Present: De Sampayo A.J. 1913.

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157—C. R. Kandy, 21,131.

Mortgage—Sale by mortgagor after mortgage—Action against mortgagor without making purchaser party—Subsequent action against the purchaser—Civil Procedure Code, ss. 643, 644.

A mortgaged his land to B in 1907 and sold it to C in 1911. Neither B nor C registered their addresses in terms of section 643. B sued on his mortgage bond in 1912, but did not make C a party to the action. When the land was seized on the mortgage decree, C claimed the land. On the claim being upheld, B brought the present action against C to have the land declared bound and executable.

Held, that B's failure to make C a party to the mortgage action was not a bar to his bringing the present hypothecary action against C.

THE facts appear from the judgment.

Balasingham, for the defendant, appellant.—The plaintiff did not join the defendant as a party in the mortgage action. It is not open to the plaintiff to bring a separate action for getting a declaration that the land, which defendant brought subsequent to the mortgage, was liable to be sold for the realization of the mortgage

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debt. Lascelles C.J. held in *Ramanathan Chetty v. Cassim* [1] that a mortgagee who did not give notice to the puisne incumbrancers in the mortgage action was not entitled to bring a hypothecary action subsequently against the puisne incumbrancer.

[De Sampayo A. J.—In that case the puisne incumbrancer had registered his address as required by the Code.] The case was not decided on the footing that as the puisne incumbrancer had registered his address he should have been given notice in the mortgage action. The *ratio decidendi* was that as the mortgagee had not given notice in the first action on the mortgage bond against the mortgagor, it was not open to him to bring a subsequent action to remedy his omission. Lascelles C.J. said: "To allow a mortgage to neglect this procedure (the object of which is to avoid expense and litigation) would be to drive a coach and six through the statutory provisions of chapter XLVI. of the Code."

Moreover, where the primary mortgagee has himself not registered his address, it does not matter whether the puisne incumbrancer has or has not registered his address. Where the primary mortgagee has not registered his address, he cannot complain that a puisne incumbrancer has not registered his. In *Elyatamby v. Valliammai* [2] both the deeds were not registered. The Supreme Court held that there was no obligation on the part of the puisne incumbrancer to register his deed or address unless the primary mortgagee had registered his address. The decision in *Elyatamby v. Valliammai* [2] is a binding authority; the facts of that case are on all fours with the facts of the present case. It was held in that case and in the earlier cases that, even where both parties had failed to register their addresses, the primary mortgagee should give notice to the puisne incumbrancer if he wants to get a decree to bind him. The primary mortgagee cannot plead his own default as an excuse for not following the imperative provisions of the law. It is not open to the primary mortgagee to get a new hypothecary decree against a subsequent purchaser. Such an action has been held to be barred by section 34 of the Civil Procedure Code. Counsel also cited *Peiris v. Weerasinghe*,[3] *Weerappa Chetty v. Arunaselam Chetty*.[4]

[De Sampayo A.J.—In all these cases the contest was between a purchaser at a Fiscal's sale under the mortgage decree and a purchaser under a private conveyance after the mortgage. In this case the plaintiff seeks to get a hypothecary decree against the defendant before the execution of the mortgage decree.] In *Ramanathan Chetty v. Cassim* [1] the plaintiff sought to get a hypothecary decree against the lessee, but the Supreme Court held that the action did not lie.

This is an action under section 247 of the Civil Procedure Code, and the rights of the parties should be decided as on the date of the claim.

[1] *(1911) 14 N. L. R. 177.*
[2] *(1918) 16 N. L. R. 210.*
[3] *(1906) 9 N. L. R. 359.*
[4] *(1909) 12 N. L. R. 139.*

J. W. de Silva, for the respondent.—The present action is to get a hypothecary decree. When neither party has registered his address, the sections of the Civil Procedure Code do not apply. The case is governed by the Roman-Dutch law, and not by the Code.

Cur. adv. vult.

June 19, 1913. DE SAMPAYO A.J.—

The facts with which this appeal is concerned are as follows. Kirihatana and Kalu, being the owners of a certain land, mortgaged it by bond dated September 28, 1907, and registered on October 5, 1907, to the plaintiff. On December 13, 1911, the bond was put in suit against the mortgagors in action No. 20,542, and a mortgage decree was obtained on May 17, 1912. When the property was seized in execution of the decree, it was claimed by the defendant by virtue of a deed of sale dated February 2, 1911, and registered on August 28, 1911, executed by Kirihatana and Kalu. The claim having been upheld, the plaintiff has brought the present action to have it declared that the property was bound and executable for the debt due to the plaintiff by Kirihatana and Kalu. This is in fact a hypothecary action by the mortgagee against a subsequent purchaser, and the Commissioner has given judgment for the plaintiff.

It is argued in appeal that plaintiff, having failed to register an address in terms of section 644 of the Civil Procedure Code, and having also failed to join the defendant as a party in the previous action, can no longer bring any hypothecary action against the defendant. In support of this contention three decisions of this Court were cited to me. The first of these is *Peiris v. Weerasinghe*.[1] I do not see how that decision is applicable to the present case. It was there held that in order to entitle a mortgagee to the benefits provided by section 644 he must, as a condition precedent, have himself complied with the requirement of the first proviso to that section. The plaintiff is not seeking to claim any benefit under that section; he does not say that the mortgage decree in the previous action is binding on the defendant; on the contrary, he is asking for a new hypothecary decree against the defendant. I may note further that there the contest was as to the title to the land between a private conveyance from the mortgagors and a Fiscal's transfer following upon a sale in execution of the mortgage decree, whereas here the plaintiff is still mortgagee, and seeks to enforce the mortgage against a subsequent transferee. *Peiris v. Weerasinghe*[1] was followed in *Weerappa Chetty v. Arunaselam Chetty*,[2] where the facts and nature of the case were similar. The next decision cited is *Ramanathan Chetty v. Cassim*.[3] There also the plaintiff had become purchaser of the property under his own writ, and the *ratio decidendi* of the

[1] *(1906) 9 N. L. R. 359.* [2] *(1909) 12 N. L. R. 139.*

[3] *(1911) 14 N. L. R. 177.*

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decision, if I read the judgment rightly, is that the plaintiff had purchased the land subject to the interest of the defendant, who was a lessee, and it was too late to bring a hypothecary action after the plaintiff had failed to get an effective decree against the defendant in the first action. One other fact which distinguishes that case from this is that the defendant there had in fact registered an address in terms of section 643 of the Code, while in this case neither party registered any address at all. Counsel lastly cited the unreported case 222 Inter., D. C. Jaffna, 7,995.[1] There also the mortgagee had purchased the property under his own writ, and the question was one of title between him and a private alienee. It is to be observed that in each of these cases, with the exception of *Ramanathan Chetty v. Cassim*,[2] the mortgagee or the purchaser at the sale under the mortgagee's writ had to depend on the binding character of the mortgage decree as against his opponent, who was no party to the action, and the gist of the whole matter appears to me to be contained in these words of Wood Renton J. in the Jaffna case above referred to (I take the liberty to italicize the words I wish to emphasize): "Compliance by the mortgagee with the requirements of these sections, *i.e.*, sections 643 and 644 of the Civil Procedure Code, is a condition precedent to a puisne incumbrancer being *bound either directly or indirectly by the decree in the mortgage action.*" The use of the expression "directly or indirectly" in this passage has reference to an argument that the purchaser under the mortgage decree, even if he had no title against the puisne incumbrancer, was at least entitled to the payment of the amount of the mortgage as *impensæ utiles*. The case of *Ramanathan Chetty v. Cassim*,[2] as I have indicated, forms an exception to this series of cases, in that there the mortgagee, though he had purchased the property, attempted to get a fresh hypothecary decree against the lessee for the balance amount of the mortgage decree which remained still unsatisfied. This was disallowed by Lascelles C.J. (1) because the plaintiff had not protected himself by the procedure laid down in chapter XLVI. of the Civil Procedure Code, and (2) principally because the mortgage was extinguished by his becoming owner; and by Middleton J. (1) because the lessees having registered an address the plaintiff had failed to cite them in the mortgage action, and (2) because section 34 of the Civil Procedure Code barred the second action.

It will be seen that the *ratio decidendi* in none of these decisions applies to this case. If it did, I would feel bound to follow them, whatever my own opinion might be. I think I am free to decide this case on my own view of the law. In my opinion sections 643 and 644 of the Code do not have the effect of doing away altogether with the common law and do not impose a new burden on a mortgagee, but rather afford certain facilities in obtaining a mortgage decree.

[1] *S. C. Min., Mar. 20, 1913.*

[2] *(1911) 14 N. L. R. 177.*

If neither party has observed the provisions of those sections, they are thrown back upon the common law, which allows a separate hypothecary action against a puisne incumbrancer. In *Ramanathan Chetty v. Cassim* [1] the learned Chief Justice allowed that the *actio hypothecaria* was still available, and that the plaintiff might have joined the lessees in his action. That being so, why should not the *actio hypothecaria* be brought afterwards? His Lordship thought that it could not be so brought, but I think that opinion was only *obiter*.

I think this action was well brought, and the judgment appealed from is right. I dismiss the appeal with costs.

Affirmed.