

and that any disposal of the case, notwithstanding the death of one of the parties will be valid subject to its being vacated at the instance of the legal representatives of the person who had died.

In the interests of justice, it is not desirable to give a right to an unsuccessful litigant to argue his case more than once merely on the ground that one of the other parties to the proceeding was dead at the time of the hearing. The affidavit in this case does not say in what manner the appellant was prejudiced in the conduct of the appeal before us by the fact that the second respondent was dead at the time. We must decline to rehear the appeal. The petition will be dismissed with costs.

S.V.

VELLAYAN
CHETTY
v.
MAHALINGA
AIYAR.
—
AYLING
AND
SESHAGIRI
AIYAR, JJ.

APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Tyabji.
RAMASAMI MOOPPAN (PLAINTIFF), APPELLANT,

1915.
February, 2

v.

SRINIVASA IYENGAR (SECOND DEFENDANT),
RESPONDENT.*

Civil Procedure Code (Act V of 1908), O. XXI, rr. 46 and 54—Attachment of usufructuary mortgagee's right under Order XXI, rule 54 and not under rule 46, illegal—Sale, consequent, invalid.

Attachment of the interest of a usufructuary mortgagee in a certain property should be in the manner provided by Order XXI, rule 46, Civil Procedure Code, for the attachment of a debt and not in the form provided for the attachment of immoveable property. Where, therefore, there was an attachment of the usufructuary mortgagee's right in the manner prescribed for attachment of immoveable properties and the mortgagor who did not receive from Court any order prohibiting him from making payment of the usufructuary mortgage debt discharged the same by payment and obtained from the mortgagee a release of his rights some time prior to the actual sale thereof in Court auction,

Held, that the sale of the mortgagee's right in Court auction was invalid and that the purchaser acquired nothing by the purchase as against the mortgagor who had redeemed the mortgage by payment.

The fact that on the date of the payment the mortgagee could not have got a personal decree against the mortgagor for the payment of the mortgage debt on account of limitation, is immaterial as limitation does not put an end to the debt and does not prevent the mortgagor and mortgagee from paying and receiving the mortgage amount.

RAMASAMI
MOOPPAN
v.
SRINIVASA
IYENGAR.

SECOND APPEAL against the decree of G. KOTHANDARAMANJULU NAYUDU, the Temporary Subordinate Judge of Tanjore, in Appeal No. 474 of 1912, preferred against the decree of P. G. RAMA AYYAR, the District Munsif of Tiruvadi, in Original Suit No. 6 of 1912.

One Govinda Row who was the owner of the suit properties usufructuarily mortgaged the same for Rs. 4,450 to one Saminatha Chetty in 1892. The mortgage was redeemable on 12th April 1898. Govinda Row's interest in the equity of redemption was purchased by one Muthiyan Chetty in Court auction on 17th February 1898. Muthiyan Chetty conveyed his interest in the equity of redemption to the plaintiff in April 1911. After the death of Saminatha Chetty the first defendant in the case who was a creditor of Saminatha Chetty, the usufructuary mortgagee, brought a suit in 1904 for the recovery of his debts against Chidambaram Chetty, the son of Saminatha Chetty, and having got an order for attachment before judgment got the usufructuary mortgagee's interest attached on 14th August 1904. The attachment was effected under section 274, old Civil Procedure Code, corresponding to Order XXI, rule 54, new Civil Procedure Code, in the manner provided for attachment of immoveable properties. After getting a decree the first defendant got the usufructuary mortgagee's interest sold to him in Court auction on 6th December 1911. First defendant having died, his son the second defendant, was brought on the record as his legal representative. Long after the attachment Chidambaram Chetty sold his mortgagee's interest to one Kandasami Mooppan in 1910, and plaintiff paid Kandasami Mooppan the mortgage amount and got a release from Kandasami Mooppan of his rights on 2nd October 1911, and obtained possession. Thus after the attachment before judgment and before the sale in Court auction of the usufructuary mortgagee's right the mortgagor's successor in interest, namely, the plaintiff, paid the mortgage amount and redeemed the property. After such redemption and after getting an adverse order on his claim petition he brought this suit for a declaration of the invalidity of the attachment and the sale to the first defendant. Both the lower Courts dismissed the suit holding that the attachment of the mortgagee's interest as immoveable property and its subsequent sale were good. Thereupon plaintiff preferred this Second Appeal.

S. Muthiah Mudaliyar for the appellant.—The attachment of the usufructuary mortgagee's interest as immoveable property under section 274, old Civil Procedure Code, corresponding to Order XXI, rule 54, the new Civil Procedure Code, is invalid. The attachment must have been as of a debt under section 268 of the old Civil Procedure Code, corresponding to Order XXI, rule. 46. Then alone there will be a prohibitory order restraining the debtor from paying the creditor. The decisions in *Nataraja Iyer v. The South Indian Bank of Tinnevely*(1) and *Chullile Peetikayil Nammad v. Othenam Nambiar*(2) are in my favour, the latter of which relates to the method of attaching a usufructuary mortgagee's interest. Having no knowledge of the attachment, my client paid the mortgage amount and redeemed the mortgage and he was thus prejudiced by the procedure adopted. *Manilal Ranchod v. Motibhai Hemabhai* (3), is distinguishable as there the mortgage was a purely usufructuary mortgage without any liability to pay and the Court treated the case as if there was no debt payable by the mortgagor to the mortgagee. In this case there was a covenant to pay.

C. V. Ananthakrishna Ayyar, for the respondent.—A mortgagee's right is an interest in immoveable property and a usufructuary mortgagee's right must be attached only as immoveable property. Moreover the creditor can elect to attach the mortgagee's right either as a debt or as an immoveable property. Notice of the attachment on the land is notice to all the persons interested in the land including the creditor and the debtor. Moreover the right to recover the mortgage amount personally was barred on the date of attachment and this case is exactly similar to *Manilal Ranchod v. Motibhai Hamabhai*(3). At the most this kind of attachment was only an *irregularity* and the plaintiff who acquired the interest in question only subsequent to the attachment cannot plead the invalidity of the attachment; see section 64, Civil Procedure Code. The invalidity of an attachment is not a thing that can be pleaded after sale and grant of a sale certificate. *Noordinkutty v. Kunki Bana*(4), *Balakrishna v. Masuma Bibi*(5) and *Velayutha Muppan v. Subramaniam Chetty*(6).

KANASAMI
MOOPPAN
v.
SRINIVASA
IYENGAR.

(1) (1914) I.L.R., 37 Mad., 51.

(2) (1914) 27 M.L.J., 289.

(3) (1911) I.L.R., 35 Bom., 288.

(4) (1912) M.W.N., 879.

(5) (1882) I.L.R., 5 All. 142 at p. 157 (P.C.).

(6) (1912) 24 M.L.J., 70.

RAMASAMI
MOOPPAN
v.
SRINIVASA
IYENGAR.

S. Muthiah Mudaliyar in reply.—My client is not a purchaser subsequent to the attachment. Even supposing that the right to recover the mortgage amount personally or from the mortgaged properties was barred by limitation, the debt was not extinguished in law and the usufructuary mortgagee was entitled to remain in possession till the debt was paid and as the mortgagor who had no notice of the attachment, paid the debt long before the Court sale, there was no mortgagee's interest to be sold in Court auction. Therefore cases relating to irregularities before the judgment-debtor's right is actually sold and which presume the existence of such a right before the sale are not to the point.

AYLING
AND
TYABJI, JJ.

The following JUDGMENT of the Court was delivered by TYABJI, J.—

The question involved in this appeal is whether the plaintiff is entitled to claim that he has a subsisting usufructuary mortgage on the properties referred to in the plaint; or whether the second defendant can claim that he has acquired not only the equity of redemption but also the mortgagee's interest. The decision of this question depends upon whether the mortgagee's interest in the property was validly attached and sold in execution or whether the attachment was invalid. After the alleged attachment of the mortgagee's interest upon which the defendant relies the plaintiff paid off the mortgage amount and purported to redeem the property. The plaintiff claims that the redemption was valid as the attachment was invalid; and the defendant claims that the alleged redemption was void under section 64 of the Code of Civil Procedure, 1908, as the property had been attached prior to the alleged redemption.

The learned pleader for the defendant relied upon the terms of section 64 of the Code of Civil Procedure, 1908, and invited us to hold that inasmuch as the section does not state that the attachment referred to therein must be a valid attachment it is immaterial whether or not it is valid; that the payments therein referred to must be held to be void as soon as an attachment is purported to be made irrespective of the validity of the attachment. We are unable to accede to this argument as stated. It is unnecessary in the present case to consider whether the section cannot operate if there is any irregularity whatsoever in the attachment. It may be that some irregularities

may not vitiate the attachment for the purposes of section 64 of the Code of Civil Procedure, 1908. But in the present case the alleged cause of invalidity cannot be described as a mere irregularity as between the parties now before us. The attachment must be held to be either entirely void or entirely valid.

The contention of the plaintiff is that the interest of the usufructuary mortgagee was attached as though it was immoveable property under section 274 of the Code of Civil Procedure, 1882 (Order XXI, rule 54 of the present Code); and that it ought really to have been attached as a debt under section 268 of the old Code of Civil Procedure, 1882 (Order XXI, rule 46 of the present Code). The substantial difference between the two modes of attachment (so far as at present material) is that under section 268 the mortgagor would have received a written order of the Court prohibiting him from making the payment to the mortgagee; and under section 274 he received no such order, nor any notice of the attachment. The mortgagor therefore can reasonably claim that the payment which he has made in ignorance of the attachment cannot be held to be void if he was entitled to proceed on the basis that there was no attachment of the mortgagee's interest because if there had been an attachment in the form in which the law entitled him to expect it to be made, he would have been prohibited from making the payment, and he was not so prohibited.

The question may therefore be considered in the following form: Is the mortgagor entitled to receive notice of any attachment of his usufructuary mortgagee's interest? And in the absence of such notice is he entitled to redeem the mortgage by paying off the amount due or will any payments he makes be invalid as against an attaching creditor of the mortgagee?

It is admitted that in the case of a simple mortgage (as distinguished from a usufructuary mortgage) the proper mode of attachment is that applicable to a debt (section 268 of the Code of Civil Procedure, 1882; now Order XXI, rule 46) but it is urged that the case is different when the mortgage is usufructuary. Some support is given to this argument by the decision in *Mansil Ranchod v. Motibhai Hemabhai* (1); on the other hand *Chullile Peetikayil Nammad v. Othenam Nambiar* (2)

RAMASAWMI
MOOPAN
v.
SRINIVASA
IYENGAR.
—
AYLING
AND
TYABJI, JJ.

(1) (1911) I.L.R., 35 Bom., 288.

(2) (1914) 27 M.L.J., 289.

RAMASAMI
MOOPPAN
v.
SRINIVASA
IYENGAR.
—
AYLING
AND
TYABJI, JJ.

(to which one of us was a party) is relied upon by the plaintiff. In our opinion there is no conflict in the ratio decidendi of each of these cases: *Manilal Ranchod v. Motibhai Hemabhai*(1) proceeded on the assumption that on the true construction of the deed then before the Court, there was no debt which the mortgagee was entitled to recover at the time of the attachment; and consequently a person who claimed to have acquired from the mortgagee a right which the mortgagee himself did not possess, could not claim to be put in possession of property as collateral security for a debt which did not exist. Where in accordance with the document the mortgagee cannot claim to recover any debt from the mortgagor nor the mortgagor claim to make any payment to the mortgagee it would seem that the attachment of the rights arising under such a document cannot take the form containing in Order XXI, rule 46 of the Code of Civil Procedure (section 268 of the Code of Civil Procedure, 1882); for that form consists of prohibitions from making and receiving payments: it would be meaningless to prohibit persons from making and receiving payments when their relationship is such that no payments are contemplated. On the other hand the decision in *Chullile Peetikayil Nammad v. Othenam Nambiar*(2) proceeds on the basis that where there is a debt payable by the mortgagor the fact that the mortgagee is in possession of the land does not the less make it a debt, nor is the mode of attachment of such debt affected by the collateral security for such debt, even though that security may take the form of possession of the property.

We have therefore to determine in this case first whether there was any debt which ought to have been attached as such; and secondly whether in failure of any such attachment, the payment on which the plaintiff relies can be considered to have transferred the mortgagee's rights to him.

The mortgage in question was no doubt usufructuary. It however provided for redemption on 12th April 1898; and the mortgagor promised to the mortgagee "we shall pay to you the principal of the mortgage amount and we shall redeem the said lands clear of sirkar teervai. Further after discharging (the loan) as above, we shall get back the mortgage deeds and

(1) (1911) I.L.R., 35 Bom., 288.

(2) (1914) 27 M.L.J., 239.

other documents, eight in number, which we have obtained and given to you. Should we "fail to pay you the principal of the usufructuary mortgage amount on the said due date, we shall, on your demanding it of us within the 1st of the month of Chittrai in any year pay you the said amount and redeem the mortgage." At the time of the attachment therefore, viz., on 14th August 1904, the mortgagor had already become bound to repay the mortgage debt, and had in any case a right to pay it and to demand possession of the mortgaged property. Hence it is clear that there was such a right to receive payment, if it was offered, as could have been attached, and if the attaching creditor desired that the payment should be made to him he should have obtained an order of the Court prohibiting the mortgagor from making the payment to the mortgagee: section 268 of the Code of Civil Procedure, 1882.

RAMASAMI
MOOPPAN
v.
SRINIVASA
IYENGAR.
—
AYLING
AND
TYABJI, JJ.

Secondly (as the learned pleader for the appellant forcibly pointed out in argument) if the attachment be taken to be that of the mortgagee's collateral security by way of being in possession of immoveable property till his debt is paid, then assuming that the attachment was valid the attaching creditor acquired merely that precarious interest in immoveable property by attaching under section 274 of the Code of Civil Procedure, 1882; and the defendant cannot claim to have any right to be in possession of the property (for that is all the right that he can claim) as security for a debt which has now been paid off.

It was contended for the defendant that there could not be said to be a debt capable of being attached, as the mortgagee's personal rights had become barred, at the date of the attachment. But assuming that at the date of the attachment the mortgagee could not have obtained any relief on his mortgage-deed except possession of the property, it does not affect the mortgagor's right to pay off the mortgagee and to obtain possession of the property nor the corresponding right of the mortgagee to receive payment prior to giving up possession. These reciprocal rights were not barred by limitation and the attachment could not affect them.

The appeal will therefore be allowed. The suit will be remanded to the Court of first instance for disposal on the other issues. Costs will abide the result.