

1944

*Present: Keuneman and Cannon JJ.*VELUPILLAI, Appellant, *and* DE SILVA *et al.*, Respondents.39—*D. C. Galle, 63.*

Mortgage decree—Sale of property—Surplus proceeds after satisfaction of decree—Claim by unregistered transferee of property and by creditor of mortgagor—Claims of transferee preferred.

In execution of a mortgage decree the mortgaged property was sold, and after satisfaction of the mortgage in suit, the surplus proceeds were claimed, on the one hand, by a transferee of the mortgaged property, whose transfer was not registered and who was therefore not a party to the mortgage action, and on the other by a creditor of the mortgagor, who seized the surplus in execution of a money decree,—

Held, that the transferee was entitled to the surplus proceeds.

A PPEAL from a judgment of the District Judge of Galle.

H. V. Perera, K.C. (with him *G. Thomas*), for judgment-creditor, appellant.

E. B. Wikremanayake for first respondent, claimant.

Cur. adv. vult.

November 17, 1944. KEUNEMAN J.—

This is an action on a mortgage bond brought by the plaintiff against the defendant, neither of whom is concerned with the present appeal. Decree was entered in this case on February 9, 1943, for Rs. 3,112.50. The property mortgaged was sold and realised over Rs. 6,000, and after the plaintiff was paid off a surplus of over Rs. 2,500 remained in the case. The present conflict is between the first respondent and the appellant. The first respondent claimed the surplus on the ground that the defendant had transferred the property mortgaged to her by deed before the institution of the mortgage action. The deed was not registered, and the first respondent was accordingly not a necessary party to the mortgage action but was bound by the mortgage decree under section 6 (2) and (3) of the Mortgage Ordinance, Cap. 74. The first respondent claimed to be entitled to the surplus remaining after the plaintiff's decree was satisfied.

The appellant held a money decree against the defendant, and seized the surplus lying in Court as belonging to the defendant, and claimed that the surplus should be paid to him in satisfaction of his decree.

The short point in the appeal is whether the first respondent who had title to the mortgaged property can claim title to the surplus remaining in the mortgage action after the sale. Mr. H. V. Perera concedes that had the first respondent been a party to the action before decree she would have been entitled to claim the surplus, but argues that as the first respondent was no party to the action before decree she is not entitled to claim the surplus. I do not agree with this distinction.

Even if the first respondent had been a party to the decree, there would have been nothing in the mortgage decree establishing a right in the first respondent to the surplus. The mortgage decree would have established the right of the plaintiff only, viz., to the hypothecation and the order for the sale of the mortgaged property. Whatever right the first respondent had would have arisen from the fact that she had title to the mortgaged property before the sale.

Mr. Wikremanayake draws our attention to section 6 (3) of the Mortgage Ordinance, under which a person who is not a necessary party under section 6 (2) is bound by every order decree and sale or thing done in the mortgage action "as if he had been a party to the action" but he may be permitted to intervene at any stage of the proceedings before distribution of the proceeds of sale on such terms as to the Court may seem just. Under section 6 (4) nothing in the section shall affect any right to participate in the surplus proceeds of the sale which remain after the satisfaction of the mortgage in suit, or to follow such proceeds.

It is clear in this case that the first respondent was bound by the decree and sale "as if she had been a party to the action". She has clearly been permitted to intervene in the action before the distribution of the proceeds of sale was completed. The decree has now been fully satisfied, and there are no outstanding claims by the plaintiff. I can see nothing that can prevent the first respondent from claiming that in virtue of her original title to the mortgaged property she is entitled to the surplus remaining from the sale of the property. Her claim is superior to that of the appellant, who is the holder of a mere money decree against the defendant and has no claim against the first respondent.

If Mr. Perera's argument is sound, then had the conflict been between the first respondent and the defendant who had transferred the property to her, we should have been compelled to hold that the claim to the surplus by the defendant was superior to that of the first respondent. I do not think that proposition can be entertained.

The appeal is dismissed with costs.

CANNON J.—I agree.

Appeal dismissed.