

APPELLATE JURISDICTION (a)

Regular Appeal No. 31 of 1870.

ANNAVUNADAVAN.....Appellant.

IYASAWMY PILLAI and 4 others.....Respondents.

The plaintiff sued to recover certain land which had been hypothecated to him in 1843, and subsequently sold to him in 1868, while under attachment in execution of a decree in a suit brought by the plaintiff to establish his hypothecatory claim. The 3rd defendant claimed under a mortgage prior in date to the hypothecation to the plaintiff, and under a sale prior in date to the sale to the plaintiff, made to the 3rd defendant whilst the land was under attachment in execution of the decree to the plaintiff.

Held, that the sale to the 3rd defendant, which was made not under any agreement with the plaintiff for the satisfaction of the decree through the Court, was invalid by reason of Section 240 of the Civil Procedure Code; but that the alienation to the plaintiff, the decree holder, during the attachment to satisfy the decree which was duly sanctioned by the approval of the Court which issued the process of attachment, was valid.

THIS was a Regular Appeal against the decision of W. M. Cadell, the Acting Civil Judge of Trichinopoly, in Original Suit No. 40 of 1868.

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The suit was for the recovery of lands together with the mesne profits accruing thereon, the value being estimated at Rupees 1,146-12-2.

The plaintiff asserted that one Letchumana Pillai, a divided uncle of the 1st and 2nd defendants, in the year 1843 executed two bonds of hypothecation to the plaintiff's father and died sometime afterwards issueless; that the 1st and 2nd defendants then became his heirs, when the plaintiff sued them, in Suits Nos. 78 and 79 of the late Sadr Amin's file, for the amount of these bonds, and obtained decrees in his favor; that subsequently plaintiff got the property specified in the bonds attached in satisfaction of the decrees, when the 3rd defendant put in a petition alleging that he had purchased the lands from one Comaravanathriyan; that this petition was rejected, and that the 3rd defendant again instituted the suit, Original Suit No. 26 of 1862, to establish his right; that the suit was, however, dismissed, as also the Appeal Suits therefrom, No. 74 of 1865; that the plaintiff then again applied for execution against the lands, when the 3rd defendant presented a petition along with an agreement,

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1871. and promising to pay up the amount due, but this petition
uary 18. was again rejected ; and that the 1st and 2nd defendants
No. 31 having on the 28th April 1868, sold the lauds hypothecated
f 1870. to the plaintiff for the decree amount, the property was
 released from attachment, but as the defendants remained in
 forcible possession of the property, and the 3rd and 4th
 defendants had assisted in carrying away the produce—hence
 the suit was instituted.

The 1st defendant in his answer contended that only
 Rupees 1,020-1-0 were due under the two decrees passed in
 Suits 78 and 79 of 1854 of the Sadr Amin's Court, viz., Ru-
 pees 512-11-0 in No. 78, and Rupees 507-6-0 in Suit No. 79;
 that it was agreed in the presence of certain persons that the
 lands hypothecated were to be sold for Rupees 2,000, and that
 after deducting therefrom the sum of Rupees 1,020-1-0 due by
 him (1st defendant), the remaining sum of Rupees 979-15-0
 was to be paid him by the plaintiff; that although the deed of
 sale was accordingly drawn up, still the same had not been
 formally completed, and that the allegation of the plaintiff
 that the sum of Rupees 2,000 was due under the said decrees
 was altogether false.

1st defendant further expressed his willingness to abide
 by the said deed, provided he was paid the sum of Rupees
 979-15-0, failing which he prayed the deed might be declared
 to be null and void.

The 3rd defendant asserted that the land claimed in the
 plaint originally belonged to Letchumana Pillai, the divided
 uncle of the 1st defendant ; that it was first mortgaged in
 the year 1838, and finally sold with certain other lands to
 one Comaravanathriyan in the year 1846 for the sum of
 Rupees 1,000 ; that the said Comaravanathriyan, who was
 enjoying the lands up to the year 1860, then sold them to
 him, 3rd defendant, for the sum of Rupees 1,500, and also put
 him in possession, together with the title-deeds, and that
 he (3rd defendant) had ever since enjoyed the same ; that
 after the death of Letchumana Pillai his brother Muthucar-
 nappa Pillai (who was also the 1st defendant's father) inherited
 the deceased's property under Hindu Law, and was thus
 alone the owner thereof, but not the 2nd defendant.

That the 1st defendant had not only in the year 1857 executed an agreement to the said Comaravanathriyan supporting his right to the said land, but had also subsequently enjoyed a portion thereof on mortgage and sale.

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That although the suit, Original Smit No. 26 1862, brought by him in this Court for the release from attachment of the lands specified in the plaint, was dismissed, the sale-deed of 1846 was not proved, still the 1st defendant admitted the genuineness of the deed, and that the same was therefore valid.

That subsequent to the dates of the original and appeal decrees, or in September 1866, the 1st defendant had executed an agreement to the third defendant, which had been registered, declaring the sole right of the 3rd defendant to the lands in question, and that, therefore, the sale of the lands in the year 1868, as alleged by the plaintiff, could not be held to be valid.

That the suit was barred by the Law of Limitation, and that the plaintiff's purchase was altogether invalid, inasmuch as the seller was not in possession of the property sold since the year 1846.

The following were the issues directed by the Court to be tried on the 15th July 1869.

1st issue to prove that the sale to the plaintiff was duly made, and that the full amount of consideration as specified in the sale-deed was given.

The 2nd issue was whether the suit was barred by the Limitation Act

The Civil Judge delivered the following Judgment :—

In this case it seems unnecessary to go at length into all the evidence adduced by the parties, the main point for decision being simply, was the sale of the property to the plaintiff a good and valid transaction or the contrary.

To support his claim, the plaintiff has produced ten exhibits, but it rests mainly if not entirely on the document, exhibit A, and the evidence adduced in support of it.

The plaintiff has cited six witnesses, of whom two speak as to the execution of the document in question, but even these admit that no consideration at all was paid at the time

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and all the six concur in stating that the land sold was at the time not in possession of the 1st, but of the 3rd defendant, and that for a series of years.

It is also proved by the evidence of the witnesses for the 3rd defendant that in the year 1866, he, 1st defendant, resigned altogether his claim to the land and executed an agreement, exhibit VIII, to that effect. This he denied in his examination, but in the Sessions just closed he has been tried and found guilty of giving false evidence in making such denial, and yet two years afterwards, he sells again land to which, and by his own deliberate act, he has altogether forfeited his claim.

It must also be observed that the 1st defendant has been committed to take his trial for deliberate and wilful perjury in denying certain documents to which his signature was affixed, and there can be but little doubt but that this suit has been brought in collusion with him.

The Court is, therefore, of opinion that the plaintiff is only entitled to receive the sum of Rupees 905 from the 3rd defendant, under the terms of document exhibit VIII, as awarded in Original Suits Nos. 78 and 79 of 1854.

Each party to bear their own costs.

The plaintiff appealed to the High Court at Madras against the decree of the Civil Judge for the following reasons :—

1st.—The decree of the Civil Judge is against the weight of evidence and contrary to law.

2nd.—The Civil Judge has misapprehended the real points in the case.

3rd.—The document A is valid and binding.

Miller, for the appellant, the plaintiff.

The Court this day delivered the following

JUDGMENT :—In this case plaintiff sues to enforce a sale of property which had been hypothecated to his father in 184, and subsequently, while under attachment in execution of decrees 78 and 79 which had established plaintiff's hypothecatory claim, sold to plaintiff by the heirs of the original judgment-debtor for the decree amount. This sale was

made in 1868. The first defendant contended that a certain portion of the consideration for the sale was still due. Third defendant set up a mortgage of the property in 1838 by the uncle of 1st defendant to a third person Comaravanathriyan, to whom in 1846 it was sold. He said that this person enjoyed till 1860, when he sold the property to 3rd defendant, and that he has since been in enjoyment of it; that in 1857 the title of his vendor was admitted by 1st defendant in an agreement in writing, and that although the Suit No. 26 of 1862, brought by him to set aside the attachment made in execution of the decrees 78 and 79, was dismissed on the ground that the execution of the deed of sale in 1846 was not proved, still, as 1st defendant had in 1866 executed and registered an agreement in 3rd defendant's favour, acknowledging his title, the subsequent sale to plaintiff in 1868 was ineffectual to pass the property.

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The Civil Judge dismissed the plaintiff's claim to the property, considering (as we understand the language of his judgment) that he had failed to prove payment of the consideration for the sale, and, therefore, no title passed by the instrument of sale in 1868, but decreed payment to him by the 3rd defendant (to whom the Civil Judge seems to have held that the 1st defendant's title passed under the document, exhibit 8) of the sum which he found due under the decrees in the suits 78 and 79 of 1854.

No attempt has been made on the part of the respondents to resist the appellant's objection that the Civil Court erred in holding the instrument of sale to the plaintiff (exhibit A) invalid:—and it is clear that, being a fully perfected sale for a valuable consideration, the non-payment of the balance of the consideration, after deducting the amount due under the decrees, is not a ground for invalidating the effect of the instrument as a transfer of the vendor's right.

The first question for determination is, whether the 3rd defendant became entitled to the land in dispute under the document (exhibit 8) subject to the payment of the plaintiff's mortgage debt, his claim through Comaravanathriyan being concluded by the decree in the Suit No. 26 of 1862. Now, assuming that document to be in terms a fresh transfer of the 1st defendant's right, it clearly had no such legal opera-

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tion by force of Section 240 of the Code of Civil Procedure. It appears to have been effected while the plaintiff's attachment of the property was in operation and not under any agreement with the plaintiff for the satisfaction of the decree through the Court : and that Section declares that any private alienation of the property attached whether by sale, gift, or otherwise during the continuance of the attachment shall be null and void. The 3rd defendant's claim of title therefore must be set aside.

The second question is whether the Section does not also invalidate the instrument of sale to the plaintiff, the attachment being still in force at the time of its execution. That would no doubt be its effect if the words used be given a strictly literal application. But we are of opinion that the words "any private alienation" were not intended to apply to an alienation effected with the acceptance of the decree-holder to satisfy the decree and duly sanctioned by the approval of the Court which issued the process of attachment. This is clearly shown, we think, by Section 245 of the Code providing for the withdrawal of an attachment upon satisfaction of the decree otherwise than by payment of the amount decreed and all costs and charges into Court. Under this provision an alienation of the property under attachment, accepted by the decree-holder in satisfaction of the decree, may, after execution, be sanctioned by the Court, and an order thereupon made for the withdrawal of the attachment. An alienation so sanctioned cannot therefore be considered as one to which Section 240 was meant to be applicable. As then the instrument of sale and transfer to the plaintiff was duly submitted to the Civil Court, and satisfaction of the decree thereupon entered in the record by the Court, it operated, in our opinion, as a valid conveyance of the vendor's title to the plaintiff. For these reasons, the decree of the Court below must be reversed and possession of the land in question decreed to the plaintiff. The decree must also direct an enquiry in execution as to the amount of mesne profits to which the plaintiff is entitled down to the execution of the decree, and order payment of the amount found due. The appellant, we think, should have his costs throughout.

Appeal allowed.