

MADAR LEBBE v. NAGAMMA.

*D. C., Colombo, 12,719.*

*Mortgage decree in favour of plaintiff—Registration thereof after conveyance to defendant had been passed and registered—Merger of mortgage bond January 21. 1902. in decree.*

Where plaintiff obtained a mortgage decree against S and seized certain property which defendant had bought at a Fiscal's sale as property belonging to S, and where defendant had registered the conveyance in her favour prior to plaintiff's registration of the mortgage decree,—

*Held*, that in an action brought under section 247 of the Civil Procedure Code, the plaintiff was not entitled to have the property made executable under his decree, as his mortgage decree was of no avail as against the defendant's conveyance, which had been registered before such decree was registered.

*Government Agent v. Hendrikhamy (3 C. L. R. 86)*, not to be considered any longer as law.

**T**HE plaintiff obtained a mortgage decree against one Samsudeen in case No. 11,910, and seized the property mortgaged. The defendant's claim to the property having been upheld, the plaintiff brought the present action against her under section 247 of the Civil Procedure Code for a declaration that the lands claimed by her be sold in execution of the plaintiff's decree against Samsudeen.

1902.  
January 21.

It appeared that Samsudeen's mortgage bond to the plaintiff was registered in May, 1897, and that the mortgage decree against him, dated November, 1898, was not registered till October, 1899. In the meantime the defendant, having obtained a decree against Samsudeen, caused the Fiscal to sell the land in dispute and bought it herself. The Fiscal's conveyance to her, dated August, 1897, was registered in September, 1899, a month before plaintiff registered his mortgage decree.

The Additional District Judge (Mr. F. R. Dias) dismissed the plaintiff's action in these terms:—

“ From the ruling of the Appeal Court in *3 C. L. R. 86* (a case on all fours with the present one) it is clear that the Fiscal's transfer held by the defendant must prevail over the rights of the plaintiff to sell the land under his decree. The fact of his mortgage bond having been registered before the defendant's transfer does not affect the question in any way. It is merged in the decree, on which alone the plaintiff's rights depend.

“ It has been urged that, as the defendant had no Fiscal's conveyances at the time she made her claim before the Fiscal, or at the time the Court inquired into her claim, she should not be allowed to improve her position by the documents since obtained. But a Fiscal's conveyance, no matter when it was actually issued, relates back to the date of sale, and even though at the date of her claim the defendant had not obtained her conveyances, she had the right to apply for and obtain them. That was a sufficient interest in the lands seized to entitle her to prefer a claim. The conveyances are only evidences of the defendant's right to the lands, and it does not matter in the least degree when they were obtained. Here they are, and they prove the defendant's title to the lands. The plaintiff asks for a declaration that the lands are now executable under his writ, but he can only have such relief if at the present moment his mortgagor has not been lawfully divested of his ownership. But he has been very effectually divested of title by the judicial sale and prior registration of the purchaser's conveyances.”

Plaintiff appealed.

*Sampayo* (with him *Van Langenberg*), for appellant.—The case on which the District Judge relies (*Government Agent v. Hendrikhamy, 3 C. L. R. 86*) has been questioned by the Supreme Court in D. C., Galle, 5,041 (*1 Browne's Reports, Appendix B, p. 11*); also judgment of Lawrie, J., in D. C., Batticaloa, 2,072 (*S. C. Minutes, 16th August 1901*).

*Bawa* (with him *H. J. C. Pereira*), for defendant, respondent. 1902.  
 —The plaintiff and the defendant claim from the same source. *January 21.*  
 It is open to the plaintiff to make this land executable under his mortgage by making defendant, who was in possession of the land *ut dominus* at the time of the seizure, a party to the hypothecary action. No such action was raised. The mortgage decree in plaintiff's favour is void, as against the conveyance in defendant's favour, which is prior in registration. Registration Ordinance No. 14 of 1891, sections 16 and 17. *Government Agent v. Hendrikhamy* (3 C. L. R. 86). By plaintiff's laches to get his decree registered in due time, he has lost his rights against the defendant, and under that decree the land now in possession of the defendant cannot be sold. The land may still be subject to the mortgage, but the decree on which plaintiff relies does not touch the defendant.

*Sampayo* heard in reply.

21st January, 1902. BONSER, C.J.—

We have come to the conclusion that the decree in this case is right, and must be affirmed. We do not, however, agree with the reasons given by the Additional District Judge.

The facts are shortly these. This action is one brought under section 247 of the Civil Procedure Code, to have it declared that certain pieces of land, the subject of the action, are liable to be seized and sold in execution under a certain decree in favour of the plaintiff. It appears that in 1897 these lands were mortgaged to the plaintiff, who duly registered the mortgage in 1898 and put this bond in suit and obtained a mortgage decree. The only defendant to that action was the mortgagor, and the decree is of course binding upon him. The decree was not registered. During the pendency of the action an ordinary creditor of the mortgagor sued him and obtained judgment for his debt. The judgment-creditor caused these lands to be seized and sold by the Fiscal. They were bought by the present defendant in this action. She obtained a conveyance from the Fiscal, which was duly registered. Subsequently to the registration of this conveyance, the mortgagee registered his decree. The District Judge dismissed the action, on the ground that it was covered by a case (*Government Agent v. Hendrikhamy*) reported in 3 C. L. R. 86, where it was held that the mortgage was merged in the judgment and that if the judgment was not registered before a subsequent conveyance, both the mortgage and the decree were gone, and the purchaser could hold the land free from all encumbrances. But as both the Judges who took part in the judgment in the case

1902. upon which the District Judge relied were subsequently parties to  
 January 21. judgments which were entirely inconsistent with the decision in  
 that case, I think we are free to consider that the judgment has  
 BONSER, C.J. been over-ruled, and is not to be considered any longer as law.

It seems to me that there is no merger of the mortgage in the decree, as I said, in the case reported in *Appendix B of 1 Browne's Reports, p. 11*. In that case I said that the personal remedy against the mortgagor upon the mortgage bond was gone, but that the charge on the land still existed, and the decree merely confirmed its existence. At the same time the mortgage decree is a decree which is capable of being registered under the Registration Ordinance, and ought to be registered, and if it is not registered, any person claiming adversely to it under a subsequently registered instrument or decree is entitled to say that "that unregistered decree is void as against me."

The result is that as regards the present defendant the unregistered mortgage decree is of no validity. It must be treated as non-existent, and as this action is for the purpose of enforcing the mortgage decree against them, the substratum of the action is gone. Of course, it will be open to the plaintiff by a proper proceeding to render the land, of which they are owners, subject to the mortgage executable for the mortgage debt. But he must establish the debt and the charge as against them.

I am afraid that the necessity of registration, and also the necessity of complying with chapter 46 of the Civil Procedure Code, are too often lost sight of by persons interested and their legal advisers.

WENDT, J.—

I agree. As to the merger which was relied upon, besides the reasons given by the Chief Justice, I think another reason against it is that the defendant in the present case was not a party to the mortgage decree, and assuming that some interest in the land was vested in him at the date of the decree, I do not see how that interest could be merged in the decree by which he was not bound.

As regards the action under section 247, it is obviously based on the decree alone, and although certain cases have been referred to in which the plaintiff-creditor in such an action was allowed to treat it as in effect a hypothecary action, I do not think that we ought to permit that in the present case, having regard to the allegations in the answer against the *bond fides* of the origin of these transactions, allegations which have not yet been framed into issues or tried.