1869. *August* 26. *S.A. Nos.* 595 *of* 1868 *and* 167 *of* 1869.

should have been directed without entertaining any question as to the validity or operation of the instruments—See the case of *Khadar Saib* v. *Khadar Bibi*, 3 *Madras High Court Reports*, 149. It makes no difference that the questions decided by the Lower Courts arose out of the defence, registration being essential to admit of the Courts looking at the terms of the instruments in order to see their nature and effect.

For these reasons, we must reverse the decrees of the Lower Courts, and, as the execution of the instruments has been admitted by the defendant, the decrees in the appeals may at once direct the Registrar to register the instruments. Plaintiff's costs throughout must be paid by the defendant.

Appellate Jurisdiction (a)

Regular Appeal No. 34 *of* 1869.

KULLAPPA NAIK and another.....*Appellants.*

RAMANUJA CHARIYAR and 11 others.....*Respondents.*

Regular Appeal No. 61 *of* 1869.

COLLECTOR OF MADRAS.....*Appellant.*

RAMANUJA CHARIYAR and 11 others.....*Respondents.*

The plaintiffs sued, as the mirassidars of a village, to establish their right to the grant of a puttah of certain waste lands of the village which had been granted to some of the defendants. The Collector, who was made a defendant, stated that the Hookumnamah Rules of the District directed that land should be given to mirassidars on their tendering sufficient security, and that the plaintiffs on previous occasions had received lands for which offers had been made by others in consideration of the plaintiffs' preferential right, but that they had failed to cultivate the lands or pay the assessment in breach of their agreements.

Held, that the plaintiffs were entitled to the relief sought for.

1869. *August* 31. *R. As. Nos.* 34 *and* 61 *of* 1869.

THESE were Regular Appeals against the decision of E. B. Foord, the Civil Judge of Chingleput. in Original Suit No. 29 of 1867.

(a) Present: Scotland, C. J. and Innes, J.

1869. *August* 31. *R. As. Nos.* 34 *and* 61 *of* 1869.

The plaint set forth that the plaintiffs and the defendants from 3 to 31 are the mirassidars of the divided village of Pillapaukum; that contrary to the usage of the district, the 1st and 2nd defendants caused a lease of certain waste lands in that village to be issued in their names by the Collector in Fusli 1269, notwithstanding that plaintiffs raised objections thereto and bound themselves to pay the full assessment of those lands. Plaintiffs therefore sued to eject the 1st and 2nd defendants and defendants from 32 to 66 who occupied portions of the said lands, and to have the lease cancelled.

The defence was that the lease was lawfully granted by the Collector with the plaintiffs' consent, and that the village in question was an undivided one.

The supplemental defendant (the Collector) pleaded that the issue of the lease to the 1st and 2nd defendants was in accordance with the hookumnamah of the district which directed that leases should only be granted to mirassidars upon their tendering good and sufficient security; that the plaintiffs had, on previous occasions, in consideration of their preferential rights as mirassidars, been granted leases of lands applied for by poyacarries, but had always failed either to cultivate the lands or pay the assessment thereon, although they had entered into written agreements to pay the assessment whether they cultivated the lands or not, and that such being the case, his predecessor, Mr. Shubrick, was justified in granting a lease to the defendants.

It was admitted at the first hearing by the pleaders on both sides that it made no difference to their respective clients whether the village in which the disputed lands are situated is divided or undivided.

The plaintiffs' pleader admitted that, unless the plaintiffs had agreed to cultivate the said lands, the Collector had authority to grant a lease to the defendants.

Defendants' pleader admitted that the plaintiffs are the mirassidars of the village.

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The Civil Judge gave judgment for the plaintiffs as follows after stating the evidence :—

It is admitted that the plaintiffs, being the mirassidars, had a preferential right to have the lands in dispute leased to them, provided they agreed to pay the assessment, whether they cultivated them or not, and to give security for the payment of the same.

That they were willing to comply with all those terms is clear from exhibits A, B and C, and it remains to be determined whether under such circumstances the supplemental defendant, the Collector, was justified in rejecting their offer and in granting a lease to the other defendants.

I am of opinion that he was not, for the following reasons. The only ground he assigns in his written statement is that on previous occasions they had failed to fulfil their agreements to cultivate certain lands which his pleader admits are not the same now in dispute. He does not say that he considered the security tendered insufficient. That it was in fact ample seems clear from the statement of the 3rd (joint) witness, the Kurnum, and from the Tahsildar's urzi C.

The terms on which waste lands should be leased to mirassidars in this district were laid down in a Despatch from the late Honorable Court of Directors to the Government of Madras, dated 28th July 1841, and the late Provincial Court declared in their decree dated 15th December 1841 that the law on the subject was in accordance with that Despatch.

The written statement of the supplemental defendant shows that those rules were still in force when the cause of action arose.

For the above reasons I am therefore clearly of opinion that the supplemental defendant was not justified under the circumstances of the case in granting the lease to the other defendants, and that he was bound under the rules in force in the district to grant it to the plaintiffs.

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Gordon, for the appellants, the 1st and 2nd defendants in No. 34.

Srinivassa Chariyar, for the respondents, the 1st, 3rd, 4th, 7th, 8th, 10th, 11th, and 12th plaintiffs in No. 34.

Handley (Government Pleader) for the appellant, the 67th defendant in No. 61.

Rama Row for *Srinivassa Chariyar*, for the 11th respondent, the 11th plaintiff in No. 61.

The Court delivered the following

JUDGMENT:—The plaintiffs in this suit and the defendants from No. 3 to No. 31 are the mirassidars of the village of Pillapaukam, in the zillah of Chingleput, and have brought the suit to establish their right to the grant of a puttah of certain waste lands in the village of which the 1st and 2nd defendants were in occupation as Sugavasi tenants under a puttah granted to them by the Collector, and to obtain the issuing of a puttah to them and the eviction of the 1st and 2nd defendants. They rest their claim on the ground that, as mirassidars, they have a right to the pre-occupancy of waste lands as against strangers who apply to become tenants of such lands for cultivation upon giving sufficient security for the payment of the full revenue assessment, and that they had tendered such security before the puttah was granted to the 1st and 2nd defendants.

The 1st and 2nd defendants and the other defendants claiming under them pleaded and at the trial relied upon the right of the Collector to grant the puttah to them, notwithstanding the objections of the plaintiffs and the other mirassidars. The Collector, upon being made a supplemental defendant, put in a written statement which sets forth that the land was given to the 1st and 2nd defendants as durkhastdars for the protection and security of the Government revenue; that the proceedings in that respect were in keeping with the Hookumnamah Rules of the district which directed that lands should be given to mirassidars on their tending sufficient and trustworthy security;

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that the plaintiffs as the mirassidars of the village had, on previous occasions, competed for lands for which offers had been made by Poyacarries and were allowed to take them up *in consideration of their preferential rights*, but they had failed to cultivate the lands or pay the assessment in breach of their agreements to do so, and consequently the late Collector (his predecessor) had not in the mirassidars that security for the due and punctual payment of the Government revenue that the interests of Government demanded.

The recorded issues raised the question whether the Collector had authority in the circumstances of the case to grant the lease to the 1st and 2nd defendants, and at the trial the case on both sides was rested upon the admission contained in the Collector's written statement and repeated and accepted by the vakils of the contesting parties that the mirassidars had a preferential right to a tenancy of the land in dispute on entering into an agreement to pay the revenue assessment whether they cultivated or not and giving sufficient security for the payment of the same. The evidence on the part of the plaintiffs was confined to shewing that such agreement and security had been duly tendered before the grant of the puttah to the 1st and 2nd defendants, and on the part of the 1st and 2nd defendants and the Collector the only evidence adduced was in proof of the averment in the Collector's written statement that the plaintiffs had failed to cultivate the waste lands granted to them on a former occasion and to pay the assessment thereon. The Civil Judge was of opinion that this default was no ground of defence, and considering it proved that the proper agreement and sufficient security had been tendered, he decreed the relief prayed in the plaint.

From that decree the Collector and the 1st and 2nd defendants have brought the present appeals, and the ground on which it is sought on their behalf to invalidate the decree is that the plaintiffs as mirassidars have not a preferential right to the occupancy of waste lands which the Collector is bound to recognise. The Civil Judge's conclusion in regard to the tender of the proper agreement

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and sufficient security is not objected to, and it is conceded that the refusal to entertain the plaintiffs' application because of their breach of a former agreement was not sanctioned by any authoritative rule or custom. We are of opinion that it is not open to the appellants now to set up that the mirassidars have no right whatever to claim the occupancy of waste lands. Their preferential right subject to the conditions already stated has been deliberately and distinctly admitted, and on that admission the suit was heard and determined by the Civil Court. If on the part of the Government a Judicial decision as to the right of pre-occupancy is desired, the question may be properly raised in another suit when the mirassidars will have the opportunity, to which they are entitled, of adducing evidence of custom in support of their claim.

For these reasons the decree of the Civil Court must be affirmed with costs.

Appellate Jurisdiction. (a)

Regular Appeal No. 40 *of* 1869.

GOLLA CHINNA GURUVUPPA NAIDU..... *Appellant.*

KALI APPIAH NAIDU and another..... *Respondents.*

The plaintiff brought a suit on an instrument, dated 1861, described as a mortgage bond, to recover the amount due by a decree against the first defendant personally and against the mortgaged property which was in the possession of the 2nd defendant under a registered deed of sale by 1st defendant to him in 1866. The Civil Judge gave a decree against the 1st defendant, but refused the prayer against the 2nd defendant on the ground that he was a *bona fide* purchaser for valuable consideration without notice.

Held, by the High Court, that the plaintiff was entitled to a decree against the property in the possession of the 2nd defendant for satisfaction of the debt, whether the instrument sued on was a mortgage, or whether its effect was merely to create a lien.

1869. *September* 3. *R. A. No.* 40 *of* 1869.

THIS was a Regular Appeal against a decision of E. F. Eliott, the Acting Civil Judge of Chittoor, in Original Suit No. 33 of 1866.

The suit was brought to recover rupees 3,000 under certain mortgage bonds.

(a) Present. Bittleston and Innes, J. J.