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*Present: Garvin J. and Lyall Grant J.*

MUDALIHAMY *v.* DINGIRI MENIKA.

167—*D. C., Kurunegala, 10,000.*

*Exceptio rei venditae et traditae—Sale of undivided share—Partition decree allotting share to vendor—Claim by vendee—Finality.*

Where a person who had sold his undivided interests in a land was subsequently allotted, in lieu of such undivided interests, a share in a partition action to which the purchaser was no party,—

*Held*, the decree in the partition action barred any claim by the purchaser to the land and that the plea of *exceptio rei venditae et traditae* was not available to him.

**T**HIS was an action by the plaintiff for the declaration of title to an undivided half share of the defined western half share of a land called Hitinawatta. By deed No. 34,382 dated March 31, 1913, the first defendant sold the interests claimed to the plaintiff. Thereafter an action was instituted by one Ukku Banda, who claimed to be the owner of the eastern half of this land, for the partition of the whole land, and the first defendant was one of the defendants in the action. The transfer of March 31, 1913, was not brought to the notice of the Court, and final decree was entered under which

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a specified portion of land the equivalent of half share was allotted to the first defendant. The plaintiff was no party to the action. After the partition decree the first defendant transferred the land to the second defendant. *Mudaliamy v. Dingiri Menika*

The learned District Judge held that title was concluded by the partition decree and dismissed the plaintiff's action.

H. V. Perera, for appellant.

February 22, 1927. GARVIN J.—

This is an appeal by the plaintiff, whose action for declaration of title to an undivided half share of the defined western half share of a land called Hitinawatta has been dismissed.

By deed No. 94,382 dated March 31, 1913, the first defendant sold and transferred the interests now claimed to the plaintiff. Thereafter an action was instituted by Ekanayake Mudiyanseleage Ukku Banda, who claimed to be the owner of the eastern half of this land, for the partition of the whole of Hitinawatta, presumably upon the footing that the land was one and undivided. The present first defendant was one of the defendants in that partition proceeding. The fact of the transfer of March 31, 1913, was not brought to the notice of the Court, and when the final decree was entered a specific allotment of land being the equivalent of a half share of the land was allotted to the first defendant. The plaintiff, who was not a party to the action, was completely excluded by the partition decree so entered. Thereafter the first defendant transferred her interests to the second defendant.

The District Judge has held that the matter of titles is concluded by the judgment in the partition case and accordingly dismissed the plaintiff's action.

The facts as outlined above are not in dispute. It is sought, however, by counsel for the appellant to bring this case within the principle of *Gunatilleke v. Fernando*.<sup>1</sup>

He admits that there is a valid and subsisting decree under the Partition Ordinance, but he claims that the decree in so far as it declared his vendor entitled to the western half share of this land has enured to his benefit, and that he is therefore entitled to rely upon this very partition decree as part of his title.

Now, I am aware of no case in which it has been held that the *exceptio rei venditæ et traditæ* is available to a purchaser who is seeking to resist his vendor or a person claiming through him upon a title declared by the final decree in a partition action. Nor has counsel been able to refer me to any authority for the proposition. The matter is *res integra*.

<sup>1</sup>(1921) 22 N. L. R. 385

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Under the Roman-Dutch law a purchaser who has got possession from the vendor who at the time of the sale had no title or a defective title could rely upon a title subsequently acquired by his vendor and resist any attempt on the part of the vendor or any person claiming under the vendor to eject him; and if he has lost possession since his purchase he may recover possession by the *actio publiciana* repelling his vendor and those claiming under him by virtue of the new title by virtue of the *exceptio rei venditae et traditae*.

The underlying principle would seem to be that the vendor or those claiming through him must not be permitted to deny the title of his vendee. Where, therefore, the vendor takes proceedings with a view to dispossessing a purchaser he is repelled by the plea that inasmuch as it was he, who sold and delivered the property, his title has enured to the purchaser. Where the purchaser has lost possession he is permitted by a legal fiction to assert as against his vendor or those claiming through him a title which he has not got and to repel the plea of title by claiming the benefit of the *exceptio rei venditae et traditae*. In both cases the purchaser must be in a position to establish his claim of title by purchase from his vendor.

But it is well settled law that a partition decree is conclusive against all persons whomsoever even as against a person owing an interest in the land partitioned whose title has by fraudulent contrivance been concealed from the Court. The effect of such a decree is to determine all pre-existing right or title and every claim to any right or title to the subject of partition.

The decree in the partition case relied on by the defendant is binding and conclusive against the plaintiff as effectively as if he himself had been a party to the case. Whatever right or title or claim of right or title he may have had has been finally determined.

In a sense, it is correct to say that the parties who by a final decree in a partition action are allotted shares in severalty have acquired a new title, but that is only the indirect effect of the decree and proceed from the fact that it is good and conclusive against all persons whomsoever. So far as the plaintiff is concerned the title derived by the first defendant under this decree necessarily involves the extinguishment of any claim of title which he may have had prior to the passing of that decree.

He is effectively barred by the decree from asserting a claim to any interest in the land, and is not therefore in a position to establish that interest which he must show before he can estop his vendor or those claiming under them by the *exceptio rei venditae et traditae*.

In any other view of the law it will be competent even for a person through whose negligent omission to assert his title to an interest in the land a final decree for partition has been entered allotting that interest in severalty to his vendor, to maintain

successfully against his vendor and those claiming through him upon a title based on that decree that he is still the owner. It is a view which, in my opinion, is unsound.

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The exception must, I think, be limited to cases in which the new title which the purchaser asserts has enured to his benefit is obtained by his vendor by the usual means by which title is derived, such as purchase, gift, or inheritance.

A decree which bars a title cannot be relied on by a person who is estopped by that decree to support and confirmed the very title which it bars.

The appeal is dismissed.

LYALL GRANT J. concurred in a separate judgment.

*Appeal dismissed.*

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