

Present : Dalton J. and Maartensz A.J.

MUDALIHAMY v. APPUHAMY.

65-66—C. R. Kurunegala, 7,658.

Partition—Mortgage of undivided share of land—Partition action with respect of land—Lot in severalty allotted to mortgagor—Action by mortgagee—Purchase by him of undivided share—Sale of divided lot in execution for costs of partition—Purchase by defendant—Competition between the two transfers—Ordinance No. 10 of 1863, s. 12.

The plaintiff took on mortgage an undivided $\frac{2}{3}$ share of two contiguous fields in October, 1927. In January, 1930, the defendant brought a partition action treating the two fields as one *corpus*. Final decree was entered in the action declaring the plaintiff's mortgagor entitled to a half share only of the fields and lot A was allotted to her. In January, 1931, the plaintiff put his bond in suit and purchased the undivided shares mortgaged to him at the sale in execution of his decree, obtaining a Fiscal's transfer dated January 25, 1932. Prior to that date the defendant took out writ against the plaintiff's mortgagor for *pro rata* costs due to him and became the purchaser of lot A, obtaining Fiscal's transfer dated April 17, 1931, in his favour.

Held, (in an action brought by the plaintiff for declaration of title to lot A), that he was entitled to $\frac{2}{3}$ share of the lot.

CASE referred by Dalton J. to a Bench of two Judgs.

This was an action for declaration of title to a land. The facts upon which the question referred arises are fully stated in the head-note.

Rajapakse (with him *R. H. E. de Silva*), for plaintiff, appellant in No. 65 and respondent in No. 66.—Ukku Menika, having mortgaged her undivided share of the whole land, thereafter was declared entitled to lot A 3 in the partition decree. The lot she received (A 3) will be subject to the mortgage. (Section 12 of the Partition Ordinance, *Abdul Hamid v. Perera*¹, and *Godage v. Dias*².) Any purchaser from her will, therefore, buy it subject to the mortgage.

All the undivided interests she had in the whole land were mortgaged ; therefore, the whole of lot A 3 which she was allotted in lieu of her undivided interests became subject to the mortgage. See section 12 of the Ordinance.

Weerasooria, for defendant, respondent in No. 65 and appellant in No. 66.—*Lis pendens* in the partition action was registered. Hence in law the plaintiff had notice of the partition proceedings, and in fact too he was aware of them.

Once the land was partitioned, new lots came into existence. The old land ceased to exist. The plaintiff in the mortgage action should have asked for a hypothecary decree in respect of the divided lot A. See *Sidambaram Chetty v. Perera*³. Not having made the necessary amendment in his prayer, the plaintiff got a decree which is bad, because no such land existed at the time. The practice may be different, but a bad

¹ 26 N. L. R. 433.

² 30 N. L. R. 100.

³ 24 N. L. R. 214.

practice cannot make good law. See *Pate v. Pate*¹. In any case the plaintiff cannot get the whole of lot A 3. The deed has to be interpreted. Plaintiff got a conveyance of undivided 2/3 of the whole land, hence he cannot get anything more than 2/3 of lot A 3. See *Bernard v. Fernando*².

Rajapakse, in reply.—The substantive portion of section 12 of the Partition Ordinance enacts that the rights of a mortgagee are not to be affected by the decree under section 8. The proviso merely contains a *curtailment* of these rights, which are conserved, viz., the mortgage subsists but is limited to the specific portion allotted to the mortgagor. The section is intended to protect the rights of the mortgagee, not to take them away.

Cur. adv. vult.

June 7, 1934. DALTON J.—

These appeals have been referred to a Court of two Judges, as they raise an important point regarding the Security of mortgagees when they have taken a bond in respect of undivided interests in immovable property, which property has subsequently been the subject of a partition action. The question raised now has not been raised before, although it is admitted the mortgagee in suing on the bond as he has done here has followed the usual procedure adopted in such circumstances.

The plaintiff brought this action that he be declared entitled to a lot of land, described in the plaint and which I will call lot A 3. He also asked that defendant be ejected therefrom and claimed damages.

In October, 1927, Ukku Menika mortgaged an undivided 2/3 share of a field named Malgahumulaliadde and an undivided 2/3 share of a field called Karawagahumulaliadde, each one pela in extent and contiguous, to the plaintiff. On January 7, 1930, the present defendant instituted a partition action, D. C. Kurunegala, 14,487, to partition these two fields, treating them as one land and calling them Malgahakumbura. In this partition action it was ascertained that Ukku Menika was entitled to an undivided half share of the two fields she had mortgaged, the defendant being entitled to the remaining half share. Final decree, dated August 18, 1930, followed accordingly, the land was partitioned, and lot A 3, described in the plan, was allotted to Ukku Menika for her undivided share.

On January 8, 1931, the present plaintiff put his bond in suit in C. R. Kurunegala, 12,363, seeking to have the interests as described in the mortgage seized and sold. His *lis pendens* was registered on January 13, 1931. He obtained judgment and himself purported to purchase the undivided interests described in the bond, obtaining Fiscal's transfer (P 1) on January 25, 1932. Before, however, he had obtained this transfer, the defendant himself had issued writ against Ukku Menika for *pro rata* costs in the partition action, seizing lot A 3. This lot was sold by the Fiscal on February 9, 1931, and purchased by the defendant. Fiscal's transfer (D 1) therefore was issued to defendant on April 17, 1931. Two further facts may be mentioned here. Plaintiff was fully aware, before he obtained the decree in the mortgage action, that the land had been partitioned and that his mortgagor's interest at the time of the execution

¹ 18 N. L. R. 289.

² 16 N. L. R. 438.

of the bond was not an undivided 2/3 but only an undivided half share in the lands. Defendant was also fully aware at the time he purchased lot A 3 that plaintiff was claiming that this lot was subject to his mortgage.

In the action the trial Judge found that in view of the provisions of section 12 of the Partition Ordinance, inasmuch as the share that Ukku Menika had mortgaged was more than the share that she was found to be entitled to in the partition action, the whole of the lot A 3, allotted to her as her share in severalty, was subject to the mortgage in plaintiff's favour. He further found that defendant was bound by the decree in the mortgage suit. That decree, however, was in respect of Ukku Menika's alleged undivided 2/3 share in the two fields as described in the mortgage bond. Although the plaintiff was aware that a decree had issued allotting a share in severalty to Ukku Menika in place of her undivided interest, he chose to ignore it and proceeded with his suit as for an undivided 2/3 share. In that event the learned Judge has held that plaintiff was entitled to claim only a 2/3 share in Ukku Menika's interest in the divided lot A 3, and he found accordingly.

Both plaintiff and defendant appeal from this decision, plaintiff urging that he is entitled to the whole of lot A 3, and defendant on the ground that plaintiff having obtained a decree for an undivided share that had previously been extinguished by the partition decree, the resulting seizure and sale at his instance were the seizure and sale of something that had no existence, and plaintiff therefore had no basis for his present claim. The logical sequence of this argument on behalf of the defendant might well be that defendant had bought lot A 3 subject to the mortgage, but Mr. Weerasooria stated it was not necessary for him to meet that position in this case, since plaintiff's action must be dismissed.

As I mentioned before, it seems that plaintiff in suing Ukku Menika on the bond as he did, and asking that the undivided interest mortgaged be seized and sold in execution, acted in conformity with the procedure which is commonly followed in such cases. Where, however, as a result of a partition under the Partition Ordinance the undivided interest mortgaged has become a share in severalty, I certainly think that some such procedure as is denoted by the learned trial Judge, amongst other things invoking the aid of section 12 of the Partition Ordinance and asking that the share in severalty be declared liable to be seized and sold, should more properly be adopted. If that had been done in this case, I do not see that plaintiff could have failed to obtain all he wanted. He chose, however, not to do so, unwisely, I think.

The argument for defendant on the appeal, that the original bond has been extinguished by the partition decree, is not, I think, sound. What I have stated in the preceding paragraph will supply at least one reason for that. Further, section 12 of the Partition Ordinance says that nothing in the Ordinance shall affect the right of any mortgagee save in this one respect, namely, that his right shall be limited to the share in severalty allotted to his mortgagor. In all other respects the bond stands, so far as it is applicable to a share in severalty. The intention of the section is clearly to protect the rights of the mortgagee, and no new deed is required for that purpose.

In holding that plaintiff is entitled to an undivided $\frac{2}{3}$ share only of lot A 3, the learned Judge states he finds support for his conclusion in *Bernard v. Fernando*¹. In that case the plaintiff sued the defendants for a declaration of title to lots A and D and for ejectment. The facts show that some time prior to the action an undivided $\frac{1}{5}$ share of a land that had belonged to one X was the subject of a partition decree in 1905 and became lots A and D. The defendants in the action, although they knew of the partition in 1905, purchased from X in 1907 and 1909 his former undivided $\frac{1}{5}$ share in the entire land. In 1912 the plaintiff bought lots A and D from X. In their answer to plaintiff's claim, defendants pleaded that their undivided $\frac{1}{5}$ share, as a result of the partition decree, was represented by lots A and D, and they asked that plaintiff's action be dismissed. It was held by the trial Judge, however, and the Court of Appeal decided it was correctly held, that as the defendants had purchased an undivided share in the entirety, they could not establish on their deeds title to the divided lots A and D. The Court however, varied the judgment of the District Judge, who had found in favour of plaintiff for the whole of lots A and D. The Court of Appeal (Pereira J. and de Sampayo A.J.) held that defendants' deeds were sufficient to give them an undivided $\frac{1}{5}$ share in the divided lots A and D, and that plaintiff was entitled to an undivided $\frac{4}{5}$ share only of the two lots.

Applying the reasoning in that case to the one before us, I think the learned trial Judge was justified in holding that, inasmuch as plaintiff, in the circumstances I have detailed, seized, and had sold by the Fiscal, and himself purchased only an undivided $\frac{2}{3}$ share in the entirety, he is entitled as a result to an undivided $\frac{2}{3}$ share only in the share in severalty. I agree that the question is one not without some difficulty, but I can see no sufficient reason to say that the trial Judge was wrong in his conclusion. In those circumstances the judgment of the lower Court will be affirmed, and both appeals must be dismissed with costs.

MAARTENSZ A. J.—

This is an action for declaration of title to the parcel of land marked A 3 in plan 1,246 filed of record to which plaintiff claims title thus: One Ukku Menika purporting to be entitled to $\frac{2}{3}$ of two lands called Malgahamulaliadde and Karagahamulaliadde, mortgaged her interests to the plaintiff by bond No. 4,226 dated October 8, 1927. The bond was registered on the 12th of the same month.

The bond was sued on in case No. 12,363 of the Court of Requests of Kurunegala, on January 8, 1931. In execution of the mortgage decree entered on February 4, 1931, Ukku Menika's interests were sold on October 31, 1931, and purchased by the plaintiff, who obtained a Fiscal's transfer No. 10,341 dated January 25, 1932, for an undivided $\frac{2}{3}$ share of the two lands.

The defendant before the action on the bond was filed had filed suit for the partition of the two lands which he described as one land called Malgahamulakumbura *alias* Etamkotuwekumbura, 2 pelas in extent. Ukku Menika in the partition suit was found to be entitled to only half the land and was by the partition decree dated August 18, 1930, allotted A 3 in severalty.

¹ 16 N. L. R. 438.

In execution of a writ issued in the partition suit to recover from Ukku Menika her *pro rata* share of the costs incurred in that suit, lot A 3 was sold by the Fiscal on February 9, 1930, and purchased by the defendant, to whom the Fiscal issued a transfer No. 10,193 dated April 17, 1931.

The question for decision is whether the plaintiff acquired title to lot A 3 or any part of it under the Fiscal's transfer No. 10,341. The answer to this question depends on whether the plaintiff can, as he contended, derive his title from his mortgage bond which was prior in date and registration to the defendant's Fiscal's transfer. The *lis pendens* was registered.

In support of his contention the plaintiff relied on section 12 of the Partition Ordinance, No. 10 of 1863, which enacts as follows :—

“ Nothing in this Ordinance contained shall affect the right of any mortgagee of the land which is the subject of the partition or sale: Provided that if at the time any partition or sale shall be made an undivided share only of the land, and not the whole thereof, shall be subject to mortgage, the right of the mortgagee shall be limited to the share in severalty allotted to his mortgagor by and under the same conditions, covenants, and reservations as shall be stipulated in the mortgage bond so far as the same shall apply to a share in severalty; and the owner of the share in severalty so subject to mortgage shall without a new deed of mortgage, warrant and make good to the mortgagee the said several part after such partition as he was bound to do before such partition ”.

It was argued that by virtue of this section the mortgage to the plaintiff was not affected by the partition action except that the rights of the mortgagee were limited to the share in severalty.

The defendant also relied on this section and contended that the true effect of the section was to substitute the share in severalty for the undivided share, and the plaintiff should have framed his action so as to obtain decree declaring the share in severalty bound and executable, and that as he had not done so and had bought the undivided shares, which had been extinguished by the partition decree, the plaintiff acquired no title to lot A 3 under his Fiscal's conveyance.

I am of opinion that section 12 has not the far-reaching effect contended for by defendant's counsel so as to deprive the plaintiff of any rights under the mortgage decree because the lot in severalty was not declared bound and executable and conveyed to the plaintiff by his Fiscal's transfer. At the same time having failed to take the necessary steps to have lot A 3 declared bound and executable and sold he cannot claim the entirety of lot A 3. Having purchased an undivided 2/3 share of the whole land, when the execution debtor was entitled to lot A 3 he is only entitled to an equivalent share, namely 2/3 of A 3 (*Bernard v. Fernando*¹).

I am of opinion that the District Judge has come to a right decision in the case and would dismiss the appeals with costs.

Appeal dismissed.

¹ (1913) 16 N. L. R. 638.