Present: Ennis A.C.J. and Loos A.J.

1919.

APPUHAMY *v.* NAIDE.

109—D. C. Kurunegala, 7,106.

Mortgage—No address left with Registrar by either mortgagee or puisne incumbrancer—Action by mortgagee without making puisne incumbrancer a party—Mortgagee aware of puisne incumbrance—Puisne incumbrancer aware of mortgage action—Bid by puisne incumbrancer at auction—Estoppel—Subsequent action by mortgagee—Civil Procedure Code, s. 643.

Hendrick executed a primary mortgage in 1912 in favour of defendant and Peiris. In 1913 he executed a secondary mortgage in favour of the second plaintiff. On January 7, 1918, he sold the lands to the first and second plaintiffs. The first plaintiff paid off the secondary mortgage and half of the primary mortgage. On February 27 the defendant put the primary mortgage bond in suit without making the plaintiff a party, though he was aware of the purchase and bought the land himself. No address, as required by section 643 of the Civil Procedure Code, was given either by the defendant or the plaintiff.

Held, that the plaintiffs were not bound by the mortgage decree.

The facts that the plaintiff knew of the pendency of the mortgage action but took no steps, and that he bid at the auction sale, were held not sufficient in the circumstances of this case to constitute an estoppel.

Held, further, that the defendant could not bring a fresh action on the mortgage bond to make the plaintiffs liable.

THE facts appear from the judgment.

Bawa, K.C. (with him *Roberts*), for appellant.

E. W. Jayawardene (with him *Weerasinghe*), for respondents.

1919.

Appuhamy v. Naide

June 27, 1919. ENNIS A.C.J.—

This was an action for declaration of title to half share of certain lands and for ejectment. It appears that the land originally belonged to one Hendrick Singho, who mortgaged it on a primary mortgage on October 23, 1912, to the defendant and one Peiris Singho. He subsequently mortgaged it on a secondary mortgage on November 18, 1913, to the second plaintiff. On January 7, 1918, he sold it to the first and second plaintiffs. The first plaintiff assets that he had paid off the secondary mortgage, and paid off half of the primary mortgage to the administrator of Peiris Singho's estate. On February 27, 1918, the defendant put the primary mortgage bond in suit and received judgment, had the land sold, and bought for himself. The plaintiff was not a party to that action, and no address for service as required by section 643 of the Civil Procedure Code was given to the Registrar by the defendant or by the plaintiff. The learned Judge held that the plaintiff was not affected by the mortgage decree, because the mortgagee had not registered his address, and had further failed to make the plaintiff a party, although he knew of his purchase. The defendant appeals. The appeal raises an interesting point as to the construction of section 643 and 644 of the Civil Procedure Code. It is contended for the appellant that those sections are not exhaustive of the cases in which a person is bound by the mortgage decree in a case in which he is not made a party. Two cases were cited, in both of which neither party had registered an address, but it was held that the mortgagee's decree was binding, as the subsequent grantees had purchased during the pendency of the mortgagee's action. These two were the cases of *Sebastian Perera v. Jusey Perera* [1] and *Muheeth v. Nadarajapillai.*[2] It was argued that the sections 643 and 644 are not exhaustive, and do not expressly say what is to happen in cases in which the mortgagee has not registered an address for service, that section 4 of the Civil Procedure Code comes into operation, and that under that section the Court must look to the previously existing procedure and practice. It was contended that under the procedure and practice before the introduction of the Code a mortgagee had his remedy against the mortgagor, a personal remedy; and that his remedy against the land was effectual, if he made the person in possession of the land defendant in the case. In support of this contention the case of *Marimuttu v. De Soysa* [3] was cited. That was a Full Court decision, and would control this case, but for the fact that the provision of chapter XLVI of the Civil Procedure Code have been held to supersede the Roman-Dutch procedure for the realization of money secured upon the mortgage. This was a matter which came before the Full Court in case of *Suppiramaniam Chetty v. Weeresekere*,[4] where it was definitely held

[1] *(1910) 14 N. L. R. 20.*
[2] *(1917) 19 N. L. R. 461.*
[3] *8 S. C. C. 121.*
[4] *(1918) 20 N. L. R. 170.*

that only one action was now surviving to a mortgagee, and that was the action under chapter XLVI. of the Civil Procedure Code. Whether or not in such an action it is necessary or desirable to join the person in possession it is unnecessary to consider, because in the present case it would seem that there is no affirmative evidence that the person sued by the defendant in his mortgage action was in possession of the land, and so, as a matter of fact, the appellant in any event will be unable to fall back on the mortgage action as an action under the Roman-Dutch law, in which the mortgagee had sued the person in possession as such for the purpose of binding the land. There is no such allegation in the plaint in that action. I would, however, mention certain cases, namely, *Peiris v. Weerasinghe* [1] and *Elyatamby v. Valliammai*,[2] which went so far as to decide that a mortgagee, who had not registered his address, could not succeed as against subsequent grantees and puisne incumbrancers, even though they also had not registered their address. Compliance with section 643 in the matter of registering an address for service was held to be a condition precedent to success. The only other point in the appeal was a question of estoppel. It was argued for the appellant that the plaintiff was estopped from setting up a claim to the land as against the defendant in possession, because the plaintiff knew of the pendency of the mortgage action, and took no steps, and further, that the first plaintiff bid at the auction sale. It was suggested that this showed that the plaintiffs did not rely on their deed as any impediment to the sale. I appreciate the terms used in expressing this point in the argument of the appeal, but fail to see how it can really create an estoppel in the circumstances of the present case. The learned Judge has found that both the parties were well aware of one another's action, and that the defendant had knowledge of the plaintiff's purchase, and being aware of the true state of affairs, he can hardly fall back on an estoppel on a pure assumption that he acted on a belief to the contrary.

It was finally contended on appeal that the defendant's mortgage is not dead. I am not prepared to say that it is dead, but for effective purposes it is quite inoperative against the plaintiff. The defendant cannot bring a second mortgage action, as he has already exhausted that remedy, and after this case by the plaintiff, he cannot bring any other kind of action successfully against the plaintiff by virtue of the mortgage, even if it is not quite extinct.

In the circumstances I would dismiss the appeal, with costs.

Loos A.J.—I am of the same opinion.

Appeal dismissed.

[1] *9 N. L. R. 359.*

[2] *(1913) 16 N. L. R. 210.*