

1942

Present : Howard C.J. and Soertsz J.

AIYATHURAI *v.* THURAISINGHAM *et al.*

24—D. C. Jaffna, 22,284.

Conveyance in mortgage action—Sale of undivided shares in mortgaged property—Partition action pending sale—Allotment of divided portions to mortgagors—Application by purchaser for writ of possession—Rectification of deed.

In execution of a mortgage decree, the appellant purchased the property mortgaged, an undivided 2/5 share of a land, and a conveyance was executed by the Commissioner in favour of the appellant on November 5, 1940.

While the mortgage action was pending an action was instituted to partition the land mortgaged, to which the mortgagors were parties. In the final decree entered on August 29, 1940, a year after the sale of the land to the plaintiff, certain divided lots were allotted to the mortgagors in lieu of their undivided shares, subject to the decree entered in the mortgage action.

On February 6, 1941, the appellant moved the District Court to issue writ to the Fiscal to deliver the divided lots to the appellant. The respondents, the mortgagors, opposed the application.

Held, that the appellant was entitled to have his conveyance rectified by the substitution of the divided lots in place of the undivided shares and to an order for the delivery of the said divided lots to him.

Markar v. Siman (1 *Matara Cases* 9) followed.

Mudalihamy v. Appuhamy (36 *N. L. R.* 33) distinguished.

A PPEAL from an order of the District Judge of Jaffna.

H. V. Perera, K.C. (with him S. Saravanamuttu), for the purchaser, appellant.

No appearance for the respondent.

Cur. adv. vult.

June 29, 1942. HOWARD C.J.—

This is an appeal from an order of the Additional District Judge of Jaffna, dismissing an application by the appellant, the purchaser, under a mortgage decree entered in the case to have his conveyance rectified by the substitution of divided lots in lieu of undivided lots of the land sold. A certain P. Sinnatamby Aiyathurai, the assignee and substituted plaintiff in the case, was entitled to all rights and title and interest in a

mortgage decree obtained by the original plaintiff in respect of an undivided two-fifth share of certain land belonging to the respondents. On October 14, 1939, on a commission issued by the District Court of Jaffna in execution of the said decree, the said two-fifth share belonging to the respondents was sold by the Commissioner to the appellants. On application made to the District Court to have the sale confirmed, an objection taken to such confirmation was raised by the respondents and the sale was set aside. On appeal to the Supreme Court the order of the lower Court was set aside and the sale confirmed on October 30, 1940. A commissioner's conveyance, dated November 5, 1940, was executed in favour of the appellant. Whilst the mortgage action was pending, case No. 11,072 of the District Court of Jaffna was filed to partition the said land amongst the various co-owners. In that action, the first and second defendants were the respondents in this appeal. The final partition decree was entered on August 29, 1940, about a year after the sale of the two-fifth share in the land to the appellant. By the said partition decree, lots 4 and 5 were allotted to the respondents, subject to the mortgage decree in favour of the said P. Sinnetamby Aiyathurai, the mortgage decree holder, in lieu of their undivided two-fifth share. On February 6, 1941, the appellant moved the District Court to issue writ to the Fiscal to deliver possession of lots 4 and 5 to the appellant. The respondents objected to the delivery of possession of the entirety of lots 4 and 5 and contended that possession could be given of only two-fifth share of the said lots. On September 4, 1941, the appellant moved the District Court that an endorsement might be made on the said conveyance, substituting the words, "lots 4 and 5 according to Final Partition Plan in case No. 11,072 of the District Court of Jaffna", in place of "an undivided two-fifth share of the land". The appellant further moved that after the said endorsement the writ should be re-issued to the fiscal to deliver possession of the said lots 4 and 5 to the appellant.

In refusing the application of the appellant, the learned Judge seems to have arrived at the conclusion he did on the ground (a) that inasmuch as the Supreme Court had not confirmed the sale of divided lots, it was not competent for the District Court to make the amendments desired and (b) that the matter in issue was set at rest by the case of *Mudalihamy v. Appuhamy*¹. In that case the plaintiff took on mortgage an undivided two-third share of two contiguous fields in October, 1927. In January, 1930, the defendant brought a partition action, treating the two fields as one *corpus*. Final decree was entered in the action, declaring the plaintiff's mortgagor entitled to a half share only of the fields and lot A was allotted to her. In January, 1931, the plaintiff put his bond in suit and purchased the undivided shares mortgaged to him at the sale in execution of his decree, obtaining a Fiscal's transfer, dated January 25, 1932. Prior to that date the defendant took out writ against the plaintiff's mortgagor for *pro rata* costs due to him and became the purchaser of lot A, obtaining Fiscal's transfer, dated April 17, 1931, in his favour. It was held by Dalton J. and Maartensz A.J. that (in an action brought by the plaintiff for declaration of title to lot A) he was entitled to two-third share of the lot. The plaintiff in this case, before he obtained the decree in the

¹ 36 N. L. R. 33.

mortgage action, was fully aware that the land had been partitioned and that his mortgagor's interest at the time when he put the bond in suit was not an undivided two-third share but only an undivided half share in the lands. This fact, to my mind, is in itself sufficient to distinguish the case of *Mudalihamy v. Appuhamy* (*supra*) from the present case, where the appellant purchased the undivided share of the respondent on October 14, 1939, at a time when their interests were undivided shares and about a year before decree was entered in the partition action. Moreover, another distinction in the facts of the two cases arises from the fact that in the present case it is the mortgagors in the mortgage action who are disputing the right of the appellant, the purchaser at the sale, to take the interests allocated to them by the partition action, whereas in *Mudalihamy v. Appuhamy* (*supra*) it was a third party, namely, the plaintiff in the partition action, who was claiming the property in order to recover from the mortgagor her *pro rata* share of the costs in that action. For the reasons I have given, I have come to the conclusion that *Mudalihamy v. Appuhamy* (*supra*) has no application and was wrongly applied by the learned Judge to the facts of the present case.

The appellant, both in this Court and in the District Court, has relied on the case of *Markar v. Siman*¹. The facts in this case were as follows. A certain Don Siman was a party to a partition suit in respect of land, on three-fourth of which a mortgage had been created in favour of the plaintiff. On June 8, 1888, it was adjudged that Don Siman was entitled to an undivided half of the said land and no more. In July, 1888, the plaintiff obtained a decree against Don Siman and under the writ in execution of the said decree purchased, in September, 1888, an undivided half share of the land in question. Subsequent to this judicial sale the land was partitioned and on May 17, 1889, the Court by its decree confirmed the apportionment of the western half of the said land as the said Don Siman's share. On July 11, 1892, the plaintiff obtained a Fiscal's transfer, which purported to convey to him an undivided half share of the land in question, such being the nature of the share to which the judgment-debtor was at the time of the said auction entitled to. In the course of the partition proceedings, the defendant had recovered costs against the said Don Siman and in execution of the order for costs he took out writ and seized the half of the land which had been apportioned to his debtor, Don Siman. The plaintiff brought an action under section 247 of the Civil Procedure Code to establish his right to the western half of the land which the defendant had seized under his writ. The Court, constituted by Lawrie A.C.J. and Withers J., held that, by virtue of section 12 of the Partition Ordinance, the right of a mortgagee is conserved to him with the necessary qualifications attended on the conversion of an undivided into a separate share. It is deemed to be incorporated with the bond and the owner of the allotted share is to warrant and make good to the mortgagee the said several parts after such partition as he was bound to do before. The plaintiff was, therefore, declared to be entitled, by virtue of the sale under his mortgage decree and the provisions of section 12 of the Partition Ordinance and nothing having occurred to affect the rights of third parties, to the western

¹ 1 *Matara Cases* 9.

half of the land in question. By way of further relief the Court directed that the decree should be endorsed on the Fiscal's transfer. The learned District Judge distinguished the facts of this case from those in the Matara case on the following grounds:—

- (1) The Matara case, deals with a Fiscal's sale and Fiscal's transfer.
- (2) The question did not arise in that case as to whether a fraction or the entirety of the lands should be proceeded against.
- (3) That case did not decide the particular point raised in this case.
- (4) Whilst mortgagees are protected by section 12 of the Partition Ordinance, such protection does not extend to purchasers at sales.

In the present case, the District Judge on November 9, 1938, issued a commission to one N. Kandiah to sell the two-fifth share of the land in question. A commissioner's conveyance of the two-fifth share was executed in favour of the appellant on November 25, 1940. By virtue of section 289 of the Civil Procedure Code, a Fiscal's sale subsequently confirmed vests the property in the purchaser from the time of sale and in this respect such a sale differs from a sale by commission. This difference, however, does not in my opinion affect the question at issue in the present case. The other reasons given by the learned Judge for holding that *Markar v. Siman (supra)* had no bearing on the present case depend on the meaning to be given to section 12 of the Partition Ordinance. The position of a person who purchases in execution the undivided interests of a party pending partition proceedings, but obtains his Fiscal's conveyance after final decree is considered in *Jayawardene on the Law of Partition in Ceylon* on pp. 229-300. The learned author is of opinion that the purchaser is entitled to the share allotted to the judgment-debtor, but expresses doubt as to how the Fiscal's purchaser is to claim the divided lot on his conveyance for an undivided share. He also considers that, unless the Fiscal's conveyance can be altered to a conveyance for the divided block, the purchaser is in danger of losing his rights to an alienee from the execution-debtor. In the present case, there is no question of an intervention by a third party claiming rights as an alienee of the execution-debtor. It is the execution-debtor who is setting up his own rights against those of the purchaser. Can the purchaser at a sale in execution occupy a worse position than a mortgagee? In this connection it must be borne in mind that the mortgagee in *Markar v. Siman (supra)* was claiming rights as purchaser at the Fiscal's sale. In my opinion, the facts in this case cannot be distinguished from those in *Markar v. Siman (supra)*. I am, therefore, of opinion that the appellant is entitled to the relief which he claims. The order of the Additional District Judge, dated December 10, 1941, is set aside. It is further ordered that an endorsement be made on the commissioner's conveyance, dated November 25, 1940, substituting "Lots 4 and 5" in place of the words "an undivided two-fifth share of the land". The District Court is directed to deliver possession of the said lots to the appellant, who is awarded costs in this Court and the District Court.

SOERTSZ J.—I agree.

Appeal allowed.