

1947 Present : Wijeyewardene and Canekeratne JJ.

MEERA PULLE, Appellant, and GOONERATNE, Respondent.

81—D. C. (Inty.) Kandy, 1,469.

Mortgage of movables—Consent order that hypothecation should be made within a certain time with Secretary of Court—Failure of due delivery of bond—Facts for consideration.

On January 21, 1946, consent order was entered that plaintiff should hypothecate certain movable property with the Secretary of the Court "within 7 days from today".

The plaintiff executed a notarial bond on January 28, 1946, hypothecating the property with the Secretary of the Court and filed it in Court on January 29, 1946. The bond, however, was not registered.

Held, that there was no delivery of the bond within the stipulated time.

A PPEAL from an order of the District Judge of Kandy.

H. V. Perera, K.C. (with him *H. W. Jayewardene* and *G. T. Samarawickreme*), for the plaintiff, appellant.—The consent motion does not contain any covenant that the bond should be filed in Court. The bond was executed on the 28th and was therefore in time. In interpreting the words "within seven days from today", one of the terminal days must be excluded from the computation. See for instance section 11 (a) of the Interpretation Ordinance; *Encyclopaedia of the Laws of England* Vol. 14, page 84. Delivery of the bond to the mortgagee is not necessary to create the obligation. The Secretary had approved the draft on the 28th. As the bond must be regarded as one in favour of the Crown, registration was not necessary. Unless a statute expressly so states, it does not bind the Crown. The mortgagee could have registered the bond if he

had so desired.—Section 26 (1) Registration of Documents Ordinance. The Secretary was the nominee of the defendant, and the possession of the defendant was possession by the Secretary. The bond was binding, in spite of non-registration, as between the parties. See *Mitchell v. Fernando*¹.

C. Thiagalingam (with him *S. Canagarayar*), for the defendant, respondent.—It was the intention of the parties to create a valid and binding hypothecation. The Court will imply that in order to give the agreement “business efficacy”. See *Cheshire and Fifoot on Contracts* p. 102. Section 18 of the Registration of Documents Ordinance requires registration of the instrument where the mortgagee does not have possession of the movables, in order to create a valid and effectual mortgage. See also *Mohamad v. Eastern Bank*²; *Gunatileke v. Ramasamy Pulle*³; *Appuhamy v. Appuhamy*⁴. The bond given to the Secretary cannot be considered a bond in favour of the Crown—*Fernando v. Fernando*⁵.

In the expression “within seven days from today” effect should be given to both “within” and “from”. Both terminal days should be included—*Norton on Deeds* p. 182. The Bond though executed on the 28th was delivered to the Secretary only on the 29th. The plaintiff was therefore clearly out of time. Party undertaking to do a thing should do all ancillary acts that are necessary for its proper execution. The plaintiff should have sent the deed for registration within time.

H. V. Perera, K.C., in reply.

Cur. adv. vult.

January 24, 1947. WIJEYWARDENE J.—

The plaintiff filed this action for the recovery of a boiler and engine given on hire to the defendant and for damages and arrears of rent due to him. The defendant filed answer praying for a dismissal of the plaintiff's action and claiming in reconvention a sum of money on account of repairs effected by him.

On November 30, 1944, a consent decree was entered. It provided, *inter alia*: (a) that the defendant should be permitted to use the boiler and engine for a period of one year from that date; (b) that, on the expiry of that period, the defendant should at his expense deliver the boiler and engine in working order to the plaintiff at Colombo and (c) that, on defendant failing to give such delivery, the plaintiff should be entitled to issue writ for obtaining possession of them or for recovery of Rs. 10,000 as their value.

On November 27, 1945, the defendant filed papers in Court alleging that the plaintiff failed wrongfully to take delivery of the boiler and engine though they were duly tendered to him in terms of the decree. He said he incurred an expenditure of Rs. 1,120 by reason of plaintiff's failure to take delivery and was incurring expenses at Rs. 150 a month for storing the boiler and engine in Colombo. He moved that satisfaction of the decree be entered and that an order be made in his favour for the sums claimed in the application. The plaintiff filed a counter affidavit

¹ (1945) 46 N. L. R. 265.

² (1919) 6 C. W. R. 125.

³ (1931) 33 N. L. R. 73 at 82.

⁴ (1932) 35 N. L. R. 329.

⁵ (1921) 23 N. L. R. 453.

stating that the defendant failed wrongfully to give him an opportunity for ascertaining the condition of the boiler and engine, before he accepted delivery, and that he spent Rs. 450 in arranging to take delivery. He prayed for the dismissal of the defendant's application and for an order against the defendant for Rs. 450. He asked further, that, if the boiler and engine were not found to be in working order, he should be given a writ for the sum of Rs. 10,000 mentioned in the decree.

The defendant's application of November 27, 1945, came up for inquiry on January 21, 1946, when the District Judge made the following consent order :—

The inquiry is adjourned on the following terms which are agreed between the parties—

- (1) The plaintiff will hypothecate the boiler and engine with the Secretary of this Court within 7 days from today to secure payment of any money that may be awarded to the defendant either by way of damages or on any other count in the proceedings.
- (2) The plaintiff will and shall at all events take delivery of and remove at his expense the engine and boiler ——— on 30th January, 1946 ———.
- (3) In the event of plaintiff failing to give security as provided for in paragraph 1 hereof or failing to take delivery of the engine and boiler for any reason whatsoever, it is agreed that the present application of defendant will stand allowed and decreed as prayed for therein with costs in either eventuality.
- (4) ———.
- (5) ———.
- (6) ———.

The plaintiff executed a notarial bond P 1 on January 28, 1946, hypothecating the boiler and engine with the Secretary of the District Court and filed it in Court on January 29, 1946. The bond, however, is not registered. The plaintiff also took delivery of the boiler and engine on the due date.

When the defendant's application of November 27, 1945, came up for inquiry on March 18, 1946, the District Judge held that the plaintiff had failed to give security in terms of paragraph 1 of the consent order of January 21, 1946, and entered judgment for plaintiff for Rs. 1,120 and Rs. 300 as damages—both being items referred to in the defendant's application—and also for a further sum of Rs. 250 "being expenses incurred in connection with the delivery of the boiler and engine on January 31, 1946". The plaintiff's appeal is from that order.

It was clearly the intention of the parties that the plaintiff should tender a duly executed bond to the Secretary. The plaintiff got a Notary to prepare the bond and executed it on January 28th. The bond was filed by the plaintiff in Court on January 29th at 4 P.M. There has been therefore no delivery of the bond within the stipulated time and the

defendant is entitled to an order under paragraph 3 of the consent order. Under paragraph 3 the defendant is entitled to claim only the sums referred to in the application of November 27, 1945. That application does not refer to the sum of Rs. 250 allowed to him by the District Judge as "expenses incurred in connection with the delivery of the boiler and engine on January 31, 1946." I would affirm the order appealed against, deducting Rs. 250 from the amount mentioned therein.

The defendant is entitled to the costs of appeal.

CANEKERATNE J.—I agree.

Order affirmed.

