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the Munsif was not made with reference to the argument now suggested. As the defendant contented herself with relying on an untrue case as to the consideration for the transfer, no issue was raised as to whether the inaction of the plaintiff in the interval relied on, amounted to such an acquiescence as would estop him from obtaining the relief sought. And no evidence was adduced on either side, and the plaintiff had not any opportunity of offering such explanation in the matter as he could. In these circumstances the defendant cannot be allowed to rely on the present ground of objection.

The second appeal is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Boddam.

1905.
March 17.

IBRAHIM KHAN SAHIB (SEVENTH DEFENDANT), APPELLANT,

v.

RANGASAMI NAICKEN AND OTHERS (PLAINTIFF AND DEFENDANTS
Nos. 1 to 6), RESPONDENTS.*

Abkéri Act I of 1886 (Maāras), s. 28, Sale for arrears under—Effect on prior encumbrances—'As if they were arrears of land revenue,' meaning of—Limitation.

A sale for arrears of abkéri revenue of immoveable properties belonging to the defaulter under section 28 of Act I of 1886 has not the effect of discharging encumbrances created prior to the sale.

Bamachandra v. Pitchaikanni, (I.L.R., 7 Mad., 434), followed.

The words 'as if they were arrears of land revenue' in the new Act have the same meaning as the words 'in like manner as for the recovery of arrears of land revenue' in the old Act.

Chinnasami Mudali v. Tirumalei Pillai and the Right Honourable the Secretary of State for India, (I.L.R., 25 Mad., 572), followed.

Kadir Mohideen Marukkayar v. Muthukrishna Ayyar, (I.L.R., 26 Mad., 230), followed.

Where lands subject to mortgage are sold under section 28 of Act I of 1886, the mortgagee's suit to enforce his mortgage right against the purchaser does not fall within article 12 of schedule II of the Limitation Act, when the plaint contains no prayer for setting aside the sale.

* Second Appeal No. 477 of 1903, presented against the decree of F. D. P. Oldfield, Esq., Acting District Judge of Tanjore, in Appeal Suit No. 1003 of 1901, presented against the decree of M.R.Ry. P. Narayanachariar, District Munsif of Kumbakonam, in Original Suit No. 38 of 1901.

THIS suit was brought by the plaintiff to recover the amount due on a mortgage bond executed in his favour by defendants Nos. 1 and 2 on the 6th May 1899. Of the two items mortgaged, item No. 1 belonged to the first defendant and item No. II to defendants Nos. 2 to 5, who formed an undivided family of which the second defendant was the managing member. Item No. I was sold on the 28th August 1899 for arrears of abkári rent due by the first defendant to Government, and was purchased by the seventh defendant. The plaintiff prayed, in default of payment of his mortgage amount, that item No. I might be sold. The seventh defendant contended, *inter alia*, that the claim of Government for arrears had priority over plaintiff's claim, and that item No. I should not be sold. The second issue raised was, whether the plaintiff's mortgage was binding on the seventh defendant, and whether item No. I could be sold. An additional issue was raised at a late stage, as to whether the plaintiff's claim against the seventh defendant was barred by limitation, in not having been brought within a year of the abkári sale.

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The District Munsif found the second issue against the seventh defendant and, on the additional issue, held that article 12 of schedule II of the Limitation Act did not apply. He passed a decree in favour of the plaintiff. On appeal by the seventh defendant, the District Court confirmed the decision of the District Munsif.

The seventh defendant preferred this second appeal.

K. Narayana Rao for *C. Sankaran Nair* for appellant.

T. R. Ramachandra Ayyar for *P. Anandu Charlu* for first respondent.

K. Ramachandra Ayyar for seventh respondent.

JUDGMENT.—The revenue authorities sold certain lands in accordance with the powers given by section 28, Act I of 1886 (Madras), for arrears of abkári revenue due by its owner. It was purchased by the seventh defendant in this suit, and the question is whether the seventh defendant took it free of all incumbrance, or, whether he took it subject to a mortgage which had been created on it prior to the sale. We are clearly of opinion that the seventh defendant took the land subject to the mortgage. In *Ramachandra v. Pitchaikanni*(1) it was decided that, when land

(1) I.L.R., 7 Mad., 434.

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is sold under section 10 of the Madras Abkâri Act III of 1864 for arrears due by an abkâri renter, the purchaser at the sale does not take the land free of all incumbrances as in the case of a sale for arrears of land revenue under the provisions of the Revenue Recovery Act II of 1864 (Madras), and excellent reasons are given for that decision.

The only question is whether the change in the wording of section 28 of the present Act which corresponds with section 10 of the old Act, effects a change in the law.

Section 10 of the old Act enables the abkâri arrears to be recovered "in like manner as for the recovery of arrears of land revenue." Section 28 of the present Act says that the abkâri arrears may be recovered "as if they were arrears of land revenue."

We do not think that there is any real difference in the meaning of the two provisions. The same question lately arose in regard to the provisions of section 7, clause 1 (a), of the Land Improvement Loans Act XIX of 1883 and in regard to section 30 of the Income Tax Act II of 1886, in which the powers given for the recovery of the Government dues are, in the same words, as in the present Abkâri Act. In both cases this Court decided that those words did not render the sale free of prior incumbrances (*Chinnasami Mudali v. Tirunalai Pillai and the Right Honourable the Secretary of State for India*(1) and *Kadir Mohideen Marakkayar v. Muthukrishna Ayyar*(2)).

In addition to the reasons that are stated in those cases, we may add that to hold that a sale of the land for an arrear of abkâri rent would have the effect of discharging all prior incumbrances, would open a wide door to fraud on *bonâ fide* mortgagees.

We agree with the Judge that the plaintiff did not apply to set aside the sale and there is therefore no limitation.

We dismiss the second appeal with costs two sets.

(1) I.L.R., 25 Mad., 572.

(2) I.L.R., 26 Mad., 230.