

1959

*Present : Basnayake, C.J., and Pulle, J.*

SEELAWATHIE PERERA, Appellant, and K. K. DON  
PETER *et al.*, Respondents

*S. C. 661—D. C. Colombo, 473/Z*

*Partition Ordinance (Cap. 56)—Section 17—Transfer of a divided portion after final decree of partition and pending appeal—Validity.*

*Action under s. 247 of Civil Procedure Code—Plea of forgery—Discretion of Court to refer that issue to a separate action.*

Where a party who has been allotted a divided portion in the final decree of a partition action transfers that portion during the pendency of an appeal against the final decree, there is nothing in section 17 of the Partition Ordinance to render the transfer void.

Where, in an action instituted by a judgment-creditor under section 247 of the Civil Procedure Code, the judgment debtor pleads that the deed alleged to have been executed by him in favour of the claimant was a forgery, the Court may refer the issue of forgery to a separate action.

**A**PPPEAL from a judgment of the District Court, Colombo.

*H. W. Jayewardene, Q.C.*, with *E. S. Dassanayake* and *C. P. Fernando*, for Plaintiffs-Appellants.

*Sir Lalita Rajapakse, Q.C.*, with *C. R. Gooneratne*, for 1st and 2nd Defendants-Respondents.

*Cur. adv. vult.*

June 12, 1959. PULLE, J.—

The appellant is the plaintiff in an action filed by her under section 247 of the Civil Procedure Code on 2nd July, 1954, to have it declared that a deed No. 175 dated 28th August, 1953, was null and void as being in fraud of creditors and that the premises conveyed thereby to the 1st and 2nd defendants by one Seekuge Sirisena *alias* James Perera was liable to be sold in execution of a decree in her favour against James Perera in D.C. Colombo Case No. 19,369/M. On a point taken by the 1st and 2nd defendants in their answer that James Perera was a necessary party he was made the 3rd defendant in the present action. By his answer the 3rd defendant pleaded, *inter alia*, that deed No. 175 was a forgery and prayed that it be declared null and void.

The premises which the plaintiff sought to seize and sell is depicted as lot 1 on plan No. 4,886A dated 7th March, 1951, made in partition action No. 5,320. By the final decree dated 10th October, 1951, the 3rd defendant was declared entitled to Lot 1 in that plan. An appeal by him in the partition action was dismissed on 16th March, 1954.

At the trial learned counsel for the plaintiff raised the following issues :—

1. Was deed No. 175 executed in fraud of creditors ?
2. Was the deed executed in fraud during the pendency of partition action No. 5,320, and if so, whether it was void ?

The issue suggested on behalf of the 3rd defendant reads, " Was the said deed No. 175 executed by the 3rd defendant or is the said deed a forgery ? "

The allegation of forgery was made only by the 3rd defendant and, in effect, he counterclaimed against the 2nd and 3rd defendants a declaration that the deed was null and void. The learned trial Judge was of the opinion that it would be inconvenient to try in an action under section 247 of the Civil Procedure Code an issue of forgery, arising only as between the judgment debtor and the successful claimants, and referred the parties to a separate action on that issue. One of the points stressed in this appeal on behalf of the plaintiff is that the learned Judge should have himself tried the issue of forgery instead of referring the 3rd defendant to a separate suit.

The action, D.C. Colombo No. 19,369/M, in which the execution proceedings were taken, was filed on 3rd May, 1948, and decree was entered on 29th September, 1954. Apparently prior to this decree the 3rd defendant had been ordered to pay Rs. 566/88 to the plaintiff and for the purpose of recovering this amount she caused the premises in suit to be seized on 6th February, 1954. A claim by the 1st and 2nd defendants that they were in possession of the premises as owners under deed No. 175 of 28th August, 1953, was upheld on 24th June, 1954, and the present action was filed, as stated before, under the provisions of section 247 of the Code on 2nd July, 1954. The second point urged both in appeal and in the District Court was that deed No. 175 was void because it was executed pending the action No. 5,320 instituted on 26th April, 1948, to partition a property of which the premises in suit formed a part. In this action interlocutory decree was entered on 3rd October, 1950, and the final decree by which the 3rd defendant was allotted the premises seized was entered on 10th October, 1951. It is contended that until the appeal from the final decree was disposed of on 16th March, 1954, section 17 of the Partition Ordinance was a bar to the 3rd defendant executing a valid conveyance of the lot allotted to him in the final decree. This submission was not accepted.

On the issue of fraudulent alienation the learned trial Judge has in a carefully considered judgment given convincing reasons for holding against the plaintiff and we see no reason for disturbing his findings. There remain, therefore, for consideration only the submissions that the reference of the issue of forgery, raised by the 3rd defendant, for decision in a separate action should not have been made and that section 17 of the Partition Ordinance rendered deed No. 175 void.

The plaintiff instituted the action not on the basis that there was no alienation of the premises seized but that deed No. 175 was liable to be set aside as being in fraud of creditors and that it was further void by reason of section 17 of the Partition Ordinance.

The issues suggested on behalf of the plaintiff who was seeking relief against the 1st and 2nd defendants covered only these two grounds.

The 3rd defendant sought no relief against the plaintiff. If the plaintiff desired to rely on a third ground for attacking the deed the proper course was to move the Court to amend the plaint in order to bring out clearly the new matter in issue. It is not unlikely that the plaintiff thought it wiser to restrict herself to the two issues suggested on her behalf because prior to the execution of deed No. 175 the 3rd defendant had on 4th May, 1950, 1D2, agreed to sell to the 1st and 2nd defendants the divided interests that would be allotted to him by the final decree in partition action No. 5,320 and that after the date of execution of deed No. 175 the 1st and 2nd defendants had by deed 1D4 of 7th January, 1954, leased a house standing on the premises for a period of five years. In point of fact the consideration for the sale in 1953 had already been paid at the execution of the agreement to sell in 1950. A powerful circumstance of this nature might have deterred the plaintiff from raising an issue which might have involved her in heavy costs if the deed was eventually found to have been executed by the 3rd defendant. There was also the additional circumstance that at the claim inquiry following on the seizure the Judge had come to a clear finding of possession in favour of the 1st and 2nd defendants. The prayer of the 3rd defendant in effect sought a declaration against the 1st and 2nd defendants that he was the owner of the premises. In this state of affairs I am of opinion that it was within the discretion of the court to order what was an action within an action to be tried separately and not to enlarge the scope of the trial beyond the limits desired by the plaintiff who set the machinery of the court in motion to obtain relief only for herself and not relief for a third party whom she did not even make, in the first instance, a defendant. The plaintiff came to court on the basis that there was in fact a conveyance of the premises by the 3rd defendant and it is not open to her now to complain that the trial Judge tied her down to that position. The 1st and 2nd defendants filed three answers in all of which it was alleged that the vendor on deed No. 175, who is the brother of the plaintiff, "was making an endeavour to help his sister by denying the execution" of the deed. Throughout the course of the pleadings no effort was made by the plaintiff to make common cause with her brother by alleging that the 1st and 2nd defendants were parties to a forgery. It cannot be said that the order of the learned Judge has caused irremediable harm to the plaintiff for, in the event of the 3rd defendant succeeding in proving forgery in a separate action, the premises will be available to the plaintiff to levy execution on.

On the second point the learned Judge held that there was nothing in section 17 of the Partition Ordinance to render deed No. 175 void. He is clearly right. It cannot be said by any stretch of language that the 3rd defendant by deed No. 175 alienated his undivided share or interests in the land sought to be partitioned in case No. 5,320. His undivided interests came to an end with the final decree entered two years earlier. He then became the owner of a new entity which he conveyed and the fact that an appeal was pending could not, in the absence of express provision to the contrary, prevent him from disposing of what

was allotted to him. The purchasers took the risk of the final decree being set aside and this risk was no more than that taken by any purchaser whose vendor's title would be open to attack. Had the final decree been set aside in appeal the deed would have been inoperative to convey title not because of the prohibition against alienation in section 17 but by reason of the foundation of the vendor's title being destroyed. The learned Judge has given other reasons for holding against the plaintiff's contention which I need not elaborate.

In my opinion the appeal fails and should be dismissed with costs.

BASNAYAKE, C.J.—I agree.

*Appeal dismissed.*

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