1913.

Present: Lascelles C.J. and Wood Renton J.

ELYATAMBY *v.* VALLIAMMAI *et al.*

222—D. C. Jaffna, 7,995.

Mortgage of an undivided share—Mortgagee not registering address and not making puisne incumbrancer a party to mortgage action—Subsequent action for partition—Mortgagee not entitled to a declaration that the share mortgaged is subject to the mortgage—Civil Procedure Code, ss. 643 and 644—Utilis impensa.

Compliance by a mortgagee with the requirements of sections 643 and 644 of the Civil Procedure Code is a condition precedent to a puisne incumbrancer being made bound either directly or indirectly by the decree in the mortgage action.

A mortgagee of an undivided share did not register his mortgage or his address, in accordance with section 643, Civil Procedure Code, and did not make the person to whom the mortgagor had subsequently gifted the land by an unregistered deed a party to the

mortgage action. Under his decree the mortgagee himself purchased the land. Thereafter a co-owner brought an action for partition, and the mortgagee asked for a declaration that the title of the subsequent donee was subject to his mortgage.

Held, that the title of the subsequent donee was not subject to the mortgage.

WOOD RENTON J.—The appellant's (puisne incumbrancer's) deed was admittedly not registered, but there would be no obligation on her part to register it in any competition between it and the respondent's mortgage deed, unless the mortgagee had both registered that deed and provided the Registrar of Lands with an address to which puisne incumbrancers might send notices of their incumbrances.

THE facts material to this report are set out in the following extract from the judgment of the District Judge:—

Now I come to the most important point in dispute, viz., the title to the 25 lachams which belonged to Ponnachchi. She dowried to her daughter Valliammai 24 lachams out of this. She had previously mortgaged the 25 lachams to the second defendant. On the same day the dowry deed was executed the 24 lachams were sold to the second defendant by Valliammai; and second defendant considered that the mortgage bond given in his favour by Ponnachchi was discharged by the sale by Valliammai. There was litigation, and it was held that the deed by Valliammai in favour of second defendant was invalid. Thereupon second defendant sued Ponnachchi on the mortgage bond granted by her, and obtaining judgment sold up the 25 lachams and purchased them by Fiscal's conveyance dated March 25 last. In the hypothecary action Valliammai was not made a party. The question for decision is whether Valliammai is not entitled to 24 lachams out of 25 lachams by the dowry deed in her favour. The dowry deed was executed in contemplation of future marriage, but the marriage has not taken place. Therefore, it appears to me that the dowry deed must be regarded as a settlement or a donation. It was urged that this so-called dowry deed is of no effect, because it has not been accepted by a competent person on behalf of Valliammai. Valliammai herself has signed this deed, and I have to hold, following the decision reported in *11 N. L. R. 232*, that Valliammai by signing the deed duly accepted the donation. The question as to whether a minor by signing a donation deed could accept it effectually has not been specifically dealt with in any other case but this. The decision in this case is, therefore, binding on this point. Therefore, I must hold that Valliammai, the first defendant, is entitled to 24 lachams, subject to the mortgage in favour of the second defendant, and that the second defendant is entitled to the balance 1 lacham.

The first defendant appealed.

A. St. V. Jayewardene, for the first defendant, appellant.—The second defendant did not register his mortgage bond and his address, and did not make the first defendant (to whom the land was given by way of dowry by the mortgagor) a party to the mortgage action. He cannot now ask for a declaration that the land is subject to the

1913.

Elyatamby v. Valliammai

mortgage. The second defendant did not follow the procedure laid down in sections 643 and 644 of the Civil Procedure Code. He cannot get over the consequences of his failure by getting the Court in this partition action to declare that the first defendant's title was subject to the mortgage. Counsel cited *Ramanathan Chetty v. Cassim*,[1] *Pieris v. Weerasinghe*.[2]

Balasingham, for the plaintiff, respondent.—The point argued does not affect the plaintiff's title.

E. W. Jayewardene, for the second defendant, respondent—*Peiris v. Weerasinghe* [2] does not apply to the facts of this case, as the second defendant does not seek for a declaration of title to the land mortgaged.

The appellant himself did not register his mortgage or address, and he cannot take advantage of the first defendant's failure to comply with the provisions of sections 643 and 644 of the Criminal Procedure Code.

The mortgage debt must be regarded in the circumstances as *utilis impensa*. The property was undoubtedly burdened with the mortgage when the first defendant acquired title, and he should not be permitted to gain at the expense of the second defendant. The mortgage is not extinguished. *Silva v. Silva* [3] applies to the facts of this case.

Counsel cited *Nicholas de Silva v. Shaik Ali*,[4] *Rowel v. Jayawardene*,[5] *Hanniffa v. Silva*.[6]

A. St. V. Jayewardene, in reply.

Cur. adv. vult.

March 20, 1913. Wood Renton J.—

The contest between the appellant and the respondent, in so far as this appeal is concerned, relates to an extent of 24 lachams of the land described in the plaint. Ponnachchi, the original owner of the share in question, mortgaged it to the respondent by deed No. 837 of August 7, 1905, and subsequently gifted it by dowry deed of September 8, 1906, to her daughter Valliammai, the appellant. The respondent put the mortgage bond in suit, obtained decree, and purchased the share on Fiscal's transfer D 4 dated March 25, 1912. The appellant's dowry deed was admittedly not registered, but there would, of course, be no obligation on her to register it in any competition between it and the respondent's mortgage deed, unless the mortgagee had both registered that deed and provided the Registrar of Lands with an address to which puisne incumbrancers might send notices of their incumbrances.

[1] *(1911) 14 N. L. R. 177.*
[2] *(1906) 9 N. L. R. 359.*
[3] *(1909) 13. N. L. R. 33.*
[4] *(1895) 1 N. L. R. 228.*
[5] *(1910) 14 N. L. R. 47.*
[6] *(1912) 15 N. L. R. 362, at page 365.*

There was nothing on the face of the record, when the case first came before us in appeal, to show whether or not the respondent had complied with the conditions precedent imposed upon him by section 643 of the Civil Procedure Code. Accordingly we allowed him an opportunity of satisfying us by affidavit, if he was in a position to do so, that the conditions precedent just referred to had, in fact, been complied with. It now appears that the respondent is not in a position to furnish this proof, and we have, therefore, to consider whether, in that state of the facts, the learned District Judge, in declaring the appellant entitled to the 24 lachams in question under the dowry deed, was right in making that declaration of title subject to the mortgage in favour of the respondent. In my opinion he was not. The case is governed by the *ratio decidendi* in *Peiris v. Weerasinghe*,[1] and by the interpretation placed by that decision on sections 643 and 644 of the Civil Procedure Code. It is true that in *Peiris v. Weerasinghe* [1] the mortgagee claimed a declaration of title to the land in suit, whereas the respondent's counsel at the argument before us was content to claim only that the payment by him of the mortgage debt should be treated by the Court as a *utilis impensa*. We can, however, in my opinion, give effect to *Peiris v. Weerasinghe*,[1] and to the spirit of sections 643 and 644 of the Civil Procedure Code, only if we hold 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.

I would set aside so much of the judgment of the Court below as declares the 24 lachams found to be the property of the appellant to be subject to the mortgage in favour of the respondent. The appellant is entitled to the costs of contention in connection with that issue in the District Court, and to the costs of this appeal as against the present respondent.

LASCELLES C.J.—

The quesion for decision is whether the District Judge was right in holding that the first defendant-appellant's (Valliammai's) title to 24 lachams is subject to the mortgage in favour of the second defendant. It appears that the second defendant had neither registered his mortgage deed nor furnished the Registrar or Lands with an address, in accordance with section 643 of the Civil Procedure Code. This being so, the first defendant-appellant was deprived of the opportunity which section 644 allowed her of being joined as a defendant in the mortgage action, and she is not bound by the mortgage decree (*Peiris v. Weerasinghe* [1]).

Then it was argued that the principle of *utilis impensae* came in, and that the first defendant-respondent should not be allowed

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

1913.

LASCELLES C.J.

Elyatamby v. Valliammai

to profit by the property being discharged from the mortgage at the respondent's expense. But to allow the application of this principle would be to nullify the procedure laid down by the Code.

If the respondent had registered his mortgage and furnished his address in accordance with section 643, the appellant would have been bound by the mortgage decree. But the respondent has failed to make use of the means which the Code has provided for his protection. I do not think that there is any real analogy between the present case, where the mortgagee has allowed a puisne incumbrancer to slip in by neglecting to comply with the requirements of the Code and cases such as *Silva v. Silva*,[1] where the mortgage was invalidated on other grounds.

I would vary the judgment by declaring that the 24 lachams found to be the property of the appellant are not subject to the mortgage. The appellant is entitled to the costs of that issue in the District Court and to the costs of this appeal.

Appeal allowed.