

Present : Dalton J. and Jayewardene A.J.

GODAGE *v.* DIAS.

81—*D. C. Galle, 23,507.*

*Partition—Mortgage of undivided share—Sale of property—Proceeds—
Liability of share—Ordinance No. 10 of 1863, s. 12.*

Whore land, sold in partition proceedings, was subject to a mortgage in respect of an undivided share,—

Held, that the property sold was liable in the hands of the purchaser to the extent of the undivided share mortgaged.

*Fernando v. Silva*² followed.

THIS was an action brought by the plaintiff to recover a sum of Rs. 700 from the first and second defendants, husband and wife, on a mortgage bond No. 4,112 and to have a hypothecary decree over lots A, B, G, D, E, and F of a land called Wellbroongewatta. The land mortgaged was the undivided half share of lots 2 and 3 of Wellbroongewatta and Wateadderaowita. Subsequent to the mortgage a partition action was instituted in respect of the land and a certificate of sale issued. The preliminary decree declared the second defendant entitled to one-half plus one-eightieth of the land. The land was sold in lots, and lots A, B, and G were purchased by the third defendant, the first defendant purchasing lots E and F.

¹ 23 *N. L. R.* 95.

² (1898) 2 *Tambyah* 111.

The third defendant pleaded that the mortgage did not attach to the three lots purchased by him but to the proceeds of sale. The learned Judge held that half the blocks dealt with by the sale under the decree were liable for the mortgage if the proceeds of sale were insufficient to meet the plaintiff's claim. The third defendant appealed against this order.

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H. V. Perera (with *M. C. Abeywardene*), for third defendant, appellant.—Section 12 of the Partition Ordinance provides that “nothing in this Ordinance contained shall affect the right of any mortgagee of the land which is the subject of partition or sale.” The words “any mortgagee” refer to a mortgage of the whole land (vide *Silva v. Wijesinghe*¹). The proviso to section 12 says that in the event of a partition or sale the rights of the mortgagee shall be limited to the share in severalty allotted to his mortgagor. In the case of a partition the “share in severalty” will be a share in the land, but in the case of a sale such a contention cannot stand. The share in severalty in the case of a sale must necessarily be a share of the proceeds of sale. The money, in other words, takes the place of the land.

Garvin (with *Soertsz*), for plaintiff, respondent.—The observations of de Sampayo J. in *Silva v. Wijesinghe* (*supra*) are in direct conflict with the finding in *Fernando v. Silva*.² De Sampayo J.'s remarks are *obiter*. The words “share in severalty” are defined in *Stroud*, vol. III., p. 1846, and the holder of such a share is he that holds it in his “own right only without any other person being joined or connected with him in point of interest during his estate therein.” The word “severalty” connotes immovables. The words “or sale” in the proviso to section 12 are a mistake. They have been inadvertently inserted (vide *Abdul Hamidu v. Perera*³).

H. V. Perera, in reply.—The definition referred to in *Stroud* is a definition of the term “share in severalty” with reference to lands and tenements. The definition does not deal with the case of money. To say that the words “or sale” are a mistake is no doubt an easy way of getting over a difficulty. But when the draftsman introduced those words he meant them, presumably, to have a meaning. Such a meaning has been assigned to the words, and in the absence of anything to the contrary, the Court will accept that meaning.

September 13, 1928. DALTON J.—

Plaintiff sued the first and second defendants (husband and wife) in this action to recover Rs. 700 on a mortgage bond No. 4,112 of September 20, 1916, and asked for an hypothecary decree over

¹ (1917) 20 N. L. R. 147.

² (1898) 2 Tambyah 111.

³ (1925) 26 N. L. R. 433.

1928. lots A, B, G, E, and F of a land called Wellbroongewatta. The mortgage was duly registered. The land mortgaged was the undivided half shares of lots 2 and 3 of Wellbroongewatta and
 DALTON J. Watteadderaowita. Subsequent to the mortgage a partition
 Godage v. action (No. 19,221, D. C. Galle) was instituted in respect of the
 Dias land and a certificate of sale was issued dated January 9, 1924.

The preliminary decree declared the present second defendant entitled to $\frac{1}{2}$ plus $\frac{1}{80}$ of the land. The land was sold in lots, and lots A, B, and G were purchased by the third defendant, the first defendant purchasing lots E and F. The third defendant now pleaded that the mortgage does not attach to the three lots purchased by him but to the proceeds of sale only. The trial Judge held that half of all the blocks dealt with by the sale under the decree "are liable for this mortgage if the proceeds of their sale in deposit are not sufficient to meet the plaintiff's claim." He accordingly entered judgment for the plaintiff against the first and second defendants for the amount claimed. He then directed that if realization cannot be had against them and out of the proceeds of sale in deposit to their credit in the partition case, one-half of the blocks A, B, G, E, and F will be liable to be sold for recovery of a proportionate share of the amount set out in the decree. The third defendant appeals against this order in so far as it concerns lots A, B, and G.

The evidence shows that at the time of his purchase third defendant had no knowledge of plaintiff's mortgage, nor is there anything to show it was referred to in the partition proceedings, or in the conditions of sale.

The question to be considered is, what property is subject to the mortgage following on the partition proceedings. Section 8 of the Partiticon Ordinance sets out what is to be done upon a decree for sale. It is to be sold to any owner subject to any mortgage or other charges or "incumbrances" which may be on the same." In the event of no owner becoming the purchaser, it is to be sold "subject to any such mortgage, charge, or incumbrance" by public auction to the highest bidder. Section 12 further enacts that nothing in the Ordinance shall affect the right of any mortgagee of the land which is the subject of the partition or sale, and then goes on to provide for the case of a mortgage of an undivided share of the land as opposed to the whole land. If at the time of any sale or partition an undivided share only of the land is subject to mortgage the right of the mortgagee shall be limited "to the share in severalty allotted to his mortgagor" under the stipulations of the mortgage bond.

It was first argued for the appellant that section 12 only protected mortgages of the whole land, as opposed to mortgages of an undivided interest in the land, but this argument seems to me to be

quite untenable, having regard to the definite wording of the section. This question was considered in *Abdul Hamidu v. Perera*,¹ where it was held that section 12 applies to any mortgage of the land. De Sampayo J. in *Silva v. Wijesinghe*² came to a different conclusion on this point, with which Wood Renton C.J. states he was inclined to agree, but Jayewardene J. in *Abdul Hamidu v. Perera* (*supra*) points out that the observations of de Sampayo J. were not really necessary for the decision of that case. If there are conflicting decisions on this point I have no difficulty in coming to the same conclusion as Ennis A.C.J. and Jayewardene J. in *Abdul Hamidu v. Perera* (*supra*). If there are not conflicting decisions I respectfully follow the decision in that case.

Section 12 therefore applies to the mortgage in question. What property then is subject to the mortgage under the provisions of that section subsequent to the sale? It will be noticed that in the first line of the proviso appear the words "any partition or sale," whereas the words "or sale" do not appear in the last line of the section. Mr. Garvin argued that the words "or sale" where they appear can be given no meaning and that the section only applied to a partition, and the proviso had no application here. That is an easy solution which it seems to me it is impossible to adopt. There may be an omission of the words "or sale" in the last line, but it need not concern the question now to be decided, which is, to ascertain what is the share in severalty allotted to the mortgagor. By the preliminary decree the mortgagor was declared to be entitled to $\frac{1}{2}$ plus $\frac{1}{80}$ interest in the land, but having regard to the decree for sale being made, there was strictly speaking no allotment of any share in severalty to the mortgagor, although the first defendant is stated to have purchased lots E and F at the sale. It was urged for appellant that in the case of a sale the share in severalty could only mean the share of the proceeds of sale which would come to the mortgagors in proportion to their interest in the land. There is however a decision of this court directly contrary to this argument. In *Fernando v. Silva*³ certain undivided shares of a land had been mortgaged by two of the co-owners. A sale under the Partition Ordinance followed. One person then purchased the whole of the land. The purchaser then, in an action by the mortgagee on his bond, set up the defence that the mortgagee must under section 12 look for payment to the proceeds of sale, and that by his purchase at the sale he had acquired the land free from encumbrance. The Court rejected this defence that the mortgagee must look to the proceeds of sale for payment, referring to the express provisions of section 12, adding that there was no good reason why the same share of the land mortgaged should not be

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¹ (1925) 26 N. L. R. 433.² (1917) 20 N. L. R. 147.³ (1898) 2 Tambyah 111.

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sold in satisfaction of the mortgage. In that case of course the purchaser bought the whole land, but here he only purchased lots A, B, and G, the first defendant himself purchasing lots E and F.

On this point also, as to the rights of the mortgagee after a sale, the decision in *Fernando v. Silva (supra)* is directly contrary to the decision in *Silva v. Wijesinghe (supra)*. Whether or not *Fernando v. Silva (supra)* was considered in the latter case does not appear. In discussing these two conflicting decisions the late Mr. Justice A. St. V. Jayewardene in his *Law of Partition*, at p. 247, expresses the opinion that the decision in *Fernando v. Silva (supra)* appears to be sounder. He gives his reasons for that opinion, which certainly commends itself to me, and I would follow the earlier decision. The mortgagee can therefore enforce his mortgage against, in the words of *Fernando v. Silva (supra)*, "the same share of the land mortgaged," or in the words of Mr. Justice Jayewardene, at p. 247, "the share of the land." These words I assume are intended to be an interpretation of the words "the share in severalty allotted to his mortgagor" as set out in the proviso to section 12.

The question then arises what, in this case, following on the sale is "the share of the land mortgaged." Is it the interest to which the second defendant was declared entitled in the preliminary decree? If so, how is that interest to be now ascertained? What share of the land do lots A, B, and G represent? Do lots E and F purchased by the first defendant represent, or are they equivalent to, the interest of his wife, the second defendant, in the land as found by the preliminary decree?

Further difficulties on these questions are presented from the fact that it appears from the argument put forward in the lower Court that lots A, B, E, G, and F do not comprise the whole of the land sold under the Ordinance. There are other lots which were purchased by some of the co-owners. It seems to me that to decide the question what is the share in severalty allotted to the mortgagor the case must be sent back to the lower Court for the facts to be elucidated further by evidence. When that share is ascertained, the right of the mortgagee, the plaintiff, will be limited to that share in terms of section 12.

The decree of the lower Court will therefore be set aside and the case referred back for this purpose and for further adjudication. Costs of appeal will abide the event.

JAYEWARDENE A.J.—

According to section 8 of the Partition Ordinance, No. 10 of 1863, a purchaser at a sale held under the Ordinance would buy the property "subject to any mortgage or other charges or incumbrances which may be on the same."

Section 12 enacts that nothing in the Ordinance "shall affect the right of any mortgagee of the land which is the subject of the partition or sale."

In *Fernando v. Silva*¹ it was held that the mortgagee of an undivided share was entitled to have a decree declaring the share which was mortgaged to him bound and executable. The plea of the purchaser that the mortgagee must look for payment from the price paid by the purchaser at the sale and that the purchaser acquired the land free from incumbrance was directly raised and repelled.

The case of *Silva v. Wijesinghe*² presents some difficulty. As pointed out by Wood Renton C.J., the Court was there concerned merely with a claim to certain portions of the proceeds of the sale, and according to De Sampayo J., the appellant came into Court and claimed a share of the proceeds. De Sampayo J. was of opinion that section 12 dealt with a mortgage of the whole land, and Wood Renton C.J., was disposed to agree with that view. It cannot be said that the point directly arose in that case, as the claim was only to a share of the proceeds. In *Abdul Hamidu v. Perera*³ Ennis A.C.J. and A. St. V. Jayewardene A.J. fully considered *Silva v. Wijesinghe* (*supra*) but would not adopt the view therein enunciated. They held that section 12 applied to any mortgage whether of the whole land or any undivided share thereof.

The Ordinance conserves the right of any mortgagee of the land which is the subject of partition or sale. I am inclined to think that the language is comprehensive enough to include mortgagees of undivided shares as well as mortgagees of the whole land, and I would follow the cases of *Fernando v. Silva* (*supra*) and *Abdul Hamidu v. Perera* (*supra*).

The land sought to be partitioned was sold in several lots, and the several purchases of the various lots hold those lots subject to the mortgages on the land, in the proportion of the interests which they have purchased. It will be necessary to ascertain what proportion the lots E and F purchased by the first defendant bear to the whole land, and whether they represent or are equivalent to the interest of the second defendant, his wife, in the land as allotted to her in the preliminary decree. It will also be necessary to find what proportion the lots A, B, G purchased by the third defendant bear to the whole land and to that extent and in that proportion the third defendant's lots will be bound and executable under the plaintiff's mortgage decree. In the preliminary decree the present second defendant was not allotted only a life interest

¹ (1898) 2 *Tambyah* 111.

² (1917) 20 *N. L. R.* 147.

³ (1925) 26 *N. L. R.* 433'

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so that the whole of the interests in the mortgaged property will be bound and executable. The preliminary decree cannot now be altered, as sales have taken place under it.

I agree to the order proposed. All costs should, in the circumstances, abide the event.

Set aside.

