1950 *Present:* **Dias S.P.J., Gratiaen J. and Pulle J.**

SIRISOMA *et al.*, Appellants, *and* SARNELIS APPUHAMY *et al.*, Respondents

S. C. 30—D. C. Balapitiya, L 90

Co-owner's alienation or hypothecation, pending partition proceedings, of what would be allotted to him in the final decree—Validity and effect of such alienation or hypothecation—Partition Ordinance, sections 9 and 17.

Section 17 of the Partition Ordinance does not prohibit the alienation or hypothecation, pending partition proceedings, of an interest to which a co-owner may ultimately become entitled by virtue of the decree in the pending action.

Where an instrument is executed, pending partition proceedings, in respect of an interest to which the grantor may ultimately become entitled upon the decree, the question whether it should be construed as an actual alienation or hypothecation of such contingent interest *or* merely as an agreement to alienate or hypothecate such interest (if and when acquired) must be decided in accordance with the ordinary rules governing the interpretation of written instruments.

If such an instrument is in effect only *an agreement* to alienate or hypothecate a future interest, if and when acquired, no rights of ownership or hypothecary rights (as the case may be) pass to the grantee upon the acquisition of that interest by the grantor *unless and until the agreement has been duly implemented;* if, without implementing this agreement, the grantor conveys to a third party the rights which he has acquired under the decree, the competing claims of that third party and of the original grantee must be determined with reference to other legal principles such as the application of Section 93 of the Trusts Ordinance.

If the instrument is in effect a present alienation or hypothecation of a contingent interest, the right of ownership (or the hypothecary rights) vest in the grantee automatically upon the acquisition of that interest by the grantor; and no further instrument of conveyance or mortgage requires to be executed for the purpose; the execution of "a deed of further assurance" confirming the result which has already taken place may in certain cases be desirable but it is not essential in such a case.

The provisions of section 9 of the Partition Ordinance do not invalidate a transaction whereby an interest (which is not presently vested in the grantor and which could only become vested in him, if at all, upon the passing of a final decree for partition) is intended to pass to the grantee upon its acquisition.

Appuhamy v Babun Appu (1923) 25 N. L. R. 370 and *Fernando v. Atukorale (1926) 28 N. L. R. 292* overruled.

CASE referred by Wijeyewardene C.J. to a Bench of three Judges.

E. B. Wikramanayake, K.C., with *C. V. Ranawake* and *C. Seneviratne*, for defendant appellants.—The question for decision is whether the sale of divided lots which may be allotted in a partition action operates as an actual conveyance or merely as an agreement to convey. *Louis Appuhamy v. Punchi Baba*[1] and *Subaseris v. Prolis*[2] are not helpful decisions

[1] *(1904) 10 N. L. R. 196.* [2] *(1913) 16 N. L. R. 393.*

1——J. N. A 97628-1,042 (5/50)

as the question whether the transaction operates as a present conveyance or an agreement to convey was not considered. The decision in *Khan Bhai v. Perera*[1] to the effect that persons desiring to dispose of their interests in property subject to a partition action can only do so by disposing of the interests to be ultimately allotted to them in the action was *obiter* to the question at issue. That case does not bear the interpretation given by Soertsz A.C.J. in *Manchanayake v. Perera*[2]. See also *Fernando v. Atukorale*[3]. If the deed in the present case passes title then section 9 of the Partition Ordinance destroys that title. If it does not pass title then there is only an agreement to convey giving rise to an action for specific performance.

H. V. Perera, K.C., with *N. E. Weerasooria, K.C.*, *M. M. Kumarakulasingham*, and *J. E. R. Candappa*, for plaintiffs respondents.—An agreement to sell cannot be construed as a sale, and conversely a sale cannot be construed as an agreement to sell. The nature of the transaction depends on the terms of the document. Maartensz A.J. in *Fernando v. Atukorale* (*supra*) thought that when a person sold a future interest it was only an agreement to sell. This view is incorrect. Both the Roman Law and the Roman-Dutch Law contemplated the present sale of a future interest. If the purchaser's rights come into existence only after final decree section 9 has no effect as there is nothing to wipe out. If a sale of a future interest is possible then the sale is complete when the interest comes into being and nothing further need be done by the seller to perfect the transaction. Whether the transaction is a sale is a matter of construction. The only point is whether there can be a sale of a future interest. Under our law this is possible—*Abdul Ally v. Kelaart*[4]; *Louis Appuhamy v. Punchi Baba*[5]; *Subaseris v. Prolis*[6]. The view of Ennis J. expressed in *Appuhamy v. Bubun Appu*[7] regarding the decision in *Subaseris v. Prolis* (*supra*) is not correct. The decision in *Fernando v. Atukorale*[8] is incorrect as it is based on the fallacy that a vendor cannot convey *in praesenti* what he did not own at the moment. *Rajapakse v. Gunasekera*[9] is in point and the decision is correct though the reasons given are doubtful. *Salee v. Natchia*[10] is precisely in point and lays down the correct principle. See also *Manchanayake v. Perera*[11] followed in *Nazeer v. Hassim*[12]. If the matter is looked upon as *res integra* no authority is required. The statute law prohibition against alienation should be kept within bounds. The prohibition only deals with undivided shares. In the present case there is a sale of a future interest, *ex hypothesi* not undivided.

E. B. Wikramanayake, K.C., in reply.—Even assuming that a present sale of a future interest is possible when the interest comes into existence the sale relates back to the date of the agreement. Section 9 wipes out the right. Things not in existence can be divided into two classes: (1) things which must necessarily come into existence, and (2) things

[1] *(1923) 26 N. L. R. 204.*
[2] *(1945) 46 N. L. R. 457.*
[3] *(1926) 28 N. L. R. 292.*
[4] *(1904) 1 Bal. 40.*
[5] *(1904) 10 N. L. R. 196.*
[6] *(1913) 16 N. L. R. 393.*
[7] *(1923) 25 N. L. R. 370.*
[8] *(1926) 28 N. L. R. 292.*
[9] *(1928) 29 N. L. R. 509.*
[10] *(1936) 39 N. L. R. 259.*
[11] *(1945) 46 N. L. R. 457.*
[12] *(1917) 48 N. L. R. 282.*

which may or may not come into existence. A sale is possible only with regard to things in the former class. With regard to things in the latter class there can only be an agreement to sell—see *Moyle's Contract of Sale, p. 32.*

Cur. adv. vult.

May 29, 1950. GRATIAEN J.—

By a notarially attested deed of transfer No. 307 dated 14th March, 1942, the second defendant-appellant sold to the plaintiffs, during the pendency of partition proceedings in respect of certain premises, his "undivided" shares in the land "*or whatever rights, interests, lot or lots that may be allotted to (him) in the said partition action*". He further covenanted with the plaintiffs "*to do and execute or cause to be done and executed all such and other acts, deeds, matters and things whatsoever for the better and more effectually assuring the said premises and every part thereof*" to the plaintiffs.

On 31st March, 1947, final decree in the partition action was entered whereby the second defendant became entitled, in lieu of his undivided shares, to certain defined allotments in the larger land. Five days later, ignoring the execution of the earlier deed No. 307, he purported to convey these defined allotments to the first defendant. The present action relates to the competing claims of the plaintiffs and of the first defendant to ownership of the allotments in question. After trial the learned District Judge entered judgment in favour of the plaintiffs with costs.

The defendants have appealed to this Court from the judgment and decree entered against them. The appeal came up for hearing in the first instance before my brothers Dias and Basnayake. Upon a preliminary question of law the following order was made by my brother Dias (Basnayake J. concurring):

> "In this case learned counsel for the appellants and respondents agree that the case of *Fernando v. Atukorale*, (1926) 28 N. L. R. 292, is in conflict with the later case of *Manchanayake v. Perera*, (1945) 46 N. L. R. 457.
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> "This case deals with the question of the effect of a deed executed by a co-owner during the pendency of partition action, wherein he transfers the divided shares which he will be allotted in the final decree. It is important that the question whether such a deed prevails over a subsequent conveyance by the co-owner should be settled by an authoritative decision of this Court.
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> "My brother and I agree that in terms of section 51 of the Courts Ordinance, Chapter 6, this is a proper case to be decided by a Full Bench. We accordingly refer the matter to His Lordship the Chief Justice."

Upon this recommendation the question was referred by Sir Arthur Wijeyewardene, Chief Justice, for the decision of a Divisional Bench consisting of three Judges of this Court. We are indebted to Mr. H. V. Perera and Mr. E. B. Wickramanayake for the assistance which they have given us in our endeavours to elucidate the present state of the law regarding the validity and effect of transactions relating to interests in land during the pendency of proceedings under the Partition Ordinance.

The deed No. 307, in so far as it purports to dispose of "undivided" interests in property during the pendency of a partition action, is clearly obnoxious to the provisions of the Partition Ordinance. The only question which remains for decision is as to the effect of that part of the deed which disposes of the "rights, interests, lot or lots which may be allotted" (*and which were in fact subsequently allotted*) to the second defendant under the partition decree. The matters which we have been called upon to consider in regard to this purported conveyance are :—

(1) Is such a grant obnoxious to the provisions of section 17 of the Partition Ordinance ?

(2) If not, should it be interpreted as an *actual conveyance* of the allotments which might ultimately pass to the second defendant under the final decree for partition *or* merely as an *agreement to convey* his interests in those allotments if and when they passed to him ?

(3) If the first of these alternative interpretations be correct, is such a purported conveyance invalid and inoperative *either* by reason of the provisions of section 9 of the Partition Ordinance *or* because it offends some principle of the Roman-Dutch Law which regulates contracts of sale of this description ?

The conclusions at which I have arrived is that those questions should be answered as follows :

(1) No ;

(2) As an *actual conveyance* of the allotments which might pass (and which in the present case did eventually pass) to the second defendant under the partition decree ;

(3) No ; the conveyance is not affected by the provisions of section 9 of the Partition Ordinance ; nor is it invalidated by any principle of the common law which governs the case.

It is convenient at this stage to review the judicial opinions expressed in earlier decisions of this Court as to the extent to which the provisions of section 17 of the Partition Ordinance impose a fetter on the free alienation of interests, present or contingent, in property during the pendency of partition proceedings. In *Adbul Ally v. Kelaart*[1] Wendt J. and Sampayo J. held that an assignment by anticipation of "so much of the proceeds realised by the sale (i.e., under a decree for sale in a pending partition action) as shall represent the (vendor's) undivided share" was not obnoxious to section 17. In *Louis Appuhamy v. Punchi Baba*[2], Layard C.J. and Moncrieff J. took the same view, and decided that section 17 was "not intended to hinder or prevent persons from alienating or mortgaging the rights to which they become entitled after a partition had been decreed in respect of the land". In *Subaseris v. Prolis*[3] Wood Renton J., sitting alone, held that a party to a pending partition action could deal by anticipation with whatever divided interest he might ultimately obtain. In *Khan Bhai v. Perera*[4] the question came

[1] *(1904) 1 Bal. 40.*
[2] *(1904) 10 N. L. R. 196.*
[3] *(1913) 16 N. L. R. 393.*
[4] *(1923) 26 N. L. R. 204.*

before Bertram C.J. and Porter J. as to the precise point of time up to which the prohibition against the alienation or hypothecation of a co-owner's interests continued *in cases where the decree in the action was for a sale* and not for a partition of the land. Bertram C.J. referred this question for a ruling of the Full Bench of the Court consisting of himself, Ennis J., Schneider J., Garvin J. and A. St. V. Jayawardene J. The unanimous ruling of the Court in regard to the immediate question submitted for its decision was that "the prohibition must be deemed to continue so long as the common bond of co-ownership exists, that is to say (where there is a decree for sale) until the issue of the certificate under Section 8". Apart from the authoritative decision of the Full Bench on this particular point, the occasion was considered appropriate to give a ruling of general application on the question "as to the true interpretation of the prohibition against alienation or hypothecation of the undivided shares or interests in property subject to a partition action". The Judges unanimously decided on this general question that persons desiring to charge or dispose of their interests in a property subject to a partition action could do so "*by expressly charging or disposing of the interest to be ultimately allotted to them in the action*". It seems to me to be a question of academic refinement whether the ruling which was pronounced on this occasion by five distinguished Judges of great learning and experience is, in effect, only an *obiter dictum*—*per* Maartensz J. in *Fernando v. Atukorale* [1]—or whether it would be more correct to say, with Soertsz J. in *Manchanayake v. Perera* [2] that "the pronouncement is of the very essence of the *ratio decidendi* in the case". I am convinced that, apart from technicality, the view expressed in *Khan Bhai v. Perera* [3] which I have quoted above should now be regarded as having the force of binding authority. The ruling has influenced the actions of countless vendors and purchasers for over a quarter of a century, and it confirms the opinion previously pronounced by an exceptionally strong Bench of Judges of this Court. Besides, it is unquestionably a correct statement of the law on the point. Section 17 of the Partition Ordinance prohibits the alienation or hypothecation of *undivided interests presently vested* in the owners of a land which is the subject of pending partition proceedings. There is no statutory prohibition against a person's common law right to alienate or hypothecate, by anticipation, interests which he can only acquire upon the conclusion of the proceedings. That right is in no way affected by the pendency of an action for partition under the provisions of the Ordinance. "Section 17 imposes a fetter on the free alienation of property, and the Court ought to see that that fetter is not made more comprehensive than the language and the intention of the section require". *Subaseris v. Prolis* [4].

It has been argued before us that a conveyance by anticipation of whatever interests a party may acquire upon the termination of partition proceedings must always be interpreted as an *agreement* to convey those interests. This cannot be so. The contrary view is implicit in the ruling of the Full Bench in *Khan Bhai v. Perera* [5] and in the earlier

[1] *(1926) 28 N. L. R. 292.*
[2] *(1945) 46 N. L. R. 457.*
[3] *(1923) 26 N. L. R. 204.*
[4] *(1913) 16 N. L. R. 393.*
[5] *(1923) 26 N. L. R. 204.*

decisions to which I have referred. Even if the matter were *res integra*, I would say with little hesitation that the proper interpretation of a conveyance cannot be affected by the question whether or not it was executed during the pendency of a partition action. Where, upon an application of the normal rules governing the interpretation of written instruments, it is in terms a conveyance of a contingent interest (when acquired), effect can only be given to the document, if at all, upon that basis. If such a conveyance were invalid (which it is not) its character could not properly be altered, by invoking some insupportable "equitable" doctrine, into that of a mere *agreement* to convey. Certain observations of Ennis J. in *Appuhamy v. Babun Appu* [1] and of Lyall Grant J. and Maartensz J. in *Fernando v. Atukorale* [2] indicate that in their opinion the validity of a sale by anticipation of a contingent interest which the vendor may acquire in a particular action cannot be recognised except by regarding the transaction, contrary to its true intent, as having the effect of an agreement to convey. I venture to doubt if these Judges had the advantage which we have enjoyed of a full argument on this question. With great respect, I think that *Fernando v. Atukorale* [2] should be over-ruled by the present Divisional Bench, and that *Appuhamy v. Babun Appu* [1] should similarly be over-ruled in so far as it purports to decide that a sale by a co-owner, pending a partition action, of the interests which he may ultimately acquire under the partition decree "remains merely an agreement to convey, and would not operate as a conveyance or alienation". I prefer to follow on this point the later rulings of this Court in *Rajapakse v. Gunesekera* [3], *Salee v. Natchia* [4], and *Manchenayake v. Perera* [5]. In *Hewawasan v. Gunesekera* [6] there was disagreement between Garvin J. and Dalton J. on the one hand, and Jayawardene J. on the other, as to the proper construction of a particular document. On general principles, however, they seem to have agreed that a completed agreement intended to pass an *immediate* interest in land, pending partition proceedings, was obnoxious to Section 17, but that a dealing by anticipation with divided interests to be ultimately obtained by the vendor was unobjectionable. One should not forget that two of the Judges concerned had contributed to the decision in *Khan Bhai v. Perera* [7] and that neither of them, or Dalton J., indicated any doubts as to the correctness of its comprehensive ruling.

I now proceed to deal with two arguments which Mr. Wickramanayake submitted for our consideration. He first argued, but (if my impression be correct) with little enthusiasm, that a sale by anticipation of a contingent interest in land is obnoxious to the Roman-Dutch Law. In my opinion this submission is without merit. In *Gunatilleke v. Fernando* [8] the Privy Council, although somewhat handicapped by the failure of learned Counsel to cite express authority to them on the point, took the view that there was nothing to indicate that the alienation of a contingent interest in land was prohibited by the policy of the Roman-Dutch Law. Indeed, this view is amply supported by authority which we have had the advantage of considering. As far as the Roman Law

[1] *(1923) 25 N. L. R. 370.*
[2] *(1926) 28 N. L. R. 292.*
[3] *(1928) 29 N. L. R. 509.*
[4] *(1936) 39 N. L. R. 259.*
[5] *(1915) 16 N. L. R. 457.*
[6] *(1926) 28 N. L. R. 33.*
[7] *(1923) 26 N. L. R. 204.*
[8] *(1921) 22 N. L. R. 385.*

is concerned, it is stated in unambiguous terms in the Digest (18-1-18) that " the law recognises the purchase of *res futurae* in the sense that on the occurrence of ' the birth ' (that is, on the happening of the anticipated event) the sale is regarded as relating back to the time when the bargain was made ". These words mean in their context that, if and when the contingent interest intended to be transferred is in fact acquired, it immediately and automatically becomes vested in the purchaser by virtue of the contract of sale which has already taken place. This principle has been taken over in its entirety by the Roman-Dutch Law (*Voet 18-1-13*). When an expectation (*spes*) has been purchased, " the sale is considered as made *iam tunc* when it comes into existence " (*vide* the footnote to *Berwick's translation* at page 18). What does this mean when the principle is applied to suit the requirements of modern conveyancing ? It can only mean, I think, that when an instrument has been executed whereby a present right is conveyed in respect of a contingent interest which the parties to the transaction expect to be realised at some future date, the instrument already executed operates so as to vest that interest in the purchaser as soon as it has been acquired by the vendor. No further conveyance is needed to secure the intended result—although it may well be desirable, as is often stipulated by prudent conveyancers, that the result already achieved should be " confirmed " in a further notarial instrument which will place the purchaser's rights beyond the possibility of controversy. In my opinion *Manchanayake v. Perera* [1] was rightly decided on this point.

Mr. Wickramanayake's other submission was that the sale by anticipation of a contingent interest during the pendency of a partition action can never be crystallized into a vested right because, immediately upon the passing of the final decree for partition, section 9 operates to extinguish the purchaser's rights under the earlier conveyance. I respectfully think that the decision of Maartensz J. to this effect in *Fernando v. Atukorale* [2] is wrong and should be overruled. Under section 9, the title to a divided allotment acquired by a co-owner under a decree for partition is no doubt conclusive against interests in that allotment which were vested or were claimed to be vested in any person *at some point of time preceding the date of the decree*. On the other hand, section 9 has no bearing on a purchaser's right to claim that, upon the vesting of the divided allotment in his vendor under the decree, the allotment has automatically passed to him by virtue of the earlier conveyance. This conclusion necessarily follows, in my opinion, from an analysis of the language of the section ; there is no need, and indeed there is no scope for reliance on the Roman-Dutch Law doctrine of *exceptio rei venditae et traditae* in this context.

Whether each question which I have discussed be examined by reference to the trend of past decisions of this Court *or* on the assumption that it may legitimately be considered as *res integra*, I think that the following propositions should now be accepted as settled law :—

(1) Section 17 of the Partition Ordinance does not prohibit the alienation or hypothecation, pending partition proceedings, of

[1] *(1945) 46 N. L. R. 457.* [2] *(1926) 28 N. L. R. 292.*

an interest to which a co-owner may ultimately become entitled by virtue of the decree in the pending action ;

(2) Where an instrument is executed, pending partition proceedings, in respect of an interest to which the grantor may ultimately become entitled upon the decree, the question whether it should be construed as an actual alienation or hypothecation of such contingent interest *or* merely as an agreement to alienate or hypothecate such interest (if and when acquired) must be decided in accordance with the ordinary rules governing the interpretation of written instruments ;

(3) If such an instrument is in effect only *an agreement* to alienate or hypothecate a future interest, if and when acquired, no rights of ownership or hypothecary rights (as the case may be) pass to the grantee upon the acquisition of that interest by the grantor *unless and until the agreement has been duly implemented* ; if, without implementing this agreement, the grantor conveys to a third party the rights which he has acquired under the decree, the competing claims of that third party and of the original grantee must be determined with reference to other legal principles such as the application of Section 93 of the Trusts Ordinance ;

(4) If the instrument is in effect a present alienation or hypothecation of a contingent interest, the rights of ownership (or the hypothecary rights) vest in the grantee automatically upon the acquisition of that interest by the grantor ; and no further instrument of conveyance or mortgage requires to be executed for the purpose ; the execution of "a deed of further assurance" confirming the result which has already taken place may in certain cases be desirable but it is not essential in such a case ;

(5) The provisions of section 9 of the Partition Ordinance do not invalidate a transaction whereby an interest (which is not presently vested in the grantor and which could only become vested in him, if at all, upon the passing of a final decree for partition) is intended to pass to the grantee upon its acquisition.

Any earlier decisions of this Court which express or appear to express opinions in conflict with the general propositions enumerated above should now be regarded as over-ruled to that extent. Owners of land, and the practitioners who are called upon to advise them, should not be left in a state of continual doubt as to the scope of the restrictions which the Partition Ordinance imposes upon the alienation and hypothecation of interests in land. As Dr. C. K. Allen points out, it would be disastrous to the public interest if "the vaunted 'certainty' of our system of precedents has too much in common with the kind of 'certainty' which is to be found on the race-course and the dog-track" [1].

For the reasons which I have given, I think that the answer to the question referred for the decision of the Divisional Bench is that the divided allotments of land which passed to the second defendant under the partition decree of 31st March, 1947, became automatically vested in the plaintiff by virtue of the deed of transfer No. 307 dated 14th March,

[1] *63 Law Quarterly Review, page 437.*

1942. Subject therefore to any other defences which properly arise on the defendants' appeal, the conveyance to the plaintiffs must prevail over the later conveyance of the same allotments of land in favour of the first defendant in April, 1947.

The appeal must now be listed for argument in the normal way before a Bench of two Judges for the consideration of any other questions of law or fact which may arise upon the petition of appeal. The defendants will in any event pay to the plaintiffs the costs of the argument before the present Bench.

DIAS S.P.J.—I agree.

PULLE J.—I agree.

Appeal to be listed in due course.

1950 *Present :* Dias S.P.J., Nagalingam J. and Gratiaen J.

YAKOOB BAI, Appellant, *and* SAMIMUTTU, Respondent

S. C. 381—D. C. Kandy, M. S. 1,972

Civil Procedure Code (Cap. 86)—Section 218 (j)—Execution of decree to pay money—Judgment-debtor, a Head Kangany—Seizure of his wages, dearness allowance and pence money—Invalidity of such seizure—Meaning of "labourer"—Service Contracts Ordinance (Cap. 59), Section 2—Estate Labour (Indian) Ordinance (Cap. 112), Section 3.

In execution of a money decree entered against the defendant, the plaintiff seized the wages, dearness allowance and pence money of the defendant. It was established that the defendant was a Head Kangany who did no manual or physical work of any kind and that his duty was to supervise labourers who did the manual work.

Held, (Gratiaen J. dissenting), that an estate kangany employed merely to supervise a number of estate labourers is a "labourer" within the meaning of section 218 (*j*) of the Civil Procedure Code and that the seizure was, therefore, not valid.

APPEAL from a judgment of the District Court, Kandy. This case was referred to a Bench of three Judges owing to a difference of opinion between the two Judges before whom it had been previously listed.

H. W. Tambiah, with *G. T. Samarawickreme* and *S. Sharvananda*, for plaintiff appellant.—The question at issue is whether a kangany who merely supervises labourers and does no manual or physical work is himself a "labourer" within the meaning of section 218 (*j*) of the Civil Procedure Code. The Estate Labour Ordinance (Cap. 112) defines a "labourer" for the purpose of *that* Ordinance. This definition cannot be used for ascertaining the meaning of the word "labourer" as used in the Civil Procedure Code. One must look at section 218 of the Civil