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cases of all public service inams. We must hold that lands burdened with a dasabandham service, which is a service of a public nature, are inalienable as being against public policy and, being inalienable, cannot be sold in execution of a decree against an inamdar. The lower appellate Court also found that estoppel cannot be relied upon to defeat a prohibition in law on the ground of public policy. No argument to the contrary was addressed to us by the appellant upon this point and that question therefore does not arise in this appeal. The second appeal must fail and be dismissed with costs.

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APPELLATE CIVIL.

Before Sir Owen Beasley, Kt., Chief Justice, and Mr. Justice King.

1934, August 29.

NARAYANA GOUNDAN (PLAINTIFF), APPELLANT,

v.

APPAVU GOUNDAN, MINOR BY HEAD CLERK, DISTRICT MUNSIF'S COURT, UDUMALPET, AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Code of Civil Procedure (Act V of 1908), O. XXI, r. 83—Certificate to judgment-debtor under, authorising private alienation—Grant of—Alienation pursuant to—Attachment of same property between dates of, in execution of another decree—Purchaser at sale under—Invalidity of alienation made pursuant to certificate as against—Sec. 64—Applicability and effect of.

Certain property having been attached in execution of a decree, the judgment-debtor sought for permission under

* Second Appeal No. 598 of 1929.

Order XXI, rule 83, of the Code of Civil Procedure to mortgage the property in order to satisfy the decree. Permission was granted by the Court, the mortgage was effected in pursuance of it, and the mortgage-money was paid into Court by the mortgagee and the decree was discharged. Meanwhile, that is, subsequent to the grant of the permission and before the execution of the mortgage, the same property had been attached in execution of another decree against the judgment-debtor and the property was in due course proclaimed and sold in pursuance of the attachment.

Held that the mortgage having been executed during the pendency of the attachment ordered in the execution of the other decree was by virtue of the provisions of section 64 of the Code not binding upon the purchaser at the sale under that other decree.

Sub-section (2) of rule 83 of Order XXI of the Code contemplates the situation as it exists at the time of the issue of the certificate and cannot possibly refer to an attachment made subsequent to the issue of the certificate or affect any claims enforceable under that subsequent attachment.

APPEAL against the decree of the Court of the Subordinate Judge of Coimbatore in Appeal Suit No. 132 of 1927, preferred against the decree of the Court of the District Munsif of Udumalpet in Original Suit No. 75 of 1925.

A. C. Sampath Ayyangar for *M. Krishna Bharathi* for appellant.

L. A. Gopalakrishna Ayyar and *C. D. Venkataramanan* for respondents.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by KING J.—Two decrees were obtained against one Appavu Goundan, a minor with his mother Konammal as his guardian in Original Suits Nos. 1114 and 835 respectively of 1922 on the file of the District Munsif of Udumalpet. In execution of the first (Original Suit No. 1114) certain

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property was attached on 2nd May 1923. On 4th July 1923, Konammal on behalf of her son sought for permission under Order XXI, rule 83, Civil Procedure Code, to mortgage the property in order to satisfy the decree. Permission was granted by the Court on 5th July, and the mortgage was actually effected in pursuance of it on 19th August by Exhibit A. Next day (20th August) the mortgage-money was paid into Court by the mortgagee (Narayana Goundan) and the decree in Original Suit No. 1114 was discharged. Meanwhile however, on 19th July, the decree-holder in Original Suit No. 835 had also attached the same property and the property was in due course proclaimed and sold in pursuance of the attachment, one Kandasami Chetti becoming the auction-purchaser on 8th February 1924. In 1925 the mortgagee under Exhibit A brought a suit (Original Suit No. 75 of 1925) to enforce his mortgage, impleading Kandasami Chetti as the second defendant. The second defendant pleaded that the mortgage, having been executed during the pendency of the attachment ordered in the execution of his decree, was, by virtue of the provisions of section 64, Civil Procedure Code, not binding on him. Both the District Munsif of Udumalpet and the Subordinate Judge of Coimbatore on appeal have upheld this contention and dismissed the mortgagee's suit. The mortgagee has accordingly filed this second appeal.

On a mere comparison of dates it is of course obvious that the appellant cannot succeed, his mortgage having been effected one month later than the attachment in favour of the second

defendant. But the appellant takes his stand upon the language of sub-section 2 of Order XXI, rule 83, which contains the phrase "notwithstanding anything contained in section 64", and it is argued that what this sub-section means is that once a Court has granted a certificate to the *judgment-debtor* authorising private alienation *no one* can make use of section 64 to attack the title of the alienee when the alienation has been effected, or, in other words, that the mere issue of the certificate was enough to render the title of the alienee unassailable.

It seems to us that this interpretation of the sub-section cannot be accepted. The whole of the first portion of that sub-section runs as follows:—

> "In such case the Court shall grant a certificate to the judgment-debtor authorising him within a period to be mentioned therein, and notwithstanding anything contained in section 64, to make the proposed mortgage, lease or sale."

It is clear from this that what is contemplated is the situation as it exists at the time of the issue of the certificate, and the sub-section must mean that, in spite of the fact that the property in question *has been* attached, which would ordinarily invalidate any alienation according to the provisions of section 64, yet in these particular circumstances that attachment shall not invalidate the alienation made in pursuance of the Court's certificate. We entirely fail to see how the sub-section can possibly refer to an attachment made subsequent to the issue of the certificate or affect any claims enforceable under that subsequent attachment. That the issue of the certificate is itself enough to render the alienee's title unassailable is a position which cannot be maintained in

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view of the proviso with which sub-section 2 ends :

"Provided that no mortgage, lease or sale under this rule shall become absolute until it has been confirmed by the Court."

In the present case there is nothing at all to show that the mortgage has been confirmed, and, though there is no positive finding on this point by either of the Courts below, it seems highly probable that there was in fact no confirmation as no order of confirmation was produced by the plaintiff.

It was argued for the appellant that a liberal construction ought to be put upon the phrase "notwithstanding anything contained in section 64" as otherwise great hardship would be done to the appellant. Why, it was argued, should a mortgagee lend his money in perfect good faith and on the strength of a certificate from the Court, and then run the risk of losing his security because of the existence of some second attachment of which he had no knowledge? No doubt a mortgagee so circumstanced might fairly complain of his ill-fortune but we fail to see how this equitable argument can successfully be raised in favour of the present appellant. The findings of fact are that, though the Court passed an order allowing the application of the 4th July, no certificate was actually issued and the use of the word "shall" in sub-section 2 shows that the issue of such a certificate is an essential step in the procedure and further, as we have already stated, there is nothing to show that the mortgage was ever confirmed. In these circumstances the appellant, apart altogether from the meaning of the disputed clause, cannot plead that he has obtained from

the Court an indefeasible title. The act of confirmation by the Court is as essential as the issue of a certificate and it is here, it seems to us, where the unfortunate hypothetical mortgagee who has relied upon the Court's certificate would receive his protection, for, in an application for confirmation, the Court would certainly consider the question of a subsequent attachment and could refund to the mortgagee the money which he had deposited into Court.

It remains to consider various rulings which have been cited before us by the appellant's learned Advocate. The first is a decision of the Calcutta High Court reported as *Miajan Ali* v. *Rup Chandra Sarma*(1). In that case there was a certificate granted by the Court on 15th January, a second attachment on 24th January and a representation to the Court by the judgment-debtor, decree-holder and purchaser on 31st January that a sale had actually been effected. It was held that this sale, even though not then formally confirmed, could be confirmed at any time the purchaser cared to apply for confirmation and that it was not invalidated by the attachment. The crucial date, viz., the date when the sale was actually effected, is nowhere given in this ruling. If this were between the 15th and 24th January, as is very likely, the sale could of course not be invalidated by the attachment, but it is impossible to cite this ruling, as appellant's learned Advocate wishes to do, as authority for the position that because the certificate was prior to the attachment the sale effected in pursuance of the certificate (whatever may be its date) cannot be assailed.

(1) (1913) 21 I.C. 210.

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Next comes *Qurban Ali* v. *Ashraf Ali*(1). In that case some arbitrators made an award that L should sell certain property to Q. Later a decree was passed in accordance with the terms of this award, and, in compliance with the decree, L executed a conveyance of the property to Q. Between the date of the award and the date of the decree the property was attached. It was held that the conveyance was not invalidated by the attachment as the conveyance, being made in pursuance of a decree of the Court, could not be held to be a private alienation. Now in the present case there was no decree directing an alienation but only an order permitting an alienation under certain terms. It was attempted to be argued by appellant's learned Advocate that alienations under Order XXI, rule 83, stood in a class by themselves as quasi-public or quasi-private alienations, but it is clear from *Dattaram* v. *Gangaram*(2), which is cited in the judgment of the learned District Munsif, that such alienations are the "acts of the judgment-debtor alone" and clearly therefore fall under the terms "private transfer" in section 64. The Allahabad ruling is therefore of no assistance to the appellant.

The ruling in *Lakshman* v. *Ramchandra*(3) can also be distinguished in the same way, for it was there held that a mortgage executed by the Court in pursuance of a decree for specific performance by A against B was not a private alienation by B. *Sunkari Sitayya* v. *Mudaragaddi Sanyasi*(4) is another case of an alienation following upon a decree for specific performance.

(1) (1882) I.L.R. 4 All. 219.
(2) (1898) I.L.R. 23 Bom. 287.
(3) A.I.R. 1932 Bom. 301.
(4) (1924) 46 M.L.J. 361.

Finally was quoted the ruling in *Madan* v. *Rebati*(1). It was there held that

"a conveyance of a property executed after its attachment before judgment by a creditor, in pursuance of a contract dated before the attachment, should prevail, inasmuch as it was merely carrying out an obligation which was incurred prior to the attachment."

Now it is true that in this case there was no actual *decree* but emphasis must be laid upon the word "obligation" and in the present case, as already pointed out, the judgment-debtor was under no obligation to do anything.

The appellant can therefore in our opinion derive no assistance from the various rulings on which he seeks to rely, and, as we have already indicated, the reasonable and natural interpretation of the words in sub-section 2 of Order XXI, rule 83, is not the interpretation which he asks us to adopt. The appeal accordingly fails and must be dismissed with costs.

A.S.V.

(1) (1915) 23 C.L.J. 115.