

Oct. 20, 1910

Present : Hutchinson C.J. and Wood Renton J.

SEBASTIAN PERERA v. JUSEY PERERA.

197, D. C., Negombo, 7,956.

Action by secondary mortgagee instituted after primary mortgagee had instituted action on his bond—Fiscal's sale under secondary mortgagee's decree pending primary mortgagee's action—Sale void as against primary mortgagee—Civil Procedure Code, ss. 643 and 644.

After the primary mortgagee had instituted an action on his bond, the secondary mortgagee instituted an action on his bond and obtained a decree and bought the land himself, and got his Fiscal's transfer registered before the Fiscal's sale and transfer under the primary mortgagee's decree. Both the mortgage bonds were duly registered in their order, but neither mortgagee had left an address as provided by sections 643 and 644 of the Civil Procedure Code.

Held, that the transfer to the secondary mortgagee was void as against the primary mortgagee, by reason of its having been made during the pendency of the primary mortgagee's action.

IN this case the plaintiff-appellant and the defendant-respondent both set up title to the land in suit through the same original owner. The plaintiff claims on a mortgage dated November 11, 1907, and registered on January 7, 1908. The property was sold in execution, and bought by the appellant on November 27, 1909. The Fiscal's transfers in his favour are dated January 11, 1910. They were registered on January 24. The respondent's claim vests on two mortgages, dated respectively January 4, 1899, registered on October 27, following, and January 17, 1905, registered on January 27, 1905. The defendant put both bonds in suit on June 21, 1909, in D. C., Negombo, 7,677, obtained decree on July 23, had the mortgaged lands sold in execution by the Fiscal, purchased them himself and obtained Fiscal's transfers dated February 4, 1910. It was admitted at the trial that neither mortgagee had left an address with the Registrar of Lands as required by sections 643 and 644 of the Code of Civil Procedure, and also that the secondary mortgagee was neither made a party to, nor given notice of, the primary mortgagee's action. On these facts the learned District Judge held (1) that as the secondary mortgagee had given no address to the Registrar of Lands, the primary mortgagee was not bound to make him a party to, or give him notice of, his action; and (2), following the decision of Wendt J. in *Sami Appu v. Disanayake*,¹ that as the plaintiff's case was instituted subsequently to, and during the pendency of, the defendant's, the plaintiff was bound by the decree

¹ (1902) 6 N. L. R. 263.

in that action, and could acquire no title by an alienation *pendente lite*. On these findings the District Judge dismissed the plaintiff's action with costs.

Oct. 20, 1910

Sebastian
Perera v.
Jusey Perera

The plaintiff appealed.

H. A. Jayewardene (with him *Cooray*), for the plaintiff, appellant.—The plaintiff, who is a secondary mortgagee, is entitled to notice of the primary mortgagee's action under section 643 of the Civil Procedure Code. As no notice was given the plaintiff is not bound by the defendant's decree. See *Peris v. Weerasinghe*,¹ *Weerappa Chetty v. Arunachalam Chetty*,² *Ratnaweera Liyana Arachchi v. Mohamadu Ibrahim*,³ *Meyappa Chetty v. Rawter*,⁴ *Lebbe v. Siddik*,⁵ *The Oriental Bank Corporation v. Boustead*.⁶

The fact that the Fiscal's sale under plaintiff's writ took place during the pendency of the defendant's action does not invalidate the sale. The doctrine of *lis pendens* would invalidate only voluntary alienations, and not compulsory alienations. See *Perera v. Perera*.⁷

Van Langenberg, for the defendant, respondent.—If the secondary mortgagee had sued on his bond and sold the land and the primary mortgagee had not brought an action on his bond, the purchaser under the secondary mortgagee's writ would get a title subject to the primary mortgage. The fact that the primary mortgagee brought an action to enforce his mortgage right should not prejudice him.

Neither the primary nor the secondary mortgagee had given his address to the Registrar as required by section 643. Section 644 does not therefore apply. It has never been usual to make the secondary mortgagee a party to an action by a primary mortgagee on his bond. The cases cited refer to subsequent purchasers or lessees. *Sami Appu v. Disanayake*⁸ is an authority direct in point. Counsel also referred to *Sanmugam Chetty v. Khan*.⁹

H. A. Jayewardene in reply.—Section 643 has put a subsequent purchaser and mortgagee on the same footing, and requires that notice of action should be given to both. In this case the primary mortgagee cannot complain that the secondary mortgagee has not left an address at the Registrar's office, as he has not himself left an address with the Registrar.

Cur. adv. vult.

October 20, 1910. HUTCHINSON C.J.—

The defendant held two mortgages on the land which is the subject of this action, one dated and registered in 1899, the other dated and registered in 1905. M. P. W. Juan Peiris held a secondary mortgage on the same land dated in 1907 and registered in 1908.

¹ (1906) 9 N. L. R. 359.

² (1909) 12 N. L. R. 139.

³ (1904) 4 Leader 69.

⁴ (1903) 6 N. L. R. 220.

⁵ (1906) 3 B. A. L. 225.

⁶ (1883) 6 S. C. C. 1.

⁷ (1906) 9 N. L. R. 217.

⁸ (1902) 6 N. L. R. 263.

⁹ (1906) 2 A. C. R. 10.

Oct. 20, 1910

HUTCHINSON
C.J.

Sebastian
Perera v.
Jusey Perera

The defendant sued the mortgagor on his bonds on June 21, 1909, and obtained a decree in July, 1909; the land was sold in execution of the decree in December, 1909, and was bought by the defendant, who obtained a transfer dated February 4, 1910. Juan Peiris sued the mortgagor on his bond in August, 1909, and obtained a decree, in execution of which the land was sold in November, 1909, and was bought by the plaintiff, who obtained a Fiscal's transfer dated January 11, 1910. Thus, although the defendant's mortgages were prior to that through which the plaintiff claims, and his action was begun first, the sale and transfer to the plaintiff were prior to the sale and transfer to the defendant, so that the *dominium* is vested in the plaintiff, unless the sale to him was void as against the defendant by reason of his having been made during the pendency of the defendant's action.

The plaintiff did not furnish an address to the Registrar of Lands. Therefore the provisions of section 644 of the Civil Procedure Code do not apply.

The plaintiff claimed in this action a declaration of his title to the land and to recover possession. The District Court dismissed his claim, on the ground that his purchase was made *pendente lite* and could not affect the defendant; and I think that that was right. The defendant had a valid mortgage duly registered; he sued the mortgagor to enforce it, and he was not bound to give the plaintiff notice of the action, because the plaintiff had not given any address for service to the Registrar of Lands; the plaintiff was bound equally with the mortgagor by the proceedings in that action. If the land had been transferred to the plaintiff before the defendant sued, the defendant would then have had to make the plaintiff a party to his action, because the plaintiff would have been the owner of the land, subject to the defendant's mortgage, and would have had the right to redeem the mortgage. But, as it was, the defendant's action was properly constituted, and it would be absurd to decide that he lost his rights under his mortgage because he sued to enforce it. I would follow the decision of Wendt J. in *Sami Appu v. Disanayake*,¹ which, in my opinion, is not over-ruled by the decision in *Perera v. Perera*² on the words of section 17 of the Partition Ordinance. I would dismiss the appeal with costs.

WOOD RENTON J.—

His Lordship stated the facts, and continued :—

The appellant's counsel contended that under section 643 of the Civil Procedure Code a secondary mortgagee is entitled to notice of a primary mortgagee's action. None of the cases that have come before the Courts under section 643 seems to decide

¹ (1902) 6 N. L. R. 263.

² (1906) 9 N. L. R. 217.

this point directly. See, for example, *Peiris v. Weerasinghe*,¹ where the title competing with that of mortgagee was that of a transferee on a private alienation ; *Weerappa Chetty v. Arunaselam Chetty*,² also a case of purchase subsequent to mortgage ; and *Ratnaweera Liyana Arachchi v. Mohamada Ibrahim*,³ a case raising the question of the position of a lessee. I do not think, however, that it is necessary to decide the point now, inasmuch as admittedly notice was given by neither side, and the District Judge was therefore clearly right in holding that sections 643 and 644 of the Code of Civil Procedure do not apply. On the second point I agree with my Lord the Chief Justice that we should follow the decision of Wendt and Grenier JJ. in *Sanmugam Chetty v. Khan*.⁴ I do not think that that decision is in any way affected by the construction put by the Supreme Court on section 17 of the Partition Ordinance, 1863 (No. 10 of 1863), in *Perera v. Perera*,⁵ to which it may be mentioned Wendt J. was himself a party. I would dismiss the appeal with costs.

Oct. 20, 1910

WOOD
RENTON J.

Sebastian
Perera v.
Jusey Perera

Appeal dismissed.

