

and passed a decree requiring that the defendant No. 1 should execute a conveyance as prayed, and his decree was affirmed on appeal by the District Judge.

KUMRALINGA
PILLAI
v.
ARJAPUTRA
PADIACHI.

Defendant No. 1 preferred this second appeal.

Krishnasami Ayyar for appellant.

Tirumalaisami Chetti for respondent.

JUDGMENT.—At the time of the auction-sale the plaintiff was the usufructuary mortgagee in possession, and the land was brought to sale in satisfaction of a decree upon a prior hypothecation. The equity of redemption was purchased by the first defendant, who at the time was the plaintiff's paid agent, and it is found that in the purchase the first defendant acted as plaintiff's agent and that the plaintiff supplied the money for the purchase. The plaintiff remained in possession through his tenants. The mortgage being usufructuary, the first defendant could not have disturbed him without redeeming the mortgage even if he (first defendant) had purchased the equity of redemption on his account. But it is found that he agreed to execute a conveyance to the plaintiff, allowed plaintiff to take possession of the sale certificate and delivery order and that he was at the time plaintiff's agent.

We think the case falls within the principles laid down in *Monappa v. Surappa*(1) and *Sankuni Nayar v. Narayanan Nambudri*(2) and that section 317, Code of Civil Procedure, is not a bar to the suit.

The second appeal is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Muthusami Ayyar and Mr. Justice Best.

MUNIAPPA NAIK AND OTHERS (DEFENDANTS), APPELLANTS,

v.

SUBRAMANIA AYYAN (PLAINTIFF), RESPONDENT.*

1894.
December 20.

*Civil Procedure Code—Act XIV of 1882, ss. 268, 274—Attachment of mortgage-debt
—Suit by purchaser on mortgage.*

The plaintiff sued to recover principal and interest due on a mortgage. He claimed title as purchaser at a court-sale held in execution of a decree against the

(1) I.L.R., 11 Mad., 234. • • (2) I.L.R., 17 Mad., 282.

* Second Appeal No. 1427 of 1894.

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mortgagee. It appeared that there had been no attachment under Civil Procedure Code, section 274, but under section 268 only :

Held, that the purchase by the plaintiff was not invalid by reason of the last-mentioned circumstance, and that the plaintiff was entitled to recover as against the property.

SECOND APPEAL against the decree of V. Srinivasacharlu, Subordinate Judge of Kumbakonam, in appeal suit No. 524 of 1893, reversing the decree of N. Sambasiva Ayyar, District Munsif of Tiruvadi, in original suit No. 113 of 1893.

Suit to recover principal and interest due upon a mortgage, dated the 9th November 1880, and executed by the father of the defendants to Maruda Asari to secure the repayment of Rs. 100 with interest. The plaintiff claimed as the purchaser at a court-sale held in execution of a decree against the mortgagee. There had been no attachment under Civil Procedure Code, section 274, but attachment had taken place under Civil Procedure Code, section 268 as of a simple debt, and it was objected that the sale was invalid for this reason

The District Munsif overruled this objection, but he dismissed the suit on the ground of limitation on its appearing that the due date in the bond was the 9th of March 1881 and the plaint was not filed until the 4th March 1893. He referred to *Appasami v. Scott*(1), *Sami v. Krishnasami*(2) and *Karimunnissa v. Phul Chand*(3).

The Subordinate Judge reversed this decree and passed a decree for the plaintiff. He held that the omission on the part of the plaintiff to effect an attachment under section 274 was an irregularity unattended by substantial injury and did not vitiate the sale, and he held that the plaintiff was entitled to a decree for sale, although his claim was barred so far as the personal remedy was concerned.

Defendants preferred this second appeal.

Krishnasami Ayyar for appellants.

Rajagopalachariar for respondent.

JUDGMENT.—We agree with the learned Judges who decided the cases of *Debendra Kumar Mandel v. Rup Lal Dass*(4) and *Kasinath Das v. Sadasiv Patnaik*(5).

(1) I.L.R., 9 Mad., 5.

(3) I.L.R., 15 All., 134.

(5) I.L.R., 20 Calc., 805.

(2) I.L.R., 10 Mad., 169.

(4) I.L.R., 12 Calc., 546.

The object of attachment is to take the property out of the disposition of the judgment-debtor. Though the omission to attach under section 274 of the Code of Civil Procedure was an irregularity, we are not able to hold that the irregularity was material or that plaintiff has been prejudiced thereby.

It is next contended that the document contains no provision for interest *post diem*, and that consequently the claim is one for damages and barred under article 116 of the Limitation Act. But on the true construction of the document the last clause appears to provide for interest to date of payment and to make the same a charge on the property; and as interest is not asked for at the enhanced rate there is no question of reasonable compensation under section 74 of the Contract Act, nor is the suit barred under the Limitation Act.

This appeal fails and is dismissed with costs.

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APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Best.

AMIR BAKSHA SAHIB (PETITIONER), APPELLANT,

v.

VENKATACHALA MUDALI (COUNTER-PETITIONER), RESPONDENT. *

1895.
July 26.
August 6.

Civil Procedure Code—Act XIV of 1882, ss. 293, 306, 588—Execution sale—Default by purchaser in paying deposit—Remedy against purchaser.

The purchaser at an execution sale failed to make the deposit of 25 per cent. under Civil Procedure Code, section 306, alleging that the property was discovered by him subsequently to the sale to be subject to an incumbrance. The property was put up for sale again and knocked down for a smaller sum. The decree-holder sought in execution to recover the amount of the difference from the first purchaser. The Court of first instance made an order dismissing the application:

Held, that an appeal lay against the order in question.

APPEAL against the order of E. J. Sewell, District Judge of North Arcot, in miscellaneous appeal No. 18 of 1893, dismissing the appeal against the order of T. Venkataramayya, District Munsif of Vellore, in execution petition No. 527 of 1893.

* Appeal against Appellate Order No. 40 of 1894.