

Present: Mr. Justice Wendt, Mr. Justice Middleton, and Mr. Justice Wood Renton.

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PEIRIS *v.* PEIRIS *et al.*

D. C., Kalutara, 3,215.

Partition suit—Adding of lessees as parties—Appraisement of lessees' interest—Payment in money—Ordinance No. 10 of 1863, sections 8, 9, 12, and 13.

Held, that the Court has power to add as parties to a partition suit persons holding leases from some of the co-owners of their undivided shares.

Held, also, that it is competent for the Court, where it decrees a sale under the Partition Ordinance, to order the interests of such lessees to be appraised separately and the amount deducted from the proceeds of sale.

THIS was a partition suit. The plaintiff claimed an undivided one-sixth share of the land and allotted to the defendants the remaining five-sixths. Prior to the institution of the suit, the defendants had leased their mining rights in the land to the added defendants for a term of five years. The lessees filed a statement of claim setting forth their interest in the land. The District Judge (C. R. Cumberland, Esq.) added the lessees as defendants in the action, and, as the land was to be sold under the provisions of the Partition Ordinance, a partition being impracticable, ordered their interests to be appraised separately and the amount to be paid out of the proceeds sale and the balance to be divided between the plaintiff and the defendants.

The plaintiff and one of the added defendants appealed.

H. Jayewardene for the added party, appellant.—The Court has no power to add the lessees as parties. The Partition Ordinance does not require that they should be joined. The procedure being purely statutory, the Court has no power to go beyond the provisions of the statute. On this principle it has been held that damages cannot be awarded in a partition suit. Even if the Court has power to add the lessees as parties, it has no power to deal with their rights. Section 13 provides that when a partition takes place it should be subject to all leases. Similarly, under section 8 of the Ordinance, a sale is subject to all mortgages, charges, and incumbrances. It is submitted that a lease is a charge or an incumbrance. [MIDDLETON J.—Do not the words “charge or incumbrance” mean something in the nature of security?] The words are large

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enough to include any burden on the land such as a lease: If there is no express provision in the Partition Ordinance, the rule of the common law should apply that a lease goes before a sale. It would be inequitable to allow the owners to execute a lease, and then deprive the lessees of the benefits accruing therefrom by instituting a partition suit. The land being a mining land, it would be very difficult even to approximately value the interests of the lessees.

H. J. C. Pereira (*Schneider* with him), for the plaintiff, respondent. —Apart from the provisions of the Partition Ordinance the Court has power under section 18 of the Civil Procedure Code to add all parties whose presence may be necessary for the final adjudication of the matter in litigation. Lessees are persons interested in the land, and the Court has inherent power to make them parties. The words "other charges or incumbrances" do not include leases. They must be taken to be *ejusdem generis* with mortgages. Even if they do include leases, they must be leases of the entire property. To hold that the Court has no power to deal with the rights of lessees would be to render nugatory the provisions of the Ordinance, and to make a sale under the Ordinance an impossibility. Some of the co-owners cannot by giving a lease of their shares deprive the other co-owners of their undoubted right to demand a partition or sale of the common property. A certificate of sale under the Partition Ordinance gives a conclusive and clear title to the purchaser; otherwise it would be difficult to find a purchaser for the property. The result would be that the lessees and the purchaser would be owners in common, and the proceedings under the Partition Ordinance would be absolutely useless. The principle contended for by the appellants, viz., that lease goes before sale is not infringed by such an order as the District Judge has made. The lessees have to be paid the appraised value of their interests first, and the balance is to be divided among the co-owners. This order practically recognizes the preferent right of the lessees. A similar order was made in D. C., Ratnapura, 910 (1) by the District Judge, and that order was affirmed by the Supreme Court.

H. Jayewardene, in reply.

Cyr. adv. vult.

24th July, 1906. WENDT J.—

This is a partition action in which the plaintiff has been rightly declared entitled to one-sixth of the land, and each of the first, second, third, fourth, and sixth defendants to one-sixth thereof.

The two added defendants hold a lease from the defendants of their undivided five-sixths of the land for a term of five years, commencing from 21st November, 1905, for the purpose of mining for plumbago, the lessees yielding to the lessors a share of the plumbago won by way of ground rent. The land being of very small extent and chiefly valuable as plumbago land, the owners are agreed that a sale was properly ordered in lieu of a partition. The present appeal arises out of the way in which the District Judge has dealt with the interests of the lessees. He has ordered that the land be sold free of the lease, that the lease be valued and its value paid out of the proceeds sale to the added defendants, and that the balance proceeds sale be divided equally among the plaintiff and the original defendants. There is an obvious mistake here, inasmuch as plaintiff's share is made to contribute to the amount payable to the lessees as though that share were also subject to the lease. The proper order would have been that plaintiff should receive one-sixth of the proceeds sale and that the value of the lease should be deducted from the remaining five-sixths belonging to the defendants, and the balance proceeds divided equally amongst the defendants.

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Appellant (who is one of the two lessees) objected that he was wrongly made a party to the action. I cannot agree with him. No doubt section 2 of the Partition Ordinance, in specifying certain things which the plaintiff shall state in his libel—amongst them the names of co-owners and mortgagees—does not mention lessees; but very clearly a lessee of an undivided share is a person whose interest may be seriously prejudiced by his lessor colluding with the other shareholders. For instance, the lessor may agree to a smaller share being allotted him than he has demised by the lease, or he may without objection accept his portion out of the uncultivated or barren part of the land, and the consequence from the enactment in section 13 would be that the lessee would have his rights confined to that portion. I therefore think it was prudent and right to bring the lessees in as parties.

But the main ground of appeal involves a different question—a question which it was thought desirable a Full Bench should consider, viz., whether the Court had jurisdiction to expropriate the lessees and compel them to accept a money compensation for the loss of their leasehold rights. The lessees deny that jurisdiction, and say that the Court should not have concerned itself about the lease at all, but simply ordered a sale, the consequence of which would have been (they say) that five-sixths of the land would by law have continued subject to their lease. Obviously this is not a desirable result; the purchaser at the sale would in effect continue

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a co-owner with the lessees in spite of the proceedings, under the Ordinance to put an end to the common ownership. But if the Ordinance entails such a result, of course we cannot alter the law.

Section 13 deals expressly with leases, and in effect enacts that after a partition has been effected a lease of an undivided share shall apply exclusively to the portion allotted in severalty to the lessor. Nothing is said as to the consequence of a sale instead of a partition; nor is the section prefaced by the declaration which in section 12 introduces a similar provision in respect of mortgage, viz., that "nothing in the Ordinance contained shall affect the right of any mortgagee of the land." Unless, therefore, the land when sold carries with it its burden of the lease, such sale would extinguish the lessee's rights, and it would therefore follow that the Court should provide for the lessee receiving compensation out of the proceeds sale.

But appellant's counsel argued that the terms "mortgage, charge, or incumbrance," to which the sale was made subject by section 8, included a lease. I cannot however assent to that argument. These terms import a mere security, and are not apt for describing a lease. I therefore consider that a sale under the Partition Ordinance would wipe out a lease which was not saved by section 13. Section 12 saves all mortgages from the operation of the Ordinance, whether a partition be ordered or a sale, and makes special provision as to mortgages of undivided shares. Section 12 does not similarly save all leases, but it makes special provision for leases in cases of partition only. The result is that in cases of sale leases are not specially provided for, and the effect of section 9 is to give the purchaser a title free of them.

The maxim that hire goes before sale is not violated by so holding. It means that an owner cannot by a sale prejudice the interest already created by him by a prior lease. The maxim is respected by the Court which avers that the value of the lease should be paid to the lessee out of the price of the land demised. That the Court should have the power to order the land to be sold free of the lease is only reasonably necessary for effectually carrying out the object of the Partition Ordinance, and I have no hesitation in holding that it has that power. I agree with my brothers that the appeal should be dismissed with costs subject to the modification I have already mentioned.

MIDDLETON J.—

The question really in this case, a partition action, was whether the Court was entitled to order a lease upon land which it was empowered to sell under the Partition Ordinance to be cancelled and valued and the proceeds paid to the lessees.

The plaintiff as an owner of one-sixth of a certain plumbago land sued his five brothers and sisters as owners of five-sixths for partition. The five defendants had leased their shares to the two added defendants for plumbago mining purposes for five years, and the District Judge ordered that the land, which was too small for partition, being only 1 acre and 28 perches in extent, should be sold free of the lease, that the lease should be appraised separately and its value deducted from the purchase money and paid to the added defendants and the balance distributed between the plaintiff and defendants.

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One of the added defendants only appealed. In the Partition Ordinance there is apparently no provision for such a case as this, and it was objected that the Court had no power to expropriate the interest of the lessees in the way proposed.

In my opinion it was right and convenient, though not ordered by the Ordinance, to join the added defendants as parties to the partition suit, considering their interest under the lease and the conclusive results of a formal partition decree.

At the same time I was much impressed by the argument for the respondent that any person knowingly leasing from some only of the co-owners of property must be taken to be cognizant of the fact that the other co-owners have a right to obtain partition, and that the land may possibly be ordered to be sold for that purpose.

Even in the case of a sale the purchasers from co-owners could not resist a claim for partition from the other co-owners.

If also, as was argued for the respondents, the Court were to act in the manner suggested by the learned counsel for the appellant and sell the land subject to the early lease, the result would in effect be the nullification of the Partition Ordinance, as the purchaser, who might be the plaintiff, would buy subject to a lease of five-sixths by his late co-owners to the added defendants, and the same condition of things in a somewhat different form would arise. The fact that a lease by some of the co-owners has not, in the case of a sale under the Ordinance, been considered therein by the Legislature rather leads to the inference that the interests of such lessees were intended only to be safeguarded by compensation under section 9.

If by any chance such lessees got no notice of a partition, the final decree under section 9 would, I think, deprive them of their rights under the lease, leaving them to their remedy only in damages.

If they are cited to attend proceedings on partition with a view to the representation of their interests, and have an opportunity of doing so and an equitable order is made dealing with their

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interests, I think it will not be in their mouths to complain of expropriation by the Court when, if they had no notice, their rights under the lease could be swept away by an order for sale under section 9.

The case quoted from the Ratnapura Court (D. C., Ratnapura, 910, Supreme Court Minutes, 7th May, 1903), though not exactly an authority for such action as has been adopted by the District Judge here, shows that lessees have been found willing in cases like the present to accede to an equitable arrangement for compensation.

In my opinion, therefore, the appeal should be dismissed and the order of the District Judge should stand.

WOOD RENTON J.—

I have had the advantage of reading the judgment of my brother Middleton, and I agree with his reasoning and his conclusion. I think that the lessees were properly joined [*cf. Cornish v. Gest* (1)], and that, in such a case as the present, the lease must be taken to have been entered into subject to the common law right of one co-owner to compel a partition, with the incidental possibility of a sale being ordered by the Court. The common law rule, referred to by Mr. Hector Jayewardene, in his argument for the appellant, as to a lease taking priority over a purchase, does not, in my view, apply to the case of a lease of an undivided share of land. I may add that I do not think that a lease can be brought under the words "mortgage," "charge," or "incumbrance" in section 9 of "The Partition Ordinance, 1863" (No. 10 of 1863), or that under existing legislation (see sections 9, 12, 13 of No. 10 of 1863) the Court has any power to make a decree for a sale in partition proceedings subject to the provisions of a lease of the property sold.