

1951

*Present : Gratiaen J. and Gunasekara J.*ARUMUGAM *et al.*, Appellants, and ARUMUGAM, Respondent*S. C. 27—D. C. Jaffna, 4,635**Registration of Documents Ordinance (Cap. 101)—Section 7 (2)—“ Prior registration ”
—“ Collusion ”.*

A. bought certain property from B. and entered into possession of it as its lawful owner. C. was aware of the transaction but, nevertheless, in the hope of taking advantage of the fact that A. had registered his deed in the wrong folio, purported subsequently to purchase from B., with knowledge of B.'s intended fraud, certain rights in the property. C. registered the later deed in the correct folio.

Held, that C. was guilty of “ collusion ” within the meaning of section 7 (2) of the Registration of Documents Ordinance and could not, therefore, claim the benefit of prior registration.

APPPEAL from a judgment of the District Court, Jaffna.

C. Thiagalingam, K.C., with *V. Arulambalam* and *P. Somatilakam*, for the defendants appellants.

C. Renganathan, with *S. Sharvananda*, for the plaintiff respondent.

Cur. adv. vult.

June 6, 1951. GRATIAEN J.—

This action was instituted on 5th July, 1948, for the partition of a land in which the plaintiff claimed an undivided $\frac{1}{2}$ share by right of purchase from the 3rd defendant Thambimuttu under the deed P5 of 1st October, 1947. The main contest at the trial was between the plaintiff on the one hand and the appellants (i.e., the 1st and 2nd defendants who are husband and wife) on the other. The case for the appellants was that under the deed 1D2 of 13th November, 1938, they had already purchased Thambimuttu's undivided $\frac{1}{2}$ share in the land which represented at that time the entirety of his interests in the property. They claimed that Thambimuttu was therefore vested with no rights which he could pass to the plaintiff under P5. In reply to this contention, the plaintiff claimed the benefit of Section 7 of the Registration of Documents Ordinance (Cap. 101) on the ground that his deed P5, though later in point of time, had been registered in the correct folio whereas the appellants' deed 1D2 had by some long-standing error been registered in the wrong folio. The evidence certainly established that the folio which the plaintiff had selected for the registration of P5 was the earliest folio in which an instrument affecting a share in the *corpus* had been registered.

The appellants disputed the position that P5 was in fact correctly registered, but on this point the finding of the learned District Judge in favour of the plaintiff is, in my opinion, clearly right. The plaintiff could therefore claim priority for his deed if he could satisfy the Court that he had given valuable consideration for the interests which passed to him under P5—unless, of course, the appellants were able to defeat this priority by proving fraud or collusion on the part of the plaintiff either in obtaining his instrument or in securing its prior registration. Issues were raised at the trial for the learned Judge's decision on all these points of contest.

Our task as an appellate tribunal has been made more difficult by reason of the fact that the learned Judge has not recorded in his judgment any specific finding as to whether or not in his opinion consideration had passed on P5. The evidence of the plaintiff on this issue is certainly not so convincing that we could safely infer that it has been accepted by implication by the learned Judge. For instance, the plaintiff had in the first instance stated that *the entire consideration of Rs. 1,000 had been paid to Thambimuttu in the presence of the attesting notary*. It was then pointed out to him in cross-examination that this evidence was in conflict with the terms of the notary's certificate in the attestation clause. In re-examination he gave a different version as to how and when the alleged consideration had been paid. "I paid earlier than the deed of transfer", he said. "I paid Rs. 500 on the transferring of the land. After arranging the settlement (whatever that might mean) I paid Rs. 300 and on the day of the transfer deed Rs. 200 was paid. *At the time the notary attested the deed I did not pay any money*". The only other person who gave evidence on this issue was Thambimuttu himself who was represented by counsel at the trial and had presumably been present in Court, in his capacity as the 3rd defendant, when the plaintiff gave his version of the transaction. Thambimuttu was not called as a witness by the plaintiff to support his case. He did give evidence, however,

on his own behalf in support of his claim to be allotted an undivided $\frac{1}{32}$ share in the proposed partition. This claim was rightly rejected, and his evidence was discredited on many points. It is significant that neither in the course of his examination-in-chief nor of his cross-examination on behalf of the appellants did he testify to the passing of any consideration on the deed P5. After he had been cross-examined by the appellants' counsel, however, he answered certain questions which were put to him on behalf of the plaintiff. He then stated in a single sentence, and without elaboration, that he had "received Rs. 1,000 from the plaintiff for the purchase of his share". It is indeed a matter for surprise that learned Counsel who appeared at the trial for the appellants did not ask for an opportunity to cross-examine Thambimuttu once again in order to test this item of evidence which had been introduced at so late a stage. Be that as it may, I consider that unless this appeal can satisfactorily be disposed of on some other ground, the case should be sent back for re-trial upon this issue. The burden was on the plaintiff to establish that valuable consideration had passed on the deed P5 before he could claim the benefit of prior registration. I find it impossible to adjudicate on this point in appeal in the absence of a decision on the point by the trial Judge. It must be borne in mind that the evidence of the plaintiff and of Thambimuttu had not been accepted as truthful on many other important points.

The question whether a re-trial should be ordered depends, therefore, on whether in our opinion the learned Judge was justified in holding in favour of the plaintiff on the outstanding issues of fraud and collusion. As these issues only arise on the assumption that valuable consideration did pass on P5, I shall so assume for the purposes of what follows in my judgment.

The learned Judge has not directed himself properly on the issues of fraud and collusion because he has not given his consideration to the effect of many material matters which were relevant to his decision. Fortunately, however, his findings on some of these relevant questions have been recorded in connection with certain other points of controversy (such as the issue of prescription) and it is for this reason that I find myself in possession of sufficient material upon which I can form a definite conclusion.

It was important to ascertain whether, at the time when the plaintiff negotiated for the purchase of a share in the land from Thambimuttu, he was aware that the appellants were already the lawful owners in possession of that share. On this point the learned District Judge has expressly accepted the 1st appellant's evidence that he and his wife, who before 13th November, 1938, had been co-owners in possession to the extent of an undivided $\frac{1}{4}$, had upon the execution of 1D2 entered into possession of the additional share which they purchased from Thambimuttu. Admittedly, the plaintiff was in a particularly favourable position to know the true facts, because he was a close relative of Thambimuttu and had lived in the immediate neighbourhood since his childhood. He stated in evidence that to his knowledge Thambimuttu had after November, 1938, continued in possession as ostensible owner of the share which had been sold to the appellants. This evidence, as well as that of Thambimuttu which was to the same effect, was disbelieved. Not only

did the plaintiff and Thambimuttu attempt to explain away by false testimony facts which were material to the issues of fraud and collusion, but they went further, and impugned the earlier deed in favour of the appellants as having been dishonestly obtained by some improper means. Thambimuttu's evidence on this point was also disbelieved by the learned Judge.

It is unnecessary to examine in detail the other suspicious features of the case which are material to these issues. In my opinion this Court can safely assume, upon the basis of the learned Judge's express findings of fact and of the inferences which necessarily follow from them, that both Thambimuttu and the plaintiff were fully aware of the following circumstances at the time when the plaintiff purported to purchase a share in the land from Thambimuttu on 1st October, 1947:—

(a) that Thambimuttu's interests in the land had already effectively passed to the appellants for valuable consideration on the deed 1D2 of 1938 ;

(b) that this transaction had been acted upon by the appellants, and that since 15th November, 1938, the 1st appellant, on behalf of himself and his wife, had enjoyed possession *ut dominus* of that share in its entirety ;

(c) that all the parties, namely, Thambimuttu, the appellants and the plaintiff himself were until shortly before October, 1947, under the erroneous impression that the appellants' deed 1D2 and the earlier deed 1D1 under which Thambimuttu had acquired the share which he later sold, had been registered in the correct folio.

The evidence clearly establishes that shortly before 1st October, 1947, if not earlier, Thambimuttu (whose financial condition during that period may be gauged from the circumstance that at the time of the trial he was drawing a charitable allowance from the Ceylon Government) conceived the idea of dishonestly defeating the appellants' rights of ownership by purporting to sell again some part of his interests which were no longer his to dispose of. The plaintiff, with full knowledge of the true position, and fortified by his recent discovery that the earlier conveyance 1D2 had in fact been registered in the wrong folio, agreed to purchase from Thambimuttu a share (which had already been effectively disposed of) in order that he might secure to himself a personal advantage to the appellants' detriment. In pursuance of this common design he secured the execution of the deed 1D2 and promptly caused it to be registered in what he had discovered to be the correct folio. In other words, he entered into a collusive transaction with Thambimuttu and lent himself as a party to the latter's intended fraud on his previous vendors. This thoroughly disreputable transaction took place within a short time of the date on which the appellants' rights under 1D2 would have been strengthened by the acquisition of prescriptive title to the $\frac{1}{2}$ share purchased by them in 1938.

On these findings of fact I am satisfied that the plaintiff is not entitled in law to claim the benefit of the provisions of the Registration of Documents Ordinance because he had been guilty of *collusion* with Thambimuttu in obtaining the execution of the conveyance 1D2 in order to defeat

the appellants' rights of which he was fully aware. This is not a case of a genuine purchaser who was only affected by "mere notice" of a prior unregistered instrument which admittedly would not by itself provide sufficient evidence of fraud so as to deprive his deed of the priority conferred by law. On the contrary, this is a case of a person who, with knowledge of the vendor's intended fraud, joined the wrongdoer in a transaction for their mutual benefit. Such conduct amounts to "collusion" which was designed "to defraud the persons entitled to the land under the prior instrument of their lawful rights".—*Per Lord Maugham in Abeysondera v. Ceylon Exports Limited*¹. The judgment of the Privy Council to which I have referred upheld the decision of this Court in *35 N. L. R. 417* where Dalton J. held that the defendant in that case was guilty of "collusion" because he knew of the earlier conveyance over which he claimed priority, and "was aware of a great deal more than the existence of a prior and unregistered conveyance". It is unnecessary to discuss the long line of authorities dealing with cases of this nature. It suffices to follow, with respect, the dictum of Bertram C.J. in *Ferdinando v. Ferdinando*², that there is "collusion" within the meaning of the Registration of Documents Ordinance whenever the evidence establishes "the joining of two parties in a common trick".

Human ingenuity is such that the categories of fraud and collusion are far too varied to permit of any comprehensive definition which would fit every possible case which might arise for adjudication between competing instruments affecting land under the Registration of Documents Ordinance. The provisions of Section 7 (2) are by no means confined to transactions where some fiduciary relationship exists or where the subsequent purchaser to whom fraud or collusion is imputed is proved to have taken an active part in the earlier sale over which he claims priority. If any person, knowing that his proposed vendor had effectively parted with his interests in a property in favour of someone who has entered into possession of the property as its lawful owner, nevertheless, and in the hope of taking advantage of some recently detected flaw in the registration of the earlier deed, purports to purchase from that vendor certain rights in the property which have already been disposed of, he is guilty of "collusion" within the meaning of Section 7 (2) of the Ordinance. The law does not grant the benefit of prior registration to transactions of this kind.

In taking the view that no fraud or collusion had been established against the plaintiff, the learned trial Judge misdirected himself by not taking into account the effect of the incriminating circumstances to which I have referred. For these reasons, I would hold that no title passed to the plaintiff under the deed P5 of 1947, and he therefore possessed no interest in the land which enabled him to institute these proceedings under the Partition Ordinance. I would therefore set aside the judgment appealed from, and dismiss the plaintiff's action. The plaintiff will pay to the appellants their costs both here and in the Court below.

GUNASEKARA J.—I agree.

Appeal allowed.

¹ (1936) 38 N. L. R. 117.

² (1921) 23 N. L. R. 143.