[NETTLETON, C.J. AND DICKINSON, P.J.]

NETTLETON, C.J. & DICKINSON, P.J. 1926

June 4

CHRISTODOULOS CONSTANTI

v.

THE AGRICULTURAL BANK OF CYPRUS BY ITS MANAGER, PETER AMIRAYAN.

MORTGAGE—FORECLOSURE AND SALE THROUGH THE LAND REGISTRY OFFICE—MORTGAGED PROPERTY LAW, 1890, SEC. 1 (*b*) AND SEC. 6—MUKHTAR'S CERTIFICATE OF SERVICE—BANK ACCOUNT—LIABILITY TO EXAMINE—HOLDING OUT—AGENCY.

The facts are fully set out in the judgments of the District Court and the Supreme Court.

The District Court gave judgment for defendants as follows:—

In this case the plaintiff claims the sum of £80 by way of damages arising out of defendant's alleged negligence in selling certain properties which had been mortgaged to the defendant to secure a certain loan. The facts as admitted or proved are as follows:—

The plaintiff in January, 1908, borrowed the sum of £12 from the defendants which sum with interest was to be paid off by twelve equal yearly instalments. This loan was secured by a mortgage on plaintiff's property which the plaintiff himself then valued at £54 10*s*. (*vide* exhibit G.A. 1).

The plaintiff paid off his instalments at more or less irregular intervals from 1909 to 1922, and it is perhaps instructive to note that none of these instalments were paid to the Imperial Ottoman Bank but were paid to individual agents of the defendant Bank, while those of 1921 and 1922 were paid to the manager of the said Bank himself.

The final instalment became due on the 30th January, 1923, and on the 6th May, 1923, a notice under section 6 of Law 13 of 1890, was sent to the plaintiff at his usual or last known place of abode in Cyprus. It has not been suggested that the plaintiff gave or that the defendant had any notice as to any change of address. Learned counsel for the plaintiff has argued that as the Court made an order for security of costs against the plaintiff under Order X., Rule 1 (Rules of Court, 1886), it must follow that the plaintiff is a non-inhabitant of Cyprus under section 6 of Law 13 of 1890, but I hardly think he was serious in this contention as a comparison of the rule and the section quickly shows. We therefore find that the plaintiff in May, 1923, was not a non-inhabitant of Cyprus under the section nor was he a person who could not be found in Cyprus although he may have been absent from the Colony at the time. We say he was not a person who could not be found in

Cyprus because he had a house in Kathika which house was kept open and occupied during his absence, and Kathika was the only address he gave the Bank. The section in question reads as follows:—(*Read*)

We have been asked to find that the Mukhtar's certificate, dated the 6th May, 1923, was notice to the defendant that his notice of sale under the Law of 1890, had not been served, but the Court is unable to agree with that proposition. On the contrary it appears to us that this certificate was sufficient to justify the defendant in thinking the plaintiff had full knowledge of his intention to sell, the notice having been served on " his representatives " and presumably accepted by them as such representatives.

On the 12th July, 1923, we find as a fact that a letter of which Exhibit C.A.2 is a copy, was posted to the plaintiff's address at Kathika, and in view of the fact that within a month of such posting the plaintiff hurries over to Cyprus (as he himself says to pay off his debts and save his property), and also to the fact that he knew the exact amount which he had to pay although interest was made up to a date of which, as far as we can see, he was totally unaware, we have no hesitation in finding that if he did not receive the actual letter he had the fullest knowledge of its contents. A copy of that letter has been put in and reads as follows:—(G.A. 2).

On the 15th September, 1923, immediately prior to his departure from the Colony the plaintiff pays into the Imperial Ottoman Bank to the credit of the defendant the sum of £1 12*s.* 4*cp.* and receives the receipt Exhibit C.C. 1. Either through ignorance or sheer inadvertence the plaintiff failed to give notice of such payment to the mortgagee. Some attempt has been made to show that it was the usual custom of the defendant Bank to receive payment of moneys owing to them through the Imperial Ottoman Bank that evidence was somewhat vague and has, to our minds, been completely swept away by Mr. Amirayan's evidence on the point and the production by him of the special form of notice sent out by the Bank in such cases. *Vide* G.A. 3.

The law on the question of discharge of a mortgage by payment is fully discussed and clearly laid down in *Wilkinson v. Candlish* 82 R.R., p. 588, and *Kent v. Thomas* 108 R.R., p. 677, while the note to these cases in Halsbury, Vol. XXI., p. 307, would make it appear that an implied authority to an age.. t to receive the principal must be very clear indeed. In the present case there is no evidence before the Court that the Imperial Ottoman Bank were either expressly or impliedly the agents of the defendant to receive the final or any instalment of the

mortgage debt and interest. While sympathising with the plaintiff, in so far as he has lost his property it must be borne in mind that such loss has been occasioned solely by his own remissness in not giving his mortgagee notice of payment and also that the mortgagee as soon as he knew of what had happened did all in his power to help the mortgagor, out of the hole in which he had placed himself. There will be judgment for the defendant with costs.

From that judgment Plaintiff appeals.

For Appellant *Pavlides.*

For Respondent *N. Paschalis.*

Judgment: A mortgagee in serving a notice of foreclosure and sale under the Sale of Mortgaged Property Law, 1890, on an absentee mortgagor through the Mukhtar of the mortgagor's village, must see that the affidavit of service clearly discloses the fact that the requirements of the law concerning the service of notice under sections (1) *b* and 6 thereof have been strictly complied with.

If the mortgagee proceeds with the sale of the mortgaged property in the absence of proof of such service, he will be liable for consequential damages.

In the present case the notice was sent to the Mukhtar for service on the mortgagor who, at that time, was absent from Cyprus. The Mukhtar's certificate states that he served the notice by delivering it to the parents-in-law of the mortgagor, but does not show that he did so " by leaving it at his usual or last known place of abode in " Cyprus " as provided by section 6 of Law 13 of 1890.

The mortgagor denied receiving the notice. The Court, however, was satisfied that he not only knew the last instalment of his mortgage was due, but also the amount of interest due and payable thereon; and he paid the balance of the mortgage debt and interest to the Imperial Ottoman Bank, Paphos Branch, to be placed to the credit of the mortgagee (the Agricultural Bank) at Famagusta.

The Agricultural Bank entered into the contract of loan with the appellant, the plaintiff (mortgagor), in Paphos, in 1908, but for reasons not indicated at the hearing, closed their office in Paphos in 1915. After the closing of the office, collections of instalments due on loans in the Paphos District were made from time to time by collectors from the Famagusta office, who visited Paphos for that purpose at irregular intervals.

The appellant (mortgagor) paid off all but one of the instalments of his debt (each of which consisted of part of the principal debt and interest) to these peregrinating collectors. Then, in 1922, he left for Egypt as he was in debt, and there was able to save some £80, and in September, 1923, he visited Paphos to pay off his debts and to return to Egypt.

From enquiries he made he found that other persons were paying their instalments due to the Agricultural Bank through the Imperial Ottoman Bank, Paphos Branch. Being in a hurry to return to Egypt, he paid the remaining instalment to the Imperial Ottoman Bank, who accepted it, and placed it, at his request, to the credit of the Agricultural Bank at Famagusta.

The Agricultural Bank never examined their account, and apparently never enquired so as to ascertain whether the final instalment had been paid in by the appellant, and proceeded, two months later, to sell the property he had mortgaged to them at a knock-out price.

The appellant (plaintiff) claimed £80 compensation or alternatively as damages for negligence, and the District Court held appellant (plaintiff) failed because he had not personally informed the Agricultural Bank of his payment.

HELD: Reversing the decision of the District Court that in the absence of proof of service of the notice in accordance with the provisions of section 6, the sale was illegal and the appellant (plaintiff) was entitled to recover any loss accruing as a result.

The Court also finds that the respondents, by their conduct, held out the Imperial Ottoman Bank as their agents to receive payments from their mortgage debtors, and it is to be observed that the case was dealt with as a foreign action.

The mortgagor's (appellant's) property was sold for about £2, when the official assessed value was £35 and other valuations were considerably higher.

The Court allowed the appeal and fixed the amount of damages at £40, and entered judgment for the appellant (plaintiff) for that amount and costs here and in the District Court.

SEMBLE: Before proceeding to sell mortgaged property under Law 13 of 1890, it is a duty on the mortgagee to make all reasonable enquiries to see that the mortgage debt has not been paid off.