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November 20.

VELLAIAPPA CHETTY *v.* PITCHA MAULA.

(ALIM, Special Mortgagee; VELLIAPPA CHETTY and others, Simple Creditor).

D. C., Kurunegala, 1,625.

Special mortgage of movables—Preference to proceeds of sale—Effect of section 352 of Civil Procedure Code.

BONSER, C.J.—A special mortgagee of movables is entitled to be preferred to all other creditors of the debtor in respect of the proceeds of the sale of such movables.

Since the price of the property sold in execution takes the place of the property itself, the Court is bound to hand over to the special mortgagee so much of the money as would cover his claim.

Section 352 of the Civil Procedure Code has not the effect of repealing the Roman-Dutch Law as to the right of a special mortgagee of movables to preference in the proceeds of the sale of those movables.

Konamalai v. Sivakolunthu (*9 S. C. C. 203*), commented upon.

PLAINTIFF having sued out writ of execution against the defendant, certain goods were seized and sold by the Fiscal as belonging to the defendant, and the Fiscal brought into Court the sum of Rs. 1,160, stating at the same time that the goods sold under plaintiff's writ were also under seizure under five other writs, including writ No. 11,890 of the District Court of Colombo. The Fiscal further reported that the holder of 11,890 claimed preference over the proceeds of the sale as mortgagee of the goods, while the other writ-holders claimed concurrence.

Plaintiff in case No. 11,890 appeared in Court, alleging that the goods sold had been specially mortgaged to him, and claimed the proceeds of the sale. Notice of this claim was given to the other writ-holders.

The District Judge found that the identity of the goods mortgaged with the goods sold was not satisfactorily proved, rejected the mortgagee's claim to preference, and allowed him concurrence with the money decree-holders.

The mortgage-creditor appealed.

Bawa, for appellant.

Dornhorst, for respondent.

20th November, 1899, BONSER, C.J.—

In this case, the appellant was the mortgagee of certain movable property by a duly registered notarial deed. He obtained judgment against the debtor, and various other simple creditors of the debtor also obtained judgments. The property of the debtor was

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sold, and amongst it the movable property mortgaged to the appellant and the proceeds of the sale are in the hands of the Court. The appellant claims to be paid his mortgage debt out of the proceeds of the sale of the mortgaged property in preference to the ordinary judgment-creditors. The District Judge refused to allow this to be done, on the ground that the identity of the goods was not established to his satisfaction.

Mr. Dornhorst, who appeared for the respondent, admitted that he could not support that finding of the District Judge; but he contended that even assuming that the identity of the goods was established, the result must be the same, and he relied on certain dicta of the judges who decided the case of *Konamalai v. Sivakolunthu* (*9 S. C. C. 203*) as establishing the proposition that the Roman-Dutch Law as to the right of a special mortgagee of movables to a preference in the proceeds of the sale of those movables was repealed by the provisions of the Civil Procedure Code.

It is difficult to believe that the Legislature can have intended to make so startling a revolution in the commercial law as would be effected by mortgagees of movables losing their right to the proceeds of the sale of the mortgaged goods. I should have expected that, if that was the intention of the Legislature, it would have expressed it in unmistakable terms and not left it to be inferred from the language of any obscure section in a Procedure Code. The section which is supposed to have effected this change is section 352 of the Civil Procedure Code, and I think I am not doing that section an injustice in saying that it is loosely drawn, for it speaks of the last preceding section when it means the section itself. I do not understand the argument of some of the members of the Court, in the case referred to, that it is impossible to believe that the Legislature intended only to provide for some cases and not for all, for I find that the Code itself in section 4 contemplates the contingency of various matters being left unprovided for, and provides that in such cases the existing practice is to remain in full force. It seems to me that section 352 does not expressly take away the rights of the mortgagee. Those rights must be determined by the law as it existed at the date of the passing of the Civil Procedure Code. As to that there is no doubt. Mr. Dornhorst admitted that the law was clear. It seems to me that section 352 would be given its legitimate force and effect by referring it to cases where there is competition between holders of ordinary money decrees. The proviso at the end of the section seems to me to manifest the intention of the Legislature not to interfere with the rights of mortgagees, and I must say I fail to

see on what principle the mortgagee can be deprived of his right to the proceeds of the movables hypothecated to him. The law is clear that, when property is sold by a Fiscal, the purchase money takes the place of the things sold. Why should the fact that the Court has sold property and converted it into money deprive the mortgagee of his rights? It is an old maxim that the act of the Court injures no one. It seems to me that if, whilst the money is in the possession of the Court, the mortgagee comes forward and establishes that he had a mortgage over the goods which that money represented, the Court is bound to hand over to him so much of the money as would cover his claim. The section provides that, if the money is paid to the wrong person, the person entitled may sue and compel a refund. Surely the Court is not to commit the roundabout injustice of deliberately paying money to a person not entitled to it and referring the person entitled to his right of action.

I am therefore of opinion that the mortgagee in this case is entitled to be paid his mortgage claim out of the proceeds of the sale of the hypothecated property.

WITHERS, J.—

In my opinion, too, this appeal succeeds. In the first place, it is clear by Roman-Dutch Law that the appellant's security is a special hypothec.

The statement of the law will be found in Voet (*XX. 1. 2: Taburna obligata, si dominus tabernæ merces inde per tempora distraxerit et alias comparaverit, omnia quæ postea in ea taberna deprehenduntur, pignori esse creduntur.* As such special mortgagee the appellant has a right to be preferred to all the creditors of his judgment-debtor. He has a right to take from the proceeds, before it is distributed to them, so much as will satisfy his specially secured debt.

If that right has not been taken away by the Civil Procedure Code, it ought to be sustained.

Now, section 352 of the Civil Procedure Code has been pointed out to us as showing that a special mortgagee is not entitled to the preference which he enjoyed before the Code; but I adhere to the view expressed by me in *3 C. L. R., 37*. That judgment pointed out that sections 232 and 352 taken together indicate the intention of the Legislature to preserve the preferential rights of special mortgagees. But if I pressed a fuller meaning into those sections than they can be found to contain, then I rely on the provisions of the 4th section of the Civil Procedure Code, which says that

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where no provision is made by this Code the procedure and practice hitherto in force shall be followed.

Then Mr. Dornhorst pointed out that the appellant had not got a special mortgage decree in this case. I have read the decree, and it purports to be in accordance with section 201 of the Civil Procedure Code. The District Judge has followed the form in the schedule adapted to that section.

If section 201 is intended to apply to hypothecary actions (and the practice of the Courts is so to apply it), I venture to think that it would be well to include in the judgment in such an action a declaration that the property is specially bound and executable for the particular debt.