

Present: Ennis J. and De Sampayo A.J.

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389—D. C. Colombo, 36,324.

Partition action—Mortgage of land after decree for sale—Mortgage is invalid as against the purchaser under the decree for sale.

A mortgage of land executed after decree for sale under section 4 of the Partition Ordinance and prior to the sale thereunder has no effect as against the purchaser at the sale.

Section 12 of the Ordinance, which enacts that nothing in the Ordinance shall affect the right of any mortgagee of the land which is the subject of the partition or sale, refers to a mortgage effected prior to the commencement of the action, for section 17 expressly prohibits the mortgage of an undivided share during the pendency of the action.

THE facts are stated as follows by De Sampayo A.J. :—

This appeal raises the question whether the mortgage bond in suit in case No. 34,136 of the District Court of Colombo is valid in law as against the defendant. It appears that a certain land belonged in common to four persons named Agnes Abeykoon, Julia Abeykoon, Thomas Wanigesekere, and Stephen Abeykoon, and in an action for partition the Court by its decree dated July 16, 1910, ordered the land to be sold. On July 21, 1910, Agnes Abeykoon and Thomas Wanigesekere, together with two others who were no parties to the partition action and admittedly had no interest in the land, mortgaged the entire land to the plaintiff, but the plaintiff admits in this action that the mortgage was effective only as to an individual half of the land, being the shares to which Agnes Abeykoon and Thomas Wanigesekere were entitled. In pursuance of the decree for sale in the partition action, the land was sold on October 22, 1910, and was purchased by Thomas Wanigesekere himself, and a certificate of sale was issued to him by the Court on March 7, 1912. Before the issue of the certificate, however, Thomas Wanigesekere, as purchaser of the land, sold it on January 28, 1912, to Peter de Saram, who by conveyance dated July 16, 1912, in which Thomas Wanigesekere joined, sold it to the present defendant. In the meantime the plaintiff on March 27, 1912, put the mortgage bond in suit against his mortgagors, and having obtained judgment seized the land in execution on January 24, 1913, when the defendant claimed the same. The claim being upheld, the plaintiff brings the present action, under section 247 of the Civil Procedure Code, to have it declared that an undivided half of the land is liable to be seized, and sold under his mortgage decree.

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Cur. adv. vult.

December 9, 1913. ENNIS J.—

The question for determination in this appeal is whether a mortgage of land executed after decree under section 4 of the Partition Ordinance and prior to a sale thereunder has any effect as against the purchaser at the sale. The facts of the case are fully set out in the judgment of the learned District Judge, who held that the mortgage was not obnoxious to section 17 of the Partition Ordinance, No. 10 of 1863, on the ground that the decree under section 4 of the Ordinance, and not the certificate of sale, was the final judgment in the case, and that the partition action was accordingly not pending when the mortgage was executed.

Section 9 of the Partition Ordinance provides that the decree for partition or sale given as hereinbefore provided shall be good and conclusive against all persons. Decrees for partition or sale are dealt with in section 4, and by section 6 decrees for partition are not absolute until final judgment has been entered. As regards decrees for sale, section 8 makes no express provision for a final judgment, but after providing for a sale and payment into Court, it concludes that "the" certificate of the Court shall be evidence of the title of the purchaser. The Ordinance, however, contains no provisions relating to certificates to which the use of the definite article can be referred. It may, and probably did, refer to the ordinary procedure of the Courts on the sale of land by order of the Court under which a sale of land was not absolute until the confirmation of the sale by the order of the Court subsequent to which the Court issued a certificate. (*Cf.* section 282 *et seq* of the present Civil Procedure Code, No. 2 of 1889.)

If this be so, the decree for sale "given as hereinbefore provided," to which reference is made in section 9, is the ordinary order of Court making the sale absolute. Hutchinson C.J., in *Catherinahamy v. Babahamy*¹, held that the decree for sale referred to in section 9 was the final decree "when the sale is confirmed and completed by certificate of the Court under section 8." All the previous cases were reviewed in the judgment in that case, and the decision is, I consider, binding on us. This being so, the action was still pending at the time of the execution of the mortgage, which is void under section 17. In my opinion there is so substance in the objection that, as the mortgage purported to deal with the entirety of the land, it does not fall within the provisions of section 17; it did in fact deal with undivided shares.

¹ (1908) 11 N. L. R. 20.

No issue with regard to estoppel was raised, neither does it seem to me to arise in this case.

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I would set aside the decree and dismiss the claim with costs.

DE SAMPAYO A.J.—

His Lordship stated the facts, and continued:—

The questions arising from the above state of facts are whether, in view of section 17 of the Partition Ordinance, the mortgage bond of July 21, 1910, in favour of the plaintiff is valid, and whether, at all events, the certificate of sale operates so as to give a preferent right to the defendant as against the plaintiff. It was contended for the plaintiff that the final decree in a partition action, in the case of a sale, was the decree for sale under section 4 of the Ordinance, and that the plaintiff's mortgage, which had been granted five days after the decree for sale, was not touched by the provisions of section 17. I do not think it necessary, even if it were competent for us, to revive the old controversy, as we were invited to do, as to whether in the case of a sale the conclusive decree is the decree for sale or the confirmation of the sale and issue of the certificate. The latter view was taken in *Catherinahamy v. Babahamy*,¹ which therefore concludes the matter against the plaintiff. But, independently of that question, I do not think that the plaintiff's position can be maintained. Counsel for the plaintiff relied on section 12 of the Ordinance, which enacts that nothing in the Ordinance contained shall affect the right of any mortgagee of the land which is the subject of the partition or sale. It was contended that "any mortgage" included the mortgage of an undivided share. That may be so, but it is quite clear that the section refers to a mortgage effected prior to the commencement of the action, for section 17 expressly prohibits the mortgage of an undivided share during the pendency of the action. Nor is the contention tenable that section 17 does not apply, because as a matter of fact the mortgagors purported to mortgage the entire land. The plaintiff himself admits that in reality the mortgage was only of an undivided half of the land. In the case of several co-owners each must be taken to mortgage his share only, so that the bond would contain so many mortgages of undivided shares. Counsel also relied on *Louis Appuhamy v. Punchi Baba*,² which was said to have decided that a mortgage, even of a share of the land, between the date of decree and the date of certificate was valid. The facts are not fully stated in the report of the case, and some difficulty appears to arise from the statement in the judgment that the mortgage was in respect of a "divided portion of land." I had the record of the case sent for, and I find that the entire land was mortgaged, but only an undivided half was sought to be realized, as the plaintiff had

¹ (1908) 11 N. L. R. 20.

² (1904) 10 N. L. R. 196.

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subsequently to the mortgage purchased a half share from the mortgagor by private contract. By the expression "divided portion of land" was evidently meant a distinct *corpus* as distinguished from an undivided share. The mortgage in that case had been effected by the purchaser on the very day of the sale and before the certificate was issued by the Court and the point of the decision appears to me to be that the mortgage of what the purchaser might become entitled to upon the issue of the certificate was not obnoxious to the provisions of section 17, though the learned Chief Justice did hold that the conclusive decree, in the case of a sale was the decree for sale under section 4. The language of section 17 of the Ordinance is at first sight somewhat puzzling. It prohibits any of the co-owners from alienating or hypothecating "his undivided share or interest therein, unless and until the Court . . . shall, by its decree in the matter, have refused to grant the application for such partition or sale." It was argued upon this that, as in this case the Court had by its decree granted the application for sale, the mortgage subsequently created was valid even so as to affect the land after the sale in pursuance of the decree. I think the solution of the apparent difficulty arising from the phraseology of the Ordinance is to be found in the principle that acts of parties should not be allowed to disturb or affect the effectual carrying out by a Court of its own decrees in a partition case. Since before its decree the Court has ordinarily no power to control the acts of parties, the Ordinance supplies the necessary limitation and prohibits all dealing with the land by the co-owners during the pendency of the proceedings. If the Court by its decree disallows the application, then the proceedings come to an end and the parties are restored to their original rights. If, on the other hand, the Court grants the application, then no express legislative provision is necessary to control the acts of the parties. The decree *ipso facto* takes it out of the power of the parties to deal with the subject of the action. Accordingly the Ordinance is silent as to what is the effect of dealings with the land by the co-owners after the decree, and leaves the matter to the operation of the general principle that the Court's decree for partition or sale is paramount. This was the suggestion thrown out by Wendt J. in *Abdul Ally v. Kelaart*¹, and I am content to rest my judgment in this case on this view of the law. It is not even necessary to decide that the plaintiff's mortgage is wholly invalid; it is sufficient to say that it is subject to the final result of the partition action, and must yield to the title created by the Court by the issue of the certificate in pursuance of the sale held under the order of the Court. It was lastly argued that Thomas Wanigsekere, the purchaser, and therefore also the defendant, are estopped from setting up that title against the mortgage. But no issue was raised on that point, and even if raised does not affect the

¹ (1904) 1 Bal. 40.

other mortgagors. Further, it is now settled that the *exceptio* or plea in that respect only affects the original vendor or mortgagor, and not a subsequent purchaser for consideration, like the defendant in this case. Moreover, in the view I have taken of the effect of the sale, no such estoppel would arise. The certificate displaces all previous rights so far as the title to the land itself is concerned. The plaintiff's mortgage might attach to the share of the proceeds sale due to the mortgagors, but the mortgagee has ceased to be an encumbrance on the land in the hands of the defendant.

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I think the appeal should be allowed with costs.

Appeal allowed.
