

*Present:* Dalton and Akbar JJ.

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GIRIGORIS *v.* ARNOLIS *et al.*

312—D. C. Ratnapura, 4,912.

*Registration—Sale of property under mortgage decree—Non-registration of a mortgage action and decree—Alienation by mortgagor—Prior registration of transfer—Ordinance No. 21 of 1927, s. 11 (f).*

Plaintiff claimed title to the land in question on a Fiscal's transfer registered on October 5, 1926, issued in execution of a decree in a mortgage action brought upon a bond registered on January 13, 1919. Neither the mortgage action nor the decree nor the seizure of the land was registered.

Defendants derived title from a sale by the mortgagor dated June 21, 1926, and registered on June 22, 1926.

*Held*, that the defendant's title prevailed subject to plaintiff's right to compensation for the amount of the mortgage, in accordance with the principle laid down in section 11 (1) of Ordinance No. 21 of 1927.

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

The facts appear from the judgment.

*N. E. Weerasooria*, for defendants, appellants.

*H. V. Perera (with Amarasekera)*, for plaintiff, respondent.

February 19, 1930. . AKBAR J.—

This appeal raises the often-recurring point when there are two competing deeds to a land: one derived from a sale in a mortgage action and the other from the mortgagor. The appeal was substantially pressed on one point of law, namely, that the deed in favour of the defendants (D 1) was to be preferred in law to the Fiscal's transfer in favour of the plaintiff (P 1). No evidence was led in the case, but certain documents were put in by both parties and judgment was delivered on the argument of counsel on those documents. This appeal must therefore be decided on these materials. The plaintiff sued the defendants for declaration of title to certain shares of land sold to him on a Fiscal's transfer (P 1) dated October 3, 1926, and registered on October 5, 1926, issued to him in execution of a mortgage action brought upon a bond (P 2) dated January 2, 1919, and registered on January 13, 1919. Neither the mortgage action nor the mortgage decree, nor the seizure of the land preparatory to the issue of Fiscal's transfer (P 1) was registered. P 1 recites that writ was issued on July 17, 1925, that the sale took place in September 15, 1925, and that the Court confirmed the sale on December 12, 1925. First defendant derived title to the shares dealt with in P 1 by D 1, which was a sale by"

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the mortgagor on P 1 (among others) dated June 21, 1926, and registered on June 22, 1926.

It will be thus seen that D 1 was executed and registered prior to P 1 and that three vital steps which a mortgagee should take to protect his interests and those of the purchaser at the execution sale were not taken, namely, registration of the *lis pendens*, of the mortgage decree, and of the seizure.

As pointed out by the Supreme Court in *Saravanamuttu v. Solamuttu*<sup>1</sup> and *Adappa Chetty v. Babi*,<sup>2</sup> a mortgage decree requires registration. The decree having been entered on August 7, 1924, and not being registered has to give way to D 1 executed and registered in June, 1926. Therefore P 1 which depends on the mortgage decree must give way to D 1. Mr. Perera, for the respondent, argued that plaintiff, who bought at the Fiscal's sale on September 15, 1925, did so because there was no adverse deed registered in the encumbrance sheets, and that the principle stated by me above should not be applied, whereas in this case defendants' deed was after execution. But the plaintiff should have known of the non-registration of the *lis pendens*, the decree, and the seizure. It is true that the first-named case cited by me above referred to a purchaser who bought between judgment and execution. But in this case the Fiscal's sale, although confirmed in December, 1925, was not completed by issue of the transfer till October 3, 1926, nearly four months after D 1, and the plaintiff, on whom lay the burden of proof, has not led any evidence to prove that satisfaction of the mortgage decree was entered before D 1 was executed. Even if satisfaction was entered after D 1 was executed, this only means the extinction of the mortgage decree, and the two competing deeds left will be D 1 and P 1; D 1 being executed and registered prior to P 1. In my opinion the judgment of the District Judge who purported to follow the cases referred to in Jayewardene's *Law of Registration*, pp. 101-3, is wrong, as will be seen from the later case of *Anohamy v. Haniffa*.<sup>3</sup> This does not, however, conclude the case, because when D 1 was executed the mortgage bond (P 2) was registered and first defendant had notice of it. As a result of the mortgage action and P 1 the mortgage has been wiped out, and first defendant should compensate plaintiff for this. This principle was recognized in the case last mentioned by me, and legislative sanction has been given to it by section 11 of Ordinance No. 21 of 1927. By sub-section (2) of that section, sub-section (1) is to apply even to sales effected before that Ordinance. The amount due on the mortgage bond (P 2) is Rs. 50. Defendants are therefore entitled to succeed, subject, however, to the payment of Rs. 50 by them.

<sup>1</sup> 26 N. L. R. 385.

<sup>3</sup> 25 N. L. R. 289.

<sup>2</sup> 25 N. L. R. 284.

Mr. Weerasooria did not seriously press his second ground of appeal, namely, that his clients were not liable to pay even this Rs. 50 because D 1 was executed to pay off the stamp duty in the testamentary case referred to in D 1, but I do not think he is entitled to succeed on this point, as the burden of proof on this ground was on the defendants, and they have led no evidence on which this point can be decided. Moreover, issue (4) as framed does not cover this point as raised at the appeal.

The appeal is allowed and plaintiff's action is dismissed with costs in both Courts, but defendants will pay Rs. 50 to the plaintiff.

DALTON J.—I agree.

*Appeal allowed.*

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