

1904.
November 29.

Present: Sir Charles Peter Layard, Chief Justice, and
Mr. Justice Moncreiff.

LOUIS APPUHAMI *v.* PUNCHI BABA.

D. C., Matara, 3,206.

Partition suit—Decree for sale—Mortgage after such decree and before certificate—Validity—Mortgage of share that may be allotted in the partition suit—Conclusive order—Ordinance No. 7 of 1887.

A sale or mortgage executed during the pendency of a partition of Ordinance No. 10 of 1863 (Partition Ordinance), but before the certificate of sale is signed by the judge, is valid.

A sale or mortgage executed during the pendency of a partition suit in respect of a share or interest, to which a person may become entitled after the termination of such suit, is valid, and is not affected by section 17 of Ordinance No. 10 of 1863.

A PPEAL from a judgment of the District Judge of Matara. The facts sufficiently appear in the judgment of Layard C.J.

Sampayo, K.C., for the plaintiff, appellant.

Van Langenberg, for the defendant, respondent.

Cur. adv. vult.

29th November, 1904. LAYARD C.J.—

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The plaintiff in this case sought to enforce a mortgage given to him in respect of a divided portion of land which was a part of a larger land, the subject of a partition action in another suit. The mortgage was executed undoubtedly after the institution of that partition action and after the decree for sale made in that suit under the provisions of the Partition Ordinance, No. 10 of 1863; the certificate of sale of the land, however, was not signed by the District Judge until the 28th April, 1897, long subsequent to the decree for sale. The District Judge has rightly in this case held himself to be bound by the judgment of this Court in the Court of Requests, Matara, case No. 622, in which Mr. Justice Lawrie held in appeal that the issue of the certificate of sale marked the termination of proceedings in a partition suit where the land is sold, his attention not having been drawn to the later decision of this Court, which is unreported.

The following opinion is the one arrived at by me independently of the later decision. The provisions of section 9 of Ordinance No. 10 of 1863 provide that the decree for a partition or sale, given as thereinbefore in the Ordinance provided, shall be good and conclusive as against all persons whomsoever, whatever right or title they may have, and shall be good and sufficient evidence of such partition and sale and of the title of the parties to such share or interest as has been thereby awarded in severalty. This Court has repeatedly held that a decree for a partition therein referred to is a final decree entered for a partition. Mr. Justice Lawrie, in the judgment referred to by the District Judge, seems to have thought that from analogy the certificate of sale must be treated for the purposes of that section as a decree for a sale. I cannot see that any analogy can be drawn from the decisions of this Court that the decree for partition for the purposes of that section is a final decree, for the certificate under the hand of the Judge that a property has been sold under the order of the Court is declared by section 8 of the Ordinance to be merely evidence of the purchaser's title, without any deed or transfer from the former owner. The certificate of sale is good for that purpose, but the Ordinance nowhere provides that the certificate of sale is to be treated as a decree. A certificate and a decree are two entirely different things, and the difference in this particular Ordinance is emphasized by the fact that the certificate cannot issue until there has been a decree for sale, and something more than a decree until there has been a sale of the land under that decree. I think, therefore, that the District Judge was wrong in holding that in view of the decision of Mr. Justice Lawrie, following the judgment in *Browne's Reports*, III., page 200, that the mortgage in this case was invalid. I am justified in my opinion by the judgments of Wendt J. and Sampayo J. in the unreported case mentioned above,¹

¹ 59 D.C., *Interlocutory*, Colombo, 11,747; *S. C. Min.*, August 4, 1904.

1904. two Judges whose judgments are entitled to much weight owing to
November 29. their great local experience. Respondent's counsel has invited my
LAYARD C.J. attention to section 17, and has very fairly pointed out to the Court
that the sales of properties to which that section is obnoxious are sales
of undivided shares or interests in land, the subject of a partition
action. I do not think that that section was intended to embrace or
affect or to hinder or prevent persons from alienating or mortgaging
the right to which they might become entitled after a partition had
been decreed in respect of the land, the subject of a partition suit to
which they were parties. Such a sale or mortgage executed during
the pendency of a partition suit in respect of a share or interest, to
which a person may become entitled after the partition suit has
terminated, appears to me not affected by section 17. The purchaser
and mortgagee, however, could probably not interfere with the
adjustment of the expenses and costs incurred in respect of the
partition of the land, and it may be, and probably is, that the sale or
mortgage in his favour would not entitle him to any interest sold or
mortgaged until the expenses of the partition proceedings had been
paid.

The appellant's appeal must succeed, and the case be remitted to
the District Court for further hearing. The appellant is entitled to
the costs of this appeal.

MONCREIFF J.—

I agree with the Chief Justice in thinking that the Judge is wrong
in considering that the plaintiff's mortgage fell within section 17 of
the Partition Ordinance.

Appeal allowed.
