Present: Bertram C.J. and De Sampayo J.

1918.

FERNANDO *et al. v.* FERNANDO *et al.*

212—D. C. Negombo, 12,370.

Partition—Right of a Co-owner and of a Mortgagee not disclosed—Action for damages by mortgagee—Ordinance No. 10 of 1863, s. 9.

Where a plaintiff obtained a partition decree without disclosing the mortgage rights of another person (or the rights of the mortgagor), though he was aware of them—

Held, that the mortgagee was entitled to recover damages from the plaintiff.

THE facts appear from the judgment.

A. St. V. Jayawardene, for the appellants.

Samarawickreme (with him *Croos-Dabrera*), for respondents.

[1] *(1852) 2 De G. M. & G. 886.* [2] *3 Russ. 539.*

November 5, 1918. BERTRAM C.J.—

This is an action under section 9 of the Partition Ordinance, in which the plaintiffs claim damages as mortgagees, on the ground that the defendants, being fully aware of the fact that the plaintiffs' mortgagor had an interest in certain lands which were the subject of a partition action which had been originated by the defendants, and being also aware that they, the plaintiffs, had a mortgage of this interest, fraudulently omitted to disclose both the title of their mortgagor and the mortgage rights of the plaintiffs. It appears that the claim which the defendants originally made in the partition action was to half the land in dispute. They justified their claim under a transfer to them of that share by their predecessor in title. But there is a very strong body of evidence to show that the land was not held in halves but in thirds, and that one of the persons who held one-third of the land and possessed it for a very long time was the plaintiffs' mortgagor, who was a member of the same family as the defendants and claimed by inheritance.

The learned District Judge has very carefully examined the facts, and has given a series of findings. He has nowhere expressly declared that the defendants were fully aware of the title of the plaintiffs' mortgagor, and that they omitted to disclose it through motives of fraud. But we have got to ask ourselves what is the reasonable conclusion to draw from the findings which he has made in coming to a decision ourselves upon this point. Before I address myself to that question, let me briefly refer to the state of the law on the point.

The law is laid down in the judgment of my Brother de Sampayo J. in the case of *Appuhamy v. Samaranayake*.[1] I think it is clear that no action lies under section 9, except upon proof of the breach of a legal duty. The proviso to section 9 does not create fresh remedies, but merely keeps intact such remedies as exist. If a person claims damages under that proviso, he must show that the person against whom he claims them had been guilty of a breach of a legal duty towards him. That legal duty may be sought for outside the Ordinance, or it may be sought for within the four corners of the Ordinance. One of the sections which may originate such a legal duty is section 2, which makes it incumbent upon a plaintiff, when instituting a partition action, to "state the names and residences of all the co-owners and mortgagees and of their respective shares or interests, so far as the said matters or things, or any of them, shall be known to him or them." I think the position must be accepted that a plaintiff is not bound to state the names and residences of persons claiming to be co-owners whose title he in good faith disputes. As it is put in the case just referred to: "I do not think that parties to a partition action will be liable in damages, if they acted *bona fide* in ignorance of the rights of any third party." The principle of that decision seems equally to apply

[1] *(1917) 19 N. L. R. 403.*

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to claims which though known to the petitioning party, are in good faith repudiated.

Now, let us apply that principle to the findings of fact of the learned District Judge in this case. He finds as a fact that Suse, the predecessor in title of Pedurū, the plaintiffs' mortgagor, was allowed to plant up and possess a portion of the land in dispute. He finds as a fact that the second defendant was aware that Peduru's share was mortgaged as claimed by the plaintiffs in this action. He further draws attention to the evidence of witnesses of great weight, who speak to the possession of Peduru. He says that there is no reason to doubt their evidence, and if the facts as he finds them are correct, there can be no doubt that the defendants were perfectly aware that Peduru, the plaintiffs' mortgagor, was living on the land, had partially planted it, and claimed an interest in it. Further, there is evidence to show that there was a dispute between Peduru and the defendants about the same time as the institution of the partition action. Very clear and explicit evidence is given on this point, and this evidence is nowhere explicitly or clearly contradicted. It appears from the evidence of one of the witnesses that that particular dispute was settled by the arrangement of a boundary line. The dispute related to certain coconut trees. The boundary was put up between two rows. Sebastian, that is to say, the second defendant, consented to the settlement.

Now, if these are the facts, and if the mortgagor of the defendants, Peduru, did possess in the manner found by the learned District Judge, I cannot myself reconcile these facts with *bona fides* on the part of the defendants. They justify their action, on the ground that their own conveyance gave them a half share, and that they could not have made Peduru a party without acting entirely inconsistently with their own claim. That is undoubtedly a point in the case. I accept it for what it is worth. But the other points against them are so strong that I must conceive them as simply taking advantage of that circumstance, and not relying upon it in good faith.

We have further to consider the position of Peduru. His action is very difficult to understand, unless we find either that he was acting in collusion with the defendants as originally suggested in the plaint, or else that he was lulled to sleep and induced to forego his claim under the supposition that the matter had been settled. It appears to me that the latter is the more probable alternative. The evidence seems very strongly to point to the fact that there was some sort of settlement, that Peduru imagined that the action had been withdrawn, and that he had informed his mortgagee that the partition action had been started, but that he need not trouble about the matter as it was going to be settled. Taking these to be the facts, I come to the conclusion, in the first place, that, *prima facie*, the plaintiffs have a cause of action under section 9, on the ground that the defendants knowingly omitted to disclose the interests of

Peduru and of the plaintiffs in the partition suit. But it is said that, even accepting that position, the plaintiff has no cause of action, because her husband, whom, as his executrix, she represents, had notice of the partition suit. The defendants for this purpose relied upon the evidence of Peduru himself, who says: "I told the Annavi that a partition case had been filed and had been settled," and they cited in their support a passage from the case which I have previously referred to: "Moreover, if any owner or co-owner himself, who is aware of the pendency of the partition action, abstain from coming forward, I do not know under what principle he can afterwards claim damages." I would, however, distinguish the facts in this case from those contemplated in those observations. Here all that the mortgagee knew in this case was that a partition action had been started, but that it had been settled. The very notification that informed him of the danger in which he might be supposed to be placed informed him also that the danger had been removed. I do not think that, under these circumstances, he can be considered to be guilty of laches, so as to disentitle him, or any one representing him, to the remedy sought in the action. I would, therefore, affirm the decision of the learned District Judge, and dismiss the appeal, with costs.

With regard to the damages, the amount given by the District Judge requires adjustment. The measure of the plaintiff's damages is the value of the security of which she was deprived by the action of the defendants. In this case the mortgage property was more than sufficient, as is admitted by both sides, to cover the whole of the mortgage debt. The measure of the damages is, therefore the amount of the mortgage debt at the time of the disappearance of the security. That the learned District Judge has estimated at Rs. 530, and judgment should, therefore, be entered for the amount.

DE SAMPAYO J.—

In *Anpuhamy v. Samaranayake* [1] I ventured to discuss the various legal points that usually arise for consideration in regard to the interpretation and application of the proviso to section 9 of the Partition Ordinance. To the authorities I referred to in my judgment I may add *Wickremasekera v. Fernando* [2] and *Migel v. Punchi Hamy*,[3] which have been cited by Mr. A. St. V. Jayawardene. Practically the only new feature in this case is that the action is brought by or on behalf of the estate of a mortgagee. By section 2 of the Partition Ordinance the plaintiff is required to state in his plaint, among other particulars, the names and residences of the co-owners and mortgagees. Therefore, apart from the question of the omission of Peduru, the plaintiffs' mortgagor, the plaintiffs in the partition action would have been obliged to mention the mortgagee himself, if, at the time of the filing of the action, they had

[1] *(1917) 19 N. L. R. 403.* [2] *(1895) Matara Cases 19.* [3] *(1897) Matara Cases 21.*

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known of the mortgage. The evidence in this case shows that the first and second defendants, who were plaintiffs in the partition action, were aware of the existence of the mortgage in favour of the plaintiffs' testator. I therefore think that the first and second defendants can be made liable under section 9 of the Partition Ordinance. I agree with the view of the facts stated by my Lord the Chief Justice.

Varied.