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Present : De Sampayo and Schneider JJ.

MEURLING v. GIMARAHAMY et al.

133—D. C. Matará, 9,845.

Sale under the Partition Ordinance—Mortgage of share by purchaser—Sale of entirety—Registration—Undivided shares registered in different folios before partition action—Subsequent mortgage and sale also registered in different folios—Right folio—Action on mortgage bond against administrator before letters of administration were taken out.

The land in question was sold under the Partition Ordinance and bought by B, who thereafter mortgaged a share to M. At the sale under the mortgage decree, plaintiff purchased the share. B sold the entirety of the land to defendants, who registered the deed in A 35/120. The mortgage bond and Fiscals' transfer were registered in A 80/394. Prior to the partition decree, the undivided shares were registered in the two folios without cross reference. A 80/394 was the folio in which any deed relating to the land was first registered.

Held, that the transfer in favour of the defendants was not registered in the right folio.

“No doubt the title created by the certificate of sale cannot be defeated by prior or other registration of deeds affecting the original undivided shares, but when a question of competing registrations arises with regard to transactions subsequent to the certificate of sale and referable to it, the former volumes and folios in the registrar's book come into play.”

Where a person who was appointed administrator by Court but who had not taken out letters of administration was sued as administrator, and the property was sold in execution, *held*, that the purchaser's title was not affected by the fact that letters had not been issued to the administrator.

H. J. C. Pereira, K.C. (with him *Cooray*), for defendants, appellants.

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Samarawickreme (with him *Keuneman* and *Amerasekera*), for plaintiff, respondent.

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November 15, 1922. DE SAMPAYO J.—

The main question involved in this appeal has reference to the proper registration of deeds after a partition decree. It appears that the land called Nagahawatta was owned in common by several persons, one of whom was Don Bastian de Silva. This land was the subject of the partition action (D. C. Matara, 1,966), in which by decree of April 29, 1898, the land was ordered to be sold. The sale took place on August 15, 1898, when Don Bastian de Silva became the purchaser, and the Court issued to him a certificate of sale on September 30, 1898. Though he thus became the owner of the entire land, he by bond dated August 8, 1912, mortgaged to Miss Frances Meurling an undivided 263/360 shares, and in discharge of this bond he again mortgaged the same share to Miss Meurling by a bond dated October 1, 1913. This second bond was put in suit in D. C. Matara, 7,642, and in execution of the decree obtained in that action the share mortgaged was sold, and was purchased by the plaintiff, to whom the Fiscal issued a transfer dated March 24, 1920. His title being disputed by the defendants, he brought this action to vindicate it. The first, third, and fifth defendants are daughters of Don Bastian de Silva, and they claim the entire land for themselves and their sister Leisihamy on the strength of a deed executed in their favour by Don Bastian de Silva. This is the deed No. 9,550 dated October 8, 1912, by which Don Bastian de Silva purported to sell the land to his four daughters. There is room for doubt whether this deed, notwithstanding its form, was a deed for consideration, but the point in this case must, I think, be decided on the assumption that it was an actual deed of sale. The difficulty in the case arises from the fact that the deeds prior to the partition action No. 1,966 were registered in two different folios, some being registered in folio A 80/394 and others in folio A 35/120 without any cross references. But the folio in which any deed was first registered is the folio A 80/394, which, therefore, was the right folio for purposes of registration. The mortgage bonds by Don Bastian de Silva in favour of Miss Meurling were registered in that folio, and so was the Fiscal's transfer obtained by the plaintiff. On the other hand, the certificate of sale issued to Don Bastian de Silva was registered on October 1, 1898, in folio A 35/120, and Don Bastian de Silva's deed of October 8, 1912, in favour of his daughters, was also registered in that folio.

The plaintiff relies on the registration of his series of deeds in folio A 80/394 which I have above described as the right folio. It

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is contended for the defendants, however, that all old registrations were wiped out by the partition decree, just as all the old titles were so wiped out, that the question of right folio and wrong folio must be determined by the state of registration subsequent to the partition decree, that the certificate of sale of Don Bastian de Silva being registered in folio A 35/120, the plaintiff's deeds were registered in the wrong folio, and for the same reason Don Bastian de Silva's deed in favour of the defendants was registered in the right folio, and that consequently the defendants' title must prevail over that of the plaintiff on the ground of registration.

The defendants rely for their contention on my judgment in *Bernard v. Fernando*,¹ but the point there decided is quite different from that raised in this case. It is true that by reason of prior registration of the old deeds of a party, the efficacy of a partition decree cannot be defeated, but the question here is, where and in what manner deeds relating to the title derived from the partition decree should be registered. For this purpose I do not think that the question of the folios in which the old deeds were registered can be ignored. The Registration Ordinance itself appears to contemplate the continuation of such folios. For section 27 provides that "on the partition of any land registered as one allotment, the registrar shall, upon a written application in that behalf, register the new allotments on separate and fresh pages of the book, *with such reference as may be necessary to identify them with the original registration.*" The words italicized by me make the intention clear. It is now settled, I think, that the "partition" here referred to is a partition however effected, whether by agreement between the parties or by decree of Court. If, then, in the case of an actual partition of the land, the old pages in the register must be carried forward by way of reference, I think the same principle is applicable in the case of a sale of the land under the decree in a partition action. For certain purposes the question of identity may be as important in the one case as in the other. It is true that there is no express provision with regard to a sale of the land by decree, but I think that the language of section 24 of the Registration Ordinance is wide enough to include the case of a certificate of sale under the Partition Ordinance, for it enacts that "when any property which shall have been once registered shall be subsequently sold, encumbered, or otherwise affected or dealt with, the deed or instrument purporting to transfer or otherwise deal with or affect such property shall state the volume and folio of the register in which such property has been previously registered." No doubt the title created by the certificate of sale cannot be defeated by prior or other registration of deeds affecting the original undivided shares, but I think that when a question of competing registrations arises with regard to transactions subsequent to the certificate of sale and referable to it, the former volumes

¹ (1913) 16 N. I. R. 438.

and folios in the registrar's book come into play. For this reason, I think the deed of Don Bastian de Silva in favour of the first, third, and fifth defendants was not registered in the right folio, and cannot, therefore, gain priority over the mortgage bond in favour of Miss Meurling or the Fiscal's transfer in favour of the plaintiff. The share so mortgaged was assumed in the course of the argument to have been Don Bastian de Silva's original share, but I find that the partition decree declared him entitled to 3,356/4,320 shares. In any case there was nothing to prevent Don Bastian de Silva, though he had become owner of the entirety by the purchase at the partition sale, from mortgaging a share, and that circumstance, therefore, makes no difference in the determination of the present question.

There was a subsidiary question as to the validity of the mortgage decree. It appears that when Miss Meurling put the mortgage bond in suit, Don Bastian de Silva was dead, and in a separate proceeding an application was made to appoint his widow as administratrix of his estate, and the Court appointed her as administratrix. The widow, as administratrix, was made defendant to the mortgage action. Pending the action the widow also died, and the eldest son was appointed administrator of Don Bastian de Silva's estate, and in that capacity was substituted as defendant in the mortgage action. But neither the widow nor the son actually took out letters of administration, and the contention is that in view of this circumstance the decree was not obtained against a proper representative of Don Bastian de Silva. On the face of the proceedings in the mortgage action, however, Don Bastian de Silva's estate was represented by an administrator, and I do not think that a purchaser at the Fiscal's sale was bound to look beyond that fact. As against the plaintiff who was the purchaser, the administrator's failure to take out letters must, I think, be considered to be no more than an irregularity, and that it does not materially affect his title.

In my opinion the judgment appealed from is right, and I would dismiss this appeal, with costs.

SCHNEIDER J.—I agree.

Appeal dismissed.

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