[FULL BENCH.]

1913.

Present : Pereira J., Ennis J., and De Sampayo A.J.

SILVA *v.* SOYSA *et al.*

146—D. C. Colombo, 32,015.

Partition—Land sold under Ordinance—Subject to existing leases.

Per PEREIRA J. and ENNIS J. (DE SAMPAYO A.J. *dissentiente*).—The word "incumbrance" in section 8 of the Partition Ordinance (No. 10 of 1863) includes a lease, and so, where a land is sold under the Ordinance, the sale is subject to existing leases, and a lessee has no right to claim the proceeds.

THE facts appear from the judgment.

Grenier, K.C. (with him *Koch* and *Balasingham*), for the appellant.—The appellant is entitled to claim a portion of the proceeds of sale. A lessee had no right to intervene in the case.

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Section 13 of the Partition Ordinance expressly conserves the rights of lessees in the event of a sale. The lessee could not know whether the land was to be partitioned or sold.

The lease is an incumbrance within the meaning of section 8 of the Ordinance. [Pereira J.—In any event your appeal cannot succeed. If the lease is an incumbrance, your rights are not affected by the sale.] If we were wrong in having applied to the District Court, let us have a declaration that the lease is not affected by the sale. We had to apply to the District Court for a share of the proceeds in view of the *obiter dictum in Peiris v. Peiris*,[1] lest we should lose our rights entirely.

Under the Registration Ordinance (No. 14 of 1891), section 16, a lease is an incumbrance. In section 643 of the Civil Procedure Code the words used are " grantees, mortgagees, lessees, and other incumbrancers." It shows that lessees are incumbrancers. Why should the word receive a different meaning in the Partition Ordinance? Counsel cited *Stroud's Judicial Dictionary, vol. II., p. 953.*

J. S. Jayewardene, for the respondents.—In either case the appeal should be dismissed. If a lease is an interest in the land, the lessee has lost his right by not coming forward at the proper time. If it is an incumbrance, the lessee's rights are not affected by the sale, and the present application to share in the proceeds of sale cannot be allowed. A lease is an incumbrance. Counsel cited *Punchirala v. Menikhamy*,[2] *Uduma Lebbe v. Sego Mohamado*.[3]

Cur. adv. vult.

December 10, 1913. DE SAMPAYO A.J.—

This is a partition action in which a certain land was by decree of Court ordered to be sold under the provisions of Ordinance No. 10 of 1863. The land was sold on November 18, 1912, and was purchased by one Don Nicholas. The purchase money was duly brought into Court, and the Court, on December 28, 1912, ordered the certificate of sale to be issued to Don Nicholas, who has since entered into possession of the land. It appears that the respondents, who are some of the parties to the action, had, by deed of lease dated November 16, 1899, leased to the appellant their interests in the land for a term of twenty years, commencing from November 16, 1899. Prior to the sale, the appellant notified his lease to the Court, but had no objection to the sale and intimated that he would take further steps in due course. Accordingly, on July 18, 1913, he applied by petition, supported by affidavit, that a sum of Rs. 3,000 be paid to him out of the share of money due to the respondents, as damages suffered by him by reason of the sale and consequent loss of possession of the land. The District Judge refused this

[1] *(1906) 9 N. L. R. 231.* [2] *4 Bal. 7.* [3] *2 C. L. R. 159.*

application, as I understand his order, on the ground that the appellant should have come as a party interested before the decree was entered and established his claim, and that the decree for sale extinguished any right he might have had as lessee even to the proceeds.

The appeal is bound to fail whether the appellant is regarded as a party having an interest in the land, as the District Judge thought, or whether he is an " incumbrancer " within the meaning of the Ordinance. In the first case the reasoning of the District Judge is obviously right ; and in the second case the incumbrance would attach to the land, notwithstanding the sale, and not to the proceeds sale. The only possible question is, on which ground the dismissal of the appeal should be put. I understand that my learned brothers, before whom the appeal came, were inclined to think that a lease was an incumbrance, but as they thought the opinions to the contrary expressed by the Full Court in *Peiris v. Peiris* [1] were *obiter dicta* and required reconsideration, the appeal was put down for argument before a bench of three Judges. As the appeal must in any case be dismissed, I am afraid that whatever opinions we ourselves may now express will in a sense be mere *dicta* also.

Mr. Grenier, for the appellant, maintained the argument, which in itself disposes of the appeal, that a lease was an incumbrance and continued to attach to the land, while Mr. Jayewardene, for the respondents, naturally agreed with that view. I regret that in the result we have to decide the question on a one-sided argument, and in the absence of the only party interested in the decision, viz., the purchaser Don Nicholas.

I venture to think that *Peiris v. Peiris supra* is a binding authority, and that the opinions there expressed are in no way mere *obiter dicta*. In that case the District Judge had added as defendants in the action certain persons who had a lease from some of the co-owners and filed a statement of claim, and he had ordered their interests to be valued separately and the amount paid out of the share of proceeds sale of the lessors when the sale of the land should have taken place. The appeal was taken on the ground that the lessees should not have been joined at all, as the lease was an incumbrance, to which the sale would be subject, and that the order for expropriating the lessees and for compensating them out of the share of money due to the lessors was therefore wrong. The Court had accordingly to consider and decide the very question submitted to us for decision. All the three Judges were agreed that " incumbrance " referred to in section 8 did not include a lease, and that the lessees were rightly joined so as to share in the proceeds, as otherwise their rights would be extinguished by the sale, and they accordingly approved of the orders of the District Judge. The

[1] *(1906) 9 N. L. R. 231.*

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ratio decidendi of that case applies to this case, and I consider, with deference, that it is not competent for us to go behind that decision. I may add that that decision has since been followed. See, for instance, *Appuhamy v. Fernando*,[1] where the lessee sued in ejectment some of the parties to a previous partition action in which the proceedings had gone only so far as the decree. The plaintiff had failed to put in a claim as lessee, and Wood Renton J. held, on the authority of *Peiris v. Peiris* and certain other cases, that the plaintiff had lost his rights as lessee by force of the decree and could not maintain his action.

Even if the matter were *res integra*, I would still hold that a lease was not an incumbrance which could continue to be a burden on the land after sale thereof under decree of Court in a partition action. The words relied on in this connection are those occurring in section 8 of the Ordinance, which enacts that the commissioner appointed to carry out the sale shall sell the property " subject to any mortgage or other charges or incumbrances which may be on the same." Here the word " incumbrance " is used as a synonym of " charge, " which, again, is, from the context, *ejusdem generis* with mortgage. To my mind there is no room for doubt that " incumbrance " is in this connection used in the sense of security, as was decided in *Peiris v. Peiris*. I venture to think that no assistance can be derived from the meaning assigned to it in certain cases under the English law, or from its use in other enactments or in other contexts. The question is what it can reasonably be made to bear in section 8 of this Ordinance. After all it is not section 8 that conserves the rights of mortgagees or incumbrancers; it only contains directions to the commissioner as to the conditions under which he shall sell the property. It is section 12 that conserves such rights, and there is no mention there of incumbrancers, but only of mortgagees. This seems to me to be an additional reason for thinking that in section 8, which must be read with section 12, an incumbrance means nothing more or less than a mortgage. Section 13 provides for the case of a lease in the event of an actual partition of the land, but there is no provision whatever for the case of a lease in the event of a sale. In this connection it is worthy of notice that the present Ordinance No. 10 of 1863 is a substitution for, and is substantially a re-enactment of, sections 7-19 of the Ordinance No. 21 of 1844. In section 15 of the latter Ordinance, which corresponds to section 8 of the present Ordinance, the provision is that the property shall be sold " subject to all such charges or incumbrances as then may be on the same," and the word " mortgage " does not occur at all. But it is obvious that " charges or incumbrances " meant mortgages and other securities of the same kind, and that the present Ordinance made the meaning more clear by adding the word " mortgage " to the expression

[1] *(1909) 1 Cur. L. R. 80.*

used in the older enactment. To me the conclusion is irresistible, that the Ordinance No. 10 of 1863 meant to treat leasehold interests as interests in the land, and provides specially for the case of a partition, and leaves the lessee, in the event of a sale, to put forward his claims before the decree for sale, but if he omits to do so in time his interest is wiped out by the operation of section 9. It is true that the lessee may not know beforehand whether the land is going to be partitioned or sold, but he can always put in his claim, and his rights will be saved in any contingency. I am unable to accept the view that, although a lease is an incumbrance attaching to the land even after the sale, the lessee may at his option come in to claim proceeds of the sale. In such a case, not only will the Court be swayed by the will of a private party, but the procedure will be contrary to principle. A lease either is an incumbrance or it is not. If it is, then there is no law which will enable the lessee to draw the proceeds of the land which is sold subject to the lease. The certainty and finality aimed at by the Ordinance should, I think, be jealously guarded, except in so far as it is otherwise provided in the Ordinance itself. I think that *Peiris v. Peiris* is not a decision merely holding, as suggested, that the Court may allow a lessee to be added as a party and value his interest and pay him out of the proceeds, but that it is a decision that that is the only possible course, the lessee's interest, just as much as a servitude or usufruct, being an interest in the land, and not a mere incumbrance on it. The lessee, in my opinion, has no option but to make his claim, and, to use the words of Wood Renton J. in *Appuhamy v. Fernando*, it is his "right and duty to set up his claim in the partition proceedings." For this reason I think the appeal should be dismissed with costs.

PEREIRA J.—

This is an action under the Partition Ordinance. An order for a sale of the land which was the subject of the action was entered up on May 1, 1912. More than four months thereafter the appellant, professing to be a lessee of the land, informed the Court, through his proctor, that he had no objection "to the sale taking place," and that he "would take further steps." He did nothing until after the sale of the land by the commissioner appointed for the purpose. On April 4, 1913, that is, after the sale had taken place, the appellant moved that the proceeds of sale which had then been deposited in Court be not paid out without notice to him. Thereafter he moved, with notice to the respondents, that a sum of Rs. 3,000 out of the proceeds be paid to him as compensation that he claimed to be entitled to as lessee by reason of the sale of the land under the order for sale; and the present appeal is from the order of the District Judge disallowing this application.

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It appears to be extremely doubtful whether the appellant or his co-petitioner in the Court below can be deemed to be a lessee on the lease produced, but that question need not at present be gone into. I shall assume for the purposes of this judgment, and do no more than assume, that the appellant is entitled to all the rights of the lessee on the lease produced. The question is whether, in view of the stage of the proceedings in which he came into the record, and the circumstances in which he did so, he is entitled to share in the proceeds of sale. Section 13 of the Partition Ordinance expressly and clearly conserves the rights of lessees of the property or any part or share of the property directed to be partitioned under the Ordinance. This appeal was first argued before my brother Ennis and myself, and it seemed to us that the underlying principle of section 13 of the Ordinance was to leave leases untouched by the Ordinance, and that, therefore, while section 13 dealt with the case of leases in the event of a partition, it was intended to provide for the case of leases in the event of a sale by section 8 of the Ordinance. That section enacted that a sale under the Partition Ordinance should take place if it be a sale at which the public might bid " subject to any mortgage, charge, or incumbrance " which then might be on the property ; and it seemed to us that the word " incumbrance " was used in the section to meet just such a case as has now occurred ; in other words, that the word " incumbrance " was used to include a lease. But in view of certain *dicta* in the judgment in the case of *Peiris v. Peiris* [1] cited to us, we thought that the case should be reserved for argument before a fuller Bench ; and the appeal was accordingly re-argued before a Bench of three Judges on the 9th instant. In the case cited it was held that the Court had power to add as parties to a partition suit persons holding leases from some of the co-owners of their undivided shares, and it was also held that it was competent to the Court, where it decreed a sale under the Partition Ordinance, to order the interest of lessees who are allowed to intervene to be appraised separately and the amount to be deducted from the proceeds of sale. That ruling coincides with the view taken by myself in an older case, namely, the case of *Grigoris v. Meedin.* [2] There I held that the comprehensive nature of the provision of section 9 (which provided that a decree for partition or sale should be good and conclusive against all persons whomsoever, " whatever right or title they had or claimed to have " in the property dealt with) showed that once a partition suit was floated by a party entitled to do so, there was no limit to the interests in assertion of which persons might claim to be joined as parties. In the case of *Peiris v. Peiris* [1] the question before the Court was whether a lessee should be allowed to intervene in a partition suit before judgment, and whether, in the words of Middleton J., the " Court was entitled to order a lease upon land which it has

[1] *(1906) 9 N. L. R. 231.*

[2] *1 Bal. 177.*

empowered to sell under the Partition Ordinance to be cancelled and valued and the proceeds paid to the lessees." No doubt the Judges who took part in the appeal expressed in the course of their judgment their opinions that a "lease" was not an "incumbrance" in the sense in which that word was used in section 8 of the Ordinance; but whether that was so or not, the decision on the substantive question involved in the case would obviously have been the same. Whether a sale under the Partition Ordinance took place subject to a lease or not, there was no objection to the lessee being made a party to the action and his rights adjudicated upon, and a suitable order being made with reference to them. But in the present case we are concerned with the situation that the lessee did not move to be added as a party, and he was in fact no party to the decree for sale in the case. He chose to stand out until the last moment. Can it be said that his rights under the lease are in any way affected by the decree for sale? Had the decree been a decree for partition his rights would not have been affected. Section 13 of the Ordinance clearly says so. It is said that the fact that the order was that the land should be sold made a difference. To my mind, as regards the rights of a lessee in the case of a decree for sale, section 8 of the Ordinance made in effect the same provision as section 13. The direct question in the case is whether the word "incumbrance" in section 8 includes a lease. Respondents' counsel made reference to the first three lines of section 12, which enacted that nothing in the Ordinance should affect the right of any mortgagee of the land which is the subject of partition or sale, and argued that there was no such provision with reference to a lease. But this is a perfectly superfluous provision. Section 8 expressly provides that a sale should be subject to a mortgage, and section 12 itself provides that a partition should be subject to a mortgage, and I do not think that a superfluous provision of this nature should be allowed to influence the decision of the question as to a lease. Does, then, the term "incumbrance" in section 8 include a lease? A lease is undoubtedly an incumbrance on the land leased. It is so referred to usually, and it has been so held in more than one case (see, for instance, *Baggett v. Meux* [1]), although its provisions may sometimes be such as not to make it an incumbrance. The Land Transfer Acts contain provisions to remove certain leases from the category of incumbrances. In *Punchirala v. Menikhamy* [2] it was held that where a Court decreed a land sought to be partitioned to be sold, it was desirable to decree the land to be sold free of the "incumbrance" created by the "lease" pleaded in the case. In *Uduma Lebbe v. Sego Mohamado* [3] leases are repeatedly referred to as "incumbrances," and in section 71 of Ordinance No. 3 of 1907—an Ordinance already passed though not proclaimed—clearly leases are included in the term "incumbrances." Although, as observed above, the terms

[1] *13 L. J. Ch. 228.* [2] *4 Bal. 7.* [3] *2 C. L. R. 159.*

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of certain leases may be such as to remove them from the category of "incumbrances" on land, clearly in view of our law as to the duties of vendors of landed property who are, *inter alia*, required to deliver vacant possession of the property sold to the vendee, a lease in the usual terms cannot but be regarded as an incumbrance.

For the reasons given above, the land, which was the subject of the present case, must be deemed to have been sold subject to the lease produced by the appellant, and he has therefore no right to the proceeds of the sale, and I would dismiss the appeal with costs.

ENNIS J.—I agree.

Appeal dismissed.