1976 *Present :* **Wimalaratne, J., Sirimane, J., and Wijesundera, J.**

MERCANTILE BANK LIMITED, Appellant, *and* A. H. H. M. ANVER and others, Respondents

S. C. 30/71 (Inty)—D. C. Galle 2424/M. B.

Mortgage Act—Sections 2, 46, 48—Mortgagee of movables—Right to have recourse to property other than the mortgaged movables—Civil Procedure Code, Section 34.

It is open to the mortgagee of *movable* property, to have recourse to other property of the mortgagor if the amount realized by the sale of such mortgaged property is insufficient to satisfy the mortgage debt.

"The Mortgage Act has no doubt improved the position of a mortgagee of movables by incorporating special provisions regarding the mortgage of shares, life policies, book debts and motor vehicles (sections 73 to 104) and by safeguarding his rights in the event of the mortgaged property being seized in execution by other creditors (section 105). But yet the insecurity of a mortgagee of movables is still there, and that fact would have been in the minds of the legislature when provision similar to section 46 was not enacted in relation to movables." per Wimalaratne, J.

APPEAL from a judgment of the District Court, Galle.

C. Ranganathan with *K. N. Choksy* for Plaintiff-Appellant.

H. W. Jayewardena with *A. Mampitiya* and *Miss Sriyanganie Fernando* for Defendants-Respondents.

Cur. adv. vult.

September 6, 1976. WIMALARATNE, J.—

I have had the opportunity of reading the judgement of Wijesundera J., and I agree with the conclusion reached by him that in the case of a *mortgage of movables,* if the amount realised by the sale of the mortgaged property is insufficient to satisfy the mortgage debt., it is open to the mortgagee to have recourse to other property of the mortgagor.

Until the enactment in 1950 of the Mortgage Act (Cap 89) the common law permitted a mortgagee of both movables and immovables to have recourse to other property of the mortgagor, if the mortgaged property was insufficient to satisfy the mortgage debt.

Section 46 of the Mortgage Act makes it abundantly clear that no decree in any hypothecary action upon any *mortgage of land* and no decree in any action for the recovery of any money due upon any such mortgage shall order any property other than the mortgaged land to be sold for the recovery of any moneys found to be due under the mortgage. Although there is no similar provision in relation to the mortgage of movables, the definition

of " hypothecary action " in section 2, as meaning " an action to obtain an order declaring the mortgaged property to be bound and executable for the payment of the moneys due upon the mortgage, and to enforce such payment by a judicial sale of the mortgaged property ", has given rise to a doubt as to whether in the case of mortgage of movables, the mortgagee has a right of recourse to property other than the mortgaged movables.

Could there have been any reason for the legislature to have drawn a distinction between movables and immovables and to alter the common law only in regard to immovables ? Quite apart from the natural distinction between movables and immovables, it would appear that the method of creation of the two types of mortgages and the procedure for their enforcement are different. These differences appear also to affect the types of relief available to the mortgagee.

The security afforded by movables for the repayment of a loan is subject to very serious infirmities. They are, as the name connotes, movable, and can change from hand to hand with ease. Whereas immovables may be subject to a real charge, movables will not be affected by such charges by reason of the maxim ' mobila non habent sequelam '.

In most cases they are not readily identified. It is not possible to record prior transactions which have taken place in respect of movables. There is no means of indicating in a register or other document with certainty that a particular movable which one may wish to purchase has been the subject of an earlier mortgage. A mortgagee of movables can therefore never have that sense of security experienced by a mortgagee of land.

Whereas a mortgage of land has to be executed in conformity with the Prevention of Frauds Ordinance, a mortgage of movables can be created either by delivery or by a registered document. In the case of a pledge effected by delivery of the articles the mortgagee may have continuous possession, and his possession may be sound ; but not so in the case of a mortgage created by a registered document. Registration only gives authenticity to the document on the date it was registered, but the other information such as of earlier mortgages executed, is far from being as reliable as the information relating to mortgages of land.

The Mortgage Act has no doubt improved the position of a mortgagee of movables by incorporating special provisions regarding the mortgage of shares, life policies, book debts and motor vehicles (sections 73 to 104), and by safeguarding his rights in the event of the mortgaged property being seized in

execution by other creditors (section 105). But yet the insecurity of a mortgagee of movables is still there, and that fact would have been in the minds of the legislature when provision similar to section 46 was not enacted in relation to movables.

The procedure for enforcement of a mortgagee's rights has also undergone a change after the Mortgage Act came into force. As stated earlier, the Roman Dutch law allowed the mortgagee a right of recourse to the other property of the mortgagor if the mortgaged property, whether movable or immovable, was insufficient to satisfy his debt. He had two actions available, a personal action on the loan and a hypothecary action for the realisation of his security. The Civil Procedure Code, by section 34(1) required every action to include the whole of the claim which the Plaintiff was entitled to in respect of the cause of action, and in terms of section 34(3), an obligation and a collateral security for its performance were deemed to constitute but one cause of action. The Mortgage Ordinance, No. 21 of 1927, however by section 16(1) provided that notwithstanding section 34 of the Civil Procedure Code, a claim to all or any of the remedies of a mortgagee to enforce payment of the mortgage money may be joined to a claim in a hypothecary action, or that a separate action may be brought in respect of each remedy. This was the position regarding the enforcement of mortgages, both of movables and immovables, until the Mortgage Act replaced the Mortgage Ordinance. That Act, by section 7(1) provided that notwithstanding section 34 of the Civil Procedure Code, a claim to enforce payment of the moneys due upon a mortgage may be joined to a claim in a hypothecary action, or that a separate action may be brought in respect of each such remedy. Sub Section (2) makes it quite clear that the section applies to actions on *mortgages of land only.* So that in respect of actions on mortgages of movables, it was section 34 of the Civil Procedure Code that was available, and in terms of that section the personal claim on the loan and the hypothecary claim for realisation of the security had to be included in one action, and consequently, the Plaintiff would in the same action have been entitled, had he succeeded, to a decree on the personal claim as well as to a hypothecary decree.

One of the most important matters considered by the Mortgage Commission of 1943, under the Chairmanship of the late Mr. L. M. D. de Silva was the proposal that in a *mortgage of land* the mortgagee's right to sell the property of his debtor should be limited to the property mortgaged. The Commission in its Second Interim Report (S.P. 5 of 1945) recommended (at page 36) that ordinarily it should be so, but that there should also be

provision for express renunciation of this right by the mortgagor. What is important to note for the purpose of the topic under consideration is the fact that no such proposal had been considered and no recommendation made in respect of the *mortgage of movables.*

I agree that the Plaintiff-Appellant's appeal should be allowed and that the Plaintiff should have judgment as prayed for with costs, both here and in the court below, subject to the restriction of the liability of the 7th and 8th Defendants to a sum of Rs. 100,000.

WIJESUNDERA, J.—

The 1st to the 8th defdt. respdts. carry on a business in partnership under the name, style and firm of A. R. Abdul Hameed & Bros. at Nugaduwa Mills, Galle. The 7th and the 8th defdt.respdts. being minors the 9th defdt.-respdt. was duly authorised by the District Court of Galle in case No. 1852 to carry on the said business on behalf of the two minors, to obtain overdraft facilities for the partnership business on behalf of the minors upto a sum of Rs. 100,000, and to mortgage the interests of the minors in the business for obtaining an overdraft up to a sum of Rs. 100,000. The defendant-respondents had an account with the Mercantile Bank, Galle, the plaintiff-appellant. The plaintiff-appellant on the 7th Sept., 1963 allowed overdraft facilities up to a limit of Rs. 250,000 to the defendant-respondents who mortgaged and hypothecated their stock in trade and merchandise and "movable property of every sort and description lying at Nugaduwa Mills, Galle" by bond of the same date, as security for the payment of this sum of money. On the 12th March 1964, the defendant-respondents were allowed another sum of 250,000 by way of overdraft on their executing a similar bond of that date as security for the payment of the overdraft. On the 1st of October 1965, the plaintiff-appellant allowed an overdraft of a further sum of Rs. 100,000. Only the 1st to the 6th defendant-respondents were parties to that bond.

The amount outstanding on these overdrafts and the interest due up to the 31st of December 1969 amounted to Rs. 588, 029/91. Alleging that the defendant-respondents failed and neglected to pay this sum the plaintiff-appellant filed action (*a*) to recover this amount, restricting the liability of the two minors to Rs. 100,000, (*b*) to have the mortgaged property declared bound and executable for the payment of the amount due, (*c*) indefault, for the sale of the property and (*d*) for an order that the defendants respondents pay the plaintiff appellant any balance amount left outstanding subject to the restriction regarding the two minors.

The learned District Judge of Galle after trial entered judgment in favour of the plaintiff appellant that the mortgaged property be sold in default of payment of the amount claimed, but dismissed the other relief claimed that the defendant-respondents be ordered to pay any balance left outstanding and further decided that the plaintiff appellant was not entitled be excuss any property other than the property mortgaged, in this action. In his view the action filed by the plaintiff-appellant is a hypothecary action within the meaning of section 2 of the Mortgage Act, Cap. 89, and therefore payment can only be enforced by the sale of the mortgaged property. To determine whether this view is correct it is necessary to consider certain provisions of the Mortgage Act.

Part 2 of the Mortgage Act provides for hypothecary actions on mortgages of land and sec. 4 makes the provisions of part 2 applicable ONLY to a mortgage of land, to any hypothecary action in respect of any land and to any action to enforce payment of any moneys due upon a mortgage of land. In this part there are two other sections viz. 46 and 48 which are relevant. Sec. 48 (1) provides that in a hypothecary action, if the court finds that the mortgage should be enforced, the decree shall order the land mortgaged to be sold in default of payment. Sec. 46 further enacts :— "No decree in any hypothecary action upon any mortgage of land..... and no decree in any action for the recovery of any moneys due upon any such mortgage shall order any property other than the mortgaged land to be sold..... and no property whatsoever other than the mortgaged land shall be sold....." Sec. 2 of the Act defines land and sec. 46 further states that an action for the recovery of any moneys due upon a mortgage includes any action to recover the money secured by the debt whether the cause of action is based on the mortgage or not. The words used are "no decree..... shall order". They are emphatic and the prohibition is unqualified. The result is only the mortgaged land can be sold in default of payment whatever be the form of action to recover the debt due on the mortgage.

In the case of mortgaged movables, the section corresponding to sec. 48 (1) is section 107 which provides "where in a hypothecary action in respect of mortgaged movables the court finds that the mortgage should be enforced, the decree shall order the movables be sold in default of payment." The two provisions are the same and the decree according to both, orders the property mortgaged to be sold. The question naturally arises what is to happen if the price realised by the sale is insufficient to satisfy the debt. In the case of mortgaged land there is an answer. Section 46 prohibits the court, in any action arising out of the mortgage, from entering

a decree for the sale of any property other than the mortgaged land in default of payment of the debt. But in the case of mortgaged movables there is no provision similar to section 46. This omission is significant and we have to look elsewhere for the answer.

The learned Attorney for the defendant-respondents submitted that the action of the plaintiff-appellant was a hypothecary action and the only decree a court can enter in terms of sec. 107 of the Act is a decree for the sale of the property mortgaged. Section 2 of the Act defines a hypothecary action to mean an action to obtain an order declaring the mortgaged property to be bound and executable for the payment of the money due upon the mortgage and to enforce such payment by a judicial sale of the mortgaged property. In the plaint, the plaintiff-appellant has come into court both on the money claim for the amount due, and on the mortgage. He has clearly set out both claims and has prayed for the sum due, for an order declaring the mortgaged property bound and executable for the payment of the sum due, for a sale in default of payment, and for an order directing the defendant-respondents to pay any balance due after the sale. Then this action is not an action only to obtain an order declaring the mortgaged property bound and executable for payment of the debt and for the sale of the property in default of payment, but also one where on a money claim on the principal obligation the plaintiff-appellant prays for an order that the defendant-respondents be directed to pay the balance due after the sale. Then it is not a hypothecary action as contemplated in section 2 of the Act. Then section 107 is no bar to order the relief, in addition to the sale of the mortgaged property, claimed by the plaintiff-appellant.

The learned Attorney for the defendant-respondents submitted that it was open to the plaintiff appellant to come and should have come by way of a separate action obviously in case the proceeds of the sale are insufficient to wipe out the debt. In the bonds in question there is the obligation to repay the overdraft subject to various terms and conditions, and for securing the repayment of the overdraft, the defendant-respondents have mortgaged and hypothecated certain properties, which are without dispute movables. Section 34(3) of the Civil Procedure Code provided : "For the purpose of this section an obligation and a collateral security for its performance shall be deemed to constitute but one cause of action." Then the plaintiff appellant was obliged to sue both on the principal obligation to repay the overdraft, and on the mortgage in the same action.

Section 7 of the Mortgage Act which empowers a mortgagee to bring a separate action on the money claim and another on the mortgage has no application as that provision applies only to mortgages of land.

There remains to consider the common law. In the Roman-Dutch Law a mortgage is a right over another's property which serves to secure an obligation. This same concept is taken over to the Mortgage Act of 1949, when it defined in section 2 a mortgage as to include any charge on property for securing money or money's worth. Both these definitions are wide enough to include any type of property. Other terms have been used to denote special mortgages, e.g., the word pledge denotes a mortgage of movables. A mortgage then is accessory to a principal obligation which is generally to pay money. If the principal obligation is not discharged " a mortgagee or a pledgee may execute upon property as has been bound to him. " Wille : The law of Mortgage and Pledge in South Africa, p 173. The proceeds of the sale of the property must first be applied in reduction or discharge of the debt due on the mortgage or the pledge, p 179. The learned author then continues on the same page, relying on among others Voet 20.5.12 " if the proceeds of the sale of the mortgaged property are not sufficient to satisfy the mortgage debt, and the mortgagee while having no security, still has a personal action against the mortgagor for the balance." The word mortgage here from the context includes a mortgage of movables as well. Reference to the title from Voet in vol. 3 Gane's translation p 625 confirms this. In the case of *Wijesekera vs. Rawal* 20 N.L.R. 126 the question Sampayo J. had to consider was whether a mortgagee " has a right to sell unmortgaged property before exhausting the mortgaged property " p. 127. The learned Judge said that even if a decree " does not specifically direct that the mortgaged property be sold in default of the payment of the debt, the creditor should first realize the mortgage and can resort to the other property only for the deficiency, unless of course the debtor otherwise consents " p 128. The question had obviously been considered in relation to the mortgage of land. But in coming to that conclusion the learned Judge has relied upon the opinions of some Jurists, who seem to have been considering the mortgage of movables as well,— referred to as " goods " at one place. Then unless there is some agreement to the contrary or some statute prohibiting it, a mortgagee can recover any deficiency from the mortgagor, if the sale of the mortgaged property does not realize sufficient money to satisfy the debt by resorting to the other property, whatever be the nature of the property. But the Mortgage Act by section 46 took away this right of a mortgagee of land and prohibited the sale of other property of the mortgagor to satisfy

the mortgage debt. There being no such statutory provision in the case of mortgaged movables in the Act, it is open to the mortgagee of movable property to claim any balance after the sale of the mortgaged movable and to realizé it by the sale of the other property of the mortgagor.

In the result the appeal is allowed. I set aside that part of the judgment and decree where it is ordered that the recovery of the sum due be enforced only by the sale of the mortgaged property and in its place order that, in default of the payment of the amount due, the mortgaged property be sold and the defendant-respondents pay to the plaintiff-appellant, if the proceeds of the sale of the mortgaged property be insufficient to satisfy the total sum due, any balance amount subject only to the restriction of liability of the 7th and the 8th defendant-respondents to a sum of Rs. 100,000. The plaintiff-appellant will be entitled to the costs of this appeal.

SIRIMANE J.—I agree.

Appeal allowed.