

1936

Present : Akbar S.P.J. and Koch J.

MURUGAPPA CHETTY v. ALPISINGHO *et al.*

417—D. C. Colombo, 27,787.

Mortgage action—Mortgage of shares to be allotted in partition action—Lease pending action—Mortgage subject to lease—Ordinance No. 10 of 1863, ss. 12, 13, 17.

The first and second defendants mortgaged with the plaintiff, during the pendency of a partition action the shares of the land to which they would be declared entitled under the decree in the action. Thereafter they executed a lease of their undivided interests to the third defendant, also during the pendency of the partition action.

Held (in an action brought by the plaintiff to enforce the mortgage), that the mortgage was subject to the lease in favour of the third defendant.

PLAINTIFF instituted this action against the first and second defendants to recover a sum of Rs. 4,000 and interest on a mortgage bond dated March 26, 1924. The defendants by the bond mortgaged with the plaintiff all that share and portion of the whole land which they shall be declared entitled to in a partition action and all that share of the proceeds of sale of the said land in the event of a sale.

An action for the partition of the land had been instituted at the date of the mortgage but neither interlocutory decree nor final decree had been entered therein.

The third defendant was made a party to this action as he had obtained a lease from the first and second defendants on June 23, 1927, which was also executed pending the partition action.

H. V. Perera (with him *E. B. Wikramanayake*), for third defendant, appellant.—The mortgage pending a partition action of the share to be ultimately allotted to the mortgagor in the final decree creates no real right in the land. If it did, such right would be wiped out by the final decree. It is merely an agreement to mortgage (*Fernando v. Atukorale*¹). A lease pending a partition action is not obnoxious to the provisions of section 17 (*Kirihamy v. Mudiyanse*², *Appuhamy v. Nonis*³). This lease of an undivided share would operate from the date of its execution. Under section 13 the lease would attach to the share allotted to the mortgagor in severalty immediately final decree was entered. Therefore when the mortgage came to be attached to the land allotted to the mortgagor it would already be subject to the lease which would therefore have priority over the mortgage.

N. E. Weerasooria (with him *T. S. Fernando*), for plaintiff, respondent. It was held by the Full Bench in *Khan Bhai v. Perera*⁴ that persons desiring to charge or dispose of their interests in a property subject to a partition suit can only do so by expressly charging or disposing of the interest to be ultimately allotted to them in the action. This is not *obiter*. The mortgage creates a real right. It would attach to the lot allotted

¹ 28 N. L. R. 292.² 23 N. L. R. 272.³ 23 N. L. R. 415.⁴ 26 N. L. R. 204.

to the mortgagor directly final decree was entered. Section 12 is not confined to mortgages executed before the filing of the action. It would include a case such as this. The mortgage deed is prior in date and is registered. The lessee has notice of it. The mortgage document is not a mere agreement to mortgage. It is an effective mortgage. (*Rajapakse v. Dassanayake*¹.)

Cur. adv. vult.

H. V. Perera, in reply.

May 20, 1936. AKBAR S.P.J.—

In this appeal the question relating to the validity of alienations and hypothecations pending partition proceedings has arisen, a question on which there are a number of conflicting decisions by the Supreme Court.

The plaintiff-respondent instituted this action for the recovery of Rs. 4,000 and interest said to be due to him from the first and second defendants on a mortgage bond dated March 26, 1924. The third defendant-appellant was made a party to this action as he had obtained a lease from the first and second defendants on June 22, 1927. This mortgage action was brought on May 9, 1928, at which date a partition case (D. C. 5,256) relating to the land mortgaged was then pending. This partition case was instituted so far back as June 14, 1922, but the final decree was not entered till February 6, 1928. It will be seen that at the date of the mortgage (March 26, 1924), the partition case had already been instituted but neither interlocutory decree (November 23, 1925), nor final decree had been entered.

The mortgage bond, however, did not hypothecate undivided interests of the first and second defendants in the land which was the subject-matter of the partition case but what it did mortgage was all that share or portion of the whole land which they shall be declared entitled to in the partition action and all that share of the proceeds of sale of the said land as they shall be declared entitled to in the event of a sale in the partition action. It will thus be seen that the mortgage bond was not affected by section 17 of the Partition Ordinance.

Under section 17 of Ordinance No. 10 of 1863 what is prohibited is the alienation or hypothecation by any owner of an undivided share or interest in the land which is the subject of the partition action pending the case.

Under section 12 of the Ordinance nothing in the Ordinance is to affect the right of "any mortgagee of the land" which is the subject of the partition or sale, and the proviso to it provides that if the mortgage was of an undivided interest the mortgage is to attach to the share in severalty allotted to the mortgagor under the action. This section in view of the prohibition in section 17, can only refer to a mortgage executed prior to the partition action—nor can section 12 relate to the kind of mortgage held by the plaintiff in this case, for this mortgage was a mortgage of whatever interest the mortgagors may be allotted under the decree in the partition case. The opening words of section 12 that nothing shall affect the right of any mortgagee of the land which is the subject of the partition or sale cannot therefore relate to a mortgage like the plaintiff's in this case even though section 17 does not affect his mortgage.

¹ 29 N. L. R. 509.

In the case of the third defendant's lease (D 1), however, the position is different. By two decisions of the Supreme Court (*Kirihamy v. Mudiganse*¹ and *Appuhamy v. Nonis*²) a lease pending a partition case was held not to be an alienation within the meaning of section 17 of the Ordinance. The two cases are exactly in point and are binding on me. As a matter of fact, if I may say so with respect, I agree with the reasons given by Ennis J. and I am not prepared to disagree with those decisions on the judgment reported in *Carron v. Fernando*³, which only decided that a notarial lease created a real right in the land and did not purport to interpret section 17 of the Partition Ordinance. Under section 13 of the Ordinance immediately the decree was entered the lot given to the first and second defendants became subject to the leasehold rights created by D 1. As the plaintiff's mortgage was over the shares to which the first and second defendants were to be declared entitled to under the partition decree, the mortgage bond became subject to the lease of the third defendant appellant. The fact that first and second defendants' interest under the partition was sold under a Fiscal's sale and bought by the third defendant on July 20, 1929, during the pendency of this action but long after its institution on May 9, 1928, does not affect the position, because this case has to be decided as to the rights of the parties at the date of this action. Moreover, there is a definite issue (No. 4) on the point and no question of merger was raised on the issues. As a matter of fact issue No. 8 which was suggested by plaintiff's counsel was framed so as to exclude the appellant's Fiscal transfer from consideration in this case.

It follows from what I have said that the appellant must succeed in this appeal, but as a reference was made to the cases bearing on the point and respondent's counsel argued that on those decisions the plaintiff's mortgage must be regarded as a right which vested at the date of the mortgage, and therefore must have priority over the later lease, I will state here briefly the real effect of these judgments. As a matter of fact as I have already said the mortgage was of the share which would be allotted by the partition decree to the first and second defendants, which can only mean a mortgage over the actual rights in the share allotted to the first and second defendants to which they would be entitled to as a result of the partition decree. In other words the plaintiff's mortgage would be over the share allotted to the first and second defendants with all the obligations, rights, and duties imposed on the share by the Partition Ordinance. If there was a servitude imposed on the share so allotted the mortgage will be subject to the servitude. Similarly here it will be subject to the lease, as a result of section 13.

The earliest case on the point seems to be that of *Louis Appuhami v. Punchi Baba*⁴. That was a case where the plaintiff sought to enforce a mortgage given to him by the defendant in respect of a divided portion of land which was a part of a larger land, the subject of a partition suit. The mortgage was executed after the decree for sale in the partition action but before the certificate of sale was issued. The Chief Justice held that the mortgage was valid as it was after the decree for sale.

¹ 23 N. L. R. 272.

² 23 N. L. R. 415.

³ 13 C. L. Rec. 124.

⁴ 10 N. L. R. 196.

The Chief Justice also held that section 17 did not affect a sale or mortgage executed during the pendency of a partition case in respect of a share or interest to which a person may become entitled after the partition suit had terminated. Mr. Justice Moncrieff agreed with this part of the Chief Justice's judgment. In *Subaseris v. Prolis*¹, Wood Renton A.C.J. held that a deed of sale conveying the vendor's share which he would be entitled to either in common or partition, after interlocutory decree but before final decree, was not rendered void by section 17 as that section only prohibited the alienation of undivided interests or shares in property pending partition proceedings.

This was the only question argued and if I may say so with respect I am in full accord with the Chief Justice's judgment. The point that was raised in the later cases of *Perera v. Alvis*² and *Appuhamy v. Babun Appu*³ was not argued before Wood Renton A.C.J. in *Subaseris v. Prolis* (*supra*) and in fact it did not arise in that case. In the two former cases the Court held that section 17 would apply even when a defined lot was conveyed or mortgaged pending partition proceedings if the vendor had, as a matter of fact, only an undivided interest or share in the divided lot sold or mortgaged at the date of the deed of sale or mortgage. It will be seen that these cases do not affect the mortgage before me, because what was mortgaged was the share that the first and second defendants would be entitled to under the partition action.

In the Full Bench case *Khan Bhai v. Perera*⁴, the point the Court did decide was that the prohibition against alienation or hypothecation in section 17, where the Court decrees a sale, continued until the issue of the certificate of sale under section 8 of the Partition Ordinance. As Maartensz J. pointed out in *Fernando v. Atukorale*⁵, the further expression of opinion of the C.J. that "persons desiring to charge or dispose of their interests in a property subject to a partition suit can only do so by expressly charging or disposing of the interest to be ultimately allotted to them in the action" was *obiter*. This expression of opinion can only mean that section 17 would not affect a disposition drawn up in the terms mentioned and the learned Chief Justice did not mean to lay down all the law on the subject.

In *Appuhamy v. Babun Appu* (*supra*), for instance, Ennis, Acting Chief Justice, interpreted the remarks of Wood Renton A.C.J. in *Subaseris v. Prolis* (*supra*) in the sense in which I have done. Lyall Grant J. in *Fernando v. Atukorale* (*supra*) also came to the same conclusion.

Ennis A.C.J. and Lyall Grant J. construed the transfer of shares to be allotted under the partition decree pending the action as agreements to transfer.

There only remain two more cases to be mentioned and they are *Hewawasan v. Gunasekere*⁶, which was unfortunately not cited at the argument of *Fernando v. Atukorale* (*supra*) and *Rajapakse v. Dassanayake*⁷. In *Hewawasan v. Gunasekere* (*supra*) after interlocutory decree a

¹ 16 N. L. R. 393.

² 17 N. L. R. 135.

³ 25 N. L. R. 370.

⁴ 26 N. L. R. 204.

⁵ 28 N. L. R. 292.

⁶ 28 N. L. R. 33.

⁷ 27 N. L. R. 509.

commission was issued to survey, and a survey was made by which it was proposed to allot certain lots to the defendant in the final decree. Before final decree was entered by which these same lots were allotted the defendant transferred these lots to the plaintiff with an undertaking to execute any further deeds, &c., which may be necessary to assure more perfectly the premises to the purchaser. Garvin and Dalton JJ. (Jayawardene J., dissenting) held that the transaction was not obnoxious to section 17 and effect could be given to it as between the parties. Dalton J. held further that on the doctrine of the *exceptio rei venditae et traditae* the title to the lots vested in the purchaser. It will be seen from the remarks of Lord Phillimore in *Gunatilleke v. Fernando*¹ that under this *exceptio* it was the purchaser who had got possession of the land sold, either actual physical possession or symbolical, who could rely upon a title subsequently acquired by the vendor, not only against the vendor but against any one claiming from the vendor.

In the case of *Hewawasan v. Gunasekere (supra)*, as the share sold was a defined specific lot, possession was possible. But if the sale had been of whatever share the vendor may be declared entitled under the partition decree, possession of that problematic share would not have been possible and the doctrine of the *exceptio* would seem to be inapplicable. This doctrine would only apply to sales and not mortgages.

In *Fernando v. Atukorale (supra)*, the decision of the Supreme Court in *Hewawasan v. Gunasekere (supra)* is not referred to, but Lyall Grant J. held that a sale of shares to be allotted in the partition action pending the action although not obnoxious to section 17 would be no more than an agreement to sell. Maartensz J. held that section 9 of Ordinance No. 10 of 1863 wiped out such a sale. One difference between these two cases was that in 28 N. L. R. 33 it was an action between the parties to the contract whereas in the other case, the contest was between a third party and the vendor. In *Rajapakse v. Dassanayake (supra)* the Supreme Court held that a deed of sale of whatever lot or lots the vendor would be entitled to under the partition decree pending the action was not obnoxious to section 17 and it was a case between the vendor and vendee. It will thus be seen that the principles of law on which I have come to the conclusion that the third defendant-appellant is entitled to succeed in this appeal are in no way inconsistent with the decisions on the point. Indeed, if effect is given to those decisions in which it was held that a mortgage of this kind would be nothing more than an agreement to mortgage, this will be an added reason why the appellant should succeed in this case.

The appeal is allowed with costs in this Court and the Court below.

KOCH J.—

The facts are briefly and concisely set out in my brother's judgment. The one point to be decided on this appeal is whether the mortgagee's rights on a bond that was executed by the first and second defendants

¹ 22 N. L. R. 385.

take priority over the lessee's rights on a lease that was subsequently executed by the same executants. Both transactions took place during the pendency of partition proceedings that were instituted in respect of a land of which the first and second defendants were co-owners and which proceedings terminated in a final decree. On a careful perusal of the Partition Ordinance, No. 10 of 1863, and after giving effect to the connection between the various sections, it will be generally seen that while the unqualified mortgage of immediate undivided interests executed by a co-owner during the pendency of proceedings under the Ordinance is null and void, a lease, on the other hand, executed under similar conditions is effective, provided such lease is considered not to be an alienation as contemplated by section 17. I agree with my brother's view that section 12 read in conjunction with section 17 refers only to such mortgages as have been executed prior to the institution of a partition action, and I am of opinion that by reason of the peculiar wording of section 13 a lease by a co-owner can effectively be made during partition proceedings. There is, in addition, judicial precedent in favour of the validity of such a lease for the reason that leases cannot be regarded as alienations under section 17. (*Kirihamy v. Mudiyanse*¹ and *Appuhamy v. Nonis*².) If then a mortgage executed during partition proceedings is to be valid, it must be something different in type and nature from that contemplated in section 17.

The mortgage in question is not of presently existing undivided interests but of such interests that the mortgagor may be declared entitled to under the final decree for partition or sale. The bond of mortgage therefore comes to be imposed on the interests dealt with only at the moment when final decree is entered and not till then. Till such time, there is only a contract to secure a mortgage of such interests. Any attempt on the part of the mortgagee to differentiate his position from what I have stated, is to bring him closer within the ban that is set out in section 17 and to render his claim unrecognizable in law. The more substantiality he claims for the contract in his favour, the nearer he brings that contract within the prohibition prescribed in section 17 and the more he identifies his interests with those contemplated under that section.

I cannot help but feel that the various decisions my brother has referred to, which recognize the validity of a mortgage such as the present mortgagee holds, proceed on the view I have taken. I therefore agree with my brother that the mortgage in favour of the respondent is subject to the lease in favour of the third defendant-appellant.

It is needless for me to refer in detail to the many authorities that have been cited to us in the course of the argument, as my brother has discussed them fully.

The appeal must be allowed with costs in both Courts.

Appeal allowed.

¹ 23 N. L. R. 272.

² 23 N. L. R. 415.