

SEEMAN

v.

DAVID

COURT OF APPEAL
WEERASURIYA, J.
UDALAGAMA, J.
CA NO. 320/93(F)
DC PANADURA 2504/SPL
19TH AUGUST 1999
03RD SEPTEMBER 1999
13RD OCTOBER 1999

*Usufructuary Mortgage - Discharge - Prescription - Prescription Ordinance
S. 5 - When could the usufructuary mortgagee claim prescriptive rights?*

Held :

(1) A usufructuary mortgage being a devise for use and enjoyment of property in lieu of interest - prescription could run only from a breach of that condition.

(2) Person who entered property in a subordinate character cannot claim prescriptive rights till he changes his character by an overt act. The proof of adverse possession is a condition precedent to the claim for prescriptive rights.

(3) Usufructuary mortgagee is bound to the terms of the Bond itself and his rights are confined to the terms in the bond. He cannot claim prescriptive rights till he changes his character and claim adversely disregarding the conditions of the Bond. There is no question of merger of the entirety of the rights and no prescriptive rights being acquired by the Mortgagee by adverse possession.

APPEAL from the Judgment of the District Court of Panadura.

Cases referred to :

1. *Robert v. Silva* 24 NLR 158 at 159
2. *Jayasinghe Bandara v. Elias Appuhamy* 12 NLR 300
3. *Government Agent Western Province v. Fredrick Perera* 11 NLR 337
4. *Vallappa Chettiar v. J. Vanderpoorten* 52 NLR 108 at 114
5. *Velupillai v. Kandiah* 27 NLR 89

Hemasiri Withanachchi with *S.N. Vijithsingh* for 1st Plaintiff-Appellant.
Defendant-Respondent absent and unrepresented.

Cur. adv. vult.

October 13, 1999.

WEERASURIYA, J.

The Plaintiff-Appellants by their plaint dated 18. 09. 1989 instituted action against the Defendant-Respondents seeking an order on the Defendant-Respondents to discharge usufructuary mortgage bond bearing No. 8505 dated 28. 01. 1921 and in the event of their failure for an order on the Registrar to effect such discharge of the bond and damages. The Defendant-Respondents in their answer whilst denying averments in the plaint prayed for dismissal of the action.

This case proceeded to trial on thirteen issues and the learned District Judge at the conclusion of the trial by his judgment dated 07. 07. 1993 dismissed the action with costs. It is from the aforesaid judgment that this appeal has been lodged.

At the hearing of this appeal, learned Counsel appearing for the Plaintiff-Appellants contended that the learned District Judge had misdirected himself by holding:

- (a) that action was prescribed in terms of Section 5 of the Prescription Ordinance and
- (b) that the Defendant-Respondents had acquired prescriptive rights to the property in suit.

The learned District Judge in his judgment had held that in terms of Section 5 of the Prescription Ordinance, the mortgagor should redeem the bond before expiry of ten years from the date of such instrument. Section 5 of the Prescription Ordinance stipulates that no action is maintainable for the recovery of any sum due upon any hypothecation or mortgage of any property or upon any bond conditioned for the payment

of money unless the same be commenced in the case of an instrument payable at a definite time, within ten years from the expiration of such time and in all other cases within ten years from the date of such instrument of mortgage or hypothecation or of last payment of interest thereon or of the breach of the condition.

A usufructuary mortgage being a devise for use and enjoyment of property in lieu of interest, prescription could run only from a breach of that condition (Vide *Robet v. Silva*⁽¹⁾ at 159)

Mestiyage Don Remanis Goonetillake by usufructuary mortgage bond bearing No. 8505, mortgaged his undivided 1/2 share of the property morefully described in the schedule to the plaint in favour of Dona Misi Nona and Don Welenis. Don Welenis died without redeeming the mortgage and Mei Nona by deed bearing No. 2102 dated 14. 06. 1934 marked 1D1 transferred undivided 131/504 shares to Misi Nona and to 1st - 4th Defendant-Respondents.

Remanis left as his heirs his wife Mei Nona and the 1st and 2nd Plaintiffs, Misi Nona and Baby Nona. Baby Nona died leaving Violet Goonetillake who got married to the 1st Defendant, David Goonetillake. Misi Nona died leaving Welenis and 1st - 4th Defendants. Therefore, on the death of Remanis Goonetilake his 1/2 share devolved on Mei Nona and his four children. Mei Nona, being the wife, was entitled to 1/2 share of his interest, namely. 1/4 share of the property. Therefore, Mei Nona by virtue of deed No. 2327 dated 08. 09. 1995 and the aforesaid devolution from Remanis was entitled to 3/4 share of the property in suit. In the circumstances, by deed marked 1D1 Mei Nona having divested only 131/504 shares to Misi Nona and the 1st - 4th Defendants, she was left with substantial undivided shares which was not subject to the usufructuary mortgage. The question whether in terms of 1D1 the usufructuary mortgagee has acquired entirety of rights of

Mei Nona would be relevant on the issue whether there was a merger of proprietary rights with the usufructuary mortgage.

It would appear that Mei Nona having divested 131/504 share of the rights was left with substantial rights which were free of any encumbrance in favour of Welenis and Misi Nona.

It was held in *Jayasinghe Bandara v. Elias Appuhamy*⁽²⁾ that where a mortgagee of immovable property becomes the owner of the property mortgaged or any share of it, the mortgage security is extinguished to that extent but the debt remains.

The learned District Judge had come to the finding that the Defendant-Respondents had acquired prescriptive rights to the entire property on the basis that along with their predecessors in title they had possessed the property for a period of 70 years. This appears to be an erroneous view.

To claim prescriptive rights the Defendant-Respondents ought to prove adverse and uninterrupted possession for a period of over ten years. The Defendant-Respondents and their predecessor in title commenced possession of the property on the strength of the usufructuary mortgage bond which authorised them to possess the property in lieu of interest. Therefore, the possession of the property was subject to the terms of the mortgage bond namely, to possess the property and to enjoy the produce in lieu of the interest payable on the amount of money lent to the mortgagor.

It is well settled law that a person who entered property in a subordinate character cannot claim prescriptive rights till he changes his character by an overt act. He is not entitled to do so by forming a secret intention unaccompanied by an act of ouster. The proof of adverse possession is a condition precedent to the claim for prescriptive rights.

In *Government Agent Western Province v. Fredrick Perera*⁽³⁾ it was held:

“that usufructuary mortgagees had acquired title by prescription to the land, inasmuch as after their purchase at the fiscal’s sale the character of their possession changed and thereafter they must be considered to have possessed ut domini and not qua mortgagees.”

In that case, the usufructuary mortgagees of a land purchased the same at a sale by the fiscal under subsequent mortgage and claimed to set off the amount due on their mortgage against the purchase money and possessed the land for over ten years without obtaining any fiscal’s transfer.

Further, it was observed in *Valliappa Chettiar v. J. Vanderpooten*⁽⁴⁾ at 114 as follows:

“... In the first place a mortgagee, like any other holder of property under a deed, is subject to the terms of the deed and his rights may be enlarged or diminished by its terms. In the second place a mortgagee in Ceylon is not subject to all the underlying conceptions of English law, but is without doubt bound strictly to fulfil the terms of the deed under which he holds.”

Further in case of *Velupillai v. Kandiah*⁽⁵⁾ it was held:

“that on the purchase by the mortgagee of the mortgaged land, the mortgage is merged in the ownership and that the question of revival of a mortgage can only arise in a case in which for some reason a valid merger does not take place.”

Therefore, it would be clear that a usufructuary mortgagee is bound to the terms of the bond itself and his rights are confined to the terms in the bond. He cannot claim prescriptive rights till he changes his character and claim adversely disregarding the conditions of the bond. Therefore, there is no question of merger of the entirety of the rights and no prescriptive rights being acquired by the mortgagee by adverse possession.

In the circumstances, we are of the view, that the learned District Judge had misdirected himself in coming to the conclusion that action is time barred in terms of Section 5 of the Prescription Ordinance and that the Defendant-Respondents had acquired prescriptive rights to the entirety of the property.

For the foregoing reasons, we set aside the judgment of the learned District Judge dated 07. 07. 1993 and allow this appeal without costs.

UDALAGAMA, J. - I agree.

appeal allowed.