[FULL BENCH.] 1921.

Present : Bertram C.J. and Ennis and De Sampayo JJ.

PERIYANAYAGAMPILLAI *v.* SILVA *et al.*

350—D. C. Colombo, 54,431.

Payment—Debtor paying mortgagee before notice of assignment—Payment by purchaser from mortgagor to mortgagee in ignorance of assignment—Is payment a discharge of the debt ?—Is hypothecary action against purchaser only available under our law ?—Mortgagor must be sued along with the purchaser in one action—Money not recoverable without six months' notice—Action brought after three months' notice—Action withdrawn—Subsequent action after one year—Is action maintainable without fresh notice ?

A mortgagor who in ignorance of the assignment of the bond in good faith pays the assignor (mortgagee) is wholly discharged ; not so if notice has been given him by the assignee not to pay the assignor. The above principle does not apply to the case of payment by a purchaser from the mortgagor. The purchaser must take measures to satisfy himself that the person he pays is entitled to receive the money. Otherwise he pays at his peril. It is immaterial in such circumstances whether the assignee has or has not given notice to the original mortgagor.

The Roman-Dutch law allowed a personal action against the mortgagor for the debt, and a separate hypothecary action against any vendee of the mortgage property ; the hypothecary action was available even without the personal action being brought at all. Under the Civil Procedure Code the mortgagor must be joined as a defendant in one and the same action, and a decree for the debt and for the sale of the mortgaged property must be obtained in such action.

It follows that unless a decree for the debt is obtained against the mortgagor, no hypothecary decree can go against the purchaser.

By the terms of a mortgage bond, a mortgagor undertook to repay on receipt of six months' notice in writing. The plaintiff gave notice in September, 1918, and the action on the bond was instituted in November, 1918, before six months had elapsed.

The action was withdrawn, and a new notice was posted in March, 1919. But it did not reach the first defendant. A fresh action was instituted in December, 1919.

Held, by DE SAMPAYO J., that with the termination of the first action the notice ceased to have any operation, and that a fresh notice was necessary before the second action.

By BERTRAM C.J.—The previous notice would have been good for the purpose of this action if the first defendant had received it.

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THE facts appear from the judgment.

E. W. Jayawardena (with him *E. G. P. Jayatileke*), for appellant.

E. W. Perera, for first defendant, respondent.

Hayley, for second defendant, respondent.

Cur. adv. vult.

August 2, 1921. BERTRAM C.J.—

The question to be decided in this case is a simple one. What is the position of the purchaser of a mortgaged property, who pays the mortgage debt or part thereof to the original mortgagee without knowledge that the mortgage debt has been assigned ?

The law as to the position of a mortgagor so paying his mortgagee is well settled :—

"*Plane nostris moribus circa cessas actiones magis placuit, jus omne cedentis cessione extinctum esse, nec amplius cedentem, sed solum cessionarium, compellere posse debitorem invitum ad solutionem, licet necdum debitori denunciatio per cessionarium facta sit, ne solvat cedenti. Debitorem tamen cessionis ignarum bona fide solventem cedenti, in totum liberari. Non item, si ei per cessionarium jam fuerit denunciatum, ne solvat cedenti . . . . . Et sibi cessionarius imputare debeat, si ob neglectam aut dilatam denunciationem in damno sit.*"—*Voet. XVIII., 4, 15.*

" Certainly according to our customary law on the subject of the assignment of actions, the opinion has prevailed that the whole title of the assignor is extinguished by the assignment, and that the assignor can no longer enforce payment of the debt; but that only the assignee can do so, even although notice has not yet been given by the assignee to the debtor not to pay to the assignor; but, nevertheless, the debtor who is ignorant of the assignment in good faith pays the assignor is wholly discharged; not so if notice has been given him by the assignee not to pay the assignor . . . . The assignee has only himself to blame if through neglecting or delaying to give notice he incurs a loss."

But what is the position of the purchaser of mortgaged property who so pays the mortgage ? On this there is no authority. The case must, therefore, be settled on principle. The purchaser is in the position of having paid the wrong person. The right to receive the debt has wholly passed away from the mortgagee, and now resides exclusively in the assignee. No notice is necessary to complete his title. It is no doubt true that the debtor who pays his original creditor without notice of the assignment is discharged. This is on equitable grounds. Though notice to the mortgagor is not necessary to complete assignee's title, it is reasonable and right that he should notify to the debtor that he has acquired the debt,

and call upon him to pay the debt to himself. But no such obligation can be supposed to rest upon the assignee with respect to a purchaser of the mortgaged property. The assignee knows nothing of any such purchase. The purchaser must take measures to satisfy himself that the person he pays is entitled to receive the money. Otherwise he pays at his peril.

It seems to me immaterial in such circumstances whether the assignee has or has not given notice to the original mortgagor. There is no certitude that any such notice would be transmitted to the purchaser. The purchaser's position cannot be affected by the fact that a notice, which he never received, was in fact given to somebody else.

In ordinary circumstances no difficulty arises, for on paying off the mortgage the purchaser would naturally require delivery of the mortgage bond. The danger arises, where, as here, the payment is only a payment on account. In this case the purchaser (or rather the purchaser's husband) paid the original mortgagee, because he trusted in his own brother, who was the mortgagee. He must suffer for this natural, but misplaced, fraternal confidence. Had he taken the ordinary precaution of inspecting the register, he would have seen that the assignment was registered. He omitted to do so for the same reason, and must suffer accordingly.

The learned District Judge, without further explaining himself, says that in law and equity the purchaser must have the benefit of the payment. I do not here follow him. So far as law is concerned, the purchaser has paid the wrong person; as to equity, why should the plaintiff suffer for not having notified a person of whose existence he was unaware?

The learned Judge finds that the payment was made in good faith. There are certainly circumstances of suspicion in the case which suggest a contrary conclusion. In particular the receipt given for the payment by one brother to the other is so elaborate, and so peculiarly phrased, as to inspire the feeling that something indirect is afoot. But it is not possible to translate the suspicion so inspired into a logical proposition. One is conscious of a suspicion, but the difficulty is to define what one suspects. There is no doubt that the money was paid; there is no doubt that another property was mortgaged to raise it; I do not feel justified, therefore, in disturbing the finding of the learned Judge that the payment was *bona fide*.

So far as the legal aspect of the payment is concerned, this finding is immaterial. The purchaser having paid the wrong person, it does not matter whether the payment is *bona fide* or not. But it has a bearing on another aspect of the case, which must now be considered.

According to the terms of the mortgage bond, six months' notice in writing was to be given of the calling in of the mortgage debt. The

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learned Judge has held that the notice, though posted, did not reach the mortgagor, as it was sent to a wrong address. He has, therefore, dismissed the action against the mortgagor and given judgment against the purchaser and her husband for Rs. 250, the balance of the mortgage debt. This is clearly erroneous. A money judgment cannot be given against a person who is subject only to a hypothecary obligation. The judgment against such a person must be for the sale of the mortgaged property. There is, however, no cross appeal against this judgment, and Mr. Hayley (who appears for the purchaser) admits he is bound by it. He raises, however, on this appeal a point not raised in the Court below. He maintains that, even though we hold that the payment of Rs. 750 does not discharge his client, no order can be made against his client for the sale of the property, inasmuch as no judgment has been recovered for the mortgage debt. The Court by dismissing the action against the mortgagor has declared the mortgage debt not recoverable in this action ; it cannot, therefore, direct a sale of the mortgaged property for the discharge of this debt.

Mr. E. W. Jayawardene seeks to escape from this position by the help of *Ahamado Lebbe Markar v. Luis*,[1] and contends that he has alternative remedies, pecuniary against the mortgagor and hypothecary against the purchaser, and that he can pursue them independently. The case of *Supramaniam Chetty v. Weeresekera*[2] and the cases therein discussed, and the terms of section 640 of the Civil Procedure Code, are fatal to him. These remedies must now be pursued in the same action, and the hypothecary order is dependent upon the recovery of a money judgment for the mortgage debt.

It becomes therefore of the first importance to inquire whether the Judge's finding that the necessary notice never reached the mortgagor must be upheld. If it is upheld, then, though the plaintiff is successful on the main point of law, this action, already twice instituted, must be dismissed, and must be instituted a third time, when the necessary notice has been duly served. As my brother Ennis and I were not in accord on this question, we desired the assistance of our brother De Sampayo. We also incidentally obtained his assistance on the point last mentioned.

The facts are briefly these : The purchaser was the sister of the mortgagor, and was married to the brother of the mortgagee. All of them lived for many years together at Welisara, where the mortgagor was the village schoolmaster. About two years before action brought, he married, left the village, changed his occupation, and settled down near Polgahawela as the conductor of an estate. The mortgagee, as the learned Judge believes, unknown to the family, assigned his mortgage to the plaintiff, who is a Chetty, and when this Chetty determined to put his bond in suit, his proctor addressed

[1] *(1880) 3 S. C. C. 99.*

[2] *(1918) 20 N. L. R. 170.*

a notice calling for the money to the mortgagor, sending the letter by registered post to the address mentioned in the mortgage bond, namely, Welisara. The action was by mistake instituted before the notice had expired, and accordingly proved abortive. But in that action the mortgagor appeared, and denied having received the notice. Fresh notices were accordingly issued, and a new action commenced. These notices were not sent by registered post. The proctor for the plaintiff, apprehending that acceptance might be refused, obtained receipts from the letters and sent them by the ordinary post. In spite of the fact that the mortgagor had given his address as Polgahawela when he appeared in the previous action, his letter was directed to Welisara (or more correctly Ragama, which is the postal address of Welisara). The mortgagor denied that he had received this letter also ; the learned Judge has accepted his denial on the ground that the letter was in fact misdirected. He overlooked the fact that even, although this notice may not have reached the mortgagor, the previous notice would have been good for the purpose of this action had he received it. He makes no finding on this question. If we were considering the matter on these facts alone, no doubt it would be open to the Court to presume that either or both of these letters were delivered at the house of the purchaser and re-directed on to her brother's address and were duly received by him. The District Judge having made no finding with respect to the first letter, no doubt we are free to express our own opinion in the matter. Further, it is possible to draw a distinction between the two letters. The second letter was sent with two others addressed to the purchaser and her husband. They would have realized the nature of the letter addressed to the mortgagor, and if they were minded to give trouble would have suppressed it. With regard to the first letter, this was posted by itself. Plaintiff's proctor had not at that time heard of the purchase, and gave the notice to the purchaser subsequently. There would be no likelihood of any suppression of this first letter. But the real question is whether we are to accept the view of the learned District Judge that these people were acting *bona fide*. He saw and heard them, and he has so found. I do not feel justified in disturbing that conclusion. With regard to the second notice, the mortgagor denied that he received it, and the District Judge has believed him ; with regard to the first notice, he denied that he received that also. The learned Judge has not expressed an opinion on this point, but if it had occurred to him to do so, I cannot but believe that he would have accepted the denial in that case also. I am not prepared myself, therefore, to presume that either of these letters actually reached the mortgagor, but as my brothers take a contrary view, the appeal must be allowed, with costs, both here and below. The money decree against the second and third defendants should be converted into the ordinary hypothecary order.

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The undisputed facts in this case are as follows :—

The first defendant borrowed Rs. 1,000 from Richard Rupesinghe, and by way of security executed a usufructuary mortgage of certain lands on December 2, 1915. The bond was only registered on December 14, 1915. By the terms of the bond, the first defendant undertook to repay the Rs. 1,000 " on receipt of six months' notice in writing."

The first defendant was a schoolmaster, and lived in Welisara, near Ragama, with his sister, the second defendant, and her husband, the third defendant, who was a brother of Richard Rupesinghe, for seven or eight years.

The brothers Rupesinghe both worked in the same office in Colombo, and practically saw one another every day. Richard Rupesinghe, in addition to his office work, ran a boutique, in connection with which he got into debt with the plaintiff, to whom he assigned the mortgage on March 10, 1916. The assignment was duly registered on March 23, 1916. Richard Rupesinghe was in possession under his mortgage, and on assignment to the plaintiff a draft lease was drawn up, but not executed, under which Richard Rupesinghe was to pay rent to the plaintiff.

On April 22, 1917, the first defendant conveyed to his sister, the second defendant, the mortgaged lands subject to the mortgage. With regard to this transaction the third defendant said in evidence : " When the first defendant transferred the property to my wife I agreed to pay all his debts, including the debt due on the pro-note. The consideration for the transfer was Rs. 1,500. I paid first defendant in money by cheque Rs. 500." The promissory note referred to in the evidence was one for Rs. 130 by first defendant in favour of Richard Rupesinghe.

About this time the first defendant left Welisara and took up work as a conductor on an estate in Polgahawela.

On September 18, 1918, the proctor for the plaintiff posted a registered letter (P 1) to the first defendant, addressed to Ragama, demanding the payment of Rs. 1,000 within six months. Richard Rupesinghe died on October 6, 1918. In November, 1918, before the six months had expired, the plaintiff filed an action against the three defendants for the recovery of the Rs. 1,000 on the bond. On January 31, 1919, the first defendant, in support of an application for time to file answer in the case, swore an affidavit, in which he said he had received the summons in the case on January 20. Later, the action was withdrawn with leave to the plaintiff to bring a fresh action.

On March 21, 1919, the proctor for the plaintiff sent to each of the defendants another letter demanding payment within six months. These letters were addressed to Welisara, and it is admitted that the second and third defendants duly received the letters addressed to them.

The present action was instituted on December 6, 1919. The first defendant asserted that he had not received six months' notice to pay as required by the bond, and the second and third defendants asserted that they had paid Rs. 750 to Richard Rupesinghe on April 20, 1918.

The learned Judge found that the first defendant had not received the notice P 4, but omitted to make any mention of the earlier notice P 1. He also found that the second and third defendants had paid Rs. 750 to Richard Rupesinghe in good faith. He accordingly dismissed the plaintiff's action, and, holding that the plaintiff's hypothecary rights were not effected, he ordered payment by the second and third defendants of Rs. 250. The decree is a simple money decree.

The plaintiff appeals.

The learned Judge did not discuss the evidence in his judgment, and did not expressly disbelieve the plaintiff's evidence, he seems to have regarded both the plaintiff and the first and second defendants as innocent parties.

With regard to the question as to whether the first defendant received the six months' notice, there is a strong presumption that the letters P 1 and P 4 reached him. They were posted to the address given in the bond, where the first defendant had lived for seven or eight years, and where his sister and brother-in-law still lived, and they have not been returned through the dead letter office. The second and third defendants admit receiving their copies of P 4, which were posted to them the same day. Moreover, it appears that they forwarded the summons in the earlier action to the first defendant, so it would seem that they were in the habit of receiving communications for the first defendant and sending them on to him. The notice P 1 was sent in a registered letter. The first defendant in evidence did not expressly deny having received this notice, it is recorded that he said " I did not receive any notice of that action," which is not a denial that he received the six months' notice to pay. He denied the receipt of any letter, of which B 4 was a copy. In the circumstances, I am of opinion that he has not rebutted the presumption that he received the registered letter P 1. Further, I am of opinion that the evidence shows that very little reliance can be placed on the evidence of the first defendant and on the evidence of the third defendant, so that I am not prepared to accept the first defendant's word in rebuttal of the presumption that he had received the second notice P 4. The case is full of fraud, evasion, and subterfuge. The execution of the receipt 3 D 1 by Richard Rupesinghe was clearly fraudulent. The two brothers saw one another frequently as they worked in the same office. The third defendant says that his brother Richard drew up this document when the Rs. 750 was paid. The document recites by number and date a deed which at the time had passed into the possession

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of the plaintiff, and declares that Richard Rupesinghe has no right to the property. It purports to transfer all his rights and interests in the property to his sister, the second defendant, from that date, and adds that the deeds will be surrendered when the Rs. 250 balance due on the mortgage is paid. I find it difficult to believe that the third defendant accepted a document of this tenor in good faith and without suspicion. It next appears that the plaintiff instituted his first action on the bond in November, 1918, *i.e.*, while Richard Rupesinghe was still alive. The third defendant says that on receipt of the summons in the earlier case he went to the plaintiff and told him about this payment to Richard Rupesinghe, taking the receipt with him. Such conduct does not seem natural. The plaintiff's story, on the other hand, is much more natural. He says that the third defendant told him of the second defendant's purchase from the first defendant, and that he would pay the money. The plaintiff further says that when he threatened to sue, the two brothers came to him and asked him not to sue, but to give them time, which he did, and that, after he had issued the first summons, the third defendant came to him and said, he would pay and again asked him not to sue. The plaintiff further gave evidence that the third defendant and the first defendant later came and told him of Richard Rupesinghe's death and proposed a compromise. Of the two stories, the plaintiff's is to be preferred. The second defendant, if he discovered Richard's fraud for the first time on receipt of the summons, and while Richard was still alive, would be more likely to go to Richard first than to go to the plaintiff with a disclosure of Richard's fraudulent transaction. If the plaintiff's evidence is to be believed (it has not been expressly disbelieved by the learned Judge, and it is more consistent with natural conduct), then it follows that the second defendant's evidence is false, and the alleged payment of Rs. 750 as a *bona fide* transaction is open to grave suspicion, especially when we find other conduct by the third defendant open to suspicion. For instance, it appears that no search for incumbrances was made when first defendant conveyed to the second defendant, and that the third defendant did not consult a proctor in connection with the alleged transfer set up in the document 3 D 1. Further, I find a difficulty in accepting the third defendant's story that he purchased the land from the first defendant for Rs. 1,500, paying Rs. 500 cash and agreeing to pay off all the first defendant's debts, which, so far as the evidence goes, amounted to Rs. 1,130 (*i.e.*, Rs. 1,000 on the bond and Rs. 130 on a promissory note).

It would seem from the letter 3 D 2 of April 2, 1918, from Richard to the third defendant, that Richard was trying to obtain money, and the mortgage bond 2 D 3 shows that the third defendant raised Rs. 750 upon the mortgage of some of his lands on April 17. It is this money which the third defendant says was paid to Richard

on April 20. There is no explanation as to where the amount Rs. 130 due on the promissory note came from. It is quite possible that the third defendant came to his brother's assistance and lent him money, but that the sum was paid *bona fide* to redeem the mortgage to that extent is rebutted by the evidence of the plaintiff, which shows that the third defendant was aware of the assignment to the plaintiff, as he could not have failed to be had he taken the ordinary steps, both on the purchase from the first defendant and on the alleged transfer to him of Richard's rights in the land, The translation with Richard is coloured with fraud, and the third defendant has not, in my opinion, established his *bona fides*. He paid the wrong man in any event, and it was not a good payment to redeem the mortgage. The plaintiff's evidence shows that the first defendant knew of the assignment of the mortgage, and the defence that the debt was not due because of the absence of six months' notice is purely technical.

I find, therefore, that the evidence does not support the learned Judge's finding of fact, and I would accordingly set aside the decree and enter judgment for the plaintiff for the full sum claimed against the first defendant and the usual mortgage decree against the second and third defendants. The plaintiff to have costs, both on appeal and in the Court below. The plaintiff's right to claim mesne profits is reserved, as was done in the Court below. On the points of law in the case I agree with the Chief Justice.

DE SAMPAYO J.—

I agree with the view taken by my brother Ennis as to the facts, and I think the findings of the District Judge that the first defendant did not receive the notices sent by the plaintiff, and that the third defendant paid Rs. 750 to Richard Rupesinghe on account of the mortgage bond, are against the weight of evidence, and cannot be supported. This being so, the plaintiff is entitled to judgment as claimed. But it is desirable to express an opinion on one or two questions, for the consideration of which, as I understand the matter, the Full Bench was constituted.

Mr. E. W. Jayawardena, for the plaintiff, argued that the first notice (P 1) dated September 18, 1918, which was the preliminary to the institution of the first action, No. 51,896, should, at all events, be taken to have been served on the first defendant, and that on that footing the present action was well brought. I do not agree with this. Action No. 51,896 was instituted before the expiration of the six months mentioned in the notice, and had consequently to be withdrawn. I think that with the termination of that action the notice ceased to have any operation. The first defendant cannot, in the circumstances, be said to have any certain intimation that the plaintiff required him any longer to pay the debt in terms of

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that notice, and I think it was necessary to give him a fresh notice as the plaintiff in fact did.

There is no question that both the notices were served on the second defendant, who purchased the mortgaged property from the first defendant subject to the mortgage, and Mr. Jayawardene expressed himself as content to get a hypothecary decree against the second defendant alone. This would have been possible under the Roman-Dutch law, which allowed a personal action against the mortgagor for the debt and a separate hypothecary action against any vendee of the mortgaged property, the latter being available even without the former being brought at all. But the Roman-Dutch law on this point has undergone a change by virtue of section 640 of the Civil Procedure Code, and it has been held that after the Code came into operation the mortgagor must be rejoined as a defendant in one and the same action, and that a decree for the debt and for the sale of the mortgaged property must be obtained in such action, *Punchi Kira v. Sangu*[1] and *Suppramaniam Chetty v. Weeresekera*.[2] It appears to follow that unless a decree for the debt is obtained against the first defendant, no hypothecary decree can go against the second defendant.

The remaining question is whether, if a payment of Rs. 750 was made to the mortgagee, Richard Rupesinghe, by the second defendant, or by the second defendant or by the third defendant on her behalf, it was a good payment as against the plaintiff, who obtained an assignment of the mortgage bond previous to such payment. In the absence of any express authority to the contrary, I agree with the reasoning of the Chief Justice on this point, and would hold that it would have been a good payment, if it was in fact made without notice of the assignment.

In the view I take of the facts, however, I think that the plaintiff should have a decree against the first defendant for the full amount, and a hypothecary decree against the second defendant for the sale of the mortgaged property.

Set aside.

[1] *(1900) 4 N. L. R. 42.* *(1918) 20 N. L. R. 170.*