

UNIVERSITY OF LONDON  
INSTITUTE OF JURISPRUDENCE  
16 JAN 1969

1.

IN THE PRIVY COUNCIL

No. 27 of 1967

ON APPEAL FROM THE COURT OF APPEAL  
OF GUYANA

B E T W E E N :

A.P. SINGH Appellant

- and -

INA MORTIMER, widow,  
individually and in  
her capacity as  
Administratrix of the  
Estate of Dixie  
Fleetwood Mortimer,  
deceased

Respondent

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CASE FOR THE APPELLANT

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1. This is an appeal from the judgment of the Court of Appeal Guyana, (Stoby, Ch., Persaud and Cummings, J.J.) dated the 28th October, 1966 which had, by a majority, dismissed the Appellant's appeal from a judgment of the High Court (Bollers J.) dated the 10th December, 1965 which had dismissed the Appellant's claim that he was entitled to specific performance of an agreement to transfer to him an undivided half-share in Plantation Endeavour, Hogg Island, in the County of Essequibo and consequential relief.

2. The relevant legislation is:-

Civil Law of British Guiana Ordinance.  
(Chapter 2)

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3. From and after the date aforesaid 1st January 1917 save as provided by any Act of the Imperial Parliament now or hereafter applying to the Colony, or by any Order of Her Majesty in Council, or by this Ordinance, or by any other Ordinance of the

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Legislative Council now or at any time hereafter in force, or by any order of the Governor in Council made in pursuance of any statute, or of any other lawful authority, -

(A) the law of the Colony relating to . . . immovable or real property and chattels real, and all matters relating to any of the aforesaid subjects, and the law of the Colony relating to all other matters whatsoever, . . . , shall cease to be Roman-Dutch law and as regards all matters arising and all rights acquired or accruing after the date aforesaid, the Roman-Dutch law shall cease to apply to the Colony; 10

(B) the common law of the Colony shall be the common law of England as at the date aforesaid including therewith the doctrines of equity . . . . ,

(C) the English common law of real property shall not apply to immovable property in the Colony; 20

(D) there shall be as heretofore one common law for both immovable and movable property, and all questions relating to immovable property within the Colony and to movable property subject to the law of the Colony shall be adjudged, determined, construed and enforced, as far as possible, according to the principles of the common law of England applicable to personal property Provided that - 30

(a) immovable property may be held as heretofore in full ownership, which shall be the only ownership of immovable property recognised by the common law and shall not be subject to any rules of succession by primogeniture or preference of males to females, or to any other incident attached to land tenure or to estates in land in England and not attached to personal property in England, 40

(b) the law and practice relating to

conventional mortgages or hypothecs of movable or immovable property, and to easements, profits a prendre, or real servitudes, and the right of opposition in the case of both transport and mortgages, shall be the law and practice now administered in those matters by the Supreme Court;

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(c) the relief by judgment for specific performance shall be granted in the case of immovable property on the same principles on which it is granted in England in the case of contracts relating to land or to interests in land; . . . .

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3. By his amended Statement of Claim delivered the 7th August 1964 the Appellant stated that on the 13th September 1963 he had objected to the Respondent publicly transferring to herself personally and to her children title to an undivided half-share in Plantation Endeavour, of 118 acres, on Hogg Island in Essequibo county, on the ground that the Respondent was the widow and administratrix of Dixie Fleetwood Mortimer (hereinafter called "the deceased"), who had died on the 17th December 1961 intestate, and that during the lifetime of the deceased the Appellant had entered into a written agreement dated the 26th July 1961 with the deceased and his sister Hannah de Camp to purchase the whole of Plantation Endeavour for \$2.500, of which \$100 had been paid on the 26th July 1961, and \$5 paid to the Respondent in 1962. The Respondent had been asked, by solicitors letters, to transfer the half-share belonging to the deceased to the Appellant but had failed to do so, and the Appellant claimed specific performance of the written agreement by transfer to him of an undivided half-share for \$1.250, or damages of \$5.000, and consequential relief.

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4. The Defence, dated the 10th May 1965, denied the Appellants claim; it alleged that Hannah de Camp never signed the said written agreement which was not a sufficient memorandum in writing; at the date of the agreement Hannah de Camp was dead and the agreement was a nullity; the

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agreement had purported to be for the sale of the whole plantation by Hannah de Camp and the deceased jointly, and the Appellant was not entitled to divide the land or the purchase price for the purposes of this action; the Respondent was prepared to repay the sums of \$100 and \$5.

5. The hearing of the action took place before Bollers J. in the High Court of Guyana between the 14th and 16th November 1965.

The Appellant gave evidence and produced the agreement of the 26th July 1961; it had been signed by himself and the deceased, whom he had known, but not by Hannah de Camp, who was unknown to him; the deceased had said that he and his sister had borrowed money from the Mr. Yhap mentioned in the agreement, and the Appellant had agreed to repay it if necessary; the \$100 had been paid on the signing, and he had paid \$5 to the Respondent, who had given him a receipt; the Respondent had on the 31st August 1963 advertised the transport of an undivided half-share of the Plantation from the estate of the deceased to herself, and he had opposed that transport, and had earlier, through his solicitors, called upon her to transfer the half-share to him pursuant to the agreement. In 1962 the land would have been worth about \$400 an acre. He also produced a transport, no. 675 of 1957, whereby the High Court had confirmed the title of Hannah de Camp and the deceased to Plantation Endeavour in 1957, on which was endorsed the transfer of the half-share of Hannah de Camp to her children on the 18th February 1963. The Appellant also produced the death certificate of Hannah de Camp, recording her death from senile debility at East Canje, Berbice, on the 23rd February 1960.

No other evidence was called.

6. Bollers J. gave judgment on the 10th December 1965 dismissing the action.

He detailed the facts given in evidence, which had not been challenged. It had been argued for the Respondent that the agreement had

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never been completed and was a nullity as its language showed an expectation that Hannah de Camp would sign it as well; on the other side it had been argued that as each owner owned separately an undivided half-share, the proper meaning of the agreement was that the deceased was selling his half-share, and, on established authority, the Appellant was entitled to specific performance in respect of that half-share at a reduced price. 10 The learned trial judge held that, as the agreement concerned the sale of land, he could not look outside, even to see what interest the deceased and his sister had had in the land. He concluded from the agreement itself that it had been intended to sell the whole Plantation on behalf of the deceased and Hannah de Camp jointly; the inference was that the signatories were not aware of the death of Hannah de Camp and expected her to sign later, and the contract 20 therefore remained incomplete.

The learned trial judge held that there had been a want of mutuality which in equity prevented a decree of specific performance. On the assumption that he could consider the transport of the property in 1957 to the deceased and Hannah de Camp, the Appellant was not entitled to succeed on the principle of Mortlock v. Butler (1804) 10 Ves. 315, since he had not represented himself as the owner of the whole property, nor 30 had he purported to sell only his undivided half-share, and there had been no fraud, misrepresentation or mistake. The learned judge held that the deceased and Hannah de Camp were joint tenants, which supported the conclusion that a joint sale of the whole Plantation had been intended, in which event the action failed and must be dismissed with costs.

7. The Appellant appealed to the Court of Appeal (Stoby, Ch. Persaud and Cummings J.J.) and on the 28th October 1966, the appeal was 40 dismissed, Cummings J. dissenting.

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Stoby, Ch., in his judgment first set out the facts; it had been argued for the Appellant that although Hannah de Camp had not signed the agreement there was nevertheless a binding

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contract for the sale of the deceased's share, and reliance had been placed on Basma v. Weekes (1950) A.C. 442. However the question in the present case was whether there was such a contract as that claimed; the evidence supported the conclusion that the only contract intended was one made jointly for the sale of the whole plantation, and it had been argued that the deceased and Hannah de Camp had been joint owners; on the death of one, the title in the whole plantation had passed to the other. This question was one of great importance for the position of such owners had never previously been decided. 10

The learned Chancellor then reviewed at length the position in Guyana of joint owners of real property, and whether they held as joint tenants or tenants in common; he referred to the change in 1917 to English law from the Roman-Dutch system of law effected by the Civil Law Ordinance, and, in particular, the exclusion of English land law by section 3C, and the application of the English law relating to movables to questions relating to immovable property. He held that joint owners of land in Guyana had since 1917 held land as joint tenants, to which was attached the incident of survivorship. However in the present case, the transport to the vendors in 1957 had not specified in what capacity they held it; it had been the common belief in Guyana that there could be no holding of land as joint tenants, and Hannah de Camp's share had been separately transported in 1963; it was clear that the title had been registered as tenants in common, and the Chancellor held that the Plantation had not been held in joint ownership, and that accordingly the appeal must be dismissed. 20 30

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8. Persaud J. in his judgment considered the nature of the ownership of the land by the deceased and Hannah de Camp, and held that there could be either joint tenancies or tenancies in common in Guyana according to the relevant circumstances; in the present case he considered that the land had been held on a tenancy in common. As to the agreement itself, it 40

contemplated that the whole Plantation should be sold, and it was the intention that it should be signed by Hannah de Camp. Since she was dead, the contract had never been completed and there was no liability under it.

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9. Cummings, J. dissented in his judgment. He held that since the conclusion as to the effect of the agreement was to be gathered from inferences drawn from the uncontested primary facts, the appeal court was in as good a position as the trial judge to draw such inferences. Upon his consideration of the agreement and the surrounding circumstances, which he was entitled to take into account, the probability was that the death of Hannah de Camp was known to the deceased when the agreement was signed, and that the deceased had intended subsequently to acquire Hannah's share and transfer that as well as his own to the Appellant; it was important to notice that one of the terms of the written agreement was that transport "was to be advertised and passed as soon as title is acquired by the vendor", which implied that full title had not then been acquired by the vendor.

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The learned judge held that the incidents of co-ownership were the same as they had been under the Roman-Dutch law; the courts and conveyancers had worked on that basis for the last fifty years and knowledge of the unanimous practice must be imputed to the vendors; the learned trial judge had been wrong in holding that they held the land as joint tenants; even if he had been correct, the whole title would have passed to the deceased by 1961. The learned judge of appeal accepted that the deceased had contracted to sell his half-share in the land, and the Appellant was willing to take what he could get, and was entitled to enforce the agreement to that extent, subject to compensation for the difference, on the clear statements of authority approved in Basma v. Weekes (supra). However the Appellant ought not to be granted specific performance, since the written agreement referred to an agreement of sale with Mr. D. Yhap of 22nd June 1957, about which there had been no evidence, and which might be prejudiced. The

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Appellant ought instead to be awarded \$500 damages.

10. The Appellant respectfully submits that the judgments of Stoby, Ch. and Persaud J. ought to be reversed and that he should be granted the decree of specific performance sought in the Statement of Claim.

It is submitted that in considering the true nature of the written agreement of the 26th July 1961, it is proper and necessary to look at the surrounding circumstances, and in particular, at the form of ownership of the Plantation by the deceased and Hannah de Camp resulting from the transport to them of the 19th February 1957. Consideration of that fact would in no way vary the meaning of the agreement but would enable the Court to arrive at a proper understanding of it.

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It is the primary submission of the Appellant that the deceased and Hannah de Camp held the land as tenants in common. The judgment of all the judges in the Court of Appeal are relied upon; they show that since the Civil Law Ordinance of 1917 the unanimous practice and understanding had been that, whatever the true meaning of the Ordinance, land had been transferred to joint owners with the intention that they should hold it in common; this long usage, and the inconvenience otherwise resulting, confirms the interpretation found by the Court of Appeal. If the land was held in common, it is submitted that the purpose and intent of the deceased signing the written agreement was to agree to transfer his interest in the land, namely his undivided half-share. The fact that the Appellant might have no claim against Hannah de Camp in respect of her share ought not to affect the claim in respect of the deceased's share. The fact that the agreement on its face was purporting to transfer the whole plantation ought not to be allowed to defeat the Appellant's claim, upon the authority of the line of cases summarised in Basma v. Weekes (supra).

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11. In the alternative, if, on the true interpretation of the Civil Law Ordinance, the land



was held by the deceased and Hannah de Camp as joint tenants, it follows that on the death of Hannah de Camp in 1960, ownership of the whole passed to the deceased by right of survivorship. When the written agreement was made in 1961, the deceased was entitled to dispose of the whole Plantation; since one half was transported elsewhere in 1963, the Appellant is entitled to the other undivided half claimed by him.

10 12. It is submitted that if the deceased did in fact validly agree to sell his half interest in the land to the Appellant, there are no grounds why the Appellant should not be granted specific performance of that agreement. The only objection specifically given by Cummings J. was that it might prejudice the operation of the agreement with Mr. Yhap referred to in the written agreement. There was no evidence about that agreement, apart from that of the Appellant, and  
20 it is submitted that it was for the Respondent to establish that it would be a valid objection to the grant of specific performance; the Respondent did not seek to discharge that onus.

13. The Appellant therefore respectfully submits that this appeal should be allowed, with costs, that the judgment of the Court of Appeal, Guyana, should be set aside and that he should be granted the decree of specific performance prayed for in the amended Statement of Claim for the  
30 following, among other

#### REASONS

1. BECAUSE Plantation Endeavour had been held by its owners as tenants in common.
2. BECAUSE the deceased agreed to sell his share therein to the Appellant.
3. BECAUSE the true effect of the written agreement was to transfer an undivided half share in the Plantation to the Appellant.
- 40 4. BECAUSE the Appellant is entitled in equity to the decree of specific performance claimed.

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5. BECAUSE even if the Plantation was held by the owners as joint tenants, the Appellant is entitled to the relief claimed.
6. BECAUSE of the other reasons in the judgment of Cummings J. relating to whether the Appellant had a good cause of action.

MERVYN HEALD.

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C A S E

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