1918.

[FULL BENCH]

Present: Ennis, Shaw, and De Sampayo JJ.

SUPPRAMANIAM CHETTY *v.* WEERASEKERA.

458—D. C. Negombo, 12,251.

Mortgage—Address not registered by mortgagee—Action by mortgagee against mortgagor without joining puisne incumbrancer—Subsequent action by mortgagee against puisne incumbrancer to have property declared bound for his mortgage debt—Civil Procedure Code, ss. 640 to 644.

A mortgagee who has failed to register his address under section 644 of the Civil Procedure Code, and who has sued his mortgagor and obtained a decree against him, cannot afterwards bring another action against a puisne incumbrancer or grantee claiming a declaration that the property in his possession is bound and executable for the mortgage debt.

THE facts are set out in the judgment of Ennis J.

A. St. V. Jayawardene (with him *J. S. Jayawardene*), for first defendant, appellant.—The plaintiff did not register his address, as required by sections 643 and 644 of the Civil Procedure Code. If he had done so, the first defendant would have notified to him that he had purchased the mortgaged property.

The plaintiff having failed to give notice of his action on the mortgage bond to the first defendant, he is not bound by the decree in favour of the plaintiff. The plaintiff cannot now bring a separate hypothecary action against the defendant to have it declared that the mortgaged lands are bound and executable for the mortgage debt. Section 640 of the Code contemplates only one action for the realization of the moneys due on a mortgage bond, and the mortgagor is to be sued as a party defendant in such action. The plaintiff has not made the mortgagor a party to this action, nor can that be now done, as he has been already sued in the original action. The object of the Code is to avoid a multiplicity of actions, and the plaintiff is debarred by section 34 of the Code.

Counsel cited *Punchi Kira v. Sangu*,[1] *Peiris v. Weerasinghe*,[2] *Weerappa Chetty v. Arunaselam Chetty*,[3] *Ramanathan Chetty v. Cassim*,[4] *Elyathamby v. Valliammai*[5]; *Thambaiyar v. Paramusamy Aiyar*,[6] and *Bank of England v. Vagliano*.[7]

[1] *(1900) 4 N. L. R. 42.*
[2] *(1906) 9 N. L. R. 359.*
[3] *(1909) 12 N. L. R. 139.*
[4] *(1911) 14 N. L. R. 177.*
[5] *(1913) 16 N. L. R. 210.*
[6] *(1917) 19 N. L. R. 385.*
[7] *(1891) A. C. 107.*

Samarawickreme (with him *Cross-Dabrera*), for plaintiff, respondent.—The provisions of sections 643 and 644 of the Code are not imperative. They do not have the effect of doing away altogether with the common, law, and do not impose a new burden on a mortgagee, but rather afford certain facilities in obtaining a mortgage decree (see *Bodia v. Hawadia* [1]). Under the common law the mortgagee could bring two actions, one against the mortgagor personally, and the other, a hypothecary action, against the property. He could have done this in any order he pleased. The change introduced by the Code was that the mortgagee should first sue the mortgagor, but it nowhere says that another and subsequent action against a third party in possession or a purchaser from the mortgagor does not lie. That such an action lies has been recognized in several cases. The mortgagor is not a necessary party to this action. He has already been sued, and a decree obtained against him.

Counsel cited *Samaranaike v. Samaraweera*,[2] *Sleema Lebbe v. Banda*,[3] *De Saram v. Perera*,[4] No. 9,810—D. C., Kandy,[5] *Wijesinghe v. Don David*,[6] *Mutturamen v. Massilamany*,[7] and *Silva v. Gunawardena*.[8]

A. St. V. Jayawardene, in reply.

Cur. adv. vult.

February 28, 1918. ENNIS J.—

This case raises a difficult question as to the effect of chapter XLVI of the Civil Procedure Code, relating to the realization of money secured on mortgage.

On May 4, 1909, one Christogu Fernando mortgaged certain lands with the plaintiff; the plaintiff put the bond in suit, the lands were sold in execution, and plaintiff obtained Fiscal's transfers on September 24, and 30, 1915. Meanwhile Christogu Fernando had, on February 3, 1914, sold the lands to the second defendant, and, under a decree in a partition suit, the second defendant was subsequently allotted a divided portion in respect of his purchase from Christogu Fernando. On August 7, 1916, the second defendant conveyed this portion to the first defendant.

The second defendant was not a party to the plaintiff's action on the mortgage bond, and the plaintiff was not a party in the partition suit. The plaintiff, when he registered his mortgage, did not register and address for the service of notice, as required by section 643 of the Civil Procedure Code. The defendants also failed to register an address when the subsequent deeds to them were registered.

Some time after the plaintiff had purchased he sought to have the sale in execution and the decree in the mortgage suit set aside under

[1] *(1913) 16 N. L. R. 463.*
[2] *(1897) 2 N. L. R. 368.*
[3] *(1898) 1 A. C. R. 72.*
[4] *(1897) 1 Browne 117.*
[5] *(1897) 1 Browne 121.*
[6] *2 Matara Cases 36.*
[7] *(1913) 16 N. L. R. 289.*
[8] *(1915) 18 N. L. R. 241.*

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the provisions of the Civil Procedure Code. He was, however, unsuccessful. He then instituted the present action, to have the lands mortgaged to him declared bound and executable for the principal sum and interest amounting to Rs. 1,500. The mortgagor, Christogu Fernando, was made a party to the suit. The learned District Judge found in favour of the plaintiff, and the first defendant appeals.

My brothers Shaw and De Sampayo have referred this case to the Full Court, as there are a number of conflicting decisions as to the effect of a failure by a mortgagee to register an address. Prior to the enactment of the Code of Civil Procedure two actions were open to a mortgagee: he could sue in a personal action against the mortgagor for the recovery of the amount of the debt, or he could institute a hypothecary action to have the land sold in execution. Chapter XLVI of the Code enacted (section 640) that in any action by a mortgagee for the "realization of moneys secured to him upon a mortgage" the mortgagee "shall" sue the mortgagor "as defendant." Section 643 provided that the mortgagee should give notice of the action to any subsequent grantee or incumbrancer who had duly registered his deed and "furnished an address for the service of such notice." Section 644 then provided that persons so noticed could apply to be joined as defendants in the action, and if they failed to do so, that they should be bound by the decree; but it was subject to the proviso that the mortgagee had duly registered his mortgage and had "furnished an address to the Registrar of Lands" and to every subsequent grantee or incumbrancer who had given him notice that they had duly registered their documents of title. The question is whether the action provided by chapter XLVI supersedes entirely the two common law actions.

Many of the earlier cases relating to actions by mortgagees appear to have been decided as if the two common law actions were still available (*Samaranaike v. Samaraweera*,[1] *Sleema Lebbe v. Banda*,[2] *De Saram v. Perera*,[3] No. 9,810—D. C. Kandy,[4] *Wijesinghe v. Don David* [5]); and my brother De Sampayo, in *Bodia v. Hawadia*,[6] held that the *actio hypothecaria* was available, in addition to the action under chapter XLVI of the Code, and he cited an expression of opinion by Lascelles C.J. in *Ramanathan Chetty v. Cassim* [7] based on *Mayappa Chetty v. Rawter*.[8]

It is to be observed that in *Sleema Lebbe v. Banda* [2] Lawrie J. expressly said that the plaintiff had not availed himself of the provisions of chapter XLVI, which had not been mentioned at all in the course of the argument.

[1] *(1897) 2 N. L. R. 368.*
[2] *(1898) 1 A. C. R. 72.*
[3] *(1897) 1 Browne 117.*
[4] *(1897) 1 Browne 121.*
[5] *2 Matara Cases 36.*
[6] *(1913) 16 N. L. R. 463.*
[7] *(1911) 14 N. L. R. 117.*
[8] *(1903) 6 N. L. R. 220.*

In *Pattiriani v. Kanapatti Pulle*, No. 1,798—D. C. Batticaloa,[1] Bonser C.J. doubted the correctness of the earlier decisions, and in *Punchi Kira v. Sangu* [2] he held that chapter XLVI. of the Code was plainly intended to alter the old procedure.

In *Peiris v. Weerasinghe* [3] it was held that compliance with the requirements of the first proviso to section 644 of the Code was a condition precedent to a mortgagee claiming the benefit of the other provisions of the section, and this was followed in *Veerappa Chetty v. Arunasclam Chetty*.[4]

In *Ramanathan Chetty v. Cassim* [5] Lascelles C.J. said: "Sections 643 and 644 of the Civil Procedure Code were clearly enacted with the intention of enabling all rights with regard to the mortgaged property coming into existence subsequently to the date of the mortgage, to be disposed of once and for all in the course of the mortgage action"; and he held that a mortgagee having failed to give notice of his mortgage action to a subsequent lessee who had duly registered, and having failed to join him in the action, could not bring a subsequent action against the lessee to have the lessee's interest in the land declared bound and executable for the balance of the debt.

In *Elyatamby v. Valliammai* [6] it was held that a subsequent donee whose deed had not been registered obtained a title free of the mortgage by the neglect of the mortgagee to register his address. Wood Renton J. in his judgment said: "We can, however, in my opinion, give effect to *Peiris v. Weerasinghe*,[3] and to the spirit of sections 643 and 644 of the Civil Procedure Code, only if we held that compliance by the mortgagee with the requirements of those sections is a condition precedent to a puisne incumbrancer being bound either directly or indirectly by the decree in the mortgage action."

In *Mutturamen v. Massilamany* [7] it was held that the registration of the mortgage bond enured to the benefit of a purchaser in execution of the mortgage decree as against a lessee whose lease was dated prior to the mortgage, but who had lost priority by failing to register till after the mortgage bond had been registered; and in *Silva v. Gunawardena*,[8] where there was a gift of land and a subsequent mortgage of the same land, registered before the deed of gift, but neither the mortgagee nor the donee had registered an address, the mortgagee obtained judgment on his bond without making the donee a party, and it was held that the donee was bound by the mortgage decree, and that the title of the purchase at the execution sale prevailed over the title of the donee. These two cases, however, dealth with priority of registration rather than the effect of chapter XLVI. by itself.

[1] *(1897) 1 Browne 119.*
[2] *(1900) 4 N. L. R. 42.*
[3] *(1906) 9 N. L. R. 359.*
[4] *(1909) 12 N. L. R. 139.*
[5] *(1911) 14 N. L. R. 177.*
[6] *(1913) 16 N. L. R. 210.*
[7] *(1913) 16 N. L. R. 289.*
[8] *(1915) 18 N. L. R. 241.*

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In *Thambaiyar v. Paramusamy Aiyar* [1] it was held that the heirs of a deceased mortgagor could not be sued without joining the legal representative, even when the estate is under Rs. 1,000 in value.

The tendency in these later cases has been to require a strict compliance with the provisions of chapter XLVI. of the Civil Procedure Code as between the mortgagee and all subsequent grantees or incumbrancers, and prior grantees or incumbrancers who register after the mortgage has been registered are not regarded as subsequent grantees or incumbrancers, and are bound by the mortgage decree, even when the mortgagee has failed to register an address.

I am of opinion that the view taken by Lascelles C.J. in *Ramanathan Chetty v. Cassim* [2] as to the intention of the Legislature in enacting chapter XLVI. of the Code is the correct view. The action under chapter XLVI. was intended to provide one action only " to realize moneys due or secured upon mortgage," and to do away with the multiplicity of suits. It provides that the mortgagor should be the defendant, and subsequent grantees or incumbrancers were to receive notice of the action, and they were to be bound by the decree in the action, whether they came in as defendants or not, provided the mortgage had registered his address. Conversely it would seem that if a mortgagee neglected to register his address, subsequent grantees or incumbrancers would not be bound by the decree, and the mortgagee would be left without a remedy against them.

I am of opinion that the action under chapter XLVI. superseded the common law remedies, and that it is the only action now available to a mortgagee to realize the money due on a mortgage. By neglecting the procedure and failing to register his address the plaintiff-respondent has lost his remedy against the subsequent grantee.

I would allow the appeal, with costs.

SHAW J.—

The question arising for our determination in this case is whether a mortgagee who has failed to provide an address to the Registrar of Lands under section 644 of the Civil Procedure Code, and who has sued his mortgagor and obtained a hypothecary decree against him, can afterwards bring another hypothecary action against a puisne incumbrancer or grantee claiming a declaration that the property in his possession is bound and executable for the mortgage debt.

The question is a somewhat difficult one, and it is impossible to satisfactorily reconcile all the decisions on the subject; but I think the question must be answered in the negative, and that the decision

[1] *(1917) 19 N. L. R. 385.* [2] *(1911) 14 N. L. R. 177.*

in *Ramanathan Chetty v. Cassim*,[1] which is a direct decision on the point, is correct, and I agree with the opinion there expressed by Lascelles C.J., that sections 643 and 644 of the Civil Procedure Code were enacted with the intention of enabling all rights with regard to the mortgage property coming into existence subsequently to the date of the mortgage to be disposed of once and for all in the course of the mortgage action.

To hold that a second action cannot be brought seems to be the necessary consequence of the recent Full Court decision in *Thambaiyar v. Paramusamy Aiyar*,[2] affirming the decision come to in *Punchi Kira v. Sangu*,[3] that a hypothecary action is not properly constituted under the provisions of the Code unless the mortgagor, if he is alive, is a party, or, if he is dead, then his executor or administrator or some party appointed by the Court. If the mortgagor or his representative has been sued and a decree obtained against him in the first action, it appears clear to me that he cannot again be sued in a subsequent action in respect of the same matter.

Chapter XLVI, of the Code is one of a group of chapters regulating the procedure in various special causes of action, and provides the procedure—and the only procedure—by which actions to realize money due or secured upon mortgages can now be brought. It does not, as was pointed out by Bonser C.J. in *Punchi Kira v. Sangu*,[3] take away the old common law remedies, but renders it necessary for them all to be sought in one action.

The mortgagee is fully protected by the procedure provided. If he not only registers his security, but also provides the Registrar of Lands with an address according to the provisions of section 644, his decree binds all incumbrancers or grantees subsequent to his mortgage, but if he neglects to do so, it does not. *Weerappa Chetty v. Arunaselam Chetty*,[4] *Peiris v. Weerasinghe*.[5]

I would allow the appeal, and enter judgment for the defendants, with costs.

DE SAMPAYO J.—

The facts of this case appear in the judgments of my learned brothers, and I need not repeat them. The point for decision is the same as that which I considered in *Bodia v. Hawadia*.[6] In that case I examined the cases in which it had been held that the registration of an address by a mortgagee was a condition precedent to his obtaining a binding decree against puisne incumbrancers, and I ventured to express an opinion that, while that was so, if the puisne incumbrancers were not parties to the mortgagee's action against the mortgagor, the mortgagee was not prevented from bringing a separate hypothecary action against the puisne incumbrancers.

[1] *(1911) 14 N. L. R. 177.*
[2] *(1917) 19 N. L. R. 385.*
[3] *(1900) 4 N. L. R. 42.*
[4] *(1909) 12 N. L. R. 139.*
[5] *(1906) 9 N. L. R. 359.*
[6] *(1913) 16 N. L. R. 463.*

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That view may be further supported by such cases as *Sleema Lebbe v. Banda* [1] and *Wijesinghe v. Don David*,[2] which allowed to a mortgagee the right to bring a hypothecary action against persons who successfully claimed the property when seized in execution of the decree obtained against the mortgagor. It appeared to me that the change introduced by chapter XLVI. of the Civil Procedure Code only took away the option available to a mortgagee under the Roman-Dutch law to bring the hypothecary action in the first instance against subsequent purchasers or parties in possession without suing the mortgagor for the debt at all, and that the Code required that in every case the mortgagee should sue the mortgagor for the debt, and if he wished to get a binding decree against puisne incumbrancers in the same action, he should in that case observe the requirements of section 644 of the Code and register an address. Now that the point has come up again for final determination, I recognize the importance of putting an end to controversy by an authoritative decision. While the exhaustive argument in this case has, I confess, not induced me to alter materially the view I expressed in *Bodia v. Hawadia*,[3] I agree that the ruling in *Ramanathan Chetty v. Cassim* [4] should be followed, and that accordingly this appeal should be allowed, with costs.

Appeal allowed.