

1930

Present : Garvin A.C.J. and Lyall
Grant J.

SILVA v. SALO NONA *et al.*

13—D. C. Gaile. 26,446.

*Trust—Registration of agreement to sell land
—Subsequent sale to third party—Notice
—Ordinance No. 9 of 1917, s. 93.*

Registration of an agreement to sell land is of itself notice, within the meaning of section 93 of the Trust Ordinance, to a person who acquires the land subsequent to such agreement.

THE plaintiff sued the first and second defendants and the third defendant, who is the appellant, for specific performance of an agreement entered into by the first and second defendants to convey certain premises to the plaintiff by a valid deed before September 30, 1928. The third defendant, appellant, who purchased the aforesaid premises from the first and second defendant by deed No. 6,104 of October 3, 1928, was added as a party to affect him with notice of the action. The learned District Judge entered judgment for the plaintiff as prayed for.

N. E. Weerasooria, for defendant, appellant.—No question of registration has been raised at the trial. Plaintiff cannot rely on section 93 of Ordinance No. 9 of 1917 unless his deed is duly registered. Under section 93 plaintiff must prove both due registration and notice. Section 3 defines notice. It is a question of fact whether a person comes or does not come within its provisions. It is too late to raise the question now. Section 93 was not referred to in the lower Court. To hold that mere registration is notice would be to ignore section 3. The trend of authority is that mere notice of registration does not defeat the priority which a subsequent deed would otherwise have and that registration is not notice. (*V. Muttu v. P. Chetty*,¹ *Fernando v. Peiris*.²) Section 93 was probably enacted to meet the case of *Fernando v. Peiris* (*supra*). But notice

¹ 1 S. C. C. 90.

² 19 N. L. R. 281.

is necessary, see *Jayawardene on Registration*, pages 227, 228. The observations of Ennis J. in *Rajapakse v. Fernando*,¹ are *obiter dicta*. Notice in fact must be proved or admitted. (*Hall v. Pelmadulla Tea Co.*?) Under the English Acts statutory provision was necessary to declare that registration amounted to actual notice. (47 & 48 Vic. ch. 54, section 15.)

F. de Zoysa, K.C. (with him *Rajapakse*), for the respondent.—The issue is whether the appellant is bound by the agreement. Under section 93 he is bound if he had notice. In the case of contracts affecting immovable property the prescribed form of notice is registration. Otherwise there would be a conflict with the provisions of Ordinance No. 7 of 1840. Registration is notice. (*Rajapakse v. Fernando (supra)*.) Under the corresponding section of the Indian Trust Act registration amounts to notice (see Sanjiva Row on the Indian Trusts Act (2 of 1882), section 91 at page 350, also section 3 at pages 17 onward). If the appellant searched the register he would have had notice of the agreement. This omission is wilful and he has had notice within the meaning of section 3 of Ordinance No. 9 of 1917.

Weerasooria, in reply.—The Indian authorities are conflicting.

August 27, 1930. GARVIN A.C.J.—

In our earlier judgment in this case we found upon the evidence that the third defendant had no actual knowledge of the agreement to convey, which is the foundation of the plaintiff's action. In view, however, of the point briefly touched upon by counsel for the respondent in his reply that the registration of the agreement was of itself notice to the third defendant within the meaning of the Trust Ordinance we decided to hear further argument. At the hearing, counsel for the appellant submitted that inasmuch as registration had not been specially pleaded he was not prepared to admit that the agreement had been "duly" registered within the meaning of the Registration Ordinance

¹ 20 N. L. R. 301. ² 28 N. L. R. 422 and 31 N. L. R. 55.

He submitted that he was entitled to an opportunity to look into the question and raise such objections to the registration as such inquiry may justify. It was intimated to him that the matter would receive our consideration and that should it be necessary an opportunity would be reserved to him. The argument then proceeded upon the question whether registration—by which I mean due registration—of an agreement to convey is of itself notice to a person who acquires the property subsequently within the meaning of section 93 of the Trust Ordinance, No. 9 of 1917. For the purpose of the Trust Ordinance notice is defined in section 3 as follows :—

"A person is said to have notice of a fact either when he actually knows that fact, or when, but for wilful abstention from inquiry or gross negligence he would have known it, or when information of the fact is given to or obtained by any person whom the court may determine to have been his agent for the purpose of receiving or obtaining such information."

The principle of the Ordinance relating to the registration of deeds and other instruments in Ceylon is that such documents shall take effect according to priority of registration. Every unregistered deed or instrument is deemed void as against a party claiming an adverse interest thereto on valuable consideration by virtue of any subsequent deed which shall have been registered and the priority thus conferred is absolute save where there has been fraud or collusion in obtaining the later deed or in securing its prior registration. Mere notice of the existence of an unregistered deed prior in date is not sufficient to defeat the priority conferred by registration. It is only when the circumstances prove that there has been fraud or collusion in obtaining the later deed or in procuring its registration that it is competent for a Court of law to deny to it the benefit which has been secured by priority of registration. Actual notice and knowledge of the existence of a deed

affecting land is not of itself fraud and does not deprive a purchaser under a deed later in date but prior in point of registration of the priority conferred by such registration. The law was declared in this sense in *D. C., Kandy, No. 67,295*,¹ and has been consistently followed thereafter. Notice, actual or constructive, is therefore of itself of no importance where there is competition between deeds or instruments which convey or create any interest, mortgage, or incumbrance in, over, or affecting the same land; in the absence of fraud or collusion priority of registration is decisive. But the respective rights of a person claiming specific performance under a registered contract affecting land and of a subsequent purchaser for value depend upon whether the remedy of specific performance is available in such a case under our law; if so, whether it is sufficient to affect the purchaser with notice; and finally whether the registration of the contract is notice in law. The cases in which these questions have been considered by our Courts are not numerous. The earliest of such cases is that of *Waira Muttu v. Ponnappen Chetty*,² where Phear C.J., refused to give effect to a prior registered agreement observing that although registration of the transaction had undoubtedly been effected he did not think that, "regard being had to the circumstances surrounding registration, and the description of the parcels of immovable property in this country he should presume a notice by construction on that ground". In the case of *Mathes Appuhamy v. Raymond*,³ which was an action for specific performance of an agreement to sell, where the land which was the subject of the agreement had subsequently been sold to a third party, Bonser C.J. doubted whether specific performance can be granted in a case where the vendor had before action brought actually sold and conveyed the land and put it out of his power to perform the contract. No question based upon registration was raised or considered, but

the judgment is of importance, in that it indicates the true reason why under the law then in force in the Island the question of notice of such an agreement whether registered or not was of little importance, viz., that the remedy for specific performance of such an agreement was not considered available when the property which was the subject of the agreement had been conveyed to a third person. The case of *Carimice Jajferjee v. Theodoris*¹ has been referred to as an instance of a case where the registration of an instrument was held to be notice to a third party who subsequently became the purchaser of the property referred to in the earlier instrument. It was an action to set aside the conveyance in favour of a third party on the ground that the land was the subject of the agreement embodied in a registered instrument whereby the vendor undertook for valuable consideration not to sell the land for 20 years. The case is not a very satisfactory one and the passage relied on appears in the judgment of Lawrie J., which is very brief and so far as it relates to the matter under consideration merely consists of the statement "that the agreement related to and affected land, and if it was registered the purchaser bought with knowledge that the vendor had bound himself not to sell".

This case has been interpreted as merely an instance when an instrument affecting land prior both in date and in registration has been held to prevail over a later registered instrument. But whether that ground of differentiation is sound or not the case was expressly considered in the case of *Fernando v. Peiris*² by De Sampayo J., who was not prepared to agree with the holding that such constructive notice of an agreement to sell *ipso facto* makes void a subsequent sale by the owner to a third party, and that specific performance may be claimed as against such third party. That case once again dealt with the question of the extent to which the remedy of specific performance was available in Ceylon and declares the law in the sense that the remedy was not

¹ (1877) *Ram.* 198. ² 1 S. C. C. 90.

³ 2 N. L. R. 270.

¹ *Bal Notes of Cases* 20. ² 19 N. L. R. 281.

available against a third party to whom the land was sold subsequent to a duly registered agreement to sell except in case where there has been fraud, "this exception is founded on good reason inasmuch as where there is fraud the former owner still remains the true owner and is rightly considered to be in a position to specifically perform his contract". If I may respectfully say so, none of the earlier cases are satisfactory. Inasmuch as the remedy of specific performance was only available against a third party purchaser on proof of fraud the question of notice did not really affect the matter. Under the law as it stood at the time *Fernando v. Peiris (supra)* was decided notice whether of a registered or unregistered deed was of importance only as an element in the proof of fraud. Since then the law on the point has undergone a change. The Trust Ordinance, No. 9 of 1917, introducing a body of law which had hitherto been foreign to our system is now part of our law. Section 93 of that Ordinance is as follows :—

"Where a person acquires property with notice that another person has entered into an existing contract affecting that property, of which specific performance could be enforced, the former must hold the property for the benefit of the latter to the extent necessary to give effect to the contract. Provided that in the case of a contract affecting immovable property, such contract shall have been duly registered before such acquisition".

Inasmuch therefore as notice of an existing contract affecting property of which specific performance could be enforced is now sufficient to compel a person who acquires such property with notice to hold the property for the benefit of the person seeking specific performance, the question of notice in all its aspects assumes special importance. In his work on the law of registration and when dealing with section 93 of the Trust Ordinance Jayawardene, J. says :—

"This latter enactment bears out the principle that registration is not notice,

for if registration amounts to notice, it would be sufficient if the agreement itself had been registered, but the further requirement that the purchaser also should be affected with notice could have but one meaning, viz., that registration is not notice."

I am unable, however, to take the same view as to the effect of the proviso. The principal clause of section 93 presents no difficulty of construction. All that is required is notice. This clause is subject to the proviso that where the contract affects immovable property the contract shall have been registered before the subsequent acquisition. Now the purpose of this proviso, it seems to me, is to insist upon compliance with the provisions of the Ordinance relating to registration of deeds and to prevent any conflict which might otherwise arise between the provisions of that Ordinance and section 93 of the Trust Ordinance. For instance, but for this section the application of the Registration Ordinance to the case of an acquisition of immovable property with notice of an existing unregistered contract affecting that property would be to leave the acquisition wholly unaffected, whereas if section 93 was to be given full operation without reference to the proviso, the unregistered contract will prevail over the subsequent acquisition to the extent necessary to give effect to the contract. It seems to me that the purpose and effect of the proviso is to harmonize these two enactments and enable the Registration Ordinance to operate unaffected by section 93 of the Trust Ordinance except to the extent that notice of an existing contract affecting land will without proof of fraud suffice to deprive the subsequent acquisition of the full effect which it would otherwise have enjoyed provided such contract has been duly registered. The section does not say that in the case of a contract affecting land there must be notice apart from and in addition to registration. All it does is to exclude

contracts affecting land from the provisions of the section unless they are registered. *Non constat*, that registration may not of itself be notice. Indeed the reason for penalizing unregistered contracts affecting land would seem to be to insist upon such transactions being placed upon the registers which are designed and intended to give notice of every existing transaction relating to any land or lands to persons who may be desirous of acquiring any interests therein. In short, no form of notice other than due registration will suffice to admit a contract affecting land to the privileges of section 93. I am unable therefore to agree with the learned author that the language of section 93 justifies the inference that the legislature intended that in the case of a contract affecting immovable property registration should not of itself operate as notice to a subsequent purchaser. The question whether registration of an instrument which is the record of a contract to sell a specified parcel of land is of itself notice to a subsequent purchaser can no longer be approached from the old standpoint. The remedy of specific performance is now available against any subsequent purchaser with notice. No question of depriving a later deed of the privileges secured to it by prior registration arises since the case is that of an instrument duly registered before the subsequent acquisition. The only question therefore is whether it can fairly be said of the subsequent purchaser by reason of the registration of the contract to sell that he would have known of it "but for wilful abstention from inquiry and gross negligence".

In deciding whether registration of such an instrument is of itself notice within the meaning of section 93 of the Trust Ordinance regard must necessarily be paid to the system of registration. In Ceylon the system of registration of deeds applies throughout the whole Island; every deed, judgment, order, or instrument affecting land is required to be registered; elaborate provision has been made for the

accurate registration of such documents, and the effect of non-registration is declared. Moreover, the system substantially in the same form in which it exists to-day has been in operation for over 60 years. Ample provision exists for the search of the register by persons interested in doing so, and the person who does so cannot but come to the knowledge of all transactions affecting such land which are entered in the register. "The scheme is clearly meant to give notice to subsequent purchasers and others of previous dealings with the property"—*vide* Ennis J. in *Rajapakse v. Fernando*.¹

That learned Judge after a careful examination of the provisions of the Registration Ordinance came to the conclusion that registration was notice and embodied his own conclusions in the following passage from Hogg on Deeds of Registration, page 99 :—

"A person who ought to search the register must be taken as having notice of what he would find there if he did search. Facts and circumstances that might thus be discovered will then be constructive notice"

The same view was taken by the Full Bench of Allahabad in the case of *Mate Din Kasodhan v. Kazim Husain et al.*² The decision is in point. "Notice" is defined in the Land Transfer Act in identically the same terms as in our Trust Ordinance, and section 85 of the Land Transfer Act which required all parties having an interest in a mortgage to be joined as parties to the action, "provided that the plaintiff has notice of such interest". It was held that the registration of a mortgage was notice within the meaning of that provision. The High Courts of Calcutta and Madras do not subscribe to the view of the law held by the Courts of Allahabad and Bombay, and hold that it should be left to be determined whether in the circumstances of each case registration should or should not be deemed to be notice.

¹ 20 N. L. R. 301.

² 13 All. 432.

But for the reasons already given I prefer the view of the High Court of Allahabad and hold that for the purpose of section 93 of the Trust Ordinance due registration of a contract affecting land is notice.

The means of search are available ; there can be no doubt that a prudent purchaser should and almost invariably does search the register in his own interest ; if he searches the existence of registered documents is revealed to him and he has knowledge. Having regard to what I said earlier as to the system of registration which obtains in Ceylon, it seems to me that if such a person refrains from searching he must be held to have knowledge of those facts which would have come to his knowledge but for his wilful abstention from inquiry.

The judgment will therefore be set aside and the case remitted to the Court below for the trial of the question whether or not this contract has been duly registered.

If the question is answered in favour of the plaintiff judgment will be entered for him as prayed for ; if it is answered in favour of the defendant the plaintiff's action will stand dismissed. All costs, including the costs of appeal, will abide the event.

LYALL GRANT J.—

I have had the advantage of reading the judgment of my Lord the Acting Chief Justice. That judgment sets out in detail the opinion I have formed on the effect of registration.

One object of a land register, if not the main object, is to enable the public to obtain information regarding transactions affecting land. If it were open to a person acquiring land to say, I had no notice of a previous transaction affecting the land I bought because I failed to see the register, the system of registration would lose much of its value.

I agree that if the agreement to sell was duly registered the subsequent purchaser must be held to have had notice of it. It follows that under section 93 of the Trust Ordinance he must hold the

land for the benefit of the plaintiff to the extent necessary to give effect to his contract. The effect of that section is to alter the law to the extent that proof of actual fraud is no longer required in order to enable the person who first registered his contract to enforce it in spite of a subsequent transfer.

I agree with the judgment proposed by the Acting Chief Justice.

Case remitted.