

1946 Present : Wijeyewardene and Jayetileke JJ.

ABEYSURIYA *et al.*, Appellants, and GUNAWARDENE
et al., Respondents.

63—D. C. Matara, 156/14,165.

Partition action—Agreement, pending action, to transfer divided lot after final decree—Does not convey immediate interest—Partition Ordinance (Cap. 56), s. 17.

Where, pending an action for the partition of a land, one of the defendants executed an agreement which provided that he would within a month of the entering of the final decree convey the divided portion that would be allotted to him under that decree—

Held, that the agreement did not convey an immediate interest and could not be given effect to in the interlocutory decree entered in the case.

A PPEAL against a decree of the District Court of Matara.

N. E. Weerasooria, K.C. (with him *S. W. Jayasuriya*), for the defendants, appellants.—The question is whether a person who has got a deed pending a partition action could intervene in the action. Section 17 of the Partition Ordinance declares such a deed void. Only a purchaser under a Fiscal's sale can intervene, and that only after the conveyance is obtained—*Perera v. Perera*¹.

[WIJEYWARDENE J.—Cannot a person who has a right to the proceeds of sale under a deed pending partition have his rights reserved in the partition action?]

No; he has to bring a fresh action for specific performance upon entering of the final decree—See *Hewawasam v. Gunasekera*².

L. A. Rajapakse, K.C. (with him *Vernon Wijetunge*), for the eighth defendant, respondent.—A *cestui que trust* can intervene in a partition action to have his rights reserved—*Galgamuwa v. Weerasekera*³.

¹ (1906) 9 N. L. R. 217 at 219.

² (1926) 28 N. L. R. 33.

³ (1919) 21 N. L. R. 108.

[JAYETILEKE J.—Do you get a right under the partition decree? You have no interest in the property until the decree is entered.]

One cannot say that we have no interest; we have an interest to have a conveyance after final decree; the agreement is registered and registration is notice—*Silva v. Salo Nona*¹. Hence our rights are preserved by section 93 of the Trusts Ordinance. A deed like the present one conveys an immediate interest—*Manchanayake v. Perera*². Where the substantial rights of parties are not prejudiced an appeal will not be allowed on account of any error, defect or irregularity—section 36 of the Courts Ordinance.

N. E. Weerasooria, K.C., in reply.—21 N. L. R. 108 does not apply—a *Cestui que trust* has a present interest.

[WIJYEWARDENE J.—What about a fideicommissary's interest?]

In this case we are concerned with a deed pending partition and therefore a fideicommissary's case is not analogous to the present one. Section 36 of the Courts Ordinance cannot override the provisions of section 17 of the Partition Ordinance.

Cur. adv. vult.

September 17, 1946. WIJYEWARDENE J.—

The plaintiffs filed this action on November 24, 1941, under the Partition Ordinance in respect of a land called Gerietayagahahena apportioning to himself, the first defendant and the second defendant undivided 5/12, 5/12 and 2/12 shares respectively. There is no dispute as to the correctness of those shares.

By deed 8D2 of November 20, 1941, the first defendant conveyed his undivided 5/12 shares to the eighth defendant. As they had been advised that the deed 8D2 was void in view of the provisions of section 17 of the Partition Ordinance the first and eighth defendants executed an indenture 8D3 of February 21, 1942. The relevant provisions of 8D3 are :—

- (a) that the first defendant shall within a month of the entering of the final decree convey the divided portion that may be allotted to him under that decree.
- (b) that the eighth defendant shall be liable to pay all the *pro rata* costs and compensation, if any, that the first defendant may be ordered to pay under the decree.
- (c) that the first defendant shall be liable to repay to the eighth defendant the sum of Rs. 750 paid at the execution of 8D2 and a further sum of Rs. 500 as liquidated damages if he refuses or neglects to convey the divided lot as agreed to the eighth defendant.
- (d) that in the event of the decree being a decree of sale, the eighth defendant shall be entitled to the relative share of the proceeds of the sale.

The second and eighth defendants entered into a similar indenture 8D9 of December 8, 1942, in respect of the undivided 2/12 shares of the second defendant.

¹ (1930) 31 N. L. R. 81.

² (1945) 46 N. L. R. 457.

The first defendant died pending the action and his intestate heirs at the time material to this case were the fourth, fifth, sixth and seventh defendants.

In spite of an objection raised by the defendants-appellants, the District Judge directed interlocutory decree to be entered declaring that the 5/12 shares devolving on the fourth, fifth, sixth and seventh defendants were "subject to the terms of agreement D3 in favour of the eighth defendant". The decree also declared the 2/12 shares of the second defendant "subject to the deed of agreement D9 in favour of the eighth defendant".

Clearly, the eighth defendant got no interest in the land under 8D2. The indentures 8D3 and 8D9 were merely agreements to transfer divided lots after the final decree. They do not convey an immediate interest in the land. I am, therefore, compelled to modify the decree

(a) by directing that the schedule should read :—

plaintiff entitled to	..	5/12 shares
fourth to seventh defendants entitled to	..	5/12 shares equally
second defendant entitled to	..	2/12 shares

(b) by vacating the order for costs made in favour of the eighth defendant against the fourth, sixth and seventh defendants.

The rights of the eighth defendant under 8D3 and 8D9 are, of course, unaffected by the modification of the decree.

I would allow the appellants costs of appeal as against the eighth defendant.

JAYETILEKE J.—I agree.

Decree modified.

