Privy Council Appeal No. 25 of 1955

The Colombo Apothecaries' Company Limited - - - *Appellant*

v.

Martha Agnes Peiris and others - - - - - - *Respondents*

FROM

THE SUPREME COURT OF CEYLON

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 11TH DECEMBER, 1956

Present at the Hearing:

EARL JOWITT
LORD OAKSEY
LORD COHEN
LORD KEITH OF AVONHOLM
MR. L. M. D. DE SILVA

[*Delivered by* MR. L. M. D. DE SILVA]

The plaintiff in this case (a respondent to this appeal) instituted the action in the District Court of Colombo for a sale under the Partition Ordinance (Chapter 56, Legislative Enactments of Ceylon) of certain premises situated in Colombo. He pleaded that he and the first five defendants (also respondents to this appeal) were entitled to the property as co-owners. He further pleaded that the 6th defendant (the present appellant) had no right to the premises and was in wrongful possession thereof.

The learned District Judge in an able and careful judgment held that the respondents had no title to the land and dismissed the action. On appeal the Supreme Court held that the plaintiff-respondent and the first defendant-respondent had certain fiduciary rights to the land under a deed of gift of 1870 creating a *fidei commissum*, and that the second to the fifth defendants-respondents also had had certain rights which they had lost owing to prescriptive possession by the appellant. The Supreme Court entered decree accordingly.

The appellant now asks that the decree of the District Court dismissing the action be restored.

It is common ground that one Solomon Rodrigo was originally the owner of the premises. His sole issue was his son Lorenzo Rodrigo. In 1870 by deed No. 8,550 (referred to in the proceedings as P1) Solomon gifted the premises to Lorenzo, reserving a life interest to himself and creating a *fidei commissum* in favour of Lorenzo's descendants, which, as the deed was executed in 1870, was effective for four generations. Solomon died intestate in 1873. Lorenzo died intestate in 1899 leaving issue a daughter Madalena and a son Lawrenti. Madalena died in 1934 intestate and leaving as issue the 2nd to the 5th defendants-respondents. Lawrenti died in 1939 intestate and leaving as issue the plaintiff-respondent and the 1st defendant-respondent. Lawrenti on 21st December, 1895, when his father Lorenzo was still alive, by deed No. 5249 (referred to in the proceedings as 6D1) transferred the whole of the premises to one Dias. It is not disputed that the interest, if any, in the premises which passed to Dias on 6D1 either at the time of execution of 6D1, or at any time thereafter,

has, upon a series of instruments, passed to the appellant. It is convenient before dealing with the rest of the case to examine what interest if any the appellant acquired on this series of instruments.

At the time 6D1 was executed Lawrenti had no title to the whole of the premises which he purported to convey or to any interest at all therein because his father Lorenzo was still alive. The deed 6D1 was registered on the 31st December, 1895. The Deed of Gift No. 8,550 (P1) was not registered at the time and was in fact unregistered at the date of action. Sections 38 and 39 of the Land Registration Ordinance No. 8 of 1863 (re-enacted as sections 16 and 17 of the Land Registration Ordinance 14 of 1891) are to the following effect:—

> 38. "From and after the time when this Ordinance shall come into operation, every Deed or other instrument of sale Purchase, Transfer, Assignment or Mortgage, of any land or other immovable property, or of Promise, Bargain, Contract or Agreement, for effecting any such object, or for establishing or transferring any security, interest or encumbrance affecting such land or property (other than a Lease at will or for any period not exceeding one month), or of Contract or Agreement for the future sale or purchase or transfer of any such land or property; and every Deed or Act of Release, Surrender or Annulment, of or affecting any such Deed or other instrument, and the Probate of any Will, and every grant of Administration affecting any such land or property and every Judgment or Order of Court affecting any such land or property shall, if executed made granted or pronounced after the time when this Ordinance shall have come into operation, be registered in the Branch Office of the District or Province in which such land or . . . property is situate. . . ."
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> 39. "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."

Parties are agreed (subject to the possibility of the intervention of another principle of law discussed later) that, according to the law of Ceylon, had Lorenzo been dead at the times of execution and registration of 6D1, the deed, by reason of registration, would have passed from Lawrenti to Dias such interest as Lawrenti would have had if both his father Lorenzo and grandfather Solomon had died intestate and the grandfather had not executed deed No. 8,550. The registration of 6D1 would have wiped out the provisions of deed No. 8,550. It is also not disputed that under the law of Ceylon by reason of the application of the doctrine *exceptio rei venditae* any interest which Lawrenti would have inherited from Lorenzo after the execution of 6D1 would pass on 6D1 to the transferee although at the time of execution of 6D1 Lawrenti had had no interest. The question which arises is whether the registration of 6D1 at a time when it passed no interest is sufficient to enable the transferee to defeat the provisions of Deed No. 8,550. It is not disputed that if 6D1 had been registered after the death of Lorenzo (instead of being registered before the death) it would have defeated Deed No. 8,550. Upon this point the learned District Judge said:—

> "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.

> " If the subsequent instrument can be made use of to give title, why cannot the registration of the same instrument confer priority, provided all the other requirements to confer such priority, are present: the subsequent acquisition of title would not only give the benefit of such title to the instrument already executed, but would also in my opinion give the grantee the benefit of priority by the registration of that instrument; the position can however be different if the competing deed had been registered before the subsequent acquisition of title; but if the competing instrument remained unregistered at the time of the acquisition of title, then, I do think that the subsequent, but duly registered, instrument prevails over the unregistered deed."

Their Lordships agree. It was argued that as at the time 6D1 was registered it did not pass any interest it was not an instrument coming within the range of the documents described in section 38, and that, in consequence, the registration was ineffective at the time it was made and remained ineffective ever after. Their Lordships cannot accept this argument as the description of instruments contained in section 38 is wide, and sufficient to cover instruments which though they are ineffective at the time of execution may become effective at a later date. Moreover 6D1 remained on the register from the time it was registered and was on the register at the point of time of, and after, Lorenzo's death. Their Lordships are of opinion that the character of being a registered instrument at that point of time is not avoided or diminished by reason of the fact that it had been on the register before then.

Both sides referred to the ordinances mentioned above in the course of argument and it was not suggested that the Registration Ordinance 1927 made any difference to the conclusions drawn.

On appeal the Supreme Court did not consider the matters discussed in the preceding paragraph because it thought that the intervention of another principle of law made them irrelevant. It took the view:—

> " 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 P1 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 P6 of the District Court of Colombo, which was upheld by this Court on appeal, decided that P1 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."

The decree referred to was the decree in case No. 11,739 of the District Court of Colombo. In that case Lorenzo sued Dias, the transferee on 6D1, for a declaration of title to and ejectment from the premises in question. The original of Deed No. 8,550 was unobtainable for the purposes of case 11,739 and Dias raised the defence that by that deed Soloman had gifted the premises directly to his grandson Lawrenti subject to an interest in Lorenzo which had expired. On secondary evidence the contents of deed 8,550 were established to be what now appears in the document P1, which, as stated earlier, is a conveyance by Solomon to Lorenzo reserving a life interest in Solomon and creating a *fidei commissum* in favour of Lorenzo's descendants. Lorenzo would have been entitled to succeed when it became clear that deed 8,550 conveyed nothing directly to Lawrenti as contended by Dias. There was however a finding that deed 8,550 contained a *fidei commissum* and this finding though correct was purely incidental. Upon appeal the decision that Lorenzo was entitled to a declaration of title and possession was affirmed but a finding by the District Court (unnecessary for Lorenzo's success) that the deed of transfer 6D1 from Lawrenti to Dias was null and void was deleted. The deed was restored to its " pristine condition " and, Lorenzo having died during the pendency of the appeal, the question as to what Dias may have received on 6D1 from Lawrenti by reason of " inheritance " by Lawrenti from Lorenzo was expressly left open by the

Supreme Court. This is the very question discussed in previous paragraphs. As it was expressly left open nothing that happened in Case No. 11,739 could have given rise to a plea of *res judicata* upon it.

In the present case the Supreme Court on the question of *res judicata* said:—

> "The effect and true meaning of P1 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 P1 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 P1 prevailed over 6D1."

It is true that in Case No. 11,739 P1 prevailed and 6D1 did not prevail. The question in controversy there was, whether, as stated by the defendant (in that case) P1 conveyed an interest directly to Lawrenti or whether it did not. When P1 was reconstructed on secondary evidence it was clear that P1 conveyed no such direct interest and consequently 6D1 (in which the transferor was Lawrenti) became totally ineffective during the lifetime of Lorenzo. It was no doubt held that P1 created a *fidei commissum*. That fact is not, and has never been, denied by the appellant in the present case, and the decision that P1 created a *fidei commissum* is not material to the considerations in the present case. The question whether it created a *fidei commissum* is not, and has never been, in controversy in this case. What is in controversy is whether, in the completely altered circumstances prevailing on the death of Lorenzo, 6D1 could be said to be a duly registered instrument passing title. The questions involved in this controversy did not arise (and indeed could not have arisen) in case 11,739. All that can be said of the decision in Case No. 11,739 is that it fixed Dias with notice of the *fidei commissum* but this fact appears to be immaterial for the purpose of their Lordships' decision. It was said for the appellant that under the law of Ceylon notice of a prior deed does not alter the effect of the registration of a subsequent deed. This view has not been challenged and it follows that there is nothing in the decision in Case No. 11,739 which detracts from the normal consequences of the registration of 6D1 discussed in previous paragraphs. Upon the series of instruments referred to in those paragraphs the appellant became entitled to an undivided half share of the premises.

The 2nd to the 5th defendants-respondents claimed the remaining half share of the premises as fiduciaries under the deed of gift P1 on the death of Madalena in 1934. The learned District Judge held that the appellant who had been in possession for 26 years had prescribed to the interests of these respondents. This finding was not disturbed by the Supreme Court and has not been challenged on this appeal.

It follows from what has been said that the plaintiff-respondent has no interest in the premises in respect of which she brought this action. Her action must therefore be dismissed.

Their Lordships will humbly advise Her Majesty that the appeal be allowed, that the decree of the Supreme Court be set aside and that the decree of the District Court be restored. The plaintiff-respondent, who was the only appellant to the Supreme Court and who was the only respondent represented on this appeal, must pay the costs of this appeal and the costs of the appeal to the Supreme Court.

(39891) Wt. 8069—83 100 12/56 D.L.

In the Privy Council

THE COLOMBO APOTHECARIES' COMPANY LIMITED

v.

MARTHA AGNES PEIRIS AND OTHERS

[DELIVERED BY MR. L. M. D. DE SILVA]

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