Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Malkarjun bin Shidramappa Pasare v. *Narhari bin Shivappa and Another, from the High Court of Judicature at Bombay; delivered* 21*st July* 1900.

Present at the Hearing:

LORD HOBHOUSE.
LORD MACNAGHTEN.
LORD LINDLEY.
SIR RICHARD COUCH.
SIR HENRY DE VILLIERS.

[*Delivered by Lord Hobhouse.*]

The Respondents to this Appeal represent the Plaintiffs below who instituted their suit on the 24th January 1889. The Defendant below is now represented by the Appellant. The Plaintiffs stated that on 28th March 1887 one Nagappa whose heirs they are, mortgaged land to the Defendant to secure the sum of Rs. 3,000; and they prayed for accounts and redemption of the mortgage.

The only defence which need now be considered was that in a suit instituted against Nagappa by a creditor of his named Vithal a decree was obtained in execution of which Nagappa's interest in the property was put up for sale; that it was purchased by the Defendant on 9th June 1880; and that on 11th October 1880 possession was given to the Defendant and had continued with him ever since. The plaint was

wholly silent about this sale. The written statement went on to suggest that the Plaintiffs might possibly contend that the sale was illegal because it took place without the Plaintiffs being joined in the certificate as heirs. The Defendant said that he waited to hear whether the Plaintiffs would make any such case, but that if they did he had an answer to it; and he pleaded by anticipation that the legality of the sale could not be impeached in the present suit, one reason being that Vithal the decree-holder was no party to the suit. Finally the Defendant put in a distinct plea that the claim for redemption cannot be maintained unless a suit is brought to set aside the sale.

The Plaintiffs persisted in their suit according to its original frame. Eleven issues were settled by the First Court. The first issue was whether the mortgage debt merged in the subsequent purchase. In point of form that issue was not adapted to the facts of the case; nor, as it was treated by the First Court, was it adapted in point of substance. There was no issue adapted to examine the propriety of the execution proceedings.

The First Court dismissed the suit on the ground, as the learned Judge expressed it, that the mortgage merged in the purchase. The Plaintiffs appealed. They complained that proper issues had not been stated, and that they had been prevented from tendering evidence on points connected with the regularity of the execution proceedings. The Defendant made objections to the same effect. But no further issues were stated, and no further evidence was given.

The Judge of the Second Court, the first Appeal Court, who is styled the Joint First Class Subordinate Judge, A. P. at Sholapur, affirmed the decree below. As there has been no remand

of the case on account of defects in the issues or evidence, his findings of fact are in this stage conclusive; and from them and the documents referred to in them the case appears to stand as follows. Vithal's decree was against Nagappa as principal debtor and Wyankappa as surety. The latter was Nagappa's son-in-law being the husband of Tukava one of the original Plaintiffs in this suit. The date of the decree was 27th June 1877. It is an important document but there is no copy of it in the Record. It is spoken of as a simple decree for payment of money; but from the terms of the application for execution, which was made on 22nd November 1878 (*Rec. p.* 21) it appears that the decree also related to some property which was mortgaged, and that on a previous application made in the year 1878 a trifling sum, Rs. 3. 4 a., had been realised by sale of that property. The application is in a tabular form as required by the then code of procedure, the terms of which are those of Section 235 of the existing Code of 1882. The name of the person against whom the execution is sought is given as "the estate of "the deceased Nagappa." The names of the parties are given as, first Nagappa deceased by his heir Ramlingappa, and secondly Wyankappa. The relief sought is sale of the immovable property of the deceased Defendant for the realisation of Rs. 65 and a fraction, being the balance remaining due under the decree.

Notices were served upon Ramlingappa and Wyankappa. The former was the nephew of Nagappa but was not his heir, the family having been divided as the Court has now found. On the 23rd December 1878 Ramlingappa appeared to show cause. What then took place appears from an entry of that date. Ramlingappa stated "As Nagappa separated from my father "even during [my father's] lifetime I am not

" Nagappa's heir. His heirs are his daughters " (and he named them, meaning to name the Plaintiffs). " I have not with me any 'estate' of " the deceased nor did I receive it. Therefore " this decree should not be executed against " me."

The Court's judgment was as follows : " The " Plaintiffs' application for execution is not " against other property: it is against the " 'estate' of the deceased. If [any] property " belonging to you is included in that [estate], " you should take legal steps after the attach- " ment is levied." (*See Rec. pp.* 25, 26.)

After that the execution proceedings went on; with the result that the mortgaged property was put up on the 9th June 1880 to be sold subject to the charge then stated to be Rs. 3,680, and was bought by the Defendant. It would appear that the property was considered to be worth nothing substantial beyond the mortgage debt; the highest biddings for all the lots only amounting to Rs. 9. 12.

The Second Court dismissed the Plaintiffs' Appeal. The learned Judge proceeded on the ground that Ramlingappa was a legal representative of Nagappa within the meaning of the code because he was a relative of the deceased and was possessed of some of his property. He also relied on the presence of Wyankappa as a party to the execution proceedings, arguing that knowledge of them was thus brought home to the Plaintiffs, and that they could not be allowed to lie by for years and then after the property had increased in value to treat the sale as invalid. If, he said, they objected to the proceedings as irregular they ought to have sued within the year allowed by the law of limitation.

The Plaintiffs appealed to the High Court, when there appeared a great variety of judicial opinion. The appeal was first heard before Sir

Charles Farran C.J. and Parsons J. The former of those learned Judges pointed out the insufficiency of the reasons assigned by the Courts below for their decrees. He held that notice should have been served on Nagappa's heirs, and that in default of such notice the sale was informal and irregular, and might be set aside on an application made in good time (*Rec.*, *p.* 172). Then he addressed himself to the question whether the sale however irregular was a nullity; and he held that it was not, that it must be set aside before the Plaintiffs could recover the property, and that they had never sued to set it aside (*pp.* 172, 174). Parsons J. on the other hand held that the sale was an entire nullity and that the Plaintiffs were entitled to proceed as if it had never taken place (*p.* 176).

Upon this conflict of opinion the cause was referred to three other Judges of the High Court. Ranade J. agreed with Parsons J. that the Court had no jurisdiction at all to make the sale which was consequently a nullity (*p.* 184). Candy J., without deciding the point, assumed for the purpose of his judgment that the sale passed the property subject to challenge in a regular suit, but he held the present suit to be a suit for that purpose. He further held that the suit was brought in good time; apparently on the ground that the right to set aside the sale is subservient to the right to redeem, and that the necessity of impugning the sale arises from the Defendant resisting the suit to redeem (*p.* 180). Jardine J. gives his reasons at length for holding that the Court had jurisdiction to order the sale and that the sale was not a nullity. But then he expresses agreement with Candy J. as to the nature of the present suit and its competency. (*p.* 182).

The decree of the High Court does nothing but direct accounts to determine what amount the Plaintiffs must pay for redemption. It does not set aside the sale. It must therefore rest on the principle that the sale is an absolute nullity, though in fact only one of the Judges on the first hearing and one on the second hearing was of that opinion.

This is indeed the cardinal point of the case, and it is one of great importance to all those who take property under the apparent security afforded by a judicial sale; which in India is conducted not by the creditor who seeks payment but by the Court itself. It is very unfortunate that the views which have prevailed in the High Court have not been supported by any argument at this Bar. Their Lordships have done what they can to understand and appreciate the views of the two learned Judges who think that the sale was a nullity, and to examine the authorities cited for that opinion, but they feel the disadvantage of being without a Respondent.

It is not disputed that if the Court took proceedings wholly without jurisdiction the Plaintiffs would remain unaffected by them, and two of the learned Judges below go the whole length of affirming that the execution Court had no jurisdiction. But a decree had been made, and partially though to a minute extent executed, against Nagappa; and his estate was liable to make good the balance. To enforce this liability was within the jurisdiction of the Court. If a judgment debtor dies before full execution of a decree the creditor may apply for execution against his legal representative. To receive that application is part of the Court's jurisdiction. In point of fact the application made was against "the estate of Nagappa," and in another column Ramlingappa is named as his

heir. The Court had jurisdiction to receive such an application and either to reject it as defective or to order some further proceeding. If Ramlingappa had actually been successor in title nobody could have objected to the regularity of the proceedings. If there had been a dispute who was heir or whether the property had or had not devolved upon the heir, it was for the Court to determine such matters for the purpose of the execution. If it had been found impossible to discover whether any representative of the deceased was in existence, it was for the Court to say what steps should be taken. All these matters, which might involve questions of nicety, were for the Court to decide. It is clear that the jurisdiction was not lost for the reason that the form of application might be open to exception. How was it lost afterwards?

The Code goes on to say that the Court shall issue a notice to the party against whom execution is applied for. It did issue notice to Ramlingappa. He contended that he was not the right person, but the Court having received his protest decided that he was the right person, and so proceeded with the execution. In so doing the Court was exercising its jurisdiction. It made a sad mistake it is true; but a Court has jurisdiction to decide wrong as well as right. If it decides wrong, the wronged party can only take the course prescribed by law for setting matters right; and if that course is not taken the decision, however wrong, cannot be disturbed. The real complaint here is that the execution Court construed the Code erroneously. Acting in its duty to make the estate of Nagappa available for payment of his debt, it served with notice a person who did not legally represent the estate, and on objection decided that he did represent it. But to treat such an error as destroying the jurisdiction of the Court is

calculated to introduce great confusion into the administration of the law. Their Lordships agree with the view of the learned Chief Justice that a purchaser cannot possibly judge of such matters, even if he knows the facts; and that if he is to be held bound to inquire into the accuracy of the Court's conduct of its own business no purchaser at a Court sale would be safe. Strangers to a suit are justified in believing that the Court has done that which by the directions of the Code it ought to do.

As for authority, many cases are cited, but their Lordships cannot find any decision which supports the one now under discussion. That which is relied on by Candy J. is *Baswantapa* v. *Ranu* 9 Bomb. 86. In that case the creditor of a man who was dead sued his mother in the character of heir, whereas the real heir of the debtor was his widow. In August 1878 the creditor obtained a decree *ex parte* upon which execution took place, and the debtor's property was transferred to the Defendant in November 1880. In 1881 a son adopted by the widow of the debtor sued by her as his guardian to recover the land. The plea of bar by time under Article 12 of the Limitation Act was set up; and it was held that the article did not apply because the sale was a nullity and there was no need to set it aside. In that case neither the debtor nor his estate were ever made subject to the decree of the Court, the liability never was established, and the process of execution had nothing to rest upon. The Court actually had not the jurisdiction which it purported to exercise. It is a different matter when the Court has by its decree established the debtor's liability and is in the process of working it out against his estate.

Other decisions are cited in which proper notices have not been served after decree; but

on examining them they all appear to be cases in which proceeedings have been taken, either under Section 311 of the Code or by independent suit, within the year allowed for setting aside a sale. In such cases the necessity for distinguishing between irregularity and nullity does not arise; and general assertions of the invalidity of such sales, quite appropriate to the case in which and the purpose for which they are used, are only misleading when separated from their context and applied to a case in which the distinction between irregularity and nullity is the cardinal point.

17. It is then necessary for the Plaintiffs to set aside the sale in order to clear the ground for redemption of the mortgage. There can be no question that omission to serve notice on the legal representative is a serious irregularity, sufficient by itself to entitle the Plaintiff to vacate the sale. But there may be defences to such a proceeding, and justice cannot be done unless those defences are examined by legal methods. It may be that the Plaintiffs could unite a suit to set aside with one to redeem, and that the Defendant's anticipatory plea of misjoinder would if tried have been overruled. But that need not be discussed, because their Lordships think it to be beyond reasonable dispute that this is not a suit to set aside the sale.

18. The Plaintiffs have deliberately refused to make it such a suit in the face of the Defendant's challenge. It can only be called a suit to set aside a sale in the sense in which any other suit might be so called if it prayed relief inconsistent with the validity of the sale. Candy J. considers that the only thing wanting is a formal prayer to set the sale aside, and he says that if the plea had been raised that there was no such prayer leave would have been given to amend. (*Rec. p.* 179). In fact the plea was raised at a

time when the Plaintiffs could amend at their option, but they did not do it. To give leave to amend at the hearing may have been in the discretion of the Court, but it would be very far from a matter of course to do so. It would be giving leave to institute a new suit with the date of an earlier one. The decree holder would be affected by it. He would be a proper party and (unless there is some recognised practice in India to the contrary as to which Mr. Phillips could not inform the Board) a necessary one. The issues would be different. It cannot be denied that the conduct of interested parties at the time of sale may be a bar to them when they come to set it aside. The Defendant said openly that if the Plaintiffs made a case for setting aside the sale he had got an answer to it. If the Plaintiffs then made such a case he must have been allowed to make his answer, and the issues raised by him or by the judgment creditor must have been tried. When defeated in the First Court the Plaintiffs complained (*Rec. p.* 153) that proper issues had not been framed for trying points connected with the sale; which was true though it was their own fault; but they did not ask to remodel their suit. When defeated in the Second Court they complained (*Rec. p.* 165) that the Court had drawn presumptions as to their knowledge of the sale without issues or evidence; which was true; but they did not ask to remodel their suit. In fact their case has been conducted throughout on the principle that the question of nullity was the sole question, and that they could not succeed on any other ground. To allow them now to shift their ground and to make a new case, and that too without allowing the Defendant an opportunity of making the defence which he says he has in reserve, is wrong in principle and is calculated to work practical injustice.

In the case of *Jagadamba Chowdrani* v. *Dakhina Mohun* reported in L.R. 13 Ind. App. p. 84 the Plaintiffs were reversionary heirs of a deceased Hindoo, subject to the interest of his widows. They brought suits not long after the surviving widow's death to recover the estate. But adoptions had been made in 1853 and 1856, either of which, if valid, would displace the Plaintiffs. The law of limitation applicable to the case (the Act of 1871) provided that a suit to set aside an adoption must be brought within 12 years after the date of the adoption. The Plaintiffs sued, not to set aside the adoptions, but to recover the estate; and they argued that their title was good until an adoption was set up; that those who set it up must prove its validity; which accordingly might be controverted by the Plaintiffs. There was difficulty in the case because the expression "set aside an adoption" is inaccurate; an adoption cannot be set aside, though its validity may be impeached; and in fact the language was altered in 1877 before the appeal was heard. This Board found however that the expression had been frequently used in legal documents and was known to Indian lawyers as a short way of denoting any process in which the fact or the validity of an adoption was disputed. On that ground they held that the Legislature must have intended to place the specified limit on suits for these purposes. Then the suit, being rightly described as one to set aside an adoption, attracted the consequence that the time for suing ran from the date of the adoption, and that the suits of 1873 and 1874 were barred. It is obvious that the expression "set aside a sale" is not attended by any such difficulty, because a sale, valid until set aside, can be legally and literally set aside; and anybody who desires relief inconsistent with it may and should pray to set it

aside. That brings us to the last point in this rather tangled controversy: viz., what is the period allowed for setting a sale aside?

Their Lordships have discussed the nature of this suit in detail because the two learned Judges who affirm or assume the reality of the sale make the case turn upon it. But if the conclusion could be reached that the suit is one to set aside the sale, the result would be equally fatal to the Plaintiffs. Article 12 (*a*) of the Limitation Act of 1877 provides that a suit to set aside a sale in execution of a decree must be brought within one year after the sale is confirmed. That seems precisely applicable to the present case. It is said by Candy J. (with whom Jardine J. agrees) that it has not been contended that the Plaintiffs were bound to sue within the year: and he refers to a text-book for cases to show that the article does not apply to a suit for a declaration that the sale is inoperative as against the Plaintiff. Here the sale is, as their Lordships hold, and as the learned Judge himself assumes, operative as against the Plaintiffs though liable to be set aside for due cause.

The only case cited by the learned Judge himself is *Bhagvant Govind* v. *Kondi* reported in 14 Bomb. 279. In that case there was no judicial sale. Property was mortgaged by a Hindoo, and after his death his widows, who seem also to have been guardians of his infant heir, sold the property to a trustee for the mortgagee. The heir sued to redeem, but not till after the expiry of the three years after his majority which by Article 44 of the Limitation Act are the limit of time for setting aside a sale by a guardian. In overruling the plea of limitation the Court made the following observations. "The necessity of "impugning the sale of 1863 to the second Defen- "dant arises from the second Defendant's resisting

" the Plaintiff's suit to redeem the mortgage and " is therefore subservient to that suit." That is the only reason assigned for overruling the plea.

Candy J. says that these observations apply exactly to the facts of the present case. Possibly they do, but their Lordships find it impossible to grasp the reasoning behind them. If it means that the right to set aside the sale is kept alive as long as the right to redeem would subsist by virtue of the mortgage, the result is that the validity of the sale might be held in suspense for 60 years. The two learned Judges intimate that there is a limit of 12 years, but how that limit is arrived at does not appear. They treat the sale as valid until vacated, but apparently they allow it just so much validity as suffices to turn the possession of the mortgagee into the adverse possession of an absolute owner, and no more. But if the sale is a reality at all, it is a reality defeasible only in the way pointed out by law; and it seems to their Lordships that the case must fall either within Section 311 of the Code or within Article 12 (*a*) of the Limitation Act of 1877, or within both; any way there exists a bar by one year's delay.

The Limitation Act protects *bonâ fide* purchasers at judicial sales by providing a short limit of time within which suits may be brought to set them aside. If the protection is to be confined to suits which seek no other relief than a declaration that the sale ought to be set aside, and is to vanish directly some other relief consequential on the annulment of the sale is sought, the protection is exceedingly small. Such however seems to be the effect of the doctrine of subservience laid down by the Bombay High Court. In the adoption case just cited from 13 Ind. App. this Board remarked that there was no principle on which simple declarations of

invalidity should be barred by the lapse of 12 years after the adoption, while the very same issue, if only mixed up with a suit for the possession of the same property, is left open for 12 years after the death of the widow. Their Lordships make the same remark now. What is the justification for refusing to construe Article 12 (*a*) according to its obvious meaning whenever a suitor goes on to pray for that relief which is the object, perhaps the only object, of setting aside the sale? Their Lordships hold that both the letter and the spirit of the Limitation Act require that this suit, when looked on as a suit to set aside the sale, should fall within the prohibition of the article.

The High Court ought to have dismissed the Plaintiff's appeal with costs, in accordance with the opinion of the learned Chief Justice. Their Lordships will now humbly advise Her Majesty to make that order, reversing the decree appealed from. The Respondents must pay the costs of this Appeal.