APPELLATE CIVIL.

Before Mr. Justice Coutts Trotter and Mr. Justice Ramesam.

1922, February 9.

N. RAMAKRISHNA MUDALI (PLAINTIFF), APPELLANT,

v.

THE OFFICIAL ASSIGNEE OF MADRAS AND OTHERS (DEFENDANTS), RESPONDENTS.*

Transfer of Property Act (IV of 1882), sec. 52—Mortgage with power to sell—Suit for redemption—Sale by mortgagee—Lis pendens—Applicability of doctrine—Assignment of mortgage—Assignment of power of sale—Sale by assignee—Validity—Transfer of Property Act (IV of 1882), sec. 69—Power to sell exercised—Indebtedness as to part only—Validity of sale—Damages.

A private sale by a mortgagee in exercise of a power conferred by the mortgage-deed is not affected by the doctrine of *lis pendens* embodied in section 52 of the Transfer of Property Act and is valid, though made during the pendency of a redemption suit filed by the mortgagor.

A mortgagee who has such power may assign it with the mortgage to a third person and the latter can validly exercise it.

Where such power is exercised in part as to an indebtedness which it did not in truth cover the sale is not invalidated but the mortgagor is entitled to damages under section 69 of the Transfer of Property Act if he can prove that he has been damnified.

APPEAL against the decree and judgment of PAUL APPASWAMI, Acting City Civil Judge, Madras, in O.S. No. 296 of 1919 on the file of the City Civil Court, Madras.

The facts are set out in the Judgment.

Balasubramania Mudaliyar for *A. Krishnaswami Ayyar* for appellant.

K. Krishnamachariar, *W. Kothandaramiah*, *N. Visvanatha Ayyar*, and *V. Chelamiah* for respondents.

* City Civil Court Appeal No. 20 of 1920.

The JUDGMENT of the Court was delivered by

COUTTS TROTTER, J.—The plaintiff in this case in 1904 executed a mortgage in favour of the Mylapore Benefit Fund to secure a loan of Rs. 1,500. The mortgage conferred a power upon the mortgagee to sell the property, on failure by the mortgagor to carry out the terms as to repayment and so forth. In 1910 the Fund was pressing for repayment and the plaintiff was not able to repay. Thereupon the Fund announced its intention of selling the property. Just before the sale the plaintiff was enabled to produce one Devasikamani Chetty who stepped into the breach, paid off the Fund and took over the security. Devasikamani Chetty, further more, made a new advance of, I think, Rs. 800 over the original consideration of Rs. 1,500 to the plaintiff and secured that by a further equitable mortgage by deposit of title-deeds of the same property that was covered by the original mortgage to the Mylapore Fund. Devasikamani Chetty fared no better than the Fund, because he, in his turn, could get no repayment. So he sub-mortgaged the property to the second defendant in this case who ultimately, purporting to act in exercise of the power of sale conferred under the document, sold it to the present fourth defendant. The plaintiff now brings this suit for redemption of the property and that suit has been dismissed by the learned Judge in the Court below. Hence the Appeal to us.

On behalf of the plaintiff several points have been raised, with the most important of which I will briefly deal. The first argument is based upon section 52 of the Transfer of Property Act and was this; that as the plaintiff had started this suit for redemption before the sale to the fourth defendant, the sale fell under the doctrine of *lis p ndens* and, by virtue of the provisions of section 52 of the Act, no rights could be conferred under it. It

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has been held in a series of cases in the Bombay High Court that the doctrine embodied in section 52 of the Transfer of Property Act has no application whatever to a mortgagor who has given under that mortgage an express power of sale and that he cannot, by starting a suit—perhaps a perfectly hopeless suit for redemption—derogate from that which he has in express terms conferred upon the mortgagee by the instrument, namely, the power of sale. It appears to us that that is the only logical result that can be arrived at, and we agree with the view of the Bombay High Court that to hold otherwise would simply be to tear up the instrument which contains the contract agreed upon between the parties.

The next argument that was put forward was: that by the assignment the power of sale in the mortgage was not conveyed, and authorities were cited to the effect that a mere assignment of the mortgage does not inevitably carry with it the power of sale arising from certain eventualities. It is sufficient to say that having examined the words of the assignment here we are quite clear that they are not only wide enough to convey the power of sale but were expressly designed to do so.

Then it is said that the power of sale, in any event, can only be exercised by the party to the original instrument and not by somebody claiming under him. This part of the argument, we think, was founded on a fallacy engendered by an attempt to apply the case of *In re Rumney* v. *Smith*(1), where it was held that, on a transfer and upon the true construction of the deed considered in that case, it was not intended that any one but the original contracting party should have the right to exercise the power of sale. That may very well have been in that case, and it may be that that intention was

(1) [1897] 2 Ch., 351.

disclosed and could be inferred from the deed and from the known circumstances. But in this case there was an express provision in the mortgage that all the rights and powers conferred by it should be exercisable by the assign of the mortgagee and, therefore, the whole analogy of *In re Rumney* v. *Smith*(1) fails to apply from the outset.

Finally, an argument was put forward which was based upon section 69 of the Transfer of Property Act. It appears that this property was brought to sale under the power not only for the original debt of Rs. 1,500 and interest covered by the mortgage originally given to the Mylapore Fund but also in respect of the subsequent indebtedness of Rs. 800 created by the loan of Devasikamani Chetty secured only by an equitable mortgage by deposit of title-deeds and obviously not covered by the power of sale; and it was suggested that, as the power of sale has been exercised in part as to the indebtedness which it did not in truth cover, the whole sale should be set aside. It appears to us that that point is covered both by the Act itself and by the authorities. By section 69 it is enacted as follows:—

"When a sale has been made in professed exercise of such a power" (that is the power of sale in the given instrument) "the title of the purchaser shall not be impeachable on the ground that no case had arisen to authorize the sale, or that due notice was not given, or that the power was otherwise improperly or irregularly exercised; but any person damnified by an unauthorized, or improper, or irregular exercise of the power shall have his remedy in damages against the person exercising the power."

That remedy is available to this plaintiff if he can show that he has been in any way damnified by the exercise of this power. That is the section and it is in

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accordance with the settled line of decisions of the English Chancery Courts on the subject, and we need only refer to a judgment of Sir GEORGE JESSEL, M.R., in *Dicker* v. *Angerstein*(1), where the sale was held good, even though it was proved that the security had actually been satisfied. A similar doctrine has been acted upon in this Court in *Madras Deposit and Benefit Society* v. *Passanha*(2).

We, therefore, are of opinion that all the points taken by the plaintiff and very clearly put in an interesting argument, when examined, fail to stand the test of criticism and that the learned Judge was right in dismissing the plaintiff's suit.

The Appeal fails and must be dismissed with costs, one set.

M.H.H.

APPELLATE CIVIL.

Before Mr. Justice Spencer and Mr. Justice Devadoss.

1922, March 3.

NATARAJULU NAICKER (SECOND DEFENDANT), APPELLANT,

v.

SUBRAMANIAN CHETTIAR AND NINE OTHERS (PLAINTIFFS AND DEFENDANTS, NOS. 1, 3 AND 4), RESPONDENTS.*

Paper Currency Act (II of 1910), sect. 26—Promissory note payable to bearer forming consideration for hypothecation—Enforceability of hypothecation—Admissibility in evidence of promissory notes payable to bearer—Loan for illegal or immoral purpose when not recoverable.

Though promissory notes payable to bearer are unenforceable according to section 26 of the Paper Currency Act, a hypothecation bond whose consideration is made up of the prior liability evidenced by such notes is enforceable.

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(1) (1876) 3 Ch. D., 600. (2) (1888) I.L.R., 11 Mad., 201.

* Appeal No 183 of 1919.