[SMITH, C.J. AND MIDDLETON, J.]

SMITH, C.J. & MIDDLETON, J. 1897

G. D. PIERIDES, *Plaintiff,*

v.

SOPHOCLI PETRIDES, *Defendant.*

March 27

MORTGAGE—SALE OF MORTGAGED PROPERTY AT INSTANCE OF JUDGMENT CREDITOR — MONEYS REALIZED INSUFFICIENT TO SATISFY MORTGAGE — *LIABILITY OF JUDGMENT CREDITOR TO MORTGAGEE — CONSTRUCTION* — MARGINAL NOTE—THE CIVIL PROCEDURE AMENTMENT LAW, 1885, SECTIONS 53, 54, 55.

The Defendant obtained an order under Section 53 Sub-section c. of The Civil Procedure Amendment Law, 1885, for the sale of immoveable property of his judgment debtor which was mortgaged to the Plaintiff. The reserve price fixed by the Court and the moneys actually realized at the sale were insufficient to satisfy the moneys due under the mortgage at the time of the sale.

HELD: *that under Section 55 the Defendant was liable to make good not only any deficiency in the expenses of the sale, but any deficiency in the moneys due to the Plaintiff under the mortgage.*

The marginal note in a Law is not part of the Law.

APPEAL from the District Court of Nicosia.

Artemis (*Pascal Constantinides* with him), for the Appellant.

Respondent in person.

The facts and arguments sufficiently appear from the judgment.

Judgment: This case comes before us on appeal from the judgment of the District Court of Nicosia, and the question for our decision is what is the proper construction to be placed upon Section 55 of The Civil Procedure Amendment Law, 1885. *April* 10

We understand the facts to be that the Plaintiff held a mortgage of certain immoveable properties of Raouf Bey to secure the sum of £500, which became due on the 11th February, 1892. The mortgage certificate states that interest is payable at the rate of 12% per annum. It appears that the plaintiff also held a bond for the same amount, on which he obtained judgment on the 12th October, 1892, with interest at 12% from the 11th February, 1892, and we understand that the mortgage and the bond were given to secure the payment of the same sum.

The Defendant was also a judgment creditor of Raouf Bey, and wishing to obtain execution of his judgment he applied to the District Court under Sub-section *c.* of Section 53 of the Civil Procedure Amendment Law, 1885, to order a sale of the mortgaged property. On the

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hearing of the application the Court directed the sale, fixing the reserve price at £600.

This order was made on the 26th March, 1894, when, according to our calculation, there would be about £120 due for interest on the mortgage, so that the total amount due on that date would be £620, and, therefore, the reserve price fixed by the Court was insufficient to cover what was then actually due under the mortgage.

The sale does not appear to have been completed until the 16th October, 1894, at which date a further sum of about £40 was due for interest, making the total sum due to the Plaintiff under his mortgage about £660.

The property realized at the sale only £601, which was received by the Plaintiff who, subsequently, commenced this action against the Defendant, claiming from him £60, the difference between what he had to receive under the mortgage and the amount realized at the sale of the mortgaged property.

The claim is based on Section 55 of the Law which says: "If the moneys so realized as last aforesaid—that is to say, at any sale under Section 53, Sub-section (c.)—shall not be sufficient for the payment in full of the moneys due under the mortgage and the expenses of the sale, the judgment creditor shall be answerable for the deficiency, but may, where the Court shall think fit so to order, add the amount of such deficiency to the amount of his judgment debt as costs of execution."

The Defendant's defence was that the Law contemplated that a judgment creditor should be answerable only for a deficiency in the expenses of the sale, and that, as the Court fixed the reserve price on the information of the mortgagee, the Plaintiff, the fact that this reserve price had, under the circumstances, proved insufficient to satisfy the Plaintiff's claim under the mortgage, could not render him liable to the Plaintiff. The Defendant also did not admit that the Plaintiff had to receive £60 under the mortgage.

The allegation that the Court was led to fix the reserve price on the information supplied by the Plaintiff was denied, and the issue of fact fixed was whether £60 was, as a matter of fact, due to the Plaintiff.

At the hearing, the judgment of the District Court in the action in which the Plaintiff sued Raouf Bey on the bond and recovered judgment for £500 with interest at 12% per annum from 11th February, 1892, was produced. This does not appear to us to be evidence that the same moneys were due under the mortgage: but the point does not appear to be contested, and we have ourselves seen the mortgage certificate

which stipulates for the payment of interest at 12% per annum from the same date.

The District Court held that the provisions of Section 55 of the Civil Procedure Amendment Law have reference only to a deficiency in the costs of the sale, and dismissed the Plaintiff's action.

The Plaintiff has appealed, and it is contended for him that the language of Section 55 admits but of one meaning, and that is, that the judgment creditor is liable for any deficiency arising on a sale of mortgaged property, whether the deficiency be a deficiency in the moneys secured by the mortgage, or the costs of the sale; and that the language being clear, it is not open to the Court to place any other construction upon it, save that which the language itself clearly imports.

The principle upon which a statute or any written instrument is to be construed is, that the words of any section are to be taken in their ordinary grammatical sense, unless the construction so placed upon them leads to any inconvenience or absurdity or repugnancy with the rest of the statute. They are to be so construed as to carry out the intention of the Legislature to be gathered from the whole statute, and when that intention is discovered, effect is to be given to it, whatever view the Court may take as to its policy or wisdom. The duty of the Court is to interpret the language and not to legislate.

The language of Section 55 being in itself clear and free from ambiguity, would a literal construction of its words lead to any inconvenience, absurdity or repugnancy with the other provisions of the Civil Procedure Amendment Law, or can we say that such a construction would not carry out the intention of the Legislature? What was the intention of the Legislature? Sections 53 to 55 deal with the sale of the immoveable property of a judgment debtor which is mortgaged to some person other than the judgment creditor who is desirous of procuring their sale.

Section 53 provides that a judgment creditor who desires to obtain the sale of immoveable property of his debtor, which is subject to a mortgage, may take one of three courses:

1st. He may pay to the mortgagee on behalf of the judgment debtor all moneys secured by the mortgage, and add the amount so paid to that of his judgment debt, and procure a sale of the mortgaged property.

2nd. He may tender to the mortgagee the moneys secured by the mortgage, and if the latter refuse to receive them, the Court may, on his application, direct a sale of the mortgaged property on

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terms of his paying the amount due under the mortgage into Court, or otherwise securing its payment as the Court may direct.

3rd. He may, without paying or tendering the moneys due under the mortgage to the mortgagee, apply to the Court to direct a sale of the property; and upon his furnishing security for the payment of the expenses to be incurred in and in connection with the sale, the Court may direct the property to be sold " subject to a reserve bidding to be fixed by the Court for securing the moneys due and to become due under the mortgage:" if the reserve price is not reached the property cannot be sold.

Now it appears to us in the first place that as this is a proceeding by a judgment creditor, who practically forces a mortgagee to realize his security, it was clearly the intention of the Law to protect, so far as it could, the interests of the mortgagee. Under the first two sub-sections he either receives or may, if he chooses, receive everything due to him under his mortgage, and under Sub-section c., the Court, for his protection, is to fix a reserve price sufficient to cover not only what is then due, but also what is to become due under the mortgage up to the time of the sale. If the judgment creditor adopt either of the first two courses pointed out in Section 53, and the property sold does not realize the amount which was due under the mortgage, the judgment creditor clearly will be out of pocket by the difference between the amount he paid to the mortgagee, or paid into Court, or otherwise secured the payment of, and the amount realized at the sale. If the judgment debtor has no other property the creditor will sustain an absolute loss. We see no reason for thinking that the Legislature intended that he should not be out of pocket (to use the same phrase) if he adopted the third course pointed out in Section 53. It may very well have been the intention of the Legislature that the Court should fix such a reserve price as to secure the mortgagee against the probability of any loss, but that in case any loss did arise, the judgment creditor, at whose instance the Court ordered the property to be sold, should bear it, and not the mortgagee.

Supposing for example in the present case, the Court in ordering this property to be sold had fixed such a reserve price as was sufficient to what was due under the mortgage at the time of the application for the sale, and also future interest for a further period of six months. Six months might very well have been taken as a sufficient margin of time within which the sale of the property might be effected. The sale of the property, however, was not effected for some reason or other for nine months. Who would be responsible for the three months' interest that would be deficient? If the intention of the Law is that the mortgagee

is to be protected from loss owing to the action of the judgment creditor, is there anything unreasonable in holding that the Legislature intended by the provisions of Section 55 that the judgment creditor should make good the deficiency to the mortgagee? The literal construction of this section, certainly, would render him liable in such a case, and we think that this construction neither leads to any absurdity, inconvenience or repugnancy with the provisions of Section 53, but even is in conformity with this intention of the Legislature as appears from that section.

It may possibly be that it was not contemplated that in the case of a sale where the Court has fixed a reserved price any deficiency in the moneys due under the mortgage would arise.

This appears to us probable both from the marginal note to Section 55, which runs "*creditor liable for costs of sale,*" and from the provisions in the section that the judgment creditor may, if the Court think fit so to order, add the amount of such deficiency to the amount of his judgment debt as costs of execution. With regard to the marginal note we agree with the Appellant's Counsel that we cannot regard it as part of the Law or allow its language to control that of the section itself.

With regard to the provision that the amount of the deficiency may, by order of the Court, be added to the amount of the judgment debt as costs of execution, it appears to us to be more consistent with the Respondent's contention that the section really contemplated a deficiency as regards the expenses of the sale. If a deficiency in the moneys due under the mortgage was in contemplation, it would seem more probable that the section would have provided for the addition of the amount of the deficiency to the amount of the judgment debt simply. The payment to the mortgagee of a balance of moneys due under the mortgage can hardly be characterized as costs of execution. And we incline to think that the section really contemplated only a deficiency in the expenses of the sale.

We find then that the Law clearly intends that the mortgagee shall be guaranteed against all loss to arise from a sale of the property mortgaged to him which takes place on the application of a judgment creditor; we find further that whilst probably not contemplating that any deficiency would arise in a sale under Sub-section *c.*, the Legislature has used words in Section 55 which taken in their natural and ordinary meaning render the judgment creditor liable to make good the deficiency to the mortgagee; we cannot say that these words so construed lead to any absurdity or inconsistency with the other sections of

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the Law, and we, therefore, think it safest to place upon them the construction which they naturally bear, and to hold that the Defendant is liable to make good to the Plaintiff the deficiency between the price for which these properties sold, and the sum due under the mortgage at the time of the sale.

There is one other point which was raised by the Defendant as a defence to which we may advert. It was alleged by him that the reserve price of £600 was fixed by the Court on the application of the mortgagee, and it was contended that it was his action which has led to the deficiency in this case.

We have obtained from the District Court the file of proceedings relating to the application of the Defendant tc sell this mortgaged property. The notes are very meagre but it appears from them that on the 28th February, 1894, Mr. Chakalli, on behalf of the Defendant, applied to the President of the District Court of Nicosia for the sale of the mortgaged property, and suggested that £550 should be the reserve price fixed. The mortgagee, the present plaintiff, was absent and unrepresented. Service of notice of the application was proved, and the matter was adjourned to a sitting of the District Court to be held on the following day. The note of the proceedings on that day runs simply " Mr. Pascal for Djabra Pierides accepts. Reserve price fixed at £600 and indemnity bond at £20." There is nothing to show what it was that Mr. Pascal assented to, whether it was to a sale of the mortgaged property simply, or to a sale with the reserve price asked for by the judgment creditor, viz.: £550. We cannot say on the notes of these proceedings that the Plaintiff is estopped from making the claim in this action. The order does appear to have been made on very insufficient information, so far as can be judged by the notes, but we do think that, although the Plaintiff is not estopped, it was his duty to have placed before the Court information of the amount due to him under the mortgage, and as it is manifest that the reserve price fixed by the Court was insufficient to cover what was due and to become due under the mortgage, he ought to have objected to the reserve price fixed by the Court as inadequate. The mortgagee knows exactly what amount remains due under a mortgage at the time of an application for sale, and the judgment creditor does not, or may not. In setting aside the judgment of the District Court and entering judgment for the Plaintiff we shall do so without costs.

We also think that the Defendant is entitled to an order under Section 55 to add the amount of the deficiency, viz.: £60 to the amount of his judgment debt; and we shall add a direction to that effect

to our judgment when drawn up. He has been compelled to discharge a portion of the judgment debtor's liability to the mortgagee, and is entitled to recover it, if he can, from the judgment debtor.

We do not think that the Defendant should be allowed to charge his judgment debtor with the interest on the £60 which he will have to pay to the Plaintiff, as his defence to action having failed, he should have paid the £60 on its institution.

Our judgment will, therefore, be that the judgment of the District Court be set aside, and that the Defendant do pay to the Plaintiff the sum of £60 with interest thereon at the rate 9% from the date of the institution of the action—the 23rd May, 1895.

Appeal allowed.