

1942

Present : de Kretser J.

MOTHA v. FERNANDO.

42—C. R. Nuwara Eliya, 15,070.

Rates on mortgaged premises—Payment by mortgagee—Action to recover from mortgagor—Municipal Councils Ordinance (Cap. 193), s. 147.

Where a mortgagee pays rates due to a local authority, on behalf of a mortgage, in respect of the mortgaged premises, an implied promise by the mortgagor to pay the mortgagee cannot be inferred in the absence of evidence that such payment was made under compulsion.

Where a mortgagee pays such rates after a warrant has been issued, he is entitled to add the amount so paid to his claim on the mortgage bond.

Where a mortgagee omits to add the amount so paid when suing on the bond, he is barred by section 34 of the Civil Procedure Code from suing subsequently.

Velaiter v. Nallathamby (2 C. L. R. 120) distinguished.

¹ 12 C. L. W. 108.

² 5 C. W. R. 156.

A PPEAL from a judgment of the Commissioner of Requests, Nuwara Eliya.

E. F. N. Gratiaen (with him *S. Nadesan*), for the defendant, appellant.

F. A. Tisseverasinghe (with him *J. A. P. Cherubim*), for the respondent.

February 20, 1942. DE KRETZER J.—

The defendant was the owner of certain premises situated within the limits of the Urban Council of Nuwara Eliya and as such liable to pay rates. Plaintiff had a mortgage of the premises and put her bond in suit and eventually purchased the property. During the pendency of the mortgage the plaintiff, on an unspecified date, paid Rs. 81.66 as rates due on the premises. After she purchased the property she paid a further sum of Rs. 267.90 as rates. She then sued to recover the money so paid and restricted her claim to Rs. 300, in order to give the Court of Requests jurisdiction.

The learned Commissioner gave judgment for plaintiff and the defendant appeals.

There are two reasons why plaintiff's claim should not succeed, viz., (1) There is no evidence that plaintiff was compelled to pay on either occasions. This circumstance distinguishes it from the case of *Velaither v. Nallathamby*¹ cited by the trial Judge. (2) The plaintiff bought the property subject to the legal hypothec on it. The second payment was in discharge of this hypothec and she cannot seek to recover from the defendant what she was herself under a liability to pay.

Mr. Tisseverasinghe argued that plaintiff paid the first sum of money only after a warrant of distress had been issued. There is no evidence to this effect and the facts stated at the trial and in the judgment do not suggest that this was the case nor does the circumstance that plaintiff cited the Chairman of the Urban Council to produce the receipts for the payments made and did not require him to produce any warrant. Such an important piece of evidence would not have been left undisclosed. Besides, it is most unlikely that a warrant would issue for only a part of the arrears.

It is true that defendant was originally liable to pay and the plaintiff has discharged the liability, but before an implied promise to pay can be inferred equitably, there must be evidence of the element of compulsion. It is not even as if compulsion were inevitable for the rates may have been levied by distress of movable property of the defendant or even of a tenant. It may even have been waived in certain circumstances.

There is another objection. Section 147 of chapter 193, which applies, distinctly states that when a mortgagee pays after a warrant has been issued he is entitled to add the amount so paid to his claim on the mortgage bond. Note, it is only after a warrant has issued and danger is imminent, and the right is given only to a mortgagee. The provision is on the footing of legal rights and provides for a quicker way of recovery, viz., by adding this amount to the mortgage debt instead of suing by separate action.

¹ 2 C. L. R. 120.

When, therefore, the plaintiff paid the first sum of money, if she did pay it under compulsion in order to save her security, she should have added the amount paid to her mortgage debt, by amendment of her pleadings, if necessary. Had she done that she would probably not have been allowed to buy the property below the amount of her claim. That is the usual condition imposed. Besides, section 34 of the Civil Procedure Code required her to sue for the full amount of her claim: If she relinquished or omitted to sue for any part, as she has done in this very case, she cannot sue again for it.

Plaintiff fails. The appeal is allowed with costs. The decree entered will be set aside, and plaintiff's action dismissed with costs.

Appeal allowed.
