

1962

*Present*: T. S. Fernando, J., and Tambiah, J.

M. A. HERATH and 2 others, Appellants, and M. A. ASLYN NONA,  
Respondent

*S. C. 360/1959—D. C. Gampaha, 6315/P*

*Partition action—Sale of co-owner's interests pending action—Misdescription of subject-matter—Effect—Partition Act (Cap. 69).*

Pending a partition action, after interlocutory decree was entered, one of the co-owners executed a deed of sale. The description of the *corpus* conveyed was not the same as the subject-matter of the partition action but a description of the *corpus* which the vendor would receive in the final decree. There was also an erroneous assumption that the final decree had already been entered.

*Held*, that the sale was not obnoxious to Section 67 of the Partition Act.

**A** PPEAL from a judgment of the District Court, Gampaha.

*H. V. Perera, Q.C.*, with *Cecil de S. Wijeratne*, for the 4th to 6th defendants-appellants.

*M. L. S. Jayasekera*, with *K. Charavanamuttu*, for the plaintiff-respondent.

*Cur. adv. vult.*

February 20, 1962. TAMBIAH, J.—

The plaintiff brought this action for the partition of an allotment of land called Hapugahawatta Kebella, which is depicted as Lot 1 in Plan No. 855, marked D2, of 18th April 1955. This land formed part of a larger land which was the subject-matter of partition action No. 1755 D. C. Gampaha. By virtue of the Final Decree marked P1 or D1 entered in that case, Lot 1 in Plan 1140, marked X, and also shown in D2, was allotted to the following persons: Gabonis, the plaintiff, who is the 3rd defendant in this case, William and Elaris both of whom are the 1st and 2nd defendants in this case as well as in the former case, and Singhappu, the 20th defendant who is not a party to this action, but whose child is the plaintiff in this action, in the following proportions, 198/318, 12/318, 12/318 and 96/318 shares, respectively.

The plaintiff, who is the daughter of Singhappu, who was allotted 96/318 shares, has instituted this action to partition Lot 1 shown in Plan X and has claimed the share of Singhappu by right of inheritance. The shares of the 1st and 2nd defendants and of the 3rd defendant, who is now dead, leaving as heirs the 6th defendant, his widow, and the 4th-5th defendants as children, are not in dispute. The 4th-6th defendants contend that Singhappu, by deed No. 5865 of 13th May, 1955, marked D3, transferred an undivided 96/318 shares in Lot 1 in Plan D2 to Gabonis Appu, the 3rd defendant, and that they are entitled on this deed to the

shares of Singhappu claimed by the plaintiff in this action. The only issue for consideration is whether Singhappu's share of Lot 1 in Plan X (i.e. 96/318 shares) devolved on the plaintiff by inheritance or passed to the 4th-6th defendants, the heirs of Gabonis, the 3rd defendant deceased.

The interlocutory decree in this case had been entered on the 23rd of May 1953 and the final decree on the 22nd of May 1957. It is common ground that D3 had been executed pending partition action No. 1755 and the question for decision is whether D3 is obnoxious to section 67 of the Partition Act (Cap. 69) (which now substantially reproduces section 17 of the Partition Ordinance No. 10 of 1863, as amended by 10 of 1897 and 37 of 1916) and whether any title passed to the 3rd defendant on this deed.

Section 67 of the Partition Act (*supra*) enacts as follows :—

- “(1) After a partition action is duly registered as a *lis pendens* under the Registration of Documents Ordinance no voluntary alienation, lease or hypothecation of any undivided share or interest of or in the land to which the action relates shall be made or effected until the final determination of the action by dismissal thereof, or by the entry of a decree of partition or by entry of a certificate of sale.
- (2) Any voluntary alienation, lease or hypothecation made or effected in contravention of the alienation of subsection (1) shall be void.”

Section 17 of the Partition Ordinance has been interpreted in many decisions of this Court. In *Peiris v. Peiris et al.*<sup>1</sup>, Bertram C.J., in delivering the judgment of the Full Bench, observed “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”. In *Hewawasan v. Gunasekera*<sup>2</sup> certain parties to whom some lots were allotted by the surveyor in a plan made by him on a commission issued to him, in a partition action, after interlocutory decree, transferred the same before there was confirmation of the proposed scheme by the final decree. The question arose whether the transferee obtained any rights under the deed of transfer. It was held by the majority of the Divisional Bench that the deed was not invalid. Garvin, J., stated (*vide* 28 N. L. R. at p. 38): “It is quite obvious that the parties did not deal and did not intend to deal with any undivided interest. They dealt with certain lots which both believed and assumed to be the share in severalty which would in due course be allotted by the final decree. The respondent has undertaken that he will at all times do and execute all such acts and deeds as may be necessary to assure the premises to the appellant. He is in a position to do so, and must do so unless he can justify his refusal on some legal ground. It is said that the transaction embodied in these two deeds is obnoxious to section 17 of the Partition Ordinance. For the reasons already set out this transaction is not, in my opinion, such an alienation as is prohibited by that section”.

<sup>1</sup> (1924) 6 C. L. R. 1.

<sup>2</sup> (1926) 28 N. L. R. 33.

The effect of a sale or alienation of what a party would be allotted in a partition decree was also considered by the Divisional Court in *Sirisoma v. Sarnelis Appuhamy*<sup>1</sup> where it was held that on entering of a final partition decree title vested in the transferee.

In the instant case, the relevant portions of deed D3 are as follows :  
“Madampe Appuhamillage Singho Appuhamy of Biyagama in the Adicari Pattu of Siyane Korale, hereby sold, transferred and set over the lands and premises described in the schedule appended below and held and possessed by me, the Vendor on a title decreed upon me, by the Final Decree in District Court Case No. 1755, and which said Decree is not produced before me (the Notary Public)”. The *habendum* clause states that the vendor has sold, transferred, set over unto the said vendee all his right title and interest to be held and possessed by him and his heirs, executors, administrators and assignees. There is also an assurance in the deed that the vendor would execute any further deeds to ensure the instrument more valid. The schedule to this deed states that the subject-matter of the sale is an undivided 96/318 share of the corpus within the metes and boundaries stated therein.

The vendor, on this deed, appears to have erroneously assumed that the final decree has been entered allotting to him the share which is conveyed in Lot 1 in Plan X. At the time of transfer, he had no title to the share which is sold in Lot 1 in Plan X and what he *intended* to convey was this share which he would have obtained under the final partition decree. The title which he intended to convey is further described as the one decreed upon him by the final decree in District Court Case No. 1755. This description, although erroneous, makes it clear that what the vendor intended to convey was the share allotted to him in the partition decree.

Where a description forms an integral part of the *corpus* intended to be conveyed, effect should be given to it. In *Sandris v. Dinakahamy*<sup>2</sup>, A conveyed to B a one-sixth share of a property which she said she inherited from her father. A did not as a matter of fact inherit any share from her father, but she inherited a one-sixth share from her husband. It was held that the conveyance could not be taken to have conveyed to B the share A inherited from her husband.

Section 17 of the Partition Ordinance (which, as stated earlier, is substantially reproduced in section 67 of the Partition Act (Cap. 67)) “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 those proceedings are still pending, and the clear object of the enactment was

<sup>1</sup> (1950) 51 N. L. R. 337.

<sup>2</sup> (1950) 5 Cal. Reps. 76.

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 " (per Wood Renton C.J. in *Subaseris v. Porolis*<sup>1</sup>, cited with approval by Dalton J., in *Hewawasan v. Gunasekere* (supra) ).

Applying these principles to the facts of the instant case, the description of the *corpus* conveyed is not the same as the subject-matter of partition case No. 1755 D. C. Gampaha but a description of the *corpus* which Singhappu would have received in the final decree in the partition case although there is an erroneous assumption that a decree had already been entered. It is a well-known canon of interpretation that in construing a deed, the paramount consideration is to give effect to the intention of the parties (vide *Ford v. Beech*<sup>2</sup>). Effect must be given to the general intention, not to the literal words, in order to make the deed operative (Vander Linden's Institutes 1 : 14 : 4).

It is clear from the *corpus* described in D3 that Singhappu had no title to the land described in the schedule at the time of transfer. When he obtained the same by the final partition decree, his title enured to the benefit of the transferee by the application of the doctrine of *exceptio rei venditae et traditae*. The scope and ambit of this doctrine was fully considered by the Privy Council in *Gunatilleke v. Fernando*<sup>3</sup> and needs no further elaboration. Applying this principle to the facts of the instant case, when final decree was entered in D. C. Gampaha Case No. 1755, Singhappu's title enured to the benefit of the 3rd defendant and has now devolved on the 4th-6th defendants.

The counsel for the respondent contended that this deed was invalid and relied on the dissentient judgment of Jayewardene A.J., (as he then was) in *Hewawasan v. Gunasekere* (supra). It must however be noted that the majority view was against the opinion of Jayawardene A.J., referred to by the counsel for the respondent. When three judges hear a case and one judge dissents, the majority view must be considered the judgment of the Court of three judges (vide *Appusinno v. Grigoris*<sup>4</sup>). Thus, the ruling in *Hewawasan v. Gunasekere* (supra) is binding on us.

For these reasons, we hold that Singhappu's interest passed to the 3rd defendant on deed D3 and that the plaintiff had no title to bring this action. We set aside the order of the learned District Judge and dismiss the plaintiff's action with costs. The plaintiff respondent will pay the appellants the costs of appeal.

T. S. FERNANDO, J.—I agree.

*Appeal allowed.*

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

<sup>2</sup> (1848) 11 Q. B. 842, 852.

<sup>3</sup> (1921) 22 N. L. R. 385.

<sup>4</sup> *Bel. Notes* 20.