

1937

*Present: Abrahams C.J. and Maartensz J.*PERERA *v.* SOYSA

6—D. C. Colombo, 428

Registration—Partition of land—New folio opened for divided portion—Registration of deed affecting portion of divided land—Cross-reference to original folio but not to new folio—Registration of Documents Ordinance, No. 23 of 1927, s. 151 (a).

Where, after the partition of a land held in undivided shares, a divided portion of the land was registered in a new folio connected up with the old folio, and where a deed affecting a part of the divided portion was registered in another folio connected with the original folio but without reference to the new folio,—

Held, that the deed was not registered in such a manner as to facilitate reference to all existing alienations or encumbrances affecting the land.

Mohammadu Sali v. Isa Natchia (15 N. L. R. 157) and *Paaris v. Perera* (15 N. L. R. 148) referred to.

A defined portion of land called Delgahawatta was mortgaged by Martin Perera to the plaintiff's daughter by bond No. 76 dated October 15, 1929. It was registered in folio M 290/248 which was the continuation of M 206/241 on October 21. The plaintiff purchased the land at a sale in execution of the mortgage decree entered in the action on the bond. His conveyance No. 620, dated July 23, 1935, was registered in folio M 290/248 on July 24.

The first and second defendants claimed an undivided half share of the land upon a deed of gift No. 10,620 dated April 20, 1927, executed by Martin Perera in their favour. This deed was registered on July 9, 1927, in folio M 279/264. The District Judge held that plaintiff's deed was registered in the right folio.

N. E. Weerasooria (with him *E. B. Wikremenayake* and *A. E. R. Corea*), for defendants, appellants.—The original owners of Delgahawatta were Davith and Martin Perera. They divided the land amicably, but it was not registered. The land in dispute was the portion given to Martin Perera. Delgahawatta was first registered in folio M 136/382 opened in 1908. Martin Perera opened a new folio M 206/241 for his portion of the land in 1920. This folio was connected up with the earlier one M 136/382 by cross-references. Martin Perera mortgaged this land to plaintiff's daughter, who put the mortgage bond in suit. At the sale plaintiff bought the land. On that day plaintiff was told by the defendants of their title. The plaintiff's deed was registered in M 206/241 on July 24, 1935.

In July, 1927, Martin Perera gifted a half share of his land to his daughter and son-in-law, the present defendants. This was registered in 1927, in folio M 279/264 which was connected with the original registration M 136/382. The Notary who attested the deed of plaintiff could have seen the earlier registration if he had searched properly. The defendants deed was registered prior to that of the plaintiff and the latter cannot claim the benefit of his registration.

H. V. Perera, K.C. (with him *P. A. Senaratne*), for plaintiff, respondent.—Section 15 of the Registration of Documents Ordinance, No. 23 of 1927, deals with the registration of instruments. The first transaction is registered in a folio. All subsequent registrations must be in that folio or in a continuation of that folio. Hence there is only one folio with respect to the same land. The whole land was registered in M 136/382. When it was divided into two portions, each becomes a separate land and must be registered in a new folio. There are cross-references merely to trace the history of the land and a folio cannot be continued by these cross-references. Hence when once the folio M 206/241 was opened the subsequent dealings must be registered in that folio and not in a new folio with a cross-reference to M 136/382. Further it would be very difficult to trace the history of a piece of land if a Notary has to search through all the cross-references given in the folio where the land of which this is a portion, is registered. Hence the folio in which the plaintiff's deed was registered is the correct one and the defendant's deed was in the wrong folio (*Silva v. Appu*³).

¹ (1911) 15 N. L. R. 157.

² (1912) 15 N. L. R. 148.

³ (1914) 4 Bal. Notes of Cases 28 at p. 30.

N. E. Weerasooria, in reply.—When a new folio is started it becomes the correct folio because it is connected with the folio (parent folio) in which the whole land was registered. The parent folio is the correct folio for any portion of that land. M 206/241 is the correct folio because it was connected with M 136/382, so is the folio M 279/264.

[MAARTENSZ J.—Then both folios are right.]

Yes. Section 15 of the Registration of Documents Ordinance, No. 23 of 1927.

[MAARTENSZ J.—There should be a reference in M 206/241.]

Yes. See *Chelliah Pillai v. Devadasan*¹; *Meurling v. Gimarahamy*².

The new folio must be connected up with any previous registration. The reference to M 206/241 was given in our deed, though the registrar made no cross-reference to that folio.

Counsel further cited *Peris Appuhamy v. Weerasinghe*³.

The case was listed for further argument and the Attorney-General was noticed to appear.

It is merely one registration.

H. V. Perera.—There is no inconsistency. The Land Registration Ordinance, 1891, states what the proper folio is. The precise manner of registration is not stated. Section 7 of the Registration of Documents Ordinance, No. 23 of 1927, is the operative section. If that section stood alone, the old Ordinance must be looked at to find what due registration is. Now section 15 (2) states how the deed must be registered. It must be done to facilitate reference. Cross references must be in the prescribed manner.

J. E. M. Obeyesekere, C.C., for Attorney-General.—There is no inconsistency. The Registration of Documents Ordinance, No. 23 of 1927, sought to codify the law. It re-enacted certain provisions of the old Ordinance, but at the same time embodied the practice of judicial decisions. Where a deed has been registered under the old Ordinance, it has to be seen whether the provisions of section 15 (2) had been complied with in order to gain the benefit of section 7 (3). The provisions in section 15 (2) does not alter the old law, but enacts the practice. Section 15 (1) (a) states that every previous registration must be mentioned.

Cur. adv. vult.

December 21, 1937. MAARTENSZ J.—

This is an action for declaration of title to a defined portion of a land called Delgahawatta, 1 rood 28.66 perches in extent, depicted in plan P 4 which at one time formed part of a land 2½ acres in extent.

The land in dispute was mortgaged by Martin Perera to the plaintiff's daughter by bond No. 76, dated October 15, 1929. It was registered in folio M 290/248 on October 21. The plaintiff purchased the land at a

¹ (1937) 16 *Cey. Law Rec.* 165.

² (1922) 25 *N. L. R.* 500, at 501.

³ (1922) 5 *Cey. Law Rec.* 93.

sale in execution of the mortgage decree entered in the action on the bond. His conveyance No. 620, dated July 23, 1935, was registered in folio M 290/248 on July 24, 1935.

The first and second defendants claimed an undivided half share of the land north of the road, upon a deed of gift executed by Martin Perera in their favour bearing No. 10,620 and dated April 20, 1927, which was registered on July 9, 1927, in folio M 279/264 (D1).

The District Judge held that the first and second defendants were estopped from denying plaintiff's title and that the deed of gift was registered in the wrong folio, and entered judgment for plaintiff as prayed for with costs.

The first and second defendants appeal from this order.

The first ground upon which the District Judge held against the defendants cannot be sustained as the plaintiff, when he purchased the land at the sale in execution, did so with the knowledge that the first and second defendants were claiming an interest in the land upon the deed of gift D1. Moreover, the plaintiff pleaded that the estoppel arose from the fact that the second defendant signed the mortgage bond No. 76 as a witness. Now the mere fact of his signing the bond would not operate as an estoppel on which the mortgagee could rely; much less can it operate as an estoppel on which the plaintiff can rely.

As regards the question of registration, the deed of gift D1 was prior in date to and was registered before the mortgage bond No. 76 and the plaintiff's deed No. 620, and must prevail if it was duly registered. To determine whether it was duly registered it is necessary to set out a history of the registration of the deeds affecting the land in dispute and the land of which it formed a part.

The first registered instrument affecting the land Delgahawatta of 2½ acres in extent, so far as this action is concerned, was registered in folio M 136/382; it is therefore the right folio. (See the case of *Silva v. Appu*¹). The deed 3,021 dated October 8, 1916, upon which Martin Perera acquired title to an undivided share in Delgahawatta of 2½ acres is registered in this folio which was carried over to folio M 187/175. There is an endorsement to this effect at the end of the earlier folio and there is an endorsement on folio M 187/175 that it was brought forward from the earlier folio.

The plain P4 shows that the land of 2½ acres was partitioned on or about March 31, 1917, and that the land depicted in the plan was allotted to Martin Perera. Although the partition was not confirmed by a notarial instrument the Registrar registered a mortgage bond No. 884 dated February 25, 1920, in a new folio M 206/241. Presumably he did so in pursuance of the provisions of section 27 of the Land Registration Ordinance, No. 14 of 1891. This section enacts as follows: "On the partition of any land, registered as one allotment, the Registrar shall, upon a written application in that behalf, register the new allotments on separate and fresh pages of the book, with such references as may be necessary to identify them with the original registration".

¹ (1914) 4 *Bal. Notes of Cases* 28.

To identify folio M 206/241 with the folio of the original registration, there is an endorsement under the head "Remarks" as follows: "For entire land see M 136/382", and on folio M 136/382 there is endorsed on the top left-hand corner "For a portion see M 206/241".

The mortgage bond No. 76 and the plaintiff's deed No. 620 are registered in folio M 290/248 which is a continuation of folio M 206/241.

The deed of gift on which the appellants rely, although it affects an undivided share of the same divided portion, was registered in another folio, namely, M 279/264, on which on the top left-hand corner is endorsed: "This is a portion of the land registered in M 187/175"; on the latter is endorsed "For a portion see M 279/264".

The plaintiff contended that after the partition, the right folio was the folio, namely, M 279/264, on which on the top left-hand corner is endorsed: that is, folio M 206/241, which could by reason of the references be identified with the original registration.

The appellants on the other hand submitted that as the folio in which their deed of gift was registered could be identified with the original registration their deed was duly registered.

The plaintiff's contention is not, so far as I am aware, covered by authority. In the cases of *Mudalihamy v. Punchi Banda*¹ and *Chelliah Pillai v. Devadasan et al.*² one of the competing deeds was registered in the right folio and the other in a wrong folio, which was however connected up with the right folio by cross references in both folios, and it was held that the deed registered in the wrong folio was therefore duly registered. These cases would have applied if the folio in which the deed of gift was registered was connected up with the folio in which the first deed affecting the divided portion was registered by means of cross-references in both folios. This is not the case, and we have to decide whether this omission nullifies the effect of the registration of the deed of gift.

The deed of gift was registered on July 9, 1927, under the provisions of the Land Registration Ordinance, 1891. The new Ordinance, the Registration of Documents Ordinance, No. 23 of 1927, came into operation on January 1, 1928. By sub-section (3) of section 7 of this Ordinance, "An instrument duly registered before the commencement of this Ordinance, under the Land Registration Ordinance, 1891, or any Ordinance repealed by that Ordinance, shall be deemed to have been duly registered under this chapter" (that is, Chapter III.—Registration of Instruments affecting Land).

Section 15 provides how instruments should be registered. Sub-sections (1) and (2) enact as follows:—

"(1) 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.

¹ 5 Cey. Law Rec. 73.

² (1937) 16 Cey. Law Rec. 165.

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.

(2) An instrument, whether registered before or after the commencement of this Ordinance, shall not be deemed to be duly registered under this chapter unless it is registered in accordance with the foregoing provisions of this section”.

I confess I find it difficult to reconcile the terms of sub-section (2) with the terms of sub-section (3) of section 7. The principal part of sub-section (1) of section 15 in effect gives legislative sanction to the principle laid down by de Sampayo J. in *Silva v. Appu*¹ but the proviso (a) is new.

Under this proviso the folio in which the deed of gift was registered should in my judgment have been connected up with the folio in which a part was registered, which folio had, as I have here observed, been connected up with the folio in which the entire land of 2½ acres was registered.

The only way in which I think the proviso (a) of sub-section (1) of section 15 can be reconciled with sub-section (3) of section 7 is by holding that we must construe the terms of section 15 (1) of the Land Registration Ordinance, 1891, as provided by the proviso.

Section 15 (1) enacts—I quote the relevant passage—that “Every . . . Registrar shall prepare and keep such books as shall be required by the rules and regulations for the registration therein of any deed which may be brought to him for registration as hereinafter provided allotting to each book some defined division of the province or district, so that every deed relating to lands situate therein may be registered therein in such manner as to facilitate reference to all existing alienation or incumbrances affecting the same lands”.

The first case in which effect was given to the words “So that every deed relating to lands situate therein may be registered therein in such manner as to facilitate reference to all existing alienations or incumbrances affecting the same lands” was *Mohammadu Sali v. Isa Natchia et al.*, where it was held that a deed which was registered in the wrong folio through the negligence of the grantee was void as against a subsequent deed registered in the proper folio. The point was more clearly brought out in the case of *Paaris et al. v. Perera*², where the same question arose and was decided in the same way. de Sampayo J. in *Silva v. Appu*³ laid down how the right folio was to be determined.

In the later cases to which I have referred, it was held that a deed registered in the wrong folio was nevertheless duly registered if the wrong folio was connected up with the right folio by cross-references to each other.

¹ (1914) *Bal. Notes of Cases* 28 at p. 30.

² (1911) 15 *N. L. R.* 157.

³ (1912) 15 *N. L. R.* 148.

⁴ (1914) 4 *Bal. Notes of Cases* 28.

There was no case however in which the question arose, as in this case, whether there must be a reference in the new folio to a folio in which a part of the land was previously registered. It appears to me that proviso (a) provides for such a case; and where the new folio is not connected up with the folio in which part of the land was previously registered, it is not registered "in such manner as to facilitate reference to all existing alienations or incumbrances affecting the same lands".

I accordingly hold that the deed of gift D1 is not duly registered, and would dismiss the appeal with costs.

ABRAHAMS C.J.—I agree.

Appeal dismissed.

