1915.

[FULL BENCH.]

Present : Wood Renton C.J., Shaw J., and De Sampayo A.J.

SILVA *et al. v.* GUNAWARDENA.

434—D. C. Negombo, 10,019.

Registration—Mortgage executed after deed of gift—Prior registration of mortgage—Must mortgagee make donee a party to mortgage action to get a decree binding on donee?—Civil Procedure Code, ss. 642, 643, 644.

A gifted his land to B, and thereafter mortgaged it to C. The mortgage bond was registered before the deed of gift. Neither B nor C registered their address under chapter XLVI. of the Civil Procedure Code. C obtained judgment on the mortgage bond with making B a party.

Held, that B was bound by the mortgage decree, though he was not a party to the action, and that the title of the purchaser at the execution sale held under the mortgage decree prevailed over that of B.

Mutturamen v. Massilamany[1] followed.

THE facts are set out in the judgment of the Chief Justice.

Bawa, K.C., and *Samarawickrema*, for plaintiffs, appellants.

A. St. V. Jayewardene, for defendant, respondent.

Cur. adv. vult.

February 2, 1915. Wood Renton C.J.—

This case raises a question as to the interpretation of section 17 of the Land Registration Ordinance, 1891 (No. 14 of 1891), which has already been frequently considered by this Court. The competing instruments are a deed of donation of the land in suit in favour of the plaintiffs, who are the children of the original owners, and a mortgage of the same land by one of the owners in favour of a Chetty. The deed of donation is dated October 14, 1895. It was not, however, registered till April 2, 1898. The mortage is dated October 24, 1895, and it was duly registered on the following day. The Chetty put the bond in suit in an action instituted on November 19, 1900, and obtained a mortgage decree on March 19, 1901. In the execution of this decree the property was sold. It was purchased by Fredrick Appuhamy, who obtained a Fiscal's conveyance on March 27, 1902, and on December 30, 1903, Fredrick Appuhamy sold it to Cornelis Appuhamy, from whom it was purchased by the defendant on November 25, 1911. Neither the plaintiffs nor the

[1] *(1913) 16 N. L. R. 289.*

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Chetty gave to the Registrar of Lands for the district in which the property is situated an address for service, and therefore no rights arise to either side under sections 642 and 643 of the Civil Procedure Code, and the legal position of the parties has to be defined with reference to the common law and the statute law of the Colony, apart altogether from that Code. The plaintiffs were not, in fact, made parties to the mortgage action, and they contend that they are, therefore, not bound by the decree in that action. The learned District Judge has over-ruled this contention and dismissed the plaintiffs' action with costs. Hence this appeal.

At the close of the argument we gave formal judgment dismissing the appeal with costs, intimating that the reasons for this judgment would be delivered subsequently. The question at issue—and no other point has been taken in support of the appeal—appears to me to be directly covered by the decision of three Judges in *Mutturamen v. Massilamany* [1] (see also *James v. Carolis* [2]). Counsel for the plaintiffs admitted that the mortgage in favour of the Chetty had acquired priority by virtue of its prior registration over the deed of donation. But they argued that the effect of this priority was merely to give to the deed of donation a secondary place, and that the donees were still entitled to insist on their right at common law to be made parties to the mortgage action, and even, by the registration of their deed in 1898 before the mortgage action was instituted to acquire a new priority over the mortgage itself. In the case of *Mutturamen v. Massilamany* [1] Sir Alfred Lascelles C.J. and I in our interlocutory judgment expressly held that an instrument which acquires priority by registration pushes out of its way every competing unregistered instrument of prior date for all purposes. A further question was raised in the case as to whether the title of a purchaser at a Fiscal's sale in execution of a mortgage decree dates from the Fiscal's transfer or from the mortgage. We reserved that question for the consideration of three Judges, as there were conflicting decisions on the point. But on the further argument of the case it again became necessary to deal with the character of the priority conferred by section 17 of the Land Registration Ordinance, 1891 (No. 14 of 1891), in view of an argument, which was presented to us by counsel for the respondent, that the priority conferred on a mortgage bond by reason of this prior registration should not deprive the party entitled under the instrument, postponed to the bond by virtue of such registration, of the benefit of the provisions of section 642 and section 643 of the Civil Procedure Code. Sir Alfred Lascelles rejected this argument on two grounds, the first of which was his previous ruling that the instrument which has lost the advantage of its prior execution by reason of its subsequent registration must be treated as non-existent as regards the instrument that has gained priority by prior registration, and I expressly

[1] *(1913) 16 N. L. R. 289.*

[2] *(1914) 17 N. L. R. at p. 78.*

agreed with him on the strength of my own holding to the same effect at the original appeal. Ennis J. formally concurred in the order made by the Court. *Mutturamen v. Massilamany* [1] is, therefore, a decision of three Judges, and as such it governs the present case. For it obviously makes no difference whether the rights which it is proposed to except from the operations of section 17 of the Land Registration Ordinance, 1891 (No. 14 of 1891), arise under the Civil Procedure Code or at common law. I desire merely to add that, in my opinion, the decision in *Mutturamen v. Massilamany* [1] is sound.

SHAW J.—

I agree. I think the Full Court in *Mutturamen v. Massilamany* [1] had before it, and decided in unmistakable terms, the very point that arises for our decision in this case. That decision is therefore binding on us, until it is varied by either a ruling of the Privy Council or an act of the Legislature.

DE SAMPAYO A.J.—

The question raised in this case is whether the defendant's title, which is traced to a Fiscal's sale in execution of a decree on a mortgage bond dated October 24, 1895, and granted by one Samuel Silva, prevails over the plaintiff's title, which is founded on a deed of gift dated October 14, 1895, granted to the plaintiff's by the same person and his wife. The bond was registered on October 25, 1895, while the deed of gift was not registered till April 2, 1898, and consequently the bond gained priority over the deed of gift. But in the action on the mortgage bond the plaintiffs were not parties, and that being so, the plaintiffs contend that they were not bound by the mortgage decree, and that their right is unaffected by the execution sale. Both the plaintiffs and the mortgagee failed to register an address as provided in sections 643 and 644 of the Civil Procedure Code, and, therefore, in regard to their respective rights, they are thrown back upon the general law. The argument for the defendant is that the prior registration of the mortgage bond made the deed of gift wholly void in the sense that, so far as the mortgage and all claims following from it are concerned, the gift must be regarded an non-existent, and that consequently the plaintiffs need not have been joined as parties to the mortgage action for the purpose of obtaining a binding decree. If the matter were *res integra*, I should say that this argument could not be maintained. Section 17 of the Registration Ordinance no doubt uses the word " void, " but its import is clearly defined and limited by the section itself, which immediately declares " that nothing herein contained shall be deemed to give any greater effect or different construction

[1] *(1913) 16 N. L. R. 289.*

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to any deed, judgment, &c., save the priority hereby conferred on it." In face of this it is to my mind impossible to say that the registration of the mortgage bond rendered the deed of gift "void" for all purposes or in any other sense than that the mortgage became prior in right though subsequent in date. No doubt the indirect effect of prior registration of a later deed may sometimes be to make the prior deed of no value whatever and void in that sense. But that seems to me to arise, not from the operation of the Ordinance, but from the nature of the competing deeds. If both the deeds create the same interest, as, for example, two transfers, which are mutually destructive, one deed of course voids the other. But where the two deeds can subsist together, as in the case of a mortgage and a transfer, I think that the prior unregistered transfer can in no real sense be regarded as non-existent, but that it only becomes subordinate to the mortgage. To apply this principle to the present case, the *dominium* of the property was vested in the plaintiffs by force of the gift in their favour, and the result of the non-registration of the deed was to make it subject to the mortgage. As in every other case of ownership subject to a mortgage, the plaintiff's position was such that I think they had a right to redeem the mortgage, and necessarily also to have notice of any action on the mortgage. This is, in fact, the scope and intention of the *actio hypothecaria* of the Roman-Dutch law against a party, other than the original mortgagor, whose title is subject to the mortgage.

In this connection it will be borne in mind that the provisions of sections 643 and 644 of the Civil Procedure Code relating to notice of the mortgage action apply only to a subsequent transferee, and as a person whose prior deed gets behind a mortgage by reason of non-registration does not answer to that description, the result will be, if the contention on the defendant's behalf is correct, that such a person will not under any law or procedure have the right to redeem the mortgage or to be made a party to the mortgage action for that purpose. I do not think that the language of the Registration Ordinance can or ought to be contrued as making such a radical alteration in our mortgage laws.

But whatever my own opinion may be on this point, I think the Full Court judgment in *Mutturamen v. Massilamany* [1] which is binding upon me, has construed section 17 of the Registration Ordinance in a contrary sense, and it seems to follow therefrom that the plaintiffs, whose deed of gift must under that ruling be regarded as non-existent for the purpose of the mortgage action, are bound by the decree in that action, though they were no parties to it, and that the defendant's title, which is referrable to that decree, prevails over that of the plaintiffs. I, therefore, agree that this appeal should be dismissed, with costs.

Appeal dismissed.

[1] *(1913) 16 N. L. R. 289.*