4, 1968

IN THE PRIVY COUNCIL No. 3 of 1967

ON APPEAL
FROM THE SUPREME COURT OF CEYLON

B E T W E E N :

CEYLON THEATRES LIMITED of Parsons Road, Colombo (1st Defendant)
Appellant

- and -

1. CINEMAS LIMITED of 117, New Chetty Street, Colombo. (Plaintiff)

2. EUGENE SENEVIRATNE of "Kenilworth" No. 231, Dematagoda Road, Colombo (2nd Defendant)

3. GWENDELINE DORA JAYAKODDY of Balagalle, Divulapitiya, appearing by her Guardian-ad-litem and Curator the 4th Defendant (3rd Defendant)

4. JOSEPH de ABREW WIJESINGHE of No. 24, Tichborne Passage, Colombo (4th Defendant)

Respondents

C A S E FOR APPELLANT

Record

1. This is an Appeal from a Judgment and Decree of the Supreme Court of Ceylon dated the 25th day of March 1965 allowing the appeal of the 1st Respondent (Plaintiff) from the Judgment and Decree of the District Court of Colombo dated the 18th day of October 1961 by which Judgment and Decree the said District Court of Colombo had directed that an interlocutory decree for sale under the Partition Act No. 16 of 1951 of the premises the subject matter of the action be entered allotting rights to parties as in the said Judgment and Decree specified subject to a life interest of the 2nd Respondent (2nd Defendant) "in respect of one-third share of the soil and one-third share of the building." The Supreme Court of Ceylon, allowing the appeal, varied the said Decree of the District Court of

pp.51-63

pp.42-7

Record

Ceylon, by deleting that part of it which provided that the sale was to be subject to such life interest.

2. The principal question raised in this Appeal is whether the Court is empowered under the Partition Act No. 16 of 1951 in directing a sale, to direct that such sale shall be subject to a subsisting life interest in the land sold or whether such sale must necessarily be such as to give title to the purchaser free from any such interest.

3. The following provisions of the Partition Act No. 16 of 1951 are material.

> 2. Where any land belongs in common to two or more owners, any one or more of them may institute an action for the partition or sale of the land in accordance with the provisions of this Act.
>
> 4. In addition to the particulars required to be stated in a plaint by the Civil Procedure Code, every plaint presented to a court for the purpose of instituting a partition action shall contain the following particulars:-
>
> (a) the name, if any, and the extent and value of the land to which the action relates;
>
> (b) a description of that land by reference to physical metes and bounds or by reference to a sketch, map or plan which shall be appended to the plaint;
>
> (c) the names and addresses of all persons who are entitled or claim to be entitled to any right, share, or interest to, of, or in that land or to any improvements made or effected on or to that land, and the nature and extent of any such right, share interest or improvements, so far as such particulars are known to the plaintiff or can be ascertained by him; and

Record

(d) a statement setting out, with reference to a pedigree which shall be appended to the plaint, the devolution of the title of the plaintiff and, where possible, the devolution of the title of every other person disclosed in the plaint as a person entitled or claiming to be entitled to that land, or to any right, share, or interest to of, or in that land.

5. The plaintiff in a partition action shall include in his plaint as parties to the action all persons who, to his knowledge, -

(a) are entitled or claim to be entitled -

(i) to any right, share, or interest to, of, or in the land to which the action relates, whether vested or contingent, and whether by way of mortgage, lease usufruct, servitude, trust, fidei commissum, life interest, or otherwise, or

(ii) to any improvements made or effected on or to the land; or

(b) are in actual possession of the land or any part thereof.

25. On the date fixed for the trial of a partition action or on any other date to which the trial may be adjourned, the court shall examine the title of each party and shall hear and receive evidence in support thereof and shall try and determine all questions of law and fact arising in that action in regard to the right, share, or interest of each party to, of, or in the land to which that action relates, and shall consider and decide which of the orders mentioned in section 26 should be made.

26. (1) At the conclusion of the trial of a partition action, or on such later date as the court may fix, the court shall pronounce judgment in open court, and the judgment shall be dated and signed by the judge at the time of pronouncing it. As soon as may be after the judgment is

Record

pronounced, the court shall enter an interlocutory decree in accordance with the findings in the judgment, and such decree shall be signed by the judge.

(2) The interlocutory decree may include one or more of the following orders, so however that the orders are not inconsistent with one another:-

(a) order for a partition of the land;

(b) order for a sale of the land in whole or in lots;

(c) order for a sale of a share or portion of the land and a partition of the remainder;

(d) order that any portion of the land representing the share of any particular party only shall be demarcated and separated from the remainder of the land;

(e) order that any specified portion of the land shall continue to belong in common to specified parties or to a group of parties;

(f) order that any share shall remain unallotted.

(3) Where in a scheme of partition of a land under this Act a person is entitled to a divided portion which, by reason of its trivialness in extent or value, the court considers it inexpedient to allot to that person, the court may, on the payment to that person of such compensation as may be determined by the court, allot that portion to any other person who in that scheme is entitled to a divided portion adjoining the first mentioned portion.

(4) Where a partition action is in respect of two or more lands, the interlocutory decree may, in lieu of ordering the allotment of divided portions in all such lands to the persons entitled thereto, order

that -

(a) any divided portion or portions of one or of some of such lands, or

(b) the entirety of one or of some of such lands, whether with or without any divided portion or portions of any other such land or lands,

be allotted to any such person, whether with or without the award to him of owelty or of compensation for any improvements made by him to any such land. In any order under this sub-section the court shall determine the amount of any owelty or of any compensation for improvements and the party by whom and the party to whom such owelty or compensation shall be paid.

(5) Where in an interlocutory decree the court has ordered the sale of a share or portion of the land and the partition of the remainder, the court may allot to each of the parties such share of the money to be realized by the sale of the share or portion of land ordered to be sold, or such share of the soil in the remainder ordered to be partitioned, or such share of both the money and the remainder of the land, as the court may consider just in the circumstances of each case.

46. Upon the confirmation of the sale of the land or of any lot, the court shall enter in the record a certificate of sale in favour of the purchaser and the certificate so entered under the hand of the judge of the court shall be conclusive evidence of the purchaser's title to the land or lot as on the date of the certificate. The court may, on the application of the purchaser, attach to the certificate a plan of the land or lot prepared at the cost of the purchaser and authenticated by the court.

48. (1) Save as provided in sub-section (3) of this section, the interlocutory decree entered under section 26 and the final decree of partition entered under section 36 shall, subject to the decision on any

Record

appeal which may be preferred therefrom, be good and sufficient evidence of the title of any person as to any right, share or interest awarded therein to him and be final and conclusive for all purposes against all persons whomsoever, whatever right, title or interest they have, or claim to have, to or in the land to which such decrees relate and notwithstanding any omission or defect of procedure or in the proof of title adduced before the court or the fact that all persons concerned are not parties to the partition action; and the right share or interest awarded by any such decree shall be free from all encumbrances whatsoever other than those specified in that decree.

In this sub-section "encumbrance" means any mortgage, lease, usufruct, servitude, fidei commissum, life interest, trust, or any interest whatsoever howsoever arising except a constructive or charitable trust, a lease at will or for a period not exceeding one month and the rights of a proprietor of a nindagama.

(2) The interlocutory decree and the final decree of partition entered in a partition action shall have the final and conclusive effect declared by sub-section (1) of this section notwithstanding the provisions of section 44 of the Evidence Ordinance, and accordingly such provisions shall not apply to such decrees.

(3) The interlocutory decree or the final decree of partition entered in a partition action shall not have the final and conclusive effect given to it by sub-section (1) of this section as against a person who, not having been a party to the partition action, claims any such right, title or interest to or in the land or any portion of the land to which the decree relates as is not directly or remotely derived from the decree if, but only if, he proves that the decree

has been entered by a court without competent jurisdiction or that the partition action has not been duly registered under the Registration of Documents Ordinance as a lis pendens affecting such land.

50. (1) If in an interlocutory decree for partition any undivided share of the land constituting the subject matter of the partition action in which such decree is entered is declared to be subject to a mortgage or lease, the rights of the mortgagee or of the purchaser of the mortgaged share under a mortgage decree, or of the lessee, shall -

(a) where the partition is otherwise than in accordance with an order made under sub-section (4) of section 26, be limited to the share allotted in such interlocutory decree to the mortgagor or lessor; and

(b) where the partition is in accordance with an order made under sub-section (4) of section 26, be limited to so much of the extent of land and of any owelty or compensation allotted in the partition action to the mortgagor or lessor as the court shall determine.

(2) If in an interlocutory decree for sale any undivided share of the land constituting the subject matter of the partition action in which such decree is entered is declared to be subject to a mortgage or lease, the rights of the mortgagee or of the purchaser of the mortgaged share under a mortgage decree, or of the lessee, shall be limited to the mortgagor's or lessor's share of the proceeds of the sale of the land.

83. (1) In this Act, unless the context otherwise requires - "land", when used with reference to a partition action, means the land or lands constituting the subject matter of that action.

Record

pp. 1-7

4. By Plaint dated the 26th day of May 1958 the 1st Respondent (Plaintiff) instituted THE PRESENT PROCEEDINGS in the District Court of Colombo against the Appellant and the 2nd, 3rd and 4th Respondents for the sale or partition of all that allotment of land and those the buildings and premises called "Tower Hall" formerly bearing assessment Nos. 40, 41, 42 and 42A, presently bearing assessment No. 93 situated at Panchikawatte Road between Skinners Road South and Pichaud's Lane within the Municipality of Colombo in the District of Colombo Western Province and bounded on the North by a lane, and the property of Zainudeen on the East by premises bearing assessment No. 43, the property of Zainudeen and Skinners Road South on the South by Premises No. 39 and property of Mr. Weerasinghe and West by Pichaud's Lane containing in extent one rood and twenty-eight perches (Ao.R.1.P28) exclusive of the Lot "A" acquired by the Government. The 4th Respondent was sued as Manager of the Estate of the 3rd Respondent a person adjudged to be of unsound mind, but by Order of the said District Court dated the 16th day of July 1958 he was appointed her Guardian ad litem in the action and on the 21st day of August 1958 the said plaint was filed in a form amended so as to recite the said Order and his said appointment. At the same time three other Defendants were added but withdrew from the suit before the said District Court adjudicated thereon.

p.8.

p.8, 1.38; pp. 18-24 p.10, 1.2; p.11, 1.41; p.12, 1.6; p.37, 1.5.

5. In the said Plaint the 1st Respondent alleged that the legal ownership of the land the subject matter of the action was vested as follows:

p.23, 1.5.

The Plaintiff [1st Respondent] to 8/18 share (unfettered)

3/18 shares subject to the life interest of the 2nd Defendant [2nd Respondent].

The 1st Defendant [Appellant] to 3/18 share (unfettered) 2/18 share subject to the life interest of the 2nd Defendant [2nd Respondent]

The 2nd Defendant [2nd Respondent] life interest in 5/18ths shares.

The 3rd Defendant /3rd Respondent/ 1/18th shares (unfettered) 1/18th share (subject to the life interest of the 2nd Defendant) /2nd Respondent/

Record

The 1st Respondent pleaded that it would be impracticable to partition the said land and that it would be more expedient to have it sold under the provisions of the Partition Act No. 16 of 1951. In the prayer the 1st Respondent asked for a sale or partition of the land and that, in the event of a sale being ordered, the property be sold freed from the life interest of the 2nd Respondent. p.23, 1.17. p.23, ll. 27-31.

6. In its statement of Claim dated the 10th day of June 1959 the Appellant (1st Defendant) admitted the several averments in the Plaint and prayed p.33.

(a) that it be declared entitled to an undivided 5/18 share of the said land;

(b) that a sale of the said land etc. be ordered in terms of the Partition Act.

7. The 2nd Respondent (2nd Defendant) in her Amended Answer dated the 4th day of October 1960 admitted "the shares allotted to her as stated in . . the Plaint", alleged that "the Plaintiff or any other party in this case has no right to have the land in suit sold free from the life interest of this Defendant" and prayed "that she be allotted her shares in terms of this statement". pp.37-8

The Answer of the 4th Respondent (4th Defendant) dated the 10th day of June 1959 admitted the averments in the Plaint, alleged that a partition of the premises in question was impracticable and prayed that the Court order a sale in accordance with the provisions of the Partition Act. p.34.

8. At the hearing there was no dispute as to the interests in the property to which the various parties were entitled, the only question at issue being whether, in the event of a sale being ordered, the 2nd Respondent (2nd Defendant) was entitled to have her rights as life interest holder (in 6/18 shares) conserved. It was contended on behalf of the 2nd Respondent that if there was a sale it should be subject to this life interest. The 1st Respondent (Plaintiff) on the p.38, 1.24 p.41, 1.12. p.41, ll. 15-40.

Record

other hand asked for a decree of sale free of the life interest holder's rights which he contended should attach only to the proceeds of sale.

pp.42-5

9. The learned trial Judge delivered Judgment on the 18th day of October 1961 holding, it is submitted correctly, that upon a proper construction of the Act, a sale must be subject to subsisting life interests. He stated his reasons for so holding in the following passage:

p.44, l.17 - p.45, l.25.

> There is no doubt that a life-interest holder is a necessary party to a partition action. Section 5(a) (1) of the Act imposes upon a Plaintiff the duty to bring before Court a person claiming to be entitled to such a life-interest. Under Section 26 the Court is empowered to order interlocutory decree for sale to be entered. Section 48 of the Act contains special provisions relating to decrees which are deemed to be conclusive against all persons, whatever right title or interest they have notwithstanding any omission or defect of procedure or proof of title. This section proceeds to state that the share or interest awarded by such decree shall be free from all encumbrances other than those specified in that decree. An "encumbrance" is defined in Section 48 to mean mortgage, lease, usufruct, servitude, fidei-commissum, life interest, etc. It is clear, therefore, according to Section 48, that if such decree contains no reference to a mortgage, lease, usufruct, servitude, fidei commissum or life interest such mortgage, lease, usufruct, servitude, fidei commissum or life interest would be wiped out. We are here concerned with the legal consequence of such decree making special mention of the existence of a mortgage, lease, usufruct, servitude, fidei commissum or life interest.
>
> The Partition Act in Section 50(1) deals with this question in so far as it only affects a mortgage or lease. It provides that when an interlocutory decree for partition is subject to a mortgage or lease the rights of the mortgagee or lessee will be confined

at the partition to the share allotted to the mortgagor or lessor.

Section 50(2) further stipulates that in the event of an interlocutory decree for sale reserving a mortgage or lease the rights of the mortgagee or lessee shall be limited to the mortgagor's or lessor's share of the proceeds of the sale. Section 50 is completely silent as regards the right of a party entitled to an usufruct, servitude, fidei commissum or life interest which has been conserved in the interlocutory decree.

The case for plaintiff is that the life-interest holder would have after decree for sale is entered to confine himself to the proceeds of the sale to satisfy his life-interest. The 2nd Defendant on the other hand states that in the absence of provision in the Partition Act restricting his life interest to the proceeds of sale, the premises sold under the interlocutory decree should be subject to his life interest over 1/3 share of the soil and 1/3 share of the building and that the purchaser's title would be subject to this life interest. When Section 48 states that the decree entered shall be free from all encumbrances other than those specified in the decree it contemplates a decree being entered subject to any of the "encumbrances" specified in this section. Section 50 makes provision in the case of a decree for partition that the mortgage or lease should attach to the divided portion allotted to the mortgagor or lessor and in the event of a decree for sale to the proceeds of sale belonging to the mortgagor or lessor. But there is an absence of a similar provision to cover an usufruct, servitude, fidei commissum or life interest. If the legislature contemplated that the right of a life interest holder reserved in the interlocutory decree should be converted into a right over the proceeds of the sale of the land it should have stated so unambiguously as it has done in the case of a lessee or mortgagee. In the absence of such provision I am of opinion that a life interest over the land will continue. The plaintiff

Record

and 1st Defendant when they purchased rights in the subject matter from the successors of Edmund Seneviratne were well aware of the existence of a life interest over 1/3 share in favour of 2nd Defendant the widow of Edmund Seneviratne. The 3rd Defendant is a niece of Edmund through him she acquires rights. In my view, plaintiff is not entitled to deprive 2nd Defendant of her life interest over the land in the absence of provision in the Partition Act to the contrary.

Special reference in Section 50 to a mortgage and lease, two only of "encumbrances" referred to in the sub-section to Section 48 appears to expressly exclude the other "encumbrances" from any limitation.

10. In the result the Court decreed as follows:-

p.45, ll. 26-46.

I direct that interlocutory decree for sale of the above-mentioned premises be entered allotting rights to parties as follows:-

Plaintiff to 11/18 of which 3/18 is subject to a life interest in favour of 2nd Defendant.

1st Defendant to 5/18 of which 2/18 is subject to a life interest in favour of the 2nd Defendant.

3rd Defendant to 2/18 of which 1/18 is subject to a life interest in favour of the 2nd Defendant

2nd Defendant to a life interest over 6/18 share.

The buildings on the land will belong to the above parties in the same proportion as their soil rights stated above. The 2nd Defendant will also be entitled to a life interest in respect of 1/3 share of the buildings. The said premises will be put up for sale subject to the life interest of 2nd Defendant in respect of 1/3 share of the soil and 1/3 share of the buildings. The Plaintiff will be entitled to the costs of this action

including Survey fees to be borne by the parties pro rata. Record

Plaintiff has failed in the contest to have the premises sold free of the life interest of 2nd Defendant. I order the Plaintiff to pay to the 2nd Defendant a sum of Rs. 105/- as costs of this contest.

11. By Petition of Appeal dated the 30th day of October 1961 the 1st Respondent appealed to the Supreme Court of Ceylon, which Court on the 25th day of March 1965 allowed the appeal holding that the Order of the trial Court was "contrary to the spirit and express provisions of the Act" and made a decree "that the part of that Interlocutory Decree entered by the District Judge which states 'the said premises will be put up for sale subject to the life interest of the 2nd Defendant in respect of one-third share of the soil and one-third share of the building' be deleted and the following words be substituted: 'the said premises will be put up for sale'. pp.47-50 pp.51-9 p.52, ll. 28-34. p.61, ll. 26-35 p.62, l.32 - p.63, l.2.

It is ordered and decreed that, the rest of the Order of the District Judge in the Interlocutory Decree will stand.

It is further ordered and decreed that the interest awarded to the 2nd Defendant be valued and he be paid the estimated value of his usufruct out of the proceeds of the sale. It is also ordered that the Appellant is entitled to costs of appeal and costs of inquiry".

12. On the 4th day of November 1965 the Supreme Court of Ceylon granted the Appellant final leave to appeal from the said Judgment and Decree of the 25th day of March 1965 to the Privy Council. pp.68-9

13. The Appellant respectfully submits that this Appeal should be allowed and the said Judgment and Decree of the Supreme Court of Ceylon of the 25th day of March 1965 set aside and the Judgment of the District Court of Colombo of the 18th day of October 1961 restored with costs against the 1st Respondent here and in the Supreme Court for the following amongst other

Record

R E A S O N S

1. BECAUSE the Partition Act No. 16 of 1951 does not contain any provision either for the sale of a subsisting life interest or for its extinguishment upon the sale of the land in which it subsists.

2. BECAUSE section 48 (1) of the Partition Act No. 16 of 1951 by necessary implication authorises the Court to specify life interests to which an interlocutory decree for sale is to be subject.

3. BECAUSE upon a proper construction of the Partition Act No. 16 of 1951 the District Court was entitled to decree that the sale should be subject to the 2nd Respondent's subsisting life interest.

4. BECAUSE the District Court rightly so decreed.

5. BECAUSE the Judgment of the District Court of the 18th day of October 1961 was right for the reasons therein stated.

E.F.N. GRATIAEN.

MONTAGUE SOLOMON.

No. 3 of 1967.

IN THE PRIVY COUNCIL

ON APPEAL
FROM THE SUPREME COURT OF CEYLON

BETWEEN:

CEYLON THEATRES LIMITED
Appellant

- and -

CINEMAS LIMITED AND ORS.
Respondents

C A S E

FOR APPELLANT

LEE & PEMBERTONS,
11, South Square,
Gray's Inn,
LONDON, W.C.1.