In the case before us partition is necessary to dispossess defendants Nos. 1 and 2 and 1 award delivery of possession to the plaintiff.

The decrees of the lower Courts must, therefore, be set aside in so far as they are against the appellant, and the suit remanded to the Court of First Instance for disposal on the merits.

Costs will abide and follow the result.

Second Appeal No. 407 *of* 1903.—This second appeal is dismissed with costs.

APPELLATE CIVIL.

Before Sir S. Subrahmnia Ayyar, Officiating Chief Justice, and Mr. Justice Boddam.

VANMIKALINGA MUDALI (FIFTH DEFENDANT), APPELLANT,

v.

CHIDAMBARA CHETTY AND OTHERS (PLAINTIFFS AND DEFENDANTS NOS. 2 TO 4 AND 6 TO 8 AND SIXTH DEFENDANT'S REPRESENTATIVES) RESPONDENTS.*

1905. July, 24. August 8.

Mortgagee, paying prior incumbrancer after sale, right of—Transfer of Property Act IV of 1882, *s.* 89—*Effect of order absolute for sale.*

It is settled law that, in the absence of clear proof to the contrary, it is to be taken that, when the money of a person interested in immovable property, as for instance, the owner of the equity of redemption or a puisne mortgagee, goes to discharge an anterior encumbrance affecting it, the presumption is that the anterior encumbrance enures to the advantage of the party making the payment, if it is for his benefit so to treat it; and this rule will apply in favour of a person who, after the sale of the properties in execution of a decree on the anterior mortgage, advances money on the security of such properties to enable the judgment-debtor, to set aside such a sale under section 310-A of the Code of Civil Procedure.

Gokaldas Gopaldas v. *Puranmal Premsukhdas*, (I.L.R., 10 Calc., 1035), referred to and followed.

The provisions of section 89 of the Transfer of Property Act have reference to the execution of a mortgage decree and ought not, in reason to be so construed as to render the application of this principle impossible in cases where

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* Second Appeals Nos. 346 and 347 of 1903, presented against the decrees of F.D.P. Oldfield, Esq., Acting District Judge of Tanjore in appeal Suits Nos. 316 and 317 of 1901, presented against the decree of M.R.Ry. T. Swami Ayyar, District Munsif of Tiruvalur, in Original Suits Nos. 16 and 70 of 1900 respectively.

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an order absolute for sale had been made on the ground that such order extinguished the security.

Dinobundhu Shaw Chowdhry v. *Jogmaya Dasi*, (L.R., 29 I A.), referred to and followed in principle.

THE facts necessary for this report are fully set out in the judgment.

T. R. Ramachandra Ayyar for *V. Krishnaswami Ayyar* and Mr. *T. V. Gopalaswami Mudali* for appellants.

The Hon. Mr. *P. S. Sivaswami Ayyar* for first, eighth and ninth respondents.

JUDGMENT.—*In Second Appeal No.* 346 *of* 1903.—The plaintiff sues upon a simple mortgage executed to him by the first and second defendants on the 29th July 1897 for Rs. 400. Part of the property comprised in the plaintiff's mortgage had been previously mortgaged to one Palavoy Swaminatha Pillai. The latter brought Original Suit No. 163 of 1892 in the Court of the District Munsif of Tiruvalur and obtained a decree on the 14th September 1892. In execution of this decree an order for the sale of the property was passed and the property put up to sale and knocked down to the decree-holder himself. But before the confirmation of the sale an application under section 310-A of the Civil Procedure Code was made by the judgment-debtors, and the sale was cancelled. The money deposited with this application was lent to the first, second and third defendants by the fifth defendant in the present case under a mortgage executed on the 1st November 1897, by which instrument the property comprised in the mortgage of the decree-holder was usufructuarily mortgaged to the fifth defendant, the mortgage containing, also, a covenant to pay. The mortgage recites the passing of the decree, the sale under it, and the loan being made to prevent the confirmation of the sale, and concludes with a statement that there is no other claim on the property than that subsisting under the mortgage in favour of the plaintiff. The usufruct was to be enjoyed in lieu of interest of the rate of which, however, no mention is made, but the fifth defendant, though entitled to the possession of their mortgaged property did not obtain it. The question is as to the rights *inter se* of the plaintiff and the fifth defendant in the circumstances.

On behalf of the fifth defendant it was contended that though his mortgage was in point of date subsequent to that of the plaintiff

yet as the money advanced by him was for the purpose of discharging the prior encumbrance in favour of Palavoy Swaminatha Pillay which was binding on the plaintiff also, the fifth defendant's mortgage has priority over that of the plaintiff. Mr. Sivaswami Ayyar on behalf of the plaintiff sought to meet this contention in two ways. First, he urged that the presumption of the lien in favour of Swaminatha Pillay being preserved for the benefit of the fifth defendant should upon the facts of the case be held to have been rebutted—in other words—that the mortgage right of Palavoy Swaminatha Pillay had by act of parties been put an end to at the time the mortgage to the fifth defendant was made; and consequently, that that defendant could not claim any advantage with reference to what had thus ceased to exist. We are altogether unable to accept this argument It is of course well settled that, in the absence of clear proof to the contrary, it is to be taken that, when the money of a person interested in immovable property, as for example, the owner of the equity of redemption or a puisne mortgagee goes to discharge an anterior encumbrance affecting it, the presumption is, that the anterior encumbrance enures to the advantage of the party making the payment, if it is for his benefit so to treat it. And so far from there being any thing in the facts of the case to rebut the presumption arising from the payment, an intention to keep alive the anterior lien, and pass the benefit thereof to the fifth defendant, would seem to be distinctly inferable from the terms of the instrument itself, viz., the recitals therein as to the decree, the execution thereunder and the loan being for the discharge of the decree debt. The allusion in the document to the mortgage of the plaintiff does not, in our opinion, argue to the contrary. As pointed out by Mr. Ramachandra Ayyar that clause was mainly intended as an assurance that the property mortgaged was subject only to that other claim without it being meant to suggest any relative superiority as between the two mortgages, such assurance not being uncalled for, having regard especially to the fact that the plaintiff's mortgage instrument comprised more property than that mortgaged to the fifth defendant.

Now as to the next argument Mr. Sivaswami Ayyar put it thus:—On the passing of the order absolute for sale Swaminatha Pillay's security became extinguished by virtue of the provision to that effect at the end of section 89 of the Transfer of Property

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Act, and the decree-holder and the judgment-debtors came, thereafter, to be precisely in the position of parties to a simple money decree and, consequently, the payment made by the fifth defendant could not operate to confer any right of lien affecting the plaintiff. What exactly was in the comtemplation of the framers of section 89 in introducing the concluding sentence relied on by Mr Sivaswami Ayyar is, it must be confessed, not easy to say. The passage from the work of MacPherson on mortgages cited by Mr. Sivaswami Ayyar and quoted at length in the judgment of Bhashyam Ayyangar, J., in *Mallikarjunadu Setti* v. *Lingamurti Pantulu*(1) shows that the learned author by no means felt very confident as to the meaning of the language in question of the legislature. Nor does Dr. Ghose appear to have understood the passage as free from difficulty (see Ghose on 'Mortgage,' 3rd Edition, page 898).

It is sufficient for the purposes of this case to say that the sentence in question in the section cannot be held to warrant the position maintained by Mr. Sivaswami Ayyar. So to read the provision would upset completely one of the main principles underlying the law of mortgages, viz., that the effect of a sale in execution of a mortgage decree is to vest in the purchaser at such sale the property as it stood at the date of the mortgage, and therefore free from that, and all subsequent encumbrances. If, after the order absolute, the decree-holder and judgment-debtor were reduced to the position of parties to a mere money decree, the sale of the mortgaged property could invest the purchaser only with the right of the judgment-debtor as at the date of the sale and therefore subject to encumbrances created by him prior to the time of the sale. It is impossible to believe that the legislature really meant by the provision in question to introduce such an absurdity with reference to the rights of mortgagees, which can only be protected by postulating the continuance of the lien down to the time of the sale, and the transfer of it thereafter to the sale-proceeds.

It is further to be observed that the provision under consideration has reference to a matter connected with the *execution* of a mortgage decree and ought not to be understood as contemplating and affecting what does not necessarily relate thereto. Now the presumption arising from payment in circumstances like the present,

(1) I.L.R., 25 Mad., 244 at p. 281.

is one of general application and is a consequence of payments made whether in discharge of mortgage decrees or otherwise.

The Transfer of Property Act itself recognises the presumption in terms in the case provided for in section 101. No doubt one of the things avoided by the presumption in question is the unnecessary multiplication of written assignments of mortgages to person paying them off. But the principle of it is the prevention of unjust enrichment, as for instance, a puisne mortgagee benefiting at the expense of another person interested in the property who pays off encumbrances binding on the former, without intending to confer such a benefit on him. It was indeed as a principle of justice, equity and good conscience, that the rule was laid down in the leading case of *Gokaldas Gopaldas* v. *Puranmal Premsukhdas*(1) and has been enforced by the numerous authorities following it. And having regard to the acceptance thereof by the legislature itself in section 101 referred to above, the language of section 89 ought not, in reason, to be so construed as to render the application of such a principle to cases where an order absolute has been passed impossible.

In *Dinobundhu Shaw Chowdhry* v. *Jogmaya Dasi*(2) a judgment-debtor, two days after the attachment of his property, executed a mortgage thereof and, as previously agreed upon, applied the mortgage money in payment of two mortgages subsisting thereon, took to himself a reconveyance and handed over the old mortgage deeds to the new mortgagee.

One of the contentions urged was that section 276 of the Civil Procedure Code rendered the new mortgage even to the extent of the amount actually applied in payment of the prior mortgages void as against the attaching creditor and consequently as against the purchaser at the Sheriff's sale. This contention was rejected and the Judicial Committee held that so to construe section 276 would be quite wrong. It seems to us that to give to section 89 in question the effect sought to be given to it by Mr. Sivaswami Ayyar here would be equally wrong.

The decree of the lower Courts cannot be sustained. We accordingly direct that, in default of payment within 3 (three) months from this date by defendants Nos. 2 and 3 of the amount due to the plaintiff under his mortgage and costs, so much of the

(1) I. L. R., 10 Calc., 1035. (2) L. R., 29 I. A., 9.

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property mortgaged to him as is not comprised in the mortgage to the fifth defendant, will be sold and the proceeds applied in payment of what is due to the plaintiff. If the amount due to the plaintiff is not fully discharged thereby, the remainder of the mortgaged property shall be sold and the proceeds applied in the first instance towards the discharge of the fifth defendant's mortgage amount, viz., Rs. 750 and his costs throughout and the surplus, if any, applied so far as may be necessary in paying off the remainder of the plaintiff's claim. The decree of the lower Courts will be modified accordingly.

In second Appeal No. 347 *of* 1903.—For like reasons a similar decree will be passed in Second Appeal No 347 of 1903.

APPELLATE CIVIL.

Before Sir S Subrahmania Ayyar, Officiating Chief Justice, and Mr. Justice Sankaran Nair

1905 August 16, 29.

JALASUTRAM LAKSHMINARAYAN AND OTHERS (DEFENDANTS), APPELLANTS,

v.

BOMMADEVARA VENKATA NARASIMHA NAIDU (PLAINTIFF), RESPONDENT.*

Civil Procedure Code—Act XIV of 1882, *s.* 13—Res judicata *must be based on the grounds stated in the judgment.*

A plea of *res judicata* must be based on the grounds of the decision actually stated in the judgment; and where such grounds are unequivocally stated but do not justify the decision, it is not proper or competent to substitute something else quite different which will justify it to enable one of the parties to found a plea of *res judicata*.

THE facts necessary for this report are set out in the judgment.

C. Ramachandra Rau Sahib for appellants.

V. Krishnaswami Ayyar for respondent.

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* Civil Miscellaneous Appeal No. 224 of 1904, presented against the decree of F. H. Hamnett, Esq., District Judge of Godavari, in Appeal Suit No. 571 of of 1903, presented against decree of M.R.Ry. T. A. Narasimha Chariar, District Munsif of Bhimavaram, in Original Suit No 485 of 1903.