

KARUNASIRI
v.
RATNASIRI PERERA

SUPREME COURT
DHEERARATNE, J.,
PERERA, J.,
GUNAWARDENA, J.
SC APPEAL NO. 7/97
CA NO. 259/91 (F)
DC COLOMBO NO. 14585/L
16TH JANUARY, 1998.

Registration of Documents – Benefit of prior registration – Loss of benefit by collusion in obtaining subsequent instrument – Registration of Documents Ordinance – Section 7.

Soma who was the owner of an undivided share in a land sold her right title and interest therein to the defendants pending a partition action, on deed P8. The said deed was not duly registered due to a defect in registration. After the final decree was entered in the partition action Soma sold lot 4 allotted to her in the partition action by deed P3 to K who had been put forward by the plaintiff to buy the land for him, unknown to Soma. Prior to the sale to K, Soma told K that she had already sold her interests but K showed a Survey plan and persuaded her to believe that she was still the owner of a portion of the land. The valuable consideration for the transaction came from the plaintiff.

Held:

The evidence led in the case was insufficient to prove collusion between parties to obtain the deed P3 within the meaning of subsection 2 of section 7 of the Registration of Documents Ordinance.

Cases referred to:

1. *Karunanayake and Others v. Gunasekera and others* (1962) 65 NLR 529.
2. *Lairis Appu v. Tennakoon Kumarihamy* (PC) (1962) 64 NLR 97.
3. *Aserappa v. Weeratunga* (F.B) (1911), 14 NLR 417.
4. *Hall v. Pelmadulla Valley Tea & Rubber Co., Ltd.* (P.C) (1929), 31 NLR 55.
5. *Appusingho v. Leelawathie* (1958) 60 NLR 409.
6. *Ferdinando v. Ferdinando* (1921) 23 NLR 143 at 148.
7. *Arumugam v. Arumugam* (1951) 53 NLR 490.

APPEAL from the judgment of the Court of Appeal.

P. A. D. Samarasekara, P.C with *Keerthi Sri Gunawardena* for the plaintiff-appellant.

I. G. N. Jacolyn Seneviratne with *Damayanthi de Silva* for the defendant-respondents.

Cur. adv. vult.

February 17, 1998

DHEERARATNE, J.

The appellant (plaintiff) instituted this action against the respondents (defendants) in the District Court seeking for a declaration of title to a land called lot No. 4 of Kahatagahawattā which is 1.03 perches in extent. Admittedly lot No. 4 was allotted to one Soma Piyawathie Hettiarachchi (Soma) by the final Decree entered in partition action

No. DC Colombo 1425/P. Pending the partition action, Soma had sold her right title and interest in Kahatagahawatta by deed P8 of 20.7.79 to the defendants. After the final Decree was entered, Soma sold the divided lot No. 4 allotted to her, by deed P3 of 12.9.1986, to one Katriarachchi a friend of the plaintiff, who in turn sold it by deed P4 of the same date to the plaintiff.

The defendants deed P8 was not duly registered in terms of the Registration of Documents Ordinance (New LE Chap. 135), in that, the new folio in which it was registered was not properly connected to the folio relating to the previous registration affecting the same land, with necessary cross-references in the latter. Although the trial judge held that deed P8 was duly registered, the Court of Appeal, quite rightly, reversed that finding and both parties were agreed before us that the Court of Appeal was right on that matter. (see *Karunanayake and others v. Gunasekera and others*⁽¹⁾ re cross-reference in the prescribed manner). However, it was the finding of the Court of Appeal that the plaintiff was guilty of collusion in terms of subsection 7 (2) of the Registration of Documents Ordinance and that he has thereby lost the benefit of prior registration of deed P3, that was canvassed before us.

Subsection 7 (1) of the Registration of Documents Ordinance provides that unregistered instruments are declared void against subsequently registered instruments; subsection 7 (2) reads;

"But fraud or collusion in obtaining such subsequent instrument or in securing the prior registration thereof shall defeat the priority of the person claiming thereunder".

It is clear that for this subsection to operate there must be present, one of the elements **fraud** or **collusion**, in one of the acts of either (a) in obtaining the subsequent instrument or (b) in securing the prior registration. A person may be guilty of fraud without being guilty of collusion, and vice versa. Facts of some cases might demonstrate the existence of both elements of fraud and collusion in any of the acts (a) or (b) above, as exemplified in the case of *Lairis Appu v. Tennakoon Kumarihamy (Privy Council)*⁽²⁾. However, the specific position of the defendants as crystallised in the argument before us, was that the plaintiff was guilty of collusion (but not of fraud) in obtaining the deed P3 in favour of Katriarachchi (but not in securing prior registration).

Let me now refer to some basic facts relating to the execution of the deed P3. Soma, the executrix of that deed is a close relative of the defendants and was even called to give evidence at the trial on their behalf. The plaintiff inquired from Soma whether she would sell her interests in the land to him; that was before she sold her rights to the defendants. Soma refused. About 7 years after she sold her interests to the defendants, Katriarachchi asked whether she would sell her interests in the land to him. She told him that she had already sold her interests. Katriarachchi showed a survey plan to her and told her that she was still the owner of a portion of that land. She agreed to sell the land to Katriarachchi for valuable consideration. Unknown to her, Katriarachchi was put forward by the plaintiff to buy the land for him and Katriarachchi transferred the property to the plaintiff the same day he purchased it. The valuable consideration for the transaction came from the plaintiff.

It is the settled law that mere notice of the existence of a prior deed, or for that matter, of the fact that such deed was registered in a wrong folio, will not deprive a subsequent purchaser of property for valuable consideration, of the benefit of prior registration. See *Aserappa v. Weeratunga*; (Full Bench);⁽³⁾ *Hall v. Pelmadulla Valley Tea & Rubber Co., Ltd.* (Privy Council);⁽⁴⁾ *Appusingho v. Leelawathie*⁽⁵⁾ and *Lairis Appu v. Tennakoon Kumarihamy* (*supra*). It is contended on behalf of the plaintiff, that if at all, the evidence of Soma discloses the mere knowledge on the part of Katriarachchi and the plaintiff, of the existence of a prior deed.

"Collusion" is an agreement between two or more persons to act to the prejudice of a third party or for an improper purpose (The Oxford Companion to Law – David M. Walker). In the case of *Ferdinando v. Ferdinando*⁽⁶⁾ at 148 Bertram: CJ stated "Where, in these circumstances, anything underhand or anything involving a pretence is done in concert, there is in my opinion, collusion. And in my opinion both these elements figure in the present case".

The Court of Appeal appears to have thought that the facts of the instant case were on all fours with those of the case of *Arumugam v. Arumugam*⁽⁷⁾ and it relied heavily on the dicta of Gratiaen, J. in that case. In *Arumugam's* case (*supra*), the dishonest intention of Thambimuttu, the common seller to both contesting parties, and a close relative of the 2nd purchaser, was well-established and

Gratiaen, J. referred to those circumstances in following terms: "The evidence clearly establishes that shortly before 1st October, 1947, if not earlier, Thambimuttu (whose financial condition during that period may be gauged from the circumstance that at the time of the trial he was drawing a charitable allowance from the Ceylon Government) conceived the idea of dishonestly defeating the appellants rights of ownership by purporting to sell again some part of his interests which were no longer his to dispose of. The plaintiff, with full knowledge of the true position, fortified by his recent discovery that the earlier conveyance 102 had in fact been registered in the wrong folio, agreed to purchase from Thambimuttu a share (which had already been effectively disposed of) in order that he may secure to himself a personal advantage to the appellants' detriment. In pursuance of this common design he secured the execution of the deed 102 and promptly caused it to be registered in what he had discovered to be the correct folio. In other words, he entered into a collusive transaction with Tambimuttu and lent himself to the latter's intended fraud on his previous vendors. This thoroughly disreputable transaction took place within a short time of the date on which the appellants' rights under 1D2 would have been strengthened by the acquisition of prescriptive title to the 1/4 share purchased by them in 1938".

Learned counsel for the plaintiff contended that in order to demonstrate that there was "collusion in obtaining such subsequent instrument" within the meaning of the subsection, at least, it must be shown that Katriarachchi, as agent of the plaintiff, did collude with Soma the executrix to do something underhand to the detriment of the defendants. None can collude with oneself. A suggestion was not even made to Soma, that she was a party to a collusive act. I find that evidence led in the case is insufficient to prove collusion between parties in obtaining the deed P3.

For the above reasons I set aside the judgments of the Court of Appeal and the District Court and enter judgment for the plaintiff as prayed for in the plaint. The appeal is allowed with costs of this court fixed at Rs 10,000.

PERERA, J. – I agree.

GUNAWARDANA, J. – I agree.

Appeal allowed.