Present: Mr. Justice Wendt and Mr. Justice Middleton.

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WEERAPPA CHETTY *v.* ARUNASELAM CHETTY.

D. C., Badulla, 2,102.

Mortgage—Purchaser subsequent to mortgage—Non-joinder in action—Effect of decree—Failure on the part of mortgagee to furnish address to the Registrar—Omission on the part of subsequent purchaser to give notice—Civil Procedure Code (Ordinance No. 2 of 1889), Chapter XLVI.

Held, that before a mortgage decree can have the conclusive effect given to it by section 644 of the Civil Procedure Code, it must be clearly proved that the mortgagee has complied with the first proviso to that section, and left an address with the Registrar of Lands for service of notices.

Peiris v. Weerasinghe[1] followed.

Held, also, that the description of the mortgagee given in to the Registrar at the time of registration of the bond, and entered by him in the Register of Encumbrances, is not such an address as is required by section 644 of the Civil Procedure Code.

ACTION *rei vindicatio*. The plaintiff sued the defendant to recover certain shares of lands. The said shares originally belonged to one Annamalay Chetty, who by deed No. 2,145 dated May 10, 1894, sold them to Palaniappa Chetty and Caruppen Chetty. Palaniappa Chetty by deed No. 2,481 dated May 2, 1896, and registered on June 15, 1896, sold his undivided half share to the plaintiff; and Caruppen Chetty by deed No. 2,501 dated June 6, 1896, and registered on June 15, 1896, transferred his half share also to the plaintiff. The plaintiff, alleging that the defendant was in unlawful possession of the said shares of lands, claimed a declaration of title in his favour and also damages.

The defendant, while admitting that Palaniappa Chetty and Caruppen Chetty were the owners of the land as alleged in the plaint, averred that the said Palaniappa had by bond. No. 2,275 dated April 22, 1895, and registered on May 1, 1895, mortgaged the said lands to the defendant's attorney, Kulandavelu Chetty; that the said bond was put in suit in April, 1897, in case No. 1,301 of the District Court of Badulla, and decree obtained on March 31, 1904; that the said lands were sold by the Fiscal on November 12, 1904, in execution of such decree and purchased by the defendant, who obtained Fiscal's transfers Nos. 2,102, 2,103, 2,104, 2,105, 2,106, 2,107, and 2,108, dated June 9, 1905, and registered on June 9, 1905. The conveyance (No. 2,481) by Palaniappa Chetty to the plaintiff

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was in express terms made subject to the mortgage (No. 2,275) in favour of Kulandavelu Chetty. It was admitted that the mortgagee, Kulandavelu Chetty, left no address with the Registrar of Lands beyond the description contained in the Register of Encumbrances.

The following issues were framed at the trial :—

(1) Is plaintiff in this action bound by the decree in D. C., Badulla, 1,301 ?

(2) Damages.

The District Judge (W. A. G. Hood, Esq.) held as follows (June 10, 1908) :—

" 1. This is an action by a ' subsequent grantee ' for declaration of title to, and for possession of, certain lands previously mortgaged with defendant, who afterwards bought them at a Fiscal's sale under his mortgage decree in D. C., Badulla, 1,301.

" 2. The transfer to plaintiff and the mortgage bond to defendant were both registered, the latter having a year's priority.

" 3. An agreement having been come to on the question of amages, the only issue left for my decision is, whether plaintiff, who was not a party to D. C., Badulla, 1,301, is bound by the decree in that case. And this hinges entirely on the point whether an address given by defendant, the mortgagee, to the Registrar of Lands is such as to satisfy the requirements of section 644.

" 4. It is admitted that plaintiff furnished defendant with no address (as required by section 643) ; but he contends that defendant has failed to comply with the conditions of the first proviso to section 644, which, as is clearly laid down in the judgment cited (*9 N. L. R. 359*), is a condition precedent to the mortgagee coming within the provisions of section 644. There is no question of defendant having furnished an address to plaintiff, but the above judgment, which refers to the case of *Santiago v. Fernando*,[1] limits the proviso to section 644 to the necessity of furnishing an address to the Registrar of Lands (thereby rendering possible compliance with the otherwise mutually destructive terms of both sections 643 and 644, which decree that a mortgagee shall furnish an address to every grantee from whom he has received the notification specified in section 643, as a condition precedent to the issue of such notification) and shows that in the event of defendant's non-compliance with this proviso plaintiff is entitled to succeed. On the other hand, compliance on defendant's part would entitle him to judgment, plaintiff having admittedly failed to comply with the conditions of section 643.

" 5. The address given by defendant to the Registrar of Lands is ' Mena Ana Runa Mena Kulandavelu Chetty of Colombo,' and appears in the Register of Encumbrances against the various deeds registered by him under the column ' Grantees,' Plaintiff contends

[1] *(1901) 2 Browne 126.*

that this is insufficient; that registering a deed is not what section 644 contemplates; and that a full postal address is necessary. This question of sufficiency is the one and only point for decision in the case.

"6. I find that section 644 does not prescribe that a Registrar shall keep a separate address book for mortgagees, as section 643 does for grantees, &c., and it therefore seems to me that the Register of Encumbrances should be considered sufficient for the purposes of this section; if it be not, section 644 should include a stipulation similar to that of section 643, or at least make reference to the latter.

"7. As for the address itself, Colombo is a large place, but I am by no means prepared to say that a Chetty resident there, whose four initials were given, would not be traceable by the Post Office authorities. The question, it seems to me, is one of fact; and plaintiff should at least have tested the sufficiency of the address instead of trusting to unsupported assertion.

"8. I therefore find that defendant, the mortgagee, has furnished the Registrar of Lands with an address as required by the first proviso to section 644, that consequently plaintiff is bound by the judgment in D. C., Badulla, 1,301, in all respects, and that his action must be dismissed with costs."

The plaintiff appealed.

H. A. Jayewardene (with him *Bawa* and *Schneider*), for the plaintiff, appellant.

Walter Pereira, K.C., S.-G. (with him *Wadsworth*), for the defendant, respondent.

Cur. adv. vult.

June 7, 1909. WENDT J.—

This is a *rei vindicatio* action in respect of certain parcels of land, of which an undivided half only is in dispute on the appeal. That half was the property of Palaniappa Chetty, who in May, 1896, conveyed it to the plaintiff by a deed which was duly registered on June 15, 1896. Palaniappa had previously, viz., on April 22, 1895, mortgaged his moiety to Kulandavelu Chetty, who registered his mortgage on May 1, 1895. The mortgagee in April, 1897, sued Palaniappa on the mortgage. Thereafter the present defendant was made substituted plaintiff, on the ground that Kulandavelu had been only his agent in the matter of the mortgage, and a mortgage decree was duly entered in present defendant's favour. At the execution sales he became the purchaser, was given credit for the price, and obtained Fiscal's transfer in due course. Plaintiff had no notice of the mortgage action. The question is whether he is bound by the proceedings in it, culminating in the sale to defendant.

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According to the procedure laid down in chapter XLVI. of the Civil Procedure Code for actions to realize moneys due upon mortgages, it was the duty of Kulandavelu, upon the issue of summons in his action, to issue notice thereof in writing to all grantees whose deeds of conveyance were of date subsequent to that of his mortgage, "and who shall have at any time previous to the bringing of such action notified to him in writing that they have duly registered their deeds, and shall have also furnished him with an address for the service of such notice." The present plaintiff was such a subsequent grantee, but admittedly he had not notified Kulandavelu of the registration of his conveyance, nor furnished him with an address for service. If that were all, the mortgagee was relieved of the necessity of giving him notice of his action, but plaintiff contends that he was excused from so notifying the primary mortgagee by the fact that the latter had not complied with the requirement in section 644 that he should furnish to the Registrar of Lands an address for service, which requirement was held in *Peiris v. Weerasinghe* [1] to constitute a condition precedent to the liability of puisne incumbrancers to give the primary encumbrancer notice. On the authority of this decision, the correctness of which I have no reason to doubt, the question revolved itself into a question of fact, viz., whether Kulandavelu had furnished the Registrar with an address for service on him of notices. The District Judge has decided this question in the affirmative, and held that the plaintiff was bound by the mortgage decree and sale.

In order to prove the giving of an "address" to the Registrar, defendant put in an extract in the usual form from the Register of Lands, and pointed to the particulars relating to the registration of the mortgage, where in the column headed "Grantees" was entered "Mena Ana Runa Mena Kulandavelu Chetty of Colombo." This description "of Colombo," if it purports to be an address at all, does not purport to have been furnished as an address under section 644. It is the description of the grantee given in the mortgage itself, just as the description of the grantor as "Kawanna Pana Palaniappa Chetty of Badulla" is that which is given there of the mortgagor. I notice from the extract, which goes back to 1869, that some such general description of both the grantor and grantee as "of Colombo," "of Badulla," has often, though not invariably, been inserted in the register, being apparently taken from the instrument registered, and this long before there was any provision requiring a mortgagee to furnish the Registrar with an address. The mortgagee here did not profess to furnish such an address in compliance with the Code; he merely registered his mortgage. Section 644 requires something additional to that: "Provided..... that the mortgage shall have itself been duly registered, *and* such mortgagee shall have furnished an address." I do not suppose

[1] *(1906) 9 N. L. R. 359.*

that if the plaintiff had asked the Registrar whether an "address for service" had been furnished by any prior mortgagee under section 644 he would have been answered in the affimative, and given defendant's address as stated in the register. The provisions of chapter XLVI. as to these notices are by no means ideally precise, but the effects of compliance or non-compliance with them are so drastic that we must construe them strictly. So regarding the facts of this case, I hold that the defendant did not furnish the Registrar with an address for service of notices in connection with his mortgage. The consequence is that plaintiff has not lost his title to the lands, and that he is entitled to have that title declared against the defendant. But is he entitled to possession or to any other form of further relief? His conveyance was in express terms made subject to the mortgage, but it was not a usufructuary mortgage, and as against the mortgagee plaintiff became entitled to possession. Presumably he entered into, and was in possession. He complains that defendant took unlawful possession in October, 1903. But for the mortgage action there is no doubt that plaintiff could successfully have sued defendant in ejectment. If sued, defendant might perhaps have been entitled to claim in reconvention a decree compelling plaintiff to pay the mortgage debt as a condition precedent to getting possession. I say perhaps, in view of the provision of section 640 that the mortgagee "shall sue the mortgagor as a defendant." Can the mortgage action, which is *res inter alios acta*, make any difference in plaintiff's right? I think not. The defendant might in the present action have made such a claim in reconvention, because he has now sued the mortgagor and got a decree against him. But he has made no such claim, nor did he make any application to amend. Plaintiff is therefore entitled to possession. This case differs from the *Diklande* case,[1] which was mentioned at the argument, because there the mortgagee held a decree against the mortgagor, which was binding on the plaintiff, and entitled him to continue in possession until redeemed.

Before quitting the case, I desire to notice a contention of the Solicitor-General's to the effect that the privilege accorded by section 643 to subsequent mortgagees of giving notice of their interests to a primary mortgagee is limited to subsequent mortgagees whose bond gives them what is on the face of it a primary mortgage, and cannot apply to a second mortgage which is expressly made subject to the interest conveyed by an earlier deed (as plaintiff's conveyance is said to be expressly made subject to defendant's mortgage). I am strongly against this contention, and think that "grantee, mortgagee, lessee, and other encumbrancers" mean any grantee, &c., of the land. It would no doubt be true that the grantee of a conveyance expressly subject to a mortgage could never free the land of the encumbrance without satisfying it, but I see no

[1] *(1890) 1 C. L. R. 32.*

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ground in the Code for depriving him of the privilege of being a party to the ascertainment of the mortgage debt and of redeeming the land upon tender of the amount so ascertained.

For the reasons already stated the dismissal of the action will be reversed, and judgment entered in plaintiff's favour for the disputed moiety of the lands with the damages agreed on, viz., Rs. 1,000 up to June 10, 1908, and thereafter at the rate of Rs. 50 per mensem till possession is obtained. The defendant will pay plaintiff's costs in both Courts.

MIDDLETON J.—

Under chapter XLVI. of the Civil Procedure Code relating to actions to realize moneys due or secured upon mortgages certain rules are laid down in sections 643 and 646, the observance of which will bind by the judgment as fully as though they had been parties to the action, what are called puisne incumbrancers. These sections are involved and badly arranged, as Lascelles A.C.J. said in *Peiris v. Weerasinghe et al.*,[1] to which I was a party. In that case it was held that compliance with the conditions of the first proviso under section 644 was intended to be a condition precedent to the mortgagee coming within the proviso of section 644.

In the present case Palaniappa, the original owner of the property in question, mortgaged his half share to Kulandavelu in 1895. In 1896 Palaniappa conveyed his half share to the plaintiff, registering his conveyance. Kulandavelu sued Palaniappa on the mortgage in 1907 without making the plaintiff a party, but pending the action the present defendant, on the ground that Kulandavelu was only his agent, was made plaintiff, and obtained decree and execution, and the property was conveyed to him (present defendant) by a Fiscal's transfer.

The question is whether the plaintiff in this action is barred by the judgment against Palaniappa, resulting in the sale to defendant. The plaintiff, as a subsequent grantee, did not notify the mortgagee that he had registered his deed of transfer, nor furnish him with an address for service. The mortgagee, on the other hand, did not furnish to the Registrar of Lands any address for service beyond the meagre address "Colombo" affixed to his name, and entered under the heading "Grantees" upon the registration of the mortgage. The mortgagee did not specifically register his address with the Registrar under the section, and the address found under the heading of "Grantees" would hardly have been found and given by the Registrar to any one inquiring for the same, and even if it were, it seems to me that it is eminently insufficient to enable any one to find a Chetty in "Colombo."

I therefore agree that the mortgagee has not furnished the Registrar with an address for service under the section, which would have

[1] *(1906) 9 N. L. R. 359.*

enabled the plaintiff to fulfil his obligation of giving notice under the section, and that consequently plaintiff is not bound by the judgment against Palaniappa. I agree with my brother that even if the conveyance to the plaintiff is drawn as subject to the defendant's mortgage, yet if Kulandavelu or defendant had complied with the provisions of section 644 by furnishing an address for service, and the plaintiff with those of section 643, the plaintiff as a "grantee" was entitled to notice so as to enable him to come in and see to the ascertainment of the mortgage debt, and if so desirous to redeem the land upon its ascertainment. I therefore agree that the order of the District Judge must be set aside, and that the plaintiff is entitled to judgment declaring the dominium in and right to possession of the land in him, subject to such rights thereon as the defendant may be entitled to have declared to be in him by virtue of his mortgage decree. The plaintiff also must have the damages agreed on and costs in both Courts.

Appeal allowed.