Present: Mr. Justice Wood Renton and Mr. Justice Grenier.

1908.
June 4.

DANCHIYA *v.* DISSANCHI.

D. C., Galle, 3,970.

Deed—Non-registration—Non-admissibility in evidence—Consent of parties—Excuses for non-registration—Ordinance No. 6 of 1866, s. 7.

The provision in section 7 of Ordinance No. 6 of 1866, that an unregistered deed bearing date before February 1, 1840, shall not be received in evidence, bars its admission, even although both parties rely on it.

Grounds for non-registration of old deeds discussed.

APPEAL from a judgment of the District Court. The facts sufficiently appear in the judgment.

H. J. C. Pereira, for the plaintiff, appellant.

Cur. adv. vult.

June 4, 1908, WOOD RENTON J.—

The appellant instituted this action as trustee of Tharawitta temple at Naramvelpitiya, and claims a divided portion of a certain land as part of the property of the temple. At the trial three issues were framed: (1) Was the land Sangika property? (2) If it was so, would thirty years' prescription avail against Sangika property? And (3) Who had been in possession for the last thirty years? In support of

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an affirmative answer to the first of these questions, the appellant produced a deed of October 14, 1839, by which the land in question had been sold to Dharmarama Terunnanse, then incumbent of the temple, and " his descending heirs. " By a deed of October 15, 1871, in which the deed of 1839 is expressly recited, the same land was sold by Rewata Terunnanse, a pupil of Dharmarama Terunnanse, to the husband of the respondent, and the respondent's contention was that, on the basis of that deed, she had acquired a prescriptive title to the property. The learned Commissioner of Requests refused to admit the deed of 1839 in evidence, on the ground that it had not been registered under Ordinance No. 6 of 1866, section 7. He treated the case, therefore, as one in which the only issue between the parties was that of prescriptive possession; and, on the facts, he gave judgment in favour of the respondent. If he is right in his view of the law, I am not prepared to disturb his finding on the facts. Mr. Pereira contended, however, that the deed of 1839, on which the proof that the land in question was Sangika property would seem to depend, ought to have been admitted in evidence, on the ground (1) that it was relied upon by the respondent, equally with the appellant, as a foundation of title; (2) that there was no privity of estate between the appellant and Dharmarama Terunnanse, inasmuch as the appellant had only been trustee of the temple for a few months under the Buddhist Temporalities Ordinance; and (3) that, in any event, the non-registration of the deed was a matter utterly beyond his control, and for which, in virtue of the first proviso to section 7 of the Ordinance No. 6 of 1866, he ought not to be held responsible. In my opinion, the first and second of these grounds are clearly untenable. The provision in section 7 of the Ordinance of 1866, that an unregistered deed bearing date before February 1, 1840, shall not be received in evidence, bars its admission, even although both parties rely on it. It must be pointed out, moreover, that in the present case the respondent uses the deed of 1839 only as the starting point for prescriptive possession. It appears to me also that there is now a statutory privity, if not of estate, at least in representation, between the appellant and Dharmarama Terunnanse. Mr. Pereira's third point, however, requires more careful consideration. The first proviso to section 7 of the Ordinance of 1866 enables an unregistered deed to be received in evidence, if it is established to the satisfaction of the Court that the non-registration was owing to " the absence from the Island of the holder thereof, " or to " his being under some legal disability, " or to " other causes utterly beyond the control " of the person producing it in evidence.

The decisions bearing directly on the construction of this proviso were cited to me in the argument. In *Siriman v. Abeygunewardana*,[1] the defendant, in order to prove that certain land was burdened with a *fidei commissum*, produced an unregistered deed dated 1833, where-

[1] *(1890) 9 S. C. C. 102.*

by the land was gifted to his father, *subject* to a *fidei commissum*, in favour of the donee's heirs. The donee, who had the deed in his possession, died in 1881, leaving the defendant and other children as his heirs. The defendant then got possession of the deed, and shortly after attained his majority. The District Judge held that the deed was inadmissible. The case came up on appeal before the Full Court. According to the headnote it was held by both Burnside C.J. and Dias J. that the failure to register the deed was from causes utterly beyond the plaintiff's control, and that it ought to have been admitted in evidence. It will appear, however, on reference to the judgments themselves that the headnote goes too far. It was Burnside C.J. alone who held in terms that the deed ought to have been admitted. Mr. Justice Dias merely said that perhaps the defendant might be able to prove that he was entitled to the benefit of the proviso in section 7. The order made was to send the case for further hearing from that point of view; and Clarence J. dissented from the judgment. Moreover, the *ratio decidendi* was explained by Lawrie J. in the second of the two cases which I have referred to above—*A.-G. v. Kiriya*[1]—in the following terms: "The person producing the deed" (*i.e.*, the defendant) "showed that it was for the interest of the holder between 1866 and 1875 to withhold the deed from registration; if he had registered it, his right would have been plainly a limited right under a *fidei commissum;* whereas he pretended to be absolute owner, and as such he executed the mortgage which was the subject of that action. That, then, was a good cause why the deed was not registered; and the defendant's minority was a good reason why he did not force the registration by the procedure of the 6th section of Ordinance No. 6 of 1866."

In *A.-G. v. Kiriya* [1], however, where the defendants sought to account for the non-registration of a sannas produced by them in evidence by proof that one Hapuwa, who, before his death, was very old, infirm, and blind for many years, kept secret the fact that he had the sannas in his possession until a few days before his death, it was held by Lawrie J. and Withers J. (Browne J. dissenting) that the cause shown for non-registration was insufficient. I distinguish the present case from *Siriman v. Abeygunewardana* on the grounds that here there is a real privity in representation between the appellant and Dharmarama Terunnanse, and no question of the existence of any legal disability arises. I think, further, that the case before me is a stronger one than *A.-G. v. Kiriya*,[1] inasmuch as here no cause of any kind for the original non-registration of the deed is shown. To admit it in evidence would be to reduce the provisions of section 7 of Ordinance No. 6 of 1866 in a very large number of cases to an absolute nullity.

I dismiss the appeal with costs.

Appeal dismissed.

[1] *(1897) 3 N. L. R. 81.*