1921.

Present : Ennis J. and Schneider A.J.

PERERA *v.* KAPURUHAMY.

388—D. C. Kurunegala, 7,967.

Mortgage—Address not registered by primary mortgagee or puisne encumbrancers—Chapter 46, Civil Procedure Code, s. 643, et seq.*—Action by primary mortgagee without making puisne encumbrancer a party—Rights of purchaser under decree—Rights of puisne encumbrancer.*

Where neither the primary mortgagee nor the puisne encumbrancers registered their addresses as required by chapter XLVI. of the Civil Procedure Code, and the primary mortgagee obtained a decree against the mortgagor without making the puisne encumbrancer a party to the action, and the property was sold under the decree.

Held, that the purchaser had a title free of all the puisne encumbrances.

The secondary mortgagee was entitled to have his claims satisfied before other creditors from the proceeds of sale of the property mortgaged after the primary mortgagee was paid. He was not entitled to be made a party to an action for the realization upon the primary mortgage.

THE facts appear from the judgment of the District Judge :—

The first defendant executed a primary mortgage of this land in favour of one Thegis. He subsequently executed two mortgages in favour of the plaintiff. Thegis put his mortgage bond in suit against

the first defendant, and having obtained a decree against him had the land mortgaged sold under the decree. The second added defendant purchased the land at that sale. The plaintiff now brings this mortgage action against the mortgagor and the purchaser under the sale held under the decree obtained in the previous mortgage action.

I shall first of all dispose of the issues between the plaintiff and the second defendant. The present plaintiff, although she has not admittedly registered her address, is not bound by the decree obtained in the previous case. For her to be bound, it must be shown that the primary mortgagee had registered his address ; but there is no proof of such registration of address. It is, however, unnecessary to labour this point, as Mr. Markus admitted that he cannot contend that the previous decree binds the plaintiff. But he argued that, in the first place, the second defendant stands in the shoes of the primary mortgagee, and the primary mortgagee's priority, which has not been lost by prior registration of the bond now sued on, survives to the benefit of the second defendant, who is the purchaser under the decree obtained by the primary mortgagee. The learned proctor quoted the case reported in *16 N. L. R. at page 289* in support of his argument. What was decided there was that the purchaser under a mortgage decree can claim the benefit of the prior registration of the mortgage bond on which the decree was founded. The principle of law enunciated in that judgment does not apply to the facts here. Here there is a competition between mortgage rights themselves. Moreover, I am bound to follow the judgment of the Supreme Court reported in *21 N. L. R. at page 173.* The facts there were similar to the present facts. The facts are somewhat complicated, but it is sufficient to say that it was held in that case that a prior mortgagee has no remedy against the purchaser from the secondary mortgagee, if he has not made the latter a party in the mortgage action brought by him. In that case, as in this, neither party had registered his address.

Another point raised by Mr. Markus was that the plaintiff not having registered her address cannot succeed as against the second defendant, who can say to him : " You have joined me as a party on the footing that I am a subsequent purchaser. You have not registered your address. Not having complied with the requirements of section 643 of the Civil Procedure Code you cannot succeed." But this defence also is covered by authority. "Even though a primary mortgagee may not have registered his address, still he may join the puisne encumbrancers as parties to the action (*Ramanathan Chetty v. Cassim* (*supra*)), or give them notice of the action (*Rowel v. Jayawardena* (*supra*)), as by doing so the requirements of the law would be satisfied." (*Jayawardene's Registration of Deeds, pp. 198 and 199.*)

The result is that the plaintiff is entitled in this action to succeed against the second defendant also, and to obtain a hypothecary decree against him.

The defence of the first defendant is indicated by the remarks made by his proctor, Mr. Gomis, at the trial : " I propose to call evidence to show in what way the bond is to be paid off ; the plaintiff was to pay off the primary mortgage debt, and I was to transfer the land to the plaintiff." But this defence is not open to him, as he cannot be allowed to prove that the bond was to be discharged in some other way than that mentioned in the bond. It has not been shown how the first defendant can come under proviso (1), section 92, of the Evidence Ordinance.

1921.

Perera v. Kapuruhamy

I answer the issues thus :—

1 and 2. Not proved in view of the answer to third issue.

3. No.

4 and 5. No.

Enter decree for the plaintiff as prayed, with costs.

Samarawickreme (with him *Cooray*), for added defendant, appellant.

De Zoysa (with him *Canakaratne*), for plaintiff, respondent.

Cur adv. vult.

July 22, 1921. SCHNEIDER A.J.—

The defendant executed three mortgages, one in 1909 in favour of Thegis Perera, and the other two in 1913 in favour of the plaintiff. Upon the facts proved, the first must be regarded as a primary, and the others as a secondary and a tertiary, mortgage, respectively. No one of the mortgagees registered an address under the provisions of chapter XLVI. of the Civil Procedure Code. Thegis sued upon his bond making the defendant his mortgagor only a party to the action. At the date of that action, by the facts upon which the trial proceeded, it is not proved that the mortgages in favour of the plaintiff had been then created. But the trial of this action appears to have proceeded upon the footing that they had been created, and I will, therefore, proceed upon that assumption. Thegis obtained a mortgage decree in his favour, and caused the property mortgaged to be sold. It was purchased by the added defendant-appellant, who appears to have obtained a transfer in his favour in 1919. I say " appears " because the date of the transfer is given in his answer as May 9, 1909, which is an impossible date. It was registered on July 8, 1919, the date, therefore, of the transfer was probably May, 1919. In this action the plaintiff originally sued the defendant, his mortgagor, alone upon the mortgage bonds, but before trial added the appellant as a defendant, upon the allegation that the appellant was a party in possession of the land mortgaged. The appellant took no objection in the lower Court to his being added as a party. On appeal that objection was taken. But, in my opinion, it comes too late, and I therefore decline to consider it. The appellant pleaded in his answer that when the land was sold in execution under the decree upon the primary mortgage, he had purchased it, and that the plaintiff was not entitled, therefore, to ask for a hypothecary decree in respect of the land.

The learned District Judge, purporting to follow the case of *Appuhamy v. Naide*,[1] gave judgment for the plaintiff declaring the land bound and executable for the satisfaction of the plaintiff's claim upon his bonds. From this the added defendant has appealed.

[1] *(1919) 21 N. L. R. 173.*

I must confess I am unable to follow the reasoning of the learned District Judge. It is tantamount to this, that the plaintiff is not bound by the decree in the action by Thegis, but that as a result of that action the primary mortgage has vanished for some mysterious reason, and the secondary and tertiary mortgages are still alive and attach to the land. The case relied on by the District Judge has no application. It is only an authority for the proposition that a primary mortgagee, who sued his mortgagor alone at a date when the mortgagor had sold his interests and a third party was in possession of the property mortgaged, could not bring a subsequent action upon his bond against the party in possession, and that the party in possession was not bound by the decree against the mortgagor alone. I therefore fail to see how that case has any application to the present action. I have already dealt with the first contention of the appellant over-ruling it. There remains the second. It is this. When a land subject to more than one mortgage is sold under a decree upon the primary mortgage, title to it passes to the purchaser free of any secondary or any other subordinate mortgage. The appellant's title, therefore, to the land was free of the mortgages in favour of the plaintiff.

This contention is sound, and I would uphold it. The provisions of chapter XLVI. of the Code have no application in this case. Its decision does not depend upon those provisions, but upon a consideration of what are the rights of a secondary mortgage. A secondary mortgagee is one entitled to have his claim satisfied before other creditors from the proceeds of sale of the property mortgaged after the primary mortgage is paid. He is not entitled to be made a party to an action for realization upon the primary mortgage. He can only claim the proceeds of sale left over after the satisfaction of the decree upon the primary mortgage. It follows, therefore, that the title to a land sold in execution of the decree upon a primary mortgage passes to the purchaser free of any encumbrance created by a secondary mortgage or any such encumbrance. The added defendant-appellant therefore acquired title to the land free of the encumbrances in favour of the plaintiff, not because the plaintiff is bound by the decree in favour of Thegis, but because a sale in execution under a decree upon a primary mortgagee shifts the right created by other mortgages from the land to the proceeds of sale left over after the satisfaction of the claim of the primary mortgagee.

I would, therefore, allow the appeal, with costs, and direct that the decree be varied by eliminating therefrom that portion of it declaring that the land is to be sold for the satisfaction of the decree.

ENNIS J.—I agree.

Set aside.