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Present : Fisher C.J. and Drieberg J.

A. DE ZOYSA *v.* BANDIYA *et al.*

102–102A—D. C. Kurunegala, 11,673.

Mortgage—Sale of mortgaged property—Extinction of mortgage—Sale of mortgage bond in execution—Right of purchaser in execution—scope of action under section 247 of the Civil Procedure Code.

Where a person mortgaged a land to B and subsequently transferred the land to B's wife free from encumbrances and a part of the consideration for the transfer was the discharge of the mortgage debt by B,—

Held, that the mortgage bond was extinguished and that a purchaser in execution against B obtained no rights on the bond.

A purchaser in execution of the right, title, and interest of the mortgagee is on the same footing as the latter and takes the bond subject to all equities.

Per DRIEBERG J.—An action under section 247 of the Civil Procedure Code is a statutory one which cannot be extended beyond those limits.

Where the subject of execution is a mortgage bond, the only question for decision in such an action is whether the right of action on the bond is liable to be sold in execution of the decree. Whether the bond was satisfied by payment or otherwise is a question that arises for decision only when an action to recover on the bond is instituted by the purchaser.

PLAINTIFF instituted this action to recover a sum of money due on a mortgage bond executed by the first and second defendants on February 21, 1917, in favour of one N. E. Wijeyesekere. On March 8, 1917, the first and second defendants had transferred the property mortgaged to the third defendant, wife of Wijeyesekere, free from all encumbrances. On the death of Wijeyesekere in 1918, the deceased was indebted to the plaintiff in a sum of Rs. 10,400, and the plaintiff sued the third defendant as executrix of the husband's estate.

He obtained judgment and seized in execution the mortgage bond in question. The third defendant successfully claimed the bond as her property and the plaintiff brought an action under section 247 of the Civil Procedure Code and obtained judgment in his favour declaring that the bond was liable to be sold in execution of the judgment which the plaintiff had obtained against the estate of Wijeyesekere. At the sale the plaintiff purchased the right, title, and interest of the deceased on the bond. On September 1, 1926,

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he instituted the present action against the first and second defendants as the persons who had executed the mortgage bond and the third defendant as the purchaser of the mortgaged property. The learned District Judge dismissed the plaintiff's action.

De Zoysa, K. C. (with *H. V. Perera* and *Ameresekere*), for plaintiff, appellant.

Keuneman (with *L. A. Rajapakse*), for first and second defendants, respondents.

F. H. B. Koch, for third defendant, respondent.

E. G. P. Jayatilleke (with *Croos da Brera*), for fourth defendant, respondent.

November 30, 1928. FISHER C.J.—

In this case, on February 21, 1917, the first and second defendants executed a mortgage bond in favour of N. E. Wijeyesekere to secure Rs. 15,000 with interest at 15 per cent. or in default 20 per cent. That bond was duly registered, and still remains registered and uncancelled, and the main question we have to consider is whether it survived and remained effective after the execution of the transfer of the property mortgaged to the third defendant, the wife of N. E. Wijeyesekere. That transfer was executed by the first and second defendants on March 8, 1917. The transfer, the consideration for which was stated to be Rs. 24,000, was made "free from encumbrances." On November 7, 1918, N. E. Wijeyesekere died, leaving a will of which he appointed the third defendant executrix, and probate of the will was granted to her. At the time of his death the deceased man was indebted to the plaintiff in a sum of Rs. 10,400, and he sued the third defendant as executrix to recover the debt. He obtained judgment and seized the mortgage bond in execution. The third defendant successfully claimed the bond as her own property and the plaintiff brought an action against her in her personal capacity under section 247 of the Civil Procedure Code and obtained judgment in his favour that the bond was liable to be seized and sold in execution of the judgment which the plaintiff had obtained against the deceased man's estate. The sale took place and the right, title, and interest of the deceased man in the bond was purchased by the plaintiff for Rs. 5,100, which sum he set off against his judgment debt.

On September 1, 1926, the present action was brought by the plaintiff against the first and second defendants as the persons who had executed the mortgage bond, against the third defendant to whom the mortgaged premises had been transferred, and against the fourth defendant to whom the third defendant had mortgaged the premises in 1917.

The third defendant in her answer claimed that the first and second defendants had by the deed of March 8, 1917, sold and transferred the land to her, and that at the execution of the deed the money due on the mortgage bond " was expressly or impliedly paid by the mortgagors, the first and second defendants, and the said bond was thereby discharged " and " that the mortgage created over the said land was extinguished." She pleaded alternatively " that with the consent of the mortgagee (the said Nammunidewage Edwin Wijeyesekere) the said lands were sold by the mortgagors and purchased by the defendant, and that the mortgage existing on the said land was renounced and the mortgage thereby extinguished."

The first and second defendants in their answer admitted the execution of the transfer, but claimed that the third defendant held the properties in trust for them, and further stated that only the principal sum of Rs. 15,000 was due on the bond, the mortgaged premises having been possessed by the mortgagee in lieu of interest.

Three points were discussed before us, with which I will deal before coming to the main question to which I have referred above.

The first point was that the transfer to the third defendant was in trust for her husband. Assuming that it was proved that the whole of the consideration was paid or provided for by the deceased man there was no evidence whatever from which, in the words of section 84 of the Trusts Ordinance, 1917, " it appears that such other person did not intend to pay or provide such consideration for the benefit of the transferee . . . . " It must be taken, therefore, that the third defendant was the beneficial owner of the property.

The second point was that the conveyance to the third defendant was as trustee for the first and second defendants. Of this there was no evidence whatever, and neither is there anything from which such an inference can be drawn. It is quite clear that they received benefits equivalent to or exceeding in value the amount of the consideration named in the bond.

The third point was put forward by the third defendant and it was argued that the money for which the mortgage bond was given as security was given to the third defendant for the purpose by her father D. D. Pedris, and that therefore the bond was held in trust for her by her deceased husband. This was the contention put forward by her in the action brought by the plaintiff against her under section 247 of the Civil Procedure Code. It was definitely decided against her by the judgment in that case and, in my opinion, she is precluded from again raising the point. There are other considerations which might have precluded her success on that point, namely, the absence of any evidence to comply with the requirement of section 84 of the Trusts Ordinance, 1917, referred to

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above, and also as to the quality of the evidence called by her in the District Court to support her contention, but I do not think it is necessary to deal with those matters.

We now come to a consideration of the main question, namely, whether the mortgage bond was extinguished on the execution by the first and second defendants of the transfer free from encumbrances to the third defendant. The evidence shows very clearly that the idea of transferring the property was contemplated before the execution of the mortgage bond. Moreover, the mortgage bond contained a term most unusual or even unique in ordinary mortgage bonds, namely, the proviso that the mortgagors should not " subject the said hereby mortgaged properties during the continuance of this mortgage to any lease or mortgage unless we shall have first obtained the written consent of the said creditor ; that we shall not do any act, nor make, nor execute any deed or document whereby the income deriving from the said properties would become subject to any assignment or assignments ; and that all leases, mortgages, or assignments executed without having first obtained such written consent shall be wholly null and void." This entirely accords with the explanation given by Mr. F. de Saram that the mortgage bond was kept alive in order that the transferee might be protected against any adverse dealing with the property before the transfer could be registered. The evidence as to the relationship of the plaintiff to N. E. Wijeyesekere and the circumstances attending the execution of the transfer and the nature of the transaction was described by the learned Judge as that of " witnesses of unimpeachable credit." Beyond the comment that they are speaking of what happened some time ago, there is no reason whatever for discrediting their evidence or for thinking that the lerned Judge rated the reliability of their evidence too highly. Their evidence is that the discharge of the obligation on the mortgage bond was part of the consideration for the transfer to the third defendant, and, moreover, it is clear that the plaintiff knew this to be the case and testified to it on more than one occasion after the death of N. E. Wijeyesekere.

It may be taken that N. E. Wijeyesekere provided the consideration for the transfer. He himself was a witness to the transfer. He subsequently was a party to two mortgages of the property on the footing that the mortgage bond has ceased to create an encumbrance on the property. It is clear that he himself could not have enforced any liability on the bond against the first and second defendants, and on that basis the plaintiff could not succeed in this action. By purchasing the right, title, and interest of N. E. Wijeyesekere in the mortgage action of which he became the purchaser he put himself on precisely the same footing as N. E. Wijeyesekere. This proposition is supported by several Indian decisions (see *Prayag Raj v. Sidhu*

Prasad Tewari,[1] *M. M. Hussein and another v. K. M. Roy and others*,[2] also *Moorgappa Chetty v. Holloway*,[3]) and is in accordance with the law as laid down by Voet (*Berwick's Translation, 1902 ed. pp. 100-101—lib. XVIII., tit 4, section 13*). "As the purchaser of the debt enjoys the right and advantages already enumerated of the party who makes the cession, so on the other hand he is subject to disadvantages incident to his position; for any set off which might have been opposed to the cedent's claim before cession may also be availed of against the cessionary, as shown in the title *de compensationibus n. 4. et seq.* (*lib. XVI., tit. 1*).

"Nor is it infrequent, though not invariable, that the cessionary may be defeated by the same pleas by which the party making the cession might have been repelled if he had sued.

"It would be exceedingly hard that the position either of the debtor or of other creditors should be made worse by a change of one credit or for another."

As regards the first and second defendants adopting the attitude that they still owe the capital sum the learned Judge, after expressing the opinion that the estate is now worth over Rs. 50,000 says that "It would be a great gain to them if they could get the estate back by discharging the bond in dispute."

He, however, dismissed the action against them.

It would seem that the plaintiff might have obtained judgment against them for the capital sum on their admissions in the pleadings as they stand, but in view of the fact that the decision in the action turned substantially on the validity of the mortgage bond as against the third defendant, I think we may allow the judgment dismissing the action to stand as it is. It is clear that they took up the position that the capital sum secured by the mortgage was unpaid for ulterior motives and not by way of an absolute admission of their indebtedness. However reprehensible their conduct may be, I do not think that we are bound to penalize them by giving judgment against them on the footing that so far as they are concerned the bond is valid to the extent of the capital sum being still due.

The order of the learned Judge will therefore stand and the appeals will be dismissed

The plaintiff appellant in No. 102 will pay the costs of the third and fourth defendants, respondents of these appeals.

DRIEBERG J.—

The matters in issue depend solely on what were the circumstances under which the mortgage bond 3 D 21 of February 21, 1917, in favour of N. E. Wijeyesekere and the transfer 3 D 20 of March 8, 1917, to the third defendant were executed.

[1] *(1908) 35 Cal. 877.* [2] *(1895) 22 Cal. 909, P. C.*
[3] *2 S. C. C. 168.*

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The plaintiff says that the transfer was without consideration and made merely to put the lands of the first and second defendants out of the reach of their creditors, and that N. E. Wijeyesekere agreed to have the lands transferred to them where they paid him the Rs. 15,000 which was to be given them on the mortgage bond. There is nothing to support this beyond the statement of the first defendant, and there is much which shows that that was not the arrangement. The first defendant says that he was introduced to N. E. Wijeyesekere and that he could give no explanation why N. E. Wijeyesekere should have taken so much trouble over the settlement of his debts. It is not the case that N. E. Wijeyesekere was in a position to invest money on mortgage, for on August 25, 1917, he borrowed Rs. 10,000 on a mortgage of his lands on P22 and when he died the following year his estate proved insolvent. It is clear that the primary object of the transactions between the first and second defendants and N. E. Wijeyesekere was the purchase of same lands of the first and second defendants. Those lands were subject to mortgages, and there was the possibility of existing registered seizures and of further encumbrances of both sorts accruing between the examination of the title and the perfecting of it by the Colombo Notaries for the transfer. Mr. F. de Saram says that the mortgage was only a preliminary step to the transfer and to safeguard their client against any advances he might make prior to the transfer and, I take it, to the registration of the transfer. The extract of registrations (3 D 17) was issued by the Registrar of Lands, Kurunegala, on February 22, 1917. It has not been proved when Mr. de Saram was given instructions for the transfer and when he began examining title, but 3 D 17 shows that in the case of some allotments the extracts were certified up to February 19 and in others to February 20. His application therefore must have been made before February 19, and some appreciable time before, for the extracts form a fairly bulky record and must have taken some time to prepare.

This case was presented to us as if the transfer 3 D 20 was merely a conveyance of the lands mortgaged by 3 D 21. This was far from being the case. I have examined the deeds and I think my conclusions are right. 3 D 21 was a mortgage of the southern half of Kankanimullewatte, 25 acres 2 roods and 28 perches in extent, and of a number of other allotments in that village including one, Dewatagahapitiyahena, which lies partly or wholly in Mirihetugoda. The extents of these allotments is given in Sinhalese sowing extents. For the transfer these lands were grouped together, surveyed, and described in the conveyance as Kankanimullewatte, situated in Iriyaeba and Mirihetugoda, and marked lot A, in extent 42 acres 3 roods and 14 perches, in Mr. Weeraratne's plan of February 27, 1917. The lots comprising it appear in schedule 1 to the deed.

By the bond 3 D 21 six allotments of land, in the village Medagomuwa, numbered 4, 5, 6, 7, 8, and 9, were mortgaged. No lands in Medagomuwa appear in 3 D 20. By 3 D 21 two lots in the village Halwella were mortgaged, each described as Kadurukumbura, with its adjoining high land Kadurugahamullawatte. These two allotments together with another, Pahalamullahena, not mentioned in the bond, in the same village, were grouped together to form one block marked D in Mr. Weeraratne's plan and described as Tengodawatte of 9 acres 1 rood and 32 perches.

If the object of the conveyance was only to secure the first and second defendants against their creditors nothing was easier than to have taken a simple transfer of each allotment. But the survey of the lands and the arrangement in the conveyance was such as is adopted when a Notary wishes to present a village title in a proper form which will facilitate future transactions. All this must have cost money, and the first defendant admits that all these costs, together with those of the mortgage and of the assignments, were borne by Wijeyesekere. The total cost must have been considerable.

The mortgage 3 D 21 which is in Sinhalese was executed at Kurunegala by a local Notary when Mr. de Saram was examining title for the transfer, and it was expressed to be subject to certain mortgages there stated ; on some blocks there were as many as three prior mortgages. There is thus no substance in the contention that all payments by Wijeyesekere must be regarded as made under the mortgage and not in satisfaction of the price due on the conveyance. The conveyance was declared to be free of encumbrance and the consideration was properly applied to freeing the lands of them. Wijeyesekere arranged with Mr. Daniels, Proctor for the execution creditors of the first and second defendants in D. C. Nos. 6,227 and 5,890, to pay Rs. 2,000 on account of their claims and to pay the balance in six months ; these were decrees on mortgages. Wijeyesekere gave Mr. Daniels two cheques for Rs. 1,000 each on February 20, 1917, the day before 3 D 21. It is significant that these were not honoured until March 9, the day after 3 D 20. The balance due on the two decrees, Rs. 5,917·43 and Rs. 4,834·75, were paid by Mr. de Saram on August 29. On February 24, 1917, Wijeyesekere paid off the mortgaged creditor in D. C. No. 6,383 and obtained an assignment, 3 D 16, of his decree for Rs. 5,000. By 3 D 12A of March 26, 1917, he took an assignment of two leases for Rs. 5,546 and on the same day, by 3 D 12B, an assignment of another lease for Rs. 270. Mr. de Saram speaks of the consideration for this deed as Rs. 600, and it was so stated at the argument, but this is an error. These payments amount to Rs. 23,568·18, which is Rs. 431·82 less than what was due to the first and second defendants for the transfer 3 D 20. Whether this balance was paid or not is not known. The truth cannot be had from the first and second defendants, but there is no

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evidence that they ever claimed it, and it is a fair inference that it was paid. On the same day a transfer, 1 D 2, was taken for Rs. 1,000 for same lands owned solely by Kiriya Veda, the second defendant. The sum of Rs. 4,970 paid by Wijeyesekere for the assignment by P 12A of March 12, 1918, of the mortgage bond No. 16,342 of July 13, 1915, of which mention was made at the argument, has no connection with this matter. This was not a mortgage by the first or second defendant and the bond appears unpaid and as an asset in the inventory of Wijeyesekere's estate.

A great deal was made of the fact that Wijeyesekere took assignments of these mortgages and leases, 3 D 16, 3 D 12A, and 3 D 12B, and that he did not instead get satisfaction of judgment entered in the case of 3 D 16 and surrender of the leases by 3 D 12A and 3 D 12B. I do not think there is any force in this argument. If as I believe Wijeyesekere made this purchase as a provision for his wife, he sufficiently protected her by taking over these mortgage decrees and leases himself, it is not likely that he thought of enforcing these against her. The Notaries might have adopted either method, and in fact in the case of the mortgage decrees in cases Nos. 6,627 and 5,890 amounting to Rs. 12,752·12, no assignment was taken but the creditors' Proctor had satisfaction of judgment entered, 3 D 8. If these sums went in payment of the consideration for the transfer, as I am sure they did, there is nothing due and owing on the bond, and when Mr. de Saram found as he did, that there was no unexpected encumbrance accruing between his obtaining registration extracts on 3 D 17 and the registrations of the transfer on March 13, and there is no suggestion that any such encumbrances were created, he could have had the mortgage bond cancelled; the fact that this was not done does not mean that the debt and hypothecation exist.

If this view of the facts is correct the action must fail, for if there is nothing due on the bond it is unnecessary to consider the exact nature of the third defendant's title to the land and whose money went to the payment of the price which was paid by Wijeyesekere, as found by us. It is hardly necessary to point out that it is not sought to make the land liable for a debt of Wijeyesekere as his property, but to make it liable to whomsover it may belong, as property liable as security for an existing debt of the first and second defendants.

But it was urged that if the evidence of the money being paid by D. D. Pedris and Mrs. N. E. Wijeyesekere failed, the Court was obliged to hold that there was no consideration for the conveyance and that the case of the first and second defendants that the transfer was in trust for them should be accepted. It may be well therefore to deal with the evidence on this point.

We do not think that it has been proved that D. D. Pedris gave the third defendant Rs. 15,000 for this purpose. He said that he gave this sum to her a few days before the mortgage and that the only evidence of the payment was an entry in his ledger. His evidence was resumed on a later date when he produced his ledger, which however contained no such entry.

Mrs. N. E. Wijeyesekere's evidence that she gave the third defendant Rs. 7,500 is satisfactory; the counterfoils of her letters of request for interest, 3 D 22, which were not referred to at the argument, show that on May 12, 1917, July 14, 1917, October 6, 1917, and March 30, 1918, she wrote to the third defendant for payment of interest on Rs. 7,500. The last two counterfoils have a note on them "paid by cheque" with the number of the cheque in each case. She said that these were the cheques of Wijeyesekere. The counterfoil of the letter of May 12, 1917, shows a request for interest from February 22, 1917, and this date is significant, for Wijeyesekere made his first payment, Rs. 5,000, on this transaction two days after 3 D 16. I think therefore that the evidence of Mr. Wijeyesekere that she gave the third defendant Rs. 7,500 for this purpose should be accepted.

But even if the money which Wijeyesekere paid was not provided by the third defendant, that does not lead to the conclusion claimed by the plaintiff that there was consideration for the transfer and that the transfer must be regarded as in trust for the first and second defendants. The money in that case was Wijeyesekere's and the conveyance was either to her in trust for himself or it was for her own benefit. If it was the former, the plaintiff's case must fail; the transfer to him extinguished the mortgage even if the debt subsisted, for a man cannot have a hypothec over his own property, and the only right which passed to the plaintiff on his purchase of the bond would be the mere right of recovering the debt.

But there is no reason for supposing that this was anything more than a provision by Wijeyesekere for his wife, and I believe that this was the case. A gift by husband to wife is allowed (section 13 of Ordinance No. 15 of 1876), and the third defendant got a good title subject only to the claims of those who were her husband's creditors at the time of the gift.

As I have pointed out, however, these questions do not arise if the Rs. 23,568·18 paid by Wijeyesekere was on account of the consideration for the transfer. All the evidence in the case points to this and I believe the evidence of the Messrs. de Saram and the forth defendant as to the part taken by the plaintiff and that the plaintiff was well aware of the real nature of the transaction, namely, that the third defendant became owner of the land and that there was nothing due on the bond. An endeavour was made to show that the third defendant was estopped by the judgment in D. C. Colombo,

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No. 16,210 from advancing her present claim. She there claimed that the bond was held in trust for her, also that it had been discharged, and that it had been discharged by the transfer. The Judge there held that the only question for decision was whether the bond, or rather the right of action on the bond, was liable to be sold under the plaintiff's decree. He was right, for the action was a statutory one and could not be extended beyond those limits. Whether the bond was satisfied by payment or otherwise, or if not satisfied whether it still remained secured by the mortgage, were questions which could only arise for decision when an action to recover on the bond was made by the purchaser of it.

I agree with the order made by my Lord the Chief Justice.

Appeal dismissed.