[213] APPELLATE CIVIL.

The 27th September, 1881.

PRESENT :

SIR CHARLES A. TURNER, KT., CHIEF JUSTICE, AND MR. JUSTICE KINDERSLEY.

Vencatachella Kandian.....(Plaintiff), Appellant

and

Panjanadien.....(Defendant), Respondent.*

Dispossession of second mortgagee by prior mortgagee without right to possession by means of illegal order of Court in execution of a money decree against mortgagor.

S mortgaged land to R in 1861. R pledged the mortgage-deed to H to secure repayment of a loan of 500 rupees ; P being entitled on partition with H to half of the de bt due by R, got a decree against R in the Small Cause Court for his moiety in 1870.

R sued S on the mortgage-deed (obtained from P and H for that purpose), got a decree to enforce the mortgage, and in July 1872 bought the land in execution of the decree.

In December 1872 R mortgaged the land to V and put him into possession. V had no notice of the prior pledge to P.

In 1876 P, in execution of his Small Cause decree, attached and sold the right, title, and interest of R in the land, became the purchaser at the Court sale, and was put into possession by an order of the Court executing the decree. V's claim under Section 269 of Act VIII of 1859 was rejected.

Held in a suit by V against P that V was entitled to recover the lands in dispute.

PER TURNER, C,J.—*Quaere*: Whether the decision in *Ramu Naikan* v. *Subbaraya Mudali* (7 M. H. C. R., 229) is sound.

THE facts and arguments in this case are fully set out in the **Judgments** of the Court (TURNER, C.J., and KINDERSLEY, J.)

Hon. *T. Rama Rau* for Appellant.

Ramachandrayyar for Respondent.

Turner, C.J.—Chitambara Sethurayem, the original owner of the land in suit, mortgaged it in 1861 to Rangasami for Rupees 200. In 1867 Rangasami hypothecated the mortgage-deed and another bound for Rs. 1,000 to Hari Ramien to secure Rs. 500. The respondent, Panjanadien, on a partition with his brother Hari Ramien, became the owner of one moiety of the debt due by Rangasami and the pledge by which it was secured.

[214] In 1870 the respondent sued Rangasami in the Small Cause Court and obtained a decree for his moiety of the debt. This decree was of course a mere money-decree, as the Small Cause Court had no jurisdiction to pass a decree for the enforcement of the hypothecation.

In July 1870 Rangasami, in order to sue Sethurayen, obtained from the respondent the mortgage-deed of 1861, and brought a suit on it and obtained a decree for the enforcement of his mortgage, in execution of which in July 1872 he purchased the land.

* Second Appeal No. 382 of 1879 against the decree of Arunachella Iyyar, Subordinate Judge of South Tanjore, reversing the decree of S. A. Krishna Rau, District Munsif of Valungiman, dated 24th March 1879.

On December 19th, 1872, Rangasami mortgaged the land to the appellant for Rs. 300, and, in pursuance of the conditions of the mortgage, put him in possession.

In 1876 the respondent, in execution of the decree he had obtained in the Small Cause Court, attached and sold the right, title, and interest of Rangasami in the land. He became himself the purchaser and was let into possession by an order of the Court executing the decree and the appellant's claim under Section 269, Act VIII of 1859, was rejected.

The appellant now sues to recover possession, and I am unable to see on what grounds his claim can be resisted.

By the purchase of the right, title, and interest of Rangasami in 1876, the respondent acquired no more than the right which Rangasami then had in the land, that is to say, he acquired the land subject to the right of the appellant under the mortgage of 1872, and the Court executing the decree he had obtained was not justified in ousting the appellant and placing him in possession.

But it is argued the respondent having obtained possession is entitled to defend his position on the strength of his mortgage, and, in support of this argument, we have been referred to the decision of this Court in *Ramu Naikan* v. *Subburaya Mudali* (7 M. H. C. R., 229). With all deference for the opinion of the learned Judges by whom that case was decided, I am unable to regard the ruling as altogether sound. I do not question the position, which is alone supported by the quotation from Dernberg, that two rights in the same property may co-exist in the same person without merger, nor the application of that principle in the case to which Dernberg's remarks are pertinent. If a person holds a mortgage on an estate and, after the owner has created a second mortgage in favour of a **[215]** third party, acquires what right remains in the owner, he does not thereby lose his right as mortgagee. The merger is prevented by the interposition of the right created in favour of the second mortgage, but I cannot accept the application of the principle adopted by the Court. When a second mortgage is created in favour of a person, who is not the holder of the first mortgage, the second mortgagee is entitled to pay off the first mortgage or to sell the estate subject to the first charge. On the same ground of regard for the interests of all parties that dictates the preservation of the right created by the first charge, I am unable to see why the acquisition by the first mortgagee of the right remaing in the owner deprives the second mortgagee of his right to enforce his charge by a sale of the property subject to the rights of the first mortgagee. If the first mortgagee had not acquired the rights remaining in the owner, it is unquestionable that the second mortgagee would have been entitled to call for a sale of the property subject to the rights of the prior incumbrancer. His right should not be defeated by a transaction to which he is no party. If it had been considered an objection to the preservation of his right that the first mortgagee might subsequently have applied to the Court to order a sale (and I do not think it is, for the purchaser under the second mortgage might redeem the first mortgage and prevent a sale), then a sale should have been ordered of the property to discharge both mortgages, and the proceeds should have been applied to their satisfaction in order of priority; but I believe the course which would have best fulfilled the contracts and secured the rights of the parties would have been to allow a sale subject to the first incumbrance. But to return to the case before us, which is not on all fours with the case cited; because in that case the first mortgagee obtained possession lawfully, here he has obtained possession wrongfully, and, therefore, it must be understood that, while I venture to doubt, I do not propose we should now overrule the case to which I

have referred. The respondent held a moiety of a simple mortgage, which he had taken no steps to enforce and which he could enforce only in conjunction with his brother and by a decree of Court directing a sale. That interest conferred on him no right to possession. It appears to me the rights of the parties to the suit require only accurate statement to show that the respondent cannot, in virtue of his interest in the first charge, defend the possession he has unlawfully acquired. I would, there-[216]fore allow the appeal, and, reversing the decree of the Lower Appellate Court, restore that of the Court of First Instance with costs throughout.

Kindersley, J.—Chithambara Sethurayan mortgaged the lands in question to Rangasami in 1861. Rangasami hypothecated that bond and another to the defendant's brother in 1867. On the 20th July 1870, the defendant, who had become divided from his brother, obtained a judgment of the Court of Small Causes against Rangasami for his (defendant's) share of the debt. At the same time defendant and his brother returned Chithambara Sethurayan's original mortgage-bond to Rangasami in order that he might sue Sethurayan for the money due by him. Rangasami obtained a decree upon the mortgage against Sethurayan, and, in execution, he himself purchased the land in July 1872. In the December following Rangasami mortgaged the land with possession to the present plaintiff, who took it without notice of its prior hypothecation to the defendant. Afterwards the defendant had the property sold in execution of the Small Cause Court judgment of 1870 and purchased it himself. The plaintiff's objections were overruled, and the defendant was placed in possession. The plaintiff now sues to enforce his mortgage, and to recover possession from the defendant.

The District Munsif decreed the land to the plaintiff with mesne profits from the date of the plaint to that of delivery of possession. This decree was reversed by the Subordinate Judge, who, following the case Ramu Naikan *v.* Subaraya Mudali (7 M. H. C. R., 229), decided in favour of the defendant as prior mortgagee and purchaser.

It appears to me sufficient for the determination of this case to observe that the defendant in execution of the Small Cause Court decree ought not to have been allowed to dispossess the plaintiff, who held possession as mortgagee. That which the defendant purchased in execution of his decree for money was no more than the right, title, and interest of Rangasami at the time of the execution. But at that time Rangasami had no right to recover possession of the property without redeeming the plaintiff's mortgage. Therefore the plaintiff has been erroneously dispossessed; and I agree that he is entitled to be restored. I think that the plaintiff should have his costs in every stage of the suit.

NOTES.

[A puisne mortgagee may bring the mortgaged property to sale subject to the prior mortgage:—(1894) 22 Cal., 33; (1907) 29 All., 385=4 A. L. J. 273 F. B. [(1891) 13 All., 432 was overruled in 19 All. 379).]]