

Present : Dalton J. and Jayewardene A.J.

1928,

RATTARANHAMY v. APPUNAIDE *et al.*

97—D. C. Ratnapura, 4,607.

*Usufructuary mortgage—Agreement not to lease or mortgage—Subsequent mortgage—Right of second mortgagee to discharge the previous mortgage—Authority.*

The owner of certain property gave a usufructuary mortgage to the defendants, covenanting that "he will not, during the continuance of this mortgage, lease or mortgage the said premises or do any act or deed whatever, which may impeach the rents and income thereof, without the consent in writing first had and obtained."

Thereafter he gave another usufructuary mortgage to the plaintiffs, who were authorized to retain a portion of the consideration for the discharge of the previous mortgage.

*Held*, that the plaintiffs were entitled to redeem the mortgage granted to the defendants.

THIS was an action brought by the plaintiffs to redeem a usufructuary mortgage granted by one Mohottihamy on September 16, 1922, in favour of the defendants to secure a sum of Rs. 350. On April 24, 1925, Mohottihamy executed a further usufructuary mortgage in favour of the plaintiffs for the sum of Rs. 1,400, of which a sum of Rs. 675 was retained in the hands of the plaintiffs for the purpose of discharging among others, the mortgage in favour of the defendants. On the defendants refusing to receive payment of the debt due to them, the plaintiffs instituted this action, bringing into Court the sum of Rs. 350. The learned District Judge dismissed the plaintiffs' action.

*Navaratnam*, for plaintiffs, appellant.—A debtor has the right to pay his debt and to redeem a mortgage bond securing the debt. This right he can exercise directly or through an agent. Covenants restraining him from executing a subsequent lease or mortgage to the property hypothecated cannot be construed to mean a renunciation of the right to redeem. The debtor, in the present case, seeks to pay the debt and redeem the earlier bond through his duly constituted agent, the plaintiff. No privity of contract between the first mortgagee and the plaintiff need exist to enable the latter to act as the debtor's agent. Apart from being the debtor's agent, the plaintiff relies on the usufructuary bond in his favour. He can enforce by action his right to possess and cultivate the field mortgaged to him and get out of the way the earlier bond by payment of his mortgagor's debt.

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*Rajakariur*, for defendants, respondent.—The mortgagor has definitely bound himself not to lease or mortgage to another. He has acted in breach of this express condition by giving the second usufructuary mortgage. The right to redeem is, under the circumstances, personal to him and cannot be exercised by the plaintiffs.

July 3, 1928. DALTON J.—

One Mohottihamy executed a usufructuary mortgage No. 9,959 on September 16, 1922 (D 1), in favour of Appunaide and Punchinaide, the defendants (respondents) in this action, for a sum of Rs. 350. That bond contained the following covenant :—

“ And I, the said debtor, do hereby covenant . . . . . that I will not, during the continuance of this mortgage, lease or mortgage the said premises or do any other act or deed whatever which may impeach the rents and income thereof without the consent in writing first had and obtained . . . . . ”

On April 24, 1925, Mohottihamy executed a further usufructuary mortgage No. 6,974 in favour of Rattaranhamy and Punchimenika, the plaintiffs (appellants) in this action, for the sum of Rs. 1,400. It is clear that it was raised to pay off the sum due on the first bond. The attestation clause is in the following terms :—

“ And I further certify and attest that Rs. 75 out of the consideration therein expressed was paid in my presence, Rs. 675 was retained in the hands of the creditors to pay and settle mortgage bonds No. 9,959 . . . . ., No. 4,956 . . . . ., and No. 4,238 . . . . ., and the balance was acknowledged to have been previously received . . . . . ”

I can find nothing to show this bond No. 6,974 has ever been admitted in evidence. No point has been made of this on the appeal, but want of care in dealing with and marking exhibits renders the work of this Court unnecessarily difficult to find one's way about the record.

On August 16, 1926, Mohottihamy and the plaintiffs requested (see exhibit P 1) the defendants to receive payment of their bond No. 9,959 and to execute a discharge. They apparently refused to do so, and the plaintiffs, on November 26, 1926, commenced this action, requesting that the defendants be ordered to accept the sum of Rs. 350 and to discharge the bond. They brought the sum of Rs. 350 into Court. The defendants answered that they were unaware of the execution of bond No. 6,974, and that in any case plaintiffs could not maintain the action against them. They further pleaded that their right to possess the lands mortgaged

under their bond No. 9,959 did not commence until 1928, and therefore they were being deprived of the return from the lands which they expected to receive.

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Only two issues have been raised on this appeal—

- (1) Was Mohottihamy entitled to grant a mortgage to plaintiffs without the consent of the defendants ?
- (2) Can the plaintiffs maintain this action ?

The trial Judge dismissed the action apparently on both grounds. He held the mortgagor had bound himself not to lease or mortgage the lands without the consent of the defendants, and further, that there was no privity of contract between the plaintiffs and the defendants.

On the first point, it seems to me that the covenant has not been read with sufficient care. It is not a covenant not to mortgage or lease *simpliciter*, but not to mortgage or lease or do any other act in such a way as "to impeach the rents and income" thereof. I presume that means an act that may imperil the rents and income reaching defendants hands. It has not, in my opinion, been shown, having regard to the terms of the deed, that defendants' rights under the deed to obtain rents and produce have in any way been imperilled between September 16, 1922, the date of the execution of deed No. 9,959, and April 24, 1925, the date of the execution of deed No. 6,974, or thereafter. They purport, however, to set up some other agreement whereby they say they were only to enter into possession of the lands mortgaged and obtain their rights thereunder in 1928, entirely changing the effects of the bond No. 9,959, but I am not satisfied they can do so. That is quite inconsistent with the terms of their deed. The argument advanced on their behalf would extend to an entire prohibition against the mortgagor to pay off the debt so long as the defendants, having once entered into possession of the lands mortgaged, wished to remain in possession and declined to accept the sum advanced by them on the bond. I am unable to see that by the execution of bond No. 6,974 here, under the circumstances set out, there has been any breach of the covenant set out above. Defendants were apparently willing, if their evidence is to be accepted, to lend their money on the bond in 1922 and take their chance of getting some return from the land in 1928. They could not, however, prevent the mortgagor paying off his liability before that date, under the terms of the contract into which he and they entered. In my opinion, the trial Judge's conclusion on the first point was wrong.

With regard to the question of privity of contract, having regard to the attestation clause of bond No. 6,974, it is clear that the mortgagor authorized the plaintiffs to pay off the first mortgage.

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This is confirmed by the evidence of the mortgagor himself. In requesting the defendants to receive the sum of Rs. 350, the plaintiffs were acting as the agents of the mortgagor. This, it seems to me, on the facts, is a stronger case than that of *Heema v. Panchibaba*,<sup>1</sup> in which de Sampayo J. held all the necessary conditions existed to make effective a payment made by a person other than the debtor. The learned Judge's conclusion on the second point was also, in my opinion, wrong.

For these reasons I would set aside his order dismissing plaintiffs' action with costs. They are entitled to the order they sought, with costs in the lower Court and costs of this appeal.

JAYEWARDENE A.J.—I agree.

*Appeal allowed.*

