Present : Schneider A.J. 1921.

SAMPASIVAM *v.* MANIKKAM *et al.*

25—C. R. Jaffna, 14,033.

Tesawalamai—*Right of husband to donate property acquired during marriage.*

A husband can give a donation of only one-half of the property acquired by him during marriage.

K mortgaged a piece of land acquired during his marriage to the second defendant, and subsequently executed a secondary mortgage of the land in favour of the plaintiff. K then donated it to his son, the first defendant. The plaintiff after the death of K sued the first defendant and seized and sold the land, and the proceeds were deposited in Court. The second defendant (primary mortgagee) applied to draw the balance in Court after satisfying plaintiff's writ. The claimants, who disputed the right of K to donate more than half the land to first defendant, objected.

Held, that the primary mortgagee was not entitled to draw the balance in Court.

THE facts appear from the judgment of the District Judge (G. W. Woodhouse, Esq.), and the Supreme Court.

After satisfaction of the decree in this case (which is one in favour of the secondary mortgagee against the mortgagor) by the seizure and sale of the land mortgaged, there is a balance over, which is deposited to the credit of this case.

The question is whether the money should be drawn by the mortgagor or the primary mortgagee or certain parties who claim right by the operation of the rules of the *Tesawalamai* to a half share of the land sold.

It should be observed here that it is " the right, title, and interest " of the mortgagor that has been sold under the plaintiff's writ, and the amount realized is Rs. 460.

It is admitted by Mr. Niles, on behalf of his clients who claim a share of the land, that the mortgagor had a right to mortgage the entire land. His clients' wish to forego their rights to a share of the land and draw the surplus in deposit. But I am satisfied they cannot do so until all the mortgages on the land have been paid. They would have, therefore, to come in after the *otti* holder, and possibly after the mortgagor. I do not agree that the sum realized by the sale represents the true value of the entire land.

As regards Mr. Tambyah's client, the *otti* holder, he has, in my opinion, the first right to any surplus that remains over after the secondary mortgage is paid off.

The decree is wrongly entered in the case. Second defendant was made defendant, not as debtor on the secondary mortgage, but as *otti* holder, who should have notice. (Plaintiff's proctor will take steps to see that the decree is amended.) Mr. Tambyah says that at the time of

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the sale by the Fiscal, his clients' writ was in the Fiscal's hands, and that the Fiscal's officer, who sold, made people at the sale understand that he was selling under both writs. But we can only go by the report of the Fiscal that the sale was under this plaintiff's writ. It may be that the second defendant's writs was in the hands of the Fiscal, and this officer simply informed purchasers that there was second defendant's writ in his hands. It amounts simply to notice that the land was encumbered with an *otti*.

The second defendant's writ should now be executed and the land sold, any balance over should come out of the surplus in deposit in this case. Anything over should go to the mortgagor.

The application of Mr. Niles' clients, who really have no status in this case, is dismissed with the costs of the first defendant. The money will remain in deposit until Mr. Tambyah's client has discussed the mortgaged property. If the full amount of that decree is recovered by the sale, the plaintiff in this case is at liberty to draw the amount in deposit, otherwise it will go in liquidation of the *otti* holder's decree, and any balance over may be drawn by the mortgagor.

I make no order as to costs between the first and second defendants.

The claimants appealed.

Arulanandan (with him *Joseph*), for claimants, appellants.

Balasingham, for first defendant, respondent.

No appearance for plaintiff or second defendant, respondent.

July 27, 1921. SCHNEIDER A.J.—

Kasinather, in 1874, during the subsistence of his marriage with one Parupathipillai, acquired title to an undivided half share of an allotment of land of 7¼ lachams.

The whole of this land was subject to an *otti* in favour of the second defendant. In 1902 the land was partitioned by a deed executed by the owners, and a divided extent of 3⅝ lachams was allotted to Kasinather. In September, 1917, he mortgaged this divided portion to the plaintiff, subject to the *otti* already mentioned, and thereafter donated it to the first defendant, his son. In July, 1918, Parupathipillai, acting without the authority of her husband, donated a half share of the said 3⅝ lachams to her son, Ampalavanar, who, by his last will, devised the same to the second claimant, who is the wife of the first claimant. Kasinather died on November 7, 1918. In September, 1919, Parupathipillai confirmed her donation to her deceased son, reciting that she did this as her husband had not joined her making the original donation.

The plaintiff instituted this action in December, 1919, against the first defendant upon the allegation that the land had been donated to him by the deceased mortgagor and against the second defendant as the *otti* holder. He prayed for judgment against the first defendant personally, and in default of payment that the land

be sold. As regards this part of his prayer, he omitted to state expressly that the land should be sold subject to the *otti*. But there can be no question that he intended to so pray, and that all the parties to the action understood that to be the case. Here I should pause to remark that the prayer of the plaint is not legally framed for a hypothecary action. The draughtsman of the plaint appears to have followed slavishly the faulty form given in the schedule to the Civil Procedure Code. The plaintiff in a hypothecary action should pray that the land mortgaged be declared bound and executable upon the footing of the bond for the amount decreed to be paid, and that in default of payment that the land be sold.

The defendants were in default of appearance, and the Judge directed that judgment be entered by default. Upon this order some officer of the Court appears to have entered up a decree, which is at variance with the prayer of the plaint and the order of the Judge. The decree directed that the defendants were jointly and severally to pay the plaintiff's claim, and that the title of the "said defendant" (meaning defendants) to the property mortgaged was to be sold, and the deficiency, if any, recovered from the said defendants. The decree is dated January 7, 1920. The plaintiff's proctor submitted an application for the execution of this decree with all its errors. He has not filled in the date of his application, but from the journal it appears to have been made on January 20, 1920. In this application he prayed for execution against both defendants jointly and severally, and actually asked that the amount decreed be realized by the sale of the "defendants' property jointly and severally." His application, therefore, was not for realization of any property upon a mortgage decree, but upon a money decree purely. I should have expected him to rectify the errors committed in the decree, but, instead, he not only adopted those errors, but misled the Court further by his careless application. Upon this application writ issued on January 23, 1920, in terms of the application. The copy decree attached to the writ appears to have guided the Fiscal in seizing the land which had been mortgaged. It was sold for Rs. 460 to one Katherevelu Somasunderam on May 5, 1920. The whole of the purchase money was recovered and deposited on June 2, 1920. In the meantime the second defendant had sued the first defendant in action No. 14,035 of the Court of Requests of Jaffna upon the *otti*, and on June 7, through the Fiscal, seized a sum of Rs. 128·49 out of the sum deposited in this action to the credit of the first defendant. This seizure obviously was of the surplus left over after satisfaction of the claim of the plaintiff. On June 14, 1920, the claimant filed an affidavit, and moved that as a half share of this surplus belonged to them, that this share be not paid out. The sale was confirmed on August 17, and an order for the payment of the whole of the plaintiff's claim amounting to Rs. 157·45 was entered on August 17, 1920.

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The contest between the claimants and the first and second defendants to the surplus in Court was then decided upon the facts which I have mentioned.

The learned Commissioner dismissed the application of the claimants, with costs, payable to the first defendant. The only reason given is that they have no status in this case. I am unable to regard that as a good reason for this holding.

He holds, rightly in my opinion, that the land was sold only under the writ in this action, and that therefore it is still liable to be sold under the decree in favour of the second defendant, the *otti* holder. But, quite inconsistently, he holds that if the second defendant's claim is not satisfied by the sale of the land, he should have first claim upon the surplus in deposit.

I am unable to see any reason for this order. It is clearly wrong. The sale under the writ issued in this case was of that interest of the owner of the land which would be left over after the primary mortgage was satisfied. The purchaser valued this interest at Rs. 460. The primary mortgagee has no claim upon this sum. To him there is still the land available for execution just the same as if it had not been sold at all. His rights have not been affected in any way by the sale, which has not prejudiced him at all. He had no right to seize any portion of the surplus purchase price in Court. His claim to levy execution upon the land is still intact. If the land fails to realize a sum sufficient to satisfy his claim, it will not be because the land has been sold under writ in the action upon the secondary mortgage, but for some other reason.

The contest for the surplus proceeds therefore must be confined to the plaintiff and the first defendant on the one side and the claimants on the other. I will regard the claimants as having made their claim under the provisions of section 350 of the Civil Procedure Code. There is no other section under which they could have come in. It was admitted by both parties that Kasinather had the right to create the mortgages in favour of the defendants. The question is, Did he have a right to donate more than a half of the land to the first defendant according to the *Tesawalamai?* I am unable to find anything in point in the provisions of that system of law as they appear in volume I. of the Ordinances. It would appear that the proposition that a husband could not donate more than his half share of the property acquired during the subsistence of his marriage was not challenged in the lower Court, nor the correctness of the law on this point laid down in the case of *Ammah v. Settupulle.*[1] That case was decided in 1872 by a Bench of this Court consisting of two or perhaps three Judges.

I am bound by it. It lays down as if it were well-settled law that a husband can dispose of only half the property acquired during marriage. I can find no case where the law as stated there

[1] *(1872) 3 N. L. R. 271.*

has been disputed, although the decision has stood for nearly fifty years. I would, therefore, follow it, and hold that the surplus in Court belongs one-half of it to the first defendant and the other to the second claimant or to the first claimant as executor.

The second defendant must pay the costs of the first defendant and of the claimants both of the lower and of this Court.

Set aside.