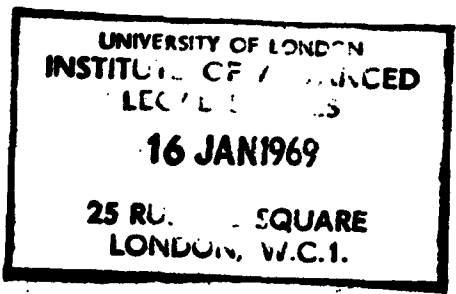


4, 1968



IN THE PRIVY COUNCIL
ON APPEAL FROM
THE SUPREME COURT OF CEYLON

No. 3 of 1967

B E T W E E N:

CEYLON THEATRES LIMITED
(1st Defendant-1st Respondent) Appellant

- and -

- 1. CINEMAS LIMITED (Plaintiff-Appellant)
- 2. EUGENE SENEVIRATNE
- 3. GWENDOLINE DORA JAYAKODDY
- 4. JOSEPH DE ABREW WIJESINGHE
(2nd, 3rd and 4th Defendants-Respondents) Respondents

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C A S E FOR THE 1ST RESPONDENT

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1. This is an appeal from the judgment and decree dated the 25th of March 1965 of the Supreme Court of Ceylon (T. S. Fernando, H. W. Tambiah and Manicavasagar, JJ.) allowing the appeal of the First Respondent from the judgment and interlocutory decree for sale dated the 18th of October 1961 of the District Court of Ceylon. The District Court had directed that the land constituting the subject-matter of the partition action instituted by the First Respondent above named be sold subject to the life interest of the Second Respondent above named, and the Supreme Court varied the said interlocutory decree by directing that the land be sold free of the said life interest of the Second Respondent.

pp. 51-61
p. 62 l.1
p. 63 l.9
pp. 42-45
p. 46 l.1 -
p. 47 l.30

p. 45 ll.39-41

p. 61 ll.26-34

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2. The First Respondent filed plaint on the 21st of August 1958, praying for a sale or a partition in accordance with the provisions of the Partition Act No. 16 of 1951 of the land and premises described in the First Schedule to the

pp. 18-27

p.23 ll.37-47

- p.23 ll.5-12 **plaint.** The First Respondent averred in the
 plaint that the First Respondent was entitled to
 an unfettered $8/18$ share, as well as a $3/18$ share
 subject to the life interest of the Second
 Respondent; that the Appellant was entitled to
 an unfettered $3/18$ share, as well as a $2/18$ share
 subject to the life interest of the Second
 Respondent; that the Third Respondent was
 entitled to an unfettered $1/18$ share, as well as
 a $1/18$ share subject to the life interest of the
 Second Respondent; and that the Second Respondent
 was entitled to a life interest in a $6/18$ share. 10
- p. 23
 ll. 30-31 The First Respondent prayed also that in the
 event of a sale being ordered that the property
 be sold free of the life interest of the Second
 Respondent.
- p.33;
 p.34 ll.1-25 **3.** The Appellant and the Fourth Respondent (the
 Guardian-ad-litem of the Third Respondent) filed
 statements of claim dated the 10th of June 1959
 admitting the averments in the plaint. 20
- p.34 l.26-
 p.35 l.17
 p.37 l.24-
 p.38 l.13 The Second Respondent filed a statement of claim
 dated the 26th of August 1959 and an amended
 statement of claim dated the 4th of October 1960
 admitting the shares allotted to her in paragraph
 33 of the plaint but averring that the value of
 the subject matter of the action was far more
 than Rs. 280,750/-, which was the amount at which
 it was valued by the surveyor commissioned by the
 district Court to survey the land. 30
- p.29 l.41 The Second
 Respondent averred also that neither the
 Appellant nor any other party had the right to
 have the land in suit sold free of her life
 interest.
- p.18 ll.19-21 **4.** There were three other persons whose names
 appear in the caption to the plaint as defendants,
 but they were not parties to the appeal to the
 Supreme Court and are not parties to the present
 appeal. 40
- p.11 ll.36-46 The Fifth and Sixth Defendants had
 seized the land in suit in execution of a mortgage
 decree, but upon the withdrawal of the said
 seizure they were discharged from the case. 40
- p.35 l.18-
 p.36 l.12 The Seventh Defendant filed a statement of claim dated
 the 23rd of September 1959, claiming an undivided
 $1/9$ share subject to the life interest of the
 Second Respondent; at the trial, however, the
 Seventh Defendant abandoned his claim, conceding
 that all his interests had passed to the Appellant.
- p.37 ll.5-7

5. Evidence was led at the trial to prove the devolution of title as set out in the plaint. It was submitted on behalf of the First Respondent that, in the event of a decree for sale being entered, the land should be sold free of the life interest of the Second Respondent. It was submitted on behalf of the Second Respondent that a sale would not operate to wipe out the life interest of the Second Respondent, which would continue to attach to the land. No submission was made on behalf of the Appellant either to the effect that the life interest of the Second Respondent would continue to attach to the land despite a sale or that the decree for sale should expressly specify that the sale would be subject to the life interest of the Second Respondent.
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6. The learned District Judge in his judgment accepted the evidence regarding the devolution of title and held that the parties were entitled to shares in the manner set out in paragraph 33 of the plaint (see paragraph 2 above). He held also that a partition of the premises was neither advantageous nor of practical benefit to the co-owners, and ordered that interlocutory decree for sale be entered.
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- The learned District Judge, however, directed that the sale shall be subject to the life interest of the Second Respondent in respect of a 1/3 share.
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7. The First Respondent appealed to the Supreme Court from the said judgment and order by its petition of appeal dated the 30th of October 1961, praying that the said order be set aside and that interlocutory decree be entered for the sale of the premises free of encumbrances inclusive of the life interest of the Second Respondent.
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8. When the appeal first came on for hearing before the Supreme Court, Abeyundere and Sri Skanda Rajah, JJ., were unable to agree and the appeal was referred to a Divisional Bench of three Judges, who ordered that
- "the part of that interlocutory decree entered by the learned District Judge which states that "the said premises will be put up for
- pp.38 1.37-
p.41 1.11
- p.43 11.37-44
- p.44 11.3-5
- p.45 11.39-41
- p.47 1.32-
p.50 1.41
- p.51 11.26-28
- p.61 11.26-34

sale subject to the life interest of the Second Defendant ~~the~~ Second Respondent to this appeal 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'."

9. The only point of contest in the District Court and in the Supreme Court and in the present appeal relates to the effect of a decree for sale: whether it would vest title to the land and premises in suit in the purchaser free of the life interest of the Second Respondent (which would have to be valued, and satisfied out of the proceeds of sale) or whether such decree would not operate to wipe out the life interest of the Second Respondent, and hence should be made subject to her life interest.

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It is respectfully submitted that an interlocutory decree under Section 26 of the Partition Act, No. 16 of 1951, must in accordance with the findings in the judgment, and hence must specify the right, share or interest of each party to, of or in the land to which the action relates, as determined in the judgment; it must thus specify the life interest of any party.

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However, the Court must "decide which of the orders mentioned in Section 26 should be made" (Section 25), and where the Court decides upon a sale of the whole of the land in suit, the Court must make an "order for a sale of the land in whole or in lots" (Section 26(2)(b)) and is not authorised to make an order for a sale of the land subject to the life interest of any party.

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Section 40 has no bearing upon the nature, scope or content of an order for sale of the land, but merely provides that "the interlocutory decree shall be good and sufficient evidence of the title of any person as to any right, share or interest awarded therein to him". Thus the only effect which Section 40 has upon the interlocutory decree entered in the present action is to make such interlocutory decree good and sufficient evidence of the life

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interest of the Second Respondent in a 1/3 share of the land in suit.

10. It is respectfully submitted that the learned Judges of the Supreme Court were right in holding that the learned District Judge, who based his decision on Section 50, was mistaken in his assumption that

10 "since Section 50 of the Act makes provision that in a decree for partition, the mortgage or lease should attach to the divided portion allotted to the mortgagor or the lessor, and in the event of a decree for sale, to the proceeds of the sale belonging to the mortgagor or the lessor, in the absence of similar provision to cover usufruct, servitude, fidei commissum or life interest, one must necessarily come to the conclusion that these interests attach to the land in the hands of the purchaser." p.60 l.48-
p.61 l.5;
p.45 ll.6-16

20 As observed in the judgment of Tambiah, J., there had existed prior to the Partition Act a conflict of opinion upon the question whether leases and mortgages continued to attach to the land even after it was sold pursuant to a decree for sale in a partition action. The Legislature in enacting Section 50 was not introducing modifications or qualifications to Section 26, but was, ex abundanti cautela, making specific provisions which would prevent any such contro-
30 versy arising under the Partition Act of 1951. p.61 ll.6-21

It is respectfully submitted that the Supreme Court correctly approached this question of construction in observing that

40 "Section 54 of the Act enacts that the rights of a proprietor of a nindagama are in no way affected by the sale of partition of a panguwa under the Act. Despite the sale, where it was intended that the interests of the nindagama proprietor should be preserved, the Legislature stated so in unequivocal language. If it was intended to preserve the rights of persons who have encumbrances or other interests the Legislature would have made similar provisions preserving such p.59 ll.35-42

rights when a sale takes place under the Partition Act."

p.52 ll.16-32, and p.60 ll.19-33

11. As pointed out by Tambiah, J., the purpose of the Partition Act is to put an end to the inconvenience of possession arising out of common ownership and common interests, and if the order made by the learned District Judge is correct one of the principal objects of the Partition Act would be defeated in that, as in the present case, the undivided interests of the co-owners would cease to exist, but an encumbrance over an undivided share (namely, the Second Respondent's life interest in an undivided 1/3 share) would continue to subsist.

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p.53 l.40- p.54 l.22

12. It is respectfully submitted that the learned Judges of the Supreme Court were right in holding that the effect of a certificate of sale entered under section 46, pursuant to a sale under an order for sale in a partition action, was to pass to the purchaser title to the land free of all encumbrances even though such encumbrances may have been specified in the interlocutory decree (except in the special case provided for in section 54).

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p.58 l.25- p.59 l.34

The Supreme Court were right in holding that "the land" in section 46 refers to the land constituting the subject matter of the action (cf. section 83(1)), and that this view was borne out by their examination of all the sections of the Partition Act, particularly those dealing with the division and valuation of the land for purposes of sale (sections 37 and 38), the judicial determination of its value (section 38(4)), the sale (section 41) and the confirmation of the sale (section 45). The contention that the purchaser only acquires the right, title and interest of the co-owners, subject to the encumbrances specified in the interlocutory decree, was rightly rejected *inter alia* for the reason that it required a meaning to be given to the word "land" in sections 26(2)(b) and 46, different from the meaning of the word "land" elsewhere in the Act.

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p.53 ll.24-30

13. It is respectfully submitted that the learned Judges of the Supreme Court were right in holding

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that the interests to which the Second Respondent was declared entitled in the interlocutory decree should be valued, and that she should be paid the value thereof out of the proceeds of sale.

p.61 11.32-34

14. A decree in accordance with the judgment of the learned Judges of the Supreme Court was drawn up on the 25th of March, 1965, and against the said judgment and decree this appeal is now preferred to Her Majesty in Council, the Appellant having obtained leave to appeal by Orders of the Supreme Court dated the 31st of August 1965, and the 4th of November 1965.

p.62 1.1-
p.63, 1.9.

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p.65 1.15-
p.66 1.16
p.68 1.27-
p.69 1.20

In the respectful submission of the First Respondent this appeal ought to be dismissed with costs throughout, for the following among other

R E A S O N S

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1. BECAUSE the effect of a sale, and of a certificate of sale under section 46, in pursuance of an interlocutory decree under section 26(2)(b) is to vest title to the land constituting the subject matter of the action in the purchaser free of any life interest or usufruct specified in the interlocutory decree.

2. BECAUSE the learned District Judge had no power to direct that the sale of the land and premises in suit shall be subject to the life interest of the Second Respondent.

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3. BECAUSE the Second Respondent is only entitled to be paid the value of her life interest or usufruct out of the proceeds of sale of the land.

4. BECAUSE the several reasons given in the judgment of the learned Judges of the Supreme Court are right and the said judgment ought to be affirmed.

N. CHINIVASABAN

MARK FERNANDO

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4. JOSEPH DE ABREW WIJESINGHE
(2nd, 3rd and 4th
Defendants-Respondents) Respondents

CASE FOR THE FIRST RESPONDENT

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