Present : Schneider and Garvin JJ. 1928.

ADAICAPPA CHETTY *v.* PERERA *et al.*

6—D. C. (Inty.) Colombo, 20,443.

Mortgage of movables—Sale under two hypothecary decrees—Right of preference of prior hypothecary creditor—Judicial hypothec.

Where movable property was sold in execution of hypothecary decrees entered in pursuance of two mortgages effected under duly registered instruments in writing,—

Held, that the prior mortgage creditor had a preferent right to the proceeds of the sale.

APPEAL from an order of the District Judge of Colombo.

H. V. Perera, for appellant.

H. H. Bartholomeusz, for respondent.

July 26, 1928. GARVIN J.—

The appellant and the respondent to this appeal were both holders of duly registered mortgages created over his stock in trade by one M. A. Perera who was doing business in the Pettah. The appellant sued on his mortgage in case No. 20,443 which was dated May 26, 1926, and obtained a hypothecary decree on July 9, 1926. The respondent, whose mortgage was created by a bond dated May 24, 1925, put his bond in suit in case No. 20,451 and obtained decree on July 10, 1926. In each instance an order to sell the property was issued to the Fiscal, but inasmuch as the appellant

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with great promptitude procured the issue of his order to sell on the very day on which decree was entered in his favour the order issued in case No. 20,443 was prior in date.

On July 23, 1926, the proctor for the appellant notified the Court of his decree and moved in case No. 20,443 that the Fiscal be directed not to give the respondent credit at the sale of this property which was advertised for August 7. This motion was allowed. On August 5, however, it was agreed that the respondent be allowed credit on his undertaking to bring into Court the proceeds of sale if it is held by the Court that the plaintiff in 20,451, *i.e.*, the present respondent, had a preferential right.

The property was ultimately purchased by a third party. The Fiscal duly made return to the orders to sell issued in the two cases, and reported that the nett proceeds amounting to Rs. 4,365·75 had been deposited by him in the Kachcheri.

Upon motion made at the instance of the respondent that the proceeds sale be paid to him as the holder of a decree under a prior mortgage a discussion took place and order was made by the learned District Judge upholding his claim to preference. The appeal is from this order.

At the time of the sale there was in the hands of the Fiscal two orders to sell issued by the Court in accordance with the decree entered in cases Nos. 20,443 and 20,451, and it is said that the Fiscal announced that he was selling the property under both orders. But in the view most favourable to the appellant the case is that of a sale of a pledge at the suit of a posterior hypothecary creditor. The respondent, a prior hypothecary creditor, who had earlier given notice, claimed that he had a preferent right to the proceeds realized by the sale of the pledge and his claim was admitted. Was it rightly admitted ?

It is well settled law in Ceylon that immovable property subject to hypothecs passes to a purchaser subject to the incumbrance—a prior hypothecary creditor therefore remains unaffected by the sale of such immovable property. It has also been held that when movable property subject to hypothecation is sold in execution of a judicial decree obtained by a third party the price succeeds in place of the thing—*pretium succedit in locum rei ;* and the right of the hypothecary creditor to preference in the proceeds has been recognized—vide *ex parte M. M. Abdul Rahman, Casy Lebbe Marikar v. Aydroos Lebbe Marikar.*[1] This judgment which approved and followed the judgment in *Ramen Chetty v. Hardie* [2] and has in turn been uniformly approved in a long series of judgments, of which it is sufficient to mention *Meera Saibo v. Muttu Chetty,*[3] *Vellaiappa Chetty v. Pitcha Maula,*[4] and *Muttiah*

[1] *1 C. L. R. 1.*
[2] *(1882) Wendt's Rep. 217.*
[3] *3 C. L. R. 37.*
[4] *4 N. L. R. 311.*

Chetty v. Don Martines,[1] establishes the right of a mortgagee of movables hypothecated by a duly registered instrument in writing without delivery of possession to preference in the proceeds sale thereof when seized and sold under an unsecured creditor's writ.

We have been invited to reconsider these judgments. It is urged that they proceed upon a misapprehension of a passage in *Voet XX. 1, 13*, which is relied on as authority for the proposition that the price succeeds in the place of the movables under hypothecation when there has been a sale thereof in execution of a judicial decree. If I correctly apprehended the argument of Counsel, it was that having regard to the context in which the material words *pretium succedit in locum rei* occurred they must be understood to apply to the case of immovables, sold by the Fisc or under a judicial decree when creditors having the right of hypothec have kept silent.

In section 13, Voet is contrasting the Roman and Roman-Dutch law. Commencing with the Roman-Dutch law in regard to immovables, he lays down the broad proposition that immovables pass subject to any existing hypothec, and specifies as exceptions the case of the sale of property subject to a hypothec by the Fisc and of formal sale and delivery under judicial decree without opposition by the hypothecary creditor, and proceeds to complete his statement of the law by reference to the rule that in such cases the price succeeds in the place of the thing. He then proceeds to refer to the rule of the Roman law that the burden of hypothec continued to effect not only immovables but movable property as well even after it had been transferred by the owner, and contrasts it with the Roman-Dutch law where the maxim *mobilia non habent sequelam* applies. He does not refer again to the rule *pretium succedit in locum rei* ; but was there any necessity to do so ? The Roman-Dutch law attached a special sanctity to sales on behalf of the Government revenue and to judicial sales which accordingly passed a title free from hypothec ; hence the rule *pretium succedit in locum rei* was a natural and a necessary corollary, unless the rights of all others including the preferent claims of the holders of valid and effectual hypothecs are to be wholly ignored and extinguished.

This is made clearer by Voet in a passage in Bk. XX. 5, 11 (Berwick, p. 448)—

> " But as by Modern Usages every sale of conventional, legal, and judicial pledges must be solemnly made under a judicial decree, and as the price thence obtained is not made over to the creditors unless thay have given security for its restitution in the event of others coming forward with preferent rights, and so the price is surrogated by public authority in place of the thing, the law now rather

[1] *10 N. L. R. 175.*

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is that purchasers fortified by the addiction and the public credit cannot be disturbed by those who claim to be preferential mortgagees, but the latter must sue the posterior creditors who have been paid out of the price, when they have just excuse for not having earlier prosecuted their rights when the matter was still *res integra*."

The price succeeds to the thing, irrespective of whether it be movable or immovable, whenever a pledge is sold under a judicial decree.

I see no reason therefore to differ from the long chain of judicial decisions of this Court by which the proposition that the purchase money takes the place of the thing sold when movable property is sold by the Fiscal is so well established.

It was then urged that by virtue of a decree in his favour and the sale held thereunder a judicial mortgage came into existence by virtue of which the appellant obtained a preferent right to the proceeds. A judicial mortgage it is said is constituted when property has been actually seized and discussed in execution of a judicial decree and gives a preference to the person who first caused it to be seized in accordance with the rule *qui prior tempore potior jure est*.

> "In Holland, however, no preference over other creditors arises from the inchoate execution of a judgment, but only from the time it has been carried through to an end and payment been obtained (in satisfaction of the judgment debt) so that persons who come forward pending execution already commenced by another creditor concur (rank) with the judgment creditor in the proceeds of the property seized"—*Voet XX. 11, 32 (Berwick's Translation, p. 353)*.

Had this been an action by an unsecured creditor a judicial mortgage would under the Roman-Dutch law have been constituted when property had been actually seized in execution of a decree obtained by him. The purpose of a hypothecary action—and this is such an action—is to procure the sale of property subject to an existing mortgage. It is a little difficult to see how in such a case a judicial mortgage is superimposed over an existing conventional mortgage or how if that were possible the appellant's position is improved thereby.

I am aware of no authority for the proposition that a judicial mortgage gives the creditor at whose instance property is taken in execution a preference over the holder of prior effective hypothecs. Indeed the passage just referred to definitely denies to the seizing creditor a preference over other creditors who are admitted to concurrence with him in the proceeds before they have been paid out—the creditors contemplated are unsecured creditors.

The law in Ceylon is now codified—*vide* section 353 of the Civil Procedure Code—and the right to concur in the proceeds of execution is limited to creditors who have prior to the realization applied to the Court by which such assets are held for execution of decrees for money against the same judgment-debtor. And it has been held that this section does not affect and leaves intact the rights of mortgagees (*Vallaiappa Chetty v. Pitcha Maula (supra)*).

The general rule in regard to the holders of hypothecs is *qui prior tempore prior jure est,* and this rule applies whether the hypothec be conventional, legal, or judicial (*Voet XX. 4, 28*).

Whether the hypothec in favour of the appellant be regarded as the conventional hypothec which it was the purpose of this action to enforce or a subsequent judicial hypothec, the respondent is the holder of a hypothec prior in point of time and therefore preferent in right.

Counsel for the appellant contended however that the maxim *qui prior tempore prior jure est* gives no right of preference where the hypothec for which preference is claimed is a hypothec of movables without delivery of possession. If there is any substance in this contention the appellant who was also a mortgagee without possession is in no better situation and the respondent is at least entitled to concurrence.

Under the Roman-Dutch law a mortgagee of movables without delivery undoubtedly was in a precarious position. "If there be an alienation or a new mortgage of it (the movables) by the same debtor to another person, accompanied by delivery, the creditor loses his right of pledge and preference and the thing, if alienated, passes to the alienee free of the encumbrance, or if it has been again given in pledge to another, that other has the right of preference." (*Voet XX. 1, 13.*)

In the case under consideration there has been no alienation or subsequent mortgage accompanied by delivery made by the debtor. So long as the movables remained in the possession of the debtor, he was in a position—as the law stood in the days of Voet—to deprive the original mortgagee of his right of preference by alienating the property or by creating a subsequent mortgage accompanied by delivery. But he has not done so. The sale of this property is the act of the Court and the proceeds take the place of the thing.

But the respondent's right to preference is impeached on the supposed authority of a single passage in *Voet XX. 1, 13* which is rendered by Berwick at p. 288 as follows :—

> "Nay, if the maxim *mobilia sequelam non habent* be true, it follows that even when things *pledged with delivery* have again reverted to the debtor without the flaw of theft, and, after he has absconded, they are found among his

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other movables having been possessed by him up till the time of his concealing himself, the creditor who previously had possession of a movable by right of pledge, but had subsequently ceased to possess it, will not be preferential in it in a concursas with other creditors in the estate of the bankrupt debtor."

Voet is here dealing with a special case—that of a mortgagee with possession who permits the movable to revert from his possession to that of his debtor. In such circumstances it is conceivable that a mortgagee may justly be regarded as having surrendered his rights.

But this very point was considered in *Tatham v. Andree* [1] known as Ledward's case and was held not to be a sufficient warrant for the contention that a mortgagee without delivery was not entitled to preference. Their Lordships approved the view of the Courts of Ceylon that according to the Roman-Dutch law as prevailing in Ceylon a mortgage of movables by writing before a Notary though unattended with possession is valid not only against the debtor himself but against his creditors.

In *Miller v. Young* [2] it was held following Ledward's case that a special mortgagee of movable property unaccompanied by delivery cannot prevent the sale of such property in execution of a third party's judgment on an unsecured debt but has a right to preferential payment of the mortgage debt out of the proceeds of such sale.

Then followed a long series of decisions, to some of which I have already referred, in which the preferent right of a mortgagee of movables without delivery to the proceeds of the pledge when sold under an unsecured creditors writ has been uniformly affirmed.

The law as amended by Ordinances Nos. 8 of 1871 and 21 of 1871 now requires that a mortgage of movables without delivery gives the pledgee or mortgagee no right or priority in respect of such property unless it is created by writing signed by the person effecting the same and unless such writing shall within fourteen days be duly registered.

The mortgage by virtue of which the respondent claims a preference to the fund in Court conforms in all respects to these requirements. He is therefore entitled to the preference he seeks.

The judgment of the District Judge will stand affirmed.

This appeal is dismissed, with costs.

SCHNEIDER J.—I agree.

Appeal dismissed.

[1] *(1863) Moore's Privy Council Cases, Vol. I, p. 387. N. S.*
[2] *(1872-76) Rum. 23.*