

**1974 Present : Rajaratnam, J. Wijesundera J. and
Vythialingam, J.**

HANIFFA, Appellant and ABDUL WAHAB, Respondent.

S.C. 244/71 (F)—D.C. Kandy, M.B./4652.

Mortgage Action—Mortgage of an undivided share of land—Assignment of mortgage after institution of partition action—Applicability of section 67 of the Partition Act.

Where an undivided share of a land is mortgaged prior to the institution of a partition action but the interests under the mortgage bond are assigned after the institution of the partition action.

Held : That the assignment is valid and it is not a voluntary alienation of any interest of or in the land ; and section 67 of the Partition Act has no application.

Per—Vythialingam, J.

“When a mortgagee assigns his rights under the mortgage bond he transfers to the assignee his right to recover the debt and also his interest in the land which serves to secure that obligation. It is, therefore, a transfer of his interests in the land to the assignee and is therefore caught up in the prohibition contained in section 67 just as much as a hypothecation itself is caught up.”

APPEAL from a judgment of the District Court, Kandy.

L. D. Guruswamy with *Daya Pelpola* for Plaintiff-Appellant.

L. Gamini Dissanayake for Defendant-Respondent.

November 12, 1974. RAJARATNAM, J.

I have had the advantage of fully considering the reasons well set out by Wijesundera J. and Vythialingam J. for their respective orders. I agree with Wijesundera J. in the particular circumstances of the present case. The plaintiff's case has been that the defendant in the final partition decree has been allotted his share in the land subject specifically to this encumbrance created by the hypothecation which was prior to the institution of the Partition Action. In other words, under s.48 of the Act, the said allotted share was not free of this encumbrance, that is to say, the encumbrance created by the said hypothecation before the institution of the action survived the final decree.

In the case, therefore, valid hypothecation continued to be valid. The defendant in the mortgage bond (vide terms of the bond No. 15,749 of 1948) bound himself not only to the mortgagee, but to her attorney, heirs, executors, administrators or assigns.

The charge on the land had already been created in favour of the mortgagee and "her aforewritten" before the institution of the Partition Action. Section 67 of the New Act does not extinguish a right already created by a valid hypothecation and moreover s.67 invalidates only rights that are sought to be created after the institution of a partition action. Therefore, if a hypothecation survives the Final decree in a partition case, it survives as a charge on the land against the mortgagor and in my view the fact that the charge collaterally gets assigned to another does not extinguish the charge. In these circumstances, although, as Vythialingam J. correctly points out, there is a difference between the owner being prohibited and others in addition to the owner being prohibited, this difference has no significance on the facts of this case, where the encumbrance survived to be attached to the defendant's land under a valid hypothecation.

I am of the view that the plaintiff had the charge in his hands, that is the interest flowing from the mortgage bond, when the encumbrance survived the partition decree. For these reasons with great respect I am unable to agree with Vythialingam, J. I, therefore, agree with the order made by Wijesundera J. that this appeal should be allowed and that the plaintiff is entitled to judgment as prayed for with costs here and below.

WIJESUNDERA, J.

The question that arises for decision in this appeal is whether a deed of assignment of a mortgage of an undivided share of land executed after the institution of an action for the partition of that land is void. I have read the reasons of Vythialingam, J.

who is of the opinion that it is void as regards the hypothecation but the assignee (plaintiff-appellant) is entitled to a money decree against the mortgagor (defendant-respondent). With respect, I do not agree.

No evidence was led in the case. According to the pleadings the defendant-respondent mortgaged an undivided share of a land by bond No. 15749 of 18th October 1948 to RV who assigned it in 1950 to AM. AM in 1957 assigned it to R who on 25th March, 1961 assigned it by deed No. 120 to plaintiff-appellant. When the last assignment was made there was a partition action pending in respect of the land. In that action, D. C. Kandy 5432, the defendant-respondent was allotted a divided portion shown in a plan of 1967 but declared subject to the mortgage on bond No. 15749 of 18th October 1948. It is this divided portion which the plaintiff-appellant prays is liable to be sold in satisfaction of the debt. The learned District Judge concluded that the assignment was void by reason of Section 67 of the Partition Act and dismissed the plaintiff's action.

Section 67 (1) of the Partition Act declares "After a partition action is duly registered. no voluntary alienation, lease or hypothecation of any undivided share or interest of or in the land to which a partition action relates shall be made.", and sub-section 2 declares any such alienation, lease or hypothecation in contravention of sub-section 1 void. This transaction is not a hypothecation. The land has already been mortgaged or hypothecated. The only question for consideration is whether the assignment of the mortgage can be termed "a voluntary alienation of an interest of or in the land". A mortgage is that *privilege* over the property of another which tends to the security of a debt or personal claim, says *Walter Pereira*, page 512, on the authority of a passage from Grotius. If it is a privilege over property it is not an interest of or in the property. But this same passage from Grotius is translated in *Lee, Roman Dutch Law*, Page 162 as "A mortgage is defined as a *right* over another's property which serves to secure an obligation." *Maarsdorp, Volume 2, page 223*, and *Wille, South African Law, page 180*, give the same translation as Lee. It only serves to secure an obligation. It is not a right of property. It is interesting to note that the Mortgage Act of 1948 defines a mortgage to include any charge on property for securing money or money's worth. The purpose of a mortgage is to secure the payment of a debt. If the debt is paid no question of the exercise of any rights arise. Only if the debt is not paid can the mortgagee claim through a Court his remedy to sell the property and to realize his money. So that when the mortgage is assigned what is alienated is the right to sue the mortgagor for the debt, and if the debt is not paid, to realize it by the sale of the land. The

assignee steps into the shoes of the mortgagee. What is alienated by assignment is not an interest of or in the land. Hence the assignment of the mortgage is not a voluntary alienation of any interest of or in the land and Section 67 of the Partition Act has no application.

The object of Section 67 of the Partition Act, as much as Section 17 of the old Ordinance, is undoubtedly to prevent delay by the intervention of parties. The plaintiff in a partition action is required to disclose, by virtue of Section 10 and Section 5 of the Act, a mortgage on the land and to make the mortgagee a party. All that can happen thereafter is that the share allotted to the mortgagor is declared subject to the mortgage. Whatever the mortgagee does, whether he assigns or puts the bond in suit, the share allotted to the mortgagor will be subject to the mortgage. Then whoever intervenes, whether mortgagee or assignee, there can be no delay as all that can happen is that the share of the mortgagor is declared subject to the mortgage. The object of Section 67 is then not defeated and consequently that cannot be a reason for invalidating an assignment of a mortgage, particularly in this case as the share of the mortgagor has been declared, subsequent to the assignment, subject to the mortgage.

It is interesting to note that Section 50 of the Partition Act speaks of “..... the rights of the mortgagee or of the purchaser of the mortgaged share under a mortgage decree....” shall be limited to the mortgagor’s share. This contemplates the mortgagee putting his bond in suit and selling the land pending partition. Then I will not subscribe to the view that the partition Act contemplates the prohibition of an assignment of a mortgage existing on the day of the institution of a partition action.

In *Don Carolis vs. Sirisena* (1923) 2 *Times of Ceylon Law Reports*, 90, at 91 Ennis, J. (with whom Garvin, J. agreed) said “Mr. Jayawardena for the appellant argued that Section 17 of the Partition Ordinance made the assignment of the mortgage void. In my opinion that argument also is not consistent with the terms of the section, for the section speaks of alienation or hypothecation after the institution of the action. There is nothing about hypothecation prior to the action or what a mortgagee under such an hypothecation can do”. Although that case dealt with a question of intervention, it was necessary to decide the validity of the assignment. Section 17 of the Ordinance prohibited “alienation or hypothecation of an undivided share or interest therein” which is very much the same as Section 67 of the Act. I am unaware of and I have not been referred to any authority to the contrary. I would follow the decision of Ennis, J. and Garvin, J. In my view the deed of assignment No. 120 of 25th March, 1961 is valid.

The plaintiff-appellant has sued the original mortgagor on the mortgage bond. If only the assignment of the hypothecation to the plaintiff-appellant from the assignor R be declared void, and following *John Appuhamy vs. William Appuhamy*, 7 CLW 56, the plaintiff-appellant is declared entitled to a money decree against the defendant-respondent, the land of the defendant-respondent is still subject to the mortgage in favour of R, the person who assigned it to the plaintiff-appellant, while the defendant-respondent has also to pay the money on the decree to the plaintiff-appellant. In *John Appuhamy vs. William Appuhamy* (*supra*), A mortgaged to B a share of his land while a partition action was pending. Though the mortgage was declared to be void it was held that on the bond there was a valid promise to pay. The result was, though a money decree was available against A, his land was free of the mortgage. That is a different situation from the instant case where an assignment has also to be considered. Consequently, the above case cannot be applied.

At the trial only two issues were raised. One is about the validity of deed of assignment No. 120 and the other whether the plaintiff is entitled to judgment in case the deed is valid. Although in the answer the defendant-respondent has pleaded that the money on the bond was paid, no issues have been raised on that footing. No submissions were made on that or any matter other than this legal issue in this Court. Hence no question arises of sending this case back for the determination of any other issue. I am of the view that the deed of assignment is valid. I allow the appeal and set aside the order of the learned District Judge and enter judgment for the plaintiff as prayed for with costs in the District Court and costs of this appeal.

VYTHIALINGAM, J.—

The defendant-respondent executed a mortgage of his undivided interest in the lands subject matter of this action to one Razeena Umma by deed No. 15749, dated 18.10.48. She by deed No. 17940, dated 17.8.1950 assigned all her interests under the bond to Abdul Majeed who assigned those interests to Rajanayake by deed No. 3192 of 21.5.1957. He by deed No. 120 dated 25.3.1961 assigned all his interests to the plaintiff who sued the defendant in this hypothecary action. The defendant admitted the original mortgage but while pleading that he was unaware of the assignments took up the position that the deeds in favour of the plaintiff were void as they were executed pending partition.

At the trial it was agreed that the deed of assignment No. 120 of 25.3.1961 in favour of the plaintiff was executed after the institution of partition action No. 5432 of the District Court of Kandy in respect of the land, an undivided share of which was the subject of the mortgage. The only issue was whether the

assignment of a mortgage is caught up in the prohibition against alienation pending partition, contained in Section 67 of the Partition Act (Cap. 69). The section renders void any voluntary alienation, lease or hypothecation of any undivided share or interest of or in the land to which the partition action relates.

The original hypothecation in 1948 was before the institution of the partition action and it was contended that the assignment did not create any new hypothecation but only placed the assignee in the shoes of the assignor. Mr. Pelpola who appeared with Mr. Guruswamy relied on the case of *Don Carolis Vs. Sirisena*, 2 *Times Law Reports*, 90. In that case the judgment sets out that the mortgagee assigned his interests in the mortgage, that the assignee put the bond in suit and the eighth defendant became the purchaser at the sale in execution. He sought to intervene in the partition action and it was held that he could.

It was held in the case of *Perera vs. Perera et al* 9 *N.L.R.* 217 by a Full Bench that section 17 of the old Partition Ordinance prohibited only voluntary alienations and not forced sales as in the case of a Fiscal's sale in execution. So that in that case the eighth defendant as a purchaser at the Fiscal's sale was entitled to intervene in a pending partition action as such a transfer was not prohibited by section 17. However for the appellants, it was submitted that section 17 of the Partition Ordinance made the assignment of the mortgage by the mortgagee void. It is doubtful if this argument was entitled to succeed because the assignee had already put the bond in suit and obtained a decree in execution of which the share was purchased by the eighth defendant. As A. St. V. Jayawardena points out in his book on Partition, Second Edition at page 312 "If a land is mortgaged pending partition proceedings and on a mortgage decree obtained, it is sold before or after final judgment, is the sale void? Not necessarily, as the sale may be treated as a sale in execution of that portion of the decree which directs the payment of money." It was not a case where the assignee sought to intervene and it was argued that he could not because the assignment was void.

However, it is unnecessary to press my views to the point of disagreement with *Don Carolis* case (supra), as it can easily be distinguished. In that case, Ennis, J. in dealing with the submissions said, Garvin, A. J. agreeing, "In my opinion that the argument also is not consistent with the terms of the section for the section speaks of alienations and hypothecations after the commencement of the action. There is nothing about hypothecations prior to the commencement of the action or what a mortgagee under such a hypothecation can do."

If I may so say with great respect as a matter of pure construction of section 17 of the old Partition Ordinance the statement of the law is quite unexceptionable. All that it means is that where there is a mortgage of an undivided share prior to the filing of a partition action the mortgagee could assign his interests even after a partition action is filed. This is quite consistent with the terms of section 17 of the old Partition Ordinance which sets out that "it shall not be lawful for any of the owners to alienate or hypothecate his undivided share or interest therein." It is only an owner who is prohibited from alienating or hypothecating his undivided share or interest therein. A mortgagee is not an owner in that sense of a share or interest but only has a charge on the land as security for his debt. His interest is only in that respect and for this reason Ennis, J. said. "There is nothing about what a mortgagee under such hypothecation can do."

The prohibition under the new Partition Act which applies to the instant case is entirely different. It states that after the lis pendens has been duly registered "no voluntary alienation, lease or hypothecation of any undivided share or interest of or in the land to which the action relates shall be made or effected. . . ." Here the prohibition is against any voluntary alienation, lease or hypothecation by anyone whatsoever in whom such share or interest is vested and not merely by the owner only. Undoubtedly a mortgagee has an interest in the land to the extent of the charge in it as security for his debt. This is recognised by section 5 (a) of the Act which requires the plaintiff to include in his plaint as parties any person entitled to "any right, share or interest to, of, or in the land to which the action relates whether vested or contingent and whether by way of mortgage. . . ."

The question then is whether an assignment is an "alienation, lease or hypothecation" of an undivided share or interest of or in the land to which the action relates. . . .". Mortgage is defined by Grotius as 'a right over another's property which serves to secure an obligation. The person who creates the mortgage is termed the mortgagor and the person in whose favour it is created is termed the mortgagee R. W. Lee, *An Introduction to Roman Dutch Law* Fifth Edition, 183. In this case the obligation to which the mortgagee is accessory, generally known as the principal obligation, is the obligation to pay the sum of money borrowed or the debt which is due. When a mortgagee assigns his rights under the mortgage bond he transfers to the assignee his right to recover the debt and also his interest in the land which serves to secure that obligation. It is, therefore, a transfer of his interests in the land to the assignee and is therefore caught up in the prohibition contained in section 67 just as much as a hypothecation itself is caught up.

The plaintiff, in paragraphs 8 and 9 of his plaint, has averred that the share allotted to the defendant is subject to the original mortgage bond No. 15749 in favour of Razeena Umma. The subsequent assignments including the one in favour of the plaintiff have not been mentioned. The partition decree itself was not produced in the case. But the defendant in his answer has not denied this. However, the mere fact that his share is declared to be subject to the original mortgage bond, does not preclude the defendant from taking up any of the defences available to him in a mortgage action including that of denying the right of the mortgagee to sue him as the rights under the mortgage had been assigned to someone else.

In para five of the plaint, the plaintiff has averred that the defendant had notice of the assignment in his favour and although the defendant has stated in his answer that he is unaware of the averments in para 5 of the plaint, yet it is quite clear that the defendant has had notice of the assignment to the plaintiff. In para six the plaintiff has averred that the defendant has paid the stipulated interest up to the year 1962, and the defendant has stated in para four of his answer that the plaintiff has not given credit for all the payments made.

In the case of *Periyamayagampillai vs. Silva et al.* 22 N. L. R. 481) Bertram, C.J. quoted Voet in regard to the rights on an assignment as follows "Certainly according to our customary law on the subject of the assignment of actions, the opinion has prevailed that the whole title of the assignor is extinguished by the assignment and that the assignor can no longer enforce payment of the debt, but that only the assignee can do so, even although notice has not yet been given by the assignee to the debtor not to pay to the assignor, but nevertheless the debtor who is ignorant of the assignment in good faith pays the assignor is wholly discharged; not so if notice has been given by the assignee not to pay the assignor."

Here, the mortgagor has notice of the assignment and the original mortgagee cannot now sue him on the bond to which the partition decree makes the mortgagor's share subject, because the right to receive the debt and to enforce the charge on the land in respect of it has wholly passed from her and now rests exclusively with the assignee. The assignment in this sense is a transfer of the mortgagor's interest in the land to the assignee who could have intervened in the partition action. The object of the prohibition against alienation in the Partition Ordinance is, as stated by Wood Renton, A.C.J., "The clear object of the enactment was to prevent the trial of particular actions from being delayed by the intervention of fresh parties whose interests had been created since the proceedings began". *Annamalai Pillai vs. Perera*, 6 N.L.R. 108 at 119

Dealing with section 67 of the Act, Wijayatilake, J. said in *Gooneratne vs. Gooneratne*, 77 N.L.R. 271 at 273, "The object of this provision would appear to be to prevent the trial of a partition action being unduly prolonged and delayed by intervention of parties who derive interests in the land after the institution of an action. The object of this prohibition has been explained in 1878 in *Baban vs. Amerasinghe*, I.S.C.C. 24. "The sole purpose of this clause seems plainly to be, to reserve full effect to the legal proceedings for partition, when once instituted, and to take care that it shall not be in the power of any party concerned to defeat them or embarrass the course of them, by transferring his share or any interest in the property to a stranger." If then the transfer of his interests in the land by a mortgagee by an assignment is permitted pending action the whole object of the Act would be defeated.

The question arises as to whether the entire instrument is void and whether the plaintiff is barred from recovering his money on the assignment. Jayawardena on Partition (*supra*) states at page 311, "A mortgage bond consists of two distinct parts, one of which contains the debtor's acknowledgement of the receipt of the consideration and of his indebtedness to the creditor, and the undertaking to pay on demand or within a specified time with or without interest, and the other contains the hypothecation or security by which the debtor hypothecates and binds his property in favour of his creditor. It is only the hypothecation or security that is declared void by this action. When a part of a contract is void, the whole instrument is not invalidated."

In the case of *John Appuhamy vs. William Appuhamy* (7 C. L. W. 56) it was held that in the case of a mortgage of a land which is the subject of a partition action, only the hypothecation is void and not the instrument containing it and that although the hypothecation is void there still remains to the mortgagee an action on the promise to pay. It was however held that in the circumstances of that case that the action for a money decree was prescribed. No such plea was taken in this case. The plaintiff in this case is entitled to a money decree and no prejudice is caused to him as in execution of the money decree he can proceed against any of the properties of the defendant as are liable to be sold in execution of the decree.

In the circumstances I would set aside the judgment and decree of the learned District Judge and direct that decree be entered for the plaintiff in terms of para (a) of the prayer to the plaint. Each party will bear his own costs of appeal but the plaintiff will be entitled to half the costs in the lower Court.

Appeal allowed.