Present: The Hon. Mr. A. G. Lascelles, Acting Chief Justice, and Mr. Justice Middleton.

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PEIRIS *v.* WEERASINGHE *et al.*

D. C., Colombo, 22,364.

Mortgagee—Puisne incumbrancers and grantees, &c., when bound—Civil Procedure Code, ss. 643 and 644.

Section 644 of the Civil Procedure Code enacts as follows:—

"Any person so noticed may on the day fixed in the summons for the defendant to appear and answer apply under the provisions of section 18 to be joined as a defendant in the action. Every person so noticed not so applying to be joined as defendant, and every such grantee, mortgagee, lessee, or other incumbrancer whose deed shall not have been registered, or who shall not have furnished such address as aforesaid, shall be bound by the judgment in the action in all respects as fully as though he had been a party thereto. Provided always that the mortgage in respect of which such judgment shall be given shall have itself been duly registered, and such mortgagee or person shall have furnished an address to the registrar of lands and to every grantee, mortgagee, lessee, or other incumbrancer from whom he has received such notification as in the last preceding section mentioned. Provided, also, that the provisions of chapter XII. of this Ordinance with regard to the cure of default in appearance or pleading shall, so far as they can be made applicable thereto, apply to any case of intervention under this section."

Held, that compliance with the requirements of the first proviso to the above section is a condition precedent to a mortgagee claiming the benefit of the other provisions of the said section.

Goonewardene v. De Silva (1) disapproved.

Santiago v. Fernando (2) followed.

THE facts sufficiently appear in the following judgment of the Additional District Judge (F. R. Dias, Esq.):—

"In July, 1905, by the deed No. 998 (marked P 1), the second defendant sold to the plaintiff a land called Delgahawatta, but the first defendant is in possession, claiming title to an undivided half by purchase from one O. Don Abraham, under the deed No. 4,533 of November, 1904 (marked D 3). The plaintiff therefore brings this action to have the first defendant ejected, and he also calls upon his own vendor (second defendant) to warrant and defend his title, or to repay the Rs. 600 he paid for the land. The facts material to the case are these. The land originally belonged to one Dona Selestina, the wife of M. Don Cornelis. By a mortgage bond executed by them in

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1892 they hypothecated it to the second defendant as security for some money lent. The bond was registered in August, 1901, put in suit in October, 1901, and under decree entered in that action the Fiscal sold the land to the creditor himself (the second defendant), in whose favour he executed the transfer No. 7,954 in November, 1903 (marked P 2), duly registered on the 10th November, 1904.

"In 1894 (that is to say two years after the mortgage to the second defendant) the owner Dona Selestina and her husband by deed No. 14,597 (marked D 2) transferred the entire land to an adopted niece named Dona Eugenahamy, who some months later was married to the first defendant's vendor Don Abraham. This young woman died intestate in 1897, leaving her husband and a minor son, and it is the husband's half share that the first defendant purported to buy under D 3. In these circumstances the question that has arisen is whether the plaintiff's title to the whole land derived through the Fiscal's transfer P 2, or the first defendant's title derived through the private alienation of the original owners by D 2, is to prevail. This latter deed was not registered till October, 1901, which was after the registration of the mortgage bond in favour of the second defendant.

"It was urged on behalf of the first defendant that, in spite of the prior registration of the second defendant's bond, he (the first defendant) and those through whom he claims are not bound by the Fiscal's sale which resulted from the second defendant's mortgage action, inasmuch as at the date of that action the legal title to the land was not in the mortgagors, but in Dona Eugenahamy and her husband, and they were the parties to the action.

"Under the Common Law no doubt they were necessary parties in a hypothecary action, but these actions are now controlled by the express provisions of Chapter 46 of the Civil Procedure Code, which have been intended to simplify the process by which a mortgagee can reach the property hypothecated to him. It has been held by a Divisional bench of the Supreme Court in *Gunawardene v. Silva* (1) that the only necessary party to an hypothecary action is the mortgagor, and if he is dead, his legal representative; and that it is not necessary to take any notice of persons who have become entitled to the property subsequent to the date of the mortgage, unless those persons have complied with the povisions of section 643 of the Code by notifying to the mortgagee the interest which they have acquired in the property, and by leaving an address with the registrar where notices may be served on them. This decision, though subsequently questioned by Justice Lawrie in *Santiago v. Fernando*

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(1), has not been over-ruled, and is binding on me. Nor do I see how it is calculated to work any mischief on any subsequent purchasers, so long as they carry out the very wholesome and simple procedure prescribed for them in section 643.

"In the present case, as I find from the evidence that has been adduced, the parties in possession when the mortgagee put his bond in suit were his mortgagors. He knew nothing about the transfer to Dona Eugenahamy; and how was he to know of it, as she had lived and died without registering her deed? Nor is it pretended that any notice of that transfer was given to the mortgagee. Even if we regard the second defendant's action as a hypothecary action under the Roman-Dutch Law, it seems to me that steps taken by the mortgagor were sufficient to bind the land itself. His mortgagors were in actual occupation as owners, and the summons in the case was served on them there. What more could he have done than make them the only defendants in his case?

"I enter judgment for plaintiff as against the first defendant in terms of the 1st, 2nd, 4th, and 5th paragraphs in the prayer of the plaint, with damages at Rs. 5 a month and costs. The second defendant will also recover his costs from the first defendant".

The first defendant appealed.

Sampayo, K.C. (with him *Peiris*), for the appellant.

Weinman, for the plaintiff, respondent.

Senathi Rajah, for the second defendant.

Cur. adv. vult.

23rd October, 1906. LASCELLES A.C.J.—

This is an appeal by the first defendant from a judgment of the District Judge of Colombo declaring the plaintiff to be entitled to the whole of a garden called Delgahawatta and ejecting the first defendant therefrom.

The land originally belonged to one Dona Celestina, who in 1892 mortgaged it to the second defendant, the mortgage being registered on 26th August, 1901. The bond was put in suit in October, 1901, and sold by the Fiscal to the mortgagee, the second defendant, by transfer P 2 registered on 10th November, 1904.

The second defendant in July, 1905, by deed P. 1, sold to the plaintiff.

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The first defendant, who is in possession, claims an undivided half share. His title is as follows.

In 1894 Dona Celestina and her husband, by deed D 2, transferred the whole land to their adopted niece Eugenahamy. Eugenahamy died in 1897 leaving a husband, Don Abraham, who by deed D 3 of November, 1904, sold an undivided half share to the first defendant.

The first defendant contends that he is not bound by the mortgage decree and consequent Fiscal's sale, inasmuch as Eugenahamy and her husband, in whom the legal title was vested at the date of the mortgage action, were not parties to the action.

In *Goonewardena v. de Silva* (2) it was decided in a similar case that it was not necessary for the mortgagee, in seeking to realize his security, to take any notice of persons who have become entitled to the property subsequent to the date of the mortgage, unless those persons have complied with the provisions of section 643 of the Civil Procedure Code by notifying to the mortgagee the interest which they have acquired in the hypothecated property.

On the strength of this decision the District Judge has given judgment for the plaintiff.

In the subsequent case of *Santiago v. Fernando* (1) it was pointed out that the statement of law in *Goonewardena v. de Silva* (2) was incomplete, and that it was expressly provided by section 644 that in order to enable a mortgagee to gain the advantages accorded by that section he must furnish his address to the Registrar of Lands so as to enable subsequent grantees to forward the necessary notification to the mortgagee.

It is impossible to doubt that this latter decision is the more correct exposition of sections 643 and 644.

Involved and badly arranged as these sections are, it is plain that compliance with the conditions of the first proviso to section 644 is intended to be a condition precedent to the mortgagee coming within the provisions of section 644. It is common ground that the mortgagee did not furnish his address to the Registrar of Lands.

It is thus clear that the first defendant is not bound by the mortgage decree, and that the action against him fails.

In my opinion we are bound, in a matter of this nature, to follow strictly the procedure laid down by the Code. Nothing but confusion and uncertainty will arise if we allow ourselves to be diverted from the course prescribed by the Code by what appear to be equitable considerations.

The judgment of the Court below must be set aside and the action dismissed with costs.

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I agree that *Santiago v. Fernando* expresses the more correct view of the law under sections 643 and 644, and that it is the duty, as Lawrie, J. says, of the mortgagee to furnish his address to the Registrar of Lands in order to give subsequent mortgagees, grantees, &c., the opportunity of giving him notice that they have registered their deeds in order that he may avail himself of the advantage which the sections give him.

I think that the appeal should be allowed and the judgment of the District Court set aside and the action dismissed with costs.