1935 *Present :* **Koch J. and Soertsz A.J.**

PEDRICK *v.* KITCHIL

163—D. C. Kandy, 43,549.

Contribution among co-debtors—Payment of mortgage debt by one of the mortgagors—Sale of land to third party—Right to contribution from transferee—Certification of payment of mortgage decree—Civil Procedure Code, s. 349.

Plaintiff and three others mortgaged a land to secure a sum of money borrowed by them. During the currency of the mortgage some of the co-mortgagors transferred their shares in the land to the defendant's intestate.

When the bond was put in suit, the plaintiff paid the debt and sued the defendant, as administratrix-transferee of the land, for a proportionate share of the debt.

***Held,* that the plaintiff had no right of contribution against the defendant's intestate.**

Section 349 of the Civil Procedure Code regarding the certification of payment out of Court applies to mortgage decrees.

APPEAL from a judgment of the District Judge of Kandy.

Gratiaen, for plaintiff, appellant.

H. V. Perera, for defendant, respondent.

Cur. adv. vult.

August 21, 1935. SOERTSZ A.J.—

The plaintiff-appellant brought this action to recover from the defendant in her capacity of administratrix of the estate of her deceased husband, Awana Meera Saibo, the sum of Rs. 619.50, with legal interest and costs. His case was that he and the vendors to the defendant's husband had borrowed a certain sum of money upon a mortgage bond by which they had hypothecated the land referred to in this case with one Jayasinghe who had assigned the bond to one de La Motte. The plaintiff's co-mortgagors had, while the mortgage was current, sold their interests to Awana Meera Saibo. The assignee of the mortgage bond put it in suit in case No. 40,056, D. C., Kandy, against the four mortgagors or their representatives against the original mortgagee, Jayasinghe, and against Awana Meera Saibo. When that case came to trial, the first defendant in that case, namely, the present plaintiff, and the defendant who had been substituted in place of the original mortgagee, Jayasinghe, were present. The other defendants were absent. The case was settled by those defendants who were present consenting to judgment in favour of the plaintiff in that case for a sum of Rs. 1,150, with legal interest from date of action without costs. Writ was not to issue for two months. As far as Awana Meera Saibo was concerned he had died in the course of the mortgage action, and his heirs with the present defendant as guardian *ad litem* had been substituted defendants, and in the decree that was entered upon the settlement those substituted

defendants were expressly declared to be liable as "*substituted transferees only*" and "*only for the purpose of binding the lands transferred and covered by the bonds*". The absent defendants were made liable by the decree for the payment of the amount agreed upon along with the present plaintiff and the defendant who had been substituted in place of the original mortgagee, Jayasinghe. After the time stipulated in the course of the settlement of the mortgage bond action had elapsed, the plaintiff in that action took out writ. Thereupon the present plaintiff paid him the full amount due and there is document P 1, a Kachcheri receipt, to attest that payment. The plaintiff claims that as the land mortgaged belonged to him and Awana Meera Saibo in the proportions of 53/96ths and 43/96ths respectively, the defendant as administratrix of the estate of Meera Saibo is liable to pay him the sum claimed as the 43/96th share of the amount paid by him to the judgment-creditor.

The case went to trial on the following issues :—

(1) Did the plaintiff pay Rs. 1,383 in satisfaction of the decree in D. C., Kandy, No. 40,056 ?

(2) (*a*) Did payment by the plaintiff constitute an *impensa utilis*, so far as the premises mortgaged are concerned ?

(*b*) If so, is the defendant liable to make good a proportionate share ?

(It was admitted that there was no decree against the defendant for Rs. 1,383.)

(3) Is plaintiff entitled to claim any contribution from the defendant ?

I cannot help saying that the case was most inadequately presented in the trial Court and the learned Judge disposed of it really on consideration of the question raised in the first issue only, although he made a passing reference to the question involved in issue (2) (*a*) and (2) (*b*) ; he held that as the provisions of section 349 of the Civil Procedure Code had not been complied with, he was debarred from holding that there had been a payment or adjustment, although as a matter of fact, he was satisfied that that was the case. He held that section 349 as interpreted in the Full Bench case, *Pitche Thamby v. Mohamadu Khan*[1] made the certificate under section 349 "the sole admissible evidence of the satisfaction of the decree". Counsel for the appellant contends that the principle laid down by the Full Bench in the case just referred to is applicable only to money decrees pure and simple and not to such a decree as was entered in the mortgage bond case in this instance, where in addition to ordering the payment of a sum of money as against some defendants, it made other defendants liable to the extent that their land was executable under the decree. In such a case, he says, where the executability of the land under the decree is obviated and an adjustment effected by the payment of the amount decreed to the parties to whom payment is due, no certificate is necessary. For this contention he relies on the case of *Sankaran Nambiar v. Kanara Kurup*[2] where it was held that section 258 which is the Indian Civil Procedure Code equivalent of section 349 of our Code, refers only to the execution of decrees under which money is payable and is not applicable to decrees for possession of immovable

[1] *9 S. C. C. 187.*

[2] *22 Madras 182.*

property. I do not think a case such as this which is a money decree and a decree affecting immovable property rolled into one was in the contemplation of the Bench that decided that case. A decree such as was entered in the mortgage action in this instance is the result of our peculiar mortgage. But apart from that the decision in that case was based upon a consideration of section 258 of the Indian Civil Procedure Code read along with the preceding section. Section 257 enacts that "all money payable under a decree shall be paid as follows: namely, (*a*) into the Court whose duty it is to execute the decree; (*b*) out of Court to the decree holder; or (*c*) otherwise as the Court which made the decree directs". Section 257A lays down that "any agreement to give time for the satisfaction of a judgment debt, shall be void unless for consideration, &c." The Judges in that case pointedly say "The opening words of the section (*i.e.*, 258) 'If any money payable under a decree is paid out of Court,' evidently refer back to section 257, clause (*b*); and the next words of section 258 'or the decree is otherwise adjusted in whole or in part, &c.' refer back to the other clauses of sections 257 and 257A. But sections 257 and 257A deal only with decrees for money. Moreover in the second line of section 258 the words 'the decree' clearly refer to the decree mentioned in the preceding line which is a decree under which money is payable". Now, in our Civil Procedure Code, section 349 is not preceded by any provision such as is contained in sections 257 and 257A of the Indian Code, and there does not seem to be any justification for restricting the scope of the local section in the manner contended for by counsel for the appellant.

In my opinion, therefore, according to the Ceylon Code any adjustment of the decree has to be certified, and the certification is made the only proof of payment or adjustment that any Court may recognize. In this connection it is worthy of note that while section 258 of the Indian Code provides "unless such a payment or adjustment has been certified as aforesaid, it shall not be recognized as payment or adjustment of the decree by *any Court executing the decree*". Our section 349 provides "unless such payment or adjustment . . . . by *any Court*". So that the trial Judge in this case, though not the Judge executing the decree, could not recognize the payment or adjustment relied upon. Counsel for the appellant next contended that no objection had been taken when P 1 was tendered in evidence and that, having been admitted without objection, it constituted proof of the payment. But the answer to that is that though P 1 was evidence of payment, it was evidence that the Court could not recognize. Counsel for the appellant also submitted that in the circumstances of this case, the plaintiff should be given an opportunity to have payment or adjustment certified as that was the course adopted in the Full Bench case. That is a plea I would entertain if I felt confident it would serve a useful purpose. But, in my opinion, it will do the plaintiff no good to have the case sent back for him to certify adjustment and then proceed against the defendant. The plaintiff's full case, as it was thought fit to present it, was before the trial Court. It is not as if the first issue was tried as a preliminary issue. It must be assumed that all the material which the plaintiff relied upon for all the issues was before the Court.

What then is the position as disclosed by this material ? The plaintiff had paid a debt which he and certain other defendants had been decreed liable to pay. Expressly, it was not a debt for which Meera Saibo was also liable. In other words Meera Saibo was not a co-debtor and, therefore, no cause of action accrued to the plaintiff when he paid that debt, to call upon Meera Saibo to contribute on the footing that a debt for which he too was liable had been paid. Viewed in that way the plaintiff's action must, therefore, fail. It would have been different if the plaintiff was suing the other defendants who had been expressly decreed liable along with him for the mortgage debt. Can the defendant be made liable on any other principle ? It is said that she is liable inasmuch as her intestate was a co-owner along with the plaintiff of a land burdened with a mortgage and that when the plaintiff paid off that mortgage he effected an "*utilis impensa*" in regard to the land and is, therefore, entitled to be compensated for it. It is true that in *Nicholas de Silva v. Shaik Ali* [1] and in *Ukku v. Bodia* [2] it was held that the payment of a mortgage was an "*utilis impensa*". In the circumstances of those cases it may well be so, but it is more than doubtful whether the payment by a person of a debt due by him can be regarded as an "*utilis impensa*" so far as a person who had no part or lot in such a debt is concerned. The plaintiff in paying the debt was fulfilling an obligation which devolved on him under the decree. It is the fact that by so doing he, incidentally, benefited the defendant, but that was just the defendant's good fortune. If those parties whose obligation it was to pay the debt failed or refused to pay the debt, then the defendant's interests in the land were liable to be sold, but that was the result of those interests having been hypothecated to secure a debt that was not the debt of the defendant's estate. Fortunately, when one of those bound to pay the debt, paid it, the defendant escaped from that risk. It was contended that when Awana Meera Saibo bought these interests he must have paid a purchase price assessed with the existence of the mortgage well in view and that now he gets the interests free from the mortgage at the same price. That, however, is a matter that cannot be taken into consideration in cases of this nature in determining the rights and liabilities of parties. Such enterprises as these are often beset with pitfalls, and it should not be a matter for complaint when in some instances there are compensating windfalls. The case of *Ukku v. Bodia* (*supra*) relied upon is clearly distinguishable. There a co-heir paid off in full the amount due by him and all his co-heirs, his brothers and sisters, who inherited the land subject to a mortgage created over it by their father. In the present case, as already pointed out, Awana Meera Saibo got the land subject to the mortgage, but he was not liable for the debt in any other way.

In my opinion, in view of all this, to send the case back for the purpose indicated will only expose the plaintiff to further litigation and expenditure without any resulting benefit. I would, therefore, dismiss the appeal with costs.

KOCH J.—I agree.

Appeal dismissed.

[1] *1 N. L. R. 288.*

[2] *6 N. L. R. 45.*