Present: Bertram C.J. and Schneider J.

SOYSA *v.* SOYSA.

482—D.C. Colombo, 8,565.

Mortgage—Assignment of a mortgage by way of security—Cancellation of assignment by assignee with the endorsement "bond cancelled and discharged"—Is such endorsement effective for the purpose of revesting the mortgagee with a right of suit on the original mortgage?—Ordinance No. 1 of 1840, s. 2.

Where a mortgagee transferred and assigned by way of security his rights on a mortgage bond and the assignee thereafter cancelled the assignment with the endorsement "bond cancelled and discharged."

Held, that under our law such an endorsement was sufficient to revest the mortgagee with a right of suit on the original mortgage without a notarially excuted retransfer of his rights by the assignee.

THE plaintiff, respondent, sued the defendant, appellant, for the recovery of a sum of Rs. 60,000 and interest alleged to be due to plaintiff from defendant upon mortgage bond No. 294 dated March 2, 1920.

The defendant filed answer stating that only a sum of Rs. 30,000 was lent by plaintiff on the said bond, and denied the right of the plaintiff to sue upon the said bond, inasmuch as by deed No. 1,717 dated may 22, 1920, the plaintiff has assigned the same to G. Fellows.

The case went to trial on the following issues:—

(1) Does the answer disclose a defence?

(2) Is the defendant estopped from denying that Rs. 60,000 is due on the bond by the judgment and decree in case No. 3,618?

(3) Can the plaintiff maintain the action in view of the fact that the mortgage bond sued on was assigned by deed No. 1,717 dated May 22, 1920, to G. Fellows?

(4) What amount, if any, in excess of Rs. 30,000 is due to the plaintiff on the bond?

The District Judge entered judgment for the plaintiff. The defendant appealed.

The deed of assignment was as follows:—

P. 19. *Deed No. 1717.*

Registered B 124/94. Kurunegala, May 25, 1920.

(Signed) Registrar.

Bond cancelled and discharged:

Colombo, May 2, 1923. G. Fellows by his attorney P. H.——

This Indenture made the 22nd day of May, 1920, between James Samuel Walter de Soysa, of Sunnyside in Moratuwa, in the Island of Ceylon, Esquire (hereinafter called the transferor) of the one part and George Fellows, Alupola estate, Ratnapura, in the said Island hereinafter called the transferee) of the other part:

Whereas by a deed poll or mortgage bond bearing No. 294 dated the 2nd day of March, 1920, and attested by Arthur Charles Abewardene of Colombo, in the said Island, Notary Public, Jeroninus William Charles de Soysa acknowledged himself to be well and truly bound to the transferor in the penal sum of Rs. 120,000 of lawful money of Ceylon, and for securing the payment of all sums of money payable thereunder the said Jeronimus William Charles de Soysa mortgaged and hypothecated to and with the transferor as a primary mortgage all that estate called and known as Dolutenne in the schedule hereto and in the first schedule hereto more particularly described:

And whereas by the said deed poll or mortgage bond it was agreed and provided that the said Jeronimus William Charles de Soysa should pay to the transferor the sum of Rs. 60,000 of lawful money of Ceylon in Colombo, upon three calendar months previous notice in writing requiring payment thereof being given to the said Jeronimus William Charles de Soysa by the transferor, which notice should not be given until after the 2nd day of March, 1923, and should in the meantime and until such repayment pay interest on the said sum of Rs. 60,000 at the rate of 8 per cent. per annum of the times and in the manner therein provided:

And whereas the said principal sum of Rs. 60,000 is still due and owing to the transferor by the said Jeronimus William Charles de Soysa upon or in respect of the said deed poll or mortgage bond:

And whereas by a deed poll or mortgage bond bearing No. 1,284 dated the 5th day of April, 1916, and attested by Harry Creasy of Colombo aforesaid, Notary Public, the transferor acknowledged himself to be well and truly bound to the transferee in the penal sum of Rs. 120,000 of lawful money of Ceylon, and for further securing the payment of all sums of money payable thereunder the transferor mortgaged and hypothecated to and with the transferee as a primary mortgage all that and those five contiguous allotments of land forming one property, with the buildings standing thereon, called and known as Wavertree House on the schedule thereto and on the second schedule hereto more particularly described:

And whereas by the said deed poll or mortgage bond it was agreed and provided that the transferor should pay to the transferee the sum of Rs. 60,000 in Colombo on or after the 31st day of March, 1919, upon receiving from or giving to the transferee three months' previous notice in writing demanding payment thereof or signifying a readiness to repay the same, and should and would in the meantime and until such payment pay interest on the said sum of Rs. 60,000 at the rate of 12 per cent. per annum at the times and in the manner therein provided; and it was further therein provided that if any instalment of interest should be paid punctually at the date the same should fall due, or within fifteen

1924.

Soysa v. Soysa

days thereof, such instalment of interest, if paid at the rate of 8 per cent. per annum, should be accepted in full payment of the instalment of interest at the rate of 12 per cent. per annum:

And whereas the said principal sum of Rs. 60,000 is still due and owing to the transferee by the transferor upon or in respect of the said deed poll or mortgage bond No. 1,284 dated the 5th day of April, 1916:

And whereas the transferee hath at the request of the transferor agreed to postpone the time for the repayment of the said principal sum of Rs. 60,000 until the 1st day of March, 1923, in consideration of the transferor granting to the transferee the further mortgage and hypothecation hereinafter contained as additional and collateral security for the repayment of the said sum of Rs. 60,000 and interest.

Now this indenture witnesseth that in consideration of the premises the transferor doth hereby for himself, his heirs, executors, and administrators, covenant, promise, and agree to and with the transferee to repay to the transferee the said principal sum of Rs. 60,000 on the 1st day of March, 1923, and in the meantime and until such repayment to pay to the transferee interest thereon at the rates and on the days and dates and in manner provided by the said deed poll or mortgage bond No. 1,284 of the 5th April, 1916.

And the transferor in pursuance of the said agreement and as further and collateral security for repayment of all moneys secured by the said deed poll or mortgage bond No. 1,284 of the 5th day of April, 1916, or by these presents doth hereby for himself, his heirs, executors, and administrators assign unto the transferee, his heirs, &c. . . . .

All that deed No. 294 dated the 2nd day of March, 1920, hereinbefore in part recited, together with the several securities thereby mortgaged, and the said principal sum of Rs. 60,000 now due thereunder, and all other moneys that may thereafter become due thereunder, and all interest due and to accrue due thereunder, and all the estate, right, title, interest, property, claim, and demand whatsoever of the transferor of, in, to, upon, or out of the same premises, together with full power to the transferee his heirs . . . .

. . . . . .

Allan Drieberg, K.C. (with him *Weerasooria*), for defendant, appellant.—A mortgagee has a personal claim against his debtor and a right to realize his security for the payment of the debt. When the debt is discharged, the right of mortgage ceases (*Vander Linden, p. 181, 2 Maasdorp, p. 287*). The plaintiff has, by notarial instrument, assigned his rights to a person who is not a party to the action. The assignee has cancelled the assignment. The endorsement " Bond cancelled and discharged " is not sufficient to revest in the plaintiff the right to realize the security. A notarially executed retransfer is necessary under section 2 of Ordinance No. 7 of 1840.

H. J. C. Pereira, K.C. (with him *Samarawickrema and E. G. P. Jayatilleke*), for plaintiff, respondent.—The endorsement operates as a cancellation of the debt as between the assignor and assignee. If the money secured by the assignment is paid by the assignor, the deed has no further effect. *The Mercantile Bank of London v. Evans.*[1] No formal retransfer is necessary. The assignee can even now be added as a party. Counsel also cited *Hughes v. Pump House Hotel Company, Ltd.*[2]

[1] *(1899) Q. B. 613.*

[2] *(1902) 2 K. B. 19.*

August 4, 1924. BERTRAM C.J.— 1924.

Soysa v. Soysa

This is an action which is the sequal of an earlier action between the same parties. In that previous action the present plaintiff was the defendant; and in that action he set up a claim in reconvention. That claim was settled by agreement, and judgment was entered by consent. The agreement for settlement was in the following terms:—" The parties arrived at a settlement in this case. The parties agreed that judgment be entered for the defendant in respect of the accounts between the parties for a sum of Rs. 30,467.68 over and above the amount due on bond No. 294 of March 2, 1920; that decree be entered in favour of the defendant in terms of prayer 2 of the answer; and that the rights of the mortgagee under the said bond be reserved, as the assignee of the bond is not a party to this action. "

In accordance with this agreement judgment was duly entered up, and the present action was brought for the assertion of the rights of the mortgagee reserved in the previous action.

Two points, however, are now raised. The first is as to the meaning of the settlement in the case. Was it intended as an admission of the accounts produced and put forward by Mr. Walter de Soysa, or was it merely that Mr. Charles de Soysa in that action consented to judgment for the sum of Rs. 30,000, while he reserved his rights to raise any objection on the accounts when the action was brought upon the mortgage bond? This is the first point.

The second point is with regard to the right to sue on the mortgage in the present action. The reason why the mortgage could not effectively be put in suit in the previous action was that Mr. Walter de Soysa, the mortgagee, had assigned his rights in the mortgaged property to Mr. Fellows as collateral security in respect of another obligation which he, Mr. Walter de Soysa, was under to Mr. Fellows. In order to enable Mr. Walter de Soysa to put the mortgage bond in suit, Mr. Fellows endorsed upon the bond—by which Mr. Walter de Soysa's interest in the mortgage bond were assigned to him, Mr. Fellows—the words: " Bond cancelled and discharged." The intention of that endorsement was to release the security to Mr. Walter de Soysa. But it is contended on the other side that the endorsement was not effective for the purpose of revesting in Mr. Walter de Soysa a right of suit on the original mortgage.

The document by which the rights of Mr. Walter de Soysa, the plaintiff in this action, were mortgaged to Mr. Fellows took the form of a transfer; but a transfer by way of security. It transferred to Mr. Fellows the plaintiff's right to recover the mortgage debt. It further transferred to him the plaintiff's right to enforce that debt by sale of the mortgaged property.

It is contended on behalf of the appellant that these rights could only be revested in the plaintiff so as to enable him to sue in the

1924.

BERTRAM C. J.

Soysa v. Soysa

present action by a formal transfer, and it is argued that until a formal transfer is executed, the plaintiff is incompetent to sue. The objection is purely technical and dilatory, and after very careful consideration we do not think it is sound.

There is no question in the case of a mortgage bond that, when the mortgage debt is paid and satisfied, the hypothecation, *ipso facto*, disappears. This is on the principle that if the principal obligation is extinguished, all accessory obligations follow suit. In *Pothier on Obligations, Part III., Art. VI., paragraph 516*, it is laid down that the effect of a payment is to extinguish an obligation and everything accessory to it.

Now, in the present case, the plaintiff's rights under the mortgage were hypothecated to Mr. Fellows for the purpose of securing the payment to Mr. Fellows of another debt. It is clear that if the debt had been fully discharged on the principle enunciated by Pothier, the accessory security ought to be discharged also. We need not inquire whether in fact the principal debt was discharged, because Mr. Fellows, by endorsing on the deed "Bond cancelled and discharged" is effect acknowledged for the purposes of this security the extinction of that debt. He in effect, without a formal transfer, intended to relinquish to Mr. Walter de Soysa the right to sue for the mortgage debt. But the question is, was a formal transfer necessary for this purpose?

Mr. H. J. C. Pereira has drawn our attention to a case which is very much in point. *The Mercantile Bank of London v. Evans (supra)*. There the question which had to be determined was whether an assignment of a particular debt was an absolute assignment or an assignment by way of security. Incidentally the question arose in that case, "What is the effect upon an assignment by way of security of the satisfaction of the debt in respect of which it is given?" In the argument of Mr. Lush, now Lush J., he urged that "the assignment purported to be by way of security, and if the money secured were repaid by the assignor, the deed would have no further effect, and no reconveyance to the assignor would be required." That argument was adopted by A. L. Smith L.J., "Assume," he says, "that the sum had been paid off to the plaintiffs, what would then be their position as to the agreement of June 1, 1897?" He came to the conclusion that the argument of Mr. Lush was sound, and that if the money secured were repaid, the deed of assignment by way of security would have no further effect.

I think that principle applies in the present case. Under the circumstances, although that course is apparently feasible, there is no occasion for joining Mr. Fellows in the present action; and as there is no necessity for a formal retransfer of the choses in action, which were transferred by way of security to Mr. Fellows, I am of opinion that the plaintiff is entitled to enforce them in this hypothecary action.

With regard to the first point which I referred to, namely, the effect of the settlement, the terms of a settlement must speak for themselves. It seems to me quite clear that, reading the terms of the settlement in conjunction with the pleadings which were by implication referred to in the settlement, it was the intention of the defendant to admit the accounts tendered by the present plaintiff, and that the judgment for Rs. 30,467.68 is in terms a judgment on that account. The only reason why the rights of the mortgagee under the bond were reserved was that the assignee of the bond was not a party to the action. For these reasons, I am of opinion, that the appeal must be dismissed, with costs.

SCHNEIDER J.—I agree.

Appeal dismissed.