

1941

Present : Keuneman J.

## AMARASEKERA v. ARUNASALEM CHETTY.

162—C. R. Negombo, 44,390.

*Mortgage bond—Payment of interest in advance—Right of mortgagor to redeem bond—Recovery of interest overpaid—Condictio sine causa.*

Payment of interest in advance on a mortgage bond does not fetter the mortgagor's right of redemption during the period for which the payment in advance is made.

Where a mortgagor who has paid interest in advance exercises his right of redemption during the period for which the payment in advance is made and, while paying the capital in full, makes it clear that he does not waive his right to claim the interest overpaid.

*Held*, that he is entitled by means of the *condictio sine causa* to recover such interest.

THIS was an action instituted by the plaintiff to recover a sum of Rs. 100 alleged to be overpaid in respect of a mortgage bond dated October 5, 1938. The facts appear from the judgment. Plaintiff's action was dismissed.

C. E. S. Perera (with him Gilbert Perera), for plaintiff, appellant.—A mortgagor can always redeem unless his power to redeem has expressly or impliedly been taken away. In the present instance that power has not been expressly or impliedly taken away. Notwithstanding his acceptance of interest for a period in advance a mortgagee can claim payment within that period (*Fernando v. Fernando*<sup>1</sup>), and so it may be argued that notwithstanding his paying interest in advance a mortgagor can redeem at any time within the period for which interest has been paid. The payment of interest in advance is no bar to a debtor's right to redeem. See *Wiley v. Mudinch*<sup>2</sup>.

A mortgagor has the right to claim a return of interest paid by him upon demand provided that at the time he made the payment he did so subject to a clear protest that the sum was not due. See *Snyman v. Pretoria Hypotheek Maatschapij*<sup>3</sup>.

L. A. Rajapakse, for defendant, respondent.—Each case must be decided according to the particular terms of the bond in question. Under this bond the creditor can claim payment of the principal on demand but the debtor is not given the right to repay the principal at any time he likes. The interest for the current half year becomes due at the commencement of the half year and the creditor can therefore at the very commencement of the half year ask for the full half yearly interest if the debtor fails to pay. See *Sockalingam Chettiar v. Munasinghe*<sup>4</sup>.

The South African case is distinguishable because of the presence there of specific provision allowing the debtor to pay up the principal after giving 3 months' notice in advance. In short, everything turns on the terms of the particular bond that comes before the Court.

*Cur. adv. vult.*

<sup>1</sup> 33 N. L. R. 313.  
<sup>2</sup> (1902) 19 S. C. 447.

<sup>3</sup> (1916) C. P. D. 263, at p. 266.  
<sup>4</sup> 41 N. L. R. 42 at pp. 44 & 47.

May 29, 1941. KEUNEMAN J.—

In this case plaintiff sued defendants for the recovery of Rs. 100 alleged to be interest overpaid in respect of mortgage bond P 1 dated October 5, 1938. Plaintiff's action was dismissed with costs and he appeals.

The circumstances are as follows:—P 1 was a mortgage bond executed by plaintiff in favour of the defendants, in the sum of Rs. 2,000. Under the bond plaintiff undertook "to repay the said sum of Rs. 2,000 to the said creditors . . . . on demand, and until such repayment to pay interest on the said sum of Rs. 2,000 at and after the rate of 15 per centum per annum to be computed from the date hereof and payable once in every six months in advance . . . . Provided, however, that if the payments of interest be regularly made in manner aforesaid the said creditors . . . . shall be bound and obliged to accept interest . . . . at the rate of only 12 per centum per annum . . . .".

On October 4, 1939, the plaintiff paid Rs. 120 being the six months, interest in advance. On November 4, 1939, he tendered to the defendants Rs. 1,900 as being the capital sum of Rs. 2,000 less Rs. 100 being the excess payment of interest paid for the period beyond November 5, 1939. The defendants refused to accept this sum and discharge the bond. Thereupon the plaintiff paid defendants the sum of Rs. 2,000 subject to a clear and unequivocal protest that the sum of Rs. 100 was not due to the defendants.

The bond clearly gives the right to the creditors to repayment on demand. It does not specifically deal with the right of redemption by the debtor. But to use the language of Villers C.J. in *Darling v. Registrar of Deeds*<sup>1</sup>, "It is of the essence of every mortgage or pledge that the mortgagor or pledger has the right of redemption, and this right can only be taken away by express words or by way of necessary inference." Can we say in this case that there has been any agreement whereby the right of redemption has been fettered or postponed or fixed for any particular date? There is clearly no express agreement to that effect. But it is suggested that there is an implied agreement in view of the fact that the plaintiff undertook to pay interest in advance. It is said that this implies that the plaintiff cannot exercise his right of redemption during the period for which the payment in advance is made.

In my opinion this cannot be implied. The agreement to pay interest in advance is quite distinct from the right of redemption inherent in the plaintiff. By paying in advance the plaintiff obtains a 3 per cent. reduction of interest. There is nothing in this agreement which affects the plaintiff's right of redemption.

I think the present case falls within the principle enunciated by Wille on *Mortgage and Pledge in South Africa* at page 314:

"If a mortgagor, who has paid interest in advance on his mortgage debt, voluntarily repays the capital sum before it is due, without stipulating that any interest shall be refunded to him, he cannot claim back interest accruing between the date of payment and the date when the debt became payable (*Wiley, N. O. v. Mudinch & Co.*). But

<sup>1</sup> S. A. Rep. (1912) A.D. at p. 28.

<sup>2</sup> (1902) 19 S. C. 447.

if the mortgagor at the time of paying the capital in full, makes it clear that he does not waive his right to claim a refund of interest previously paid in advance by him and that he reserves his right to do so later on, then he is entitled by means of the *condictio sine causa* to recover the interest paid in advance in respect of the period unexpired at the date of repayment (*Snyman v. Pretoria Hypotheek Maatschapij.* <sup>1</sup>).

The second case mentioned is unfortunately not available, but in Wiley's case it was argued by Counsel that the receipt of six months' interest in advance was an implied undertaking by the mortgagee not to call up the bond within six months, and that the payment of the said interest was an implied undertaking on the part of the mortgagor not to pay off the principal due on the bond within those six months. This matter was not actually decided in that case. But it is interesting to note that in *Fernando v. Fernando* <sup>2</sup>, Macdonell C.J. held that acceptance of interest by the mortgagee in advance for a period of six months did not operate as a waiver of the right to demand payment during that period, where the bond provided for payment on demand of the principal sum, and also for the payment of interest in advance every six months.

In this case I think the Commissioner was in error in dismissing the plaintiff's action. I allow the appeal and set aside the judgment appealed against, and enter judgment for the plaintiff as prayed for with costs in both Courts.

*Appeal allowed.*

---