1951 *Present:* **Gratiaen J. and Pulle J.**

WIJESINGHE, Appellant, *and* SONNADARA, Respondent

S. C. 569—D. C. Matara, 19,243

Vendor and purchaser—Sale of contingent interest in partition action—Sale of a chance or expectation—Conventio rei speratae *and* Conventio spei simplicis—*Validity of such contracts—Partition Ordinance, s. 17.*

The sale by a co-owner in land of whatever interests might ultimately be allotted to him under the decree in a pending partition action may be construed as a *conventio rei speratae*. In such a case, if some benefit, even to a far smaller extent than the parties had originally hoped for, accrued to the seller under the partition decree, the purchaser is not entitled to claim a cancellation of the sale on the ground of failure of consideration.

APPEAL from a judgment of the District Court, Matara.

H. V. Perera, K.C., with *H. W. Jayewardene* and *J. W. Subasinghe*, for the defendant appellant.

U. A. Jayasundera, K.C., with *C. G. Weeramantry*, for the plaintiff respondent.

Cur. adv. vult.

May 29, 1951. GRATIAEN J.—

This appeal relates to a dispute which might well have been sensibly adjusted without resorting to litigation. The action was instituted in 1948, and the contract in respect of which the parties have fallen out was entered into nearly 21 years ago. The plaintiff is now 64 years old. The defendant is about the same age.

The facts with which this appeal is concerned are no longer in dispute. On some date prior to June, 1930, the defendant had instituted a partition action in respect of lots B, C, D and E of a vast tract of land in the Southern Province, known as " Shand's Land ", which is stated to be over 4,000 acres in extent. There is no evidence before us as to the nature or the value of the plantations on the property, or as to the manner in which it had previously been enjoyed by the plaintiff and *425 other persons* whom, at one time or another, he joined as defendants in the action and with whom he had found that " common possession was no longer expedient or impracticable ". The present plaintiff was himself a party to those proceedings, but only in the capacity of a planter of some part of the property claiming compensation for the improvements effected by him.

At an early stage of the pendency of the partition action the plaintiff negotiated with the defendant for the purchase of certain interests which the latter claimed in the property. An alienation of any existing undivided rights in the land was of course precluded by section 17 of the Partition Ordinance, and the proposed transaction was therefore

confined to the acquisition by the plaintiff of what might ultimately be allotted to the defendant under the final decree in the action. When such decree would be entered, no man could predict with any confidence. In point of fact, the action seems to have proceeded at a pace which was unusually leisurely for even a partition action in the Southern Province. Final decree was duly entered of record on 15th December, 1947, the interlocutory decree having been passed on 24th March, 1943.

I must now return to the negotiations which were taking place in 1930. On 17th June of that year the defendant, in consideration of a sum of Rs. 5,000, which was duly paid to him, sold to the plaintiff under a notarial conveyance:—

"1. All that undivided one hundred acres together with all the rights advantages and disadvantages such as costs compensation et cetera thereto appertaining out of the extent and the share in common or severally which may be allotted to the vendor under the finally conclusive decree which may be entered in the partition case No. 2664 of the District Court of Tangalla of the land called Godakogalla (exclusive of the block A partitioned in case No. 1207 in the District Court of Tangalla, the block called Shandsland partitioned in case No. 1538 in the District Court of Tangalla and blocks B and C as per plan in preliminary survey in the District Court case No. 2664 of Tangalla) situate at Koggalla in Magam Pattu of the Hambantota District, Southern Province, and bounded on the North by Ridiyagama, East by Walakogalla and Koggaluara, South by Koggaluara and Koggalutota and West by Walawe River containing in extent 4,000 acres.

2. All that undivided one amunam and five kurunies of the paddy field of the land called Kodakoggalla . . . . situate at Koggala aforesaid, and bounded on the North by Ridiyagama, East by Walakoggala and Koggaluara, South by Koggaluara and Koggalutota, and West by Walawe River, containing in extent about 4,000 acres".

The second land sold under this deed was admittedly land the ownership of which was not complicated by the pendency of any partition action, and the deed operated as an immediate conveyance to the plaintiff of the paddy field concerned. The plaintiff therefore became as from that date the owner of this property.

With regard to the other property which was described earlier in the deed, it is clear that the parties had successfully steered clear of the hazards of section 17 of the Ordinance. In accordance with the recent decision of a Divisional Bench of this Court in *Sirisoma v. Sarnelis Appuhamy* [1], the deed operated as a present alienation of a part of the defendant's contingent interest in what might ultimately be allotted to him under the decree in the pending action. If, under that decree, the defendant were to receive one or more divided allotments, whose total acreage exceeded 100 acres, out of lots D or E, the plaintiff would in terms of the conveyance become automatically vested with title to an undivided share in such allotment or allotments in the proportion of 100 to their total acreage. If, however, the defendant were to receive

[1] *(1950) 51 N. L. R. 337.*

one or more allotments in lots D or E with an aggregate acreage of less than 100 acres, the plaintiff would automatically, and without any further conveyance thereof, become the owner of the entire allotment or allotments. If, finally, the defendant was allotted nothing at all in lots D or E under the partition decree, then nothing would pass to the plaintiff under the first part of the conveyance of 17th June, 1930.

The language of that part of the deed which disposed of the defendant's contingent interests in Shand's Land must be interpreted in the light of the common experience of men as to the risks which are necessarily involved in any litigation under the Partition Ordinance, and it must be assumed that both parties to the transaction had those risks in contemplation when the deed was executed 21 years ago. There were no express covenants under which the defendant, as vendor, undertook that, should any unforeseen contingency arise which they both hoped would not occur, the defendant should indemnify the plaintiff as purchaser against the loss resulting therefrom. Indeed, the outcome of the particular action was, by its very nature attendant with risks and complications of a special kind. For instance, the subject matter of the action was unusually large, and the number of interested parties exceptionally high. There was no reasonable certainty that the Judge, or successive Judges, in control of the proceedings would not decide to exclude from the scope of the action one or more of the allotments of land which taken together comprised " Shand's Land ". Besides, it was expressly stipulated in the conveyance that if the defendant were to receive under the final decree any part of the land falling within lots B and C, these allotments would not pass to the plaintiff, and both parties should have realised that the final scheme of partition was a matter on which the plaintiff could not as of right control the decision of the trial Judge. All these and other considerations, in addition to the express terms of the deed of conveyance, satisfy me that the contract between the parties in respect of the contingent interests in the land under partition was a contract under which the plaintiff purchased " a chance or expectation that a thing would come into existence ", *a conventio spei*, which, under the Roman Dutch Law governing the case, can be the legitimate subject matter of a binding contract.

Wessels tells us in his treatise on the *Law of Contracts* (*Vol. I, paragraphs 393 to 395*) that the sale of a chance or expectation (i.e., of a contingent interest) may be either *conventio spei simplicis* or a *conventio rei speratae*. " In the former case the object depends entirely on the good fortune of the moment. A fisherman sells the result of the cast of his net. He may catch fish or he may not. The object of the contract is the result of pure chance. If there is a large haul, the fisherman is bound to hand it over; if there is nothing in the net, the fisherman takes the price for which he sold the chance of a catch. In the case of a *conventio rei speratae* there is more than a mere chance—there is a considerable degree of certainty according to our ordinary experience. Thus, if I sell next year's crop or the next year's lambs of my flock, the purchaser knows from experience that there is more than a mere chance, that there will be a crop or an increase from the flock . . . . . in such a case the law presumes a tacit understanding between the parties that, *if*

by some unforeseen circumstance there is no crop whatsoever, the obligation will be without an object and therefore there will be no contract. If, however, there is a small crop or still born lambs, then the contract will be valid and enforceable ".

In my opinion the sale by a co-owner in land of whatever interests might ultimately be allotted to him under the decree in a pending partition action may fairly be construed as a *conventio rei speratae*. I do not think that the admitted hazards attendant on the outcome of proceedings under the Partition Ordinance are quite sufficient to justify the conclusion that there is not a reasonable degree of certainty that some advantage at least, however small, is likely to pass to the co-owner under the final decree. If this be so, the validity of the sale of the defendant's contingent interests must be determined by reference to the question whether or not some benefits, even to a far smaller extent than the parties had originally hoped for, did accrue to the seller under the partition decree. Applying this test to the contract in the present case, I am of the opinion that the plaintiff could not claim successfully that there was a total failure of consideration even if the sum of Rs. 5,000 paid by him under the deed was solely referable to the purchase of the defendant's contingent interests in the partition proceedings. Admittedly lot E was, by an order of Court in the interlocutory decree of 1943, excluded from the scope of the action. But under the final decree the defendant was in fact allotted 13 acres 1 rood 20 perches in lot D, and, upon the proper construction of the deed of 1930, the plaintiff automatically became the lawful owner of this allotment. In the result, the plaintiff's claim for a cancellation of the deed on the ground that there was a failure of consideration, and for the return of the purchase price, must necessarily fail. Besides, it must be remembered that what was in fact conveyed to the plaintiff in 1930 was not only a contingent interest but, in addition, a present interest in certain paddy lands. The purchase price of Rs. 5,000 represented a single indivisible consideration for both these interests. In return for this consideration, the plaintiff has no doubt received a good deal less than he had hoped for under that part of the transaction which constituted a *conventio rei speratae*. Nevertheless, that risk, which is necessarily incidental to this class of transaction, must in the eyes of the law fall on him. By virtue of the contract, he became the lawful owner of the paddy lands in 1930 and of 13 acres 1 rood 20 perches in lot B in 1947. His action for the cancellation of the deed and for the return of the consideration was therefore misconceived. It is not necessary to express an opinion whether he might have succeeded if a claim for relief had been formulated on different grounds.

Mr. Jayasundera invited us to hold that, even if there was no failure of consideration, the defendant was entitled to recover the purchase price on the ground that the contract was avoided because it became impossible of performance owing to the final result of the partition action. It seems to me that a claim of this basis would have been equally misconceived. As I understand them, the principles of the Roman Dutch Law dealing with " impossibility of performance " in relation to contracts apply only to *executory* contracts, whereas the present

contract, from the moment of its execution, operated as a present sale of a contingent interest in one land as well as of an existing interest in another. Admittedly, one must read into the contract an implied obligation undertaken by the defendant to make his best endeavours to bring the partition case which he had instituted to a successful conclusion. It is not alleged or proved that he did not fulfil this obligation, and even if he had failed in this respect, the plaintiff's appropriate remedy would have been a claim for damages and not a claim for a declaration that the contract was invalid.

In my opinion the judgment of the learned District Judge ordering the defendant to refund to the plaintiff the consideration of Rs. 5,000 with legal interest, must be set aside. I would allow the appeal and enter decree dismissing the plaintiff's action with costs both here and in the Court below.

In conclusion, I desire to point out that, according to the evidence, the defendant made an offer to convey to the plaintiff, by way of compromise, some part of what may ultimately be allotted to him out of lot E, which had been excluded from the scope of the earlier partition action but in respect of which separate proceedings under the Partition Ordinance have since been instituted. It seems to me that this would have been a very reasonable and indeed an honourable adjustment of the present dispute, and it is a pity that the plaintiff did not accept it. I can only hope that some such compromise may even now be effected.

PULLE J.—I agree.

Appeal allowed.