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*Present : De Sampayo and Porter JJ.***SIDAMBARAM CHETTY v. PERERA et al.****503—D. C. Chilaw, 6,678.**

Mortgage of a divided share by a person who was entitled to an undivided share—Partition action—Does the mortgage attach to the divided portion allotted to the mortgagor, or to the person who represents the mortgagor ?

The first defendant who was entitled to an undivided share of a land mortgaged a divided portion of the land to the plaintiff. Subsequently, the second defendant, who purchased first defendant's interests at a Fiscal's sale pending a partition action, was decreed entitled to a divided portion (representing the undivided share of the first defendant). Plaintiff brought an action on the mortgage bond.

Held, that the mortgage did not attach to the divided portion allotted to the second defendant.

THE facts appear from the judgment.

Jayawardene, K.C. (with him *Croos-Dabrera*), for the appellants—The mortgage was of a divided portion. In the partition case it was held that the mortgagor was only entitled to an undivided share which has been since sold in execution. The purchaser in execution has been allotted a divided portion by the final decree. The plaintiff cannot obtain a hypothecary decree for this lot. The bond is in respect of a portion of land, which the mortgagor was not entitled to. Section 12 of the Partition Ordinance does not help the plaintiff. It only conserves the rights of a person holding a mortgage of an undivided share. The plaintiff is only entitled to a money decree.

Arulanandan, for respondent.—The case is governed by section 12 of the Partition Ordinance. The intention of the mortgagor was to mortgage all his interest in the property partitioned. The fact that he described his share as a divided lot ought not to prejudice the mortgagee. The portion mortgaged represents the undivided share the mortgagor was entitled to, and the mortgagee's rights are saved by section 12 of the Ordinance. The construction put upon this section by the appellants is contrary to the spirit of the Partition Ordinance, and is calculated to work injustice.

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June 1, 1922. DE SAMPAYO J.—

The plaintiff in this action has taken up a very strange position, which, I think, is wholly untenable. The first defendant by a bond of January 3, 1914, mortgaged to the plaintiff as security for a certain amount of money a divided portion of a certain land, and also an undivided share of another divided portion of the same land. Subsequently, a partition action would appear to have been brought by a number of persons who claimed undivided shares in the land. The first defendant in this action was the nineteenth defendant in the partition action, and by the judgment entered on November 26, 1917, it was found by the Court that the first defendant was entitled not to divided portions of the land, but to an undivided share in the whole land, which he was declared entitled to accordingly in that decree. But it seems that about a month after that decree was entered, the shares which the first defendant in the partition action was declared entitled to was seized in execution against him, and subsequently sold, and purchased by the second defendant, who obtained a Fiscal's transfer for the same on April 25, 1919. At this date the partition had not proceeded further, and so the second defendant intervened in the action and claimed the shares he purchased against the first defendant. This claim was allowed, and in the final decree a certain divided portion was allotted to the second defendant, and to the other parties to the action similar divided lots in respect of their interests. Now, the plaintiff has brought this action upon the mortgage bond against both the defendants, and he seeks to obtain a mortgage decree against the second defendant in respect of the divided portion allotted to him in the final partition decree. I ought here to say that the divided portions mortgaged to the plaintiff by the first defendant are not identical with the divided portion allotted to the second defendant in the partition decree. But the difficulty in the way of the plaintiff goes much deeper. The question is whether, having had the mortgage over divided portions of the land effected by a person who was not entitled to portions, but only to undivided shares in the whole land, he could afterwards proceed as if undivided shares were subject to the mortgage. Section 12 of the Ordinance has been referred to in the course of the proceedings in the District Court, and the judge says he applies, what

1922. he calls, the spirit of it to the present case in support of the plaintiff's claim. The provision in that section is that where an undivided share is mortgaged, the mortgage shall attach to a divided portion that may be allotted to the mortgagor in a partition action. What has been attempted in the present case is to enforce the converse of it, which is not sanctioned in any respect by the Partition Ordinance. Moreover, the provision is that the mortgage shall attach to the share in severalty allotted to the mortgagor. But in this case a divided portion in severalty was not allotted to the first defendant, but to the second defendant, who had nothing to do with the mortgage ; and I think this is material in view of the provision in the same section of the Partition Ordinance. For it says that the owner of the share in severalty so subject to mortgage shall, without a new deed of mortgage, warrant and make good to the mortgagee the said several part after such partition as he was bound to do before such partition. By no stretch of construction could the second defendant be compelled under that provision to warrant and make good to the plaintiff the property mortgaged by the first defendant. Apart from that practical difficulty, there is no possibility of giving to the plaintiff the rights of a mortgage over a portion of land which was never mortgaged to him. I think, therefore, that the District Judge's judgment, which is very creditable to his ingenuity and sense of justice, cannot be supported either by reference to the Ordinance or upon any legal principle. The only right the plaintiff has is to recover the debt from the first defendant, and, if possible, realize that debt upon any other property he may be entitled to in the ordinary course of execution. In these circumstances, I think the judgment and decree entered by the District Judge must be modified by striking out the order for specific sale of the portion allotted to the second defendant in the partition decree as though he was bound to the plaintiff on the bond in his favour, and by restricting the judgment to a money decree against the first defendant. I think the second defendant, who was the real contestant in the District Court, is entitled to the costs of the action and also of this appeal.

PORTER J.—I agree.
