

1937

Present : Moseley J. and Fernando A.J.

JOHN APPUHAMY *v.* WILLIAM APPUHAMY

282—D.C. Colombo, 2,886

*Bond—Action on mortgage bond which is void—Right to recover on personal covenant—Bond conditioned for the payment of money—Prescription—Ordinance No. 22 of 1871, s. 6.*

An action may be maintained upon the personal covenant to pay money contained in a mortgage bond, which is void for the reason that it was executed pending a partition action.

Such a bond is one conditioned for the payment of money within the meaning of section 6 of the Prescription Ordinance.

*Sidambaram Chetty v. Jayawardana* (4 *Tambyah* 85) and *Tissera v. Tissera* (2 N. L. R. 238) followed.

**A** PPEAL from a judgment of the District Judge of Colombo.

*L. A. Rajapakse*, for plaintiff, appellant.

*M. C. Abeyewardene*, for defendant, respondent.

*Cur. adv. vult.*

February 10, 1937. MOSELEY J.—

By a mortgage bond, dated February 21, 1929, the defendant mortgaged a certain share of land which was at the time the subject of a partition action. Action was filed on the bond on March 5, 1935. The defence was that by virtue of section 17 of the Partition Ordinance, No. 10 of 1863 the hypothecation while partition proceedings were pending was void. It was further contended that in the event of the plaintiff being regarded as an unsecured creditor, action was prescribed by section 7 of the Prescription Ordinance, No. 22 of 1871.

The learned District Judge found that the hypothecation was void, that no money could be due on that mortgage bond, and that the question of prescription did not therefore arise.

From that judgment the plaintiff appeals. His first point is that, even if the hypothecation of the land is bad, the personal covenant to pay the debt remains. On this point we were referred to the case of *Sidambaram Chetty v. Jayewardana*<sup>1</sup>, which case had been considered by the District Judge and held not applicable. This case seems to provide ample authority for the proposition that only the hypothecation is void and not the instrument containing it.

Counsel for the respondent sought to distinguish the circumstances of the present case and submitted that in the case before us there is no distinct claim on the personal covenant, whereas in *Sidambaram Chetty v. Jayewardana* (*supra*), the plaintiff avoided recourse to the hypothecary action, and sued only on the personal covenant. In the present case, however, there is a perfectly clear claim for payment on the personal covenant, and I have no hesitation in following the authority and finding that, although the hypothecation is void, there still remains to the plaintiff an action on the promise to pay.

<sup>1</sup> 4 *Tambyah* 85.

This brings us to the second point, namely, whether or not the action on the promise is prescribed. The defendant's contention is that being a mere promise to pay, it falls under section 7 of the Prescription Ordinance, and that the action, not having been brought within six years, cannot be maintained.

Counsel for the plaintiff argues that the document is a bond conditioned for the payment of money within the meaning of section 6 of the Ordinance in which case the action has been commenced well within the statutory period of ten years.

We are thus faced with the vexed question as to what is a bond condition for the payment of money.

We were referred to the case of *Tissera v. Tissera*<sup>1</sup>, in which case the document under consideration contained a promise to pay a sum of money with interest on demand and the person executing it bound himself, his heirs and executors and all his properties. It was held by Bonser C.J. that the document was a "general conventional mortgage" and he had no doubt that it fell under section 6. He was also of opinion that it was a bond "conditioned for the payment of money", the meaning of which he went on to say "is that the bond is to be given for securing the payment of money, and it seems to me that what is technically a single bond, i.e., a bond without any defeasance or condition annexed, is as much within section 6 as a double or conditional bond."

This view was considered in *Seman v. Silva*<sup>2</sup> by Ennis J. who said, "I am unable to agree that this case is an authority for the proposition that a document notarially executed, containing merely a promise to pay money, is a bond conditioned for the payment of money. In my opinion the expression refers only to documents in which there is a condition that money is to be paid by way of security."

The document then under consideration was a lease which de Sampayo J. was quite sure "is not a bond. Its main purpose it not to secure the payment of money, but to vest the right of possession of a land for a certain period in the lessee".

It can hardly be controverted that the main object of the document in the case before us is to secure the payment of money.

Counsel for the respondent referred us to the case of *Sinnamy Aiyer v. Balampikai Amma*<sup>3</sup>, in which all the previous authorities were reviewed at length. The document in that case was an agreement to convey land and provided, in default, for the payment of a sum of money as the value of the land and a further sum by way of liquidated damages. The document was held not to be a "bond conditioned for the payment of money".

In *Seman v. Silva* (*supra*), de Sampayo J. observed that "an instrument should be construed as a bond or the contrary according to its substance and real characteristics". That is a proposition which commends itself to me and I feel constrained to follow the view expressed by Bonser C.J. which I have quoted above.

<sup>1</sup> 2 N. L. R. 238.

<sup>3</sup> 31 N. L. R. 47.

<sup>2</sup> 18 N. L. R. 397.

In my opinion the mortgage bond in this case must be regarded as a "bond conditioned for the payment of money" and as such falls within section 6 of the Prescription Ordinance. The action therefore is not prescribed, and the plaintiff, in the absence of any defence on the merits, should succeed.

The appeal is allowed with costs. The judgment of the District Court is set aside and judgment will be entered for the amount claimed with costs.

FERNANDO A.J.—I agree.

*Appeal allowed.*

