

APPELLATE CIVIL.

Before Mr. Justice Innes and Mr. Justice Kernan.

VENKATANARSAMMAH (DEFENDANT), APPELLANT v. RAMIAH
(PLAINTIFF), RESPONDENT.*

1879.
January 15.

Mortgage—Priority—Registration.

On the 15th July 1864 two undivided brothers executed a mortgage of their joint property to the plaintiff for Rupees 500, and on the 8th January 1868 they executed another mortgage of the same property for Rupees 1,000 to the defendant, who registered it under Act XX of 1866. In August 1871 a suit was brought against the brothers by the plaintiff on the mortgage of 1864, and a decree for the sum due was made in October 1871, directing that if the sum due was not paid within two months the mortgaged property should be sold. In March 1872 the property was sold in execution of the above mentioned decree and bought by the plaintiff, who was duly put into possession. In 1871 a suit was brought against the brothers on the mortgage of 1868 by the defendant; a decree was made similar to that in the above mentioned suit, a sale of the property was had, and it was bought by the defendant. The Plaintiff was thereupon dispossessed and referred to a regular suit, and the defendant was put into possession. This suit was then brought by the plaintiff, the first mortgagee and purchaser, to eject the defendant, the second mortgagee and purchaser, and the Lower Appellate Court making a decree in favor of the plaintiff the defendant filed this second appeal.

Held that the mortgage of 1864 did not require to be registered in order to maintain its priority over the mortgage of 1868.

Held also that the plaintiff having bought the rights and interests of the mortgagors under a sale held prior to the sale to the defendant, the mortgagors had no right or interest to sell to defendant; but that as the purchase by plaintiff was subject to the mortgage to the defendant, and as defendant was not a party to plaintiff's mortgage suit, defendant's right as mortgagee was not affected by the sale to the plaintiff, though effect could not be given to that right in the present suit.

PLAINTIFF sued defendant to set aside a sale and delivery of land purchased by him at a public sale.

The Munsif disallowed a portion of the claim.

The plaintiff appealed to the District Judge, who gave judgment for plaintiff.

The defendant preferred a second appeal to the High Court.

Rāmachandra Rau Saib for the Appellant.

Rāma Rau for the Respondent.

* Second Appeal No. 798 of 1877, against the decree of E.C.G. Thomas, District Judge of Vizagapatam, dated 25th August 1877, reversing the decree of the District Munsif of Royaveram, dated 30th November 1876.

The facts and arguments are fully set forth in the following Judgments :—

1879.
January 15.

KERNAN, J.—In this case the plaintiff seeks to eject the defendant from the possession of immoveable property. The facts are—On the 15th July 1864 two undivided brothers executed a mortgage for Rupees 500 of the joint property to the plaintiff, and on the 8th January 1868 they executed another mortgage of the same property for Rs. 1,000 to the defendant, who caused the same to be registered under Act XX of 1866. On the 2nd of August 1871 a suit was brought against the brothers on foot of the mortgage of 1864; and on the 7th October 1871 a decree was made for the sum due, Rupees 872-12-10, and the decree directed that, in default of payment in two months, the mortgaged property should be sold, and if the debt was not discharged by the produce of the sale, the mortgagors should pay the balance personally. In March 1872 the decree holder, in execution of the decree, set up for sale through the Court Officer, under the ordinary process of attachment, the property mortgaged. At the sale the present plaintiff, the execution creditor, bought the property for Rupees 427, and the sale was duly confirmed and the plaintiff was put into possession of the property, and so remained until he was put out of possession under process issued in the suit next mentioned. In the year 1871 a suit was filed against the two mortgagors on foot of the mortgage of 8th January 1868 by the mortgagee (the now defendant), and a decree was made for payment of the amount due on the mortgage and for a sale of the property in the same terms as in the decree on the mortgage of 1864. Under that decree a sale was had after attachment of the same property, and the defendant, the mortgagee and decree-holder, became the purchaser. The plaintiff in this case, who was the purchaser at the first sale, either put in, in the defendant's suit, a claim before the sale under Section 246, or he tried to obstruct the delivery of possession under Sections 268, 269; but he was referred to a regular suit and was dispossessed and the present defendant was put into possession.

VENKATANAR-
SAMMAH
v.
RAMIAH.

This suit was then brought by plaintiff, who was the first mortgagee and purchaser, against the second mortgagee and purchaser, and there being a decree of the Lower Appellate

1879.
 JANUARY 15.
 VENKATANAR-
 SAMMAH
 v.
 RAMIAH.

Court in favor of the plaintiff; the defendant filed this second appeal. The grounds of his appeal, argued by Ramachandra Rau Saib, are these:—

1st.—The sale to the plaintiff being of the rights and interests of the mortgagors, and those rights being subject to the mortgage to defendant of 1868, such sale did not operate to affect the interest of the defendant as mortgagee.

2nd.—Defendant's mortgage of 1868 was duly registered under Act XX of 1866; plaintiff's mortgage was not registered; and therefore the defendant's mortgage is entitled to priority over the plaintiff's prior mortgage.

3rd.—That plaintiff's mortgage was merged in the decree obtained by him, and that he cannot use it now to assert a title prior to the mortgage or to the decree obtained by the defendant.

Rama Rau for plaintiff contended that the legal effect of the sale under the decree made on foot of the mortgage of 1864 was to vest in the plaintiff all the rights and interests of the mortgagors at the date of that mortgage; and he cited a number of cases to be found in Sutherland's Weekly Reporter, before the establishment of the new Reports, and *Biswanath Mukhopadhyaya v. Gosindas Barumaduk* (1). He also referred to *Khandu Dubladis v. Tarachand Amarchand* (2) as an authority that the mortgage of 1864 did not merge in the decree, and also as an authority that the defendant's mortgage in 1868, though registered, does not take priority over the plaintiff's mortgage, which was executed prior to the date of the enactment of the Act XVI of 1864.

There can be no doubt that the mortgage of 1864 did not require to be registered in order to maintain its priority over the mortgage of 1868.

It seems to me equally clear that the right of the plaintiff to the security of the property pledged by the mortgage of 1864 was not merged in the decree which he obtained. On the contrary, the decree directs a sale of the mortgaged premises to give effect to the security which it expressly keeps alive. The doctrine

(1) 3 Ben. L.R., App., 140.

(2) I.L.R., 1 Bom., 574.

“*transit in rem judicatam*” has therefore no application. The effect of this doctrine is that a second suit could not be filed in respect of the same cause of action on the mortgage, that right of suit or cause of action having passed into a judgment of record.

1879.
January 15.
VENKATANAR-
SAMMAH
c.
RAMIAH.

In *King v. Hoare* (1) it is said, if there be breach of contract or wrong done or any other cause of action by one against another and judgment be recovered in a Court of record, the judgment is a bar to the original cause of action, because it is thereby reduced to a certainty and the object of the suit attained as far as it can at that stage, and it would be useless and vexatious to subject the defendant to another suit for the purpose.

Now it is quite clear that the decree of a Court of Equity giving effect to the mortgage security which it preserves, is entirely different from a judgment which merges the cause of action. If the decree is a substitute for the mortgage, then the mortgage will be no longer existing. This result would lead to the destruction by a decree of Courts of Equity of securities intended to be given effect to. For if the right to the security under the decree only takes the date of the decree, then all securities given by the mortgagor after the mortgage of 1864 and up to October 1871 (the date of the decree) being prior to the decree, the decree holder would lose the benefit of his mortgage. The decree in a mortgage suit is made according to the doctrines and practice of equity, which would be utterly inconsistent with merger. It is settled practice, when there is a decree of a Court of Equity for sale, and a sale thereunder, for the mortgagee if he has a legal estate to join in the sale and conveyance; the mere decree gives no title; it is the sale and conveyance which gives title. Again this doctrine only affects the parties to the suit in which the judgment is obtained. If there is a suit on a joint and several bill of exchange against *one* of several debtors and judgment against him, actions may be brought on the same note against the other separate debtors. (*King v. Hoare supra*) (1). The defendant in this present case was no party to the original suit on the mortgage of 1864, and is neither bound by it nor entitled to have any advantage from it. In this particular case it is not necessary to determine whether a purchaser

(1) 13 M. and W., 494 and 504.

1879.
January 15.

VENKATANAR-
SAMMAH
v.
RAMIAH.

under a sale "only" of rights and interest of the defendant in the property (Section 249, Act VIII of 1859) under a decree in a mortgage suit acquires not only those rights and interest but also the interest of the mortgagee under the mortgage. I may, however, observe that there is no express provision in the late or the present Code providing for the sale or conveyance of the mortgagee's rights to the purchaser. Sections 223 to 231 of the old Code refer to decrees for delivery of possession of immoveable property, and Section 249 relates to sale of right and interest of the defendant "only." However, as the sale of the interest of such mortgagee must have been intended to be provided for, and as there is only the one process for the sale of immoveable property under the Code, I think that the construction put upon the Code by the Calcutta High Court is a necessary result, viz., that under a sale in execution of a decree for sale in a mortgage suit, the right and interest which the mortgagee and the mortgagor could jointly sell pass to the purchaser (*Syed Emam v. Rajcoomar Dass*) (1).

In the High Court on the Original Side it has been our practice to have sales made in execution of mortgage decrees by auction, without the intervention of process of attachment.

The present Code, Section 286, contains provisions to enable the creditor and the purchaser to know what interest is really to be sold, but still the question in this case is not satisfactorily provided for, and cannot be so until provision is made for the mortgagee joining in the conveyance, or unless effect is expressly given by legislation to the sale by the officer *as if* the mortgagee had joined.

Here, however, both plaintiff and defendant have bought rights and interests of the mortgagors under mortgage decrees. Therefore if the rights of a mortgagee did not pass in the one case, neither did similar rights pass in the other case, and *vice versa*. The plaintiff bought the rights and interests of the mortgagors under a sale held in March 1872 and got into possession. Such sale and possession were prior to the sale to the defendant. There was therefore no right or interest in the mortgagors left to sell to defendant, and he acquired no title

(1) 14 Ben. L. R., at p. 421.

against the plaintiff in point of law. The plaintiff should therefore not have been put out of possession at the instance of the defendant in his suit. But although nothing passed to the defendant by the sale, yet as the purchase by plaintiff of the right and interest of the mortgagor was subject to the mortgage to the defendant, and as the defendant was not a party to plaintiff's mortgage suit, the right of the defendant as mortgagee is not affected by the sale to the plaintiff. We cannot give effect to that mortgage in this suit, and must leave the defendant to assert his rights on foot of it as he may be advised. This second appeal must be dismissed with costs.

1879.
January 15.
VENKATANAR-
SAMMAH
v.
RAMIAH.

INNES, J.—The issues were sent to the District Munsif on a misconception as to the facts, which has since been cleared.

I agree with Mr. Justice Kernan in the result. The defendant took nothing by his purchase of the rights and interests of the mortgagors, which had already been sold to plaintiff, and plaintiff is entitled to be replaced in possession of the land of which he was wrongly dispossessed by Court process issuing in execution of defendant's decree.

I do not wish to offer any opinion upon the other question of whether defendant's mortgage is still on foot and capable of being enforced. Recent legislation in regard to procedure has contracted the capacity to enforce several remedies by several suits, and it may be that defendant's mortgage right, if still existing, is barred of any further remedy. The second appeal will be dismissed with costs.

Appeal dismissed.

APPELLATE CIVIL.

*Before Sir Charles A. Turner, Kt., Chief Justice, and
Mr. Justice Innes.*

APPASÁMI, PLAINTIFF, v. AGHILANDA, DEFENDANT.*

*Act XV of 1877, Sch. II, Act 73—Shorter period of limitation.—Act XV of 1877,
Sec. 2—Act IX of 1871.*

1879.
February 10.

The period of limitation prescribed by Article 73 of the Second Schedule to Act XV of 1877 is a "shorter period of limitation" within the meaning of the last

* Referred Case No. 22 of 1878, stated under Section 617, Act X of 1877, by the District Munsif of Chidambaram.