

Present: Dalton J. and Jayewardene A.J.

RAJAPAKSE v. DASSANAYAKE.

99—D. C. Galle, 24,734.

Partition—Sale after preliminary decree—Undivided interest—Pending action—Ordinance No. 14 of 1863, s. 17.

Where a deed was executed, pending a partition action for the conveyance of property described in the following terms:—

All that undivided part of the soil of the land called Kuda Welikada Watte consisting of lots A, B, C, and D as per plan filed in partition case No. 18,633 being all the interests the above-named vendors were decreed entitled to in the preliminary decree, entered in the partition case, or whatever lot or interests the vendor will be allowed in the final decree in the above-named partition case

And where the deed contained a covenant to execute any further deed or act for more effectually assuring the premises to the vendee,—

Held, that the deed was not obnoxious to the provisions of section 17 of the Partition Ordinance.

A PPEAL from a judgment of the District Judge of Galle.

L. A. Rajapakse, for 1st defendant, appellant.

N. E. Weerasooriya, for plaintiff, respondent.

July 17, 1928. DALTON J.—

The question for decision in this case was whether the deed 2 D1 is void as being obnoxious to the provisions of section 17 of the Partition Ordinance. The trial Judge found it was not, and from that conclusion the 1st defendant appeals.

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Plaintiff claimed possession and damages from the 1st defendant under the following circumstances. 2nd defendant was joined to warrant and defend his title as against the 1st defendant. Plaintiff leased lots 9 and 11 of the land in question from the 2nd defendant. The 2nd defendant had purchased all the interest of the 1st defendant in the lots in question by the deed 2 D1 of January 15, 1926. 1st defendant now disputed the right of the 2nd defendant to execute the deed of lease and was forcibly in possession of the lots.

The 1st defendant pleaded that the deed 2 D1 was bad as being executed pending partition proceedings and conveyed no title. The evidence discloses that, having conveyed his interests to the 2nd defendant, he thereafter conveyed the lots to his wife and she to a third party.

It is agreed that the deed was executed during the pendency of the partition action No. 18,633. It purports to sell, assign, transfer over, and assure to the vendee the premises described in the schedule, and to warrant and defend the same to the vendee. The property set out in the schedule was described as follows:—

All that undivided 3,600/9,600 part of the soil of the land called Kuda Welikada Watte consisting of lots A, B, C, and D as per plan No. 166 made by H. B. Goonewardene, Licensed Surveyor, and filed in partition case No. 18,633 of the District Court of Galle, together with houses Nos. 1, 2, 3, and 4 standing thereon being all the interests above-named vendors were decreed entitled to in the preliminary decree entered in said partition case, or whatever lot or lots and interest the above-named vendors will be allowed in the final decree in the above-named case in lieu of his above recited undivided interests

There was in addition a covenant to execute at the cost of the vendee any further deed or act for the better and more effectually assuring the premises to the vendee.

The trial Judge was of opinion that in so far as this deed purported to convey undivided interests, it was bad, but it was in effect a transfer to the 2nd defendant of the rights to which the 1st defendant might subsequently be declared entitled by the final decree. The judgment goes on to point out that the lots in dispute were in fact allotted to the 1st defendant by the final decree.

No question has been raised on this appeal as to where the title is now or as to the rights of the 2nd defendant against the 1st defendant under the deed. The only question we are asked to decide is whether the deed is bad. I am unable to differentiate this case on essentials from the case of *Hewawasan v. Gunasekara*.¹ It is true

¹ 28 N. L. R. 33.

that the transaction in the latter case was contained in two documents both executed on the same date, whereas here the whole transaction is contained in 2 D1, but that is not a variation which is material so far as the application of section 17 of the Partition Ordinance is concerned. That decision is binding upon this Court.

It has been urged that the deed is nothing but an agreement to sell and that, following *Fernando v. Atukorale*,¹ therefore did not convey any interest to the vendee. The trial Judge has sought to distinguish that case from this on the facts. I am satisfied that his interpretation of the deed is correct, that it is not an agreement to sell. The right of a person to charge or dispose of his interests in a property subject to a partition suit by expressly charging or disposing of the interest ultimately to be allotted to them is clearly recognized in the Full Court decision of *Khan Bhai v. Perera*.²

For the reasons set out there I have come to the conclusion that the deed is not obnoxious to the provisions of section 17 of the Partition Ordinance.

The appeal must therefore be dismissed, with costs.

JAYEWARDENE A.J.—I agree.

Appeal dismissed.

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