[FULL BENCH.]

Present: Ennis, Shaw, and De Sampayo JJ.

SAMARAWEERA *v.* CUNJI MOOSA *et al.*

258—D. C. Colombo, 39,233.

Partition Ordinance, 1863—Is lease an encumbrance?—Sales under the Partition Ordinance are not subject to leases.

Held, per SHAW J. and DE SAMPAYO J. (*dissentiente* ENNIS J.).—Sale under the Partition Ordinance is not subject to any leases affecting the property. A lease is not an encumbrance within the meaning of the Partition Ordinance.

Peiris v. Peiris [1] followed. *Silva v. Soysa* [2] commented upon.

THE facts of this case are stated by Shaw J. as follows:—

In the year 1898 one Ahamadu Lebbe Marikar, who was entitled jointly with others to certain premises in the Pettah, by deed No. 9,794 purported to lease the entirety to one Sinna Lebbe Marikar for a term of thirty years. In December, 1911, a suit, No. 33,579, was instituted by one of the joint owners for partition of the premises. The assignees of the lease were not made parties to the suit. On May 12, 1913, the District Judge, by final decree, settled the interests of the parties to the suit, alloting to P. B. M. Saibo, the successor to the interest of Ahamadu Lebbe Marikar, three-fourths of the property, "subject to the lease of September 1, 1898," and ordered that the premises should be sold, and the proceeds distributed among the parties to the suit in accordance with the shares stated in the decree.

The property was accordingly sold on September 12, 1913, one of the conditions of sale being that the purchaser should receive possession on payment of the purchase price; and it was purchased by P. Cunji Moosa, the first defendant in the present action.

On October 23, 1913, the assignee of the lease moved for a notice on the parties to the partition suit to show cause why they should not be allowed to intervene in the suit, to enable them to establish their claim to the leasehold interest; but the Judge refused the application on two grounds, the first being that the application for intervention was too late, and the second that the case of *Silva v. Soysa* [2] decides that a sale under the Partition Ordinance is subject to subsisting leases, and therefore a lessee has no right to share in the proceeds of sale.

The plaintiff has acquired the interests of certain assignees of the lease, and has brought the present action against the purchasers

[1] *(1906) 9 N. L. R. 281.* [2] *(1913) 17 N. L. R. 67.*

under the sale in the partition suit, claiming a declaration that he is entitled to three-eighths of the premises under the lease from Ahamadu Lebbe Marikar. The District Judge has made the declaration asked for, and from his decision the present appeal is brought.

Bawa, K.C. (with him *Koch* and *Santoni*), for the defendants appellants.—The lease was not conserved by the decree in case No. 33,579, District Court, Colombo, and therefore the purchaser at the sale under the partition decree (33,579) was not bound by the lease. The decision of the Full Court in *Peiris v. Peiris*[1] is binding on this Court. The decision in *Silva v. Soysa*[2] is *obiter*, as the Judges were agreed that the appeal in that case must be decided on other grounds. See *18 Halsbury 210.*

In *Peiris v. Peiris*[1] the point whether a lease was an incumbrance was directly at issue, and the Court held that it was not. The point involved in this case is whether a lessee could be made a party to a partition suit. The lessee opposed the application to make him a party on the ground that the lease would remain in force in spite of the sale, and that he was not interested in the distribution of the proceeds of the sale. The Full Court held that the lease would be avoided by the sale, as the lease was not an incumbrance.

Section 8 of the Partition Ordinance enacts that the Commissioner shall proceed to sell the "whole" of the property; that includes the lease. The word "incumbrance" in section 8 must be given a meaning *ejusdem generis* with mortgage. It was held in *Girigoris v. Meedin*[3] that a right of way not expressly reserved is extinguished by the partition decree.

Allan Drieberg (with him *Bartholomeusz*), for the plaintiff, respondent.—It was held by the Full Court in *Silva v. Soysa*[2] that the decision in *Peiris v. Peiris*,[1] that a lease was not an incumbrance, was an *obiter dictum*. *Peiris v. Peiris*[1] has an interpretation by the Full Bench, and must be accepted. See *Raheem v. Yoosoof Lebbe*,[4] *Appusinno v. Grigoris*.[5] A lease is an incumbrance, see *Stroud's Judical Dictionary*.

Bawá, K.C., in reply.

Cur. adv. vult.

October 19, 1915. ENNIS J.—

This case raises the question as to rights of a lessee when a sale has been ordered under the Partition Ordinance. The plaintiff sued to be declared entitled, under a sub-lease from one of the previous co-owners, to possess an undivided three-eighths of the land purchased by the defendants on a sale under the Partition

[1] *(1906) 9 N. L. R. 231.*
[2] *(1913) 17 N. L. R. 67.*
[3] *1 Bal. 177.*
[4] *6 N. L. R. 169.*
[5] *(1914) 3 Bal.'s Notes of Cases 20.*

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Ordinance. The learned District Judge held that the decree in the partition case expressly conserved the rights of the lessee, which were accordingly not affected by the sale, and he decreed in favour of the plaintiff. The defendants appeal from this decree. On the appeal two points were argued, (1) whether the decree conserved the rights of the lessee, and (2) whether a sale under the Partition Ordinance is subject to leases.

On the first point the learned Judge interpreted his own decree, so there is no doubt as to his intention, but the decree itself is so worded that the premises ordered to be sold were the whole land, without any reservation of the lease. The reservation is contained merely in the shares of the parties.

The second point turns on the question whether a lease is an incumbrance within the meaning of section 8 of the Partition Ordinance. I have already signified my opinion on the point in *Silva v. Soysa*,[1] where I was in entire agreement with my late brother Pereira, to whose views I can add very little. The word "incumbrance" is not found in Roman-Dutch law. A lease is an incumbrance in English law if a vendor has contracted to give vacant possession (*vide Stroud's Judicial Dictionary*). Under Roman-Dutch law a vendor is required to give vacant possession, and, as observed by Pereira J., a lease in Ceylon in the usual terms cannot but be regarded as an incumbrance, and I see no reason to interpret the expression as used in the Partition Ordinance in any other way.

It was urged, however, on this appeal that the decisions in *Silva v. Soysa*[1] on the two points, (1) that the opinion expressed in the earlier case of *Peiris v. Peiris*[2] was *obiter*, and (2) that a lease is an incumbrance, are themselves *obiter*. Inasmuch as a decision on these points was not necessary for the determination of the appeal, for it was agreed that in any event the appeal in *Silva v. Soysa*[1] must be dismissed, I am of opinion that the contention is right, and that the opinion in *Silva v. Soysa*[1] is not a binding authority. It remains to consider again whether *Peiris v. Peiris*[2] is a binding authority for the proposition that a lease is not an incumbrance. I am of opinion that the decision on the point was no more necessary in *Peiris v. Peiris*[2] than in *Silva v. Soysa*.[1] In *Peiris v. Peiris*[2] it would seem that the lessee filed a statement of their claim and were joined as parties. An order was made for the sale of the land "free of the lease," and from the order one of the lessees appealed. On the appeal the points for determination were whether the lessees were properly made parties, and whether the Court could extinguish the lease and order a sale free of it. Wendt J. held "it was prudent and right to bring the lessees in as parties," and, on the second point, "that the Court should have power to order the land to be sold free of the lease is only reasonably necessary

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

[2] *(1913) 17 N. L. R. 67.*

for effectually carrying out the object of the Partition Ordinance." Middleton J. held that the lessees could not "complain of expropriation by the Court, when, if they had no notice, their rights under the lease could be swept away by an order for sale under section 9." Wood Renton J. agreed with the reasoning and conclusion of Middleton J., and thought that the lessees must be taken to have entered into the lease "subject to the common law right of one co-owner to compel a partition with the incidental possibility of a sale being ordered by the Court." He added briefly an expression of opinion that a lease did not come under the term "incumbrance" in the Ordinance. It is clear, in my opinion, that the point determined by *Peiris v. Peiris*[1] was that the Court had the power to expropriate a lease, and not that an order for sale under the Partition Ordinance extinguished a lease. The conclusion arrived at by Wendt J. that such a power was reasonably necessary for effectively carrying out the object of the Ordinance must have been the same, whether or not a lease were an incumbrance. All the Judges in that case expressed opinions that a lease was not an incumbrance, but these opinions were not necessary to the decision of the points before the Court. Middleton J. expressed the opinion merely to show that the appellant had no cause to complain of such an expropriation, while Wood Renton J. expressed the opinion as an addition to his judgment. I entirely agree with Pereira J. in *Silva v. Soysa*,[2] that there can be no objection to a lessee being made a party to the action, or to his rights being adjudicated upon and a suitable order made with reference to them. Section 18 of the Civil Procedure Code, with the reasonable necessity arising from the object of the Ordinance, is a sufficient authority for such a course. Neither case, in my opinion, is a binding authority for or against the appellant's contention, and for the reasons I have already given, I am of opinion that such a sale under the Partition Ordinance is subject to existing leases, unless it is expressly declared to be free of them.

I would dismiss the appeal with costs.

SHAW J.—

[His Lordship stated the facts, and continued]:—

The question whether the sale under the Partition Ordinance is subject to any leases affecting the property has been the subject of considerable judicial controversy. In *Peiris v. Peiris*[1] the Full Court unanimously expressed an opinion that it is not, whilst the majority of the Full Court (Pereira and Ennis JJ., De Sampayo J. dissenting) in *Silva v. Soysa*[2] held that the word "incumbrance" in section 8 of the Partition Ordinance includes a lease, and therefore when lands are sold under the Ordinance the sale is subject to

[1] (1906) 9 *N. L. R.* 231. [2] (1913) 17 *N. L. R.* 67.

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existing leases. The majority of the Court in this case considered that the opinion expressed by the Full Court in *Peiris v. Peiris* [1] was not binding upon it, as being not necessary for the decision of that case.

It is clear that the expression of opinion of the majority of the Court in *Silva v. Soysa* [2] are themselves *obiter*, for it was admitted by all the members of the Court that the appeal in that case must be dismissed on other grounds; the question therefore is still open to us to consider whether the expressions of opinions in *Peiris v. Peiris* [1] are *obiter dicta*, and if so whether we agree with them or not. I am clearly of opinion that they were not, and that the decision of the Court in that case, that a sale under the Partition Ordinance is free from existing leases, was necessary for the decision of the appeal before the Court, and the decision is, under the well-established practice of this Court, binding upon us until altered by the Legislature or by a decision of His Majesty in Council.

In the case under consideration certain persons who held a lease over the property the subject of the partition suit had been added as parties, in order that they might participate in the proceeds of the sale of the property, on the ground that their lease would be avoided by the sale. The appellant, one of the added parties lessees, objected, and appealed against the order adding him, on the ground that his lease would remain in force after the sale of the property, because it was an incumbrance within the meaning of section 8 of the Ordinance, and that he was therefore not interested in the distribution of the proceeds of the sale, and therefore not a necessary party to the suit. The Court, however, held that he must be joined as a party because the lease would be avoided by the sale, and his only remedy was against the purchase money.

This seems to me to be a direct decision on the point in issue in this case, and being a decision of the Full Court it is binding upon us. I shall therefore not enter into the unprofitable discussion whether I should or should not have arrived at the same conclusion if the matter had been *res integra*. I would allow the appeal, with costs.

DE SAMPAYO J.—

This case was referred to a bench of three Judges, in view of the conflicting decisions in *Peiris v. Peiris* [1] and *Silva v. Soysa*.[2] Both these are Full-Court decisions, and the questions are whether either and which of them is a binding decision on the point involved in this case, and if neither of them is, whether a lease is an incumbrance within the meaning of section 8 of the Partition Ordinance and continues to subsist notwithstanding a sale of the land by the decree of Court under the Ordinance. I agree with the rest of the

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

[2] *(1913) 17 N. L. R. 67.*

Court that the opinions of the Judges in *Silva v. Soysa* [1] are *obiter dicta*. As regards the decision in *Peiris v. Peiris*,[2] I have in my judgment in *Silva v. Soysa* [1] stated my reasons for thinking that the *ratio decidendi* of *Peiris v. Peiris* [2] is that a lease is not an "incumbrance" within the meaning of the Partition Ordinance, but only creates an interest in the land, which must be claimed in time in the partition action at the risk of the lessee losing it for ever, and that therefore *Peiris v. Peiris* [2] is a binding decision, and cannot be reviewed by the Supreme Court, however constituted. The argument of the present appeal has not induced me to take a different view. Moreover, if the question is still open, I may say, for the reasons which I have given in the same judgment, and to which I have nothing to add, I am of the same opinion as the learned Judges who decided *Peiris v. Peiris*[2] were, and think that, when the land is sold under a decree, a 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 his lessor.

I agree with my brother Shaw that this appeal should be allowed, and the plaintiff's action dismissed with costs in both Courts.

Appeal allowed.