

## APPUHAMY v. BABUN APPU.

240—D. C. Galle, 19,893.

*Partition—Alienation of a divided block after scheme of partition was submitted and before final decree—Partition Ordinance, s. 17.*

Under the scheme of partition proposed after interlocutory decree lot A was allotted to X. Before final decree X transferred lot A to S.

*Held*, that the transfer was void as being obnoxious to section 17 of the Partition Ordinance.

**T**HE facts are set out in the judgment of the District Judge (A. P. Boone, Esq.) :—

The following appear to be the facts. Though not admitted by the first defendant they are not denied by him.

The original owner of the land was Abdulla. He mortgaged his interests to Abdul Cader Hadji Ahamadu Lebbe Marikar on mortgage bond 5,156 of July 18, 1912 (P 2). The share mortgaged was one-fourth plus one-twentieth.

Abdulla then started a partition suit, No. 11,503, D. C. Galle, making the mortgagee the third defendant, and an interlocutory decree was entered on March 23, 1914, giving Abdulla a share (one-fourth plus one-twenty-fourth plus one-two-hundred-and-fortieth) slightly less than the share claimed, but making it subject to the mortgage bond in question (*vide* P 1.)

Final decree was entered on May 23, 1916, but in the final decree there was no mention of this mortgage. Abdulla's lot was A.

Then the mortgage bond was put in suit in A. C. R. 11,237, and a mortgage decree was entered on June 4, 1919, and in accordance with the mortgage decree the property was sold, and purchased by Abdul Rafee on 622/November 9, 1921, and registered shortly after. Then on 1,979/January 3, 1922 (P 3), which was duly registered. Abdul Rafee leased the premises to the plaintiff. On that deed the plaintiff leased one-twentieth plus one-fourth, but he was put in possession of the divided lot A.

The final decree was amended at the instance of Abdul Rafee after notice to the parties in the partition suit on August 15, 1922. By that amendment lot A was given to Abdul Rafee (*vide* P 4).

The first defendant also claims from Abdulla. After the institution of the partition suit, but before final decree but after the interlocutory decree, viz., on May 4, 1916, Abdulla conveyed this lot A to one Simon on deed 10,033 (D 1). Simon sold to the first defendant on D 2 on April 29, 1921.

As regards the effect of the interlocutory decree, Mr. Wiraratne says that Abdulla was bound by it and could not transfer a better title than he himself had; *e.g.*, he could only convey the land subject to the mortgage bond.

As between him and his mortgagee this is so . . . but I do not think that would affect Simon, especially as the mortgage (P 2) was not registered.

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As regards the sale of lot A on D 1 to Simon by Abdulla: At the time of the sale Abdulla had only an undivided share, and it was not till after the final decree that Abdulla got lot A. Mr. C. de Vos argues from *20 N. L. R. 301*, that the subsequent title to A acquired by Abdulla on the final decree would enure to Simon's benefit. This would be so, but in view of section 17 of the Partition Ordinance, Simon's title on D 1 appears to me not only "void" but "not lawful."

Consequently, in my opinion, first defendant, who claims through Simon, has no title at all, and questions of prior registration do not arise.

Mr. C. de Vos also says that in any case the mortgage bond and subsequent deeds of the plaintiff being for one-twentieth plus one-fourth of the land, and the land having been since divided, plaintiff can only claim one-fourth plus one-twentieth of lot A, and relies on *15 N. L. R. 321*.

I think in the circumstances of the case, however, do not warrant this contention.

I give judgment for plaintiff as prayed for, with costs, and damages at Rs. 30 per annum as against the first defendant.

*H. V. Perera*, for defendant, appellant.

*B. F. de Silva* (with him *R. C. Fonseka*), for plaintiff, respondent.

November 13, 1923. ENNIS A.C.J.—

This was an action for a declaration of title and for possession of the land shown as lot A on the plan filed in the case. It appears that this land, when it formed part of a larger land, was held by one Abdulla as to a one-fourth and a one-twentieth share. Abdulla mortgaged his interests in the larger land in July, 1912, to one Abdul Cader. This mortgage was not registered, and Abdul Cader, the mortgagee, was made the third defendant in that action. On March 23, 1914, interlocutory decree was entered, and Abdulla was given one-fourth plus a one-twenty-fourth plus one-two-hundred-one-fortieth, subject to the third defendant's mortgage. On August 29, 1914, there was a survey, and a scheme of partition was proposed, under which lot A was allotted to Abdulla in respect of his claim. On May 23, 1916, final decree was passed in the action declaring Abdulla entitled to lot A. It appears that prior to the final decree in the action, namely, on May 4, 1916, Abdulla executed a document (D 1) in favour of Simon, and this document was registered on May 12, 1916. It purports to convey to Simon lot A. Simon in 1921 conveyed his interests under this assignment to the defendant. Meanwhile, Abdul Cader put his bond in suit and obtained a decree on June 4, 1919. It was sold in execution on November 9, 1921, and purchased by one Abdul Raffee, who, in

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January, 1922, executed a lease in favour of the plaintiff. In executing that lease he referred to the land leased in terms of Abdulla's share of the bigger land prior to the partition. The learned Judge found in favour of the plaintiff, and the defendant appeals.

It was strenuously urged on appeal that section 17 of the Partition Ordinance did not apply in the circumstances of this case. It was suggested that what Abdulla sold to Simon was not an undivided share of the land but a divided whole, and that such a conveyance would not fall within the terms of section 17. In my opinion this argument is unsound, because until May 23, 1916, when the final decree in the partition case was entered, 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. Quite apart from this, however, there is another point in the case—the partition decree is a judgment *in rem*. It is good against the world, and declares to the world that Abdulla was the owner of the land. The action, therefore, of Abdul Cader in putting the bond in suit and Abdul Raffee subsequently buying it will be influenced by the fact that the partition decree declared Abdulla to be the owner on May 23, 1916, against Simon as well as the rest of the world. We have been referred to the case of *Subaseris v. Porolis*,<sup>1</sup> in which an attempt was made to grant some sort of equitable relief to a person who had purchased from a co-owner, during the pendency of a partition action, the share to which he would be entitled on partition. 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.

In the circumstances, I am of opinion that the learned Judge was right, and would dismiss the appeal, with costs.

GARVIN A.J.—I agree.

*Appeal dismissed.*

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<sup>1</sup> (1913) 16 N. L. R. 393.