

Present : Fisher C.J. and Drieberg J.

1929.

ABDUL LEBBE v. ABIDEEN *et al.*

58—D. C. (Inty.) Colombo, 19,269.

*Hypothecary action—Action by creditor against purchaser of mortgaged property—Burden of proof.*

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.

**A** PPEAL from an order of the District Judge of Colombo. The facts appear from the judgment.

*H. E. Garvin*, for third defendant and appellant.

*H. V. Perera* (with him *Peri Sunderam*), for plaintiff, respondent.

August 29, 1929. DRIEBERG J.—

The respondent brought this action to realize the amount due on a mortgage bond dated July 6, 1920, by the first defendant. The bond was for Rs. 12,000, the respondent alleged that Rs. 6,000 had been paid by the sale of some of the lands mortgaged, and he asked for a decree for Rs. 6,000 and interest, amounting in the aggregate to Rs. 11,084, and for a hypothecary decree in respect of the other lands. He joined the second defendant and the appellant as they had bought the mortgaged premises after the mortgage.

The first defendant consented to judgment, and the second defendant did not contest the action, but the appellant filed answer, in which, while admitting the execution of the mortgage bond, he alleged that the bond was executed collusively and that no consideration passed on it; he denied that any sum whatever was due from the first defendant to the respondent on it.

At the trial the following issues were framed:—

- (1) Was there consideration for the bond ?
- (2) Was it executed collusively between the respondent and the first defendant ?
- (3) What sum, if any, is due on the bond ?

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An issue was also suggested whether the power of attorney authorized the attorney under it to bring this action. This was rejected by the learned District Judge as having been raised too late. There is no reason, however, for doubting the sufficiency of the power of attorney.

The learned District Judge upheld the contention of the respondent that the onus of proof on these issues was on the appellant, being of opinion that if no evidence was led the respondent would be entitled to judgment, and that as regards the amount due on the bond that was proved by the first defendant, the debtor, having consented to judgment, and that it was for the appellant to lead evidence to the contrary. No evidence was led by either party and judgment was entered for the respondent as claimed.

Where a creditor on a bond asks for a hypothecary decree against property title to which has passed to a third party by a subsequent transfer by the mortgage debtor, he has to prove the fact of the mortgage, that it was executed to secure the repayment of money due to him, that the debt was not repaid, and that a definite sum of money is due to him on the bond. Even under the system which prevailed before the Civil Procedure Code, when the hypothecary action was brought against such third party after judgment had been obtained against the debtor in a previous action, the creditor had to prove *de novo* against such transferee all the facts which were necessary to entitle him to judgment, quite independently of anything which occurred in the previous action; thus he had to prove in the subsequent action the existence of the debt and its amount even though he had proved and obtained judgment for it against the debtor in the previous action, *Ahamadu Lebbe Marikar v. Luis*.<sup>1</sup>

The Civil Procedure Code only altered the law to the extent of requiring the hypothecary action—the *actio serviana*—to be combined with the action against the debtor on his money liability on the bond.

In *Wijeyesinghe v. Don Davith*<sup>2</sup> Sir Charles Layard C.J. said: "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." This case was after the Civil Procedure Code came into force.

Mr. Perera admitted that the onus of proof of the existence of the debt was on the respondent, but contended that in the absence of contrary evidence by the appellant it had been discharged. He contended that as the appellant admitted the execution of the

<sup>1</sup> (1879) 2 S. C. C. 80 and (1880) 3 S. C. C. 99 (Full Court).

<sup>2</sup> (1903) 2 Matara Cases 36.

bond in which the debtor acknowledged the receipt of the consideration stated in it, that amounted to *prima facie* proof against the appellant, and that as regards the amount due on the bond at the time of the action the debtor's admission in the consent to judgment was an admission against the appellant as a person who had derived his interest in the subject of the action from the debtor; he relied in this connection on section 18 of the Evidence Ordinance and on certain Indian decisions which deal with questions of liability arising between the creditor and the legal representative of the debtor and between the legal representative of the original debtor and of the creditor. I need only refer to two of these cases. *Rajeswari Kuar et al. v. Rai Bal Krishan*<sup>1</sup> and *Gorakh Babaji et al. v. Vithal Narayan Joshi*.<sup>2</sup>

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The subject matter of this action consists of two distinct things: the money liability which rests on the debtor and his representatives and the security created by the mortgage which attaches to the property in the hands of a subsequent transferee; this transferee is not liable on the bond personally and cannot be called on to pay any balance due on it which remains unrealized by the sale of the property. His position is distinct from that of the heirs or legal representatives of the debtor and is entirely unaffected by any admission by the debtor as to the existence of the debt or the amount.

The creditor cannot get a decree that the property of the transferee is liable for sale under the mortgage decree unless he proves against him the existence of that debt.

As the appellant has admitted the execution of the mortgage the respondent need only prove what sum, if any, is due on the bond, and he must do so apart from any admissions by the first defendant.

The issue that the bond was entered into collusively and without consideration does not affect the case, for the onus of proof that money was lent and that money was due is on the respondent.

The appeal is allowed. The judgment is set aside and the case remitted for trial. The respondent will pay the appellant the costs of this appeal. The costs of the proceedings of February 7 will abide the result of the action.

FISHER C.J.—I agree.

*Appeal allowed.*

<sup>1</sup> (*Privy Council*) 9 *Allahabad* 713.

<sup>2</sup> 11 *Bombay* 435.