1970 *Present :* **H. N. G. Fernando, C.J., Sirimane, J., Samerawickrame, J., de Kretser, J., and Wijayatilake, J.**

M. M. RANASINGHE and another, Appellants, *and*
C. A. C. MARIKAR, Respondent

S. C. 232/66 (Inty.)—D. C. Kandy, 5709/P

Rent-controlled premises—Co-owners—Letting of the entire premises by one co-owner without consent of the other co-owners—Sale of the premises under the Partition Act—Rights of the purchaser as against the tenant—Partition Act (Cap. 69), ss. 5, 47, 48, 50, 54—Scope of s. 48—" Encumbrance "—Rent Restriction Act (Cap. 274), as amended by Act No. 10 of 1961, ss. 13, 27.

Where there is a valid letting of the *entirety* of premises to which the Rent Restriction Act applies, a sale of the premises under the Partition Act does not extinguish the rights of the tenant as against the purchaser, even if the tenant's interest is not expressly specified in the interlocutory decree entered in the partition action. Section 13 of the Rent Restriction Act protects any tenant of rent-controlled premises " notwithstanding anything in any other law ", except upon grounds permitted by the Section.

***Britto v. Hecnatigala* (57 N. L. R. 327) approved.**

***Hecnatigala v. Bird* (55 N. L. R. 277) overruled.**

But if rent-controlled premises are owned by co-owners and one of them lets the entirety of the premises without the consent or acquiescence of the other co-owners, the protection of the Rent Restriction Act is not available to the tenant as against a purchaser who buys the premises subsequently in terms of an interlocutory decree for sale entered under the Partition Act. In such a case, the tenant cannot resist an application by the purchaser to be placed in possession of the premises.

Obiter dicta :—

(i) *Per* FERNANDO, C.J. and SIRIMANE, J.—Urgent and perhaps retrospective amendments of the law are necessary in view of the decision of the Privy Council in *Ceylon Theatres Ltd. v. Cinemas Ltd.* (70 N. L. R. 337) where it was held that a usufruct of an undivided share specified in a decree for sale under the Partition Act attached to the land, and not to the proceeds of sale.

(ii) *Per* SIRIMANE, SAMERAWICKRAME and DE KRETSER, JJ.—The rights of a monthly tenant are unaffected by a decree under section 48 of the Partition Act, whether those rights are specified in the decree or not.

(iii) *Per* FERNANDO, C.J.—Section 48 of the Partition Act neither empowers a Court to declare that a monthly tenancy shall survive a decree for partition or sale, nor by implication provides for the continuance of such a tenancy upon a partition or sale.

APPEAL from a judgment of the District Court, Kandy.

In an action under the Partition Act for the partition and sale of certain rent-controlled premises, the 2nd defendant was the owner of an undivided 9/20th share of the premises. He had purported to rent, on

1°——J 18286—2,255 (11/70)

a monthly basis, the entirety of the premises to the 5th defendant. The plaintiff, who was entitled to an undivided 6/20th share, and the 1st defendant, who was entitled to an undivided 5/20th share, were not parties to the contract of tenancy. The evidence indeed showed that the 2nd defendant had rented the premises in defiance of the other two co-owners. The question for decision in the present appeal was whether the tenant (the 5th defendant) was liable to be ejected from the premises by a person who bought the premises at the sale under the Partition Act.

C. Ranganathan, Q.C., with *G. P. J. Kurukulasooriya, P. Nagueswaran* and *P. Kurukulasooriya*, for the 5th and 6th defendants-petitioners, appellants.

H. W. Jayewardene, Q.C., with *Annesley Perera, Nihal Jayawickrama* and *Neville de Alwis*, for the purchaser-respondent.

Cur. adv. vult.

August 7, 1970. H. N. G. FERNANDO, C.J.—

The premises to which this action relates are business premises which are situated in the city of Kandy and to which the Rent Restriction Act applies. The premises were the subject of an action in which the plaintiff prayed for a decree of partition and for the sale of the premises under the Partition Act. The Interlocutory decree declared the plaintiff to be entitled to an undivided 6/20 share, the 1st defendant to an undivided 5/20 share, and the 2nd defendant to an undivided 9/20 share. The Interlocutory decree also ordered the sale of the property by public auction and the distribution of the proceeds of sale among the co-owners.

The premises were accordingly put up for sale and were purchased by the respondent to this appeal, whom I will refer to as the " purchaser ".

The purchaser on 27th August 1966 applied for a Certificate of sale and for an order of delivery of possession. Before the writ of possession was issued to the Fiscal, the 5th and 6th defendants filed objections to the issue of writ. They claimed in these objections that the 2nd defendant had on his own behalf and that of his co-owners let the premises to the 5th defendant, who had for 4 years occupied the premises for the purpose of a business carried on by the 4th and 5th defendants, and that the sale to the purchaser was subject to this tenancy. These objections were over-ruled by the learned District Judge; and the present appeal is against his order that the purchaser was entitled to take out writ of ejectment.

The argument generally for the 5th and 6th defendants has been that a sale of land under the Partition Act does not extinguish the rights of a monthly tenant which had been in existence before the institution of

the action for partition. This argument was supported on more than one ground. Firstly, Counsel relied on the language of s. 48 (1) of the Partition Act, the terms of which it is necessary to set out in full :—

"48. (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 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 decree relates 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 scheme of this sub-section appears to be that all encumbrances affecting a land will be extinguished by a partition or sale unless they are specified in the decree. In this way the Court is impliedly empowered to specify in the decree those encumbrances which will remain valid after entry of the interlocutory decree, and a person having the right of an encumbrance is impliedly entitled to ask that the encumbrance be so specified ; if however he does not so ask or the Court does not so specify the encumbrance in the decree, then the title to the shares or interests declared in the decree will be free of the encumbrance.

The definition of the term "encumbrance" in the second part of the sub-section includes certain interests such as mortgage, lease and fideicommissum ; but "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", are excluded from the meaning of the term. Therefore, it is argued, a right of any one of these three kinds was not intended by the substantive part of the sub-section to be regarded as being a defined "encumbrance", and the phrase which earlier occurs "free from all encumbrances" does not operate to free the land from such a right.

On this construction such an excluded right will continue to be effective, even though it is not expressly protected by being specified in the decree.

This construction gains much support when one considers the case of land which is subject to a constructive or charitable trust, for it is a quite acceptable argument that the Legislature could not have intended that a charitable trust will be extinguished by a decree for partition. Again s. 54 (2) of the Act provides that the rights of a proprietor of a *nindagama* shall in no way be affected by a partition or sale and that he shall be entitled to exercise his rights as though the partition or sale had not occurred. Here again, there is an expression of the intention of the Legislature that the rights of a nindagama proprietor will continue to exist despite the fact that those rights are not conserved in a partition decree. If two of the three rights of the description which are excluded in the definition of "encumbrance" should clearly survive despite the entry of a decree of partition, there is much reason to suppose that the same will be a case of the third right, namely that under a lease at will or for a period not exceeding one month.

In examining the validity of this construction, it is useful to consider the position concerning leases which prevailed under the old Partition Ordinance. Section 13 of that Ordinance in effect enacted that, after a *partition* has been effected, a lease of an undivided share would apply exclusively to the divided portion allotted in severalty to the lessor. It would follow that if before partition there had been a lease of the entire land, then the rights of the lessee would attach to all the portions separately allotted to each of the co-owners. But there was nothing in the Ordinance which dealt expressly with the effect of a lease, in a case where a land is sold under a *decree for sale* in an action for partition. This omission in the Partition Ordinance was the subject of consideration by a full Bench in *Peiris v. Peiris.*[1] Both Wendt J. and Middleton J. were of opinion that for the purposes of s. 8 of the Ordinance a lease could not be regarded as an encumbrance, and that accordingly a sale of land under that section would wipe out all leases, other than those saved by s. 13 of the Ordinance. In the result the full Bench decided that where there is a sale under the Partition Ordinance, a person who previously held a lease of an undivided share lost his leasehold rights, and could only receive compensation for the value of the lease at the distribution of the sale proceeds. The decision in *Peiris v. Peiris* was followed in *Samaraweera v. Cunji Moosa.*[2] De Sampayo J. stated quite definitely "that a lease is not an 'encumbrance' within the meaning of the Partition Ordinance, but creates an interest in the land. It must be claimed in time in the partition action at the risk of the lessee losing it for ever." He further stated that "when a land is sold under a partition decree, the lease is extinguished, and the lessee can only get his interest assessed and an equivalent in money in the distribution of the proceeds out of the share of the lessor." This decision under the old Partition Ordinance clearly established that even a formal lease would be extinguished upon the sale of land in a partition action. If then all that such a lessee could claim was to participate in the distribution of the proceeds of sale, the rights of

[1] *(1906) 9 N. L. R. 231.* [2] *(1915) 18 N. L. R. 403.*

a monthly tenant must *a fortiorari* also be extinguished in the event of such a sale. What is now to be ascertained is whether because of the consideration relied upon in the argument which I have summarised, it must be held that the Legislature has in s. 48 of the Partition Act changed the former law and thus conserved the rights of a monthly tenant in the event of a sale under the Act.

It seems to me necessary to appreciate the purpose of the Legislature in bringing a lease within the connotation of the term "encumbrance" in s. 48. Section 48 of the Partition Act was designed to secure as far as practicable that the finality attaching to partition decrees could not be doubted except in the events referred to in sub-section (3) of that Section. One expedient adopted for this purpose of securing such finality was to make express provision in sub-section (1) as to the interests which may be conserved in an interlocutory decree by their being specified therein. If the decisions under the old Ordinance which I have already cited (holding that a formal lease is not an encumbrance) had continued to apply, then the Court would have had no power in entering decree under the new Act to protect such a lease by specifying it in a decree, and consequently the actual protection sought to be afforded to leases by s. 50 of the new Act may have been ineffective. This difficulty in my opinion was overcome by making it clear in s. 48 that a formal lease fell within the term "encumbrance" and could accordingly be specified in a decree. After thus including a lease within the meaning of the term "encumbrance", the Legislature no doubt did (in the exception clause at the end of the definition) exclude a lease at will or for a period not exceeding one month. Such an exclusion was of course necessary if the intention was that only formal leases may be specified in a decree. Here again one has to bear in mind that the decided cases under the old Ordinance related only to instances of formal leases, and it is therefore reasonable to suppose that the Legislature in enacting s. 48 of the Act also had in mind only such leases. Accordingly (although the matter is not free of difficulty), I much prefer the construction that s. 48 was intended only to protect formal leases, and not to extend to monthly tenancies a protection which had not seriously been claimed for them before. I hold for these reasons that s. 48 neither empowers a Court to declare that a monthly tenancy shall survive a decree for partition or sale, nor by implication provides for the continuance of such a tenancy upon a partition or sale.

Before leaving this matter, I must refer to the recent decision of the Privy Council in *Ceylon Theatres Ltd. v. Cinemas Ltd.*[1]. The question which arose in that case was whether the Court has power, when ordering the sale of land under the Partition Act, to declare that such a sale will be subject to a life interest subsisting in an undivided part or parts of the land sold, and whether the sale will in such a case be subject to the life interest so declared. In answering that question in the affirmative, Their Lordships were impressed by the fact that s. 5 requires persons to

[1] *(1968) 70 N. L. R. 337.*

be made parties to a partition action if they 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." They then pointed out that the Act returns to a similar list in a later important section (section 48). Prima facie they were disposed to the opinion—

> " 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."

The judgment at a later stage proceeds to apply the test set out in this opinion with reference to the provisions of ss. 48 and 50.

Sub-section (2) of s. 50 declares that in the case of a decree for sale the rights of a mortgage or lessee of an undivided share shall be limited to the mortgagor's or lessor's share of the proceeds of the sale. Their Lordships thought that this sub-section gave strong support for the argument that an encumbrance of a kind not dealt with in the sub-section will continue to attach to the land.

> " 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."

The judgment in the *Cinemas case*[1] does not, in my opinion, assist the argument of Counsel for the appellants. What that judgment principally rejected was the contention that the declaration in s. 46 " the certificate (of sale) shall be conclusive evidence of the purchaser's title to the land " has the effect of freeing the land from all other interests despite the fact that such an interest has been duly specified in the interlocutory decree in terms of s. 38. But where, as in the instant case, there is merely a monthly tenancy which is not specified in the decree because it is not an " encumbrance " as defined in s. 48, there is nothing to be derived from s. 48 in support of the claim that the tenancy will survive after a sale.

As has already been shown, Their Lordships relied heavily on sub-section (2) of s. 50 for the proposition that an " encumbrance " duly specified in an interlocutory decree, which is neither a mortgage nor a lease, will continue to attach after a sale of land. But that proposition does not cover the case of some interest which is not an " encumbrance " as defined in s. 48. But even if it be assumed that a monthly tenancy may properly be specified in an interlocutory decree, it seems to me that the

[1] *(1968) 70 N. L. R. 337.*

nature of the protection that such a tenant might claim is implicit in the provisions of sub-section (2) of s. 50. Having regard to the fact that, in the event of a sale, sub-section (2) limits the right of a lessee under a formal lease to the lessor's share of the proceeds of sale, it is reasonable to ascribe to the Legislature an intention that the right of a monthly tenant in the case of a decree for sale shall be at least equally limited, and shall not continue to encumber the land after the sale.

Counsel for the Respondent in this appeal submitted that the *Cinemas case* was wrongly decided in that the decision failed to take account of judgments holding that a sale under the old Partition Ordinance freed land from interests such as *fideicommissm* or *usufruct*. But there were similarly judgments holding that leases and mortgages will not continue to attach after sales in partition actions, and it was only these latter judgments which were given statutory recognition in s. 50 of the Act. The omission of the Legislature to give similar recognition to the former judgments leads to the quite justifiable inference that the legislature intended that they will no longer apply.

Section 48 of the Partition Act clearly intends that certain "encumbrances" may be specified in an interlocutory decree, and thus manifests an intention to protect *in some manner* the interests of those persons in whose favour those encumbrances subsist. The Act then proceeds, in s. 50, to define and limit the manner in which two such interests, namely mortgages and leases, are to be protected, in the event of a sale under the Act. But the Act does not in any way define or limit the rights which might accrue by virtue of other "encumbrances" actually specified in the decree, such as a "usufruct, servitude or fidei commissum". To take the simple case of a servitude, such as a right of way, the construction that the Legislature intended that a sale in a partition action will extinguish a right of way specified under s. 48 in the decree for sale is so absurd that reasons need not be stated for the rejection of such a construction. But even where a right of usufruct or fidei commissum is specified in a decree in terms of s. 48, then in the absence of any provision in the Act (such as s. 50 which limits the rights of a mortgagor or lessee to an interest in the proceeds of sale), there is in the Act no warrant for the opinion that the Legislature intended only that such a right, when conserved by the decree, will attach only to the proceeds of sale, and not to the land itself. If the true intention of the framers of the Partition Act was to maintain the applicability of former judgments relating to the rights under *fideicommissum* or *usufruct*, it is lamentable that the actual provisions of the Act are so easily susceptible to the construction that these judgments no longer apply.

The decision in the *Cinemas case* has in my opinion revealed a serious error in the Partition Act. Having regard to former judgments, it has for many years been the practice in our Courts that, upon the sale of a land in pursuance of a partition decree the rights of persons claiming upon *usufruct* or *fideicommissum* are regarded as attaching to the proceeds of sale, and that the purchaser holds the land free of such rights. In the

case of the sale of land subject to a *fideicommissum* for instance, the proceeds of sale are invested by the Court, and the interest earned by the proceeds of sale is paid to the fiduciary until the time of accrual of the rights of the fideicommissaries, who at this later stage become entitled to the proceeds. The decision in the *Cinemas case* can well give rise to litigation in which persons who, although they have enjoyed the rights in proceeds of sale which our practice has conferred, may set up claims of ownership to lands which third parties have purchased in the faith that the lands were freed from such claims. Urgent and perhaps retrospective amendments of the law concerning this subject matter appear to be necessary.

Another argument of Counsel for the appellants was that the protection given to tenants by the Rent Restriction Act is not extinguished by a sale under the Partition Act. On a similar question, as to the effect of a decree for sale under the former Partition Ordinance, there are conflicting decisions of this Court ; and one of the purposes of the constitution of the present Bench was to resolve this conflict. In *Heenatigala v. Bird*[1] Pulle J. expressed the opinion obiter that the certificate of sale issued (under section 8 of the Ordinance) had the effect of terminating the relationship of landlord and tenant and of constituting (the purchaser) an independent title holder to whom the restriction contained in section 13 of the Act could not apply because the certificate conferred a title which was not subject to the tenancy agreement. In the latter case of *Britto v. Heenatigala*[2] Gratiaen J. came to the opposite conclusion, namely that, although the contractual relationship between a tenant and his landlord may be terminated by a decree for sale under the Partition Ordinance, nevertheless the statutory protection conferred on the tenant by the Rent Restriction Act is not extinguished by the decree for sale. I can usefully add but one observation to the reasons stated by Gratiaen J. for that conclusion. If the earlier decision in *Heenatigala v. Bird* is correct, an owner of rent-controlled premises can evade the provisions of the Rent Restriction Act by the simple device of conveying any undivided share of the land to some person and by thereafter seeking a sale in a partition action. The earlier decision has now to be over-ruled.

I also find nothing in the new Partition Act upon which to hold that the reasons stated by Gratiaen J. are no longer applicable in a case in which rent-controlled premisses are sold under the Act.

I must point out however that there may be, or may appear to be anomalies flowing from the decision in *Britto v. Heenatigala.*

The effect of that decision is that a mere monthly tenant of rent-controlled premises, whose interest is not specified in the interlocutory decree, may nevertheless be protected in his occupation despite a sale under the decree. It may appear that he is thus in a better position than a lessee under a formal lease which is specified in the decree, for s: 50 (2)

[1] *(1954) 55 N. L. R. 277.* [2] *(1956) 57 N. L. R. 327.*

of the Partition Act provides that in such a case the rights of the lessee are limited to an interest in the proceeds of sale. But s. 13 of the Rent Restriction Act protects any tenant of rent-controlled premises, "notwithstanding anything in any other law". If, therefore, the tenant of such premises under a formal lease chooses to continue in occupation of the premises after a sale under a partition decree, instead of claiming an interest in the proceeds of sale, s. 13 will operate notwithstanding s. 50 (2) of the Partition Act.

There is also the inconsistency, or perhaps the prejudice, arising from the fact that the purchaser at a partition sale may be unable to eject the occupying tenant, despite the fact that the interlocutory decree contained no reference to the tenant's interest. Such an inconsistency is sometimes unavoidable when statutory provision, such as is contained in s. 13 of the Rent Restriction Act, over-rides other laws. Provision somewhat similar to s. 13 was enacted in s. 4 of the Paddy Lands Act, No. 1 of 1958, which to a certain extent protects a "tenant-cultivator" of a paddy land against eviction. In *Odiris v. Andrayas*[1] it was held that the interest of a tenant cultivator may be specified in an Interlocutory Decree for partition, on the ground that his interest is included within the scope of the words "any interest whatsoever, howsoever arising" in the definition of "encumbrance" in s. 48 of the Partition Act. A similar construction is perhaps possible in the case of a tenancy protected by the Rent Restriction Act, not for the reason that it is a tenancy, but instead for the reason that the negative right against ejectment conferred by s. 13 is "an interest" contemplated in the definition of "encumbrance". The further consideration which I have now been able to give to this point has relieved me greatly of the fear expressed in the judgment in *Odiris v. Andrayas*. It seems to me now that even if the right of a tenant-cultivator or of a tenant protected by the Rent Restriction Act is not specified in a decree for partition or sale, that right can continue to exist because of the over-riding effect of the statutory provision which confers that right.

It is clear from the judgment in *Britto v. Heenatigala* that the defendant in that case had entered into occupation of premises by virtue of a notarial lease from one co-owner, and by virtue of contracts of monthly tenancy granted by all the other co-owners. The defendant in that case was thus the tenant of the entirety of the premises.

In the instant case, however, the learned District Judge has held that the 5th defendant was the tenant of these premises only under the 2nd defendant, and that there was no contract of tenancy between the 5th defendant and the other two co-owners, namely the plaintiff and the 1st defendant.

One can conceive of a case in which, although a tenant occupies property under a contract of tenancy with one only of the co-owners of the property, that co-owner can be regarded as the agent of all the co-owners.

[1] *(1969) 72 N. L. R. 110.*

In such a case, the protection afforded by the Rent Restriction Act may be available as against all the co-owners on the ground that they had acquiesced in the letting, and the protection may be available also against the purchaser at a sale in a partition action. I had thought that there had been such acquiescence in the instant case. But in view of the matters referred to in the judgment of my brother Sirimane, I am content to uphold the finding of the trial Judge that the 5th and 6th defendants were not tenants under all the co-owners. That being so, the protection of the Act is not available to them after the sale under the partition decree.

For these reasons, the order of the District Judge allowing the application for a writ of possession is affirmed. The appeal is dismissed with costs.

SIRIMANE, J.—

I have the advantage of having read the draft judgment of My Lord the Chief Justice, and I respectfully agree with the conclusion which he has reached, viz., that when there is a valid letting of the *entirety* of premises to which the Rent Restriction Act applies a sale under the Partition Act does not extinguish the rights of the tenant.

I am therefore of the view that the decision in *Britto v. Heenatigala*[1] correctly sets out the law, and is applicable to sales held in terms of a decree for sale under the Partition Act as well.

As I am of opinion that the 5th and 6th defendants, who are the appellants, are not protected by the Rent Restriction Act, I wish to set out briefly the reasons for my view, and also my views on certain other matters which were argued before us on this appeal.

The 2nd defendant was the owner of an undivided 9/20th shares of the premises. He purported to rent the entirety of the premises to the 5th defendant *after this action was filed* in circumstances which point to the inference that he did so in defiance of the wishes of the other two co-owners, viz., the plaintiff and the 1st defendant. We did not decide this appeal on the short point raised by Counsel for the respondent that the alienation was "pending partition" and therefore void under the provisions of Section 67 of the Partition Act, because counsel for the appellant protested that this point was not raised earlier, and further that there was no evidence before this Court as to the exact date of the registration of the *lis pendens*. But, it is quite clear from the affidavit filed by the 5th defendant himself for the purpose of claiming a stay of execution of the writ of possession, that the 2nd defendant had let the premises to him about 4 years before that affidavit was filed in 1966. This action was filed in 1960. I do not wish to go into the evidence led at the trial in any detail, but there was some evidence which indicated that the 2nd defendant had let these premises without the consent of the

[1] *(1956) 57 N. L. R. 327.*

other two co-owners, and appropriated the rents for himself. It was proved, for example, that there had been litigation between the plaintiff and the 2nd defendant (D.C. 9216) where the plaintiff successfully averred that the 2nd defendant had induced her, when a minor, to convey some undivided rights in this land to him. It was also proved that the 1st defendant had successfully sued the 2nd defendant in D.C. 6212 for her share of the rents for 3 years prior to February, 1961. There is every reason to believe that this Partition Action was filed because the 2nd defendant was keeping the plaintiff and her sister (1st defendant) out of possession of their legitimate shares by letting the premises without their consent.

One issue which was submitted for decision to the trial Judge in this Partition Action, was whether the entirety of the premises had been let. It is implicit in this issue that the Judge had to find whether the letting was done with the knowledge *and consent* of the plaintiff and the 1st defendant.

That issue was decided against the 2nd defendant. The conclusion the learned Judge reached on the evidence was that the plaintiff and the 1st defendant did not accept the 5th (and the 6th) defendants as their tenants, and that there was no contract of tenancy between them, though, of course, the plaintiff and the 1st defendant were aware that the 2nd defendant was letting these premises to different persons and taking the rents himself. There was no appeal from that finding which is binding on the parties to this application. In *Britto v. Heenatigala* (supra) the *entire* premises had been let to the tenant by all the co-owners.

What then are the rights of the 5th and 6th defendants who are the tenants only of the 2nd defendant, and therefore only of an undivided 9/20th share of the building ?

A person who takes on rent a house which is co-owned, from one co-owner only does so at his peril. If there are circumstances which show that the lessor had a mandate express or implied, from the other co-owners to deal with the entirety of the co-owned property, then the tenant's occupation is secure. If not, it may still be argued on his behalf that because a co-owner cannot be ejected from the corpus in which he has undivided rights, so too, a tenant who claims under him. But, the decree for a partition or sale under the Act puts an end to co-ownership, and the tenant is now a lessee of interests which have no physical existence as "premises" within the meaning of the Rent Restriction Act (as amended by section 11 of Act 10 of 1961), and that Act can therefore give him no protection when a purchaser seeks to eject him. His position, in my view, is at best the same as that of a lessee of an undivided share for a period over one month, whose rights have been specified in the decree, and by an analogy, he may claim these interests—perhaps the equivalent of a month's rent—out of the share of the proceeds of sale allotted to his lessor, under Section 59 (2) of the Partition Act. But he cannot, in my view, resist an application by a purchaser to be placed in possession.

I am unable to subscribe to the view that Section 48 precludes a Court from specifying in its decree that a monthly tenancy or a charitable trust attaches to certain shares.

Section 48 of the Partition Act was enacted in order to give a person who is allotted a lot, in the case of a partition, and a person who purchases a land, in the case of a sale held in pursuance of a decree under the Act, a clear and unfettered title. It was enacted to give effect to the idea earlier expressed in the somewhat picturesque phrase, that a decree under our Partition Ordinance No. 10 of 1863 gives a clear title "which is binding on the whole world". Section 48 provides therefore that *all* encumbrances (leases, mortgages, fidei-commissa, etc.) which were not specified in the decree were to be extinguished, but it saved a constructive or charitable trust, a lease at will or for a period not exceeding one month, and the right of a proprietor of a Nindagama, from such extinction.

I do not find it profitable to speculate as to why the legislature saved a monthly tenancy when notarially executed leases for longer periods even when duly registered were extinguished unless specified in the decree. It is sufficient to note that the Partition Act was enacted after the Rent Restriction Act of 1948. In my view all that the Section provides is that constructive and charitable trusts, leases at will, monthly tenancies, and the rights of a proprietor of a Nindagama are unaffected by a decree under Section 48, whether those rights are *specified in the decree or not.* Take the case, for instance, where the Viharadhipathi of a Buddhist temple avers that the shares of certain parties inherited from a common ancestor are subject to a charitable trust in favour of his temple. A contest may arise, and if the Court holds in its judgment that there is a charitable trust, then that finding will be specified in the decree. The same applies to a disputed monthly tenancy if the Court holds that such a tenancy subsists. I consider it very desirable that when such a right affecting the corpus is brought to the notice of Court, the decree which is the instrument that is registered, should refer to it. This will give notice of such rights to intending purchasers in the case of a decree for sale.

In the course of the argument our attention was drawn to the case of *The Ceylon Theatres Limited v. The Cinemas Limited*[1] where it was held that a usufruct of an undivided share specified in the decree attached to the land, and not to the proceeds of sale. But no question of ejectment or the applicability of the Rent Restriction Act arose in that case, which therefore does not help the 5th and 6th defendants. I agree with My Lord the Chief Justice that this decision reveals a defect in our law which must be speedily remedied, if long established titles are not to be disturbed or cast in doubt.

Since 1863 when a property was sold on a decree for sale entered under the Partition Ordinance the proceeds were brought into Court, and a fideicommissum or life interest attached to those proceeds. Where

[1] *(1968) 70 N. L. R. 337.*

there was an encumbrance such as a life interest or fideicommissum affecting a land, sales of such lands under the Partition Ordinance were placed on the same footing as sales under the provisions of the Entail and Settlement Ordinance, Chapter 67, and the money realised by such sale was dealt with in the same way as provided by Section 7 (*c*) of that Ordinance which enacts that the proceeds of sale should be applied to—

> "Investments in the Loan Board or in Government securities, the interest thereof being made payable to the party for the time being otherwise entitled to the rents and profits of the land sold."

This practice continued after the passing of the Partition Act of 1951, the proceeds of sale brought into Court were invested with the Loan Board which pays interest as half yearly dividends. The interest on the proceeds took the place of the income from the land, and fiduciaries and those who were entitled to life interests were paid these sums. They had no rights in the land which was thought to be free from any encumbrance whatsoever in the hands of a purchaser. It was perhaps on account of this practice based on earlier decisions of this Court that the legislature did not attempt (in Section 47) the impossible task of prescribing how a life interest, for example, should be valued for the purpose of making a payment from the capital sum realised at a sale. It was accepted that fiduciaries were only entitled to the dividends on the capital sum which was later paid out to the fideicommissaries, after the fideicommissum ended. One consideration which appears to have weighed with their Lordships in the decision in *The Ceylon Theatres Limited v. The Cinemas Limited* (Supra) is that section 47 of the Partition Act does not provide for the valuation of rights such as fideicommissa and life interests which are specified in section 5 of the Partition Act. The judgment states, at page 344—

> "Section 47, ... 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 en 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."

There are in our Courts a large number of cases where sales under the Partition Act have taken place and the money kept in Court because the shares of some co-owners are subject to a "fideicommissum in perpetuity".

The third generation which will be ultimately entitled to the proceeds lying in Court has not yet emerged to make its claim ; and the fiduciaries continue to draw the interest half-yearly. As values of land, and the rentals they command, have increased almost ten-fold in recent years, it is more than likely that fiduciaries will find it far more advantageous to claim rights in the properties sold, titles to which have by now passed to third parties on the footing that such properties are unencumbered.

I agree with the Chief Justice that urgent and perhaps retrospective amendments of the law are necessary.

As far as this case is concerned I am of the view that the order of the District Judge allowing the application for a writ of possession should be affirmed, and the appeal dismissed with costs.

SAMERAWICKRAME, J.—

The 5th and 6th defendants-appellants claimed that they were tenants of premises sold under a decree in a partition action and that they were not liable to be ejected at the instance of the purchaser at the sale.

Section 48 (1) of the Partition Act reads :—

" Save as provided in sub-section (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, fideicommisum, 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."

It appears to me that in terms of the provision the rights of a monthly tenant are not terminated by the entering of a decree in the action. All encumbrances not specified in the decree will be wiped away but it is expressly provided that a lease for a period not exceeding one month is not an encumbrance.

The rights of a person holding a tenancy from the co-owners, therefore will not be wiped away on the entering of an interlocutory decree ordering the sale of the premises but will continue to subsist thereafter. A purchaser at a partition sale really obtains the title of the co-owners

declared in the decree. As the tenant holds under the co-owners whose title the purchaser obtains there does not appear to me to be any reason why the tenant cannot claim to attorn to and become the tenant of the purchaser. Without doubt he can claim to be the statutory tenant of the premises under the purchaser as landlord within the meaning of the Rent Restriction Act.

The 5th defendant had come on the premises as tenant of the 2nd defendant who was one of the three co-owners of it. In the same way as a person who has no title to the premises may let it if he can put the tenant in occupation a co-owner may let the entirety of the co-owned premises and as between himself and the tenant there will be a letting of the whole premises but the tenant will not be able to assert rights of tenancy in respect of the shares of the other co-owners as against them unless they have acquiesced in the letting or are otherwise bound by it. The appellants have obtained no finding from the trial court that by reason of acquiescence or otherwise the 5th defendant-appellant was the tenant of the other two co-owners. Their rights must therefore be decided on the footing that the 5th defendant was the tenant of one co-owner alone.

Can a person who is the tenant of one co-owner alone claim to be the tenant of the premises against the purchaser at a partition sale ? At the most his rights of tenancy prior to the sale would have been in respect of the undivided share which the co-owner who gave him the tenancy had owned. The matter may be resolved by examining the nature of the co-ownership or community of property. *Communio* or community of property has been defined as a *jus in re* belonging to two or more persons over the same thing or things—vide Grotius 3—28—1. A co-owner has the right to compel a division of the common property—*in communione vel societate nemo compellitur invitus detineri* (Van Leeuwen's Censura Forensis 1—4—27—1). Where property could not be divided without injury or if partition was impossible or inexpedient the law permitted a sale of it, among the co-owners for preference—*vide* Jayewardene on Partition XXI. As a tenant's rights are derived from and dependent on the title of the person from whom he gets his tenancy, the rights of a tenant under one co-owner are subject to the prior right of the other co-owners to compel a division of the property by partition or sale.

Where there is a partition his rights will be restricted to the divided portion obtained by the co-owner who gave him the tenancy. As he had from that co-owner a tenancy of the entire premises he may elect to continue as tenant of a part. Where there is a sale, however, a sale subject to a tenancy in respect of an undivided share will depress the price that may be realized and thus adversely affect the other co-owners who have rights prior to that of the tenant. The latter's right, if any, must, therefore, in my view, be restricted to the share in the proceeds of sale to which the co-owner who let to him will become entitled.

In *Ceylon Theatres Ltd. v. Cinemas Ltd.* [1] the Privy Council held that land may be sold under the Partition Act subject to a usufruct in respect of an undivided share. An usufruct is a real right or a *jus in re*. As a co-owner may dispose of his undivided share so he may transfer or alienate a lesser right and the purchaser or alience may assert his rights against the other co-owners. But the rights of a tenant are subordinate to and dependent on the right of the person who lets to him.

I hold that the appellants' claim that the 5th defendant-appellant was either the tenant or the statutory tenant of the purchaser fails. I would therefore dismiss the appeal with costs.

DE KRETSER, J.—

I have the advantage of having read the judgments prepared by My Lord the Chief Justice and my brother Sirimane. I agree that the order of the District Judge allowing the application for a writ of possession should be affirmed and this appeal dismissed with costs.

The 2nd Defendant who was a co-owner together with the Plaintiff and the 1st Defendant of No. 58 Brownrigg Street, Kandy which is a business premises subject to rent control, had without their consent let it to the Petitioner Appellant whom I shall refer to for the rest of this order as the tenant.

The 2nd Defendant in so doing, had done something which he had no right to do as a co-owner for, as Dias J. with whom Basnayake J. agreed in *Vaz v. Haniffa* [2] said :

> "To enter into a lease in regard to the *whole* property is not one of the things a co-owner can do."

In that case, Dias J. referred to *Vanderlan v. Vanderlan* [3] in which Howard C. J. and Soertsz J. discussed the rights of co-owners to deal with the undivided property.

That if a co-owner lets the *whole* premises without the consent of the other co-owners the tenant in so far as the other co-owners are concerned is a trespasser, and those co-owners have a right to eject him was the decision in *Kalpage v. L. A. Gunawardene* [4]. The fact that the premises were rent controlled made no difference to the position was also decided in that case. Tambiah J. who wrote the judgment with which Sri Skandarajah J. agreed, pointed out that in *Britto v. Heenatigala* [5] Gratiaen J. had agreed "with the contention that it would be quite wrong to include within the definition of a landlord any person other than the original Lessor or some other person who derives his title from the original Lessor."

[1] *(1968) 70 N. L. R. 337.*
[2] *(1948) 49 N. L. R. 286.*
[3] *(1940) 41 N. L. R. 548.*
[4] *(1964) 66 N. L. R. 302.*
[5] *(1956) 57 N. L. R. 330.*

It was also in *Britto v. Heenatigala* that Gratiaen J. pointed out that the title a purchaser obtained at a sale of co-owned property ordered under the Partition Act is, in truth, a title derived from persons declared to be co-owners of the property. If therefore they had been the tenant's "landlords" within the meaning of the Rent Restriction Act, their statutory status was transferred to the purchaser by operation of law.

It is for that reason that when *all* the co-owners have let to a tenant the purchaser at a partition sale who takes their place as the statutory landlord cannot eject their tenant who is now deemed his tenant.

It will then be seen why when Premises No. 58 Brownrigg Street, Kandy, was sold as decreed in this partition case and bought by Marikar, the tenant does not have the protection of Section 13 of the Rent Restriction Act when Marikar seeks to have him ejected, for to Marikar had passed the rights of co-owners who were not the contractual landlords of the tenant and therefore could not have been his statutory landlords in terms of the Act.

A co-owner is entitled to let his undivided share of the common property. I agree with Sirimane J. that the other co-owners may not be entitled to eject the person who is on the common property by virtue of such a contract. The practical result of such a contract may be that much to the chagrin of the other co-owners who do not want to occupy the premises with him in the exercise of their own rights as co-owners that "the tenant" enjoys the whole premises, but it does not mean that that gives him the protection of the Rent Restriction Act even against the co-owner who let him into the premises by letting to him a fractional share, for the Rent Restriction Act does not apply to a letting of a fractional share of a premises.

Where a sale under the Partition Act has taken place, the co-ownership in consequence of which he got into the premises and his contractual right in respect of the fractional share, are at an end. It follows that he has no protection against the purchaser who wants him out of the premises.

Apropos Section 48 of the Partition Act, assuming that a monthly tenancy is an encumbrance that has to be specified in the decree if it is to survive, in my opinion the failure to have it specified will not deprive the tenant of rent controlled premises of the protection given by the Rent Restriction Act which is given "notwithstanding anything in any other law".

The drafting and the punctuation of Section 48 Sub-Section 3 are such that it does not appear to me that it is impossible to say that when the draftsman attempts to set out what an encumbrance means, he does not intend to convey that a lease at will or for a period not exceeding a month did not fall within that meaning. It appears to me that the words

"except a constructive or charitable trust" appearing after the words "any interest whatsoever howsoever arising" might well have been intended to be read only with these words. So read, within the meaning of the word encumbrance would also be :—

(1) Any interest whatsoever howsoever arising except a constructive or charitable trust.

(2) A lease at will or for one month.

(3) The rights of a proprietor of a Nindagama.

The fact that Section 54 makes provision for the protection of the rights of the proprietor of a nindagama when there is a partition of a "panguwa", may possibly be a pointer to the fact that when the corpus sought to be partitioned is not a "panguwa" or of lands in it, there is need for a nindagama proprietor to have his rights conserved in the decree. If the interpretation that the rights of a nindagama proprietor are an interest in land which will not be wiped out on the entering of a decree as they are not an encumbrance is correct, then there seems to be no need to enact in Section 54 (2) that those rights are not affected by the partition of a "panguwa".

In regard to a lease at will, it appears so extraordinary that it should not be wiped out on the entering of a decree whereas a formal lease would suffer that fate that it may be a pointer that that was not the intention of the legislature in regard to leases at will.

While I find the construction of Section 48 set out above by no means unattractive, the fact that the legislature clearly intended that there should be interests in land which were not to be considered encumbrances as it wanted encumbrances understood when it referred to the wiping out of all encumbrances other than those specified in the decree, makes me prefer the construction that a lease at will and the rights of a nindagama proprietor share the distinction undoubtedly enjoyed by a constructive trust of being interests in land which are not encumbrances for the purposes of Section 48.

I agree with Sirimane J. that no useful purpose is served in speculating as to why the legislature made a monthly tenancy such an interest, and share his view that a constructive or charitable trust, a lease at will or for one month, and the rights of a proprietor of a nindagama are unaffected by a decree under Section 48, whether those rights are specified in the decree or not. Nothing in Section 48 precludes a Court from specifying in its decree that a monthly tenancy or a charitable trust attaches to certain shares, and in my opinion a Court should do so where it becomes aware of their existence in the course of a trial.

WIJAYATILAKE, J.—

I have had the advantage of perusing the judgments of My Lord the Chief Justice and my brother Sirimane J. With great respect I agree with the principle set out that in circumstances where there is proof of a valid renting out of the entirety of the premises to which the Rent Restriction Act applies, a sale under the Partition Act does not wipe out rights of the tenant.

I agree that when premises to which the Rent Restriction Act applies are let in their entirety by one co-owner and the other co-owners acquiesce in the letting and in the receipt of rent by the person letting the premises S. 13 of the Rent Restriction Act protects the tenant against ejectment at the instance of any of the co-owners ; and the purchaser of the premises at a sale in a Partition Action is not entitled to eject such tenant except upon grounds permitted by S. 13 of the Act. However, I am unable to agree with the submission that there has been any acquiescence as such in the letting of the premises in question by the other two co-owners. The learned District Judge observes that the plaintiff and the 1st defendant who were the other co-owners were aware that the premises had been rented out by the 2nd defendant, but that they themselves had not accepted the 5th defendant as a tenant. Having made this observation the learned District Judge categorically holds that the 5th defendant is in occupation as a tenant of the 2nd defendant only ; and the 6th defendant is not a tenant even of the 2nd defendant. Furthermore, even in the petition of appeal the appellants do not allege that there was "acquiescence". It is also significant that the Action for a sale under the Partition Act was filed in 1960 and the letting out by the 2nd defendant was in 1962. This again shows that the feelings between these co-owners must have been strained and the 2nd defendant was acting not as an agent of the other co-owners or with their acquiescence but in defiance of the other co-owners. In the circumstances, I do not think we can accept the position that there has been an "acquiescence" on the part of the plaintiff and the 1st defendant.

"Premises" in the Rent Restriction Act (10 of 1961) mean any building or part of a building together with the land appertaining thereto. It is quite clear that this definition would not include an undivided share or an undefined portion of a building, vide *Premadasa v. Attapathu* [1], *Padmanaba v. Jayasekera* [2]. Thus the Rent Restriction Act will not afford any defence to a proceeding for possession of the premises in question, as the 2nd defendant could have validly dealt with only an undivided share.

With respect I agree that the Order of the District Judge allowing the Application for a Writ of possession should be affirmed and the appeal dismissed with costs.

Appeal dismissed.

[1] *(1968) 71 N. L. R. 62.*

[2] *(1969) 72 N. L. R. 132.*