GOPALASWAMI v. SWAMINATHA. — LEACH C.J.

The Court has been informed that a resale may not be necessary as the first defendant has come to an arrangement with the fourth defendant and the tenth defendant, who now represents the sixth defendant. If a resale is not necessary as the result of an arrangement between the parties, the receiver will nevertheless be entitled to his commission. By consent it is agreed that, in the event of there being no resale, the first defendant shall pay into Court as the receiver's commission a sum of Rs. 900. Liberty will be given to the receiver to apply to the Court in the event of this order not being complied with.

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Varadachariar and Mr. Justice Abdur Rahman.

1938, November 10.

YERLAGADDA MAHALAKSHMI (PLAINTIFF), APPELLANT,

v.

MIDDE SOMARAJU AND SIX OTHERS (DEFENDANTS), RESPONDENTS.*

Transfer of Property Act (IV of 1882), sec. 101—Principle underlying section.

Though section 101 of the Transfer of Property Act is generally invoked in cases where the rights of mesne encumbrancers come up for decision, the principle of the section is not limited to those cases. It only lays down a general rule of presumed intention and, where the later conveyance will be inoperative as against any intermediate right, whether

* Appeal No. 245 of 1934.

founded on an encumbrance or on an attachment, the principle must be held equally to apply.

APPEAL against the decree of the District Court of East Godavari at Rajahmundry in Original Suit No. 1 of 1932.

B. Somayya for *K. Bhimasankaram* for appellant.

P. Somasundaram for seventh respondent.

Respondents 1 to 6 were not represented.

VARADA-CHARIAR J.

The JUDGMENT of the Court was delivered by VARADACHARIAR J.—The plaintiff-appellant sued to recover money due under a mortgage deed for Rs. 3,000 executed in her favour by defendants 1 to 3 and their father on 13th March 1917. The seventh defendant was the principal contesting defendant. His defence was in the main founded upon certain events that happened in 1918 and 1920.

In August 1918, a third party who had a money claim against the mortgagors attached some of the mortgaged items before judgment pending his money suit against them. On 2nd October 1918 the mortgagors purported to sell the mortgaged items to the plaintiff under the original of Exhibit I partly for the mortgage amount and partly for a further consideration of Rs. 441. When the money decree-holder attempted to bring the properties to sale on the basis of the attachment already made, the plaintiff filed a claim petition, Exhibit G, on 29th September 1920. In this petition she claimed one of two reliefs: she set up her sale and asked that the property should be released from attachment; in the alternative, she asked that, even if the sale should be held to be invalid as against the attaching decree-holder, the execution sale should be directed to be held subject to the mortgage in her favour. It appears from the endorsement

MAHALAKSHMI v. SOMARAJU.

VARADACHARIAR J.

on Exhibit G that the decree-holder himself had referred in his sale proclamation to the mortgage in the plaintiff's favour but suggested that it was supported by consideration only to the extent of Rs. 2,500. When the matter came on for final disposal the executing Court held that the sale, having been effected subsequent to the attachment, was invalid as against the decree-holder and the Court directed that the sale should be held subject to the mortgage "referred to by the decree-holder". The property was accordingly sold subject to the mortgage and purchased by the decree-holder himself, who in turn conveyed it to the seventh defendant as the result of a decree for specific performance of an agreement entered into between them. The result of the execution sale was that the plaintiff was deprived of possession of items 1, 2 and 4 to 6 of the plaint schedule and retained possession only of items 3 and 7. The plaintiff accordingly filed this suit for the recovery of the amount due under the mortgage, contending that, as the sale had failed, she was entitled to fall back upon the mortgage. The seventh defendant contended that the sale must be deemed to have extinguished the mortgage and that the subsequent events could not revive the plaintiff's claim under the mortgage. The learned Subordinate Judge gave effect to this contention and dismissed the suit. The seventh defendant raised other contentions which formed the subject-matter of the other issues raised in the case. One of them was a plea of partial discharge which forms the subject-matter of the fourth issue. Another was a claim that the plaintiff should give credit as against the mortgage amount and the interest due thereon for the profits realised by her during the time that she had been in possession of the properties sold to her. Finally, there was a question

of the amount which the plaintiff was entitled to recover in view of the fact that she still retains as vendee two items of the hypotheca.

In so far as the lower Court dismissed the plaintiff's suit, we are unable to concur in its decision. The decision is mainly based on the judgment of this Court in *Daso Polai* v. *Narayana Patro*(1). We shall presently show that that case is distinguishable on its facts ; but we think it right to add that we are, with all respect, unable to concur in some of the observations in that case. In the present case, the Order, Exhibit G-1, was clearly one under order XXI, rule 62, Civil Procedure Code. As we have already stated, the plaintiff put forward alternative claims in her claim petition, one on foot of the sale in her favour and the other on foot of the mortgage. The Court rejected the claim based on the sale but upheld the claim based on the mortgage. Neither party took steps to impeach that order and it became conclusive between the claimant and the decree-holder in the money suit. The Court accordingly purported to sell only the equity of redemption and the decree-holder (who became the auction purchaser) having purchased only the equity of redemption could convey only that interest to the present seventh defendant. In respect of these facts the position in *Daso Polai* v. *Narayana Patro*(1) was very different. The claim petition there was dismissed as preferred too late and, as no suit was brought by the claimant under Order XXI, rule 63, Civil Procedure Code, that order became final. It was in those circumstances impossible to imply any adjudication that the claim founded on the mortgage was well-founded. The learned Judges had therefore to hold that the reference to the mortgage

(1) (1933) I.L.R. 57 Mad. 195.

MAHALAKSHMI v. SOMARAJU.

VARADACHARIAR J.

in the sale proceedings amounted to nothing more than a notice to intending purchasers under Order XXI, rule 66, Civil Procedure Code. It was on that footing that they held that the Court-auction-purchaser was not precluded from contesting the existence or validity of the mortgage. On the facts of the present case, as we have set out above, neither the decree-holder in the money suit nor the Court-auction-purchaser nor the seventh defendant as the purchaser from him could go behind the order in the claim proceedings which upheld the mortgage claim. We may also point out that in *Daso Polai* v. *Narayana Patro*(1) the learned Judges laid stress on the fact that even in the claim petition the claim based on the mortgage was never put forward and that the claimant insisted that the mortgage had been discharged by the sale deed in his favour. The conclusion reached in that case that the mortgage had been extinguished has largely been based upon this ground. That ground also will not avail the seventh defendant in this case because, as already stated, the claim was put forward both on the mortgage and on the sale. The portion of the judgment with which we are unable to agree is the interpretation which the learned Judges have placed on section 101 of the Transfer of Property Act. With all respect, we think that in a case like the present it must be presumed that it is to the advantage of the mortgagee to keep his interest as mortgagee and his interest as purchaser of the equity of redemption distinct because of the intervening attachment against which his sale cannot be effective.

The question in this class of cases is not whether the sale is not effective as between the vendor and the

(1) (1933) I.L.R. 57 Mad. 195.

vendee, but whether, there being the possibility of the sale proving ineffective as against a third party, it is not to the interest of the mortgagee not to treat his mortgage as extinguished by the sale. In the application of this principle of *presumed* intention, it makes no difference whether the third party is allowed to claim in preference to the sale on the ground of his being a subsequent encumbrancer or on the ground of his being an attaching decree-holder. If the decree in pursuance of which the attachment was made is paid off, the sale will of course stand as between the vendor and the vendee and the mortgage will be satisfied. But, if in pursuance of the attachment the properties are brought to sale in execution, the vendee is deprived of his rights under the sale to the extent to which the properties are sold in execution and we think that there is no meaning in saying that even to this extent the sale is operative as between the vendor and the vendee. This seems to us to be the principle of the decision in *Gopal Sahoo* v. *Gunga Pershad Sahoo* (1) which we are prepared to follow. The learned Subordinate Judge distinguished that case as a decision under the Civil Procedure Code of 1882, according to which he thought that a transfer pending an attachment was wholly void whereas under the present Code it is void only as against the rights enforceable under the attachment. This distinction drawn by the learned Judge is obviously erroneous. The law has always been that a transfer pending an attachment is void only as against the rights enforceable under the attachment.

The learned Counsel for the respondent drew our attention to a decision of the Allahabad High Court,

(1) (1882) I.L.R. 8 Cal. 530.

MAHALAKSHMI v. SOMARAJU. — VARADACHARIAR J.

Lachman Prasad v. *Lachmeswar Prasad*(1). With all respect, we are unable to follow that decision. The sale there was made to the father of the mortgagee and the father was a member of a joint Hindu family with the mortgagee. The sale deed directed that a portion of the consideration should be applied by the vendee to discharge the mortgage bond in favour of his son. The learned Judges observed that the father and the son must be treated as virtually one and the same person and that the direction to the father to pay off the mortgage must be treated as an extinction of the mortgage debt. We do not find any reference in the judgment to the principle of section 101 of the Transfer of Property Act. In the leading case of *Gokaldas Gopaldas* v. *Puranmal Premsukhdas*(2) their Lordships of the Privy Council referred to the practice prevailing in England of circumventing the doctrine of *Toulmin* v. *Steere*(3) by taking a conveyance of the equity of redemption in favour of trustees for the benefit of the prior mortgagee and added that in India it was unnecessary to resort to this conveyancing device and as a rule of equity the principle of presumed intention to keep the mortgage alive might be applied. It seems to us that what was done in the Allahabad case was practically the conveyancing device referred to by their Lordships of the Privy Council in *Gokaldas Gopaldas* v. *Puranmal Premsukhdas*(2) and, if even under the decision in *Toulmin* v. *Steere*(3) such a device would have prevented the extinction of the mortgage, we venture to think, with all respect, that it would be *a fortiori* so in this country.

(1) (1922) 20 A.L.J. 51 ; 66 I.C. 203. (2) (1884) I.L.R. 10 Cal. 1035 (P.C.).
(3) (1817) 3 Mer. 210 ; 36 E.R. 81.

Though section 101 of the Transfer of Property Act has generally been invoked in cases where the rights of mesne encumbrancers come up for decision, the principle of the section is not limited to those cases. It only lays down a general rule of presumed intention and where the later conveyance will be inoperative as against any intermediate right, whether founded on an encumbrance or on an attachment, the principle must be held equally to apply. In *Dinobundhu Shaw Chowdhry* v. *Jogmaya Dasi*(1) this question had to be considered in respect of the effect of an intermediate attachment, as in the present case, and their Lordships observed (at page 164):

> "It is idle to contend that there was any intention to extinguish the old mortgages for the benefit of the execution creditor or any purchaser at the sheriff's sale."

We must accordingly hold that the plaintiff's claim under the suit mortgage has not been extinguished by the subsequent sale and that it is enforceable in the events that have happened.

Mr. Somasundaram next contended that, according to the proper construction of the order (Exhibit G-1), the mortgage must be held to be valid only to the extent of Rs. 2,500. We do not think that is the effect of the order. The only point then decided was that as between the sale and the mortgage the Court upheld the mortgage and negatived the claim under the sale. This is made clear by the use of the words "mortgage *referred* to by the decree-holder" instead of words like "mortgage *admitted* by the decree-holder". The Court has now found that the mortgage was fully supported by consideration and nothing has been shown against the correctness of that finding.

(1) (1901) I.L.R. 29 Cal. 154 (P.C.).

MAHALAKSHMI v. SOMARAJU. — VARADACHARIAR J.

It remains to deal with two other questions raised by Mr. Somasundaram on behalf of the seventh defendant. He first contended that the lower Court's finding on the fourth issue was not in accordance with the evidence and that the issue should have been found in his client's favour. This relates to a plea of discharge, it being the seventh defendant's case that, in or about April 1925, he paid to the plaintiff a sum of Rs. 1,950 in full quit of so much of the mortgage debt as would be recoverable from the properties agreed to be purchased by the seventh defendant. Though the seventh defendant is not able to fix the exact date of payment, he states that the agreement between himself and the Court-auction-purchaser was in February 1925 and that the payment to the plaintiff was about two months later. Though the learned Subordinate Judge has not discussed in detail the evidence bearing upon this question, he has clearly indicated that he was not impressed by the evidence adduced in support of the plea of discharge. We have been taken by Mr. Somasundaram through the relevant portions of the oral evidence and we see no reason to come to a different conclusion. The seventh defendant has not thought fit to take any voucher for the payment of such a large sum of money nor has he even cared to insist upon the payment being endorsed on the mortgage bond. Even according to his version, the plaintiff promised to make the endorsement in due course and yet, after the plaintiff had failed to do so for more than a year, the seventh defendant never even thought fit to send any notice to the plaintiff complaining of her conduct. Further, the seventh defendant's evidence as to the circumstances under which the alleged payment was made and the manner in which he found the money to make the payment, is not at all convincing. It is

very doubtful if at or about this time he had the money to pay at all. D.W. 1, whose help has been availed of to support this story apparently because he had to receive some money from the plaintiff, is the son-in-law of the seventh defendant's brother and, assuming it to be true that he had to receive a sum of Rs. 200 from the plaintiff and did receive it about this time, we are not by any means satisfied that there is any connection between that transaction and the alleged payment by the seventh defendant to the plaintiff. The remaining witnesses who support this story of payment do not really seem to have had anything to do with the transactions between the plaintiff and the seventh defendant and, as one of them admits, it is probably the seventh defendant's local influence that has enabled him to get these witnesses to support his story. We must accordingly find against the seventh defendant on his plea of alleged discharge.

The second issue raised the question of the accountability of the plaintiff for the profits received by her from the lands which had been purchased by the seventh defendant. The law on this point is not by any means settled. We may observe in passing that the observations in *Muthammal* v. *Razu Pillai*(1) are not wholly reconcilable with the view taken in *Natesan Chettiar* v. *Ramalinga Chettiar*(2). As we do not propose to decide the question as an abstract question of law in this case, we do not think it necessary to refer to the cases in detail. We only wish to guard ourselves against being understood as concurring in all the observations in *Natesan Chettiar* v. *Ramalinga Chettiar*(2); for instance, the statement, that a purchase by a prior mortgagee in execution

(1) (1917) I.L.R. 41 Mad. 513, 518. (2) (1937) 46 L.W. 332.

MAHALAKSHMI v. SOMARAJU. — VARADACHARIAR J.

of a decree obtained in his suit without impleading the puisne mortgagee therein is a *nullity* and will not be effective even to pass the title of the mortgagor as against the puisne mortgagee, seems to us to have been too broadly made. In the circumstances of the present case, and in view of the fact that a petition has been filed before us on behalf of the seventh defendant for relief under the Madras Agriculturists Relief Act (IV of 1938), we think it best to hold that no accounting is necessary and that it would be more equitable to say that, after 23rd October 1920, the plaintiff is not entitled to claim interest as against the seventh defendant to the extent of the proportion of the mortgage debt recoverable from the properties in the seventh defendant's possession. In this view, there is no occasion, in our opinion, to deal with the petition under the Madras Agriculturists Relief Act (IV of 1938) either. As the plaintiff has become the owner of the equity of redemption in some of the items of the mortgaged property, the mortgage must be held to have been split up and the plaintiff will be entitled to a decree only for a proportionate share of the mortgage debt as against the properties purchased by the seventh defendant.

The parties are not able to agree before us as to the proportion. The lower Court will ascertain the amount due for principal and interest as per terms of the mortgage bond on 23rd October 1920, the date on which the seventh defendant's vendor became the Court-auction-purchaser; out of that amount, there will be a decree for sale of the properties purchased in that Court sale by the seventh defendant's vendor for an amount bearing the same proportion to the mortgage debt due on that date as the said properties

bear to the entirety of the mortgaged properties valued as on the date of the mortgage. MAHALAKSHMI v. SOMARAJU.

The appeal is allowed and the case will be sent back to the lower Court to give effect to the above directions and pass a preliminary decree for sale for the amount ascertained as above. The plaintiff and the seventh defendant will pay and receive proportionate costs both here and in the Court below.

G.R.

APPELLATE CIVIL.

Before Mr. Justice King and Mr. Justice Krishnaswami Ayyangar.

KALYANASUNDARAM PILLAI (JUDGMENT-DEBTOR—DEFENDANT), APPELLANT, 1938, October 6.

v.

VAITHILINGA VANNIAR (DECREE-HOLDER—SECOND PLAINTIFF), RESPONDENT.*

Provincial Insolvency Act (V of 1920), sec. 78 (2)—Period of pendency of insolvency—Exclusion of, in computing period of twelve years fixed by sec. 48 of Code of Civil Procedure (Act V of 1908)—Sec. 48, Civil Procedure Code, sec. 78 (2), Provincial Insolvency Act, and art. 182 of Limitation Act (IX of 1908)—Scope and effect of.

The judgment-debtor in a suit in which a decree was passed on 29th August 1917 was adjudicated an insolvent on 21st December 1923. The adjudication was annulled on 19th August 1929. On 18th April 1935 the decree-holder filed a petition for the execution of the decree. It was the last of four execution applications filed after the period of twelve years from the date of the decree, each of them being within time

* Appeal Against Order No. 482 of 1937.