

Present : Bertram C.J. and Jayewardene A.J.

FALKNER *et al v.* SOYSA.

127—D. C. (Inty.) Colombo, 8,142

*Mortgage action—Sale in execution—Application to stay sale by secondary mortgagee—Party interested in execution—Civil Procedure Code, s. 343.*

An application for the stay of execution proceedings under section 343 of the Civil Procedure Code may be made by a person interested, even though he is not a party to the action. The section applies to execution proceedings under a mortgage action as well.

**A**CTION on a primary mortgage. The secondary mortgagee, who was not a party to the action, applied for a stay of execution proceedings under section 343 of the Civil Procedure Code. He contended that unless the sale is stayed his interests may be prejudiced, urging that the property was already the subject of a partition action and would be sold under that action. It was suggested that, if the sale be postponed until the partition action was disposed of, it was possible that the price realized and allotted to the share, in which both the plaintiffs and himself were interested, would be sufficient to discharge the debt of the plaintiff and leave a surplus available for the satisfaction of his mortgage as well. The District Judge allowed the application subject to certain conditions.

*Garvin*, for plaintiffs, appellant.

*H. V. Perera*, for respondent.

September 12, 1924. BERTRAM C.J.—

This is an appeal from an order of one of the District Judges of the Colombo District Court which, under section 343 of the Civil Procedure Code, orders a stay of execution for six months and certain terms as a condition of that stay of execution. The person applying for the stay of execution is not a party to the action, but is a secondary mortgagee. He intervenes under that section, claiming that unless the sale is stayed his interests may be prejudiced, and urging that the property is already the subject of a partition action, and will almost certainly be ordered to be sold as the result of that action. He and the plaintiffs are interested in one-sixth of the property, and he suggests that it would be most inexpedient that that share should be sold in its present undivided condition, and that, if the sale is postponed until the partition action is disposed of, it may be that the proportion of the price realized and allotted to the share which

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is the subject of the action might not only discharge the debt of the plaintiffs, but leave a surplus available for the satisfaction of his own secondary mortgage.

Two legal objections have been taken to these proceedings. The first is that the petitioner not being a party to the action cannot be heard under section 343. We do not think that this objection can be sustained. There is nothing in the section to prevent a person interested in the matter being heard. On the contrary, it is declared that all persons interested in the matter of the execution should be made parties. If such persons, though not themselves parties, may be made parties for the purpose of the application, there seems every reason why they should be allowed to make the application, if necessary, themselves. It is easy to imagine cases in which the interests of such persons may be very seriously prejudiced unless they were allowed to apply to the Court under this section.

The second objection is that section 343 does not apply to execution proceedings in pursuance of a mortgage action. We are clearly of opinion that this objection also cannot be sustained. It has been held in several decisions of this Court that this section as well as other neighbouring sections, coming as they do under the heading of "general provisions," are not necessarily limited to ordinary execution proceedings. The objections of law, therefore, must, in my opinion, be disallowed.

On the merits, however, I confess that the case is one of some difficulty. We have sent for the partition proceedings, and we find that the defendants are extremely numerous. They have not all been served. We cannot tell what issues are likely to be raised, nor can we conjecture within what time the action is likely to be disposed of. The property is undoubtedly extremely valuable, and there is perhaps some possibility of a surplus being realized if the sale is postponed until the whole property is dealt with under the partition decree. But the plaintiffs are entitled to press for the realization of their security. It is said that one of them is a widow, and is anxious to secure the money due to her. I do not think that we should be justified in postponing the remedies of the plaintiffs under the conditions of the present case, and I would, therefore, with some reluctance, allow the appeal and set aside the order of the learned District Judge, with costs, both here and below.

JAYEWARDENE A.J.—

I agree with the judgment just delivered of my Lord the Chief Justice, particularly with the observations as to the scope and construction of section 343 of the Civil Procedure Code. I also think that the learned Judge had not before him sufficient grounds for staying the sale of the property under the plaintiffs' hypothecary decree.

*Appeal allowed.*