

1918.

Present: Lascelles C.J. and Pereira J.

MOHIDEEN *et al.* v. APPUHAMY *et al.*

403—D. C. Ratnapura, 2,122.

Civil Procedure Code, s. 648—Land seized under mortgage decree—Claim by purchaser at a Fiscal's sale who has no Fiscal's conveyance—Claim upheld—Decree-holder must bring an action under s. 247.

It is only a grantee, lessee, mortgagee, or other incumbrancer who claims an interest in land sought to be affected by an action under chapter XLVI. of the Civil Procedure Code on a valid registrable document who is entitled to the notice of action provided for by section 643 of the Code.

Where land seized on a mortgage decree is claimed by a purchaser of it at a Fiscal's sale, who, however, has not yet obtained the Fiscal's conveyance, and the claim is allowed, the proper remedy of the decree-holder is an action under section 247 of the Civil Procedure Code.

A Fiscal's conveyance cannot refer back to the date of the actual Fiscal's sale when, between that date and the date of the conveyance, the debtor has been deprived of his legal estate by means of a sale of the property on a proceeding that is effectual in law as against the party obtaining the conveyance.

THE facts appear from the judgment.

Balasingham, for the plaintiffs, appellants.—At the date of the mortgage action No. 11,564, C. R. Ratnapura, the defendants had not obtained a Fiscal's transfer. The title did not, therefore, vest in the defendants at the date of the mortgage action. Cader Saibo need not and could not have recognized the defendants as purchasers and given them notice. The mortgage decree was binding on the defendants.

The fact that plaintiffs did not bring an action under section 247 of the Civil Procedure Code, when the defendants' claim was upheld, does not bar plaintiffs' rights in the present hypothecary action. The procedure adopted by the plaintiffs is in accordance with the decision of the Full Bench in *Stema Lebbe v. Banda*¹. See also *Moraes Vederala v. Andris Appu*.²

If the plaintiffs had brought an action under section 247 of the Civil Procedure Code they would have succeeded, as the defendants had no title at the date of the seizure. See *Silva v. Nona*.³

But an action under section 247 would have been useless, as the Fiscal's transfer, when obtained, would have related back to the date

¹ (1898) 1 A. C. R. 72.² 2 C. L. R. 91.³ 10 N. L. R. 44.

of the sale, and the proceedings under section 247 would not bind the defendants. Plaintiffs could have easily brought an action under section 247, but they did not do so in view of the rulings of this Court.

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R. H. Morgan, for the defendants, appellants.—The plaintiffs cannot bring a hypothecary action now as the mortgage bond is merged in the decree to 11,564. There is no longer any bond on which he can bring an action (*The Government Agent v. Henderick Hamy*¹). Plaintiffs did not bring an action under section 247 of the Civil Procedure Code within fourteen days of the order upholding the claim of the defendants. The order in the claim inquiry is conclusive as to the rights of the parties.

Balasingham, in reply.—The doctrine of merger of the mortgage bond in the judgment has been repudiated in several later judgments. See 14 N. L. R. 177. Plaintiffs did not bring an action under section 247, as it was held that the correct procedure was to bring an hypothecary action, and not an action under section 247.

Cur. adv. vult.

December 29, 1913. PEREIRA J.—

Pathumuttu, the owner of the parcel of land in claim in this case, mortgaged it in 1901 on a duly executed bond in favour of Cader Saibo. The bond was sued upon by Cader Saibo in November, 1910, in case No. 11,564 of the Court of Requests of Ratnapura brought against Pathumuttu, and the usual money and mortgage decrees were obtained by him thereon in January, 1911. On a writ against Pathumuttu in another case, namely, case No. 10,922 of the Court of Requests of Ratnapura, the parcel of land in question was seized and sold by the Fiscal in October, 1910, to the present defendants, who, however, obtained the formal Fiscal's transfer only in March, 1912.

In the meanwhile, that is to say, in March, 1911, the land was seized in execution of the writ issued in case No. 11,564, and it was claimed by the defendants in April, 1911, and their claim was upheld in November, 1912, but no action under section 247 of the Civil Procedure Code was brought either by Cader Saibo or the present plaintiffs, who have been substituted in his place as plaintiffs.

The District Judge has dismissed the action on the ground, apparently, that the mortgagee had failed to give the defendants the notice required by section 643 of the Civil Procedure Code; but, clearly, it is only a grantee, lessee, mortgagee, or other incumbrancer who claims an interest in the land sought to be affected by an order under chapter XLVI. of the Code on a valid registrable document who is entitled to such notice, and I do not think that the reason for the District Judge's decision can be sustained.

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But it has been argued that on the question of title to the land, or rather of the plaintiffs' right to have it sold for satisfaction of the decree in case No. 11,564, the plaintiffs are concluded by their omission to bring an action under section 247 of the Civil Procedure Code, and as against this contention the decision of this Court in the case of *Slema Lebbe v. Banda*¹ has been cited. Now, in an action under section 247 of the Civil Procedure Code, what has to be determined is the question as to the rights of parties at the date of the seizure in execution. It has been so decided by the Full Court in the case (*Silva v. Nona*²) peculiar applicable to the present case by reason of the judgment-debtor there being very much in the same position as the claimant in the present case, that is to say, in the position of a purchaser at a Fiscal's sale who has obtained his transfer after the seizure that gave rise to the claim and the proceedings thereunder; and, indeed, it seems to me to be a question whether, even where a claim to property seized in execution of a mortgage decree made by a grantee or puisne incumbrancer is allowed, an action under section 247 cannot be instituted against him, and an appropriate order made by the Court, taking into consideration his rights and those of the prior mortgagee, but this question must now be deemed to be set at rest by the decision in the case of *Slema Lebbe v. Banda*.¹ That case, however, has no application to the present, inasmuch as there the claimant had armed himself with a formal transfer before even the very institution of the action on the prior mortgage, and the reason given for his decision by Bonser C.J. is that if the mortgagee had brought an action under section 247, "that action would have necessarily failed, because the property could never have been sold in execution of the decree against the mortgagor."

In the present case, however, at the date of the seizure in execution of the mortgage decree, the claimants (present defendants) had no transfer in their favour, and therefore no title to the land seized, and hence an action against them under section 247 of the Code by the mortgagee would not necessarily have failed. It has, however, been said that, in the circumstances of the present case, an order against the defendants in such an action would have been nugatory, it being liable to be defeated the moment they obtained a Fiscal's conveyance in their favour; but I think it is clear that a Fiscal's conveyance can be of no avail after the debtor has been deprived of the legal estate by means of a sale of the property on a proceeding rendered effectual by law as against the party obtaining such conveyance.

For the reasons given above I would dismiss the appeal with costs.

LASCELLES C.J.—I agree.

Affirmed.

¹ (1898) 1 A. C. R. 72.

² 10 N. L. R. 44.