

1929.*Present:* Fisher C.J. and Drieberg J.RAMANATHAN *v.* PERERA *et al.*

232—D. C. Colombo, 29,990.

Mortgage—Sale of mortgaged property—Personal action against the debtor—Hypothecary action deferred—Ordinance No. 21 of 1927, s. 16.

Where title to mortgaged property has passed from the mortgagor, it is open to the mortgagee to bring a personal action against the mortgagor to recover the debt without at the same time asking for a hypothecary decree against the transferee in possession.

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

The defendant mortgaged two lands, Dalupotha and Alothia, to secure a loan of Rs. 40,000. The land Alothia was subsequently released by the mortgagee, while shortly afterwards title to Dalupotha passed, subject to the mortgage, to the added defendant. The plaintiff, to whom the mortgage bond had been assigned by the original mortgagee, brought an action against the defendant to recover the principal and interest due on the bond. He asked for a money decree only.

The defendant, in his answer, alleged that the added defendant had purchased the land Dalupotha for, or in trust for, the plaintiff; that the plaintiff and the added defendant were acting fraudulently and collusively in order to get rid of this mortgage on Dalupotha; and that the plaintiff was not entitled to discuss other property belonging to the defendant before Dalupotha, which was the property specially hypothecated on the mortgage bond assigned to the plaintiff. The defendant prayed that the plaintiff's action be dismissed, or in the alternative that a hypothecary decree

(and not a money decree only) be entered in favour of the plaintiff, declaring Dalupotha specially bound and executable under the said decree.

The learned District Judge held that the plaintiff was the real purchaser of Dalupotha, and that Dalupotha having been sold subject to the mortgage, the defendant's debt to the plaintiff on the bond was extinguished. He dismissed the plaintiff's action with costs. The plaintiff appealed.

F. de Zoysa, K.C. (with *Nadarajah and Rajapakse*), for plaintiff, appellant.—There is no evidence to support the finding that the plaintiff was the real purchaser of Dalupotha. The debt on the bond assigned to the plaintiff by the original mortgagee therefore remains, and the defendant is personally liable on the bond though the mortgaged property has gone out of his hands. There is nothing to prevent a person who sues on a mortgage bond from asking for a money decree only against the mortgagor. The Mortgage Ordinance, No. 21 of 1927, section 16, expressly states that a hypothecary action against the third party in possession of the mortgaged property need not be combined with the personal action against the debtor. This section brings our law into line with the Roman-Dutch law (*vide Voet XX. 4, 3*). The plaintiff is entitled to a personal decree against the defendant. Dalupotha need not be discussed by the plaintiff before he goes against the defendant's property.

H. V. Perera, for defendant, respondent.—There is ample evidence that the plaintiff was interested in the purchase of Dalupotha, and that the added defendant held it in trust for him. Dalupotha was expressly bought subject to the mortgage; both the defendant's bond and the mortgage security are therefore extinguished. (*Voet XX. 6, 1*). In any event, a mortgagor is entitled to ask that the property which was specially hypothecated under the bond sued on should be first discussed before any other property is seized in execution against him. (*Wijesekera v. Rawal*¹; *Justinian's Code 8, 28, 9*; *Van Zyl's Judicial Practice 207*). Section 16 of the Mortgage Ordinance does not alter the position in any way. Even though a mortgagee can ask for a personal decree only against his debtor, the debtor is entitled to ask that, in satisfaction of the decree against him, any property specially mortgaged to his creditor should be first discussed—even when that property has passed into the hands of a third party.

De Zoysa, K. C., in reply.

Chosky (for added defendant, respondent) associated himself with the argument for the appellant.

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December 10, 1929. DRIEBERG J.—

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The appellant holds an assignment of a mortgage bond, P 1, of July 8, 1926, on which the defendant borrowed a sum of Rs. 40,000 hypothecating two estates, Dalupotha and Alothia. Alothia was released by a previous holder of P 1, and the title to Dalupotha, subject to the mortgage on P 1, has passed to the added defendant.

The appellant brought this action asking for a money decree only against the defendant for the principal and interest due on the bond, Rs. 39,367.71. The defendant on September 23, 1926, sold Dalupotha to D. B. Perera, subject to the mortgage on P 1, for Rs. 20,000; on October 14, 1926, by D 4 D. B. Perera mortgaged Dalupotha as a secondary mortgage, and other lands primarily, to the appellant to secure advances to be made on promissory notes. The appellant put the bond D 4 in suit on January 30, 1928, there being then about Rs. 100,000 due on it, and in execution of the decree Dalupotha was sold on February 29, 1928, and bought by the added defendant. There is evidence that the amount due on the primary mortgage, Rs. 40,000, was stated by the auctioneer. Dalupotha was bought by the added defendant for Rs. 17,000; it is said to be worth Rs. 60,000.

At this time the creditor on P 1 was Jayewardene, in whose favour it was executed. Five days before the sale referred to, the defendant paid Jayewardene Rs. 3,000, gave him a promissory note for Rs. 25,000, and obtained a release by deed of the mortgage on Alothia. The release was registered on February 25, and Alothia was thereafter mortgaged by the defendant for Rs. 10,000. The defendant says that at the sale he told the appellant of the release and suggests that the added defendant heard him say it.

On March 29, 1928, Jayewardene assigned P 1 to Wijeratnam, who on June 3 following assigned it to the appellant.

This action was brought on September 25, 1928. In his answer the defendant claimed that Ramanathan Chetty, who had bought Dalupotha, was a necessary party. Ramanathan Chetty was joined as added defendant, and in his amended answer the defendant said that the added defendant had purchased Dalupotha for, or in trust for, the appellant and that the appellant and the added defendant were acting fraudulently and collusively for the purpose of getting rid of the primary mortgage on Dalupotha, that the appellant was not entitled to discuss other property of his before Dalupotha, and that it was not open to the appellant to ask for a money decree only. He prayed for a dismissal of the action, or in the alternative that decree be entered against him for the sum claimed and for a hypothecary decree declaring Dalupotha bound and executable.

The learned District Judge in dismissing the action has gone on the ground that the appellant was the real purchaser of Dalupotha. The evidence does not justify this finding. The defendant says that he was told by his proctor that the appellant was trying to put him into trouble by taking an assignment of the mortgage bond P 1 and then first selling Alothia, and it was for that reason that he got Alothia released. He says that before this he had money transactions with the appellant but that he ceased to deal with the appellant and induced his friends not to do so, and that the appellant was angry with him; that before the sale he told the appellant that he would not succeed in involving him in trouble and told him of his having secured the release of Alothia. I understand from this that the appellant wished to get an assignment of P 1 so as to have the satisfaction of being a creditor of the defendant and compelling payment by him and that the defendant sought to prevent this by reducing the security and thereby making the assignment risky or unattractive to the appellant. Defendant says that the appellant told him that he would not buy Dalupotha himself but that a relative of his would do so; at the sale he heard the appellant suggesting to the added defendant how much he should bid.

The appellant did not take the assignment of P 1 until four months later.

I doubt whether the appellant had all this in mind when Dalupotha was sold. There is nothing in his advising the added defendant at the sale, and he had an interest in the best price being realized. There is no evidence of any connection between the added defendant and the appellant and nothing to show that the added defendant did not pay for the estate with his own money or that he is not holding it for himself. Nor do I think it in the least likely that a Chetty moneylender would involve himself in any risk merely out of a desire to worry a person for ceasing to borrow money from him. It appears to me that the appellant took the assignment in the ordinary course of his business knowing, as it now appears in the case, that it was a good investment. The defendant can pay the amount due and he has other property on which the appellant has placed a caveat to prevent their disposal by him. The appellant has elected in this action to take presently a money decree and execute it against the defendant, and the only question is whether the law enables him to do so or whether he is obliged to combine with it a hypothecary action in which he will get a decree rendering Dalupotha liable for the amount decreed.

It must be taken that the title to Dalupotha is in the added defendant.

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Section 16 of the Mortgage Ordinance, No. 21 of 1927, relieves a mortgagee from the necessity of combining with the personal action against the debtor the hypothecary action against the person in possession of the mortgaged property, which was the result of Chapter XLVI. of the Civil Procedure Code (*Punchi Kira v. Sangu*¹). The creditor on a mortgage bond has now, therefore, the same privileges which he enjoyed before the introduction of the Civil Procedure Code and he can elect with which of the actions he will first proceed.

The right is clearly stated by Voet :

Meanwhile, by our usages, a much greater change has been made in this matter, for when immovables are bound by special or legal mortgage and possessed by the debtor himself, it is open to the creditor to institute simultaneously the personal and the hypothecary actions, and to include both in one libel ; but when they are in the possession of a stranger, the election (allowed by the ancient law) has been restored to the creditor, of either suing the debtor in the first instance by the personal action, or the third party in possession of the mortgaged property by the hypothecary action (*Voet XX. 4, 3, Berwick's Translation*).

In *Ahamadu Lebbe Marikar v. Luis*², which was a case decided before the Civil Procedure Code came into force, a mortgage creditor obtained a simple money judgment on his bond and seized in execution the mortgaged property. On a claim being made to the property by a third party the creditor's right to bring another action for a hypothecary decree was recognized.

The bond on which the present action was brought was executed before Ordinance No. 21 of 1927 came into force, but section 4 makes the provisions of section 16 apply to mortgages created before the Ordinance. It is not denied by the defendant that the sum claimed is due on the bond P 1.

The appeal is allowed. The decree appealed from is set aside, and judgment will be entered for the appellant against the defendant as claimed, with costs. The defendant will pay the costs of the added defendant in the District Court and the costs of appeal of the appellant and the added defendant.

FISHER C.J.—I agree.

Appeal allowed.

¹ (1900) 4 N. L. R. 42.

² (1880) 3 S. C. O. 99.