

1967 Present : Tambiah, J., and Siva Supramaniam, J.

DHAMMINDA NAYAKE THERO, Appellant, and THE CEYLON THEATRES LTD. and another, Respondents

S. C. 353/64—D. C. Colombo, 781/Z

Landlord and tenant—Landlord's tacit hypothec over tenant's movable property—Execution of a prior conventional mortgage over the movables—Decree for arrears of rent—Sale of tenant's goods in execution—Claims to the proceeds of sale—Superior rights of the landlord—Mortgage Act (Cap. 89), ss. 105, 111 (1).

Where, in execution of a decree for arrears of rent due to him from a tenant, a landlord has seized and sold goods belonging to the tenant and the proceeds of the sale have already been realised, his rights to the proceeds of the sale are superior to the rights of a person who has a prior conventional mortgage over the goods sold. In such a case, the general provisions of section 105 of the Mortgage Act are subject to the special provisions of section 111 (1) of that Act.

APPEAL from a judgment of the District Court, Colombo.

Colvin R. de Silva, with *Miss Maureen Seneviratne* and *P. Ilayperuma*, for the substituted plaintiff-appellant.

W. D. Gunasekera, for the 1st respondent.

Cur. adv. vult.

December 18, 1967. TAMBIAH, J.—

This appeal involves the construction to be placed on sections 111 and 105 of the Mortgage Act (Cap. 89). The plaintiff seized and sold certain goods belonging to the second defendant respondent for payment of arrears of rent due to him, in pursuance of a decree obtained from the District Court of Colombo. The plaintiff is now dead and is represented

by the substituted plaintiff appellant. The balance of the purchase price left over was paid into Court on 15th August, 1963. On 26th August 1963 the first respondent moved to intervene in this case and prayed that the amount realised by the sale of the goods be paid to him, as his debt had priority over the appellant's debt since he had a prior conventional mortgage over the movables which he had secured by a bill of sale. The learned District Judge allowed the intervention and held that the respondent was entitled to claim priority over the appellant in respect of the proceeds of the sale. The substituted plaintiff appellant has appealed from this order.

This appeal raises an important question regarding the priority to be given to the landlord's hypothec over other secured debts of movables. Section 105 of the Mortgage Act (Cap. 89) is a general section enabling a mortgagee of movables, which have been seized by any other creditor on a decree of Court, to intervene and claim priority over the proceeds of the sale. Section 111 (1) of the Mortgage Act is a special provision which gives the landlord who has seized the goods of a particular description set out in the Mortgage Act and who has realised the proceeds of the sale to claim priority over the proceeds. It enacts as follows :—

“ Subject to the proviso to section 218 of the Civil Procedure Code, all goods belonging to a tenant and all household goods belonging to any member of his family as hereinafter defined and for the time being upon any premises shall be liable to be seized in execution of a decree in an action against the tenant for rent due in respect of the premises, and where such goods are so seized and sold, the payment of the amount of the decree shall be a first charge on the proceeds of the sale in preference to any other charge or interest whatsoever other than a charge in favour of Her Majesty or of any local authority.”

A mortgage is defined in this Act to include any charge on property for securing money or moneys worth. The landlord's hypothec is either a charge or an interest in property and the specific provisions of section 111 (1) give the landlord priority over the proceeds of the sale of the goods in preference to *any other charge or interest whatsoever other than the charge in favour of Her Majesty or any local authority*. Thus, it is clear that the only charges that are exempted and over which the landlord cannot claim priority are those in favour of Her Majesty or any local authority. By necessary implication all other charges and interests are postponed to that of the landlord's hypothec. If it was the intention of the Legislature to give priority to conventional mortgages, such mortgages could have been brought under the exceptions. But the omission to give priority to such mortgages clearly shows that if a landlord in exercising his hypothec has secured the goods and sold the same he has priority over the proceeds of the sale over the debt due even to a secured creditor. The learned District Judge has erred in construing section 111 (1) of the Mortgage Act and has held that the mortgage executed in favour of the respondent has priority over the hypothec created by operation of law in favour of the appellant.

The provisions contained in sections 110 to 113 of the Mortgage Act were enacted to implement the recommendations of the Mortgage Commission which reported that the Roman Dutch law pertaining to the tacit hypothec of a landlord was in many respects unsatisfactory.

Even under the Roman Dutch law where the landlord, who has a tacit hypothec over the *invecta illata* has perfected it by the seizure and sale, he has preference to the proceeds of the sale over all unprivileged claims, whether secured by hypothec or not. Mr. Gunasekera relied on a title in Voet (XX. 2. 5). Gane's translation of this title is as follows :—

“ So much is this so that, if a rural tenant has made a covenant that things taken on and brought in shall be pledged, and before bringing them on he has put something under obligation to another by way of hypothec, and has only afterwards brought the thing into the farm, he who accepted the pledge in special and unconditional form would be in the stronger position. That is because it was in the debtor's power to decide whether and what goods he wished to bring on and to render affected with the obligation through so doing. Thus it was still true that the right of pledge could not arise without his consent.”

Here Voet was dealing with a situation where the landlord has not secured his hypothec by seizure and sale and brought the proceeds into Court. However, in another passage dealing with special privileged hypothecs, he states (vide Voet XX. 4. 19.) :—

“ Those besides who have made advances for the repair of a house as also under our customs for the repair of a ship have a hypothec with privilege. This applies to the very houses and vessels which have been repaired, though not also to the remaining goods of the owner ; see more at length what has been said in the title on Tacit Hypothecs. In addition owners of leased tenements have one over things brought in and carried on, when they have taken steps to have them attached. And to put it shortly, the same applies to all those to whom it has been remarked above that either by law or by custom they have a hypothec over individual things or a right of retention.”

Thus it is clear that a landlord who has secured his hypothec by sale of the *invecta et illata* of the tenant has a special privilege to claim priority over all other unprivileged debts, including the debt of a secured creditor. This view has been adopted in Ceylon (vide *Wijewardene v. Noorbhai*¹.) Cayley J. said (vide 1874 Grenier Reports, Vol. 3 at p. 34) :

“ A landlord has more than a lien over, or right to retain physical possession of the *invecta et illata* until his rent is paid ; he has a tacit hypothec which when perfected by seizure becomes privileged and is entitled to preference over all unprivileged claims whether secured by hypothec or not.”

¹ (1927) 28 N. L. R. 430.

Although the Mortgage Act has made sweeping changes regarding the landlord's tacit hypothec in Roman Dutch law, in all matters where specific provisions have been made in the Mortgage Act, the Roman Dutch law has been wiped out. Section 111 (1) of the Mortgage Act has merely reiterated the existing Roman Dutch law.

Section 105 is a general section giving the right to a secured creditor of movables to intervene in a case where a creditor has seized the goods of the debtor and to claim that the goods should be sold by public auction and also claim priority over the proceeds of the sale. Section 111 (1) however is a special provision giving the landlord, who has effected his hypothec by seizure and sale, priority over all debts excepting all moneys due to the Crown or to the local authority. Applying the canon of construction which is expressed in the maxim *generalia specialibus non derogant*, when a landlord has effected his hypothec by seizure and sale, one has to apply section 111 (1) of the Mortgage Act.

For these reasons, the learned District Judge's order dated 28th February 1964 giving preference to the first defendant respondent over the proceeds of the sale is set aside. The substituted plaintiff appellant is entitled to draw the sum which has been brought into Court by the sale of the goods which were seized and sold.

The appellant is entitled to costs in both Courts.

SIVA SUPRAMANIAM, J.—I agree.

Appeal allowed.

