

Present : Bertram C.J. and Shaw J.

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SILVA v. FERNANDO.

408—D. C. Negombo, 12,953.

*Lis pendens—Is action pending even after decree?—Sale pending mortgage action—Effect of registration of conveyance.*

A suit is pending even after judgment until judgment is satisfied. A conveyance made by a mortgagor after decree is ineffectual as against the plaintiff, as a conveyance made *pendente lite*.

A sale pending a 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.

**T**HIS was an action for declaration of title regarding lot B of a certain land. By final decree in partition suit dated January 17, 1911, and registered on February 17, 1911, this lot was allotted to the first defendant-respondent, who by deed No. 1,954 dated March 2, 1915, and registered on March 4, 1915, mortgaged the whole of the land partitioned, including the said lot, to the second defendant-appellant; the second defendant put the said

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bond in suit on July 31, 1917, in case No. 25,427, C. R. Negombo, obtained decree on November 9, 1917, and sold the land on August 9, 1918. At such sale the second defendant became the purchaser upon deed No. 2,662 dated September 24, 1918, and registered on October 24, 1918. The decree was not registered. During the pendency of the said mortgage action, the first defendant by deed No. 460 dated June 17, 1918, and registered on June 21, 1918, sold the said lot B to the plaintiff-respondent. The second defendant's deeds were registered in the folios connected with the folio in which the first transaction regarding this land occurs, whereas the plaintiff's deed was registered in a folio connected with the folio in which the partition decree was registered and unconnected with the original folio. The plaintiff instituted this action on August 6, 1918, to have himself declared the owner of lot B and to have the mortgage bond in second defendant's favour declared null and void. The learned District Judge gave judgment for the plaintiff on the ground that the bond was registered in the wrong folio and the decree in the mortgage action was null and void as against the registered transfer in plaintiff's favour. The second defendant appealed.

*Croos-Dabrera*, for second defendant, appellant.—The plaint discloses no cause of action against the second defendant. Plaintiff's possession has not been disturbed. *Fernando v. Silva*.<sup>1</sup> This is a judgment of the Full Court and should be followed. [BERTRAM C.J.—Has not this decision been explained in a later case? ] Yes, in *Ceylon Land and Produce Co. v. Malcolmson*,<sup>2</sup> but the facts were different. There the two competing deeds were registered in the same folio, but in this case plaintiff comes into Court on the footing that the second defendant's deed is registered in the wrong folio. How can it be therefore said that this deed is a blot on plaintiff's title? On the question of registration, it is submitted that the second defendant's deed is registered in the right folio, and that the plaintiff's deed is registered in the wrong folio. Section 15 (1) of the Registration Ordinance, No. 14 of 1891, requires the Registrar to allot a book for every defined division in a district or province, and under section 18 (1) all deeds should be registered in the appointed page or folio of that book. The words "right" and "wrong" folio are relative, and have reference to a folio already determined. The right folio is that in which the first transaction regarding a particular land appears and all connected folios. The second defendant's deed is registered in a folio connected with the original folio. The plaintiff's deed is, no doubt, registered in the folio where the partition decree is registered, but it is not registered in the right folio, inasmuch as there is nothing to connect it with the old folio. The second defendant's deed can be considered to be null

<sup>1</sup> (1878) 1 S. C. C. 27.

<sup>2</sup> (1908) 12 N. L. R. 16.

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and void as against the plaintiff's deed only if the latter is duly registered, i.e., registered in the right folio. Under section 27 of the Ordinance, on a partition of the land the new allotments should be registered in separate and fresh pages, but there should be references to identify them with the original registration. To dispense with this requirement would be to nullify the whole object of the system of registration, which is, as stated in section 15 (1), to "facilitate easy reference." (*De Mel v. Fernando*,<sup>1</sup> *Mohammado Sali v. Isa Natchia*,<sup>2</sup> *Paaris v. Perera*,<sup>3</sup> *Mariku v. Fernando*,<sup>4</sup> *Ramasamy Chetty v. Marikar*,<sup>5</sup> *Silva v. Appu*,<sup>6</sup> *Senaratne v. Peris*.) [BERTRAM C.J.—Has the question of negligence been considered in these cases?] Negligence has not been taken into account in any of these judgments, except in *Paaris v. Perera* (*supra*) and *Cornelis v. Abeysinghe*,<sup>8</sup> where there is reference made to negligence. All the decisions have been given independently of the question of negligence. There has been no issue raised in the lower Court. Under the Registration Ordinance it was open to the plaintiff to have made a thorough search and given on his deed the correct references. Section 24 makes this imperative. If the plaintiff failed to do this, he is guilty of negligence. Counsel also referred to the judgment of the Privy Council in *Rajapakse v. Fernando*.<sup>9</sup> [Bertram C.J. referred to *Jayawardene on the Law of Registration*.]

Even if the appellant cannot succeed on the question of registration the plaintiff's deed is null and void, as it was executed during the pendency of the mortgage action. *Muheeth v. Nadarajapillai*.<sup>10</sup> [SHAW J.—Can the action be said to be pending after decree has been entered?] Yes, until the decree has been fully satisfied by execution. *Silva v. Swaris*,<sup>11</sup> *Salt v. Cooper*,<sup>12</sup> *Fonseka v. Cornelis*,<sup>13</sup> *Sandé on Restraints on Alienation*, p. 136 (9, 2, 16). The mortgage action was commenced before the coming into operation of the Ordinance relating to the registration of *lis pendens* (No. 29 of 1917). The registration of plaintiff's deed cannot take away the effect of *lis pendens*. Section 17 of the Registration Ordinance gives no greater effect to a registered deed than the priority conferred by that section. The mortgage decree was binding on plaintiff's vendor, and he is therefore stopped from questioning it. He cannot get over this by pleading the benefit of registration. *Mohamado Ali v. Weerasooriya*.<sup>14</sup> The case of *Sami Appu v. Dissanayake*<sup>15</sup> is an authority entirely in appellant's favour. Counsel also cited *Perera v. Perera*.<sup>16</sup>

<sup>1</sup> (1900) 4 N. L. R. 290.<sup>2</sup> (1911) 15 N. L. R. 147.<sup>3</sup> (1912) 15 N. L. R. 153.<sup>4</sup> (1914) 17 N. L. R. 481.<sup>5</sup> (1915) 18 N. L. R. 503.<sup>6</sup> (1914) 4 B. N. C. 28.<sup>7</sup> (1917) 4 C. W. R. 65.<sup>8</sup> (1913) 5 B. N. C. 30.<sup>9</sup> (1920) 21 N. L. R. 495.<sup>10</sup> (1917) 19 N. L. R. 461.<sup>11</sup> (1904) 1 Bal. R. 61.<sup>12</sup> (1880) 16 Oh. D. 551.<sup>13</sup> (1917) 20 N. L. R. 97.<sup>14</sup> (1914) 17 N. L. R. 417.<sup>15</sup> (1902) 6 N. L. R. 263.<sup>16</sup> (1910) 14 N. L. R. 20.

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*Francis de Zoysa* (with him *C. H. Z. Fernando*), for plaintiff, respondent.—The doctrine of *lis pendens* does not apply. The mortgage action was in respect of a land which had ceased to exist. The effect of the partition decree was to wipe out all previous titles. We question the identity of the land. Plaintiff purchased a particular lot dealt with by the decree, whereas the mortgage action was for the whole land. *Bernard v. Fernando*.<sup>1</sup> A partition decree is conclusive by itself. It does not depend on registration for its validity.

*Croos-Dabrera*, in reply.

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This action at first seemed to involve very large and interesting issues of law, the first being, whether it was competent for a person claiming land, whose rights were challenged by other parties, to bring an action before steps are taken actually to displace him. The second was as to the effect of registration in a wrong folio. The questions referred to in the argument will have to be discussed some day. There is no occasion to refer to them now, as the whole case turns upon one extremely small point. The question relates to a lot which is referred to as lot B. This lot is part of a larger land, which sometime ago was the subject of a partition action. In that action lot B was allotted to the first defendant, Jokinu Fernando. Jokinu Fernando subsequently executed a mortgage in favour of the second defendant. But it appears that in that mortgage he purported to deal, not with lot B only, but with the whole land which was the subject of the partition action. Subsequently, the mortgagee, the second defendant, put his bond in suit and obtained judgment, the judgment I understand being limited to lot B, to which his mortgagor alone was entitled. Subsequently to that judgment, but before execution, the mortgagor, that is to say, the first defendant, purported to convey lot B to the plaintiff. This conveyance was a conveyance made *pendente lite*. It is decided by a number of authorities, to which we need not particularly refer, that a suit is pending even after judgment until judgment is satisfied by execution. Therefore, there is no question that this conveyance was a conveyance *pendente lite*, and ineffectual as against the second defendant.

It has been urged, in the first place, that, nevertheless, the conveyance is a good conveyance, because the original mortgage purported to dispose of a land which had ceased to exist, namely, the whole land as it was before the partition suit. There seems to be no substance in this argument. The mortgage was valid to the extent of the mortgagor's interest, and the mortgagor's interest was ultimately defined by the judgment. It is quite impossible to

<sup>1</sup> (1918) 16 N. L. J. 438.

suppose that, because the mortgagor claimed too large an interest in his mortgage, therefore it is competent for him, after his mortgage has recovered judgment, to defeat the mortgagee's rights by conveying his true interest to another person.

There is only one other point. It was suggested that, although the conveyance to the plaintiff was void as against the second defendant, nevertheless that defect in the conveyance was cured by registration, there being a defect, as it is alleged, in the second defendant's registration of his mortgage. It is not necessary for us to discuss whether there was this defect or not. Even assuming there was such a defect, the point fails. It is expressly covered by the authority of *Sami Appu v. Disanayake*.<sup>1</sup> Wendt J. says on page 267: "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." In my opinion, therefore, the learned District Judge has decided the case under a misapprehension, and the appeal should be allowed, with costs.

SHAW J.—I agree.

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