Present : Lascelles C.J. and De Sampayo A.J. 1912.

ARUMUGAM *v.* THAMPU *et al.*

48—D. C. Jaffna, 7,690

Appeal—Interlocutory order—Privy—Judgment obtained by third party against mortgagor after execution of mortgage—Is mortgagee bound by the decree against the mortgagor?

Interlocutory appeals in the course of a trial, having the effect of suspending the proceedings, are generally to be deprecated. when the matter of such appeals may well be brought up at the final appeal. But where the point is not a mere incidental matter, but goes to the root of the case, an interlocutory appeal is convenient, especially if it would prevent necessary evidence being shut out, and thus obviate a second trial for the reception of such evidence.

A judgment is not conclusive against a person as privy in estate to a party litigant, unless it is shown that he derives title under the latter by an act subsequent to the commencement of the action.

A judgment obtained against a mortgagor of land after the mortgage is *res inter alios acta* as to a mortgagee, who was not a party to the action.

THE facts are set out in the judgment.

Kanagasabai, for the plaintiff, respondent.—The learned District Judge has not delivered judgment in the case. He has only decided one issue, and fixed the case for trial on the other issues. No appeal lies against the decision of that issue. The appellants should have waited till decree was entered up in this case, and then appealed on all matters.

Balasingham, for the first and second defendants, appellants.—An appeal lies against any judgment, decree, or order pronounced by a District Court, except where such right is expressly disallowed. (See section 75 of the Courts Ordinance.) This is an " order " within the meaning of section 5 of the Civil Procedure Code. [Lascelles C.J.—An order is defined to be the formal expression of the decision of a Civil Court. There is no formal expression of a decision here.] It has been held by the Full Court in *Peris v. Perera*[1] that an order refusing to frame an issue is " a formal expression of a decision " within the meaning of section 5 of the Civil Procedure Code, and that an appeal lay against such an order. See also *Appuhamy v. Mudianse*.[2] If an order refusing to frame an issue is an appealable order, an order deciding an issue is also an appealable order.

[1] (1906) *10 N. L. R. 41.*

[2] *2 A. C. R. 159.*

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In any case this order of the District Judge goes to the very root of the case, and practically decides the whole case. It shuts out a large volume of evidence. If the Supreme Court holds in favour of the appellant on this issue of law after the whole case is decided, it would necessitate a second trial.

[Their Lordships, without making an order on the preliminary objection, heard the appeal on the merits.]

The first and second defendants are not privies of the third and fourth defendants. The plaintiff obtained judgment against the third and fourth defendants after they had mortgaged the land to the first and second defendants. The first and second defendants are not bound by any decision obtained by the plaintiff against the third and fourth defendants after the mortgage. See *Halsbury's Laws of England, vol. 13, p. 346, section 480; Hukum Chand 186; Kuda Banda v. Dingiri Banda;*[1] *Caspersz on Estoppel, Part II., pp. 172, 162.*

Kanagasabai, for the respondent.—The appellants are privies of the third and fourth defendants. Counsel cited *Amir Ali's Law of Evidence 135, 136, and 137.*

Cur. adv. vult.

May 21, 1912. DE SAMPAYO A.J.—

The facts of the case, so far as they are material to this appeal, are these. One Sanmugam, who was the admitted owner of a land, *ottied* certain shares in 1853 to one Muttupulle, among whose heirs are the third and fourth defendants. In 1907 the plaintiff, alleging that he was a son and heir of Sanmugam, brought the action C. R. Kayts, 8,087, against the third and fourth defendants and certain others as heirs of Muttupulle to redeem the mortgage. In that action the fact of the plaintiff being a son of Sanmugam was put in issue. The Court found in favour of the plaintiff on that issue, and in the result gave him judgment. In the meantime the third and fourth defendants had mortgaged to the first and second defendants certain shares of the land which they derived from some other parties, who are alleged to be the true heirs of Sanmugam.

Subsequently to the decision of the Kayts action, the first and second defendants, who were no parties to that action, sued the third and fourth defendants on their mortgage in the action C. R. Jaffna, 7,391, and obtained judgment and an order for sale of the mortgaged property under section 201 of the Civil Procedure Code. On the property being advertised for sale by the Fiscal under that order the plaintiff claimed the property, but his claim was rejected by the Court, as there had been no seizure as in an ordinary case of execution. The property was ultimately sold, and purchased by the first and second defendants.

[1] *(1911) 14 N. L. R. 145.*

The plaintiff brought the present action against the defendants, alleging that "the third and fourth defendants have no salable interest to any share of the said land, and the wrongful sale of the said shares affects the plaintiff's right to the said land," and praying that the third and fourth defendants may be declared not to have any salable interest in the land, and that the sale may be cancelled.

In the plaint the plaintiff set out the circumstances of the above action—C. R. Kayts, 8,087—and pleaded the decree therein as *res judicata* as against the third and fourth defendants. The first and second defendants in their answer took upon themselves to deny, what was not in fact asserted by plaintiff, that the Kayts case was *res judicata* against them. However, an issue was stated at the trial as to whether the decision in that case as to the plaintiff being a son of Sanmugam was binding on the first and second defendants, and a further issue, I take it as an alternative issue, was also stated of consent as to whether the plaintiff was a son of Sanmugam. The District Judge heard argument on the preliminary issue of law, and held that in the circumstances above recited the first and second defendants were privies of the third and fourth defendants and were bound by the decree in C. R. Kayts, 8,087, and so he decided the issue in favour of the plaintiff, and fixed the case for trial on the other issues The first and second defendants appealed.

Mr. Kanagasabai, for the plaintiff-respondent, took the preliminary objection that no appeal lay on the ground that there was no appealable order. We, however, heard counsel on the appeal. So far there was only a decision on one of the issues in the case, but it was an important issue, and the decision thereon practically amounted to a refusal to hear evidence on the alternative issue of fact, whether plaintiff was a son of Sanmugam. No doubt interlocutory appeals in the course of a trial, having the effect of suspending the proceedings, are generally to be deprecated, when the matter of such appeals may well be brought up at the final appeal. But where, as in this case, the point is not a mere incidental matter, but goes to the root of the case, an interlocutory appeal is convenient, especially if it would prevent necessary evidence being shut out, and thus obviate a second trial for the reception of such evidence. In this case the plaintiff's claim turns upon the fact of his being son of Sanmugam, for otherwise he has no right to the land at all. I think we rightly heard the appeal on its merits.

In my opinion the decision appealed from is erroneous. It will be seen that this is not an action *rei vindicatio*, where the plaintiff asserts his title against the first and second defendants as purchasers at the execution sale, but an action where the plaintiff seeks to show that the first and second defendants' mortgagors, the third and fourth defendants, have no title as against him, and on that ground to have the very execution sale set aside. The form of action is rather novel, but I say nothing as to that now. But the action

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being such as it is, it is the first and second defendants' position as mortgagees that is attacked. They are, therefore, entitled to raise any defence available as at the date of the mortgage. This mortgage was prior in date to the action C. R. Kayts, 8,087, and to the decree therein in favour of the plaintiff against the third and fourth defendants, and, therefore, the decree to which the first and second defendants were no parties cannot affect them, on the principle that a judgment is not conclusive against a person as privy in estate to a party litigant, unless it is shown that he derives title under the latter by an act subsequent to the commencement of the action. A judgment obtained against a mortgagor of land after the mortgage is *res inter alios acta* as to a mortgagee who was not a party to the action. *Natal Land and Colonization Co. v. Good.*[1]

The appeal should, I think, be allowed with costs.

LASCELLES C.J.—I entirely agree.

Appeal allowed.

[1] *L. R. 2 P. C. 121.*