

1934

*Present : Dalton J.*

PUNCHIMENIKA *v.* UKKU BANDA.

113—*C. R. Badulla, 6,610.*

*Mortgage—Bond not registered—Sale of mortgaged property also not registered—  
Transferee not a necessary party—Ordinance No. 21 of 1927, s. 6 (3).*

Under section 6 (1) of the Mortgage Ordinance a subsequent encumbrancer is a necessary party only where his instrument is duly registered and where, if the mortgage in suit is duly registered, he has also registered an address for service.

**A** PPEAL from a judgment of the Commissioner of Requests, Badulla.

*Choksy* (with him *E. B. Wickramanayake* and *B. P. Pieris*), for plaintiff, appellant.

*L. A. Rajapakse*, for defendant, respondent.

<sup>1</sup> (1911) *Appeal Cases* 47.

<sup>2</sup> (1914) *1 K. B.* 414.

March 23, 1934. DALTON J.—

The plaintiff, who is the appellant, sought to have a sale to the defendant of certain property, 2 pelas in extent, set aside in the following circumstances :—

The 2 pelas, with 4 pelas in addition, were mortgaged in January, 1902, to one Bastian. The mortgagors included one Muthu Menika. The bond was not registered. Bastian assigned the bond on October 7, 1905, to Kadiravelu, the husband of Muthu Menika. The assignment was duly registered, but no address for service was registered. Kadiravelu put the bond in suit in April, 1929. The *lis pendens* was duly registered. The property was put up for sale and purchased by the defendant, who obtained Fiscal's transfer (exhibit D 1) on July 14, 1931. This deed was registered in the wrong folio.

Meanwhile Muthu Menika in March, 1928, purported to sell 2 pelas of the land to plaintiff. His deed (exhibit P 1) was also registered in the wrong folio. The Commissioner seems to have had doubts as to the genuineness of the sale to the plaintiff, but no issue was raised on this point. He seems to have decided the dispute on the question of possession, although he definitely finds neither party has established any title by prescription.

The finding of the Commissioner as to the failure duly to register the two deeds P 1 and D 1 is not, and cannot, I think, be contested on the appeal.

It is urged, however, for the appellant that he was a necessary party to the mortgage action, and as he was not made a party, he is not bound by the decree in that action. This was the only matter raised in the appeal.

The law governing this question is to be found in Ordinance No. 21 of 1927. Mr. Wickramanayake urged that section 6 of that Ordinance re-enacted the provisions of section 643 of the Civil Procedure Code on this question. He was able to cite no authority for his contention.

The law prior to Ordinance No. 21 of 1927 is laid down in several cases, of which I may cite one, *Suppramaniam Chetty v. Weeresekera*<sup>1</sup>. If the mortgagee neglects to register his address, subsequent grantees or incumbrancers were not bound by the decree.

Having regard to the wording of section 6 (2) of the Mortgage Ordinance, 1927, it would seem a change was made in the law on this point. The plaintiff was not a necessary party to the action, because the instrument under which he derived title was not duly registered. The mortgage in the suit was also in fact not duly registered, and Mr. Wickramanayake urged that none of the conditions in sub-section (2) arise until the mortgagee has registered an address for service. I do not think, however, that the sub-section is capable of that construction. The plaintiff is a necessary party where his instrument is duly registered and where, if the mortgage is duly registered, he has also registered an address for service.

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He has failed in respect of the first condition here laid down and, as I read the section, he is bound by the decree under sub-section (3) of section 6. In such a case the effect of a conveyance under the mortgage decree is set out in section 10 of the Ordinance. The deed D 1 therefore prevails.

The appeal must therefore be dismissed with costs.

*Appeal dismissed.*

