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EMPRESS
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RAMANUJAM.

rules, it does not authorize accused to transport opium, unless such authorization can be implied from the 'license to possess. Section 3 of the Opium Act I of 1878 absolutely prohibits the transport of opium, which is defined to mean the moving it from one place to another, except in the manner prescribed by the Act, and the only provisions under the Act allowing transport are contained in Rules VIII to XIII, which only apply to licensed importers, farmers, and licensed vendors, under none of which classes does accused come.

By sending his servant to bring opium from Sholavaram to Madras accused was clearly transporting opium within the meaning of the Act. Except under the provisions of Rules VIII to XIII such transport is illegal, and the license he holds does not authorize it expressly or impliedly.

Whether if accused had carried the opium himself the license to possess the opium would necessarily imply a right to transport it with him and so over-ride the prohibition of transport is a question which does not arise in this case and which we need not therefore determine.

The conviction was right and the petition is dismissed.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Shephard.

SINGJEE (PLAINTIFF), APPELLANT,

v.

TIRUVENGADAM AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Transfer of Property Act (Act IV of 1882), ss. 65, 68--Mortgagor and mortgagee--Construction of mortgage--Sale of premises at suit of a prior mortgagee--Right of a second mortgagee to sue the mortgagor personally.

The defendants, having already mortgaged certain land to another, executed a hypothecation bond comprising the same land in favor of the plaintiff to secure a debt due by them to the plaintiff and covenanted therein to pay to him daily the proceeds of certain sales of firewood, of which the plaintiff was to credit part towards the secured debt. The defendants having failed to pay the amount due on the first mortgage, the first mortgagee obtained a decree and brought the land to sale. The plaintiff now brought a suit in the Small Cause Court to recover the amount due on footing of his hypothecation bond :

* Letters Patent Appeal No. 13 of 1888.

Held, that the hypothecation bond contained no personal covenant by the obligors, but that on the construction of ss. 65 and 68 of the Transfer of Property Act the obligors had committed default so as to entitle the obligee to sue them personally under the former section.

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APPEAL under Letters Patent of the High Court, section 15, against the order of Wilkinson, J., made on civil revision petition No. 227 of 1888, setting aside the decree of the Chief Judge of the Court of Small Causes at Madras in suit No. 21478 of 1886.

Suit by the obligee of a hypothecation bond, dated 16th March 1888, against the obligors to recover principal and interest of a debt which was secured thereby. The operative part of the hypothecation bond was as follows:—

“The amount in cash that we have this day received on account of our exigency, having hypothecated the properties mentioned below, is Rs. 1,200; in words, Rs. one thousand and two hundred. Since we have received these Rs. 1,200 we will pay away to you from this date the rupees arising from sale every day in the firewood depôt mentioned below; of this, if any money is required for railway fare expense, &c., and for getting fuel, you should give (us) out of the money that we give each day, and out of the money that we give you arising from the sale each day, you will deduct 2 per cent. for commission and Rs. 100 per mensem towards payment of the principal amount, and pay us the remaining amount. We will settle account in this manner every month. If we do not give the sale-proceeds according to the terms mentioned above, and if we fail to give according to the kist (fixed time), you or those who receive your order should collect, on the properties secured in Madras itself, commission at Rs. 20 per mensem and the balance of total arrears of the principal (money).”

The land comprised in this instrument was subject to a prior instrument of mortgage executed in favor of K. Guruvappa Chetti and dated 8th December 1882: and it appeared that before the present suit it had been sold at the suit of the first mortgagee. The Chief Judge accordingly held under section 68 of the Transfer of Property Act that the plaintiff was entitled to recover the amount sued for from the defendants personally and passed a decree as prayed.

The defendants presented civil revision petition No. 227 of

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1888 praying the High Court to revise this decree. This petition came on for hearing before *Wilkinson, J.*, who delivered judgment as follows:—

“It is contended that the Small Cause Court had no jurisdiction, as there was no personal obligation to pay the mortgage amount. The bond sued on certainly gives no personal remedy against the defendants, but provides that in case of default of payment in a certain way, the mortgagee shall collect the money on the properties secured. But the learned Judge of the Small Cause Court held that, under section 68 of the Transfer of Property Act, plaintiff was entitled to sue, because the property hypothecated had been sold at the suit of the first mortgagee. I do not comprehend how section 68 applies to the case. The mortgagee has not been deprived of his security by or in consequence of the wrongful act or default of the mortgagor. It is, it is true, argued here that as the mortgagor made default in discharging the first mortgage, clause (b) applies. I do not think the word default is used there in the sense contended for, but looking at section 65 (c), I should hold that a mortgagor made default where he failed to pay public charges accruing due in respect of the property. We do not know what the terms of the first mortgage were, nor whether there was any so-called default on the part of the mortgagor as is alleged. The decree of the Small Cause Court was therefore *ultra vires* and must be set aside with costs.”

The plaintiff preferred this appeal against the order of *Wilkinson, J.*

Mr. Gants for appellant.

Rama Rau for respondents.

JUDGMENT.—Two questions are raised in this petition:—first, it is said that there is in the hypothecation bond sued on a covenant to pay, on which the plaintiff is entitled to sue the defendants personally. By the bond it is stipulated that the debtor should pay to the obligee every day the proceeds of sales of firewood and that the latter should retain in his hands, out of the amount so paid, 2 per cent. commission and Rs. 100 towards the debt, repaying the balance to the obligor. In default of such payment there is a stipulation that the obligee may collect the money due from the hypothecated property. In our opinion there is clearly no covenant to pay out of the general assets of the obligor, and

therefore the plaintiff cannot recover from the defendants on that footing. On this point the learned Judge is right.

Then it is said that there has been default on the mortgagor's part within the meaning of clause (b), section 68 of the Transfer of Property Act. The alleged default is the non-payment of the amount due on the first mortgage which led to the sale of the mortgaged property. And in this connection our attention is drawn to clause (c), section 65 :—“and where the mortgage is a “second or subsequent incumbrance on the property, that the “mortgagor will pay the interest from time to time accruing “due on each prior incumbrance as and when it becomes due, “and will, at the proper time, discharge the principal money “due on such prior incumbrance.” In the absence of an express contract to the contrary, this clause would certainly be an authority for implying a contract on the part of the mortgagor in favor of the second mortgagee to pay the first mortgage debt on its becoming due, and a breach of a covenant, whether express or implied, would equally be a default within the meaning of clause (b) of section 68. The conclusion arrived at by the Small Cause Court is therefore right. We must set aside the order of the learned Judge and restore the decree of the Small Cause Court.

The revision petition is dismissed with costs including the costs of this appeal.

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APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Handley.

KANDASAMI (DEFENDANT NO. 3), APPELLANT,

v.

AKKAMMAL AND OTHERS (DEFENDANT NO. 2 AND
PLAINTIFFS NOS. 1 AND 2), RESPONDENTS.*

1889.
Sept. 30.

Specific Relief Act—Act I of 1877, s. 42—Declaratory decree—Suit by reversioner.

The intervention of two life estates does not preclude the reversioner from obtaining a declaration of his interest as to land under Specific Relief Act, s. 42.

SECOND APPEAL against the decree of G. D. Irvine, Acting District Judge of Coimbatore, in appeal suit No. 48 of 1888, confirming

* Second Appeal No. 88 of 1889.