SAMSI LEBBE *v.* FERNANDO.

1904.
April 22.

D. C., Colombo, 16,967.

Action by mortgagee to realize his mortgage over a property already leased—Stipulation in lease that the lease should terminate upon signing of mortgage decree—Necessity for joining lessee as party defendant in mortgage suit—Meaning of "mortgage decree."

Where a property has been leased to one party and then mortgaged to another, and the mortgagee desires to realize his mortgage, it is necessary to join the lessee as a party defendant in the mortgage suit, even though the lease stipulated for its determination upon the passing of a mortgage decree.

"Mortgage decree" in such a case must be taken to mean such decree as may be obtained after the joinder of the lessee, so that it may be binding on him.

THE plaintiff in this case was the mortgagee, and the defendants the lessees, of a property which belonged to one Periyatamby. The plaintiff prayed that the defendants be ejected from the premises leased. The lease preceded the mortgage, but contained a stipulation that any mortgage subsequently executed should have precedence over the lease, and that the sale of the premises should determine the lease.

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In the hypothecary action which the plaintiff had brought against the mortgagor the lessees were not made parties. The lessees refused to be bound by the mortgage decree and resisted the present action in ejectment.

The District Judge held that, in view of the stipulation contained in the lease, it was unnecessary to have made the lessees parties, and gave judgment for the plaintiff.

The defendants appealed.

The case came up for argument before Layard, C.J., and Moncreiff, J., on 15th March, 1904.

Dornhorst, K.C. (with him *Walter Pereira*), for defendants appellant contended that the lessees must have notice of the action against the mortgagor. He cited *Ellis v. Dias 5 N. L. R. 44, Ellis v. Careem, 5 N. L. R. 281; Issac Perera v. Baba Appu, 3 N. L. R. 48; Oriental Bank Corporation v. Boustead, 6 S. C. C. 1.*

Sampayo, K.C. (with him *F. M. de Saram*), for plaintiff, respondent.—There is a stipulation in the lease, which makes the lease to terminate when a decree is passed in an action to realize the mortgage executed after the lease. Therefore, the joinder of the lessee as a party is unnecessary.

Cur. adv. vult.

22nd April, 1904. LAYARD, C.J.—

The District Judge's judgment proceeds on the ground that it was not necessary to make the defendants parties to the action brought by the plaintiff on the mortgage bond. Now, the defendants were the lessees of the plaintiff's mortgagor on a lease executed prior to the mortgage in favour of the plaintiff. The authorities cited before us show that this Court has recognized that a lessee should be joined as a party to the mortgage suit if the lease was executed subsequent to the mortgage. This seems reasonable, as a lessee may have vested in him a term of ninety-nine years, and may desire to pay off the prior encumbrance so as to continue in possession until the end of his term. In this case, however, the lease was executed prior to the mortgage, but contained a condition that any mortgage subsequently executed should have precedence over the lease, and that the sale of the premises leased under such a mortgage should determine the lease. The District Judge seems to think that in view of this condition it was unnecessary to make the lessee a party, because he says the sale of the premises by the mortgagee under a mortgage decree according

to that condition terminated the lease. The question is, what did the parties mean by " a mortgage decree," and was the decree obtained by the mortgagee without joining the lessee such a mortgage decree as was binding on him ? It appears to me that the parties must have been taken to have contemplated such a " mortgage decree " as was binding on the lessee by his being made a party to the action, otherwise the lessor might create a fictitious mortgage and allow his mortgagee to obtain a mortgage decree thereon, and the lessee, according to the construction placed on the lease by the District Judge, would at once, on the decree being obtained, cease to have any interest in the property leased to him. I cannot believe that that could have been the intention of the parties to the lease.

From the seventh paragraph of the statement setting out the facts of the case it appears to me doubtful whether the Fiscal did sell to the respondent anything more than the premises, subject to the existing lease. He appears to have seized and sold to the plaintiff the premises leased, together with all the rents reserved and payable to the mortgagee by virtue of the lease. There would have been no necessity to assign the rents payable under the lease to the plaintiff, if the Fiscal intended to sell the property free of the defendant's leasehold interest.

I do not think the plaintiff is entitled to eject the defendants from the premises leased, and I would set aside the judgment of the District Judge and dismiss the plaintiff's action with costs in both Courts.

MONCREIFF, J.—

I am of the same opinion. I agree with the Chief Justice in thinking that Periyatamby's lessees (that is, the defendants) should have been made parties to the plaintiff's mortgage action against Periyatamby. As they were not made parties, they occupy the position of ordinary lessees whose lessor's land has been seized and sold in execution, and are not subject as regards the plaintiff to the special arrangements made between them and their lessor with regard to a mortgage of the leased premises made subsequently to their lease.