

[IN THE PRIVY COUNCIL]

1962 Present : Lord Radcliffe, Lord Cohen, Lord Keith of Avonholm,
Lord Hodson and Lord Devlin

THE BANK OF CEYLON, JAFFNA, Appellant, and
K. A. CHELLIAHPILLAI, Respondent

PRIVY COUNCIL APPEAL No. 52 OF 1960

S. C. 693 of 1956—D. C. Jaffna, 10403

Mortgage—Execution of a second bond some time after the first bond—Second bond given “by way of further and additional security”—Hypothecary action brought on the second bond alone—Maintainability—Mortgage Act of 1949, s. 7—Amendment of pleadings and framing of issues—Scope—Civil Procedure Code, ss. 93, 146.

By bond No. 208 made on 27th February 1951 the defendant mortgaged certain goods to secure an advance of Rs. 20,000. On 20th February 1952, when the sum owing to the creditor (a Bank) was Rs. 14,792, the mortgagor entered into a second bond No. 3427 whereunder he mortgaged certain land “by way of further and additional security” for the due payment of that amount.

The Bank instituted the present hypothecary action on the second mortgage bond No. 3427. The main defence to the Bank’s plaint was put forward simply as a point of pleading. The plaint referred only to the second or accessory mortgage bond, although there was no defect in the first or principal bond. Moreover, it was erroneously alleged in the plaint that the personal covenant to repay was contained in the second bond whereas it was contained only in the first; all that was done by the second bond was to give further security for the debt. It was pleaded in the Answer “that no claim for the payment of any sum of money can be made on the said Deed No. 3427”.

Held, that the action was simply a hypothecary action; and to succeed in it the plaintiff needed to prove only the validity of the bond No. 3427 granting the land as security and the existence of a debt so secured. How the debt was created was for this purpose immaterial and the first bond was not therefore an essential part of the cause of action. It could without being pleaded be produced in evidence to prove the debt.

Held further, that the fact that a lorry, which was one of the goods mortgaged under bond No. 208, was with the knowledge of the Bank seized and sold, subject to the mortgage, at the instance of a judgment-creditor of the mortgagor, constituted no bar to the relief claimed in the present action.

Obiter : The Civil Procedure Code gives in section 93 ample power to amend pleadings. Moreover, by virtue of section 146 of the Code, a case must be tried upon the “issues on which the right decision of the case appears to the Court to depend” and it is well settled that the framing of such issues is not restricted by the pleadings.

APPEAL from a judgment of the Supreme Court.

E. F. N. Gratiaen, Q.C., with *Walter Jayawardena*, for the plaintiff-appellant.

Raymond Walton with *W. H. Goodhart* for the defendant-respondent.

Cur. adv. vult.

March 5, 1962. [*Delivered by LORD DEVLIN*]—

This is an appeal from the judgment of the Supreme Court of Ceylon in which that Court, upholding the decree of the District Court of Jaffna, refused to grant to the appellant, the Bank of Ceylon, any relief in a hypothecary action brought by the Bank to enforce a mortgage.

By a bond No. 208 made on 27th February, 1951, the respondent mortgaged certain goods, of which it is necessary to specify only one thing, a Chevrolet lorry, to secure an advance of Rs. 20,000. On 20th February, 1952, there being then owing to the Bank Rs. 14,792, the mortgagor entered into a second bond No. 3427 whereunder he mortgaged certain land "by way of further and additional security" for the due payment of that amount.

On 29th January, 1953, the lorry was seized by a creditor in execution of a money decree obtained against the mortgagor and on 7th March it was with the knowledge of the Bank sold subject to the mortgage. The mortgage debt at this time amounted to Rs. 12,861 and the purchaser paid for the lorry subject to the mortgage Rs. 1,650. For the purpose of the mortgage the lorry had been valued at Rs. 9,000. It appears therefore probable that the purchaser reckoned that he would be able to settle with the Bank to release the mortgage on the lorry for something less than Rs. 12,861. In fact on 12th March, 1953, he offered the Bank Rs. 5,850 which the Bank were willing to accept in reduction of the mortgage debt and in extinction of their claim upon the lorry; but the mortgagor was not.

On 8th October, 1953, the Bank brought an action on the second mortgage bond in which they claimed relief in the terms of the following prayer.

"Wherefore the plaintiff Bank prays:

- (a) for judgment against the defendant in the sum of Rs. 13,461·77 together with interest on the sum of Rs. 12,861·56 at the rate of six per centum per annum from the date hereof till date of decree and thereafter on the aggregate amount of the decree at five per centum per annum till payment in full and costs of suit payable forthwith,

(b) that the lands and premises in the Schedule hereto fully described together with the buildings standing thereon and all rights, privileges, easements, servitudes and appurtenances whatsoever to the said lands and premises belonging and all the estate, right, title, interest, property, claim and demand whatsoever of the defendant in to out of or upon the same be declared specially bound and executable for the repayment of the said sum and interest and costs of suit on the footing of the said mortgage bond No. 3427.

(c) that in the event of default being made in the payment of the said sum Rs. 13,461.77 interest and costs as aforesaid the lands and premises declared specially bound executable as aforesaid and more fully described in the Schedule hereto be sold by public auction by the Fiscal, Northern Province, Jaffna or by any other person authorised in writing by the said Fiscal, the Fiscal being hereby directed."

The main defence to the Bank's plaint is put forward simply as a point of pleading. The plaint refers only to the second or accessory mortgage bond. There is no defect in the first or principal bond and no reason has been given to their Lordships why it should not have been pleaded. Moreover, it is erroneously alleged in the plaint that the personal covenant to repay is contained in the second bond whereas it is contained only in the first; all that is done by the second is to give further security for the debt. This point was immediately taken in the Answer which pleads "that no claim for the payment of any sum of money can be made on the said Deed No. 3427."

The Civil Procedure Code gives in section 93 ample power to amend pleadings. Moreover, the case must be tried upon the "issues on which the right decision of the case appears to the Court to depend" and it is well settled that the framing of such issues is not restricted by the pleadings; see section 146 of the Code, *Attorney-General v. Smith*¹ and *Silva v. Obeyesekera*². By either of these means a point that is interesting and difficult but far removed from the merits of the case might have been taken out of the controversy. But this was not done and their Lordships must now deal with the matter as they find it.

The question is whether the first bond is an essential part of the cause of action leading to the relief claimed. The first paragraph of the prayer asks for a money decree which can be obtained only if the personal covenant is sued upon. Since this is not contained in the bond pleaded, their Lordships, in agreement with both courts below, are of the opinion that this part of the claim is not made out. But their Lordships, in

¹ (1905) 8 N. L. R. 229 at 241.

² (1922) 24 N. L. R. 97 at 107.

thus disagreeing with respect with the judgments below, hold that the Bank is entitled to a declaration that the lands mentioned in paragraph (b) of the prayer are specially bound and executable for all sums secured by mortgage bond No. 3427 and for a sale decree on the lines of paragraph (c) of the same prayer. There should be an enquiry as to the precise amount of those sums, if it is not agreed by the parties.

The distinction between a claim to enforce payment of money due on a mortgage and a claim in a hypothecary action is clearly drawn in section 7 of the Mortgage Act, 1949, notwithstanding that by that section the two claims may be joined. This action in relation to the second and third paragraphs of the prayer is simply a hypothecary action; and to succeed in it the plaintiff need prove only the validity of the bond granting the land as security and the existence of a debt so secured. How the debt was created is for this purpose immaterial and the first bond is not therefore an essential part of the cause of action. It can without being pleaded be produced in evidence to prove the debt. On the third issue which he framed the District Judge found that the defendant did "by the said bond No. 3427 give further and additional security for the repayment of the sum of Rs. 14,792 with interest at 6 per cent. per annum which is due to the plaintiff on bond No. 208 of 27.2.51". This finding is sufficient to sustain paragraphs (b) and (c) of the prayer.

The other ground of the defence was not accepted in the courts below and their Lordships can deal with it shortly. It is pleaded in paragraph 5 of the Answer that the Bank wrongfully consented to the delivery of the lorry to the purchaser and that thereby the second bond was discharged. Alternatively, it is pleaded in paragraph 6 that the Bank by consenting to the sale of the lorry has lost the right to enforce the second bond. Alternatively, it was urged in argument that the purchaser as a condition of the sale agreed to discharge the whole of the mortgage debt and that the Bank must be taken notionally to have received the money from him. Their Lordships will not consider whether any of these pleas has been made out in fact because none of them is good in law. The sale of the lorry subject to the mortgage is at best unusual and inconvenient and may lead to difficulties in the ultimate adjustment of the parties' rights, but it constitutes no bar to the relief claimed.

Their Lordships will therefore humbly advise Her Majesty that this appeal should be allowed and that the case should be remitted to the District Court of Jaffna so that an order may there be made in accordance with the views they have expressed. The respondent must pay to the appellant the costs of this appeal and of the proceedings in the courts below.

Appeal allowed.