

MERS IYAR, Plaintiff

v.

ROSANG SUNGIYAMA and SINTAU WONG, Defendants

Civil Action No. 151

Trial Division of the High Court

Palau District

November 17, 1960

Action to determine rights in land in Koror Municipality, in which mortgagor gave use rights of portion of land to plaintiff and his family as gift, and also mortgaged unspecified portion of same land to another to secure a debt. Upon default of payment of debt, mortgagee claimed certain portion of land, including portion given to plaintiff. The Trial Division of the High Court, Chief Justice E. P. Furber, held that mortgages of land in Palau District may be foreclosed only through court action and therefore mortgagee has no present right to possession of land other than that to which mortgagor expressly consents, subject to her right of redemption.

1. Mortgages—Recording

Where mortgage is recorded after default in payment of secured debt, unrecorded gift of use rights in mortgaged land is subordinate to mortgage so far as areas covered may overlap, provided mortgagee had no notice of gift at time mortgage contract was entered into. (T.T.C., Sec. 1023 (b))

2. Mortgages—Foreclosure—Palau

Japanese law regarding foreclosure of mortgages of land in Palau District remains in full force and effect except as changed by express written enactment of Trust Territory. (T.T.C., Sec. 24)

3. Mortgages—Foreclosure—Palau

Unless and until some other method or methods of foreclosure are provided by express written enactment, mortgages of land in Palau District may be foreclosed only through court action.

4. Mortgages—Foreclosure—Palau

Under present Trust Territory law, court action regarding foreclosure of mortgages in Palau District would have to be brought in the High Court. (T.T.C., Sec. 123)

5. Mortgages—Foreclosure

Voluntary agreement of all parties involved in mortgage transaction will obtain substantially same result as foreclosure of mortgage through court action, provided agreement is entered into understandingly after default has occurred.

6. Mortgages—Foreclosure

Court action for foreclosure of mortgages prevents injustice which may be caused if land is allowed to pass automatically to mortgagee upon default in payment, regardless of how much more land may be worth than amount due on mortgage.

7. Mortgages—Generally

As matter of public policy and to promote justice and fair dealing, courts look beyond terms of mortgage document to real nature of transaction as one of security and not of purchase.

8. Mortgages—Foreclosure

Where court action is brought on default of mortgage debt, court will enable mortgagee to obtain payment of amount due within reasonable time, but prevent him from taking over property for far less than its fair worth.

9. Mortgages—Foreclosure—Sale

Where court action is brought on default of mortgage debt, mortgaged property may be ordered sold and proceeds applied first in payment of amount due on mortgage and balance given to mortgagor or those claiming under him.

10. Mortgages—Foreclosure—Palau

Where no court action has been brought in Palau to foreclose mortgage, mortgagee has no present right to possession of land beyond that to which mortgagor and any persons claiming under her have consented and subject to her right of equity of redemption.

FURBER, *Chief Justice*

FINDINGS OF FACT

1. About 1950 the defendant Rosang gave the plaintiff Mers and his family roughly the southern half of lot 904, in accordance with Palauan custom, to use in view of the fact that the plaintiff Mers is considered to be like a son to Rosang because of his close relationship to her.

2. The dividing line between the northern and southern "halves" or parts of lot 904 is shown by a concrete foundation wall running west from the road to Mokko, between the plaintiff's house on the southern part of that lot and the house occupied by Hiroichi and his wife Oop on the northern part of the lot. This dividing line runs in a

straight line along this concrete foundation wall and in extension of it to the west boundary line of the lot.

3. Neither the defendant Rosang nor the plaintiff Mers has consented to the defendant Sintau Wong or those claiming under him taking possession of any part of this southern "half" or part of lot 904.

OPINION

There is little dispute in this action about the main facts involved. The difficulty arises in determining what inferences should be drawn from those facts and what the legal consequences of them are.

From the evidence and the view of the premises taken by the court, it appears that the land claimed by the plaintiff is not correctly described in the complaint and pre-trial order, and that what he is really claiming for himself and his family is roughly the southern half of that part of Owang (sometimes spelled Eang) known to the parties as lot 904. This lot does not extend to the extreme southern part of Owang, and the part the plaintiff claims extends further north than the land the defendant Sintau agrees the plaintiff and his family have a right to use.

The defendants entered into a rather unusual kind of mortgage contract in which Rosang purported to mortgage to Sintau two hundred (200) tsubo of the much larger tract known as Owang, or Eang, to secure the payment of \$400.00 on a certain date, without specifying in any way which 200 tsubo were referred to. After default in payment of the mortgage, Sintau claimed he could select the 200 tsubo he wanted out of Owang, and has purported to take the most valuable part right on the corner where the two streets meet which bound Owang on the north and east. The part he purports to have taken includes the northern "half" or part of lot 904 and a considerable portion of the southern "half" or part, including part of

the land on which the plaintiff's house stands. The defendant Rosang has expressly consented to the use of the northern "half" or part of lot 904 by the wife of the man who is claiming right of possession under Sintau Wong, since this wife is a relative of Rosang, and Rosang has, in effect, at least acquiesced in Sintau's taking possession of the northern "half" or part of lot 904, but that is clearly less than 200 tsubo. Rosang has offered to make up the additional tsubo out of the part of Owang south of lot 904. Sintau does not agree with this.

[1] This action turns largely on the important question of the exact rights, under the present administration, of a mortgagee of land in the Palau District upon default in payment. The mortgage involved was recorded in the office of the Clerk of Courts for the Palau District after the default. Rosang's gift of use rights referred to in the first Finding of Fact was made orally and was naturally not recorded, and is therefore subordinate to the mortgage so far as the areas covered may overlap, provided Sintau had no notice of the gift at the time the mortgage contract was entered into. See Trust Territory Code, Section 1023(b).

[2-5] The court takes judicial notice that under the Japanese Administration mortgages of land in what is now the Palau District could only be foreclosed through court action. Section 24 of the Trust Territory Code provides as follows:

"The law concerning ownership, use, inheritance, and transfer of land in effect in any part of the Trust Territory on December 1, 1941, shall remain in full force and effect except insofar as it has been or may hereafter be changed by express written enactment made under the authority of the Trust Territory of the Pacific Islands."

The court therefore holds that unless and until some other method or methods of foreclosure are provided by express

written enactment, mortgages of land in the Palau District may still be foreclosed only through court action. Under present Code provisions this court action would have to be in the High Court. The court recognizes that substantially the same result might be obtained by voluntary agreement of all concerned, if this were entered into understandingly after the default occurred, but in the present case there is no indication of any such agreement.

[6] Court action for foreclosure of mortgages in order to prevent the injustice which may be caused if a piece of land is allowed to pass automatically to a mortgagee upon default in payment of the mortgage, regardless of how much more the land may be worth than the amount due on the mortgage, is well known to English and American courts, and when properly understood should cause no hardship.

[7-9] The important point is that as a matter of public policy, to promote justice and fair dealing, the courts look beyond the terms of the document to the real nature of the transaction as one of security and not of purchase. The courts endeavor to enable the mortgagee to obtain payment of the amount due within a reasonable time, but prevent him from taking over property for far less than its fair worth. If necessary the property may be ordered sold and the proceeds applied first in payment of the amount due on the mortgage and any balance above that given to the mortgagor or those claiming under him. 36 Am. Jur., Mortgages, § 180 and following. 37 Am. Jur., Mortgages, § 532 and following.

[10] The court therefore holds that since there has been no court action to foreclose the mortgage here in question, the defendant Sintau has no present right to possession of any part of Owang, beyond that to which Rosang and any involved claiming under her have con-

sented, namely, the northern "half" or part of lot 904, and that the defendant Rosang still has a right or equity of redemption even in that part of lot 904. The question of just what other parts of Owang the mortgage should be considered as applying to is left to be decided by the court when and if an action is brought to foreclose the mortgage.

JUDGMENT

It is ordered, adjudged, and decreed as follows:—

1. As between the parties, all of whom live in Koror, Palau District, and all persons claiming under them, rights in the land located in Koror known to the parties as part of lot No. 904 and constituting part of the land known as Owang (sometimes written Eang), which part of said lot No. 904 lies south of the foundation wall and the extension thereof running west from the road to Mokko, between the house of the plaintiff on the land in question and the house occupied by Oop and Hiroichi on the northern part of lot No. 904, are held as follows:—

a. The plaintiff Mers and his family have the right to live on this land as long as they want to and continue to do so and fulfill all their obligations under Palauan custom to the defendant Rosang, but this right is subject to possible interference by order of this court as it deems justice requires in any action which may hereafter be brought to foreclose the mortgage between the defendants recorded in the Office of the Clerk of Courts for the Palau District on August 6, 1958, in Book 1, pages 37, 38, and 39.

b. Unless and until an order is entered in an action to foreclose said mortgage, the defendant Sintau Wong has no right to possession of any of said lot No. 904 south of the line mentioned above.

c. Subject to the above-mentioned right of the plaintiff Mers and his family and the above-mentioned mort-

gage, the land in question is owned by the defendant Rosang Sungiyama as her individual land.

2. This judgment shall not affect any rights of way which may exist over or across the land in question.

3. No costs are assessed against any party.