1945 *Present:* **Keuneman, Jayetileke and Rose JJ.**

SARAM, Appellant, *and* THIRUCHELVAM, Respondent.

73—D. C. Kegalla, 2,289.

Mortgage—Usufructuary mortgage in favour of A—Subsequent usufructuary mortgage in favour of B—Right of subsequent mortgage to discharge the previous mortgage.

L granted to the defendant a usufructuary mortgage bond in 1940 and subsequently in 1942 granted another usufructuary mortgage bond to the plaintiff. Plaintiff brought the amount of the earlier bond into court, not in the name of the debtor but in his own right as subsequent mortgagee, and asked for an order that the defendant should accept the said sum and give a discharge of the bond.

Held, that in the absence of proof that the prior mortgagee (the defendant) had taken steps to enforce his rights the plaintiff was not entitled to redeem the mortgage granted to the defendant.

CASE referred to a Bench of three Judges in terms of section 775 (1) of the Civil Procedure Code. The facts appear from the argument.

E. B. Wikremanayake (with him *H. Samaranayake*), for the plaintiff, appellant.—By deed of August 14, 1940 (D 2), one L granted a usufructuary mortgage to the defendant, and subsequently on October 8, 1942, gave a usufructuary mortgage (P 2) of the same property to the plaintiff. Plaintiff has tendered to the defendant Rs. 625 in full payment of the debt due under D 2 and asks in the present action that the bond D 2 be discharged. He is entitled in law to succeed. A secondary mortgagee can in his own right discharge a prior mortgage and the prior mortgagee is under a legal duty to accept payment and discharge the bond. This view was accepted in *Heema v. Punchibanda* [1] although in that case the person who offered payment was the agent of the debtor. The plaintiff in the present case can, although he does not have the authority of the debtor, oblige the defendant who is the creditor to receive the payment which he offers in the name of the debtor—Walter Pereira's *Laws of Ceylon (2nd ed.) pp. 765, 534;* Grotius *Jurisprudence 2. 48. 43.* (Lee's Translation p. 289) ; Wille's *Mortgage and Pledge in S. Africa (1920 ed.) pp. 269, 236.*

[JAYETILEKE J.—*Voet 20. 4. 35* which is referred to in Nathan's *Common Law of S. Africa, Vol. 2, Art. 1037A* would appear to be against you.] The words " in his name and on his behalf " in *Voet 20. 4. 35* do not mean that the person who offers payment should have the authority of the debtor. Pother's *Obligations 3. 1. 1 (463)* (Evans' Translation p. 330) is directly in point.

N. Nadarajah, K.C. (with him *H. W. Thambiah*), for the defendant, respondent.—The defendant cannot be compelled to accept payment from the plaintiff unless the payment is made at the instance of the debtor of unless the defendant has sought to enforce by action his rights under D 2

[1] *(1921) 23 N. L. R. 95.*

against the debtor—*Sanmugam Chetty et al. v. Khan et al.*[1]; Pothier's *Obligations* (Evans' Translation pp. 328-332, particularly at p. 331); *Rattaranhamy v. Appunaide et al.*[2]; Grotius *Jurisprudence* (Lee's Translation p. 489, ss. 7, 8 and 10); Burge's *Colonial Law, Vol. 3, p. 316 (1st ed.)*

E. B. Wikremanayake replied.

Cur. adv. vult.

March 5, 1945. KEUNEMAN J.—

This matter has been referred to this Bench of three Judges in terms of section 775 (1) of the Civil Procedure Code. One Liyanasekera granted to the defendant a usufructuary mortgage bond—D 2 of 1940—and subsequently granted another usufructuary mortgage bond—P 2 of 1942—to the plaintiff. The plaintiff brought the amount of the earlier bond into court and asked for an order that the defendant should accept the said sum and give a discharge of the bond. At the trial the following issues were framed:—

(1) As the plaintiff is only a mortgagee from the owner of the land, is he entitled to maintain this action and obtain a discharge of the bond in favour of the defendant?

(2) Did plaintiff tender the amount due on the bond in favour of defendant prior to action?

The second issue is immaterial as the money was brought into court with the plaint. The District Judge answered the first issue against the plaintiff, who appeals from that judgment.

The two Ceylon cases cited at the hearing do not cover this point; *Heema v. Punchibanda* [3] and *Rattaranhamy v. Appunaide* [4]. In each of these cases the plaintiff had authority from the mortgagor to pay off the prior mortgage, and was acting as the agent of the mortgagor. In the present case Counsel for the plaintiff admitted that he could not maintain the action as agent of the mortgagor, and that he did not come in in that capacity. Counsel claimed to maintain the action as mortgagee. The question we have to consider is whether a subsequent mortgagee has the right to compel a prior mortgagee to accept payment of the amount due to him and to give a discharge of his bond.

Voet in his Commentary on the Pandects deals with this matter. In 20. 4. 5 he refers to the rights of persons in possession of pledges to pay on action brought by another pledgee, and considers whether cession of action takes place under those circumstances. He admits that the matter is not quite clear, but argues as follows:—

"It cannot indeed be denied that a stranger who spontaneously (*sponte sua—i.e.*, without being impelled by his own interest) offers to pay another's debt to a creditor on behalf of a debtor has no legal right to have the obligation (*i.e.*, the mortgage) transferred to him (by the creditor whose claim he thus satisfies) . . . . but it is otherwise when one either in pursuance of a contract, as in the case of guaranty (*constitutum*) and suretyship, or under the apprehension of losing possession

[1] *(1906) 2 A. C. R. 10 at 12-13.*
[2] *(1928) 30 N. L. R. 97.*
[3] *23 N. L. R. 95.*
[4] *30 N. L. R. 97.*

of any kind (more especially when an action has been commenced by the creditor against him as the 'detentor' of a pledge) offers payment to a creditor who is neither unwilling nor reluctant (to receive it) but is taking every means of enforcing it, and in default of this is about to deprive him of the possession ". (*Berwick's Voet p. 384.*)

I have cited this passage in full because some reliance was placed upon it by Counsel for the appellant. But I do not think it covers the present case. Voet talks of a case " where an action has been commenced by the creditor ", or else the creditor " is taking every means of enforcing it, and in default of this is about to deprive him of the possession ". In the latter case Voet also postulates that the creditor " is neither unwilling nor reluctant to receive it ". In that case a person who is not a mere " stranger " may pay the debt and obtain cession of action.

See in this connection *Sanmugam Chetty v. Khan* [1]. " Voet's reasoning . . . . . shows that the condition of being sued by the creditor is essential to the right of a possessor to pay and claim cession ".

Voet deals with the tender by a posterior to an anterior hypothecary creditor in 20. 4. 34 & 35. The passages which are of importance are as follows:—

" 34. The second part of this title treats of those who succeed in the place of prior hypothecary creditors: as to which it should be known that posterior hypothecary creditors could tender to a prior one, even against his will, what is due to him, and thus succeed in the place of the prior mortgagee thus settled with, in respect both of principal and interest, although the debtor was not a consenting party to such succession ". (*Berwick's Voet p. 428.*)

In 35 Voet deals with the fact that these tenders had some " inequity ", and adds " They were inequitable in this, that the anterior creditor was deprived of the benefit of a mortgage obtained (it might be) through the greatest prudence and foresight as security for his loan and interest (*i.e.*, by way of a convenient and prudent investment of his money: *Tr.*); and so the more fortunate he had been in providing himself with a sufficient hypothec the more liable was he to be thrust out of it by a tender from a posterior creditor; his vigilance thus profiting not himself but others. They were necessary however because the second creditor could not efficaciously sell the pledge against the will of the prior mortgagee without first tendering to him payment of the debt. . . . But as by our usages the posterior creditor may rightly demand a solemn (*i.e.*, judicial) sale of the pledge against the will of the first, this right of tender fails thus far, that it cannot be forced on an anterior unwilling creditor so as to transfer the right of preference in the pledge: though, for the rest, it may be agreed between the first and second creditor. . . .
that the right to the debt, and equally the right of mortgage and of preference, should pass to him with whose money the hypothecary creditor has been paid . . . . " (*Derwick p. 429.*)

It is important to remember that in section 34 Voet is setting out the law as contained in Justinian's Code and Digest, and his references are

[1] *A. C. R. 10 at 13.*

to the Code and the Digest. In section 35 he sets out first the " inequity " in this, and also argues that at that time there was a necessity so to regard the law " because the second creditor could not efficaciously sell the pledge against the will of the prior mortgagee without first tendering to him payment of the debt ". This ground of " necessity " had ceased to exist under the Roman-Dutch law, for " by our usages " the posterior mortgagee could demand a judicial sale of the pledge against the will of the first. Consequently the right of tender could "not be forced on an anterior unwilling purchaser, so as to transfer the right of preference in the pledge ". But it was open to the second creditor " by convention " to obtain a transfer of the rights of the prior creditor according to the legal form.

The authority of Pother on Obligations has also been cited to us: Part III. C. 1 Art. 1,463—464 (Evans' Translation pp. 330,331). The following passages may be noted:—

" 463. It is not essential to the validity of the payment that it was made by the debtor or any person authorised by him; it may be made by any person without such authority or even in opposition to his orders, provided it is made in his name and in his discharge, and the property is effectually transferred; it is a valid payment, it induces the extinction of the obligation, and the debtor is discharged even against his will ". (The authority cited for this is Gaius.) " But if the payment was not made in the name of the real debtor it would not be valid."

Later Pother (in 464) points out that no difficulty arises in this connection where the creditor has agreed to receive the payment, but that the authorities " do not decide whether the creditor can or cannot be obliged to receive the payment ". He then considers certain texts and continues—" From these texts the rule may be inferred that any tender made to the creditor by any person whatsoever in the name of the debtor will be valid, and place the creditor *en demeure*, when the debtor has an interest in the payment, so as to put an end to any action which the creditor may have commenced, or to stop the accumulation of interest or to extinguish a right of hypothecation. But if the payment offered would not procure any " advantage to the debtor, and would have no other effect than to change his creditor, the offer ought not to be regarded ". Here the right is given to any person interested in the payment to offer to the prior mortgagee the amount of the debt and so to obtain an extinguishment of the obligation. But two points may be noted in this connection: (1) that the offer of payment must be made in the name of the debtor; (2) that the offer should not be regarded if it does not procure any advantage to the debtor, for instance if it has no other effect than to change his creditor.

Reference has also been made to Grotius—Bk 2, ch 48, 43—(Maasdorp 3rd Edn. p. 192). " A later mortgage may tender to one who has precedence payment of his claim, and thus step into his place by cession of action." It is sufficient to say that Grotius is not here dealing with the right of a posterior creditor to compel a prior creditor to receive payment.

I need only add in Schorer's Notes on this section there is a reference to Voet 20. 4. 35. (Maasdrop 3rd. Edn. p. 546).

There is also a passage in Burge (1838 Edn. Vol. III p. 816) based on the Digest. But Burge is not considering whether the creditor can be compelled to accept the payment. "It (payment) may be made by any person without any authority from and even in opposition to the orders of the debtor if it is made in the name of and in discharge of him".

It may be argued that the passages in Voet and in Pothier are not reconcilable. If this is so, I think we ought to rely on the authority of Voet rather than of Pothier. But it is possible that in 20. 4. 35 Voet was in fact dealing with the cession of action, as distinct from the extinction of the debt. and that he said no more than that a cession of action could not be forced upon an unwilling creditor. I think the two passages may be reconciled upon this view. But even accepting the law as laid down by Pothier as applicable to this case, it is clear that the tender of payment in this case was not made in the name of the debtor. The plaintiff has all along in the proceedings insisted on his right as subsequent mortgagee to pay off the debt. In his plaint (paragraph 6) he asserted that he acted as agent for the debtor but he withdrew from this position in the course of the proceedings, and he has nowhere asserted that he made the tender in the name of the debtor. I may add that if in fact the plaintiff claimed cession of action, his offer should be disregarded, for there would be no advantage to the debtor, in that the only result would be a change of creditor. But counsel for the plaintiff has stated that he does not claim cession of action, and the plaintiff has not asked for it in the prayer of his plaint.

In my opinion the various authorities establish the following propositions:—

(1) It is open to any person who has an interest in the payment to offer to the prior mortgagee the amount of the debt without the consent and even in opposition to the orders of the debtor. The prior mortgagee can be compelled to accept the offer. In the case of a valid offer there will be an end of any action brought by the prior mortgagee, and the accumulation of interest will be stopped and the right of hypothecation extinguished. But for the offer to be valid it must be made in the name of the debtor and the offer will not be regarded if there is no advantage to the debtor for example if all that results is a change of creditor. (*Vide Pothier 3.1.1. and Voet 20.4.34.*)

(2) The person who makes the offer and compels its acceptance will not obtain the cession of action nor the right to any preference in the pledge, but any person may by agreement with the prior mortgagee obtain a transfer of the latter's rights, provided the transfer is made according to the form permitted by law. (*Vide Voet 20.4.35.*)

(3) Where the prior mortgagee has brought action, or has taken steps to enforce his rights, the position is different. (*Vide Voet 20.4.5.*)

In the present case the prior mortgagee (the defendant) has not taken steps to enforce his rights. The plaintiff has made his offer to pay the

amount of the debt but he has not done so in the name of the debtor, but in his own right as subsequent mortgagee. His action must therefore fail.

The appeal is dismissed with costs.

JAYETILEKE J.—I agree.

ROSE J.—I agree.

Appeal dismissed.