1917.

Present : Wood Renton C.J. and De Sampayo J.

NAGAHAWATTE *v.* GUNASEKERA *et al.*

206—D. C. Matara, 7,440.

Mortgage of two lands—One land purchased by third party under an unsecured creditor's writ—Right of purchaser to ask for cession of mortgage on tendering sum due on bond.

Where two lands were mortgaged, and one of the lands was subsequently purchased by a third party under an unsecured creditor's writ,—

Held, that the purchaser was entitled to an assignment of the mortgage bond on his tendering the entire sum due on the bond to the mortgagee.

THE facts are set out in the judgment.

Bawa, K.C., for plaintiff, appellant.

Zoysa, for defendant, respondent.

Cur. adv. vult.

August 3, 1917. DE SAMPAYO J.—

This appeal raises a point of law on the following state of facts. One Francis Abeyewardene was the owner of two lands called Ettarawa and Walaskaduwewila, which he mortgaged to the defendants by bond dated June 22, 1915, to secure a sum of Rs. 2,000. Under an unsecured creditor's writ the land Ettarawa was sold by the Fiscal and purchased by the plaintiff, who obtained therefor the Fiscal's transfer dated July 16, 1916. The plaintiff brought the sum of Rs. 2,000 into Court, and prayed that the defendant be ordered to accept this sum in satisfaction of his claim, and to execute an assignment of the bond in favour of the plaintiff, and in the alternative that the lands be valued and the defendants be ordered to accept a proportionate sum in respect of Ettarawa and release the same from the mortgage. The defendants did not agree to this alternative proposal, and were willing to receive the full amount of the debt but denied the right of the plaintiff to ask for an assignment of the bond. The District Judge decided this

[1] *(1844) 6 Q. B. 443.*

question of law in favour of the defendants, and entered judgment ordering the defendants to draw the sum deposited and declaring the bond discharged.

The relief which the plaintiff claimed appears to be fair and equitable, and unless there is some distinct law to the contrary, it should, I think, be granted. *Voet 20, 4, 5* discusses the case of a mortgage of several things, and the right to cession of a third party who has subsequently acquired one of them. He says that some jurists are of opinion that this right should be allowed only to " just possessors " and not to " unjust possessors," but he adds that the better opinion is that generally cession of action against the principal debtor and the possessors of the other pledges should be made to any possessor who, when sued by the hypothecary action, offers the whole debt. Voet then expresses his own opinion thus: " Certainly if rights of action are, on the most certain principles of law, to be ceded to guarantors of another's debt and also to sureties, when these are willing to pay the debt in full, against the other persons who at the same time became co-sureties or guarantors, I see no reason why cession of action ought not to be also made to any person whatever who pays the whole debt, and thus also the right of action should be ceded to a purchaser by him whom he pays." (*Berwick's Trans. 383.*)

Of course, the law would not recognize any such right in a stranger. The plaintiff in this case is not a stranger but a purchaser, and a " just " one, and comes within the class of persons in whom even the qualification which some Roman-Dutch jurists appear to introduce exists. In *Sanmugam Chetty v. Khan*[1] Mr. Justice Wendt thought the reason in *Voet* showed that the condition of being used by the mortgage-creditor was essential to the right of a possessor to pay and claim cession, and he disallowed the relief claimed in the case of a possessor who had purchased pending the mortgage action, and who, therefore, was bound by the mortgage decree without being sued himself on the mortgage. Taking this as the correct reading of the passage in *Voet*, I think the plaintiff is entitled to the benefit of cession on paying the whole debt, inasmuch as the defendants have not yet sued on the mortgage in their favour, and would have to bring a hypothecary action against the plaintiff, if they wish to realize the land Ettarawa which the plaintiff has acquired by purchase in execution against the debtor. I think, therefore, that this appeal is entitled to succeed on the point raised.

I would modify the judgment of the District Court by deleting the order as to discharge of the bond, and by including in the decree an order that the defendants do execute an assignment of the bond in favour of the plaintiff. The defendants should also pay the costs of the action and of the appeal.

WOOD RENTON C.J.—I agree

Appeal allowed.

[1] *(1906) 2 A. C. R. 10.*