

1962

Present : Herat, J., and Abeyesundere, J.

B. SILLIE FERNANDO, Appellant, and W. SILMAN FERNANDO
and others, Respondents

S. C. 37 (Inty.) of 1961—D. C. Panadure, 4476/P

Partition action—Transfer by co-owner, pending action, of whatever will be allotted to him in the final decree—Death of transferor before entering of final decree—Rights of transferee.

Where, prior to the entering of the interlocutory decree in a partition action, a party transfers by sale or donation whatever will be allotted to him by the final decree, the lot in severalty finally allotted to the transferor or those representing him (if he has died before the entering of the final decree) will automatically pass and vest in the transferee, without any further conveyance by the transferor or his representatives.

APPPEAL from an order of the District Court, Panadure.

Nimal Senanayake, for 41st Defendant-Appellant.

No appearance for respondents.

October 12, 1962. HERAT, J.—

In this action, which is a partition action, the 2nd defendant claims certain soil shares, certain plantations and a thatched house. Prior to the entering of the interlocutory decree, the 2nd defendant, by the deed marked Z1, donated to his natural children born to his mistress the 41st defendant-appellant, the soil, plantations and thatched house, which would be allotted to him ultimately by the final decree.

This deed Z1 was duly accepted by the 41st defendant on behalf of herself and her minor children. The 2nd defendant died before the entering of the final decree and his mistress the 41st defendant and her children are now in possession of the thatched house claimed by the 2nd defendant. The 2nd defendant's wife and legitimate child, namely, 39th and 40th defendants, were respectively substituted in place of the 2nd defendant after his death, pending the partition action.

Final decree was entered in which the thatched house, the plantations claimed by the 2nd defendant and the soil shares of the 2nd defendant as a lot in severalty, were allotted to the substituted defendants, namely, 39th and 40th defendants.

It has been held by this Court in *Sirisoma v. Sarnelis Appuhamy*¹ and by a fuller Bench at a later stage, that, when a deed purports to sell or donate an undivided interest in a land, whatever will be allotted to the vendor or donor by a final decree in a partition action, the lot in severalty

¹ (1950) 51 N. L. R. 337.

allotted to the vendor or donor or those representing him will automatically pass and vest in the vendee or donee under the deed in question, without any further conveyance, either by the vendor or donor or by his representatives.

In view of this position, the moment a final decree was entered in this case allocating the thatched house, plantations and the lot in severalty to the representatives of the 2nd defendant in consequence of the terms of the deed Z1, title to that lot in severalty vested under the donees in Z1, namely, a life interest or usufruct in favour of the 41st defendant-appellant and title or donarium in her children.

After the final decree was entered, the 39th and 40th defendants moved for a writ of possession against the 41st defendant and her children in respect of the thatched house and the lot in question. She resisted possession and set up title to the same lot on the strength of deed Z1.

The learned District Judge made his order directing that the writ of possession should be executed and the 41st defendant and her children ejected from the lot in question and he dismissed her application for the stay of writ with costs. From that order the 41st defendant has appealed.

We are of opinion that her appeal is entitled to succeed, because, in view of what we have said earlier, and according to the terms of Z1, immediately on the final decree being entered, her life interest in the lot in question vested in the 41st defendant, whilst title to the said lot vested in her children. The order of the learned District Judge is therefore set aside, and the 41st defendant's appeal is allowed with costs. Writ of ejectment will not be executed against the 41st defendant-appellant and her children over whom she has been appointed guardian ad litem. The 41st defendant-appellant will be entitled to the costs of the inquiry in the Court below.

ABEYESUNDERE, J.—I agree.

Appeal allowed.

