

1931

Present: Akbar J. and Maartensz A.J.

KOBBEKADUWA v. GENERAL RUBBER COMPANY *et al.*

322—*D. C. Kandy*, 37,082.

*Registration—Deed of gift creating fidei commissum unregistered—deeds of transfer by donees—Certain fidei commissaries joining deed—Further covenant to convey title—Adverse interest—Priority.*

M by deed of gift dated March 21, 1884, registered on March 1, 1915, donated certain lands to his son T and his wife, subject to a *fidei commissum* in favour of their seven children.

T and his wife by deed dated February 15, 1915, registered on February 18, 1915, sold the lands to the defendant company. The deed did not set out their title but contained a recital that, doubts having arisen as to whether the children of the vendors were entitled to any interest in the land, three of them, who were of age, joined in the deed to transfer their rights, if any. The vendors and these parties further covenanted that the other children on attaining majority would execute deeds in favour of the company to divest themselves of their interest. This covenant was not fulfilled. T was the intestate heir of M.

*Held*, the deed of transfer by reason of prior registration prevailed over the deed of gift.

APPEAL from a judgment of the District Judge of Kandy.

*Hayley, K.C.* (with *Choksy and Wendi*), for first defendant, appellants.

*N. E. Weerasooriya*, for plaintiff, respondent.

*Rajapakse*, for second and third defendants, respondents.

September 9, 1931. MAARTENSZ A.J.—

This was an action to partition the lands described in the schedule to the plaint. The lands belonged to Wegodapola Bandaranayake Wasala Mudiyanse, who by deed No. 8,441 dated March 21, 1884, donated them to his son Ratwatte Weligala Walauwe Tikiri Banda and his

wife Giragama *alias* Diwelgama Tikiri Kumarihamy subject to a *fidei commissum* in favour of the donee's children.

The donees died leaving as heirs seven children, Abeyratne Banda, Tikiri Banda, Heen Banda, Leelawathie, and the plaintiff and the second and third defendants.

Tikiri Banda and his wife by deed No. 299 dated February 15, 1915, and registered on February 18, 1915, sold the lands in question and other lands to the first defendant company. The vendors did not set out their title. The deed merely recites that "the vendors are seized and possessed of or otherwise well and sufficiently entitled to all those several allotments . . . in the schedule hereto annexed more fully described and set out".

The deed further recites that doubts have arisen as to whether the children of the vendors may not be entitled to an interest in the said allotments, that the vendors have seven children of whom Seelawathie (plaintiff), Wilmot (second defendant), and Lionel (third defendant) are minors, that the parties of the second part (Tikiri Banda, Heen Banda, and Leelawathie) have agreed in consideration of the premises to join in the deed for the purpose of transferring their rights and interests, if any, in the said lands which may have accrued or may hereafter accrue to them under and by virtue of a certain deed of gift bearing No. 8,441 dated March 21, 1884, and also for the purpose of entering into the covenant on their part hereinafter contained.

The vendors and the parties of the second part thereafter convey to the first defendant company their interests in the lands described in the schedule and covenant that Seelawathie, Wilmot, and Lionel will after they respectively attain their majority execute in favour of the company all deeds for divesting themselves of their rights and interests (if any) and conveying them to the company.

This covenant was not fulfilled and the plaintiff and the second and third defendants seek to establish their title in this partition suit.

It was stated at the argument in appeal that the question whether the deed No. 8,441 created a *fidei commissum* was decided in the affirmative by this Court in case No. 24,169 of the District Court of Kandy and that the company will not contest the correctness of that decision in this appeal. The right to ask for a re-consideration in the case of an appeal to the Privy Council was reserved.

In view of this statement, the only question we have to decide is the third issue, namely :—Can the first defendant company claim priority of title by reason of the registration of the deed of transfer No. 299 in view of the recitals therein and in view of the registration of the leases by Tikiri Kumarihamy and Tikiri Bandá in 1887 ?

The leases referred to in the issue were executed in 1887 by the donees in favour of one T. C. Owen who assigned them to the first defendant company in 1898.

I do not see how the leases affect the question of registration.

The learned District Judge held that deed No. 299 did not gain priority by registration as Tikiri Banda's wife and children were parties to the deed and provision had been made in the deed for the transfer of the shares of the minor children to the first defendant company. He accordingly allotted a 1/7th share each to the plaintiff and the second and third defendants, and a 4/7th share to the first defendant company.

The first defendant company appeals from this order.

It was admitted in appeal that Tikiri Banda was sole heir *ab intestato* of the donor Wegodapola Bandaranayake.

The appellant's contention was that the deed of donation No. 8,441 not having been registered, was void as against the

defendant company's deed which created an adverse interest thereto by virtue of prior registration.

Deed No. 8,441 was, I find on reference to record No. 24,169, registered on March 1, 1915. The registration does not affect the appellant as it was effected after the deed relied on by the company was registered.

It was argued that what was conveyed to the company was the interest of Weligala Walauwe Tikiri Banda as sole heir *ab intestato* of the donor Wegodapola Bandaranayake, that the respondents derived title from the same source and that the appellant was therefore entitled to claim the benefit of the provisions of section 17 of the Ordinance relating to registration. The Ordinance then in force was Ordinance No. 14 of 1891.

In support of this argument we were referred to the decision in case No. 24,169 of the District Court of Kandy and the case of *de Silva et al. v. Wagapadigedera*.<sup>1</sup> The latter case was, I find on examination of the record, an action for declaration of title to a half share of a field called Radapotta. The field was gifted with other lands by the owner, Loku Mudianse, by deed No. 2,740 dated December 4, 1868 (P 1), to his wife Ran Menika subject to a *fidei commissum* in favour of the donor's grandchildren Bandara Menika and Muttu Menika and, as was held by this Court, in favour of their descendants.

After Ran Menika's death Bandara Menika and Muttu Menika executed a deed of partition No. 4,785 dated April 5, 1902, by which each of them transferred half the field to the other.

Bandara Menika by deed dated June 10, 1902, gifted her half share of the field to her son William. William died on March 31, 1918, leaving as his widow, the first plaintiff, and second and third plaintiffs, his children.

The defendant claimed the land on a deed No. 4,929 dated January 9, 1914,

<sup>1</sup> (1929) 30 N. L. R. 317.

executed in his favour by William and denied that the deed of gift No. 2,740 created a *fidei commissum*.

The learned District Judge's finding that the deed No. 2,740 created a *fidei commissum* was affirmed in appeal and the case remitted to the District Court for further hearing.

At the further hearing, the defendant pleaded that on the death of Loku Mudianse the land devolved on his grandchildren Bandara Menika and Muttu Menika, that Bandara Menika by deed No. 4,948 of 1902, registered on May 2, 1904, gifted her share to her son William, who by deed No. 4,929 dated January 9, 1914, and registered on January 14, 1914, sold to the defendant and that the registered deeds prevailed over the unregistered deed of gift executed by Loku Mudianse.

The plaintiff in reply pleaded an estoppel as Bandara Menika entered into possession under the deed of gift P 1.

Issues were tried on these pleas and plaintiff's action was dismissed on the ground that the deed of gift was void as against the defendant's registered deeds. This decision was affirmed in appeal.

The contention in appeal that section 17 of the Registration Ordinance did not apply as the defendant was bound by the recitals in his chain of title was rejected.

I find on examination of these deeds that Bandara Menika and Muttu Menika in the deed of partition No. 4,785 stated that they were entitled to the field in question by right of their grandmother Ran Menika and that she, Ran Menika, was entitled under the deed of gift in her favour bearing No. 2,740 dated December 4, 1868.

Bandara Menika in her deed of gift No. 4,948 to her son William recited that she was entitled to the land gifted upon deed No. 4,785 dated April 5, 1902, and William in his deed to the defendant claimed title under the deed No. 4,948.

Bandara Menika became entitled to the land in dispute by inheritance as well as by the deed of gift No. 2,740. But the registered deed in favour of the defendant was held to prevail over the deed of gift although his predecessors in title clearly recited a title derived from the deed of gift.

The decision of this Court that, where a deed of gift creating a *fidei commissum* was unregistered and the fiduciary who was also the intestate heir of the donor sold the property to the defendant who registered his deed, the defendant's title was superior to that of the *fidei commissary* heirs is therefore clear authority against the respondent's contention in the present appeal that deed No. 299 by reason of its recitals cannot prevail over the deed of gift No. 8,441 dated March 21, 1884, as the grantor's title was based on the deed of gift. But in my opinion this contention cannot be urged in the present case as Tikiri Banda and his wife do not recite title as under the deed of gift in question. There are, it is true, references to the deed of gift in deed No. 299, but these references were for the purpose of catching up the title of their children "if any".

In case No. 24,169 of the District Court of Kandy the competition was between this same deed of gift No. 8,441 and a deed No. 3,627 dated April 27, 1893, and registered on May 4, 1893, executed by Tikiri Banda in favour of the added defendant's predecessor in title.

Tikiri Banda in deed No. 3,627 recited his title as being derived by intestate succession from his late father Wegodapola. The District Judge held that the deed of gift being subsequently registered was void as against the adverse interest created by deed No. 3,627.

The plaintiffs appealed, but appellants' counsel did not contest the correctness of this finding. The fact that appellants' counsel did not contest the correctness

of the District Judge's finding is not an authority upon which a decision can be based.

The case of *Gooneratne v. The Bishop of Colombo*<sup>1</sup> is not an authority upon which the respondent can rely ; for in that case the registered conveyance was a conveyance of the interests derived from the will and was expressly subject to the terms of the will. There was in fact no interest transferred independent of the will.

I see no reason to dissent from the ruling in the case of *Silva et al. v. Wagapedigedera* (*supra*) and accordingly allow the appeal and dismiss plaintiff's action with costs in both Courts.

AKBAR J.—I agree.

*Appeal allowed.*

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