

Present: Wood Renton C.J. and De Sampayo J.

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101—D. C. (Inty.) Galle, 11,057.

Partition Ordinance, s. 12—Mortgage of a share—Sale of the land by order of Court—Does the mortgage attach to any share of the land after sale?—Rights of mortgagee.

A co-owner who had mortgaged his share of a land was not allotted any share of the land in a partition action, but was only given a planter's interest and a house. Under the partition decree the land was ordered to be sold.

Held, that the mortgagee, who was not a party to the partition action, was entitled to draw only the share of the money due to the mortgagor under the decree out of the amount realized by sale of the land. A purchaser of the share under a mortgage decree will be in the position of the mortgagee.

"A mortgage security is no higher or more extensive than the mortgagor's title to the property, and if the title is by any legally effective means extinguished, and not merely transmitted to another by contract or descent, the mortgagee is affected equally with the mortgagor. The effect of the partition decree is to wipe out the fifth defendant's (mortgagor's) title as if he never had any, and I think the mortgage must be taken to have gone with it. It is different if the mortgagor suffers defeat in an ordinary action for title to which the mortgagee is no party."

The main provision of section 12 of the Partition Ordinance deals with a mortgage of the whole land which is the subject of action. The proviso to the section does not touch the case of a mortgage of an undivided share in the event of a sale in the partition action, and in such a case the right of a mortgagee is confined to the proceeds of the sale.

THE facts are set out in the judgment of De Sampayo J.

Bawa, K.C. (with him *M. W. H. de Silva*), for sixty-first defendant, appellant.—The shares allotted to fifty-first to fifty-fifth defendants belonged to the fifth defendant, and were subject to mortgage at the time of the institution of partition action. The decree in the partition action had the effect of transferring the shares to these defendants, but could not extinguish the rights of the mortgagee. Section 12 of the Partition Ordinance specifically conserves those rights. The sale under the partition decree gave an absolute title to the purchaser, but the proceeds of sale remained subject to the mortgage, and the appellant, who purchased these shares under the mortgage decree, is entitled to the proceeds. In any case, the

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appellant's claim to the proceeds of the house and plantation to which the mortgagor, the fifth defendant, has been declared entitled to must succeed.

Counsel cited 2 *Cur. L. R.* 222, 18 *N. L. R.* 408, D. C. Colombo 33,579,¹ 2 *Tamb.* 111.

J. S. Jayawardene, for fifty-first to fifty-fifth respondents.—The decree gave the shares in question to the respondents. That wiped out the rights of the fifth defendant entirely, along with the mortgage given by him. Section 12 has no application, as no share has been allotted to the mortgagor in the decree. The appellants have no right to intervene after final decree.

The authorities cited do not apply to the facts of this case.

Cur. adn. vult.

October 30, 1917. WOOD RENTON C.J.—

This is a partition action in which the appellant, who was the sixty-first defendant, intervened. The material facts are these. The fifth defendant, Helenis, had, on deed No. 720 of July 25, 1905, acquired certain interests from the fortieth defendant, Isabella, which she in turn had obtained on deed No. 2,735 of December 5, 1901, from one Hingohamy and four of her children or representatives, including several of the present respondents. The fifth defendant, Helenis, had disclosed in his answer the fact that Hingohamy and the children above mentioned had dealt with their rights, but had done so vaguely and without specifying any documents. The fortieth defendant, Isabella, was silent on the subject, and no reference whatever was made in the pleadings to the fact that the fifth defendant, Helenis, had by deed of April 30, 1916, mortgaged his interests in the property to Cornelis Zoysa. The learned District Judge finds that in the partition proceedings "the fifth defendant wilfully suffered an eclipse of all his rights," and his share, with the exception of a house and planter's interest in a certain plantation, was by the final decree allotted to Hingohamy's representatives and the other respondents to this appeal. The decree was in the alternative for partition or sale. The property was ultimately sold, the usual certificates were issued, and we are concerned now merely with a claim to certain portions of the proceeds of the sale. In the meantime Cornelis Zoysa had obtained a mortgage decree on his bond from the fifth defendant, and the present appellant is the purchaser in execution at that sale. By virtue of section 12 of the Partition Ordinance, 1863,² he claims the proceeds of the sale both of the share assigned to the fifth defendant by the final decree, and also of the interest of the fifth defendant allotted by the same decree to the respondents. As regards the former of these shares, the appellant is clearly entitled to succeed. But as regards the latter, I think that his claim fails. None of the cases cited by Mr. Bawa in

¹ *S. C. Min.*, November 27, 1916. ² *No. 10 of 1863.*

support of the appeal has, in my opinion, any application to the circumstances before us. The District Judge has not found affirmatively the existence of collusion between the fifth defendant and Hingohamy or her representatives in the partition proceedings, and they derive their title to the shares in question, not in any way under or through the fifth defendant, but by virtue of the decree of the Court. I am disposed to agree with what my brother De Sampayo suggested in the argument, that the first clause in section 12 of the Partition Ordinance, 1863,¹ contemplates a case in which the whole of the land sought to be partitioned has been mortgaged. But, be that as it may, the language of the proviso to that section makes it quite clear that the interest of the mortgagee attaches only to the share allotted in severalty to his mortgagor or to some one claiming under him. The fact that the proviso speaks of the "owner" of the share in severalty is capable of easy explanation. When once the land had been partitioned, it would no longer be possible to speak in this connection of the mortgagor, who, on the partition, at once becomes the owner of the share allotted to him in severalty.

I agree to the order proposed by my brother De Sampayo.

DE SAMPAYO J.—

This appeal raises a question as to the rights of a mortgagee under the Partition Ordinance. The subject of the action is a land called Arakkumullewatta, of which one Kariyawasan Andris was entitled to $\frac{3}{32}$ share. Andris died, leaving his wife, Hingohamy, and five children. In the plaint the plaintiff allotted the fifth defendant a certain planter's interest and a house, about which there was no dispute. The fifth defendant, however, filed an answer stating that Hingohamy and four of Andris's children had sold to him their shares, viz., $\frac{3}{64}$ and $\frac{12}{320}$, and claimed the same, in addition to the planter's interest and the house. But he did not plead any deed or produce one at the trial, though he was represented by his proctor, nor was any attempt made to establish his right to the said shares, with the result that the District Judge allotted the same to the fifty-first to fifty-fifth defendants, who are the children of Andris or their representatives. A preliminary decree was on that footing entered on July 31, 1916, and a decree for sale on October 10, 1916. The sale took place on January 10, 1917, and the proceeds appear to be still in Court. At this stage the appellant, who is designated the sixty-first defendant, came into Court and claimed a share of the proceeds. His claim was based on the following state of facts. It appears that, as a matter of fact, Hingohamy, and two of the children of Andris and two of his grandchildren sold their shares, equal to $\frac{48}{640}$, on December 5, 1901, to one K. G. Isabella, who on July 25 sold the same to the fifth defendant. By bond dated April 30, 1906, the fifth defendant mortgaged the said

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shares, together with his planter's interest and house, to one Cornelis Zoysa. Pending this partition action, to which Cornelis Zoysa was no party, a mortgage action was instituted against the mortgagor, the fifth defendant, and a decree was obtained on October 28, 1915. In execution of that decree the mortgagor's property was sold on December 23, 1916, and was purchased by the appellant, who obtained the Fiscal's transfer dated February 23, 1917.

It is conceded that the sale under the partition decree was valid, so far as the purchaser is concerned. Indeed, this concession must be made for the appellant's purpose, for otherwise he may go against the purchaser at the partition sale for a share of the land, but cannot come into the partition case and claim a share of the money. But the appellant's case is that the proceeds representing the shares mortgaged by the fifth defendant are subject to the mortgage, and may now be drawn by the appellant as purchaser under the mortgage decree. I entertain some doubt as to whether a stranger to the action can intervene for such a purpose at this stage of the partition action. But the appeal may be considered, I think, on its merits. Section 2 of the Partition Ordinance contemplates the joinder of mortgagees as parties to the action. In the event of a decree for sale, section 8 directs that the Commissioner shall sell the land "subject to any mortgage or other charges or incumbrances which may be on the same." Considering that the effect of section 9 of the Ordinance is to vest absolute title in the purchaser under the decree for sale, and that the whole object of the Ordinance is to put an end once and for all to undivided ownership, I for my part think that the words quoted above from section 8 mean that, when an undivided share has been subject to a mortgage, the right conserved is to the share of proceeds due to the mortgagor. Then comes section 12, which is in these terms:—

"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."

In my opinion the main provision of this section deals with a mortgage of the whole land, which is the subject of the action, and conserves the right of the mortgagee in such case, and this meaning

is made clearer by the proviso, which is concerned with the exceptional case of a mortgage of an "undivided share only of the land and not the whole thereof." The reason why it is enacted that nothing in the Ordinance shall affect the right of a mortgagee of a whole land is easy to understand. For, in such a case, the inconvenience of undivided ownership which the Ordinance aims at will not arise; the mortgagee will sell the whole land under his mortgage decree, and the purchaser will be entitled to and possess the whole land, notwithstanding the partition or sale under the Ordinance. It is noticeable that the proviso does not touch the case of the mortgage of an undivided share in the event of a sale in the partition action, and this confirms me in the opinion above indicated, that in that case the right of the mortgagee will be confined to the proceeds of the sale. When these considerations are applied to the present case, it will be seen that the mortgage by the fifth defendant, being a mortgage of a share only of the land and not the whole thereof, is not conserved by the main provisions of section 12. The mortgagee's right, if any, must I think be taken to be to the proceeds of sale. One difficulty in the way of the appellant, however, is that he is not the mortgagee, but only a purchaser of the mortgaged share of the land. But I shall assume for the purpose of this appeal that he is in the same position as the mortgagee. He is then confronted with the still more serious difficulty, that in the partition decree the share mortgaged was not allotted to the mortgagor, the fifth defendant, but to the fifty-first to the fifty-fifth defendants, the respondents to this appeal, and that the share of the proceeds of sale in question therefore belongs not to the former but to the latter. Can, then, the appellant claim the money as against the respondents? No authority has been cited on behalf of the appellant on this point, and the claim appears to me to be untenable. Rightly or wrongly, the fifth defendant's share in the land has been allotted in the partition to the respondents, and the partition decree is conclusive and binds the fifth defendant as well as the appellant. But Mr. Bawa advanced the ingenious argument, that by reason of the fifth defendant's share being allotted to the respondents, some of whom were vendors to the fifth defendant, there was, in effect, a transfer by the fifth defendant of his share to the respondents, and that the respondents are, therefore, subject to the appellant's rights just as much as the fifth defendant himself. There was, however, no consent on the part of the fifth defendant to his share being allotted to the respondents. He was only negligent or inactive in the partition proceedings, and it was the Court that, in the absence of any proof of his title to the share in question, allotted the same to the respondents. It was then suggested that it did not matter to whom the mortgaged share was allotted, provided that the mortgagor was entitled to it at the time of the mortgage. Here, again, the argument is not supported by any authority, and if it be tested by

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principle, I think it cannot be maintained. A mortgage security is no higher or more extensive than the mortgagor's title to the property, and if that title is by any legally effective means extinguished, and not merely transmitted to another by contract or descent, the mortgagee is affected equally with the mortgagor. The effect of the partition decree is to wipe out the fifth defendant's title as if he never had any, and I think the mortgage must be taken to have gone with it so far as the respondents are concerned. It is, of course, different if the mortgagor suffers defeat in an ordinary action for title to which the mortgagee is no party, and the present case is, therefore, distinguishable from *Gooneratne v. Ibrahim*,¹ which was cited on behalf of the appellant. It may be that the result is to defeat the just claim of the appellant, who purchased on the strength of the mortgage decree; but the appellant is bound to yield to the effect of an imperative statutory provision.

In my opinion the appellant's claim cannot be sustained, so far as the fifty-first to fifty-fifth defendants are concerned. But the appellant is, I think, entitled to draw the amount due to the fifth defendant in respect of the planter's interest and house, which also were mortgaged by the fifth defendant and purchased by the appellant at the Fiscal's sale. The appeal should be dismissed, with costs, as regards the fifty-first to fifty-fifth defendants. But as regards the fifth defendant, the order appealed from should be modified by allowing the appellant to draw the money due to the fifth defendant out of the fund in Court.

Varied.