

## APPELLATE CIVIL.

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

KASTURI (DEFENDANT NO. 2), APPELLANT,

*v.*

VENKATACHALAPATHI (PLAINTIFF), RESPONDENT.\*

1892,  
Feb. 18, 23.

*Evidence Act—Act I of 1872, s. 115—Estoppel—Civil Procedure Code—Act XIV of  
1882, s. 237—Prior encumbrance—Notice to executing decree-holder.*

A hypothecation bond executed in 1878 by the husband (deceased) of defendant No. 1 to secure a debt due by him to a partner of the plaintiff was assigned to the latter in 1888. In 1882 the plaintiff, who was aware of the existence of this instrument, brought the land comprised in it to sale in execution of a money decree obtained by him against the executant, and defendant No. 3 became the purchaser. At the time of the sale the plaintiff gave no notice of the existence of the encumbrance. In a suit to recover the principal and interest due on the hypothecation bond :

*Held*, that the plaintiff was estopped from recovering the secured debt against the land.

SECOND APPEAL against the decree of J. A. Davies, District Judge of Tanjore, in appeal suit No. 474 of 1890, affirming the decree of A. Kuppusami Ayyangar, District Munsif of Kumbakonam, in original suit No. 449 of 1889.

Suit to recover principal and interest due on a hypothecation bond, dated 20th August 1878, and executed by the husband (deceased) of defendant No. 1 in favour of one Aundi Chakrapani Chetti, who transferred it to the plaintiff by an instrument dated 23rd June 1888. The plaintiff's assignor, who was his partner, was not joined in this suit.

It appeared that the plaintiff sued the late husband of defendant No. 1 in original suit No. 556 of 1878 in the Court of the District Munsif of Kumbakonam and obtained a personal decree against him, in execution of which he brought the land comprised in the above-mentioned hypothecation bond to sale in 1882, and defendant No. 2 then became the purchaser, and was now in possession of it. The plaintiff at that time was aware of the

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\* Second Appeal No. 875 of 1891.

existence of the hypothecation bond, but he gave no notice of it at the time of sale.

The District Munsif passed a decree for the plaintiff declaring the amount of the decree a charge on the land in the possession of defendant No. 2, and the District Judge on appeal affirmed this decree, referring to the fact that at the time of the sale the High Court had made no rules under Civil Procedure Code, section 287 : and the plaintiff preferred this second appeal.

*Parthasaradhi Ayyangar* for appellant.

*Ramasami Mudaliar* for respondent.

JUDGMENT.—There can be no doubt that if plaintiff himself had been the holder of the prior encumbrance when he brought the property to sale, he would be subsequently estopped from enforcing the lien of which he had given no notice. See *Agarchand Gumanchand v. Rakhma Hanmant*(1), followed by this Court in *Jaganatha v. Gangi Reddi*(2), *Nursing Narain Singh v. Roghobur Singh*(3), *Tinnappa v. Murugappa*(4). The decision in *Banwari Das v. Muhammad Mashiat*(5) is not in conflict with these decisions, since in that case it was not attempted to be shown that the provisions of section 287 of the Code of Civil Procedure had not been complied with (*vide* judgment of Edge, C.J., page 702). All that was urged was that plaintiff as a bidder had not personally announced his encumbrance.

It is urged in this suit that it was not plaintiff but Aundi Chakrapani Chetti who held the prior mortgage. It is admitted, however, that this man was plaintiff's partner, and that plaintiff was aware of the existence of the prior mortgage of which he took an assignment some years after the sale.

It appears to us to be immaterial that a suit by Chakrapani Chetti himself might have been successful. The ground of decision is that it was plaintiff himself who led intending purchasers to believe that the property was offered for sale free of encumbrances, and that plaintiff by concealing the existence of a lien, of which he was aware, led the purchaser to pay full value for the property. He is, therefore, estopped from now denying that the sale took place free of encumbrances (section 115, Indian Evidence Act). Under section 237 of the Code of Civil Procedure

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(1) I.L.R., 12 Bom., 678. (2) I.L.R., 15 Mad., 308. (3) I.L.R., 10 Cal., 609  
(4) I.L.R., 7 Mad., 107. (5) I.L.R., 9 All., 690.

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the plaintiff as execution-creditor was bound to specify the judgment-debtor's interest so far as he had been able to ascertain it.  
*Tinnappa v. Murugappa*(1).

On this ground the decrees of the Courts below must be reversed so far as second defendant is concerned and the plaintiff's suit dismissed with costs throughout.

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## APPELLATE CRIMINAL.

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

HAYES

v.

CHRISTIAN.\*

1892.  
 February 24.  
 March 1.

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*Indian Penal Code—Act XLV of 1860, s. 499—Defamation—Privilege of party—  
 Appeal from the Resident's Court, Bangalore—Limitation.*

A person who was being defended by counsel on a criminal charge interfered in the examination of a witness and made a defamatory statement with regard to his character. He was now charged with defamation and convicted in the Resident's Court at Bangalore.

On an appeal to the High Court, preferred more than sixty days after the conviction:

*Held*, (1) that the appeal should be admitted:

(2) that the occasion was not privileged and the words complained of were uttered maliciously and the conviction was right.

APPEAL against the judgment and sentence of the Assistant to the Resident at Mysore and Justice of the Peace for the Town of Bangalore in Criminal Revision Case No. 1 of 1891.

The facts of the case are stated in the judgment of the High Court sufficiently for the purposes of this report.

The sentence appealed against was pronounced on 10th October 1891 and this appeal was filed on 6th January 1892.

The appeal having come on before a single Judge for admission, it was referred to a Bench of two Judges with reference to the question as to whether or not it was barred by limitation.

It then came on before *Collins, C.J.*, and *Parker, J.*

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(1) I.L.R., 7 Mad., 107.

\* Criminal Appeal No. 11 of 1892.