

1943

*Present : Soertsz and Hearne JJ.*CEYLON THEATRES, Appellants, and DOMBAL *et al.*, Respondents.

62—D. C. Colombo, 9,611.

*Administration—Sale of business—Sanction of Court—Right of purchaser to be heard.*

Where an inquiry is being held by a Judge in administration proceedings to consider whether he should or should not sanction the sale of a business, the intending purchaser should not be allowed as of right to be heard.

Where, however, the sale had taken place by agreement as to price and the purchaser had been placed in charge of the business, pending the sanction of Court, the purchaser may be heard in support of a completed sale he was advancing.

**A** PPEAL from an order of the District Judge of Colombo.

*H. V. Perera, K.C.* (with him *N. Nadarajah, K.C.*, and *H. W. Jayewardene*), for appellant and applicant in revision.

*F. C. W. VanGeyzel* for first respondent.

*S. J. V. Chelvanayagam* (with him *E. B. Wickremanayake*) for second and third respondents.

*E. F. N. Gratiaen* (with him *D. W. Fernando*) for fourth respondent.

*Cur. adv. vult.*

November 26, 1943. SOERTSZ J.—

The material facts necessary for answering the questions raised on the appeal, and on the petition for revision before us may be stated briefly thus:

Lancelot de Dombal died intestate leaving as his heirs his widow the 1st respondent and two minor children, the 2nd and 3rd respondents, both of whom were represented in the testamentary action by a guardian *ad litem*. The principal asset of the deceased's estate appears to be a cinema business, with all its appurtenances, known as The Gintupitiya Talkies, valued in the inventory at Rs. 26,763.

This business was carried on, on premises vested in the trustee of a Hindu Temple, which premises had, by the Trustee, been leased to one W. C. Brodie. The deceased was Brodie's tenant. Brodie's lease has a short period yet to run, and he is under covenant not to sub-lease these premises without the consent of the Trustee his rentor. Brodie is a creditor of the estate of the deceased.

The widow is the administratrix of the estate. In the course of administration, she decided to sell this business, and her proctors negotiated for that purpose and found purchasers, namely, The Ceylon Theatres Ltd., who were willing to pay Rs. 90,000 for it. The Administratrix was prepared to accept this offer but with the reservation that the sanction of the Court should be obtained for her final acceptance of it. Both she and her proctors appear to have thought that the sanction of the Court would be given for the asking, and so informed The Ceylon Theatres;

Ltd. In that view of the matter they paid the sum of Rs. 90,000 to the proctors for the administratrix and she agreed that the Ceylon Theatres should carry on the business pending the sanction of the Court. When the offer was brought to the notice of the Court, it very properly intimated to the administratrix that it would sanction the sale provided the guardian *ad litem* agreed to it. This the guardian *ad litem* was unwilling to do, for he was of opinion—and he was quite competent to form an opinion on that matter—that the business was worth more. He looked about for another purchaser and found one C. C. Roche who was prepared to pay Rs. 110,000 and he announced this fact to the Court. The Court was disposed to sanction this sale, but the Ceylon Theatres sought to intervene at this stage, and filed petition and affidavit stating certain grounds upon which they claimed that a sale had already taken place and that conveyance should be made to them and not to Roche.

On September 2, 1943, the Judge made order disallowing the application of Ceylon Theatres, Ltd., to intervene and also disallowing an application made on behalf of Roche for a direction to the administratrix to convey to him, but sanctioning the sale to Roche and directing that the Rs. 110,000 be deposited in Court on September 3, 1943. But on September 2 itself, the Rs. 110,000 was paid into Court and the Judge directed that "the money must be deposited to the credit of the Estate. It will not be drawn upon for any purposes connected with the administration until and unless the assignment goes through". On that day, the Ceylon Theatres filed the appeal now before us.

On September 23, 1943, the administratrix made an affidavit declaring that there were certain difficulties encountered by her in and about giving Roche a conveyance of the business and possession of it and she asked for directions. This matter came up for inquiry on October 9, 1943. On that date, Counsel appearing for the administratrix stated that Ceylon Theatres, Ltd., were prepared to increase their offer to Rs. 100,000.

The result of the inquiry was that Roche agreed to take a conveyance of all the right, title, and interest of the administratrix in the machinery and the business of the Gintupitiya Talkies and to be content with such possession as the administratrix had, and to indemnify the administratrix against any claims made by Brodie and one Tampoe with the latter of whom there was in existence a contract for the supply of films. Order was made accordingly. On this occasion too the Ceylon Theatres sought to intervene but were not allowed to do so. They then moved that the Court do direct that all proceedings relating to the matter of the sale that had been sanctioned be stayed pending the decision of the appeal they had taken against the order of September 2, 1943. The application was refused. They then moved this Court in revision and obtained a stay of the sale on terms.

The questions that arise upon the facts I have stated are:

(a) Had the appellants a right to be added as parties under section 18 of the Civil Procedure Code and to be heard before the Court made an order regarding the sale of this business?

(b) If they had, what order should be made by us in the matter?

On the first question I should have been disposed to uphold the order made by the trial Judge that "any intending purchaser should not be allowed *as of right* to be heard at an inquiry" that is being held by the Judge in order to consider whether he should or should not sanction a sale for which an administratrix is seeking his sanction. Mr. Perera's submission on behalf of the appellant was that they were entitled to be heard because they were contending (a) that a sale to them took place when they paid the price agreed upon between them and the administratrix and when they were put in charge of the business and were, thereby, enabled to conduct it; (b) that even if that contention failed, they were entitled to preference and to be given an opportunity to object to the proposed sale to the 4th respondent or, alternatively to ask that the business be sold to them at the price offered by the 4th respondent. In the circumstances of this case, I am inclined to agree with the first of these contentions that the appellants should have been heard in support of the case of a completed sale that they were advancing, but I am quite unable to entertain Mr. Perera's other submissions.

In this view of the matter, ordinarily the case would have had to go back for the Ceylon Theatres, Ltd. to be made added parties and to be heard on the question indicated, but in this instance it seems clear from the proceedings that the trial Court while professing not to give the Ceylon Theatres, Ltd. and Roche any hearing on the question before it, was in effect hearing them and that the order appealed from was made with full knowledge of the relevant facts. Be that as it may, we are now in full possession of all the facts and can deal with the matter ourselves without sending the case back and so involving the testamentary proceedings in further delay.

I am unable to take the view that a valid sale to the Ceylon Theatres, Ltd. had taken place when the administratrix went before the Court. It may be that it was competent for the administratrix to sell this business directly without seeking the sanction of the Court. But she did not take the course, perhaps, because there were minors concerned. She made it quite clear to the Ceylon Theatres, Ltd., that the sale must depend on the Court's sanction of it and they agreed to it. Whatever sanguine expectation the parties entertained in regard to that matter, they entertained at their peril, and they cannot be heard to say that the payment made and the possession given were sufficient to compel the sanction of the Court. The guardian *ad litem* of the minors was entitled to do what he did, and once a better offer was before the Court, it was the duty of the Court, in the interests of the minors, to prefer it. And it did. It sanctioned that sale. Such reservations as there were in that offer when it was first made have now been withdrawn and the sale will be on the terms laid down by the Court in the final order made by it.

In passing, I would observe that the appellants had an opportunity to raise the offer it had made before the sale to the 4th respondent was sanctioned. They did not choose to take it. After that sale had been sanctioned, they made an offer of Rs. 100,000. Not only was that too late, but its acceptance would have meant a loss to the estate of Rs. 10,000, half of which the minors would have to bear.

For these reasons, I do not find any occasion to interfere with the directions given by the trial Judge. I dismiss the appeal. The proceedings in revision were only ancillary to the appeal and no order is now necessary in regard to them. The appellants and the 4th respondent will bear their own costs. The costs of the minors and of the administratrix will come out of the estate. The sum of Rs. 90,000, if it is in deposit in Court, will be paid out to the appellants with such interest, if any, as might have accrued to it.

HEARNE J.—I agree.

*Appeal dismissed.*

