Privy Council Appeal No. 70 of 1934.

Frederick Emmanuel Abeyesundera - - - - - *Appellant*

v.

The Ceylon Exports, Limited, and another - - - *Respondents*

FROM

THE SUPREME COURT OF THE ISLAND OF CEYLON.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 9TH JULY, 1936.

Present at the hearing:

LORD BLANESBURGH.
LORD MAUGHAM.
LORD ROCHE.

[*Delivered by* LORD MAUGHAM.]

This is an appeal from the decree of the Supreme Court of the Island of Ceylon dated the 23rd October, 1933, setting aside a decree of the District Judge of Kurunegala dated the 29th April, 1932. The latter decree dismissed the action wherein the original plaintiff was one John de Silva Rajapakse and the original defendant was the present appellant.

The original plaintiff instituted the action as long ago as the 30th November, 1926, for a declaration that he was entitled under a deed of gift No. 1294 of the 21st September, 1908, executed in his favour when a minor aged five years by his father W. Benjamin Rajapakse (who was added as defendant in the course of the proceedings but has not appeared before this Board), to a property called Raigamwatte consisting of six specified lots of land of the aggregate extent of about 250 acres. The problems that arise for decision in the proceedings are due to the circumstance that the added defendant whom it will be convenient to call Benjamin Rajapakse, notwithstanding the deed of gift executed by him in 1908, purported by a deed of transfer No. 5487 dated the 28th September, 1915, to convey the same estate to the appellant who thereupon entered into possession of the estate and was still there when the proceedings were commenced.

The claim of the appellant so far as it is based on the deed of transfer from Benjamin Rajapakse depends upon the provisions of a registration ordinance No. 14 of 1891.

It has been replaced by an ordinance No. 23 of 1927 in practically identical terms but it is the ordinance of 1891 which was in force at the relevant period. Section 17 of ordinance No. 14 of 1891 was 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 that 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."

It was contended that since the deed of gift of 1908 had not been registered at the time when the deed of transfer of 1915 was registered, namely, on the 1st October, 1915, the former was void as against the appellant. This conclusion would, no doubt, follow subject to the effect, if any, of the proviso that fraud or collusion in obtaining the transfer would defeat the priority of the person claiming under that document. The question whether such fraud or collusion had been established was the main question in debate in Ceylon. Another question of some importance was also raised which will have to be the subject of separate consideration, but it seems best to dispose of the question of fraud or collusion before embarking on the other question. It should be mentioned here that the District Judge arrived at a conclusion on the question of fact favourable to the appellant but that view was not taken in the Supreme Court.

Benjamin Rajapakse was a landed proprietor and planter who at different times encountered much financial trouble. He was helped by his brother in 1898. In 1901 he was insolvent with liabilities of Rs.250,000 and he then settled with his creditors with the help of his father. In 1908 he again got into financial difficulty and it is admitted that his father then agreed to pay or settle his debts if he transferred the properties he then possessed to the children by his second marriage. Benjamin Rajapakse assented to this proposal, and as a result the deed of gift already referred to was duly executed in favour of Benjamin's son John Rajapakse, the original plaintiff, then a child aged about five years and nine months who was living with and under the care of his father. The deed of gift contains a declaration that the grant or gift to her son was received and accepted by his mother the wife of Benjamin Rajapakse. Having regard to this acceptance no question could be raised as to the validity of the deed, though it required registration under the ordinance above referred to if it was to avoid the danger of a subsequent deed, judgment, order or other instrument being registered purporting to confer an adverse interest on some other party. In fact the deed of

gift was not registered until the 17th December, 1915. John Rajapakse also conveyed by deed of gift another estate called Rawita to his two minor daughters and this deed also remained unregistered. After the execution of the deeds of gift the minor children including the original plaintiff John Rajapakse continued to live with their parents up to the year 1918. Benjamin Rajapakse remained in possession of the land and he proceeded to borrow money on the security of the Raigam estate and of the Rawita estate. As regards the Raigam estate there was this difficulty, that the deed of gift or a reference thereto was endorsed in the margin of the title deed relating to the Raigam estate; but this difficulty did not deter Benjamin Rajapakse from his transactions with money lenders. The device used was of the simplest character; a piece of paper was pasted over the endorsement so as to conceal it and thus to conceal the existence of the unregistered deed of gift, but the evidence does not establish by whom, and at what date this was done. It should here be mentioned that at one time it was alleged by Benjamin Rajapakse that the agreement in 1908 by his father that he would pay or settle the debts of his insolvent son, in return for which he was to assign his properties to his minor children, was never carried out by the father, and that accordingly Benjamin Rajapakse was justified in regarding himself as being still the owner of the properties. This view found favour with the learned Trial Judge, but not with the judges of the Supreme Court. The matter depended upon inference, and no reliance was or could have been rested on the demeanour of Benjamin Rajapakse who, when called as a witness at the trial, gave three or four different accounts of the matter, accounts which it was impossible to reconcile one with the other. Dalton, J. Acting Chief Justice in his careful judgment elaborately considers the evidence in relation to this matter and in the opinion of their Lordships nothing would be gained by repeating at length the reasons which he stated for coming to the conclusion that there is no ground for holding that the promise made by the father of Benjamin Rajapakse was not carried out. Their Lordships will only add that in addition to the positive evidence of the notary who actually attested the deed of gift in 1908, and saw some of the debts paid, strong ground for trusting his recollection in this matter is to be found in the circumstance that when Benjamin Rajapakse was proposing to apply to the Court, with the object of having the deed of gift declared invalid and the property mentioned in it revested in him, he never suggested that the promise of the father had not been fulfilled and that the deed of gift had thus been obtained by a consideration which had failed. The suggested ground was of a completely different character and one which clearly had nothing to recommend it. Their Lordships see no reason to doubt that the Supreme Court rightly came to the conclusion that there was no substance in the suggestion that the promise of the father was not duly carried out.

Benjamin Rajapakse seems to have made no attempt to sell Raigam till the year 1915, but in that year his liabilities were such that he found it necessary to endeavour to obtain a purchaser. As a result one Mudaliyar Wijewardene entered into negotiations with him for its purchase. Benjamin Rajapakse's title deeds were left with Mr. A. Alvis, the proctor for the proposed purchaser, and it was then discovered that the strip of paper pasted on the deed conveying the property to Benjamin Rajapakse covered the endorsement in relation to the deed of gift in favour of John Rajapakse. According to the evidence Mr. Alvis then pointed out to Benjamin Rajapakse his duty to his son to have the deed of gift registered. It seems clear that it was at this time that Benjamin Rajapakse suggested that he might obtain the leave of the Court for a re-transfer of the property. Counsel's opinion was taken on a statement of facts submitted by Mr. Alvis. The opinion was in the following terms :—

> " In my opinion the donor W. B. Rajapakse is neither entitled to the property nor to have it retransferred to him. The Court will not sanction such a retransfer. The payment of the mortgage gives him no rights whatever. The deed of gift being unregistered a subsequent purchaser from the donor for value would get title if he registers his deed but that does not mean that the donor has title that is a result which follows from the special provisions of the registration ordinance."

It will be noted that the final sentence in this brief opinion was inaccurate in that it made no reference to the proviso in section 17 of ordinance 14 of 1891 and did not qualify the statement that a subsequent purchaser from the vendor for value would get title if he registered his deed by remarking that fraud or collusion in obtaining such deed would not defeat the priority under the deed of gift. Mr. Alvis pointed out to Wijewardene the difficulties of the position and the prospect of litigation, and the latter declined to proceed with the matter unless Benjamin Rajapakse could get the property re-vested in him.

The next step in the history is that the defendant (the present appellant) came forward as a possible purchaser, and took a deed of transfer of the estate from Benjamin Rajapakse, dated the 28th September 1915, in consideration of the sum of Rs.42,500. It is a singular feature of the case that the appellant was not called as a witness although there was a charge of fraud and collusion against him, and although he was present and his counsel called evidence in answer to the plaintiffs' claim. Benjamin Rajapakse, who did give give evidence, was, as their Lordships have already indicated a witness whose statements called for very careful scrutiny before they could be accepted; but this fact seems to be no sufficient ground for the absence of the appellant from the witness box. It was not denied on behalf of the appellant before this Board, that Benjamin Rajapakse had committed a fraud on his son by conveying the property

to the appellant after having executed the deed of gift to the former in 1908. The contention on his behalf was that he had in 1915 no knowledge of this fraud and owed no duty to John Rajapakse and was not in a fiduciary position as regards him. The Acting Chief Justice however summarises in very clear terms the state of knowledge of the appellant when he obtained the conveyance in 1915.

> "He knew of the earlier conveyance, and it seems to me that on the facts he was aware of a great deal more than the mere existence of a prior and unregistered conveyance. He knew the earlier conveyance was to the minor son of his grantee, he knew an attempt had been made to conceal it and must have suspected that Rajapakse was the author of that attempt, he knew that conveyance was unregistered, he knew it was the duty of Rajapakse as father and guardian of his son to have the earlier deed registered, he knew Counsel had advised that Rajapakse had no title to the property, and was not entitled to have it reconveyed to him, he knew Rajapakse was in the hands of money-lenders who were pressing him, he knew Rajapakse was trying to sell this property to others to raise money, he was told that if he took a conveyance litigation might result in view of the earlier deed, and it was a dangerous thing to do, and he knew if Rajapakse registered the deed to his son as he was told he should do, he (defendant) could not even plead the benefit of the Registration Ordinance. Knowing all this, although it probably did not require any persuasion he got Rajapakse during the course of the transaction to undertake not to register the deed to the minor; he pushed through the conveyance to himself with great celerity, he showed no desire to want the advice of Mr. Alvis who nevertheless cautioned him as to the risk he was taking, he dispensed with searches, lent Rajapakse Rs. 40,000/- on mortgage which in the circumstances put the latter in his power, and could only result in the conveyance which to judge from his actions he seemed bent on obtaining."

Counsel for the appellant was unable to challenge this statement, but he placed great reliance on the opinion which has been set out and suggested that the appellant acted upon the faith of it. It seems, however, to their Lordships in the admitted circumstances of the case that if the appellant desired to show that he had really been misled by the inaccuracy in the opinion above set forth he should certainly have given evidence to that effect. In the view of their Lordships section 17 of ordinance No. 14 of 1891 does not present any difficult question of construction, though no doubt there may be difficuties of fact in determining in a particular case whether fraud or collusion has been established. Section 16 of the ordinance contains an elaborate statement of the deeds and other instruments which require registration and it should be observed that these include contracts or agreements for the future sale or purchase or transfer of land and all kinds of accounts of mortgages or encumbrances affecting land, as well as of judgments or orders of court affecting land. Their Lordships see no reason for doubting the proposition that in Ceylon mere notice of a prior unregistered instrument is not of itself sufficient evidence of fraud so as to deprive a person register-

ing of the priority conferred by law. That has been the law in Ceylon since the year 1877 and a number of authorities are cited in the judgments of the Supreme Court which illustrate the proposition. Nor do their Lordships think that anything would be gained by attempting to define the words " fraud or collusion ", though it is probably a good working rule to hold that the words import serious moral blame, and that mere constructive fraud resulting from notice would not justify a finding of fraud or collusion. It may not be improper to add that a question of honesty is not a matter of law, and such a question should present no difficulty to persons capable of appreciating the relevant facts although they may not have had the advantages of a legal training. In the present case Benjamin Rajapakse was endeavouring for his own benefit to deprive his son of the property which he had transferred to him by the deed of gift in 1908; the appellant was fully aware of what he was doing and for his own purposes joined with him in the transaction. There could scarcely be a plainer case of collusion, which must mean in this connection collusion to deprive the person entitled to the land under the prior instrument of his lawful rights. The various authorities in Ceylon cited in the judgments of the Supreme Court contain some strong examples justifying this conclusion. In these circumstances their Lordships must agree with the finding of the Supreme Court upon the subject of fraud or collusion with the result that in the circumstances the transfer of 1915 obtained no priority or benefit by reason of its prior registration.

The second question which was discussed on the present appeal depends upon the special facts in relation to the Raigam estate. The land appears to have been, as regards far the greater portion of it, forest, waste or chena land situate in a district formerly comprised in the Kandyan provinces. Section 6 of ordinance No. 12 of 1840 enacts in reference to such lands as follows :—

> " All forest, waste, unoccupied, or uncultivated lands shall be presumed to be the property of the Crown until the contrary thereof be proved, and all chenas and other lands which can be only cultivated after intervals of several years shall, if the same be situate within the districts formerly comprised in the Kandyan Provinces (wherein no thombo registers have been heretofore established), be deemed to belong to the Crown and not to be the property of any private person claiming the same against the Crown, except upon proof only by such persons of a sannas or grant for the same, together with satisfactory evidence as to the limits and boundaries thereof, or of such customary taxes, dues or services having been rendered within twenty years for the same as have been rendered within such period for similar lands being the property of private proprietors in the same districts; and in all other districts in this Colony such chena and other lands which can only be cultivated after intervals of several years shall be deemed to be forest or waste lands within the meaning of this clause."

The appellant has contended that the land must be presumed to be Crown land within the meaning of section 6 and accordingly that having obtained, as he did, by purchase or grant from the Crown the land in question there is no room for the application of any trust binding such land and that the action therefore failed. In order to appreciate this point it is necessary to consider the circumstances under which the appellant obtained his grant from the Crown.

Benjamin Rajapakse began taking steps for the purpose of obtaining a grant from the Crown in relation to the Raigamwatte estate as early as the year 1913. He got Mr. Murray, a surveyor, who was called as a witness, to make what is called a C.Q.P. (certificate of quiet possession) plan of the estate and apparently of some other property. On the 24th April, 1917, the plan and a tenement sheet made by Mr. Murray were sent to an official called the Settlement Officer at Colombo with a request that the certificate of quiet possession should be issued to the defendant. The Settlement Officer requested the solicitors for the defendant to set out the defendant's title; and the title deeds which purported to show the title of Benjamin Rajapakse and the transfer from him to the defendant were sent to the officer. It should here be stated that, notwithstanding the terms of ordinance No. 12 of 1840 and of certain subsequent ordinances, a practice has grown up in the Island and still continues under which persons who are in possession of forest, waste, unoccupied, or uncultivated lands deal with the same by deeds and other instruments as though they had a title of some kind to the lands, the title being well-known in Ceylon as " a village title ". By letter dated the 1st June, 1917, the Settlement Officer informed the solicitors for the defendant that he would not be entitled to a C.Q.P. for the land except a few acres of old garden, but that if he were seeking a settlement of his dispute as to title with the Crown, the matter would come up in the ordinary course of business within the next two years and the claim would then be enquired into. Such an enquiry took place in due course, both Benjamin Rajapakse and the appellant being present. Benjamin Rajapakse gave evidence and was questioned by the Settlement Officers; and it is clear that the latter came to a decision on the footing that Benjamin Rajapakse had transferred his village title to the appellant by the transfer of 1915, and it is equally clear that the existence of the previous deed of gift in favour of Benjamin's son was not mentioned to the Settlement Officer. Crown grants, the dates of which are mentioned in the answer of the defendant, were issued to him in the years 1919-1922, and a final order under the Waste Lands Ordinance was published in the Ceylon Government Gazette. The Acting Chief Justice states the position as regards the settlement enquiry and the way in which the

Crown grants were obtained by the appellant in the following terms :—

> " It is clear however from the evidence that the purpose of the settlement enquiry is to settle the land, subject to what the witnesses say as to the age of the plantations, upon the persons entitled thereto under the village title. In other words the Settlement Officer for the purpose of deciding who is entitled to the grant recognises the equitable interests of the claimants as disclosed by their village titles, in practice applying the provisions of s.8 of the Ordinance as regards possession and payment. This I think I might well say is common knowledge and was of course known to Benjamin Rajapakse, and there is not the least reason to doubt it was known to the defendant. It is the recognised policy of the department in settlement matters. The fact of the earlier conveyance was not disclosed to the Settlement Officer, for it is clear that had it been produced, any grant obtained by Rajapakse must have been obtained on behalf of and for the benefit of his son who had village title in his own name and possession through his father."

In these circumstances is it possible for the appellant to claim to hold the estate free from any claim by the respondents, the Ceylon Exports Limited who, it should be explained, were purchasers from the original plaintiff and were substituted as plaintiffs in the course of the trial ?

Section 118 of the Trust Ordinance No. 9 of 1917 enacts as follows :—

> " All matters with reference to any trust, or with reference to any obligation in the nature of a trust arising or resulting by the implication or construction of law, for which no specific provision is made in this or any other Ordinance shall be determined by the principles of equity for the time being in force in the High Court of Justice in England."

Their Lordships are clearly of opinion that this section makes the English law applicable to trusts or obligations in the nature of a trust arising or resulting by the implication or construction of law which has not been provided for by the ordinance. There is no doubt that according to the law of Ceylon, as according to the law of England, a guardian stands in a fiduciary relation to his ward, and their Lordships can see no reason for doubting that Benjamin Rajapakse stood in such a fiduciary relation to his son John Rajapakse. It was his duty, if not at once to register the deed of gift, at least to prevent the registration of any instrument by which a third party could destroy the interest of the son. The relevant facts were known to the appellant; and in the circumstances the appellant became a constructive trustee of the estate included in the Crown grants since that estate was obtained by him on the strength of the transfer of 1915 from a person in a fiduciary position and by concealment of the fact that the beneficial owner of the village title was the minor John Rajapakse.

The attention of their Lordships has been called to the fact that the decree of the Supreme Court directs that the question of compensation for improvements alleged to

be due to the defendant and the question of damages to the plaintiffs be dealt with in the District Court to whom the matter was referred for further enquiry. This order and direction requires some amendment since the appellant may be entitled to compensation for improvements effected by him or by Benjamin Rajapakse after the date of the deed of gift, and to costs and expenses properly incurred by the appellant in obtaining or perfecting a title from the Crown to the lands included in the deed of gift, and also to monies paid by the appellant in discharge of a mortgage bond No. 170, and questions may also arise as to the interest, if any, to be allowed to either party as well as the question of damages, if any, sustained by the substituted plaintiffs. The decree under appeal should be amended in those respects. Subject to these amendments their Lordships are of opinion that the judgments of Dalton A.C.J. and Maartensz J. are correct for the reasons therein contained; and they will, therefore, humbly advise His Majesty that this appeal should be dismissed with costs.

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In the Privy Council.

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