

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

RAJA GOUNDAN (PLAINTIFF), APPELLANT,

v.

RAJA GOUNDAN AND OTHERS (DEFENDANTS), RESPONDENTS.*

1893.

August 24,
25, 29, 30.

November 16.

Sale of mittah for arrears of revenue—Purchase by Government—Subsequent sale by Government—Suit by owner of a share in the mittah for cancellation of second sale—Revenue Recovery Act—Madras Act II of 1864, ss. 38, 59—Limitation—Admissibility of horoscope—Indian Evidence Act—Act I of 1872, ss. 17 and 18.

The plaintiff was the owner of a share in a mittah which was sold on 15th February 1886 for arrears of revenue and bought by Government, who, on 16th June 1886, sold it to the first defendant, notifying the resale in the form prescribed under Madras Act II of 1864. The first defendant subsequently resold portions of the mittah to defendants 3 and 5 to 8. The plaintiff sued for cancellation of the second sale so far as his share was concerned, instituting a suit for this purpose on 31st March 1890 :

Held, (1) that the sale of 16th June 1886 was not a sale under section 38 of Act II of 1864, although the notification of the sale was in the form prescribed by that Act, but a sale by Government of property that had become its own by reason of the purchase at the prior sale of 15th February ;

(2) that even assuming the sale of 16th June 1886 to have been a sale under section 38 of Act II of 1864, the suit was time-barred under section 59 of that Act, since it should have been brought within six months from the date of plaintiff's majority, viz., 29th November 1888, as proved by his horoscope, which had been a public record from a period *ante litem motam*, was relied upon by the defendants in the present suit, and was put in as an 'admission' under the Indian Evidence Act, ss. 17 and 18. *Ram Nivain Kallia v. Monce Bibec*(1) and *Satis Chunder Mukhopadhyaya v. Mohendra Lal Pathak*(2) distinguished ;

(3) that the limitation prescribed by section 59 of Madras Act II of 1864 is applicable to sales which are illegal by reason of contravening some express law, as well as to sales which are irregular. *Gobind Lal Roy v. Ramjanam Misser*(3) relied on.

APPEAL against the decree of P. Dorasawmy Aiyar, Subordinate Judge of Bellary and Salem, in original suit No. 6 of 1890.

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

* Appeal No. 24 of 1892.
(2) I.L.R., 17 Calc., 849.

(1) I.L.R., 9 Calc., 613.
(3) I.L.R., 21 Calc., 70.

of the Lower Court was for the defendants. The plaintiff preferred this appeal.

Sadagopachariar for appellant.

The *Acting Government Pleader* (*Subramanya Ayyar*), *Bhashyam Ayyangar*, and *T. Subramanya Ayyar* for respondents.

BEST, J.— The appellant was plaintiff in the Lower Court, his suit being (1) for cancellation, so far as his share of the Puthur mittah (in Salem district) is concerned, of a sale held on the 16th June 1886 by which the entire mittah was sold; or (2) in case it is found that the sale is not liable to be set aside, for a declaration that defendants hold the plaintiff's share as trustees and for a decree directing them to convey to plaintiff his share of the mittah and of the income thereof since the date on which defendants got possession of the same.

The Subordinate Judge has found that plaintiff's suit was not barred by limitation, and that if the suit had been for the purpose of setting aside the *first* sale held in February 1886, plaintiff would have been entitled to a decree, but that the second sale (of June 1886) is not one that is open to question by the plaintiff, as it was a sale of property no longer belonging to plaintiff, but belonging to Government as purchaser at the sale of February 1886.

As is seen from exhibit I, the mittah in question was put up for sale, for arrears of revenue, on 15th February 1886, when there being no other bidders, it was purchased on behalf of Government for Rs. 1,000 and this fact was reported to the Board of Revenue on the following day (see exhibit T); and orders were also issued at once to the treasury to credit this sum of Rs. 1,000 towards the arrears of the said mittah (see exhibit XXXIX, also exhibits XL and III). The mittah was again sold, on 16th June 1886, on the Collector's recommendation contained in his letter to the Board of Revenue which is filed as exhibit H (dated 11th March 1886), the resale being sanctioned by the Revenue Board's Proceedings, dated 2nd April 1886 (see exhibit I).

The Collector's letter H is as follows: "Since reporting the result of the sales of the Puthur and Tammakurichi mittahs, I have the honour to inform the Board that I have received two offers, one for Rs. 35,000 for the two mittahs that have been sold. As only a certain number of the villages of each mittah (though not separately registered) belongs to the minor proprietors for whose default they were sold, and as the owners of the other villages have regularly paid their share, I would strongly

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“recommend a resale to enable Kylasa Goundan who has offered the Rs. 35,000 or some other co-sharers to secure these old-standing mittahs and thus arrange among themselves to clear of all encumbrances. This Kylasa Goundan proposes to do. Government can in no case be loser.”

It must here be noticed that Tammakurichi mittah was also sold on the 15th February 1886 when Puthur was sold, and bought like Puthur on behalf of Government for Rs. 1,000, but plaintiff does not appear to claim any interest in that mittah, his case being (*vide* paragraph 2 of the plaint) that there had been a partition between his branch of the family and that of defendants 1 and 3 to 8, though the registry continued joint. By I “the resale of the mittahs is sanctioned as recommended” with the proviso that “Kylasa Goundan’s offer should be fixed as the upset price.”

The mittahs were accordingly resold on the 16th June 1886, when first defendant became the purchaser: this is the sale that is now sought to be set aside, and which the Subordinate Judge has held to be not a sale under section 38 of Act II of 1864, but a sale by Government of property that had already become its own by reason of the purchase at the prior sale of 15th February.

The first question for consideration in this appeal is whether the Subordinate Judge is right in thus holding? The answer to this question must, I think, be in the affirmative. As pointed out by the Subordinate Judge, no order passed by the Collector cancelling the sale of February, with reference to the provisions of section 38 of Act II of 1864 as amended by Act III of 1884, has been produced. On the contrary, it is admitted that no such order was passed; but the Collector’s letter H (above set out in full) is referred to as being equivalent to such an order. Neither in this letter however nor in the Revenue Board’s order thereon (exhibit I) is there anything said about setting aside the previous sale, and the mere use of the word *resale* clearly implies nothing more than a second sale. It is clear also from exhibits II and V that the resale was with reference to Standing Order No. 111 of the Board of Revenue which deals with lands bought in by Government. No doubt the notification of this resale was issued in the form prescribed under Act II of 1864 for sales on account of arrears of revenue; but it is explained, on behalf of the respondents, that no form had then been prescribed for sales under Standing Order No. 111. Be this as it may, the circumstance

that in the notification A (clause 2) the current revenue payable by the purchaser is entered as *nil*, when compared with the corresponding entry in B, the notification of the sale of 15th February (in which the sum is stated to be Rs. 8,532-1-7) places beyond doubt the fact that the 'resale' was not on account of arrears of revenue, but of property that belonged to Government as purchasers at the previous sale. Such being the case, the order (exhibit O) is of no weight. This suit which is for setting aside the sale of 16th June 1886 for irregularities *in such sale* must therefore fail.

But even if the suit did not fail on this ground, it must do so as time-barred in so far as cancellation of the sale is sought. The period of limitation for a suit of this kind is six months from the date of the sale (see section 59 of Act II of 1864 and *Venkata v. Chengadu*(1). The appellant's contention that the limitation prescribed by the above section is inapplicable to sales which are open to the objection of illegality (as distinguished from mere irregularities) by reason of their contravening some express law—such as Regulation X of 1831, as alleged in the present case, is opposed to the recent ruling (dated 8th July 1893) of the Privy Council in *Gobind Lal Roy v. Ramjanam Misser*(2); where a similar contention in the case of a sale under Act XI of 1859 was disallowed on the ground that "a sale is a sale made under the Act within the meaning of the Act, when it is a sale for arrears of Government revenue, held by the Collector or other officer authorized to hold sales under the Act, although it may be contrary to the provisions of the Act either by reason of some irregularity in publishing or conducting the sale, or in consequence of some express provision for exemption having been directly contravened."

It was therefore incumbent on appellant to have brought his suit before the expiration of six months from the date of his attaining majority. If it were a fact, as alleged in the plaint, that plaintiff was a minor till October 1889, this suit, which was brought on 31st March 1890, would be in time. But the Subordinate Judge has found—and no doubt rightly—that plaintiff was born on 29th November 1870 and consequently attained his majority on the 29th November 1888, which is sixteen months prior to the institution of this suit.

(1) I.L.R., 12 Mad., 168.

(2) I.L.R., 21 Cal., 70.

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The fact of plaintiff's birth having taken place in November 1870 is proved from his horoscope (exhibit XXV), which was produced by his mother before the Tahsildar in November 1880. It is initialled by the Tahsildar with the addition of the date, 10th November 1880, and in the deposition VII of Kaliyammal (appellant's mother), dated 9th idem, she is found to have stated that there was a copy of the horoscope with Rama Krishnier and that she would "send a person and get it this night." Rama Krishnier has been examined as defendants' third witness and identifies exhibit XXV as the copy which he then gave to Kaliyammal. It is now produced from the public records where it appears to have been kept ever since its production in November 1880. Moreover, there is no room for doubt as to its identity with the horoscope produced before the Tahsildar, for in his report (X) to the Collector, which is dated 12th November 1880, he gives the plaintiff's age as 9 years 11 months and 11 days on the 18th idem, and in the Collector's letter VIII (of 13th December 1880) to the Board of Revenue the plaintiff is stated to be a minor 'now aged 10 years.' As at the time of the deposition VII and production of XXV there was no reason for misrepresenting the age of plaintiff, the evidence thus afforded may be safely relied on. It is also in accordance with the age of the plaintiff as stated in exhibits V and LIII, the former of which is a deposition of Kaliyammal, dated 22nd March 1879, when she stated the plaintiff's age to be eight years, and the latter a petition of the same Kaliyammal, dated 7th December 1879, in which her son's age is given as nine years. This petition is proved by defendants' eighth witness Ramalinga Aiyar, by whom it was presented on behalf of Kaliyammal under the vakalat (exhibit LII). These documents give support to the evidence of defendants' fourth witness Ramasawmi Aiyar, who was manager under plaintiff's father from Akshaya (1866-67) till his death in Iswara (1877-78). He states that plaintiff was born in the year Pramōduta (1870-71). It has been contended on behalf of appellant that the horoscope is inadmissible in evidence and in support of this contention we have been referred to the rulings of the Calcutta High Court in *Ramnarain Kallia v. Monce Bibee* (1) and *Satis Chunder Mukhopadhyaya v. Mohendro Lal Pathuk* (2). Those cases are not on all fours with the present one. In both the Calcutta cases

(1) I.L.R., 9 Cal., 613.

(2) I.L.R., 17 Cal., 949.

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the horoscopes were produced then for the first time and by the parties relying on them; whereas in the present case defendants are relying on a horoscope produced by plaintiff's mother and which has been a public record from a period *ante litem motam*. It is not put in here as evidence admissible under section 32 of the Evidence Act, but more as an 'admission,' to which sections 17 and 18 of that Act are applicable. The date of plaintiff's birth is found to be 29th November 1870 and this finding is well supported by the evidence. The suit so far as it seeks for cancellation of the sale is consequently time-barred under section 59 of Act II of 1864.

It is therefore unnecessary to consider the alleged illegalities or irregularities in the conduct of the sale.

But it is further contended on behalf of appellant that, even if plaintiff is not entitled to a decree setting aside the sale, the first defendant should be held to have purchased as a trustee on plaintiff's behalf and a decree should be passed awarding to plaintiff his share of the zemindari. First defendant was in no sense a trustee for the plaintiff, and there is no reason whatever for holding that the sale was brought about by fraud on the part of the defendants. As is seen from the Collector's letter (exhibit H), the arrears of revenue on account of which the mittah was sold were entirely due on the villages which constituted the share of plaintiff's branch, and the shares of defendants 3 to 8 were sold only because they were also liable in consequence of their not being separately registered. It was because the revenue due on the other shares had been 'regularly paid' that the Collector recommended the resale "to enable Kylasa Goundan or some other co-sharer to secure these long-standing mittahs and to arrange among themselves to clear off all encumbrances." There is therefore no ground for presuming fraud from the circumstance of first defendant having, subsequently to his purchase on 16th June 1886, resold portions to defendants 3 and 5 to 8 respectively under exhibits G and F.

I would dismiss this appeal with costs (two sets).

MUTTUSAMI AYYAR, J.—I concur.