12/1962

IN THE PRIVY COUNCIL No.66 of 1960

ON APPEAL

FROM THE SUPREME COURT OF THE ISLAND OF CEYLON

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED LEGAL STUDIES
29 MAR 1963
25 RUSSELL SQUARE
LONDON, W.C.1.
68169

B E T W E E N :

ALBESIRI MUNASINGHEGE LAIRIS APPU
(Defendant) Appellant

- and -

1. KANDEGEDERA WIJESUNDERA GUNERATNE HERAT MUDIYANSE RALAHAMILLAGE ENID NANDAWATHIE TENNAKOON KUMARIHAMY, wife of RIENZI KUMARADASA WIJESINGHE (Plaintiff) Respondent

2. DUNUSINGHE ARATCHIGE APPUHAMY
2nd Defendant Respondent

3. ULU ARATCHIGE L. APPUHAMY
3rd Defendant Respondent

CASE FOR THE PLAINTIFF-RESPONDENT

Record

1. This is an appeal from a Decree of the Supreme Court of the Island of Ceylon dated the 3rd December 1958 in accordance with their Judgment pronounced the 28th November, 1958, dismissing an appeal by the Appellant from a Decree of the District Court of Kurunegala, dated the 21st December, 1954, whereby it was ordered and decreed that the Respondent/Plaintiff (hereinafter called "the Respondent") be entitled to the premises described in Schedule "C" to the Decree of the District Court of Kurunegala. (p.84; p.70; p.63; p.64)

2. By Deed of Gift No.5843 (P I) of the 29th June 1919, Charles Edward Tennakoon Ratemahatmaya (hereinafter referred to as Tennakoon Dissawe) donated the land in dispute among others to his son, Kandegedera Wijesundera Gunaratne Tennakoon Herath Mudiyanse Ralahamillage Charles Wilmot Tennakoon Bandaramahatmaya (hereinafter referred to as Wilmot Tennakoon) subject to a life interest in the donor's favour and subject to a fidei commissum in (pp.104-107; p.105 ll26-41)

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p.105 l.40-41 p.106 l. 1-8	favour of Wilmot Tennakoon's two children, Charles and the Respondent in this appeal.	
p.126 p.149	3. Tennakoon Dissawe died in 1932 leaving a Last Will (p 14) dated the 27th October 1930 by which he left, inter alia, all his residuary estate, movable and immovable, to the Respondent and her brother, Charles. This Last Will was admitted to Probate in D.C. Kurunegala Case No.4066 on the 19th June 1935.	
p.168 p.168 l.20	4. On the 12th April 1945, by Deed No.3014 (D3) Wilmot Tennakoon, claiming to be entitled to the land in dispute by right of paternal inheritance, purported to sell the said land in dispute to the Appellant in this appeal, who duly registered the said Deed. On the 26th April 1946 the Appellant purported to execute a Deed of Mortgage (D4) of the said land to the 2nd and 3rd Defendants/ Respondents.	10
p.181	5. On the 18th August 1945, the Respondent and her brother, Charles, amicably divided their properties between themselves by Deed No.2823 of 1945 (P.II) and the land in dispute was by that division allotted to the Respondent.	20
p.8 p.9 l.1-10 p.9 l.10-15	6. On the 20th September 1951, the Respondent filed an action in the District Court of Kurunegala and alleged in the Plaint, inter alia, that the Respondent should be declared entitled to the land in dispute either as a fiduciary heir under the Deed of Gift No.5843 (P.I) or as a beneficiary in the Last Will of Tennakoon Dissawe.	30
p.18	7. By his amended Answer dated the 17th August 1954 the Appellant alleged interalia that the Deed of Gift (P.I) was inoperative for want of acceptance by the said Wilmot Tennakoon or by the Fidei commissaries or anyone on their behalf; that the said land was sold to the Appellant by Wilmot Tennakoon for valuable consideration; and that the Deed D3 relied on by the Appellant being duly registered was entitled to prevail over any Deeds relied on by the Respondent by reason of prior and proper registration.	40
p.17 l.7	8. The Issues agreed between the parties included the question whether the registration of Deed D3 by the Appellant was secured by fraud and/or collusion between the parties to the said Deed.	

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9. The Registration of Documents Ordinance (C.101) provides inter alia as follows:

"7. (1) An instrument executed or made on or after the first day of January, eighteen hundred and sixty-four, whether before or after the commencement of this Ordinance shall, unless it is duly registered under this Chapter, or, if the land has come within the operation of the Land Registration Ordinance,
10 1877, in the books mentioned in Section 26 of that Ordinance, be void as against all parties claiming an adverse interest thereto on valuable consideration by virtue of any subsequent instrument which is duly registered under this Chapter, or, if the land has come within the operation of the Land Registration Ordinance, 1877, in the books mentioned in Section 26 of that Ordinance.

"(2) But fraud or collusion in obtain-
20 ing such subsequent instrument or in securing the prior registration thereof shall defeat the priority of the person claiming thereunder.

"(4) Registration of an instrument under this Chapter shall not cure any defect in the instrument or confer upon it any effect or validity which it would not otherwise have except the priority conferred on it by this section."

30 "10. (1) A will shall not, as against a disposition by any heir of the testator of land affected by the will, be deemed to be void or lose any priority or effect by reason only that at the date of the disposition by the heir the will was not registered under this Chapter.

"(2) This section applies whether the testator died before or after the commencement of this Ordinance, but does not apply -

40 (a) where the disposition by the heir was executed before the commencement of this Ordinance; or

(b) where, at the time of the disposition by the heir, being not less than one year

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after the death of the testator, letters of administration to the estate of the testator have been granted on the footing that he died intestate."

10. The main witness at the trial for the Respondent was Mrs. Eva Tennakoon the widow of Wilmot Tennakoon. She said inter alia that after the Deed P1 was executed Tennakoon Dissawe gave it to her husband, who gave it to her. Before the deed of sale to the Appellant, her husband leased the land in dispute to the Appellant by deed of lease (P10 and D8) dated the 19th December 1944 which contained the words "to which premises the lessor is entitled to a life interest only." Her husband died in May 1951. The Appellant was always aware of the deed of gift P1 and of the fidei commissum. A note in her husband's diary (P9) showed that the deed of gift had been in the Appellant's possession.

p.21 l.5-8
p.22 l.6
l.31
p.22 l.39
p.26 l.8

Further evidence was given for the Respondent by the Respondent's husband R.K. Wijesinghe who said that in December 1944 he met the Appellant and discussed the Appellant's lease from Wilmot Tennakoon. He asked the Appellant to assign this lease to him and told him that under the fidei commissum Wilmot Tennakoon could lease out the property for only 4 years. The Appellant had replied that he had taken it for 10 years and that it was his business.

p.29 l.15

11. The Appellant in his evidence denied that at the date of his purchase of the land he knew of the deed of gift. He denied the meeting with Mr. Wijesinghe in December 1944.

p.35 l.6
p.35 l.28

In cross-examination he gave the following evidence:

p.39 l.12-41

"I said that until this case was instituted I was not aware of the clause in D8 referred to earlier namely that the lessor was only entitled to a life interest. Mr. Wiratunga was my Notary for a considerable time. He was retained in my litigation both criminal and civil. Even before that Mr. Wiratunga was my Notary. For the purposes of D8 the person who picked up the Notary Wiratunga was myself. He was my Notary for the preparation of that deed. He read the deed but did not read the clause referred to. I do not say

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that he did so to defraud me. I cannot say if he did so to help Mr. Tennakoon. I do not know if Mr. Wiratunga was personally aware of what was in the deed. I do not know if Mr. Wiratunga was not aware of the clause.

Q. You know that by right of paternal inheritance a person cannot acquire only a life interest?

10 A. I cannot say.
I know what a life interest is and I know that when a person inherits from paternal inheritance he cannot have only a life interest.

Q. If you saw the sentence in D8 "to which the lessor ... only a life interest" you would have been on your guard when that man later said that he got the land by right of paternal inheritance?

20 A. I would never have taken the lease if I was aware that there was only a life interest.

Q. If you had noticed that the deed of lease referred to the fact that the lessor had only a life interest you say you would never have bought the land?

A. I would never have bought the land.
Because I would have known that there was something wrong.

30 The Notary who attested the deed of lease which contains the clause referred to also attested the deed of transfer in my favour. The deed of transfer was within a period of four months from the deed of lease."

As to the payment of consideration for the alleged purchase he said:

p.41 1.15-33

"Although I had a bank account I paid Mr. Wilmot Tennakoon cash because he wanted cash. I had cash in my possession. I do not have an iron safe. I had the money in the drawer. I do not have an iron safe because
40 there is no reason to keep an iron safe since I have a bank account. I could get cash by cashing a cheque or by taking from some one else or from the moneys in my house. I say that Rs.10,000/- passed before the Notary.

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Q. Did you try to check on the evidence to show that you got the Rs.10,000/-?

A. I did not think about it. This question was asked from me only now and it did not strike me earlier.

Q. In your entire evidence-in-chief you have been pointedly drawing the attention of Court to the fact that the Rs.10,000/- passed in cash? You realise that it is a strong point in your case that the Rs.10,000/- actually passed? 10

A. I have not realised.

Nobody drew my attention to check up as to how I got the Rs.10,000/-. The deed of transfer was attested between 10 a.m. and 12 noon in Mr. Wiratunga's Office."

p.44 l.26 — The next day he said that he had not checked his cheque book to see how he got the Rs.10,000/- which he paid. It was not a sum he bothered about.

p.48 l.17, p.54 l.32 — Evidence was also given for the Appellant by one De Silva that he was present when the sum of Rs.10,000/- was paid. The Notary, Mr. Wiratunga, who was present in Court, was not called. 20

p.58 l.20 — 12. The learned District Judge found that the Deed P1 did not fail for want of acceptance.

p.60 l.28 — He also found that the Appellant throughout was well aware of the title of Wilmot Tennakoon to the land and that Wilmot Tennakoon was only a fiduciary whose rights would pass to his children according to P1 on his death. 30

On the question of consideration the learned judge found as follows:-

p.61 l.1-11 — "The Notary who attested D3 was present in Court but he was not called into the witness box. He could have supported the certificate in the deed. Though the fact of his not being called is a matter that can be taken into consideration on this question of consideration, yet there is not enough material for me to hold that the full consideration of Rs.10,000/- did not pass. 40

But one thing is clear. The consideration was altogether inadequate. The land in question and the house in the heart of Kurunegala

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Town are certainly worth three or four times that sum. The defendant has bought the land and the house if I may use the expression, for a song from the thriftless drink addict Wilmot Tennakoon."

He found that this was a case of clear fraud and collusion on the part of the Appellant. He further said that if the question of registration had been decided against the Respondent, she would have been entitled to the land under the last Will of Tennakoon Dissawe. p.61 l.38

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13. It is respectfully submitted that the judgment of the learned District Judge was right except as to his finding on the question whether valuable consideration had been paid by the Appellant for his purported purchase of the said land.

It is submitted that the onus of proof was on the Appellant to prove (a) that the alleged consideration of Rs.10,000/- was actually paid; and (b) that the said consideration was intended to be reasonably equivalent to the value of the property. The learned Judge should have found that this onus had not been discharged and accordingly that the Appellant could not for that reason (inter alia) rely on S.7 (1) of the Registration Ordinance.

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14. The appeal by the Appellant against the judgment of the learned District Judge to the Supreme Court was dismissed with costs.

Basnayake, C.J. held that fraud and collusion within the meaning of S.7 (2) of the Registration Ordinance had not been established; but that the will P14 in effect revoked the gift P1 and that by virtue of S.10 of the Registration Ordinance the Respondent became entitled to the said land under the said Will. p.73 l.27 p.75 l.3 p.78 l.8

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Sinnetamby, J. held that the competing deeds provided for by S.7 (1) of the Registration Ordinance must be traced to the same source for the registered deed to have priority. If no will had been left and Wilmot Tennakoon had been sole heir D.3 would have prevailed over P.1. But since the said land had been bequeathed by Tennakoon Dissawe to the Respondent and because of the provisions of S.10 (1) of the Registration Ordinance, which in effect provided that a disposition by a testator p.79 l.19 p.81 l.40- p.83 l.10

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cannot be defeated by a transfer made by an heir merely by virtue of the prior registration of the latter, the Appellant's claim failed.

p.83 l.6

> "Whatever rights he (the Appellant) got under D3 must be confined to the fiduciary interests Wilmot Tennakoon had under Pl. On the death of Wilmot Tennakoon these rights ceased to exist and his claim to the property in dispute must therefore fail."

p.83 l.11

Sinnetamby J. did not think it necessary to consider whether there had been fraud or collusion in securing the registration of D3. 10

p.72 l.19

15. Before the Supreme Court learned Counsel for the Appellant did not press the point that there had been no acceptance of the deed of gift and the Supreme Court proceeded on the assumption that Pl was a valid deed of gift.

16. It is respectfully submitted that the order of the Supreme Court was right, but that Basnayake C.J. erred in holding that fraud and collusion had 20 not been established, when it was rightly found inter alia by the learned District Judge that the Appellant had seen a copy of Pl and was aware of the fidei commisum and of the limited interest of Wilmot Tennakoon in the said land.

17. The Respondent respectfully submits that this appeal should be dismissed with costs for the following, amongst other,

R E A S O N S

1. BECAUSE the Deed Pl created, upon due acceptance of the donation, a valid fidei commissum 30 in favour of the Respondent and her brother Charles, and Wilmot Tennakoon had only a fiduciary interest which he could convey to the Appellant;

2. BECAUSE the fiduciary interest of Wilmot Tennakoon was extinguished upon his death in 1951, and the Appellant ceased thereafter to have any title to or interest in the property; 40

3. BECAUSE the Appellant did not discharge the burden of proving that he had paid valuable consideration for the execution in his

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favour of the conveyance D3 and was not therefore entitled to claim the benefit of Section 7 (1) of the Registration of Documents Ordinance (Cap.101);

4. BECAUSE the learned District Judge's finding upon the evidence that the Appellant had been guilty of fraud and collusion within the meaning of Section 7 (2) of the Ordinance was right;

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5. BECAUSE even if the deed D3 in favour of the Appellant had prevailed by reason of prior registration over the earlier deed of gift P1, the validity of the alternative title of the Respondent and her brother as devisees under the last Will (P 14) dated the 27th October 1930 was protected by the provisions of Section 10 (1) of the Ordinance against the claim of the Appellant that the property had passed to Wilmot Tennakoon on the footing that Tennakoon Dissawe had died intestate.

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6. BECAUSE there was no evidence in any event as to the extent of the share which would have passed to Wilmot Tennakoon if Tennakoon Dissawe had in fact died intestate.

E.N.F. GRATENEW.

DICK TAVERNE.

A.R.B. AMERASINGHE.

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v.

KANDEGEDERA WIJESUNDERA
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RALAHAMILLAGE ENID NANDAWATHIE
TENNAKOON KUMARIHAMY, wife of
RIENZI KUMARADASA WIJESINGHE,
and OTHERS

C A S E

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