Judge held, however, that though defendant No. 1 might have a remedy against Latchmi Ammal and plaintiff in the form of a suit for specific performance, such right to sue could be no defence in the present action, as exhibit I was inadmissible in so far as it tended to affect the immovable property in question. The Judge further held that the letter of July 1885 was a good and sufficient tender and gave a decree for the plaintiff, the redemption money having been paid into Court.

We are of opinion that the view taken by the District Judge as to exhibit I was right. Though not receivable in evidence

(1) I.L.R., 5 Mad., 115.

(2) I.L.R., 5 Bom., 143.

(3) I.L.R., 16 Cal., 315.

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(being unregistered) as creating an interest in land, it might be used for the purpose of obtaining specific performance of the agreement, *The Bengal Banking Corporation v. Mackertich*(1). In this respect the want of registration would not be a fatal bar as against the subsequent registered conveyance. See *Kadar v. Ismail*(2).

But in this case the defendants were in possession, and had been for years in possession by virtue of their mortgage. Exhibit I stipulated that the balance of the purchase-money (Rs. 800) should be paid by 11th June 1885, and defendant No. 1 alleged that he went to Latchmi Ammal with the money and with the stamped paper for the execution of the conveyance, but that she refused to fulfil the contract, and that plaintiff's sale-deed was deliberately executed on 15th June in fraud of his rights and in spite of his protest, the plaintiff having offered Latchmi Ammal a large sum as purchase-money. If this be the case, *i.e.*, if defendant No. 1 can prove both the agreement to convey and the tender of the purchase-money, we do not think that we ought to compel him to bring another suit to obtain specific performance of his contract of sale. He is in possession, and all that Latchmi Ammal could claim would be the payment of Rs. 800 on her execution of a sale-deed. If plaintiff bought with the knowledge of the agreement and the tender, he ought not to be allowed to obtain possession.

No issue appears to have been framed in the Courts below as to this point and we will therefore refer to the District Judge the following issues for trial:—

(1) Did defendant No. 1 by 11th June 1885 tender to Latchmi Ammal the balance of the purchase-money (Rs. 800) and a stamped paper for the execution of a conveyance?

(2) Did plaintiff purchase from Latchmi Ammal with knowledge of the agreement and the tender?

(3) Is defendant No. 1 entitled to a charge upon the property to the extent of Rs. 400 under section 55, paragraph 6, clause (b), of the Transfer of Property Act?

Further evidence may be taken.

The District Judge returned findings in the affirmative on all the above issues.

(1) I.J.R., 10 Cal., 315.

(2) I.L.R., 9 Mad., 119.

The second appeal having come on again for final hearing the Court delivered the following

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JUDGMENT:—It is contended that plaintiff had no knowledge of the tender, but we consider that having knowledge of the agreement he was put upon enquiry to ascertain whether the tender had been made, and whether there was any objection to his purchase on that ground. He did not go into the box to explain the matter. We cannot in this appeal consider plaintiff's claim for repayment of purchase-money. We reverse the decree of the Lower Appellate Court and restore that of the Subordinate Judge. The appellant is entitled to his costs in this Court and in the Lower Appellate Court.

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### APPELLATE CIVIL.

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

CHERU KURUP (DEFENDANT), APPELLANT,

v.

CHERU KANDA KURUP (PLAINTIFF), RESPONDENT.\*

1889.  
April 9.

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*Civil Procedure Code, s. 624—Who may review judgment—Grant of application for review.*

An application for review of judgment was presented on other grounds than those specified in s. 624 to a District Munsif who had delivered the judgment, and he thereupon ordered the decree to be produced. The District Munsif having resigned, his successor heard and determined the application:

*Held*, it was not competent to the District Munsif who had not delivered the original judgment to entertain the application for review.

SECOND APPEAL against the decree of Lewis Moore, Acting District Judge of South Malabar, in appeal suit No. 74 of 1888, affirming the decree of N. Sarvothama Row, District Munsif of Calicut, in original suit No. 192 of 1886.

An application by the decree-holder in original suit No. 341 of 1885, made under section 331 of Civil Procedure Code, having been registered as a suit between the decree-holder and the claimant came on for hearing before O. Chandu Menon, District Munsif of Calicut, and was dismissed with costs on 29th September 1886.

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\* Second Appeal No. 739 of 1886.