

41,1956

No. 25 of 1955.

# In the Privy Council.

## ON APPEAL

FROM THE SUPREME COURT OF CEYLON.

UNIVERSITY OF LONDON  
W.C.1.

20 FEB 1957

BETWEEN

THE COLOMBO APOTHECARIES COMPANY  
LIMITED (6th Defendant)

*Appellant*

INSTITUTE OF ADVANCED  
LEGAL STUDIES

AND

46094

- 1. MARTHA AGNES PEIRIS (Plaintiff)
- 10 2. CLARA STEPHANIA PATHIVILLA *nee*  
RODRIGO
- 3. KURUPPUMULLAGE DONA THERESA
- 4. KURUPPUMULLAGE DONA LUCY
- 5. KURUPPUMULLAGE DON GABRIEL
- 6. KURUPPUMULLAGE DONA ROSELINE . *Respondents.*

## Case

FOR THE FIRST RESPONDENT.

1. This is an appeal from the judgment and order of the Supreme Court of Ceylon given on the 8th April, 1954, whereby the said Court allowed the Respondent's Appeal from a judgment and order of Manickavasagar, A.D.J., in the District Court of Colombo, dated the 25th October, 1950.

RECORD.

2. The 1st Respondent, who was the Plaintiff in these proceedings, instituted an action for the sale, under the Partition Ordinance (Cap. 55), of certain premises situate at Glennie Street, Slave Island, Colombo.

3. The land and premises in question were originally owned by Manisge Solomon Rodrigo, who by a deed No. 8550 dated 9th November, 1870 (referred to in the judgment as P.1) transferred and conveyed the property by way of gift to his son Manisge Lorenzo Rodrigo, subject to a *fidei commissum* in favour of his male and female heirs. This said deed was not registered.

4. The said Manisge Lorenzo Rodrigo died in or about the year 1898 leaving as his heirs Manisge Madelena Rodrigo, the mother of the 2nd, 3rd, 4th and 5th Defendants in these proceedings, and Manisge Lawrence alias Lawrenti Rodrigo, the father of the 1st Respondent (i.e., the Plaintiff) and the 1st Defendant.

5. The said Manisge Madelena Rodrigo died in 1934, leaving the said 2nd, 3rd and 4th Defendants as her heirs and the said Manisge Lawrence alias Lawrenti Rodrigo died in 1939 leaving the 1st Respondent and the said 1st Defendant as his heirs.

pp. 7-8.

6. By her Complaint, dated the 4th November, 1947, the 1st Respondent stated that she and the 1st Defendant were entitled each to an undivided one-fourth share in the said property and that the 2nd and 5th Defendants inclusive were each entitled to an undivided one-eighth share in the property.

She further stated that the Appellant (i.e., the 6th Defendant) was in wrongful possession of the said premises. 10

By her Complaint she prayed *inter alia* as it was impracticable and inconvenient to possess the said land in common and it was not practicable to partition the same that—

(A) She, the Plaintiff, and the 1st to 5th Defendants be declared entitled to the said land in the shares set out above; and

(B) The said land be sold under the provisions of the Partition Ordinance.

p. 15.

7. By their Answer the Appellant (6th Defendant) claimed that it was entitled to possession of the entire land on the following grounds :—

(A) That the said Lawrenti Rodrigo by deed No. 5249 of 20 21st December, 1885 (referred to in the judgments as 6D1) had conveyed the said land to one Theobald Dias and that it was the descendant in title thereto. The said deed No. 5249 was registered.

(B) That it and its predecessors-in-title had been in long continuous and undisturbed possession of the said property independent of and adverse to everyone else and had gained a prescriptive title thereto.

8. The 1st and 5th Defendants in this action did not file Answers or contest the suit. 30

9. Manickavasagar, A.D.J., gave judgment on the 25th October, 1950, whereby he dismissed the said action with costs.

There were four main issues to be decided by the learned judge and were as follows :—

(A) Whether the deed of gift No. 8554 (P.1) created a *fidei commissum*.

(B) Whether the deed of sale No. 5249 (6D1) by which the property was sold by the said Lawrenti Rodrigo, took priority over the deed of gift No. 8550 (P.1) by virtue of prior registration.

(C) Whether the Appellant (6th Defendant) had acquired a title 40 by prescription.

(D) Whether the judgment in the case of *Manisgey Lorenzo Rodrigo v. Theobald Dias and another* (Case No. 11739), which decided that the deed of gift No. 8550 (P. 1) prevailed over the deed of sale No. 5249 (6D1) operated as *res adjudicata* against the Appellant (6th Defendant), who was the successor in title to the unsuccessful party in those proceedings.

10. On these four main issues the learned judge held—

(A) That he had no doubt that the deed of gift No. 8550 (P.1) p. 32, ll. 1-7. created a *fidei commissum* for the full period of four generations.

10 (B) That the deed of sale No. 5249 (6D1) took priority over p. 35. the deed of gift No. 8550 (P.1) by reason of the former being duly registered.

A relevant portion of the judgment is as follows :—

20 “ The question I have to decide is whether 6D1 has priority p. 32, ll. 14-40. over the deed of gift by reason of its being duly registered. The difficulty arises from the fact that at the time Laurenti conveyed to Dias by 6D1, he had no title. If he had executed the conveyance after the death of his father Lorenzo, then this deed would have effectively shut out P.1, and prevailed over it, by the fact of its being duly registered : because Laurenti, though a fiduciary, was also the heir *ab intestato* of his father Lorenzo : this was the basis of the decisions in the 30 N.L.R. 317 and 32 N.L.R. 353. The moot question in this case is whether the fact that 6D1 was executed and registered at a time when Laurenti had no title, makes any difference : if for the moment, we leave out of consideration the deed of gift P.1, and the question of registration, then the fact of Laurenti having conveyed without any title would not ordinarily make a difference ; for his subsequent acquisition of title on the death of his father, would enure to the benefit of Dias, as from the date of such acquisition : that is, the conveyance, and the equitable right conveyed by the Roman-Dutch law principle of *exceptio rei vindictæ*, will combine to give the grantee Dias, the title subsequently acquired by his grantor, Laurenti, without anything further being done ; there is no need for another conveyance after the subsequent acquisition of title by him ; because the title so acquired enures automatically to the grantee.

40 What I wish to emphasize is, that the same instrument though executed at a time when the grantor had no title, is made use of to complete the title of the grantee ; cannot then, this same instrument, though it had been duly registered before the grantor acquired his title, be made use of to give priority by registration over an earlier deed, which is not registered at all or registered subsequent to the acquisition of such title. My answer to this is in the affirmative.”

(c) On the issue of prescription as follows :—

“ On the issue of prescription the 6th Defendant Company has been in possession of the entire premises for the last 26 years ; in view of the decision I have reached that the 6th Defendant is

p. 35, l. 39-p. 36, l. 3.

entitled to a half share of the premises by virtue of 6D1, and the succeeding deeds in their chain of title, they by their possession for 26 years have acquired a prescriptive title to the half share ; in regard to the balance half, the second to fifth Defendants claim as fiduciaries under P1, on the death of Madelena in 1934 ; the 6th Defendant Company has been in possession of these interests too for over 10 years ; the Company have therefore prescribed to the interests claimed by the 2nd to 6th Defendants on P.1. Issue 7 is answered in the affirmative.”

(D) On the issue of whether the judgment in the case of 10  
*Manisgey Lorenzo Rodrigo v. Theobald Dias* operated as *res adjudicata* as follows :—

p. 35, ll. 13-30.

“ This brings me to a consideration of the effect of the decree in D.C. 11739 ; I have already alluded to the facts of the case ; I do not think that the judgment and decree in the case can operate as *res judicata* on the issue of title raised in this case ; apart from holding that the deed of gift P1 created a *fidei commissum* in favour of the male and female descendants of the donor ; all that it declared was, that as betwixt the Plaintiff Lorenzo, and the Defendant Dias, the former was entitled to the 20 premises ; and rightly so, because deed 6D1 on which Dias relied for his title, could not have conveyed at that time any title, as Laurenti had none to convey—his father Lorenzo being then alive ; whereas Lorenzo was entitled to the possession of the premises either as fiduciary or intestate heir of his father Solomon ; the issue of title conferred by priority of registration did not arise in that case and could not have arisen, because at the time of that action, there could have been no competition between P1 and 6D1 ; it is also of the utmost significance that although the District Court declared 6D1 as being null and void the 30 Supreme Court, advisedly, deleted that part of the decree, thereby leaving open for subsequent decision if it did arise, the question of any title that may accrue on 6D1.”

11. Being aggrieved by the said decision of the said learned District Judge, the first Respondent appealed to the Supreme Court of Ceylon.

12. The appeal was heard by Gratiaen J. and Gunasekara J. who by their judgment dated 8th April, 1954, allowed the appeal of the first Respondent.

p. 41, ll. 32-35.

13. In regard to issue (A) Gratiaen J. said as follows :—

“ The learned District Judge has held, and learned Counsel 40 for the 6th Defendant concedes, that the deed of the gift P1 must be interpreted as having created a valid *fidei commissum* for four generations in favour of Lorenzo Rodrigo and his descendants.”

p. 42, ll. 3-41.

14. Gratiaen, J., next dealt with issues (B), (C) and (D) :—

“ The main argument addressed to us on behalf of the 6th Defendant was that Lawrenti’s purported conveyance 6D1 of 1895 was entitled to prevail over the earlier deed P.1 by virtue of prior

registration. On this point, the learned Judge held in favour of the 6th Defendant. In my opinion, however, the issue of prior registration has no application to the facts of this case. An earlier decree P.6 of the District Court of Colombo, which was upheld by this Court on appeal, decided that P.1 prevailed over 6D1, and this decision operates as *res adjudicata* against the 6th Defendant who is the successor-in-title of the unsuccessful party in those proceedings.

10 The action to which I refer is D.C. Colombo No. 11739 which was instituted by Lorenzo Rodrigo (as the first fiduciary under P.1) against Theobald Dias (the purported purchaser from Lawrenti under 6D1). Lorenzo sued Theobald Dias for a declaration of title to, and for ejection from the premises, and Dias' defence was that, upon his suggested interpretation of P.1, Lawrenti became absolute owner of the property on attaining his thirtieth birthday, so that 6D1 operated to pass the entire title to Dias.

20 The effect and true meaning of P.1 was prominently raised in issue between the parties to those proceedings. The basis of the decree against Dias in favour of Lorenzo was (1) that P.1 created a valid *fidei commissum* in favour of Lorenzo and his 'descendants' and (2) that Lawrenti had, at the time when 6D1 was executed during his father's lifetime, only a contingent *fidei commissary* interest in the property. It follows that the 6th Defendant, as the successor-in-title of the purchaser under 6D1, is bound by the decision that P.1 prevailed over 6D1. Upon the death of Lawrenti on 29th October 1939, his interests in the property came to an end, and his children, the plaintiff and the 1st defendant, being the descendants of Lorenzo, became fiduciary co-owners to the extent of one-fourth each. As this action commenced within ten years of the date of vesting, the 6th defendant has not defeated the fiduciary interests of either the plaintiff or the 1st defendant by adverse prescriptive possession.

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Upon these facts, there is no room in my opinion for the operation of the principle of prior registration. In view of the decree in D.C. Colombo No. 11739, 6D1 merely created a title which was subordinate to that previously created by P.1, and no question of competition between deeds 'from the same source' arises.

40 For these reasons, I take the view that the plaintiff should have been granted a decree for sale under the Partition Ordinance on the basis that he and the 1st defendant had a fiduciary interest in a one-fourth share in the premises to which this action relates."

15. Finally, Gratiaen, J., made order as follows :—

"I would allow the appeal and send the case back with a direction that a decree for sale under the provisions of the Partition Ordinance be entered on the basis that the Plaintiff and the 1st Defendant are each vested with a fiduciary interest in an undivided one-fourth share of the property, and that the 6th Defendant has acquired a prescriptive title to the remaining half share to

p. 43, ll. 5-18.

the extent that it defeats the fiduciary interests of the 2nd to the 5th Defendants. Before the decree for sale is entered of record, the learned Judge must investigate and adjudicate upon the rights of the 6th Defendant in respect of improvements effected on the property, and the decree must also make suitable provision to safeguard future *fidei commissary* interests under the deed P.1 dated 9th November, 1870.

The 6th Defendant must pay to the Plaintiff the costs of this appeal and half the costs of the contest in the Court below. All other costs should be borne *pro rata* between the Plaintiff, the 10 1st Defendant and the 6th Defendant."

16. The 1st Respondent humbly submits that the appeal of the Appellant should be dismissed with costs and the judgments and orders of the Supreme Court upheld for the following among other

### REASONS

- (1) BECAUSE the deed of gift P.1 created a valid *fidei commissum* for four generations in favour of Lorenzo and his descendants ;
- (2) BECAUSE the Supreme Court of Ceylon had earlier held that P.1 prevailed over 6D.1 ; 20
- (3) BECAUSE the said earlier decision of the Supreme Court of Ceylon operates as *res adjudicata* against the Appellant ;
- (4) BECAUSE the Supreme Court of Ceylon rightly held, in the present appeal, that, in these circumstances, the issue as to prior registration had no bearing on the matter in dispute between the parties thereto ;
- (5) BECAUSE the District Court of Colombo wrongly held that the doctrine of priority of registration prevailed against the 1st Respondent ; 30
- (6) BECAUSE the judgment of the District Court of Colombo was wrong ;
- (7) BECAUSE the judgment of the Supreme Court is right and should be affirmed.

BIDEN ASHBROOKE.

SIRIMEVAN AMERASINGHE.

**In the Privy Council.**

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**ON APPEAL**

*from the Supreme Court of Ceylon.*

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BETWEEN

**THE COLOMBO APOTHE-  
CARIES COMPANY,  
LIMITED** (6th Defendant) *Appellant*

AND

**MARTHA AGNES PEIRIS**  
(Plaintiff) **and Others**  
(Defendants Nos. 1 to 5) *Respondents.*

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**Case**

**FOR THE FIRST RESPONDENT**

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