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Present: Garvin and Drieberg JJ.

SILVA *v.* DAVITH *et al.*

226, 226A—D. C. (Inty.) Kalutara, 9,873.

Registration of deeds—Ola deed of 1815—Starting point of prescription—Mortgage action—Lis pendens—*Non-registration of decree—Transfer* pendente lite—*Subsequent purchaser.*

An ola instrument of 1815, which has not been registered in accordance with the provisions of Ordinance No. 6 of 1866, may be admitted in evidence for the purpose of establishing a starting point for a prescriptive title.

An unregistered decree in a mortgage action instituted prior to Ordinance No. 29 of 1917 (Registration of *lis pendens*) operates as a valid charge against a transfer effected by the mortgagor *pendente lite.*

Where a purchaser from such transferee obtained his conveyance after the decree and registered it,—

Held, that the registration of his conveyance did not give it priority over the unregistered decree.

APPEAL from a judgment of the District Judge of Kalutara. The question in dispute in case No. 226 is stated by the learned Judge as follows:—" The plaintiff's title is based on a Dutch grant of 1794. The contesting defendants claim the right by prescriptive possession to work this field in perpetuity on their paying one-fifth share to the owners as ground rent. Their Counsel has moved to produce an ola document of 1815, which has not been registered as required by the provisions of Ordinance No. 6 of 1866, to prove the starting point of prescription in their favour.

Objection is taken to its production by the other side on the ground that, as it has not been registered, it cannot be produced for any purpose whatever in view of the express provisions of section 7 of the Ordinance. In my opinion the document cannot be produced for the purpose indicated."

H. V. Perera, for appellants in Case No. 226.

E. W. Jayewardene, K.C. (with *E. W. Perera* and *N. E. Weerasooria*), for respondents in Case No. 226 and appellants in Case No. 226A.

De Zoysa, for respondents in Case No. 226A.

February 15, 1928. GARVIN J.—

The first of the two appeals in this case (No. 226) was entered by the 12th to the 21st, 24th to the 32nd, 79th, and 80th defendants. To this appeal the plaintiff is the respondent. It was taken from an order made in the course of these partition proceedings refusing to admit in evidence a certain ola instrument bearing date November 10, 1815.

It was the case for the defendants that they were entitled to the perpetual user and enjoyment of the subject of partition upon terms that they paid to the owner a one-fifth share of the produce. In the answer filed by them they claimed to be declared entitled to 4/5ths share of the soil. But that was evidently a mistake, and the true nature of their claim was disclosed at the trial. The ground upon which the document was rejected was that it had not been registered under the provisions of Ordinance No. 6 of 1866 and consequently fell into the category of documents, the reception in evidence of which was barred by the provisions of section 7 of that Ordinance. It was stated, however, that it was not sought to submit the document as evidencing the right which the plaintiff claims, or to base any claim of right or title upon it, but for the purpose of establishing what has been referred to as the " starting point " for a prescriptive title.

Now, the right which these defendants are claiming is in the nature of an emphyteusis. There is authority to be found in the works of Grotius and of certain other recognized authorities of the Roman-Dutch law for the proposition that such an interest may be acquired by user for the third of a century, and there is local authority for the proposition that such a right may even be acquired under the local enactment relating to the law of prescription, see *Daniel v. Silva*,[1] *Jayawardena v. Silva*,[2] and *Podi*

[1] *16 N. L. R. 431.* [2] *18 N. L. R. 269.*

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Singho v. Jaguhamy.[1] The question, however, was not very fully argued before us and I wish to refrain therefore from expressing any opinion of my own on the point.

I propose to address myself to the question of the admissibility in evidence of this document on the assumption that the law is settled in the sense that such an interest is susceptible of acquisition by prescription. The argument that the document cannot be admitted in evidence for any purpose whatsoever is one to which I am unable to assent. The Ordinance in terms states that it may not be admitted for certain purposes. That it is admissible for purposes other than those specified is a necessary inference from the terms of the Statute, and if authority be needed I would refer to the *dicta* in the judgment of Lawrie A.C.J. and Withers J. in the case of *Attorney-General v. Kiriya.*[2] Section 7 of the Ordinance provides that from the date specified therein " no deed, sannas, ola, or other instrument as aforesaid shall be received in evidence in any civil proceeding in any Court of justice for the purposes of creating, transferring, or extinguishing any right or obligation, unless such deed, sannas, ola, or other instrument shall have been previously registered in the manner heretofore directed." The meaning of these words would seem to be that no such instrument shall be admitted in evidence in any Court for the purposes of proving that any right or obligation was created, transferred, or extinguished thereby; in short, that no such document shall be admissible as evidence of the creation, transmission, or extinguishment of the right or obligation of which it is the record. Having regard to the scope of the Ordinance, I am unable to see that it was the intention of the Legislature that section 7 should be given any wider or more extended interpretation, nor is there reason for supposing that such documents were not to be admitted for purposes other than those expressly specified. Subject to the limitations already noticed, there is no prohibition in the Ordinance against the use of these documents as evidence in other cases in which they would be admissible under the Rules of Evidence for the time being in force. Recitals and statements in the deed would clearly be admissible as evidence upon any question relating to paternity, relationship, or marriage, or to prove any other fact so long as it does not fall within the prohibition already mentioned. The appellant would clearly be entitled to the benefit of any recital or statement which directly or by inference establishes the fact that his predecessor in title entered into possession of these premises at a certain date.

Counsel for the appellant, however, contends that the document is admissible, not merely for the purpose of showing the point of time at which his predecessor entered into possession, but also for

[1] *26 N. L. R. 87.* [2] *3 N. L. R. 81.*

the purpose of showing that when he did so, he did it with the intention of holding it in perpetuity with all the rights of an emphyteutical tenant. This necessarily involves the consideration of the document and every part of it as a whole. In effect he claims to be entitled to use the document for the purpose of showing that this predecessor of his entered into possession in consequence of the agreement and upon the terms specified therein, in order to link it up with other evidence by which he proposes to establish the continuity of possession upon the same footing and with the same intention, uninterruptedly up to the present day. The document is clearly inadmissible as evidence of the rights or obligations which it purports to create, and nothing can make it admissible for any such purpose. But the question is whether it may not be admitted for the purpose of showing that the possession, if such possession can be established, from its very inception, was the possession of a person who claimed to hold with all the rights of an emphyteutical tenant. The purpose for which it is sought to be used is not therefore to establish that the possession at its inception was of right and that the possession of the successors of the original occupant was also of right, but merely to show as I have already indicated, the fact of possession; that it was possession akin to that of an emphyteutical tenant; and that such possession continued for the necessary period and matured into a prescriptive right to what is sometimes referred to as a servitude of emphyteusis.

The point is one of no little difficulty and of great interest, but to decide it at this stage would, it seems to me, be premature. The appellants should first establish that they and their predecessors in title had been in possession uninterruptedly up to the date of this document. For it is only then that it would be necessary to consider whether the document can be utilized for the purpose of showing that the possession of that ancestor was possession akin to that of an emphyteutical tenant. The case must, it seems to me, go back to enable the defendants to place before the Court their evidence to establish the right they claim. It is conceivable that the right they claim may be established without the necessity of carrying their evidence as far back as 1815, but however that might be, it is only when and if they succeed in giving reasonable proof of continuous possession by their predecessors in interest which dates back to that period that it will be necessary to consider whether or not the document of 1815 can be admitted for the purpose indicated.

I would therefore set aside the order under appeal and send the case back for trial and disposal. The costs of this appeal will be costs in the cause.

Case No. 226a.

The second appeal—No. 226A—proceeds from a contest between the plaintiffs and the 5th, 6th, and 7th defendants on the one side

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and the 45th defendant on the other. Their respective cases depend upon the assertion which both sides make that at a certain point of time one Balthasar was entitled to a share of this land.

By a bond dated November 28, 1907, and duly registered Balthasar mortgaged his interests to and with one Suppramaniam Chetty, who put the bond in suit in the District Court of Colombo, and on August 30, 1909, obtained a decree declaring those interests specially bound and executable for the amount of his judgment. During the pendency of this action Balthasar executed in favour of one Ponniah Pulle a conveyance (P 9) which was registered on August 16, 1909. Suppramaniam Chetty did not proceed to execution of his decree. On August 4, 1914, he assigned his interest therein to the 45th defendant. The decree still remains unexecuted. On December 1, 1917, Ponniah Pulle executed the deed P 10, under and by virtue of which the plaintiffs and the 5th, 6th, and 7th defendants claim title to the interests of Balthasar. This deed was registered on December 6, 1917.

The claim of the 45th defendant was that in any decree entered in these proceedings the allotment of Balthasar's interests, if any, should be made subject to the reservation of his rights under the decree of which he is the assignee. The District Judge made order in his favour, and the plaintiffs and the 5th, 6th, and 7th defendants have appealed.

The submission made in this appeal is that the deed P 10 prevails over the mortgage decree by reason of the circumstance that it was duly registered whereas the decree was not. For this deed the claim is made that it has the same effect as if it had been executed by Balthasar after the unregistered mortgage decree since Ponniah Pulle by virtue of the right acquired by him on P 9 was his representative. How far the appellants can for this purpose claim the benefit of the deed P 9 is a question which I shall consider later.

The proposition that a mortgage decree is a registrable instrument and one which should be registered is supported by a large volume of judicial decision, see *Adappa Chetty v. Babi*[1] and the case referred to therein. Where such a decree has been entered in an action instituted after the enactment relating to the registration of *lis pendens* affecting land became operative, *i.e.*, November 9, 1917, and is not registered it is void against a purchaser for valuable consideration who obtains title after judgment and before execution (*Saravanamuttu v. Sollamuttu*[2]).

The present action was instituted long prior to the enactment referred to, and the effect of the rule of *lis pendens* to the full benefit of which the plaintiff was entitled afforded him complete protection against all dealings by the defendant Balthasar with the interests involved in the action in the period between the institution of the

[1] *(1923) 25 N. L. R. 284.* [2] *(1924) 26 N. L. R. 385.*

action and the date of the decree. When that decree was entered the property was definitely affected and the charge was valid and operative, not only as against the defendant, but against all persons to whom he purported to convey the property *pendente lite*. Balthasar's transfer P 9 was therefore null and void as against the rights created by the mortgage decree.

But by reason of the provisions of the Registration Ordinance the charge thus created is rendered ineffective against a subsequent purchaser from Balthasar.

The transferee under P 10 is not in fact a subsequent purchaser from Balthasar, and the only way in which the appellants seek to place him in that position is by seeking to take the benefit of the deed P 9 by which Balthasar purported to convey to Ponniah Pulle.

But that conveyance is null and void as against the interests of the decreeholder and cannot be employed by Ponniah Pulle's assignee to defeat those very interests. It is impossible therefore for the appellants to place the transferee under deed P 10 in the position of a purchaser from Balthasar without pleading as against the decree the benefits of conveyance executed *pendente lite* of the very action in which that decree was entered, and this they are not entitled to do.

The order of the Court below is I think correct and should be affirmed.

At the close of his argument Counsel for the appellant intimated that he had various objections to take to the execution of this decree by the assignee, and amongst them satisfaction of the decree by payment—I cannot now recall whether he said satisfaction in whole or only in part. He pleaded that in any order adverse to his client it should be made clear that the share in dispute will only be executable for the amount for which execution is allowed by the Court which passed the decree. It is obvious that any declaration that the share, if any, which may ultimately be allotted to the persons claiming under and by virtue of deed P 10 shall be subject to the right of the assignee to take the same in execution of the mortgage decree can give the assignee no larger rights than those to which the Court to which he has applied for execution of that decree may grant him so that I do not think it necessary to give any special directions in the matter.

The appeal is dismissed with costs.

DRIEBERG J.—I agree.

Appeal dismissed.