

## PRIVY COUNCIL.\*

GANAPATHY MUDALIAR (PLAINTIFF),

v.

KRISHNAMACHARIAR AND OTHERS (DEFENDANTS).

[On appeal from the High Court of Judicature  
at Madras.]1917,  
November  
12 and 13,  
and  
December,  
14.

*Mortgage—Suit for sale of mortgaged property—Decree not in accordance with section 88, Transfer of Property Act (IV of 1882)—Sale in execution of decree—Confirmation of sale—Purchase by mortgagee at auction sale with leave of the Court—Right of redemption by mortgagor—Suit to redeem against auction-purchaser—Parties—Civil Procedure Code (Act XIV of 1882), sec. 244—Question in execution of decree.*

In a suit to enforce a mortgage and for sale of the mortgaged property the decree made was not in accordance with the provisions of section 88 of the Transfer of Property Act (IV of 1882), no day being fixed by the Court on which payment might be made within six months from the date of declaring in Court the amount due. In execution of the decree the mortgaged property was attached, sold and purchased, with the leave of the Court by the mortgagee-decree-holder, and the sale was duly confirmed in a suit by the mortgagor for redemption of the mortgage, which was one of ancestral property made by the plaintiff's father before the birth of his sons.

*Held*, that, whether or not the decree was in accordance with the provisions of the Act, the property, and all the right, title and interest of the defendant were in fact sold in execution of the decree of a Court which had jurisdiction to entertain the suit in which the decree was made, and that decree was not appealed from; and that consequently the mortgagor had no right of redemption.

*Held* further, that the question now raised could have been raised before the sale was confirmed, and, if so raised, would have been determined by the Court executing the decree, and that the suit was therefore barred by section 244 of the Code of Civil Procedure (Act XIV of 1882).

*Prosunno Kumar Sanyal v. Kali Das Sanyal* (1892) I.L.R., 19 Calc., 688; s.c., L.R., 19 I.A., 166, followed.

APPEAL No. 155 of 1915 from a judgment and decree (17th February 1914) of the High Court at Madras, which affirmed a judgment and decree (9th February 1910) of the District Judge of North Arcot.

One Kumarasami Mudaliar, a Hindu governed by the Mitakshara law, executed three mortgages of ancestral property;

\* Present:—Lord BUCKMASTER, Sir JOHN EDGE, Sir WALTER PHILLIMORE, Bart. and Sir LAWRENCE JENKINS.

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on 12th December 1876 in favour of one Varadappa; on 7th January 1879 in favour of one Vijayaraghava Chariar, the father of the first respondent Krishnama Chariar; and on 10th May 1881, in favour of one Narasingha. Subsequently to the mortgage of 1881, two sons were born to the mortgagor, namely, Ganapathy Mudaliar, the appellant, in September 1881, and Ramasami (since deceased) in May 1882. On 20th January 1886 Narasingha, the third mortgagee, assigned his mortgage to Vijayaraghava, and on 19th March 1886 Vijayaraghava filed a suit on that mortgage in the District Court of North Arcot against the mortgagor and his two minor sons, describing the latter as "infants maintained by their father." No mention was made of the first and second mortgages in the plaint, and the first mortgagee was not made a party to the suit. It was alleged in the plaint that most of the properties were the self-acquired properties of the mortgagor.

The mortgagor did not contest the suit himself, but at the hearing he appeared and denied that he was the guardian of his sons. The Court however decided that he was the guardian, and on 15th April 1886 the District Judge made a decree against all three defendants for the amount of the mortgage debt, with interest at 6 per cent and costs "to be recovered from the mortgagor personally, and by sale of the mortgaged property." No time was fixed for payment of the amount decreed, and no further order was made as directed by the Transfer of Property Act, sections 88 and 89, but on 16th August 1886, Vijayaraghava applied for execution of the decree by attachment and sale of the mortgaged properties, and with his application filed a schedule of the properties to be sold in which he for the first time mentioned the fact that there were two other mortgages on the properties, and asked that the sale should be subject to the claims under those mortgages.

On 28th September 1886, one Govindaraju, an uncle of the two minors, applied in the suit to be appointed their guardian, and that the decree might be set aside as against them on the ground that their father was not, and had not consented to be their guardian *ad litem*. On the hearing of this application on 10th November 1886 the District Judge held that the appointment of the father as guardian was illegal, and appointed Govindaraju to be guardian in his place, set aside the decree as

against the minors, and ordered Govindaraju to file a written statement on their behalf on the 15th November 1886. Govindaraju never filed any written statement, nor did he appear, and the Judge then made an ex parte decree against all three defendants in the same terms as before, except that the two sons were described as 'minors by their maternal uncle and guardian Govindaraju.'

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No execution was ever taken out under that decree, but on 24th January 1887 a proclamation of sale of the mortgaged properties was issued under the execution of August 1886 already taken, the minors being described as 'under the protection of their father,' and this proclamation was duly published and returned to the Court.

On 15th September 1887 a sale warrant was issued by the District Court in pursuance of the proclamation and the properties were subsequently sold in execution and were purchased by the decree-holder with leave of the Court.

The mortgagor died in May 1894; the appellant, on 10th June 1904, obtained a release from his brother of the latter's rights in the equity of redemption; and in September 1904 the younger brother died.

On 16th November 1907 the appellant brought the present suit to redeem the mortgages in suit.

The District Judge held that the plaintiff had been properly represented in the suit to enforce the mortgages, and was bound by the decree and the execution proceedings, and that the suit was barred by section 244 of the Civil Procedure Code, 1882.

On appeal the High Court (MILLER and TYABJI, JJ.), affirmed, that decision, and dismissed the suit.

On this appeal—

*Sir W. Garth* for the appellant contended that the sale took place in execution of the decree of 15th April 1886 which had been set aside as regards the appellant and his brother, to which decree therefore they were not parties, and consequently their interests in the mortgaged properties and in the equity of redemption could not and did not pass on the sale under the decree. The attachment was made under the application of 16th August 1886, and in the proceedings which led up to the sale the minors were described as being 'under the protection

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of their father.' They were not properly represented in those proceedings, and the sale was therefore not binding on the plaintiff. *Khia Rajmal v. Daim*(1) and *Rashidunnissa v. Muhammad Ismail Khan*(2) were relied upon. The right to redeem, it was submitted, was not extinguished by the sale, for the necessary decree for the sale, and an order absolute for sale were not made by the Court as required by the provisions of sections 58, 60, 85, 86, 88 and 89 of the Transfer of Property Act (IV of 1882). The legislature having provided that certain steps must be taken in order to make a valid sale, a sale made without such requirements would be invalid, and ineffective to extinguish the plaintiff's right of redemption.

Reference was made to *Mallikarjunadu v. Lingamurti*(3).

Sir *H. Erle Richards, K.C.*, and *Kenworthy Brown* for the respondent contended that the sale of 1887 and the purchase thereat by *Vijayaraghava*, the father of the first respondent and assignee of the mortgage who had previously obtained leave to bid at the sale, was valid and effectual for all purposes, and the appellant had no right of redemption. The sale bound the sons having regard to what had taken place in the suit. There were not really two separate decrees; the second decree was really substituted for the first. The proceedings show that the guardian had knowledge of the proposed sale. In any case the sale being of ancestral property binds the sons in the absence of immorality or fraud: *Sripat Singh Dugar v. Prodyot Kumar Tagore*(4). The minors, it was submitted, were properly represented in the suit and the execution proceedings. The effect of the substitution of the decree of 15th November 1886 for the decree of 15th April 1886 was that the attachment and sale took place under the second decree. The plaintiff, moreover, was a party to the retrial of the suit, and was bound by the proceedings therein. The present suit was barred by section 244 of the Civil Procedure Code (Act XIV of 1882); *Prosunno Kumar Sanyal v. Kali Das Sanyal*(5). The questions now raised might have been raised before the sale was confirmed.

(1) (1904) I.L.R., 32 Calc., 296 at 332; s.c., L.R., 32 I.A., 23 (35).

(2) (1909) I.L.R., 31 All., 572; s.c., L.R., 36 I.A., 168.

(3) (1902) I.L.R., 25 Mad., 244.

(4) (1916) I.L.R., 44 Calc., 524; s.c., L.R., 44 I.A., 1.

(5) (1892) I.L.R., 19 Calc., 683 at p. 689; s.c., L.R., 19 I.A., 166 at p. 169.

Sir *W. Garth* in reply :—In order to see what was sold in execution of a decree, the proceedings which led up to the sale must be looked at: *Thakur Bashma v. Jiban Ram Marwari*(1). Section 244 of the Civil Procedure Code, 1882, was not applicable to the present suit so far as the minors were concerned, as they were not parties to the execution proceedings not having been properly represented therein.

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The JUDGMENT of their Lordships was delivered by

Sir JOHN EDGE.—This is an appeal from a decree of the High Court at Madras, dated the 17th February 1914, which affirmed a decree, dated the 9th February 1910, of the District Judge of North Arcot, by which the suit was dismissed. The plaintiff is the appellant.

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The suit was brought in the Court of the District Judge of North Arcot on the 16th November 1907 to redeem three mortgages, dated respectively the 12th December 1876, the 7th January 1879 and the 10th May 1881. The mortgages were of ancestral property, and were made by the father of the plaintiff before the plaintiff or his brother, since deceased, were born. The mortgage of the 7th January 1879 was in favour of N. Vijayaragavachariar, a vakil, to whom their Lordships will refer as the vakil. The mortgages of the 12th December 1876 and the 10th May 1881 vested by assignment in the vakil. The plaintiff in this suit was born in September 1881; his brother was born in May 1882.

On the 19th March 1886, the vakil brought in the District Court of North Arcot a suit for sale on the mortgage of the 10th May 1881, against the plaintiff's father, the plaintiff, aged 4 years, and his brother, aged 3 years, the brothers being described as 'maintained by the first defendant,' who was their father. The suit was entered on the files of the Court as Original Suit No. 5 of 1886. Their father, who had not been appointed as their guardian for the suit, objected that he was not their guardian, but the District Judge overruled the objection, and, on the 15th April 1886, made a decree in the following terms :—

"It is ordered that plaintiff do recover Rs. 10,891 together with further interest at 6 per cent per annum from date of plaint to

(1) (1913) I.L.R., 41 Calc., 590 at p. 599; s.c., L.R., 41 I.A., 38 at p. 43.

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date of payment and costs, to be recovered from the first defendant personally, and by sale of the mortgaged property."

That decree was doubtless intended to be in compliance with the provisions of 'The Transfer of Property Act, 1882,' but it did not comply with those provisions.

On the 16th August 1886, the vakil presented to the District Court his petition, under section 230 of the Code of Civil Procedure, 1882, for execution of the decree of the 15th April 1886. The petition was entered on the files of the Court as 'Execution Petition No. 57 of 1886 in O.S. (Original Suit) No. 5 of 1886,' and by it the petitioner prayed 'that the amount may be recovered with further costs, together with further interest, by the attachment and sale of immovable property set out in the schedule herewith filed.' In that petition the present plaintiff and his brother were described as minors, defendants 'by their guardian, the first defendant.' In the schedule the vakil disclosed the fact that there existed the mortgages of the 12th December 1876 and the 7th January 1879. On the 18th August 1886, the warrant of attachment was issued, and on the 13th September 1886 a notice of sale was issued.

On the 28th September 1886, one Govindaraju Mudali, who was a maternal uncle of the present plaintiff, and his brother, applied to the District Court to be appointed their guardian and to have the decree of the 15th April 1886 set aside, on the ground that their father was not their proper guardian. Govindaraju Mudali apparently contended in support of his application that the debt, in respect of which the mortgage of the 10th May 1881 had been given, was not one which the minors or the properties were liable to discharge. On the 10th November 1886, the District Judge held that the appointment of the father as guardian had been illegal, and in his place appointed Govindaraju Mudali as guardian of the minors, and set aside the decree of the 15th April 1886 as against them. Govindaraju was ordered to put in a written statement on the 15th November 1886 on behalf of the minors, but he failed to do so and did not appear. On the 15th November 1886, the District Judge made a decree that the plaintiff (the vakil) 'do recover Rs. 10,891 together with further interest at 6 per cent per annum from date of plaint to date of payment, and

costs to be recovered from the first defendant personally and by sale of the mortgaged property.' That decree did not comply with the provisions of 'The Transfer of Property Act, 1882,' but it was not appealed and it became final. It was obviously intended to be in supersession of the decree of the 15th April 1886, and must be regarded as having superseded that decree.

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On the 24th January, 1887, the Court of the District Judge caused a proclamation of the intended sale to be made under section 287 of the Code of Civil Procedure, 1882. The proclamation is described on the face of it as in Original Suit No. 5 of 1886, application No. 57 of 1886, and proclaimed that—

“Whereas the immovable property mentioned in the list attached hereto and belonging to the said defendants (the father and his two sons) has been attached upon a petition being presented for execution of the decree passed in the above suit. Take notice that if the amounts specified below be not paid into this Court, or if no other steps be taken to satisfy the decree, the said property shall be sold in public auction in this Court on the 19th September, 1887, and that in that sale the right, title and interest possessed by the above defendants alone in respect of that property shall be sold.”

So far as appears from the documents in the record, the only attachment which had issued was that of the 18th August 1886.

It appears that Govindaraju Mudali, as the guardian of the minors, had appealed to the High Court at Madras from some order which the District Judge had made on the 20th December, 1886, in Original Suit No. 5 of 1886. What the order appealed from was does not appear, nor is there anything in the record which suggests what the nature of the order was. However, that appeal not having been disposed of, Govindaraju Mudali, at some time between the 24th January, 1887, and the 2nd March, 1887, applied to the High Court for an order to stay the sale of the property attached in execution of the decree of the District Court of North Arcot in Original Suit No. 5 of 1886. That application was dismissed by the High Court on the 1st August, 1887.

On the 28th February, 1887, the District Court made an order permitting the vakil to bid at the sale. On the 19th September, 1887, the immovable properties in question were sold,

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subject to incumbrances, by public auction, and the vakil became the purchaser.

The sale was confirmed by the District Judge on the 13th December, 1887, and he, on the 1st February, 1888, gave the sale certificate under his hand and the seal of the Court. The vakil died before this present suit; the first respondent is his son. The other respondents are purchasers from the vakil. The father of the present plaintiff died in May 1894. The plaintiff's brother died in September 1904. The present plaintiff, his brother and their father had constituted a Hindu joint family.

On behalf of the appellant here it was contended that the sale took place in execution of the decree of the 15th April, 1886, and not in execution of the decree of the 15th November, 1886, and that under such circumstances only the right, title and interest of the father were sold. That contention is based on the fact that the attachment of the 16th August, 1886, was made under the decree of the 15th April, 1886. The sale must have been under the decree of the 15th November, 1886. No one was or could have been misled as to the decree under which the sale was taking place. The proclamation of sale of the 24th January, 1887, was made subsequent to the decree for sale of the 15th November, 1886, and must have been made consequent on that decree, with the knowledge of all parties and without challenge, and that proclamation shows that what was to be sold by auction was the right, title and interest in the property of the defendants to the suit of the 19th March, 1886, and the certificate of sale shows that the right, title and interest in the property of the defendants to that suit were sold to the vakil. The present plaintiff and his brother were defendants to that suit, under the guardianship of Govindaraju Mudali, at the time when the decree of the 15th November, 1886, was made and at the time when the sale took place, and thence until the sale was confirmed and the certificate of sale was made.

It has also been contended on behalf of the appellant here that as the provisions of 'The Transfer of Property Act, 1882,' were not complied with in the suit for sale of the 19th March, 1886, and as no day was fixed by the Court on which payment might be made within six months from the date of declaring in Court the amount due, the defendants to the suit of the 19th March, 1886, were not debarred from a right to redeem. It



appears to their Lordships that the answer to the contention is that whether or not the provisions of 'The Transfer of Property Act, 1882,' were complied with, the property and all right, title and interest of those defendants in it were in fact sold to the vakil in execution of a decree of a Court which had jurisdiction to entertain the suit in which the decree was made, and that decree was not appealed.

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By section 244 of the Code of Civil Procedure, 1882, it was enacted that :—

"244. The following questions shall be determined by order of the Court executing a decree and not by a separate suit (namely):—

"(c) Any other question arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, or to the stay of execution thereof."

This Board decided in *Prosunno Kumar Sanyal v. Kali Das Sanyal*(1), that section 244 had been rightly held in India to apply in a case in which the question raised concerned the auction purchaser at an auction sale as well as the parties to the suit. In this case the vakil was the auction purchaser and was also a party to the suit. The questions raised in the present suit could have been raised before the sale was confirmed, and, if so raised, would have been determined by the Court which was executing the decree of the 15th November, 1886.

Their Lordships will humbly advise His Majesty that this appeal fails, and should be dismissed.

The appellant must pay the costs of this appeal.

*Appeal dismissed.*

Solicitor for the appellant : *Douglas Grant.*

Solicitors for first respondent : *Chapman, Walker and Shephard.*

J.V.W.

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(1) (1892) I L.R., 19 Calc., 683; s.c., L.R., 19 I.A., 166.