1956 *Present :* **Basnayake, C.J., and Weerasooriya, J.**

EDWIN, Appellant, *and* DIAS *et al.*, Respondents

S. C. 416—D. C. Kandy, 1,720/MB

Mortgage—Hypothecary action—Withdrawal of it by plaintiff—Right of mortgagee to sue again—Civil Procedure Code, ss. 406, 408—Mortgage Ordinance (Cap. 74), s. 16—Mortgage Act, No. 6 of 1949, ss. 7, 26.

The provisions of section 7 (1) of the Mortgage Act, No. 6 of 1949, must be read subject to the provisions of section 406 and also section 408 of the Civil Procedure Code. Accordingly, where a hypothecary action instituted against the mortgagor is dismissed with the consent of the mortgagee and without any permission applied for by him or granted by Court to bring a fresh action, the mortgagee is precluded from bringing a second hypothecary action against either the mortgagor or the person to whom the mortgagor has transferred the mortgaged property.

APPEAL from a judgment of the District Court, Kandy.

H. W. Jayewardene, Q.C., with *P. Ranasinghe*, for the plaintiff-appellant.

G. P. J. Kurukulasuriya, for the 1st defendant-respondent.

T. B. Dissanayake, for the 3rd defendant-respondent.

Cur. adv. vult.

April 24, 1956. WEERASOORIYA, J.—

This is a hypothecary action filed by the plaintiff-appellant for the recovery of the principal sum and interest due on a mortgage bond No. 3071, dated the 23rd December, 1947, granted in his favour by one John Michael Dias who died on the 25th September, 1948, leaving as his heirs his widow the 1st defendant-respondent and a daughter.

By deed No. 1871, dated the 23rd October, 1948, the property hypothecated on bond No. 3071 was sold and transferred by the 1st defendant-respondent to the 2nd defendant, who retained in his hands a certain part of the purchase price representing the principal and interest then due on the bond, and soon afterwards he made unsuccessful attempts to induce the appellant to receive payment on the bond and grant a discharge of it. The appellant, however, had certain other claims against the deceased mortgagor's estate, of which the only asset of any value seems to have been the mortgaged property, and he took up the position that the sale to the 2nd defendant was in fraud of the creditors of the estate and refused to recognise it or to accept payment. The 2nd defendant thereupon filed D. C. Kandy Case No. 3,312 against the appellant on the 30th November, 1948, bringing into Court a sum of Rs. 666 as the principal and interest due on the bond and asking for an order on the appellant to accept the same and grant a discharge of the bond. Before the appellant had been served with summons in that case he filed on the 11th January, 1949, D. C. Kandy Case No. 1,364 (M.B.) against the 1st defendant-respondent (personally and also as the appointed legal representative of the estate of J. M. Dias) for the recovery of the principal and interest due on bond No. 3071 and for the usual hypothecary decree that in default of payment the property hypothecated be sold. It is not clear whether at the date of the filing of that action the 2nd defendant was a necessary party to it in terms of Section 6 (2) of the Mortgage Ordinance (Cap. 74) which was the law governing the action. In any event he was not made a party to it. That action seems, however, to have been brought on the basis that the property hypothecated still formed part of the estate of the deceased mortgagor notwithstanding the transfer by deed No. 1871, to which transaction no reference was made in the plaint. The 1st defendant-respondent filed answer in due course in which one of the defences pleaded was the sale by her to the 2nd defendant of the land hypothecated on the bond and that the latter had already sued the appellant for a cancellation of the bond having brought into Court the amount due thereon. This case was fixed for trial on the 28th September, 1949, on which date the following order was made by Court: " Of consent action is dismissed. No costs ". Decree in the case was accordingly entered in terms of this order. This dismissal of the appellant's action was without any permission applied for by him or granted by Court to bring a fresh action in respect of the same subject matter as provided in Section 406 (1) of the Civil Procedure Code. In a subsequent affidavit (D3) filed by the appellant in support of an application made by him to the Supreme Court to have the decree in that case set aside, he explained that he did not obtain such permission as the arrangement was that he should withdraw the sum deposited in Court in Case No. 3,312 filed against him by the 2nd defendant and grant a cancellation of the mortgage bond. But the 2nd defendant, who was no party to that arrangement, proceeded thereafter to frustrate it by obtaining an order of Court in Case No. 3,312 granting him permission to withdraw his action with liberty to file a fresh action if so advised, and also permission to withdraw the sum of Rs. 666 being the amount brought into Court. This

order was made *ex parte* on the 15th December, 1949, summons even on that date not having been served on the appellant. There can be no doubt that had the appellant displayed even ordinary diligence he had ample opportunity after the date of the order entered of consent in Case No. 1,364 (M.B.) of having himself represented in Case No. 3,312 prior to the granting of the 2nd defendant's application to withdraw that action as well as the money brought into Court. This step he did not, however, take till the 20th December, 1949, when a proctor filed his proxy and stated that his client consented to accept the money and cancel the bond and moved for an order of payment of that money (which had not yet been withdrawn in terms of the permission granted on the 15th December, 1949) in his favour. This application appears to have been objected to by the 2nd defendant, and after inquiry into the matter the Court made order dismissing it on the ground that on the date on which the Court had granted the 2nd defendant's application to withdraw his action the appellant was " out of Court ". The attitude of the 2nd defendant in objecting to this application, though in strange contrast to his previous insistence that the appellant should accept the money and grant a discharge of the mortgage bond, seems to have been justified if one regards the order made by the Court on this occasion as a correct one. The question of the correctness of that order, however, or of the earlier *ex parte* order dated the 15th December, 1949, does not arise in this appeal. But with regard to the order made on the 15th December, 1949, it seems to me that generally speaking a Court should not grant a plaintiff permission in terms of S. 406 (1) of the Civil Procedure Code without notice to all the persons whose names appear on the record as parties to the action even though summons may not yet have been served on some or all of them. If this precaution had been taken by the Court in this particular instance the appellant would, without doubt, not have found himself in the predicament which has given rise to the action now under appeal.

After the dismissal of the appellant's application in Case No. 3,312 the amount in deposit was paid out to the 2nd defendant less a sum due to his proctor as taxed costs.

Having been thus foiled in his attempt to realise the moneys due to him on the mortgage bond, the appellant resorted to various other steps to obtain relief. On the 7th February, 1950, he filed a motion through his proctor in Case No. 1,364 (M.B.) praying that the order dated the 28th September, 1949, entered of consent dismissing that action be vacated, but soon after he seems to have apprehended the futility of that application and he consented to it being dismissed. He then made an application by way of *restitutio in integrum* to this Court and it was in that connection that he filed the affidavit D3 to which I have already referred. This application met with the same fate as his previous efforts and was refused on the 20th November, 1950.

A little over a year later the present action was filed. To this action the 2nd defendant was made a party as a puisne encumbrancer by reason of the transfer of the mortgaged property to him by deed No. 1871.

and so was the 3rd defendant-respondent (a son of the 2nd defendant) on the ground that the title to the land under mortgage had passed to him by virtue of a deed of gift No. 3422 dated the 20th August, 1949, executed in his favour by the 2nd defendant subject, however, to the mortgage. The 1st defendant has been joined in the action only as the duly appointed legal representative of the estate of the deceased mortgagor, and not in her personal capacity also (unlike in the previous mortgage bond action No. 1364). In the answer of the 1st defendant-respondent and the joint answer of the 2nd defendant and the 3rd defendant-respondent the substantial defence put forward was that the decree entered in the previous mortgage bond action operated as *res judicata* between the plaintiff and the defendants and that the present action is, therefore, not maintainable. After filing answer but before the trial the 2nd defendant died and the case went to trial as against the other two defendants on certain issues including issues based on the plea of *res judicata* taken in the answers. The learned District Judge, while holding that the sums claimed were due on the bond, dismissed the appellant's action with costs, one of the grounds for his order being that the bond was not enforceable in the view taken by him that section 406 of the Civil Procedure Code precluded the appellant from maintaining this action. This appeal has been filed by the appellant against the dismissal of his action.

At the date of the institution of the present action the Mortgage Ordinance (Cap. 74) had been repealed by the Mortgage Act, No. 6 of 1949. In deciding the questions arising in this appeal certain provisions of these two enactments have to be considered, particularly section 16 of the repealed Ordinance and the corresponding section 7 of the Mortgage Act.

It was held in *Slema Lebbe v. Banda*[1] that in the circumstances which existed at the time of the filing of Case No. 1,364 (M.B.) the only remedy available to a mortgagee against the mortgagor is the personal action for the recovery of the money and not the hypothecary remedy. That decision, which was prior to the Mortgage Ordinance (Cap. 74) would still appear to be good law and in my opinion neither section 16 of the Mortgage Ordinance nor section 7 of the Mortgage Act would enable a mortgagee to bring a hypothecary action against a mortgagor who has parted with his interests in the mortgaged property. It was, of course, open to the appellant to have filed one action against the 1st defendant-respondent and the 2nd defendant praying for a decree against the former for the payment of the money and for a decree against the latter declaring the mortgaged property bound and executable in default of payment of the money. But this he did not do. The appellant in his evidence at the trial said that when he filed the earlier action he was aware of the transfer of the mortgaged property to the 2nd defendant on deed No. 1871, but he refrained from making him a party to that action. Notwithstanding the omission to do so, he could, under either of the two sections referred to, have brought a separate subsequent

[1] *(1898) 1 A. C. R. 72.*

action against the 2nd defendant in respect of the hypothecary remedy had he succeeded in the earlier action in obtaining a decree against the 1st defendant-respondent as the legal representative of the deceased mortgagor's estate for the payment of the money due on the mortgage. The question is whether having consented to the dismissal of the earlier action he can now maintain the present action.

The learned trial Judge, in dismissing the appellant's present action, was principally influenced by the fact that the appellant's earlier action had been dismissed without any permission obtained by him under section 406 (1) of the Civil Procedure Code to bring a fresh action " for the subject matter " of that action and he held that, therefore, section 406 (2) was a bar to the present action. In considering this aspect of the case, however, the trial Judge seems to have travelled outside the issues of *res judicata* since the bar contained in section 406 (2) is, strictly speaking, not based on the principle of *res judicata* though somewhat analogous to it. No issue was raised at the trial whether section 406 (2) operated as a bar to the present action, but despite this omission it cannot be said that the learned Judge should not have considered that question, being a pure question of law, and especially as it was the subject of argument in the addresses of counsel after the leading of evidence had been concluded. At the hearing of the appeal too the argumont revolved chiefly on this point, and the issues of *res judicata* were not touched upon.

It will be seen that although section 16 (1) of the repealed ordinance and section 7 (1) of the Mortgage Act expressly refer to section 34 of the Civil Procedure Code, they are silent in regard to the operation of any other bar to the maintainability of an action for the bringing of which provision is made under those sections. It was held in the case of *Savarimuttu v. Annamah*[1] that section 16 (1) does not entitle a plaintiff to succeed in an action which has already ceased to be maintainable under the Prescription Ordinance (Cap. 55). In *Kumarappa Chettiar et al. v. Gunawathie et al.*[2] the question arose only incidentally whether where a previous hypothecary action had been dismissed it was open to the mortgagee, under the provisions of section 16 of the Mortgage Ordinance, to bring a second hypothecary action in respect of the same matter, and Nagalingam J. refrained from expressing an opinion that he could. In the case of *Muheyadin v. Thambiappah*[3] the same Judge took the view that section 16 (1) of that ordinance allows a mortgagee to bring a second action in respect of the same remedy and cited as authority for this view the earlier case of *Savarimuttu v. Annamah* (*supra*), but it is to be observed that in both those cases the previous hypothecary actions had not resulted in their dismissal and, instead, a hypothecary decree had been entered for the sale of the mortgaged land.

While these authorities deal with the construction of section 16 (1) of the repealed Mortgage Ordinance, the somewhat different language adopted in the corresponding section 7 (1) of the Mortgage Act does not

[1] *(1937) 39 N. L. R. 80.* [2] *(1946) 48 N. L. R. 34.*
[3] *(1948) 51 N. L. R. 392.*

seem to justify the view that the same *ratio decidendi* would not be applicable where the question that arises is as regards the rights of a mortgagee under the latter provision. Having considered these authorities I have come to the conclusion that the provisions of section 7 (1) of the Mortgage Act must be read subject to the provisions of section 406 and also section 408 of the Civil Procedure Code. In my opinion, whether one regards the dismissal of the previous action brought by the appellant as a withdrawal of it under section 406 or an adjustment under section 408, the effect of the decree passed in that action is to preclude the appellant from bringing the same action again, notwithstanding the provisions of section 7 (1) of the Mortgage Act.

Under section 406 (2) of the Civil Procedure Code a plaintiff who withdraws from an action is denied the right to bring a fresh action "for the same matter" unless, prior to the withdrawal, he obtains the permission of Court to do so. Section 408 provides that an adjustment of an action by any lawful agreement or compromise shall be notified to the Court which is then required to enter a decree in accordance therewith and the decree shall be final so far as it relates to the subject matter of the action as dealt with by the agreement or compromise.

In the previous mortgage action brought by the appellant he joined a money claim on the bond against the 1st defendant, in her personal capacity and also as the legal representative of the estate of the deceased mortgagor, to the claim that in default of payment the mortgaged property be held bound and executable. It is clear, therefore, that his present action in so far, at least, as it is sought to obtain a decree against the 1st defendant in her representative capacity (and therefore binding on the deceased mortgagor's estate) for the payment of the money due on the bond is an action "for the same matter" as the previous one and is barred by section 406 (2) of the Civil Procedure Code. It is also barred by section 408.

Even if the appellant cannot succeed in his present action as against the deceased mortgagor's estate for the payment of the money due on the bond, is he entitled to maintain it for the limited purpose of obtaining a decree binding on the 3rd defendant-respondent declaring the mortgaged land bound and executable ? In my opinion the answer to this must also be in the negative. "Since a mortgage is only accessory to the original obligation or debt, it follows that when that is discharged the mortgage is *ipso jure* extinguished ".—Wille on Mortgage and Pledge in South Africa[1]. The same result must necessarily follow, I think, where in consequence of a decree of a Court the right to sue for the debt is lost. All that the appellant could have enforced against the 3rd defendant-respondent was the sale of the mortgaged property so long as the obligation to pay the amount due on the bond remained undischarged and actionable. The appellant has no claim against the 3rd defendant-respondent for the payment of the mortgage debt, which remains the liability of the deceased mortgagor's estate ; nor, once that liability has been discharged or extinguished by reason of the

[1] *(1920 ed.) p. 265.*

operation of a previous decree of a Court, has he any independent remedy against the 3rd defendant-respondent to have the mortgaged land declared bound and executable or to have it sold for the debt.

Learned counsel for the appellant in seeking to justify the present action against the 1st defendant-respondent also invoked the provisions of sections 7 (1) and 26 of the Mortgage Act, No. 6 of 1949. Section 7 (1) provides, *inter alia*, that in every hypothecary action the mortgagor shall be sued as a defendant, and section 26 contains provision for a legal representative being appointed to represent the estate of a deceased mortgagor. The provisions of section 7 (1) would be satisfied if the mortgagor is sued as a defendant but no relief is claimed against him and, in my opinion, they do not enable a second claim for the payment of the money due on a mortgage being successfully maintained against the mortgagor or against the estate of a deceased mortgagor where a previous action in respect of the same claim has been dismissed in the circumstances in which Case No. 1,364 (M.B.) came to be dismissed.

In view of the conclusions which I have reached it is not necessary to consider to what extent, if any, the decree in Case No. 1,364 (M.B.) operates as *res judicata* in respect of the present action.

The appeal is dismissed with costs.

BASNAYAKE, C.J.—I agree.

Appeal dismissed.