

1934

Present : Garvin S.P.J. and Akbar J.

IBRAHIM *v.* HONG KONG AND SHANGHAI BANK.

40—D. C. (Inty.) Colombo, 47,760.

*Registration—Seizure of property on a mandate of sequestration—Mortgage by owner subsequent to seizure—Prior registration of mortgage—Seizure void as against the mortgage—Seizure does not create an interest in land within the meaning of section 6 (1) of Ordinance No. 21 of 1927—Seizure is an instrument affecting land within the meaning of the Registration of Documents Ordinance, No. 23 of 1927.*

A notice of seizure issued by the Fiscal on a mandate of sequestration was registered after a mortgage effected by the owner, which was subsequent in date to the seizure but prior in registration.

*Held*, the notice of seizure on a mandate of sequestration was an instrument affecting land within the meaning of section 6 of the Registration of Documents Ordinance, No. 23 of 1927, and was void as against the mortgage.

*Held, further*, that such a notice of seizure did not create an interest in land within the meaning of section 6 (1) of the Mortgage Ordinance, No. 21 of 1927.

**A** PPEAL from a judgment of the District Judge of Colombo.

*H. V. Perera*. (with him *Nadarajah*), for plaintiff, appellant.

*Keuneman* (with him *Choksy*), for defendant, respondent.

November 28, 1934. AKBAR J.—

The plaintiff-appellant in this case sued one Thiagarajah in D. C. Colombo, No. 35,982, and issued a mandate of sequestration seizing the property in dispute in this case on December 21, 1929, but this seizure unfortunately for him was not registered till January 11, 1930. On February 19, 1930, he obtained judgment and on writ issued on June 11, 1930, this property was seized and sold on September 19, 1930. Plaintiff obtained his Fiscal's transfer on December 17, 1930. During this time Thiagarajah mortgaged this property to the defendant on December 24, 1929, and the mortgage was registered on January 3, 1930. The defendant instituted a mortgage action on this bond on January 16, 1930, the *lis pendens* being registered on January 18, 1930. He obtained a

mortgage decree on the same day, viz., January 18, 1930, and the decree was registered also on the same day. The property was sold and bought by the defendant on conveyance D 5 dated February 21, 1931, and registered on February 25, 1931. A number of issues was framed but by agreement of parties the trial Judge delivered his order on the 5th issue, viz., whether plaintiff's fiscal transfer was null and void as against the conveyance dated February 21, 1931, in defendant's favour under his mortgage decree and whether plaintiff was bound by the mortgage action and decree and sale.

The appeal is from the order of the District Judge in which he held against the plaintiff. It will thus be seen that there is no dispute as regards the facts and that the appeal is purely on questions of law relating to the correct interpretation of certain sections of the Mortgage Ordinance, No. 21 of 1927, and the Registration of Documents Ordinance, No. 23 of 1927. The only question that appears to me to arise in this appeal is whether the plaintiff is bound by the decree in the mortgage action. He was admittedly not made a party to the mortgage action and he will therefore be bound by the mortgage decree if he was not a necessary party to the hypothecary action within the meaning of these words in section 6 of Ordinance No. 21 of 1927. In the first place had the plaintiff "an interest in the mortgaged property" within the meaning of section 6 (1) of that Ordinance. He obtained a mandate of sequestration on December 21, 1929, three days prior to the mortgage bond in favour of plaintiff. The notice of seizure issued by the fiscal on this mandate of sequestration was registered on January 11, 1930, eight days after the registration of defendant's mortgage bond. Now a notice of seizure cannot be said to create an interest in land. It is a notice prohibiting the owner of the property from transferring, alienating, or charging the property and all other persons from receiving the same by purchase, gift or otherwise, (see form No. 50, schedule, Civil Procedure Code). In other words, it is a notice prohibiting the creation of any new interest in the land. A notice of seizure issued by the fiscal on a mandate of sequestration is in my opinion "an instrument affecting land" within the meaning of sections 6, 7, and 8 of Ordinance No. 23 of 1927, for two reasons. In the first place, such a notice would appear to fall within the words "orders of any authority . . . which purport or operate to limit or extinguish any right, whether past, present, or future to, in, or over any land" in section 8 (b). In the second place by section 657 of the Civil Procedure Code all sequestrations are to be made in the manner provided for the seizure of property preliminary to sale thereof in execution of a decree for money, and therefore the notice of seizure issued by the fiscal may be regarded as a notice issued under section 237 of the Civil Procedure Code and thus as coming within section 8 (b) of Ordinance No. 23 of 1927. But this does not help the plaintiff, for defendant's mortgage though later in date was registered prior to the registration of the sequestration (the two dates being January 3, 1930, and January 11, 1930), and therefore the mortgage will have preference over the sequestration.

Although such a notice may be an instrument affecting land within chapter III. of Ordinance No. 23 of 1927, it does not in my opinion,

as I have already said, create an interest in the land seized within the meaning of section 6 (1) of Ordinance No. 21 of 1927. Dalton J. in *Chettiar v. Coonghe* was of the same opinion (*vide* the Privy Council case, *Moti Lal v. Karaabuldin and others*) and my view finds support in section 6 (2) (a) for every person having an interest in land must have duly registered "the instrument, if any, under which he derives title" at the time the plaint in the hypothecary action is filed before he can be regarded as a necessary party. A person issuing a mandate of sequestration cannot be said to derive any title to any land from the notice of seizure issued by the fiscal. Further, under section 6 (2) (b) the person having the interest in the land must have registered an address for service at the time when the plaint in the hypothecary action is filed, before he can be regarded as a necessary party to the hypothecary action. In the form given in the schedule to chapter II. of the Ordinance, such a person has to give particulars of the instrument under which he derives title, viz., the number and date of the deed under which he derives such title, the name of the attesting notary and the volume and folio where the deed is registered. These details are inappropriate to a notice of seizure issued by the fiscal. For all these reasons the plaintiff in my opinion was not a necessary party to the hypothecary action brought by the defendant against Thiagarajah and is therefore bound by that action. The result may appear to be very unfortunate for the plaintiff but the blame is entirely his or his agent's in delaying to register his sequestration which was effected on December 21, 1929, till January 11, 1930.

The appeal fails and will be dismissed with costs.

GARVIN S.P.J.—I agree.

*Appeal dismissed.*

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