

1940

Present : Moseley J.

PERERA v. PERERA.

72—C. R. Panadure, 7,289.

*Mortgage bond—Assignment to heir of mortgagor—No discharge of bond—
Right to sue on bond.*

Where a mortgage bond was assigned to one of the heirs of the deceased mortgagor who put the bond in suit against the legal representative of the deceased.

Held, that the assignment of the bond did not operate as a discharge of the bond and that the plaintiff was entitled to sue on the bond.

Peiris v. Peiris (3 C. W. R. 222) followed.

A PPEAL from a judgment of the Commissioner of Requests, Panadure.

A. C. Z. Wijeratne, for the plaintiff, appellant.

No appearance for the defendant, respondent.

Cur. adv. vult.

June 28, 1940. MOSELEY J.—

The plaintiff in this action is the son of one Mudalihamy, deceased, who in his lifetime had executed a mortgage bond in favour of one Herman Perera. After the death of Mudalihamy, Herman Perera assigned the bond to the plaintiff. The latter sued the defendant who is the legal representative of the deceased's estate. The deceased had left nine children including the plaintiff and in bringing his suit the latter credited the estate with the value of his one-ninth share. The main issue upon which the parties went to trial was:—

Does the deed of assignment operate as a discharge of the mortgage bond?

The learned Commissioner answered this issue in the affirmative, relying upon the case of *Dias et al. v. Silva*¹ where it was held that where one of a number of co-debtors of a debt secured by a mortgage has paid and discharged the debt the property does not become burdened with a real charge in favour of that debtor.

Counsel for the plaintiff brought to the Commissioner's notice the case of *Peries v. Peries*² and the Commissioner was of opinion that the principle in each case was the same.

The facts in the latter case are almost exactly similar to those in the present case. De Sampayo J. in the course of his judgment observed as follows:

“The plaintiff did not pay the debt as such, but only purchased Rodrigo's (the mortgagee's) rights on the bond. There might be a merger in respect of his own share of the debt, but even on the footing

¹ 34 N. L. R. 108.

² 3 C. W. R. 222.

of payment of the debt he had a right to contribution from his co-debtors. Consequently I think it was competent to plaintiff not only to recover Carolis' (co-mortgagor) share of the debt but to realize the same by sale of his share of the land on the footing of the mortgage."

It seems to me that this decision is exactly in point and that the issue should have been answered in the negative.

I would therefore allow the appeal with costs. The judgment of the Court of Requests is set aside and judgment will be entered for the plaintiff as prayed with costs.

Appeal allowed.

