inconsistent with the analogies of Hindu law, but there is also no authority as far as we are aware in its support. It appears further that evidence of custom was adduced by the appellant in this case under the second issue and the Subordinate Judge did not consider it satisfactory. I agree with him in the opinion that both the appellant and Timmu could not have been validly adopted and that the relation of sisters could not have been lawfully constituted on the analogy of Hindu law. On this ground I do not consider that the appeal can be supported, and dismiss it with costs.

PARKER, J.—I agree.

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## APPELLATE CIVIL.

*Before Mr. Justice Kernan and Mr. Justice Brandt.*

SAMI (PLAINTIFF), APPELLANT,

and

KRISHNASAMI AND OTHERS (DEFENDANTS), RESPONDENTS.*

1886. Dec. 16.

*Civil Procedure Code, ss.* 268, 269, 274—*Attachment and purchase of creditor's interest in a mortgage bond.*

S got a decree against V for money and having attached a bond hypothecating certain land as security for a debt, executed in favor of V, under s. 269 of the Code of Civil Procedure, 1877, purchased the same. S then sued on the bond. The suit was dismissed on the ground that the attachment had not been made by obtaining an order under s. 268. S then attached the bond as immovable property under s. 274 and purchased it and the mortgagee's interest therein. S again sued to recover the amount due by sale of the land hypothecated. The defendants contended that S had no title because there had been no attachment under s. 268:

*Held* that the objection was bad and that S was entitled to the relief claimed.

APPEAL against the decree of T. Ganapathi Ayyar, Subordinate Judge at Kumbakonam, dismissing suit No. 8 of 1884 on the ground that plaintiff had derived no title by his purchase of the bond in suit.

The facts necessary for the purpose of this report appear from the judgment of the Court (Kernan and Brandt, JJ.).

*Bhashyam Ayyangar* and *Desikacharyar* for appellant.

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* Appeal No. 145 of 1885.

SAMI v. KRISHNASAMI.

*Subramanya Ayyar*, *Balaji Rau*, and *Ramachandra Rau* for respondents.

KERNAN, J.—The appellant is the plaintiff in original suit No. 8 of 1884 on the file of the Subordinate Court of Kumbakonam. The Subordinate Judge dismissed the suit with costs.

The facts are not in dispute, and the questions in this appeal are questions of law. The plaintiff seeks to recover, out of the lands particularized in the plaint, the amount due on foot of a hypothecation deed, dated the 12th of March 1869, executed by Muttuvayyan, the father of defendant No. 1, for Rs. 5,000 to Kuppusami Ayyar, payable on the 11th of March 1872.

The defendants claim the lands specified in the hypothecation deed under different titles and in different shares.

The first question is whether the appellant has acquired the right and interest of Kuppusami, the grantee in the hypothecation deed of 12th March 1869, to the debt thereby secured, and whether he is entitled to enforce that security against the lands.

The appellant's claim is founded on a purchase in execution of a decree of the right of Kuppusami. The respondents contend that the proper proceedings were not adopted to attach the debt due on the hypothecation bond, and that therefore appellant is not entitled to maintain this suit.

There are various other defences afterwards referred to, but the main question is whether appellant has title to maintain the suit. The facts on this question are as follows, viz. :—The appellant obtained a decree in suit No. 15 of 1875 in the Court of the Subordinate Judge of Kumbakonam against Venkataramayyan and others, sons of the same Kuppusami, for money, and attached the deed of hypothecation under s. 269 of the code of 1877, which is in terms the same as s. 269 in the present code, and became the purchaser thereof for Rs. 1,200 and obtained a certificate of the purchase and possession of the deed of hypothecation. The appellant afterwards filed suit No. 63 of 1877 against several of the respondents to this appeal founded on the purchase so made, but that suit was dismissed upon the ground that the appellant had not in suit No. 15 of 1875 attached the debt secured by the hypothecation deed in the manner prescribed for attachment of debts by s. 268, *i.e.*, by obtaining an order under that section. After such dismissal, the appellant attached in suit No. 15 of 1875 under s. 274 the estate and interest of the defendants in that suit in the

deed of the 12th March 1869 and in the lands thereby pledged as security for the debt. Appellant became the purchaser at the auction-sale held on the 15th of June 1880, and on the 21st of September 1880 received a certificate of sale in these terms, viz. :—

"It is hereby certified that, in the auction-sale held on 15th June 1880 in execution of the decree passed in this suit, the aforesaid plaintiff has been declared to have purchased for Rs. 1,200 the hypothecation bond along with the said defendants' interest therein, executed on 12th March 1869 by Muttuvayyan in favour of the defendants' father, Kuppusami Ayyar, for Rs. 5,000, hypothecating the two houses bearing Municipal Door Nos. 4-61 in Patchayappa Mudaliyar Agraharam, in Kusba Kumbakonam, attached to the Sub-Registration District of Kumbakonam, in Tanjore district, veli 1 and, kulis $93\frac{3}{8}$ of nanja punja, and other lands in Pulukappu Kattalai village in Kumbakonam taluk in the aforesaid district; 1 ma and $43\frac{1}{16}$ kulis of nanja land in Somanadhan Kattalai in the aforesaid taluk, and 5 velis, 13 mas and $90\frac{5}{16}$ kulis of nanja, punja, and other lands in Puttur village, Malayur Maganam, attached to Mathyarjanam Sub-Registration district, in the aforesaid district, total for the three villages being 6 velis, 16 mas, and $26\frac{3}{4}$ kulis, in order that the amounts thereof may be fully recovered on the liability of the hypothecated properties, and that the said sale has been duly confirmed by the court."

Upon these facts the question of law is, whether, by reason of the debt not having been attached in the mode pointed out by s. 268, viz., by restraining order, the title of the plaintiff to sue for the recovery of it under the deed of hypothecation is defective. If the debt only was intended to be sold, or if it was intended to be sold jointly with immovable property in order to recover it by personal remedy, it should have been attached under s. 268. Section 284 only authorizes the sale of attached property. But it has been held by this court, *Appasami* v. *Scott*(1) that the interest of a defendant in a debt secured by hypothecation of land is an interest in land and should be attached under s. 274. Under that section an order duly proclaimed prohibits the defendant from transferring or charging the property in any way, and prohibits all persons from receiving the same by purchase, gift, or otherwise.

(1) I.L.R., 9 Mad., 6.

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The interest of the mortgagee in the hypothecated property was the right to realize thereout the amount due under the hypothecation deed. The mortgagee had no interest in the property hypothecated except as security for the debt for payment of which it was hypothecated. The attachment and sale were not of the interest of the defendants in the land alone, but of the right of defendant No. 1 to recover the amount of the bond secured on the land.

As the Court had power to sell the interest of the defendants in the property to realize the debt, I am unable to see how an attachment of the debt alone was necessary to enable the Court to sell the interest attached under s. 274. In the case of decrees to raise the amount of mortgages or charges on land which have been attached it has been held that the attachment should be made under s. 274.—*Naoroji Beramji* v. *Rogers*(1), *Musammat Bhawani Kuar* v. *Gulab Rai*(2). No doubt in cases of such decrees the debt passed into a decree, but no distinction was made on that ground. In *Musammat Bhawani Kuar* v. *Gulab Rai*, the Court say: "The decree is for money recoverable by sale of property hypothecated for its payment. The right and interest which it creates is a right in a judgment-debt recoverable by sale of immovable property charged with its payment. The decree gave to the decree-holder a subsisting interest in the nature of a charge on hypothecated property, and the sale of their rights under the decree must be held to be a sale of an interest in immovable property."

It is not necessary to decide whether a sale of the interest of the mortgagee after attachment under s. 274 would carry the right to the purchaser to recover the debt by personal remedy against the debtor as the plaintiff admits such remedy is barred by limitation.

For the above reasons I think the plaintiff's title to realize the debt from the hypothecated property is not defective by reason of the absence of attachment of the debt under s. 268.

I may add that the mortgagee has not assigned the debt, but he produced the hypothecation deed in court before the sale and the plaintiff has had the possession of it since the sale.

* * * *

(1) 4 Bom. H.C.R., 64. (2) I.L.R., 1 All., 349.

BRANDT, J.—I only wish to add a few observations regarding the first question, viz., whether this suit is not maintainable by reason of the appellant having failed to attach in execution the mortgage instrument on which he sues, both as a debt under s. 268 of the Code of Civil Procedure, and also under s. 274 as immovable property or an interest in immovable property.

It is not alleged that what was sold was not duly attached and brought to sale *quâ* immovable property under the execution proceedings taken by the appellant in 1880.

In execution of the decree in original suit No. 15 of 1875, obtained by the appellant against the sons of Kuppusami Ayyan, the interest of the latter under the mortgage instrument A was attached and sold as movable property.

A suit brought by the appellant on the strength of his purchase at such sale was dismissed on the ground that under the attachment no interest in the immovable property passed under the sale: and this is not questioned. The decision is in accordance with authority, *Appasami* v. *Scott*(1). In support of his decision that unless the interest of the mortgagee be attached under s. 268 as well as under s. 274, the plaintiff took no title under his purchase, the Subordinate Judge refers to *Mahadeo Dubey* v. *Bhola Nath Dichit*(2), *Fida Husain* v. *Kutub Husain*(3), *Srinath Dutt* v. *Gopal Chundra Mittra*(4).

The question for consideration in the first case cited was whether a sale in execution of a simple money decree is *de facto* void where there has been no attachment, and the question was answered as might be expected in the affirmative.

The case is not apposite here, for here there was an attachment and there is nothing to show that it was not "a regularly perfected" attachment: the question is whether the appellant must fail because there were not (as it is said) two attachments, one as of a debt, and the other as of immovable property. The second case cited has no bearing whatever on the point before us: it appears to have been cited in the Court below simply because the case of *Mahadeo Dubey* is mentioned in it.

In *Srimath Dutt* v. *Gopal Chundra Mittra* the learned Judges do no doubt throw out a suggestion that in the case of sale in execution of a debt secured by a mortgage there should be an

(1) I.L.R., 9 Mad., 5.
(2) I.L.R., 5 All., 91.
(3) I.L.R., 7 All., 40.
(4) I.L.R., 9 Cal., 512.

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attachment under both sections, viz., 274 and 268, but the only point really determined was that the sale of such a debt as a debt alone under the provisions of the Code applicable to movable property was a material irregularity producing substantial injury to the judgment-debtor: and that may well be; but in the case before us the interest of the mortgagor in the immovable property was attached and sold, and it is difficult to see what injury there could be to the mortgagor by reason of its not having been attached and sold as a debt also.

The particular question before us has not, so far as I know, been decided, and the objection appears then to me to be purely technical: it remains to consider whether it must prevail.

The facts of this case are in some respects singular. It was conceded that the personal remedy of the mortgagee against the mortgagor is barred by time, and that fact was relied on as showing that there was no debt to attach; and it was argued that there can be no "debt" unless there is personal liability. The argument would have been stronger if for "no debt" there had been substituted the words "no such debt as is contemplated under s. 268 of the Code of Civil Procedure;" but even then the necessity for an attachment under that section might be put on the ground that, before the execution creditor should sell, the mortgagor might otherwise pay the amount secured to a third party and the land could not then be sold as the security.

The attachment of the debt *quâ* debt was necessary not so much, if at all, in the interest of the judgment-debtor as of the judgment-creditor, and as a matter of fact no payment of the money due was made to a third party. And it was not contended that it would be necessary where attachments have been made both under s. 258 and under s. 274 that whatever is attached should be sold both as a debt or movable property, and also as immovable property; and a sale of the interest put up to sale as immovable property might, and in the present case at all events did, in my opinion, convey all that there was capable of being sold; and that, as my learned colleague has put it, was the interest of the mortgagee in the hypothecated property, that interest consisting of the right to realize the amount due under the hypothecation deed, and the right of the appellant was to have that property sold in satisfaction of the amount due under A.

I also am therefore of opinion that the sale of such interest as

the respondent No. 1 had in the property mortgaged was, in the circumstances of this case, a valid sale.

* * * *

Upon other questions arising in the suit issues were sent down for trial, and on 7th January 1888 the decree of the lower Court was reversed by Kernan and Parker, JJ.

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## APPELLATE CIVIL.

*Before Mr. Justice Muttusami Ayyar and Mr. Justice Shephard.*

PERAYYA (DEFENDANT), APPELLANT,

and

VENKATA (PLAINTIFF), RESPONDENT.*

1888. April 5, 27.

*Transfer of Property, Act* 1882, *s.* 60.

The breach of a condition in a mortgage deed to the effect that on default of payment on a certain date, the mortgage shall be deemed an absolute sale, does not amount to an extinguishment of the right of redemption by act of the parties within the meaning of the proviso to s. 60 of the Transfer of Property Act, 1882.

APPEAL from the decree of J. Kelsall, District Judge of Vizagapatam, reversing the decree of K. Murtirazu, District Munsif of Yellamanchili, in Suit 317 of 1886.

Plaintiff alleged that on 24th October 1885 he borrowed Rs. 200 from defendant and executed a deed mortgaging certain land to defendant: that he retained possession thereof under a lease from defendant (which had expired) and that he tendered the amount due on the 14th April 1886, but that defendant refused to receive the amount or to return the mortgage bond. The deed contained a condition that if the amount due was not paid on the 4th April the mortgage deed was to be considered as a deed of absolute sale.

The defendant pleaded that the condition "was intentionally inserted for enforcement, and not for the purpose of fear," as alleged in the plaint.

The Munsif framed an issue as to whether it was the intention of the parties that the condition for sale should take effect absolutely on the expiry of the term fixed for payment. No evidence

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* Second Appeal 594 of 1887.