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SAMI APPU v. DISANAYAKE.

C. R: Matara, 1,553.

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*Purchase of land—Mortgage duly registered—Decree thereon—Sale in execution.  
—Purchase under such decree—Subsequent purchase under original  
mortgagor, subject to his mortgage—Prior registration of such deed of  
purchase—Validity of title.*

B mortgaged his interest in a land to A by deed dated May, 1896, and registered it in June, 1896. A obtained a mortgage decree on 19th March, 1900, and at the Fiscal's sale held on 9th November, 1900, he became purchaser of B's share of the land, which was conveyed to him on 22nd April, 1901. The deed was registered on 18th May, 1901. C obtained a money decree against B and sold in execution on 22nd February, 1900, B's land subject to A's mortgage. At the Fiscal's sale held on 22nd February, 1900, D purchased it. His deed, dated 26th September, 1900, was registered on 1st October, 1900.

*Held*, that D's purchase, having been made pending the mortgage suit of A, was null and void as against the decree in that suit, and could obtain no force or validity as against it by prior registration.

**I**N this partition suit, before the decree was entered the fifth, sixth, seventh, and eighth defendants intervened. According to the original defendants, the land sought to be partitioned was owned by three families in equal shares. The sixth, seventh,

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and eighth added defendants came in saying that the owners of the land were only one of the three families mentioned by the original defendants. The District Judge, Mr. W. E. Thorpe, found in favour of the contention of the original defendants, as regards this issue and the second issue whether one Balahamy, the mother of the plaintiff, and the fourth defendant was or was not a daughter of Wattu and sister of Dingihami. The third issue was between the third defendant and the fifth added defendant. Both claimed one Balappu's share. The third defendant alleged it was one-twelfth, and the fifth defendant alleged it to be much more. Upon this issue the District Judge gave judgment as follows:—

“ The important point is, Who is entitled to this share? What the share is I will go into later on. The point is an instance of the evergreen controversy as to whether the purchaser, under a writ issued under a mortgage decree obtained on a duly registered mortgage bond, has a prior title over a subsequent purchaser from or against the original mortgagor, whose conveyance has been registered before that of the purchaser under the mortgage decree.

“ I think it is impossible to reconcile the decisions on the point, but in spite of that I see no difficulty in deciding such cases in accordance with common sense and justice.

“ In this case the fifth defendant was the mortgagee, and in course of time put his bond in suit. A proper mortgage decree was entered, and in due process of law a Fiscal's conveyance was obtained and registered. But meanwhile the third defendant had bought this same land under a writ issued in pursuance of a simple money decree entered against the mortgagor, and obtained a Fiscal's conveyance and registered it before the conveyance relied upon by fifth defendant. There was no unreasonable delay on the part of the fifth defendant after he had once got his judgment in doing all that the law required him to do. The Registration Ordinance gives priority of course to the document first registered. But, to get over the manifest injustice this rule inflexibly applied would frequently work and the door it would open to fraud, the doctrine has been evolved that the Fiscal's conveyance finally obtained under the registered mortgage relates back to the date of the registered mortgage. The matter is not complicated by any consideration of whether the decree is a mortgage decree or not, as it is admitted that the fifth defendant's decree is a proper mortgage decree.

“ On behalf of the third defendant, it is contended that there is no such rule at all—anyhow that the mortgage decree was not registered.

“ As to the first contention, I think that the doctrine does exist, that it must exist, and that it is a most salutary rule.

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“ Mr. Justice Withers, in a judgment often referred to, has laid down that the mortgagee has no title to the land, but has the privilege of selling the land under his decree. If the mortgagee can sell, it is evident that the purchaser must be able to hold the land against subsequent purchasers from or against the mortgagor, otherwise the whole system of mortgages would be an utter farce. I do not say that cases may not arise when the rule *Diligentibus non dormientibus, &c.*, would apply. If, for instance, the mortgage decree-holder delayed greatly to make use of it and get the Fiscal's transfer, it would apply; but, as remarked before, there has been nothing of the sort here.

“ Now, as to the second contention that the mortgage decree was not registered: if the mortgage had never been put in suit, there would be no question that the third defendant's purchase would have been subject to the mortgage in favour of the fifth defendant. What then? Does the fifth defendant, by putting it in suit, lose the benefit of the registered mortgage? This sounds ridiculous, but this is what the third defendant contends. I refuse to believe that the law can be so absurd.

“ I allot Balappu's share, therefore, to fifth defendant ”.

The District Judge dismissed the seventh defendant's claim, and allowed the eighth defendant one-thirty-sixth share.

The third defendant appealed. His appeal came on for hearing on the 20th June, 1902.

*Van Langenberg*, for third defendant, appellant.

*Sampayo*, for fifth defendant, respondent.

The arguments in appeal and authorities cited appear in the judgment of Wendt, J.

*Cur. adv. vult.*

3rd July, 1902. WENDT, J.—

This is a partition action, and the question raised on the appeal is an instance of what the Commissioner aptly styles “ the ever-green controversy ” between the purchaser of land in execution under a duly registered mortgage and another purchaser who bought subsequently to the mortgage and subject to it, but registered his conveyance before the registration of the conveyance in favour of the purchaser under the mortgage. The question is here raised in a contest between the third and fifth defendants as to which of them is entitled to the interest which one Balappu admittedly had in the land which is the subject of partition.

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Balappu mortgaged his interest to the fifth defendant by a deed dated May, 1896, registered in June, 1896. On 21st February, 1900, fifth defendant commenced an action against Balappu to realize his mortgage, and on the 19th March, 1900, obtained a mortgage decree, in execution of which the Fiscal, on 9th November, 1900, sold the land to the fifth defendant as the highest bidder, and duly conveyed the land to him on 22nd April, 1901. This conveyance was registered on 18th May, 1901.

The third defendant's title is derived as follows.—On 11th November, 1899, a money decree was passed against Balappu at the instance of an unsecured creditor, in execution of which, on 22nd February, 1900, the Fiscal sold the land to the third defendant, who obtained his conveyance on 26th September, 1900, and registered it on 1st October following.

Under these circumstances, it was argued, for the third defendant, that the competition was between his conveyance and the mortgage decree, in which the fifth defendant's mortgage had been merged, and that that decree not being registered was void as against his subsequent conveyance which was duly registered, and the case of the *Government Agent v. Hendrickhamy* (3 C. L. R. 86) was relied upon. I think, however, that in view of the decisions of this Court in D. C., Galle, 5,041 (1 *Browne*, Appendix B, p. xi.), and D. C., Batticaloa, 2,072 (*Civil Minutes*, 16th August, 1901), that case is no longer an authority on this point. Mr. Van Langenberg next relied upon the case of *Madar Lebbe v. Nagamma* (2 *Browne*, 322, 6 N. L. R. 21) decided by Chief Justice Bonser and myself. That was an action brought by the holder of a decree passed in an action upon a duly registered mortgage, to have the land declared liable to sale under that decree, in spite of the claim of a person who had bought the mortgaged land subsequently to the mortgage, in execution of a money decree against the mortgagor. The claimant's conveyance was dated subsequent to the decree, but was registered in September, 1899, whereas the decree was not registered until the following month of October. This Court held that, from the frame and scope of the action plaintiff had to rely solely on his decree, to which defendant was not a party, and that decree being void for want of registration, and defendant being admittedly the owner of the land, though subject to the mortgage, it could not possibly be considered that the defendant's resistance to the sale of his land under that decree was wrongful.

The present case has reached a later stage. The mortgage decree has been executed, and the purchaser has obtained a conveyance, which he has duly registered, subsequently, it is true, to third defendant's conveyance, but that necessarily followed from the

respective dates of the two conveyances. The fifth defendant's action on his mortgage was rightly constituted, because the third defendant did not acquire an interest in the land until the day after the action was commenced, and he was not, therefore, entitled to be made a party to that action. He is bound by the decree in it, although he was not a party to that decree. It is a well-established principle that the alienation, *pendente lite*, of the interest of one of the parties to an action will not be allowed to prejudice the rights of the other party. The action, in fact, is to proceed, and the decree in it to operate, as if the interest alienated was still the property of the original owner. This principle is enunciated in the well-known English case of *Bellamy v. Sabine* (26 L. J. Chancery, 707; 1 de G. & J. 578). Lord Cranworth's dicta in that case are quoted by Mr. Justice Clarence in the case of *De Leney v. Peries* (8 S. C. C. 94), and I need not repeat them here.

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Applying that principle to the present case, the third defendant's purchase, having been made pending the fifth defendant's mortgage action, is null and void as against the decree in that action, and could obtain no force or validity as against it by prior registration.

It may be that the plaintiff in the case of *Madar Lebba v. Nagamma* might, upon the facts of that case, have relied upon this ground to defeat the defendant's claim, but the principle of *Bellamy v. Sabine* was not put forward at the argument, as I have satisfied myself by consulting my notes of the proceedings.

The appeal is dismissed.

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