

1944

*Present: Howard C.J. and Jayetileke J.*

VELUPILLAI, Appellant, and KANDIAH, Respondent.

296—D. C. Point Pedro, 1,578.

*Mortgage—Property purchased by the mortgagee in execution of a money decree—Partition action—Sale under partition decree—Action on bond.*

A mortgage of an undivided half share of land purchased the share in execution of a money decree against the mortgagor. In an action instituted for the partition of the land the mortgagee was allotted the share in question and on a sale of the property under the partition decree it was purchased by the third defendant against whom the mortgagee put the bond in suit.

*Held*, that the mortgage was extinguished by the purchase of the property by the mortgagee.

**A** PPEAL from a judgment of the District Judge of Point Pedro.

*N. Nadarajah, K.C.* (with him *V. Arulambalam*), for the third defendant, appellant.—When a mortgagee becomes the owner of the property mortgaged the mortgage security is extinguished. The moment 3 D 1 was executed the mortgage in the present case came to an end—*Voet XX. 6. 1* (*Berwick's Translation*, p. 443); *Wille's Mortgage and Pledge in South Africa* (1920 ed.), p. 294; *Jayasinghe Bandar v. Elias Appuhami et al.*<sup>1</sup>; *Mutturaman Chettiar et al. v. Kumarappa Chettiar et al.*<sup>2</sup>; *Burge on Colonial and Foreign Laws* (1838 ed.), p. 238. Section 12 of the Partition Ordinance does not affect the case of the appellant.

[JAYETILEKE J. drew attention to *Dias v. de Silva*<sup>3</sup>.]

The money debt can be distinguished from the hypothecary claim. The former may remain after the latter is extinguished.

*No appearance* for respondents.

*Cur. adv. vult.*

May 23, 1944. JAYETILEKE J.—

The questions to be determined in this case are simple and appear to me to be free from doubt or difficulty. The events out of which the dispute has arisen are as follows:—On September 20, 1934, the first and second defendants mortgaged to the plaintiff by bond No. 2,489 attested by *V. Sanathirajasekaram* (P 1) and undivided half share of a land called Oddai to secure the payment of Rs. 600 and interest.

On September 7, 1939, the said share was sold by the Fiscal in execution of a money decree obtained by the plaintiff against the first and second defendants. At the sale the plaintiff purchased it for a sum of Rs. 103 and duly obtained a conveyance in his favour bearing No. 1,708 dated September 30, 1940 (3 D 1).

Thereafter the third defendant instituted action No. 1,233 of the District Court of Point Pedro for the partition of the entire land called Oddai. In the decree that was entered in that action the plaintiff was allotted the half share which he purchased on 3 D 1.

<sup>1</sup> (1909) 12 N. L. R. 300.

<sup>2</sup> (1942) 43 N. L. R. 499.

<sup>3</sup> (1937) 39 N. L. R. 358.

As a partition of the land was found to be impracticable the Court ordered a sale of the property. At the sale held in pursuance of that order the third defendant purchased the land for a sum of Rs. 1,595 and obtained a certificate of title in his favour 3 D 2.

The plaintiff drew from Court the half share of the proceeds of sale to which he was entitled and thereafter instituted this action on P 1 claiming a hypothecary decree. The third defendant pleaded that the hypothecation came to an end when the plaintiff acquired the ownership of the mortgaged property.

Upon this point there is very clear authority. It is sufficient to quote the well known passage in *Voet's Commentaries* XX. 8. 1 *Ber. Tr.*; p. 443:—

“The *Vinculum Pignoris* may be dissolved (or the *Jus Pignoris* extinguished) in many ways; for example, by the creditor becoming owner of the mortgaged thing by contract, succession, or otherwise; for just as one cannot have a servitude over his own property; *Dig. 7, 6, fr. pr. (si usufruct, pet. vel. ad al. pert. neg.)* so neither can it be bound in pledge to him, and therefore it falls into the predicament that it cannot be the subject of pledge. *Dig. 13, 7. fr. 29 (de pignorat. act.)*; *Dig. 50. 17, 45 (de reg. juris.)*.”

The plaintiff contended that when the property was sold under the decree for sale his rights on the bond revived. This contention appears to me to be wholly untenable. When the plaintiff became the owner of the land the mortgage in his favour was at law merged in the ownership. The question of revival can only arise where merger does not take place. If the transfer in favour of the mortgagee is for some reason invalidated merger does not take place and the mortgage must therefore be treated as in existence.

This view is supported by the decision of this Court in *Silva v. Silva*.<sup>1</sup> In that case the transfer in favour of the mortgagee was invalidated under section 238 of the Civil Procedure Code by reason of a prior duly registered seizure under another creditor's writ. It was held that the mortgagee was entitled to fall back on the mortgage and enforce his rights under it.

This case was cited with approval in *Wijesinghe v. Dingiri Appuhamy*<sup>2</sup>, where Pereira J. said:—

“If, however, the deeds C and AD 5 are to be deemed to have the effect of rendering ineffectual deed D in the plaintiff's favour, then clearly, the plaintiff's rights on the mortgage bonds (A and B) granted by the first and fourth defendants must be taken to have revived. This view is well supported by the decision in the cases of *Silva v. Silva (supra)*, *Elaris Appuhamy v. Moises Fernando*<sup>3</sup>, and also by the principle underlying the law enunciated by Voet in *XX. 5. 10 and XX. 6. 1* of his commentaries which do not appear to have been cited in the argument in *Silva v. Silva (supra)*.”

For the reasons given above I am of opinion that the judgment of the learned District Judge is wrong and must be set aside.

I would accordingly allow the appeal and dismiss the action against the third defendant with costs here and in the Court below.

HOWARD C.J.—I agree.

*Appeal allowed.*

<sup>1</sup> 13 N. L. R. 33.

<sup>2</sup> C. A. C. 139.

<sup>3</sup> *Times of Ceylon* 17. 2. 1905.