

1967 Present : H. N. G. Fernando, C.J., and Sirimane, J.

M. W. A. P. JAYATILLAKE, Appellant, and P. G. SOMADASA,
Respondent

S. C. 83/65—D. C. Badulla, 3304/M.B.

Partition action—Mortgage by a party pendente lite of the interest that will be allotted to him in the final decree—Mortgage not specified in subsequent final decree—Right of the mortgagee to sue on the bond—“ Encumbrance ”—Partition Act (Cap. 69), ss. 5, 12, 19, 48, 67, 70.

Section 67 of the Partition Act has not altered the position which prevailed under the former Partition Ordinance that the prohibition against the alienation or hypothecation of an undivided share or interest pending a partition action does not prevent a party from disposing, during the pendency of the action, of the interest that will be ultimately allotted to him in the final decree.

An interest which vests only upon entry of the final decree is not contemplated in the term “ encumbrance ” in section 48 of the Partition Act. Accordingly, where, after interlocutory decree has been entered in a pending partition action and before the final decree, a party mortgages the interest that will be allotted to him under the final decree, the mortgagee will be entitled to sue on the mortgage bond after the final decree is entered, even if the interest mortgaged is not conserved in the final decree. In such a case, it cannot be contended that the final decree is free from the “ encumbrance ” of the mortgage.

APPPEAL from a judgment of the District Court, Badulla.

Nimal Senanayake, for Plaintiff-Appellant.

Bala Nadarajah, with *N. J. Abeysekera*, for Defendant-Respondent.

Cur. adv. vult.

June 20, 1967. H. N. G. FERNANDO, C.J.—

This is an action for a hypothecary decree upon a mortgage bond by which the defendant had mortgaged to the plaintiff “ all my right, title, interest claim, demand advantages and disadvantages whatsoever that I would be declared entitled to by virtue of the Final Partition Decree in case No. 13026 of the District Court of Badulla in to from, and out of all that and those the contiguous lands called and known as ‘ Kadewatte ’ ”. The bond was executed after interlocutory decree for partition had been entered in the pending partition action, but before the final decree.

The defendant took two defences. One was that the mortgage was void under s. 67 of the Partition Act (Cap. 69) as having been executed during the pendency of the partition action. This defence was rightly rejected by the learned District Judge. Section 67 has not altered the position which prevailed under the former Ordinance that the prohibition against the alienation or hypothecation of an undivided share or interest pending partition does not prevent the changing or disposing of the interest to be ultimately allotted to a party in the pending action (*Kahan Bhai v. Perera*)¹.

¹ (1923) 26 N. L. R. 204.

The other defence taken in this case was that (in terms of s. 48 of the Partition Act) the right awarded to the defendant in the partition action is free of all encumbrances and that a mortgage executed in the interval between the entry of the interlocutory decree and the entry of the final decree is an “encumbrance” within the meaning of s. 48. The learned District Judge has upheld this contention and has held that, since the mortgage was not specified in the final decree, the right of the defendant as declared in the final decree is free of this encumbrance.

In *Karunaratne v. Perera*¹ this Court rejected the argument that a donation pending partition of the interests to be allotted to the donor in a partition action will be wiped out by the final decree if the interest donated is not conserved in the final decree. Sansoni, C.J. stated succinctly his opinion :—

“ We are unable to accept this submission, because we take the view that the interests referred to in s. 48 of the Partition Act are interests which are presently vested in the grantee, and do not include interests which have not already vested even in the grantor. We see no difference in this respect between the provisions of the old Partition Ordinance and the new Partition Act. ”

I agree entirely with that opinion, but the arguments of Counsel in this appeal render it desirable to state my reasons for so agreeing.

Section 5 of the Partition Act requires the plaintiff in a partition action to include in the action, as parties, all persons who to his knowledge are entitled or claim to be entitled “to any right, share, or interest to, of, or in the land to which the action relates, whether vested or contingent, and whether by way of mortgage, lease, usufruct, servitude, trust, fidei-commissum, life interest, or otherwise, or.....”. Section 12 of the Act provides for the joinder in the action (by an amended plaint) of persons disclosed upon inspection of the land register to be persons who should have been, but were not, joined as parties in the original plaint. Section 19 requires every defendant to disclose the names of every person who to his knowledge has any right, share or interest in the land, but who has not been joined as a party. Section 70 permits the Court, at any time before the entry of the interlocutory decree, to join persons as parties to the action.

The provisions of the Act which I have just mentioned afford ample scope for the joinder or intervention of persons who might have interests in the corpus of a partition action, and for the determination or declaration of such interests by the Court; and the justification for the provision in s. 48, which “wipes out” certain interests unless they are specified in the decree, is that by and large those provisions give the holders of such interests adequate means to protect themselves by participation or intervention in the action.

¹ (1965) 67 N. L. R. 529.

But since intervention is not permissible *after interlocutory decree* has been entered, a person (like the plaintiff in this case) who acquires some interest after that stage cannot intervene in order to have that interest specified in the final decree. And if an interest so acquired must be regarded as an "encumbrance" within the meaning of that term in s. 48 of the Act, the holder of the interest will be quite powerless to prevent the extinction of the interest. I cannot ascribe to the Legislature an intention so harsh and unreasonable.

Where there is a dealing by a party with "the divided lot to be allotted to him" in a pending partition action, the transaction becomes effective to vest rights in the alienee only after the interest is in law allotted to the party, i.e., only at the stage when the final decree is entered; at that stage the lot allotted to the party becomes for the first time subject to the rights arising by virtue of the transaction. Hence I respectfully agree with Sansoni, C.J., that an interest which vests only upon entry of the final decree is not contemplated in the term "encumbrance" in s. 48.

I should add that this construction does not affect the finality of a final partition decree. The law as to the registration of interests affecting land secures that a person like the mortgagee in the present case must duly register his mortgage if it is to prevail against persons who in the faith of the final decree acquire interests from those to whom divided lots are allotted in the final decree.

The appeal is allowed with costs. The District Judge will enter hypothecary decree as prayed for in the plaint.

SIRIVANE, J.—I agree.

Appeal allowed.

