Present: Ennis A.C.J. and Jayewardene A.J.

1925.

ABDUL HAMIDU *v.* PERERA.

316—D. C. Ratnapura, 4,055.

Partition—Mortgage of undivided share—Sale of mortgagor's interest in execution to third party—Partition action—Share allotted to purchaser—Does the mortgage attach to the share—Ordinance No. 10 of 1863, s. 12.

A co-owner mortgaged his undivided share of a land, which was subsequently sold in execution against him and bought by a third party, who intervened and was allotted the share in a partition action, to which neither the mortgagor nor mortgagee was party.

Held, that it was not necessary for the mortgagee to have intervened in the partition action to preserve his rights, and that under section 12 of the Partition Ordinance the mortgage attached to the divided portion allotted to the purchaser in execution.

APPEAL from a judgment of the District Judge of Ratnapura. Action by the plaintiff on a mortgage bond dated January 7, 1916, by which the first defendant mortgaged the undivided share of a certain land to him. The mortgage was registered on August 12, 1916. In execution in case No. 32,325, D. C. Colombo, the mortgagor's interests were sold on June 30, 1916, and purchased by J. B. M. Pereira, who obtained a Fiscal's transfer on June 22, 1918. He sold his interest to the second defendant. In the meanwhile a partition action had been instituted in respect of the land, and the share which belonged to the first defendant had been allotted to J. B. M. Pereira, neither the plaintiff nor the first defendant being parties to the action. The learned District Judge held that the non-intervention of the plaintiff in the partition action extinguished his mortgage.

E. G. P. Jayatilleke (with him *Weerasuriya*), for plaintiff, appellant.—If the judgment is correct, then the mortgagor by transferring his rights immediately after the mortgage can get rid of the burden on the undivided share.

This would be adding one more hardship on the mortgagee.

A correct construction of section 12 would give relief to all mortgagees, whether of the whole land or any share or interest therein; these encumbrances should attach to the portion allotted in severalty. Mortgagor includes any person claiming under him.

In the construction of section 12 I would draw the attention of the Court to a dictum of Bertram C.J. in *Colombo Stores, Ltd., v. Silva*[1] on the effect of a proviso.

[1] *(1924) 26 N. L. R. 185.*

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Counsel cited *Sidambaram Chetty v. Perera*[1] and *Silva v. Wijesinghe*.[2]

H. V. Perera (with him *Francis de Zoysa*), for respondent.—The case *Sidambaram Chetty v. Perera* (*supra*) is exactly in point, and the trend of the decisions is to create a distinction between mortgages of the whole land and a share of the land (*Silva v. Wijesinghe* (*supra*)).

Mortgagees always take certain risks, and this is one of them. Either the mortgagor or the mortgagee should have intervened in the partition action to conserve their rights. If that is not done, the land is rid of the encumbrance.

The proviso to section 12 throws much light on the construction of the words in the substantive section. There is a distinction created between "a mortgage of the land" and "mortgage of an undivided share of the land."

May 8, 1925. ENNIS A.C.J.—

This is an action by a mortgagee. It appears that on a mortgage bond No. 4,190 of January 7, 1916, the first defendant mortgaged an undivided share of a certain land to the plaintiff. That mortgage was registered on August 12, 1916. On May 29, 1916, the land was seized in execution in case No. 32,325, D. C., Colombo. The seizure was registered on June 2, 1916, and the sale was on June 30, 1916. The mortgagor's interests were purchased by J. B. M. Pereira, who obtained a Fiscal's transfer on June 22, 1918. He sold his interests on November 1, 1922, to the second defendant. But before doing so a partition action in respect of the land had been brought to a conclusion on March 20, 1919. The first defendant in the present case was not a party to that partition action, and the share which originally belonged to him in the land was allotted to J. B. M. Pereira. A number of issues were framed, and the learned Judge held that the non-intervention of the plaintiff in the partition action was fatal to his claim in this case, because his mortgagor, the first defendant, was no party to the partition action.

On appeal, practically the only matter for consideration is the effect of section 12 of the Partition Ordinance, No. 10 of 1863. The substantive part of that enactment is quite clear. It is: "Nothing in this Ordinance contained shall affect the right of any mortgagee." The only qualification of mortgagees contained in the section is in the concluding words, "of the land which is the subject of the partition or sale." It has been suggested in some cases that this rule applies only to mortgagees of the whole land, and that it could not apply to preserve the rights of a mortgagee of a divided

[1] *(1922) 24 N. L. R. 214.* [2] *(1917) 20 N. L. R. 147.*

interest in the land. I am quite unable to entertain this argument, because the section goes on with a proviso dealing with the rights of mortgagees of undivided shares. The ordinary rule with regard to provisos in any section is that the proviso deals with a matter, which but for the proviso would be covered by the substantive enactment. A proviso does not introduce new matter. It qualifies the substantive words of the enactment, and does not introduce substantive legislation for matters not covered by the preceding words. That being so, the very fact that the proviso in this section deals with the position of mortgagees of undivided shares shows conclusively that the rule itself covers any mortgagee of the land. That being so, the partition action would not affect the rights of the mortgagee.

The cases of *Silva v. Wijesinghe* (*supra*) and *Sidambaram Chetty v. Perera* (*supra*) have been cited. In the first of those cases we find the first suggestion that the rule enunciated by section 12 applies to a mortgage of the whole land only. That suggestion was not accepted by Wood Renton C.J. in his judgment, although he said that he was disposed to agree with it. Wood Renton C.J. went further, and said that the interest of the mortgagee attaches to the share allotted in severalty to his mortgagor or " to some one claiming under him, " and he drew attention to the subsequent use in the proviso of the word " owner " as tending to show that the owner need not necessarily be the mortgagor. In the second of those cases the facts were somewhat peculiar. In that case the mortgagor had mortgaged a divided share in a certain land. The mortgagor, in fact, owned an undivided share in the whole land, and on partition some difficulty was experienced in defining the rights of a mortgagee in such circumstances in the land in severalty, which was allotted to a person who was not the original mortgagor. In both those cases the effect of the word " provided " found in the section under reference does not appear to have been brought to the notice of the Court. I am, therefore, of opinion that the interests of the mortgagee in the present case were preserved by section 12 of the Partition Ordinance, and that the plaintiff is, therefore, entitled to succeed.

We have been asked to allow a new issue to be framed raising the question as to whether the mortgage in question was a genuine one. But I see no reason at this stage of the case to raise an issue which would require entirely fresh evidence and be in fact a totally different case. In the circumstances I would allow the appeal, with costs.

JAYEWARDENE A.J.—

In this case questions are raised with regard to the construction of section 12 of the Partition Ordinance. In the first place, it is contended that the main provision applies only to mortgages of

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an entire land and not to mortgages of undivided shares of a land. In the second place, it is contended that the proviso only applies where in the decree a divided share is allotted to the mortgagor himself, and if the mortgagor has before action divested himself of his rights in the land in favour of a third party, and if that third party has been allotted a share which the mortgagor had mortgaged, the mortgagee's rights are entirely wiped out.

In support of the first contention counsel for the respondent has relied upon certain observations made in the case of *Silva v. Wijesinghe* (*supra*) by De Sampayo J., with which Wood Renton C.J. was inclined to agree. The learned Judge by reading the main provision in the light of the proviso has come to the conclusion that it is impossible to read that provision as having any application to a mortgage of an undivided share. I am unable to agree with this construction, for it seems to me that the use of the word " any " indicates the inclusion of every kind of mortgage, that is, whether the mortgage be of the entire land or of an undivided share of the land, and whether the mortgage be a primary or secondary mortgage, or of a right of superficies or of a life interest in the land. " Any " when used in statutes excludes limitation or qualification of any kind whatsoever, and to limit the main provision to mortgages of the entire land would be, in my opinion, to violate one of the well-known canons of construction, that a proviso cannot be used for the purpose of restricting the use of the language in the main provision. In this connection I would refer to the judgment cited by Bertram C.J. in the case of *Colombo Stores, Ltd., v. Silva* (*supra*), where he quoted a passage from the judgment of Lord Herschell in *The West Derby Union v. The Metropolitan Life Assurance Society*[1] to the following effect: "I decline to read into any enactment words which are not to be found there, and which alter its operative effect because of provisions to be found in any proviso. " In my opinion, therefore, the main provision cannot be controlled by the provision in the proviso, and, as I said, by the use of the word. " any " every kind of mortgage is intended to be included in the main provision. I may mention that the observations of De Sampayo J. were not really necessary for the decision of the case of *Silva v. Wijesinghe* (*supra*).

As regards the second contention, learned counsel for the respondent relies upon certain dicta to be found in the case of *Sidambaram Chetty v. Perera* (*supra*). These observations there were also not necessary for the decision of that case, and I do not find from the argument that counsel argued the question before the Court. It seems to me that the word " mortgagor " in the proviso must be taken as including a mortgagor and his successors in title; otherwise the consequences would be most disastrous, because a person has only to mortgage his rights and then transfer them, and if the

[1] *(1897) A. C. 647.*

transferee becomes a party to a partition action and is allotted that share, he would get that share free from the mortgage, unless the mortgagee has intervened in the action. I think, if the contention of learned counsel is to be given effect to, a proviso which was intended to protect the interests of mortgagees, would result in the destruction of those rights. The view which I have expressed was, I think, indicated by Wood Renton C.J. in the case of *Sidambaram Chetty v. Perera* (*supra*), that the term "mortgagor" included a mortgagor and those deriving title from him. With all respect to the learned Judges who decided in a contrary sense, I may say that my own opinion is that section 12 and its proviso were intended to safeguard the interests of mortgagees, whether they were mortgagees of the entire land or whether they were mortgagees of an undivided share, and whether that undivided share remained in the hands of the mortgagor or had passed into the hands of third parties who took it subject to the mortgage.

There was another point raised in the case on behalf of the appellant, viz., that the learned Judge was wrong in holding that a mortgage which was executed prior to the seizure and its registration was void, in view of the fact that the mortgage had not been registered until after the registration of the seizure. The case of *Mohotte v. Dissanayaka*[1] shows that section 237 of the Civil Procedure Code does not affect with nullity any mortgage or alienation executed prior to the seizure and registered subsequent to the registration of the seizure. In view of this decision learned counsel for the respondent has not supported the judgment of the learned District Judge on this ground. The judgment in *Mohotte v. Dissanayaka* (*supra*) is a judgment of two Judges, and I do not think that its correctness can be questioned. I agree, therefore, with my Lord the Acting Chief Justice in allowing the appeal, with costs, in both courts.

Appeal allowed.

[1] *(1910) 13 N. L. R. 70.*