

PRIYI COUNCIL.

SETRUCHARLU RAMABHADRA RAJU BAHADUR AND
OTHERS (DEFENDANTS),

1919,
February,
13, 14, 25.

v.

MAHARAJA OF JEYPORE (PLAINTIFF).

[On appeal from the High Court of Judicature at
Madras.]

Jurisdiction—Mortgage of property situated partly in district subject to the Code of Civil Procedure, 1908, and partly in a scheduled district under Act XXIV of 1839—Mortgage of such property and order for sale made by Court under Code of Civil Procedure—Order for sale without jurisdiction—Civil Procedure Code, 1908, sec. 1, sub-section 3, and ss. 17, 21—Meaning of 'Courts' in sec. 17.

A suit was brought under the Code of Civil Procedure, 1908, to enforce a mortgage of property which was situate partly in a district to which that Code applied, and partly in a scheduled district under Act XXIV of 1839, and therefore subject to the special jurisdiction of the Agency Courts, and a decree, on the mortgage and for sale of the mortgaged property, was made by the Subordinate Judge, and affirmed by the High Court.

Held, that so far as the decree was for sale of the mortgaged property in the scheduled district [the Courts had no jurisdiction to make it, section 21 of the Code not being applicable to such a case, and it could be set aside, notwithstanding that no objection to the jurisdiction had been taken in the Subordinate Judge's Court.

The word 'Courts' in section 17 of the Civil Procedure Code, 1908, means Courts to which that Code applied, and not Courts one of which was subject to the Civil Procedure Code, and the other to the Agency jurisdiction.

The alteration made in the decree by striking out that part of it which ordered the sale of the mortgaged property would not interfere with the plaintiff's right to obtain from the Agency Court an order for the sale of the property situate in its jurisdiction.

APPEAL No. 93 of 1917 from a judgment and decree of the High Court of Madras, dated 3rd March 1916, which affirmed a judgment and decree of the Subordinate Judge of Vizagapatam, dated 1st May 1914.

The suit out of which this appeal arose was brought by the respondent, the Maharaja of Jeypore to enforce two mortgages, dated respectively 4th January 1906 and 4th July 1911. The

* Present: Viscount HALDANE, Viscount CAVE, Lord DUNEDIN, Sir JOHN EDGE and Mr. AMERU ALI.

RAMABHADRA
RAJU
BAHADUR
v.
MAHARAJA OF
JEYPORE.

properties comprised in both mortgages were the same and were situate partly within the Vizagapatam district and partly within the jurisdiction of the Agent's Court of Vizagapatam, known as the Agency Tract. The mortgage of 4th January 1906, described as a "deed of mortgage without possession," was executed by the appellants (defendants) to secure 5 lakhs of rupees with interest as to half the amount at $4\frac{1}{2}$ per cent and as to the other half at 4 per cent per annum. The mortgage of 4th July 1911 the appellants executed to secure a further sum of Rs. 1,20,000 with interest at $4\frac{1}{2}$ per cent per annum.

By the earlier of the two mortgages the interest was to be paid annually, the first payment being due on 4th January 1907; in default the arrears were to bear interest at 6 per cent until payment, and the whole amount of principal and interest was made payable by 4th January 1913; but it was provided that if two consecutive instalments of interest were not paid on the due dates, the respondent should be at liberty to take possession of the mortgaged properties for the discharge of the debt out of the income.

By the second mortgage the first instalment of interest was payable on 4th January 1912, and the succeeding instalments on the same date in each year; in default the arrears were to carry interest at 6 per cent per annum; and it was further provided that the whole amount of principal and interest on both mortgages should be repayable on 4th January 1916, and that the terms of the first mortgage should be deemed by this change to be included in the second mortgage.

The interest on the prior mortgage was not paid on the stipulated dates, but part of it was afterwards paid with interest on the arrears. No interest was paid on the second mortgage.

The respondent brought the present suit on 21st July 1913 against the appellants for recovery of the whole of the principal and interest on both mortgages, and in default for sale of the mortgaged properties, and in the alternative for possession of the mortgaged properties as usufructuary mortgagee and for other reliefs.

The appellants pleaded that the suit was premature as regarded the principal sums secured by the mortgages, and that the mortgaged properties could not be sold to satisfy either the

principal sums or the arrears of interest until after the due date prescribed by the second mortgage, namely, 4th January 1916.

The Subordinate Judge held on the construction of the mortgages that the respondent was entitled under the earlier one to bring the mortgaged properties to sale or to take possession of them in case of failure to pay either the principal and interest on the due dates, or to pay two consecutive instalments of interest; that all the terms of the former mortgage were embodied in the later one; that continuous default had been made in the payment of interest, and the suit was therefore not premature, and he accordingly made the usual mortgage decree in favour of the respondent, directing payment of the principal and interest secured by both mortgages, and in default that the mortgaged properties should be sold.

The appellants appealed to the High Court and, in addition to the contentions raised in the first Court, put forward as one of the grounds of appeal that in any case the Subordinate Judge had no jurisdiction to order the sale of such of the mortgaged properties as were situate in the Agency Tracts.

A Bench of the High Court (ABDUR RAHIM and SRINIVASA AYYANGAR, JJ.) which heard the appeal held that the Subordinate Judge was wrong on the construction of the mortgages; that the respondent was only entitled at the date of the suit to ask for the sale of a sufficient portion of the mortgaged properties to satisfy the arrears of interest, the principal sums not being due or payable until the 4th January 1916. The High Court further held however that as that date was now past, and as forcing the respondent to another suit would only increase the costs without in any way benefiting the appellants, there was no necessity to interfere with the mortgage decree passed by the Subordinate Judge.

With regard to the objection to the jurisdiction, the High Court held that it was only an objection to the "place of suing" within the meaning of section 21 of the Civil Procedure Code, and that as it had not been taken in the first Court, it could not be now raised by the appellants. The appeal was therefore dismissed with costs.

ON THIS APPEAL

Sir William Garth, for the appellants, contended that on the true construction of the mortgages the suit, so far as it asked for

RAMABHADRA
RAJU
BAHADUR
v.
MAHARAJA OF
JEYPORE.

RAMABHADRA
RAJU
BAHADUR
v.
MAHARAJA OF
JEYPORE.

a sale of the mortgaged properties, was premature, and should have been dismissed. It was wrongly held by the High Court that the decree of the Subordinate Judge ought not to be disturbed on the ground that the due date for payment of principal had passed during the pendency of the appeal. For determining the rights of the parties in a suit, the situation at the time the suit is brought must alone be considered, and consequently the plaintiff in a suit was not as a rule entitled to any relief to which he was not entitled at the institution of his suit. Events taking place subsequently could entitle him to no relief to which he was not then entitled. Reference was made to *Evans v. Bagshawe*(1); *Rays v. Royal Exchange Assurance Corporation*(2), *Ram Rattan Sahu v. Mohant Sahu*(3). The decree of the Subordinate Judge was also invalid because part of the land mortgaged was in the Agency Tracts and to make the decree was not within the jurisdiction of the Subordinate Judge nor of the High Court. Reference was made to *Maha Prasad v. Ramani Mohan Singh*(4), in which it was decided that in such a case the whole decree was invalid, as the decree should have been held to be in the present case. Section 17 of the Code is only applicable where the Court is not in a scheduled district, but is one which is subject to the Civil Procedure Code. In *Maha Prasad's* case objection to the jurisdiction was only taken when the case came before the Judicial Committee; here it was taken in the High Court which, it was submitted, was in time. Section 21 of the Civil Procedure Code does not apply to the present case, and the objection to the jurisdiction as regards the properties within the Agency Tracts should have been upheld.

De Gruyther, K.C., and *Kenworthy Brown*, for the respondent, contended that, on the construction of the mortgages, he was entitled to bring his suit for sale in July 1913, and the suit was not premature. It was rightly held by the High Court that the respondent was entitled to retain the decree for sale because there was no dispute as to the amount of the mortgage debts, nor as to the validity of the mortgages. Reference was made to the Civil Procedure Code, 1908, Order XLI, rule 33. Section 17 of the Code gave the Subordinate Judge power to make the

(1) (1870) L.R., 5 Ch. App., 840. (2) (1897) 2 Q.B., 135.

(3) (1907) 6 C.L.J., 74.

(4) (1914) I.L.R., 42 Cal., 116; s.c., 41 I.A., 197.

decreed he passed, the suit having been brought in a Court subject to the Code. The rules made under Act XXIV of 1839 show that that Act, whilst providing particular Courts for suits arising in the Agency Tracts, did not otherwise affect the procedure. Reference was made to the Madras Code (Fourth Edition), Volume II, Appendix X, page 1264. The case of *Maha Prasad v. Ramani Mohan Singh*(1) was decided on special legislation enacted for the Sonthal Parganas. The suit was, it was submitted, rightly brought in the Subordinate Judge's Court; and the objection that the plaintiff should have sought relief in the Agency Courts should have been taken early in the suit. In any view there was power to decree sale of land not in the Agency Tracts.

RAMABHADRA
RAJU
BAHADUR
v.
MAHARAJA OF
JEYPORE.

Sir W. Garth, in reply, cited the case of *Kannu v. Natesa*(2) to show that the interest was not recoverable irrespective of the provision in the mortgage deed.

The JUDGMENT of their Lordships was delivered by

Lord DUNEDIN.—On the 4th January 1906, the appellants, who are zamindars, borrowed from the respondent, the Maharaja of Jeypore, 5 lakhs of rupees, and in security thereof mortgaged certain lands. The mortgage is in ordinary form providing for payment of interest and compound interest, but contains the following special clause :—

Lord
DUNEDIN.

“ These properties are mortgaged and retained in our possession. But in case at any time any amount remains due out of the amount of interest payable on the due dates of any two years consecutively, or in case, within seven years from this date, the entire amount of principal and interest then remaining due be not paid, though the interest is paid according to instalments, we shall raise no sort of objections to your entering on and taking possession of the above-mentioned mortgaged properties, irrespective of the said mortgage term.”

The term of payment was, therefore, on the 4th January 1913. By the 4th January 1911 the borrowers were two years in arrear in payment of interest, and were in need of further monies. Accordingly, a second mortgage was granted in July 1911 for the said two years of interest and compound interest and further monies, amounting in all to Rs. 1,20,000. The

(1) (1914) I.L.R., 42 Cal., 118; s.c., 41 I.A., 197.

(2) (1891) I.L.R., 14 Mad., 477.

RAMABHADRA
RAJU
BAHADUR
v.
MAHARAJA OF
JEYPORE.
—
LORD
DUNEDIN.

deed, after reciting the various sums, which amount to the Rs. 1,20,000, continues as follows :—

“ We shall pay the above principal sum of Rs. 1,20,000 and the interest accruing according to the terms of the deed, in full, on the 4th January 1916. Further, though the 4th January 1913 is the due date for the mortgage deed for Rs. 5,00,000 executed on the 4th January 1906 in your favour by Nos. 1, 2, 3, 4, 5 and 7 among us and by late Sri Somasekhararaju Bahadur Garu and registered as No. 22 of 1906 in the Sub-Registrar's office at Parvatipur, you and we have settled now that the due date for the said deed should also be the 4th January 1916, along with this deed. Therefore, by this change, the entire terms of the registered deed, dated the 4th January 1906, are deemed to have been included in this deed, and we shall agree to the said terms even regarding the discharge of the principal and interest of this deed also and be bound by them. If, according to the terms of this deed, the interest of each year be not paid on the respective due date, these terms will not prevent you from recovering the said amount then and there, if you should so desire, without waiting for the due date, namely, the 4th January 1916.”

The appellants paid no interest whatever after the date of the second deed, and accordingly, in July 1913, there being two years' interest in arrear, the respondent brought the present suit for decree for the whole sum due and for an order of sale of the mortgaged properties. To this action the appellants pleaded in defence, first, that the mortgage was a usufructuary mortgage and did not authorize sale; and secondly, that the action was premature, the term of the 4th January 1916 not having yet arrived. The learned Subordinate Judge held that the mortgages were simple mortgages, with merely an alternative power of entry into possession, and granted decree and order for sale in ordinary form.

Appeal being taken to the High Court of Madras, that Court affirmed the view that the mortgages were simple mortgages. They further held that the sale of the lands for principal was premature at the date of the decree of the Subordinate Judge, but in respect that by the time the case was before them the term of the 4th January 1916 had been passed and no payment had been made, they allowed the decree of the Subordinate Judge to stand.

Appeal being taken to this Board the appellants urged that inasmuch as the Appeal Court had held that the sale was premature in respect of the principal and only good for the interest, it was not permissible for them to enlarge the suit as laid because at the time they came to deal with the appeal a decree for the principal on a new suit would have been competent, to which the respondent replied that, as the proceeding was entirely executory, it was proper for the Appellate Court to pronounce a decree which would regulate the true rights of parties as they stood at the time when the final judgment came to be pronounced.

RAMABHADRA
RAJU
HADU
v.
MAHARAJA OF
JEYPORE.
—
Lord,
DUNEDIN.

The first question, however, which arises, and which if settled one way renders any further discussion unnecessary, is whether, in view of the terms of the second mortgage, the suit raised in July 1913 for the whole sum due was or was not premature. This question depends on the meaning of the clause —

“If according to the terms of this deed, the interest of each year be not paid on the respective due date, these terms will not prevent you from recovering the said amount then and there, if you should so desire, without waiting for the due date, namely, the 4th January 1916.”

It is settled, that apart from special stipulation, there is no right to demand a sale of mortgaged lauds for payment of interest in arrear. The learned Judges of the High Court thought that “the said amount” meant interest alone, and that the clause received meaning as giving the right of sale for interest. Their Lordships do not think that that is the meaning of the clause. It was a most natural thing that, as nothing had been ever paid by the borrowers, the lender, on being asked to allow the surplus interest to become principal in a new mortgage and to postpone the term of the old mortgage, should stipulate that, if this non-payment of anything should continue, he might be done with the whole matter and call everything up. Besides, a power to enter into possession if interest was not paid had already been given, for all the terms of the first mortgage are incorporated in the second. It seems, therefore, antecedently much more probable that the meaning of the clause, if ambiguously expressed, should be to give the power of recalling the prolongation of the term than to give a mere power of sale for interest, which would avail little. This view would lead to an affirmance of the decree, though on different grounds.

RAMAHADRA
 RAJU
 BAHADUR
 v.
 MAHARAJA OF
 JENPORE.
 Lord
 DUNEDIN.

There is, however, another point. Some of the lands of which sale had been decreed are situate in what are known as the Agency districts. Now the suit is raised in terms of the Code of Civil Procedure, 1908. By section 1 (3) the Code is, with the exception of certain sections not here in point, excluded from the scheduled districts, and by Act XXIV of 1839 the district in which the lands above referred to are situate was scheduled. The learned Judges of the Court of Appeal thought that the matter was met by section 21 of the Code, which provides that no objection as to the place of suing shall be allowed by any Appellate Court unless the objection was taken in the Court of First Instance, which in this case had admittedly not been done. Their Lordships cannot agree with this view. This is not an objection as to the place of suing; it is an objection going to the nullity of the order on the ground of want of jurisdiction. The order for sale is made under sections of the Code of Civil Procedure which the Code itself says are not to apply to the scheduled district.

The learned Counsel for the respondent sought to justify the decree in respect of the terms of section 17, which provides that—

“Where a suit is to obtain relief respecting, or compensation for wrong to, immovable property situate within the jurisdiction of different Courts the suit may be instituted in any Court within the local limits of whose jurisdiction any portion of the property is situate.”

Their Lordships think that ‘Courts’ here must be held as meaning Courts to which the Code applies, and that therefore no help is to be claimed from this section.

Their Lordships think, therefore, that the decree pronounced by the High Court must be varied by deleting the order for sale so far as applicable to the lands situate within the Agency districts. This will be, of course, without prejudice to the respondent’s right to apply in the Agency Court for an order for sale of those lands.

This variation is insufficient in their Lordships’ opinion to deprive the respondent of any portion of his costs here or in the Courts below. Their Lordships will humbly advise His Majesty accordingly.

Appeal dismissed.

Douglas Grant, Solicitor for the appellants.

T. L. Wilson & Co., Solicitors for the respondent.

J.V.W.

KAMABHADRA
RAJU
BAHADUR
v.
MAHARAJA OF
JEYPORE.

Lord
DUNEDIN.

APPELLATE CIVIL (FULL BENCH).

*Before Sir John Wallis, Kt., Chief Justice, Mr. Justice
Ayling and Mr. Justice Sadasiva Ayyar.*

SEENI NADAN (SECOND COUNTER-PETITIONER),

APPELLANT,

1919,
April,
8, 9 and 24.

v.

MUTHUSAMY PILLAI AND NINE OTHERS (PETITIONERS AND
COUNTER-PETITIONERS NOS. 5 TO 9 AND LEGAL REPRESENTATIVE,
THIRD COUNTER-PETITIONER), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), ss. 37, 33, 39 and 150—Limitation Act (IX of 1908), art. 182, cl. 5—Application for execution of decree—Proper Court—Transfer of territorial jurisdiction of Court which passed the decree to another Court—Subsequent application for execution to former Court, whether made to proper Court—Jurisdiction of former and latter Court to execute decree—'Include' in sec. 37, Civil Procedure Code, meaning of.

Held, by the Full Bench, that the Court which passed the decree is a *proper Court* for execution within the meaning of clause 5 of article 182 of the Limitation Act, notwithstanding the fact that the jurisdiction which it had at the time of the decree was taken away from it and assigned to another Court at the time of the presentation of the application for execution.

Sections 37, 38 and 150, Civil Procedure Code, construed.

Dicta in *Subbiah Naiker v. Ramanathan Chettiar*, (1914) I.L.R., 37 Mad., 462, overruled.

APPEAL against Appellate Order of MUHAMMAD FAZL-UD-DIN, the Subordinate Judge of Tinnevely, in Appeal Suit No. 30 of 1917 preferred against the order of T. N. KRISHNAMURTI, the

* Civil Miscellaneous Second Appeal No. 44 of 1918.