

1974 Present : Wijayatilake, J., Wijesundera, J., and Ismail, J.

R. G. P. A. GOONERATNE, Appellant, and A. V. P. A.
GOONERATNE and another, Respondents

S. C. 263/69 (Inty.)—D. C. Kalutara, 1642/P

Partition action—“Voluntary alienation” of an interest in the corpus pending the action—Whether a consent decree entered by Court can be tantamount to a voluntary alienation—Holder of the bare dominium of the corpus—Not entitled to institute a partition action—Partition Act (Cap. 69), ss. 2, 67.

In the present partition action No. 1642 instituted in July 1963 by A, the defendants were B and C, who were the brother and father respectively of A. During the pendency of the action, C instituted action No. 1035 against his sons A and B claiming that a donation of land executed by him in favour of A and B in January 1952 was null and void on the ground of the sons' ingratitude and that he be declared entitled to the land, which was the same corpus as that described in the present action. The action brought by C was settled on the date of trial and consent decree was entered according to which the deed of gift remained unannulled but C was declared entitled to the life interest over the corpus.

Held, that the settlement "of consent" in action No. 1035 was not tantamount to a "voluntary alienation" within the meaning of section 67 of the Partition Act. Furthermore, by reason of the life interest given to C by the consent decree, the plaintiff A in the present action had only the bare dominium of the property without any right to the usufruct and, therefore, was not entitled to institute an action for partition.

A PPEAL from a judgment of the District Court, Kalutara.

D. C. Amerasinghe, for the plaintiff-appellant.

1st defendant-respondent in person.

The other defendants-respondents absent and unrepresented.

Cur. adv. vult.

March 8, 1974. WIJAYATILAKE, J.—

This appeal raises the question whether a settlement "of consent" in Court can be recognised as a "voluntary alienation" within the meaning of Section 67 of the Partition Act.

The plaintiff filed this action on 5.7.1963 for a partition of a land called Idama or Madangahawatta in extent 7A. 3R. 30P. with the tiled house, trees, plantations and everything thereon as depicted in Plan No. 965A of 10.3.1901 excluding a 12 foot roadway. The 2nd defendant is the father of the plaintiff and the 1st defendant. Thereafter while this case was pending the 2nd defendant filed action No. L 1035 also in the District Court of Kalutara on 8.8.1964 against his two sons, the present plaintiff and the 1st defendant for a declaration that the deed of gift No. 6281 of 27.1.1952 is null and void on the ground of *inter alia* neglect and physical threats, and also that he be declared entitled to a 7/8th share of the land referred to in schedule 1 to that plaint, which is the same corpus as appearing in the schedule to the instant action. Both the defendants in that case

(the present plaintiff and the 1st defendant) filed answer praying for a dismissal of the action. When the case came up for trial on 22.9.1965 the Court was informed of the fact that the parties had come to a settlement. The learned District Judge entered decree in terms of this settlement 2D5. *Inter alia* the terms of this settlement were as follows:—

“That the deed of gift which is sought to be set aside will stand and of consent, the plaintiff is declared entitled to the life interest over the entirety of the properties described in schedules 1 and 2 to the plaint.”

In view of the settlement the 1st and 2nd defendants conceded a reasonable means of access; they agreed to vacate the portion of the building occupied by them standing thereon in schedule 1 to the plaint on or before 31.3.1966; in default of the defendants leaving the house the plaintiff to be entitled to a writ of ejection without notice.

When the instant action for partition came up for trial on 6.8.1969, issues 8, 9, 10 and 11 were raised in respect of the aforementioned decree in the District Court of Kalutara L/1035 and the principal question arose as to whether the present plaintiff has any interests in regard to possession of the subject matter of this action and if so whether he could maintain this action. It was submitted that the settlement 2D5, which I have referred to above, contravenes the provisions of Section 67 of the Partition Act as it is tantamount to a “voluntary alienation” within the meaning of this Section. Section 67 of the Act prohibits any voluntary alienation, lease or hypothecation of any undivided share or interest of or in the land to which the action relates after a partition action is duly registered as a *lis pendens* under the Registration of Documents Ordinance until the final determination of the action by a dismissal thereof or by the entry of a decree of partition or by the entry of a certificate of sale. This Section is based on Section 17 of the repealed Partition Ordinance and Section 17 of Ordinance 21 of 1844. The object of this provision would appear to be to prevent the trial of a partition action being unduly prolonged and delayed by intervention of parties who derive interests in the land after the institution of an action. The object of this prohibition has been explained in 1878 in *Baban v. Amerasinghe*¹ 1 S.C.C. 24. “The sole purpose of this clause seems plainly to be, to reserve full effect to the legal proceedings for partition, when once instituted, and to take care that it shall not be in the power of any party concerned to defeat them or embarrass the course of them, by transferring his share or any interest in the

¹ 1 S. C. C. 24.

property to a stranger." See also *Annamalai Pillai v. Perera*¹ 6 N.L.R. 108 at 119, *Subaseris v. Prolis*² 16 N.L.R. 393, *Hewawasan v. Goonesekera*³ 28 N.L.R. 33 at 42 and the Law of Partition in Ceylon by Wickremesinghe at page 191.

In the instant case as would appear from the settlement, the present plaintiff of consent has parted with his life interest over the property in question. The question does arise as to whether in the context of the settlement in that action in Court whether it amounted to a voluntary alienation of an interest in the corpus as contemplated by Section 67 of the Partition Act. The learned District Judge has held that this settlement cannot be considered a "voluntary alienation" as such.

Mr. Amerasinghe, learned counsel for the appellant has drawn out attention to the judgment in *Perera v. Perera*⁴ 9 N.L.R. 217 and he has submitted that the words in this Section should not be given a restrictive interpretation as the essence of the disposal is its voluntary character. In this context the marginal note to Section 67 affords some light as to the object of the Legislature. On a perusal of the settlement in Court, it would appear that although it was of consent it was a consent which was obtained after the parties were at issue (the relations between the father and the two sons being very bitter as would appear from the averments in the plaint in that action) and subject to certain conditions. This would all go to show that it is not analogous to a transaction such as a sale, lease or hypothecation, as when parties enter into a settlement in Court they do so as there is always a lurking fear that the ultimate result may not be so advantageous. The acceptance of the settlement by Court and the decree entered in consequence would amount to something more than a mere formality. It would be a superimposition by Court.

Mr. Amerasinghe has very cogently submitted that the settlement in Court being of consent it would not be analogous to a Fiscal's transfer which is in effect a "forced" transfer. He has argued that the distinction between voluntary alienations and necessary alienations has to be kept in mind in the context of this case. As I have already indicated although the settlement in question was of consent but still the circumstances under which the settlement was effected would show that it is not a voluntary alienation as contemplated in Section 67. See also the judgment in *Saparamadu v. Saparamadu*⁵ 10 N.L.R. 221 which followed the judgment in *Perera v. Perera* referred to above and also "The Law of Partition in Ceylon" by Wickremesinghe

¹ 6 N. L. R. 108 at 119.

² 16 N. L. R. 393.

³ 28 N. L. R. 33 at 42.

⁴ 9 N. L. R. 217.

⁵ 10 N. L. R. 221.

at page 198. In these circumstances, I am of the view that this settlement would not amount to a "voluntary alienation" within the meaning of Section 67 of the Partition Act.

The settlement, in fact, refers to this partition case that was pending in the same Court. This would also show that the parties to this settlement did not recognise it as a "voluntary alienation" within the meaning of Section 67 of the Partition Act.

Furthermore, the plaintiff in this action having parted with this interest is now seeking to base his claim on his own default. I do not think the plaintiff is entitled to pursue this action for partition in the circumstances.

Section 2 of the Partition Act No. 16 of 51 provides that :

"Where any land belongs in common to two or more owners, anyone or more of them may institute an action for the partition or sale of the land in accordance with the provisions of this Act."

-- The learned District Judge has held that as the plaintiff has only the bare dominium of the property or a share in it without any right to the usufruct over the property he is not entitled to institute an action for partition. He has relied on the judgment of Dalton, S.P.J. in *Charles Appu v. Dias Abeysinghe* 35 N.L.R. 323. With respect I am in agreement with this view.

I would accordingly dismiss the appeal without costs.

WIJESUNDERA, J.—I agree.

ISMAIL, J.—I agree.

Appeal dismissed.

