[IN THE PRIVY COUNCIL]

1962 *Present :* **Lord Denning, Lord Hodson, Lord Guest, Lord Devlin, and Mr. L. M. D. de Silva**

A. M. LAIRIS APPU, Appellant, *and* E. N. TENNAKOON KUMARIHAMY and others, Respondents

Privy Council Appeal No. 66 of 1960

S. C. 260—D. C. Kurunegala, 7915/L

Registration of Documents Ordinance—Section 7—Prior registration—"Fraud or collusion".

A person donated certain proporty on 29th Juno 1919 to his son subject to a fideicommissum, after the donee's lifetime, in favour of the donee's two children, one of whom was the plaintiff. On 12th April 1945 the fiduciary, in breach of the fideicommissum, sold the land to the defendant.

The deed of gift of 29th June 1919 was never registered, while the deed of transfer of 12th April 1945 was registered on 19th April 1945. It was established, however, beyond all doubt, that the fiduciary and the defendant knew of and accepted the plaintiff's title and were relying solely on prior registration to defeat it. The fiduciary was unquestionably defrauding the plaintiff, and the defendant was aware of it. Moreover it was impossible to suppose that it was not implicit in the negotiation between the fiduciary and the defendant that the father (the fiduciary), in breach of his duty and in fraud of his daughter (the plaintiff), would refrain from taking any steps to secure prior registration of the deed of gift.

Held, that there was not only fraud but also collusion within the meaning of section 7 of the Registration of Documents Ordinance. Accordingly tho unregistered deed of gift prevailed over the subsequent deed of sale, although the latter was registered.

The words "in obtaining such subsequent instrument" in section 7 of tho Registration of Documents Ordinance do not exclude the case of a collusion between the transferor and the transferee. *Appusingho v. Leelawathie* (60 N. L. R. 409), overruled on this point.

APPEAL from a judgment reported in (*1958*) *61 N. L. R. 97.*

Walter Jayawardena, for the defendant-appellant.

E. F. N. Gratiaen, Q.C., with *A. R. B. Amerasinghe*, for the plaintiff-respondent.

Cur. adv. vult.

April 4, 1962. [*Delivered by* LORD DEVLIN]—

This is an appeal from a judgment of the Supreme Court of Ceylon upholding a judgment of the District Court of Kurunegala, whereunder the plaintiff in the action, the respondent before the Board, obtained an order of ejectment of the defendant from a piece of land, the ownership of which was in dispute between them.

2—J. N. B 441 2—1,883 (8/62)

The history of the matter stretches from 1919 to 1951 and involves three generations of the family of Tennekoon—the plaintiff's grandfather, her father and mother, her husband (for although when the story begins she was a child, long before the end of it she was grown up and married) and her brother. On 29th June, 1919, the grandfather by Deed of Gift donated the land to the plaintiff's father, subject to a life interest reserved for himself, the grantor, and subject also to his right of revocation ; and finally subject to a proviso whereunder the father was not to alienate the land or lease it for a term of more than four years but to hold it only during his lifetime so that after his death it devolved on the plaintiff and her brother. Thus there was created a *fidei commissum* in favour of the plaintiff and her brother with the father as fiduciary. The grandfather died on the 17th September, 1932. By his will, after a number of specific bequests, he left all his "remaining movable and immovable property" to the plaintiff and her brother. On 12th April, 1945, the father, in breach of the *fidei commissum* sold the land to the defendant for Rs. 10,000. On 18th August, 1945, the plaintiff and her brother entered into a Deed of Partition of their various interests with the result that the plaintiff obtained the brother's interest in the land in question in this case and so he drops out of the story. On 21st May, 1951, the father died and his life interest thus ended. On 20th September, 1951, the plaintiff brought this action of ejectment to obtain possession of the land from the defendant.

The Deed of Gift of 29th June, 1919 has never been registered, while the Deed of Transfer of 12th April, 1945, by which the defendant bought the land was registered on 19th April, 1945. The Registration of Documents Ordinance Section 7 provides that an instrument shall, unless duly registered, "be void as against all parties claiming an adverse interest thereto on valuable consideration by virtue of any subsequent instrument which is duly registered... 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." The main question now left in this case is whether this section provides the defendant with a good defence to the plaintiff's claim.

On 21st December, 1954, the District Judge gave judgment in favour of the plaintiff holding that there was fraud and collusion between the father and the defendant and accordingly that the Deed of Gift prevailed. In the Supreme Court on 28th November, 1958, this decision was upheld but not the finding of fraud and collusion. Basnayake, C.J. held that fraud or collusion had not been established and Sinnetamby, J. found it unnecessary to go into that question.

On the footing that there is no fraud or collusion the legal situation is one of some complexity. Mr. Gratiaen has conceded that the plaintiff's claim under the Deed of Gift would then be defeated. But can she then rely on the residuary bequest in the will of all remaining immovable property? Section 10 of the Registration of Documents Ordinance provides that "a will shall not as against a disposition by any heir of the

testator of land affected by the will, be deemed to be void or lose any priority or effect by reason only that at the date of the disposition by the heir the will was not registered." This must be a good answer to any defence based on the Ordinance. But then the question arises, did the residuary bequest cover this land? If at the time of the death the land had been alienated by a valid deed of gift, the grandfather could not dispose of it by will. Was there a valid deed of gift? The defendant gets rid of the deed of gift, which would otherwise defeat his claim, by means of an enactment which says that it is to "be void as against him". Can he maintain that the deed of gift is to be treated as void as against him when the Court is considering the effect of his deed of purchase, but valid when the Court is considering the effect of the will? The Chief Justice thought not. Moreover, the Chief Justice held that the residuary bequest in the will was an exercise of the power of revocation in the Deed of Gift. As to this, Mr. Jayawardena for the defendant contended before the Board that while a specific bequest might amount to a revocation, a general residuary bequest should be construed as excluding land which the testator had already donated.

Another point much discussed before the Supreme Court was the precise effect of section 7 of the Ordinance. Clearly it applies to two deeds made by the same grantor. But suppose a purchaser relies upon a deed from a man who never had any title to the land; clearly he cannot merely by registration obtain a title which his vendor never had. Can it then be said that the father, having only a life interest, had no larger title to grant to the defendant? In *James v. Carolis*[1] the Supreme Court of Ceylon held that where the two deeds proceeded from the same source—in the present case the source would be the grand-father's title—section 7 applied.

The Judges in the Supreme Court answered enough of these questions in favour of the plaintiff to enable them to sustain the judgment which she had obtained below. But the difficulties to which some parts of the judgments give rise were sufficient to lead Mr. Gratiaen for the plaintiff to place in the forefront of his argument before the Board a submission that the judgment of the District Judge on the issue of fraud and collusion should be restored. Their Lordships accept this submission. They will not therefore express any opinion on the other matters discussed before the Supreme Court but will proceed to examine the facts which in their opinion prove fraud or collusion within the meaning of section 7 of the Ordinance.

When the father received and accepted the Deed of Gift as fiduciary he gave it to the plaintiff's mother for safe-keeping. He was however well aware that under it he had only a life interest arising on the grand-father's death. There has been exhibited a letter written by him on 1st April, 1935, to the Commissioner of Stamps in which he states that he has only a life interest.

[1] *(1919) 17 N. L. R. 76.*

The District Judge has described the father as a " thriftless drink addict ". While this language is perhaps rather stronger than the facts warrant, there is acceptable evidence from the mother that the father drank a good deal and was generally short of money. In 1944 he wanted to raise some money on the land and there can be little doubt that it was for this purpose that he obtained possession from the mother of the Deed of Gift. The defendant is a rich man who had been engaged, the District Judge said, in some questionable deals. The father got money from him in the first instance by means of a lease of the land, made on 19th December, 1944, for ten years. This was a breach of the *fidei commissum* under which his power of leasing was limited to four years. The consideration for the lease was a lump sum of Rs. 2,000 of which Rs. 1,000 was payable forthwith. The defendant employed his regular notary to prepare the lease. The description of the land in the schedule to the lease is followed by the words " to which premises the lessor is entitled to a life interest only ".

The plaintiff's husband got to hear of the lease and had a conversation about it with the father and the defendant. His object was to get an assignment of the lease from the defendant to the plaintiff since she was eventually to come into the property. In this he was not successful as they could not agree upon terms. However, he told the defendant that there was a *fidei commissum* and that under it the father could not grant a lease for more than four years.

The lease had run only for four months when on 12th April, 1945 the Deed of Transfer, the material document in this case, was executed. Presumably the father wanted more money and he in fact obtained a further Rs. 10,000 as the sale price. The same notary who had prepared the Deed of Lease for the defendant and attested it attested also the Deed of Transfer. In the Deed of Transfer the father is described as being entitled to the land " by right of paternal inheritance from my deceased father ".

On these facts there appears to their Lordships to be a perfectly clear case of fraud. It has however been urged upon them that these are not the full facts and that their Lordships ought to fill out the story with the following suppositions. Fraud, it is said, ought not lightly to be attributed to a dead man and any sinister inference from the facts as stated above can be explained away if their Lordships were to suppose that between the granting of the lease and the execution of the Deed of Transfer the father took legal advice. As a result of that advice he would have learned that, so far from having only a life interest as stated in the lease and as up till then he had believed, he was in truth the absolute owner of the land. The lawyer who would have given him this advice would have based it on the case of *Carolis v. Alwis*[1]. It is undoubtedly the law that a *fidei commissum* to be effective must be accepted; and

[1] *(1944) 45 N. L. R. 156.*

in the case referred to it was held by the Supreme Court of Ceylon that an acceptance by the immediate donee, the daughter of the donor, was not a sufficient acceptance on behalf of her brother and sister who were *fidei* commissaries. On this authority it is said that the acceptance by the father (which is now admitted) in the present case was not a sufficient acceptance for his children ; accordingly, the *fidei commissum* in favour of the plaintiff fails, leaving the donation to the father to operate without curtailment.

Of course if *Carolis v. Alwis* and the conclusions which are supposed to have been drawn from it were good law, they would provide a complete answer to the plaintiff's claim. Their Lordships were not invited to say that. An argument of a similar sort, based on non-acceptance by the father, was originally advanced but abandoned in the Supreme Court. It is now agreed that the dictum cited from *Carolis v. Alwis* cannot stand as good law in the light of the Board's decision in *Abeyawardene v. West* [1]. But it is argued that before 1957 it would have been believed to be good law and therefore would have formed the basis of advice tendered to the father.

It can and has been objected that all this is very speculative. Their Lordships will go further than that and say that even as a hypothesis it will not stand cursory examination. The father is dead and cannot speak, but the defendant is alive and can. What does he say caused him to buy land, which he had been told was subject to a *fidei commissum*, from the fiduciary who a few months before had been described in the lease as having only a life interest ? Before he put down his money, he must at least have been told by the father that he had consulted a lawyer and been advised that the *fidei commissum* was ineffective. One would have expected the defendant to consult his own lawyer and that his notary would have obtained at least the name of the hypothetical lawyer whose evidence could have turned the hypothesis into fact. But the defendant in the witness box, so far from supporting the hypothesis now advanced, testified that he never knew that the father had not complete power of disposition. He denied any conversation about the matter with the plaintiff's husband and his denial was disbelieved. He said that his notary who read through the lease to him, must have omitted to read the reference in it to the father's life interest. The notary, although present throughout the trial, was not called to give evidence.

That is one ground for dismissing the hypothesis. The second is that if the supposed advice has been given and taken the defendant would have based his title as vendor of the land on the deed of donation, freed from the *fidei commissum*. In fact he based it on his " right of paternal inheritance from my deceased father ". This is the point that it was attempted to argue in the courts below. It was said, not that the donation remained effective without the *fidei commissum* but that it was altogether invalid for want of acceptance ; and that in some way, which their Lordships do not understand, the land was not covered by the general residuary bequest in the will but passed to the father as on an intestacy.

[1] *(1957) A. C. 176; 58 N. L. R. 313.*

Finally, it is not suggested that the father, although he lived for six years after the transfer ever asserted to anyone that the *fidei commissum* was ineffective. The plaintiff came to hear of the transfer and on 17th September, 1945, her proctors wrote to the defendant to say that his vendor had only a fiduciary interest in the property due to be determined at his death and that the plaintiff could not accept the defendant's *bona fides* in the matter. There was no reply to this letter. Their Lordships have no doubt at all that the father and the defendant throughout knew of and accepted the plaintiff's title and were relying solely on prior registration to defeat it.

While the main weight of the argument for the defendant before the Board was put on the hypothesis which their Lordships have rejected, reliance was also placed on the reasons given by the Chief Justice for setting aside the finding of fraud and collusion. The Chief Justice said :—

> " For the purpose of bringing a deed within the ambit of section 7 (2) it is not sufficient to establish that the person who obtained the deed was an unscrupulous person who would take undue advantage of any situation for the purpose of gain or that he had been punished for evasion of revenue laws or that he had committed fraud on previous occasions. Fraud or collusion in obtaining the particular deed in question must be established. It is contended on his behalf that neither fraud nor collusion has been established. I have in my judgment in S. C. 688, D. C. Tangalla L-393, delivered on 13th November, 1958, dealt with the meaning of fraud and collusion in this context. Learned Counsel's contention that fraud or collusion within the meaning and content of those expressions in section 7 (2) has not been established is in my view correct and must be upheld. "

Their Lordships respectfully agree with the opening observations in this passage and consider, as the Chief Justice evidently did, that the District Judge has somewhat exaggerated the importance of material whose only relevance was to discredit the defendant as a witness. But that does not affect the really significant finding of fact by the District Judge—a finding which was not challenged on appeal—that the defendant was told of the *fidei commissum* in the terms of the conversation that their Lordships have recorded.

There was another finding by the District Judge on this topic which was attacked in the argument before the Board and which it is convenient to consider here. That is the finding that the consideration of Rs. 10,000 was altogether inadequate. The learned Judge appears to have based that finding on his own estimate that the land in question was worth three or four times that sum. It was proved that the defendant had mortgaged the land for Rs. 15,000 and that at first sight makes it look as if Rs. 10,000 was too low a price. But none of these matters was put to the defendant in cross-examination and there was no proper evidence of value. Accordingly, their Lordships cannot accept the finding that

the consideration was inadequate. But while inadequacy of consideration is good evidence of collusion, it is not an essential element ; *Ceylon Exports Ltd. v. Abeysundere* [1].

Dalton, A.C.J. in the case just cited reviews all the important decisions on the meaning of fraud and collusion in section 7 and his judgment was upheld by the Board in 38 N. L. R. 117. Mere notice of a prior unregistered instrument is not enough. There must be actual fraud in the sense of dishonesty. In this sense of the term the father was unquestionably defrauding his daughter and the defendant was aware of it. Moreover, the defendant was aware that the father was a fiduciary and that therefore it was his duty, both as father and fiduciary, to protect his daughter's interests by registering the instrument by which she derived her title. If at any time before 19th April, 1945, the father had registered that title as he should have done, the common purpose of the father and the defendant, namely, the exchange of land (which the defendant wanted) for money (which the father wanted) would have been frustrated. It is impossible to suppose that it was not implicit in the negotiation between the two that the father, in breach of his duty and in fraud of the plaintiff, would refrain from taking any steps to secure prior registration of the deed under which she claimed. Thus there was collusion in the fraud.

In the case which he mentioned in his judgment, *Appusingho v. Leelawathie* [2], the Chief Justice was applying to the facts of that case the well-established principles to which their Lordships have referred ; and their Lordships do not doubt that on the facts of that case he did so correctly. But their Lordships with respect reach a different conclusion upon the application of those principles to the facts of this case.

In the course of his judgment in the earlier case the Chief Justice said at 413 :—

> " The words ' in obtaining such subsequent instrument ' exclude the case of a collusion between transferor and transferee, because the transferor cannot be said to be party to obtaining the subsequent instrument ; but to granting or giving it. The ' collusion ' must therefore be between persons other than the transferor who combine to obtain the subsequent instrument. "

If this construction of section 7 is correct, it would provide an answer to the charge of collusion in the present case ; and it may be that the Chief Justice was proceeding on this view of the law when he held in the present case that the District Judge's finding should be set aside. Counsel for the defendant did not in his argument before the Board seek to uphold this construction and their Lordships with respect think it to be wrong.

Their Lordships will humbly advise Her Majesty that this appeal should be dismissed. The appellant must pay the costs.

Appeal dismissed.

[1] *(1933) 35 N. L. R. 417 at 428.*

[2] *(1958) 60 N. L. R. 409.*