1954 *Present:* K. D. de Silva, J., and Sansoni, J.

THAMBIPILLAI *et al.*, Appellants, *and* CANAGARATNE *et al.*, Respondents

S. C. 53–54—D. C. (Inty.) Jaffna, 4,398

Execution—Concurrence of decree holders—Civil Procedure Code, ss. 232, 350, 352—Mortgage—Scope of rule that mortgagee should first discuss the property mortgaged.

After the claim of two primary mortgagees was satisfied from the proceeds of a hypothecary sale, the balance of the proceeds lying in Court to the credit of the mortgagor was seized under section 232 of the Civil Procedure Code by three classes of judgment creditors, viz., unsecured creditors holding money decrees of the same Court, unsecured creditors holding money decrees of another Court, and secondary and tertiary mortgagees of the land sold under the hypothecary decree, who had obtained hypothecary decrees prior to the sale but subsequent to the entering of the decree upon the primary mortgage.

Held, that there was nothing in either section 350 or section 352 of the Civil Procedure Code to prevent all the seizing creditors, including the secondary and tertiary mortgagees, from being equally entitled to claim concurrence and share rateably, so long as the money lying in the custody Court had not been appropriated to a particular decree holder or holders by an order of that Court.

Held further, that the claim for concurrence by the secondary and tertiary mortgagees was not prejudiced by the fact that, apart from the land sold at the instance of the primary mortgagees, other lands had also been hypothecated under their bonds.

APPEAL from an order of the District Court, Jaffna.

S. J. V. Chelvanayakam, Q.C., with *M. Rafeek*, for Appellants in S. C. 53.

S. J. V. Chelvanayakam, Q.C., with *A. Nagendra*, for Appellants in S. C. 54.

A. C. Nadarajah, for 1st Respondent in S. C. 53 and for 2nd Respondent in S. C. 54.

T. W. Rajaratnam, for 2nd Respondent in S. C. 53 and for 3rd Respondent in S. C. 54.

C. Manohara, for 3rd and 6th Respondents in S. C. 53 and for 4th to 7th Respondents in S. C. 54.

Cur. adv. vult.

November 24, 1954. SANSONI, J.—

A hypothecary decree was entered in this action on 16th June 1948 in favour of two primary mortgagees, and by order of Court the land mortgaged was sold by a Commissioner. The primary mortgagees' claim has

been satisfied and the money in Court is the balance left over out of the proceeds of the sale. After this money was deposited in Court seizure notices under section 232 of the Civil Procedure Code were forwarded to the Court by the Fiscal on behalf of three classes of judgment creditors, viz., unsecured creditors holding money decrees of the same Court, unsecured creditors holding money decrees of another Court, and secondary and tertiary mortgagees of the land sold, who had obtained hypothecary decrees prior to the sale but subsequent to the entering of the decree upon the primary mortgage. Some of the seizing creditors went a step further and applied in this action that sums of money be transferred to their actions to satisfy their claims. The District Judge very properly directed that the parties and all the seizing creditors be given notice of such applications. Ultimately an inquiry was held into the claims of all the seizing creditors and the learned Judge held that only those seizing creditors who had applied for a transfer of money from this action to their respective actions could claim concurrence. He appears to have thought that this result followed from the decisions in *Mendis v. Peris* [1] and *Shaw and Sons v. Sulaiman* [2]. The secondary and tertiary mortgagees have appealed and Mr. Chelvanayagam has pressed only their claim to concurrence. He said he was not claiming preferential payment out of the money in Court. Mr. Nadarajah, however, has contested the appellants' claims even to concurrence.

I do not think the decisions cited have established the proposition on which the learned Judge based his order. On the contrary, the basis of the decision in *Shaw and Sons v. Sulaiman* (supra) is that a judgment creditor who applies for execution is not shut out from claiming concurrence so long as the money lying in the custody Court has not been appropriated to a particular decree holder or holders by an order of that Court. No such order had been made in this case prior to the inquiry. There is nothing in either section 350 or section 352 of the Code to indicate that an application for transfer of the money, such as had been made by the respondents to these appeals, confers any particular privilege on a judgment creditor. The essential order of appropriation had not been made. The position, then, is that all the judgment creditors had effected seizures, and since no order in favour of any particular seizing creditor had been made they were all entitled to share in the money and they all had the same rights. The latter part of section 350 seems to govern the matter. The seizing creditors had notified the Court of their claims to the money and the Court rightly caused notices to issue to all of them before making any order as to payment. The justice of the case requires—and that is the test laid down in the section—that all the seizing creditors, including the appellants, should share rateably.

But Mr. Nadarajah also relied on the rule enunciated by de Sampayo, J., in *Wijesekera v. Rawal* [3], that a mortgagee who has obtained a hypothecary decree should first realize the property mortgaged and can resort to

[1] *(1915) 18 N. L. R. 310.* [2] *(1928) 29 N. L. R. 481.*

[3] *(1917) 20 N. L. R. 126.*

other property of the debtor only for any deficiency, unless the debtor consents otherwise. He submitted that although the land sold under the decree in favour of the primary mortgagee had been mortgaged on the secondary and tertiary bonds, other lands had also been mortgaged and the appellants should first sell those other lands before they claimed concurrence in the proceeds of sale of the land sold. I think there are two answers to this submission. Firstly, it cannot be said that the appellants are seeking to resort to property which has not been mortgaged to them. The land sold was subject to secondary and tertiary mortgages in favour of the appellants, and by claiming to share in the money in Court, which was brought there by the sale of the land, they do not seem to me to be offending against the rule in question. It is not, in my opinion, "other property of the debtor" within the meaning of the rule. Secondly, that rule was obviously introduced for the benefit of the mortgagor whose unsecured property it was probably intended to protect. This aspect of it is emphasised by the words "unless the debtor consents otherwise". If the rule was introduced to protect other creditors of the mortgagor, obviously it could not have been open to the mortgagor to waive it. I therefore do not think this objection can be taken by the respondents who are creditors of the mortgagor. I would also draw attention to the reservation made by de Sampayo, J., to which Schneider, J., referred in *Pathinayake v. Wickremesinghe* [1], viz., that there might be good reasons for a Court not enforcing the general principle that the mortgaged property should be first discussed. It is clear that if the money lying in Court is drawn by the other creditors, the appellants will lose a great part of their security, and if they have to proceed against the other mortgaged lands first it will be too late for them to claim concurrence. The decrees entered in favour of the appellants first direct the debtors to pay the amounts due under the bonds, and are, in that respect, like any money decrees; they then direct that in default of such payment the mortgaged lands (including of course the land sold under the primary mortgage) should be sold. The appellants are doing no more than levying execution under the first part of their decrees.

For these reasons I would set aside the order of the learned Judge so far as it rejects the claims of the appellants. They will be entitled to share the money in deposit along with the seizing creditors in whose favour the learned Judge has already held. The appellants are entitled to recover their costs of these appeals from the 1st, 2nd, 3rd and 6th respondents in appeal No. 53, and the 2nd to 7th respondents in appeal No. 54. The order of the learned Judge as to costs in the District Court will stand.

DE SILVA, J.—I agree.

Order set aside.

[1] *(1923) 25 N. L. R. 102.*