1947 *Present* : **Keuneman A.C.J. and Jayetileke J.**

DINGIRI APPU, Appellant, *and* PUNCHI APPUHAMY *et al.*, Respondents.

S. C. 260—D. C. Avissawella, 4,061.

Actio negotiorum gestorum—*Payment of debt by stranger*—Negotiorum gestor—*Cession of action—Contribution*—Pro rata *liability—Joint and several liability—Misjoinder of parties and causes of action.*

The defendant and two others who were co-owners of a land executed a usufructuary mortgage bond for 600 rupees. The two others sold their 1/3 share to the plaintiff who paid off the bond. Plaintiff sued the defendants for the sum of 400 rupees which he alleged was their share of the debt less a sum of 100 rupees paid to him by the fourth defendant.

Held, that plaintiff must in the circumstances be regarded as a *negotiorum gestor* and was entitled to recover the money paid on behalf of the defendant.

Held, further, that the liability of each defendant was a separate liability for a *pro rata* share and that there was a misjoinder of defendants.

APPEAL from a judgment of the District Judge, Avissawella.

H. W. Jayewardene, for plaintiff, appellant.

E. A. P. Wijeratne (with him *H. Wanigatunga*), for first and second defendants, respondents.

Cur. adv. vult.

July 25, 1947. KEUNEMAN A.C.J.—

The first, second, third, and fourth defendants together with William and Marthelis were the owners of the land referred to in this case. They executed a usufructuary mortgage bond for Rs. 600 on June 7, 1919, in favour of Podiappuhamy, who by P 1 of 1927 assigned his rights to M. J. Perera now dead, whose estate was administered by his son N. W. Perera as administrator. William and Marthelis by P 2 of 1931 and P 3 of 1943 transferred a 1/3 share of the land to the plaintiff, who has paid off the sum of Rs. 600 due on the mortgage bond. Plaintiff alleged that out of the Rs. 400 due to him, a sum of Rs. 100 was paid to him by the fourth defendant. Plaintiff sued the first, second, third, and fourth defendants for the balance sum of Rs. 300.

The evidence led for the plaintiff was accepted in its entirety and two matters of law were raised by the defendants, contained in the following issues :—

"3. Is there a misjoinder of parties and causes of action ?

4. Can the plaintiff not being a co-debtor and not having obtained a cession of action maintain this action ? ".

The facts underlying issue 4 were not in dispute, viz., that plaintiff was not a co-debtor with the defendants, and that he had not obtained a cession of the mortgage.

The District Judge decided both these issues against the plaintiff, and dismissed his action with costs. The appeal is from that judgment.

In respect of issue 4, the District Judge conceded to a co-debtor the right to claim a ratable contribution from his co-debtors, even though he had not obtained cession of action. But he held that the plaintiff not being a co-debtor could not maintain an action for contribution against the defendants, unless he obtained cession of action. The District Judge depended on a passage in Voet 20.4.5.

In this section Voet begins with the case of co-heirs :—

> "If one of a number of heirs has in consequence of the indivisible nature of the pledge held by him, alone satisfied in full a creditor suing by the hypothecary action, there is no doubt but that a right of action *pro rata,* against the other heirs, should be ceded to him just as cession of action against other co-sureties for the same debt is made to one of them who is prepared to pay the whole of it. Besides which, he can without cession obtain indemnity from the others by the '*actio negotiorum gestorum*' or '*familiae erciscundae*'." (Berwick's Voet p. 382).

Now, in this passage Voet is dealing with the rights of the co-heir, and has mentioned two remedies which he possesses, viz., (1) the right of demanding cession of action, and (2) without cession, the right of claiming contribution from the co-heirs by an action such as *actio negotiorum gestorum.*

In the rest of the section Voet deals with the right to demand cession of action, in certain special cases. In the course of this discussion appears the passage on which the District Judge relies, viz. :—

> "It cannot indeed be denied that a stranger who spontaneously (*sponte sua*) offers to pay another's debts to the 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)."

Voet however draws a distinction where the payment is made in pursuance of a contract, as in the cases of guaranty and suretyship, or under the apprehension of losing possession of any kind. (Berwick's Voet p. 384.)

In this passage Voet appears to be discussing the right of a "stranger" who has paid the debt to claim cession of action. I cannot read into the

passage a denial to the "stranger" of the right to bring an action such as the *actio negotiorum gestorum,* and I think the District Judge was in error in so thinking.

Wessels in the Law of Contract in South Africa sets out the position as follows :—

> "2142. Can a third party, who makes a payment in his own name but on behalf of the debtor, recover from the latter the amount so paid ?
>
> "According to Vinnius and Voet the third party can recover from the debtor what he has paid for his benefit if he acted either as an agent, or as a *negotiorum gestor,* but if he did not act in either of these capacities but paid the creditor against the debtor's wish, he must be held to have intended to donate the amount to the debtor."

In Nathan's Common Law of South Africa the position of a *negotiorum gestor* is dealt with (2nd Edition Vol. 2. p. 1151, para. 1080) :—

> "Voet more briefly defines *negotiorum gestor* as a person who transacts the business of a person who is absent or unaware of it without mandate to that effect. In other words it is an unauthorised agency."

He adds :—

> "The following are the requisites for a *negotiorum gestio* : (1) the act must be done for the benefit of the principal (*dominus negotiorum*) ; (2) it must be undertaken without his request ; (3) it must be gratuitous on the part of the *gestor* ; (4) the *gestor* must have performed the service *animo obligandi,* for if the act be done *animo donandi* with respect to expenses or the like, it becomes an act of benevolence or gift ; (5) the *gestor* must have reasonable cause, from the nature of the services rendered, to presume ratification on the part of the principal, for it is this presumption on the part of the *gestor* which is necessary to bind the principal. Under such circumstances the principal is bound by the acts of the *gestor.*"

In my opinion the conditions are satisfied according to which the plaintiff must be regarded as *negotiorum gestor* in respect of these defendants who have not authorised the payment of the debt. There is evidence in the case, that one defendant, the second defendant, was actually present at the time of the payment, and approved of the payment. As regards the second defendant the plaintiff can be regarded as having acted in the capacity of agent. (See Wessel's Vol. 1, p. 659) :—

> "2137. If the payment is not made by the third party *mero motu,* he must act either as the debtor's agent or as a *negotiorum gestor.* If he makes the payment with the knowledge of the debtor, he acts as his implied agent, if without his knowledge as a *negotiorum gestor* (Vinnius)."

In my opinion the District Judge has wrongly decided issue 4, and I hold that the plaintiff is entitled to claim contribution against the first, second, and third defendants. According to the plaint, the fourth defendant has already paid his share of Rs. 100, and the action against him is misconceived and must be dismissed.

Issue 3 has now to be considered. Voet says (20.4.6) "It is less open to doubt that one who pays the entire debt does not recover it *in solidum* from other possessors of other things mortgaged, but only *pro rata.*"

In *Silva v. Punchirala*[1] Shaw J. held that where one judgment debtor who was jointly and severally liable with others paid the whole claim, and subsequently sued his co-debtors for contribution in one action, his cause of action against each defendant was separate and that there was a misjoinder of parties and causes of action.

"Although the original liability to the Basnayake Nilame was a joint and several one, the liability of the defendants to repay the plaintiff what he has paid on their account is not.

He is only entitled to recover from such of his co-defendants in the previous suit the amount he has paid on behalf of each of them respectively. His cause of action against each of the defendants is for their proportion of the debt only".

In *Dias v. Silva*[2] Garvin S.P.J. deals with the case of one of a number of debtors who has paid without demanding cession of action. "Such a person is not debarred from claiming in his own right from each of his co-debtors a share of the debt for which each is liable. (See Sande's Cession of Action pp. 123, 124)".

I agree with these findings, and on principle I do not see why this rule should be restricted to the case of co-debtors, nor has any authority been cited to us to that effect. The passage in Voet 20.4.6 has I think by implication a wider significance. Also the Roman Dutch Law appears to have extended this to the claim of one surety who has paid the whole debt to recover from each of his co-sureties a proportionate share. See the comments in Sande's Cession of Action (translation by P. C. Anders, p. 129).

I hold that the plaintiff could enforce his claim only against each of the defendants separately for a *pro rata* share, and that there has been a misjoinder of parties and causes of action in this case.

It was, however, argued that the District Judge should not have dismissed the plaintiff's action, but that he should have permitted the plaintiff to elect to go against one of the defendants, and to strike out the others. *Kuthdoos v. Joonoos*[3] was referred to in this connection. I think the argument fails for two reasons. No application was made to the District Judge or to us, to strike out any parties wrongly joined, and to restrict the claim to a share *pro rata* against one particular defendant. I do not think an opportunity should now be given to the plaintiff to make such an election. Further it seems clear that an action against a single defendant should have been brought in the Court of Requests and not in the District Court, where the scale of fees is materially different.

The appeal is dismissed with costs. As I have already pointed out the action as against the fourth defendant could never have been maintained. As regards the first, second, and third defendants, the plaintiff will be at liberty to bring separate actions against each of them for the *pro rata* amounts for which they are liable.

Appeal dismissed.

[1] *(1921) 3 C. L. Rec. 67.* [2] *(1932) 34 N. L. R. 108.* [3] *(1939) 41 N. L. R. 251.*