

1942

Present: Howard C.J. and Soertsz J.

GUNARATNE v. PERERA et al.

244—D. C. Kalutara, 21,746.

Lis pendens—Mortgage action registered—Decree unregistered—Sale under partition decree—Competition between Fiscal's transfer and certificate of sale—Registration of Documents Ordinance (Cap. 101), s. 8, proviso 1—Partition Ordinance (Cap. 56), s. 12.

Where the plaint in a mortgage action has been registered the registration of the decree is unnecessary and the purchaser at a subsequent partition sale, which was held between the sale in execution of the mortgage decree and the Fiscal's transfer, cannot claim priority by virtue of the mortgagee until he has made them effective according to law.

Section 12 of the Partition Ordinance continues to protect the rights of the mortgagee until he has made them effective according to law.

A PPEAL from a judgment of the District Judge of Kalutara.

H. V. Perera, K.C. (with him *D. W. Fernando*), for the plaintiff, appellant.

N. Nadarajah (with him *A. C. Z. Wijeyeratne*), for the defendants, respondents.

Cur. adv. vult.

July 14, 1942. SOERTSZ J.—

A brief statement of the facts in this case is necessary in order to clarify the matter in controversy on this appeal. One Daniel Pieris mortgaged on mortgage bond P 4 of 1920 493/504 shares of a land called Kongahawatta *alias* Kosgahawatta and certain planter's shares and buildings. The mortgagee was one Adeline Wijeyegoonewardene. Eleven years later, by deed P 5, he conveyed these same interests to one Dona Madalena subject to the mortgage.

Adeline Wijeyegoonewardene put her bond in suit in D. C. Kalutara, 19,538, on March 8, 1934, and obtained a hypothecary decree dated June 11, 1935, against the mortgagor Daniel Pieris and the subsequent purchaser Dona Madalena. Nearly six months after this decree had been entered one Don Abraham Appuhamy instituted an action for the partition of this land. Dona Madalena was the first defendant in that case. Decree for sale was entered on August 2, 1937, and Dona Madalena was allotted 157/192 shares of the soil, and the same proportion of the buildings and plantations therein. (See P 2). While the partition suit was pending there was a sale in execution of the hypothecary decree, at which the present plaintiff became the purchaser and obtained Fiscal's transfer P 6 dated April 26, 1939.

Between the date of the sale on the hypothecary decree and the issue of the Fiscal's transfer, the sale in pursuance of the decree in the partition suit took place and one P. P. Don Pieris bought the entire land with everything thereon and obtained a certificate of sale dated November 19, 1937 (D I). He sold all the interests he had acquired on D I to the first defendant on D 2 of 1938. The second defendant is the first defendant's lessee by virtue of D 3 of 1939.

The plaintiff brought the present action against both landlord and tenant praying that he be declared entitled as against them to the entirety of the mortgaged interests that he had purchased on P 6 and asking for damages and ejectment. The defendants filed answer denying that any title passed to the plaintiff on P 6 and praying for a dismissal of the action.

The case went to trial on a number of issues which it is not necessary to recapitulate. The trial Judge dismissed the plaintiff's action with costs on the ground that the mortgage decree of June 11, 1935, not having been registered, the title conveyed to the 1st defendant by the registered certificate of sale gained priority over the title based on the mortgage decree.

The plaint in the mortgage action bears on the face of it an endorsement that it has been registered in a certain folio by the Registrar of Lands. If this endorsement is sufficient proof that this *lis* was registered then by virtue of section 8, proviso 1 of the Registration of Documents Ordinance, the registration of the decree of June 11, 1935, was unnecessary and the defendant can claim no priority by virtue of the Registration of their certificate of sale.

Their title would be subject to the mortgage by operation of section 12 of the Partition Ordinance which enacts that "nothing in this Ordinance contained shall affect the right of any mortgagee of the land which is the subject of the partition sale". The meaning and implication of the section have been considered with reference to all the earlier authorities in the case of *de Silva v. Rosinahamy*¹.

Counsel for the respondent, however, contended—

- (a) that there is no legal proof that the plaint in the mortgage action was registered, and that therefore his title gained priority by registration.
- (b) that assuming that the *lis* was registered the mortgage was swallowed up by the decree and that section 12 of the Partition Ordinance conferred no benefit on the plaintiff inasmuch as the partition or sale was made subject to the mortgage alone and not to the decree or consequent sale.

In regard to (a) the concluding part of the trial Judge's judgment makes it quite clear that this question of priority by registration was raised at the eleventh hour by the defendants and even then raised only by way of questioning the registration of the decree and not of the *lis*. It is clear that in raising the issue of registration in that way, the respondent's Counsel in the Court below was relying upon the *dictum* of Bertram C.J. that "the result is that, though the principle of *lis pendens* operates up to final execution its registration only protects the mortgagee up to decree. After decree, he must further protect himself by registering the decree". *Saravanamuttu v. Sollamuttu*². But that *dictum* was applicable to the law of registration as it stood at the date of that decision, 1924, when decrees were registrable documents regardless of whether the *lis* had been registered or not. The position is different now in view of the proviso of section 11 of the present Registration of Documents Ordinance (Cap. 101) which has been in force since January 1, 1928.

¹ 41 N. L. R. 56.

² 26 N. L. R. 385.

The defendant's Counsel in the Court below did not question the registration of the *lis* and it is too late now to raise the matter on appeal. Besides regulation 13 of the regulations for the Registration of Documents Ordinance (Cap. 101, Vol. 1, Sub. Legis.) provides for the registration of a *lis* to be in the form of the endorsement adopted in P 3 and a presumption arises under section 114 (d) that the endorsement is regular.

In regard to point (b) taken by the respondent's Counsel I am afraid it cannot be sustained at all. "Subject to the right of any mortgagee" can only mean subject to his rights till he had made them effective according to law.

For these reasons I am of opinion that the appeal must be allowed and judgment entered for the plaintiff for 157/192 of the soil and of the plantations and of the buildings. Those were the interests allotted to Dona Madalena, the successor in title of the mortgagor, and the rights of the successor in title to the mortgagee must be limited to that extent.

The plaintiff is entitled to the damages agreed upon, that is to say, to Rs. 7.50 a month from September 14, 1929, till he is placed in possession of the shares to which he has been declared entitled; he is also entitled to a decree directing that he be placed in possession of those interests, and to an order for costs here and below.

HOWARD J.—I agree.

Appeal allowed.

