

[FULL BENCH.]

Present: Lascelles C.J. and Wood Renton and Ennis JJ.MUTTURAMEN *v.* MASSILAMANY.

331—D. C. Colombo, 34,176.

Purchaser under mortgage decree—Registration of mortgage bond enures to benefit of purchaser—Competition between purchaser and a lessee of the mortgagor—Lease executed before mortgage, but registered after—Is mortgagee bound to give notice to lessee under s. 643, Civil Procedure Code?

A leased his land to B by a deed dated 1905 and registered in February, 1910. Thereafter A mortgaged his land to C by a bond dated 1907 and registered in the same year. Under the mortgage decree obtained by C against A the land was purchased by D in April, 1910. D obtained a Fiscal's transfer on August 19, 1910, and registered it on the 25th of the same month.

Held, that B's lease was void as against D, as the competition was between the lease and the mortgage and not between the lease and the Fiscal's transfer.

The prior registration of a mortgage bond enures to the benefit of the purchaser in execution of the mortgage decree.

The duty of a mortgagee under section 643 of the Civil Procedure Code to notice subsequent incumbrances arises only when the latter have notified their deeds to him in the manner provided by the section.

A mortgagee is not bound to give notice of his action to a lessee, whose deed was executed before but registered after the execution and registration of the mortgage bond, as section 643 excludes instruments the date of which is earlier than that of the mortgage.

LASCELLES C.J.—The date of execution is the test of the applicability of section 643, and the section does not extend to instruments which, if they can be described at all as subsequent incumbrances, can only be described as such in a figurative sense on account of the artificial priority which the Registration Ordinance gives to a competing deed.

A PPEAL from the judgment of the District Judge of Colombo. The facts are fully set out in the judgment of the Chief Justice.

This case was referred to a Bench of three Judges by Lascelles C.J. and Wood Renton J. by the following judgments:—

March 5, 1913. LASCELLES C.J.—

The facts in this case are of the simplest character. They are such as must frequently occur in the course of everyday transactions; and it is surprising that our system of law should leave room for well-founded doubt as to the rights of the parties.

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The joint owners of the property in question mortgaged it by bond dated October 11, 1907. The bond was registered three days later. The mortgagee put the bond in suit, and the premises were sold by the Fiscal and bought by the plaintiff on April 11, 1910. The Fiscal's transfer was issued on August 19, 1910, and registered on August 25 of the same year. The defendant claims possession under a lease from the joint owners dated June 25, 1905 (*i.e.*, prior to the date of the mortgage), and registered on February 22, 1910. *i.e.*, before the Fiscal's transfer.

The learned District Judge has declared that the plaintiff is entitled to the premises, but has dismissed his claim to possession. In other words, he has held that the plaintiff's purchase at the Fiscal's sale was subordinate to the defendant's lease. Against this decision the present appeal has been filed.

At the outset it should be noticed that the decision of van Langenberg A.J. in *Massilamany v. Santiago*,¹ though given on the same facts, is not an adjudication of the question now at issue, nor is it an authority for the decision of the learned District Judge in this case. In that case the contest was between the present defendant as plaintiff and his own sub-tenant as defendant; and it was contended by the latter that the present defendant's title as lessee was determined by the prior registration of the mortgage in favour of Ramanathan Chetty. It was held, and, if I may respectfully say so, rightly held, that, though the rights of the present defendant may have been subordinated to those of the mortgagee, his title was not extinguished, because registration of the mortgage only affected the priority *inter se* of the competing deeds, namely, the mortgage bond and the lease, and did not avoid the title of this lessee as against his sub-tenant.

The decision of the learned District Judge, as I understand it, proceeded mainly on the ground that the plaintiff in this case must be considered to have derived his title from the Fiscal's transfer and not from the mortgage.

Before referring to the decisions on this point, I desire to consider the matter, apart from authority, by the light of the language of section 17 of the Land Registration Ordinance, 1891. The object of this section was clearly to secure purchasers and mortgagees who have duly registered these securities against unregistered prior incumbrances. If it be held that the purchaser under a mortgage decree at a Fiscal's sale derives title from the Fiscal's sale and not from the mortgage, the protection afforded by the section is reduced to a shadow. The position will be thus: the prior incumbrance, being registered subsequently to the mortgage bond, is admitted to be void as against that instrument; but it is said that, inasmuch as the incumbrance was registered before the Fiscal's transfer, the sale is subject to the incumbrance, and the purchaser

¹ (1911) 14 N. L. R. 292.

buys subject thereto. The result is extraordinary. The mortgagee made his advance on the security of property which was free from any prior incumbrance. Yet, when the time comes to realize the security, it is said that the property must be sold subject to an incumbrance which was void against the mortgage bond, with the result that a mortgagee, who has duly registered his mortgage, may lose partly or altogether the value of his security. I cannot believe that this was intended. Section 17 enacts that an unregistered deed shall be deemed void as against all parties claiming an adverse interest thereto on valuable consideration by virtue of any subsequent deed which has been duly registered. The unregistered deed in the present case is of course the defendant's lease. What is the registered deed by virtue of which an interest adverse to the lease is claimed? Surely it is the mortgage bond, and not the Fiscal's transfer. Taking the transactions in chronological order, it is clear that as soon as the mortgage bond was executed and registered an interest adverse to the lessee was claimable under that instrument. The subsequent sale and conveyance by the Fiscal are merely stages in the procedure by which the mortgagee is allowed by law to realize his interest under the mortgage bond.

The Fiscal's transfer under a mortgage decree cannot, in my opinion, be regarded as a source of title. It is the formal instrument legalizing a sale under a mortgage decree which declares the property to be bound and executable in satisfaction of the mortgage bond. The mortgage bond, I should have thought, was the root of the purchaser's title.

It is, of course, true that a mortgage in Ceylon, unlike a mortgage in England, does not invest the mortgagee with a legal title to the property. But it, nevertheless, creates an interest in the land, and it is registrable and entitled to priority under the Registration Ordinance.

So far I have considered this question apart from authority, and have stated what appears to me to be the proper construction of section 17 of the Ordinance. But there is a considerable weight of judicial authority opposed to the view which commends itself to me.

In *Lebbe et al. v. Siddik* ¹ my brother Wood Renton was of opinion that the appellant's title was derived from the Fiscal's transfer and not from the mortgage, and he considered that the weight of authority was opposed to the views expressed by Dias J. in D. C. Galle, No. 52,692, and C. R. Tangalla, No. 27,077. But I doubt whether this expression of opinion is much more than *obiter dictum*, since the decision of the appeal really rested on the ground that the lessees had not been made parties to the mortgage decree.

In C. R. Balapitiya ² Browne A.J. took the same view. He referred to the contrary opinion expressed by Dias J. in D. C. Galle, No. 52,692, and C. R. Tangalla, No. 27,077, stating that he did not know that the other Judges concurred in that view.

¹ (1906) 3 Bal. 225.

² (1889) 1 Br. App. B, xi.

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The case of *Abeygoonewardene v. Andris Appu*,¹ which was a decision of the Full Court, is a clear authority for the proposition that the title of a purchaser under a mortgage decree does not relate back, for purposes of priority under the Registration Ordinance, to the mortgage bond.

In the case of *Ungo Appu v. Babuwe*² the same proposition was re-affirmed by the same Judges. Withers J. there stated that Mr. Dornhorst had invited him to reconsider his ruling in *Abeygoonewardene v. Andris Appu*,¹ and that he was willing to do so whenever a proper case came before him on appeal.

The present condition of the law on this most important subject appears to me so unsatisfactory that I would set the case down for re-argument before a Court of three Judges.

In view of the conclusion at which I have arrived on the principal point in the case, it is only necessary to refer shortly to the other points on which the respondent relied.

The Registration Ordinance, it was argued, is concerned with the priority of deeds; it does not invalidate the unregistered instrument; it merely postponed it to the registered instrument; the plaintiff, therefore, should be given possession of the premises, for to deny him possession would be equivalent to cancelling the defendant's lease. It is, of course, quite true in a general sense that it is the priority of deeds which is directly affected by the Ordinance. But in some circumstances a declaration that one deed shall be considered as subsequent in date to another comes to the same thing as a declaration that the first-named deed is to be treated as void as against the latter. Section 17, after enacting that a prior unregistered instrument shall be deemed void as against parties claiming an adverse interest under a subsequent registered instrument, goes on to mention the "priority thereunder" (*i.e.*, under the registered deed) and the "priority hereby conferred on it." Thus, the section treats the enactment that one deed shall be deemed to be void as against parties claiming under another as the same thing as an enactment that priority is conferred on the latter as against the former. The result is, I think, quite clear. In the present case, if the competition is between the defendant's lease and the mortgage bond, the lease, so far as it comes into conflict with the plaintiff's title under the mortgage bond, must be treated as non-existent. But beyond this the lease is unaffected, and any rights which may exist thereunder are enforceable so long as they do not conflict with the plaintiff's title.

The respondent endeavoured to support the judgment principally on the ground of procedure. It was argued that the respondent should have been made a party to the mortgage action, and that inasmuch as he was not joined he is not bound by the decree.

¹ (1894) 3 G. L. R. 71.² (1894) 3 G. L. R. 76.

The argument is that, though the respondent, as regards the date of his lease, is not a subsequent incumbrancer, he must nevertheless be treated as one, because by the operation of the Registration Ordinance his lease is postponed to the mortgage bond.

Now, whatever may be the merits of this argument, it is clear that the duty of the mortgagee, under section 643 of the Civil Procedure Code, to notice subsequent incumbrancers arises only when the latter have notified their deeds to him in the manner provided by the section.

The foregoing are the views which I have formed at present; they may, of course, be modified when the case is argued before the Collective Court.

WOOD RENTON J.—

The plaintiff claims a declaration of title to the premises described in the plaint under a Fiscal's transfer dated August 19, and registered on August 25, 1910. The premises were sold by the Fiscal in execution of a decree in an action by Mutturamen Chetty on a mortgage bond in his favour by the original owners, John Domingo Casie Chetty and Anna Bridget Casie Chetty. The bond was dated October 11, and was registered on October 14, 1907. The defendant-respondent claims possession under a deed of lease by the original owners above named dated June 26, 1905, and registered on February 22, 1910. The appellant's contention is that the lease is void as against the mortgage bond and in respect of all rights derived under it by virtue of priority of registration. The appellant further argued that the respondent was estopped from relying on his lease since he had signed as a witness to the bond, which described the premises as free from incumbrances. The learned District Judge disposed of this latter contention summarily, and in my opinion quite correctly. Mutturamen Chetty gave evidence at the trial, and admitted that he was aware of the lease in favour of the respondent. It is obvious, as the learned District Judge points out, that under such circumstances no estoppel could arise.

The other points involved in the appeal are, however, more difficult. They are raised by the following issues:—

Is the lease dated June 26, 1905, registered February 22, 1910, void as against mortgage bond dated October 11, 1907, registered on October 14, 1907, by reason of the prior registration of the latter?

The defendant not being made a party to the mortgage action, is he bound by the decree in the mortgage action and the sale held thereunder?

The learned District Judge holds that the questions of law raised by these issues are disposed of by the case of *Massilamany v. Santiago*. I am unable to accept that view. The contest there was

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not between the lessee and a mortgagee, but between a lessee and his sub-tenant; and van Langenberg A.J. held, and rightly held, that although the mortgage by virtue of its prior registration prevailed over the lease, the title of the lessee as against his sub-tenant remained unaffected. The effect of section 17 of the Land Registration Ordinance, 1891, apart from the interminable series of decisions of which it has been the subject, is, I think, fairly clear. The instrument which acquires priority by registration pushes out of his way every competing unregistered instrument of prior date for all purposes, but leaves such instruments otherwise unaffected. There was no issue at the trial as to whether or not the provisions of sections 642 and 643 of the Civil Procedure Code were applicable in the present case, and I would not allow any such issue to be raised now.

The only remaining question is whether the title of the purchaser at the Fiscal's sale dates from the Fiscal's transfer or from the mortgage. In the case of *Lebbe et al. v. Siddik*,¹ I had no occasion to consider, and did not consider, that question on its merits. I only held, as I was bound to hold sitting as a single Judge, that the weight of the existing judicial authority was against the view expressed by Dias J. in D. C. Galle, No. 52,692 (December 17, 1886), and C. R. Tangalla, No. 27,077,² that in such a case the priority of earlier registration of a bond could be carried forward to benefit a decree on it or a purchase or transfer in execution of that decree. I quite agree, however, that this question is one of serious importance, and that, having now been formally raised, it should, in view of the conflicting decisions, be referred to the Collective Court. It is only on that point, however, that any reference to the Collective Court is necessary.

A St. V. Jayewardene, for the plaintiff, appellant—The plaintiff's title is not subordinate to the defendant's lease. The lease was registered after the mortgage. The benefit of the prior registration of the mortgage bond enures to the benefit of the purchaser under the mortgage decree. The judgments by which this case was referred to the Full Bench decide the point in favour of the appellant.

De Sampayo, K.C., for the respondent.—The mortgage decree does not bind the defendant (the lessee), as he was not made a party to the mortgage action. [Lascelles C.J.—That point was already decided by us, and we did not reserve that for the consideration of the Full Bench.] I relied more on this point even at the original argument. The defendant is a puisne incumbrancer, who should have been noticed by the plaintiff in the mortgage action if he desired to get a decree binding on the defendant. Although the

¹ (1906) 3 Bal. 225.² 1 Br. App. B, ii. and iv.

lease was executed before the mortgage, it has become a puisne incumbrance by reason of the fact that the mortgage had gained priority by registration. [Lascelles C.J.—Section 643 of the Civil Procedure Code refers to incumbrances of a date subsequent to that of the mortgage.] The lease in this case is a puisne incumbrance by virtue of the Registration Ordinance. Section 643 did not take into consideration this type of cases, but the words may be interpreted to cover these cases. Counsel cited *Samsi Lebbe v. Fernando*.¹

Section 643 does not apply to this case. The case is governed by the common law.

Jayewardene, in reply.

May 5, 1913. LASCELLES C.J.—

This appeal, which was argued on February 25 before a Bench of two Judges, was set down for re-argument before a Collective Court, in order to obtain an authoritative ruling on the question which is principally involved in the appeal. The question may be thus stated in general terms—in a contest between a purchaser under a mortgage decree on the one hand, and a party claiming under an instrument registered subsequently to the mortgage bond but before the Fiscal's conveyance on the other hand—should the first-named party be considered to claim his adverse interest by virtue of the mortgage bond, or by virtue of the Fiscal's conveyance in his favour?

The point is of considerable importance, as if it be held, in circumstances such as those which have arisen in the present case, that the purchaser's title is in virtue of the Fiscal's conveyance and not in virtue of the mortgage bond, the registration of a mortgage, so far as the title of the purchaser at the execution sale is concerned, will be of no avail, and his purchase will be subject to the title of the opposing party, though the latter deed was registered after the mortgage.

In my judgment at the first argument I set out at length my reasons for holding that the purchaser must be held, for the purposes of section 17 of the Land Registration Ordinance, 1891, to claim his adverse interest under the mortgage bond, and that that instrument was the real and effective source of his title.

At the re-argument the respondent's counsel did not contest this position, but relied only on the point that the defendant should have been made a party to the mortgage decree. Although this matter was not referred to the Collective Court, I will shortly notice Mr. de Sampayo's argument. It is true, it was said, that the defendant is not a puisne incumbrancer in the ordinary sense of the word, inasmuch as his lease was prior and not subsequent to the mortgage

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bond. But the effect of section 17 of the Land Registration Ordinance, 1891, is to give the mortgage bond priority, and thus in effect to give the lease a secondary position. Hence it was ingeniously argued that the defendant, as lessee, should have been made a party under section 643 of the Civil Procedure Code, and that not having been made a party he is not bound by the decree. In my previous judgment I mentioned one consideration which appeared to me to be fatal to the respondent's contention. I will now state another. The procedure for joining puisne incumbrancers as parties in mortgage actions is prescribed in sections 643 and 644 of the Civil Procedure Code. The incumbrancers to whom this procedure is applicable are clearly designated in section 643. They are those "whose deed of conveyance, mortgage, lease, or other incumbrance shall be of date subsequent to that of the mortgage on which such action is brought." This language clearly excludes instruments the date of which is earlier than that of the mortgage. The date of execution is the test of the applicability of the section, and the section does not extend to instruments which, if they can be described at all as subsequent incumbrances, can only be described as such in a figurative sense on account of the artificial priority which the Registration Ordinance gives to a competing deed.

The case of *Samsi Lebbe v. Fernando*¹ does not, I think, support Mr. de Sampayo's contention, as the decision there turned upon the construction of the term "mortgage decree," in a lease which was put in evidence in the case. The circumstance that the term "mortgage decree" was construed in that particular lease to mean a decree binding on the lessee can hardly affect the general question of law under consideration.

For the reasons given in my previous judgment, I am of opinion that the decree should be modified (1) by adding a declaration that the plaintiff is entitled to possession of the premises, and an order placing him in possession; (2) by awarding the plaintiff Rs. 200, the agreed amount of compensation; and (3) damages at the agreed rate of Rs. 70 a month. The plaintiff is entitled to his costs here and in the Court below.

WOOD RENTON J.—

I have fully stated the facts of this case in my interlocutory judgment dated March 5, 1913, and there is no need to repeat them. Mr. de Sampayo, K.C., who appeared for the respondent, did not attempt to support the view taken by the majority of the Judges in *C. R. Balapitiya, 2,586*,² *Dingiri Banda v. Muttu Carpen Chetty*,³ *Abeygoonewardene v. Andris*,⁴ and *Ungu Appu v. Babuwe*,⁵ and now

¹ (1904) 6 N. L. R. 59.

² (1899) 1 Br. App. B, xi.

³ (1899) 1 Br. App. B, xi.

⁴ (1894) 3 C. L. R. 71.

⁵ (1894) 3 C. L. R. 76.

that we have the opportunity of deciding the question, I am clearly of opinion that the view expressed by Dias J. in the cases which I have cited in my interlocutory judgment should prevail. That was really the only point referred for consideration to three Judges. Mr. de Sampayo raised again, however, the contention which he pressed upon us at the original argument of the appeal, that the priority conferred on the mortgage bond, by reason of its prior registration, should not deprive the lessee, whose lease, by reason of the prior registration of the bond, was postponed to the bond, of the right to be joined as a party to the mortgage action under sections 642 and 643 of the Civil Procedure Code. I expressed an opinion adverse to this contention in my interlocutory judgment, and I adhere to what I have there said on the subject. Mr. de Sampayo relied on the case of *Samsi Lebbe v. Fernando*,¹ in which it was held, in the construction of a particular lease containing a clause stipulating for its determination upon the passing of a "mortgage decree," that the term "mortgage decree" must be taken to mean such a decree as may be obtained after the joinder of the lessee so that it might be binding upon him. I confess that I should have felt disposed to construe the lease in question in a different sense. But in any case I do not think that the interpretation of a conventional provision of this description can be regarded as a safe guide to the construction of such an enactment as section 17 of the Land Registration Ordinance, 1891.

I concur in the order proposed by my lord the Chief Justice.

ENNIS J.—

I concur, and would make the same order.

Appeal allowed.

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¹ (1904) 8 N. L. R. 59.