

1936

Present : Moseley J. and Fernando A.J.

SALEE *et al.* v. NATCHIA *et al.*

175—D. C. Kalutara, 14,337.

Partition—Transfer of shares pending partition—Shares to be awarded in partition case or of amount realized by sale of property—Validity of sale—Ordinance No. 10 of 1863, s. 17.

Where the interests in a land in respect of which a partition action was pending were transferred in the following terms :

“ We do hereby sell and transfer all that right and title described in the schedule belonging to us or the shares of the said property to be awarded by the decision arranged in partition case No. 5,303 now pending or the shares of the amount that will be realized by the sale of the said property.”—

Held, that the transfer was not obnoxious to section 17 of the Partition Ordinance.

Hewawasan v. Gunasekere (28 N. L. R. 33) followed.

A PPEAL from a judgment of the District Judge of Kalutara.

Weerasooria (with him *T. S. Fernando*), for 11th to 11d defendants, appellants.

Haniffa, for 3rd and 13th defendants, respondents.

Cur. adv. vult.

November 9, 1936. FERNANDO A.J.—

This is a partition action, and the main question that arises on this appeal is whether the deed of transfer 11 D 11 was inoperative in view of section 17 of Ordinance No. 10 of 1863. It is common ground that D. C. 5,303 was a partition action for a land of which the lot now in dispute formed a portion, and that the plaint in that action was filed on May 21, 1913, and final decree was entered on November 2, 1914. Deed 11 D 11 is dated June 4, 1914, and was therefore clearly executed before the final decree.

The learned District Judge states that deed 11 D 11 deals with undivided interests and for this reason he appears to have come to the conclusion that that deed was inoperative. The deed, however, is in these terms: "We . . . do hereby sell and transfer all that right and title described in the schedule belonging to us, or the shares of the said property to be awarded by the decision arranged in partition case No. 5,303 now pending, or the shares of the amount that will be realized by the sale of the said property". Now the question whether a deed of this kind is valid in view of section 17, and if valid what effect such deed has, have been considered in a series of judgments of this Court. In *Abdul Ally v. Kelaart*¹ Wendt J. held that a deed by which the vendor purported to sell and convey his undivided share of a property, which was the subject of a partition action where the deed further provided that if in the partition action the property shall be sold in its entirety and converted into money the vendor shall be entitled to take and receive to his own use so much of the proceeds realized by such sale as shall represent his undivided share sold, was not obnoxious to section 17 because at that date the vendor had not an undivided interest in the land, but an interest which had been transmuted by the decree into a right to receive a share of the proceeds sale. De Sampayo J. in the same case thought that the deed apart from its effect as a conveyance of the share also contained an assignment of the equivalent share of the proceeds of the sale, and that the deed looked at in this way did not contravene the letter or the intention of section 17. In the same year 1904, the Supreme Court in *Louis Appuhamy v. Punchi Baba*² held that section 17 was not intended to affect, or hinder, or prevent persons from alienating the right to which they might become entitled after a partition had been decreed. "Such a sale", said Layard C.J. "executed during the pendency of a partition suit in respect of a share or interest to which a person might become entitled after the partition suit has terminated, appears to me not affected by section 17". In *Subaseris v. Porolis*³ Wood Renton C.J. after referring to these two cases observed that section 17 "imposed a fetter on the free alienation of property, and the courts ought to see that that fetter is not made more comprehensive than the language and the intention of the section require. The section itself prohibits only, in terms, the alienation of undivided shares or interests in property which is the subject of partition proceedings while these proceedings are still pending, and the clear object of the enactment was to prevent the trial of partition actions from being delayed by the intervention of fresh parties whose interests had been created since the proceedings began. - Such a transfer as we have to deal with in the present case (by which a party had assigned to the plaintiff all the advantages or disadvantages such as costs and also the share which he would be entitled to either in common or partition by virtue of the decree in the partition action) is not touched either by the language or by the spirit of section 17". In *Appuhamy v. Babun Appu*⁴, however, Ennis A.C.J. appears to have taken a rather different view. He referred to the case of *Subaseris v. Porolis* (*supra*) and said that in that case "An

¹ 1 *Balasingham* 40.

² 10 *N. L. R.* 196.

³ 16 *N. L. R.* 394.

⁴ 25 *N. L. R.* 370.

attempt was made to grant some sort of equitable relief to a person who had purchased from a co-owner, during the pendency of a partition action, the share to which he would be entitled on partition. The decision in that case was influenced by the consideration that a party to a partition action should be able to deal by anticipation with whatever divided interests he may ultimately obtain. With that consideration I am in entire accord. It is possible that a co-owner in land subject to a partition suit may sell his interests in the land and agree to convey whatever he may receive under the final decree. It is possible that such an agreement would not be obnoxious to section 17 of the Partition Ordinance. But it remains merely an agreement to convey, and would not operate as a conveyance or alienation". It was therefore, held, that the transfer in that case was void, and Garvin J. agreed. No reference appears to have been made in that case to the earlier judgments in *Abdul Ally v. Kelaart* or *Louis Appuhamy v. Punchi Baba* although those two cases were referred to in the judgment of Wood Renton A.C.J. in *Subaseris v. Porolis*. In *Khan Bhai v. Perera*¹ a Bench of five Judges of the Supreme Court considered the question of the period during which the prohibition contained in section 17 would continue, and held that the prohibition continued until the issue of the certificate of sale under section 8 of the Ordinance. Bertram C.J., however, observed in his judgment that "persons deciding to charge or dispose of their interests in a property subject to a partition suit can only do so by expressly charging or disposing of the interests to be ultimately allotted to them in the action", and it is clear that he himself was of opinion that by acting in this manner a person could effectively charge or dispose of the interest to be ultimately allotted to him, and that a deed by which he purported to deal with the property in this way would not be necessarily regarded as a mere agreement to dispose of his interest.

The question as to the effect of section 17 expressly came up before a Bench of three Judges in *Hewawasan v. Gunasekere*²; and Garvin J. who had taken part in the judgment in *Appuhamy v. Babun Appu* (*supra*) held that a deed of transfer by a party to a partition action transferring certain lots which according to the survey would probably be allotted to the party, should be given effect to as between the two parties and was not obnoxious to section 17. He further states, "this is a sale by one and a purchase by the other of certain lots of land which had no existence as separate holdings, but which the parties believed would as a result of the final decree be allotted in severalty to the respondent; possession was to commence on the entry of the final decree, the respondent binding himself to do nothing to deprive the appellant of the benefit of the same and to execute all such further deeds as may be necessary to assure to the appellant a good title to the premises. Now, what is this transaction but a dealing by anticipation with the share which it was thought would be allotted to the respondent by the final decree? What the respondent intended to sell and the appellant to buy was the share to be allotted to the respondent by the final decree It is said that the transaction embodied in these deeds is obnoxious to section 17 of the Partition Ordinance. For the reasons

¹ 26 N. L. R. 204.

² 28 N. L. R. 33.

already set out this transaction is not in my opinion such an alienation as is prohibited by that section". He then proceeded to consider the observations of Ennis A.C.J. in *Appuhamy v. Babun Appu* (*supra*) and he states that the deed in favour of the vendee Simon in that case was not before him and "it is impossible to say whether or not the language of the deed justified the observations made by Ennis A.C.J." He then went on to state that in the case before him there was no dispute as to title, and that the action was only to compel the respondent to fulfil a part of the agreement by executing a transfer of the title declared by the final decree, the respondent having bound himself to execute all such further deeds as may be necessary, and he, therefore, held that there was nothing in the Partition Ordinance which would disentitle the appellant to the relief claimed by him. As far as I can follow this judgment, it seems to me that Garvin J. thought that the deed in *Appuhamy v. Babun Appu* probably was in effect an agreement to sell, and that that was the reason for the decision in that case, whereas in *Hewawasan v. Gunasekere* (*supra*) the deed was in effect an alienation and was held not to be obnoxious to section 17. The plaintiff, however, in *Hewawasan v. Gunasekere* was only asking for a further transfer by his vendor and in the circumstances of the case, the vendor having bound himself to give such a further conveyance, it was not necessary to consider whether in fact such a conveyance was absolutely necessary, and whether the title of the vendor to the portion allotted to him in the final decree had not already vested in the purchaser. Dalton J. concurred in the judgment of Garvin J., but Jayewardene A.J. who dissented from it thought that the alienation sought to be effected by the deed in question offended against section 17 and was therefore void. He then proceeds to consider the question whether the title subsequently acquired by the vendor under the final decree enured to the benefit of the purchaser, and came to the conclusion that that benefit could not enure to him because the deed was void under section 17 and could not therefore become effective. He also proceeded to hold that it was not possible to construe the deed as an agreement to convey because a deed that is void under section 17 is void to all intents and purposes, but he appears to have adopted the reasoning of Bertram C.J. in *Khan Bhai v. Perera* (*supra*) and he quotes in full the passage which I have already quoted with regard to the only manner in which persons desiring to dispose of their interests in a property subject to a partition suit can do so.

The question appears to have come up again in September, 1926, in the case of *Fernando v. Atukorale*¹, a few months after the case of *Hewawasan v. Gunasekere*. In that case Lyall Grant J. thought that the deed which was in the ordinary form a conveyance could not operate as a conveyance because the property dealt with did not at the time of the execution of the deed belong to the vendor. "If the deed is to have any effect, it must operate not as a conveyance but as an agreement to convey." Maartensz J. after referring to the earlier cases observed that the statement of Sir Anton Bertram C.J. with regard to persons desiring to charge or dispose of their interests during the pendency of a partition suit was obiter to the question before the Court in the case of

¹ 28 N. L. R. 292.

Khan Bhai v. Perera. With regard to the deed in question in *Fernando v. Atukorale*, Maartensz J. said that whether that deed "is looked upon as an out and out sale as in the case of *Subaseris v. Porolis* or as an agreement to sell which is the view taken by Ennis J. in *Appuhamy v. Babun Appu*, it is possible that it invests the transferee with rights which the transferor may not be entitled to deny, but other considerations arise where the contest is between a third party and the transferee". He then proceeded to discuss the effect of section 9 of the Partition Ordinance, and came to the conclusion that the sale in question was extinguished by the partition decree". In the case where a vendor acquires a title other than under a partition decree he acquires a title good against the world, but the person to whom he has sold the property. In the case of title acquired under a partition decree the title is good and conclusive, against all persons whomsoever, whatever right or title they have or claim to have in the said property, and he referred to the case of *Bernard v. Fernando*¹. The case of *Hewawasan v. Gunasekere* does not appear to have been cited at all or considered by the Judges in the case of *Fernando v. Atukorale*.

The last case to which we have been referred is the case of *Rajapakse v. Dassanayake*² and in that case Dalton J. and Jayewardene A.J. held that a deed pending a partition action conveying "all that undivided part of the land being all the interests which the vendors were declared entitled to in the preliminary decree, or whatever lot or interests the vendors will be allowed in the final decree" was not obnoxious to the provisions of section 17, and Dalton J. in that case followed the case of *Hewawasan v. Gunasekere* which was binding on him as it is binding on us in this case. The deed in question in this case is clearly a transfer and not an agreement to sell, and I see no reason why I should not follow the decisions in which effect has been given to documents of this kind. The deed 11 D 11 was by the thirteenth and fourteenth defendants in this action in favour of Thomas Fernando, and as the learned Judge himself states in his judgment the two vendors and the vendee were all parties to the partition action. I would, therefore, hold that deed 11 D 11 is not obnoxious to section 17 of the Partition Ordinance, and that the learned District Judge was wrong in holding to the contrary.

In view of his findings as to the effect of the deed the District Judge held that it was for the eleventh defendant and her children to establish their title by prescription, but in view of the conclusion to which I have arrived as to the effect of that deed the burden of proving title by prescription would not be on these parties. On the evidence, however, I think the learned District Judge was wrong in coming to the conclusion that the fourth defendant had not acquired a title by prescription. The land is only 24 perches in extent, and Ahamadu Lebbe, the fourth defendant, put up buildings and recovered all the rents. The only other person who occupied that portion of the land was Samsi who according to the evidence paid rent to Ahamadu Lebbe. The fourteenth defendant appears to have been ejected from one of the boutiques of the

¹ 16 N. L. R. 438.

² 29 N. L. R. 509.

land, and she appears to have been in possession under Carrim. Neither the fourteenth nor the fifteenth defendant has had any possession since 1927.

I would accordingly hold that all the interests of Samsi Lebbe under the final decree in case No. 5,303 have passed to the eleventh defendant and defendants 11A to 11D, and that similarly the rights of the thirteenth and fourteenth defendants have passed to defendants 11A and 11B. The Interlocutory Decree will be amended accordingly, and the third and thirteenth defendants will pay to defendants 11 to 11D their costs of this contest and of this appeal.

MOSELEY J.—I agree.

Judgment varied.

