APPELLATE CIVIL—FULL BENCH.

Before Sir Walter Salis Schwabe, Kt., K.C., Chief Justice Mr. Justice Oldfield and Mr. Justice Coutts Trotter.

1922, March 13.

RAJARAJESWARA SETHUPATHI ALIAS MUTHURAMALINGA SETHUPATHI AVARGAL, RAJA OF RAMNAD THROUGH HIS AUTHORIZED AGENT RAO SAHIB S. THIRUMALAI AYYANGAR, DEWAN OF RAMNAD (DEFENDANT), APPELLANT,

v.

MINOR VENKATARAMAIYER BY HIS NEXT FRIEND SUNDARAMMAL AND OTHERS (PLAINTIFFS), RESPONDENTS.*

Jurisdiction—Civil Courts—Suit to set aside sale—Sale held under provisions of Madras Estates Land Act (I of 1908).

Civil Courts have jurisdiction to try a suit by a ryot to set aside a sale of his holding which was held under the provisions of Chapter VI of the Madras Estates Land Act.

SECOND APPEAL against the decree of P. S. SITARAM AYYAR, Temporary Subordinate Judge of Ramnad at Madura, in Appeal Suit No. 17 of 1918, preferred against the decree of T. K. SUBBA AYYAR, District Munsif of Sattur, in Original Suit No. 334 of 1914.

The facts are set out in the Order of Reference. The Second Appeal came on for hearing before KUMARASWAMI SASTRI and DEVADOSS, JJ., who made the following

ORDER OF REFERENCE TO A FULL BENCH.

This appeal arises out of a suit filed by the respondents to set aside a revenue sale at the instance of the appellant, the Zamindar, who claimed that arrears of rent were due by the respondents, his tenants, and brought the holding to sale under the provisions of Chapter VI of the Madras Estates Land Act. Various

* Second Appeal No. 612 of 1920.

contentions were raised; but for the purposes of this Second Appeal, it is only necessary to refer to the contentions raised by the tenants that no notice was served on them as required by section 112 of the Act and to that of the landlord that the Civil Court has no jurisdiction to entertain the suit.

As regards the first contention, it is admitted that there was no personal service of the notice required by section 112. The finding is that the respondents (tenants) were residing in Madura and that there was nothing to prevent service on them. Section 112 requires service to be effected by delivering a copy to the defaulter, or to his authorized agent, or to some adult male member of the family at his usual place of abode, and it is only if such service cannot be effected that substituted service either by affixture "on some conspicuous part of the last known residence, if he has any within 10 miles of the holding, or on some conspicuous part of the holding" is allowed.

It is a well established rule that, when the law requires service of notice or process, it should wherever possible be personal. There is nothing in the Estates Land Act which requires the tenants to reside in the village where their holding is; and it is difficult to construe the clause in section 112 enabling the landlord to affix the notice on some conspicuous part of the last known residence, if he has any within 10 miles of the holding, should he be unable to effect personal service, to mean that a tenant is bound to reside within 10 miles of his holding and that should he reside outside the ambit personal service is unnecessary.

When the Act wishes to relieve the landlord from the duty of serving a tenant who resides several miles away from his holding, it expressly provides for it. For example, section 78 of the Act which provides for notice of

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distraint states that notice is to be served on the tenant by delivering a copy to him or to some adult male member of his family at his usual place of abode, *provided that it is in the neighbourhood to which the distress refers*, or to his authorized agent, or when such service cannot be effected, by affixing a copy of the notice on some conspicuous part of the land to which it refers. Comparing section 78 with section 112, it is clear that where in the case of distraint and sale of moveables the law relieves the landlord of the necessity of personal service in cases of tenants who do not reside in the neighbourhood of the holding, it requires personal service wherever the tenant may reside in cases where the holding itself is to be sold for non-payment of arrears. This difference in the wording of sections 78 and 112 is all the more significant when it is remembered that the Madras High Court in construing section 39 of the Rent Recovery Act of 1865 held in *Oliver* v. *Anantharamayyan*(1), that the service of the notice required under section 39 of the Rent Recovery Act of 1865 by affixture on the land was sufficient where the tenant was residing in foreign territory, as they were of opinion that the words "the usual place of abode" seemed to denote that it was contemplated that the notice would ordinarily be served upon the tenant himself, or his relations or his authorized agents in the neighbourhood of the land in respect of which the patta was tendered; and it could not have been intended that the landlord would go personally, or send an agent to the foreign territory to tender the notice. The legislature in section 78, clause 2, provides that personal service is necessary only if the defaulter resides in the neighbourhood of the land to which the distress refers, and that if there is no such residence a copy of

(1) (1895) I.L.R., 18 Mad., 30.

the notice may be affixed on some conspicuous part of the land. In providing for the sales of tenure itself the legislature omitted the words in section 78 as to any residence in the neighbourhood. It is doubtful how far any presumed intention of the legislature or any hardship that may exist would be a valid reason for overriding the plain provisions of a section. But having regard to the difference in the wording of sections 78 and 112, we do not think we can in construing section 112 import any such consideration as weighed with the Judges who decided *Oliver* v. *Anantharamayyan*(1). It is not suggested in the present case that there would have been any difficulty in serving the tenants who were residing in Madura only a few miles from the holding, and there is no reason for not complying with the provisions of section 112 which direct that the Collector shall cause service to be effected by delivering a copy to the defaulter, or to his authorized agent, or to some adult male member of his family at his usual place of abode, and it makes the other mode of service valid only if such service cannot be effected. In *Kumud Nath Roy Chowdhury* v. *Jotindra Nath Chowdhury*(2), it was held that substituted service under Order V, rule 17, of Civil Procedure Code, can only be justified when it is shown that proper efforts were made to find the defendant, and serve him at his residence; and that though the defendant had an ancestral family house, affixture on the door of that house was not justified in law where the defendant was living and working in a different district for some years. We are of opinion that the service in this case does not comply with the provisions of section 112.

On the second question as to the jurisdiction of Civil Courts to entertain suits to set aside sales, the authorities

(1) (1895) I.L.R., 18 Mad., 30. (2) (1911) I.L.R., 38 Calc., 394.

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are conflicting. The right of suit is not denied. Section 189 of the Madras Estates Land Act enacts that "a Collector or other Revenue Officer specially authorized under the Act shall hear and determine as a Revenue Court all suits and applications of the nature specified in Parts A and B of the Schedule, and no Civil Court in the exercise of its original jurisdiction shall take cognizance of any dispute or matter in respect of which such suit or application might be brought or made." The present suit is one for a declaration that the Revenue sale held at the instance of the appellant and the purchase by him at such a sale of the holding of the respondents are fraudulent and invalid and not binding on the plaintiffs (respondents), for setting aside the auction sale, for a declaration that the respondents possessed occupancy right in the land and the appellant had no such right, and for an injunction restraining the appellant from ejecting the respondents from the land. So far as Parts A and B of the Schedule to the Act are concerned, the only clause relating to sales under section 112 is No. 12 of Part A which relates to suits to contest the right of sale of holdings, and it provides 30 days within which a suit could be filed from the date of service of notice on the defaulter requiring him to pay the amount due, or to file a suit contesting the right of sale. It is clear that this clause only refers to suits instituted before the sale is held contesting the right of the landlord to bring the property to sale. It cannot, on the plain meaning of the clause, refer to suits instituted after the sale, and the period of limitation and the time from which it begins to run could have no application to such suits. The Act is silent as to where the suit is to be filed when the sale has taken place and the plaintiff wants to set aside the sale. It is well settled that Civil Courts have jurisdiction in all cases where they would have had jurisdiction prior

to the Estates Land Act, except so far as that jurisdiction is expressly or by necessary implication taken away by the provisions of section 189. In *Chidambaram Pillai* v. *Muthammal*(1), it was held by AYLING, J., that a suit for a declaration that the sale of a holding under section 111 and the subsequent sections of the Madras Estates Land Act was void, was maintainable in a Civil Court. The learned Judge observed

"It seems clear that a suit of this nature is maintainable in a Civil Court, in the absence of any statutory bar—vide *Doraisami Pillai* v. *Muthusamy Mooppan*(2), and *Zamindar of Ettayapuram* v. *Sankarappa Reddiar*(3). Respondent relies on section 189 of the Estates Land Act. This makes it clear that a suit for damages sustained in consequence of the alleged illegality would lie in a Revenue and not in a Civil Court which is also specifically laid down in section 213 (3). But a suit for declaration like the present one is not one of those set forth in the Schedule to the Act. It may seem anomalous to give the jurisdiction to award damages for the illegality to the Revenue Court which ordered the sale, and the jurisdiction of setting it aside to the civil tribunal. But if the view taken by the lower Court is correct, then in spite of the mandatory directions of section 315, an order of a Collector for sale which was passed without jurisdiction must stand and cannot be questioned; for, admittedly, no suit to set aside the sale will lie in a Revenue Court."

In *Gouse Mohideen Sahib* v. *Muthialu Chettiar and another*(4), it was held by SADASIVA AYYAR and SPENCER, JJ., that section 189 of the Estates Land Act does not take away the right to bring a suit in the Civil Courts to set aside a sale on the ground of fraud. The learned Judges observe

"The argument of the appellant's (first defendant's) learned vakil that section 189 of the Estates Land Act takes away the right to bring a suit in the Civil Courts to set aside a sale on the ground of fraud cannot be accepted. It only takes away the

(1) (1915) I.L.R., 38 Mad., 1042.
(2) (1904) I.L.R., 27 Mad., 94.
(3) (1904) I.L.R., 27 Mad., 483 (F.B.).
(4) (1914) M.W.N., 55.

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right to apply to the Civil Courts under section 131 of the Estates Land Act to set aside the sale in accordance with the provisions of that section."

In *Jagannadha Charyulu* v. *Satyanarayana Varaprasada Rao*(1), it was held by SPENCER and KRISHNAN, JJ., following *Chidambaram Pillai* v. *Muthammal*(2) and *Gouse Mohideen Sahib* v. *Muthialu Chettiar*(3), that a suit by the purchaser of a holding at a sale held under the provisions of Chapter VI of the Madras Estates Land Act for a declaration that the order of the Deputy Collecter setting aside the sale was *ultra vires* and void lay in a Civil Court and not in a Revenue Court. A contrary view was taken in *Ramnathan* v. *Ramaswami*(4), where it was held that section 189 and clause 12 of Part A of the Schedule to the Madras Estates Land Act precluded a Civil Court from taking cognizance of a suit by a ryot to recover possession of a holding sold under the Madras Estates Land Act for non-payment of rent, on the ground that the landholder had no right to sell the holding on the ground that clause 12 is not confined to a suit to question an intended sale of the holding. But that clause and section 189 preclude Civil Courts from taking cognizance of any dispute in respect of which a suit might be brought before a Collector, and that it was not likely that the legislature would allow the validity of a sale to be impeached after the sale while prohibiting a suit for a declaration that no valid sale could be effected. The learned Judges distinguish *Gouse Mohideen Sahib* v. *Muthialu Chettiar*(3), on the ground that the sale was sought to be set aside on the ground of fraud. With all respect, it seems to us that if there is a right to set aside a sale which has been effected by a Revenue Court on the ground that the conditions requisite to give the

(1) (1920) I.L.R., 43 Mad., 351.
(2) (1915) I.L.R., 38 Mad., 1042.
(3) (1914) *M.W.N.*, 55.
(4) (1916) I.L.R., 39 Mad., 60.

landlord a right to bring the property to sale have not been complied with, the question as to the forum has to be determined by the express words of section 189 and clause 12 of Part A to the Schedule, and that we are not at liberty to speculate as to what the intention of the legislature was. It is also difficult to see how the allegation of fraud will take away the jurisdiction of Revenue Courts, if the Estates Land Act conferred the jurisdiction to set aside sales on Revenue Courts. The decision in *Chidambaram Pillai* v. *Muthammal*(1) has not been referred to by the learned Judges. In *Irulappan Servai* v. *Veerappan*(2) there are observations of the Officiating Chief Justice and ODGERS, J., which support the view that section 189 of the Estates Land Act bars the jurisdiction of Civil Courts to entertain suits to declare that a Revenue sale is invalid.

Having regard to this conflict of authority and to the importance of the question we refer the following question for the decision of a Full Bench:

"Has a Civil Court jurisdiction to entertain a suit by a ryot to set aside a sale of his holding which was held under the provisions of Chapter VI of the Madras Estates Land Act?"

C. V. Anantakrishna Ayyar and *S. Sundararaja Ayyangar* for the appellant.—When once there has been a sale of a holding under the Estates Land Act, fraud apart, there cannot be a suit in a Civil Court to set it aside. Under the Estates Land Act the landholder has three remedies to recover rent. (1) Bring a suit for arrears of rent. The Revenue Courts are substituted for the Civil Courts. (2) Distrain movables. Damages are allowed against the person responsible for any wrongful act. (3) Bring the holding to sale. This is a special

(1) (1915) I.L.R., 38 Mad., 1042.
(2) Second Appeal 1563 of 1920.

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procedure allowed by the Act. The landholder is given a lien. The only relief is damages.

[C.J.—Do you go so far as to say that even if no rent was due or no notice was given the sale would give good title?

Yes. If the landholder wishes to sell he gives notice and the tenant gives notice that he will file a suit.]

[C.J.—But if there is no notice by the landholder? Even then, the Court will have no jurisdiction to set aside the sale? The tenant has a claim for damages under section 213 of the Estates Land Act.]

[C.J.—What section takes such a case out of the jurisdiction of the Civil Courts? See section 213 (2). Sub-section (3) to section 189 and clause 12 of Part A of the Schedule.]

K. Jaganatha Ayyar for respondents was not called upon.

The OPINION of the Court was delivered by

SCHWABE, C.J.

SCHWABE, C.J.—The question referred to the Full Bench is

"Has a Civil Court jurisdiction to entertain a suit by a ryot to set aside a sale of his holding which was held under the provisions of Chapter VI of the Madras Estates Land Act?"

It is found as a fact in this case for the purpose of the reference that no notice was given to the ryot by the landholder of his intention to sell. The sale was therefore illegal, and Civil Courts of this country have a right to set aside illegal sales, unless there is some statutory provision to prevent them from doing so. It is, therefore, necessary to look at the Madras Estates Land Act of 1908 to see if the Civil Courts are precluded from setting aside such a sale. Under section 213

"Any person deeming himself aggrieved by any proceedings taken under colour of this Act . . . shall be at liberty to seek redress by filing a suit for damages before the Collector"

and then sub-section 2 says

"This section shall not be deemed to bar any right of action in a Civil Court in any case not taken out of its jurisdiction by this Act."

In order to ascertain what cases are taken out of the jurisdiction of the Civil Courts by the Act, one has to look at section 189. Under section 189, suits and applications of the nature specified in Parts A and B of the Schedule can be brought before the Revenue Court, and are taken out of the jurisdiction of the Civil Courts expressly. Turning to the Schedule, the only article in the Schedule which it is suggested could apply is article 12, Part A, where among the suits triable by a Collector are included suits under section 112 of the Act to contest the right of sale of a holding, and then that article gives a limit of thirty days in which to commence that suit from the date of the service of the notice on the defaulter; and looking at section 112, the landholder who has to avail himself of the powers of sale has to give notice in writing to the defaulter, that notice having to be given in a particular way and to contain certain particulars, and has to inform the defaulter, if he does not pay the amount or file a suit within that time, the property will be sold. That is the suit and the only suit which is referred to in article 12, Part A of the Schedule, namely, a suit by the ryot within thirty days of the service on him of the notice to contest the right of sale. This suit is nothing of the kind. This is a suit by the ryot, who says that his property has been unlawfully sold and there is nothing in the Act or in the Schedules of the Act to take away the jurisdiction of the Civil Courts to try such suits.

That being so, the answer to the question referred to us must be in the affirmative.

M.H.H.
