

1936

Present : Garvin S.P.J. and Maartensz A. J.

NAGOOR PITCHE *v.* KAWALA UMMA.

23—D. C. Colombo, 35,054.

Mortgage action—Sale of property under decree—Application by purchaser to remove person in possession—Proof that the respondent is a person bound by the decree—Ordinance No. 21 of 1927, s. 12.

In an application under section 12 of the Mortgage Ordinance by a purchaser of property sold under a mortgage decree for directions as to the delivery of the property to him and the removal of the respondent who was in possession, it is essential that the petitioner should show that the respondent is bound by the decree within the meaning of the section.

A PPEAL from an order of the District Judge of Colombo.

Hayley, K.C. (with him *H. V. Perera, Canakeratne, and Ferdinands*),
for petitioner, appellant.

Keuneman, for the respondent.

Cur. adv. vult.

May 21, 1934. GARVIN S.P.J.—

At a sale in execution of a hypothecary decree entered in this case the appellant became the purchaser. It was provided by the decree that the Fiscal should give delivery of possession. Presumably, in pursuance of this provision, the purchaser applied to the Court and obtained a writ authorizing the Fiscal to place him in possession. The Fiscal reported that he had given possession to the purchaser. Shortly afterwards the purchaser applied to the Court stating that he was unable to obtain effective possession of the premises and that the respondent was in possession and claiming to do so in her own right. Thereupon the petitioner applied again to the Court for a special order directing the Fiscal to remove the respondent from the premises. There is nothing in the way in which the petition is drawn up to show under what provision of the law it was made. But it is quite clear from the arguments that have taken place before us, and also from the proceedings in the Court below and in particular the order of the learned District Judge that this was an application under section 12 of Ordinance No. 21 of 1927, by which the Court is empowered among other things, to give directions and orders as to delivery to the purchaser and as to the removal of any person bound by the decree from the property.

It is essential, therefore, for the petitioner to show that the respondent was a person bound by the decree before he can be granted an order directing that she be removed. Now reference was made in the course of the argument to the provisions of sections 6 and 10 of the Ordinance. The first section is intended to indicate to a mortgagor those who are necessary parties to the action and to inform him that there are certain classes of persons who under special circumstances need not be joined. Section 10 then proceeds to state that when the provisions of this Ordinance have been complied with the conveyance issued to the purchaser shall operate to convey the property sold "for such estate and interest therein as is the subject of the mortgage freed from the interests, mortgages and rights of every party to the action and every person who by sub-section (2) of section 6 is declared not to be a necessary party to the action". In effect the decree not only bound those parties ordinarily bound by the decree but even those who by sub-section (2) were declared not to be necessary parties to the action. If, therefore, the purchaser is to succeed he must show that the respondent comes within one or other of these classes. The respondent was not a party to the action nor am I aware of any circumstances which would justify one in holding her bound by the judgment and she certainly does not come within sub-section (2) of section 6. The claim she made was the right to retain property which the law gives to an improver. It has been urged that certain documents tendered in evidence indicated that in point of fact she had no such

right, and, in the alternative, if she had any right it was a right to compensation based on a parol agreement and was not the *jus retentionis* of the Common law. The question for the decision of the Court was not whether or not the right which the respondent asserted was well founded but whether she can be said to be a person bound by the decree in the case. In so far therefore as it is alleged that she had no right, I think that was a matter which was outside the scope of this section. As to the argument that the respondent's position is akin to that of a puisne encumbrancer the material before us does not justify us in coming to any such conclusion.

A definite claim is to be found in the answer filed by her in case No. 36,200, a copy of which was filed of record. After stating that her husband Thana Mohamadu was prior to 1928 the tenant of the premises in question, it proceeds to state that he built on and otherwise effected improvements to the premises and that it was agreed that he should possess the premises, and that on the valuation of the improvements Seenia Kadiripillai Marikar, the owner, should execute a transfer of the premises in favour of Thana Mohamadu for a sum of Rs. 22,000. The case for the respondent would seem to be that there was an agreement by Kadiripillai Marikar undertaking to sell the premises to her husband for a stated price and that pending the completion of the transfer he went on to make certain repairs and improvements. If this be in accordance with fact, it is impossible to say that the respondent was merely in the position of a person who has effected some improvements upon an express agreement by which he was to be paid for the improvements and nothing more. In the result, therefore, we have here a claim by the respondent to retain these premises adversely to the mortgagor and those claiming under him. There is nothing in the evidence to justify one in holding that this right is one which he derived from the mortgagor or in treating the respondent as occupying a position akin to that of a puisne encumbrancer. It was for the Court to determine whether or not the person claiming to remain in possession was a person bound by the decree. I can see no alternative on the evidence before the Court but to hold that she was not such a person. It was pointed out that the District Judge had expressed himself in a manner which might be taken to mean that as between the purchaser and the respondent it had been definitely found that the respondent was entitled to the right she claimed. I think it is right to say that if that was the intention of the District Judge then I think he has travelled beyond the limits of the section. The question in this proceeding under section 12 is not whether the respondent had a *jus retentionis*, but merely, as I said before to determine whether she is a person bound by the mortgage decree entered in the action. The only question on which any determination of the learned District Judge is binding upon the petitioner is this, that she was not a person who was bound by the decree in the mortgage action within the meaning and for the purpose of section 12. The respective rights of the parties must be left to be determined in appropriate proceedings. For these reasons I would dismiss the appeal with costs.

MAARTENSZ A.J.—I agree.

Appeal dismissed.