

Present: Schneider J.

1922.

FERNANDO *v.* PERIS *et al.*

362—C. R. Colombo, 81,520.

*Transfer of property subject to mortgage—Failure of mortgagee to register address or lis pendens—Competition between purchaser under mortgage decree and transferee—Lis pendens—Service of summons.*

Maria Nona in January, 1917, mortgaged the land in dispute to Fernando. He instituted an action on the bond on November 5, 1919, and obtained decree on December 5, 1919. At the sale under the decree, plaintiff purchased the land in February, 1920 (Fiscal's transfer, September, 1920; Registration, December, 1920).

Maria Nona on October 28, 1919, transferred the land to defendant, subject to the mortgage in favour of Fernando. On November 7, 1919, Fernando's proctor gave notice of his mortgage action to defendants' proctor. Fernando did not register his address as required by chapter 46 of the Civil Procedure Code, and did not register his *lis pendens*.

Plaintiff sued defendant for declaration of title.

*Held*, defendant had superior title.

"The transfer in favour of the first defendant is expressly dated to be subject to the mortgage, but this fact makes no difference in deciding the question of title."

Mortgage action is *lis* within the meaning of Ordinance No. 21 of 1918. *Lis pendens* only comes into existence upon the service of summons.

**T**HE facts appear from the judgment.

*E. W. Jayawardene*, for plaintiff, appellant.

*Nagalingam*, for first defendant, respondent.

February 24, 1922. SCHNEIDER J.—

One Maria Nona being the owner of the land, the title to which is in dispute, by bond dated January 17, 1917, hypothecated it with Lavara Fernando to secure a loan of money. The mortgagee instituted on November 5, 1919, action No. 71,257, to realize the mortgage, making Maria Nona alone the defendant, and obtained a hypothecary decree on December 5, 1919. The land was sold under the decree in February, 1920, and was purchased by the plaintiff, who obtained a transfer from the Fiscal dated September 21, 1920, and registered in December, 1920 (P 1). The plaintiff alleged that he had been placed in possession and was ousted by the defendant in June, 1921.

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The defendant pleaded title in himself by virtue of a deed of transfer dated October 28, 1919, executed by Maria Nona (1 D 1). This deed was registered in November, 1919. It purports to sell and convey the land to the defendant subject to the mortgage in favour of Lavara Fernando. The defendant caused a letter dated October 29, 1919, to be written to Lavara Fernando by a proctor offering to pay and settle the mortgage. It is stated in this letter that the defendant had instructed her proctor that Lavara Fernando had refused to accept payment. It is a fair presumption that the defendant had been informed by Fernando of the fact that an action had been instituted. However that may be, by November 7, 1919, Lavara Fernando's proctor informed the defendants' proctor by letter that the action, the particulars of which he gave, had been filed upon the bond.

The question between the parties is whether the plaintiff's Fiscal's transfer (P 1) or the defendants' deed (1 D 1) should prevail in conferring title.

It is agreed that the mortgagee had not furnished an address to the Registrar of Lands in accordance with the provisions of chapter XLVI. of the Civil Procedure Code; and that he did not register his *lis pendens* under the provisions the Land Registration (Amendment) Ordinance, No. 29 of 1917, which came into operation in November, 1917, and was amended by the Land Registration (Amendment) Ordinance, No. 21 of 1918, which came into operation on January 17, 1919.

The learned Commissioner of Requests held against the plaintiff, and dismissed his action. This appeal is by him. Plaintiff's deed is subsequent in date, both as regards execution and registration. No question therefore arises upon the registration of the deeds of title. The plaintiff accordingly must show that the defendant is bound by the decree in the action instituted upon the mortgage bond. There were open to him only two ways to do this. He might have shown that the mortgagee had complied with the provisions of chapter XLVI. of the Procedure Code so as to bind the defendant who is a puisne encumbrancer by that decree. The admitted facts do not enable him to show this. The only other course was for him to have pleaded *lis pendens*. Here too his contention is bound to fail for two good reasons. His *lis pendens* had not come into existence at the date of the transfer in favour of the first defendant, because the summons had not been served on the defendants in No. 71,257 till November 26, 1919, (a fact which I have had to ascertain by sending for the record of that action), while the transfer in favour of the first defendant was on October 28, 1919. Even if there was a *lis pendens* at the date of that transfer, it would not have bound the first defendant in this action because the *lis pendens* was not registered as required by the Registration Ordinances I have already mentioned. It is now settled law that a *lis pendens* only

comes into existence upon service of summons; and the statute law is clear that a *lis pendens* must be registered.

The nature of the action No. 71,257 is such that it is a *lis* coming within the purview of the Ordinance. I do not think it necessary to discuss the law because it is admirably discussed and summed up in part III, Chapter VII., of Jayawardene's *The Law of Registration of Deeds*—a book of the highest practical value upon one of the most intricate branches of our law.

The transfer in favour of the first defendant is expressly stated to be subject to the mortgage upon which the action No. 71,257 was founded, but this fact makes no difference in deciding the question of title.

I therefore uphold the judgment of the Commissioner, and dismiss the appeal, with costs.

*Appeal dismissed.*

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