1932 *Present:* **Garvin S.P.J. and Maartensz A.P.J.**

SOKALINGAM CHETTIAR *v.* RAMANAYAKE *et al.*

171—D. C. (Inty.) Colombo, 43,649.

Cause of action—Mortgage bond—Security for payment of advances made by two obligees—Action by obligees to recover money due to them.

Where a mortgage bond, granted as security for the repayment of monies to be advanced from time to time by two obligees, provided *inter alia* "that the obligor will on demand pay to the obligees or their aforewritten all and every sum of money which shall become due to the obligees upon promissory notes or cheques made or endorsed by the obligor and delivered to the obligees or either of them . . . . or in respect of loans, advances, or payments made by the obligees or either of them " . . . .

"All sums so lent and advanced by the obligees shall be deemed to have been lent and advanced by the obligees and to be recoverable by the obligees in the proportion of half part or share by the first named obligee and half part or share by the second named obligee."

Held, that the obligees were entitled to sue in one action to recover the aggregate amount due to them.

APPEAL from an order of the District Judge of Colombo. The facts appear from the judgment.

H. V. Perera (with him *Nadarajah*), for appellants.

N. E. Weerasooriya, for first defendant, respondent.

Croos Da Brera, for second defendant, respondent.

January 25, 1932. MAARTENSZ A.P.J.—

This is an action for the recovery of a sum of Rs. 129,415.87 alleged to be due on a mortgage bond numbered 515 and dated July 18, 1928, executed by the first defendant in favour of the first plaintiff and one S. K. R. A. A. R. Ramasamy Chetty. S. K. R. A. A. R. Ramasamy Chetty by deed bearing No. 1,635 dated April 1, 1931, assigned to the second plaintiff all sums of money due from the first defendant upon the bond sued on.

The second and third defendants have been made parties as they are puisne incumbrancers.

The issues with which the appeal is concerned are the seventh and eighth issues, which are as follows:—

(7) Is there a misjoinder of plaintiffs and of causes of action?

(8) Are the promissory notes mentioned in paragraph 6 of the plaint or any notes of which they are renewals not enforceable by reason of the failure to give details required by section 10 of Ordinance No. 2 of 1918?

The learned District Judge answered the seventh issue in the affirmative and the plaintiffs' appeal is from this order. He answered the eighth issue against the first and second defendants who have filed a cross objection against this part of the order.

The question whether there is a misjoinder of plaintiffs and causes of action arises from the form of the bond.

The bond was executed to secure the repayment of money to be advanced from time to time by the obligees. The obligor agreed that he

or his heirs, executors, administrators, and assigns will on demand pay to the obligees or their aforewritten all and every sum of money which shall become due to the obligees upon promissory notes or cheques made or endorsed by the obligor and delivered to the obligees or either of them or upon chits, tundus, or other writings made and delivered by the obligor to the obligees or either of them, or in respect of any loans, advances, or payments made by the obligees or either of them to or for the use or accommodation or on account of the obligor, or in respect of any amount or amounts or transactions whatever between the obligor and obligees or either of them with interest at 12 per cent. He also agreed to pay all sums whatsoever which shall hereafter be or become due and owing to the obligees or either of them and all interest and other charges if any and also any balance of amount which may be found due by the obligor to the obligees or either of them.

It was further " expressly agreed and declared that the obligees may and the right is hereby reserved to them to lend and advance to me the obligor in respect of these presents and upon the securities herein contained only such sums or sum of money as to them the obligees shall seem fit, safe, and expedient and at any time to stop further advances or loans or transactions with me the obligor without any notice to me and that all such sums of money so lent and advanced to me by the obligees shall be deemed to have been lent and advanced by the obligees and to be recoverable by the obligees in the proportion of half part or share by the first named obligee and half part share by the second named obligee ".

For securing the repayment of all sums payable to the obligees the obligor mortgaged and hypothecated with the obligees " as a first and primary mortgage " the allotments of lands, premises, and buildings described in the schedule to the bond.

The bond provided that if the obligor " shall fail to pay or retire on the due date or on demand, as the case may be, any one or more of the promissory notes, cheques or chits, tundus or other writings made or endorsed by me the obligor and delivered to the obligees or either of them or to pay the interest regularly as the same shall be demanded by the obligees or to keep the said several premises hereby mortgaged in good order and condition and the buildings thereon in proper order and repair or to pay and discharge all rates, taxes, assessments or other charges whatsoever now payable or hereafter to become payable in respect of the said mortgaged premises or to cause any drainage connections to be laid to or other works executed on the said mortgaged premises at the request or on the orders of the Municipality of Colombo or other lawfully constituted body or to observe and carry out all directions with regard to the maintenance of the said mortgaged premises in a sanitary condition or permit the obligees or their agents to visit and inspect the said premises at all reasonable time during the continuance of this security it shall and may be lawful for the obligees or their aforewritten at once to sue for and recover under and by virtue of these presents not only the amount of the promissory notes, cheques, chits, tundus, or other writings or documents already dishonoured and of all other loans, advances, and accommodation made to me by the obligees in respect of these presents but

also the amounts of any and every and all promissory note or promissory notes, cheques, chits, tundus, and other documents or writings made or endorsed by me and delivered to the obligees or either of them or their aforewritten though the same may not have matured or fallen due and also all other sums of money lent or advanced or in any other manner due and payable to the obligees on any account or transaction whatsoever in respect of these presents".

The plaint averred that the first plaintiff had lent to the first defendant various sums aggregating to Rs. 72,317 and that S. K. R. A. A. R. Ramasamy Chetty had lent to him various sums aggregating to Rs. 57,083.37 and that there is now due and owing to the first plaintiff Rs. 72,332.50 which includes a sum of Rs. 15.50 charged as noting fees, and Rs. 57,083.37 to the second plaintiff.

The plaintiffs prayed that the first defendant be ordered to pay (1) the first plaintiff, Rs. 72,332.50, with interest; (2) the second plaintiff, Rs. 57,083.37, with interest; (3) that the first defendant be ordered to pay the said sums and interest and costs on some date to be named by the court; (4) that the property, debts, rights, and interest described in paragraph 3 of the plaint be declared especially bound and executable for the said sums of Rs. 72,332.50 and Rs. 57,083.37, interest, and costs on the footing of the said mortgage bond; (5) that in default of payment of the said sums of Rs. 72,332.50 and Rs. 57,083.37, interest, and costs of suit within the period aforesaid the said premises declared especially bound and executable as aforesaid be sold.

The learned District Judge held that there was a misjoinder of plaintiffs and causes of action as the plaintiffs were not entitled to recover the amount sued for jointly or severally or in the alternative as provided by section 11 of the Civil Procedure Code. I agree with him that this is not a case in which the plaintiffs can be said to be entitled to sue for the amount due in the alternative.

As regards the right to sue jointly the learned District Judge observed that the draftsman of the bond seemed to have taken pains to indicate that the rights of the mortgagees were independent of one another and quoted with, I take it, approval the contention on behalf of the first defendant that there were really two bonds on one piece of paper; that in the plaint itself the plaintiffs claim each a different sum of money and that the answer affects the different claims separately, and that for all practical purposes two cases are being tried together; that the bond contemplates that the mortgagor may be indebted to only one of the two " obligors " (should be obligees) and proceeds to state " that all such sums of money so lent shall be deemed to have been lent by the obligees and be recoverable by the obligees in the proportion of half part or share by the first named obligee and half part or share by the second named obligee".

The construction put upon this clause by the plaintiffs that it was intended to put beyond doubt the proportions in which the mortgagees were entitled *inter se* was not accepted nor was the contention on behalf of the first defendant that each obligee was at liberty to recover a half share of the money lent accepted.

The learned Judge ultimately held that the causes of action are not the same and that the plaintiffs are not jointly interested and ordered the plaintiffs to elect which of them will continue the action and make the other a defendant.

It was contended on behalf of the plaintiffs-appellants that the right to the relief claimed existed in them jointly in respect of the same cause of action, namely, the failure of the first defendant to pay the obligees the amounts due to them.

In support of this contention we were referred to various passages in the bond sued on. The first passage relied on is contained in the second paragraph of the bond in which the obligor agrees with the obligees and each of them to pay the obligees money advanced by them or each of them. It was pointed out that the agreement was to pay the obligees, the words " and each of them " being omitted in this part of the agreement. The next passage relied on was the clause that the money lent and advanced to the first defendant shall be deemed to have been lent by the obligees and to be recoverable by the obligees in the proportion of half part or share by the first named obligee and half part or share by the second named obligee. It was urged that the earlier part of the clause clearly created a joint right as by its terms the money advanced by each obligee was deemed to have been advanced by both and that the latter part of the clause merely set out the rights of the obligees *inter se*.

It was also pointed out that the property hypothecated to secure payment of the debt was hypothecated to botn the obligees, the words "and either of them" being omitted. In reply it was contended that the words "and their aforewritten" in the clause by which the obligor agreed to repay the advance and in the hypothecating clause were intended to include the words and/or each of them. I am unable to agree with this contention. The words "and aforewritten" are a conventional term usually used to avoid the repetition of the words executors, administrators, and assigns, and they do not appear to have been used for any other purpose in the bond. It was also argued on behalf of the respondent that the provision that the money lent and advanced should be recoverable in the proportion of half each, created distinct rights which could not be combined in one action. But for this provision the obligees would, in my opinion, have been bound to sue together to recover the amount advanced. for the earlier part of the clause provides that the money lent should be deemed to have been lent and advanced by both. The latter part of the clause does not in my opinion prevent the obligees suing together to recover the whole amount. It was I think inserted as contended by the appellants for the purpose of enabling them to sue for the whole amount on the footing that they were entitled to a half each irrespective of the amount each of them had actually advanced.

That the bond was intended to create a joint right in the obligees is, I think, clear from the provision that on the obligor failing on the due date or on demand, as the case may be, to meet the notes, cheques, &c., issued by him, the obligees were entitled to sue for and recover not only the amount due on the notes and cheques which were dishonoured, but the whole amount then due to the obligees. The failure to meet a note or

cheque on the due date created a right of action in both to sue for the whole amount due to both of them.

The property mortgaged was hypothecated to secure repayment of the sums lent by both the obligees. If they are not entitled to sue in one action, effect could not be given to the hypothecation of the property. The obligees suing on the bond would have to sell the property in execution of his decree subject to the mortgage in favour of the other obligee. The difficulty created by the plaintiffs not being able to sue in one action cannot be got over by making one of the obligees a defendant. The other obligee not being a puisne incumbrancer, he cannot be made a party to the action, so as to affect his rights as mortgagee. He can only be made a party on the ground that he refused to be joined as plaintiff, which is not the case.

The difficulties which the order of the District Judge creates support my opinion that the right to relief exists in the obligees jointly in respect of the same cause of action. In my opinion the plaintiffs are entitled to sue for the aggregate sum of money lent by them, or either of them, and to recover such sum as may be found to be due. We indicated in the course of the argument that the prayer of the plaint required amendment accordingly. The plaintiffs must settle between themselves to what proportion of the aggregate sum each is entitled.

I would accordingly set aside the order of the District Judge directing the plaintiffs to elect which of them will continue the action. The plaintiffs will be entitled to costs in both Courts.

The first and second defendants' objection to the order is that the District Judge has not decided issue No. 8 or has decided it wrongly.

Issue No. 8 raises the question whether the promissory notes referred to in paragraph 6 of the plaint or any notes of which they are renewals are not enforceable " by reason of the failure " to give details required by section 10 of Ordinance No. 2 of 1918.

The learned District Judge said in his judgment that issue No. 8 involved both law and fact and it was not necessary to discuss it at that stage because Mr. Perera (plaintiffs' counsel) was going to take no risks and was going to lead evidence as to the actual payment of money.

I entirely agree with the statement that issue No. 8 involved both law and fact and that it cannot therefore be decided as a preliminary issue of law. We ascertained at the argument that what the first and second defendants really objected to was the passage in the judgment that Mr. Perera was going to lead evidence of payment of money. It was submitted that this passage might be construed to be a finding by the District Judge that such evidence was admissible.

I am unable to agree with this submission. It appears to me that it was merely a reference by the District Judge to the procedure which the plaintiffs were going to adopt and was in no way a determination of the question whether the plaintiffs could follow that procedure. However that may be, I hold that it was not open to the District Judge to determine the procedure at that stage and that it will be open to the defendants to take such objections as they may be advised to raise to the evidence the plaintiffs proposed to lead.

I would accordingly disallow the objection raised by the first and second defendants but without costs as it has not involved the appellants in any further costs.

The respondents contended they were not liable in costs even if the appellants were successful as the plea of misjoinder was justified by the terms of the prayer of the plaint.

I am of opinion that the first and second respondents were not entitled by the prayer of the plaint to press the objection regarding which they have failed in appeal. If the prayer of the plaint was not in accordance with the terms of the bond sued on they could have asked for an amendment of the prayer which might have been acceded to and not put the appellants to the expense and delay resulting from an objection which was in this action a very serious objection. I am therefore of opinion that the appellants are entitled to their costs here and in the District Court from the first and second defendants.

GARVIN S.P.J.—I agree.

Appeal allowed.