

1928.

Present : Fisher C.J. and Driberg J.

RANASINGHE *v.* CAROLIS *et al.*

212—D. C. Kurunegala, 11,943.

Lis pendens—Mortgage action not registered—Sale by mortgagor's heir pending action—Transfer by heir registered in wrong folio—Conflict of title.

The plaintiff was the purchaser of property at a Fiscal's sale held in pursuance of a decree entered in his favour in a mortgage action, which was not registered as a *lis pendens*. He registered his Fiscal's conveyance in the right folio.

The added defendant who purchased the property from an heir of the mortgagor during the pendency of the action registered his conveyance in the wrong folio.

Held, that the plaintiff's title ought to prevail.

PLAINTIFF instituted the present action for declaration of title to a land, which was owned by one Mudianse, who mortgaged it to him by a deed dated March 6, 1915, and registered on May 15, 1915. On November 23, 1915, Mudianse obtained a Crown grant

for the land which he registered in a different folio. Mudianse died and the plaintiff instituted an action on the land against his legal representative and obtained a decree on February 12, 1925. Neither the *lis pendens* nor the decree was registered. The land was sold in pursuance of the decree and purchased by the plaintiff, who obtained a Fiscal's transfer on August 4, 1926, which he registered on August 28, 1926. Prior to this date the mortgaged premises had been sold by the heir of Mudianse to the added defendant, who had leased it to the defendants. The transfer in favour of the added defendant was registered in the wrong folio. The learned District Judge held that as the plaintiff had failed to register his *lis pendens* or decree the added defendant was not bound by the proceedings and dismissed the plaintiff's action.

1928.

Ranasinghe
v.
Carolis

H. V. Perera (with him *Amarasekara*), for plaintiff, appellant.—The non-registration of the *lis pendens* or the mortgage decree is immaterial. The added defendant's deed is registered in the wrong folio. It must, therefore, be treated as an unregistered deed. The competition is then between a prior registered Fiscal's conveyance at a sale in execution against a judgment-debtor and an unregistered voluntary conveyance from him. The question is merely one of the application of sections 16 and 17 of Ordinance No. 14 of 1891. The prior registered deed prevails. The added defendant could have protected himself by due registration. He has not done so. Had the appellant registered his *lis pendens* and his decree he would merely have had additional rights and been able to rely on his mortgage bond and the rights flowing from the mortgage action. In the present case he cannot do so, but he can still treat his mortgage decree as a simple money decree and avail himself of the provisions of sections 16 and 17 of the Land Registration Ordinance by reason of the prior registration of the Fiscal's conveyance issued in pursuance of the sale in execution.

N. E. Weerasooria, for defendant, respondent.—The rights of the appellant are derived from the contract upon the mortgage bond. The mortgagee is himself the purchaser and the appellant. His position is different from that of a stranger purchaser (*Abdin Khan v. Ali Khan*¹). In a mortgage action the *lis pendens* must be registered (section 27A of Ordinance No. 14 of 1891). A mortgage action is pending until the delivery of possession to the purchaser for the purpose of section 27A. (See *Saravanamuttu v. Sellamuttu*² and *Silva v. Fernando*.³) The provisions of sections 16 and 17 of Ordinance No. 14 of 1891 must be read in the light of, and not independently of, the provisions of this section, which is a section of the same Ordinance not inconsistent with the former, and, being a later section,

¹ 10 All. 166.² (1924) 26 N. L. R. 385.³ (1920) 22 N. L. R. 39.

1928.
 ———
 Ranasinghe
 v.
 Carolis

may be said to control the former. The mortgagee must combine in one action all his remedies (*Punchi Kira v. Sangu*¹ and *Suppramaniam Chetty v. Weerasekara*²). In order to get a binding decree he must register his *lis pendens* and his decree (*Saravanamuttu v. Sella-muttu (supra)* and *Anohamy v. Haniffa*³). There was no encumbrance on the register when the added defendant obtained his conveyance and no necessity for him to register his deed as far as the mortgage action was concerned. The appellant having failed to observe a statutory provision and permitted the added defendant to obtain a deed unaffected by his action could not, being in default by a later act, defeat rights already acquired. A mortgage purchaser's rights are different to those of a purchaser on a money decree (*Velupillai v. Muthupillai et al.*⁴ and *Anohamy v. Haniffa*⁵). The former cannot claim any rights in regard to the land as divorced from the contract on the bond and the *lis pendens* and decree arising from the action thereon. Having failed to observe the provisions of the Land Registration Ordinance in regard to *lis pendens* and the decree, he cannot avail himself of other sections in the same statute to cure his default unless there is special provision to that effect.

H. V. Perera, in reply.

December 3, 1928. FISHER C.J.—

In this case Mudianse was the owner of certain lands which he mortgaged to the plaintiff by a document dated March 6, 1915. That document was registered on May 15, 1915. On November 23, 1915, Mudianse obtained a Crown grant for the same lands which he registered in another folio. Mudianse died, and the plaintiff having had one Ukku Banda appointed his legal representative instituted an action on the bond against him on August 18, 1924. The plaintiff obtained judgment in that action and decree was entered on February 12, 1925. Neither the *lis pendens* nor the decree were registered by the plaintiff-appellant. In due course the mortgaged lands were sold in pursuance of the decree and purchased by the plaintiff-appellant who obtained a Fiscal's transfer dated August 4, 1926, which he duly registered, in a folio which was a continuation of the folio in which the mortgage bond had been registered, on August 28, 1926. Prior to this date, namely, on February 3, 1925, the mortgaged premises had been sold by the heir of Mudianse to the added defendant, by whom they were leased to the defendants. The deed transferring the property to the added defendant was registered in the wrong folio, and this appeal was argued on the footing that there was no registration of the transfer to the added defendant.

¹ (1900) 4 N. L. R. 42.

² (1923) 25 N. L. R. 289.

³ (1918) 20 N. L. R. 170.

⁴ (1923) 25 N. L. R. 261, at p. 267.

⁵ (1923) 25 N. L. R. 289, at p. 295.

In December, 1926, the plaintiff brought an action for declaration of title to the land in question and asked that the defendants be ejected therefrom and that he should be placed in quiet possession. The learned Judge was of opinion that inasmuch as the plaintiff had not registered his *lis pendens* or decree the defendant was not bound by proceedings founded on the mortgage bond and that the Fiscal's transfer did not prevail over the added defendant's deed of February 3, 1925. He dismissed the plaintiff's action and declared the defendants entitled to the land, but ordered the defendants and added defendants to pay the plaintiff the amount due on the mortgage bond with interest.

1928.

FISHER C.J.

Ranasinghe
v.
Carolis

This case is not a case of competition between registered documents. The sole question is whether the failure by the plaintiff to register his action on the mortgage bond as a *lis pendens* vitiates the Fiscal's transfer which was the outcome of the proceedings in that action. The learned Judge seems to have inclined to the view that the case would have been different had the purchaser at the Fiscal's sale been a stranger. In my opinion the learned Judge has attached too much weight to the failure of the plaintiff to register his *lis pendens*. I do not think the registration of a *lis pendens*, so far as it affects a case such as the present case, can have a further effect than this, namely, that a purchaser who buys during the pendency of an action which has not been registered as a *lis pendens* is not affected by proceedings in the suit in so far as they are previous to the transfer to him, but I fail to see on what principle it can be said that he is not then subject to the obligation to look after his own interests in the matter of registration. Had the added defendant duly registered his transfer he would have been in a perfectly safe position. It is clear that if the mortgagor or his representative had transferred the property on his own initiative subsequent to the transfer to the added defendant, or if the transfer had been in pursuance of a sale by the Fiscal in execution of an ordinary decree for payment of money, and the transferee had caused the transfer to be duly registered in the right register, that the transfer, apart from any question of notice, would prevail over that of the added defendant. Mr. Weerasooriya even admitted that if the transfer to the added defendant had been after the date of the Fiscal's transfer the latter must prevail. I cannot see any reason why a transferee who fails to protect himself by registering his transfer should be in any better position as against a Fiscal's transfer which is the result of proceedings in a mortgage action which has not been registered as a *lis pendens*, even though the purchaser is the plaintiff in the action, than he would be in the case of a registered transfer which was unconnected with any action. Nor do I see why a person in the position of the plaintiff who has failed to

1928.
 FISHER C.J.
 Ranasinghe
 v.
 Carolis

protect himself by registering his *lis pendens*, and has therefore run some risk during the pendency of the action should not get the benefit of registration when at length he decides to so safeguard himself. To discriminate between a transfer on a Fiscal's sale, under circumstances such as obtained in the present case, and a transfer unconnected with a mortgage suit seems to me to be purely artificial. The plaintiff got good title by legal process and registered his transfer, and in the competition between him and an unregistered transfer I think he should prevail.

In my opinion the decree of the District Court should be set aside and judgment should be entered for the plaintiff as claimed, for declaration of title and for an order ejecting the defendants and placing him in quiet possession. No evidence was called as to damage, but the plaintiff is entitled to an order for costs against the defendants in the District Court and of this appeal.

DRIEBERG J.—

This is an action *rei vindicatio*. The owner, Mudianse, mortgaged the premises to the appellant by a bond P 5, of March 6, 1915, which was registered on May 15, 1915, in folio 24/65. This is the folio in which the first deed relating to this land was registered and it is therefore the right folio in which, or in the continuations of which, all subsequent dealings with the land would have to be registered if they are to be regarded as duly registered for the purpose of the Registration Ordinance. The appellant registered his address as well under the provisions of the Civil Procedure Code.

The appellant instituted action on this bond on August 18, 1924, obtained decree on February 12, 1925, and the land was sold by the Fiscal. He bought it himself and obtained Fiscal's transfer of August 4, 1926, which was duly registered on August 28, 1926, in folio 187/130 which is an extension of folio 24/65.

The appellant did not register the institution of his action or the decree.

Mudianse on November 23, 1915, obtained a grant from the Crown for this land and it was registered in a new folio, F 162/221, not connected with folio 24/65. Bandara Ettana who succeeded to Mudianse's estate by inheritance sold the land to the added defendant-respondent by deed D 1 of February 3, 1925, which was registered on February 5, 1925, in folio 162/221. The defendants are lessors under the added defendant.

The learned District Judge held that the defendants-respondents had superior title, but he ordered that the appellant should recover from the defendants-respondents the amount due on his mortgage bond and interest. The appeal is from this judgment.

So far as the rights of these parties are to be decided on a comparison of the conveyances to them alone, title is in the appellant, for the transfer to him of Mudianse's interest is duly registered and that of the added defendant-respondant is not, but it is contended that the transfer to the added defendant-respondent, which was after the institution of the mortgage action and before the decree was unaffected by the institution of the mortgage action and the title derived under it as there was no registration of it as a *lis pendens*.

1928.

DRIEBERG J.

Ranasinghe

v.
Carolis

This proceeds upon a misapprehension of the effect of the registration of a *lis pendens*, when a person has bought in execution of a decree in an action, the institution of which was registered, and finds himself in conflict with a transfer by the defendant during the pendency of the action, but which has priority over his conveyance by due registration, he can claim preference for his title on the ground that the purchaser from the defendant was bound by the registration of his *lis* and that no transfer could therefore be made by the defendant to the prejudice of the person deriving title under the execution of the decree in the action.

But if he finds himself opposed by a transfer from the defendant which in itself has no priority over his conveyance, either by it being registered later or not registered at all, he can rely on the priority of his conveyance alone and this would be quite unaffected by the question whether the *lis* was registered or not.

This is the position of the appellant, to whose registered Fiscal's conveyance is opposed the deed of the added defendant-respondent which is not duly registered and is therefore void as against the appellant's conveyance.

The appeal is entitled to succeed.

The judgment of the District Court is therefore set aside and judgment will be entered for the appellant as claimed, but not for damages. An issue as to damages was framed but there was no evidence on the point.

The respondents will pay to the appellant the costs of this appeal.

Appeal allowed.
