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Present: Lyall Grant J. and Maartensz A.J.

WALPOLA *v.* COOKE.

88—D. C. (Inty.) Colombo, 25,455.

Mortgage Decree—Assignment by way of mortgage—Subsequent seizure in execution—Realization of security by decree-holder—Rights of mortgagee—Civil Procedure Code, s. 339.

A obtained judgment against X on a mortgage bond, and mortgaged the decree with B. Subsequently C, in execution of a decree against A, seized the mortgage decree, got himself substituted as plaintiff in the action and had the security realized.

Held, that C had a preferent right to the proceeds of sale.

THIS was a mortgage action in which the plaintiff, A obtained judgment against X for a sum of Rs. 8,480 and interest. Decree was entered on November 25, 1927. Plaintiff assigned the decree by way of mortgage to intervenient appellant B by deed No. 115 of January 21, 1928, which was registered in the register dealing with immovable property. The substituted plaintiff-respondent C, who was judgment-creditor in D. C., Colombo, No. 29,229, obtained decree in that case on August 23, 1928, and seized the decree in this case on August 30, 1928, under section 234 of the Civil Procedure Code, had himself substituted plaintiff on September 17, 1928, and proceeded to execute the decree by sale of the mortgage property. Proceeds amounting to about Rs. 4,000 were brought into Court on November 2, 1928, by the auctioneer. B intervened on November 12, and moved that no sum of money be paid out without notice to him. On C moving to draw a sum of Rs. 2,577.25, that is, the amount of his decree in D. C., Colombo, No. 29,229, P claimed a preferent right. The learned District Judge held that B had no such right. B appealed.

Keuneman (with *Ferdinands*), for intervenient appellant.—The learned District Judge was wrong in upholding the contention that deed No. 115 should have been registered in the Register of Movables. A decree is a chose in action, not a chose in possession. Chose in action is omitted from Ordinances No. 8 of 1871 and No. 23 of 1927, section 17 (2). The Supreme Court has held that mortgages of choses in action do not come within the old Ordinance and so need not be registered (*Dawson v. Van Geyzel*[1]). This ruling will apply to the present Ordinance.

The learned District Judge seems to think that when C seized this decree under section 234 he was really an assignee of the decree and, as such, got himself substituted under section 239. He is wrong. He fails to distinguish between choses in action and choses in possession.

The position of a person who seizes a decree is not the same as a person to whom it is assigned for valuable consideration. A

[1] (*1893*) *3 C. L. R. 35.*

person who seizes under section 234 is, by section 254, deemed to be an assignee merely for the purpose of giving him the power to execute the judgment and to pay himself out of the proceeds—not an assignee for all purposes whatsoever. This interpretation has been adopted by Your Lordship's Court in *Cader v. Saibu.*[1]

We must not be penalized for not taking into possession a thing which we cannot take into possession.

The substituted plaintiff C can execute his decree subject to the mortgage. He ought not to be in a better position than the original mortgagor. If deed No. 115 is construed as an assignment our position is stronger. We could take up the position that it is really a transfer subject to the equity of redemption.

[MAARTENSZ A. J.—Have you got a precedent for a mortgage of a debt or decree?]

Debts could be mortgaged (*Burge III., p. 544*). What is mortgaged is the right embodied in the decree, that is, the money due on the decree. (*Sande's Cession of Action (Ander's), p. 77; Voet XVIII. 4, 9 and 17; Jayasinghe's Notary's Manual 239; Encyclopædia of Forms and Precedents, vol. VIII., p. 704*).

Our right against the mortgage property is gone but we can assert our right against the proceeds of the decree. A mortgagee of movables has a preference to the proceeds (*Adicappa Chetty v. Perera* [2]). He has preference even over costs of seizing creditor (*Marikar v. Marikar* [3]).

If we regard deed No. 315 as a pure mortgage and not as an assignment our right is to ask that the money be retained pending an action. In an assignment we can claim the money. In this case it makes no difference which it is, as the money is in Court.

H. V. Perera (with *Navaratnam*), for substituted plaintiff, respondent.—The correct position is that the deed is an instrument of mortgage. The instrument is not an assignment; it is simply a mortgage of a judgment debt. In Roman-Dutch law where there is no delivery of movable property the hypothecation attaches only so long as the property remains in the possession of the mortgagor. The right of hypothec is lost as soon as the mortgagor loses possession (*2 N. L. R. 94; Voet XX. 1, 12*).

Seizure of a decree is equivalent to an assignment of that decree—section 254 of the Civil Procedure Code. Such assignment has the same effect as an assignment by a writing. A judgment debt being movable property is capable of possession. The person in possession in this case was the original plaintiff, being the decree holder; when the seizing creditor was substituted plaintiff he got possession; that act destroyed the hypothec.

When seizure of movables takes place under section 227 of the Code possession does not change and therefore right of hypothec

[1] *(1923) 25 N. L. R 36.* [2] *30 N. L. R. 27 (28)* [3] *(1900) 1 C. L. R 1*

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is not lost. When the fiscal sells the property the Roman-Dutch law doctrine of the price taking the place of the goods takes effect (*Marikar v. Marikar* [1]).

This is so only if the hypothec attached to the goods at the moment of the sale (*Jayawardene on Mortgages, p. 37*). In South Africa the attachment gives rise to a judicial pledge with delivery, that is, the Fiscal holds for the creditor. Mortgages of land are movable property (*Silva v. Mudalihamy* [2]).

With regard to the argument that the document is an assignment of the decree, we must look at the whole document. Nowhere is it said that it is an assignment with a right of redemption. It is a simple mortgage. If it was an assignment the intervenient would have got himself substituted.

[MAARTENSZ A. J.—If we assume that it is assignment, what is your position?]

That brings us to a very difficult question of Roman-Dutch law.

[MAARTENSZ A. J.—Can there be a cession of a debt without delivery of a debt?]

There must be a placing of the assignee in control of the debt (*Sandé's Cession of Action 227*). Roman-Dutch law jurists being in conflict, we ought to follow English law and require notice. Notice in this case could have been given by the intervenient getting himself substituted. An assignment of a judgment debt is not complete till the assignee gets into a position to enforce it. Lastly the possibility of fraud ought to be considered.

Keuneman, in reply.—Question of fraud need not be considered in this case as there is a notarial deed. Section 339 insists upon an assignment in writing.

The Court will not give to the statutory provisions of section 254 any extended meaning. Voet, in the passages cited by the other side, seems to deal with voluntary alienations and not to alienations by operation of law. Our real defence is that this is an assignment. It is a clear assignment.

November 26, 1929. LYALL GRANT J.—

The question raised by this appeal is whether the appellant or the respondent is entitled to certain proceeds of a Fiscal's execution on a decree.

The facts may be briefly and formally set out as follows: On November 25, 1927, A obtained judgment against X for a sum of Rs. 8,480 and interest, the amount due on a mortgage bond. On January 21, 1928, he mortgaged the decree to B (the appellant) in connection with a loan for Rs. 7,000.

B registered the mortgage in the register of immovable property.

No steps were taken to execute the decree, and on August 23, 1928. C (the respondent) obtained a decree against A for Rs. 2,577.25.

[1] *1 C. L. R. 1* [2] *17 C. L. R. 328*

including costs in another case. On August 30, 1928, he seized the decree in the case of A and X. On September 17, 1928, he got himself substituted as plaintiff in that case, executed the decree, and brought the proceeds of sale, amounting to Rs. 4,000, into Court on November 2, 1928.

On November 12, 1928, B intervened and claimed the whole of this sum under his mortgage.

The learned District Judge has held that C is entitled to prevail against B on the grounds that—

(1) the mortgage was movable property and should have been registered in the Register for movables and for want of registration it is void.

(2) when he became substituted plaintiff the movable property (*i.e.*, the decree) passed into his hands and a mortgagee of movables could not follow it there.

In the petition of appeal it was pleaded that—

(1) no registration is required of a chose in action, which is specially exempted in section 17 (2) of the Registration of Deeds Ordinance, No. 23 of 1927,

(2) if A had realized the decree B would have been entitled to the proceeds of sale by virtue of his mortgage, and C being an assignee by operation of law cannot be in a better position than his assignor,

(3) (a variation of 2) C as assignee became the holder of the decree subject to all legal rights appertaining to it,

(4) when the decree was realized in execution the appellant's mortgage immediately attached to the fruits of the decree, and B was entitled to the moneys in Court.

In this Court the principal arguments of the appellant were—

(1) B's document is an assignment,

(2) it required no registration,

(3) C was in the position of a purchaser or voluntary assignee of the decree.

Under section 254 he acquired only limited rights against A, and there was nothing in that section by which alone rights are conferred on him, to entitle him to defeat the previously acquired rights of a third party.

For the respondent it was argued—

(1) that the mortgage was not an assignment but only a hypothecation,

(2) that when a mortgagor gives possession to a third party of hypothecation movables of which he has been left in possession, the mortgagee by operation of law loses his right of hypothec, *i.e.*, that it is not available against a third party,

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(3) that the only person in possession of a decree is the plaintiff on the record and that transfer of possession is effected by the substitution of another plaintiff on the record.

In reply it was urged that, assuming the document to be merely hypothec, C acquired only limited rights under section 254 " so far as that person's interest extends " and not all the rights of an ordinary assignee. He could only take the reversionary interest in the mortgage which was all that remained in the mortgagor, " the person " referred to in the section.

The principles of English law relating to judgment debts and other choses in action are set out in *Halsbury's Laws of England*, under the title of choses in action.

It appears that while no registration or notice is essential to the validity of such an assignment, the assignment is postponed to a subsequent assignment of which prior notice has been given provided that the subsequent assignee does not know of the first assignment at the time when he takes his security.

By the Judicature Act of 1873 certain conditions are required to vest in an assignee legal rights to a chose in action (which includes a judgment debt).

These are (1) the assignment must be in writing, (2) it must be absolute and not by way of charge only, and (3) express notice in writing must be given to the debtor.

A conditional assignment, *e.g.*, one expressed to be till money advanced is repaid is not within the statute and to determine whether an assignment purports to be by way of charge the whole effect of the document must be looked at.

There can I think be no doubt that if the principles of English law were to be applied C's execution would defeat B's prior mortgage of which he had no notice.

The question is to some extent dealt with in the Ceylon Civil Procedure Code.

Section 339 of the Code deals with assignment of a decree " when made in writing," and it has been held that such assignments are void unless they are in writing. The section provides that the transferee may apply for execution of the decree by petition to the Court which passed it and shall make all parties to the action respondents, and if the Court thinks fit it may substitute the transferee's name for that of the transferor in the record of the decree, and thereupon the decree may be executed, &c.

It seems to me that the effect of this section is that the transfer of a decree is not complete until the Court after consideration has sanction it. Possession of the decree does not pass by the assignment in writing or before the decision of the Court. The decree of the Court substituting the assignee's name in the decree is equivalent to transfer of possession.

A point to be noted is that all the parties to the action must be noticed and given an opportunity to state objections before any right *in rem* is acquired by the assignee.

Section 339 provides that where a decree of Court is seized in execution of another decree, the judgment-creditor of the second decree is in the situation of an assignee of the judgment-creditor of the decree which is seized.

In such a case there is a transfer by operation of law and the creditor can apply to have his name substituted as plaintiff.

I can find no reference in the Code to the mortgage of a decree nor has any case been cited to us which deals with such a transaction. We have however been referred to an English form which provides for the assignment of a decree by way of mortgage.

The security recited by the document is that for further security and for a loan of Rs. 7,000 the mortgagor assigns and sets over (by way of mortgage) as primary mortgage the sum of money due and owing to him in respect of the decree entered in his favour and all his rights, &c., in the judgment decree and with full power to recover the moneys payable and recoverable in respect of the judgment.

I think, especially in view of the last words quoted, that there is intended here something more than a mere hypothec. Power to recover the money is given, and it would appear to be intended to operate as a transfer by assignment which could be enforced under section 339.

The construction of the document was primarily a matter for the District Court to decide if the matter had been brought before it under section 339. If that Court came to the conclusion that it was not an assignment it would refuse to substitute the mortgagee as plaintiff and the mortgage would operate as a hypothecation without delivery of possession.

The only way so far as I can see in which the mortgagee can complete his security is by taking proceedings under section 339. Until he does so he is not secured. In other words, possession of the decree remains in the mortgagor. Possession is transferred not by the deed but by the Court and at the Court's descretion. It is no doubt true that the Registration Ordinance does not declare mortgages of choses in action void unless there is either delivery or registration. but it remains to be ascertained what security is created in such a case, and to ascertain this we are thrown back upon the Common law.

As indicated above, I do not think that any right *in rem* was acquired by B. The document merely gave him an opportunity to acquire such a right by going to the Court and by being substituted as plaintiff, but he did not avail himself of his right. The case is analogous to a mortgage of movable property where there has been no pledge of the goods and the mortgagee has neglected to register.

No doubt B has personal rights against A in the sense that if A had executed the judgment he would have had a claim to the funds as against A, but this is not a security which under either English

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or Roman-Dutch law would give him any rights against a subsequent assignee who obtained possession without notice.

It was further argued that even if this were so as between competing voluntary assignees, C obtained only the rights given him by section 254 and that these rights are limited to the interests actually possessed by A at the time of his seizure. If A realized the decree the proceeds would clearly have been attachable under the mortgage and C can be in no better position than the person to whom he is substituted.

This argument, if sound, would appear to have dangerous consequences. Any creditor seizing a judgment would be liable to be defeated by some secret document dated anterior to the seizure and showing a mortgage or hypothec by the person whose judgment is seized. The door would be opened wide to fraud and collusion. That seems to me contrary to the principles of both English and Roman-Dutch law. The only decision cited to us which has any bearing on the interpretation of these words " so far as that person's interest extends " is that of Schneider J. in *Cader v. Caibo*.[1]

He says " A judgment-creditor who seizes a decree in another action is to be deemed an assignee of the latter decree only for the limited purpose of execution of the decree seized for the satisfaction of the decree in his favour. He cannot be regarded as entitled to all the rights of an ordinary assignee. Any surplus after satisfaction of his claim will not belong to him, but to the actual decree holder."

With this dictum, if I may say so, I agree, but it does not touch the question now before us, which is, What were the interests of A at the date of seizure by C ? To ascertain what these interests were we must look at the Common law.

The provisions of the Roman-Dutch law relating to assignees of property burdened with an undisclosed hypothec will apply. The creditor's security depends on his possession or on notice. If a third party gets possession without notice he obtains preference.

Here a third party with no notice of the security has got possession, and it seems to me to be in accordance with the provisions of the Roman-Dutch law (see *Voet XXI, 12 and 13*), which on this point is in agreement with the English law, that he should prevail. Section 13 of *Voet* is very clear on this point.

To sum up. I think that A gave B an instrument on which perhaps possession of the property mortgaged might have been obtained by process of Court, but possession was not so obtained. The instrument operates therefore as a mere hypothec or assignment without transfer of possession and without notice and is liable to be defeated by a subsequent assignment with transfer of possession.

A seizing creditor without notice of the mortgage is in the position of a subsequent assignee and has preference.

The appeal is dismissed with costs.

MAARTENSZ A.J.—I agree.

Appeal dismissed.

[1] *25 N. L. R. 36*