Present: Bertram C.J. and Ennis J.

1924.

SARAVANAMUTTU *v.* SOLAMUTTU.

483—D. C. Colombo, 7581.

Mortgage—Registration of lis pendens—*Failure to register decree—Sale by mortgagor after decree—Purchase by mortgagee—Equitable rights—Ordinance No. 14 of 1891, ss. 16 and 17.*

A mortgagee registered his mortgage and his address, and on instituting his action on the bond failed to register either *lis pendens* or the decree, and bought the land in execution of his decree.

After the decree, the mortgagor sold the land to the plaintiff who registered his transfer.

Held, that a mortgage decree requires registration under section 16 of the Land Registration Ordinance, and that, unless it is so registered, it is void as against a purchaser for valuable consideration, who acquires title after judgment and before execution.

In the case of a mortgage action, the doctrine of *lis pendens* operates after judgment and up to the conclusion of execution.

Where a person has bought subject to a registered mortgage, he ought not to be allowed to eject the purchaser under the decree, except on terms of equitable compensation in respect of the extinction of the mortgage.

APPEAL from a judgment of the District Judge of Colombo. Action for declaration of title to a land which belonged to one Ameresekere, who, on August 1, 1919, mortgaged it to the defendant. The mortgage was registered on August 2, 1919, by the defendant, who also registered his address on August 28, 1919. On November 15, 1921, the defendant put his bond in suit, but he did not register his *lis pendens*. He obtained a decree on November 21, 1921, which was not registered. On the sale in execution on March 3, 1922, the defendant purchased the land and obtained a conveyance on March 17, 1922, which was registered on March 25. On December 12, 1921, *i.e.*, between the decree and the sale in execution, Ameresekere sold the land to the plaintiff, who registered his deed on January 27, 1922. The learned District Judge found in favour of the defendant.

H. V. Perera (with him *Weerasooria*), for plaintiff, appellant.—The defendant is a purchaser at a sale in execution in a mortgage action. The *lis pendens* was not registered. Plaintiff purchased from the mortgagor during the pendency of the action. Plaintiff's deed is registered prior to Fiscal's transfer in favour of defendant. Section 3 of Ordinance No. 29 of 1917 applies. Plaintiff gets a title free of any rights arising through the mortgage action. The learned District Judge purported to follow *Mohamadu Buhari v. Silva* [1]

[1] *(1923) 24 N. L. R. 477.*

1924.

Saravanamuttu v. Solamuttu

rather than *David v. Davith.*[1] The decision in *Mohamadu Buhari v. Silva* (*supra*) does not apply. Even if it does apply, it has been over ruled by a Bench of five Judges in *Anohamy v. Haniffa*[2] which is entirely in point.

Samarawickreme (with him *Navaratnam*), for defendant, respondent.—Sections 643 and 644 of the Code are capable of the construction that the registration of the mortgage bond and of the address is a sufficient compliance with the requirements of the law to render the *mortgage decree* binding, not only on a subsequent grantee, the conveyance to whom is prior to the institution of the action on the bond, but also on a person who seeks to set up title to the property hypothecated on a conveyance from the mortgagor suubsequent to the decree. Since a mortgage decree is purely *declaratory* and does not purport to *create* an interest affecting land, the registration of the plaint in a mortgage action is a superfluity. The matter in issue in a mortgage action is whether or not the property hypothecated is executable, in the event of the mortgagor's failure to satisfy the mortgagee's claim by payment. And, it is the decree in favour of the mortgagee that gives a good and valid title to a purchaser under the decree, as against the mortgagor and those claiming under him. Once the mortgage decree is entered, the property hypothecated is *in custodia legis*, till the decree is satisfied; and the mortgagor is precluded from dealing with the property declared to be executable under the decree. Any dealing with the property, subsequent to the decree, in contravention of the terms of the decree is nothing but an unlawful attempt to re-agitate the matter already decided in favour of the mortgagee. The *plea of res judicata* must, therefore, be held to prevail against a title derived from the mortgagor after the decree.

H. V. Perera in reply.—A mortgage decree requires registration (*Adappa Chetty v. Babi*[3]). The decree in the mortgage action in which defendant purchased was not registered. The principle of *res judicata* does not apply. The legislature expressly says that the *lis* does not bind unless registered. The decree is a part of the proceedings. Equitable relief should not be granted to the defendant. He has not claimed it in his answer. The defendant himself was the mortgagee. His position is different from that of a stranger-purchaser.

August 25, 1924. BERTRAM C.J.—

This is one of those cases which so frequently come before our Courts in which a mortgagee has to struggle with the difficulties caused by the fact that he has not fulfilled the requirements of the law. In order fully to protect himself against all eventualities, the

[1] *(1922) 4 C. L. R. 43.* [2] *(1923) 25 N. L. R. 289.*
[3] *(1923) 25 N. L. R. 284.*

mortgagee has to register first of all his mortgage; secondly, his address; thirdly, when he sues to enforce his mortgage, his action as a *lis pendens;* fourthly his decree when he obtains it; and finally, his Fiscal's transfer. It is the business of those who advise him to see that these things are done. If he fails to do any one of them, he has to depend upon the ingenuity of counsel to rescue him from what in this respect appears to be the inveterate negligence of notaries and proctors.

The facts of the case are comparatively simple, and may be made simpler still by the elimination of the fact that the mortgagor granted a lease to the present plaintiff before the action. It is agreed that this circumstance does not affect the issue of the appeal. The simple facts then are that after the mortgage decree the mortgagor purported to convey the land mortgaged to the plaintiff, The mortgagee had registered his mortgage and his address, but did not register either his *lis pendens* or his mortgage decree, and the question with which he is faced is, how to escape the consequences of his failure to do so. The mortgage decree was dated November 21, 1921. The plaintiff purchased the land about three weeks later, that is to say, on December 12, 1921, and registered his deed on January 27, 1922. The property was sold on March 3, 1922, the mortgagee himself being the purchaser, and his Fiscal's transfer was dated March 17, 1922. The mortgagee by his answer alleges that " the said J. H. E. Ameresekere (the mortgagor), in the erroneous belief that the title of a purchaser at the said execution sale could be defeated by a private sale by him of the said property, as the said action had not been registered, has in collusion with the plaintiff executed the transfer pleaded by the plaintiff with the fraudulent object of defeating the title of the purchaser at the said sale. The plaintiff is merely a nominee of the said J. H. E. Ameresekere (the mortgagor)."

The case was tried on a preliminary point of law, namely, the question of precedence between the plaintiff's conveyance and the defendant's Fiscal's transfer. The question whether or not the transfer was a transfer for valuable consideration was not tried. It turns out that this question is vital to the case, and it will be necessary to remit the matter to the District Court for the trial of this question of fact.

Mr. Samarawickreme, on behalf of the mortgagee, the respondent, raised a number of pleas, some of which have already been the subject of a judicial decision. One of these pleas was that, if a mortgagee registered his address in pursuance of section 643 of the Civil Procedure Code, his judgment was under section 644 binding against all subsequent grantees who had failed to register their addresses before action, even though they were not in existence at the date of the action. It is not possible to consider this suggestion seriously. The main points on which he relied, however, were

1924.

BERTRAM C. J.

Saravanamuttu v. Solamuttu

two; firstly, that a mortgage decree does not require registration, as it is not a judgment affecting the land mortgaged; secondly, that the failure of his client to register his *lis pendens* does not matter, inasmuch as the contending transfer took place after judgment, and consequently he was protected by another and independent principle, that of estoppel by *res judicata*.

He further contends that even if a mortgage does require registration, yet, for the purpose of application of the principle of *res judicata*, such registration is immaterial.

Before we deal with these contentions, it would be well to consider the effect in this case of the failure of the mortgagee to register his *lis pendens*. Mr. Samarawickreme made the suggestion that the principle of *lis pendens* only applies up to the final decree, and after final decree another principle was substituted, namely, estoppel by *res judicata*. It has already been held by this Court that, for the purpose of the application of the principle of *lis pendens*, a mortgage action is to be considered as pending up to the completion of execution. See *Silva v. Fernando*.[1] It was suggested, however, that the authorities were not fully considered in that case, and it would be well to submit the question to further examination. It appears to be undoubtedly the rule that in ordinary cases the principle of *lis pendens* extends only up to the final decree, and that after the decree and before execution a *lis pendens* can no longer be said to exist. But this is where the decree disposes of all matters between the parties, and nothing has to be worked out by further proceedings. With regard to mortgage actions, the leading textbook on the subject, *Bennett on Lis Pendens*, states the law as follows:—

> "Although it is true, in a general sense, that the *lis pendens* ceases with the rendition of judgment or entry of final decree, yet, in the case of a foreclosure of a mortgage on real estate, it cannot be said that the *lis pendens* ceases upon the making of the master's deed after sale under the decree. Where something remains to be done by the Court in the execution of its judgments and decrees, other than can be done without order of Court by the mere ministerial officers of the Court, *lis pendens* continues until the decree is executed. So in the case of a mortgage, it continues until the purchaser has been put into possession of the property." See *Hukm Chand's Res judicata on page 697*.

This has been expressly held to be the law in Indian Courts with regard to mortgage actions. See *Shibjiram v. Warnan*,[2] where the authorities are collected and considered. See also *Samal v. Babaji*.[3] In *Shibjiram v. Warnan* (*supra*), the question propounded was: Does the execution proceedings in a case like the present revive or give

[1] *(1920) 22 N. L. R. 39.*
[2] *(1897) 22 Bom. 939.*
[3] *(1904) 28 Bom. 361.*

continuance to the *lis pendens?* That question was stated to have been answered in the affirmative by a case in the Privy Council. I do not think it matters whether the *lis pendens* is to be considered as continuous, or only as having been revived by the execution proceedings. In either view of the matter, the principle of *lis pendens* prevails just as it is deemed to prevail in the interval between the final decree subject to appeal and the appeal. See *Hukm Chand, section 277; Caspersz's Modern Estoppel and Res judicata, 3rd ed., p. 331.* It must be taken, therefore, that, for the purpose of this action, the principle of *lis pendens* extended after decree and up to the sale.

As I have said Mr. Samarawickreme's two contentions were: first, that it is not necessary to register a mortgage decree; and secondly, that inasmuch as the transfer he attacked took place after judgment, he is entitled to avail himself of an alternative weapon, that of estoppel by *res judicata*, and that this is available to him, notwithstanding the fact that his decree was not registered.

With regard to the first of these contentions it is an attempt to extend the decision of this Court in *Mohamad Ali v. Weerasuriya*,[1] which declared that a decree in an action claiming a declaration of title to land was not a decree affecting land within the meaning of the Land Registration Ordinance. That decision, undoubtedly, established the principle that a decree cannot be said to affect the land, unless it invests a person with an interest in the land or imposes or creates some charge, interest, or liability which would operate prejudicially to the title of any subsequent purchaser. But I think that on an examination of the subject it will become clear that a mortgage decree does affect the land in this sense.

His second contention was that a judgment against a mortgagor precludes both the mortgagor and anyone who claimed through him from setting up a title inconsistent with the effect of that judgment. It was urged in fact that the operative effect of a judgment was binding on the person against whom it was pronounced and his privies as *res judicata*.

I think we shall be in a better position to deal with both these contentions if we examine the history of the doctrine which we are accustomed to refer to as that of *lis pendens*.

Strictly speaking, the terms which we have come to apply to this doctrine is a misnomer. The terms "*lis pendens*," both in Roman and Roman-Dutch law, had reference to quite a different subject. The law recognized an *exceptio litis pendentis*, but this exception was a plea that a suit was at the time actually proceeding in another Court. This exception is discussed by Voet in *IV., 2, 7, and 8*, and is referred to by Hukm Chand in the opening paragraph of his chapter on *Lis Pendens*. The principle of Roman and Roman-Dutch law which applies to the present case is a distinct and separate one,

[1] *(1914) 17 N. L. R. 417.*

1924.

BERTRAM C.J.

Saravanamuttu v. Solamuttu

namely, the *exceptio rei litigiosæ*. I cannot help thinking that the authorities dealing with these two exceptions have, in some cases, been confused. See in particular the judgment in *Perera v. Silva*.[1]

Roman law absolutely prohibited the alienation of a *res litigiosa*. The subject will be found dealt with in special sections both of the Digest and of the Code. See *Digest XLIV., 6 Cod., VIII., 36* (*37*). The prohibition was of a very ancient date, and is referred to in a particular form by Gaius in his treatise on the Twelve Tables, *Digest XLIV., 6, 3, "Rem de qua controversia est prohibemur in Sœrum dedicare."* It was the subject of a special novel by Justinian, number CXII., in which he reinforced the prohibition by special penalties.

In Roman-Dutch law the question arose whether this prohibition rendered the alienation absolutely void, and it was held that it did not. It was pointed out that it was a prætorian prohibition, inasmuch as it was enforcible by an exception. The alienation was not void, but voidable, and became void on the exception being pleaded. See *Sande de prohibita rei litigiosæ alienatione, ch. IX., ss. 2, 12.* It was further pointed out by Voet that if every such alienation was void, this would also apply to alienations made by the victorious party, and that this was contrary to reason, *Voet XLIV., 6, 1.* The alienation was, therefore good, subject to the right of the successful party to the suit to set it aside. Hence in Roman-Dutch law there followed the conclusion that *res litigiosæ* might be freely alienated or transferred in any other manner, but always subject to the right of the other party to the litigation, *Salvo iure tertii.* The decree against the party alienating could be executed against the possessor of the property without a new suit. See *Voet, XLIV., 6, 3; Van Leeuwen's Censura Forensis, bk. II., 1, 26, 16; Vander Kessel's Theses, DCXXX.* All these authors states this principle in almost the same terms. See in particular *Vander Kessel:—*

> *Res litigiosa nunc alienari potest, sed Salvo iure tertii litigantis, qui reportata Victoria, rem, de qua litigavit, absque novo processu, a præsente possessore per executionem avocare potest.*

This is in fact exactly the English principle of *lis pendens* which is embodied in the maxim, *pendente lite nihil innovetur*, and which appears to have received statutory recognition as early as the reign of Edward I. (*Hukm Chand, paragraph 269*). In Ceylon we have long had the habit of expressing this principle of our own law in the phraseology of the corresponding English doctrine. We have treated the leading English case of *Bellamy v. Sabine* [2] as our own leading authority so long ago as 1887. We have treated the English authorities as governing our own law, and have recently consecrated this state of affairs by legislation.

[1] *(1910) 13 N. L. R. 81.* [2] *(1857) De G. and J. 578.*

I mention this development for this reason; that under the Roman-Dutch law a hypothecary action does not make the land *res litigiosa*, and the mortgagor was not restrained from alienating it. See *Sande, ibid, IX., 1, 4.* The mortgagee had indeed other special remedies, and his rights are specially dealt with in the novel of Justinian just cited. De Sampayo J. considered this very question in *Muheeth v. Nadarajapillai,*[1] and with some reluctance came to the conclusion that the principle of *lis pendens* does apply to mortgage actions. He does not appear to have realized that the question was specifically dealt with in *Sande*, and if he had done so, it is possible that he might have been of another opinion. The opinion he expressed was adopted by Wood Renton C.J., and *subsilentio* by Shaw J., and is binding on ourselves. It seems clear from the authorities cited in an earlier passage of this judgment that in places where the English Common law prevails, the principle of *lis pendens* is regarded as applicable to mortgage actions, and I think it should be taken that, with the phraseology of the English law, we have also adopted the sphere of its application.

The material question here, however, is: What is the basis of the principle which we administer? In our own law it originates in the prætorian prohibition against alienation of property which was the subject of a suit. On what ground does this prohibition proceed? *Hukm Chand, ibid, section 269*, says: "This is virtually another extension of the doctrine of *res judicata* in regard to persons, and was recognized even by the Romans among whom the *res* from the commencement of *lis* became *litigiosa* which neither of the parties could alienate; the subject in dispute after *litis contestatio* became litigious and passed into *quasi* judicial custody, and both parties came under an obligation not to withdraw it from the decision of the Judge." Hukm Chand quotes as his authority for this way of regarding the principle Lord Mackenzie's Roman law, but the passage cited does not appear to justify the citation. I have not been able to discover in any Roman or Roman-Dutch text any expression of this view of the matter. But the same view has been taken in the American Courts. See the case cited in *Hukm Chand* on page 691. The main purpose of the rule is to keep the subject-matter of the litigation within the power of the Court until the judgment or decree shall be entered; otherwise, by successive alienations, its judgment or decree could be rendered abortive, and thus make it impossible for the Court to execute its judgment or decree. If then, as we justly may, we adopt this, as the explanation of the original prohibition, it applies equally to the modern principle which has been evolved from it. The principle of *lis pendens* means that from the commencement of the suit the subject becomes *litigiosa* and passes into *quasi* judicial custody. That *quasi* judicial custody in the case of a mortgage action, we have seen,

[1] *(1917) 19 N. L. R. 466.*

1924.

BERTRAM C.J.

Saravanamuttu v. Solamuttu

continues until the final execution of the mortgage decree. We sometimes use the term *custodia legis*. This, in English law, refers to the custody by the Sheriff of goods delivered to him in execution. (See *Stephen's Commentaries, vol. III. on page 290*), and has no reference to the subject we are discussing. But in the sense explained by Hukm Chand the mortgaged land is *in custodia legis* from the institution of the suit until sale, and cannot be dealt with except subject to the determination and executive action of the Court.

This being the position, it will become apparent that the subject of *res judicata* is irrelevant to our present problem. The judgment has no special operative effect in the way of putting the property into the custody of the Court. It is in the custody of the Court from the institution of the action. Moreover, the principle of estoppel by *res judicata* is not concerned with the operative effects of judgments. That principle does not mean that the parties to a judgment are bound by its operative effect, but that they are bound by the determination of the Court on all actual or implied issues of fact and law, and may not raise them again. I have carefully perused the textbooks dealing with this subject, and I cannot find that it has at any time been regarded as having any other scope. That scope for the purpose of our own law is defined by the explanation to section 207 of the Civil Procedure Code. It is not possible, therefore, for a litigant who has disabled himself from using the weapon of *lis pendens* by failing to register his suit to make good his defect by having recourse to the alternative weapon of *res judicata*. The position is thus clear for considering the effect of the failure of the plaintiff in a mortgage action to register *lis pendens* and his decree respectively. On the institution of *lis pendens*, the mortgaged land becomes liable to be affected by the judgment. upon decree it becomes actually so affected. By the operation of the same principle, the order for sale is binding upon any subsequent purchaser until the order has been finally carried out. It thus imposes a charge which prejudicially affects him. But for this reason the law imposes a further condition upon the mortgagee. This charge does not become effective against a subsequent purchaser who has duly registered. If it is not so registered, the purchaser acquires an unaffected title which prevails against the subsequent title of a person buying at the sale held in execution of the decree. The result is that, though the principle of *lis pendens* operates up to final execution, its registration only protects the mortgage up to decree; after decree he must further protect himself by registering the decree. On the other hand, as I understand the position, if the mortgagee neglects to register his *lis*, but does register his decree, then he is sufficiently protected against all purchasers acquiring an interest between the decree and its execution.

I agree, however, with the proposition of my brother Ennis that when that Statute says no *lis pendens* shall bind a " purchaser " unless and until the same shall be registered, it means by " purchaser " a purchaser for value. It does not include a grantee on a voluntary conveyance. The term " purchase " has, it is true, a " technical " meaning in English law; a purchaser being a person who obtains title by descent or devolution of law, but I do not think the word in the English Act, from which our enactment is taken, was used in this technical sense could be imputed to the word "purchaser" used in our own Ordinance. The word " purchaser " in the Statute of Elizabeth (*27 Eliz. C. 4, s. 2*) was interpreted as meaning a purchaser for money or other valuable consideration (*Twyne's case, 3 Rep., 83a*). And I think it must receive a similar construction here.

The result, therefore, is that as against a person who is not a purchaser for valuable consideration, the principle of *lis pendens* still operates notwithstanding any default in registration, and as against such a person the decree does affect the land. As against such a person, moreover, it is not necessary to register. To sum up, therefore, I hold that—

(1) In the case of a mortgage action, the doctrine of *lis pendens* operates after judgment and up to the conclusion of execution.

(2) As against a purchaser for value acquiring title after judgment but before execution, the doctrine of *res judicata* does not protect a mortgagee who has failed to register his *lis pendens*.

(3) A mortgage decree requires registration under section 16 of the Land Registration Ordinance, No. 14 of 1891.

(4) Unless it is so registered, it is void as against a purchaser for valuable consideration, who obtains title after judgment and before execution.

In any case it is clear that the plaintiff has bought subject to a duly registered mortgage, and he ought not to be allowed to eject the defendant except on terms of equitable compensation in respect of the extinction of that mortgage. This principle has been already recognized in two decisions of this Court (*Kristnappa Chetty v. Horatala* [1] and *Anohamy v. Haniffa* (*supra*)), but has not so far been worked out in detail.

I would, therefore, set aside the decree, and send the case back for further consideration. If it is found that the purchase was not for valuable consideration, judgment should be entered for the defendant. If, on the other hand, it should be found that the purchase was a purchase of this nature, plaintiff should be declared entitled to the land, subject to the payment of such compensation for extinguishing the mortgage as the Court may determine on proper issues framed, or as the parties may agree.

I agree that the costs of the appeal should abide the result.

[1] (*1923*) *25 N. L. R. 39.*

1924.

Saravanamuttu v. Solamuttu

ENNIS J.—

This was an action for a declaration of title to land and for the recovery of possession.

The land in question belonged to one Ameresekere, who, on August 1, 1919, mortgaged the property to the defendant. The defendant duly registered his mortgage on August 2, 1919, and registered his address on August 28, 1919. On August 5, 1921, Ameresekere leased the land for two years, and the lease was registered on May 3, 1922. On November 13, 1921, the defendant put his bond in suit on a warrant of attorney to confess judgment. He did not make the lessee a party to the action, and did not register a *lis pendens*. He obtained a decree on November 21, 1921. He did not register the decree. On the sale in execution on March 3, 1922, the defendant purchased the land and obtained a conveyance on March 17, 1922, which was registered on March 25, 1922.

On December 12, 1921, *i.e.*, between the decree and the sale in execution in the defendant's mortgage action, Ameresekere sold the land to the plaintiff, who registered his deed on January 27, 1922.

The case was heard on a preliminary issue of law, and the learned Judge held in favour of the defendant.

On the appeal it was conceded that the plaintiff, as lessee under the lease, was bound by the judgment in the action as he did not register his lease before the institution of the action.

The plaintiff's appeal was pressed on the ground that his deed of sale was executed and registered before the conveyance to the defendant and so obtained priority under section 17 of the Registration Ordinance, 1891.

The argument in appeal resolved itself into a consideration of the various ways in which a mortgagee can protect his mortgage against subsequent grantees—

(1) *Before the Institution of the Action.*—By registering his mortgage and address he can deal with all subsequent grantees up to the date of the institution of the action, by giving all those who have duly registered their deeds and addresses notice of the action. Then by section 644, Civil Procedure Code: "Every person so noticed . . . . and every such grantee . . . . whose deed shall not have been registered, or who shall not have furnished such address as aforesaid," are bound by the judgment in the action as if they had been made parties. It was argued that the true intent of sections 643 and 644 of the Civil Procedure Code was to provide a means by which every subsequent grantee would be bound by the action. The words of section 644, by reference to such grantees and furnishing an address as aforesaid, clearly limit the persons to be bound by the action to those whose grants are executed before the date of the institution of the action.

(2) *After the Institution of the Action.*—Purchasers whose deeds are dated after the institution of the action can be bound by the action only when the *lis pendens* is registered (section 27 (*a*) 1 of the Registration Ordinance, 1891, as amended by Ordinance No. 29 of 1917). If a *lis* be not registered, a purchaser who has obtained the legal title after the institution of the action is not bound by the action.

(3) *After the Decree in the Action.*—Section 16 of the Registration Ordinance, 1891, provides *inter alia* that every judgment affecting land shall be registered.

And section 17 provides that: "Every deed, judgment, order, or other instrument as aforesaid, unless so registered, shall be deemed void as against all parties claiming an adverse interest thereto on valuable consideration, by virtue of any subsequent deed, judgment, ... which shall have been duly registered as aforesaid. Provided, however, ... that nothing herein contained shall deemed to give any greater effect or different construction to any deed, judgment, order, or other instrument registered in pursuance hereof, save the priority hereby conferred on it."

At this stage of the case it is to be observed that an issue was raised as to whether the plaintiff was a *bona fide* purchaser for valuable consideration. That issue has not yet been tried, but assuming that he was, it would seem that by his prior registration of his deed he obtained priority over the decree.

It was argued (1) that a decree in a mortgage action was not a document affecting land and need not be registered, (2) that there was no adverse interest, and (3) that the decree was *res adjudicata*.

On the first of these questions, I am of opinion that a mortgage decree is a document affecting land. The mortgage action is an action "to enforce a right of sale under a mortgage" (see section 201, Civil Procedure Code.) On the decree there is no seizure of the land, the land automatically passes into the custody of the Court, and the Court makes arrangements for the sale and subsequent conveyance to the purchaser. The decree in a mortgage action, therefore, in my opinion, operates to transmit the property to the Court and enables the Court to grant a valid conveyance to the purchaser. That a mortgage decree must be registered was held in the cases of *Salman v. Gabo*,[1] *Madan Lebbe v. Nagamma*,[2] and *Adappa Chetty v. Babi* (*supra*).

On the second point, I am unable to see how the mortgage and grant are adverse, because they can both exist concurrently. The moment, however, that a decree is passed in the mortgage action, if, as I think, there is a transmission of the land by operation of law to the Court, when the property is "*in custodia legis*," then there is an adverse interest, and the grant or the decree will stand or fall

[1] *1 Leembruggen's Rep. 27.* [2] *(1902) 6 N. L. R. 21.*

1924.

ENNIS J.

Saravanamuttu v. Solamuttu

with priority of registration. It has been held that the protection afforded by registering a *lis pendens* may extend to the subsequent conveyance by the Court.

On the third question, I am unable to see how any question of *res adjudicata* can arise. If the decree be void for the purpose of the priority of the competing grant, there is no judgment to form the basis of *res adjudicata* as applied by section 207 of the Civil Procedure Code.

Should it be found that the plaintiff is not a purchaser for valuable consideration, then his grant obtains no priority by registration. What then is the position of the mortgagee on obtaining a decree? The decree is prior in date. Has such an unregistered decree any force to bind a grantee who has not given valuable consideration for his grant? The object of the requirement of section 16 of the Registration Ordinance, that judgments affecting land must be registered, seems to be to afford notice to intending purchasers that the legal title has been affected by the decree.

The amended section 27A (1) says that no *lis pendens* shall bind a " purchaser," unless and until registered. The word " purchaser " seems to have the same meaning as the words " party " claiming on valuable consideration found in section 17. The amended section 27A (1), therefore would not apply to a grantee other than a purchaser, and such a person would be bound as formerly by the *lis*, and the decree would be *res adjudicata* against him.

I would set aside the decree and send the case back for a finding of fact on the issue undecided. The costs of the appeal to abide the result. If the plaintiff is a purchaser for value, he should be declared entitled to the land, subject to the payment to the defendant of such compensation for extinguishing the mortgage as the Court may determine on proper issues framed, or as the parties may agree. If the plaintiff be not a purchaser for value, his claim should be dismissed.

Set aside and sent back.