12/1962

IN THE PRIVY COUNCIL No. 66 of 1960

ON APPEAL FROM
THE SUPREME COURT OF CEYLON

B E T W E E N:

ABEYSIRI MUNESINGHEGE LAIRIS APPU
(First Defendant) Appellant

- and -

1. K.WIJESUNDERA GUNERATNE HERAT MUDIYANSERALLAHAMILLAGE ENID NANDAWATHIE TENNEKOON KUMARIHAMY
(Plaintiff)

2. DUNUSINGHEARATCHIGE APPUHAMY
(Second Defendant)

3. ULU ARATCHIGE L. APPUHAMY
(Third Defendant) Respondents

68170

CASE FOR THE APPELLANT

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1. This is an Appeal by the First Defendant (hereinafter called "the Appellant") against the Judgment and Decree of the Supreme Court of Ceylon, dated the 28th November 1958, whereby the Supreme Court dismissed with costs the Appellant's appeal from the Judgment and Decree of the District Court of Kurunegala, dated the 21st December 1954. The said Judgment and Decree of the District Court declared the Plaintiff (hereinafter called "the Respondent") entitled to a certain allotment of land, the subject-matter of the action, and ordered the restoration of possession, damages and costs in favour of the Respondent. The Second and Third Defendants are formally named as parties but have taken no steps in this Appeal.

p.70, l.25 - p.84, l.40.

pp.55-63.

2. The action out of which this Appeal arises was instituted by the Respondent on the 20th September 1951 in the District Court of Kurunegala against the Appellant and the Second and Third Defendants praying for (a) a declaration of title

pp.8-11.

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to an allotment of land described in Schedule C to the plaint (b) restoration of possession (c) for damages for unlawful possession and (d) costs.

3. The Respondent in her Plaint, claimed title to the land in dispute on two alternative grounds -

p.9, ll.1-9. (a) as a fideicommissary under a deed of gift, dated the 29th June 1919 (Exhibit P.I) executed by Tennekoon Dissawe, her grandfather; and

p.9, ll.10-15. (b) as a devisee under the last will of the said Tennekoon Dissawe, dated the 29th October 1930 (Exhibit P.14). 10

4. The Respondent also pleaded, inter alia, that:-

p.9, ll.30-33. (a) Charles Wilmot Tennekoon, her father, who was the fiduciary donee under P.I, died on the 21st May 1951 and that on his death she and her brother, Charles Ennoruwe Tennekoon, became entitled as fideicommissaries named in P.I to the lands described in Schedules A and B to the Plaint;

p.9, ll.16-23. (b) the Respondent and her said brother partitioned the lands described in Schedules A and B by a deed of partition whereunder she became the sole owner of the land in dispute; 20

p.9, ll.34-39. (c) the Appellant was in unlawful possession of the land in dispute on the footing of a fraudulent and speculative deed of Conveyance, dated the 12th April 1945 (Exhibit D3), in his favour by Charles Wilmot Tennekoon; and

p.9, ll.25-29. (d) The Respondent had prescriptive title to the land in dispute.

p.18, l.1 to p.19, l.26. 5. The Appellant, in his amended Answer, admitted the title of Tennekoon Dissawe but denied that the Respondent had any title to the land. The Appellant further pleaded:- 30

p.18, ll.26-35. (a) that the deed of gift P.I failed for want of acceptance by the fiduciary and by the fideicommissaries;

p.19, l.3. (b) that Charles Wilmot Tennekoon was the sole heir of Tennekoon Dissawe;

(c) that even if the title to the land in dispute passed to the Respondent under the last Will, P.14, the probate of the Will not having been registered, the Appellant's title under the deed of Conveyance, D3, prevailed over the Respondent's title by reason of prior and proper registration; Record p.19, 1.6.

(d) that the deeds relied on by the Appellant were duly registered and prevailed over the deeds pleaded by the Respondent by virtue of prior and proper registration; and p.19, 11.15-18.

(e) that the Appellant was entitled to the land by prescription. p.19, 11.19-21.

6. At the trial the following issues were framed, and the learned District Judge, having answered the issues in the manner indicated below, gave judgment on the 21st December 1954, in favour of the Respondent as prayed for with costs, except that the damages were fixed at Rs.50/- per month (as agreed by the parties) from the 21st May 1961 until the restoration of possession: p.13, 1.20 to p.15, 1.30. p.20, 11.1-13. p.23, 11.29-36.

1. Did C.E. Tennekoon by deed No. 5843 of 29th June 1919 gift the lands described in Schedules A and B to the Plaint to Wilmot Tennekoon?
   Answer: Yes.

2. Did the said deed create a fideicommissum whereunder the lands in Schedules A and B to the Plaint passed, on the death of Wilmot Tennekoon, to the Plaintiff and her brother Charles?
   Answer: Yes.

3. Did the Plaintiff and the said Charles by deed No. 2823 of 18th August 1945 partition, inter alia, the said lands between the two of them?
   Answer: Yes.

4. Under the said partition did the Plaintiff become entitled to the lands in Schedule C to the Plaint?
   Answer: Yes.

5. Did Wilmot Tennekoon die on or about 21st May 1951?
   Answer: Yes.

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6. If so, did the Plaintiff thereupon become entitled to the premises described in Schedule C to the Plaint by virtue of deeds No. 5843 of 29th June 1919 and No. 2823 of 18th August 1945?
Answer: Yes.

7. Prescriptive rights of parties?
Answer: Does not arise.

8. Damages?
Answer: Rs. 50/- per mensem as agreed upon from 21st May 1951 until possession is given.

2(a). Did the fideicommissum, if any, created by the said deed No. 5843 fail in as much as there was no acceptance on behalf of the alleged fidei-commissarii?
Answer: Acceptance by the fidei-commissarii not necessary in law.

2(b). Did Wilmot Tennekoon become the absolute owner of the said lands on the said deed No. 5843?
Answer: No.

9. Did Wilmot Tennekoon on deed No. 3014 of 12th April 1945 sell and convey the said premises to the First Defendant for valuable consideration?
Answer: Yes.

10. Was the said Wilmot Tennekoon the sole heir of the said C.E. Tennekoon Dissawe?
Answer: Yes.

11. Was the said deed No. 3014 duly registered?
Answer: Yes.

12. Does the title of the First Defendant on the said deed No. 3014 prevail over the title, if any, of the Plaintiff by reason of due and prior registration?
Answer: No.

13. Has the First Defendant and his predecessor in title acquired prescriptive title to the said premises?
Answer: No.

14. Did the said deed No. 5843, dated 29th June

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1919, fail and/or not operate as a gift in as much as the said gift was not accepted by -

(a) the donee Charles Wilmot Tennekoon;

(b) the alleged fidei commissarii or by anyone else on their behalf?

Answer: No.

15. Did any title pass either to Charles Wilmot Tennekoon or the Plaintiff and/or her brother C.E. Tennekoon on the said deed of gift by reason of non-acceptance?
Answer: Title passed.

16. Were the daughters of Tennekoon Dissawe viz: Mrs. Marambe, Mrs. Dias Bandaranayake and Mrs. Madawela, married out in diga and forfeit their rights to the premises in question?
Answer: Yes.

17. Was the probate of the last Will of Charles Wilmot Tennekoon duly registered?
Answer: No.

18. If not, does any title pass thereunder to the Plaintiff or to any devisee under the Will?
Answer: Yes.

19. Is the First Defendant's deed No. 3014 entitled to prevail over the Plaintiff's title, if any, under the last Will by reason of due and prior registration?
Answer: No.

Another issue numbered 14 was not answered formally at the end of the judgment but was dealt with and decided in the course of the judgment. It is as follows:-

14. Was the registration of the said deed 3014 secured by fraud and/or collusion between the parties to the said deed?

7. With regard to the question whether the deed of gift P.I was accepted, the learned District Judge held as follows :-

"The above facts have been discussed in p.58, 11.18-31.

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detail for the purpose of answering the issues of acceptance. A deed of gift must be accepted by a donee or by someone on his behalf. On the face of the deed P.I there is no acceptance but acceptance is a question of fact and the fact that the deed was handed to Wilmot Tennekoon by his father as stated by Mrs. Eva Tennekoon, the fact that Wilmot Tennekoon himself had possessed some of the lands dealt with by that deed after the death of Tennekoon Dissawa and had even leased the land to the First Defendant prove acceptance by him.

As regards acceptance by the fidei commissarii, it should be noted that the deed P.I is a deed creating a fideicommissum in favour of the family. In such a case acceptance is not necessary by the fidei commissarii heirs - vide 47 New Law Reports 361. Therefore on the issue of acceptance, the First Defendant must fail."

8. On the question whether the Appellant's document of title, D3, prevailed over P.I by reason of due and prior registration, the learned trial Judge held that P.I was not registered at all and that the deed D3 was duly registered. He accordingly held that "by reason of due registration, therefore, deed D3 is entitled to prevail over P.I unless it was obtained by the Defendant for no consideration or by fraud and collusion". The learned Judge, however, held (wrongly, it is submitted) that there was fraud and collusion on the part of the Appellant and decided the question of priority by registration against the Appellant.

p.58, ll.33-42.

p.61, ll.38-41.

9. With regard to the Respondent's rights under the last Will, P.14, the learned Judge held as follows :-

p.61, l.42 to p.62, l.11.

"Even if the question of registration is answered against the Plaintiff, yet the Plaintiff claims the land under the last Will of Tennekoon Dissawa. Mr. Wikramanayake for the Plaintiff had not raised specific issues on the point on the first date of trial. My predecessor has recorded then that he withdrew the claim on the alternative cause of action. When the case came up for trial before me, Mr. Wikramanayake stated that the record was not quite correct and that he did not withdraw the

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alternative cause of action but that he only raised no issue on the point. Mr. Weerasooriya, however, in the course of the trial raised issues on the last Will (vide issues Nos. 17, 18 and 19). Under this last Will the Plaintiff, in my opinion, is entitled to claim the land in dispute. No question of registration arises because under Section 10 of the Registration Ordinance First Defendant's deed cannot get priority over the last Will merely by prior registration."

Earlier in his judgment, the learned judge had, presumably upon a misreading of P.14, held that "Tennekoon Dissawa left a last Will No. 555677 of 1930, P.14, by which he devised and bequeathed the same premises to Charles Ennoruwe Tennekoon and the Plaintiff." p.55, 11.39-41.

10. The Appellant appealed and the Supreme Court (Basnayake C.J. and Sinnatamby J.) on the 28th November 1958, dismissed the appeal with costs. p.70, 1.25 to p.83, 1.28.

11. Basnayake C.J. held, correctly it is submitted, that fraud and collusion within the meaning of Section 7(2) of the Registration of Documents Ordinance (Cap. 101, Vol. 3 of the Legislative Enactments of Ceylon 1938 Revision) had not been established. p.73, 11.26-28.

On the question of acceptance His Lordship said:-

"The Plaintiff bases her claim on both the deed of gift P.I and the last Will P.14. Learned Counsel did not press his objection to the validity of the deed P.I on the ground that the gift was not accepted although it was raised in the petition of appeal. I shall therefore proceed on the assumption that P.I is a valid deed of gift." p.72, 11.18-22.

On the question of priority, His Lordship held that "as far as the Plaintiff's claim is based on P.I, she cannot be regarded as having any rights to the land based on it as against the Appellant." But His Lordship went on to hold that the last Will, P.14, in effect revoked the deed of gift, P.I, and that the Respondent's claim under P.14 was not defeated by non-registration of the Probate. On this aspect of the case he said:- p.74, 11.12-14. p.74, 1.4 to p.75, 1.8.

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"The effect of the section (section 10) is that P.14 though not registered is not deemed to be void as against the disposition D.3 by Wilmot Tennekoon by reason of the fact that at the date of D.3 the Will was not registered. The effect of P.14 which by virtue of section 10 is not void as against the Appellant is that it deprived Wilmot Tennekoon of any right to the land in dispute. At the time he executed D.3 and claimed that he was entitled to the land by right of paternal inheritance he had no such right and D.3 conveyed no right or title to the Appellant.

The Will, P.14, in effect revokes the gift P.I. They cannot co-exist. Tennekoon Dissawa, being a Kandyan, was entitled to revoke his gift. In fact when Wilmot Tennekoon executed D.3 he seems to have acted on the footing that P.I did not exist for he recited his title as based on the right of paternal inheritance, Tennekoon Dissawa his father being dead at the time."

His Lordship's view in regard to the implied revocation of P.I appears to proceed from a mis-
p.72, ll.8-12. direction in an earlier passage:

"Tennekoon Dissawa left a last Will No. 55867 of 1930 (P.14) by which he devised and bequeathed the land in dispute and other lands to the two children of Charles Wilmot Tennekoon, namely, Charles Ennoruwe Tennekoon and Enid Nandawathie Tennekoon, the Plaintiff."

His Lordship presumably accepted without testing the erroneous finding of the learned trial Judge referred to in paragraph 9 above.

p.78, l.30 to p.83, l.30. 12. Sinnatamby J., in a separate judgment, dealt with the question whether by the due registration of the deed D.3 the Appellant obtained a good title to the land in dispute as against the fidei commissaries designated in the deed P.I. His Lordship declined
p.81, ll.1-20. to apply the Supreme Court decision in the case of Fonseka v. Fernando (15 N.L.R.491) on the authority of which counsel for the Appellant contended that although Wilmot Tennekoon had only a defeasible title in P.I, yet by the registration of D.3 the Appellant obtained absolute title as against the

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fidei-commissaries whose rights were based on the unregistered deed P.I. Sinnatamby J. however held that "if no will had been left and if Wilmot was the sole heir there was no doubt that D.3 would prevail over P.I on the authority of the Supreme Court decision in de Silva v. Wadapudigedera (30 N.L.R. 317)." He then examined the effect of section 10 of the Registration of Documents Ordinance and proceeded to say:- p.81, ll.40-42.

> "The effect of the provision, therefore, is that a disposition by a testator cannot be defeated by a transfer made by an heir merely by virtue of the prior registration of the latter instrument. Tennekoon Dissawa had left a last Will devising his property to the Plaintiff and Charles and this bequest could not be defeated by the intestate heir Wilmot Tennekoon transferring the property in question to the first Defendant on the basis of an inheritance by intestacy from Tennekoon Dissawa. Issues 17, 18 and 19 must accordingly be answered against the first Defendant. The resulting position would have been quite different if Tennekoon Dissawa had left no Will. The non-registration of the last Will P.14 does not affect the dispositions made by that last Will and the first defendant would get no title merely by registration of his deed D.3." p.82, l.37 to p.83, l.6.

The final conclusion in the judgment of Sinnatamby J. is based upon a vital misdirection, namely, that the land in dispute was bequeathed to the Respondent and her brother by the last Will P.14.

13. It is submitted that the decision of the learned trial Judge on the question of acceptance is wrong and should be reversed. The acceptance of a deed of gift to be valid under the Roman Dutch Law must be complete during the lifetime of the donor. In the present case, the only circumstance relevant to acceptance is the delivery of the deed of gift by the donor to Wilmot Tennekoon, the immediate donee. This circumstance is sufficient to constitute a valid gift to Wilmot Tennekoon under the Kandyan Law but is insufficient to constitute a valid fideicommissum under the Roman Dutch Law. The true position thereof, it is submitted, is that the gift to Wilmot Tennekoon, the Respondent's

vendor, is good while the fideicommissum intended to be created has failed to take effect.

14. It is submitted with respect that this Appeal should be allowed and the Respondent's action dismissed with costs throughout for the following among other

R E A S O N S

1. BECAUSE the decision of the Supreme Court adverse to the Appellant on the question of prior registration was based on a misdirection regarding the last Will P.14.

2. BECAUSE Sinnatamby J. erred in declining to apply the principle in the Supreme Court decision in Fonseka v. Fernando.

3. BECAUSE there was no valid acceptance of the deed of gift P.I on behalf of the fidei commissaries. either by the fiduciary or

4. BECAUSE the Appellant's title under deed D.3 is good as against the Respondent by virtue of the provisions of Section 7 of the Registration of Documents Ordinance.

WALTER JAYAWARDENA.

No. 66 of 1960

IN THE PRIVY COUNCIL

ON APPEAL FROM THE SUPREME COURT OF CEYLON

B E T W E E N :

ABEYSIRI MUNESINGHEGE LAIRIS APPU
(First Defendant) Appellant

- and -

1. K. WIJESUNDERA GUNERATNE HERAT MUDIYANSERALLAHAMILLAGE ENID NANDAWATHIE TENNEKOON KUMARIHAMY
(Plaintiff)

2. DUNUSINGHEARATCHIGE APPUHAMY
(Second Defendant)

3. ULU ARATCHIGE L. APPUHAMY
(Third Defendant)
Respondents

CASE FOR THE APPELLANT

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