

1932

Present : Garvin S.P.J. and Dalton J.

SILVA et al. v. SILVA.

72—D. C. Colombo, 31,987.

Mortgage Ordinance—Addresses not registered—Transfer of property—Sale under hypothecary decree—Mortgage to be kept on foot—Payment of compensation—Ordinance No. 21 of 1927, s. 11—Retrospective effect.

Section 11 of the Mortgage Ordinance, No. 21 of 1927, does not affect a land, title to which has been acquired before the Ordinance came into operation.

THIS was a partition action in which fifth defendant-appellant intervened, claiming the entire property. The original owner, Santiago Silva, mortgaged the property with one Hendrick Perera who assigned the bond to the fifth defendant. He put the bond in suit, purchased the property at a Fiscal's sale and obtained transfer by deed (D 3) dated March 19, 1928, and registered in 1929. Neither fifth defendant nor Hendrick Perera had registered their addresses. Plaintiff's case was that Santiago Silva conveyed the land in 1923 to Thomas Silva and others from whom he purchased in June, 1927. Neither Thomas nor plaintiff had registered their addresses. The fifth defendant claimed that, even if plaintiff's title was superior, he was entitled to compensation under section 11 of Ordinance No. 21 of 1927. The learned District Judge rejected the claim.

J. R. Jayewardene, for fifth defendant-appellant.—The only question is whether under section 11 of the Mortgage Ordinance of 1927 we are entitled to a hypothecary charge on the property. This section has been drafted to meet the requests of the Supreme Court as expressed in *Kristnappa v. Horatala*¹ and *Anohamy v. Haniffa*² that some form of equitable compensation should be granted to those in the position of the appellant, i.e., a *bona fide* purchaser at a mortgage sale. See 9 C. L. Rec. XLVIII. Why should he suffer for the fault of the mortgagor or mortgagee, who have not registered their addresses?

This doctrine is analogous to the English doctrine and applies to sales effected before or after the Ordinance of 1927. The words "will not affect a title acquired for valuable consideration" before the new Ordinance preclude us from claiming title to the land or attacking their title; they do not prevent us from claiming compensation. There is no other remedy open to us, but to intervene in this partition action and claim the amount of money which we paid at the sale or the amount of the mortgage—see *Girigoris v. Arnolis*³.

L. A. Rajapakse (with him *R. C. Fonseka*), for plaintiff-respondent.—The words "will not affect title" preclude the appellant from claiming compensation. A hypothecary charge as created by section 11 affects

¹ 25 N. L. R. 39.

² 25 N. L. R. 289.

³ 31 N. L. R. 481.

title. It has been repeatedly held that the non-registration of the address of a mortgagee prevents the sale on a mortgage bond binding persons to whom the mortgagor has transferred the mortgaged property, subsequent to the mortgage. We are not bound by the sale. Our title is good. Section 2 restricts the application of section 11 to sales after the commencement of the Ordinance.

Jayewardene, in reply.

October 25, 1932. DALTON J.—

This appeal raises a question under section 11 of the Mortgage Ordinance, 1927. The fifth defendant-appellant, intervened in the action, a partition action, claiming the entire property. He pleaded that a previous owner, Santiago Silva, mortgaged the property to one Hendrick Perera, who had assigned the bond to him. He put the bond in suit, obtained judgment, purchased the property at Fiscal's sale, and obtained transfer by deed (D 3) dated March 19, 1928. That deed was registered in 1929, but neither Perera nor appellant had registered their addresses.

Plaintiff's case was that Santiago Silva conveyed the land in 1923 to Thomas Silva and his other children. Thomas sold his interest to the plaintiff in June, 1927, by deed P 3. That deed was registered in June, 1927, but neither Thomas nor plaintiff had registered their addresses, and so appellant could not make them parties to the mortgage action. They were therefore not bound by the decree in the mortgage suit.

Under these circumstances, the fifth defendant claims that even if the title of the plaintiff is superior to his, nevertheless he is entitled to the amount due on the mortgage decree or to a hypothecary charge on the property to the amount of the mortgage that was extinguished by the sale. In support of this contention, he relies upon the provisions of section 11 of Ordinance No. 21 of 1927.

The trial Judge has held, on this point, that as plaintiff obtained title in June, 1927, this section does not apply in view of the provision in sub-section (2). The Ordinance came into force on January 1, 1928, and it is provided that the section "shall not affect any title acquired for valuable consideration before the commencement of this Ordinance". There was a discussion before us as to the meaning of the words "any title acquired"; but reading the whole section together, the meaning of the section seems to me to be that the section shall not affect any land the title to which is acquired for valuable consideration before January 1, 1928.

Counsel for appellant has, however, referred to *Girigoris v. Arnolis*¹, a similar case up to a point, in which the Court held that the unsuccessful plaintiff, having taken action which resulted in the mortgage being wiped out, was entitled to be compensated under the provisions of section 11. The successful defendants in that action derived title from a conveyance by the mortgagor dated June 21, 1926.

An examination of the judgment, and also of my notes taken during the course of the argument, shows that under the circumstances there

¹ 31 N. L. R. 481.

the defendants did not press the question of the payment of the amount due on the mortgage, which amounted to only Rs. 50, by them, nor was sub-section (2) of the section referred to in the course of the argument.

In view of the provisions of this sub-section, I am of opinion that the judgment of the lower Court was correct and section 11 does not apply in this case. It is not necessary therefore to consider the nature of the relief given by that section.

The appeal is dismissed with costs.

GARVIN S.P.J.—I agree.

Appeal dismissed.
