whole holding of Rs. 392-11-0, and it should not be open to the other co-sharers to say that their lands are liable for smaller rent. We wanted to hear the other sharers if they have got anything to say in the matter but they were not represented and no arguments were advanced on their behalf. We therefore allow the second appeal and direct that the patta to the plaintiff should be issued by the first defendant with rent of Rs. 77-10-0 and corresponding cesses. The decree of the Deputy Collector will be restored with costs here and in the lower appellate Court to be borne by the first defendant. The declaration should be entered in the decree.

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Venkatasubba Rao.

1934, March 7.

PAPI NAIDU (DECEASED) AND FOUR OTHERS (SECOND DEFENDANT AND HIS LEGAL REPRESENTATIVES), APPELLANTS,

v.

SUBBARAYA CHETTY AND FOUR OTHERS (PLAINTIFF AND DEFENDANTS 3 TO 6), RESPONDENTS.*

Code of Civil Procedure (Act V of 1908), O. XXI, rr. 46 and 54—Mortgage with possession—Debt under—Attachment of, under r. 46—Permissibility—Effect of—Security and right to possession if affected by—Separate attachment of security or of right to possession under r. 54—Necessity.

A mortgage debt under a possessory mortgage can be attached under Order XXI, rule 46, of the Code of Civil Procedure. The attachment of the mortgage debt operates not only on the debt but also on the security which fastens itself to the debt. There is therefore no further necessity to attach

---

* Second Appeal No. 243 of 1930.

PAPI NAIDU v. SUBBARAYA CHETTY.

the security as immovable property. A valid attachment of the mortgage debt under rule 46 affects also the right to possession and it is not therefore necessary to separately attach the right to possession under rule 54 of Order XXI. The expression "security" covers the right to possession.

APPEAL against the decree of the Court of the Subordinate Judge of Salem in Appeal Suit No. 88 of 1928 preferred against the decree of the Court of the District Munsif of Krishnagiri in Original Suit No. 253 of 1927.

D. Ramaswami Ayyangar for *C. S. Venkatachariar* for appellants.

B. Somayya for *V. V. Chowdary* for first respondent.

JUDGMENT.

This appeal raises an important question as regards the validity of an attachment effected under Order XXI, rule 46, of the Code of Civil Procedure. The first defendant held an anomalous mortgage and, under the terms of the mortgage deed, was in possession of the property. The plaintiff obtained a decree against him, attached his interest in the mortgage under rule 46, brought it to sale and purchased it in court-auction. The plaintiff, as the purchaser of the first defendant's mortgage interest, has brought this suit for possession and for mesne profits. As regards his claim to possession, no question arises, as the property has since the suit been delivered to the plaintiff. The lower appellate Court has passed a decree for mesne profits not only against the first defendant, who does not appeal, but also against defendants 2 to 6, with whose liability alone we are now concerned. I have said that the plaintiff himself became the purchaser at the

court-sale ; he obtained the sale certificate on the 27th July 1926 and on the next day, i.e., on the 28th, the first defendant leased the property to the second. On the 5th May 1927 the present suit was commenced and the property was delivered to the plaintiff on the 9th May 1928. The mesne profits claimed are for the period between the date of the lease and the date of the delivery.

Mr. Ramaswami Ayyangar for the appellant (the second defendant) contends that, though by reason of the attachment under rule 46 the mortgage debt was validly attached, there was, so far as the right to possession was concerned, no legal attachment. It must now be taken as settled that the procedure to be followed as regards the attachment of the mortgage debt is that prescribed by rule 46. The question arose whether a mortgage debt was " a debt not secured by a negotiable instrument " within the meaning of that provision. The contention was put forward that a mortgage was an interest in immovable property and that rule 46 would not therefore apply ; but that contention was rejected and the Courts held that a debt secured by a mortgage was none the less a debt for the purpose of the rule in question. The earlier cases that arose, such as *Karim-un-nissa* v. *Phul Chand*(1), *Tarvadi Bholanath* v. *Bai Kashi*(2) and *Nataraja Iyer* v. *The South Indian Bank of Tinnevelly*(3), were in respect of simple mortgage debts ; the argument that a mortgage debt should be treated as immovable property was repelled, as I have said, in those cases and the judgment in *Tarvadi Bholanath* v. *Bai Kashi*(2)

(1) (1893) I.L.R. 15 All. 134. (2) (1901) I.L.R. 26 Bom. 305.
(3) (1911) I.L.R. 37 Mad. 51.

PAPI NAIDU v. SUBBARAYA CHETTY.

contains a lucid statement of the reasons for the view the learned Judges adopted. In those cases the question was left open, whether or not a mortgage debt under a possessory mortgage could be attached under this provision; that question has since been answered in the affirmative in *Chullile Peetikayil Nammad* v. *Othenam Nambiar*(1) and *Ramasami Mooppan* v. *Srinivasa Iyengar*(2). The effect of these decisions is shortly this: the attachment of a mortgage debt operates not only on the debt but also on the security, which fastens itself to the debt; the security therefore follows the debt. In other words, even granting that the interest of the mortgagee is immovable property, that interest arises from the debt and is ancillary to it; therefore there is no further necessity to attach the security as immovable property, when the debt has already been attached. In *Manilal Ranchod* v. *Motibhai Hemabhai*(3), in the case of a usufructuary mortgage, a different view seems to have been taken; but that decision has been distinguished by our Court in two cases, *Ramasami Mooppan* v. *Srinivasa Iyengar*(2) and *Nataraja Iyer* v. *The South Indian Bank of Tinnevelly*(4), the ground of distinction being that in the Bombay case it was assumed that the mortgagor had no right to pay and the mortgagee no right to demand. But Mr. Ramaswami Ayyangar urges that the point he now raises is uncovered by authority; what he contends is that, although the debt has been validly attached under rule 46, the right to possession has not been affected, because

(1) (1914) 27 M.L.J. 239.
(2) (1915) I.L.R. 39 Mad. 389.
(3) (1911) I.L.R. 35 Bom. 288.
(4) (1911) I.L.R. 37 Mad. 51.

it can only be attached under rule 54 as immovable property. That is to say, according to him, the debt must be attached under rule 46 and further, under rule 54, the right to possession must be separately attached ; there must thus be a two-fold attachment. I think, on the authorities as they stand, I cannot accede to this contention. According to both *Tarvadi Bholanath* v. *Bai Kashi*(1) and *Nataraja Iyer* v. *The South Indian Bank of Tinnevelly*(2), the security follows the debt and it is difficult to distinguish between one part of the security, i.e., the right to bring the property to sale, and the other part of it, namely, the right to possession ; indeed, the expression "security", as used in *Ramasami Mooppan* v. *Srinivasa Iyengar*(3), is expressly made to cover the right to possession, as the following passage shows :—

> "On the other hand the decision in *Chullile Peetikayil Nammad* v. *Othenam Nambiar*(4) 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."

Mr. Ramaswami Ayyangar points out that some hardship results from the view I have taken. Under rule 46 an attachment is effected *inter alia* by a prohibitory order being served upon the debtor ; but, if the debtor happens to be at a place different from where the mortgaged property is, there being no proclamation under rule 54, the attachment is not brought to the knowledge of

---

(1) (1901) I.L.R. 26 Bom. 305.
(2) (1911) I.L.R. 37 Mad. 51.
(3) (1915) I.L.R. 39 Mad. 389.
(4) (1914) 27 M.L.J. 239.

PAPI NAIDU v. SUBBARAYA CHETTY.

third parties. I cannot, however, allow considerations of this sort to influence my judgment. As has been pointed out in *Tarvadi Bholanath* v. *Bai Kashi*(1) by JENKINS C.J., even in the case of a simple mortgage debt,

> "it may be that a more complete safeguard could be devised, but that is beside the question."

If the hardship pointed out is real, that may be a good reason for the changing of the rule, but with that I am not here concerned.

In the result, the second appeal is dismissed and in this Court I direct each party to bear his costs.

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Varadachariar and Mr. Justice Burn.

1934, August 23.

KAILASANATHA MUDALIAR AND THREE OTHERS (DEFENDANTS 1 TO 4), APPELLANTS,

v.

PARASAKTHI VADIVANNI AND ANOTHER (PLAINTIFFS 2 AND 3), RESPONDENTS.*

Hindu Law—Daughter—Stridhanam of mother inherited by—Surplus income—Devolution of, on daughter's death—Surplus income accretion to mother's estate, if—Marriage—Asura form of—Essence of.

Two daughters of a deceased Hindu woman sued, as her heirs, for the recovery, *inter alia*, of certain properties purchased out of the income accruing from their mother's estate subsequent to her death, and of a large sum, by way of profits, on the ground that for a number of years their father and their

(1) (1901) I.L.R. 26 Bom. 305.

* Appeals Nos. 434 of 1928, 88 of 1929 and 236 of 1932.