1936 *Present:* **Abrahams C.J. and Dalton S.P.J.**

KADAPPA CHETTIAR *v.* RAMANAYAKE *et al.*

289—D. C. Colombo, 49,485.

Mortgage action—Action on mortgage bond against mortgagor—Failure to join secondary mortgagee and transferee—Subsequent action against them—Ordinance No. 21 of 1927, s. 16.

Where a mortgagee, in an action against the mortgagor on the mortgage bond, failed to make a secondary mortgagee and a subsequent transferee of the property parties thereto, he is not debarred from bringing another action to have the property bound and executable as against them.

THIS was an action brought against the three defendants on a mortgage bond No. 1,101 for Rs. 40,000 executed by first defendant in favour of the plaintiff. On February 24, 1931, the first defendant executed a secondary mortgage in favour of the second defendant and on March 10, 1931, executed a conveyance of the property to his wife, the third defendant. Plaintiff, who was unaware of the secondary mortgage and the conveyance, instituted action No. 46,335 in the District Court of Colombo on the bond against the first defendant. Judgment was entered in favour of the plaintiff and mortgage decree entered in the usual terms. Plaintiff took no further steps on the decree. He then instituted the present action making the mortgagor, the secondary mortgagee, and the transferee defendants to realize the mortgage and to have the property bound and executable against the second and third defendants.

The learned District Judge held that as the second and third defendants, who were necessary parties to the previous action under the provision of Ordinance No. 21 of 1927, were not made parties to that action, plaintiff could not maintain a second action against them.

H. V. Perera (with him *F. A. Tisseverasinghe*), for plaintiff, appellant. The object of the Mortgage Ordinance of 1927 was to re-introduce the Roman-Dutch law of mortgage. Section 16 gives the mortgagee the right to bring a separate action in respect of each of his remedies. Under the Roman-Dutch law the mortgagee was not limited to one hypothecary action *Sinnaya Chittyar v. Babanis*[1] *and Arumogam v. Velupillai*[2]), The restriction was made by section 34 of the Civil Procedure Code which provided that a plaintiff should sue for all his remedies in one action. That section has been repealed by section 16 of the Mortgage Ordinance. Even under the Code there was a conflict of judicial opinion as to whether a second hypothecary action could be brought[3]. The matter was settled by a Full Bench (*Supramaniam Chetty v. Weerasekere*[4]), which held that only one action could be brought. That decision has been subsequently disapproved of in *Moraes v. Nallan Chetty*[5]. The new Mortgage Ordinance gave effect to the suggestion of Bertram C.J. in this case. See also *Suppiah v. Sinniah*[6] and *Ramanathan v. Perera*[7].

[1] *(1882) Wendt 213.*
[2] *8 S. C. C. 97.*
[3] *16 N. L. R. 463.*
[4] *20 N. L. R. 170.*
[5] *24 N. L. R. 297 at 302.*
[6] *25 N. L. R. 383.*
[7] *31 N. L. R. 304.*

The first action in this case was only in form a hypothecary action. It was not so in fact because the mortgagor had parted with his title. Second and third defendants were no parties to that action. No plea of *res judicata* is available to them. Necessary party in section 6 of the mortgage does not mean an essential party. The first action was maintainable without them.

E. B. Wikramanayake (with him *M. T. de S. Amarasekera*), for second and third defendants, respondents. It is true that a necessary party in section 6 is not an essential party. But he is a party necessary if the plaintiff wants a decree that binds him. If he is not made a party no further remedy is available against him. A mortgagee cannot bring more than one hypothecary action. The object of the Mortgage Ordinance is to achieve finality (*Subasinghe v. Palaniappapillai*[1]). Under the Common law a puisne encumbrancer need not be made a party at all. He had a right only to whatever was left after the primary mortgagee's debt was satisfied. But the Code imposed certain conditions on the primary mortgagee if he wanted a decree binding on subsequent encumbrancers—*see* sections 643 and 644 of the Civil Procedure Code. Under those sections it has been held by a Full Court that where a necessary party was not made a party to the action no subsequent action could be brought against him. (*Supramaniam Chetty v. Weerasekere* (*supra*).) Section 6 of the Mortgage Ordinance has re-enacted those sections of the Code with slight modifications. The Full Bench decision is therefore applicable. Section 16 of the Mortgage Ordinance does not give a mortgagee the right to bring more than one hypothecary action. It only removes the disability imposed on him by section 34 of not being able to bring separate actions in respect of his separate remedies. For his remedies one must look to the Common law. *Arumogam v. Vellupillai*[2] is no authority for appellants' proposition. The only question decided there was a question of misjoinder.

H. V. Perera, in reply.—*Moraes v. Nallan Chetty* (*supra*) disapproves of the reasoning in the Full Bench case. The earlier decisions are based not on sections 643 and 644 of the Code but on section 640. That section has been expressly repealed. That decision will not therefore apply. Nothing is enacted corresponding to section 640. It may be conceded that sections 643 and 644 are re-enacted in section 6 of the Mortgage Ordinance. Those sections were not the basis of the decisions relied on.

Cur. adv. vult.

August 3, 1936. DALTON S.P.J.—

This is an appeal by the plaintiff against a judgment of the lower Court of July 18, 1934, dismissing his action against the three defendants on a mortgage bond.

On November 4, 1929, the first defendant executed a bond No. 1,101 for Rs. 40,000 in favour of the plaintiff. Subsequently on February 24, 1931, the first defendant executed a secondary mortgage over the same premises by bond No. 2,542 in favour of the second defendant. He then, on March 10, 1931, executed a conveyance of the mortgaged property to his wife, the third defendant.

[1] *35 N. L. R. 289 at 291.*

[2] *8 S. C. C. 97*

In ignorance of the secondary mortgage and subsequent conveyance above mentioned, the plaintiff on October 2, 1931, instituted action No. 46,335 in the District Court, Colombo, on bond No. 1,101. In that action the mortgagor, the present first defendant, was the only defendant. Judgment was obtained by the plaintiff on a warrant of attorney to confess judgment, and the usual mortgage decree was entered in terms of the plaint on October 8, 1931. The plaintiff took no further steps on that decree, as he appears shortly thereafter to have heard of the existence of the secondary mortgage and the conveyance. He then on July 7, 1932, instituted the present action No. 49,485, making the mortgagor, the secondary mortgagee, and the wife of the first named as transferee of the mortgaged property, parties to the action, claiming, however, no remedy against the first defendant, against whom he already had a decree in action No. 46,335. He brought this second action, as he sets out in his plaint, for the realization of the mortgage debt and to have the property mortgaged declared bound and executable as against the second and third defendants.

At the trial certain issues were framed, but only the first two were dealt with by the trial Judge, as he stated they appeared to go to the root of the case. They were as follows :—

1. Can the plaintiff maintain this action against the defendants, as the second and third defendants who were necessary parties to D. C. No. 46,335 have not been joined in that action and decree has been entered in that action without the second and third defendants having been joined ?

2. The plaintiff having obtained a decree against the first defendant in D. C. 46,335, is the first defendant liable to be made a party in this action ?

The first issue has been answered against the plaintiff. The trial Judge is of opinion, as regards the second issue, that the first defendant was a necessary party to the action on the assumption that the action was properly maintainable against the second and third defendants, but inasmuch as this action is not maintainable against these two latter defendants, it follows that it must fail against the first defendant also.

The judgment of the lower Court has proceeded upon the basis that inasmuch as the second and third defendants were necessary parties to action No. 46,335, under the provisions of Ordinance No. 21 of 1927, since they were not made parties to that action, the plaintiff has exhausted his rights and cannot now maintain this second action against them.

There seems to have been some misunderstanding as to the meaning of the term " necessary party " as used in the Mortgage Ordinance, No. 21 of 1927. This term appears to have been adopted by the draughtsman from one of the earlier judgments of this Court which was cited to us. Having regard to the different provisions of that Ordinance, the term does not mean necessary or essential for the proper constitution of the action, but necessary if the plaintiff mortgagee desires to obtain a decree binding upon any particular person in that particular action. This would seem to be clear from the provisions of section 10 of the Ordinance. The question to be decided here is whether the mortgagee has thereafter a

right of action against persons who were "necessary" parties in the earlier action, who were not made parties to that action or are not bound by the earlier decree.

Prior to the enactment of Ordinance No. 21 of 1927, before the repeal of certain sections of Chapter XLVI of the Civil Procedure Code, this Court had held that Chapter XLVI provided for one action only to realize moneys due or secured upon mortgage, within which the mortgagee must embrace all claims against all persons concerned. It has been held that it superseded the Common law remedies open to mortgagees prior to the Civil Procedure Code of 1889. This conclusion, as pointed out by Bertram C.J. in *Moraes v. Nallan Chetty*[1] is the result of section 640 of the Code. It is urged by Mr. Perera on behalf of the appellant that the effect of Ordinance No. 21 of 1927 is to restore the position, so far as remedies are concerned, which obtained under the Roman-Dutch law prior to the enactment of the Code.

Ordinance No. 21 of 1927 repealed sections 640-644, amongst other sections, of the Civil Procedure Code. Mr. Wikramanayake urged, however, that section 6 of the Ordinance in effect re-enacted the repealed sections 643 and 644, subject to slight changes with regard to registration and giving of notice. Even, however, if that is taken to be so, as Mr. Perera has pointed out, section 640 is repealed and that is the section according to Bertram C.J., upon which all the determining decisions since the enactment of the Code have been given. It was not suggested, as I followed the argument, that section 640 of the Code has been re-enacted in the Ordinance, nor do I think any such suggestion can be maintained.

An examination of some of the decisions prior to the Ordinance of 1927, however, would show that section 34 of the Code is the section which has been regarded as prohibiting more than one action to realize moneys due upon a mortgage bond. The effect of those decisions and of the application of section 34 of the Code is now repealed by section 16 of the Ordinance. Mr. Wikramanayake in the course of his argument had considerable difficulty, I think, with section 16. At one point he argued that the section merely gave a mortgagee a right to bring an action on a personal claim for a money decree, and a separate hypothecary action. He conceded, however, that section 16 (2) had no meaning if that sub-section applied only to actions for a money decree.

It seems to me that, although there are difficulties in construing some of the provisions of the new Ordinance, the effect of it is to restore the position in respect of remedies to what it was before the Civil Procedure Code was enacted. This seems to be the conclusion to which Fisher C.J. and Drieberg J. came in *Ramanathan v. Perera*[2]. The learned trial Judge has referred to that decision in the course of his judgment, but he has, in my opinion, put a very much narrower interpretation upon it than the decision will properly bear.

The conclusion to which I have come on the material before us is that the plaintiff was, in the present state of the law, entitled to maintain this action, and the first issue should therefore have been answered in the affirmative.

[1] *24 N. L. R. at p. 301.*

[2] *31 N. L. R. 304.*

With regard to the position prior to the Civil Procedure Code, a case cited in the course of the argument, *Mohideen Saibo v. Walters*[1], is not on the facts exactly on all fours with the case before us, but it is authority for the proposition that prior to the Code where the mortgaged property has subsequent to the mortgage passed into the ownership of another, the mortgagee is not restricted to only one action against the mortgagor and the purchaser. He may, however, under the provisions of section 16 (2) of the Mortgage Ordinance, now be refused costs in any action except the first action.

The second issue whether or not the plaintiff was right in making the first defendant a party to this action has been answered in the affirmative and there was no appeal against that conclusion. Inasmuch, however, as the answer to the first issue was in the negative, the action against the first defendant was also dismissed. The result of the appeal must be therefore that the decree of the lower Court dismissing the action against the three defendants must be set aside, and the case will go back to the lower Court for the further issues now to be tried.

The appeal is allowed with costs here and with the costs of July 11, 1934, in the lower Court. Other costs of proceedings in the lower Court will be dealt with by the trial Judge when he deals with the further issues in the action.

ABRAHAMS C.J.—I agree.

Appeal allowed.