1949 *Present :* **Nagalingam and Windham JJ.**

NANAYAKKARA, Appellant, *and* ABEYGUNAWARDENE, Respondent

S. C. 332—D. C. Galle, L 755

*Mortgage Ordinance—Hypothecary action—*Lis pendens *not registered—Sale by mortgagor after decree—Sale in execution—Who has superior title—Necessary party—Section 6—Chapter 74.*

Section 6 of the Mortgage Ordinance must be read as limiting the scope of its provisions to necessary parties *in esse* at the time that a hypothecary action is instituted.

The title of a purchaser under a hypothecary decree does not relate back to the date of his bond.

APPEAL from a judgment of the District Judge, Galle.

H. W. Jayewardene, for plaintiff appellant.

E. B. Wikramanayake, K.C., with *Cyril E. S. Perera*, for defendants respondents.

Cur. adv. vult.

May 9, 1949. NAGALINGAM J.—

This is an action by a purchaser under a mortgage decree for a declaration of title to the land purchased by him against a private purchaser from the mortgagor who obtained his conveyance subsequent to the date of the mortgage decree but prior to both the sale and the conveyance to the mortgage purchaser.

For a proper appreciation of the legal points involved it may be best to set out a few salient facts. The mortgage was executed in 1936. The mortgagee put his bond in suit in 1941, and obtained his decree the same year. The decree of the District Court was appealed against and the judgment of the Supreme Court was delivered on March 19, 1942, affirming that of the lower Court. Five days later, namely on March 24, 1942, the mortgagor transferred by deed 1D1 the land mortgaged to the 1st defendant who by a later deed conveyed it to the 2nd defendant. The property hypothecated was under the decree sold on August 27, 1942, and purchased by the plaintiff to whom conveyance P6 of October 27, 1942, was duly issued.

The contest revolves round the question as to whether the plaintiff has a title superior to that of the 1st defendant. The case has been argued on the footing that no question of registration is involved. On behalf of the plaintiff-appellant Mr. Jayawardene relies upon section 6 of the Mortgage Ordinance Cap. 74 Legislative Enactments and contends that as the 1st defendant had not at the date of the filing of the plaint in the mortgage action registered his deed and furnished an address for service on him of legal documents as required by sub-section (2) thereof the decree entered in the mortgage action by virtue of sub-section (3) thereof binds the 1st defendant.

Section 6 of the Mortgage Ordinance it is true in sub-section (1) thereof declares that every person is a necessary party to a hypothecary action who has any mortgage on or interest in the mortgaged property to which the mortgage in suit has priority. Sub-section (2) proceeds to say that a party declared to be necessary under sub-section (1) shall not be a necessary party unless the instrument under which the necessary party derives his title is duly registered and the party has also furnished an address for service of legal documents on him. But it is clear both from a reading of sub-section (1) and sub-section (2) that section 6 of the Mortgage Ordinance must be read as limiting the scope of its provisions to necessary parties *in esse* at the time that a hypothecary action is instituted. This will be clear when one asks the question as regards sub-section (1) not necessarily: Who is a necessary party, but more appropriately: To what does the sub-section declare a person to be a necessary party? The obvious answer is that it is to the hypothecary action. This is made clearer still if one has recourse to sub-section (2) of the section which specifies the point of time at which the instrument under which a necessary party derives title should be registered. The answer again is obvious for the section declares that the point of time should be that at which the plaint is filed and that is the plaint in the hypothecary action.

Now, if a puisne encumbrancer was not in existence at the time the plaint is filed could it be said that such a person is a necessary party? Mr. Jayawardene contends that it is immaterial when a puisne encumbrancer acquires his title but that every person who subsequent to the mortgage in suit even after decree acquires any title or interest is a person who is not only declared to be a necessary party to the action but also one who is required to have the document under which he derives his title or acquires interest to be duly registered and have his address furnished and that any such person failing to comply with these requirements is a person who is declared by sub-section (2) of section 6 to be a not necessary party, and therefore by virtue of sub-section (3) bound by the decree.

I do not think this contention can prevail. The only persons who are declared to be necessary parties are puisne encumbrancers in existence at the date of the institution of the action and correspondingly a puisne encumbrancer in existence at the date of the institution of the hypothecary action who fails to have the instrument under which he derives his title registered and fails to register his address is declared to be a not necessary party who alone would be bound by the decree entered in the hypothecary action. To uphold Mr. Jayawardene's contention would be not only to revolutionise all notions relating to mortgage actions but to attribute to the legislature an intention to compel the performance of acts which would be impossible and incapable of accomplishment. A mortgagee cannot possibly make a puisne encumbrancer who acquires his title after the entering up of the decree in the mortgage action a party to the suit and a puisne encumbrancer who acquires his title subsequent to the decree cannot possibly register the instrument under which he derives his title or register his address so that it may be in the registers *at the date of filing of the plaint.*

I do not therefore think that the scope of section 6 of the Mortgage Ordinance extends to puisne encumbrancers whose title comes into existence only subsequent to the institution of the mortgage action. Mr. Jayawardene however relied upon a passage in the judgment of Garvin S.P.J. in the case of *Subasinghe v. Palaniappa Pillai*[1] where no doubt the learned Judge in discussing the right of a person who acquires interest in the mortgaged property even subsequent to the mortgage decree to intervene in the mortgage action said :

> " Assuming that the petitioner was the person who during the pendency of that action (mortgage action) had acquired an interest in the property under hypothec then it was his duty to avail himself of the provisions of section 6 (3) and intervene in the action."

It will be noticed that the learned Judge was not dealing with the precise point with which I am concerned in the present case. It is undoubtedly true that section 6 (3) enables a person who is declared by sub-section (2) to be not a necessary party to intervene but the observation of the learned Judge cannot be regarded as implying that he took the view that a person who acquires his rights subsequent to the institution of the action is one who is deemed a necessary party under sub-section (2) of section 6 of the Ordinance.

Support for the view I have expressed is to be found in the case of *Wijewardene v. Perera*[2] where certain parts of the headnote are somewhat misleading and which I am afraid has misled Mr. Jayawardene too for he relied upon this case as well in support of his proposition. Fernando J. delivering the judgment of the Court said :

> " When the action on the mortgage bond was filed the 1st defendant had no title, was not in a position to have title registered and therefore had no interest in the property which would entitle her to be a party necessary to the determination of the action."

I am therefore of opinion that the 1st defendant was not a necessary party within the meaning of sub-section (1) of section 6 nor was he a party declared by sub-section (2) of section 6 to be a not necessary party. The resulting position therefore is that the 1st defendant was neither a necessary party within the meaning of sub-section (1) of section 6 nor a not necessary party under sub-section (2) of section 6 nor was he in fact a party to the action. The decree, therefore, entered in the hypothecary action was not binding on him.

Mr. Jayawardene presented alternatively another line of argument and that is that the plaintiff is entitled to fall back upon the mortgage itself which is the source of his title and relied upon the case of *Mohamed Buhari v. Silva*[3]. In that case de Sampayo J. no doubt held that " the purchaser under the mortgage decree is entitled to refer his title back to the mortgage bond," relying on the cases of *Muttu Raman v. Marsilamany*[4] and *Silva v. Gunewardene*[5]. Had the case cited stood without modification Mr. Jayawardene's contention would have been entitled to succeed. But the view expressed in that case came up for consideration

[1] *(1934) 35 N. L. R. 289.*
[2] *(1937) 11 C. L. W. 57.*
[3] *(1923) 24 N. L. R. 477.*
[4] *(1913) 16 N. L. R. 289.*
[5] *(1915) 18 N. L. R. 241.*

before a bench of five Judges in *Anohamy v. Hanifa*[1] where the Judges definitely expressed the contrary view and held that the doctrine of relation back could not be sustained. The doctrine of relation back was built up on the doctrine of *lis pendens*. So long as no statutory provision was made in regard to registration of *lis pendens*, from the moment of *litis contestatio* any dealing with the property would have been void as against the rights acquired under the decree. The legislature stepped in in view of the hardships caused by applying this principle and enacted a provision regarding the registration of *lis pendens* firstly by Ordinance 29 of 1917, and subsequently by the Registration of Documents Ordinance Cap. 101; by section 11 of this latter Ordinance the legislature enacted that no *lis pendens* instituted after November 9, 1917, should bind a purchaser unless and until the *lis pendens* is duly registered. De Sampayo J. in regard to the corresponding provision of the Ordinance 29 of 1917 took the view that the registration merely enabled the purchaser to use it as a weapon of offence against persons acquiring title subsequent to the *lis* but held that the non-registration permitted the purchaser to fall back on the mortgage bond and contest the title afresh against a person desiring title subsequent to the *lis*. In the five bench case this view too was dissented from and it was held that the effect of non-registration of *lis pendens* was to leave the title of a subsequent purchaser unaffected by a title derived under the decree entered in the *lis* that was not registered. The doctrine of relation back of the title of the purchaser to the mortgage bond is of no assistance to the plaintiff.

Mr. Jayawardene is unable to rely on the registration of the *lis pendens* in regard to the mortgage action as in fact no registration has taken place. Had the *lis pendens* been registered then the 1st defendant would have been bound by the decree and the title of the plaintiff would be superior. It is disheartening to find that Proctors do not even after the Registration Ordinance has been in operation for a number of years seem to utilise its salutary provisions and prevent clients who have the misfortune to retain their services from suffering irreparable loss merely because of their own ignorance of the provisions of the law or their carelessness in regard to fulfilling the obligations cast on them as members of a learned profession. The mortgagee's rights are very simply and effectively conserved by the two enactments the Mortgage Ordinance and the Registration of Documents Ordinance. A mortgagee plaintiff need only consult the registers at the date of the institution of his action and add as parties all puisne encumbrancers whose names are placed on the register. This step effectively binds all persons who had acquired interests up to the date of action but subsequent to the mortgage in suit. Immediately the action is filed if the *lis pendens* is registered and if this second step is taken no further dealing by the mortgagor can in any way tend to detract from the validity of a conveyance executed in pursuance of the mortgage decree.

In view of the foregoing the appeal fails and is dismissed with costs.

WINDHAM J.—I agree.

Appeal dismissed.

[1] *(1923) 25 N. L. R. 289.*