

1916.

Present : De Sampayo J.APPUHAMY *v.* GUNASEKERA.

165—C. R. Negombo, 23,452.

Mortgage—Transfer of mortgaged property to several persons—Division of mortgaged property by transferees—Sale in execution of one transferee's portion.

A mortgage is indivisible, and a mortgagee has a right to realize the debt out of the whole or any part of the security without reference to the fact that the property has since been divided and passed into several hands. The result is the same if several things are mortgaged for the same debt and they subsequently come into the possession of several persons, such as heirs or alienees of the mortgagor. In all such cases the person who pays the debt when the creditor has brought the hypothecary action may have recourse against the others for contribution. The mortgage being indivisible, all those to whom the mortgaged property come are in the position of co-obligors.

THE facts are set out in the judgment.

Aserappa, for defendant, appellant.

J. S. Jayewardene, for plaintiff, respondent.

Cur. adv. vult.

June, 27, 1916. DE SAMPAYO J.—

This action for contribution has been brought under the following circumstances. One Louis Vedarala, being the owner of three lands, namely, (1) Ambalamkumbura, (2) the northern half of Delgahawatta, and (3) the southern half of Delgahawatta, mortgaged them to Cadirasen Chetty. He afterwards transferred the lands in equal shares to the plaintiff and the defendant, who are his sons, subject to the mortgage, and subsequently died. The plaintiff and the defendant then entered into a deed of partition, by which

the second land was allotted to the plaintiff and the third land to the defendant, the first land being left to be possessed in common. The Chetty brought an action against the plaintiff and the defendant to realize the amount due on the mortgage, the defendant, who had been appointed legal representative of the deceased mortgagor under section 642 of the Civil Procedure Code, being sued in that character as well as in his personal capacity. Under the decree obtained in that action the land held in common was first sold in execution, and there being still a balance due on the decree, the land allotted in severalty to the plaintiff was next seized and sold, and the decree was fully satisfied. The result of this was that a sum of Rs. 135.50 was paid by the sale of the plaintiff's part of the mortgaged property in excess of his half share of the mortgage debt, and the plaintiff has sued the defendant to recover this sum.

The principal ground on which the defendant resists the plaintiff's claim is that they were not debtors on the bond, but were only sued as persons in possession of the mortgaged property, and that, therefore, the law as to contribution among debtors does not apply. I do not think that this contention is sound. A mortgage is indivisible, and a mortgagee has a right to realize the debt out of the whole or any part of the security without reference to the fact that the property has since been divided and passed into several hands. The result is the same if several things are mortgaged for the same debt and they subsequently come into the possession of several persons, such as the heirs or alienees of the mortgagor. *Grotius 2, 48, 42; Voet 20, 4, 4.* In all such cases the person who pays the debt when the creditor has brought the hypothecary action may have recourse against the others for contribution. The mortgage being indivisible, all those to whom the mortgaged property come are in the position of co-obligors. *Maasdorp's Institutes, vol. III., p. 87,* shows that even a voluntary payment entitled the person who pays to contribution from his co-obligors. His position appears to me all the stronger if the debt is satisfied by the sale in execution of his part of the mortgaged property. Nor is it necessary that the whole debt should have been paid; even if he has paid a part only of the debt, he will still be entitled to indemnity, provided he has paid more than his rateable share. See *Gauder v. Gauder*, D. C. Colombo, No. 18,949.¹ These authorities dispose of the defendant's contention in this case, for it is abundantly clear that the liability to contribute exists, not only among the original debtors, but also among persons to whom the mortgaged property has passed by inheritance or transfer. The principle of this contribution is the same as in the case of sureties. As regards the mode of enforcing the obligation, *Voet 24, 4, 5* says that the person who pays whether he be an heir or an alienee of the mortgagor, is entitled to ask the creditor for a cession of action.

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which he may, of course, then enforce for his own benefit, but Voet adds that even without cession he may claim indemnity by the *actio negotiorum gestorum*. This action is founded on the implied obligation of a person to indemnify another who has been obliged to pay what he himself was bound to pay. The Roman-Dutch law appears to be in harmony with the English law on the subject. Where a person is compelled to pay another's debt, the English law implies a request on the latter's part to make the payment, and gives the former the action for money paid, which is in essence the *actio negotiorum gestorum* of the Roman and Roman-Dutch law. In *Edmunds v. Wallingford*¹ the law is thus stated: "Where a person's goods are lawfully seized for another's debt, the owner of the goods is entitled to redeem them and to be reimbursed by the debtor against the money paid to redeem them, and in the event of the goods being sold to satisfy the debt, the owner is entitled to recover the value of them from the debtor." This is equally applicable to one of several co-debtors from whom more than his proportionate share is recovered.

In my opinion the decision of the Commissioner is right, and the appeal is, therefore, dismissed with costs.

Appeal dismissed.

