

Present: Mr. Justice Wendt, Mr. Justice Middleton, and
Mr. Justice Wood Renton.

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PERERA v. PERERA *et al.*

D. C., Colombo, 20,449.

Fiscal's sale—Pendency of partition suit—Validity—"Alienation"—Partition Ordinance (No. 10 of 1863), s. 17.

Section 17 of Ordinance No. 10 of 1863 enacts: "Whenever any legal proceedings shall have been instituted for obtaining a partition or sale of any property as aforesaid, it shall not be lawful for any of the owners to alienate or hypothecate his undivided share or interest herein, unless and until the Court before which the same were instituted shall, by its decree in the matter, have refused to grant the application for such partition or sale, as the case may be; and any such alienation or hypothecation shall be void."

Held, that this section applies to voluntary and not to necessary alienations, and that a Fiscal's sale of the shares of some of the co-owners pending a partition suit is valid.

Held, also, that the Fiscal's purchaser was entitled to be substituted on the record in place of the parties whose interests he purchased.

The judgment in *Annamalai Pillai v. Perera* (6 N. L. R. 108) explained.

THIS was a partition suit. Preliminary decree was entered on the 26th April, 1905. On the 13th April, 1905, the interests of the eleventh and twelfth defendants (husband and wife) and the sixteenth defendant, who were subsequently allotted certain shares in the preliminary decree, were sold by the Fiscal and purchased by the second added defendant, who obtained Fiscal's transfers Nos. 8,280 and 8,281, dated the 31st July, 1905, and claimed to be substituted in place of the said eleventh, twelfth, and sixteenth defendants on the record.

The District Judge (F. R. Dias, Esq.) dismissed the claim of the second added defendant, holding on the authority of *Annamalai Pillai v. Perera* (1) that the Fiscal's sales were void under section 17 of Ordinance No. 10 of 1863.

The second added defendant appealed *ex parte*.

A. St. V. Jayewardene for him.—The decision in *Annamalai Pillai v. Perera* (1) did not deal with Fiscal's sales pending partition proceedings. The question was not raised or discussed, as Moncreiff J., one of the Judges who took part in *Annamalai Pillai v. Perera* (1), explained in *Guneratne v. Tinanhamy* (2). The Roman Law and

(1) (1902) 6 N. L. R. 108.

(2) S. C. Min. March 17, 1904.

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the Roman-Dutch Law recognized a clear distinction between alienations *voluntariæ* and *necessariæ*; where alienation was prohibited, such prohibition was considered to extend only to voluntary alienations; and a sale of a debtor's property at the instance of creditors was considered a necessary alienation: *Digest* 23, 5, 1; *Voet* 23, 5, 2; *Digest* 27, 9, 3, 1; *Voet* 27, 9, 12; *Sande, de prohib. rer. alie.* 3, 8, 13. This distinction exists in the English law, and has been adopted by the Courts in India, *Silva v. Gimarah* (1). The words of this section clearly refer to alienations by the owners, and not to execution sales against the will of the owners. The Roman Law too, which prohibited alienations pending partition, excluded necessary alienations (*Digest* 10, 2, 13). If Fiscal's sales be held to come within the terms of section 17, debtors will be enabled to place their property beyond the reach of their creditors for an indefinite length of time by instituting proceedings under this Ordinance. (*Hukm Chand's Res Judicata*, p. 723).

19th July, 1906. WENDT J.—

The question which is specially brought before for us for consideration in this case is, whether a Fiscal's sale of an undivided share of land, pending proceedings for partition, is void under section 17 of the Partition Ordinance, as an alienation by an owner. The learned District Judge in holding against the sale considered himself bound to do so in view of the decision of the majority of the Supreme Court in the case of *Annamalai Pillai v. Perera* (2). I was one of the Judges who decided that case, and I dissented from the view of my brother Judges. The question there reserved for the consideration of the Full Court, and the only question argued before us, was whether an alienation obnoxious to section 17 was absolutely void, or void only *quoad* the partition proceedings, as decided in the case of *Babun v. Amarsinghe* (3), and the fact that one of the alienations upon which the claimant founded was a Fiscal's sale was barely mentioned at the argument. The reason, I suppose, was that, even assuming the Fiscal's sale was valid, the claimant would still have failed because his transfer from the execution-purchaser was executed pending the old partition proceedings. That case, however, has been regarded—partly at least, owing to the form of the reporter's headnote—as deciding that an execution sale pending partition proceedings was void, and Layard C.J. in *Silva v. Gimarah* (1), so treated it and held himself bound to hold in the same way. His own opinion was the other way, and in support of it he cited authority

(1) (1903) 7 N. L. R. 135.

(2) (1902) 6 N. L. R. 108.

(3) (1878) 1 S. C. C. 24.

which established conclusively that a purchaser at an execution sale is not the alienee of the judgment-debtor, as the grantee of a conveyance from him would be, but claims title adversely to him and by operation of law; and such a sale therefore cannot properly be regarded as an alienation by the judgment-debtor.

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The very terms of section 17 are, in my opinion, in appellant's favour. The Legislature, had it been minded to forbid sale in execution as well, could (and I think would) have enacted that once a partition suit was commenced no change in the ownership of the land should be effected until after its determination. Instead of such an enactment, it merely says that "it shall not be lawful for any owner to alienate or hypothecate his undivided share or interest." *Prima facie* this language is not applicable to a sale *in invitum* by the Fiscal. Section 17, moreover, is a re-enactment of section 17 of the first Partition Ordinance, No. 21 of 1844, which in section 19 expressly provided for the execution sale of the share of one of the parties pending the action, and for the award to the purchaser of the share due to his execution-debtor. Section 17, therefore, when first enacted, did not apply to Fiscal's sales, and although the express provision I have mentioned was not re-enacted in section 16 of the present Ordinance, which reproduced the remaining directions of section 19, I find nothing to suggest that that indicates an intention to bring Fiscal's sales within the prohibition in section 17. It would rather appear that express provision was regarded as unnecessary, inasmuch as in the absence of the consent of all the co-owners, which the preceding part of the section contemplated, the Fiscal could only sell the share of the judgment-debtor.

The common law recognized the validity of sales made *ex necessitate* where voluntary alienations were forbidden, execution sales being classed as "necessary." See the texts cited by appellant's counsel: *Voet* 23, 5, 2 (as to dotal property); 27, 9, 13 (as to the property of wards); *Sande, de prohib. rer. alie.*, 3, 8, 13 (*fidei commissum* property) *Dig.* 10, 2, 13.

In my opinion, a Fiscal's sale is not an alienation by the execution-debtor within the meaning of section 17 of the Partition Ordinance, and we ought therefore to allow the appeal with costs.

MIDDLETON J.—

If the judgments in *Annamalai Pillai v. Perera* (1) given by Moncreiff J. and my brother Wendt are carefully read it will be seen at once that the question in that case was whether the sale of the

(1) (1902) 6 N. L. R. 108.

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11th September, 1899, by Marthelis de Silva to plaintiff Annamalai Pillai pending a partition suit between Elizabeth Perera, the former owner, and her co-owners was void or voidable under section 17 of the Partition Ordinance—Moncreiff J. clearly held that the sale was void.

My brother Wendt, on the ground that the decision of Phear C.J. and Dias J. in *Babun v. Amerasinghe* (1) had been followed for nearly a quarter of a century by this Court, held that the sale was voidable, and made some observations at the end of his judgment which show he did not hold that the alienation by the Fiscal was void.

In my judgment it appears I held (using the plural) that these alienations were void under the section.

The headnote of the case makes it appear that the majority of the Court held that the Fiscal's transfer to Marthelis de Silva was void under the section.

Although from the words used in my judgment it may appear that I held so, there is nothing in the judgments of either of my brothers to warrant the headnote stating it to be the judgment of the majority of the Court.

That I held so myself I find it now difficult to believe, and am at a loss to understand my use of the plural in the last paragraph but one of my judgment.

My ruling would be however *obiter* of the point for decision.

The question as to the Fiscal's transfer was never really raised or argued in that case, but in the present case it is definitely before us for decision.

I agree with my learned brothers, whose judgments I have had the advantage of perusing, that an alienation by the Fiscal being *ex necessitate*, and involuntary so far as the owner of the share sold is concerned, is not an alienation by the owner within the meaning of section 17 of the Partition Ordinance, and would grant the prayer of the petition of appeal with costs.

At the same time I take leave to think that just as much embarrassment, delay, and inconvenience is caused by a Fiscal's transfer pending partition proceedings as by a voluntary alienation by one of the co-owners as the author of the Law of Partition in Ceylon observes.

WOOD RENTON J.—

The facts are clearly set out by the learned District Judge, and I do not propose to repeat them. The question of law that we have to decide is whether a Fiscal's sale comes within section 17 of "The

Partition Ordinance, 1863" (No. 10 of 1863), which prohibits the alienation of land "by the owners" during the pendency of proceedings for its partition. The District Judge, holding himself bound by a decision of the Full Court in *Annamalai Pillai v. Perera* (1), has answered this question in the affirmative. Sir Charles Layard C.J. in *Silva v. Gimarah* (2), while expressing the opinion that the judgment of the Full Court in the case referred to was questionable, held, like the District Judge, that he was bound by its authority. Now that the question, however, has again been brought before the Full Court, I think that we are at liberty to consider what was the main point of controversy in the case of *Annamalai Pillai v. Perera (ubi sup.)*. The issue debated there was whether a sale pending partition proceedings was void or voidable under section 17 of Ordinance No. 10 of 1863. It is true that the sale in question was a Fiscal's transfer. But the majority of the Court do not at all deal with this aspect of the question. Their attention had been directed not to the character of the sale, but to the character of the statutory prohibition. In his dissenting judgment, Wendt J. raises the point which is before us in the present appeal. Now that we have to consider it directly, I venture to think that a Fiscal's transfer does not come within section 17 of "The Partition Ordinance, 1863." The distinction between voluntary and necessary alienation and the principle that the latter did not constitute a contravention of the prohibition of the alienation of dotal property (*Voet*, 23, 5, 2), or of the property of a ward (*Voet*, 27, 9, 12) or (as regards a right of action against the alienator himself) of property subject to a *fidei commissum* (*Sande*, 3, c. 8, s. 13) were clearly established in Roman-Dutch Law. There are direct Indian authorities, *Lala Parbhu Lal v. Mylne* (3); *Bashi Chunder Sen v. Enayet Ali* (4); *Anundo Moyee Dossee v. Dhonendro Chunder Mookerjee* (5), for the proposition that the title of a purchaser under a judgment decree cannot be put on the same footing as the title of a person claiming under a voluntary alienation. The language of section 17 of the Partition Ordinance itself seems to point only to the latter class of alienations. It speaks of alienations "by the owners." But the purchaser at a Fiscal's sale acquires title not from the owner but adversely to the owner by operation of law.

I would set aside the judgment and decree appealed against and direct that the appellant be substituted for the eleventh and sixteenth defendants, as prayed for in the petition of appeal.

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(1) (1902) 6 N. L. R. 108.

(3) (1887) I. L. R. 14 Cal. 401 at p. 413.

(2) (1903) 7 N. L. R. 135.

(4) (1892) I. L. R. 20 Cal. 236 at p. 239.

(5) (1871) 14 Moo. I. A. 101.