

1934

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

SUBASINGHE *et al.* v. PALANIAPPA PILLAI.

160—D. C. (Inty.) Colombo, 33,589.

*Mortgage action—Decree entered—Sale of property hypothecated in execution of a money-decree—Intervention by purchaser under money-decree—Right to intervene—Distribution of proceeds of sale—Mortgage Ordinance, No. 21 of 1927, s. 6 (2), (3), (4).*

A person who during the pendency of a hypothecary action purchases the property under mortgage, in execution of a money decree, may intervene under the provisions of section 6, sub-section (3), of the Mortgage Ordinance, No. 21 of 1927, but such intervention may be permitted only before the distribution of proceeds of sale under the mortgage decree.

**A** PPEAL from an order of the District Judge of Colombo.

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

*S. W. Jayasuriya*, for the first and second plaintiff, respondents.

*Weerasooriya* (with him *E. B. Wikramanayake*), for the fourth and fifth respondents.

*D. R. Jayakoddy*, for the sixth respondent.

February 21, 1934. GARVIN S.P.J.—

This appeal raises a question of considerable interest and, I venture to think, of considerable importance. The plaintiff in this action got a judgment on a mortgage bond. The decree was in the usual form of a hypothecary decree. In due course the property hypothecated was brought to sale and was actually sold on March 7, 1930, to the third respondent, Jinadasa. The deposit required by the conditions was paid but the purchaser failed within the time allowed for the purpose to pay the balance purchase money into court. On May 20, 1930, upon the application of the plaintiff the court made order declaring the amount of the deposit forfeited and directed that the property be re-sold at the risk of the third respondent. In the meanwhile, in execution of a decree obtained in another action against the same defendant the same property had been seized and sold and at that sale the present petitioner-appellant became the purchaser. On May 2, 1930, the purchase price was paid in full into Court and all conditions were apparently complied with to entitle him to a conveyance. Before the sale could be confirmed certain others intervened and objected to the confirmation of the sale. Various postponements were obtained for the consideration of the objections taken to that sale and, while that matter was still pending, an application was made in this case to have the order made by the District Judge, declaring the deposit forfeited and the property under hypothecation to be sold at the risk of the third respondent, vacated and that further

time be given to the third respondent to complete his purchase. On July 18, 1930, with the consent of all parties to the action the application was allowed and the order vacated. On that same day the third respondent paid the purchase price into court and obtained from the Secretary a conveyance of the property purchased by him. It is in evidence that on July 18 he transferred the property to the fourth and fifth respondents who themselves executed a mortgage in favour of the sixth respondent to secure a sum of Rs. 4,000. On July 21 upon the application of the plaintiff he was permitted to draw the amount of Rs. 11,486.24 in satisfaction of the decree and a further order was made permitting a sum of Rs. 405.13 to be drawn in and towards his taxed costs. After all these steps had been taken, a conveyance had been issued and the purchase money drawn in satisfaction of the decree, Palaniappa Pillai, the present appellant petitioned the Court and it is evident that the object and purpose of his petition was to obtain from the Court an order declaring that all orders and steps taken in this case from and including the order of July 18, 1930, vacating the earlier order of June 18, 1930, be set aside and that he be permitted to intervene in the action for that purpose. The learned District Judge after hearing argument held that the petitioner had no status to make the application, basing his conclusion upon his view of section 344 of the Civil Procedure Code. He felt constrained to treat that section as one which gives only to the persons specified therein, namely "parties to the action in which the decree was passed or their legal representatives," a status to raise in the same action any question relating to the execution of the decree.

It seems unnecessary to follow the learned District Judge or to examine or consider the view he has taken of the scope of that section for the reason that this question is really governed by Ordinance No. 21 of 1927, to which no reference whatever appears to have been made in the Court below. This was a hypothecary action to which the provisions of section 6 of Ordinance No. 21 of 1927, are applicable. Assuming that the petitioner was a person who, during the pendency of that action, had acquired an interest in the property under hypothecation, then it was his duty to avail himself of the provisions of section 6 (3) and intervene in the action. Ordinance No. 21 of 1927 contains enactments which are manifestly intended to afford to every person having an interest in property under hypothecation which is the subject of a hypothecary action opportunities to protect their interests in so far as they are imperilled by such an action. But such persons must avail themselves of the opportunities which are afforded them by the provisions of this Ordinance within the time which the Ordinance prescribes. Sub-section (3) of section 6 enables every person who by sub-section (2) and the other provisions of this Ordinance would be bound by a decree in a hypothecary action to apply to be permitted to intervene, but this application must be made "at any stage of the proceedings before distribution of the proceeds of sale". There is a further provision in sub-section (4) which reserves the rights of the parties to participate in the surplus proceeds of sale but the right to intervene is at an end when the proceedings have reached the stage at which the proceeds of sale have been distributed. It follows therefore that this application to intervene comes too late.

There is an indication in these proceedings that the salutary provisions of Ordinance No. 21 of 1927 are not perhaps as generally known as they should be. That Ordinance, while it gives every opportunity to persons interested in property hypothecated to conserve their interests, has another purpose and that is to make the decree in the action a final determination of every interest claimable in the property hypothecated. Section 10 (1) carries out this policy by giving a special effect to the conveyance issued to a purchaser at a sale in execution of such a decree and its effect is to convey the property sold . . . . freed from the interests, mortgages, and rights of (a) every party to the action and (b) every person who by sub-section (2) of section 6 is declared not to be a necessary party to the action. Such a conveyance has been issued in this case. It is not possible at this stage to permit the petitioner to intervene in this action except for the single purpose of participating in the surplus proceeds, if any.

For these reasons I would dismiss this appeal with costs.

AKBAR J.—I agree.

*Appeal dismissed.*

