1939 *Present :* **Soertsz A.C.J. and Keuneman J.**

DE SILVA *v.* ROSINAHAMY *et al.*

322—D. C. Galle, 36,377.

Mortgage—Land sold under decree for sale in partition action—Whole land under mortgage—Mortgage attaches to land in hands of purchaser—Hypothecary action against purchaser—Partition Ordinance, No. 10 of 1863, s. 12.

Where property is sold under a decree for sale in a partition action, the mortgage attaches to the land or part of it both in the case of a mortgage of the whole land as well as in the case of the mortgage of an undivided share.

The failure of the mortgagee to make a claim on the mortgage in the partition action does not debar him from bringing a hypothecary action against the purchaser of the land.

Godage v. Dias (*30 N. L. R. 100*) followed.

Silva v. Wijeysinghe (*20 N. L. R. 147*) not followed.

THE plaintiff-appellant sued the first to fourth defendants-respondents to recover a sum of Rs. 2,000 due on a mortgage bond executed by them in his favour, and he joined the fifth to nineteenth defendants-respondents as parties to the action in order to obtain a hypothecary decree. The fifth to nineteenth defendants had purchased the mortgaged land, when it was sold in lots under a decree for sale entered under section 4 of the Partition Ordinance, subsequent to the mortgage. The learned District Judge ordered a decree against the first to fourth defendants on the money count, but dismissed the action against the fifth to nineteenth defendants. From this order the plaintiff appeals.

H. V. Perera, K.C. (with him *P. A. Senaratne*), for the plaintiff, appellant.—The plaintiff-appellant had two mortgage bonds over this land. In the partition action he intervened and disclosed one of the bonds. With regard to the other, he was under the misapprehension that it referred to another land. The learned District Judge held that he was estopped from claiming a hypothecary decree against the fifth to nineteenth defendants. Under the Partition Ordinance there is no duty cast on a mortgagee to disclose the mortgages. By sections 8 and 12 of the Ordinance the rights of mortgagees are conserved. The fact that he was a party in the partition action would not operate as *res judicata* as there is no adjudication with regard to the bond.

L. A. Rajapakse (with him *J. R. Jayawardana*), for fifth to ninth, eleventh to thirteenth, sixteenth and eighteenth defendants, respondents.—The appellant says his only interest in the land to be partitioned was that he

had two mortgages, affecting undivided shares. He admits he disclosed one and not the other, because he thought it did not apply to this land.

The appellant need not have intervened in the action at all, because the Partition Ordinance conserves his rights ; but once he *elected* to intervene in the action, he was under a legal *duty* as a party to the action to disclose all his interests in the subject-matter of the action. See : section 34 of Civil Procedure Code. The proceeds of the sale have been distributed among the parties. The appellant is, therefore, estopped as against the purchasers-respondents. See : section 115 of the Evidence Ordinance.

Further there is no proof that the bond was duly registered ; and in fact the appellant's evidence suggests that it does not apply to the land in question.

Section 12 of the Partition Ordinance provides that the right of the mortgagee shall *not* be affected. This means that the final decree in the case of a partition or sale, which wipes out all pre-existing rights and which create a *new* title, is not to wipe out the rights of the mortgagee.

In case a partition is decreed, a mortgage of the whole land or of an undivided share will attach to the whole land or the lot allotted to the mortgagor in severalty respectively. In case a sale is decreed, the mortgage will attach to the proceeds of sale. See *Silva v. Wijeysinghe* [1].

The words " share in severalty allotted to the mortgagor " clearly refer to a case of partition only. They are meaningless with reference to a decree for sale. The words " or sale " in the proviso are an error ; in the concluding portion of it, the word " sale " is omitted. See *Jayewardene on Partition, p. 255.*

The ruling in *Godage v. Dias* [2] should be restricted to the circumstances of that case. Difficulties arose there as to what " the share in severalty " meant.

It is submitted that the decision in *Fernando v. Silva* [3] is not correct and should not be followed.

H. V. Perera, K.C., in reply.—Section 12 of the Partition Ordinance is clear. The rights of a mortgagee are preserved whether a partition or a sale is ordered. The words " limited to the share in severalty " apply to cases where a sale is ordered as well as to cases where a partition is decreed.

Cur. adv. vult.

July 21, 1939. SOERTSZ A.C.J.—

In this case, the plaintiff sued the first to fourth defendants to recover a sum of Rs. 2,000 due on a mortgage bond executed by them in his favour, and he joined the fifth to the nineteenth defendants as parties to the action in order to obtain a hypothecary decree. Those defendants had purchased the mortgaged land, when it was sold in lots under a decree for sale entered under section 4 of the Partition Ordinance, subsequent to the mortgage.

The fifth to the nineteenth defendants contended that (1) because the plaintiff had intervened in the partition case and had claimed certain interests in respect of this land on another mortgage, and had failed to set up a claim on this mortgage, he was barred from making the present

[1] *20 N. L. R. 147* [2] *30 N. L. R. 100.* [3] *2 Tambyah 111.*

claim for a hypothecary decree ; (2) that the effect of section 12 of the Partition Ordinance in the case of a sale is to make the mortgage applicable to the proceeds of the sale, and to liberate the land itself from the mortgage. It was further contended on their behalf that (3) there is no proof that the land sought to be made executable, is the land mortgaged ; (4) that there was no proof that the mortgage bond was properly registered. I mention (3) and (4) because they were advanced at the argument, but I do not think they merit serious consideration. The identity of the land is beyond question on the pleadings themselves, and so far as proper registration is concerned I do not understand the case for the respondents. The appellants' deed is registered on the face of it. But Mr. Rajapakse argues that because there was an issue " Has the plaintiff's bond been *properly* registered " ?, the plaintiff was bound to prove that the deed was registered in the proper folio. Now, the question of proper folio is a comparative or relative matter and presupposes the existence of at least another folio, and in the absence of an allegation by the defendants-respondents that there is some other folio which is the right folio, I do not see how the question arises, or how the appellant could have addressed himself to that issue.

In regard to the plea that the plaintiff is barred from setting up his present claim on the ground that he had failed to assert it when he intervened in the partition case and set up his other mortgage, the plaintiff's evidence is that he did not claim on this mortgage because he was under the impression that this mortgage did not affect the land sought to be partitioned. He was under a misapprehension as to the identity of the land sought to be partitioned in that case. But quite apart from this evidence on the point, I fail to see how it can be said that the matter was *res judicata* or that the plaintiff was estopped by virtue of section 115 of the Evidence Ordinance, as it was argued, he was.

For one thing, there was no adjudication on the question of this mortgage upon which a plea of *res judicata* could be based, and in regard to the argument that there was, in effect, a bar similar to the bar of *res judicata* because the plaintiff could have asserted his claim on this mortgage in the partition case and could have had the partition declared subject to the mortgage, the answer appears to be that he was under no legal obligation to set up the mortgage in the partition case. The effect of sections 8 and 12 of the Partition Ordinance is to conserve the mortgage, may be in a modified form, whether it had been set up or not. The fact that one mortgage was set up makes no difference as far as I can see. It might have been different if this mortgage had been asserted in the partition case and an adjudication obtained upon it, that was adverse to the plaintiff.

In regard to the plea under section 115 of the Evidence Ordinance, I am afraid it was advanced in not too whole-hearted support of the finding of the trial Judge that the plaintiff was present at the sale under the Partition Ordinance and refrained from asserting his mortgage in the presence of the prospective purchasers. That finding is clearly not justified by the evidence. The plaintiff's uncontradicted testimony is that he was not present at that sale. The trial Judge appears to have

gathered a wrong impression from the plaintiff's statement that *after the partition* case he took a mortgage of another lot of this land from a purchaser, and put that bond in suit and bought the lot himself. I do not know that it would have made a difference if the plaintiff had been present at the sale under the Partition Ordinance and had failed to notify his mortgage, unless, of course, for some reason there was a legal obligation requiring him to speak. There is not one word of evidence on that point in the case nor is there any evidence that any of the defendants-respondents were misled by any "declaration, act or omission" on the part of the plaintiff, if indeed such evidence could have availed the defendants-respondents. Estoppel is a matter of evidence and cannot be established inferentially by means of large conjecture, and that was what the respondents' Counsel sought to do. It is on the grounds that the plaintiff was barred by the pleas of *res judicata* and estoppel, that the trial Judge dismissed the action, but as I have pointed out both pleas fail.

The only matter left for consideration is what effect a sale under the Partition Ordinance has on existing mortgages. Counsel for the respondents sought to support the decree on the ground that by operation of section 12 the mortgage was extinguished. Some little difficulty is created by a certain divergence of views on this point. But after careful consideration, I am clearly of the opinion that notwithstanding the sale, it is still to the land and not to the proceeds of sale that existing mortgages whether of the whole land or of shares of it, attach. Section 12 of the Partition Ordinance makes that very clear. Counsel for the respondents conceded as he had to concede, when he invoked in aid of his contention certain dicta in the case of *Silva v. Wijeysinghe* [1], that in the case of a mortgage of the entire land, the mortgage continued to attach to it, despite the partition or sale. In the case referred to de Sampayo J., with whom Wood Renton C.J. was "disposed" to agree, said that "the main provision of this section (*i.e.*, section 12 of the Partition Ordinance) *deals with a mortgage of the whole land* which is the subject of the action, and conserves the right of the mortgagee in such a case" . . . . and that in the "*case of the mortgage of an undivided share* in the event of a sale in the partition action . . . . *the right of the mortgagee will be confined to the proceeds of the sale*". These were *obiter dicta* and were not necessary for the decision of that case, for the purchaser in execution under the mortgage, was asking for a share of the proceeds of sale, and the only question submitted to the Court was whether the purchaser was entitled to be paid the value of the share allotted to the mortgagors under the decree or the value of the share mortgaged which was greater than the share allotted. Undoubtedly, the opinion of so eminent a Judge although given *obiter* must carry great weight, but if I may say so with the greatest possible respect, the reasoning by which de Sampayo J. came to that opinion does not appear to me to be convincing. It is opposed to the view taken by Lawrie A.C.J. and Withers J. in *Fernando v. Silva* [1], when this question arose directly for decision. Lawrie A.C.J. said, "the purchaser appeals against a decree declaring

[1] *20 N. L. R. 147.*

the land bound and executable and urges that the mortgagee must look for payment from the price paid by the purchaser at the sale under the Ordinance, for, that, by that sale, he urged, he acquired the land free from incumbrance. I am of opinion that this plea cannot be sustained. The 12th section of the Partition Ordinance expressly provides that nothing in the Ordinance shall affect the right of any mortgagee, and I can see no good reason why the same share of the land mortgaged should not be sold in satisfaction of the mortgage". This case although cited in the course of the argument in the case before Wood Renton C.J. and de Sampayo J. has not been noticed in the course of their judgments.

Again in the case of *Abdul Hamidu v. Perera*[1], Ennis A.C.J. and Jayewardene A.J. took a contrary view to that of de Sampayo J. Ennis A.C.J. said "it had been suggested in some cases that this rule (*i.e.*, the rule in the substantive part of section 12 of the Partition Ordinance) applies only to mortgagees of the whole land, and that it could not apply to preserve the rights of a mortgagee of a divided interest in the land. I am quite unable to entertain this argument because the section goes on with a proviso dealing with the rights of mortgagees of undivided shares". Ennis A.C.J. added—and if I may say so, this additional argument concludes the question—a proviso does not introduce new matter. It qualifies the substantive words of the enactment . . . . . That being so, the very fact that the proviso in this section deals with the position of mortgagees of undivided shares shows conclusively that the rule itself covers *any* mortgagee of the land".

In a later case, that of *Godage v. Dias*[2], Dalton J. and Jayewardene A.J. followed *Fernando v. Silva* (*supra*) and *Abdul Hamidu v. Perera* (*supra*), and held that where land sold in partition proceedings was subject to a mortgage in respect of an undivided share, "the mortgagee can . . . . enforce his mortgage against 'the same share of the land mortgaged' or 'the share of the land'". Dalton J. added "these words I assume are intended to be an interpretation of the words "the share in severalty allotted to the mortgagor".

An examination of section 12 of the Partition Ordinance satisfies me beyond any manner of doubt that both in the case of a mortgage of the whole land, and in the case of a mortgage of an undivided share, on a sale in the partition action, the mortgage attaches to the land or to some part of it, and not to the proceeds of the sale. I cannot discover any sound principle on which a discrimination such as that suggested in *Silva v. Wijeysinghe* (*supra*) can be justified. It would be to treat a mortgagee harshly indeed, to deprive him of his charge on the land and refer him to a fund which may disappear before he ever becomes aware of its existence. Sections 8 and 12 recognize this fact and leave mortgages substantially unaffected by proceedings under the Ordinance.

Mr. Rajapakse was obviously in difficulty and was driven to all sorts of expedients to support the judgment of the trial Judge and the view taken in *Silva v. Wijeysinghe*. He suggested that the words "or sale" in the first line of the proviso should be struck out or ignored. He cited the comment made on page 255 of *Jayewardene on The Law of Partition*

[1] *2 Tambyah 111.* [2] *26 N. L. R. 433.* [3] *30 N. L. R. 100*

that "the inclusion of sales in the proviso is clearly a mistake". I fear that is too hasty an assumption. I always have great difficulty in accepting these cordial invitations to go tilting at Legislative Enactments, deeds and instruments, striking out a word here, putting in another there, in a happy-go-lucky manner. I have been too often told that every word must be assumed to have been used with a purpose, and must be given a meaning if it is at all possible to do so. When Counsel for the appellant in *Godage v. Dias (supra)*, made a similar submission, Dalton J. observed, "Mr. Garvin argued that the words 'or sale' where they appear can be given no meaning, and that the section only applied to a partition and the proviso had no application here. That is an easy solution which, it seems to me, it is impossible to adopt". I respectfully agree. I would add that, in my opinion, it will not avail the respondents in this case even if I strike out the words "or sale" from the proviso, for the substantive part of the section with which Mr. Rajapakse confesses he has no quarrel at all, remains unimpaired and catches him up. As I have already pointed out, the main section applies to all mortgagees, the mortgagees of the whole land as well as to mortgagees of undivided shares. It provides that "nothing in this Ordinance contained shall affect the right of *any* mortgagee". The word "any" occurring as it does, universalizes the category "mortgagee", and if I may repeat myself in order to make clear what I wish to say, it is impossible with the word "any" placed as it is, to restrict that part of the section to mortgagees of the whole land as distinguished from mortgagees of shares of it

The view I have formed is that this proviso is designed to modify the substantive part of the section and to adjust it to contingencies that must frequently arise in the course of proceedings under the Ordinance. The purpose of the Ordinance is to establish title finally and conclusively to the shares decreed to the parties. If this proviso had not been appended, the result would be that, in the event of a partition or sale, the mortgagee would be able to raise the question of what share his mortgagor is entitled to despite the allotment under section 4 in order to give his mortgage as full an effect as possible, if in the allotment his mortgagor obtained less than he had mortgaged. The proviso makes that impossible. It states that if at the time of a partition or sale, an undivided share only of the land shall be subject to a mortgage, the right of the mortgagee shall be limited to the share in severalty allotted to the mortgagor or his successor in title. The phrases "share in severalty", and "the owner of the share in severalty" need create no difficulty as it was suggested they did. They seem to recognize and emphasize the fact that on a decree being entered allotting shares to the parties with a view to ordering a partition or sale, the pre-existent co-ownership is at an end, and the shares thereafter are not shares in common, but shares in severalty. From the time of the decree and order under section 4 of the Ordinance, the mortgagee may not look beyond the shares allotted to his mortgagor or to his mortgagor's successor-in-title. In other words, he is prevented from reopening the decree for the purpose of his mortgage. The words "limited to the share in severalty" appear to me to have been chosen

with great care. They apply to cases in which a sale as well as to cases in which a partition is decreed. In either case, the mortgagee must realize his mortgage within the limits of the shares allotted in severalty to the mortgagor or his successor. If for instance, in the event of a decree for partition, the mortgagor or his successor has been allotted a one-fourth, and in respect of that one-fourth a definite lot is given to him, the mortgagee may sell only so much of that lot as his mortgagor had mortgaged. If the mortgagor had mortgaged a one-fourth, and that share has been allotted to him in severalty, then the whole lot given to him in respect of that one-fourth is liable to be sold ; but if the mortgagor had mortgaged only a one-eighth share, and is allotted a one-fourth in the decree, the mortgagee may sell up only a half of the lot allotted to the mortgagor or his successor in respect of that one-fourth. If the mortgagor had mortgaged a fourth and he or his successor was allotted only an eighth, the mortgagee could obtain a hypothecary decree only in respect of the lot given to his mortgagor or his successor, in respect of that one-eight. For the rest, he has only a claim for money due on the bond. Similarly, in the case of a sale, the mortgagee will be able to assert against a purchaser his mortgage within the limits of the share allotted to the mortgagor or his successor. By way of illustration again, if the mortgagor had mortgaged a fourth, and in the decree ordering a sale he or his successor was allotted a fourth, then the mortgage would attach to a fourth of the whole land in the case of a purchaser of the whole land, or to a fourth of each lot if the land had been sold in lots to different purchasers. The position would be the same in the other cases considered by me in connection with a decree for partition. Difficulties such as arose in the case of *Godage v. Dias* (*supra*) can occur only in exceptional circumstances such as existed in that case where in view of the fact that the mortgagor had mortgaged an undivided half share of two lots of the land partitioned as well as of another land, an inquiry seemed necessary to ascertain what proportion of the whole land partitioned, an undivided half-share of lots 2 and 3 represented, and the case was remitted for that purpose. But such difficulties are susceptible of more or less easy solution. At any rate, they cannot affect the interpretation of section 12.

One other matter has been submitted for consideration, and that is the absence of the words "or sale" after the word "partition" in the last part of the proviso. Much stress was laid on this absence, but it is not at all clear to me how respondents' Counsel sought to profit by this "omission" which he said was significant. To say that this is an omission is, I think, to beg the question. As I read section 12, the words "or sale" after the word "partition" would be pure redundancy, or perhaps I should say quite out of place. The words "after such partition" connote the whole future measured from the point of time at which the decree or order under section 4 is entered. The words "such partition" refer to that order or decree by which the common ownership is terminated, and a partition into shares in severalty is effected for the purpose either of a partition or of a sale. The proviso enacts that from that time, the mortgage holds good and attaches to the share in severalty till it is

discharged—sale or no sale. The first part of the proviso appears to deal with an allotment in severalty to the mortgagor himself. The second part of the proviso, brings within its scope the case of a successor-in-title as well as the case of a purchaser at the partition sale, and it provides that in each of those cases, the mortgage attaches to the share in severalty after the severance under section 4 till it is discharged; and that in respect of that share in severalty, *the mortgagor* is bound "by and under the same conditions, covenants, 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 mortgagor the said several part". Examined in this way, section 12 is seen to be a complete and logical adjustment of existing mortgages to the scheme of the Ordinance, and I do not find in it one word too many or too few.

For these reasons, the appeal in this case is entitled to succeed. I set aside the judgment of the District Judge and direct that decree be entered as prayed for in the petition of appeal. The appellant will have costs here and below.

KEUNEMAN J.—The plaintiff brought this action to recover from the first to the fourth defendants a sum of Rs. 2,000 being principal and interest due on mortgage bond No. 972 of November 15, 1927. The fifth to the nineteenth defendants were joined as parties to be bound by the hypothecary decree, which the plaintiff claimed *inter alia* over 5/192 of the property Wela-adderawatta *alias* Wetakeiyagahawatta which had been broken up into several blocks and sold to the fifth to the nineteenth defendants. The sale in blocks was under a decree for sale in partition action D. C. Galle No. 30,989.

At the trial the following issues were framed—

(1) Are the purchasers under the partition sale bound by the mortgage in plaintiff's favour ?
(2) Is the plaintiff estopped from claiming hypothecary decree in regard to this land in view of the fact that he was a defendant in the partition case and did not disclose this mortgage bond in his answer ?
(3) Has the plaintiff's bond been properly registered ?
(4) Should the plaintiff be restricted to the proceeds of sale in any event ?

The learned District Judge entered judgment in favour of the plaintiff against the first to the fourth defendants, but held that the premises in question sold to the fifth to the nineteenth defendants were not subject to the mortgage and ordered the plaintiff to pay the costs of these defendants. The plaintiff appeals.

The District Judge gave two reasons for his decision. He held that the present plaintiff had been a party (the hundredth defendant) in the partition proceedings D. C. Galle, No. 30,989, and had filed answer disclosing another bond No. 32,625 of September 23, 1930, whereby 9/20 of a certain house standing on the premises in question and the soil covered thereby had been mortgaged to him. He further held that the

present plaintiff had appeared at the sale in the partition case and purchased some of the properties at that sale. The District Judge appears to have thought that these grounds constituted an estoppel.

I may say that the second ground mentioned is not in accordance with the facts as disclosed in the evidence and appears to have been based on a misunderstanding. All that the present plaintiff admitted was that after the sale in the partition case he took a mortgage of another lot of the land in question from the purchaser at the partition sale, and subsequently put the bond in suit and purchased that lot himself. The plaintiff stated that he was not present at the sale in the partition case.

As regards the first ground mentioned by the District Judge it is certainly the case that the present plaintiff was the hundredth defendant in the partition case, and that he filed answer putting forward a claim based upon the bond No. 32,625 above mentioned, and did not claim under the bond now sued upon. The plaintiff has offered an explanation for doing so, but in any event is he precluded from suing on the bond now in question ?

It was not contended before us that section 34 of the Civil Procedure Code had any application to the present case, and I do not think that section applied here. No doubt it was open to the present plaintiff or to the other parties to that partition action to raise the question whether the present bond had any effect or not and had such questions been raised and decided, the matter may have been *res judicata*. I do not think, however, there was any obligation on the part of the present plaintiff to claim upon the bond now in question. Now under section 8 of the Partition Ordinance, the Commissioner for sale is required to put the premises up for sale "subject to any mortgage or other charges or incumbrances which may be on the same", and section 12 provides that "nothing in this Ordinance contained shall affect the right of any mortgagee of the land which is the subject of the partition of sale". I think it follows from these sections that any mortgage, which has not been excluded in consequence of a finding in the partition case, must be regarded as having force and effect in spite of the partition or sale.

The further argument was addressed to us that in any event the mortgage now in question must be regarded as binding upon the proceeds of sale and not upon the property in the hands of the purchasers. It is true that the decision of this court are not all in accord. I am, however, with respect in agreement with the decisions in *Abdul Hamidu v. Perera* [1] and *Godage v. Dias* [2] that section 12 protects not only mortgages of the whole land but also mortgages of undivided interest in the land. There is no need to repeat the arguments in those cases. The real difficulty appears to arise in the application of the proviso, namely, "if . . . . 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". At one time I thought that the phrase "share in severalty" could only apply to a divided portion of the land, but on consideration I do not think that the words "in severalty" are equivalent to "divided", and I agree with the

[1] *26 N. L. R. 433.* [2] *30 N. L. R. 100.*

suggestion of the Acting Chief Justice that in the case of a sale these words may be applied to the share allotted to the mortgagor under the preliminary decree. It is to be noted that under section 4 if the defendants make default, the Court will inquire into the extent of the "respective shares and interests", and when the defendants appear and raise disputes, the Court will inquire into their "several shares and interests". "Several" is not used here in the sense of "divided". It is also the case that although the provision to section 12 uses the words "undivided share" in connection with the mortgage, it limits the mortgagee to the "share in severalty" allotted to the mortgage. If the mortgagee is to be restricted to a "divided share", it would be natural to use the word "divided" and not "in severalty". Further, when the divided share is specifically referred to in the last words of the proviso it is described as "the several part". The distinction between "several share" and "several part" is significant. I think therefore that the "share in severalty" may be, in the case of a sale taken to mean the share allotted to the mortgagor in the preliminary decree under section 4, and that the mortgage is preserved by section 12 up to that extent even as against the purchaser at the subsequent sale.

I agree with the order made by the Acting Chief Justice.

Appeal allowed.