

1909.
October 27.

Present : Mr. Justice Grenier.

JAYASINGHE BANDAR v. ELIAS APPUHAMI *et al.*

C. R., Negombo, 16,953.

Mortgage bond—Purchase by mortgagee of a share of the mortgaged property—Release of debt—Extinction of the security—Roman-Dutch Law.

Where a mortgagee of immovable property becomes the owner of the property mortgaged or any share of it, the mortgage security is extinguished to that extent, but the debt remains.

A PPEAL by the plaintiff from a judgment of the Commissioner of Requests (B. Constantine, Esq.). The facts sufficiently appear in the judgment.

H. A. Jayewardene (*V. Grenier* with him), for the plaintiff, appellant.

No appearance for the respondent.

Cur. adv. vult.

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The facts of this case are these. Hendrick Perera mortgaged a certain field by bond No. 6,480 dated October 28, 1899, with Lewis Saram Appuhamy as security, for a sum of Rs. 200. The mortgagee assigned the bond to the plaintiff on December 17, 1904. After the death of the mortgagor and his wife, their children sold half of the mortgaged property to Rupesinghe and the other half to the plaintiff and Senanayake. The present action was brought by the plaintiff against the legal representative of the estate of Hendrick Perera, duly appointed as such by the Court.

The defendant raised two questions in defence, and the Commissioner framed the following issues in regard to them :—

- (1) Is plaintiff estopped from maintaining this action as he has acquiesced in the sale to Rupesinghe and by terms of deed 6,944, to which he is a party ?
- (2) Has the mortgage merged in the sale ?

We are not concerned with the first issue, which the Commissioner has decided in favour of the plaintiff, but on the second issue he was of opinion that the mortgage debt had been released or extinguished by the purchase by plaintiff of a half share of the property. I have not had the advantage of any statement of the law or arguments on behalf of the respondent, but in my opinion the Commissioner's decision is wrong and cannot be supported.

The plaintiff appears to have paid valuable consideration in respect of the half share purchased by him, and the debt due on the mortgage was therefore not extinguished by such purchase. Had

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he purchased this half share for the debt due to him, the case would undoubtedly stand on a different footing. The plaintiff's security so far as the half share purchased by him was concerned was gone, but that does not mean that the debt due on the mortgage bond was extinguished. The mortgage as regards the remaining half share of the land would still remain in force, unless there was any special binding agreement whereby the plaintiff waived this security. The plaintiff was clearly entitled to a decree in his favour for the debt due to him on the mortgage bond, and also to a hypothecary decree declaring one-half of the land executable for the debt. I have not been able to discover any authorities exactly in point, but I think it may be stated as a broad proposition that where a mortgagee purchases from his mortgagor property mortgaged with him and pays valuable consideration for his purchase, the mortgage is merged in the sale, but the money debt remains all the same, and can be recovered by the mortgagee, if necessary, by execution against other property belonging to the mortgagor, because, for obvious reasons, the mortgagee cannot levy execution on property which is already his own.

Under the Roman-Dutch Law the right of pledge or mortgage ceases in the following cases : (1) When the debt which formed the obligations is discharged by payment, novation, or acceptance of another security, compensation or set-off, release of the debt, merger, or the like ; (2) by release of the thing mortgaged, the debt then remaining only as a concurrent and simple contract or unprivileged debt ; (3) when a mortgagor sells the things mortgaged with the consent of the mortgagee ; (4) when the thing mortgaged perishes ; (5) by effluxion of time when limited by the mortgage deed ; (6) by prescription (*Henry's Vanderlinden*, p. 181, 182, Bk. I., Chap. XII., section 6).

These exhaust the modes by which the right of pledge or mortgage ceases or is extinguished. None of these modes seem to have any application to the facts of the present case, where the mortgagee bought only a half share of the property mortgaged and paid valuable consideration for the same, leaving the remaining half bound to him by the *vinculum pignoris* for the debt due on the bond. I would set aside the judgment of the Court below and order judgment to be entered for plaintiff as prayed for in the plaint, limiting the hypothecary decree only to a half of the property mortgaged. The appellants will have his costs of this appeal.

Appeal allowed.