Present: Mr. Justice Wood Renton and Mr. Justice Grenier. *Oct. 18, 1909*

SILVA *v.* SILVA *et al.**

D. C., Galle, 8,893

Mortgage—Sale of mortgaged property by mortgagor to mortgagee in satisfaction of mortgage debt—Prior registered seizure—Revival of rights under mortgage—Civil Procedure Code, s. 238.

Where a mortgagee purchased the property mortgaged by private sale and discharged the bond, and where such purchase was invalidated under section 238 of the Civil Procedure Code, by reason of a prior duly registered seizure under another creditor's writ,—

Held, that the mortgagee was entitled to fall back on the mortgage and enforce his rights under it.

Gopal Sahoo v. Gunga Pershad Sahoo[2] followed.

APPEAL by the second defendant from a judgment of the District Judge in favour of the plaintiff. The facts are fully set out in the judgments.

Bawa (*Sansoni* with him), for the second defendant, appellant.

De Sampayo, K.C., for the plaintiff, respondent.

Cur. adv. vult.

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On November 17, 1904, the first defendant mortgaged five lands to the respondent. On June 13, 1906, the respondent, by a notarial endorsement on the bond, discharged the mortgage and took a conveyance from the first defendant of the lands in question, the consideration being the amount of the mortgage debt. Meanwhile, however, viz., on June 5, 1906, four out of the five lands had been seized in execution by the judgment-creditor of the first defendant (in case No. 7,522, D. C., Galle). That seizure was registered on June 12, and the lands having been sold in execution, the second defendant-appellant, as execution-purchaser, obtained Fiscal's transfers—afterwards duly registered—in pursuance of the sale. There is no doubt (see section 238 of the Civil Procedure Code)—and the respondent admits—that the registration of the seizure on June 12 avoids the conveyance to him on June 13, 1906. But he claims that he is thereby entitled to fall back upon, and enforce his rights under, the mortgage of November 17, 1904. The learned District Judge has upheld this contention, and I think he is right. The case of *Gopal Sahoo v. Gunga Pershad Sahoo*[2] appears to me to

[1] *(1908) 10 N. L. R. 351.* [2] *(1882) I. L. R. 8 Cal. 530.*

* Reported by Mr. H. A. Jayewardene, during his editorship.

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be in point, and I think that we ought to follow it. Mr. Bawa argued that that case differed from the present, inasmuch as here the mortgage debt had been discharged by the notarial endorsement, and the seizure affected only four out of the five lands included in the conveyance of June 13, 1906. But the discharge is merely *primâ facie* evidence of the satisfaction of the mortgage debt (*cf. Mohamadu Cader v. Lourensz*[1]), and, having been granted in ignorance of the seizure, does not prevent the revival of the claim under the mortgage bond. I agree with my brother Grenier that the appellant cannot now be allowed to raise the point that the conveyance of the fifth land, which is not seized, may have been accepted by the respondent as a satisfaction of the mortgage debt. In *Gopal Sahoo v. Gunga Pershad Sahoo*[2] where, as here, it was the execution-purchaser alone who defended the suit, the Calcutta High Court held that, whether or not the subsequent conveyance had, as alleged by the plaintiff, been cancelled, it was absolutely void as against the execution-purchaser. I would apply that reasoning here.

On the other points in the case I have little to add. I agree with my brother Grenier (1) that fraud is not made out (2) that there is sufficient proof of consideration to satisfy the *ratio decidendi* in such cases as *Ahamado Lebbe Markar v. Luis*,[3] and (3) that there is no estoppel by "standing by" within the meaning of such cases as D. C., Batticaloa, 16,673,[4] and *Sadris Appu v. Cornelis Appu*.[5]

I would dismiss the appeal with costs.

GRENIER A.J.—

In this case the plaintiff averred that the first defendant, there being two defendants, was the owner of certain shares in five lands, more fully described in the plaint.

By bond No. 9,728 dated November 17, 1904, the first defendant mortgaged the said shares to the plaintiff as a primary mortgage to secure the payment to the plaintiff, on demand, the principal sum of Rs. 1,500, with interest thereon at the rate of 18 per cent. per annum. On January 5, 1905, the first defendant paid to the plaintiff the sum of Rs. 300 in respect of interest due on the bond, and a further sum of Rs. 500 in respect of the principal. On June 13, 1906, there was due the sum of Rs. 1,080 for balance principal and interest, and the plaintiff alleged that the first defendant, being unable to pay the same, requested the plaintiff to take a conveyance of the mortgaged property for the said sum of Rs. 1,080, and for a further sum of Rs. 120 due by the first defendant to a third party in respect of a secondary mortgage. The plaintiff agreed to this proposal, and the first defendant by this deed No. 1,275, dated June 13, 1906, sold and conveyed to the plaintiff the mortgaged

[1] *(1897) 2 N. L. R. 304.*
[2] *(1882) I. L. R. 8 Cal. 530.*
[3] *(1879) 2 S. C. C. 80.*
[4] *Vand. Rep. 261.*
[5] *(1905) 8 N. L. R. 380.*

premises. The value of each share of land mortgaged is stated in paragraph 6 of the plaint, and it would appear that the share in the fifth land, to which reference would be made hereafter, had a value of Rs. 136 placed on it. The plaintiff alleged that on June 5, 1906, before the execution of the conveyance in his favour, the first second, third, and fourth lands had been seized in execution under writ issued in case No. 7,522, D. C., Galle, and that the seizure was registered on June 12, 1906, the plaintiff being unaware of the same. There was thus only a day's difference between the conveyance to the plaintiff and the registration of the seizure. On July 27, 1906, the premises so seized were sold by the Fiscal and purchased by the second defendant, who is now in possession of the same under a conveyance to him by the Fiscal. The plaintiff's cause of action was that, as the conveyance to him by the first defendant was void as against the second defendant by reason of the registration of the seizure under writ in D. C., Galle, No. 7,522, he was entitled to enforce his mortgage in respect of the first, second, third, and fourth lands. The plaintiff therefore prayed for judgment against the first defendant for the balance sum due on the mortgage with interest, and for a declaration that the first, second, third, and fourth lands were bound and executable for the amount due to him.

First defendant filed answer admitting all the allegations in the plaint, and consented to judgment being entered against him as prayed for. The second defendant in his answer raised four points of law. The first was that the plaintiff was not entitled to maintain this action against him, as the mortgage bond sued upon was one to which he was no party, and on the further ground that the bond had been discharged by the plaintiff on January 13, 1906. The second point was that he was wrongly joined in this action. The third point was that no cause of action had accrued to the plaintiff, as the transfer in his favour remained uncancelled, and there was no averment in the plaint that by reason of any action of the defendant he had been prevented from taking possession of the lands purchased by him, or that he had been disturbed in such possession. The fourth point appears to me to have no merit beyond its brevity.

As regards the substantial claim of the plaintiff, the second defendant alleged that no consideration passed on the bond dated November 17, 1904, and that it was executed in collusion between the plaintiff and the first defendant to defraud the plaintiff in case No. 7,522, D. C., Galle. The second defendant further alleged that no consideration passed on the transfer dated June 13, 1906, and the same was executed in collusion by plaintiff and the first defendant to defraud the plaintiff in the case I have already mentioned. I will say at once that these averments of fraud have not been substantial, and they must be dropped out of consideration.

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In the third paragraph of his answer the second defendant alleged that the plaintiff had due notice of the seizure, which was made on June 5, 1906, and was registered on June 12, 1906. On the question of notice, I may say at once that no issue was framed in the Court below, nor has any point been taken in the petition of appeal; and I am of opinion that the plaintiff is not estopped by reason of his not having notified to the Fiscal at the time the lands were seized that he had a mortgage in respect of them, from maintaining his present action. The case is not the same as that of a man who stands by and permits his own property to be seized and sold as the property of his judgment-debtor. There he allows bidders to believe and act on the belief that the property is that of his judgment-debtor, and he cannot afterwards turn round and claim the property as his after it had been purchased by a third party. That is the case reported in *8 N. L. R. 380*, and there is no analogy between that case and this. At the trial several issues were framed, but it is necessary only to deal with three questions at the most, which, I think, would exhaust all the matters in dispute between the parties.

The first question is whether, in view of the plaintiff having taken a conveyance from the first defendant and discharged the mortgage bond in his favour, he can now maintain his action upon it. On turning to the bond itself, I find this endorsement on it: "That out of the amount appearing herein, a sum of Rs. 1,080 was set off against the amount due on conveyance No. 1,257 attested by me this day. 13-6-1906. (Sgd.) A. D. S. Panditetilleke, Notary Public."

The discharge appears to have been registered on June 18, 1906, at the office of the Registrar of Lands, and presumably both the plaintiff and the first defendant were under the impression that there was nothing to prevent the conveyance operating as a valid conveyance of the four lands in question; but, unfortunately for the plaintiff, the conveyance was void in law, because at the date of its execution the properties transferred by it were under seizure, which had been duly registered. There is nothing to show that the plaintiff accepted the conveyance with knowledge of this fact. The question now is whether, in these circumstances, the plaintiff can fall back upon his mortgage bond, his conveyance being clearly void under section 238 of the Civil Procedure Code. In my opinion he can do so, because in accepting the conveyance he acted in perfect ignorance of the registration of the seizure; and it would therefore be manifestly inequitable to deprive him of his remedy both on his mortgage bond and on his conveyance. I was certainly inclined to think at first that, if there had been a discharge of the debt due on the mortgage bond such as is evidenced by the endorsement on it, the plaintiff's action would fail altogether; but I think now that, whether there was such a discharge or not, the plaintiff having acted in ignorance of the registration of the seizure, he is at liberty to recover on his mortgage bond.

The case of *Gopal Sahoo v. Gunga Pershad Sahoo*, cited by Mr. Sampayo from the *Indian Law Reports, Calcutta, vol. VIII, 530*, is almost on all fours with the present case. The facts of that case were that the plaintiff advanced money to two persons on the security of a mortgage of certain properties. A year after the plaintiff took a conveyance of the properties mortgaged to him, setting off the money due to him under the mortgage against the consideration money. At the time of this conveyance the same property was under attachment under a decree obtained by another person, and the property was in execution of this decree put up for sale and purchased by a third party.

In an action brought by the plaintiff on the mortgage bond (to recover the money lent, and asking that the properties might be made liable to satisfy the debt) against the mortgagors and the purchaser, it was held by Mr. Justice Mitter and Mr. Justice Maclean that the conveyance of 1875 being void as against the purchaser, the plaintiff was entitled to fall back upon the lien created by the mortgage bond. In so holding the Court followed the case of *Bissen Doss Singh v. Sheo Prosad Singh*,[1] in which the same principle appears to have been laid down.

It was suggested by Mr. Bawa that the law of mortgage in India is possibly different from our law; but I do not see how, even if there is any difference, it will affect the principle laid down in both these cases. I think that the considerations which moved the Calcutta High Court were purely equitable, irrespective of any special features in the Indian law of mortgage which may be different from ours.

I hold, therefore, that the plaintiff is entitled to maintain his action on the mortgage bond, and that the second defendant was rightly joined as a purchaser in execution of four out of the five lands mortgaged to the plaintiff. This disposes of, I think, the real contention between the parties; but there was a second question raised as to whether there was any consideration for the mortgage bond in favour of the plaintiff.

During the argument of the appeal, we intimated to Mr. Sampayo that we were satisfied from the evidence adduced by the plaintiff that there was consideration. The plaintiff in his evidence stated that the first defendant had given him a promissory note, which he produced, marked P 1, in September, 1904, and that the amount due on the promissory note was the consideration for the bond. The first defendant gave evidence to the same effect in support of the plaintiff's statements, and there was nothing on the part of the second defendant to show that the evidence of these two persons was false.

[1] *5 Cal. L. R. 29.*

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The third and last question which arises is with reference to the fact that the conveyance to plaintiff includes the fifth land mentioned in the plaint, and which is unaffected by the registration of the seizure, which only related to the first four lands.

It was submitted by Mr. Bawa that, so far as the fifth land was concerned, it may be assumed that it was a case of accord and satisfaction, and that the plaintiff cannot now have recourse to his mortgage bond. The point was not taken either in the Court below or in the petition of appeal, and the plaintff was not asked any questions as to whether or not he had accepted a conveyance of the fifth land in satisfaction of the debt due to him on the mortgage bond. The probabilities are that there was no such acceptance by him, and the reason that has weighed with me most is that the plaintiff's claim is for Rs. 944, with interest at 18 per cent. per annum from June 13, 1906, whilst the value of the fifth land is only Rs. 136. There is no evidence that it is worth more, and I think it was simply an accident that the fifth land was also not seized in execution.

I would dismiss the appeal with costs.

Appeal dismissed.