1967 *Present :* **T. S. Fernando, Siva Supramaniam and Samerawickrame, JJ.**

M. R. DON PEIRIS, Appellant, *and* M. P. C. MARASINGHE, Respondent

S. C. 10/65—D. C. Kurunegala, 1598/L.

Trusts Ordinance (Cap. 87)—Section 93—" Notice "—" Property "—Relevant date of " existing contract "—Partition action—Agreement, pending the action, to transfer future interests in the corpus—Effect—Specific performance.

Section 93 of the Trusts Ordinance reads as follows :—

" 93. Where a person acquires property with notice that another person has entered into an existing contract affecting that property, of which specific performance could be enforced, the former must hold the property for the benefit of the latter to the extent necessary to give effect to the contract :

Provided that in the case of a contract affecting immovable property, such contract shall have been duly registered before such acquisition. "

Held, (i) that due registration of an agreement to sell land is of itself notice, within the meaning of the Section, to a person who acquires the land subsequent to such agreement.

(ii) that the expression "property" in the Section includes rights on a usufructuary mortgage of immovable property.

During the pendency of a partition action, A and B, two of the co-owners, agreed on 20th September 1956 to sell to C the shares that would be allotted to them under the final decree. The agreement was duly registered. Subsequently, before final decree was entered, A and B mortgaged their interests in the corpus to D in the form of two usufructuary mortgage bonds, the mortgagors expressly undertaking thereby "to allow the mortgagee, his attorney, heirs executors administrators or assigns to possess the premises in lieu of interest". After final decree in the partition action was entered, the shares which were allotted to A and B were transferred by them to C in accordance with the agreement of 20th September 1956. In the present action C sued D claiming declaration of title to those shares and D's ejectment therefrom.

Held, that C was entitled to the protection of section 93 of the Trusts Ordinance. In determining whether there was an existing contract of which specific performance could be enforced the relevant date or dates were the respective dates of the execution of the two mortgage bonds.

APPEAL from a judgment of the District Court, Kurunegala.

H. W. Jayewardene, Q.C., with *D. S. Wijewardene* and *G. S. Marapone*. for the plaintiff-appellant.

W. D. Gunasekera, with *W. S. Weerasooria,* for the defendant-respondent.

Cur. adv. vult.

February 11, 1967. T. S. FERNANDO, J.—

This appeal came before us for hearing following upon a disagreement between the two judges before whom it was first listed. It raises questions relating to the interpretation of section 93 of the Trusts Ordinance (Cap. 87), and the facts relevant to the determination of these questions are as set out hereunder.

Four persons, Adelaide Stainwall, Agnes Landers, John Pavey and Letitia Pietersz who were parties to partition action No. 10627, as evidenced by notarial agreement P1 of 20th September 1956, agreed to sell to the plaintiff and the plaintiff agreed to purchase within three months of the entering of final decree in the said action all their interests in the land the subject matter of that action. P1 was duly registered,

and no question arises here in regard to correctness or priority of registration. Final decree was entered on 5th March 1963, and the first three of the vendors named in agreement P1 were declared entitled to the divided lots 2, 3 and 4 respectively in partition plan No. 1765. Letitia Pietersz was not allotted any interests under that decree. These lots were thereafter conveyed to the plaintiff by the three vendors concerned by transfer deed P4 of 6th April 1963, i.e., within the time specified in agreement P1. The vendors declared in P4 that the three lots were free from all encumbrances whatsoever.

After the date of the agreement P1 and before either final decree was entered or transfer P4 was executed one of the three vendors, Adelaide Stainwall, named in P4 mortgaged to the defendant her interests in the land in respect of which the partition action was pending, receiving from the defendant a sum of Rs. 500 and executing therefor mortgage bond D1 of 20th April 1961. Another of the aforesaid vendors, John Pavey, also similarly mortgaged to the defendant his interests in the same land. Pavey received from the defendant a sum of Rs. 1,000 and executed in the latter's favour mortgage bond D2 of 6th July 1961. Both D1 and D2 were usufructuary mortgage bonds, the mortgagors expressly undertaking thereby " to allow the mortgagee, his attorney, heirs executors administrators or assigns to possess the premises in lieu of interest." D1 and D2 were also duly registered, but, of course, subsequent to the registration of P1.

After the signing of transfer P4, the plaintiff appears to have been placed in possession of the said lots 2, 3 and 4 by the Fiscal acting in execution of a writ of possession issued in the partition action for the purpose of placing in possession the three vendors named in P4. In regard to this event, the learned district judge has stated that the plaintiff had no right to be placed in possession in that way by ejecting the defendant who had been there by virtue of the usufructuary bonds D1 and D2 in his favour. The ejectment of the defendant in that way was improper and the tactics adopted by the plaintiff were undoubtedly questionable. However, the defendant regained possession of lots 2 and 4 on 16th August 1963, and the plaintiff would have it that he did so forcibly. The present action came to be filed in consequence of the regaining by the defendant of possession of these two lots. There is now no dispute in respect of lot 3 which did not belong to either of the mortgagors who executed D1 and D2.

The law regarding the validity and effect of transactions relating to interests in land during the pendency of partition proceedings was considered by a bench of three judges of this Court in *Sirisoma v. Sarnelis Appuhamy* [1], and that bench, in laying down certain propositions as settled law, stated *inter alia*,

" If such an instrument is in effect only an agreement to alienate or hypothecate a future interest, if and when acquired, no rights of ownership, or hypothecary rights (as the case may be) pass to the

[1] *(1950) 51 N. L. R. 337.*

grantee upon the acquisition of that interest by the grantor *unless and until the agreement has been duly implemented* ; if, without implementing this agreement, the grantor conveys to a third party the rights which he has acquired under the decree, the competing claims of that third party and of the original grantee must be determined with reference to other legal principles such as the application of section 93 of the Trusts Ordinance."

Now, section 93 of the Trusts Ordinance enacts that where a person acquires property with notice that another person has entered into an existing contract affecting that property, of which specific performance could be enforced, the former must hold the property for the benefit of the latter to the extent necessary to give effect to the contract. In the case of *Silva v. Salo Nona* [1], this court held that due registration of an agreement to sell land is of itself notice, within the meaning of section 93 of the Trusts Ordinance, to a person who acquires the land subsequent to such agreement. The trial judge, in holding against the plaintiff, has been influenced by the opinion he has formed that the expression " property " in section 93 cannot include rights on a mortgage. If this opinion is correct a mortgagee is in a more advantageous position than even a transferee. On behalf of the plaintiff it has been contended that this opinion is erroneous, and, indeed, that it was erroneous was not seriously disputed by learned counsel for the defendant.

Confining myself to the case before me, we have here not merely a mortgage of immovable property in favour of the defendant, but a usufructuary mortgage at that, the mortgagor undertaking to allow possession of the land and actually giving over possession to the mortgagee.

We were referred to Voet's Classification of Things in Book 1, Title 8, section 27 (1 Gane's transl. p. 172) as indicating that the only dispute in regard to debts, whether carrying interest or not, supported by hypothec of immovables was whether they were to be considered movable or immovable, not that they were not within the classification of things or property. The nature of the rights of a usufructuary mortgagee is set out by Voet in Book XX, Title I which deals with the Contract of Pledge and Hypothec. In section 23 (see 3 Gane's Translation, p. 499), the *pactum antichreseos* is described as follows :—" But an agreement of *antichresis* is particularly approved in mortgages. It is arranged by such agreement that the creditor shall use the mortgaged property in place of interest until the debt has been paid, whether he wishes himself to reap the fruits or advantages by living in the house or by tilling the farms, or to let them out to others. So much is this so that if he has lost possession before the debt has been fully paid he can either follow up the property put under obligation in a hypothecary action in accord with the common nature of hypothecs, or can employ an action *in factum* to recover his *antichresis* or the reciprocal use of the mortgaged property in return for his advance." I am of opinion that the contention of plaintiff's counsel is correct, and that when the defendant entered into

[1] *(1930) 32 N. L. R. 81.*

possession of lots 2 and 4 by virtue of bonds D1 and D2 he acquired property within the meaning of section 93 of the Trusts Ordinance. I might here add that, in the case of *Kameswaramma v. Sitaramaniya* [1], the High Court of Madras has held that where a mortgagee, at the time of his mortgage, is aware of circumstances which ought to have put him on enquiry, and such enquiry, if made, would have revealed the existence of an agreement by the mortgagor to mortgage the property to a third party, the mortgagee's rights will, on the principles embodied in section 40 of the Transfer of Property Act and section 91 of the Trusts Act (same as section 93 of our Trusts Ordinance) be postponed to the rights of such third party.

Learned counsel for the defendant endeavoured to support the judgment appealed against by arguing that section 93 had no application in that, (i) P4 having been executed before action was filed, there was therefore no contract thereafter existing of which specific performance could have been enforced and (ii) the defendant being obliged to hold the property for the benefit of the plaintiff only to the extent necessary to give effect to the contract, and the contract having been performed by the execution of P4, no question of necessity to give effect to the contract remained. He relied on certain decisions of the Indian Courts, but it becomes unnecessary to examine them here as in determining whether there was an existing contract of which specific performance could be enforced the relevant date or dates in this case were the respective dates of the execution of D1 and D2. As at those dates there existed contract P1 of which specific performance could have been enforced. As for the contract having been performed by the execution of P4, the argument overlooks the fact that the contract evidenced by P1 was a contract to transfer title free from encumbrances and not a title subject to D1 and D2. I am unable to uphold the argument for the defendant. The plaintiff was, in my opinion, entitled to the protection of section 93 of the Trusts Ordinance. It follows that D1 and D2 cannot prevail over P4, and the plaintiff was entitled to possession as against the defendant.

The decree appealed against is hereby set aside. Let a fresh decree be entered in favour of the plaintiff declaring him entitled to the lands described in the first and third schedules to the plaint and ordering the ejectment of the defendant therefrom, and incorporating therein also an order for damages as from 16th August 1963 till restoration of possession to the plaintiff in such sum as may be determined by the District Court, after further evidence, if necessary. The defendant must pay the plaintiff the costs of the trial and of this appeal.

SIVA SUPRAMANIAM, J.—I agree.

SAMERAWICKRAME, J.—I agree.

Decree set aside.

[1] *(1905) 29 I. L. R. (Madras) 177.*