Present : Ennis and Porter JJ.

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317—D. C. Matara, 9,524-R. F.

Mortgage by widow and son for paying of husband's debts—Action by mortgagee—No registration of lis pendens—*Purchase under mortgage decree by defendant—Half land sold on a writ against widow and purchased by plaintiff.*

L, the widow (administratrix) of W, and her son mortgaged in August, 1916, the whole of the land in question to P, for the purpose of paying the debts of W (husband). P put the bond in suit in October, 1919, and without registering the *lis pendens* obtained judgment, and under the sale under the mortgage decree defendant purchased the land and obtained a Fiscal's transfer in September, 1920. Under writ issued against L in C. R. Tangalla, 9,187, half of the land was seized, and plaintiff purchased at Fiscal's sale in March, 1920, and obtained Fiscal's transfer in July, 1920.

Held, that plaintiff purchased the land subject to the mortgage.

"At the time of the institution of the mortgage action, the plaintiff had no title and could not be made a party; but the mortgagee failed to register the *lis pendens*, and by section 27 (*a*) (1) of the Land Registration Ordinance, 1891, as amended by Ordinance No. 29 of 1917, the failure of the mortgagee to register his action left the plaintiff free to purchase without being affected by the action. The plaintiff completed his purchase in July, 1920, and the defendant did not acquire any title to the land until September, 1920. A new position, therefore, appears to be created, which is not covered by the case of *Suppramaniam Chetty v. Weerasekera* [1] which decided that a mortgagee could have but one action on the bond. The Ordinance which says that the purchaser is not bound by any unregistered *lis pendens* enables a person to acquire title who could not possibly be made a party to the conclusive mortgage decree referred to in the case of *Suppramaniam Chetty v. Weerasekera* (*supra*).

THE facts are set out in the following judgment of the District Judge (C. W. Bickmore, Esq.):—

About June, 1919, plaintiff sued one Lokuhamy in her representative capacity in C. R. 9,187, Tangalla, and got a decree by default on August 22, 1919. Writ was taken out in November, 1919, and property seized on December 2, 1919. On February 5, 1920, the Fiscal returned the writ for extension, and on the extended writ the property was sold on March 5, 1920. Fiscal's transfer (P3) was issued on July 10, 1920, and registered on July 12, 1920. Meanwhile, another chain of title had been accruing. On May 7, 1916, Lokuhamy and Bainis (her son) made a note in favour of Davit Appu for Rs. 100, reciting the necessity for

[1] *(1919) 20 N. L. R. 170.*

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money in connection with the testamentary case No. 2,283 and promising to execute a bond. On May 9, 1916, Bainis paid a sum of Rs. 281 into Court in case No. 1,760—not 2,283, be it remarked—Thereafter Lokuhamy made several attempts to induce the Court to grant her permission to sell or mortgage properties, but without success, and meanwhile on August 17, 1916, she gave one Podihamy the bond D1. She did this without the authority of Court, she does not recite in it that she makes it in her representative capacity, but she says the property belongs to her by virtue of testamentary case No. 2,283.

On October 14, 1919, as suit was brought on the bond No. 10,843, and on writ dated January 6, 1920, the property was sold to defendant. He obtained a Fiscal's transfer dated September 9, 1920, and registered it on September 22, 1920.

I might note that defendant's land was registered on August 24, 1916, and also that he attended the sale on plaintiff's writ and bid for the property (P4). Plaintiff says that the bond was only to bind Lokuhamy's share of the estate, and he adds that in 10,843, she was not sued in her representative capacity. He points out that the amount of the bond is very small for such a valuable property.

Defendant, on the other hand, says that the surviving spouse, when the parties are married in community, has the right to sell or encumber the property of the community to pay the debts.

On this point it seems to me doubtful whether Lokuhamy, who had applied for leave of Court, was justified in dispensing with that leave. Furthermore, the bond was given to repay a loan on the note D 3.

Now, although that document says the object of raising the money was to defray expenses connected with D. C. 2,283, the money was actually expended for a very different purpose, namely, to pay for lands purchased in D. C. 1,760.

I therefore answer issues 6 and 7 against defendant.

I will answer now the various incidental questions which have arisen, and thereafter turn to the main points of importance.

Issue 4 raises the question whether plaintiff is estopped by his failure to bring a section 247 action on his claim in 10,843 having been rejected. There was no decision on the claim—it was rejected as coming too late—and I think there is ample authority for holding that a claim rejected in this way is tantamount to no claim having been made.

Again on issue 1 (*b*) I think it is quite clear that a fresh seizure on plaintiff's re-issued writ was not necessary. I notice that the Fiscal in his transfer recites that he sold by virtue of a writ dated November 11, 1919. He returned the writ for an extension to sell property seized, and I think it would have been oppressive and unnecessary to expect him to go through the formal process of a second seizure.

We come now to the crux of the case, unfortunately we are only too familiar by now with the position created by the person who first mortgages to one person and then mortgages or sells to another.

In order to protect the mortgagee there is provision in sections 643 and 644 for the registration of addresses, and I think it is now pretty well settled that a mortgagee, who does not avail himself of this protection, loses his rights against a puisne incumbrancer not joined in his mortgage action.

On the other hand, however, sections 643 and 644 clearly do not cover the whole ground. A puisne incumbrance may be created after the institution of the mortgage case, and this is what has happened in the

present instance. Obviously such an incumbrancer could not be joined in the mortgage case as he did not exist at the time it was instituted.

However, still in order to protect the mortgagee, there was the doctrine of *lis pendens* by which a purchaser, *lite pendente*, was pushed out.

Unfortunately for defendant in this case, this doctrine of *lis pendens* was productive of so much fruitless legal discussion and hardship to innocent purchasers that by Ordinance No. 29 of 1917 it was enacted that no *lis pendens* should affect a purchaser unless it was registered.

Defendant in this case did not register his *lis pendens*, and the sale to plaintiff, *pendente lite*, was therefore valid.

The only remaining point is the question how the death of the debtor Lokuhamy affects the validity of the respective transfers.

The decision of the Appeal Court in *Juan v. Fernando* [1] is fatal to defendant's case on this point.

He says Lokuhamy died in January—his writ is only dated January 6. He has not proved that she was alive when seizure took place—and his transfer is therefore a nullity.

On the other hand, I think it is to be gathered from the decision above quoted that a seizure before the death of the debtor brings the property "*in custodia curiæ*," and that plaintiff's seizure in December, before the debtor's death, is therefore good.

I think I have now answered all the complicated questions raised by this case, and all of them substantially in plaintiff's favour.

Judgment for plaintiff with damages as agreed, and costs.

A. St. V. Jayawardene, K.C. (with him *Soertsz* and *Weerasooriya*), for defendant, appellant.

Hayley (with him *Siriwardene*), for plaintiff, respondent.

March 14, 1922. ENNIS J.—

This was an action for a declaration of title to a half share of a certain land. The defendant claimed the whole land, and the plaintiff obtained judgment. The defendant appeals against that judgment. The whole of the land originally belonged to one D.D. Wickremasingha who was married in community of property to Lokuhamy. Wickremasinha died, and Lokuhamy, as widow, took out administration to his estate in case No. 2,233 in the District Court of Matara. In the Court of Requests case No. 9,187 half of the land was seized in the hand of Lokuhamy, and on a writ in execution it was purchased by the plaintiff on March 5, 1920. The seizure in that action was on December 2, 1919, and was duly registered. It appears, however, that prior to that action Lokuhamy had on August 17, 1916, mortgaged the whole of the land to one Podihamy for the purpose of paying her husband's debts. Her son also joined in this mortgage. Podihamy put the bond in suit and the land was sold by the Fiscal and purchased by the defendant who

[1] *(1916) 16 N. L. R. 135.*

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obtained a Fiscal's transfer on September 9, 1920, which was registered on September 22, 1920. I omitted to say that the plaintiff's Fiscal's transfer was dated July 10, 1920. The mortgage action was instituted on October 14, 1919. It is clear, therefore, that at the time of the institution of the mortgage action the plaintiff had no title, and could not be made a party, but the mortgagee failed to register the *lis pendens*, and by section 27 (*a*) (1) of the Land Registration Ordinance, 1891, as amended by Ordinance No. 29 of 1917, the failure of the mortgagee to register his action left the plaintiff free to purchase without being affected by the action. The plaintiff completed his purchase on July 10, 1920, and the defendant did not acquire any title to the land until September 9, 1920, namely, after the plaintiff had acquired title. A new position therefore appears to be created which is not covered by the case of *Suppramaniam Chetty v. Weerasekera* (*supra*), which decided that a mortgagee could have but one action on his bond, an action against all those entitled to notice at the time of the institution of the suit. The Ordinance which says that the purchaser is not bound by any unregistered *lis pendens* enables a person to acquire title who could not possibly be made a party to the conclusive mortgage action referred to in the case of *Suppramaniam Chetty v. Weerasekera* (*supra*). The plaintiff in this case, therefore, it would seem, has purchased a land subject to a mortgage. The facts in the case are very meagre, and the defendant has not made any claim on the basis of this position. It may be that he cannot make any such claim, but the question has not been gone in to or considered. I would accordingly dismiss the appeal, but reserve to the defendant any rights which may remain to him under the mortgage of August 17, 1916. There is one other point in the case which I may as well refer to. It was asserted by the respondent that the administratrix had no right to mortgage the property, as she could not do so without the leave of the Court, and she had twice applied for leave and had been refused. It would seem, however, so far as the record tells us, that the mortgage of August 17, 1916, preceded an application to the Court for leave to sell, and the application to the Court for leave to sell, related to other lands. Moreover, the record makes it clear that the money raised by the mortgage was used for the payment of a debt due to Wikremasinha's estate, for the inventory of that estate has been filed, and it discloses the debt due in respect of action No. 1,760, the action referred to by the learned Judge as that for which the money raised on mortgage was spent. It would seem then that the administratrix had a right to mortgage the property so far as the facts in the present case go. The respondent is entitled to the costs of the appeal and in the Court below.

PORTER J.—I agree.

Appeal dismissed.