1965 *Present :* **T. S. Fernando, J., Tambiah, J., and Manicavasagar, J.**

CINEMAS LTD., Appellant, *and* CEYLON THEATRES LTD. and 3 others, Respondents

S. C. 573/61—D. C. Colombo, 8603/P

Partition action—Interlocutory decree—Order for sale of land—Encumbrances stated therein—Certificate of sale—Effect—Title of purchaser is free from any usufruct—Partition Act, ss. 4, 5, 16, 18, 19, 23, 25, 26, 38, 40, 42, 43, 45, 46, 47, 48, 50, 54.

On a proper construction of sections 46, 48 and other relevant provisions of the Partition Act, it is clear that when, in pursuance of an order for the sale of a land, a certificate of sale of the land is entered in terms of section 46 of the Partition Act, the title which the certificate of sale confers on the purchaser of the land and buildings thereon is free from any life interest or usufruct which may be declared in favour of a person in the interlocutory decree entered under section 26, read with section 48, of the Act. The purchaser under a decree for sale gets title free from all encumbrances except only the interests of the proprietor of a *nindagama* and the interests which are specially preserved by section 54 of the Act.

In the interlocutory decree entered in a partition action, the Court gave the 2nd defendant life interest over one-third share of the land and building standing thereon and ordered that the sale of the property should be subject to the life interest of the 2nd defendant over the one-third share.

Held, that that part of the interlocutory decree which stated that " 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 " should be deleted and the following words be substituted : " the said premises will be put up for sale ". The interests awarded to the 2nd defendant should be valued and he should be paid the estimated value of his usufruct out of the proceeds of the sale.

APPEAL from a judgment of the District Court, Colombo. This appeal was referred to a Bench of three Judges as there was disagreement between the two Judges before whom it previously came up for argument.

S. Nadesan, Q.C., with *C. Ranganathan*, for plaintiff-appellant.

H. V. Perera, Q.C., with *N. E. Weerasooria* (Jnr.), for 1st defendant respondent.

H. W. Jayewardene, Q.C., with *L. C. Seneviratne* and *S. S. Basnayake*, for 2nd defendant-respondent.

Cur. adv. vult.

March 25, 1965. TAMBIAH, J.—

This appeal raises an important question of law regarding the effect of an order for sale of a land in an interlocutory decree entered under the provisions of section 26 of the Partition Act, No. 16 of 1951, which will

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hereinafter be referred to as the Act. As there was disagreement between Abeyesundere J. and Sri Skanda Rajah J., this matter has been referred to a Divisional Court.

The short point for decision in this case is whether a certificate of sale of a land under section 46 of the Act gives title to the purchaser free from any usufruct which may be declared in favour of a person in an interlocutory decree entered under section 26 of the Act.

In the interlocutory decree entered in this case the learned District Judge declared the plaintiff entitled to 11/18th share of the land of which 3/18th was subject to the life interest in favour of the 2nd defendant. He declared the 1st defendant entitled to 5/18th share of the land, of which 2/18th was subject to the life interest in favour of the 2nd defendant; and the 3rd defendant to 2/18th share of the land of which 1/18th is subject to the life interest in favour of the 2nd defendant. In the result he gave the 2nd respondent life interest over 6/18th or 1/3rd share of the land and the buildings standing thereon and ordered that the sale shall be subject to the life interest of the 2nd defendant over 1/3 rd share of the land and building.

The Act was intended to give conclusive title to the land which a person buys under a decree of court.

The objects and reasons contained in the Bill presented to Parliament state as follows :

> " The essence of a partition decree is that persons declared entitled under it obtain title good against all the world. Various decisions of the Supreme Court have tended to eat away the indefeasibility of the title. The commission appointed by the Government in 1918 to enquire into and report on the question of providing a more speedy and less expensive method of partitioning land than that provided in Ordinance 10 of 1863 (Sessional Paper I of 1921), the Land Commission appointed in 1927 (Sessional Paper XVIII of 1929) and the Judicial Service Commission appointed in 1935 (Sessional Paper VI of 1936) have all expressed their opinions as to the unsuitability of the existing Ordinance. "

It is however unnecessary to look into the objects and reasons of this Bill in view of the clear and unambiguous provisions of the Partition Act which deal with this matter. Although a partition action is not based on a cause of action (vide *Sinchi Appu v. Wijegunasekera* [1]; *Abeyesundere v. Babuna et al.* [2]), the purpose of the Act is no doubt to put an end to inconvenience of possession arising out of common ownership and common interests (vide *Abeyesundere v. Babuna et al.* (supra)). It is for this reason that the view has been taken that a person must have the right to possess a land to entitle him to bring a partition action in respect of it (vide *Charles Appu v. Dias Abeysinghe* [3]; *Kuda Etana v. Ran Etana* [4]; The Law of Partition in Ceylon by Jayewardene, p. 44).

[1] *(1902) 6 N. L. R. 1 at 6.*
[2] *(1925) 6 Ceylon Law Recorder 92 at 94.*
[3] *(1935) 35 N. L. R. 323.*
[4] *(1912) 15 N. L. R. 154.*

It was submitted by the counsel for the appellant that the order made by the learned District Judge defeats the objects and purposes of the Act and perpetuates the inconvenience of possession which the Act sought to put an end to, and the order made was contrary to the spirit and express provisions of the Act.

After a careful examination of the relevant provisions of the Act, I agree with the submissions made by the counsel for the appellant. A plaintiff who brings a partition action under the provisions of the Act is required to give the description of the *land* which is the subject matter of the partition case by reference to metes and bounds or by reference to a sketch or map appended to the plaint (vide section 4 of the Partition Act). It is incumbent on him to make as parties all persons, who to his knowledge, are 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, or any improvements made or effected to the *land* or are in actual possession of the *land* or any part thereof (vide section 5 of the Act).

When the court orders the issue of summons to the Fiscal for service on a defendant, it should also issue a commission to survey the *land* to which the action relates (vide section 16 of the Act). Thereupon the surveyor to whom the commission is issued is under a duty to execute the commission in terms of section 18 of the Act.

On the summons returnable date, or a later date fixed by the court for the purpose, every defendant or other party to the action may file or cause to be filed in court a statement of the claims setting out the nature and extent of his right, share or interest to, of, or in the *land* over it. Any party to the action whose rightful share or interest to, of, or in the land is mortgaged or leased by an instrument registered under the Registration of Documents Ordinance should disclose or cause to be disclosed to the court the existence of mortgage or lease and the name of the mortgagee or lessee (vide section 19 of the Act).

The court is empowered to decide disputes regarding the corpus of the land in case of any claim that the corpus should be enlarged or restricted (vide Section 23 of the Act).

At the trial the court should examine the title of each party to the action and, after hearing evidence, determine all questions of law and fact arising in that action as regards the *right, share or interest* of each party to or in the *land* to which the action relates ; and thereafter make any one of the orders set out in section 26 of the Partition Act as long as they are not inconsistent with one another.

The interlocutory decree entered under section 26 of the Act must contain not only an adjudication regarding rights, shares or interests of any party to the action, but also may contain, inter alia, *an order for the partition of the land or for the sale of the land in whole or in parts.*

When a court orders a partition of the land under section 26 (2) (*a*) there can be no question that the meaning to be attached to the word "land" is what is set out in the interpretation clause which defines it as "land or lands constituting the subject matter of that action". There is no reason why a different meaning should be given to the word "land" when the court orders the sale of the *land* under section 26 (2) (*b*), and the certificate of sale confers title to the *land* purchased under the provisions of section 46 of the Act.

Counsel for the 1st defendant-respondent contended that under section 26 (2)(*b*) of the Act when a court orders the sale of a land, in whole or in parts, it is a convenient way of stating that the Commissioner should proceed to the land and sell the right, title and interest of the shareholders, but the effect of a certificate of sale is that only the shares of the shareholders pass to the purchaser, subject to all the encumbrances stated in the interlocutory decree and the interests such as constructive or charitable trust, a lease at will for a period not exceeding one month and the rights of a proprietor of a nindagama, in view of the provisions of section 48 of the Act.

The effect of a certificate of sale is set out in section 46 of the Act which enacts as follows :

> "Upon the confirmation of the sale of the land or 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."

In view of the definition of the term "land" given in the Act, on a literal interpretation of section 46 of the Act, there is no question that a purchaser on a certificate of sale gets title to the land which is described by physical metes and bounds or by referring to a plan. But it is contended by counsel for respondent that, in the absence of the words "free from all encumbrances" the title to the land in section 46 must be construed as title to the shares of the co-owners and the title the purchaser gets is subject to the encumbrances set out in section 48 of the Act and the unspecified interests such as tenancy at will or for a period not exceeding one month, constructive or charitable trust and the rights of a proprietor of a nindagama.

It is a cardinal rule of interpretation that if the words of a statute are precise and unambiguous no more is necessary than to expound those words in their natural and ordinary sense, the words themselves in such a case best declaring the intention of the Legislature (vide *Commissioners for Special Purposes of Income Tax v. Pemsel* [1]; Maxwell on The Interpretation of Statutes, 9th Edition p. 2). A court should not usurp

[1] *(1891) A. C. 534, 543.*

the functions of a legislature by introducing words which are not found in a statute. On a proper construction of sections 46, 48 and other relevant provisions of the Partition Act, it is clear that a purchaser under a certificate of sale gets title to the land, subject of course to the rights of a nindagama proprietor, if the land had been subject to such tenure, and such title is conclusive evidence against the whole world.

Section 48 (1) and (2) of the Act which applies to both interlocutory decrees entered under section 26, as well as the final decrees entered under section 36, enacts :

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

The distinction between *plenum dominium* and a bare title burdened with encumbrances should be clearly comprehended to appreciate the submissions made by Counsel for the respondents. Under the Roman Dutch Law, by the term *plenum dominium* is meant full rights of ownership. In common parlance and in legal phraseology, when a person has full rights of an owner, he is said to own the land or have title to the land. The rights of an owner have been summed up in the Latin phrases *jus utendi fruendi* and *jus abutendi* (vide the Institutes of South African Law by Maasdorp, Vol. II, 6th Edition, p. 100 ; An Introduction to Roman Dutch Law by R. W. Lee, 5th Edition, p. 121). This definition was adopted by the Privy Council in the case of The *Attorney-General v. Herath* [1]. Certain interests which may be vested in others may be deducted from the *plenum dominium*. When these interests over the

[1] *(1960) 62 N. L. R. 145.*

land could be asserted against the whole world the Glossators and Commentators, who developed the Roman Law during the mediaeval period, coined the phrase *jura in re aliena* to describe them. Some of the interests defined as " encumbrances " in the Partition Act are *jura in re aliena*. When the *plenum dominium* is denuded of all the beneficial interests of the owner, a person is said to have *nuda proprietas* or bare title to the property.

If the contention of the counsel for the respondent is upheld a purchaser at a sale held under the Partition Act would only get *nuda proprietas*, if the property has been burdened with encumbrances in such a way that shareholders get only the bare title.

It was contended by counsel for the 2nd respondent that where an interlocutory decree for sale of a land specifically mentioned certain encumbrances, any sale is subject to such encumbrances in view of the provisions of section 48 of the Act. Section 48 deals with the contents of an interlocutory decree and a final decree. In the case of a final decree for partition, no doubt the encumbrances stated in the decree would attach either to the whole land or to the lots allotted to the various shareholders as the case may be. The effect of a sale is not set out in section 48 but in section 46 of the Act which states in unambiguous language that the certificate of sale in favour of the purchaser is conclusive evidence of the *purchaser's title to the land or lot* as at the date of the certificate.

In support of his contention, counsel for the 2nd respondent relied on the dictum of Gratiaen J. in *Mrs. Britto v. Heenatigala* [1], where it was held that the statutory protection of a tenant under the Rent Restriction Act is not automatically extinguished if the leasehold premises are purchased either by a co-owner or third party in terms of a decree for sale under the Partition Ordinance. In that case Gratiaen J. adopted the dictum of Garvin J. in *Fernando et al. v. Cadiravelu* [2], which is as follows :

> " Upon the issue of the certificate of sale to the purchaser under a decree for sale, *the title declared to be in the co-owner is definitely passed to the purchaser.*"

But it should be noted that section 8 of the repealed Partition Ordinance emphasises that the certificate of sale operates to pass the co-owners' title to the purchaser as effectively as if they themselves had executed a conveyance in his favour.

The dictum of Garvin J. which was relied on by Gratiaen J. in *Fernando et al. v. Cadiravelu* (supra) was *obiter*. In that case the Court had to consider the question whether in a decree for sale under the repealed Partition Ordinance, courts could give an order for possession to a purchaser. The main ground on which that decision was made was that the repealed Partition Ordinance was silent on this matter and the provisions of the

[1] *(1956) 57 N. L. R. 327.* [2] *(1927) 28 N. L. R. 492 at 498.*

Civil Procedure Code, which applied only to orders of possession being given when a sale took place under the provisions of the Civil Procedure Code, had no application to sales under the Partition decree.

Section 9 of the repealed Partition Ordinance enacts that the decree for partition or sale is good and conclusive evidence against all persons whomsoever, whatever right or title they have or claim to have in the said property, although all persons concerned are not named in any of the said proceedings, nor the title of the owners nor any of them truly set forth and shall be good and sufficient evidence of such partition and sale, and of the titles of the parties to such shares or interests as have been thereby awarded in severalty. It is further provided that the certificate of sale under the hand of a judge is conclusive evidence that the said property had been sold under the order of the court. The certificate issued is evidence in any court of the *purchaser's title without any deed or transfer from the former owners* (vide section 8 of the Ordinance). Therefore, there is some justification for holding that the purchaser under a certificate of sale issued under the repealed Partition Ordinance obtained title to the shares of the shareholders. But similar words are not found in the Act. A certificate of sale under section 46 of the Act confers on the purchaser the title to the land. It is unsafe to act on the decisions of the Supreme Court which interpreted sections 2 and 9 of the repealed Partition Ordinance when one is called upon to construe section 46 of the Act.

The Partition Ordinance was defective in many respects and made no provisions to meet various situations which arose when a land was partitioned or sold under the Ordinance. Thus, no express provisions are found in the Partition Ordinance stating the effects of a decree for partition or sale on fideicommissa or trusts.

Earlier the view was taken that such a property could not be the subject matter of a partition action under the Partition Ordinance (vide Ramanathan Reports (1877) page 307). After a period of uncertainty during which the courts were doubtful as to whether a property subject to a fideicommissum could be partitioned, the Privy Council expressed the view that such a course could be adopted (vide the *obiter dictum* of the Privy Council in *Tillekaratne v. Abeyesekera* [1]). Subsequently the Supreme Court held that such lands could be the subject matter of a partition action (vide *Abeyesundere v. Abeyesundere* [2]).

In the case of a sale under the Partition Ordinance, difficulties arose as to the effect of a decree for sale on a fideicommissum. The view was taken that a sale under the Partition Ordinance should be regarded as a sale under the Entail and Settlement Ordinance and therefore the fideicommissum attached to the proceeds of the sale (vide *Sathiananden v. Matthes Pulle* [3]). But in taking this view, apart from its artificiality, it

[1] *(1897) 2 N. L. R. 313 at 317 and 318.* [2] *(1909) 12 N. L. R. 373.*
[3] *(1897) 3 N. L. R. 200.*

was not appreciated that to invoke the jurisdiction of the Court under the Entail and Settlement Ordinance an application should be made by a person interested in the land, which is the subject matter of the fideicommissum, and reasons should be adduced for the court to order a sale. Further it was not realized that in a partition action brought in the Courts of Requests the court has no jurisdiction to act under the provisions of the Entail and Settlement Ordinance. Yet, the ruling in *Sathiananden v. Matthes Pulle*[1] was followed in a series of decisions and the principle laid down in that case is firmly entrenched in our legal system.

In *Marikar v. Marikar*[2], the Divisional Court was confronted with the question whether a decree for partition extinguishes an express or constructive trust. In the absence of any provisions in the Partition Ordinance on this matter, the Court sought a solution to this difficult problem by interpreting sections 2 and 9 of the Partition Ordinance.

Bertram C.J. by a process of reasoning which, with respect, I have shown to be untenable (vide *Duraya v. Elandi* S. C. 116/'63 D. C. Kurunegala 804/L, S. C. Minutes of 11.2.65—decided after judgment was reserved in the present appeal), came to the conclusion that trusts attached to the proceeds of the sale when a land was sold under an order of court in an action brought under the Partition Ordinance. In arriving at this conclusion, Bertram C.J. took the view that " title to the parties to such shares or interest means, title to the legal ownership and that the words " right or title " are not intended to include obligations of an equitable nature, which although originally binding on the conscience, have subsequently come to be enforceable in law on the persons vested with legal ownership ". He also took the view that the rights in the nature of a *jus in re aliena* were wiped out unless specially preserved in the decree (vide 22 N. L. R. at 140). This view is clearly contrary to the submission made by Counsel for the respondent who urged that despite a sale under the Partition Ordinance, interest in the nature of *jus in re aliena* attached to the land. This view is also in conflict with the dictum of Garvin J. and Gratiaen J. in the cases cited earlier.

The Partition Ordinance merely provided for the partition or sale of a land held in common by a co-owner and the complex questions which the courts were called upon to decide were never contemplated by the framers of this piece of legislation. The courts, in their anxiety to give relief and do justice, sought to give various interpretations to sections 2 and 9 of the Partition Ordinance and it is unsafe to rely on casual dicta in

[1] (*ibid*). [2] (*1920*) *22 N. L. R. 137.*

such cases to elucidate the meanings of the plain words found in sections 2 and 9 of the Partition Ordinance. It is too late to differ from the principles laid down in those cases which dealt with such difficult questions but they cannot be unduly extended.

In the case of *Quinn v. Leathem* [1], Lord Halsbury said as follows:

> " There are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found."

The Partition Act of 1951 was enacted to clarify the law and settle many points in dispute which arose under the repealed Partition Ordinance. When interpreting the provisions of the new Act, resort should not be had to the dicta of judges on the interpretation of sections 2 and 9 of the Partition Ordinance particularly when there is a conflict of views.

Counsel for the 1st respondent submitted that the word " title " in section 46 of the Act means title to the shares of the co-owners. As stated by Coleridge J. in *Adey and another v. The Deputy Master of the Trinity House* [2], the word " title " has different meanings. In one sense it may mean that one has a right to a thing which is admitted to exist, or it may mean something that does in fact exist. In the case of title to land, the question is to whom does the land belong. When one examines the provisions of section 25 of the Act, the word " title " does not have the meaning suggested by the counsel for the 1st respondent. The word " title " is used in different senses in the Act. Thus, in section 25 of the Act, it is stated that the court shall examine the title of each of the parties to the land. So that persons who claim interests in the nature of encumbrances also should prove their title to such interests. The word " title " in common parlance as well as in legal language does not mean title only to the share of the land of the previons co-ownens but may also include a claim to any interest.

A further examination of a few relevant sections of the Act makes it clear that what is sold under an order for sale made under section 26 of the Act is the land and the purchaser gets title to the land.

Section 42 of the Act makes it obligatory on the part of the Commissioner, who is responsible for the sale, to make his return to court informing the court of the amount to which the *land*, or where the land was

[1] *(1901) A. C. 495 at 506.* [2] *(1852) 22 Law Journal, Q. B. 4.*

sold in lots, *each lot* is sold and the name and address of the purchaser thereof and to pay into court the money deposited with him by the purchaser. Section 43 of the Act enables the purchaser of the land or if the land was sold in lots, the purchaser of each lot, to pay into court the money realized by the sale of the land or of that lot in conformity with the conditions prescribed and the orders issued by court under section 39 of the Act.

On the date specified in the notice referred to in section 40 of the Act, the person who is entrusted with the sale has to first put up the land, or when the land is sold in lots, to put up each lot, to auction among the co-owners, and if the highest bid of a co-owner is not less than the value of a land or of such lot, determined by the court under section 38 of the Act, then he shall be declared the purchaser of the land or of the lot.

What is valued under section 38 of the Act is the land and not the interests of the shareholders subject to the encumbrances over them. So that it is clear that the purchaser could only purchase the land at a price above the valuation of the land. It cannot be contended that the word "land" there means the title of the shareholders. One can conceive of a case where the shareholders only have a bare title and all the beneficial interests in the land are in the hands of other persons who hold encumbrances. In such a case, if the construction sought to be placed by counsel for the respondent on section 46 of the Act is to be adopted, then a co-owner has to buy the land at the appraised value of the land but in fact he would be buying only the bare title of the land, shorn of all beneficial interests which would be in the hands of others who are entitled to encumbrances, such as leases, usufructs, mortgages, etc. Such a result was never intended by the Legislature. Therefore when an order for sale is made under the Act, what is valued and sold is the land and the title which passes to the purchaser is the title to the land.

An examination of some of the further provisions of the Act confirms the view that what is sold under a decree for sale is the land and not th shares of the co-owners subject to the encumbrances. Section 47 of th Act provides for the distribution and withdrawal of monies deposited in the court which form the proceeds of sale when the *land* is sold under a partition decree. It is significant to note that the court is empowered to cause to be prepared by a party a schedule of distribution showing the amount which *each party* is entitled to withdraw out of the monies deposited in court. The parties to a partition case are *not only the shareholders but also those who have other interests and encumbrances.* Therefore

provision is made for the distribution of monies not only to shareholders but also to the parties who have encumbrances and also interests according to the valuation which is to be placed on such encumbrances or interests. Therefore it follows that the purchaser under a decree for sale gets title free from all encumbrances save the interests of a proprietor of a nindagama and the interests which are specially preserved by section 54 of the Act.

Section 45 of the Act deals with confirmation of sales and the circumstances in which a sale could be set aside. This section enacts that when the amount realized by the sale of the land or any lot is less than the value of the land or the lot, the court may set aside the sale and re-issue commission for the sale of the land or the lot. This provision again shows that what is sold is not the title of the shareholder but the land. If it were otherwise, the Legislature would have said in clear words that the court could set aside the sale if the value of the title of the shareholders is less than the amount for which it was bought.

Section 54 of the Act enacts that the rights of a proprietor of a nindagama are in no way affected by the sale or partition of a panguwa under the Act. Despite the sale, where it was intended that the interests of a 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 rights when a sale takes place under the Partition Act.

Counsel for the 2nd respondent contended that if it is held that a sale under an interlocutory decree entered under section 26 of the Act passes title to a purchaser free from encumbrances, then valuable servitudes such as a right of way over the land which had been sold, or the right to insert a beam into a building in such a land would be extinguished and irreparable loss would be caused to the owner of the dominant tenement. The answer to this contention is that however valuable a servitude may be to the owner of a dominant tenement, its value cannot exceed the value of the *plenum dominium* over the land. Therefore, the persons who lose such servitudes will be compensated and would be paid its money equivalent out of the proceeds of the sale of the land. But the court is not powerless in a fit case to grant a right of servitude over a narrow strip of land which the court may for that purpose allot in common.

Counsel for the 2nd respondent also contended that where the land is subject to a charitable or constructive trust, then the title of the trustee would be wiped out, if a certificate of sale under section 46 of the Act confers title to the purchaser free from such trusts. The trust in such cases

would no doubt attach to the money which replaces the corpus of the trust when the property is sold on a decree for sale. This was the legal effect of the sale even under the repealed Partition Ordinance (vide 22 N. L. R. at 137). If the contention of the counsel for the 2nd respondent is given effect to, one would have the anomalous position of the trustee having the title to such property as well as the purchaser of the property having title to the land. Since the same title cannot remain in two different persons at the same time, such a result is untenable.

If the contention of the 2nd respondent's counsel on the effect of a sale on a partition decree is accepted, then there can be encumbrances over shares of the former co-owners when the undivided shares over which they existed have been wiped out by the partition decree. Thus one can conceive of a case where there are three co-owners each having an undivided one-third share. There may be an encumbrance in the nature of life interest over each of these shares. When the title to undivided shares is wiped out by the partition decree and the purchaser gets title under a certificate of sale, the life interest holders would still have the life interest over one-third share of the property. Indeed the facts of the present case create this difficulty. Thus a common possession between the life interest holders would be perpetuated despite the sale under a partition decree of the property which put an end to the divided interests of the shareholders. Such a result would militate against the object and purposes of the Partition Act.

Counsel for the 2nd respondent also submitted that even under the provisions of the Civil Procedure Code the Fiscal can seize and sell the houses, lands and goods of the judgment creditor (vide section 225 (3) of the Civil Procedure Code read along with secton 43 of the First Schedule). But the Fiscal sells only the right, title and interest of the judgment debtor. He urged, by way of analogy, that when the Court orders a sale of a land under section 26 of the Act, the Commissioner is empowered only to sell the title of the shareholders of the land which is the subject matter of the action. But under the provisions of the Civil Procedure Code, what the Fiscal is expected to seize and sell is the property of the judgment debtor (vide section 226 (2) of the Civil Procedure Code) and by way of contrast what a Commissioner is empowered to sell under section 26 of the Partition Act, is the land. The certificate of sale under section 46 of the Act confers title to the land on the purchaser of the land.

The learned District Judge based his decision on the mistaken assumption that since section 50 of the Act makes provision to the effect 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, fideicommissum or life interest, one must necessarily come to the conclusion that these interests attach to the land in the hands of the purchaser.

Section 50 of the Act is not an enabling section but a restrictive provision. Under the repealed Partition Ordinance, in the absence of specific provisions, there was a conflict of opinion on the vexed question whether the interest of lessees and mortgagees subsisted when the property was sold under a decree for sale. One view was that leases and mortgages attached to the land even after the sale (vide the Law of Partition in Ceylon by Jayewardene, pp. 244 and 247 ; for mortgages vide *Fernando v. Silva* [1], *De Silva v. Rosinahamy et al.* [2]; for leases see *Soysa v. Soysa* [3]). The other view was that the land was sold free from leases and the lessee had to look to the monies allotted to the lessor in claiming his interests (vide *Peiris v. Peiris* [4]). Therefore it became necessary to enact specific provisions to end this controversy. Hence section 50 of the Act provides that in the case of a sale under the Act the interest of a mortgagee or a lessee is restricted to the share of the proceeds of the sale which would be allotted to the mortgagor or the lessor, respectively.

The learned District Judge failed to note that section 47 of the Act makes specific provisions for distribution of monies to parties who have interests in the land, and that mortgagees or lessees are persons who have interests over the land.

For these reasons I order that the part of that interlocutory decree entered by the learned District Judge which states that " 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 substitued : " the said premises will be put up for sale ". The rest of the order of the learned District Judge in the interlocutory decree will stand. The interests awarded to the 2nd defendant will be valued and he will be paid the estimated value of his usufruct out of the proceeds of the sale.

The appellant is entitled to costs of appeal and costs of inquiry.

T. S. Fernando, J.—I agree.

Manicavasagar, J.—I agree.

Decree amended.

[1] *(1898) 2 Tambyah Reports 111.*
[2] *(1939) 41 N. L. R. 56.*
[3] *(1913) 17 N. L. R. 67.*
[4] *(1906) 9 N. L. R. 237.*