Present: Wood Renton C.J. and Ennis J.

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MARIKU *v.* FERNANDO *et al.*

330—D. C. Kalutara, 5,673.

Registration—Priority—Merger of two lands—Registration in a new folio—Fraud in obtaining deed.

A deed which has been registered on a wrong folio is void as against parties claiming an adverse interest on valuable consideration by virtue of a subsequent deed which has been duly registered.

Where two lands previously registered are consolidated and registered in a different folio without reference to the previous registration of the separate lands, the registration was held to have been made in the wrong folio. A subsequent deed does not gain priority by registration if there is fraud in obtaining the deed.

THE facts are set out in the judgment of the District Judge (L. W. C. Schrader, Esq.):—

This is an action for the partition of a small lot of land, Punchiliadda, corresponding with lot V 843 (or T. P. 76,519) of 1 rood and 16 perches, in Crown tracing of 1868.

The plaintiff seeks to partition off his interest of one-fourth acquired by him upon deed of transfer 516 of November 26, 1913 (P 3).

The case is that the lot was purchased from Crown by Jusenis and Juan Fernando. Jusenis left two children, first defendant and Ambrose, each of whom became entitled to a fourth, and Ambrose sold his share to plaintiff. Juan, by deed of July, 31, 1886 (3 D 1), conveyed his half of the land to Franciscu Fernando, the father of the fourth to sixth defendants, who with the widow (third defendant) are now entitled to it.

2. The first and second defendants filed no answer, but mentioned that their rights had been sold to one Girigoris, who was made added party, and has alone filed answer. His answer is that V 843 belonged to Juan and Jusenis, and U 488, the lot to the east of it, known as Baranawedageliadda, belonged to Juan and Kaithan. The three owners agreed to possess the two lots in common, Juan of course having half and Kaithan and Juseins each a fourth share, and that they possessed on this footing.

3. In accordance with this agreement and system of possession, Ambrose sold to him (Girigoris) by deed 3,705 of March 25, 1909 (7 D 1), his one-eighth share of the combined lots under the name Baranawedageliadda, while first defendant (Christina) sold to him her one-eighth share of the contiguous lots (giving both names), but within the same one set of boundaries, by deed 783 of August 23, 1913 (7 D 2). By these two deeds he became the owner of one-eighth of the two lands, and by common consent of the other owners came to an agreement and effected a partition with them on October 14, 1913, as shown on plan 119 (3 D 2), whereby he became the owner of lot C, the third to sixth

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defendants owners of lot A, and the other owners (presumably the representatives of Kaithan's interest) the owners of lot B.

4. The plaintiff rests his case entirely on the issues of priority of his deed by virtue of registration. The register of lands shows that the original Crown grant P 1 was registered on folio 40 of vol. A 27. The same folio was used for the registration of Juan's conveyance to Franciscu (3 D 1). Then comes a reference, "For subsequent transactions see A 202/341." There we find the plaintiff's deed (P 3) from Ambrose, as well as a mortgage 1,040/30-1-14 by third defendant. On the other hand, the first of added defendant's deeds, that from Ambrose (1909), 7 D 1, is registered on folio 136 of vol. 176 under the title Baranawedagehadda, and his second deed, that from Christina (first defendant), 7 D 2, is registered on again an unconnected page, viz., folio 28 in vol. A 202.

The contention for the defence is that where two adjoining lands are merged by the owners their boundaries are different, and they must necessarily be registered on a different folio from the deeds affecting a land which is only a portion of them. I am of opinion that this is clear common sense. An estate, for example, is built up of a number of separate parcels of land acquired singly. It would be absurd to expect to find the transactions affecting the estate to follow the registration of the lots of which it was composed.

It is absolutely certain that the plaintiff has prevaricated, and almost perjured himself over the steps he took before plunging into this litigation. He has shown that he had no serious intention of effecting an amicable partition at all, and he feigns complete ignorance of the facts which stood in the way of a partition being effected. No one can believe him. He lives about fifty fathoms off the land, and is a cousin of seventh defendant. He has known the land for thirty-eight years. Surely it would be ridiculous to believe that he did not know intimately what was going on, did not see or hear of the survey, never heard of the intention of the parties to divide the land. His studious indifference to his cousins building on Baranawedagewatta or as to his rights makes it clear that ignorance cannot be credited to the plaintiff. His purchase within a month of the actual amicable partition, and failure to discover before his purchase that the land had been sold by his vendor under a different name, is not reconcilable with due diligence. Why the sudden desire to acquire a share of this land which he had known uncultivated and unoccupied for fifteen and had altogether known for thirty-eight years ?

5. I am doubtful that defendant's deeds can be held to have been registered on the wrong folio merely because they are not registered in the same folios as the deeds affecting Punchihadda or folios connected by a reference. But certainly I think plaintiff did not make such due inquiries before purchase as to entitle him to any sympathy. My belief is that he and the vendor (who he has not called to defend the title) conspired together to see what could be done to make a little more out of rights which the vendor had already alienated. The vendor, of course, had a guilty knowledge—for he had sold all his right—and he was committing fraud with the plaintiff. It is not possible to believe that plaintiff was so careless or confiding as to have been led astray. No, he went in with open eyes to see whether he could not get a bit of the land himself, as he suddenly thought it might be of some use for building on if he could get a little.

6. In the next place, before plaintiff's purchase the parties who owned had divided the land. And Punchiliadda then belonged to third to sixth defendants. Ambrose had no title to sell anything in it to plaintiff. If Ambrose's sale to plaintiff were recognized by reason of priority of registration, it would be the third to sixth defendants, who are entirely innocent parties in connection with the sales or registration of the deeds given by Ambrose and first defendant, who would suffer.

That is, the plaintiff comes in too late with his purchase. He may argue that his deed should prevail to benefit him. In competition between him and seventh defendant he cannot argue that it should prevail in his favour against equally innocent parties who have exclanged their *bona fide* property with the seventh defendant..

He cannot ask that a fourth of this land, which is clearly the third to the sixth defendants', should be given up to him because he has got a better right to it than the seventh defendant. He would have been entitled to the argument had he been the holder of the title at the time of the partition and had his rights been ignored. But as this was all done before he acquired any rights, all that he took must be subject to the disposition of the land that had preceded, and, as the title then was, his deed conveyed him nothing.

7. So that on two grounds I answer the plaintiff's second issue in the negative :—

(*a*) I am not able to hold that the defendants' title deeds are wrongly registered.

(*b*) That even if they are, the plaintiff must be the sufferer rather than the present owners of the property, who are *bona fide* holders, and it is very far from clear that this is the case with plaintiff.

8. I therefore dismiss the action with costs.

A. St. V. Jayewardene, for plaintiff, appellant.

Bawa, K.C., for third defendant and seventh added defendant, respondent.

Cur. adv. vult.

November 4, 1914. Wood Renton C.J.—

The contest between the plaintiff-appellant and the seventh added respondent is as to a fourth share of the land sought to be partitioned. The plaintiff claims this share on a deed of transfer from Ambrose Fernando, a son of Jusenis Fernando, one of the original owners, dated November 26, 1913. The seventh added defendant claims the same share on a deed of transfer from the same purchaser dated March 25, 1909. According to the plaint the land in dispute is Punchiliadda. The claim of the seventh added defendant is based on the assumption that Punchiliadda has been consolidated with an adjoining land under the name of Baranawedageliadda. The learned District Judge, after hearing evidence on both sides, has adopted the seventh added defendant's contention on this point, and I do not think that his finding on the question should be disturbed now.

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The main issue in the case may be stated thus. The root of title of Jusenis Fernando and his co-owner Juan Fernando was a Crown grant dated October 5, 1870. This Crown grant was registered in folio 40 of vol. A 27. The plaintiff's deed is registered in the same folio. On the other hand, the seventh added defendant's deed of March 25, 1909, is registered in folio 136 of vol. 196 under the title Baranawedageliadda. It is now the settled law of this Colony (see *Mohammadu Sali v. Isa Natchia*,[1] *Paaris v. Perera*,[2] and 263—D. C. F. Chilaw, 741 [3]) that a deed which has been registered in a wrong folio is void as against parties claiming an adverse interest on valuable consideration by virtue of a subsequent deed which has been duly registered. The plaintiff claims the benefit of this principle. He contends that the original root of title being the Crown grant of 1870, all the subsequent dealings with the land should have been entered in the same folio in which the Crown grant was registered, and that, as his deed complied, while the deed of the seventh added defendant did not comply with that requirement, the former has priority over the latter. The seventh added defendant, on the other hand, relies on the merger of the adjoining lands under the name of Baranawedageliadda, and contends that, where such a merger takes place, the boundaries of the consolidated lands become different, and must necessarily be registered in a different folio from the deeds affecting one of the lands so consolidated. An issue was framed at the trial on these conflicting contentions in the following terms: "Has the added defendant's deed dated March 25, 1909, been duly registered, that is, in the proper folio?" The burden of proving a negative answer to that issue of course, rested on the plaintiff. He called as his witness Mr. E. C. D. S. Gunesekera, a clerk at the Land Registry. Mr. Gunesekera's evidence is not altogether satisfactory. In his examination-in-chief he supports the case for the plaintiff. In his cross-examination he seems partially to veer round to the side of the seventh added defendant. His re-examination, however, restores him to his original position. I think that what he intended to say was that where two lands previously registered are consolidated and registered in a different folio, the usual course is to insert entries in the registration entry of the first of the two lands showing the connection between them, but that there are other indexes in the register by which that connection can be traced. In that state of the facts the seventh added defendant's deed was, in my opinion, registered in the wrong folio. There was, however, also an issue as to whether, even if that deed had been registered in the wrong folio, the plaintiff's deed "was entitled to prevail by reason of its prior registration." Under this vague issue the learned District Judge went into the question of the comparative good faith of the plaintiff and the

[1] *(1911) 15 N. L. R. 157.* [2] *(1912) 15 N. L. R. 148.*

[3] *S. C. Mins., October 7, 1914.*

seventh added defendant, and held that the latter and his vendor had " conspired together to see what could be done to make a little more out of rights which the vendor had already alienated." If this conduct amounts to " collusion in obtaining " his deed within the meaning of section 17 of the Land Registration Ordinance, 1891 (No. 14 of 1891), the plaintiff's deed must prevail. In my opinion it does. The law has now been authoritatively declared to be that mere notice of the existence of a prior deed, or, for that matter, of the fact that it was registered in the wrong folio, would not have prevented the plaintiff from taking a conveyance of the land and getting his own deed registered in the proper folio. See *Kirihamy v. Kiri Banda* [1] and *Aserappa v. Weeratunga.* [2] But the present case is different. What is here found is collusion in obtaining the deed itself, not the mere act of taking advantage of a legal right to obtain priority of registration. Section 17 of the Ordinance of 1891 (No. 14 of 1891) contemplates fraud in obtaining a deed as well as fraud in connection with its registration. I agree with my brother Ennis that the judgment of the District Judge can be supported on this ground, and that the appeal should be dismissed with costs.

ENNIS J.—

In this case the only question on appeal is whether document No. 3,705 of March 25, 1905, registered in a new volume and folio of the register, can take priority to the subsequent document No. 516 of November 26, 1913, dealing with the same land which was registered in the volume and folio of the register in which the original Crown grant of the land had been registered in 1870.

Section 24 of Ordinance No. 14 of 1891 prescribes that " when any property which shall have been once registered shall be subsequently sold.....the deed or instrument purporting to transfer.....such property shall state the volume and folio of the register in which such property had been previously registered ..... ". The deed No. 3,705 of March 25, 1909, did not comply with this requirement, and, notwithstanding that the land in dispute may have been merged with an adjoining land and have been dealt with as a single land, the failure to comply with the terms of section 24 would, in my opinion, ordinarily give a subsequent deed properly registered the priority, as the registration of the earlier deed in a new folio could not have been made with such references as to identify the land with the original registration, and section 17 of the Ordinance would apply. Section 17, however, makes a proviso against fraud or collusion, and in this case the learned District Judge has found that the appellant and his vendor conspired together, and that there was fraud in the transaction. I see no reason to differ from the finding of fact which causes the later deed to lose the priority it would otherwise have gained.

[1] *(1911) 14 N. L. R. 284.*

[2] *(1911) 14 N. L. R. 417.*

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In a partition action the absence of a specific issue would not by itself be a ground for setting aside the decree, and in this case I find that the defendant's counsel in the course of the case raised the objection of fraud. I would dismiss the appeal with costs.

Appeal dismissed.