Present : Ennis A.C.J. and Jayewardene A.J.

KRISTNAPPA CHETTY *et al. v.* HORATALA.

181—D. C. Kurunegala, 8,353.

Mortgage in favour of two persons—Address not registered—Action by secondary mortgagee first—Sale in execution—Subsequent action by primary mortgagee—Sale in execution—Rights of purchasers under the mortgage decrees—Claim to compensation by purchaser at second sale—Civil Procedure Code, ss. 643 and 644.

P mortgaged the land in question to F in 1912 and to A in 1914. A put his bond in suit first, and on a sale in execution purchased the land in November, 1917, and transferred it to plaintiff in November, 1918. F instituted an action on his bond in October, 1917, and in execution of the mortgage decree the property was purchased by defendant by deed dated September, 1919. Neither party complied with the requirements of sections 643 and 644 of the Civil Procedure Code, and neither mortgage decree was registered. In an action for declaration of title :

Held, " As plaintiff's title is based on a sale which was prior in date to the sale in favour of the defendant, the plaintiff's predecessor acquired the title of the mortgagor before the purchaser under the prior mortgage, and he must be declared entitled to the

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land and to be placed in possession thereof. He is, however, bound to redeem the first mortgage. If he is not prepared to do so, the defendant is entitled to redeem him and obtain possession of the land. For this purpose, both mortgages are in law taken to have revived. But the plaintiff is not entitled to immediate possession as defendant claims to have improved the land and to retain possession till he is compensated. If the improvements had been effected before the purchase under the second mortgage, no question of compensation would arise, as the improvements must be taken to have been effected by a transferee from the mortgagor, and they would accede to and form part of the land mortgaged. A question might also arise as to whether the amount to be paid in redeeming is the price paid by the purchaser or the amount due under the mortgage. Ordinarily it would be the latter. But in this case the defendant's right is to claim satisfaction in respect of this purchase under the mortgage of earlier date."

THE facts are set out in the following judgment of the District Judge (A. Beven, Esq.) :—

The land in question was mortgaged by Patumma and Ismail, amongst several other lands, to Arunachalam Chetty by bond No. 414 of July 10, 1914 (P 4), the bond was put in suit in D. C. 6,246, and, after decree, writ issued, and the property was purchased by Arunachalam Chetty on November 26, 1917, and he obtained final transfer 8,381 of August 22, 1918 (P 6), and was placed in possession on October 12, 1918 (P 7). He sold to plaintiff by deed 23,726 of November 14, 1918 (not produced). It appears that Patumma and Ismail had executed an earlier bond 31,881 of November 18, 1912 (P 1) in favour of Agida and Daniel Fernando. Daniel died, and his widow, Agida, discharged the bond P 1 and got a bond in her own favour for Rs. 1,000 by 15,875 of October 20, 1913 (P 2). This was assigned by 16,272 of February 12, 1914 (P 3) to Juanis Appu. Plaintiff states that that all previous writs were discharged on the execution of P 4, but I do not see that P 3 was discharged in the Encumbrance Sheet P 5. Rapiel, as administrator of the estate of Don Daniel, sued Patumma and Ismail on the bond P 1, and got judgment in D. C. 6,690 (*vide* D 3), which was affirmed in appeal. It was in execution of that decree that defendant purchased the land on September 16, 1919, by D 2. The competition is, therefore, between plaintiff's purchase on P 6 under the secondary mortgage in D. C. 6,246 and defendant's purchase on D 2 under the primary mortgage in D. C. 6,690. It is admitted that neither of the mortgagees registered an address under the provisions of chapter XLVI. of the Civil Procedure Code. It was submitted by defendant's proctor that as the sale to Arunachalam Chetty took place on November 26, 1917, and the summons in D. C. 6,690 was served on the mortgagors on November 13, 1917, the doctrine of *lis pendens* would apply, and the sale would be a nullity.

The question arises whether an execution purchaser, who is also a *bona fide* purchaser, is affected by *lis pendens*. This point has been fully discussed in pages 171 and 172 of *Jayewardene on Registration*, and it is now settled law that the rule of *lis pendens* is applicable to Court sales. But to be effectual the *lis pendens* should have been registered, and this could not possibly have been done in view of the circumstances above mentioned. I hold, therefore, that the doctrine of *lis pendens* does not apply to plaintiff's purchase.

I was also referred to the decision on page 176 of *23 N. L. R.* where it was held that a purchaser under a primary mortgage decree had a title free from all encumbrances in a case where neither the primary nor secondary mortgagees had registered their addresses. But in that case a secondary mortgagee sued the mortgagor and the purchaser under the first mortgage decree, and it was held the secondary mortgagee was entitled to have his claims satisfied from the proceeds of the sale of the mortgaged property after the primary mortgagee was paid, but was not entitled to be made a party to an action for the realization upon the primary mortgage. In this case the point at issue is whether the purchaser under the secondary mortgage has a better title than the purchaser under the primary mortgage, when both mortgagees have failed to register their addresses.

It was held by the Supreme Court in several cases (*16 N. L. R. 210* and *20 N. L. R. 170*) that if a primary mortgagee has not registered his address, nor joined the puisne encumbrancers to a mortgage action, the decree will not bind the puisne encumbrancers, irrespective of whether the puisne encumbrancers have complied with the requirements of sections 643 and 644 or not.

There is no evidence as to whether plaintiff's vendor or his agent was present at the sale at which defendant bought, so the question of estoppel does not arise.

I hold that the purchaser under mortgage decree D. C. 6,246 has acquired a superior title to the defendant purchaser in D. C. 6,690.

Enter judgment for plaintiff with costs. The question of improvements said to have been effected by defendant may be referred to arbitration.

Hayley (with him *Garvin*), for defendant, appellant.

Samarawickreme (with him *Ameresekere*), for plaintiff, respondent.

October 24, 1923. ENNIS A.C.J.—

This was an action for a declaration of title. The land in dispute was at one time owned by Pathumma and Ismail Lebbe.

By the deed P 4 No. 414 of July 14, 1914, Pathumma and Ismail mortgaged the land to Arunasalem and Maiappa Chetty who put the bond in suit in D. C. Kurunegala, No. 6,246. On a sale in execution on November 26, 1917, Arunasalem Chetty became the purchaser and obtained a Fiscal's transfer, P 6 on August 22, 1918. Arunasalem conveyed the property to the plaintiffs on November 14, 1918.

The defendant's title is that by the deed P 1 No. 31,881 of November 18, 1912, the land was mortgaged by Pathumma and Ismail to Don Daniel Appuhamy and his wife Agida Fernando. Don Daniel Fernando died, and his administrator put the bond in suit in the action No. 6,690 instituted on October 8, 1917. On June 30, 1919, the land was sold under the decree in that case to the defendant Horatala who obtained a transfer D 2 on September 16, 1919. The learned Judge found in favour of the plaintiffs, and the defendant appeals.

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Both mortgage bonds were duly registered, but the mortgagees did not register addresses under sections 643 and 644 of the Code of Civil Procedure; and in the action on the bond which was earlier in date, viz., No. 31,881, the mortgagees under the bond which was of subsequent date, viz., No. 414, were not given notice of the action.

In the case of *Supramaniam Chetty v. Weerasekera*,[1] which was a Full Court decision, it was definitely held that—

> "the action under chapter XLVI. (Civil Procedure Code) . . . . is the only action now available to a mortgagee;"

and that

> "if a mortgagee or his representative has been sued, and a decree obtained against him in the first action . . . . . he cannot again be sued in a subsequent action in respect of the same matter."

A few days before the judgment under appeal was delivered, a Full Bench of the Supreme Court delivered a judgment in the case of *Moraes v. Nallan Chetty*[2] holding that the purchaser at a sale in execution under a decree obtained by a second mortgagee took the property subject to the first mortgage.

The question before us is whether the two cases can be reconciled. It would seem that the decision in *Moraes v. Nallan Chetty* (*supra*) was induced by equitable principles, for it is suggested by Bertram C.J. who gave the principal judgment, that the effect of the earlier decision was not just, apparently on the argument that sections 643 and 644 of the Civil Procedure Code were intended to confer certain advantages upon a mortgagee who availed himself of the prescribed procedure; that if he does not comply with the special procedure, all that happens is that he loses these advantages and nothing more; and that there is nothing in the sections to put him in a worse position. The argument overlooks the fact that these sections also seem to be intended to confer advantages on a subsequent grantee, mortgagee, lessee, or other encumbrancer who has complied with the sections, for it provides that the primary mortgagee shall issue notice to such encumbrancer. The procedure is imperative, and the advantages to the subsequent encumbrancers may be many; for instance, it would give a subsequent mortgagee an opportunity of paying off the primary mortgage; or, of bidding at the sale either to enhance the price or to buy the property himself; or, of applying to be joined in the action as a defendant, so that payment of any surplus after the sale may be made to him rather than to the mortgagor; or, so that he may protect his interests by showing in the mortgage action that the primary mortgage has been discharged. The procedure in the sections enables a subsequent encumbrancer to look after his interest in the

[1] *(1918) 20 N. L. R. 170.* [2] *(1923) 24 N. L. R. 297.*

land and to prevent a sale by collusion between the mortgagor and a primary mortgagee. Is a primary mortgagee at liberty to deprive with impunity a puisne encumbrancer of these advantages ? I can see no more hardship in the incidence of a penalty for non-compliance with the obligation to register an address and give the prescribed notices, than in the case of other formalities where land is concerned, viz., the formality of a writing, of notarial execution, and of registration. The provisions of sections 643 and 644 seem to me to be admirably adapted to enable a mortgagee to lift in one action all the shackles that bind the land and so enable a purchaser to obtain a good title, and, incidentally, secure to the mortgagor or subsequent mortgagees a better sale.

There is no doubt that equity will grant relief against the imposition of a penalty where there is no express provision of law imposing the formality which entails the penalty. The necessity of issuing notices to subsequent encumbrancers lies in the imperative terms of section 643, and the necessity of the formality of registering an address is an inference from the proviso that a mortgagee cannot secure the advantages of the section unless he registers an address, considered with the provisions of section 207 relating to *res judicata* as they bear on section 640.

On equitable principles a mortgagee under a second mortgage cannot claim the advantages of the sections unless he himself has complied with the provisions of the sections. This principle is, in substance, that laid down by the Privy Council in the Indian case of *Mukhanlal v. Sri Krishna Singh*;[1] that a man cannot both affirm and disaffirm the same action, a maxim which " is founded not so much on any positive law, as on the broad and universally applicable principles of justice."

It is possible to accept the conclusion in *Moraes v. Nallan Chetty* (*supra*) without doing violence to the principles laid down in *Suppramaniam Chetty v. Weerasekera* (*supra*).

In the case of *Perera v. Kapuruhamy*[2] no one of the mortgagees had registered an address under the provisions of chapter XLVI. of the Civil Procedure Code, and an innocent third party had become the purchaser and obtained possession of the land on the sale in execution of the decree on the primary mortgage before the secondary mortgagee instituted his action. It was equitable, therefore, that his claim should be upheld.

In the case now under appeal the plaintiffs claim through second mortgagees who had not complied with the provisions of sections 643 and 644 by registering an address, but they said that on November 13, 1916, a discharge of the mortgage bond No. 31,881 was registered as shown by the extract on encumbrances P 5, and they claim that the mortgage No. 414 then became the primary mortgage. It appears that the mortgagors settled the debt with Agida

[1] *(1869) 12 Moore I. A. 157.*

[2] *(1921) 23 N. L. R. 176.*

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Fernando after the death of her husband Daniel Appuhamy, but it was held in the action No. 6,690 to which the mortgagees under the mortgage No. 414 were not parties that the private settlement of the debt with the widow was invalid as against the administrator of Daniel Appuhamy's estate. The defendant who was the purchaser in execution in that suit effected certain improvements on the land for which he claimed compensation. Applying the principle that the Court can grant equitable relief against the forfeiture of the rights of either mortgagee where both have failed to register an address, it would seem that the first person to secure the right, title, and interest of the mortgagor in the land steps into his shoes. The mortgagor had a right to redeem a mortgage, and the obligation to pay it off attached to the land to the extent of its sale value. As soon as the mortgagor is divested of his legal title to the land, sections 640, 643, and 644 of the Civil Procedure Code operate to release the land from the shackles which bind it, even when addresses for service have not been registered. This is the effect of *Suppramaniam Chetty v. Weerasekera* (*supra*). But equitable considerations may intervene in such a case, and the person who has obtained the legal title without the protection afforded by compliance with the sections may have to give compensation in respect of another mortgage ; or, at his option, surrender the land.

As the plaintiffs were the first to secure the legal title of the mortgagor, they are entitled to the declaration they claim against the defendant, but as the defendant is in possession and claims compensation for improvements, the case must go back for a settlement of that question, and he would not be liable to be ejected until such compensation, if any, is paid.

I would reserve to the defendant the right to claim satisfaction in respect of his purchase under the mortgage of earlier date, when the plaintiffs will have an opportunity of establishing their contention that the earlier mortgage was discharged by the mortgagor.

The respondents are entitled to the costs of this appeal.

JAYEWARDENE A.J.—

This is an appeal by the defendant in an action for declaration of title and recovery of possession on the basis of a purchase at a sale in execution of a decree on a mortgage bond. It is common ground that two persons, named Pathumma and Segu Ismail, were the original owners of the land described in the plaint, and the series of transactions by which the contesting claimants acquired title to it are not in dispute. On November 18, 1912, the owners executed mortgage bond No. 31,881 in favour of Mirissage Agida Fernando and Don Daniel Appuhamy. On July 10, 1914, the owners executed a second mortgage in favour of two Chetties—Arunasalam and Maiappa. Both bonds were duly registered. The second

bond was put in suit in case No. 6,246, D. C. Kurunegala, and the property mortgaged was purchased by K. M. M. Arunasalam Chetty at a sale held under the mortgage decree on November 20, 1917, and he obtained a Fiscal's transfer No. 8,381 dated January 30, 1918. Plaintiff claims on a purchase from Arunasalam on deed No. 23,726 of November 14, 1918. The primary mortgagee sued on his bond in case No. 6,690, instituted on October 9, 1917, and in execution of the mortgage decree entered in the case, the property was purchased by the defendant on deed No. 22,392 dated September 16, 1919. Neither party had complied with the requirements of sections 643 and 644 of the Civil Procedure Code, and neither mortgage decree has been registered. The plaintiff bases his title on the prior execution sale against the mortgagors, and contends that as the primary mortgagee had not registered his address, the mortgage decree obtained by him does not bind the plaintiff. He is, therefore, he says, entitled to the property as against the purchaser under the primary mortgage. He also alleges that the primary mortgage had been paid off and cancelled at the date of the institution of the action on it. He relies on *Suppramaniam Chetty v. Weerasekera* (*supra*) a Full Bench decision of this Court. The defendant contends that the primary mortgagee's failure to register his address cannot confer greater rights on the second mortgagee than he has under the common law, and that sections 643 and 644 have no application to a second mortgagee. He relies on *Moraes v. Nallan Chetty* (*supra*), also a Full Bench decision of this Court.

In *Suppramaniam Chetty v. Weerasekera* (*supra*) the Full Court considered the construction of sections 640, 643, and 644, and although the contest there was between a purchaser under a mortgage where the mortgagee had not registered his address and a transferee for value from the mortgagor, who had not been impleaded in the mortgage action, it laid down a general rule that chapter XLVI. of the Civil Procedure Code which contains sections 640, 643, and 644 superseded the common law remedies, and that—

> " A mortgagee who has failed to register his address under section 644 of the Civil Procedure Code, and who has sued his mortgagor and obtained a decree against him, cannot afterwards bring another action against a puisne encumbrancer or grantee claiming a declaration that the property in his possession is bound and executable for the mortgage debt."

The *ratio decidendi* of this case must necessarily apply to a second mortgagee, for the sections refer to " all grantees, mortgagees, lessees, and other encumbrancers," and on no principle of construction, that I know of, can the words of these sections be so construed as to make them applicable to grantees, lessees, and other encumbrancers only, and to exclude " mortgagees " from

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their operation. Under these sections the term puisne encumbrancer must necessarily include a second mortgagee. But, in *Moraes v. Nallan Chetty* (*supra*), it was held that these sections, although they expressly referred to subsequent mortgagees, did not apply to such mortgagees, and *Suppramaniam Chetty v. Weerasekera* (*supra*) was distinguished on the ground that the contestant there was not a subsequent mortgagee, but a subsequent grantee. I am not sure that such a distinction can be made, but it has been made, and if the two decisions cannot be reconciled, it is the duty of this Court, confronted as it would be with two conflicting Full Court rulings, to decide which of these two it will follow: *Perera v. Perera*[1] and *Perera v. Amarasuriya*.[2]

This Court has been always impressed with the unfortunate position of a purchaser under a primary mortgage decree, when the mortgagee has failed to comply with the requirements of sections 643 and 644, owing to the drastic consequences which are supposed to follow from such failure. But our sympathy for such a purchaser should not lead us to ignore the rights of the second mortgagee which are substantial, and a way ought to be found by which justice may be done to both. What are the rights of a second mortgagee under our law? Under the Roman law the second mortgagee had no independent right to sell the mortgaged property; his only right was to redeem the first mortgagee. But, when he had redeemed the first mortgagee and put himself in the place of the first mortgagee, he could exercise the right of sale. This was altered in the Roman-Dutch law and a second mortgagee was given the right to bring the property to sale (*Voet 20, 4, 35*). But on such a sale the purchaser became entitled to the property free of all mortgages and other encumbrances, prior or subsequent, and the primary mortgagee and other mortgagees had to divide the proceeds of sale according to their rights of preference. As De Sampayo J. observed in *Moraes v. Nallan Chetty* (*supra*) at page 305, under the Roman-Dutch law "when a debtor's property was brought under the hammer, there was, so to say, an informal insolvency of the debtor, and the creditors of all sorts could only claim proceeds, in preference or in concurrence, as the case might be." This was done in a suit, called the suit for preference and concurrence (*Voet 20, 4, 10*). So that under the Roman-Dutch law the rights of the primary and subsequent mortgagees were amply protected. This procedure, if it was ever introduced into Ceylon, soon ceased to be in operation, and the rule which obtained was that a sale of mortgaged property under a mortgage decree did not wipe off prior mortgages, and the primary mortgagee was not allowed to claim the proceeds of sale, and a purchaser at such a sale bought the property encumbered with all existing mortgages to which it was subject (see *Jayewardene on "The Law of Mortgage," pp. 44–49*). Such a sale, therefore, while it

[1] (*1903*) *7 N. L. R. 473.*

[2] (*1909*) *12 N. L. R. 87.*

left intact mortgages prior in date to the mortgage under which the property was sold, extinguished all mortgages of a subsequent date. According to this rule there was no hardship to the prior mortgagees, but subsequent mortgagees were adversely affected. The primary mortgagee might institute an action on his bond without notice to the subsequent mortgagees, and have the property sold free of the subsequent mortgages. If a balance of the proceeds of sale remained after the satisfaction of the primary mortgage, the mortgagor might appropriate it, or it may be paid out to his unsecured creditors. The subsequent mortgagees would also be prevented from bidding at the sale and securing a fair price for their security. The position of subsequent mortgagees under this system became very precarious, and their securities were liable to be extinguished behind their back. This position of subsequent mortgagees attracted the attention of the Courts in many cases, and they attempted to grant them relief. For instance, in *The Oriental Bank Corporation v. Boustead*,[1] where subsequent mortgagees attempted to intervene in an action to contest the accounts between the prior mortgagee and the mortgagor, and to call on the prior mortgagee to marshall his securities in his favour, and the District Judge allowed them to come in for the limited purpose of ranking as puisne claimants to the proceeds of the prior mortgagee's execution. Burnside C.J. and Clarence J. said :—

> " It has been urged by respondents, the plaintiffs, that it has not been the practice in Ceylon for a first encumbrancer, when suing to realize his mortgage, to make puisne encumbrancers parties. Whatever may have been the law or procedure of the United Provinces as to the realization of mortgages, it has been so trenched upon during the ninety years which have elapsed since Dutch rule ceased in Ceylon, that we can hardly seek guidance on such a matter from Roman-Dutch jurists. Considering the effect now attached to mortgage encumbrances, it seems clear that a first mortgagee who has notice of puisne encumbrances ought to make such puisne encumbrancers parties to his suit to realize his mortgage. So far as this matter is concerned, very much the same considerations seem to apply here as in England ; and in England it is well settled that the puisne encumbrancers should be parties : *Adams v. Paynter*,[2] *Tylee v. Webb*,[3] *Burgess v. Sturges*.[4]
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> " If, as respondents urge, it is not usual for first mortgagees suing in our Courts to make the puisne mortgagees parties, the practice is, in my opinion, a vicious one, which ought not to be upheld. The puisne encumbrancer is vitally

[1] (*1884*) *6 S. C. C. 1.*
[2] (*1844*) *1 Coll 530.*
[3] (*1843*) *6 Beav. 552.*
[4] (*1851*) *14 Beav. 440.*

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interested in the reckoning between the eigne encumbrancer and the mortgagor, and in the eigne encumbrancer's action against the land . . . .

"If appellants are puisne encumbrancers to whom money is still due and if they are still entitled to their security they have a direct interest in the result of the accounting between the mortgagor and the plaintiffs, and may perhaps be entitled to have plaintiffs' securities marshalled."

And the Court was prepared to allow this to be done on the intervenients giving security. See also *The Oriental Bank Corporation v. Rossiter*.[1] The law was in this state when a Commission was appointed in the year 1884 to inquire into the law of mortgage in Ceylon, and report what steps should be taken to place the law on a satisfactory footing. The Commissioners reported that "what was needed was not so much an alteration of the existing substantive law of mortgage as the creation of a satisfactory system of procedure which will facilitate the realization of mortgaged properties without prejudice to the mortgagor or his creditors and procure for them on realization something like a fair market value" and proposed "for the mutual convenience of mortgagors and mortgagees in any proceedings relating to mortgaged property :—

30. That every mortgagor and mortgagee shall, at the time of the mortgage contract being registered, register at the Registrar's Office, in a book to be kept for that purpose, an address in Ceylon for receiving legal notices and processes relating to the mortgaged premises, and, in default of this being done by either mortgagor or mortgagee, such notice or process when affixed on the mortgaged premises shall be deemed to be equivalent to personal service.

31. That notice of an intended hypothecary action by a mortgagee be given to such puisne mortgagees, if any, as have notified their encumbrances to him and registered in manner above provided for an address in Ceylon for service of such notice" (see *Jayewardene on "The Law of Mortgage," Appendix A*).

When the Code of Civil Procedure was introduced in the year 1889, these proposals, with certain modifications and amendments, were included in sections 643 and 644. These sections were intended to give to subsequent mortgagees and other puisne encumbrancers an opportunity of appearing in mortgage actions to protect their rights. They have been very inartistically drafted, and it took

[1] *(1885) 7 S. C. C. 133.*

many years before their effect, and that of section 640 was fully grasped and a satisfactory construction placed on them. It has now been authoritatively decided that the procedure obtaining in Ceylon, before the Code, has been repealed by it, and that only one action is available to a mortgagee under the Code, that the primary mortgagee must register his address in the first instance, and that puisne encumbrancers must register their addresses and notify such addresses in writing to the primary mortgagee. If the primary mortgagee registers his address and issues notice of the institution of the action with a copy of the summons to all puisne encumbrancers, who have notified their addresses to him, the latter may apply to be joined as defendants in the action. Every puisne encumbrancer so noticed not applying to be added as a defendant is bound by the judgment in the action as if he had been made a party thereto. If the primary mortgagee fails to register his address, or fails to give notice of his action to puisne encumbrancers who have notified him of their encumbrances and their addresses, or fails to make such encumbrancers parties to the action, they would consequently be not bound by the judgment in his action. If a primary mortgagee comply with the requirements of the section, he would be fully protected, and if the subsequent mortgagees have also complied with what they are required to do, they would be afforded an opportunity of protecting their interests in the security. But what would be the result when the primary mortgagee has failed to comply with the requirements of the law and has obtained a judgment which binds only the mortgagor and not the puisne encumbrancers ? As regards a puisne encumbrancer who is a grantee, he loses his rights altogether, and as regards a lessee, his rights become subject to the lease and the question remains, what are his rights as against a subsequent mortgagee or a purchaser under a decree obtained in such a mortgagee's action ?

One would have thought that in consequence of the interpretation placed on sections 640, 643, and 644 by the Full Bench in *Suppramaniam Chetty v. Weerasekera* (*supra*) that the subsequent mortgagee would necessarily be in the same advantageous position as a subsequent grantee or lessee, but a contrary note was sounded in *Perera v. Kapuruhamy*,[1] and adopted by the Full Bench in *Moraes v. Nallan Chetty* (*supra*). In these cases it has been held that a secondary or subsequent mortgagee is not entitled to be made a party to an action for the realization upon the primary mortgage, and that an action to which he is not a party binds him, so as to give the purchaser under the primary mortgage a title free of all puisne encumbrances, that the rights of the parties must be decided by a consideration of the rights of a secondary mortgagee under the common law, and that the provisions of chapter XLVI. of the Civil Procedure Code have no application to such a case. Otherwise,

[1] *(1921) 23 N. L. R. 176.*

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it is said, the primary mortgage would vanish for some mysterious reason. Bertram C.J., in *Moraes v. Nallan Chetty* (*supra*), said :—

> "It may be accepted, until the law is amended, that it is the implied intention of section 640 that a mortgagee shall not afterwards assert against a puisne encumbrancer a claim which he might have asserted in the original action. But surely this can only be the case with respect to a claim which it was necessary for him to assert in order to establish his rights. Was it then necessary for a mortgagee to assert any claim at all against a secondary mortgagee ? Was there anything which compelled him to make a secondary mortgagee a party to a mortgage action ? It seems clear that there was not. Under the pure Roman-Dutch law, as expounded by Mr. Berwick, there was certainly no such obligation on the primary mortgagee."

Then he referred to *Oriental Bank v. Naganader*[1] and *Meyappa Chetty v. Rawter*[2] and continued :—

> "In many cases it is certainly most reasonable and convenient that a secondary mortgagee should be joined. Accounts might be gone into for the purpose of settling the mortgage debt in which he might be interested, and he clearly would not be bound by any settlement of accounts in an action in which he was not a party. But if he is so joined, he is not joined for the purpose of any order to be made against him. Apart from any such question of accounts, he is really joined for his own information. But there is no decision prior to the Code, and no enactment of the Code itself which requires him to be joined." (The attention of the Court had, evidently, not been drawn to the case of *Oriental Bank Corporation v. Boustead* (*supra*).)

The other members of the Court took similar views, and thought that the primary mortgagee's rights would be unimpaired by his failure to observe the requirements of sections 643 and 644, so far as subsequent mortgagees were concerned. The result of this decision is to reduce the subsequent mortgagee to the hapless condition in which he was under the law of Ceylon before the passing of the Code. Under the Roman-Dutch law, it may not have been necessary to make the puisne mortgagees parties to the primary mortgagee's hypothecary action, nor was it necessary to make the primary mortgagee a party to a subsequent mortgagee's action, although it resulted in his being deprived of his security, but, before the proceeds realized by the sale were distributed, there was a proceeding or suit for concurrence or preference to which all the creditors of the mortgagor were summoned (*Voet 20, 4, 10*), and the distribution of the assets was carefully regulated, as appears from what Voet lays down. This proceeding had disappeared under our

[1] (*1879*) *2 S. C. C. 146.* [2] (*9*13) *6 N. L. R. 220.*

law and the mortgagor was entitled to be paid the balance remaining after the satisfaction of the first mortgagee, unless subsequent mortgagees got information of the mortgage action and intervened in time to protect their rights. I have already referred to the strong remarks made by this Court in *The Oriental Bank Corporation v. Boustead* (*supra*), where the inadequacy of what was said to be the existing practice, to safeguard the rights of puisne mortgagees was pointed out, and the practice was condemned as " vicious " and as one that ought not to be upheld. This is the practice which this Court, if it follows *Moraes v. Nallan Chetty* (*supra*) would be restoring. The force of the observations of this Court in *Boustead's Case* (*supra*) was appreciated, hence the appointment of the Commission in 1884, and the adoption of that part of its report which dealt with this aspect of the law of mortgage and its embodiment in the Civil Procedure Code. The rights of a puisne mortgagee have been described by my Lord, the Acting Chief Justice, in his judgment which I have had the advantage of reading, and I need not state them again. The provisions of the Civil Procedure Code were intended to give to puisne encumbrancers these rights which have been in abeyance for years, rights which I respectfully assert, they enjoyed under the Roman-Dutch law and which they enjoy under most systems of law. I think it is the duty of this Court to give effect to the object which the Legislature had in view in enacting sections 643 and 644 of the Civil Procedure Code. In my opinion, not only does the law require it, but also justice demands that a puisne encumbrancer should be joined as parties to an action brought by the primary mortgagee on his bond. But it may also be necessary to see that in attempting to do justice to puisne encumbrancers we do not destroy the rights of the primary mortgagee altogether.

As pointed out above a subsequent mortgagee has the right to sell the property mortgaged subject to the primary mortgage, and the purchaser would acquire the interests or estate of the mortgagor, that is, the ownership of the land subject to the primary mortgage. He would be in the position of an assignee of the subsequent mortgage and of a purchaser of the mortgagor's right which was only a right to redeem. The primary mortgagee also can bring the property to sale under his mortgage, and the purchaser would acquire the rights of the mortgagor, that is the ownership of the land free of all encumbrances, but if he has not complied with the requirements of sections 643 and 644, or has not made the subsequent mortgagee a party to the action, the subsequent mortgagee would not be bound by the decree he obtains on his mortgage. In such a case he would be in the position of an assignee of the first mortgage and of the interests of the mortgagor but the mortgagor's interest which he acquires would be burdened with the second mortgage. It is a necessary implication from the words of section 644 that, if a certain procedure is followed, the subsequent mortgages would be

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bound, that the subsequent mortgagee would not be bound if that procedure is not followed. Then if the subsequent mortgagee is not bound by the primary mortgagee's decree, what follows ? The rights of the subsequent mortgagee must be considered as being left unimpaired, and his right to sue for sale of the property, that is, the interests of the mortgagor which existed previous to the primary mortgagee's action must remain, and a purchaser under the subsequent mortgagee's decree would take the property subject to the first mortgage. His rights cannot be restricted to a mere claim to the balance (if any) of the sale proceeds after satisfying the debt due to the first mortgagee. But it might be urged that the primary mortgage having been sued upon and the property sold under it, there has been a merger and extinguishment of the debt. If the subsequent mortgage is still outstanding, there can be no merger, for " merger is the destruction or ' drowning ' by operation of law of the less in the greater of two estates coming together and vesting without any intervening estate in one and the same person in the same right." *Encyclopedia of the Laws of England, Vol. 9, p. 193.* For, as was said by the Full Bench of the Madras High Court in *Mulla Vitil Seethi Kutti v. Achuthan Nair*,[1] when dealing with a similar case :—

> " Merger, on principle, is impossible, for the case of the first mortgagee acquiring the equity of redemption, when a second mortgage is still outstanding, is not one of the rights and correlative obligation coalescing in the same person (see *Lindley's Jurisprudence, p. 75*), or of a smaller interest getting absorbed by a larger (see *Lindley, Appendix LVII.*), or of two contiguous interests carved out of property combining to form a larger whole."

The debt due to the primary mortgagee need not be regarded as necessarily extinguished. It may be regarded as revived for the purpose of enabling him or the purchaser under his decree to preserve his priority. A similar principle of revival has been applied in cases where, by virtue of section 238 of the Civil Procedure Code, a private alienation in discharge or cancellation of a previous sale or mortgage becomes void, and the previous sale or mortgage has been held to revive (*Silva v. Silva*[2]). In so deciding, our Courts adopted the principle laid down in India in *Gopal Sahee v. Gunge Pershad Sahee.*[3]

In my opinion, the failure of the puisne mortgagee to comply with the requirements of sections 643 and 644 cannot affect his rights so far as mortgages prior to his are concerned. Where, therefore, there are two purchasers, one under the primary mortgage and the other under the subsequent mortgage, both would be standing in the shoes of the mortgagor whose only right

[1] *(1911) 21 Mad. L. J. 213.* [2] *(1899) 13 N. L. R. 33.*
[3] *(1882) 8 Cal. 530.*

as against the mortgagees is the right of redemption. Neither purchaser is bound by the decree obtained by the other. In these circumstances, the person who first purchases the property against the mortgagor would be entitled to be declared the owner of the land and to possession. If the first purchaser is a purchaser under the primary mortgage, he is liable to be called upon to redeem the subsequent mortgage; but if the first purchaser is under the subsequent mortgage, he can be called upon to redeem the primary mortgage. If the first purchaser, in either case, is not prepared to redeem the outstanding mortgage, then he must consent to be redeemed and surrender possession of the property. If the purchaser under the first mortgage is given the right to bring a second action, which is denied to him under our law, the purchaser under the second mortgage might refuse to redeem him, and compel him to sue a second time on the bond. This is, in my opinion, the result of the primary mortgagee's failure to comply with the requirements of sections 643 and 644, or to make the subsequent mortgagee a party to his action. Such a solution of the difficulties does justice to both mortgagees, and the primary mortgagee's failure or omission would not subject him to the drastic consequences of losing all his rights. It would also enable the Court to give effect to the provisions of sections 643 and 644, make *Moraes v. Nallan Chetty* (*supra*) not entirely inconsistent with *Suppramaniam Chetty v. Weerasekera* (*supra*), and penalize the primary mortgagee for his failure to observe the provisions of these sections without destroying his rights *in toto*.

Difficulties arising from the competing claims of primary and puisne mortgagees and purchasers under their mortgages, similar to those arising in Ceylon, have arisen in India, and they appear to have been solved on the lines indicated above. It is not correct to say, as is very often said, that the law of mortgage in India is based on the English law, and is entirely different from the law of mortgage obtaining here. There is a form of mortgage in India called a "simple mortgage," which is identical with mortgages under the Roman-Dutch law. Section 58 of the "Transfer of Property Act, 1882," defines the various kinds of mortgage known to the law of India, one is known as "the English mortgage" and another a "simple mortgage" is thus defined :—

> "Where, without delivering possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgage money and agrees expressly or impliedly, that, in the event of his failing to pay according to his contract, the mortgagee shall have the right to cause the mortgaged property to be sold, and the proceeds of sale to be applied so far as may be necessary, in payment of the purchase money, the transaction is called a simple mortgage and the mortgagee a simple mortgagee."

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This is a definition which exactly describes a mortgage under our law. A simple mortgagee has no right of foreclosure but only a right of sale (section 67). As under our law a second or subsequent mortgagee has the right to sue for the sale of the mortgaged property subject to the prior mortgage : section 75 (O. 34, r. 1,) Indian Civil Procedure Code, and under section 85, now repealed and re-enacted with slight alterations as O. 34, r. 1, of the Indian Civil Procedure Code :—

> " Subject to the provisions of this Code, all persons having an interest either in the mortgage security or in the right of redemption shall be joined as parties to any suit relating to the mortgage.
>
> " *Explanation.*—A puisne mortgagee may sue for foreclosure or for sale without making the prior mortgagee a party to the suit ; and a prior mortgagee need not be joined in a suit to redeem a subsequent mortgage."

The law in India does not provide for the registration of addresses, but all persons having an interest in the mortgage security must be joined as parties. A sale by a prior mortgagee in an action to which subsequent mortgagees are not parties does not displace puisne mortgagees, and leave them with nothing but a claim against the surplus proceeds, if any, as held by Lord Macnaghten in *Gobind Lal Roy v. Ramjanam Misser*.[1] In such a case the puisne mortgagee has the right to proceed against the land (*ibid*). The similarity between mortgages in India and here and between the rights of prior and subsequent mortgagees makes it possible to apply under our law the principles which have been applied in India for the solution of like difficulties. Thus it has been held in India in *Mulla Vitil Seethi Kutti v. Achuthan Nair* (*supra*) that a first mortgagee who purchased the mortgaged property in execution of a decree on his mortgage and sues for possession, or in the alternative for the recovery of his money, is not entitled to a decree for possession as against a puisne mortgagee with possession (that is, where the mortgage is usufructuary) who was not a party to the suit by the first mortgagee. The puisne mortgagee is entitled to redeem him. The puisne mortgagee's position would be stronger if he had sued on his mortgage and purchased the property. In that case, after a careful review of the law on the subject, the following propositions (which I give in full, as they would be helpful) were formulated :—

(1) " A second mortgagee is entitled to the same rights as the first mortgagee, with reference to his security, having regard to the nature of his mortgage.

(2) " The purchaser of the equity of redemption (that is, of the interests of the mortgagor) after the first mortgagee and the second mortgagee both stand on the same footing with reference to their respective rights against the first mortgagee when they have not been impleaded in the suit instituted by him on his mortgage.

[1] *(1893) 21 Cal. 70.*

(3) " Those rights are unaffected by the suit of the first mortgagee to which they are not made parties, and the decree passed therein and the sale made in pursuance thereof.

(4) " The purchaser in such a suit, whether it is a first mortgagee or a stranger, does not acquire the rights of the mortgagor as at the date of the first mortgage, but only those that subsist in him at the date of the suit."

This is a decision of the Full Bench of the Madras High Court, and contains a learned and instructive discussion of the subject. It has been followed in a later case, *Chinnu Pillai v. Venkatasamy Chettiar*,[1] which also contains equally instructive judgments, and where it was held that " where a prior mortgagee sued for a sale on his mortgage without making a puisne mortgagee a party to his suit and obtained a decree, and in execution of the decree the property was sold and purchased by a third person, the puisne mortgagee is entitled to sue for sale on his mortgage, subject to the prior mortgage after making the purchaser a party to the suit."

In my opinion, therefore, as the plaintiff's title in the present case is based on a sale which was prior in date to the sale in favour of the defendant, the plaintiff's predecessor acquired the title of the mortgagor before the purchaser under the prior mortgage, and he must be declared entitled to the land and to be placed in possession thereof. He is, however, bound to redeem the first mortgage. If he is not prepared to do so, the defendant is entitled to redeem him and obtain possession of the land. For this purpose, both mortgages are in law taken to have revived. But the plaintiff is not entitled to immediate possession as the defendant claims to have improved the land and to retain possession till he is compensated. If the improvements had been effected before the purchase under the second mortgage, no question of compensation would arise, as the improvements must be taken to have been effected by a transferee from the mortgagor, and they would accede to and form part of the land mortgaged. A question might also arise as to whether the amount to be paid in redeeming, is the price paid by the purchaser or the amount due under the mortgage. Ordinarily it would be the latter. But in this case, I agree with my Lord, the Acting Chief Justice, that the defendant's right is to claim satisfaction in respect of his purchase under the mortgage of earlier date.

The plaintiff also contends that the primary mortgage had been paid off and discharged. These questions cannot, in my opinion, be satisfactorily decided in this case. The plaintiff is entitled to be placed in possession of the land on his paying to the defendant the compensation, if any, that may be found due to him. I agree to the order proposed by my Lord, the Acting Chief Justice.

Varied.

[1] *(1915) 40 Mad. 77.*