

MOHAMADU BUHARI v. SILVA

263—C. R. Matara, 12,186.

Sale under mortgage decree—Mortgage action not registered—Lis pendens—Sale under simple money decree—Right of purchaser under mortgage decree to refer back to mortgage bond.

D mortgaged the land in question to S in 1915 by a bond which was registered in the same year. S put the bond in suit in 1920 and obtained a decree in the same year. The *lis pendens* was not registered. The mortgaged property was sold in execution on May 11, 1921, and purchased by L. Fiscal's transfer was issued to L on August 22, 1921, and registered on August 23, 1921.

On a writ against D on a simple money decree on March 7, 1921, one-eighth share of the land was sold on May 4, 1921, and purchased by defendant, to whom the Fiscal issued the transfer on August 22, 1921, which was registered on September 7, 1921.

Held, that L had superior title.

"The purchaser under the mortgage decree is entitled to refer his title back to the mortgage bond."

THIS case referred to a Bench of two Judges by Schneider J. by the following judgment:—

An important point has been raised in this appeal, which I would refer to a Bench of two Judges, under the provisions of section 41 of the Courts Ordinance, 1889.

The plaintiff claimed title upon the following facts:—One Divunu Hamy was entitled to an undivided half of a land described as lot B, and she mortgaged that interest with one Siman Appu, who sued upon the bond in C. R. Matara, No. 11,254, to which the defendant was not a party. The action was instituted on June 18, 1920, and decree was entered on October 1, 1920. The land was sold by the Fiscal under this decree on May 11, 1921, and a transfer bearing No. 15,730 dated August 22, 1921, was issued by the Fiscal. This transfer was registered on August 23, 1921. The defendant claimed title adversely to the plaintiff upon the following facts. Under a writ issued against the said Divunu Hamy in C. R. Matara, No. 8,983, the Fiscal sold an undivided one-eighth of the land, of which lot B formed a portion at one time. The defendant, as purchaser, obtained Fiscal's transfer No. 15,740 dated August 22, 1921, and registered on September 7, 1921.

The question which I wish to refer to a Bench of two Judges is one whether the plaintiff's title is entitled to prevail against that of the defendant even in respect of the undivided one-eighth share of lot B which appears to me to be the only interest which the defendant can claim should it be held that the plaintiff's title is not superior to that of the defendant. The decisions of the Full Bench in the cases of *Mutturomen v. Massilamany*¹ and *Silva v. Gunawardena*² appear to me to cover the point in dispute, but Mr. Soertsz, on behalf of the appellants,

¹ (1913) 16 N. L. R. 289.

² (1915) 18 N. L. R. 241.

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submitted that the effects of section 3 of Ordinance No. 29 of 1917 was to deprive the plaintiff of any benefit which he might derive from action No. 11,254, to which the defendant was not a party, and which was unregistered. Mr. Soertsz relied on the case of *Davith v. Davith*.¹ As there seems to be some conflict between this case and the Full Bench decisions, let this appeal be listed before a Bench of two Judges.

Soertsz, for defendant, appellant.—The provision for the registration of *lis pendens* was introduced in order to protect *bona fide* purchasers. The purchase by defendant was no doubt subject to the mortgage bond, but it is submitted that he cannot be bound by the decree in the action on the bond. He was not aware of the decree, and it is inequitable that he should be bound by it. If the action had been registered, he would have had an opportunity of paying the amount due. The plaintiff should suffer for the failure to register. Counsel cited *Davith v. Davith (supra)*.

Keuneman (with him *Croos-Da Brera*), for plaintiff, respondent.—The plaintiff's title is based on a mortgage bond which is both prior in date and registration. His title relates back to the bond. *Mutturamen v. Masillamany (supra)* and *Silva v. Gunawardena (supra)*. The question of *lis pendens* does not arise. The plaintiff does not rely on this plea, and the non-registration of the *lis* does not matter. The question of title can be always discussed in a subsequent action. The effect of registration of *lis pendens* is to make the purchaser bound by the result of any pending action.

June 20, 1923. DE SAMPAYO A.C.J.—

This appeal originally came before my brother Schneider sitting alone on May 29, 1923, and a point, regarding the effect of non-registration of a *lis pendens*, which was raised at the argument, has been referred by my brother to a Bench of two Judges.

The facts may be briefly stated as follows: One Divunu Hamy, who was entitled to half share of a land marked lot B in the plan, mortgaged the same to Siman Appu by bond dated November 26, 1915, and duly registered on December 16, 1915. The bond was put in suit on June 18, 1920, in C. R. Matara, No. 11,524, and a mortgage decree obtained on October 1, 1920. In execution of this decree the mortgaged property was sold on May 11, 1921. Leiris Appu became the purchaser, and the Fiscal issued to him a transfer dated August 22, 1921, and registered on August 23, 1921. Leiris Appu sold the property to the plaintiff on November 18, 1921. The plaintiff has brought this action against the defendant for declaration of title and ejectment.

The defendant, tracing his title to the same Divunu Hamy, claimed one-eighth share of the land. It appears that Divunu Hamy was judgment-debtor in the action No. 8,983 of the Additional Court of Requests of Matara. Writ was issued against her in that

¹ (1922) 4 C. L. R. 43.

action on March 7, 1921, and thereunder one-eighth share of the land was sold on May 4, 1921, and purchased by the defendant, to whom the Fiscal issued the transfer dated August 22, 1921, and registered on September 7, 1921.

The mortgage action No. 11,524 was duly constituted, because at the date of its institution and even at the date of the decree the defendant had not acquired any interest in the mortgage property, and Divunu Hamy, the mortgagor, was the only person that need have been sued. The Fiscal's transfers in favour of Leiris Appu and the defendant, respectively, were issued on the same day, and therefore the matter of the prior registration of Leiris Appu's Fiscal's transfer may be left out of consideration. Nor do the provisions of sections 643 and 644 of the Civil Procedure Code apply, because the defendant was not a " puisne encumbrancer " within the meaning of those sections. The question then between the plaintiff and the defendant must be decided on other considerations. The registration of the mortgage bond in December, 1915, must, I think, have its full effect. The Fiscal's transfer in favour of the defendant, which is subsequent both in date * and in registration, cannot prevail over claims under the mortgage. The purchaser under the mortgage decree is entitled to refer his title back to the mortgage bond. The Full Bench cases (*Mutturamen v. Masillamany (supra)* and *Silva v. Gunawardena (supra)*) are decisive on this point. The reason for referring this case to a Bench of two Judges was that counsel for the defendant, relying on *Davith v. Davith (supra)*, had contended that the mortgage decree was not binding on the defendant, because the mortgage action had not been registered as a *lis pendens* as required by section 27 (a) (1) of the Registration Ordinance, 1891, as amended by Ordinance No. 29 of 1917. What the amending Ordinance declares is that no *lis pendens* shall bind a purchaser, mortgagee, or lessee, unless the same shall be registered, &c. It appears to me that *lis pendens* is a weapon of offence which the party relying on it must plead or otherwise put forward. In the present case the plaintiff does not seek to defeat the defendant by saying that the defendant purchased pending the mortgage action, and was therefore bound by the result of that action. In the original plaint he merely pleaded the deed in his favour from Leiris Appu, and even in the amended plaint he only traced his title to the registered mortgage bond. What the defendant appears to attempt to do is to thrust upon the plaintiff a weapon which the plaintiff never wanted. As a matter of fact the plaintiff relies on other grounds, such as those decided in the Full Bench decisions above referred to. It is noticeable that (*Davith v. Davith (supra)*) does not refer to those decisions, and they do not appear to have been cited. The plaintiff in that case was in a position and similar to that of the defendant

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*NOTE.—The Fiscal's transfer in favour of defendant bore a subsequent number, but was issued on the same date (August 22).

1923. in this case, and Ennis J., while expressing the opinion that a
DE SANPAYO purchaser may acquire good title pending a mortgage action if the
J. mortgage action has not been registered, proceeds as follows:—

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“ This plaintiff, therefore, it would seem, has purchased a land subject to a mortgage. The facts in the case are very meagre, and the defendant (purchaser under the mortgage decree) has not made any claim on the basis of this position. It may be that he cannot make any such claim, but the question has not been gone into or considered. ”

The Court, while dismissing the appeal, reserved to the defendant any rights which might remain to her under the mortgage. It is thus clear that the point now under consideration was not decided in *Davith v. Davith (supra)*, but was reserved for future decision if it were properly raised. I think, therefore, we are at liberty to consider the question of title in this case independently of any opinion expressed in *Davith v. Davith (supra)* with regard to the effect of non-registration of a mortgage action as a *lis pendens*.

In my opinion the appeal should be dismissed, with costs.

SCHNEIDER J.—I agree.

Appeal dismissed.

