APPELLATE JURISDICTION (a)

Special Appeal No. 116 *of* 1866.

MUNI REDDI........................ *Special Appellant.*

VENKATA REDDI and 3 others. *Special Respondents.*

Plaintiff in 1862 purchased a house of 1st defendant which was already hypothecated to 2nd defendant. In 1863, 2nd defendant sued 1st defendant in the Small Causes Court for the debt on account of which the hypothecation had been made and got a judgment. He then had the house attached and put up to auction, bought the right, title, and interest of the judgment debtor in the premises, and entered and continued in possession. Plaintiff claimed, in the present suit, to recover possession in right of his purchase in 1862. *Held* that, as 1st defendant had no interest whatsoever in the property at the date of the purchase, 2nd defendant's purchase was not a purchase from the debtor in part satisfaction of his debt, 2nd defendant's claim still existed, and he could pursue his remedy either against the person or upon the property : and that, as he was in possession, he had a right to demand the liquidation of the debt due to him before submitting to be turned out.

Held also, that the obligation of the 1st defendant gave the 2nd defendant a two-fold cause of action and a two-fold remedy : one against the person, and the other against the thing.

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THIS was a Special Appeal from the decision of T. Krishnasàmi Iyer, the Principal Sadr Amin of Chittur, in Regular Appeal No. 623 of 1814, confirming the decree of the District Munsif's Court of Tirupati in Original Suit No. 33 of 1863.

Srinivasachariyar, for the special appellant, the 2nd defendant.

Tirumalachariyar for *Parthasarady Aiyangar*, for the 1st special respondent, the other special respondents not appearing in person or by Counsel.

The Court delivered the following judgments, in which the facts sufficiently appear.

INNES, J.—Plaintiff in 1862 purchased of 1st defendant a house which was already hypothecated to 2nd defendant.

In 1863, 2nd defendant sued 1st defendant in the Small Causes Court for the debt on account of which the hypothecation had been made.

(a) Present : Innes and Collett, J. J.

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As the suit was brought in the Small Causes Court, there could of course be no claim to an enforcement of the lien, and the judgment was, as in all Small Cause Cases, a mere judgment for money.

2nd defendant, however, had the house attached in execution and finally put up to public auction. 1st defendant was then living in it as the tenant of plaintiff, but the sale by 1st defendant to plaintiff being unknown to 2nd defendant, he purchased at auction the right, title and interest of the judgment debtor in the house, and entered into and continued in possession. Plaintiff's claim in the present suit is to recover the house in right of his purchase of 1st defendant in 1862.

The fact of the purchase has been found by both the Munsif and the Principal Sadr Amin. The fact of 2nd defendant's hypothecation and its priority to the sale to plaintiff are also found by the Munsif and assumed by the Principal Sadr Amin, and they have given judgment for plaintiff.

The judgment of the Principal Sadr Amin proceeds upon the supposition that the High Court have held that when a person sues in a Small Causes Court for the recovery of an amount due to him which is secured upon immovable property, he abandons his right to the security, and that this suit having been brought subsequent to the promulgation of this opinion, the plaintiff is bound by it, implying that otherwise he would not be bound. There are here two erroneous views. The proceedings of the High Court,(a) to which allusion is made, did not arise out of any case coming before the Court for decision, and amounted merely to an expression of opinion for the guidance of the Courts. But supposing them to be a judicial decision, it would make no difference whether the decision were given prior or subsequent to the date of institution of plaintiffs' suit. The High Court does not by its decisions make the law, it merely declares what the law has been and is. And if the law were so prior to the institution of plaintiff's case, it would make no difference that the point was not decided until subsequently. Further, I think that the proceedings

(a) 29th October 1862.

have not the meaning attributed to them. They amount simply to saying that a plaintiff cannot in a Small Causes Court seek to enforce his lien upon real property, and that when he brings a suit in such a Court for a debt secured upon real property, he must *in that suit* forego the enforcement of his lien.

The loss of plaintiff's right of lien is not an effect of the judgment upon the claim in the Small Causes Court. The view that the judgment would be attended with this effect proceeds upon the supposition that only one cause of action arises out of the obligation, for which, if that were so, there could of course be only one action. But this supposition appears to be erroneous.

An obligation to pay a certain amount, with hypothecation of property as security for payment, is the ordinary contract to pay personally, conjoined to an alternative contract that, in the event of non-payment by the obligor, the amount may be realised from the property hypothecated ; and if the remedies pursued against the obligor personally are thought insufficient, there is a good cause of action against him in respect of the hypothecated property. Both remedies may be pursued at the same time, although of course the claimant cannot recover more than the amount due on the obligation.

If, however, in the action brought against the obligor personally, he has recovered a judgment for the whole amount of his claim, and, on proceeding to execution, attaches property in which the judgment debtor has some title, however small, and on its being put up to auction to an amount equal to or exceeding the amount of his debt, purchases the right, title and interest therein of the judgment debtor in satisfaction of the judgment, his claim is satisfied and his lien is gone, as he has elected to take the title of the judgment debtor in exchange for the debt.

If, however, in the same circumstances, he purchases for a sum less than that of the judgment debt, then his claim is only satisfied to that amount and he has still a cause of action in respect of the hypothecated property, which is

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liable for the balance of the debt in whose hands soever it may be.

But supposing the judgment debtor to have no title at all in the property sold, then no property has passed from the judgment debtor to the judgment creditor, and the claim is not even partially satisfied.

Now, in the present case, 2nd defendant purchased the house at the Court sale for 102 Rupees, an amount less than that of the judgment debt, and if the 1st defendant had had any interest in the property, however small, at the date of the purchase, I should be of opinion that 2nd defendant had chosen to barter 102 Rupees worth of his judgment debt for the title, such as it might turn out to be, of the 1st defendant. But this is not the case here—1st defendant had no interest whatsoever in the property at the date of the purchase, and therefore 2nd defendant's purchase was not a purchase from the debtor in part satisfaction of his debt. 2nd defendant's claim still exists in its two-fold form, and he could pursue his remedy either against the person or upon the property, and, as he is in possession, he has a right to demand the liquidation of the debt due to him before submitting to be turned out.

Before determining the case, however, it is necessary that we should have before us a finding upon the genuineness of the hypothecation deed, which the Principal Sadr Amin has merely assumed.

The suit should therefore be remitted to the Principal Sadr Amin to find whether this exhibit is genuine, and if so, the amount due to 2nd defendant under it at the time of the purchase. If this document be genuine, the hypothecation is necessarily prior to the sale to plaintiff.

Collett, J.—I am of the same opinion. The sale by 1st defendant to plaintiff is found by both Courts and was prior in date to the sale by auction to the 2nd defendant, but the hypothecation deed by the 1st defendant to the 2nd defendant is found by the Munsif to be genuine and to have been prior in date to the sale to the plaintiff. The Principal Sadr Amin does not very distinctly find the authenticity of the hypothecation deed.

Clearly the Principal Sadr Amin has quite misunderstood the proceedings of this Court ; they could not and did not purport to make any new law or affect any one's rights.

Upon the facts as found, the 2nd defendant bought at the auction nothing, for he could only have bought the 1st defendant's equity of redemption, and that the 1st defendant had already parted with to the plaintiff. But the question is, whether the 2nd defendant, having got into possession, is not entitled to use his right of lien by the hypothecation as a shield.

That is the question which both Courts have considered and decided ; it is not very clearly repeated in the grounds of special appeal, some of which indeed are quite untenable, but it is the question which we allowed to be discussed as the real and indeed sole ground for an appeal here.

Both Courts have considered that the 2nd defendant, by pursuing his remedy against the person of the 1st defendant in the Court of Small Causes, has lost his remedy against the thing hypothecated. But I think that that is not so. The obligation of other 1st defendant gave the 2nd defendant a two-fold cause of action and a two-fold remedy, one against the person and the other against the thing. The 2nd defendant might, at his option, have pursued both remedies concurrently, or have pursued that against the thing without having recourse to that against the person, or *vice versa*. Or, as often happens, he might have lost by lapse of time under the statute of limitations the remedy and cause of action against the person, whilst the remedy and cause of action against the thing might remain unbarred. In point of fact he first pursued his remedy against the person, but he did not therefore lose his remedy against the thing. The plaintiff bought what the 1st defendant had to sell, which was the equity of redemption. The auction sale of the property was simply in execution of the personal decree against the 1st defendant, and not an enforcement of the 2nd defendant's remedy under the hypothecation against the thing.

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The 2nd defendant at the auction bid either more or less than the sum decreed in his favour ; if more, then the sum decreed as due on the bond was set off in part payment of the purchase money and the excess is the loss which the 2nd defendant must now bear ; if he bid less, then to that extent only was his claim under the decree in appearance, but, as it now turns out, not in fact, satisfied. But having got into possession, he is, I think, entitled to say to the plaintiff : " I was unfortunate when pursuing my remedy in buying a shadow, but by pursuing my remedy against the person, I did not abandon my remedy against the property, and I am entitled to fall back upon that and to use it as a shield, and you cannot turn me out under your title derived from the first defendant without first paying me what was due under my lien when I got into possession."

The sum due under the hypothecation bond, Exhibit I, will of course be the sum decreed by the Court of Small Causes, but less the costs of that suit. I think the suit should be remitted and the Principal Sadr Amin should be required to find :—

I. Whether the hypothecation deed, Exhibit I, is genuine ? II. If so, what sum was due by the first defendant to the 2nd defendant under Exhibit I at the time that 2nd defendant entered into possession ?

Ordered accordingly.