Privy Council Appeal No. 3 of 1967

Ceylon Theatres Limited – – – – – – *Appellant*

v.

Cinemas Limited and others – – – – – *Respondents*

FROM

THE SUPREME COURT OF CEYLON

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 23RD JANUARY 1968

Present at the Hearing:
VISCOUNT DILHORNE
LORD GUEST
LORD DEVLIN
LORD WILBERFORCE
LORD PEARSON

[*Delivered by* LORD WILBERFORCE]

This appeal from the Supreme Court of Ceylon raises the question whether, in proceedings under the Partition Act (No. 16 of 1951) the court has power, when ordering a sale of land held in co-ownership, to direct that such sale is to be subject to a life interest subsisting in an undivided part or parts of the land sold (as was held by the District Judge) or whether (as was held by the Supreme Court) such sale must be made so as to pass a title free from the life interest.

The property in question consists of land and buildings at Panchikawatte Road in the Municipality of Colombo. It is not necessary further to particularise it beyond stating that almost the whole of the land is occupied by a building called the Tower Hall Theatre. The relevance of this is that no physical partition of the property is practicable. The common interests in the property arose under the Will of one G. A. Don Hendrick Appuhamy (or Seneviratne) dated 7th April 1929 and in consequence of certain subsequent devolutions.

For the purpose of this appeal it is sufficient to set out the findings of the District Judge, which, on this matter, are not challenged. He held the parties to be entitled as follows:

> " Plaintiff (1st Respondent) to an undivided 11/18 share of which 3/18 share is subject to the life interest in favour of the 2nd Defendant (2nd Respondent).
>
> The 1st Defendant (Appellant) to an undivided 5/18 share of which 2/18 share is subject to the life interest in favour of the 2nd Defendant (2nd Respondent).
>
> The 3rd Defendant (3rd Respondent) to an undivided 2/18 share of which 1/18 share is subject to life interest in favour of the 2nd Defendant (2nd Respondent).
>
> All the buildings will belong to the parties in the same proportion as their soil rights above-mentioned, and the 2nd Defendant (2nd Respondent) also will be entitled to the life interest in respect of 1/3 share of soil and 1/3 share of the buildings."

It may be material to add that the life interest of the 2nd defendant (2nd respondent) was under the terms of the Will subject to forfeiture on remarriage.

The decree then continued:

> "It is further ordered and decreed that the said land and premises be sold by Public Auction in conformity with Partition Act No. 16 of 1951 subject to the life interest in favour of the 2nd Defendant in respect of 1/3 share of the soil and 1/3 share of the buildings, and the proceeds thereof be entitled [*sic*] to the parties according to their proportionate shares."

Although the 2nd defendant, who as stated was entitled to the life interest in 1/3 of the land and buildings, was duly made a party to the partition proceedings, she took no part in the present appeal which was argued between the appellant (1st defendant) on the one side and the respondent (plaintiff) on the other. No objection was raised on either side to this procedure.

The present law in Ceylon as to partition of immovable property is contained in the Partition Act (No. 16) of 1951. It is upon the construction of that Act that the issues in this appeal must be decided. It may be convenient to preface examination of the relevant sections with some observations of a general character as to the nature of the rights and interests involved in the case.

First, rights of co-ownership, under the Roman Dutch Law, are regarded as *quasi-contractual.* One of the obligations so imposed, or treated as accepted, by the co-owners is the obligation to allow a division of the property—*in communione nemo compellitur invitus detineri.* Both by the common law, and under the successive pieces of legislation which have been passed in Ceylon concerning partition, partition may be effected by agreement or by decree of a competent court. Partition, when effected by judicial decree, appears, according to the prevailing opinion, to be in the nature of an alienation by purchase, the alienees deriving their title from the decree of the court. The position under the Partition Ordinance (Cap. 56) of 1863, the legislation which preceded the Act of 1951, has been described as follows:

> "When common ownership becomes burdensome the Partition Ordinance enables it to be determined at the instance of a co-owner by the conversion of undivided shares into shares in severalty by partition, or when that is not possible by the sale of the land. Upon the issue of a certificate of sale to the purchaser under decree for sale, the title declared to be in the co-owners is definitely passed to the purchaser and the lands cease to be held in common by the original owners." *Fernando v. Cadiravelu* per Garvin J. 28 N.L.R. 492, 497.

Thus, the conception underlying judicial proceedings for partition or sale is that of dissolving the bond of common ownership by alienation of the co-owners' shares.

It must be obvious that cases will arise where there are encumbrances affecting either the common property as a whole or individual shares and that their existence may give rise to difficulty in cases of sale. Some recognition of this difficulty and an attempt to deal with it is to be found in the Partition Ordinance (Cap. 56) of 1863. Express provision was there made for sale, under order of the court, subject to "any mortgage or other charges or encumbrances" on the property and there were other provisions dealing with the case where there was a mortgage over an undivided share. These provisions were evidently incomplete, and in the interval between 1863 and 1951 a number of cases came before the courts where the property was subject to *fideicommissa* or trusts. These are referred to in the judgment of Tambiah J. in the Supreme Court where he expresses the opinion that such complex questions were never contemplated by the framers of the Ordinance. The Act of 1951 deals

somewhat more fully with the position of encumbrances and the ultimate question for decision must be how far it has altered, or extended, the pre-existing law.

Secondly, as to the life interest of the 2nd respondent (2nd defendant). In this case the interest arises by way of usufruct and is confined to an interest in the income of the property. It is subject to forfeiture on remarriage. There is no doubt that it constitutes an encumbrance within the meaning of the Partition Act 1951. But it is necessary to bear in mind that the Act applies generally to life interests and usufructs of any character, whether affecting the whole or a part only, and whether conferring a mere interest in income or a closer interest in the land itself. Any interpretation of the Act must take account of the varied character of these rights.

With these preliminary observations the relevant statutory provisions contained in the Partition Act 1951 may now be considered. The Act commences with a general statement of the nature and purpose of partition proceedings (section 2). These may be brought where land belongs in common to two or more owners, and may be instituted by any one or more of them for the partition or sale of the land. This follows and adopts the common law conception that partition (or sale) is a right attaching to co-ownership and that the purpose of partition proceedings is to give effect to that right.

Section 4 requires the plaintiff to specify in his plaint particulars of any right, share or interest in the land and the names of all persons claiming to be entitled thereto and section 5 requires that such persons are to be made parties to the action. Section 5 (*a*) (i) describes these persons as those who are entitled or claim to be entitled:

> " 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, fideicommissum, life interest, or otherwise."

The comprehensive nature of this list is noticeable: it includes rights and interests (i) which can without difficulty be given a value in money—*e.g.*, mortgages (ii) which could be given a value in money by an appropriate procedure of valuation, *e.g.*, usufructs, trusts, *fideicommissa*, or life interest, though this would be a matter of some difficulty in the case of *fideicommissary* interests, or other interests subject to a contingency or (as in the present case) subject to defeasance, (iii) which could hardly be the subject of compensation at all *e.g.*, certain servitudes essential for the dominant land, where the compensation would, in effect, be equivalent to its value (see for a description of the variety of servitudes recognised in Roman Dutch Law Lee, An Introduction to Roman Dutch Law 5th Ed. pp. 164 ff.).

It will be seen that the Act returns to this list in a later important section (section 48).

The Act continues with a number of procedural provisions, of which it is only necessary to mention section 18 which deals with the report to be made by the commissioned surveyor. This must state the nature and value " of the land surveyed " and the details of the computation of such value: it must also refer to the parties to the action present at the survey and the name of any person not a party who has preferred any claim and the nature of such claim. Thus, although no explicit reference is made to any encumbrances on the land, it would seem that the surveyor, whose commission is accompanied by a copy of the plaint (section 16 (2)), is assumed to be aware of their existence and nature. Sections 25 and 26 are of cardinal importance. Section 25 relates to the trial of the partition action. It requires the court to examine the title of each party, to try any issue of law and fact in regard to the right share or interest of each party to, of, or in the land, and to consider and decide which of the orders mentioned in section 26 should be made. The word " title " in

this context evidently includes a title which may be subject to an encumbrance: it is, as Garvin J. said in the passage quoted above " the title declared to be in the co-owners ". Section 26 requires the court, at the conclusion of the trial, to pronounce an interlocutory decree in accordance with the findings. It states (subsection (2)) that the interlocutory decree may include one or more of the following orders namely:

" (*a*) order for a partition of the land;

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

. . .

or orders . . . whether for partition or sale relating to specified portions or shares of the land.

The form of the interlocutory decree in practice is well illustrated by the decree made in the present case, the relevant portion of which has been set out above.

Much of the rival arguments submitted in the appeal has been focussed upon these sections and in particular upon the use of the words " the land ". On the one side (for the respondents) it is said that the only reference here is to " the land " which must mean the actual physical property the subject of the suit, so that all that may be partitioned or sold, under the order of the court, is this property. No power is conferred, and none consequently exists, to sell the land subject to any encumbrance: so the inference must be that the land is to be sold free from all encumbrances.

On the other side (for the appellants) it is said that, recognition having been given by the Act to the possibility that encumbrances may exist, these must be assumed to continue unless provision is expressly made for their discharge and satisfaction. Neither does section 26 provide for their discharge nor elsewhere in the Act (except in section 50, to be referred to later) is any provision made for their satisfaction. On the contrary, such subsequent references as there are to encumbrances assume that (with certain carefully specified exceptions) they continue to affect the land. On this argument " the land " means simply " the land the subject of the action " such as it is, with all its burdens and advantages.

Their Lordships, at this stage of the argument, would be disposed to prefer the latter of these two views. The absence from section 26 of any such words as " free from encumbrances ", if the intention was that they should be discharged, appears to them more significant than an omission to add " subject to encumbrances ", if the intention was to preserve them. The reason for this is that, as has been stated, the basic object of the partition action is to sever the co-ownership, as between the co-owners, so that if the rights of other persons are to be affected, the Act might be expected so to state. To compel persons other than co-owners having encumbrances on the land or on shares in it, including owners of servitudes, owners of usufructs or life interests, or *fideicommissaries,* to accept some assessed compensation for their rights, though no doubt a possible result of legislation, amounts to a substantial interference with their rights. This should not be imposed upon them in the absence of clearly expressed provisions including adequate methods of assessing the value of their rights. Silence as to these rights appears to indicate that they are not to be affected. But the argument is not conclusive at this stage and the rest of the Act has to be considered for other indications.

The Act continues with a number of additional sections governing the manner in which partition or sale (as the case may be) is to be carried out. These contain references to " the land " but they do not in their Lordships' opinion carry the argument as to the meaning of these words any further. The sections can be operated according to their terms whether " the land " which is ordered to be partitioned or sold is the land subject to existing encumbrances, or whether it is the land free

from encumbrances. They provide little assistance in choosing between these alternatives. The next critical provisions are contained in sections 46 and 47. It is convenient to reproduce these in full.

> " 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.
>
> 47. (1) The court shall cause to be prepared by a party named by the court a schedule of distribution showing the amount which each party is entitled to withdraw out of the money deposited in court.
>
> (2) No money shall be withdrawn from court by any party until the schedule of distribution has been approved by the court.
>
> (3) A party entitled to compensation in respect of a plantation or a building or otherwise shall share proportionately with the other parties in any gain or loss, as the case may be, resulting from the sale of the land at a figure above or below the value determined by the court under section 38."

These sections were strongly relied upon by the respondent and indeed they formed the principal basis for the judgment of Tambiah J. in the Supreme Court. Section 46, it was said, shows that what the purchaser takes is " the land " and the effect of the section, is that, when he receives the certificate of sale, he acquires an indefeasible title free from encumbrances. Section 47 is the necessary counterpart of this: it provides the mechanism by which encumbrances, from which the land is liberated, pass and attach to the proceeds of sale. This section, it was claimed (and the argument logically follows) applies to all encumbrances of whatever nature with the sole exception of the interest of a proprietor of a *nindagama* which is specially preserved by section 54.

In spite of the force which these arguments derive from their acceptance by the Supreme Court, their Lordships feel obliged to take a contrary view. In their opinion these sections are unable to support the weight placed upon them. Section 46 they cannot regard as more than a conveyancing section the purpose and effect of which is to establish the certificate of sale as a new and conclusive root of title without the necessity of any conveyance from the co-owners or any investigation of their title. Reference has already been made to the use of the words " the title " in section 25, in an open sense, meaning merely the title such as it is—free from, or subject to encumbrances: it means no more in the present context. The words " the land " here repeated, carry the matter no further than it already stands under section 26. It is noticeable that a provision in terms very similar to section 46 appears in section 8 of the Partition Ordinance of 1863, a section which in terms provides for a sale to be made " subject to any mortgage, charge or encumbrance ". Although these latter words have been dropped, this fact alone is not sufficient reason to ascribe to similar terminology now appearing in section 46 a totally different effect, *i.e.*, to pass the land free from encumbrances.

Section 47, similarly, in their Lordships' opinion, fails adequately to support the respondents' argument. It provides merely for a schedule of distribution to be prepared by a party and approved by the court. If the intention was that encumbrances, of the varied character mentioned in section 5, were to be compulsorily discharged out of the proceeds of sale, it appears to their Lordships inconceivable that so scanty a mechanism should have been provided. On the one hand it can never have been intended that the amount to be paid to an encumbrancer should merely be fixed by the party presenting the schedule: on the other hand

no procedure for valuation—which, as has been shown, may in some cases be complicated and controversial—is so much as indicated. The argument for the respondent extends, and necessarily must extend, to all encumbrances, whether those affecting the land as a whole, or those affecting undivided shares: and if it is right, it represents a considerable departure from the scheme of the former Ordinance, even as this was interpreted by the courts: yet this departure is founded entirely on inference. That inference their Lordships cannot draw.

There remain for consideration three sections which appear in the Act under the heading "Special Provisions Relating to Decrees". Section 48 (1) is significant. It reads:

> "Save as provided in subsection (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 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 subsection 'encumbrance' means any mortgage, lease, usufruct, servitude, fideicommissum, 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*."

The drafting of this subsection is not entirely clear. It refers, in the first place to the interlocutory decree entered under section 26: this, in addition to declaring the rights of the parties, would contain an order for partition or for sale. The subsection continues with a reference to the final decree of *partition,* and to the right share or interest *awarded* to any persons, expressions in each case appropriate to partition and not to sale. The explanation of this appears to be that whereas in the case of partition, there is a decree of the court giving effect to the partition, in the case of sale this takes place upon the basis of the order contained in the interlocutory decree. The subsection, therefore, at the least, makes it clear that, after the interlocutory decree has been made, the land is freed from all encumbrances *not specified* in it and the only question remains whether it goes on to prescribe, or whether it merely assumes, that, as regards encumbrances *specified* in the decree, the land remains, on a sale (as it clearly does on a partition), subject to these encumbrances. Their Lordships do not find it necessary to express a final opinion on these alternatives, since on either view the subsection must be taken to support the conclusion that the land is sold subject to encumbrances. To repeat an argument already used in other connections, it is difficult to understand how this subsection could have been drafted as it is if the intention were that, on a sale, the land were, *ipso facto,* to be freed from encumbrances specified in the interlocutory decree.

Next there is section 50 which deals with cases where an undivided share is subject to a mortgage or lease. Subsection (1) deals with the case of partition and, in effect, confines the mortgage or lease to the divided share allotted to the mortgagor or lessor.

Subsection (2) is as follows:

> "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."

In their Lordships' opinion this provision must be regarded as strong support for the argument that encumbrances generally, apart that is to say from those here dealt with, continue to attach to the land. For if the respondents' arguments were correct, these mortgages and leases, like all other encumbrances, automatically would be transferred to the proceeds of sale by virtue of sections 26, 46 and 47 and this provision would be entirely otiose. Comparison between this section, with its reference to mortgages and leases, and section 48 (1) with its listed reference to encumbrances generally, strongly points the contrast between those encumbrances which remain attached to the land, or to shares in it, and those which, exceptionally attach to the proceeds of sale. It may be added that the language used in subsection (2) which after mentioning the declaration contained in the interlocutory decree of sale, then continues by stating the consequences to the purchaser of the land, when compared with that used in section 48 (1), suggests that the latter subsection is intended to effect (rather than that it assumes) that other encumbrances continue to bind the land.

Thirdly there is section 51. This provides for registration of any interlocutory decree made under section 26, any final decree of partition, or any certificate of sale under section 46. The fact that an interlocutory decree, which, under sections 25 and 26, must specify encumbrances, is required to be registered, suggests, somewhat strongly, that such specified encumbrances continue to bind the land. Moreover, when the section continues by requiring registration of the certificate of sale, the natural conclusion to draw from this would be that the certificate of sale would conform with and produce the same result as the interlocutory decree itself—*i.e.,* that under it, encumbrances would be preserved. For if, as the respondent contends, the certificate of sale was intended to pass an unencumbered title, it would be expected either that an interlocutory decree providing for sale should not be registered, or that, if registered, it should be removed when, or before, registration of the certificate of sale. But the section requires the respondent to register each document as an instrument affecting the land to which it relates.

Finally section 54 contains an express reservation of the rights of a proprietor of a *nindagama.* The Supreme Court relied upon this as inconsistent with the view that the encumbrances generally should be preserved. This section however is contained in a section of the Act dealing with Special Cases and is confined to those specifically mentioned. They are not within the general category of rights or interests previously dealt with. The section therefore affords no guidance as to the intention of the general portion of the Act.

For these reasons their Lordships are of opinion that the order made by the learned District Judge was correct. They will humbly advise Her Majesty that the appeal be allowed, and the order of the District Judge restored. The 1st respondent must pay the appellant's costs of this appeal and in the Supreme Court.

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DELIVERED BY

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