

Present: Wood Renton A.C.J.

SUBASERIS v. PROLIS.

221—C. R. Tangalla, 7,060.

Sale pending partition action—Sale of share which would be allotted under final decree—Is sale valid ?

A sale by a party to a partition action after interlocutory decree and before final decree “of all the advantages or disadvantages, such as costs, &c., and also the share which he would be entitled to either in common or partition” by virtue of the decree in the partition action, was held to be valid, and not obnoxious to section 17 of the Partition Ordinance.

THE facts appear from the judgment.

H. A. Jayewardene, for the plaintiff, appellant.—The sale by *Dineshamy* to the plaintiff is not repugnant to section 17 of the Partition Ordinance, as only the share which *Dineshamy* would be declared entitled to under the final decree was sold. It was held in *Louis Appuhamy v. Punchi Baba*¹ 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 section 17.

Balasingham, for the defendant, respondent.—The mortgage in question in the case of *Louis Appuhamy v. Punchi Baba*¹ was executed after the decree to sell was entered and before the certificate of sale was granted by the Judge. The Supreme Court very rightly held there that a mortgage after the decree for sale was valid. The certificate of sale granted by a Judge in the case of a sale cannot be considered a “final decree” as one entered under section 9. The opinion of Sir Charles Layard C.J. that a sale executed during the pendency of the partition suit in respect of a share to which a person may become entitled is valid, is merely an *obiter dictum*. The case was decided on other grounds.

It was held by the Full Court in *Annamalaipillai v. Perera*² that a sale during the pendency of a partition suit is absolutely void. It would be anomalous if the binding effect of that decision could be got over by adopting a paraphrase of the word “sale.” Where a party to a partition case sells his undivided share, he only sells what would be allotted to him under the final decree. A sale by a party to a suit during the pendency of even an action *rei vindicatio*

¹ (1904) 10 N. L. R. 196.

² (1902) 6 N. L. R. 108.

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cannot give the vendee anything more or less than what the Court gives the vendor. Parties should not be allowed to evade the provisions of section 17 in this manner.

H. A. Jayewardene, in reply.

Cur. adv. vult.

July 11, 1913. WOOD RENTON A.C.J.—

This is an action under section 247 of the Civil Procedure Code, in which the plaintiff claims that a certain land, seized by the defendant as the execution-creditor of one Dineshamy as his property, should be released. The land in question formed the subject of a partition action, and was allotted to Dineshamy by the decree in that action. Prior to the final decree, although subsequent to the interlocutory decree, however, Dineshamy had assigned 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," by virtue of the decree in the partition action. The final decree did in fact allot to Dineshamy the divided share which he had previously transferred to the plaintiff. The decision in this case depends on the question whether that transfer, made as it was before the final decree in the partition action, is void in consequence of the provisions of section 17 of Ordinance No. 10 of 1863. The learned Commissioner of Requests has answered this question in the affirmative, and has dismissed the plaintiff's action with costs. In my opinion it should have been answered in the negative, and the plaintiff is entitled to succeed. 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 enactment was to prevent the trial of partition actions 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 Ordinance No. 10 of 1863. I have so far considered the question solely as one of the interpretation of the meaning of the Legislature. But the point is not devoid of authority. There is no decision which directly supports the conclusion at which the learned Commissioner of Requests has arrived. Section 17, as we all know, has given rise to considerable discussion and difference of judicial opinion in regard to the questions whether an alienation effected in contravention of its prohibition is void or merely voidable (see *Anamalay v.*

*Suppremaniam Chetty*¹), and whether it contemplated only voluntary alienations or extended also to alienations by the act of the law. But there is no authority that I am aware of to the effect that a party to an action of this character cannot deal by anticipation with whatever divided interest he may ultimately obtain. On the contrary, there is a strong dictum by Sir Charles Layard C.J., in the case of *Louis Appuhamy v. Punchi Baba*,² 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. There is, moreover, a decision by Mr. Justice Wendt and Mr. Justice de Sampayó in *Abdul Ally v. Kelaart*³ in which 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. Considering the case on the ground both of principle and of authority, I hold that this appeal is entitled to succeed. I set aside the decree of the Commissioner of Requests, and direct that judgment be entered in favour of the appellants with the costs of the action and of the appeal.

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Set aside.