1926.

Present: Lyall Grant J. and Maartensz A. J.

FERNANDO *v.* ATUKORALE.

391—D. C. Colombo, 13,530.

Partition action—Sale of interest after interlocutory decree—Agreement to sell—Seizure in execution after final decree.

In a partition action, after interlocutory decree had been entered, a party sold " the shares of the premises which will be decreed to me in the scheme of partition " to the second defendant.

After final decree had been entered, the divided portion of the land which had been allotted to the party in question was seized in execution of a decree against him obtained by the plaintiff. The second defendant thereupon claimed the property and his claim was upheld.

Held (in an action under section 247 of the Civil Procedure Code by the plaintiff), that the deed of transfer, pending the action, did not convey any interest in the land to the second defendant and amounted only to an agreement to sell; and that the property was executable in satisfaction of the plaintiff's decree.

APPEAL from a judgment of the District Judge of Colombo.

This was an action under section 247 of the Civil Procedure Code in which the plaintiff sought to have deed No. 156 of July 27, 1923, executed by the first defendant in favour of the second defendant set aside and the land claimed by the second defendant under the deed declared liable to seizure and sale under a decree obtained by the plaintiff against the first defendant on October 30, 1922. The plaintiff instituted an action in the District Court of Colombo, against the first defendant for the partition of the land. On July 6, 1923, the interlocutory decree was entered declaring the plaintiff and the first defendant entitled to two-thirds and one-third of the land. On July 27, 1923, the first defendant executed the deed No. 156 in

question by which he conveyed " the share of the premises hereinafter described which will be decreed to me in the scheme of partition in partition case No. 6,694 of the District Court of Colombo." On April 6, 1924, final decree was entered in the partition suit. On February 4, 1924, plaintiff took out writ in execution of a decree obtained by him against the first defendant, and on August 14, 1924, seized lot A which had been allotted to first defendant in the final decree in the partition action. The second defendant claimed by virtue by deed No. 156 and his claim was upheld. The plaintiff thereupon instituted the present action under section 247 of the Civil Procedure Code. The learned District Judge gave judgment for plaintiff.

Hayley, for second defendant, appellant.

H. V. Perera (with *Ameresekere*), for plaintiff, respondent.

September 3, 1926. LYALL GRANT J.—

This is an appeal from the District Court of Colombo. The plaintiff and the first defendant were co-owners of a land which was partitioned in an action instituted on October 30, 1922.

Interlocutory decree was entered on July 6, 1923, and final decree on April 6, 1924. The first defendant had been in possession of the whole of the land since 1921. The plaintiff sued him for mesne profits and obtained judgment for Rs. 190 and costs. On February 4, 1924, the plaintiff took out writ, and on August 14, 1924, seized lot A which had been allotted to the first defendant in the partition case.

The second defendant claimed to be the owner of the lot by virtue of a deed of transfer in his favour dated July 27, 1923. That claim was upheld and the plaintiff brought an action under section 247 of the Civil Procedure Code for a declaration of title that the land was liable to be seized and sold under the decree, and that the transfer in favour of the second defendant was void as it had been executed during the pendency of the partition action and alternatively on the ground that the transfer was in fraud of creditors.

The learned District Judge held that the deed of transfer was a conveyance by the first defendant in favour of the second defendant and was one to which section 17 of the Partition Ordinance applied and it was therefore void.

He held further that the deed was executed in fraud of creditors, and entered judgment for the plaintiff as prayed for.

It was argued on appeal that the transfer was not one which was rendered void under section 17 of the Partition Ordinance, and it was also argued that the evidence did not support the finding that the deed was executed in fraud of creditors.

1926.

LYALL GRANT J.

Fernando v. Atukorale

Section 17 of the Partition Ordinance provides that:—

> "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 therein, 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."

In the present case the first defendant did not purport to convey in the deed under review his undivided share. What he purported to convey was "the share of the premises which will be decreed to me in the scheme of partition in partition action No. 6,694 of the District Court of Colombo," and it proceeds to define the premises.

In the deed there follows the usual provision to warrant and defend title and to do and execute any other act, assurance, &c., for more perfectly assuring the said premises sold.

The deed is in the ordinary form of a conveyance, and the only difficulty arises from the fact which is apparent on the face of the deed that the property did not at the time of the execution of the deed belong to the vendor.

All that belonged to the vendor at that date was an undivided share of the property.

I cannot see how this deed could operate as a conveyance. To take an example of what might have happened: If the lands denominated in the deed had been awarded in a final decree to another co-owner, it is obvious that the deed would have been of no effect as a conveyance since the partition decree would have vested the land in another person, and at no time would it have been the property of the vendor.

If the deed is to have any effect it must operate not as a conveyance but as an agreement to convey. The question whether such an agreement is in contravention of the provisions of section 17 is more difficult. There is a series of decisions to the effect that section 17 of the Partition Ordinance does not prevent a party dealing by anticipation with whatever divided interest he may ultimately obtain.

In the Full Bench case of *Pieris v. Pieris*,[1] the full Bench answered the question as to the point up to which the prohibition in section 17 endured where the application for partition or sale was granted, and it came to the opinion that the prohibition must be deemed to continue so long as the common bond of co-ownership exists and persons desiring of disposing their property, subject to a partition

[1] *(1924) 6 Ce. L. Rec. 1.*

suit, can only do so by disposing of the interests to be ultimately allotted to them in the action. The effect of this decision appears to me to be that a party to an action can enter into a binding agreement to dispose of the share which may ultimately be allotted to him. He confers upon the purchaser a personal right against himself. He does not however transfer any real right as at the time no real right had vested in him.

In *Subaseris v. Porolis*,[1] Wood Renton C.J., in a single judge appeal, held that a sale or mortgage of a share to be ultimately assigned was valid as against a judgment creditor.

In the subsequent case however of *Appuhamy v. Babun Appu*,[2] Ennis A.C.J. and Garvin A.J. held that a sale of a definite land which was afterwards allotted to the vendor by a partition decree was void inasmuch as the partition decree itself operated as a judgment *in rem*. Ennis J. reconciled this with the decision in *Subaseris v. Porolis* (*supra*) by pointing out that an agreement by a co-owner to sell the share to be allotted to him might be valid as an agreement, though it could not operate as a sale.

The authorities therefore support the view which seems consistent with the logic of the case, viz., that any transaction entered into during the pendency of a partition action which purports to convey a defined piece of land can only be read as an agreement to convey. Such an agreement cannot prevail against the rights of a third party who has obtained a real right in the property by process of law.

If the purchaser's rights are defeated, he has only a personal claim against his vendor.

For this reason I think that the appeal should be dismissed. It is unnecessary on this view of the matter to consider whether the deed was in fraud of creditors.

The appeal is dismissed with costs.

MAARTENSZ A.J.—

This was an action under section 247 of the Civil Procedure Code, 1889, in which the plaintiff sued the second defendant, appellant, to have deed No. 156 dated July 27, 1923, executed by the first defendant in favour of the second defendant, declared void, and the land claimed by the second defendant under the said deed declared liable to seizure and sale under a decree obtained by the plaintiff against the first defendant in case No. 13,453 of the Court of Requests of Colombo.

The land claimed by the second defendant formed part of a land called Gonnagahawatta. On October 30, 1922, the plaintiff instituted an action in the District Court of Colombo, numbered 6,694, against the first defendant for the partition of this land

[1] *(1913) 16 N. L. R. 393.* [2] *(1923) 25 N. L. R. 370.*

1926.

MAARTENSZ A.J.

Fernando v. Atukorale

On July 6, 1923, an interlocutory decree was entered declaring the plaintiff and first defendant entitled to two-thirds and one-third of the land respectively.

On July 27, 1923, the first defendant executed deed No. 156 by which in consideration of a sum of Rs. 150 he conveyed "the share of the premises hereinafter described which will be decreed to me in the scheme of partition in partition case No. 6,694 of the District Court of Colombo, the premises being all that allotment of land called Gonnagahawatta, with the house standing thereon." The situation and boundaries follow.

At the end of the deed there is a covenant for further assurance.

The plaintiff on February 4, 1924, filed action No. 13,453 in the Court of Requests of Colombo against first defendant averring that he was the owner of two-thirds of the land Gonnagahawatta and lessee of the remaining one-third, and that the first defendant had been in wrongful possession of the land from February 21, 1921, and claimed a sum of Rs. 257.50 as damages.

Decree was entered for plaintiff for Rs. 190, and costs. It is this decree that plaintiff is seeking to execute by a sale of the defined portion of Gonnagahawatta which was allotted to first defendant by the final decree entered in the partition suit, namely, lot A in the plan No. 2,345 dated March 5, 1924, made by Mr. J. M. H. Smith.

The action was tried on the following issues:—

(1) Was deed No. 156 of July 27, 1923, a conveyance by the first defendant in favour of second defendant of his interests in Gonnagahawatta, or was the same an agreement to convey first defendant's interest to the second defendant ?
(2) If it was a conveyance was the said conveyance valid ?
(3) Was such conveyance valid as it was executed during the pendency of case No. 6,694 ?
(4) If it is an agreement to convey then had the second defendant title at the date of seizure ?
(5) Was deed No. 156 executed in fraud of creditors ?
(6) In any event, is the plaintiff entitled to have the land declared liable to be seized under his writ in view of the existence of deed No. 156 ?

The learned District Judge held on the authority of the case of *Appuhamy v. Babun Appu* (*supra*) that deed No. 156 was void. He also held that the deed was executed in fraud of creditors and entered judgment for plaintiff. From this judgment the second defendant appeals.

In the case relied on by the District Judge, Abdulla, the owner of an undivided share of the land in dispute, mortgaged his interests to one Marikar. Abdulla was in a partition suit subsequently filed by

him allotted a divided share of the land marked " A " in the plan subject to the mortgage. The final decree did not mention the mortgage but it was subsequently amended.

The mortgagee was a party to this partition action. After the final decree was entered the bond was put in suit and the divided share allotted to Abdulla was sold and purchased by Rafee, who leased to plaintiff.

After the interlocutory decree and before final decree Abdulla sold to the defendant's predecessor in title the lot A, which was the share to be allotted to him according to the scheme of partition proposed.

Ennis A.C.J. held that the argument that what Abdulla sold was not an undivided share but a divided whole, and therefore not obnoxious to section 17 of the Partition Ordinance was unsound, as at the date of the sale Abdulla was not the owner of lot A but only of undivided shares of land—shares the alienation of which is prohibited and declared void by section 17. He added that apart from the provisions of section 17 the plaintiff was entitled to succeed as the partition decree was one *in rem* and declared to the world that Abdulla was the owner of lot A which influenced Abdul Cader in suing on the bond and Rafee in purchasing lot A.

Referring to the case of *Subaseris v. Porolis* (*supra*) he said:—

> " 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."

The appellant contends that the deed which was the subject of the action in *Appuhamy v. Babun Appu* (*supra*) is of an entirely different character to the deed No. 156 on which title is claimed in the present action, and that his deed is in form very similar to the deed which was held to be valid in the case of *Subaseris v. Porolis* (*supra*).

That case was an action under section 247 of the Civil Procedure Code, 1889. The plaintiff was the unsuccessful claimant. He claimed the land under a deed of sale executed by a co-owner after the interlocutory decree and before the final decree in a partition suit by which the vendor transferred to the plaintiff " all the advantages or disadvantages, such as costs, &c., and also the share which he would be entitled to either in common or partition." The

1926.

MAARTENSZ A.J.

Fernando v. Atukorale

learned Commissioner held that the deed was invalid. Wood Renton A.C.J. before whom the appeal was argued said:—

> "It must be remembered that section 17 of the Partition Ordinance imposes 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 enactmment was to prevent the trial of partition action 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 is not touched either by the language or by the spirit of section 17 of the Ordinance No. 10 of 1863."

He then observed that he had so far considered the question solely as one of the interpretation of the meaning of the Legislature, but that the point was not devoid of authority and referred to the dictum of Sir Charles Layard in the case of *Louis Appuhamy v. Punchi Baba* [1] to the effect that a sale or mortgage executed during the pendency of a partition suit, in respect of a share or interest to which a person may become entitled after the termination of such suit, is valid, and is not affected by the section in question, and to the case of *Abdul Ally v. Kelaart*,[2] where a conveyance, pending a partition action, of the proceeds of the sale of property which the transferor might be decreed in that action was expressly held to be valid.

The principle that a party to a partition action can deal by anticipation with whatever interest he may ultimately obtain was approved of by a Full Court (five Judges) in the case of *Kahan Bhai v. Perera et al.*[3] Bertram C.J., who delivered the judgment of the Court, said:—

> "The question under reference is a question as to the true interpretation of the prohibition against alienation or hypothecation of the undivided shares or interests in property subject to a partition action contained in section 17 of the Partition Ordinance, No. 10 of 1863."

He then proceeded to deal with the question as to the point up to which the prohibition endures, and concluded as follows:—

> "Persons desiring 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 interest to be ultimately allotted to them in the action."

[1] *(1904) 10 N. L. R. 196.*
[2] *(1904) 1 Bal. 40.*
[3] *(1923) 26 N. L. R. 204.*

The precise question before the Court in *Kahan Bhai v. Perera et al.* (*supra*) was whether, where a Court decrees a sale under the Partition Ordinance, the prohibition against alienation contained in section 17 of the Ordinance applies during the interval between the decree and its execution, and Sir Anton Bertram's statement of the law regarding persons desiring to charge or dispose of their interests during the pendency of a partition was *obiter* to the question at issue.

In the case of *Mohamed Bhoy v. Maria Dias et al.*,[1] in which the plaintiff sued on an agreement by the defendants to sell the divided share which might be decreed to the first defendant in the event of the final decree being one for the partition of the land, or the proceeds of sale if the final decree was one for the sale of the property, the validity of the agreement was not contested. The only question decided was whether the agreement was a bill of sale which had to be registered under Ordinance No. 8 of 1781. In *Fernando v. Fernando* [2] an agreement entered into during the pendency of a partition suit to convey the share of the land that may ultimately be allotted in the decree was held to be valid.

The only case in which a disposal of the interest to be ultimately allotted was held to be a valid sale is *Subaseris v. Porolis* (*supra*), which being the decision of a single judge is not binding on us but it has been considered to be the law for nearly thirteen years, and I would hesitate to express any dissent from the opinion expressed by Wood Renton J. I do not, however, think it necessary to examine the soundness of Sir Alexander Wood Renton's opinion regarding the construction to be placed on the provisions of section 17. For even if the conveyance with which we have to deal in the present case is not obnoxious to the provisions of section 17 it does not, in my opinion, in view of section 9 of the Partition Ordinance, No. 10 of 1863, vest the second defendant with a title as against a third party.

Whether deed No. 156 is looked upon as an out and out sale as in the case of *Subaseris v. Porolis* (*supra*) or as an agreement to sell, which is the view taken by Ennis J., in *Appuhamy v. Babun Appu* (*supra*) 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.

If deed No. 156 is no more than an agreement to convey, the second defendant has no title to the land, and the plaintiff as judgment creditor of the first defendant is entitled to discuss the property for the purpose of satisfying his decree.

If it operates as a sale the effect of section 9 of the Ordinance has to be considered. This section was not referred to either by counsel or Wood Renton J., in the case of *Subaseris v. Porolis* (*supra*).

[1] *(1908) 2 S. C. Decis. 7.*

[2] *(1917) 4 C. W. R. 47.*

1926.

MAARTENSZ A. J.

Fernando v. Atukorale

Section 9 enacts as follows:—

> "The decree for partition or sale given as hereinbefore provided shall be good and conclusive against all persons whomsoever, whatever right or title they have or claim to have in the said property, although all persons concerned are not named in any of the said proceedings, nor the title of the owners nor of any of them truly set forth, and shall be good and sufficient evidence of such partition and sale and of the titles of the parties to such shares or interests as have been thereby awarded in severalty: Provided that nothing herein contained shall affect the right of any party prejudiced by such partition or sale to recover damages from the parties by whose act, whether of commission or omission, such damages had accrued."

The effect of a partition decree was fully considered in the case of *Bernard v. Fernando et al.*[1] In this case the plaintiff had purchased in 1912 the divided lots allotted to two of the parties to a partition suit by a decree under section 9 dated January 30, 1905. The defendants had purchased from the same parties undivided shares in 1907 and 1909, registered in the same years. The partition decree was registered after the sale to plaintiff. The defendants claimed the benefit of the prior registration of their deeds. De Sampayo J. said:—

> "I do not think that sections 16 and 17 of the Registration Ordinance apply to partition decrees to the same extent as to other judgments or orders of Court. Partition decrees are conclusive by their own inherent virtue, and do not depend for their final validity upon anything which the parties may or may not afterwards do. They are not, like other decrees affecting land, merely declaratory of the existing rights of the parties *inter se*. They create a new title in the parties absolutely good against all other persons whomsoever."

I venture to express my entire agreement with the opinion of de Sampayo J. regarding the effect of a decree under section 9 of the Ordinance.

On the principle laid down in the case of *Bernard v. Fernando et al.* (*supra*) the final decree in the partition suit No. 6,694, D. C. Colombo, created new title in the first defendant to lot A absolutely good against the second defendant.

Appellant's counsel contended, however, that the title of the first defendant under the partition decree enured to the benefit of the second defendant. I am not prepared to accede to this argument. No doubt it is settled law that ordinarily a person who had got

[1] *(1913) 16 N. L. R. 438.*

possession from a vendor who at the time had no title could rely on a title subsequently obtained by the vendor not only against the vendor but against anyone claiming under the vendor. See *Rajapakse v. Fernando* [1] and *Gunatileke v. Fernando.*[2] But I am of opinion that that principle would not apply where the vendor subsequently acquires title under a partition decree. In the case where a vendor acquires title other than under a partition decree he acquires a title good against all the world but the person to whom he has sold the property. In the case of a 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.

A most anomalous state of things would otherwise arise. If A owning undivided shares in a land sells them to B but none the less the shares are decreed to be the property of A, B's title is extinguished, but if A having no title sells certain undivided shares to B and A is decreed the owner of the shares if the principle of the *exceptio rei venditae* is applied A's title would enure to B. Thus a person who buys from a vendor who has no title would be in a better position than a purchaser from a vendor with title.

I accordingly hold that the sale to second defendant was extinguished by the partition decree.

The appellant next founded an argument on section 93 of the Trusts Ordinance, 1917, which enacts that—

> "Where a person acquires property with notice that another has entered into an existing contract affecting that property, of which specific performance could be enforced, the former must hold the property for the benefit of the latter to the extent necessary to give effect to the contract. Provided that in the case of a contract affecting immovable property, such contract shall have been duly registered before such acquisition."

He contended that the first defendant was a trustee for the second defendant and that a purchaser at the sale in execution would hold the property for the benefit of the second defendant to the extent necessary to give effect to the contract created by deed No. 156. The respondent replied that section 93 only came into operation where there were three parties, namely, the party directly concerned and the person who took with notice of the contract.

I am not prepared to adjudicate on this question until the issue arises. Various questions might arise which should be properly formulated and argued, one of them being the applicability of section 93 to a forced sale in execution of a decree, another would be whether an instrument in form an outright sale can be treated as an agreement to sell.

[1] *(1920) 21 N. L. R. 495.*

[2] *(1921) 22 N. L. R. 385.*

1926.

MAARTENSZ A.J.

Fernando v. Atukorale

In the view I take that the title, if any, created by deed No. 156 has been extinguished I need not consider the question whether it was executed in fraud of creditors.

I dismiss the appeal with costs.

Appeal dismissed.