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*Present* : Jayewardene A.J.

ADAPPA CHETTY *et al.* v. BABI.

207—*C. R. Kegalla, 18,347.*

*Mortgage decree—Effect of not registering decree.*

R mortgaged the land in question to A in 1912. The bond was registered in the same year. In 1915 he mortgaged the same land to C. In 1918 C put his bond in suit and obtained mortgage decree, which decree was never registered. At the execution sale defendant purchased the land in September, 1920 (Fiscal's transfer, June 10, 1921). A put his bond in suit in February, 1920, and obtained decree in March, 1920, and registered the decree in October, 1920. The plaintiff purchased the property at the execution sale on June 5, 1921 (Fiscal's transfer in 1923). The defendant was in possession, and the plaintiff (purchaser under the first mortgage) sued him for declaration of title. Neither mortgagee had complied with the provisions of sections 643 and 644 of the Civil Procedure Code.

*Held*, that as the decree in favour of A (first mortgagee) was registered the plaintiff had superior title.

Mortgage decrees require registration. If a mortgage decree is not registered, any person claiming adversely to it under a subsequently registered instrument or decree is entitled to say that the unregistered decree is void as against him.

*Salmon v. Gabo*<sup>1</sup> followed.

<sup>1</sup> 53 L. J. Q. B. 344.

<sup>2</sup> (1905) 1 Leembruggen's Rep. 27.

THE facts are set out as follows by the Commissioner of Requests (W. J. L. Rogerson, Esq.) in his judgment :—

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One Rana mortgaged the land in claim by bond 17,827 of September 26, 1912, to Anamalay Chetty. This was the primary mortgage. Anamalay Chetty died, and his estate was administered by Supramaniam Chetty, who also died, and his estate was administered. His heirs were Adappa Chetty and Karupa Chetty. They instituted mortgage bond action C. R. 16,667 against Rana in 1920. The bond was reduced to judgment in 17,320, and decree registered in October, 1920. The property was sold in execution in June, 1921, and purchased by plaintiff, who obtained Fiscal's transfer 6,084 of January 13, 1922, duly registered on January 17, 1922. Plaintiff failed to register his address for the information of puisne encumbrancers. The effect of this failure is only to prevent him from taking a separate action against a puisne encumbrancer to have the mortgage property bond re-executable for the mortgage debt.

On March 30, 1915, Rana executed a secondary mortgage on bond 21,285 in favour of defendant. Defendant instituted mortgage bond action C. R. 15,029 on this bond on January, 1918, and obtained a decree in March, 1918. He did not register this decree. The property was sold on execution under his writ on September, 1920, and purchased by defendant, who obtained Fiscal's transfer 5,974 of June 10, 1921, which was registered on June 22, 1921, according to plaintiff, in the wrong folio. The issues framed are :—

(1) Is defendant bound by the decree in C. R. 16,667 ?

I take plaintiff's position to be that defendant is so bound because as mortgagee on bond 15,029 he failed to register his address.

(2) Even if not, does plaintiff gain a superior title by reason of the prior registration of the mortgage bond decree under which he purchased ?

(3) Is plaintiff's transfer superior to defendant's transfer by reason of due and prior registration ?

Defendant depends for his position almost entirely on the Full Court decision of *N. L. R. 20*, cited above. He argued that plaintiff having admittedly failed to register his address will have no remedy against subsequent encumbrancers. He also quotes *N. L. R. 16, p. 189*, and argues that defendant's vendor not being a party to plaintiff's action in the bond, defendant's bond must prevail over the sale to plaintiff. I will deal with this authority first. A reading of the headnote shows that that was a contest between a lease and a mortgage, the latter being taken in execution but prior in registration. It was held that the prior registration of a mortgage bond enures to the benefit of the purchaser in execution of the mortgage decree. That is not the question that arises in the present case, where the contest is between two Fiscal's transfers executed as the result of sales in execution in two mortgage bond actions. *In the present case plaintiff's bond is prior both in date and registration to defendant's bond.* The decision quoted cannot apply.

I will now deal with defendant's argument from the decision in *N. L. R. 20*. The argument is fully dealt with in the decision in appeal in *D. C. Kandy, 29,596*.

As already stated, defendant's position is that by his failure to register his address plaintiff has lost his rights to have the land sold

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under his bond, as the decree obtained by him was prior in date to that obtained by plaintiff, and his Fiscal's transfer is also prior.

The whole question is considered in the judgment in *D. C. Kandy, 29,596*, in which the facts were very similar to those of the present case.

The learned Commissioner discussed the cases, and continued :—

There was then no irregularity in the plaintiff's method of realizing his bond. The prior registration of defendant's Fiscal's transfer, even if it is duly registered, cannot prevail over plaintiff's transfer. For what defendant bought at the sale was only the interest of the secondary mortgagee which he bought subject to the primary mortgage. This decision must be held to be binding even if it apparently conflicts with the later judgment in *D. C. (F) Jaffna, 15,536*, decided on the 5th instant and reported in the "Times of Ceylon" of the 15th instant. That was a case of competing purchasers : one of which was by a mortgagee, the other being purchaser at a sale in execution of a money decree. It is a decision of De Sampayo A.C.J., who formed one of the Bench which decided *D. C. Kandy, 29,596*. It does not deal with the rights of primary and secondary mortgagees.

In view of my decision it is not necessary to answer the effect of a transfer not duly registered.

*Schokman*, for defendant, appellant.—The Commissioner was wrong in having followed the decision of the Full Court in *Moraes v. Nallan Chetty*<sup>1</sup> in preference to the earlier Full Court decision of *Supramanian Chetty v. Weerasekera*,<sup>2</sup> for the facts in the former case are different from those in the present case, whereas the position of the parties in the present case closely resembles that in *Supramanian Chetty v. Weerasekera (supra)*. The facts in *Moraes v. Nallan Chetty (supra)* were distinguished from those in *Supramanian Chetty v. Weerasekera (supra)* on two grounds, viz., (1) that the former was the case of a secondary mortgagee trying to take advantage of the non-compliance, with requirements which were held to be necessary to bind subsequent grantees, donees, or leasees, a distinction being drawn between the position of a subsequent mortgagee and that of a subsequent grantee ; (2) that the primary mortgagee was not bringing a supplementary action, but was only defending himself when assailed, and there was nothing to prevent him from setting up by way of defence what he may not set up by way of attack. With regard to the first point, sections 643 and 644 of the Civil Procedure Code wedges mortgagees in between grantees, lessees, and other incumbancers, and hence no distinction can be drawn between the position of a mortgagee and that of grantees, &c. With regard to the second point, in the present case the defendant (purchaser under the secondary mortgage decree) is in possession, and the purchaser under the primary mortgage is seeking to attack him. The latter's position is different from the position of the primary mortgagee in *Moraes v. Nallan Chetty (supra)*. Thus the present case must be governed by

<sup>1</sup> (1923) 24 N. L. R. 297.

<sup>2</sup> (1910) 20 N. L. R. 170.

*Supramanian Chetty v. Weerasekera (supra)*, where too the subsequent grantee was in possession and was assailed by the primary mortgagee.

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*H. V. Perera*, for plaintiff, respondent.—Granting that defendant is not bound by the primary mortgage decree owing to the mortgagee's failure to comply with sections 643 and 644, yet the defendant's Fiscal transfer is of no avail against plaintiff, as the secondary mortgagee's decree was not registered. The primary mortgagee's decree has been registered, and therefore renders void the earlier unregistered decree.

Counsel cited 6 *N. L. R.* 21 and 1 *Leembruggen's Reports* 27.

*Scholman*, in reply.

September 27, 1923. JAYEWARDENE A.J.—

In this case there is a conflict arising between two purchasers on mortgages executed by the same mortgagor. The land in question admittedly belonged to one Rana. He by mortgage bond No. 17,827 of September 26, 1912, mortgaged the land to one Anamalay Chetty, and three years later by mortgage bond No. 21,285 of March 30, 1915, he mortgaged the same interest to Charles Appuhamy. Charles Appuhamy put his bond in suit in January, 1918, obtained a decree in March, 1918, and at the execution sale the property was purchased by the defendant on September 30, 1920. He obtained Fiscal's transfer No. 5,974 of June 10, 1921. The decree obtained in March, 1918, was never registered. Anamalay Chetty instituted case No. 16,667 on his bond in February, 1920, obtained a decree in March, 1920, and he had it registered on October 16 the same year. The plaintiff purchased the property at the execution sale on June 5, 1921, and obtained a Fiscal's transfer No. 6,085 on January 13, 1922. The purchaser under the second mortgage is now in possession, and the plaintiff, the purchaser under the first mortgage, sues him for a declaration of title. Neither party had complied with the requirements of sections 643 and 644 of the Civil Procedure Code. The learned Commissioner following the decision of this Court in *Moraes v. Nallan Chetty (supra)* upheld the claim of the plaintiff and gave judgment in his favour. The defendant appeals, and tries to distinguish the present case from the Full Court case of *Moraes v. Nallan Chetty (supra)* by pointing out that in that case the purchaser under the first mortgage was in possession, and that the purchaser under the second mortgage was suing him to assert his rights to the land. The learned Chief Justice in the Full Bench case thought that that was a distinction which might make the decision of a previous Full Court case in *Supramanian Chetty v. Weerasekera (supra)* inapplicable to the facts of the case he was dealing with. I need not deal with this distinction

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between the present case and the case of *Moraes v. Nallan Chetty (ubi supra)*, but it is clear that there is a direct conflict between the *ratio decidendi* of the Full Bench decision in *Supramaniam Chetty v. Weerassekera (supra)* and the *ratio decidendi* of the Full Bench judgment in the case of *Moraes v. Nallan Chetty (supra)*, and if I had to decide the question on the issue whether the plaintiff lost his rights as against the defendant who purchased under the second mortgage by his failure to comply with the requirements of sections 643 and 644, I would have had to decide which of these two Full Court decisions I should follow. But the necessity for doing so is obviated by a fresh point taken by Mr. Perera, which shows that the defendant's purchase at the Fiscal's sale is null and void as against his client's purchase, because the decree on which the defendant has purchased has never been registered, while the decree under which the plaintiff purchased, which was later in date to the decree under which the defendant purchased, has been duly registered under the Registration Ordinance. Mortgage decrees require registration. I might refer to the case of *Mader Lebbe v. Nagamma*,<sup>1</sup> where Bonser C.J. said that "a mortgage decree is a decree which is capable of being registered under the Registration Ordinance and ought to be registered, and if it is not registered any person claiming adversely to it under a subsequently registered instrument, or decree is entitled to say that 'that unregistered decree is void as against me'" (see also sections 15 and 16 of the Registration Ordinance of 1891), and the facts of the case of *Salmon v. Gabo*<sup>2</sup> seem to be on all fours with the facts of the present case. In that case it was held that the registration of a subsequent mortgage decree renders null and void a prior mortgage decree against the same land which is not registered. This is a judgment of two Judges, and I am bound by it. Mr. Schokman, who appears for the appellant, is not able to distinguish the present case from the case of *Salmon v. Gabo (supra)*. In the circumstances, I follow the case of *Salmon v. Gabo (supra)*, and hold that all proceedings had under the decree under which the defendant purchased are void as it was unregistered and as the decree under which the plaintiff bought has been duly registered.

I accordingly dismiss the appeal, with costs.

*Appeal dismissed.*

<sup>1</sup> (1906) 6 N. L. R. 21.

<sup>2</sup> (1905) 1 Leembruggens's Rep. 27.