1950 *Present :* **Dias S.P.J. and Gunasekara J.**

PERERA, Appellant, *and* DIAS, Respondent

S. C. 190—D. C. Colombo, 16,387/M

Mortgage—Co-mortgagors—Payment of interest by one of them—Effect on prescription

The obligation under a mortgage is indivisible. A payment, therefore, of interest by one of the mortgagors would be a payment on behalf of all, for purposes of prescription.

APPEAL from a judgment of the District Court, Colombo.

S. J. V. Chelvanayagam, K.C., with *E. S. Amerasinghe* and *V. S. A. Pullenayagam*, for the defendant appellant.

H. W. Jayewardene, with *D. R. P. Goonetileke*, for the plaintiff respondent.

Cur. adv. vult.

[1] *Salonchi v. Jayatu, (1926) 27 N. L. R. 366 at 371.*
[2] *Meiya Nona v. Davith Vedarala, (1928) 31 N. L. R. 104 at 106.*
[4] *Censusa Forensis, Book III, Chapter V, Section 3.*

November 29, 1950. DIAS S.P.J.—

Paulu Fonseka and his two sons Aloysius and Edward were the owners of an undivided 13/16 of 31, Bloemendhal Road. They by mortgage bond 490 of October 3, 1929, mortgaged their shares to one James Fernando, who in D. C., Colombo, 10,869/M put the bond in suit. That action was instituted on September 29, 1939, just before the cause of action on the bond became barred by prescription. James Fernando failed to register the *lis pendens*. Under the mortgage decree P1 dated October 11, 1940, the shares which had been hypothecated were ordered to be sold. The sale took place on July 15, 1942, when the plaintiff (an outsider) purchased the shares and obtained deed P2 dated April 5, 1943. The plaintiff therefore by paying the purchase money redeemed the 13/16 share of these premises from the mortgage.

The plaintiff then discovered that the owners of the whole land including Paulu Fonseka and his two sons (the mortgagors) had by deed D1 dated June 20, 1940, sold the whole land to a person called James (not the plaintiff to the mortgage action). This purchaser had been procured by the defendant-appellant who was the son-in-law of Paulu Fonseka. James by deed D2 dated September 20, 1943, conveyed the land to the defendant-appellant.

The parties are agreed that the mortgage action did not bind the transferees on the deeds D1 and D2 by reason of the non-registration of the *lis pendens* in the mortgage action. Therefore, the defendant obtained the land freed from the effect of the mortgage action as regards 13/16. The parties are also agreed that under such circumstances, the plaintiff would have the right under section 11 of the Mortgage Ordinance (Chapter 74) to sue the defendant for a declaration that he (the plaintiff) has a hypothecary charge on the land in the manner provided by section 11.

In the present action the plaintiff sued the defendant under section 11 on August 14, 1945, claiming a sum of Rs. 1,071.50 which is the price he paid at the mortgage sale. The District Judge having held in favour of the plaintiff, the defendant appealed to the Supreme Court.

The case was first argued before the present Chief Justice and myself. It having been conceded that the plaintiff had the right to seek relief under section 11 of the Mortgage Ordinance, the substantial question urged by the appellant was whether plaintiff's claim under section 11 has been barred by section 5 of the Prescription Ordinance (Chapter 55). The appellant's submission was that what was kept alive by section 11 of the Mortgage Ordinance was the original mortgage, which on August 14, 1945 (the date on which pliantiff filed the present action), would have been prescribed, and that plaintiff therefore would be out of Court, unless it could be shown in terms of section 5 of the Prescription Ordinance that the action was instituted " within ten years of the last payment of interest thereon ".

The Judge said: " This case must go back for evidence on the issue of prescription. The plaintiff in the mortgage action (James Fernando) alleged in his plaint that interest had not been paid to him for a period of five years. This presupposes that interest for the five years had been

paid. There is no evidence before the Court as to the actual dates on which the interest was paid. The learned Judge has decided the issue of prescription on the assumption that the interest had been paid within ten years of the date of the institution of this action (i.e., the action under section 11 of the Mortgage Ordinance). We think that is wrong ".

The case having gone back, the District Judge on the evidence led has decided the issue of prescription in favour of the plaintiff. At the date of this second trial James Fernando was dead. His widow Regina Fernando gave evidence. The appellant has made a point of the fact that the witnesses alleged that there was a book in which the payment of interest had been entered, and urged that the District Judge had erred in his findings because that book had not been produced.. The learned Judge has, in my opinion, considered all the facts. It is noteworthy that the defendant-appellant, who is the son-in-law of Paulu Fonseka, lived with his wife in the house of Paulu Fonseka, and there is evidence that the book was kept in the custody of the appellant's wife. It is also in evidence that at the sale under the mortgage decree the appellant bid for the land, thereby raising the price until it was finally knocked down to the plaintiff. The appellant admits that he knew the purchaser on deed D1, and actually told him to buy the land. It was from that man James that the appellant purchased the land on the deed D2. Therefore it does not seem strange that on the question of fact, the District Judge should have preferred the evidence led for the plaintiff, and regarded the evidence of the appellant with some suspicion. Be that as it may, it is quite impossible for a Court of Appeal to interfere with a finding of fact of the trial Judge.

It was next argued that even if Edward Fonseka, one of the mortgagors had paid interest or any other sums, such payments would only take the case out of prescription in regard to Edward's share and not as regards the other mortgagors. The respondent on the other hand submits that the appellant should not be allowed to raise a new point in appeal which was not raised in the lower Court. It is submitted that had the point been taken in the lower Court the plaintiff could have met it by evidence to show that the payment of interest was in regard to the whole mortgage, and not only in regard to the share of Edward. It is unnecessary to decide this point.

The case of *Appuhamy v. Gunasekera* [1] shows that the obligation on a mortgage bond is indivisible—see also *Ungúhamy v. Hendrick* [2]. Wessels in his Law of Contract (page 488, section 1489) says: " By our law, following in that respect the Roman Law and differing from the English law, in a case of doubt the contract *if divisible*, is presumed to be rather a simple joint obligation (an obligation *prorata*) than one *in solidum* ". Again at page 494 (section 1508) he says: " An obligation *in solidum* and an indivisible contract have this in common—that the performance of both obligations can be demanded in full by any of the creditors or from any of the debtors ". If as the cases decide the obligation under a mortgage is *indivisible*, then it follows that a payment of interest by one of the mortgagors would be a payment on behalf of all. The appellant

[1] *(1916) 19 N. L. R. 266, at p. 267.* [2] *(1930) 11 C. L. Rec. 54.*

not having raised the point at the trial, it would be manifestly unjust to allow him to urge that question now in appeal for the first time. The case of *Perera v. Perera* [1] cited by the appellant has no application to the facts of this case.

Finally, it was submitted that in any event the decree in this case should not contain a direction that the defendant-appellant should pay any money, and that the decree should only be a hypothecary decree against the land.

Under section 11 of the Mortgage Ordinance, the plaintiff is entitled to " a hypothecary charge " on the purchased land for a certain sum. In his prayer to the plaint the respondent asked for a declaration that he is entitled to a hypothecary charge on the premises for the sum of Rs. 1,071.50, and in default he asked that the land be held bound and executable, &c. What the law provides, and what the plaintiff prayed for is that if the appellant did not pay the sum claimed, the land was to be held liable to be sold in order to recover that sum. That is precisely what the decree in this case says. If the appellant does not choose to pay the money due, then the land is liable to be sold.

In my opinion, the judgment and decree appealed against are right, and I would dismiss the appeal with costs.

GUNASEKARA J.—I agree.

Appeal dismissed.