1946 *Present:* **Howard C.J.**

EBERT SILVA, Appellant, *and* WIJESEKERE, Respondent.

*81—C. R. Panadure 9,499.*

*Registration of Documents—Competition between deeds of transfer executed by a person during his life time and, after his death, by his heirs—Same source—Decree "affecting land"—Decree in 247 action relating to immovable property—Is a registrable instrument—Registration of Documents Ordinance (Cap. 101), ss. 7, 8, (b).*

P conveyed his share in a land to plaintiff. After P's death his intestate heirs conveyed the same property to defendant. The deed in favour of plaintiff was not registered in the correct folio, whereas the conveyance by the heirs of P to the defendant was properly registered.

*Held*, that the two conveyances proceeded from the same source and that the deed in favour of plaintiff was void as against the subsequent deed in favour of defendant by reason of prior registration.

*Held, further*, that a decree which the plaintiff had obtained as against P's heirs in an action brought by him under section 247 of the Civil Procedure Code was a registrable instrument within the meaning of section 8 (*b*) of the Registration of Documents Ordinance and the failure of the plaintiff to register it gave priority to the subsequent deed registered by the defendant.

APPEAL from a judgment of the Commissioner of Requests, Panadure.

*L. A. Rajapakse, K.C.* (with him *K. A. P. Rajakaruna*), for the 2nd defendant, appellant.

*E. B. Wikramanayake* (with him *A. A. Rajasingham*), for the plaintiff, respondent.

*Cur. adv. vult.*

March 6, 1946. HOWARD C.J.—

In this case the 2nd defendant appeals from the decision of the Commissioner of Requests, Panadure, declaring the plaintiff entitled to 5/24th share of the land described in the plaint, awarding him also Rs. 30 as damages and continuing damages at the rate of Rs. 3 a month from June, 1942, till possession is restored and costs. The original owner of the land was one Appu Perera. The plaintiff claims 11/48th of this land by virtue of three deeds P1, P2, and P3. By P1 dated March 23, 1931, Hendrick Perera, one of the sons of Appu Perera, transferred to the plaintiff and one other 11/48th share of the land he possessed by paternal inheritance. The transferees on P1 by P2 dated September 7, 1931, transferred this 11/48th share to Sumaneris Silva who by P3 dated December 7, 1931, transferred it to the plaintiff. The 2nd defendant,

the appellant, who concedes that Appu Perera was the original owner of the land, contends that half of this land was gifted by Appu Perera to his wife Podihamy by deed of gift D3 dated July 10, 1899. On the death of Appu Perera Podihamy became entitled to a further ½ share whilst the 6 children of Appu Perera became entitled to 1/24th share each. By Deed of Gift D7 dated December 1, 1900, Podihamy transferred a ½ share to Hendrick and three other children. She subsequently died whereby Hendrick became entitled to a 5/24th share of the land made up as follows :—1/24th by succession to Appu Perera, ⅓th by deed of gift from Podihamy and 1/24th by succession to Podihamy. It is further contended that on the death of Hendrick his three children Podi Nona, Cecilia and Alpi became entitled to Hendrick's 5/24th share. By deed D12 of May 3, 1942, this 5/24th share was transferred to the 2nd defendant by these three children of Hendrick. The Commissioner has accepted the evidence of the appellant supported as it is by deeds that Hendrick became entitled to 5/24th share of the land. The plaintiff who relied on P1, P2, and P3 filed a 247 action case No. 17,639 in the District Court of Kalutara. The daughters of Hendrick Perera were made defendants in this action which resulted in the plaintiff being declared entitled to a 11/48th share. But it would appear that neither P1, P2, P3 nor the decree in D. C., Kalutara, No. 17,639 have been registered in the correct folio, whereas D12, the conveyance by the heirs of Hendrick to the appellant, has been properly registered. In these circumstances it is contended on behalf of the appellant that the older registration of D12 must prevail and that the appellant has priority of registration. The Commissioner held against this contention on the ground that Alpi, Cecilia and Podinona inherited nothing from their father Hendrick and had no title when they executed D12. Registration will be of no avail if the transferor had no title. The Commissioner further held that as the decree in D. C. case No. 17,639 was merely declaratory and did not confer title on the plaintiff, it was not a decree affecting land within the meaning of section 8 of the Ordinance and therefore did not require registration. In consequence it acted as *res judicata*.

An exhaustive examination of the questions relating to the priority of deeds is to be found in Jayawardene on the Registration of Deeds in Ceylon at pp. 63–66. At p. 63 it is stated that the subsequent instrument in addition to being registered must possess certain other requirements before it can successfully claim the priority conferred by section 7 of the Registration of Documents Ordinance (Cap. 101). The subsequent instrument (*a*) must be derived from the same source, (*b*) must convey some adverse or inconsistent interest, (*c*) must be for valuable consideration.

It is conceded by the respondent that (*b*) and (*c*) exist. The only point for consideration is whether the subequent instrument is derived from the same source. In my opinion the position in this case is the same as in *James v. Carolis*[1]. In that case A conveyed his land to B. After A's death C, who was A's intestate heir, conveyed the same land to D. The deed in favour of D was registered before the deed

[1] *17 N. L. R. 76.*

in favour of B. It was held that the deed in favour of B was void as against the subsequent deed in favour of D by reason of prior registration, as the two conveyances proceeded from the same source. It was contended in *James v. Carolis* as in the present case that the heir of A has no title and hence his transferee could obtain no title by prior registration. With regard to this contention Lascelles C.J. stated that the scope and object of the Ceylon Registration Ordinance is the protection of the purchaser for valuable consideration. If an intending purchaser finds on the register no adverse deed affecting the property, he is placed in the same position, as regards his title to the land, as if no such deed existed. On the other hand the grantee under the prior unregistered deed is penalized for his failure to put his deed on the register. He is taken to have given out to the world at large that his deed did not exist and is prohibited from getting it up against the registered deed of the subsequent purchaser for valuable consideration. The learned Chief Justice dealt with the argument that the transferee to D could not be regarded as the heiress of A because the latter had alienated her share in the estate by deed D8. The fallacy of this argument was that it assumed the validity of D8 which under section 14 of the Land Registration Ordinance declares shall be deemed invalid as against the plaintiff's deed. At p. 78 in his judgment Lascelles C.J. also states as follows :—

> " If, as is unquestionably the case, a deed by an heir to a purchaser transmits to the purchaser the title which the heir derived from his intestate, it follows that the deed is a sound link in the chain of the title. It is not less effective for the purpose of transmitting title than a deed from one purchaser to another purchaser. In *Punchirala v. Appuhamy* [1] this Court overruled the contention that, where there is a conveyance from an intestate and a subsequent conveyance from his administrator these two conveyances do not proceed from the same source, and that therefore the Registration Ordinance does not apply. It was there held that an administrator represents, and his estate is in law identical with that of his intestate.
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> Now that it is settled that the heir can pass title without the concurrence of the administrator, I think it follows that the estate of the heir must be regarded as that of his intestate "

In the same case Pereira J. at p. 79 stated as follows :—

> " The policy and effect of our law of registration are such that the mere fact that a person who has conveyed property had no title to it is insufficient to deprive the conveyance of priority by reason of prior registration ."

The only remaining question for consideration is the effect of the decree in D. C. case No. 17,639. In *Mohamed Ali v. Weerasooriya* [2] the facts were as follows :—By a decree in D. C., Kurunegala, 3,204, E and G were each declared entitled to an undivided half share of certain lands. The decree was not registered. Plaintiff was successor in title to E and defendant purchased the whole land from G. Defendant's deed was registered. It was held (per Lascelles C.J. and Ennis J.) Pereira J dissenting that defendant was bound by the decree in D. C., Kurunegala

[1] *(1900) 7 N. L. R. 102.* [2] *(1914) 17 N. L. R. 417.*

3,204, though the decree was not registered. The majority of the Court held that the decree in the Kurunegala case was not a judgment " affecting land " and therefore not a registrable instrument. This case was, however, decided under section 16 of Ordinance No. 14 of 1891. The position is different under section 8 (*b*) of Cap. 101. The material words under this provision are " decrees and orders of any Court or authority, and awards which purport or operate to create, confer, declare . . . any right, title or interest . . . in or over land. " The matter was considered in the case of *Sockalingam Chetty v. Kalimuttu Chetty* [1]. At pp. 335-336 in the judgment of Soertsz J. there is the following passage :—

" Counsel's next line of attack was that the decree entered in the old case dismissing the plaintiffs' action, although it was entered in the circumstances already indicated, was a registrable instrument.

The question then is whether that decree was such an instrument. According to section 6 of the Ordinance instrument means an instrument affecting land. It will be observed that this section reproduces the phrase of section 16 of the old Ordinance No. 14 of 1891, namely ' affecting land ', but, probably in view of the ruling in *Mohamed Ali v. Weerasuriya* [2], section 8 (*b*) of the new Ordinance goes on to enumerate the instruments which shall in future be deemed to ' affect land as . . . . all instruments including wills, decrees and orders of any Court or authority and awards, which purport or operate to create, confer, declare, limit, assign, transfer, charge, incumber, release, or extinguish, any right, title or interest, whether vested contingent, past, present, or future, to, in or over land, or which create or record or are evidence of any contract for effecting any such object, and also a notice of seizure issued under section 237 of the Civil Procedure Code.' The resulting position is that, today, decrees and orders of any court or authority are registrable instruments if they *purport or operate* to create, confer, &c., any right, title or interest . . . . to, in, or over land.

In the case of *Mohamed Ali v. Weerasuriya*, two of the three Judges held that a decree declaring parties entitled to land in an action *rei vindicatio* is not a judgment or order affecting land, and, therefore, not under the requirement of registration for the purpose of anticipating any priority that may be claimed for a subsequent instrument for a valuable consideration. That was a ruling given as far back as in the year 1913, and it has been consistently followed without question. But, it is argued that its authority has been impaired by section 8 (*b*) of the new Ordinance inasmuch as in virtue of it a decree or order which purports even if it does not operate to declare any right, title or interest to, in, or over land, is a registrable instrument and that the ruling given in the case I have mentioned cannot be given on the law as it stands now. I agree ."

This case was decided on the ground that the decree in question which was one of dismissal did not purport to declare any right, title or interest in the plaintiffs or in the defendant. The passage I have cited from the judgment of Soertsz J. was therefore obiter. Nevertheless I agree with the view taken by him.

[1] *44 N. L. R. 330.*

Mr. Wickramanayake on behalf of the respondent maintains, however, that even if the decree in this case is a registrable document, it does not by non-registration lose its priority inasmuch as the subsequent instrument registered by the appellant is not one by which the latter claims "an adverse interest" within the meaning of section 7 of the Registration of Documents Ordinance (Cap. 101). In support of this contention Mr. Wickramanayake calls in aid the penultimate paragraph in the judgment of Lascelles C.J. in *Mohamed Ali v. Weerasooriya* (*supra*). In this paragraph the learned Chief Justice says that the defendant is not relieved of the bar created by the judgment merely because his deed is unregistered and the judgment is unregistered. The plaintiff does not claim "an adverse interest" to the defendant in virtue of the judgment. He claims no interest at all under the judgment. That he merely says to the defendant that he claims the benefit of the rule of law which forbids him from again putting the matter in question. This paragraph of the judgment in *Mohamed Ali v. Weerasooriya* was merely obiter and I do not find myself bound by it. The right gained by the plaintiff in D. C. Case No. 17,639 was a right to prevent the children of Hendrick from advancing a claim to the land in question. A claim by Hendrick's children was therefore adverse to that right, and it is no more than such a claim that the appellant now sets up on the strength of the conveyance from Hendrick's children. It seems to me, therefore, that the appellant by his deed claimed an adverse interest on valuable consideration to the decree in D. C. Case No. 17,639. To hold that such a decree does not lose its priority by being unregistered because it acts as *res judicata* would nullify the effect of the Ordinance, which is intended as stated by Lascelles C. J. in *James v. Carolis* (*supra*) to protect *bona fide* purchasers for value. Such a decree is invalid.

For the reasons I have given the judgment of the Commissioner is set aside and judgment must be entered for the appellant, the 2nd defendant, with costs in this Court and the Court below.

*Appeal allowed.*