

1932

*Present : Dalton and Akbar JJ.*ABRAHAM SINGHO *v.* HARMANIS APPU.

149—D. C. Kegalla, 8,575.

*Action under section 247 of Civil Procedure Code—Property seized under hypothecary decree—Mortgagee's address not registered—Claim by transferee dismissed—Action by claimant—Claim in reconvention by mortgagee for hypothecary decree.*

A mortgaged property with the defendant. The bond was registered but the mortgagee's address was not registered. Thereafter, A conveyed the property to his own sons who transferred it to the plaintiff. Defendant obtained a mortgage decree against the legal representative of A but the plaintiff was not a party to the action. When the property was seized in execution of defendant's decree plaintiff preferred a claim which was dismissed.

*Held*, (in a 247 action brought by the plaintiff) that it was not competent for the defendant to claim, in reconvention, a hypothecary decree against the plaintiff.

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

*Navaratnam*, for plaintiff-appellant.

*N. E. Weerasooria*, for first defendant-respondent.

April 25, 1932. AKBAR J.—

This was an action under section 247 of the Civil Procedure Code to have it declared that certain lands were free from seizure. The subject matter of this action belonged originally to one Sinnappu who by bond

of April 8, 1904, gave a usufructuary mortgage of it to his son-in-law, the first defendant in this case. Although this bond was registered the address of the mortgagee was not registered. Sinnappu conveyed his interest by P 1 dated 1909, to his two sons who later sold their interest by deed of 1926 (P 2) to the present plaintiff. The first defendant in this case filed an action in the Court of Requests, Kegalla, in 1927 and obtained judgment on August 4, 1927, but neither the vendees on P 2 nor the present plaintiff were made parties to the action, the defendant being one Punchi Naide, a legal representative of Sinnappu. Neither the decree in this mortgage action nor the action itself was registered. The property mortgaged was seized for a sum of Rs. 220 and there was a claim by the plaintiff which claim was dismissed; hence this action under section 247. In the answer to this action, the first defendant claimed reconvention to have it declared that the property was liable to be sold for the debt and Punchi Naide has been added as the second defendant.

Three issues were framed which are as follows:—

- (1) Is the plaintiff entitled to the land in dispute free from any encumbrances created on behalf of the first defendant?
- (2) Can the first defendant claim to have this action treated as a hypothecary action by way of reconvention under the provisions of Ordinance No. 21 of 1927?
- (3) Is the first defendant entitled to recover the amount on the bond as *Impensae Utiles*?

It was agreed at the trial that the debt due up to date was Rs. 220. The learned District Judge answered the first issue in the negative and the second issue in the affirmative, and on the third issue, which he also answered in the affirmative, he fixed the amount due at Rs. 110. In the result the plaintiff's action was dismissed with costs, and the property was declared liable to be sold under the writ already issued.

Under section 241 of the Civil Procedure Code when any claim is preferred the Court has to decide whether it will release the property wholly or partly from seizure or disallow the claim. Under section 246 if the Court is satisfied that the property is subject to a mortgage in favour of any person, it can continue the seizure subject to such mortgage and under section 247 any party against whom an order has been made may institute an action within fourteen days for the right which he claims in respect of the property in dispute or to have the property declared liable to be sold in execution of the decree. In this case it will be noticed that the title had passed to the plaintiff before the action in the Court of Requests, and not being a party to that case, the plaintiff was not bound by the decree in that case. For some reason or other the claim was dismissed, but it should be noted that the first defendant did not ask for an order under section 246 of the Civil Procedure Code, namely, that the property should be declared subject to a mortgage in his favour. In an action under section 247 the only issue that can be decided in such an action is whether the claimant is the owner of the property in dispute if he is the plaintiff or whether the property is to be declared liable to be sold in execution of the decree in his favour if the plaintiff is the judgment-creditor. I do not think it was competent for the first defendant in this

case to claim in reconvention for a decree to have the property liable to be sold in execution of his decree as against the plaintiff in this case who was not a party to the Court of Requests case. There are authorities to this effect, namely, the case of *Vedarale v. Andris Appu*<sup>1</sup>, and *Slema Lebbe v. Banda*<sup>2</sup>. In the latter case it was held that a hypothecary action did not lie against a mortgagor who had parted with all his interest in the mortgaged property previous to the action on the mortgage, and that only a personal action lay against him for the money due. It was further held in that case (in which a 247 action was brought by the judgment-creditor) that an action under section 247 could not be brought by the mortgagee.

I do not think the law has been changed by Ordinance No. 21 of 1927. Section 11 does not affect title acquired before the commencement of that Ordinance (as in this case); nor do I think section 16 applies to a 247 action under the Civil Procedure Code. For these reasons I think the judgment is wrong and I would set aside the judgment and decree of the District Court and allow the appeal with costs.

DALTON J.—I agree.

*Set aside.*

---