

CLARKE
v.
CHAIRMAN,
OOTACAMUND
MUNICIPAL
COUNCIL.

First Instance, and direct the plaintiff to pay defendant's costs throughout.

Barclay, Morgan & Orr, Attorneys for respondent.

APPELLATE CIVIL.

Before Mr. Justice Best and Mr. Justice Subramania Ayyar.

PULLAMMA, (DEFENDANT No. 6), APPELLANT,

1859.
Feb. 14, 19.

v.

PRADOSHAM AND OTHERS (PLAINTIFF'S HEIRS AND DEFENDANTS
Nos. 7, 8 AND 9), RESPONDENTS.*

*Civil Procedure Code—Act XIV of 1882, ss. 280 to 283—Limitation Act—Act XV of
1877, sched. II, art. 11—Mortgage.*

Land having been granted to several persons jointly, disputes arose among them with reference to its allotment. The disputes having been settled by arbitration, one of the grantees sold his share to the plaintiff. Before the arbitration, another of the grantees mortgaged 7 acres of the land to A, who did not become a party to the arbitration. A subsequently obtained a decree on his mortgage and proceeded to execute it by attachment. The plaintiff intervened in execution, but in 1884 the Court passed an order stating that the plaintiff's land was not attached, and in fact his possession then remained undisturbed. A subsequently executed his decree and purchased the land brought to sale by the Court. The plaintiff's possession was disturbed under colour of this purchase, and he now sued in 1889 to recover the land sold to him :

Held, (1) that the order of the 1st of March 1884 was not an order within the meaning of Civil Procedure Code, section 283, and accordingly that the suit was not barred by the one year's rule of limitation ;

(2) that the plaintiff's vendor had, after the arbitration, a good title against both A and his mortgagor, and that the plaintiff was entitled to recover.

SECOND APPEAL against the decree of G. T. Mackenzie, District Judge of Kistna, in appeal suit No. 546 of 1891, affirming the decree of O. V. Nanjundayya, District Munsif of Masulipatam, in original suit No. 685 of 1889.

Suit to recover certain land. Certain persons, including the plaintiff's vendor and defendant No. 5, had certain lands allotted to them and disputes arose among them with regard to the allotment. During the continuance of these disputes defendant

* Second Appeal No. 799 of 1893.

No. 5 mortgaged 7 acres and 76 cents to defendant No. 7. After the disputes had been composed and a settlement made by arbitration between the allottees, one of them sold to the plaintiff his share including the land in question in this suit. Subsequently defendant No. 7 obtained a decree on his mortgage and proceeded to execute it by attachment. The plaintiff intervened claiming that the property attached belonged to him, and the Court, thereupon, made an order, dated 1st March 1884, filed in the suit as exhibit I, stating that the land of the plaintiff was not attached; and the possession of the plaintiff was not disturbed. Subsequently, however, defendant No. 7 brought certain lands to sale in execution of his decree, became himself the purchaser, and sold the lands purchased by him to defendants Nos. 8 and 9. These persons together with defendant No. 6 alleged to be their tenant ousted the plaintiff inducing his tenants to take part against him.

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The District Munsif passed a decree for the plaintiff and his decree was affirmed by the District Judge.

Defendant No. 6 preferred this second appeal.

Narayana Rau for appellant.

Pattabhirama Ayyar for respondents Nos. 4 and 5.

JUDGMENT.—Burra Surya Narayana, the fifth defendant, one Thamma Narasimman and certain others jointly applied to the revenue authorities and obtained from them some waste lands which belonged to the Government. They proceeded to make a division of the property. But disputes having arisen among them they submitted their differences to the arbitration of Mr. Koralla Subrayudu, a Deputy Collector. According to the settlement made by this officer, the lands in question, 7.76 acres, were allotted (with other lands) to the share of the said Thamma Narasimman, who sold the share thus obtained by him to the plaintiff. The plaintiff, however, failed to get possession. He brought a suit in 1882 against the fifth defendant and others, got a decree in his favour, obtained possession of the lands and leased them to first and second defendants.

The fifth defendant, under whom the other defendants claim, as will presently appear, had, however, mortgaged to the seventh defendant the lands in question before the submission to arbitration referred to above, and the seventh defendant was not a party either to the settlement by the Deputy Collector or to the suit of 1882 just alluded to.

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In 1883 the seventh defendant sued the fifth defendant upon his mortgage, got a decree and caused the lands in dispute to be sold for his decree debt and himself purchased them at that sale, and subsequently sold them to eighth and ninth defendants. The sixth defendant, claiming through the eighth and ninth defendants, ousted the plaintiff from the lands in collusion with first and second defendants. Hence this suit.

It should be observed that no attempt is made by the defendants to impeach the partition made under the Deputy Collector's award on the ground of any fraud or collusion to the prejudice of the mortgagee, the seventh defendant, or any other party.

The lower Appellate Court gave plaintiff a decree holding in substance, that the seventh defendant had no right to proceed against the property, in question, since it was allotted on partition to the plaintiff's vendor Thamma Narasimman. The sixth defendant appeals, and it has been argued before us on his behalf that the decision of the Courts below is wrong. But we are unable to accept this contention.

At the time the fifth defendant mortgaged the 7.76 acres in question he had no specific or exclusive right to them. He then possessed but an undivided interest in the whole of the lands granted to him and others jointly, including those in dispute and the mortgage made by him was clearly subject to the conditions and liabilities which at the date of the transaction affected his undivided interest in the property mortgaged.

It is quite clear that each and every one of the persons, who held such undivided interest, was entitled to claim a division and obtain his share of the common property free from any incumbrances created by any of the other co-owners, provided, of course, no fraud was committed in obtaining the share. The general principles applicable to the question under consideration are thus stated in Domat's Civil Law, section 1671, cited by Dr. Rash Behari Ghose in his work on mortgages. "If in an estate belonging in common, "without any division or partition, to two or more persons, such as "co-partners, co-heirs or others, one of them has mortgaged to his "creditor either all his estate or the right which he had to that "estate, this creditor will have his mortgage upon the undivided "portion of his debtor as long as the estate shall remain in common. "But after the partition, the right of this debtor being limited to "the portion that has fallen to his lot, the mortgage of his creditor

“will be also limited to the same. For, although before the partition, the whole estate was subject to the mortgage for the undivided portion of the debtor, and though a right which is acquired cannot be diminished, yet seeing the debtor had not a simple and immutable right of enjoying his share of the estate always undivided, but that his right implied the condition of a liberty to all the proprietors to come to a partition in order to assign to every one a portion that might be wholly and entirely his own, the mortgage which was only an accessory to the debtor’s right, implied likewise the same condition and affected only that which should fall to the debtor’s share, the portions of the others remaining free to them. But, if in the partition there was any fraud committed, the creditor might procure a redress of what has been done to his prejudice.”

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This is the view adopted by the Privy Council in *Byjnath Lall v. Ramoodeen Chowdry*(1) and followed by Macpherson and Beverley, J.J., in *Hem Chunder Ghose v. Thako Moni Debi*(2), a case very similar to the present. The Lower Courts were therefore right in holding that the plaintiff’s vendor, by the partition made under the settlement of the Deputy Collector, obtained a good and valid title to the lands in question not only against the fifth defendant but also against the seventh defendant, his mortgagee.

Another point raised by the appellant is that the plaintiff is precluded from maintaining this suit by reason of the order (exhibit I) of the District Munsif, dated the 1st March 1884, passed on a claim petition filed by the plaintiff on an attachment made in execution of the decree obtained by seventh defendant against fifth defendant in original suit No. 1027 of 1883. This contention also is unsustainable. The findings of the lower Appellate Court in the present litigation is no doubt that the disputed lands were in fact attached and sold in execution of that decree. The order relied on by appellant merely says “there is nothing to show that the petitioner’s lands have been attached.” It does not appear to have been an order passed after investigation as required by section 278 of the Code of Civil Procedure. Consequently, it is not an order within the meaning of section 283 to which the limitation of one year is applicable. Cf.—*Chandra Bhusan Gangopadhyaya v. Ram Kanth Banerji*(3).

(1) L.R., 1 I.A., 106. (2) I.L.R., 20 Calo., 583. (3) I.L.R., 12 Calo., 108.

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It was next argued that the plaintiff's vendor Thamma Narasimman stood by and allowed the fifth defendant to deal with the lands in question as his own exclusive property and that plaintiff is consequently estopped from questioning the mortgage to the seventh defendant or the proceedings taken to enforce it. This point is taken for the first time in the argument in second appeal and without any materials whatsoever on the record to support it. Under these circumstances we cannot permit such a contention to be taken at this stage.

We dismiss this appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Shepard and Mr. Justice Best.

ORR AND OTHERS (PLAINTIFFS), APPELLANTS,

v.

RAMAN CHETTI AND OTHERS (DEFENDANTS),
RESPONDENTS.*

1893.
Oct. 20, 23,
24.
1894.
May 4.
Nov. 6.
1895.
May 1.

Easement by custom—Water rights—Landlord and tenant.

The plaintiffs were lessees from a zamindar of his entire zamindari and were in occupation of lands depending for irrigation on a tank into which a natural stream emptied itself. The defendants were tenants in the zamindari, holding (under a lease prior to that of the plaintiffs) land supplied with water by an irrigation channel from the stream. The defendants erected a dam across the stream when it was low, and this had the effect of diverting all the water into the irrigation channel supplying their land. In a suit for an injunction that the dam be removed, the lower Appellate Court upheld a plea by the defendants that the dam had been erected in exercise of an established customary right of easement :

Held, that the customary easement asserted by the defendants was not unreasonable, and was enforceable by them against the lessees of the zamindar.

SECOND APPEAL against the decree of P. Narayanasami Ayyar, Subordinate Judge of Madura, West, in appeal suit No. 337 of 1891, reversing the decree of S. Dorasami Ayyangar, District Munsif of Sivaganga, in original suit No. 15 of 1890.

Suit by the plaintiffs for the removal of a dam placed by the defendants across the Palar river. This river rises in the Karan-

* Second Appeal No. 1471 of 1892.