1967 *Present :* **H. N. G. Fernando, C.J., and Sirimane, J.**

M. H. M. SHAFEEK, Appellant, *and* G. H. G. SOLOMON DE SILVA and 2 others, Respondents

S. C. 134/64—D. C. Galle, 6519

Mortgage—Hypothecary action—Order for issue of summons—Filing of declaration required by s. 8 of the Mortgage Act is condition precedent—Failure to file such declaration—Effect—Principles applicable in determining whether or not a provision of procedural law is imperative—Mortgage Act (Cap. 89), ss. 5, 8, 9, 10, 12, 13, 14, 15, 16, 18, 25, 29, 31, 37.

In a hypothecary action, the failure of a Proctor to file, before the issue of summons, the declaration required by section 8 of the Mortgage Act regarding registration of *lis pendens*, etc., renders null and void (and not merely voidable) the hypothecary decree ultimately entered and the sale in execution of it. In such a case, a person who bought the mortgaged property from the mortgagor subsequent to the date of the mortgage bond and prior to the institution of the hypothecary action has valid title to it, as against the purchaser at the sale in execution of the hypothecary decree, even if he was not entitled to notice of the hypothecary action by reason of his failure to register his address ; section 16 of the Mortgage Act would not be applicable to him.

APPEAL from a judgment of the District Court, Galle.

C. Ranganathan, Q.C., with *M. T. M. Sivardeen*, for 2nd Defendant-Appellant.

H. W. Jayewardene, Q.C., with *D. R. P. Goonetilleke*, for Plaintiffs-Respondents.

S. Sharvananda, with *C. Chakradaran*, for 1st Defendant-Respondent.

Cur. adv. vult.

July 4, 1967. H. N. G. FERNANDO, C.J.—

There arises in this appeal a question of much importance and of some difficulty involving the construction of the Mortgage Act. (Cap. 89).

One Deen, a Notary, had on 1st March, 1952 mortgaged a land to the Crown as security for the due performance of his duties as a Notary. The bond was put in suit in action No. X 2203 D. C. Galle on 28th February 1957, and upon Deen's consenting to judgment, a hypothecary decree was entered in September, 1957. The present plaintiff purchased the land at a sale in execution of the hypothecary decree, and claims title under a Fiscal's conveyance in his favour dated 15th March 1961.

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Deen had in November 1955 sold the land to the present 2nd defendant. The conveyance in the 2nd defendant's favour was registered in November 1955 in the same Folio in which the mortgage bond was registered. The position taken for the 2nd defendant in this action is that the decree and sale in the mortgage action were void, and that the 2nd defendant continues to have title to the land by virtue of the conveyance of November, 1955.

Section 8 of the Mortgage Act provides that " An order for the issue of summons in a hypothecary action shall not be made by any court unless a declaration under the hand of a Proctor is filed of record ". The declaration must certify that the *lis pendens* of the action has been duly registered in the proper Folio, and that the register has been personally inspected by the Proctor or by some other specified Proctor, and must contain a statement of the name and address of every person found upon such inspection to be " a person entitled to notice of the action ". This latter expression is defined in s. 5 (1) of the Act :—

" 5. (1) For the purposes of this Part—

' person entitled to notice ' , in relation to a hypothecary action in respect of any land, means any person who—

(*a*) has any interest in the land (whether by way of mortgage or otherwise), being an interest (i) to which the mortgage in suit in the hypothecary action has priority ; and (ii) which was created or arises by virtue of an instrument duly registered under the Registration of Documents Ordinance, as an instrument affecting the land, prior to the time of the registration of the *lis pendens* of the hypothecary action, and

(*b*) has, prior to such time, registered an address for the service on him of legal documents in accordance with the provisions of section 6 of this Act,

and includes a person declared by subsection (2) of this section to be entitled to notice of the action ;

' registered address ' means an address registered in accordance with the provisions of section 6 of this Act. "

I must refer at this stage to the fact that, although the present 2nd defendant had duly registered the conveyance to him of November 1955, he had not registered an address for service. Because of his failure to register his address, he was not, in terms of s. 5 of the Mortgage Act, a person entitled to notice of the hypothecary action No. X 2203. If then the hypothecary decree in that action is not a complete nullity, the 2nd defendant will be bound by the decree and the sale as provided in s. 16 of the Mortgage Act.

The *lis pendens* of the hypothecary action No. 2203 to which I have referred above was not registered at all, and order for the issue of summons in that action (and indeed all other orders), had been made without there being filed the declaration required by s. 8 of the Act. The case of the defendant has been that s. 8 is an imperative provision of law and that the failure to file the declaration required by s. 8 rendered the hypothecary decree ultimately entered a complete nullity.

In a careful judgment, holding that s. 8 is not imperative, the learned District judge has been guided by the decision of this Court in *Kanagasabai v. Velupillai*[1], where the statutory provision construed was the former s. 12 (1) of the Registration of Documents Ordinance (Cap. 101 of the Revised Edition 1938). That section provided that "a precept or order for the service of a summons in a partition action shall not be issued unless and until the action has been duly registered as a *lis pendens*". In that case, the *lis pendens* of a partition action had been registered, but in an incorrect Folio. L. M. D. de Silva, J. stated that two points arose for consideration :—

(1) Whether failure to comply with this section renders the decree entered in a partition action void by reason of lack of jurisdiction in the Court which entered it ; and

(2) whether, independent of the point just mentioned, such a failure deprives the decree of the conclusive effect which it would otherwise have under section 9 by reason of the fact that it is a decree not entered "as hereinbefore provided" as required by the section.

Ultimately, the Court decided the appeal only on the second ground, namely that a partition decree entered in an action the *lis pendens* of which had not been duly registered does not have the conclusive effect conferred by s. 9 of the (former) Partition Ordinance. The decision is therefore of assistance in the present appeal only in so far as it sets out briefly the principles applicable in determining whether or not a provision of procedural law is imperative. I cite the relevant observations :—

"Under the procedure prescribed by section 12 (1) the Court had after acceptance of the plaint on the material placed before it prima facie to satisfy itself that the action was duly registered as a *lis pendens* before ordering summons to issue. It is clear that the Court had jurisdiction to accept the plaint and to assume jurisdiction for that purpose so that the real question which arises is whether jurisdiction for the further progress of the case was arrested until the *lis pendens* was duly registered. If so the failure to comply with the provisions of section 12 was such a fatal irregularity as would by itself have rendered the decree void.

[1] *(1952) 54 N. L. R. 241.*

The one clear instance of a failure of jurisdiction laid down by the Privy Council is where the breach of a procedural provision results in the violation of natural justice. In the case before us there is no such violation. Beyond this as observed by Lord Goddard "No Court has ever attempted to lay down a decisive test" which would help us. We find in consequence that a Court can answer the question whether there has been a failure of jurisdiction in the case before us only with much less certainty than the second question referred to above. As the view we have formed on the second question concludes this case it is not necessary to pursue the question of jurisdiction any further."

In the instant case, as in *Kanagasabai v. Velupillai*, the plaint in the hypothecary action was duly accepted within jurisdiction. So on the authority of the passages just cited, the real question which arises is "whether jurisdiction for the further progress of the hypothecary action was arrested until the declaration from a Proctor required by s. 8 of the Mortgage Act was filed in Court". If s. 8 is an imperative provision of law, then a decree entered in an action. in which there has not been compliance with that section. would be a nullity in the fullest sense.

The principles governing the determination of such a question were well stated in the case of *Howard v. Bodington* [1] :

"I believe, as far as any rule is concerned, you cannot safely go further than that in each case you must look to the subject-matter ; consider the importance of the provision that has been disregarded. and the relation of that provision to the general object intended to be secured by the Act ; and upon a review of the case in that aspect decide whether the matter is what is called imperative or only directory."

The principles are also stated by the learned District Judge in the present judgment, in a citation from Maxwell, *Interpretation of Statutes*, 10th Ed. p. 376 :—

"It may, perhaps, be found generally correct to say that nullification is the natural and usual consequence of disobedience, but the question is in the main governed by considerations of convenience and justice, and, when that result would involve general inconvenience or injustice to innocent persons, or advantage to those guilty of the neglect, without promoting the real aim and object of the enactment, such an intention is not to be attributed to the legislature."

Let me, with these principles in mind, endeavour to examine the aim and object of the Mortage Act with special reference to s. 8, and to other relevant provisions, including the former Mortgage Ordinance which the Act replaced.

[1] *(1876) 2 L. R. Pr. 203 at 211.*

Section 6 of the former Ordinance declared certain persons to be "necessary parties" to a hypothecary action. "Every person who has any mortgage on or interest in the mortgaged property to which the mortgage in suit has priority" was a "necessary party" if his instrument of title was duly registered, and if he had also registered an address for service of legal documents. If then a "necessary party" was not joined as a party to a hypothecary action, the hypothecary decree ultimately entered would not bind him. But there was no provision in the Ordinance to ensure that all necessary parties would be joined. The Ordinance left the plaintiff in the action free to join such persons or not to join them as he chose, and the Ordinance contained no provision which declared the consequences of joinder or non joinder.

Section 5 of the Mortgage Act (Cap. 89) refers, not to "necessary parties" but instead to "persons entitled to notice of a hypothecary action". But the definition in the Act appears to comprise the same persons as those comprised in the former definition, i.e. "every person who has an interest in the land to which the mortgage in suit has priority and which was created or arises by virtue of an instrument duly registered ..... prior to the time of the registration of the *lis pendens* of the hypothecary action". But the resemblance between the two statutory provisions is illusory.

The new Act has in sections 8 and 9 a quite distinctive feature, namely, that summons must not issue until the declaration, stating that the *lis pendens* has been registered, and showing the names and addresses of "persons entitled to notice", is filed, and that when summonses are issued on the defendants, notices of the action must also be issued by the Court to all such persons. Further s. 8 requires the Proctor to certify that he has personally inspected the register. It seems to me perfectly clear, from these two sections alone, that the Legislature intended that the *lis pendens* of a hypothecary action must actually be registered and that all persons stated in the Proctor's declaration to be entitled to notice will actually be noticed. The possibility that this intention might be defeated by a defective search of the registers or by default of an officer of the Court is no ground for doubting that the intention was indeed present. Section 9 casts on the Court the duty to issue the notices; that duty can only be performed by the Court if the declaration required by s. 8 is filed. The filing of the declaration is thus a necessary antecedent to the ability of the Court to perform its duty.

Section 8 of the Mortgage Act differs substantially from the former section 12 of the Registration of Documents Ordinance and the present section 13 (1) of the Partition Act (Cap. 69). Section 12, which was considered in *Kanagasabai v. Velupillai* (supra) provided that summons in a partition action shall not issue unless the *lis pendens* of the action *is duly registered.* Such a provision may well be regarded as only directory, and not imperative. It is doubtful whether a Court can, before ordering summons, be judicially satisfied that a *lis pendens* is duly

registered, because a Court cannot be properly satisfied on such a matter without investigation of former deeds and the Folios in which they may have been registered. Even such an investigation, which would ordinarily be impracticable at the stage when a plaint is filed, may not lead the Court to a correct conclusion *as to due* registration.

In significant contrast is the condition precedent laid down in s. 8 of the Mortgage Act. It is one which a Court can fulfil with perfect ease. The section requires the Court only to perform the simple duty of seeing that a Proctor's declaration containing certain statements has in fact been filed, and the Court is here not required to consider or decide anything. It is in my opinion only reasonable to suppose that the Legislature anticipated that a judge would not fail to perform that duty.

The purpose of the issue of a notice to a " person entitled " is apparent from other sections. Section 12 gives a person served with notice the option to have himself joined as a party to the action. But once served with notice, such a person is, by reason of s. 15, bound by the hypothecary decree, whether or not he exercises his option to be made a party.

One argument for the plaintiff in this appeal has been that a breach of s. 8 (and perhaps in addition a consequential breach of s. 9) will only render the ultimate hypothecary decree voidable at the instance of a person prejudiced by the breach. Even accepting that argument for the moment, the apparently peremptory effect of these sections indicate at least a contemplation that there will ordinarily be compliance with these sections. It is only reasonable therefore to ascertain the Legislature's purpose by reference to the consequence of actual compliance. That consequence is that every person entitled to notice will become bound by the hypothecary decree and the sale.

The intention to bind persons by the ultimate decree is evidenced in other provisions of the Act : s. 9 (2) empowers the Court to issue notice of the action to a " person entitled " at any stage before sale ; s. 13 enables a " person entitled " to intervene at any time before sale ; and in both these cases, the person thus noticed or intervening will under s. 15 be bound by the decree and sale. Then section 18 contains provision under which a " person entitled ", but not in fact noticed, can intervene even after a sale for the purpose of challenging a former finding of the Court as to the amount due on the mortgage in suit (cf. sec. 18 (1)). On such an intervention, he becomes bound by the decree for sale, but can share in the proceeds of sale. Here again is evidenced an intention of the Legislature to bind persons who do not propose to challenge the priority of the mortgage in suit, but who desire to assert in the hypothecary action their rights as puisne encumbrancers to share in sale proceeds.

I must further observe that (in addition to the sections of the Act to which reference has already been made) sections 10, 14, 25, 29, 31 and 37 *inter alia* all contain provisions which would be inapplicable in a situation in which the *lis pendens* of a hypothecary action is not in fact registered. Numerous provisions refer to " persons entitled to

notice ". The definition of this expression in s. 5 of the Act pre-supposes that there is a registration of the *lis pendens*, and it is only by reference to the time of such registration that it is possible to determine who are persons entitled to notice of the action. The unusually comprehensive attention given in the Act to the fact that certain persons are entitled to notice of the action, to the consequences of due notice being given or not being given to them, and to the steps they may take in the hypothecary action, strongly evidence an intention that jurisdiction for the progress of such an action is arrested unless and until the declaration required by s. 8 of the Act is filed.

The matters discussed in the preceding paragraphs of this judgment establish the strong contrast between the Act and the former Ordinance. The Act, unlike the Ordinance, is clearly aimed at the object of securing the settlement of possible claims by persons whose interests are subsequent to the interest of a mortgagee, and I must accept the submission of Counsel for the defendant-appellant, that the object would not be secured if the prohibition enacted in s. 8 of the Act is not construed to be imperative.

What then is the practical result of the intended compliance with s. 8 and of the fact that as many prospective claimants as possible will become bound by the decree ? The result obviously is that a person who purchases a land at a sale under a hypothecary decree is reasonably assured that the land is sold free of all encumbrances created after the execution and registration of the mortgage. Defeasance is only possible at the instance of a claimant under an instrument having priority over the mortgage (whether because of prior execution or of a defective registration of the mortgage itself), or of a party omitted (i.e. a person who does not receive due notice under s. 9). I need add only that this precisely is the result which the Mortgage Commission in Sessional Paper V of 1945 hoped to achieve when it recommended the draft Act for enactment by the Legislature. This result will fail of achievement if the basic provisions of s. 8 are not construed to be imperative. The practical result expected to flow from compliance with s. 8 is one of public importance, rather than of advantage to persons interested in a mortgaged land, and this affords general justification for regarding the requirement of the section as being imperative.

Counsel for the plaintiff-respondent adduced a full and helpful argument in opposition to the construction that s. 8 must be regarded as an imperative provision of law and that failure to comply with that provision renders void (and not merely voidable) a decree entered without compliance with that provision. Counsel relied principally on the test laid down by Lord Denning in *Macfoy v. United Africa Co. Ltd.*[1] for the purpose of distinguishing between an imperative rule and one that is only directory. The test suggested is " to suppose that the other side waived the flaw in the proceedings or took some fresh step after knowledge of it ". The test was suggested in a case in which there had been a

[1] *(1961) 3 A. E. R. 1169.*

breach of a rule providing that a statement of claim may not be delivered in the Long Vacation. If in fact the defendant had delivered a defence to the statement of claim so delivered in breach of the Rule, then the defendant could not afterwards have asserted that *no* statement of claim had been delivered. The test then is that if non-compliance with a rule can be effectively waived, the rule is not to be regarded as imperative.

In *Re Pritchard*[1] the Court of Appeal held in a majority decision that an originating summons issued out of a District Registry was a nullity because the particular writ was one which the Rules required to be issued out of the Central Office. Upjohn L.J. there said that, while the test suggested by Lord Denning is a good common sense test, "it cannot be a completely legal test, for until one has decided whether the proceeding is a nullity, one cannot decide whether it is capable of waiver". This comment serves to explain the statement of Lord Denning himself that "No Court has ever attempted to lay down a decisive test for distinguishing between an act which is a *nullity* and an act which is only *voidable*". In fact, Lord Denning who dissented in this particular case was confident that the issue of the summons out of the wrong Registry was only a technical defect.

Applying in the present case the suggested test whether waiver of a rule of procedure is possible, the question is whether the defendant in a hypothecary action, i.e. the mortgagor, can directly or by implication waive the requirement of s. 8 of the Mortgage Act. I have stated already the opinion that the purpose of s. 8, considered in the context of the Act, is to secure that persons other than the mortgagor will be bound by the hypothecary decree. That purpose would not be achieved if the requirement of the section can be waived by the mortgagor, who is not a person in the category which the section is designed to reach. And on general principles it seems clear that the breach of a positive requirement cannot be cured by waiver on the part of a person who is not intended to be affected or protected by the requirement. The "other side", in the context of s. 8, is not the defendant to the action.

At the same time, I must note that the Mortgage Act (in provisions relating to a "party omitted, &c.") does contemplate the possibility that a person entitled to notice of a hypothecary action may not in fact be served with notice. Such a person may, however, intervene in the action, and, if he does so, he will be bound by the ultimate decree and sale (s. 15). This means that there can be a waiver of the requirement *in Section 9*, and Lord Denning's test therefore provides the answer that s. 9 is not an imperative requirement. If the *lis pendens* is registered, then the persons affected by s. 9 become determinable, and any of these persons may waive the requirement for notice on him. But unless and until the *lis* is registered, it is not even possible to determine which persons, if any, may waive the requirement of s. 9.

[1] *(1963) 1 A. E. R. 873.*

Counsel for the plaintiff fears that a decision that s.8 of the Mortgage Act is imperative might be only the first of a series of decisions holding that the procedural requirements of the Act are imperative. Such decisions, if they are in fact given, will tend to discourage purchases at sales in execution of hypothecary decrees. But I have already stated the opinion that s. 9 of the Act is not an imperative provision, and the fairly full examination, which Counsel and the Bench have made in this case of other provisions of the Act applicable to a hypothecary action to enforce a mortgage of land, does not reveal that any provision, other than s. 8, should be regarded as imperative. The decision I now reach has only the consequence that, when a land is to be sold under a hypothecary decree, a prospective purchaser must ascertain from the record whether the declaration required by s. 8 has actually been filed.

I hold for these reasons, that the Legislature intended that a hypothecary action must not proceed unless the provision in section 8, that the requisite declaration by a Proctor must be filed in Court, has been in fact observed. I cannot leave this matter without expressing surprise that in a mortgage action instituted by the Attorney-General there was a failure to notice so elementary and simple a requirement as that imposed by s. 8.

In the result, the hypothecary decree and sale in action No. X 2203 D. C. Galle are null and void. Accordingly, the appeal is allowed, and the plaintiff's action is dismissed with costs in both Courts.

SIRIMANE, J.—I agree.

Appeal allowed.