

## PRIVY COUNCIL. \*

RAMABHADRA NAIDU (DEFENDANT),

1921,  
February 25.

v.

KADIRIYASAMI NAICKER (PLAINTIFF).

## On appeal from the High Court at Madras.

*Mortgage—Sale in execution—Sale certificate—Property sold—Conclusiveness of certificate in a subsequent suit—Code of Civil Procedure (V of 1908), sec. 47.*

Certificates of sale are documents of title which ought not to be lightly regarded or loosely construed. Where upon a sale under a mortgage decree the purchaser has been given a sale certificate which plainly includes certain property and has been put into possession of that property, it is not open to a Court in a subsequent suit by the mortgagor's representative to hold by reference back to the mortgage deed that the property in question was not sold under the decree. The title of the purchaser can be questioned only by a petition in the execution proceedings under section 47 of the Code of Civil Procedure and not at all where that remedy is barred by limitation.

Judgment of the High Court reversed.

APPEAL (No. 125 of 1919) from a judgment and decree of the High Court (March 7 and December 19, 1917) varying a decree of the Temporary Subordinate Judge of Rāmnād at Madura.

The material facts giving rise to the suit are stated in the judgment of the Judicial Committee.

The suit was instituted on September 27, 1911, on behalf of the present respondent, the son of the mortgagor, under the mortgage of September 15, 1893, and was continued by him upon his attaining his majority. The defendant was the present appellant, the assignee of the mortgage decree of October 1, 1901, and the purchaser (by leave) at the auction sale held on April 22, 1907, under that decree. By his plaint, so far as was material to the present appeal, the plaintiff (respondent) alleged in paragraph 3 that the property mortgaged was defined by the area (9,470 kulis) of the garden lands stated in the mortgage deed, that the boundaries given in the deed which included the whole zamindari of 33,000 kulis were immaterial, and that the

\* Present: Lord BUCKMASTER, Lord SHAW and Sir JOHN EDGE.

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lesser acreage alone was sold. By paragraph 8 he alleged that pannai lands measuring about 226 kulis did not belong to the mortgagor at the date of the mortgage, but vested in him in 1902 only. The plaintiff claimed a decree, if the decree of October 1901 and the sale were held to be binding upon the plaintiff, for all the lands other than garden lands referred to in paragraph 3. The defendant by his written statement pleaded that the mortgage extended to the whole zamindari, and that the sale certificate did so also, and that the whole property had been delivered to him thereunder. It was also pleaded that the plaintiff as a party, or representative of a party, to the suit of 1907 was not entitled in a separate suit to raise any question relating to the execution, discharge, or satisfaction of the decree, reference being made to section 47 of the Code of Civil Procedure. With regard to the 226 kulis it was further pleaded that they formed part of the zamindari in 1893, there having been no legal transfer of the property itself to the late zamindar's widow.

The Subordinate Judge, by his judgment delivered on January 4, 1915, held that it was the intention that the whole zamindari should be charged by the mortgage of 1893, but that until the widow died in 1907 the zamindar had no interest in the 226 kulis of pannai land which he could alienate. It was, however, clear, in his opinion, that the defendant bought at the sale all the pannai lands including the 226 kulis, and that the plaintiff's remedy (if any) was only in the execution proceedings and under section 47 of the Code of Civil Procedure, and not by a separate suit.

The hearing of an Appeal to the High Court was delayed by an application not material to this report; judgment was delivered on March 7, 1917, varying the decree of the Subordinate Judge and giving the plaintiff a decree for 158 kulis out of the 226 kulis of pannai lands.

The judgment of the High Court was delivered by SRINIVASA AYYANGAR, J., ABDUR RAHIM, J., concurring. The learned Judges agreed with the view of the Subordinate Judge that the mortgage did not include the 226 kulis. The judgment continued as follows:—

“It would, therefore, follow that under the description contained in the decree which was presumably followed in the sale

proclamation and the sale certificate, the first defendant could not have purchased and did not purchase the 226 kulis which were in the possession of Kamalu Ammal, the former zamindar's widow. It is, no doubt, true that on the date of the decree and on the date of the sale, Kadriyasami, the mortgagor, and his heir, the present plaintiff, respectively were in possession of the 226 kulis; for Kamalu Ammal had died after the institution of the suit and before the decree. But the pannai lands in the possession of the mortgagee or his representatives, referred to in the decree and in the sale proclamation obviously refer to the lands which were in the possession of the mortgagor on the date of the mortgage and not to the properties of which he subsequently obtained possession."

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After pointing out that in the above view it was unnecessary to decide whether the mortgagor had any interest vested or contingent in the 226 kulis at the date of the mortgage, the learned Judge said :

" I think the sale certificate, which presumably followed the sale proclamation, should, if possible, be construed so as to convey only the properties which the Court had jurisdiction to sell under the decree. I therefore come to the conclusion that the sale did not include the 226 kulis."

The judgment then pointed out that the lands on which there were encumbrances were placed in the possession of the first defendant under section 319 of the Code of Civil Procedure; and that they included 68 odd kulis which had been mortgaged out of the 226 kulis after the decree for the purpose of paying the decree-holder. It was held that inasmuch as by an order of the Court the first defendant had been placed in possession of the 68 kulis in the purported execution of the sale certificate, the only Court which could determine whether the lands so delivered were included in the sale certificate or not was the Court which was executing the previous decree. It was further held that a petition under section 47 of the Code of Civil Procedure, 1908, being barred by limitation, the Court should not give leave under that section to treat the present suit as a petition. It was accordingly held that the defendants were entitled to retain the 68 odd kulis, but that the plaintiff was entitled to a decree for the balance of 158 kulis. The decree in accordance with the judgment was dated December 19, 1917.

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*De Gruyther, K. C., and Kenworthy Brown* for the appellant.—The 226 kulis were within the terms of the decree, the sale proclamation and the sale certificates; it cannot be contended that they were not in fact sold. That being so, under section 47 of the Code of Civil Procedure, 1908, the plaintiff's remedy (if any) is by a petition in the execution proceedings and not by a separate suit: *Prosunno Coomar Sanyal v. Kali Dis Sanyal*(1), *Ganapathy Mudaliar v. Krishnamachariar*(2). A petition is now barred under Article 181 of Schedule I of the Indian Limitation Act, 1908; that being so, as the High Court held in reference to the 68 kulis, the suit could not properly be treated as a petition under the section. The appellant also contends that having regard to the nature of the widow's interest in the 226 kulis they passed under the mortgage; it is not necessary to consider that question further if he succeeds on section 47.

*Arasimham* for the respondent.—The suit could under sub-section (2) of section 47 have been treated as a petition in the execution proceedings, and should have been so treated. The present plaintiff was a minor and the period of limitation was consequently extended by section 6, sub-section (1) of the Limitation Act, 1908. That sub-section in terms applies only to the bringing of a suit or the taking of execution proceedings, but it should be construed liberally and applied to a petition under section 47 of the Code.

[Sir JOHN EDGE.—Can that be so when the minor has been represented by a guardian in the suit in which the decree was obtained?]

Yes, since the time for executing the decree is in terms extended. Further the plaint assigns a cause of action on August 24, 1911, when it alleges a trespass on the lands.

The JUDGMENT of their Lordships was delivered by

LORD BUCK-  
MASTER.

Lord BUCKMASTER.—The father of the respondent in this Appeal was formerly the owner of a small zamindari known as Doddappa Nayakanur, and on 15th September 1893 he executed a mortgage of the property in favour of one Sabhapati

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

(2) (1918) I.L.R., 41 Mad., 403 (P.C.); s.c., L.R., 45 I.A., 54.

Chetti. The mortgagee took proceedings in 1901 in the Subordinate Court of Madura against the mortgagor and against the respondent, who was his son, to enforce the mortgage, and obtained in October 1901 a decree for the amount of the mortgage money and, in default, for sale of the mortgaged properties. The mortgagee, in 1906, assigned his decree in favour of the present appellant, who brought the mortgaged properties to sale in execution of the decree, and having obtained leave to bid, purchased them on 22nd April 1907. The sale was confirmed on 1st July of the same year, and delivery was made to the appellant on 3rd, 14th and 15th August 1907. The questions that have arisen upon this Appeal depend entirely upon the determination of what was actually purchased by the respondent. The facts that give rise to the dispute may be shortly stated. The mortgage included in its parcels "the pannai lands in certain named villages which belong to me, and which are in my enjoyment." At the date of the mortgage certain pannai lands to the extent of 226 kulis were not in the enjoyment of the mortgagor at all. They were in fact in the enjoyment of the widow of the previous zamindar of the property, who had been in possession of them since 1877 by an arrangement made with her husband.

The learned Judge of the Subordinate Court of Madura and the Judges of the High Court at Madras, from whom this Appeal has been brought, have alike decided that in these circumstances these 226 kulis were not included in the mortgage. Their Lordships are in entire agreement with this opinion, and they have nothing to add by way of emphasis or further reasons to the arguments stated by the learned Judges as those which lead to their conclusion.

The widow died in June 1901, and at the date of the decree in October 1901 in execution of the mortgage, the mortgagor and his heir were in possession of these properties. The decree for the realization of the mortgage set out the villages and hamlets, and directed their sale with all "the pannai lands belonging to the defendants and in their enjoyment," and the sale proclamation followed the words of the decree. The property was actually sold on 22nd April 1907, and objections were taken to the sale, among other things, upon the ground not that the pannai lands were outside the mortgage and excluded

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from the sale proclamation, but because there ought to have been a list of the pannai lands which contained by measurement 500 acres; these objections were disallowed and the sale was, by order of the Subordinate Court, confirmed on 1st July 1907, and this order was supported on Appeal. The sale certificate was dated 25th July of the same year, and it included "the whole of the pannai lands belonging to and enjoyed by the sons of the first defendant, who acquired them as legal representatives of the first defendant" and all incomes, rights and privileges attached to the zamindari.

It is in their Lordships' opinion impossible to construe this sale certificate as limiting in any way the extent of the pannai lands to which it referred.

At the time when it was issued, the whole of the lands in dispute were in fact in the enjoyment of the sons of the mortgagor, who had acquired them as his representatives. The learned Judges of the High Court appear to regard the words set out as capable of explanation and limitation by reference back to the mortgage itself; but their Lordships are unable to accede to this contention. There is no ambiguity in the words of the certificate that are capable of explanation by such means, and the object of the sale certificate would be defeated if it were possible to change its plain meaning by reference to other documents. The rights of the mortgagors, however, need not have been taken away by this fact, as they were at liberty to have taken proceedings in the suit in order to raise the contention that they now put forward under section 47 of the Code of Civil Procedure, 1908, but this they have never done and it is now too late. The atthakshi followed the words of the sale certificate and consequently of these lands possession was duly given.

The learned Judges of the High Court took a different view, holding that the general words in all the documents must be limited by reference back to the mortgage, but that of the 226 kulis 68 were actually delivered owing to the reference to the encumbrances in the document directing delivery of possession of the property. Their Lordships would agree with this conclusion if they placed the same construction on the sale certificate as that accepted by the learned Judges of the High Court, but this they are unable to do. The sale certificate was

in their opinion plain, and its meaning was accepted by all parties at the time, showing that even if they misunderstood the operation of the mortgage they were under no misapprehension as to that of the certificate. Certificates of sale are documents of title which ought not to be lightly regarded or loosely construed. There is full opportunity for challenge of all proceedings in the execution of mortgage decrees at the time, and except in clear cases a purchaser ought not to be harassed in his possession by disputes arising years after his purchase. They are consequently unable to assent to the view taken by the High Court, that any part of the pannai lands should be excluded from the sale certificate, and they think that the Subordinate Judge was right in holding that they were all bound by the decree and included in the sale.

For these reasons their Lordships will, therefore, humbly advise His Majesty that this Appeal should be allowed with costs, and the decree of the Subordinate Judge restored.

Solicitor for appellant: *Douglas Grant.*

Solicitor for respondent: *H. S. L. Polak.*

A.M.T.

## APPELLATE CIVIL—SPECIAL BENCH.

*Before Sir John Wallis, Kt., Chief Justice, Mr. Justice Oldfield and Mr. Justice Kumaraswami Sastri.*

THE CHIEF COMMISSIONER OF INCOME-TAX, MADRAS  
(REFERRING OFFICER),

v.

THE EASTERN EXTENSION AUSTRALASIA AND  
CHINA TELEGRAPH CO., LTD. (ASSESSOR).\*

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*Income-tax Act (VII of 1918)—Rule 1, framed by Government of Madras under section 43 (2) (c)—Company incorporated in England with branches in India and elsewhere—"Total Profits"—Whether Income-tax and Excess Profits Duty payable in England and Income-tax payable elsewhere to be excluded.*

Rule 2 framed by the Government of Madras under section 43 (2) (c) of the Income-tax Act provides that the profits of the Indian Branch of a foreign company may be assumed for income-tax purposes to bear the same proportion to the total profits of the Company as its receipts bear to the total receipts.

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