1942 *Present :* **Soertsz and Keuneman JJ.**

MOHAMED *v.* SINNEMUTTU

96—D. C. (Inty.) Galle, 37,513.

Partition—Sale under decree—Undivided shares subject to mortgage—Distribution of proceeds—Partition Ordinance (Cap. 56), s. 8.

Where property sold under a partition decree was owned by four co-owners in equal shares and the shares of two such co-owners were subject to mortgage, the proper method of distribution of the proceeds of sale should be based upon a consideration of the value for which the purchaser would buy the land as unencumbered.

After the deduction of the *pro rata* costs, the owners of the unencumbered shares would be entitled to one-fourth share each of the net proceeds and the others to one-fourth each less the amount of their respective mortgages.

APPEAL from an order of the District Judge of Galle.

L. A. Rajapakse (with him *E. B. Wickremanayake*), for plaintiff appellant.

H. V. Perera, K.C. (with him *U. A. Jayesundere*), for 4th defendant, respondent.

February 27, 1942. KEUNEMAN J.—

The conflict in this case arises between two schemes of distribution of the proceeds of a public sale under the Partition Ordinance. The actual sum realized at the sale was Rs. 3,175 *pro rata* costs and other expenses amounted to Rs. 250.47, leaving the net sum of Rs. 2,924.53 available for distribution.

The property in question was held in the interlocutory decree to belong to the plaintiff, 1st defendant, 3rd defendant and 4th defendant in equal shares, *i.e.*, one quarter share to each. The shares of the 3rd and 4th defendants were unencumbered. The share of the plaintiff was subject to a mortgage of Rs. 1,500 and the share of the 1st defendant was subject to a mortgage of Rs. 386.25. The sums mentioned included interest said to be due on the mortgages from the dates of the mortgages up to the date of the sale under the Partition Ordinance.

The plaintiff filed a scheme of distribution, in which the existence of the mortgages mentioned was disregarded. According to this scheme the plaintiff, the 1st defendant; the 3rd defendant and the 4th defendant received equal shares of the net sum of Rs. 2,924.53, that is to say, Rs. 731.13 each. This scheme was rejected by the District Judge.

In support of this scheme Mr. Rajapakse argues that the provision of section 8 of the Partition Ordinance (Cap. 56) made a division in this manner imperative. He depends on the words "and the purchaser shall pay into Court the amount of the purchase money, agreeably to the conditions of sale, to be paid over to the persons entitled thereto, under the order of the Court, *in the proportion of their respective shares*". Counsel argues that the word "shares" meant "shares in the premises".

There is this decree of force in the argument, viz., that the words "shares and interests" or "shares or interests" appearing in the earlier sections (*see* sections 4 and 5) are not reproduced here. Counsel argues that the word "shares" in section 8 was restricted to "shares in the premises".

I do not agree with the argument. It has to be remembered that the phrase in question occurs in a section that deals, not with the rights of the parties to the action, but with the duties and obligations of the Commissioner and of the purchaser at the sale, and the effect of the certificate of the Court. Further, the money in question is to be paid over to the persons entitled "under the order of the Court". This shows that the Court has a controlling discretion with regard to the payment of the money.

To interpret the words "shares" in the narrow sense contended for would offend against the scheme of the Partition Ordinance and would lead to manifest injustice. To take an example, a person who has improved the land, and has been held entitled to compensation for improvements under the interlocutory decree, would be precluded from obtaining any share of the purchase money, because he did not have a share in the premises.

I may add that the proviso to section 8 also throws some light on this matter. Under this, where one of the co-owners purchases the property, "the share due to him . . . . shall be deducted from the amount to be paid into Court by him". The word "share" in this connection is not the share in the premises, but appears to be the share of the proceeds to which he is entitled.

I reject the argument that the word "shares" in section 8 means "shares of the premises".

Mr. Rajapakse also argues that, though mortgages either of the whole land or of undivided shares attach to the land in the hands of the purchaser and not to the proceeds of sale (see *de Silva v. Rosinahamy*[1]) the personal obligation of the mortgagor to pay the amount due remains, and it is open to the mortgagee to bring an action against the mortgagor for the amount, and to give up the hypothecary action. I am inclined to think that this contingency is so remote that it is usually incapable to assessment, and that ordinarily such a contingency may be disregarded.

[1] *41 N. L. R. 56.*

Mr. Rajapakse also contends that the adoption of any other method of distribution, except that advocated by himself, would involve the Court in difficult and doubtful inquiries. Some of the inquiries will involve difficult questions of fact, but I do not think this affords a reason for deciding in Mr. Rajapakse's favour. Certainly special considerations will have to be taken into account, where the mortgages bind not only the land sold but other premises as well, and there may be other instances where the assessment will be doubtful. It is sufficient to say that the present case appears to be free of these difficulties.

The scheme of distribution of the 4th defendant which has been accepted by the District Judge subject to a slight modification is as follows. As Mr. H. V. Perera puts it, it is based upon the proposition that the scheme of distribution depends on the value of each party's interest as it stood immediately before the sale. Accordingly the person who had an unencumbered interest must of necessity have a more valuable asset than the person whose interest was subject to a mortgage. The next point Mr. Perera urged was that the purchaser, whose purchase was made subject to the existing mortgages, would take those mortgages into account in making his bid, and would accordingly offer less than for the premises as unencumbered.

In the present case Mr. Perera argues that the fair value of the premises unencumbered must be regarded as Rs. 3,175 (*i.e.*, the actual bid of the purchaser) *plus* the amount of the two mortgages, *i.e.*, Rs. 1,500 and Rs. 386.25. The aggregate would then be Rs. 5,061.25, which may be regarded as the purchaser's appraisement of the property as unencumbered. From this the sum payable as *pro rata* costs, &c. (*i.e.*, Rs. 250.47) has to be deducted, leaving a balance of Rs. 4,810.78. The 3rd and 4th defendants should really be entitled to one-quarter each of this amount; the 1st defendant to one-quarter, less Rs. 386.25; the plaintiff to one-quarter, less Rs. 1,500. In the case of the plaintiff, however, this results in an adverse balance against him, and accordingly the sum actually available for distribution has to be divided among the 1st, 3rd, and 4th defendants proportionally to their interests and the plaintiff gets nothing.

It is unfortunate that the plaintiff cannot be declared entitled to any compensation, but Mr. Perera argues that this is due to the fact that he has mortgaged his share for a larger amount than the purchaser was willing to pay for it.

I think the two propositions on which Mr. Perera rests his scheme of distribution are fair and reasonable, and I see no legal obstacle to their adoption for the purpose of making the distribution. In this case Mr. Perera arrives at his estimate of the fair value of the premises unencumbered by adding, to the amount of the purchaser's bid, the sums due on the mortgages outstanding. Ordinarily this may be a satisfactory method of arriving at the true value of the property as unencumbered, but I am far from saying that this method can be employed as a rule of thumb, for special circumstances may exist in particular cases which have to be taken into account. I have already rferred to one of these cases. It

is sufficient to say that, in the present case, no such special circumstances have been shown to exist, and I think the present scheme of distribution is reasonable.

There is one argument of Mr. Rajapakse to which I have not referred. He urges that besides the mortgages disclosed in the partition proceedings there may be mortgages not disclosed. In practice these would be restricted to registered mortgages, and the parties interested should be in a position to place material before the Court. As far as the Court is concerned, it will have to decide the case on the material before it. As regards the question whether any part of the capital or interest due on the mortgages has been paid before the date of sale, here again the party interested should be in a position to supply adequate material for the Court to determine this question. I do not think any of these matters provide insuperable difficulties.

The appeal is dismissed with costs.

SOERTSZ J.—I agree.

Appeal dismissed.