1970 *Present :* Alles, J., and Siva Supramaniam, J.

W. D. C. PERERA *et al.*, Appellants, *and* I. A. D. PREMAWATHIE *et al.*, Respondents

S. C. 237/67 (Inty.)—D. C. Panadura, 7594/P

Registration of Documents Ordinance (Cap. 117)—Sections 7 and 14 (1)—Invalidity of unregistered instrument as against subsequent registered instrument—Registration of deed relating to an undivided share of a land—Proper folio—Burden of proof—Evidence Ordinance, s. 114—Deed of transfer seventy years old—Valuable consideration—Quantum of evidence—Evidence Ordinance, s. 3—Person claiming under an unregistered deed as against a person who claims under a subsequent deed which has been duly registered—Issue of prescriptive title—Burden of proof.

(i) Where a deed relating to an undivided share of a land is registered in terms of section 14 (1) of the Registration of Documents Ordinance in a folio of the book allotted to the division in which the land is situated, and the registration is in a new folio without any cross-reference, the Court may presume under section 114 of the Evidence Ordinance that the official act of the Registrar has been regularly performed. Accordingly, unless the transferee (or his successors in title) under an earlier unregistered deed in respect of the same undivided share proves that there was in existence an earlier registration in respect of the whole or part of the said land, to which the registration of the later instrument should have been connected, the later instrument must be regarded as duly registered and must prevail over the earlier unregistered instrument.

(ii) A deed of transfer was more than seventy years old. The parties and the witnesses to it were all dead. It was signed by the transferor and contained an acknowledgment by her that the full consideration for the transfer had been paid to her by the vendee.

Held, that the statement of the vendor contained in the deed that she had received the full consideration for the transfer was sufficient to prove that the interest that passed on the deed was for valuable consideration.

(iii) Where the question is whether A, who claims title to a land under an unregistered deed, has acquired prescriptive title as against B who claims the land under a subsequent deed which has been duly registered, the onus is on A to prove that he has acquired prescriptive title.

APPEAL from a judgment of the District Court, Panadura.

A. C. Gooneratne, Q.C., with *R. C. Gooneratne*, for the 4th, 6th and 7th defendants-appellants.

H. W. Jayewardene, Q.C., with *D. R. P. Goonetilleke* and *G. H. S. Samaraweera*, for the plaintiffs-respondents.

G. P. J. Kurukulasuriya, for the 2nd and 3rd defendants-respondents.

Cur. adv. vult.

March 12, 1970. SIVA SUPRAMANIAM, J.—

This is an action for partition of a piece of land called Kosgahakanattawatte depicted as lots 1, 2 and 3 on plan No. 156 filed of record. There are several matters in dispute between the co-owners but the only one that concerns this appeal is a dispute between the plaintiffs, the 2nd and 3rd defendants on the one hand and the 4th, 6th and 7th defendants on the other in regard to 1/4 share of the said land.

It is common ground that one Daniel and one Bastian had been equally entitled to the land in question and that the rights of Daniel have passed to the 4th defendant-appellant. One of the children of Bastian was Selohamy who married one Joronis. The 1st and 2nd plaintiffs and the 1st and 2nd defendants are grand children of Selohamy and Joronis, being children of one of their sons, William. The 3rd defendant is the widow of William. On Bastian's death, one half of his interests, i.e., 1/4 share of the whole land, passed to his widow Bunchohamy. It is that 1/4 share that is the subject of the present dispute between the parties.

Bunchohamy, by deed P1 of 24.12.1895 transferred her 1/4 share in the land to her son-in-law Joronis. Thereafter by deed No. 9533 of 18.4.1896 (4D7) she transferred the very same share to one Elaris who by deed No. 10352 of 18.12.1897 (4D8) transferred the same to one Don Jamis. Don Jamis by deed No. 12322 of 10.2.1911 (4D9) transferred that share to one Thiyonis, another grandson of Bastian. The interests of Thiyonis have now passed to the 4th, 6th and 7th defendants-appellants, the 6th and 7th defendants being children of the 4th defendant.

The contention of the appellants is that the deed P1 in favour of Joronis was unregistered and was void as against the deed 4D7 in favour of Elaris which was an instrument for valuable consideration and was duly registered and that the appellants who have succeeded to the rights of Elaris have valid title to the 1/4 share of Bunchohamy. The learned trial Judge rejected the contention of the appellants on two grounds—

(1) that there was no affirmative evidence that the registration of deed 4D7 was in the correct folio; and

(2) that the 4th defendant had failed to prove that there was valuable consideration for the deed 4D7.

The appellants produced in evidence a certified copy (4 D 14) of the folio containing the registration of the deed of transfer 4 D 7. The folio indicates that that is the first deed to be registered. The learned trial Judge states : " 4D7 transfers only a half of an undivided half share of Kosgahakanattewatte. There is no affirmative evidence that 4D14 is the right folio for the registration of the deed 4D7 or whether it is the folio in which the first registered instrument affecting Kosgahakanatte-watte is registered or is a continuation of the said folio".

S. 14 (1) of the Registration of Documents Ordinance (Cap. 117) provides as follows :—

"Every instrument presented for registration shall be registered in the book allotted to the division in which the land affected by the instrument is situated, and in, or in continuation of, the folio in which the first registered instrument affecting the same land is registered :

Provided that—

(*a*) an instrument may, if the Registrar thinks fit, be entered in a new folio, cross-references being entered in the prescribed manner so as to connect the registration with any previous registration affecting the same land or any part thereof ; and

(*b*) where no instrument affecting the same land has been previously registered, the instrument shall be registered in a new folio to be allotted by the Registrar."

The deed 4D7 shows that the land in question is situated at Weniwelkola in Udugaha Pattu of Salpiti Korale. The document 4D14 shows that it is a folio of the book allotted to the aforesaid division. Under the Registration of Documents Ordinance it is the duty of the Registrar to register the instrument in the book allotted to the said division. The registration of 4D7 complies with that requirement. The further duty cast on the registrar is to register it in or in continuation of the folio in which the first registered instrument affecting the same land is registered and, where no instrument affecting the same land has been previously registered, to register it in a new folio. The registration is a statutory duty carried out by the Registrar and under s. 114 of the Evidence Ordinance the Court may presume that that official act had been regularly performed. The fact that the registration of the deed 4 D7 is contained in a new folio without any cross reference will therefore lead to the inference that no instrument affecting the same land had been previously registered. It was, of course, open to the respondents to prove, if such was the case, that there was in existence an earlier registration in respect of the whole or part of the said land, to which the registration of 4D7 should have been connected. In the absence of such proof, the appellants were entitled to a finding that the instrument 4D7 was duly registered.

As regards the second ground, namely, that there is no proof that the transfer was for valuable consideration, one has to bear in mind that the deed is more than seventy years old and that the parties and the witnesses to the deed are all dead. The deed which is signed by Bunchohamy contains an acknowledgment by her that the full consideration for the transfer had been paid to her by the vendee. That statement is an admission by Bunchohamy against her pecuniary interest and is a relevant fact. The learned Judge, however, held that that fact was not sufficient to prove that consideration was paid. He appears to have been influenced in his view by the judgment of this Court in *Diyes Singho v. Herath*[1] in which Fernando J. (Abeyesundere J. agreeing) held that a statement by the notary in his attestation of a deed of transfer that the consideration was paid in cash in his presence was insufficient to establish the truth of the payment of such consideration. The Court was not considering in that case the effect of a statement contained in the deed by a vendor who was dead. Besides, the deed was one which had been executed less than seven years earlier and it would have been possible for the parties to lead direct evidence in regard to the consideration paid. On the facts in the instant case, the statement of the vendor contained in 4D7 that she had received the full consideration for the transfer was sufficient to prove that the interest that passed on that deed was for valuable consideration. Under s. 3 of the Evidence Ordinance "a fact is said to be proved when, after considering the matters before it, the Court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists."

For the reasons aforesaid, the appellants were entitled to a finding that deed 4D7 had been duly registered and that P1 was void as against all parties claiming an adverse interest under 4D7.

The next question is whether Joronis and his successors have acquired prescriptive title as against the appellants to the aforesaid 1/4 share. On this issue too the learned trial Judge held in favour of the respondents. In support of that finding the learned Counsel for the respondents submitted that both Elaris and Don Jamis Appu were outsiders and in the absence of evidence that they possessed any share in the land, Joronis who had been on the land would have acquired prescriptive title against them before Don Jamis Appu transferred his interests to Thiyonis, who was a co-owner, on 4D9 of 1911. It was argued that the possession of Joronis was referable to his legal title on P1.

On the question of possession the witnesses who gave evidence were the 2nd defendant and the 4th defendant. At that time the 2nd defendant was 46 years of age and the 4th defendant 64. Neither of them could therefore have had personal knowledge of the land during the

[1] *(1962) 64 N. L. R. 492.*

period of the ownership of Elaris or Jamis. The evidence of the 2nd defendant was directed to prove that Joronis was in possession of 1/3 share of the land as planter but this claim was rejected by the learned trial Judge. It was common ground between the parties that Selohamy wife of Joronis was entitled to 1/12 share of the land and Joronis was in possession of that share even before the execution of P1. There is no evidence that after the execution of deed P1 in his favour Joronis enlarged the area he was in possession of so as to include an extent equivalent to the extent he purported to purchase from Bunchohamy. It has also not been disputed that for over thirty years the 4th defendant and his children the 6th and 7th defendants have been in possession of lots 2 and 3 as divided lots and that the total extent of these lots is roughly equivalent to their undivided interests in the whole land inclusive of the 1/4 share purchased by Elaris on 4D7. Since the legal title to the disputed 1/4 share was in the appellants by reason of the due and prior registration of 4D7, the onus was on the respondents to prove that Joronis and his successors in title had acquired prescriptive title to that share. In the absence of such proof, the appellants were entitled to succeed. The 2nd defendant conceded that from the time he came to know this land, the 4th defendant had been in possession of lots 2 and 3. There is no evidence to show that Joronis's possession was of a larger share than what he was entitled to possess by virtue of the right of his wife. The trial Judge's conclusion that neither Jamis Appu nor Thiyonis possessed the 1/4 share they purchased on 4DS and 4D9 because they did not register their respective deeds is a *non sequitur*. On the evidence led the respondents failed to discharge the burden that lay on them to prove that Joronis and his successors had acquired a prescriptive title to the said 1/4 share and the learned Judge should have answered the issue in regard to prescriptive title against the plaintiffs-respondents.

Issues 1 (*a*) and 1 (*b*) should have been answered in the negative and issues 7 (*a*), 7 (*b*), 10 (*a*) and 10 (*b*) in the affirmative.

I set aside the decree and that part of the judgment relating to the findings on issues 1 (*a*), 1 (*b*), 7 (*a*), 7 (*b*), 10 (*a*) and 10 (*b*) and direct that a fresh decree be entered on the basis of the aforesaid answers to the above issues. The learned trial Judge will make an appropriate order in regard to the costs of the Lower Court.

The appellants are entitled to their costs in appeal.

ALLES, J.—I agree.

Appeal allowed.