

1923.

[FULL BENCH.]

Present: Bertram C.J., Ennis, Schneider, and Garvin JJ., and Jayewardene A.J.

KAHAN BHAI *v.* PERERA *et al.*

154—D. C. Colombo, 32,666.

Partition action—Decree for sale—How long does prohibition against alienation continue?—Ordinance No. 10 of 1863, s. 8.

The prohibition against alienation or hypothecation of undivided shares or interests in property subject to a partition action, where the Court decrees a sale, continues until the issue of the certificate under section 8 of the Partition Ordinance, 1863.

Persons desiring to charge or dispose of their interests in a property subject to a partition suit can only do so by expressly charging or disposing of the interest to be ultimately allotted to them in the action.

THIS was a partition action in which a decree for partition was first entered on November 12, 1912. There was an appeal against that decree, and the appeal was dismissed on March 14, 1913. At this stage, certain parties intervened, and at the trial order was made allotting certain shares to the intervenients, and a decree was accordingly entered. There was an appeal from this decree also which was dismissed on May 25, 1916.

On December 1, 1916, a consent motion was filed moving for a sale of the property which was allowed by the Court on December 11, 1916. No sale, however, ever took place.

On October 5, 1922, the fifth plaintiff's share was sold by the Fiscal under writ issued in case No. 4,129 of the District Court of Colombo, and was purchased by the appellant who obtained for it Fiscal's transfer dated March 15, 1923. On March 20, 1923, the appellant moved to have himself substituted for the fifth plaintiff and to have the shares of the fifth plaintiff given to him. This was allowed by the Court.

On an application being made to the Supreme Court, that Court on December 18, 1922, set aside the decree for sale and entered a decree for partition, and ordered the District Judge to consider the scheme of partition and enter final decree.

By bond No. 702 of September 27, 1917, the fifth plaintiff had mortgaged his 7/96 shares to the respondent, who moved on April 23, 1923, to have the fifth plaintiff's shares declared subject to this Mortgage. This application was opposed by the appellant who urged that as execution-purchaser he had been substituted in the place of the fifth plaintiff, and that the mortgage executed by the fifth plaintiff was void, as it had been effected during the pendency of the partition action.

The District Judge allowed the respondent's application with costs.

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The following is the judgment of the Acting Additional District Judge (V. M. Fernando, Esq.):—

In this case a decree for partition was entered on November 12, 1912. There was an appeal against that decree, and thereafter several parties intervened, and the proceedings continued till December 11, 1916, on which date a decree for sale was entered apparently with the consent of parties, the District Judge also stating that he thought a partition impracticable. There was no appeal against this order, and in September, 1917, a commissioner was appointed to carry out the sale.

The fifth plaintiff who is allotted 48/288 subject to an entail and 21/288 absolutely mortgaged his 21/288 share by bond No. 702 dated September 27, 1917, to the intervenient, who now asks that the fifth plaintiff's rights be declared subject to this mortgage.

In October, 1922, the rights of the fifth plaintiff having been seized by the Fiscal in execution, the same were sold and purchased by the substituted fifth plaintiff who opposes the application of the intervenient. In December, 1922, the order of this Court directing the sale of the land was set aside by the Supreme Court in revision, and an order of partition entered in the case.

The position taken up by the fifth substituted plaintiff is that he himself, being the purchaser at a forced sale, is entitled to be substituted in place of the fifth plaintiff whose rights were sold, but that the mortgage in favour of the intervenient is bad, as having been executed pending the partition proceedings. To the argument that the mortgage was executed after an order for sale had been entered in the case, he replies that the Court had no power to make such an order having already ordered a partition, and that the order for sale was therefore bad. He also relies on the fact that that order was afterwards set aside by the Supreme Court in revision. No authority, however, was cited for the proposition that a sale by a party to a *bona fide* purchaser for value after a decree for sale had been entered is bad, because the Court entering that order had already entered a decree for partition. Even assuming the argument to be correct that the District Court having once ordered a partition cannot thereafter order a sale, although it is satisfied that a partition is impracticable, still I am not prepared to hold that the parties themselves are not bound by such an order for sale, if no appeal is taken from that order. If I am right, then it follows that a *bona fide* purchaser from one of the co-owners can rely on the order of the Court without examining all the steps that led to that order, and the intervenient as mortgagee is in the same position as a *bona fide* purchaser. It is clear that a conveyance or mortgage after a decree for sale is good, and the subsequent reversal of that decree for sale by the Supreme Court cannot affect rights acquired *bona fide* under that decree. The case of *Perera v. Lebbe*¹ is an authority which supports this position.

I therefore allow the intervention, and declare that the shares allotted to the fifth plaintiff absolutely are subject to the rights of the intervenient under bond No. 702 of September 27, 1917. The substituted fifth plaintiff will pay the costs of this inquiry.

¹ (1916) 19 N. L. R. 308

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 Kahan Bhai Bertram C.J. and Porter J. by the following judgment:—

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December 20, 1923. BERTRAM C.J.—

The present case raises, under somewhat peculiar circumstances, the question whether, where a Court decrees a sale under the Partition Ordinance, the prohibition against hypothecation contained in section 17 of the Ordinance applies during the interval between the decree and its execution.

Section 17 prohibits alienation and hypothecation unless and until the Court shall by its decree have refused to grant the application for partition or sale. Nothing is said as to a limitation on this prohibition where the Court does not so refuse, but grants the application. It appears to have been assumed in a series of cases that inasmuch as the prohibition expires at the moment of the decree when partition or sale is refused, so it must be held to expire from the moment of the decree when partition or sale is granted. In the case of a partition, the decree for this purpose must be held to mean final judgment under section 6, so that in the case of a partition there is no interval between the decree and its execution, but in the case of a sale there is such an interval, and it appears to have been assumed in a series of cases that the prohibition does not apply in this interval between the decree for sale and its execution. If that is the case, it would be competent to a co-owner, subject to any other principle in force, to charge his interest during this interval. The cases are: *Perera v. Alwis*,¹ *Louis Appuhamy v. Punchi Banda*,² and *Abdul Ally v. Kelaart*.³ They are far from being decisive. The most definite is *Louis Appuhamy v. Punchi Banda (supra)*, and even here the reasoning is far from clear.

Mr. Samarawickreme in this case very plausibly suggests that these cases all assume the existence of an interval during which no statutory prohibition is in force, and that the true legal situation is that up to a decree for sale any hypothecation is absolutely void under section 17, but that after the decree the case is regulated by the legal principles relating to *lis pendens*. The mortgagee, therefore, during such an interval, takes a security subject to the result of the suit, and upon the sale taking place in pursuance of the decree his security is thus transmitted into a claim against the proceeds of the sale. This sounds very plausible, but is in fact very insidious. The mortgagee is not now bound by the *lis pendens* unless it is registered. The result would be that if the partition suit were not registered, the mortgagee might bring a hypothecatory action against the purchaser under the partition decree, demanding to have the share of his mortgagor sold afresh for the satisfaction of

¹ (1913) 17 N. L. R. 135

³ (1904) 1 Bal. 40

² (1904) 10 N. L. R. 196.

his mortgage. Such a claim was actually made in the case of *Perera v. Alwis (supra)*, and De Sampayo J., speaking *obiter*, makes some very interesting observations on the point.

He suggests a legal principle which might be held to apply to such a situation. The question arises, however, whether this supposed interval is not wholly imaginary. Section 17 itself imposes no limitation to the prohibition, and it is by no means clear that there is any necessity to imply one.

In the peculiar circumstances of this case, Mr. H. J. C. Pereira raises various other points. The decree for sale on which the mortgage was based was faulty. It purported to replace another decree, namely, an interlocutory decree for partition of the same Court. This decree for sale was subsequently set aside. Mr. Pereira suggests that a mortgage executed during the interval and based upon this interlocutory decree cannot stand. He further argues relying upon an observation of Wendt J. in *Abdul Ally v. Kelaart (supra)* that all that the mortgagee could take in the circumstances was a right against the proceeds, and he maintains that under no circumstances could that right subsequently become transmuted into a right against the actual share of the land allotted to his mortgagor.

If it is held that there is no limit to the prohibition against hypothecation contained in section 17, there is no occasion to consider these contentions of Mr. Pereira. It is so important that there should be no doubt as to the position of a purchaser under a decree for sale in a partition suit that I think it best the case should be referred to a bench of five Judges.

PORTER J.—I agree.

Drieberg, K.C. (with him *Cooray* and *M. B. A. Cader*), for fifth plaintiff, appellant.

Samarawickreme (with him *H. V. Perera* and *E. G. P. Jayatilleke*), for intervenient respondent.

The judgment of the Full Court was delivered by—

August 1, 1924. BERTRAM C.J.—

The facts in this case are set out in the judgment of the learned District Judge. The question under reference is a question as to the true interpretation of the prohibition against alienation or hypothecation of the undivided shares or interests in property subject to a partition action contained in section 17 of the Partition Ordinance, No. 10 of 1863. Where the application for partition or sale is refused, that prohibition endures up to the refusal. The question is, up to what point does the prohibition endure when the

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application for a partition or sale is granted? No difficulty arises when the Court grants a decree for partition, because in the case of a partition decree there is no interval between the decree and its execution. The only difficulty that arises is where a decree for sale is granted, as in that case there is an interval between the decree for sale and the issue of the certificate under section 8, and the point to be determined is, whether the prohibition is in force during this interval. The Court is of opinion that the prohibition must be deemed to continue as long as the common bond of co-ownership exists, that is to say, until the issue of the certificate under section 8.

Persons desiring to charge or dispose of their interests in a property subject to a partition suit can only do so by expressly charging or disposing of the interest to be ultimately allotted to them in the action.

On this view of the question referred, this appeal should be allowed, with costs, in this Court and in the Court below.

ENNIS, SCHNEIDER, and GARVIN JJ., and JAYEWARDENE AJ.—
Agreed.
