1942 *Present :* **Howard C.J. and de Kretser J.**

MUTTURAMAN CHETTIAR *et al. v.* KUMARAPPA CHETTIAR *et al.*

14—D. C. Kurunegala, No. 17,309.

Mortgage—Money lent by three persons—Purchase of property by two mortgagees—Action on the bond by the third—Right of purchasers to claim concurrence—Merger—Roman-Dutch Law.

Plaintiff and the second and third defendants lent the first defendant the sum of Rs. 27,500 on a mortgage bond, plaintiff contributing Rs. 10,000 and the second and third defendants Rs. 17,500. The bond, which authorized the obligees to sue jointly or severally for the amounts due to them, contained the following clause : " And it is futher agreed that, in the event of the said security being realised and the proceeds of such realisation not being sufficient to satisfy the claims in full of the said obligees and their respective aforewritten, they shall be entitled to claim *pro rata* only on such proceeds but nothing herein contained shall prevent the said obligees, respectively, from securing the whole of any balance of their respective claims from him, the said obligor or his

aforewritten." The first defendant's rights in the property mortgaged were sold by the Fiscal under a money decree and purchased by the second and third defendants. Plaintiff brought the present action to recover a sum of Rs. 15,125 due to him on the bond and prayed for a mortgage decree.

Held, that the second and third defendants were entitled to concurrence and, in case of deficiency, to share rateably in the proceeds to be obtained when the security was realized.

Purchase of mortgaged property by the mortgagee extinguishes the debt by merger only when the persons claiming the rights of ownership and mortgage are identical and their rights are co-extensive.

APPEAL from a judgment of the District Judge of Kurunegala.

H. V. Perera, K.C., and *N. Nadarajah, K.C.* (with them *B. G. S. David*), for second and third defendants, appellants.

N. E. Weerasooria, K.C. (with him *L. A. Rajapakse*), for plaintiff, respondent.

Cur. adv. vult.

July 22, 1942. DE KRETSER J.—

Plaintiff and the second and third defendants lent the first defendant the sum of Rs. 27,500 on a mortgage bond, plaintiff contributing Rs. 10,000 and the second and third defendants Rs. 17,500. The bond authorized the obligees to sue jointly or separately for the amounts due to them, respectively, and then came the following clause:—"And it is further agreed that, in the event of the said security being realized and the proceeds of such realisation not being sufficient to satisfy the claims in full of the said obligees and their respective aforewritten, they shall be entitled to claim *pro rata* only on such proceeds but nothing herein contained shall prevent the said obligees, respectively, or their respective aforewritten from recovering the whole of any balance of their respective claims from him, the said obligor or his aforewritten.".

The first defendant's rights in the property mortgaged were sold by the fiscal under a money decree and purchased by the second and third defendants. Plaintiff brings this action setting out the details of the bond and alleging that a sum of Rs. 15,125 was due to him and praying for a mortgage decree accordingly.

The second and third defendants claim concurrence and, in case of deficiency, to share rateably in the proceeds to be obtained when the security is realised. Admittedly they have not been paid what they lent. Plaintiff denies their right to claim concurrence.

The relevant issues were—

(3) Are the second and third defendants entitled to concurrence with the plaintiffs in the event of a judicial sale of the mortgaged properties ?

(4) Do the rights of the second and third defendants on the bond sued upon revive on a judicial sale ?

(5) Can the second and third defendants claim concurrence or a revival of their rights on the mortgage bond inasmuch as they purchased the mortgaged properties at the fiscal's sale on P 1 while being co-mortgagees with plaintiffs on the bond sued upon ?

(6) Did the mortgaged rights of the second and third defendants under the bond sued upon become merged on their becoming purchasers on P 1 ?
(7) If so, did the mortgage rights of the plaintiffs also become merged ?
(8) If so, do the mortgaged rights of the second and third defendants on the bond revive in the event of a judicial sale of the mortgaged properties at the instance of the plaintiffs ?

The trial Judge, in a brief judgment, held against the second and third defendants.

Three questions have been argued before us, viz. :—

(1) Were the rights of the second and third defendants lost by merger ?
(2) If so, do they revive now that plaintiff is seeking to sell the mortgaged property against them ?
(3) Are the second and third defendants entitled to share rateably in view of the clause quoted above ?

In my opinion, the case can be decided on the clause alone. It clearly provided that, in the event of the security being realized by one creditor, other creditors were to be entitled to concurrence. If both parties sued jointly the clause would not operate and it was clearly intended to cover the case of one of the obligees suing. The mortgage being one and indivisible, the whole security would be realized. That security was intended for both, and so both were entitled to claim such sums as were due to them, respectively. As I shall show presently, the clause was unnecessary, for that would have been the legal result, but it only served to make the position clearer. It must be remembered that the principal obligation was one of loan and that the mortgage was only accessory. The clause refers only to the satisfaction of the claims and imposes no condition that a claimant should continue to have in his favour the accessory obligation.

It must also be remembered that the agreement was between the obligees on the one side and the obligor on the other and was not an agreement between the obligees directly but it set out the agreement between them also, since they had to be agreed between themselves before they could agree with the obligor. In fact, the agreement to share concurrently affected them chiefly. As, however, the obligor came in, the proviso protected them against any possible argument on his part that they had to share rateably in the event of a deficiency and could not proceed against him by personal action for any balance due.

It seems to me that it is not very important to decide whether when one obligee sued he should ask for a hypothecary decree for the full amount owing to the obligees or only for the amount due to him. There would be amounts due to each obligee, respectively, and the bond authorised them to sue jointly for the amount so due or separately for the amount so due. The security was to be realized and the total amount due ought to be claimed and this is what, in my opinion, the parties agreed to. Apart from agreement that is what is usually done when joint creditors are concerned. If all will not agree to unite, then one of them sues, making the others defendants, but he sues to recover the total amount due, restricting his own claim

to such amount as is due to him. In this case the plaintiff was entitled to sue alone and need not have invited the defendants to join him but, in my opinion, he should have stated their claim as he was seeking to realize the whole security. Had no question of merger arisen, undoubtedly he would have had to do this, for the second and third defendants could not sue to have the security realized a second time on a bond on which the creditors stood on an equal footing.

Voet (*XX. 4. 8*) makes the position plain. He says that if at the same time one and the same thing has been mortgaged to several persons, a half share to one and a quarter to another and so on, or even when no mention has been made whether of the whole or of a share, each can sue for a share only whether contending among themselves or third-parties-possessors, and such share will be a half share if an equal sum was due to each or a rateable proportion if the debts were unequal in amount. If it has been mortgaged to them *singulis in solidum* (*i.e.*, to each with an interest in every part of the whole), then each may sue a third-party-possessor *in solidum*. "As among themselves," he says (I quote from *Berwick's Translation*), "To be more plain, if the same thing has been bound to each in its entirety, and if neither of the creditors has been paid, they take shares by concursus ; and so payment of the debt to each is to be made *pro rata* from the price realized by the sale of the pledge . . . . But when one of them has been settled with by payment or otherwise, without sale of the pledge, the entire pledge remains bound to the other for his debt".

Faced with this statement of the law, Mr. Weerasooria sought refuge in the word "otherwise" and argued that the mortgage having been extinguished by merger that statement was in his favour. That is not so. Merger does not settle a debt except in the case when a debtor and creditor become united in one person, both as regards the debt and its security. There are more ways than one of settling a debt. It is the existence of the debt that is emphasized. What *Voet* is making plain beyond the possibility of a quibble is that when one creditor has been satisfied, i.e., regarding his debt the other creditor still has a hypothec over the whole of the property hypothecated.

Passing on to consider the other points, the first question is whether there was a merger in the sense in which the Roman-Dutch law understood it. The material regarding merger is rather meagre. The commentators deal chiefly with the simple case of the debt being extinguished by the creditor and the debtor becoming one and the same person. The writers refer to the absurdity of a man selling his own property in order to pay himself. But there is no absurdity in a man letting his property be sold for the joint benefit of himself and another, more especially when he cannot help it being sold. In other words, before there can be a merger, the persons claiming rights of ownership and of mortgage must be identical and their rights must be co-extensive. If A owned property as executor and had mortgage rights personally, clearly there could be no merger. If A, B, and C as one entity owned mortgage rights and A owned the property, is the position similar, as Mr. Perera contended ? It would be different if there were two mortgages on the one bond. In

the present case plaintiff does not allege merger of the security to the extent of about 17/27th of the property and only seek to make executable 10/27ths thereof.

Pothier, at *page 425* of his treatise, deals with confusion or merger, He says—"By confusion is meant the concurrence of two qualities in the same subject, which mutually destroy each other;" at *page 428*—"In order to induce a confusion of the debt, the characters, not only of debtor and creditor, *but of sole debtor and sole creditor,* must concur in the same persons. If a person, who was only creditor for part, becomes sole heir of the debtor, it is evident that the confusion and extinction can only take place with respect of the part for which he is creditor . . . ."

In the case before us each of the creditors is creditor as to part only of the debt but the mortgage is *in solidum.*

Pothier explains why the debt is extinguished. He is dealing with the case of the universal heir without benefit of inventory. In such a case the qualities of debtor and creditor become united in the same person and the debt itself is extinguished; a person cannot be his own creditor. We have the case of heirs dealt with in *Dias v. de Silva*[1] and it was there held that there was no merger in the case of heirs in Ceylon.

Pothier says—at *page 426* "The acceptance of a succession upon trust, to render a specific account, does not induce any confusion, for it is one of the effects of the *benefice d' inventaire* that the beneficiary heir and the succession are regarded as different persons, and their respective rights are not confounded.

On page 427, he says, dealing with the accessory obligation of suretyship, which would correspond to the security afforded by a mortgage: "The extinction of the accessory obligation of the surety by confusion does not induce an extinction of the principal obligation, the reason being that the existence of the principal obligation does not depend upon the subsistence of the accessory obligation." He is dealing with a simple case of merger. He points out that merger is not the same as payment.

Van Leeuwen, in his commentary, deals very briefly with merger and then only in relation to servitudes. In *Chapter XIX., s. 6* and *in Chapter XXII.,* s. I he states the position that a person cannot be subject to a service to himself, and goes on to say: "If, however, a person become proprietor of two separate houses, one of which is subject to some service to the other, such service ceases as long as that person remains the proprietor thereof; but if such houses be afterwards again sold separately, each house again acquires its former service."

The Dutch commentators do not entirely omit reference to the principles governing a case like the present. *Voet* (*XX. 5.10; Berwick's Translation, p. 446*) treats of the anterior and the posterior mortgagee. The anterior mortgagee has preference, and on his suing and having the property sold the purchaser obtains the property free of the posterior or secondary mortgagee. If the sale were under the secondary mortgage the purchaser is liable to have the property sold by the anterior or primary mortgagee. Suppose, however, the primary mortgagee buys the property *privately.* His mortgage is merged in his rights as owner and

[1] *39 N.L.R. 358.*

the posterior mortgagee now seems to have his way clear. The line of reasoning, however, seems to be—that is far too easy a way of enriching yourself at another's expense; the law does not allow that to be done; you two creditors and the mortgagor stood in a certain relationship to one another; if you wish to treat the anterior mortgagee as a stranger who has purchased the property, then you must treat him as a stranger for all purposes; then his mortgage is still in existence and he has priority. This means that merger does not kill a mortgage but only obscures or submerges it in a greater right. Remove that greater right and you see the mortgage again. It is there to be enforced, if and when necessary. It is only when the debt is extinguished that there is true merger.

Voet expressly exempts purchases at public auction. In *XX.* 5. 5. he had dealt with the mortgagee's rights when he desired to enforce his bond and had stated that he could enforce those rights only through the intervention of the court by means of a judicial sale on order of court.

When such a sale takes place the purchaser, even if he be the anterior mortgagee himself, gets absolute title and the posterior creditor can no longer follow the property. It is only when the mortgagee purchases privately that there is any room for argument. But it is also true that a sale by public authority generally conferred absolute title and so a posterior creditor could not pursue the property. (vide *Berwick; pp. 287, 448.*

I find filed in the record a copy of the judgment of this court in *D. C. Chilaw, No. 2,965* (*S. C. M. 17th Feb., 1905*). The principle upon which that judgment proceeded is helpful. There E had a primary and a tertiary mortgage and K a secondary mortgage. E sued on the tertiary bond and bought the property. His hypothec on the primary bond was now merged. K then put his bond in suit and L bought the property. Thereafter E put his primary bond in suit and seized the property in execution of the decree in his favour. L claimed successfully and E. brought an action to have the order releasing the property from seizure cancelled. Moncrieff J., quoting *Voet,* held that E's rights on the primary mortgage had revived and that he was entitled to have the property sold. Layard C.J. agreed for the same reason and called E's title by purchase in the first action a revocable title and said that his actual rights as mortgagee were in abeyance.

I do not think Mr. Weerasooria was really serious when he argued that there could be no revival of the bond as such revival was by operation of law and Ordinance No. 7 of 1840 stood in the way of that happening. No new mortgage was being created but an existing one was being enforced in the existing circumstances. It seems to me that it is clear that the second and third defendants are entitled to concurrence.

I therefore allow the appeal and set aside the order made in the case. The second and third defendants will be declared entitled to concurrence, the amount due to them being calculated before decree is entered. They are entitled to the costs of appeal and of the trial in the District Court.

HOWARD C.J.—I agree.

Appeal allowed.