

Present : De Sampayo J.

1921.

HEEMA v. PUNCHIBABA.

199—C. R. Tangalla, 9,852.

Usufructuary mortgage in favour of A—Subsequent usufructuary primary mortgage in favour of B for a larger sum—Stipulation that subsequent mortgagee should pay first mortgagee—Right of second mortgagee to compel first mortgagee to accept sum and discharge bond.

N granted a usufructuary mortgage to defendant to secure a loan of Rs. 45. Subsequently he gave another primary usufructuary mortgage bond to plaintiff for Rs. 150. Plaintiff paid Rs. 105 and retained Rs. 45 on the stipulation that it should go for the payment of the bond in favour of defendant.

Held, that plaintiff was entitled to compel the defendant to receive the sum and discharge the bond.

THE facts appear from the judgment.

Keuneman, for defendant, appellant.

Soertsz, for plaintiff, respondent.

September 26, 1921. DE SAMPAYO J.—

This appeal involves a very small point. One Nandris de Silva Karunanayake became indebted to the defendant on a bond for Rs. 45, the payment of which was secured by a mortgage of a paddy field with the right of possession in lieu of interest. This was in February, 1920. In December, 1920, Nandris de Silva Karunanayake gave another bond to the plaintiff for the sum of Rs. 150 and mortgaged the same field as a first or primary mortgage with the right of possession in lieu of interest. He actually received on this bond a sum of Rs. 105, and it was stipulated that the balance Rs. 45 which the plaintiff retained should go for the payment of the mortgage in favour of the defendant. The plaintiff appears to have tendered the Rs. 45 to the defendant, and on his refusal to accept the money, he brought the money into Court and prayed that the defendant be compelled to accept the money and discharge the first bond.

It was contended in the Court below, and it is contended here, that the plaintiff as a subsequent mortgagee had no right to tender the money to the defendant and to maintain this action. No judicial authority was cited in support of this contention, but it was generally argued that there was no privity of contract between the plaintiff and the defendant, and the plaintiff could not, therefore,

1921.
 DE SAMPAYO
 J.
 Heema v.
 Punoñibaba

seek to compel the defendant to accept the money. I am unable to agree that the plaintiff was incapable of doing what he did. The learned Commissioner in his judgment relied on a passage in Walter Pereira's Institutes at page 765, where the question as to how far a payment made by a person other than the debtor himself is valid is discussed, and I think the circumstances of this case quite fit the requirements there stated as given by Pothier. Apart from the fact which is elicited from the plaintiff that the debtor Nandris de Silva Karunanayake had armed the plaintiff with a letter to be given to the defendant in connection with the payment of the money, it is quite clear from the bond given to the plaintiff itself that the plaintiff had Karunanayake's authority, and was, in fact, required by Karunanayake to pay the mortgage debt due to the defendant. Consequently it is a case in which the plaintiff acted not as a mere stranger, but as a party interested in the payment, and acting for the debtor. These are the conditions mentioned in the passage in question as necessary to make effective a payment made by a person other than the debtor.

I cannot understand why the defendant should object to receive the money. All that he could claim on the bond was the principal, and that was tendered by the plaintiff. It appears, however, that the defendant, with a view to keeping a hold on the field and justifying his continued retention of the field, began a few days after the tender of the money to sow the field as fast as possible, with the object apparently of raising the defence, which he did, that his mortgage could not be redeemed before he had reaped the crop which was then standing.

I think the decision of the Commissioner is right, and the appeal is dismissed, with costs.

Appeal dismissed.