

1944

*Present: Howard C.J. and Keuneman J.*BARONCHI, Appellant, *and* ARIYADASA, Respondent

32-33—D. C. Matara, 13,679.

Mortgage action—Claim for hypothecary decree against transferee—Burden of proof—Matters that should be proven by plaintiff.

In an action on a mortgage bond in which the plaintiff asks for a hypothecary decree against a subsequent transferee who has acquired interests in the mortgaged property by purchase or mortgage the plaintiff is bound to prove (1) that the land belonged to the mortgagor at the time of the mortgage, (2) that it was duly mortgaged to him at the time of the mortgage, (3) that the mortgage debt has not been paid and that a definite sum of money is still due, (4) that the plaintiff is entitled to levy a definite sum of money out of the mortgaged property.

A PPEAL from a judgment of the District Judge of Matara. The facts appear from the argument.

N. Nadarajah, K.C. (with him *N. E. Weerasooria, K.C.*, and *Ivor Misso*), for the second defendant, appellant, in No. 32 and the second defendant, respondent, in No. 33.—This is an action on a mortgage bond (P 1) executed in 1930 by the first defendant in favour of one Abeyesuriya who, after certain assignments had been made, became subsequently the assignee of the bond. In execution of a money decree against Abeyesuriya in C. R. Matara, 16,622 his interests in P 1 were sold to the present plaintiff for the sum of Rs. 70. The second defendant has been made a party because she is the administratrix of a person who bought the mortgaged premises in 1931; the third defendant is her mortgagee.

As regards the execution proceedings in C. R. Matara, 16,622, there was no appointment of any legal representatives on the deaths of the plaintiff and the defendant in that case. The provisions of sections 338 and 341 of the Civil Procedure Code were not complied with. The sale, therefore, by virtue of which the plaintiff in the present case claims title was a nullity.

The plaintiff has not discharged the *onus* which the law imposes on him of proving, as against a subsequent transferee, what sum, if any, is due on the bond. See *Abdul Lebbe v. Abideen et al.*¹.

F. C. W. Van Geysel for the third defendant, appellant, in No. 33, and the third defendant, respondent, in No. 32.

H. V. Perera, K.C. (with him *L. A. Rajapakse, K.C.* and *D. Abeywickreme*), for the plaintiff, respondent, in both appeals.—As long as the Court had jurisdiction to sell, irregularities, if any, in the execution proceedings in C. R. 16,622 would not invalidate the sale—*Malkarjun v. Narhari et al.*².

This case can be distinguished from *Abdul Lebbe v. Abideen et al.* (*supra*). While in the latter case no evidence at all was led by the creditor, in the present case the bond P 1 was put in evidence and the first defendant admitted its execution. The effect not only of section 18 but also of section 19 of the Evidence Ordinance has to be considered. The burden of proof regarding any failure of consideration and on the issue of payment was on the defendants. The bond P 1 does not contain any memorandum of cancellation, nor was any discharge of it registered. In the circumstances the formal burden of proof on the plaintiff has been sufficiently discharged. See *Austin's Reports*, pp. 184-185; *Prasad Rai v. Bishan Dayal et al.*³; *Alexander v. Hedges*⁴.

N. E. Weerasooria, K.C., in reply.—*Abdul Lebbe v. Abideen et al.* (*supra*) is exactly in point. The present case is even stronger because the first defendant has denied liability and there is no evidence that any sum was due to the plaintiff. See also *Wijesinghe v. Don Davith*⁵. Whatever may be the presumptions in law as between the mortgagor and the mortgagee, they do not apply as against a third party. A third party cannot be expected to know the transactions which took place between the plaintiff and the first defendant.

Cur. adv. vult.

July 21, 1944. HOWARD C.J.—

This case relates to two appeals, one by the second defendant in D. C. Matara, No. 91/13,679 and the other by the third defendant in D. C. Matara, No. 92/13,679. In both these cases judgment was entered for the plaintiff with costs to be paid by the first, second and third defendants. The plaintiff's claim was in respect of a sum of Rs. 3,750 with interest alleged to be due on a mortgage bond dated December 18, 1930, marked P 1 and made by the first defendant in favour of one Daniel Abey Suriya. The plaintiff also claimed a hypothecary decree in respect of the premises referred to in the plaint. Various assignments were made of the said bond which by virtue of P 2 dated July 6, 1933, was assigned back to Abey Suriya. In case No. 16,622 of the Court of Requests, Matara, the interests of Abey Suriya in the said bond were sold in execution of a money decree against the said Abey Suriya. The plaintiff purchased those interests and obtained Fiscal's Conveyance dated November 4, 1938, marked P 7. The second and third defendants were made parties

¹ (1929) 31 N. L. R. 129.

² I. L. R. (1900) 25 Bom. 337 at 346-7.

³ 1904) I. L. R. 27 All. 71.

⁴ 1881) 4 S. C. C. 85.

⁵ (1903) 2 Mat. Cases 36.

on the basis that they had acquired certain rights in the mortgaged premises. The rights of the second defendant arose from the fact that the first defendant by deed of March 21, 1928, 2 D 5, mortgaged the half share of the premises to certain parties who put the bond in suit. The interests mortgaged were purchased at the sale in execution by one Baronchi who obtained on February 3, 1931, Auctioneer's conveyance marked 2 D 7. The said Baronchi also purchased from the first defendant by deed of February 3, 1931, the entirety of the land described in the schedule to the plaint. The second defendant is the administratrix of the estate of the said Baronchi. The third defendant is a mortgagee of the interests of the second defendant in the land described in the schedule to the plaint.

Counsel for the second and third defendants have contended on two grounds of law that the judgment of the District Judge is wrong. The first of these grounds is that the execution proceedings in case No. 16,622 of the Court of Requests of Matara are void and the sale bad and gave the plaintiff no title. We think there is no substance in this contention. The second ground put forward by the appellants is that the plaintiff has failed to prove that any money was due on the original bond or that any consideration was paid in respect of such bond. With regard to this aspect of the case, the learned District Judge states as follows:—

“ As regards (a) the plaintiff has produced the certified copy of the bond marked P 1 and the original marked P 8 both of which prove that the sum claimed by the plaintiff is due on the said bond. The first defendant who is the mortgagor has not contradicted this claim by evidence and I am therefore free to hold that the sum claimed is due on the bond.”

In support of this contention Counsel for the appellants has referred us to the case of *Abdul Lebbe v. Abideen*¹ the headnote of which is as follows:—

“ Where a creditor on a mortgage bond asks for a hypothecary decree against the property, title to which has passed to a third party by a subsequent transfer by the debtor, the burden is upon the plaintiff to prove the execution of the mortgage, and the sum of money due upon it.

An admission by the debtor of the amount due does not discharge the *onus* which is on the creditor of proving, as against the subsequent transferee, what sum, if any, is due on the bond.”

In his judgment in this case Drieberg J. referred to a passage from the judgment of Sir Charles Layard C.J. in *Wijeyesinghe v. Don Davith*². This passage is as follows:—

“ It has been repeatedly held by this Court that the burden of establishing the existence of the debt due on a mortgage, where a mortgagee seeks to follow the property in the hands of a third party other than the mortgagor, is on the mortgagee.”

The same principle is also formulated in *Ahamado Lebbe Markar v. Luis*³. The plaintiff in this case had obtained a decree for money against his

¹ 31 N. L. R. 129.

²(1903) 2 Matara Cases 36.

³ 2 S. C. Cir. 80 and 3 S. C. Cir. 99.

mortgagor on a mortgage bond by which the land was specially mortgaged to him. The defendant was in possession of this land by virtue of a conveyance from the plaintiff's mortgagor. The plaintiff then brought an action against the defendant to have it declared that the land was liable to be seized and sold in execution of the plaintiff's mortgage decree. In his judgment at page 81 of 2 *Supreme Court Circular*, Phear C.J. stated as follows:—

“As has already been said, the plaintiff in this suit must prove against the defendant all the facts, which are essential to his alleged right under the mortgage to sell, *de novo*, and quite independently of anything which occurred in that other suit. It seems therefore incumbent upon him at least to establish that the land in question belonged to his mortgagor at the date of his mortgage, that it was then mortgaged by that owner to him, by a sufficient instrument of mortgage, in order to secure the repayment to him of a specific sum of money actually then due as a debt to him from the mortgagor upon some sufficient consideration. That this debt has not been paid, but that a definite sum of money, being the whole or part thereof, is still due to him, secured by this mortgage, and that he is entitled to issue or to have issued writs of seizure and sale for the purpose of levying this definite sum of money out of the mortgaged premises.”

The case was next considered by the Full Court at page 99 of 3 *Supreme Court Circular*. In the course of his judgment Cayley C.J. stated as follows:—

“It accordingly appears to me to be clear that if the plaintiff has proved (as he appears to have substantially done) his mortgage, his mortgagor's title at the time of the mortgage, and that the mortgage debt is still unpaid, he is entitled to a decree in his favour declaring the property liable to be sold to satisfy that debt.”

The following passage from the judgment of Dias J. is also of interest:—

“In its judgment of May 2, 1879, this Court seems to have assumed that the plaintiff's judgment against his debtor had the effect of a mortgage-decree rendering the mortgaged property liable as against the mortgagor to be sold to satisfy the plaintiffs' debt. As the present defendant is a third party in possession of the mortgaged property, this Court held that the plaintiff was bound to prove, as against the present defendant, the whole of his right to have the mortgaged property sold in satisfaction of his claim. The plaintiff had failed to do at the first trial, but this Court having given him another opportunity, he has, I think, made out a case to entitle him to a decree as against the present defendant.”

Mr. Perera, on behalf of the plaintiff, has contended that the burden of proving that the bond was discharged lies on the defendants. In support of this contention he has referred us to Austin's Reports, 26,341, pp. 184-185, *Alexander v. Hedges*¹ and *Prasad Rai v. Bishan Dayal*². In all these cases, however, the defendants were the original mortgagors and not as in this case persons in possession of the mortgaged premises by virtue of assignment.

¹ 4 S. C. Cir 85.

² I. L. R. 27 All. 71.

Applying the principles formulated in the cases I have cited to the facts of the present case it is, I think, clear that before the plaintiff could succeed against the second or third defendant he would have to show—(1) that the land belonged to the mortgagor at the time of the mortgage, (2) that it was duly mortgaged to him for a sufficient consideration, (3) that the mortgage debt had not been paid and that a definite sum of money was still due, (4) that the plaintiff is entitled to levy this sum out of the mortgaged property. It may be conceded that—(1) and (2) are established by production of the mortgage bond, (3) and (4) have not, however, been established and I am of opinion that the learned District Judge was in error when he held that the copy of the bond P1 and the original P 8 both prove that the sum claimed by the plaintiff is due on the said bond.

The appeal is therefore allowed and the judgment set aside. The case is remitted for the plaintiff to adduce evidence to prove that a definite sum of money is due on the mortgage bond. The respondent will pay the second and third defendants the costs of this appeal. The costs so far incurred in the District Court abide the result of the action.

KEUNEMAN J.—I agree.

Appeal allowed.

