

C. Ganapathy Mudaliar - - - - Appellant,

v.

N. Krishnamachariar and Others - - - Respondents,

FROM

THE HIGH COURT OF JUDICATURE AT MADRAS.

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF  
THE PRIVY COUNCIL, DELIVERED THE 14TH DECEMBER, 1917.

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*Present at the Hearing:*

LORD BUCKMASTER.

SIR JOHN EDGE.

SIR WALTER PHILLIMORE, BART.

SIR LAWRENCE JENKINS.

[Delivered by SIR JOHN EDGE.]

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This is an appeal from a decree of the High Court at Madras, dated the 17th February, 1914, which affirmed a decree, dated the 9th February, 1910, of the District Judge of North Arcot, by which the suit was dismissed. The plaintiff is the appellant.

The suit was brought in the Court of the District Judge of North Arcot on the 16th November, 1907, to redeem three mortgages dated respectively the 12th December, 1876; the 7th January, 1879; and the 10th May, 1881. The mortgages were of ancestral property, and were made by the father of the plaintiff before the plaintiff or his brother, since deceased, were born. The mortgage of the 7th January, 1879, was in favour of N. Vijayaragavachariar, a vakil, to whom their Lordships will refer as the vakil. The mortgages of the 12th December, 1876, and the 10th May, 1881, vested by assignment in the vakil. The plaintiff in this suit was born in September 1881; his brother was born in May 1882.

On the 19th March, 1886, the vakil brought in the District Court of North Arcot, a suit for sale on the mortgage of the 10th May, 1881, against the plaintiff's father, the plaintiff, aged 4 years, and his brother, aged 3 years, the brothers being described as "maintained by the first defendant," who was their father. The suit was entered on the files of the Court as Original Suit No. 5, of 1886. Their father, who had not been appointed as their guardian for the suit, objected that he was

not their guardian, but the District Judge overruled the objection, and on the 15th April, 1886, made a decree in the following terms:—

“ It is ordered that plaintiff do recover 10,891 rupees, together with further interest at 6 per cent. per annum from date of plaint to date of payment and costs, to be recovered from the first defendant personally, and by sale of the mortgaged property.”

That decree was doubtless intended to be in compliance with the provisions of “ The Transfer of Property Act, 1882,” but it did not comply with those provisions.

On the 16th August, 1886, the vakil presented to the District Court his petition, under section 230 of the Code of Civil Procedure, 1882, for execution of the decree of the 15th April, 1886. The petition was entered on the files of the Court as “ Execution Petition No. 57 of 1886 in O.S. (Original Suit) No. 5 of 1886,” and by it the petitioner prayed “ that the amount may be recovered with further costs, together with further interest, by the attachment and sale of immovable property set out in the schedule herewith filed.” In that petition the present plaintiff and his brother were described as minors, defendants “ by their guardian the first defendant.” In the schedule the vakil disclosed the fact that there existed the mortgages of the 12th December, 1876, and the 7th January, 1879. On the 18th August, 1886, the warrant of attachment was issued, and on the 13th September, 1886, a notice of sale was issued.

On the 28th September, 1886, one Govindaraju Mudali, who was a maternal uncle of the present plaintiff and his brother, applied to the District Court to be appointed their guardian and to have the decree of the 15th April, 1886, set aside, on the ground that their father was not their proper guardian. Govindaraju Mudali apparently contended in support of his application that the debt in respect of which the mortgage of the 10th May, 1881, had been given was not one which the minors or the properties were liable to discharge. On the 10th November, 1886, the District Judge held that the appointment of the father as guardian had been illegal, and in his place appointed Govindaraju Mudali as guardian of the minors, and set aside the decree of the 15th April, 1886, as against them. Govindaraju was ordered to put in a written statement on the 15th November, 1886, on behalf of the minors, but he failed to do so and did not appear. On the 15th November, 1886, the District Judge made a decree that the plaintiff (the vakil) “ do recover 10,891 rupees, together with further interest at 6 per cent. per annum from date of plaint to date of payment, and costs, to be recovered from the first defendant personally and by sale of the mortgaged property.” That decree did not comply with the provisions of “ The Transfer of Property Act, 1882,” but it was not appealed and it became final. It was obviously intended to be in supersession of the decree of the 15th April, 1886, and must be regarded as having superseded that decree.

On the 24th January, 1887, the Court of the District Judge caused a proclamation of the intended sale to be made under section 287 of the Code of Civil Procedure, 1882. The proclamation is described on the face of it as in O.S. No. 5 of 1886, application No. 57 of 1886, and proclaimed that—

“Whereas the immovable property mentioned in the list attached hereto and belonging to the said defendants (the father and his two sons) has been attached upon a petition being presented for execution of the decree passed in the above suit. Take notice that if the amounts specified below be not paid into this Court, or if no other steps be taken to satisfy the decree, the said property shall be sold in public auction in this Court on the 19th September, 1887, and that in that sale the right, title, and interest possessed by the above defendants alone in respect of that property shall be sold.”

So far as appears from the documents in the record, the only attachment which had issued was that of the 18th August, 1886.

It appears that Govindaraju Mudali, as the guardian of the minors, had appealed to the High Court at Madras from some order which the District Judge had made on the 20th December, 1886, in Original Suit No. 5 of 1886. What the order appealed from was does not appear, nor is there anything in the record which suggests what the nature of the order was. However, that appeal not having been disposed of, Govindaraju Mudali, at some time between the 24th January, 1887, and the 2nd March, 1887, applied to the High Court for an order to stay the sale of the property attached in execution of the decree of the District Court of North Arcot in Original Suit No. 5 of 1886. That application was dismissed by the High Court on the 1st August, 1887.

On the 28th February, 1887, the District Court made an order permitting the vakil to bid at the sale. On the 19th September, 1887, the immovable properties in question were sold, subject to incumbrances, by public auction, and the vakil became the purchaser.

The sale was confirmed by the District Judge on the 13th December, 1887, and he, on the 1st February, 1888, gave the sale certificate under his hand and the seal of the Court. The vakil died before this present suit; the first respondent is his son. The other respondents are purchasers from the vakil. The father of the present plaintiff died in May 1894. The plaintiff's brother died in September 1904. The present plaintiff, his brother and their father, had constituted a Hindu joint family.

On behalf of the appellant here it was contended that the sale took place in execution of the decree of the 15th April, 1886, and not in execution of the decree of the 15th November, 1886, and that under such circumstances only the right, title, and interest of the father were sold. That contention is based on the fact that the attachment of the 16th August, 1886, was made under the decree of the 15th April, 1886. The sale must have been under the decree of the 15th November, 1886.

No one was or could have been misled as to the decree under which the sale was taking place. The proclamation of sale of the 24th January, 1887, was made subsequent to the decree for sale of the 15th November, 1886, and must have been made consequent on that decree, with the knowledge of all parties and without challenge, and that proclamation shows that what was to be sold by auction was the right, title, and interest in the property of the defendants to the suit of the 19th March, 1886, and the certificate of sale shows that the right, title, and interest in the property of the defendants to that suit were sold to the vakil. The present plaintiff and his brother were defendants to that suit, under the guardianship of Govindaraju Mudali, at the time when the decree of the 15th November, 1886, was made and at the time when the sale took place, and thence until the sale was confirmed and the certificate of sale was made.

It has also been contended on behalf of the appellant here that as the provisions of "The Transfer of Property Act, 1882," were not complied with in the suit for sale of the 19th March, 1886, and as no day was fixed by the Court on which payment might be made within six months from the date of declaring in Court the amount due, the defendants to the suit of the 19th March, 1886, were not debarred from a right to redeem. It appears to their Lordships that the answer to that contention is that whether or not the provisions of "The Transfer of Property Act, 1882," were complied with, the property and all right title, and interest of those defendants in it were in fact sold to the vakil in execution of a decree of a Court which had jurisdiction to entertain the suit in which the decree was made, and that decree was not appealed.

By section 244 of the Code of Civil Procedure, 1882, it was enacted that:—

"244. The following questions shall be determined by order of the Court executing a decree and not by a separate suit (namely):—

"(c.) Any other question arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge, or satisfaction of the decree, or to the stay of execution thereof."

This Board decided in *Prosunno Coomar Sanyal and another v. Kasi Das Sanyal and others* (19 I. A. 166), that section 244 had been rightly held in India to apply in a case in which the question raised concerned the auction purchaser at an auction sale as well as the parties to the suit. In this case the vakil was the auction purchaser and was also a party to the suit. The questions raised in the present suit could have been raised before the sale was confirmed, and, if so raised, would have been determined by the Court which was executing the decree of the 15th November, 1886.

Their Lordships will humbly advise His Majesty that this appeal fails, and should be dismissed.

The appellant must pay the costs of this appeal.

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In the Privy Council.

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C. GANAPATHY MUDALIAR.

v.

N. KRISHNAMACHARIAR AND  
OTHERS.

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DELIVERED BY SIR JOHN EDGE.

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