

Present : Bertram C.J. and De Sampayo J.

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ABEYESINGHE v. RAKKAMA.

91—D. C. (Inty.) Kandy, 22,577.

Three mortgages by shareholders—Writs issued under all mortgage decrees—Seizure under all writs—Sale under one writ—Right of other decree-holders to the surplus.

Several shareholders of a property granted three mortgages to two persons. Writs were issued on the mortgage decrees, and the Fiscal seized the shares under the several writs, and fixed the sale under one writ at 12 noon and under another at 2 P.M. of the same day. After the first sale, under the impression that the proceeds of the sale under the first writ was sufficient to satisfy all writs, he did not sell under the other writs.

Held, that all the writ-holders were not entitled to share in the proceeds of sale.

“ It is necessary, in any case, that the debtor should be identical, and the property seized under the writs should be the same. In the present case the plaintiff’s writ was against all the defendants, and Nallan’s writ was against the fourth and fifth defendants only, and the plaintiff’s other writ was against the fourth and sixth defendants In these circumstances, one sale under all the writs was not possible, and the Fiscal cannot be presumed to have held a sale under all the writs.”

THE facts are fully set out in the judgment.

E. W. Jayawardene (with him *Bartholomeusz*), for plaintiff, appellant.

A. St. V. Jayawardene, for applicant, respondent.

Cur. adv. vult.

September 17, 1920. DE SAMPAYO J.—

The question in this appeal concerns the proper distribution of the surplus proceeds of an execution sale. The facts out of which the question arises may be briefly stated as follows. The first defendant was entitled to one-fourth share of a certain land ; and the second defendant (wife of the third defendant), the sixth defendant, and the seventh defendant were each entitled to one-eighth share. The fourth defendant mortgaged her one-eighth share primarily to Nallan Chetty, the respondent to the appeal. The plaintiff had a primary mortgage of the shares of the first, second, sixth, and seventh defendants, and a secondary mortgage of the share of the fourth defendant and another mortgage of the shares of the fourth and sixth defendants, which may, for the sake of convenience, be called tertiary mortgage. Nallan Chetty sued the fourth defendant on the primary mortgage and obtained a decree, and the plaintiff

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also sued the first, second, fourth, sixth, and seventh defendants in this action on their mortgage in his favour and obtained a decree.

Nallan Chetty and the plaintiff issued writs in execution of their decrees and seized the shares of their respective debtors in the land. The sale under these writs were fixed by the Fiscal for the same date as the sale under the plaintiff's writ at 12 noon, and the sale under Nallan Chetty's writ at 2 P.M. The sale under the plaintiff's writ took place and realized a sum of Rs. 28,731, but the sale under Nallan Chetty's writ was not held, apparently because there would be sufficient money to satisfy both the writs. The proceeds of sale were brought into Court, and the plaintiff drew Rs. 17,484·70, being the full amount of his writ. The surplus of Rs. 11,246·21 was drawn as follows: Nallan Chetty Rs. 2,779·83, being the full amount of his writ; the plaintiff another sum of Rs. 3,066·63, being the amount of a decree in his favour on tertiary mortgage of the shares of the fourth and sixth defendants; the first defendant Rs. 2,249·24; and the second defendant Rs. 1,686. It appears, however, that the first defendant was, in fact, entitled to draw more than the Rs. 2,249·24 which she had drawn, and so an application was made to Court for the payment of the balance Rs. 1,734·93 still due to her, and as the fund left in Court was not sufficient to pay her this sum, and as the plaintiff had drawn in respect of the tertiary mortgage the sum of Rs. 3,066·63, though the amount to the credit of the tertiary mortgagors was only Rs. 1,494·06, her proctors further moved that the plaintiff be ordered to bring back into Court the amount overdrawn by him. Both the plaintiff and Nallan Chetty appeared in connection with this motion, and a contest arose between them, each saying that the other should bring back the money drawn by him. After discussion the District Judge ordered the plaintiff to bring into Court the sum drawn by him in respect of the tertiary mortgage, and to pay the costs of the contention. The appeal is from that order.

In addition to the plaintiff's and Nallan Chetty's writs, the Fiscal had in his hands a writ issued by the plaintiff in execution of the tertiary mortgage, and he seized under all the three writs the respective interests of the execution-debtors in the land, though he sold under the plaintiff's writ in the present action only. In reporting the sale, however, he informed the Court that he had made seizures under the other writs also.

The District Judge held that in these circumstances the sale must be presumed to have been under all three writs in the absence of any specific declaration at the sale to the contrary, and that the rights of the contestants to the surplus proceeds must be regulated by the priority of their respective mortgages. He relied on the authority of *Silva v. Perera*.¹ That case decided that when a Fiscal had in his hands several writs against a debtor, and had seized the debtor's

¹ (1908) 3 Bal. 258.

property under the writs, he ought to sell the property under all the writs, and the several writ-holders were entitled to share in the proceeds. It seems to me doubtful whether this principle can be extended to sales in execution of mortgage decrees. Even with regard to unsecured creditors' writs there is some difficulty in the application of the principle to the fullest extent, in view of the fact that under the Civil Procedure Code it is only creditors holding decrees of the same Court that can share in the proceeds of the sale in execution.

Moreover, it is necessary, in any case, that the debtor should be identical, and the property seized under the writs should be the same. In the present case the plaintiff's writ was against all the defendants, and Nallan Chetty's writ was against the fourth and the fifth defendants only, and the plaintiff's other writ was against the fourth, fifth, and sixth defendants, while the property seized in one case was the shares belonging to all the defendants; in the second case it was the one-eighth share belonging to the fourth defendant; and in the last case it was the two-eighths share belonging to the fourth and sixth defendants. In these circumstances, one sale under all the writs was not possible, and the Fiscal cannot be presumed, as the District Judge considered he should be presumed, to have held a sale under all the writs. As a matter of fact, the Fiscal purported to sell, and did sell, the three-fourths share of all the defendants under the writ issued by the plaintiff only; that is to say, he sold the shares of the first, second, sixth, and seventh defendants as primary mortgagors, and the share of the fourth defendant as secondary mortgagor. This must be taken to be the only sale which took place.

Further, the sale under Nallan Chetty was advertised for 2 P.M. of the same day, and when the sale under the plaintiff's writ took place at 12 noon, the result in law was that that sale, so far as the share of the fourth defendant was concerned, was subject to the primary mortgage in favour of Nallan Chetty. A further consequence was that Nallan Chetty had no right to share in the proceeds of the sale which took place, but must have recourse to the fourth defendant's share in the land, which was still subject to his primary mortgage, and which he might sell again over the head of the purchaser. Section 352 of the Civil Procedure Code expressly provides that "when any property is sold which is subject to a mortgage or charge, or for any other reason remains subject to a mortgage or charge notwithstanding the sale, the mortgagee or incumbrancer shall not as such be entitled to share in any proceeds arising from such sale." This is only declaratory of the common law, and arises out of the nature of mortgages and the order of preference in respect thereof. It seems, therefore, that Nallan Chetty irregularly drew a portion of the proceeds sale. It was, however, contended by Mr. A. St. V. Jayawardene that the distribution of the fund in Court was acquiesced in by all the parties, and should not now be

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disturbed. I do not think that the circumstances amount to such acquiescence. Neither the first defendant, who is the party chiefly concerned in this matter, nor the other defendants appear to have had any notice of the payments on September 7, 1917, of Rs. 3,066·63 to the plaintiff and Rs. 2,779·83 to Nallan Chetty. The fact appears to be that no proper account was at that time taken of the amounts lying to the credit of the various parties or of the claims of the respective creditors, and the surplus proceeds in Court were distributed under the wrong impression that there was enough money to pay every one in full.

The first defendant is entitled to have her full share of the surplus proceeds, and, as indicated above, she should get the deficiency from the money irregularly paid to Nallan Chetty, who should be relegated to his remedy on his mortgage security. Mr. Jayawardene was apprehensive that he would now be prejudiced in the pursuit of that remedy by reason of his having already drawn the money due to him on the mortgage, but I do not think this anxiety is well founded, seeing that by his refunding the money under compulsion of Court the *status quo* will be restored.

In my opinion this appeal should be allowed with costs, and Nallan Chetty, the respondent, should be ordered to bring into Court the sum of Rs. 2,779·83 drawn by him.

BERTRAM C.J.—I agree.

Appeal allowed.

