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[FULL BENCH.]

Present : Lascelles C.J., Ennis J., and De Sampayo A.J.SILVA *v.* MUDALIHAMY.

131—D. C. Kandy, 22,230.

Mortgage of a land by person having only a usufructuary mortgage—Sale of mortgagor's right—Purchase by owner of land—Rights of second mortgagee—Procedure for seizure and sale of mortgage debt—Civil Procedure Code, ss. 229, 255, 286.

Plaintiff in D. C. 21,014 obtained declaration of title to the lands in dispute subject to first defendant's rights to remain in possession until he was paid the sum of Rs. 600 due on a usufructuary mortgage bond (No. 9,793) executed by second defendant (original owner) in favour of first defendant.

Subsequently, in January, 1912, the first defendant executed a mortgage bond (D 1) in favour of third defendant for Rs. 400, by which he mortgaged all his right, title, and interest to the lands in dispute as a first and primary mortgage; the third defendant put the bond in suit in D. C. 21,889, to which the plaintiff was no party; and the third defendant purchased the lands at a Fiscal's sale in August, 1913.

Under a writ against the first defendant in D. C. 20,584, bond No. 9,793 was sold and purchased by the plaintiff, who obtained a certificate of sale dated June 17, 1912,—

Held (per LASCELLES C.J. and DE SAMPAYO A.J., *dissentiente*, ENNIS J.), that the first defendant's right to the lands as usufructuary mortgage was extinguished by merger by the purchase of the bond No. 9,793 by the plaintiff, and that the third defendant had thereafter no right to the lands.

ENNIS J.—The third defendant is entitled to retain possession until the amount of the first defendant's debt to her is paid off.

DE SAMPAYO A.J.—"Where a person mortgages lands which do not belong to him, but of which he has himself only a mortgage, does his mortgage interest legally become security for his debt in the hands of his own mortgagee? I do not think so, at all events not so as to affect a third party who subsequently acquires a mortgage interest D 1 is a mortgage pure and simple, and even assuming that the mortgage of the lands included in law a mortgage of the first defendant's usufructuary rights, the third defendant, in order to assert a right to possession, must previously realize that mortgage; that is to say, he must have the usufructuary mortgagee's interest sold in execution and an assignment executed in his own favour."

Where an interest of a mortgage of land is sought to be sold in execution, the mortgage bond should be seized as a debt (*i.e.*, as a movable) under section 229 of the Civil Procedure Code, and the rest of the execution proceedings culminating in the transfer should likewise follow the procedure and forms laid down for the sale of movables.

THE facts are set out as follows in the judgment of De Sampayo
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This appeal concerns two lands, which originally belonged to second defendant, against whom they were sold in execution in September, 1907, and were purchased by one Nicholas Fernando. They were again sold in execution against Nicholas Fernando, and purchased by the first plaintiff in January, 1911. In D. C. Kandy, 21,014, the first plaintiff in May, 1911, sued the first defendant in ejectment and obtained a decree declaring him entitled to the lands, but subject to the first defendant's right to possess the same by virtue of a usufructuary mortgage effected by the second defendant in favour of the first defendant by bond dated March 31, 1906, for securing the payment of Rs. 600. Subsequently, under a writ issued against the first defendant, the debt due to him on this bond, and all his right and interest as usufructuary mortgagee, were sold by the Fiscal in 1912 and were purchased by the plaintiffs, and the Fiscal granted to them a certificate of sale dated June 17, 1912. On the footing that the plaintiffs' title was thus perfected, the plaintiffs have brought the present action against the defendants in ejectment, alleging that since the issue of the certificate of sale in their favour the defendants have been in wrongful possession of the lands. The first and second defendants had practically no defence to make except a denial of the alleged wrongful possession on their part, but the third defendant asserted a right to be in possession under the following circumstances. It appears that, pending the above action No. 21,024, the first defendant by a bond dated January 29, 1912, purported to mortgage the lands to the third defendant to secure the payment of Rs. 400 with interest thereon at 10 per cent., and that under a decree entered in D. C. Kandy, No. 21,889, on this bond the lands were sold by the Fiscal and purchased by the third defendant in August, 1913. The District Judge by his decree gave judgment for the plaintiffs with right of possession, but declared the plaintiffs' title to be still subject to the rights of the third defendant as mortgagee on the bond of January 29, 1912, in her favour.

The third defendant has appealed from that part of the decree which gave possession to the plaintiffs, and the plaintiffs have also given a notice of appeal against the decree in so far as it declared their title to be subject to the rights of the third defendant as mortgagee under the bond of January 29, 1912.

A. St. V. Jayewardene, for the third defendant, appellant.—The third defendant need not have made the plaintiffs parties to his action on D 1, as the plaintiffs were not in possession of the lands when the action was brought. (See 26—D. C. Matara, 4,778¹).

The certificate of sale (P 5), which purports to convey the first defendant's interests in the bond No. 9,793 to the plaintiffs, is

¹ *S. C. Civil Mins., June 20, 1912.*

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ineffectual to transfer the mortgagee's rights to plaintiffs. The rights of a mortgagee are immovable property. The bond should have been seized and sold as immovable property. Counsel cited *Vanderstraaten's Reports* 241; *Van Leeuwen's Commentaries*, vol. I., pp. 144 and 145; *Marimuttu v. De Soysa*; ¹ *Suppramaniam v. Naganatha*.²

The procedure for the sale of immovable property is laid down in section 237 of the Civil Procedure Code. The conveyance should have been executed as directed by section 286.

The money paid by the third defendant on D 1 went to pay off prior incumbrances effected by the first defendant. The third defendant is entitled to a *jus retentionis* until the plaintiffs paid the amount of those incumbrances. (1 N. L. R. 228, 3 Bal. 248.)

Bawa, K.C., for the plaintiffs, respondents.—The procedure adopted for the seizure and sale of the mortgagee's rights is regular, and P 5 conveyed the first defendant's rights to the plaintiffs. Mortgage debt is not to be considered immovable property. (2 *Maas. 4, Salohamy v. Weerasekera*,³ *Basian Pillai v. Anapillai*.⁴) The fact that plaintiffs bought the mortgagee's rights at a Fiscal's sale should not make any difference. If the plaintiffs had paid the mortgage debt to the first defendant, they would be in a position to ignore the third defendant, who had only a precarious security.

[Ennis J.—You should not stand in a better position than a third party, who might have purchased the first defendant's rights.]

The plaintiffs are in the same position. If a third party bought the mortgagee's rights, he can only recover Rs. 600 from the plaintiffs. The payment of that sum would have extinguished the right of the usufructuary mortgagee. The same result is attained here by merger. The only interest the first defendant had to the land is that of a usufructuary mortgagee, and the right is accessory to the debt. This right vanishes the moment the debt is extinguished.

The bond in favour of the third defendant was not registered within fourteen days, and is therefore invalid.

The first defendant has mortgaged the lands themselves to the third defendant on the footing that he was the owner. There is no reference in D 1 to a mortgage of his rights as mortgagee.

Jayewardene, in reply.—The effect of D 1 is to give the third defendant a right to recover the debt. D 1 is tantamount to an assignment of the rights of first defendant to third defendant. If a mortgage right of land is movable property, P 5 should have been registered within fourteen days. It is otherwise invalid.

Cur. adv. vult.

¹ 1 C. L. R. 32.
² 7 S. C. C. 105.

³ (1908) 11 N. L. R. 36.
⁴ (1901) 5 N. L. R. 165.

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The re-argument before the Full Court has satisfied me that the position taken up by the plaintiff in his statement of objections *Silva v. Mudalithamy* represents the true rights of the parties.

For the purposes of this action, the plaintiff's title to the lands in dispute may be taken to begin with the decree of this Court in action No. 21,014, declaring the plaintiff entitled to these lands subject to the first defendant's rights to remain in possession until he was paid the sum of Rs. 600 due on a usufructuary mortgage bond No. 9,793 executed by the second defendant in favour of the first defendant.

Then, in January, 1912, the first defendant executed the mortgage bond D 1 (No. 2,649 dated January 29, 1912) in favour of the third defendant (his wife) for Rs. 400. This bond is in the ordinary form. After reciting a loan of Rs. 400 by the third defendant to the first defendant, it purports to "mortgage and hypothecate to and with" the third defendant "all my right, title, and interest as a first or primary mortgage until the payment of the principal and interest" to the lands now in question and another land. The bond also contains a declaration in the following terms: "That as I had the legal right to the above lands, I have mortgaged the same under this bond."

The decision of this case turns upon the effect of this document. The only interest which the first defendant had in the property now in dispute was his interest in the usufructuary mortgage No. 9,793. He was entitled to possess the property only so long as the Rs. 600 due under the usufructuary mortgage was a subsisting charge on the property. The moment this debt was satisfied the first defendant's rights in the property disappeared. The security for the loan of Rs. 400 which the first defendant gave to his wife was thus of a highly precarious character. It was in effect no security at all. Any notary with a proper sense of the responsibilities of his office would have advised the third defendant not to lend money on such a security.

Then the third defendant put the mortgage bond D 1 in suit, sold one of the two lands, and bought it herself, receiving the Fiscal's conveyance D 2. Meanwhile, in District Court No. 20,584, writ was issued against the first and second defendant, the debt of Rs. 2,000 due to the first defendant from the second defendant under the usufructuary mortgage bond No. 9,793 was seized, sold, and purchased by the present plaintiff for Rs. 51. A Fiscal's certificate was duly issued assigning the mortgage debt to the two plaintiffs in the usual form. This clearly terminated the first defendant's interest in the land.

The first defendant was entitled to possess the land only so long as the Rs. 600 due under the bond No 9,793 remained unpaid. When the plaintiff bought the entirety of the debt due under the

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bond the Rs. 600 was no longer due, and the first defendant's right to possess the land was determined.

Mr. A. St. V. Jayewardene contended that the deed D 1 must be construed as an assignment of the debt, so as to place the third defendant in the first defendant's shoes as regards the mortgage debt. But such a construction is inadmissible. The deed is a mortgage bond in the ordinary form, and it is impossible to give it a different effect.

It was also contended that the Fiscal's certificate P 5 was ineffectual to transfer the mortgage debt to the plaintiffs. Whether a mortgage debt under the Roman-Dutch law is technically considered as movable or immovable property is not very material. The question is whether the seizure and sale of the debt is in accordance with the provisions of the Civil Procedure Code. It cannot, I think, be contended that the seizure and sale of this debt was not in accordance with section 229 and 255 of the Civil Procedure Code.

For the above reasons I would dismiss the third defendant's appeal, and allow the plaintiff-respondent's objection by deleting from the decree so much as orders and decrees that the land decreed to the plaintiff is subject to the rights of the third defendant on her mortgage bond No. 2,649 of January 29, 1912. The third defendant, I think, should pay the costs of the appeal, and the order as to costs in the District Court should stand.

ENNIS J.—

The only question in this appeal is the effect of the document D 1. This document was executed on January 29, 1912, and registered on March 5, 1912. It purports to mortgage to the third defendant all the first defendant's "right, title, and interest" in certain land. The first defendant held a usufructuary mortgage on the land from the second defendant, and he had the right to possess the land till his mortgage was paid. The plaintiff is the successor in title to the second defendant. In District Court No. 21,014, between the plaintiff and first defendant, the plaintiff was declared entitled to the land subject to the usufructuary mortgage of the first defendant. In District Court No. 20,584 the interest of the first defendant in the usufructuary mortgage was seized and sold in execution by the Fiscal on May 21, 1912. The plaintiff was the purchaser, the Fiscal's transfer was given on June 17, 1912, and it was registered on November 18, 1912.

The learned District Judge has, in my opinion, rightly found that the transfer D 1 conveyed to the third defendant the right which the first defendant had over the land, but he has held that, inasmuch as the plaintiff had become possessed of the first defendant's rights before the third defendant put the bond D 1 in suit in District Court No. 21,889, she could not have sold without making the plaintiff a

party to the action. The plaintiff had notice, by the registration of D 1 on March 5, 1912, that the first defendant had dealt with his rights as a usufructuary mortgagee before he purchased those rights at the Fiscal's sale on May 21, 1912; and therefore it seems to me the plaintiff did not acquire anything more by his purchase in May 1912, than the first defendant's right to redeem the mortgage. The only effect then on the third defendant putting D 1 in suit in District Court No. 21,889 without making the plaintiff a party would be to leave intact the plaintiff's right to redeem, and a purchaser at a sale in execution would acquire the right of possession subject to the plaintiff's right. The third defendant was the purchaser at the Fiscal's sale in that action and all the parties interested are before the Court in this action I cannot see any ground whatever for disturbing the third defendant in her possession of the property, or that the plaintiff has any right to the possession until the mortgage has been paid off.

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I would amend the decree by striking out the words " with right of possession thereof " after the description of the properties and by eliminating the award of damages.

I would allow the appellant costs on appeal.

After the above was written this case was referred to a Full Court, and at the re-hearing it was urged that the plaintiff by his purchase at the Fiscal's sale and the subsequent transfer of the debt to him had merged the debt, and that he was entitled to the possession of the land as if he had paid the debt. The argument is that the third defendant's deed D 1 does not operate as a transfer of the debt to her; that it is operative only as a conveyance of the right of possession of the land until first defendant's debt was paid by plaintiff. D 1 purports to be a conveyance of all the first defendant's " right, title, and interest " in the land on mortgage as if the first defendant were the owner. In the case of *Marimuttu v. De Soysa*¹ the Privy Council found that one Tambayah was the owner of the estate to the extent that he could properly remain in possession of it until he was paid the amount which was due (the position of the first defendant in this case before his transfer to the third). Tambayah took certain proceedings to which the owner of the land was not a party, and under which sales of the estate were made. The defendant in that case subsequently became the purchaser under a Fiscal's sale. The Privy Council, assuming for the purpose of the decision of the case that the plaintiff was not bound to recognize the sale to the defendant and he was not a party to Tambayah's proceedings, held that " the effect must be to replace Tambayah in the position which Tambayah held.....as mortgagee in possession. He would be in lawful possession of the estate until he is paid the money due to him

¹ 1 C. L. R. 32.

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..... The plaintiff now asks to be declared the owner of the estate, and that the defendant be declared not entitled and be ejected therefrom Not a single word about payment of the mortgage which is due either to Tambayah or to the defendant. What the plaintiff desires in his plaint is to get into possession without any payment at all. That seems to their Lordships to be a glaring injustice towards the defendant, who has honestly paid for his estate and is entitled at least to all that Tambayah himself could claim."

In that case the defendant held a transfer of the land not an assignment of the debt, and yet the equities between Tambayah and the defendant were regarded. The case, however, differs from the present one, in that there the plaintiff had done nothing towards the liquidation of the debt, while here the plaintiff has made a purchase of the debt at a Fiscal's sale. *Morgappa Chetty v. Holloway*¹ is a reverse case, where the equities between a mortgagee and his assignee were regarded.

It is conceded that if D 1 had been an assignment of the debt, the purchase at the Fiscal's sale would have given the plaintiff nothing. At the time of the sale the third defendant's deed D 1 had been registered, and the plaintiff must be taken to have known of the transaction, as he should have searched the registers. It seems to me he must be held to have purchased the first defendant's right to be paid the debt subject to the equities between the first and third defendant, and the third defendant under her deed was entitled to stand in the shoes of the first defendant, at least to the amount of the mortgage to her. The first defendant's interest in the land was that of a usufructuary mortgagee, and between him and the third defendant he must be deemed to have dealt with that right as if the proper form of conveyance had been used (on the principle that the conveyance of the greater interest includes the conveyance of the lesser interest). Any one buying the first defendant's interest under his mortgage after the registration of the first defendant's deed of transfer (D 1) could not place himself in a better position, as against the third defendant, than the first defendant held.

The third defendant has honestly paid for her estate; and is, in my opinion, entitled to retain possession until the amount of the first defendant's debt to her is paid off.

DE SAMPAYO A.J.—

His Lordship stated the facts, and continued:—

The appeal of the third defendant is principally based on the argument that the first defendant's right of possession under the original usufructuary mortgage effected by the second defendant in 1906 passed to the third defendant by virtue of the first defendant's

mortgage of January 29, 1912, in her own favour. In the first place, it is to be observed that the latter bond did not grant a mortgage of the first defendant's interests as mortgagee under the old bond of 1906, but purported to mortgage the lands themselves, to which in fact proprietary title was recited as being vested in the first defendant by virtue of a deed of transfer No. 9,199 dated July 25, 1910, and I doubt whether the third defendant acquired thereunder the first defendant's right of possession as usufructuary mortgagee. Usually, no doubt, on the principle that the greater includes the less, the transfer of ownership may have the effect of transferring a lesser interest, such as a mere right of possession. But where a person mortgages lands which do not belong to him, but of which he has himself only a mortgage, does his mortgage interest legally become security for his debt in the hands of his own mortgagee? I do not think so, at all events not so as to affect a third party who subsequently acquires that mortgage interest. The mortgage of January 29, 1912, is not a transfer of the lands, and therefore not a transfer of the first defendant's right of possession of the lands, and in my opinion it did not in any way have the effect of assigning to the third defendant such right of possession. It is a mortgage of the lands pure and simple, and even assuming that the mortgage of the lands included in law a mortgage of the first defendant's usufructuary rights, the third defendant, in order to assert a right to possession, must previously realize that mortgage; that is to say, he must have the usufructuary mortgagee's interest sold in execution and an assignment executed in his own favour. This in fact he attempted to do by bringing the action No. 21,889 against the first defendant in December, 1912, when the plaintiffs had already bought up the first defendant's interest as usufructuary mortgagee. But the third defendant cannot depend on his purchase of the lands in pursuance of his decree in action No. 21,889, because the plaintiffs were no parties to that action, and because the sale took place and the Fiscal's transfer was obtained by him long after the date of the plaintiffs' purchase and certificate of sale. The third defendant is therefore obliged to fall back on the mortgage bond itself of January 29, 1912, which, however, does not, as I have already said, have the effect of assigning the first defendant's rights of possession to the third defendant. I may here not incidentally that this bond of January 29, 1912, stipulated to pay interest, and it is impossible to argue that it was intended to transfer at the same time the right of possession, which necessarily must be in lieu of interest. In the next place, what is the nature of this right of possession, and how far does it extend? An accessory obligation like a mortgage subsists only so long as the primary obligation, which is the debt, is alive, and if the debt is paid, or is otherwise extinguished, the mortgage is *ipso facto* extinguished also. Now, assuming for this purpose that by the mortgage bond of January 29, 1912, the first defendant's right

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of possession passed to the third defendant, such right could only be precarious, and was liable to be defeated at any moment by the payment or other extinction of the debt of Rs. 600 due to the first defendant on the usufructuary mortgage. That debt was extinguished, so far as the first defendant was concerned, and therefore also so far as the third defendant was concerned, when in June, 1912, the plaintiffs bought up the old bond of 1906 and all the interests thereby created. For the plaintiffs' purchase of the debt produced in effect a merger and amounted to its extinction. In my opinion the third defendant must in the circumstances be taken to have lost any right of possession he may have had previous to June, 1912.

Counsel for the third defendant next attacked the validity of the plaintiffs' purchase of the usufructuary mortgagee's interest in execution against the first defendant in June, 1912. In pursuance of the sale, the Fiscal issued to the plaintiffs a certificate of sale as provided by section 279 of the Civil Procedure Code for the case of sales of movables. It was argued that under the Roman-Dutch law a mortgage of immovables is itself an immovable, and that the Fiscal should have transferred the property by means of a conveyance, under section 286 of the Code, as in the case of a sale of immovable property. The *dictum* in D. C. Kurunegala, 1,150 (*Vand. Rep.* 241), to which reference was made, is not of much value on this point, as the report does not disclose the circumstances under which it was pronounced, nor do I think that the Roman-Dutch law or any decision founded thereon quite affords guidance in the interpretation of the provisions of the Civil Procedure Code. I prefer to follow the principle underlying the decisions in *Bastian Pillai v. Anapillai*¹ and *Salohamy v. Weerasekera*,² in which it is pointed out that, where a mortgagee's interest is sought to be sold in execution, the mortgage bond should be seized as a debt (*i.e.*, as a movable) under section 229 of the Civil Procedure Code, and I should say that the rest of the execution proceedings culminating in the transfer should likewise follow the procedure and forms laid down for the sale of movables. However that may be, all that we are at present concerned with is the question whether the debt, apart from the mortgage security, was transferred to the plaintiffs, and was sufficiently evidenced by the certificate of sale issued to them by the Fiscal. There is no room for doubt on this point, and I am of opinion that the plaintiffs validity acquired the first defendant's right to the sum of money secured by the mortgage of 1906.

It was lastly argued that at all events the third defendant should succeed on the ground that the money paid on the first defendant's bond in favour of the third defendant went to pay off two prior incumbrances effected by the first defendant, and that on that footing the third defendant was entitled to *jus retentionis* until the plaintiffs paid him the amount of those incumbrances. But these

¹ (1901) 5 N. L. R. 165.² (1908) 11 N. L. R. 36.

incumbrances, not being effected by the original owner; but by the first defendant himself, subsequently to the purchase by the plaintiffs of the lands and of the usufructuary mortgage itself (the second of them in fact being after the commencement of the present action), are in no sense prior incumbrances, and do not affect the plaintiffs. I therefore think that the third defendant has no right of retention as against the plaintiffs.

As regards the declaration in the decree to which the plaintiffs take exception, the District Judge has, if I rightly understand the judgment, proceeded on the footing that the first defendant's bond of January 29, 1912, had the effect of transferring to the third defendant the right of possession, and prevailed over the plaintiffs' certificate of sale by reason of prior registration; but, as the third defendant did not make the plaintiffs parties to the action No. 21,889 against first defendant on the mortgage, he considered the plaintiffs have presently the right to possess the lands, though that right might be defeated by the third defendant bringing an action to realize the mortgage as against the plaintiffs. I do not quite follow the learned District Judge here. No question of registration arises, because the mortgage bond in third defendant's favour is prior in date to the plaintiffs' certificate of sale, and, for the reasons I have already given, the third defendant is not in a position to bring any action as against the plaintiffs to realize his mortgage.

I think the third defendant's appeal fails, and the plaintiffs' cross appeal is entitled to succeed. I would accordingly dismiss the third defendant's appeal, and delete that part of the decree of the District Court by which the plaintiffs' title is declared to be subject to the rights of the third defendant on the mortgage bond of January 29, 1912. The plaintiffs should have costs of appeal.

*Appeal of third defendant dismissed.
Cross-objection of plaintiffs upheld.*

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