

1965 Present : H. N. G. Fernando, S.P.J., and T. S. Fernando, J.

D. A. ABEYWARNA, Appellant, and R. SARALENCHIHAMY
and others, Respondents

S. C. 586/63-D. G. Tangalla, 6207

Mortgage-Sale of mortgaged property in execution of hypothecary decree-Transfer of the property by mortgagor after registration of lis pendens of the hypothecary action-Transferee's claim, to the property as against purchaser at execution sale,-Validity-Mortgage Act, ss. 5, 16, 34, 35, 36, 54, 55.

Where mortgaged property is sold in execution of a hypothecary decree in a case in which the purchaser would be entitled to an order for delivery of possession in terms of section 54 of the Mortgage Act, a person who claims the property on the ground that he obtained a transfer of it from the mortgagor after the registration of the lis pendens of the hypothecary action is not entitled to possess the property as against the purchaser at the execution sale.

APPEAL from an order of the District Court, Tangalla.

D. R- P- Goonetilleke, for the Purchaser-Appellant.

No appearance for the Respondents.

Cur. adv. vult.

June 22, 1965. H. N. G. FERNANDO, S.P.J.-

After hypothecary decree was entered in this Mortgage Action, the property mortgaged was sold in execution of the decree and was purchased by the present Appellant. Thereafter, the Court made order for the delivery of possession of the property to the Appellant and the Appellant was in fact placed in possession by the fiscal.

It would appear that shortly before the Appellant was placed in possession the Court recalled the Writ of possession upon an application made by the present Respondent, who put forward a claim to the property on the ground that the Mortgagor Defendant had, after the hypothecary decree was entered, executed a transfer of the property to the Respondent. This stay of execution of the Writ was not brought to the notice of the fiscal in time for him to act upon it. Thereafter however, the Respondent came to Court, this time contending that she herself be restored to possession. This application was allowed by the District Judge by his order of 30th July, 1963, against which this appeal had been preferred.

The ground upon which the District Judge made order staying execution of the Writ he had issued was that in issuing the Writ he had purported to act under Section 55 of the Mortgage Act. The

Judge was right in thinking subsequently that that Section did not apply, because the Plaintiff in the Mortgage Action had not followed the procedure set out in Section 34, 35 and 36 of the Act. But in deciding thereafter that the Respondent should be restored to possession the learned Judge failed to consider relevant provisions of the Act. It would perhaps be helpful to give a brief explanation of those provisions.

Section 5 of the Act defines, in relation to a Hypothecary Action in respect of land, the " persons entitled to notice of the Action ". These are persons who have interests in the land by virtue of instruments to which the Mortgage in suit has priority, and which have been registered prior to the Registration of the *lis pendens* of the Hypothecary Action.

Thereafter the Act makes provision designed to secure that all " persons entitled to notice " are joined in the action either as original parties or by subsequent joinder. The Act also provides for the eventuality that a person entitled to notice may not have been in fact joined before entry of a Hypothecary Decree.

A person in the position of the Respondent, who acquires title from the Mortgagor after the registration of the *lis pendens* of the Hypothecary Action is not a person entitled to notice of the action. It does not follow (as the learned Judge wrongly thought) that such a person is not bound

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by the Hypothecary Decree. Section 16 expressly deals with this case and provides that such a person " shall be bound by every order, decree or sale or thing done in the Hypothecary Action ". It is not relevant for the present purpose to consider the Proviso to that Section, which empowers the Court to permit such a person to be joined on terms.

In the present action the proper order for possession should have been made under Section 54 of the Act. If such an order was made it would have bound the present Respondent in terms of Section 16. Accordingly the Respondent had nothing more than a mere technical ground of complaint that the Writ had been issued under Section 55. She was not entitled to possess the land as against the Appellant because she was bound by the Hypothecary Decree.

The order of July 30th 1963 directing the fiscal to place the present Respondent (i.e., the claimant petitioner referred to in the order) in possession of the land must therefore be set aside.

If the Appellant requires the further assistance of the Court he will be entitled to an order for delivery of possession under Section 54 ; and if such an order is made the District Court must act on the basis that the present Respondent is a party bound by the Decree and sale in the Hypothecary Action.

The present Respondent must pay the costs of this Appeal and of the proceedings of 30th July, 1963.

T. S. FERNANDO, J.-I agree.

Order set aside

- End -