Present : Ennis and Porter JJ. 1922.

FERNANDO *v.* SILVA *et al.*

452—D. C. Negombo, 14,849 F.

Mortgage of property by husband—Subsequent transfer to wife—Action by mortgagee on bond—No notice to wife—Is wife bound?—Matrimonial Rights Ordinance, ss. 13 and 14.

A mortgaged the property in dispute to B in 1899. B put the bond in suit and purchased it himself, and obtained a Fiscal's conveyance in 1915. In 1903 A conveyed for a consideration the land to his wife C, who was living in separation. She mortgaged it to D in 1911. D put the bond in suit, and purchased the property in 1919. B did not register his address, and did not make A's wife a party to his action on the bond.

Held, that D had better title; and that section 13 of the Matrimonial Rights Ordinance under which the gift of property by husband to his wife left the property still subject to the husband's debts did not dispense with the necessity of giving notice to C (wife) of the action on the mortgage bond by B.

THE facts appear from the judgment.

J. S. Jayawardene (with him *R. C. Fonseka*), for plaintiff, appellant.—The bond in plaintiff's favour was executed long prior to the deed in favour of Somiel. The deed in favour of Somiel was executed by her husband, and under section 13 of Ordinance No. 15 of 1876 it is subject to the debts and engagements of the husband as if the deed had not been made. The deed must be, therefore, treated to be null and void. The plaintiff was, therefore, under no obligation to make the wife a party to the action. In *Seneviratne v. Seeni*[1] it was held that where a lease was null and void as having been executed in contravention of a stipulation in a mortgage bond, it was not necessary to join the lessee as a party in an action on the bond. The deed in favour of the wife must be treated as non-existent, and she was therefore not entitled to any notice. Even if she was, the husband was served with notice, and in law this is sufficient, as he represents the wife in Court. The wife has no status in Court. Counsel also cited *Charisa v. Coudert.*[2]

Croos-Dabrera, for respondent.—Section 13 speaks of voluntary grants, gifts, and settlements. The deed in favour of Somiel is, on the face of it, a transfer, and must be presumed to be for consideration. No evidence has been led to rebut this presumption. The section does not make the deed null and void. It makes it

[1] *(1917) 4 C. W. R. 161.* [2] *(1914) 17 N. L. R. 397.*

1922.

Fernando v. Silva

subject to the debts of the husband. The wife is therefore in the position of a puisne encumbrancer, and the plaintiff not having registered his address, she is not bound by the mortgage decree (*Ramanathan Chetty v. Cassim*[1] and *Suppramaniam Chetty v. Weerasekera*[2]). She should have been made a party and given an opportunity of disputing plaintiff's claim. If the property had been seized under a writ on a money decree, it was open to her to prove that the debt was not due, or that the writ was irregularly issued. She should not be placed in a worse position in the case of a mortgage decree.

Jayawardene, in reply.—Under section 14 the burden of proof was on the wife to prove consideration. Counsel cited *Kanapathipillai v. Kanapathipillai*.[3]

April 4, 1922. ENNIS J.—

This was an action for a declaration of title. The land originally belonged to one Sadiris, who, on September 27, 1899, mortgaged the property on the document P 1 to the plaintiff. The plaintiff put the bond in suit and purchased the property himself, taking a conveyance on June 28, 1915. The defendant claims in the following way: He says that Sadiris on March 10, 1903, by the document D 1 conveyed the land to his wife Somiel, who, on October 3, 1911, mortgaged it to Weerasekera. Weerasekera put the bond in suit and purchased the property himself on November 20, 1919. He then sold it on May 26, 1920, to the first defendant. The learned Judge held in favour of the first defendant, on the ground that the plaintiff, when he put his mortgage bond in suit, failed to give notice to Somiel. The plaintiff appeals. I am of opinion that the learned Judge was right. Somiel was the subsequent grantee, and in the ordinary course should have received notice. It has been argued on appeal, however, that by virtue of section 13 of the Matrimonial Rights Ordinance, No. 15 of 1876, the gift of property by the husband to the wife left the property subject to the husband's debts as if the gift had not been made. This argument has been met in two ways: First, by the assertion that the conveyance by the husband to the wife was not a voluntary one. There is evidence that Sadiris and Somiel lived apart from one another. This carries it back to 1901, so that at the date of the conveyance from Sadiris to Somiel the parties were living apart, and had been doing so for about two years. The document itself recites that the conveyance is made in consideration of the payment of Rs. 500, and it goes on to say that the conveyance was for the purpose of paying a debt due by Sadiris to a person mentioned in the deed. Counsel for the appellant contended that this meant that Somiel had to pay a debt.

[1] *(1911) 14 N. L. R. 177.*
[2] *(1918) 20 N. L. R. 170.*
[3] *(1919) 7 C. W. R. 97.*

It was contended on the other side that it is merely a description of the destination of the Rs. 500, the consideration mentioned in the deed. Whichever be the correct interpretation, it still leaves the consideration mentioned in the deed (Rs. 500) intact. It was then argued that by a presumption of law this must be presumed to be the husband's money, and therefore the debt was a voluntary one. This presumption of law seems in this case to be met by the natural presumption arising from the circumstances that Sadiris and his wife were living apart, and that the money was the property of Somiel obtained independently of her husband, and property to which she was separately entitled. It would seem, therefore, that the conveyance of Sadiris was not a voluntary conveyance, and that section 13 of the Ordinance No. 15 of 1876 would not apply. Even assuming that the conveyance were a voluntary conveyance, still it would be subject to the husband's debts, and Somiel should have had notice when the debt was claimed and the bond put in suit. In the circumstances, I see no reason to interfere with the judgment appealed from, and would dismiss the appeal, with costs.

PORTER J.—I agree.

Appeal dismissed.