1946 *Present :* **Dias J. and Nagalingam A.J.**

KUMARAPPA CHETTIAR, *et al.*, Appellants, *and*
GUNAWATHIE, *et al.*, Respondents.

373—D. C. Kegalla, 2,857

Mortgage—Compulsory novation—Right to have the bond revived as against a stranger—Right to bring more than one hypothecary action upon a mortgage bond—Mortgage Ordinance (Cap. 74), s. 16.

Where the mortgagees in a hypothecary action had made *inter alios* the mortgagor and a puisne encumbrancer, who was in fact dead, parties defendants and, by reason of a conveyance of the mortgaged property executed in favour of the mortgagees by the mortgagor and a person who was not the lawful heir of the estate of the puisne encumbrancer, a compromise decree was entered dismissing the hypothecary action—

Held, that the decree must first be got out of the way before the rights of the mortgagees under the mortgage bond could be considered to have revived as against the lawful heirs of the estate of the puisne encumbrancer.

If a mortgagee considers that he has not been able to secure to himself all the remedies available to him under a mortgage by reason of a hypothecary action instituted by him proving abortive it would be open to him, by virtue of section 16 of the Mortgage Ordinance, to file another action.

APPEAL from a judgment of the District Judge of Kegalla.

H. V. Perera, K.C. (with him *H. W. Jayewardene*), for the defendants, appellants.

C. R. Gunaratne, for the plaintiffs, respondents.

Cur. adv. vult.

November 29, 1946. NAGALINGAM A.J.—

An interesting question under the law of mortgage arises on this appeal. The plaintiffs instituted this action for a declaration of title to an allotment of land described in the schedule to the plaint. It is common ground that one Peruma was the former owner of the land in question. He by deed P3 of 1930 transferred it to one Siripina who is said to have died in 1931. One question in issue between the parties was as to who the heirs to Siripina were, the plaintiffs contending that as daughter and widow of the deceased person they were the legitimate heirs to his estate while the defendants denying the alleged relationship of the plaintiffs to the deceased asserted that the deceased's heir was his mother, one Komali.

The learned Judge has found, and it has not been challenged, that the plaintiffs are the lawful heirs of the deceased Siripina and that the title to the property has now vested in them. It is alleged by the defence, however, that Peruma had prior to his sale to Siripina executed a mortgage bond bearing No. 650 of January 22, 1929, in favour of the defendants whereby he hypothecated *inter alia* the land in question. The bond itself has not been produced by the defendants but the plaintiffs appear to have tacitly accepted the fact of the execution of the aforesaid mortgage bond. The defendants put the bond in suit in case No. 19,505 of D.C., Kurunegala, on August 24, 1938, making *inter alias* the mortgagor, Peruma, and the puisne encumbrancer, Siripina, parties defendants. It should be noted that Siripina was dead at that date. No legal representative had been appointed to his estate and in fact no summons was ever reported served on him as it could never have been. But the defendants proceeded to compromise the mortgage suit with the mortgagor and with Komali, the mother of Siripina, on the footing that she was the lawful heir to the estate ; as a result of the compromise decree was entered dismissing the defendants' action.

In this state of facts the defendants claim that notwithstanding the dismissal of their action upon the mortgage bond their rights thereon revived inasmuch as the compromise which led to the dismissal of the action was based upon the belief that the deed of conveyance executed by Peruma and Komali of the land in question conveyed good title to them which in fact it did not in view of the circumstance that Komali has now been ascertained to be not the legal heir to the estate of Siripina. In regard to this question the learned Judge did not record a specific finding. On appeal the argument has been confined to a discussion of the question as to whether the rights of the defendants revived upon the mortgage bond and if so whether they are entitled to a declaration in these proceedings that the rights of the plaintiffs to the land are subject to the rights of the defendants under the mortgage created in their favour by the bond.

Two cases were cited at the bar in order to show that the bond could be considered to have revived :—*Silva v. Silva*[1]. This was a case where the mortgagor transferred the mortgaged property to the mortgagee during the pendency of a valid seizure effected on the property, the

[1] *(1909) 13 N. L. R. 33.*

seizure rendering the transfer ineffectual. The mortgagee instituted a suit upon the mortgage bond ignoring the execution of the transfer in his favour, and it was held that the rights under the mortgage bond revived inasmuch as the transfer was void.

Mudalihamy v. Mudianse and Kalubanda[1] where the facts were similar except that the deed of conveyance was rendered invalid by reason of an action for partition pending at the date of conveyance. There too it was held that the rights of the mortgagee upon the mortgage bond revived notwithstanding the void conveyance executed in his favour.

It has been urged that the principle underlying these two cases would be applicable or in any event could be extended so as to include the present case. There is a vital distinction between those cases and the one before me now. Those were cases of voluntary novation and the principle underlying was that where the novation was not real but merely nominal no novation could be said in fact to have taken place and the rights under the bond revived, or more properly, the bond was never novated. It has also to be noted that the bond was held to be revived as between the parties thereto and not as against a third party. Here there has been a compulsory novation and it is sought to have the bond revived as against a stranger to it. The bond has been sued upon and the rights in respect of it have got merged in the decree entered, and different considerations therefore apply. The decree must first be got out of the way before the claim to have the bond considered revived can be entertained. No argument has been put forward to show that the decree itself is bad ; so that the question really resolves itself into this : What are the rights of a mortgagee who having sued upon his bond and obtained a decree finds that the decree is of no avail against a puisne encumbrancer ?

Prior to the Mortgage Ordinance (Cap. 74), where a mortgagee failed to make a puisne encumbrancer a party to the hypothecary action it was held that no further action could be brought upon the bond. But section 16 of the Mortgage Ordinance was specially enacted to grant relief in such a case and it provides that a mortgagee may bring more than one action to enforce all or any of his remedies under a mortgage bond. In *Kandappa Chettiar v. Ramanayake*[2] it was expressly held that more than one hypothecary action may be instituted upon a mortgage bond. The resultant position, therefore, is that if a mortgagee considers that he has not been able to secure to himself all the remedies available to him under a mortgage by reason of a hypothecary action instituted by him proving abortive it would be open to him to file another action. But I do not wish to be understood as saying that in the circumstances disclosed in this case where the action upon the bond has been dismissed I express any opinion as to whether the defendants can bring a second action or not. It is, however, only necessary to point out that if they have any rights those rights are conserved by section 16 of the Mortgage Ordinance and without any such declaration in their favour by a court of law they would be vested with that right by virtue of the enactment itself.

[1] *(1920) 2 C. L. Rec. 64.*

[2] *(1936) 38 N. L. R. 33.*

Besides the person most affected by a declaration that the rights under the bond have revived would be the mortgagor himself, but the mortgagor is no party to these proceedings and in his absence and without giving him an opportunity of being heard no such declaration can be made. On this ground too the defendants' application must fail.

I would therefore dismiss the appeal with costs.

DIAS J.—I agree.

Appeal dismissed.