HALLOCK *v.* BANDAPPU.

D. C., Chilaw, 2,779.

1904.
March 15

Money paid by co-owner of land to save the sale of it by Fiscal—Mortgage decree against heir in possession of estate of deceased father, the mortgagor—Action for recovery of money paid under compulsion.

Where land in which A held a share as co-owner was seized in execution by B for a debt decreed to be due by C as heir in possession of the estate of D, who had mortgaged his share in it to B, and A paid the amount due by C in order to save the sale of his own share in the land,—

Held, that A was entitled to recover from C the amount so paid under compulsion.

THE plaintiff prayed for judgment against the defendants for Rs. 1,000 with legal interest, and that a certain land be sold and the proceeds applied in payment of the said amount, alleged to be due to the plaintiff under the following circumstances, viz., that one Punchirala, being owner of three-eighths of twelve acres of Timbirigahawatta, mortgaged his share to one Bastian Fernando on 9th March, 1893, for Rs. 400 and interest; that the mortgagee assigned his bond to Moses Fernando on 27th January, 1900; that Punchirala sold one and a half acre of the same land to Hitihami and three-fourths of an acre to Senanayaka, falsely representing to them that there was no mortgage thereon; that Hitihamy sold his one and a half acre to Samarakoon, who sold it to the plaintiff on 11th November, 1896; that Senanayaka's interest was also purchased by the plaintiff on 8th March, 1894, in ignorance of any incumbrance on either of the allotments; that Punchirala died in 1898 without paying the debt due on his mortgage bond of 9th March, 1893; that his sons (the defendants) who were in possession of the remaining part of this property did not pay the amount due on their deceased father's bond; that Moses Fernando recovered a mortgage decree against the defendants and seized in execution the land mortgaged to him, which included the portions purchased by the plaintiff in ignorance of the mortgage; and that the plaintiff was thus compelled to pay the amount of the decree to the writ holder, which was the Rs. 1,000 he now claimed of the defendants.

The District Judge (Mr. H. R. Freeman) gave judgment for the plaintiff.

The defendants appealed.

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Sampayo, K.C., for appellant.—The plaintiff virtually asks for a mortgage decree in his favour. He is not entitled to it without a cession of action from the mortgagor. D. C., Kalutara, 36,176, (*Wendt's Rep. 7*). Punchirala had no right to mortgage more than a half of the land to Bastian Fernando, as the other half belonged to the defendants through their deceased mother, who had been married in community to Punchirala and had died before the date of his mortgage. The plaintiff's action cannot be treated as one for the recovery of a mere money debt, because there is no proof that the defendants were in possession of their father's property (*Adagappa v. Babu, 6 S. C. C. 13; Paramanathar v. Paramanathar, 3 N. L. R. 79*).

Wadsworth, for respondent.—The plaintiff is in the position of a joint-debtor, and the rights of sureties apply to joint-debtors. A surety having paid for principal may claim from the principal what he has paid without cession of action (*Kotze's Van Leuwen, II., p. 36,46; Pothier, I., 164, s. 282*). The plaintiff was compelled to pay the amount of the mortgage debt because the whole land was to be sold. Even if there was no express request by the defendants to pay the amount the plaintiff was in the position of a *negotiorum gestor* (*Pothier, 1., p. 277*). The principle generally applicable is that where one is obliged to pay what another is bound to pay, the former can claim from the latter the amount paid. The plaintiff could not have paid only a portion of the debt and ask for a release of part of the property (*Grenier's Reports, 1874, II., p. 21*). The donation to the defendants was a fraud upon creditors, and is therefore void.

15th March, 1904. MONCREIFF, J.—

Three-eighths of twelve acres of Timbirigahawatta were possessed by the plaintiff and the defendants. The land had belonged at one time to Punchirala, who sold two and a quarter acres of it, which ultimately became the property of the plaintiff. The remainder of Punchirala's three-eighths has been held since his death five years ago by his sons, the defendants. Matters being in this position, one Moses Fernando who held (as assignee of Bastian Fernando) a mortgage bond dated 9th March, 1893, executed by Punchirala, and affecting the whole of the three-eighths, put it in suit against the two defendants and obtained a mortgage decree. The plaintiff in this case had been in ignorance of the mortgage, because Punchirala had mortgaged the land under the name of Medamukalana; and when his land was seized under the writ issued in pursuance of Moses

Fernando's decree in No. 2,134 Chilaw, he paid Rs. 1,000, the amount of the decree and costs. That is to say, he deposited the amount and the mortgagee drew it. He paid under compulsion the debt which was declared in the mortgage decree to be due from the defendants to Moses Fernando, and in respect of which the whole of Punchirala's three-eighths were declared executable. He then brought this action to recover Rs. 1,000 from the defendants, and the Judge has given him judgment for the full amount as claimed. The decree is that the defendants pay jointly and severally to the plaintiff the sum of Rs. 1,000 with legal interest from the date of deposit till payment in full. I think the Judge was right.

By English Law a plaintiff may recover money paid by him for the defendant's use, at the defendant's request. It is not enough that the plaintiff's payment benefited the defendant; it must also have been made at his request, express or implied. A request will be implied if the plaintiff has paid under compulsion, or under a threat of compulsion, of law. In *Exall v. Partridge* (*8 T. R. 308*) the plaintiff placed his goods on premises for which the defendants were bound by covenant to pay rent. The defendants made default in payment of rent; the landlord, as he was entitled to do, distrained upon the plaintiff's goods; and the plaintiff—to release his goods—paid the rent. It was held that the plaintiff acted under compulsion, and that he had his remedy against the defendants. In *Sapsford v. Fletcher* (*4 T. R. 501*) it was held that the plaintiff acted under compulsion where being a sub-tenant he was threatened by the landlord of the lessee with a distress upon his goods if he did not pay a ground rent due from the lessee to the landlord, and being so threatened he paid the amount.

The principle of English Law applies exactly to this case. The plaintiff's land was seized for a debt due by the defendants. It was executable for the payment of that debt because it passed *cum suo onere seu causâ*, and it would have been sold to meet that debt. Although he was not a party to No. 2,134, the plaintiff knew that the mortgagee could ultimately cause his land to be sold to satisfy the mortgage debt.

Punchirala, in selling to the plaintiff's authors, not only assured them that the land was not mortgaged, but took steps to prevent their discovering that it was. The prices given for it therefore were reckoned without knowledge on the part of the vendees that it was liable to be seized and sold for a debt of Rs. 400 with interest. The plaintiff had already paid for the benefit of Punchirala the equivalent for his risk on the mortgage,

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and he has now paid under compulsion Rs. 1,000 for a debt which was entirely for the benefit of the defendants or their father.

There seems to be warrant for this principle in Roman-Dutch Law also.

It was suggested that, even admitting that the plaintiff is entitled to recover money paid at the request of the defendant, he can only recover the share of the money which is proportionate to the share of the land in the hands of the defendants.

It appears, however, that Moses Fernando's prayer against the two defendants in No. 2,134 was that they should pay the debt secured by Punchirala's bond; that in default of payment the land should be sold; and that if the proceeds of the sale were not sufficient to meet the claim, the defendants should pay the deficiency. The plaint shows that the mortgage action was not founded solely on the possession of the land by the defendants. The 4th paragraph alleges the death of Punchirala, leaving him surviving the defendants his children "who have adiated his inheritance and are in possession of his estate, including the property mortgaged." The action was against heirs of the mortgagor who had adiated his inheritance and were in possession of the hypothecated land. The defendants neither disputed the claim nor filed answer.

There are some special features in our law on this subject. A mortgagee cannot, as he could under Roman-Dutch Law and as he could here before the Civil Procedure Code became law, sue for the realization of the mortgage debt without making the mortgagor or his legal representative defendant. He cannot in general proceed simply against the land; section 640 of the Code forbids him. Even where (see section 201) "the action is to enforce a right of sale under a mortgage," the decree for sale of the land is subject to default in payment of the debt within a delay specified in the decree. The debt therefore was that of the defendants, and was not exigible from the plaintiff's land until they had made default.

But, say the defendants—the land was donated to us by deed of gift on the 16th May, 1894—we are in possession as donees, not as heirs. Case No. 2,134, Chilaw, was an action by a creditor of Punchirala. There has been no administration; there was, as the defendants say and I can well imagine, a total absence of assets; and the deed of gift set up by the defendants was, I fear, made in fraud of creditors and of the mortgagee.

It will be noted that, having mortgaged this land under the name of Medamukalana in March, 1893, Punchirala in the

following year sold two and a quarter acres of it under the name of Timbirigahawatta, and donated the remaining two and a quarter acres of Timbirigahawatta to his four sons. By the deed of gift he donated no less than ten lands to his four sons, two of whom survive. The defendant Bandappu says his father donated all the property he was entitled to, and in the answer it is stated that there were no assets. If the contention of the defendants is correct, the effect of the deed of gift was to withdraw the whole of Punchirala's property from his creditors, for the disposal of the remaining portion of Timbirigahawatta was part of the same *manœuvre*. The defendants admit that they are in possession of part of Timbirigahawatta, and of Lankindekumbura which is part of the donated lands. They are the sole heirs, and say there was no other inheritance to adiate or renounce.

Punchirala having divested himself of nearly the whole of his property in favour of his sons under lucrative title and sold what remained, concealing from his vendees that the land was mortgaged under the name of Medamukalana, the donation was, on the principles expressed in *Supramanian Chetty v. Gunawardana* (*3 N. L. R. 278*) and *Kanappen v. Mylipody* (*3 N. L. R. 274*), a fraud upon creditors, and cannot be supported. If that be so, the defendants were rightly decreed to pay the debt of their father, and the plaintiff is entitled to recover from them what he has been compelled to pay.

They are in possession as heirs and not as donees. It would be a strange thing if one, having procured an advance by mortgage of a small portion of his property, could thereupon, selling two and a quarter acres, donate to his children the whole of his remaining estate consisting of ten lands, thus rendering himself insolvent; and that, on his death, his children might repudiate his debt on the ground that he had left no inheritance to adiate. I think the appeal should be dismissed with costs.

LAYARD, C.J.—I agree.