QUEEN-EMPRESS v. MAHALINGAM SERVAI.

Abkari Act must be read together and that the words "being the "holder of a license" in section 56 must be taken to include any person in his employ and acting on his behalf for the time being, as otherwise the words in section 64 "for any offence committed "by any person in his employ and acting on his behalf under "section 56" would have no meaning or application. This view of the law is, in our opinion, correct.

We set aside the acquittal in each case and we convict each of the accused Mahalingam Servai and Venkatachalam Sorvai of offences punishable under sections 56 and 64 of Madras Act I of 1886, and we sentence Mahalingam Servai to pay a fine of Rs. 15 (fifteen rupees) or in default to suffer rigorous imprisonment for three weeks, and Venkatachellam Servai to pay a fine of Rs. 10 (ten rupees) or in default to suffer rigorous imprisonment for fourteen days.

As regards Ramasami Servai, accused in Criminal Appeal No. 583, we direct that he be re-tried in accordance with law, as the Magistrate does not appear to have gone into the facts in his case.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.

1897. July 23. October 26. November 30.

SIVATHI ODAYAN AND ANOTHER (DEFENDANTS), APPELLANTS,

v.

RAMASUBBAYYAR (PLAINTIFF), RESPONDENT.*

Transfer of Property Act—Act IV of 1882, *s.* 85—*Mortgagee's Suit—Parties—Redemption.*

A mortgaged lands X, Y and Z to B for Rs. 5,000. Lands X and Y were sold and the proceeds applied towards the discharge of the mortgage. Land Z was sold to C for Rs. 990, which was not so applied. C transferred his rights to the

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JUDGMENT.—We do not consider that the construction suggested by the District Magistrate can be adopted. Section 56 and section 64 of the Abkari Act must be read together, and if, as suggested by the District Magistrate, no offence could be committed under section 56 but by the holder of the license, the words "for any offence committed by any person on his employ and acting on his behalf under section 56" would be insensible. The words "being the holder of a license" in section 55 must be taken to include any person in his employ and acting on his behalf for the time being. We decline to interfere.

* Second Appeals Nos. 905 and 906 of 1896.

present defendants. B brought a suit on the mortgage joining A and C but not C's transferees as defendants. C did not appear and a decree was passed by consent for Rs. 1,050, and land Z was brought to sale and purchased for Rs. 270 by the plaintiff who now sued the defendants separately for possession:

Held, that the defendants not having been joined in the previous suit were entitled to redeem on payment of Rs. 1,050 and interest.

SECOND APPEALS against the decree of W. Dumergue, District Judge of Madura, in Appeal Suits Nos. 574 and 575 of 1895, modifying the decrees of S. Ramasami Ayyangar, District Munsif of Sivaganga, in Original Suits Nos. 169 and 170 of 1895, respectively.

These were suits by the same plaintiff to recover possession of land under the following circumstances:—

On 3rd July 1885, Nagasundram Chetti and his son mortgaged three items of property to Chidambara Chetty to secure Rs. 5,000 and interest. In 1886 the mortgagors sold the third item of the mortgage premises, being $2\frac{3}{4}$ pangus in a certain village, to Arulananda Odayar for Rs. 990, and he transferred his right in $2\frac{1}{2}$ pangus to the present defendants in 1888 and 1890. Chidambara Chetty sued on the mortgage in Original Suit No. 4 of 1891, on the file of the Subordinate Court of Madura, West, joining as defendants the mortgagors and also Arulananda Odayar (who did not appear), but not the present defendants. Part of the mortgage debt had been discharged by the proceeds of the sale of other two items of the mortgage premises before the suit, and while the suit was pending, the mortgagee purchased part of the mortgage premises. A decree was passed by arrangement for Rs. 1,050 against the mortgagors personally and the $2\frac{3}{4}$ pangus above referred to. In execution of the decree the $2\frac{3}{4}$ pangus were brought to sale and purchased for Rs. 270 by the present plaintiff, who now brought these two suits to recover the $2\frac{1}{2}$ pangus transferred to the defendants.

The District Munsif by his decrees ordered that unless in each case the defendants within three months paid to the plaintiff the sums of Rs. 108 and Rs. 162, respectively, being two-fifths and three-fifths of the purchase money paid by him, the plaintiff should obtain possession.

The District Judge on appeal passed an unconditional decree for the plaintiff holding that the defendants had not proved title.

The defendants preferred these second appeals.

Sundara Ayyar for appellants.

Mahadeva Ayyar for respondent.

SIVATHI ODAYAN v. RAMA-SUBBAYYAR.

JUDGMENT.—If the District Judge intended to find that there was no transfer to Arulananda at all, it is clear that he was in error, and that on a matter about which there was no contest.

Arulananda was impleaded in the former suit (Original Suit No. 4 of 1891) as the transferee, and the plaintiff does not in these suits deny that transfer. Arulananda has transferred his right thereunder to defendants Nos. 1 and 2 and whether there was consideration for that transfer is a question that does not arise in these suits between the plaintiff and defendants Nos. 1 and 2. As the equity of redemption had thus vested in defendants Nos. 1 and 2, they should have been made parties to Original Suit No. 4 of 1891, and as they were not made parties, their rights are not affected by the decree. They are entitled to have the opportunity of redeeming the mortgage on the land.

We must, therefore, ask the District Judge for a finding on this issue, viz. :—What is the amount due by defendants Nos. 1 and 2 to plaintiff in respect of such redemption. Fresh evidence may, if necessary, be taken on this issue, and a return is to be made within two months of the receipt of this order.

Seven days will be allowed for filing objections after the finding has been posted up in this Court.

[In compliance with the above order, the District Judge submitted the following finding :—

Defendants are willing to pay Rs. 270 to redeem. Plaintiff, I presume, would have been willing to take a decree for Rs. 1,050, but he now argues through his vakil that he is entitled, as a matter of law, to a proportionate share of the original mortgage and that, in general, is the view which I hold. The principle laid down in *Dadoba Arjunji* v. *Damodar Raghunath*(1) is, I think, applicable to the present case. The defendants are allowed to redeem, because they were no parties to Original Suit No. 4 of 1891. Had they been parties, their right to redeem would have been on condition of paying what was then due on the mortgage. The amount, that plaintiff paid as a purchaser in execution, has nothing to do with the matter. . . . . The decree for Rs. 1,050 in Original Suit No. 4 of 1891 was the balance—by consent of parties—then due on the mortgage. The defendants, had they been parties to Original Suit No. 4 of 1891, could have redeemed

(1) I.L.R., 16 Bom., 486.

on paying Rs. 1,050 on the date of the decree in that suit. They are now entitled to redeem on the same terms that they could have redeemed, had they been parties to Original Suit No. 4 of 1891—in fact, they are entitled to be put into the position they would have been in, had they been parties to Original Suit No. 4 of 1891. A proportionate share of the mortgage —on this date—is practically the same as the amount decreed in Original Suit No. 4 of 1891 with interest. The calculation would be as follows:—Total amount due on mortgage up till this date is Rs. 12,181-10-8. Deducting payments of interest, namely, Rs. 535-0-9 plus Rs. 1,436-10-8, the balance is Rs. 10,209-15-3 or roughly Rs. 10,210. I take the value of 2½ pangus, which plaintiff sues for, to be Rs. 900 and the total value of the mortgaged property to be Rs. 6,141. The proportion is about Rs. 1,500 in round numbers. I am of opinion, for the reasons mentioned above, that plaintiff is entitled to a decree for Rs. 1,050 plus interest on that amount at 10 annas per cent. from the date of the decree till the date of payment and this is my finding on the point referred by the High Court.]

These second appeals came on for final hearing the 26th October 1897. The parties were represented as before.

JUDGMENT.—We cannot accede to the contention that the District Judge is wrong in holding upon the issue remitted to him that the sum payable by the appellants to the respondent is not Rs. 270, the price paid by the latter for the property when he purchased it at the Court sale held in execution of the decree obtained by the mortgagee, but Rs. 1,050, which the Judge found, to be the proportion of the mortgage debt chargeable in respect of the property.

The decision is in accordance with the principle stated in Fisher on Mortgages in the following words:—"The assignee stands in "the place of the assignor; and as the latter might have assigned "to him *gratis*, it is but just that the measure of the allowance "should be what was due and not what was paid. The assignee "taking the hazard should also have the benefit of the bargain, of "which neither the mortgagor nor any subsequent incumbrancer "can have any equity to deprive him." (5th Edition, section 1734.) *Davis* v. *Barrett*(1) is one of the modern cases in which the above

(1) 14 Beav., 542.

SIVATHI ODAYAN v. RÁMA-SUBBAYYAR.

principle was acted upon. There A devised an estate to his heir who in his own right had a charge on it. The heir bought up an incumbrance on the estate amounting to £11,555 for £2,000. Sir John Romilly, M. R., held that the heir was entitled to the full amount as against other incumbrancers on the estate. In dealing with the contention that the owner of the second charge was entitled to have an account of what was actually paid for the purpose of getting in the former mortgage and of making it stand simply as security for that amount, the Master of the Rolls said: "I am of opinion that the second mortgagee has no such equity "against any stranger who might purchase the first charge, and "that the owner of the reversion not having created the first or "second charge, is, in this respect, entitled to stand in the place "of a mere stranger. It would be, as I believe, a new equity, "and productive of the most injurious consequences, if a second "mortgagee were entitled, as against the *bonâ fide* assignee of a "first mortgage, to insist on an account being taken of what "was actually paid for the first mortgage." In *Macrae* v. *Goodman*(1) the Judicial Committee held similarly.

There are, no doubt, exceptions to the rule stated above as when the purchaser occupies a fiduciary position or when there is fraud or collusion. In the present case however the respondent was a *bonâ fide* purchaser at a Court sale which vested in him the right of the mortgagee in so far as the property in dispute was concerned. The finding of the District Judge must therefore be accepted.

The decrees of the Lower Appellate Court are reversed and those of the District Munsif restored with the modification that the amount payable by the appellants to the respondent is (instead of Rs. 270) Rs. 1,050 with interest thereon at 10 annas per cent. per mensem from the date of the decree to the date of payment. Each party will bear his own costs in this and in the Lower Appellate Court.

(1) 5 Moo. P.C., 315.