

Present: Mr. Justice Wendt and Mr. Justice Middleton.

MUTTIAH CHETTY *v.* DON MARTINES.

WIJESKERE APPUHAMI *et al.*, Claimants.

C. R. Hatton, 4,773.

1904.

January 15.

*Mortgage of movables—Sale of mortgaged property by unsecured creditor—
Proceeds of sale—Preference—Absence of mortgage decree—Roman-
Dutch Law—Civil Procedure Code, ss. 4, 232, and 352.*

A mortgagee of movable property hypothecated by an instrument in writing duly registered, without delivery of possession, is entitled to preference in respect of the proceeds sale, where such property is sold in execution at the instance of an unsecured creditor; and in order to claim such preference it is not necessary that he should have obtained a decree on the bond.

THE facts are fully stated in the judgment of Wendt J.

Bawa, for the claimants, appellants.

Sampayo, for the plaintiff, respondent.

Cur. adv. vult

1904. 15th January, 1904. WENDT J.—
 January 15.

The question raised upon this appeal is whether the appellants, the mortgagees, without possession, of certain movable property, are entitled to be paid the proceeds sale of that property in preference to the plaintiff, who procured the sale in execution of his decree in the present action on an unsecured debt. The appellants' mortgage was created by an instrument in writing dated September 1902, and duly registered. The property consisted of certain shop goods, and the mortgagor, the defendant in the action, remained in possession of them. The transaction was in fact what would be known in England as a bill of sale. Plaintiff's decree was dated 19th June, 1903, and the sale took place on 6th July following. On 9th July the appellants presented a petition in which the plaintiff and defendant were named as respondents, and which was supported by affidavit. Their prayer was that out of the proceeds sale a sum of Rs. 278.40, representing the price of goods comprised in the mortgage, be paid out to them in preference to plaintiff. They alleged that they were unaware of the proceedings in the action until 26th June, when it was impossible for them to sue upon their bond and obtain a decree before the proceeds sale should be drawn by the plaintiff.

The Commissioner held that a decree was essential before a mortgagee could claim the proceeds sale of his security, and therefore disallowed the application. The mortgagees have appealed.

It was admitted on behalf of the appellants that in every case hitherto decided in favour of the mortgagees' preferent right to the sale proceeds he had held a decree, but it was submitted that this was an accident, and that the Court had never laid it down that a decree was a condition precedent to the enforcement of the right. It is certain that prior to the enactment of the Code of Civil Procedure no decree was necessary in the case either of a secured or of an unsecured creditor, before preference or concurrence, as the case might be, was allowed in competition for a fund *in medio* [see *Sinnapulle v. Tilliamharam* (1), *Casy Lebbe Marikar v. Aydroos Lebbe Marikar* (2)]. But section 352 of the Code now requires every unsecured creditor at least to hold a decree [*Konamalai v. Sivakulanthu* (3)], and the question is, whether that requirement applies as well to debts secured on movable property. The section does not embrace mortgages of land, because the land continues subject to the incumbrance notwithstanding the sale, and in such event the proviso debars recourse to the sale proceeds. So far as this proviso goes it was held in *Meera Saibo v. Muttu Chetty* (4)—and I think rightly held—that a mortgage over movables is not an

(1) (1878) 2 S. C. C. 5.

(2) (1890) 1 C. L. R. 1.

(3) (1891) 9 S. C. C. 203.

(4) (1893) 3 C. L. R. 37.

incumbrance which continues to attach to the property after its sale, so that that proviso in itself will not debar the mortgagee from claiming the proceeds. 1904.
January 15.

WENDT J.

What are the rights of a mortgagee of movable property which the debtor retains in his own possession? He has the right of suing his mortgagor and bringing the property to sale if it still remains the property of his debtor. When so sold he will rank preferentially on the proceeds. If, however, the goods have been sold by the debtor, he cannot follow them in the hands of the purchaser. Nor can he prevent such sale, which is within the rights of every mortgagor under the Roman-Dutch Law. Neither can he prevent the seizure and sale by an unsecured creditor of the mortgagor [*Wijewardene v. Maitland* (1)]. His "security" would therefore depend on his being able (as the mortgagee in *Meer Saibo v. Muttu Chetty* did) to obtain a decree on his mortgage and seize the proceeds sale under section 232 before they were handed over by the Court to the creditor who made the levy. Considering the short notice of sale necessary in the case of movable property, and the improbability of the mortgagee receiving notice of the action or of the seizure, this means that in most cases the mortgagee's security will be gone before he knows anything about it. But to this it may be answered that that is inseparable from the nature of the security, and that it will be equally defeated by a private sale by the debtor.

It seems to me that the point before us is completely covered by authority. In *Meera Saibu v. Muttu Chetty* Withers J. pointed out that *Konamalai v. Sivakulantha* was an authority for insisting on decrees in the case of unsecured claims only, and he gave preference to a mortgagee of movables who had obtained his decree after the assets had been realized. In *Vellaiappa Chetty v. Pitcha Maula* (2) the mortgagee had a decree of the Colombo District Court, but he had not applied for execution to the Kurunegala Court, which held the assets, and this (it was argued) on the strength of *Konamalai v. Sivakulantha* deprived him of recourse to the proceeds. But Bonser C.J., and Withers J. held that section 352 of the Code was limited to the case of unsecured claimants, and that the case of a mortgagee was a *casus omissus* to which, in accordance with section 4 of the Code, the old law must still be applied. The following cases came under the consideration of this Court in the recent case of *Raheem v. Yoosoof Lebbe* (3); when Layard C.J. summed up their effect as follows: "The law, as laid down by the above-cited cases, appears to be that section 352 only affects cases where there is competition between holders of ordinary money decrees, and that sections 232 and 352 read together indicate the intention of the Legislature to preserve the preferential right of special mortgagees."

(1) (1893) 3 C. L. R. 7.

(2) (1899) 4 N. L. R. 311.

(3) (1902) 6 N. L. R. 169.

1904.
January 15. For myself I agree in this view, and it follows that the appellants
WENDT J. were entitled to be paid in manner claimed by them. I understand,
however, that in claiming Rs. 278.40 they are seeking to avoid
contributing to the cost of realization. That is not equitable.
They must bear their due proportion of that cost.

The appellants will have the costs of the appeal as well as of the
contention in the Court below.

MIDDLETON J.—I agree.

Appeal allowed.

