Privy Council Appeal No. 7 of 1928.

Robert Hall and another - - - - - - *Appellants*

v.

The Pelmadulla Valley Tea and Rubber Company, Limited - - *Respondents*

FROM

THE SUPREME COURT OF THE ISLAND OF CEYLON.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 27TH JUNE, 1929.

Present at the Hearing:

LORD BUCKMASTER.
VISCOUNT DUNEDIN.
LORD WARRINGTON OF CLYFFE.

[*Delivered by* LORD WARRINGTON OF CLYFFE.]

The question in this appeal is whether the first appellant (the plaintiff in the action) as purchaser from the second appellant, is entitled to recover from the respondent company possession of certain lands the subject of such purchase, notwithstanding a previous agreement on the part of the second appellant to sell the same lands to the respondents, or whether, on the contrary, the respondents are entitled to specific performance of such previous agreement.

The action came on for trial before the District Judge of Ratnapura, and by the decree dated the 22nd August, 1925, the plaintiffs' action was dismissed and an order was made in effect for the specific performance of the agreement, certain enquiries and accounts being directed for the purpose of carrying such order into effect.

The present appellants appealed from this decree to the Supreme Court of Ceylon, and by their Order dated the 8th March, 1927, it was adjudged that the decree of the District Court should

be modified in certain respects not material to this appeal, and that, subject to such modifications, the decree of the District Court should be affirmed and the appeal dismissed with costs. Leave to appeal having been obtained from the Supreme Court the present appeal to His Majesty in Council was in due course presented by the two appellants.

The facts material to the present appeal may be shortly stated.

The respondent company was incorporated in the year 1909 for the purpose, amongst other things, of purchasing from the appellant Thornhill, an estate called Rilhena, which purchase was subsequently carried into effect. Thornhill, at the same time, undertook to transfer to the company 1,000 a. of adjoining land, of which he was not then possessed.

For the purpose of giving effect to this undertaking he entered into a contract in writing with the respondents dated the 27th September, 1910, and conveniently referred to in the proceedings as agreement No. 693.

By this agreement Thornhill agreed to sell and convey to the respondents all land he might then be possessed of or might thereafter purchase in certain specified villages adjoining the Rilhena estate up to 1,000 a. at a price and upon terms which need not be stated.

There prevails in Ceylon a system of registration of deeds, but agreement No. 693 was not registered, and was, in fact, incapable of registration for the reason that it contained no sufficiently definite description of the lands affected by it.

This appeal relates only to certain blocks of lands, part of the 1,000 a. acquired by the appellant Thornhill after considerable delay, in fact, not until the year 1921, but in 1912 the respondents were, in anticipation of such acquisition, allowed by him to take and did take possession of such blocks of land and have since been, and are now, in possession thereof.

Disputes arose between the appellant Thornhill and the respondents as to the mode of carrying into effect agreement No. 693, and a subsequent agreement was made modifying its terms in certain respects and pending such disputes the said appellant executed in favour of the appellant Hall the transfer on the validity of which, as against the respondents, the question turns.

The transfer was dated the 25th October, 1923, and by it the appellant Thornhill, in consideration of Rs. 45,624, stated to be paid to him by the vendor did sell, convey, transfer set over and assure unto the appellant Hall the lands in question described in the schedule to hold the same to him his heirs, executors, administrators and assigns absolutely. The deed was attested by a notary, who certified that of the consideration Rs. 30,624 were acknowledged by the executant to have been received prior to the execution of the instrument, and for the residue Rs. 15,000 a promissory note was granted by the vendor in favour of the executant.

This deed was, on the 29th October, 1923, duly registered at Ratnapura, and on the 13th May, 1924, the present action was instituted by the appellant Hall against the respondents. The appellant Thornhill was subsequently added as a defendant.

The defence raised two points material for the decision of this appeal: (1) That having regard to section 93 of the Trust Ordinance No. 9 of 1917, the property comprised in the transfer was held by the appellant Hall for the benefit of the respondents to the extent necessary to give effect to agreement No. 693, and (2) that failing this defence the transfer was fraudulent and collusive and conferred no title on the transferee as against the respondents claiming under the previous agreement 693.

The trial Judge decided both points in favour of the respondents. In the Supreme Court the learned Judges agreed with the trial Judge on the first point, and, therefore, did not deal with the second, though they said they must not be held to dissent from the view of the Judge thereon.

The first question is one solely of the construction of section 93 of the Ordinance of 1917, which is in the following terms :--

> "Where a person acquires property with notice that another person has entered into an existing contract affecting that property, of which specific performance could be enforced, the former must hold the property for the benefit of the latter to the extent necessary to give effect to the contract: provided that in the case of a contract affecting immovable property such contract shall have been duly registered before such acquisition."

The trial Judge and the Supreme Court found in fact that the appellant Hall acquired the property with notice of the existing contract No. 693, and that nothing had occurred to prevent specific performance of the contract, and they further held that on the true construction of the section the provision as to registration did not affect its application to the contract in question, inasmuch as the non-registration thereof was due to the fact that it was not capable of registration.

The appellants did not, and, indeed, could not, before this Board raise again the questions dealt with by the concurrent findings of fact, and the question, therefore, is solely one as to the construction of the final words of the section.

On this point the Chief Justice said that in his view the object of the proviso was to secure compliance with the law as to registration, and that as the non-registration of the contract involved no breach of the registration law the proviso in such a case had no effect.

Their Lordships are unable to concur in this view. The prior registration of the contract is made a condition of the application to it of the benefit conferred by the section. The object in the mind of the Legislature in imposing such a condition even if it could be known, would not affect the meaning of the words used. Under these words it is plain that the contract is one which does not satisfy the condition upon which alone it is entitled

to the benefit conferred by the section. If, therefore, the rights of the respondents depended on the Trusts Ordinance alone the appeal would succeed, and it is therefore necessary to consider the second question mentioned above. This turns on the proper construction and effect under the circumstances of this case of section 17 of the Land Registration Ordinance of 1891 (No. 14 of 1891).

Section 17 is in the following terms :—

> " Every deed, judgment, order or other instrument as aforesaid, unless so registered, shall be deemed void as against all parties claiming an adverse interest thereto on valuable consideration, by virtue of any subsequent deed, judgment, order or other instrument, which shall have been duly registered as aforesaid. Provided, however, that fraud or collusion in obtaining such last-mentioned deed, judgment, order or other instrument, or in securing such prior registration, shall defeat the priority of the person claiming thereunder, and that nothing herein contained shall be deemed to give any greater effect or different construction to any deed, judgment, order or other instrument registered in pursuance hereof, save the priority hereby conferred on it."

Prima facie, therefore, under the provisions of the first sentence, the agreement No. 693 would be void as against the appellant Hall claiming an adverse interest on valuable consideration by virtue of the subsequent registered conveyance of 1923. Moreover, it is admitted that according to decisions in Ceylon the mere fact that the appellant Hall had notice of the existence of the agreement would not affect his right to the priority given by the Ordinance. The question then is was there fraud or collusion on his part in obtaining the deed of 1923, or in securing its prior registration ? If there was it would defeat his priority.

The Judge in the District Court said dealing with this point : " There is only one conclusion that I can come to after a careful perusal of the evidence on this point, and that is that the sale and purchase of these lands was a concerted device on the part of the added defendant to circumvent the company." It will be observed that this is a finding only that there was a concerted device on the part of Thornhill, but inasmuch as it appears from other parts of his judgment that he found the appellant to be practically in the same position as Thornhill so far as knowledge of what had happened and was being done was concerned, it is not unreasonable to infer that when the Judge says the sale and purchase was a concerted device on the part of one he really means to involve the other party to the " concert." But in truth this point is not of much consequence. Facts emerged in reference to the transfer which show clearly in their Lordships' opinion, that it was fraudulent and collusive in that it was not intended to be the out and out transfer to Hall which it professed to be. It is on the face of it a sale of the land out and out for a sum of money (Rs. 45,624) paid to the vendor by the vendee. It is admitted that of the Rs. 45,624 a sum of Rs. 30,654 is the amount of a number of loans alleged to have been made at various times and in various amounts over a period extending from

the 8th December, 1922, to the 17th October, 1923, and interest thereon. The evidence in support of the existence of these loans is of the slightest description, and it is quite evident that the Judge had difficulty in accepting even such evidence as there was, but, accepting the story as true, it shows a state of things utterly at variance with the transaction as it appears on the face of the deed. The transaction, so far as the Rs. 30,624 was concerned, was not a sale for money thus paid as consideration for the transfer, but a transfer of land in consideration of moneys paid *alio intuitu*, viz., by way of loan by the purchaser to the vendor to be accepted, presumably, in satisfaction of the debt. As to the Rs. 15,000 there is no evidence that it was ever paid. A promissory note was, as appears by the notary's certificate, given by the purchaser to the seller for the amount. This note has never been produced, in fact, it is said to have been torn up when later on the appellant Hall says he gave Thornhill a cheque for Rs. 15,000 in payment of the note. No evidence of this except the bare statement of Hall was given. The cheque was not produced nor was any bank book or other evidence of payment. Their Lordships cannot but come to the conclusion that the whole transaction was a sham never intended to be anything more than a device for getting priority over the respondents' claim, and that this amounts to fraud or collusion within the meaning of the Ordinances.

For these reasons they are of opinion that this appeal fails, and ought to be dismissed with costs, and they will humbly advise His Majesty accordingly.

In the Privy Council.

ROBERT HALL AND ANOTHER

v.

THE PELMADULLA VALLEY
TEA AND RUBBER COMPANY, LIMITED

DELIVERED BY LORD WARRINGTON OF CLYFFE.

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