

1919.*Present: Ennis J. and Shaw J.*

ARANA v. IBRAHIM LEBBE.

285—D. C. Kalutara, 7,289.

*Usufructuary mortgage—Right of Mortgagee to proceeds of a mine.*

Where the bond creating a usufructuary mortgage did not refer to mining rights, and where a mine was opened after the execution of the bond, the mortgagee was held not to be entitled to a share of the proceeds of the mine.

THE facts are set out in the judgment of the District Judge (Allan Beven, Esq.):—

This is an action by plaintiff to recover from defendant the sum of Rs. 1,500, being the balance money due to him for plumbago sold by plaintiff to defendant.

The defendant admits that a sum of Rs. 1,500 was due to plaintiff for plumbago, but states he held a usufructuary mortgage for half the land from which plumbago was dug, and with the consent of the plaintiff retained that sum as ground share due to him as usufructuary mortgagee. Now, there are four valuable lands mortgaged for the sum of Rs. 1,500, and, according to plaintiff and his witness, this particular land, though a plumbago land, had also coconut, jak, arecanut, breadfruit, &c., sufficient to bring in a yearly income of Rs. 120. It was argued by defendant's counsel that the land being primarily intended for digging for plumbago, the usufructuary mortgagee had a right to the ground share. If this was so, I have no doubt it would have been so mentioned in the mortgage. The income derived from the produce of the four lands was more than sufficient for the interest on Rs. 1,500.

The plaintiff has proved, by the production of receipts (P 1 to P 6), that he has paid ground share for the plumbago to other co-owners. If defendant's story is at all likely, he would have demanded his ground share every time the plumbago was sold. He admits it was sold five times, but he waited till the final sale to demand his ground share.

I do not think the law allows a lessee or usufructuary mortgagee the right to dig for minerals or share in the proceeds, unless it is expressly so stipulated in the lease or mortgage bond.

Enter judgment for plaintiff as prayed for, with costs.

The mortgage bond was as follows:—

*D. 1.—No. 512.*

Know all men by these presents that I, Kurupitige Soderis Fernando, of Mahagama, in Gangaboda pattu of Pasdun Korale East, in the District of Kalutara, Western Province, am held and firmly bound unto Ismail Lebbe Marikar Ibrahim Lebbe Marikar, of Tunduwa, in Galle District, in the sum of Rs. 1,500 lawful money of Ceylon, being for so much money borrowed and received by me from him at or before the execution of these presents (the receipt whereof I do hereby admit and

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acknowledge), and which said sum of Rs. 1,500 I do hereby, renouncing the legal exception *non numerata pecunia*, engage and bind myself, my heirs, &c., to repay unto the said Ismail Lebbe Marikar Ibrahim Lebbe Marikar, his heirs, &c., on demand.

And as security for the due repayment of the said principal, I do hereby mortgage and hypothecate to and with the said Ismail Lebbe Marikar Ibrahim Lebbe Marikar and his aforementioned, as a primary mortgage free from incumbrances the following property, to be possessed by him, the said Ismail Lebbe Marikar Ibrahim Lebbe Marikar, in lieu of interest thereon, to wit :—

. . . . .  
And I further engage and bind myself, my heirs, &c., for the payment of any balance sum that may be due and payable under and by virtue of these presents, if the proceeds realized by sale of the premises hereby mortgaged be found to be insufficient to cover the above-mentioned debt.

In witness whereof, &c.

Signed, witnessed, and attested on April 24, 1914.

*Bawa, K. C.*, for appellant.

*Cooray*, for respondent.

February 27, 1919. ENNIS J.—

The only question in this appeal is whether the appellant, who is the usufructuary mortgagee, is entitled as such to the revenues from a plumbago mine on the property. The learned Judge held that the facts of the case were such that he read the instrument of mortgage to be one relating to the taking of the agricultural produce from the soil. He pointed out that the produce of the trees was more than sufficient for the interest on the amount of the mortgage, and he concluded by saying that he was not aware that the law allowed a usufructuary mortgagee the right to dig for minerals or share in the proceeds, unless it is expressly so stipulated in the bond. No authority has been cited to show that the Judge's view is wrong. An English case, *County of Gloucester Bank v. Rudry Merthyr Steam and House Coal Colliery Company*,<sup>1</sup> was cited, but the circumstances were not quite the same, where it was held that in deciding a question of this sort one had to look to the instrument and see what was intended. So here the instrument is merely an ordinary form of a usufructuary mortgage. It is possible that had there been plumbago mines on the land at the time the instrument was given, the mortgagee would have had the right to work those mines. In the present case, however, there is no evidence that there was any mine on the property at that time. All the evidence relates to the plumbago taken from the land after making of the mortgage. In the circumstances, I see no reason to interfere, and would dismiss the appeal, with costs.

<sup>1</sup> (1895) C. A. 634.

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I agree. The mortgage deed of April 27, 1914, does not properly bear the construction that it was a mortgage of mines. Neither have the parties to this case ever suggested that such a construction could be given to it, or that the defendant was entitled to participate in the proceeds of the mining carried on on behalf of the co-owners during the continuance of the mortgage. It is only after the mortgage has come to an end, and after the debt due to the defendant on the mortgage has been paid in full, that the defendant has raised the present claim. These also appear to me to be another fatal objection to the defendant's claim. Had he worked the mine, in my opinion, he would have had to account for the proceeds of the mine and to reduce the mortgage debt due to himself by the profits he made. As there is no debt due for him to reduce, it appears to me that he has no claim whatever on the profits derived from the mine.

I agree with the order proposed in my brother's judgment.

*Appeal dismissed.*

