

KUMARASINGHE
v
DINADASA AND OTHERS

SUPREME COURT
JAYASINGHE, J.
TILAKAWARDANE, J. AND
MARSOOF, (PC) J.
S.C. (APPEAL) NO. 56/2002
FEBRUARY 07TH, 2006

Registration of Documents Ordinance, No. 23 of 1927 – Fraud and collusion within the meaning of section 7(2), Evidence Ordinance – Presumption under section 144 considered.

The defendants claimed title to the same land on deeds emanating from a common owner on the basis of prior registration. The plaintiff disputed the claim of the defendants on the ground that the said claim frustrates for the reason of fraud or collusion in obtaining the said deeds or securing prior registration thereof by the defendants.

The main question considered by the Supreme Court was whether the benefit of registration that has accrued to the defendants-appellants can be negated by the application of section 7(2) of the Registration of Documents Ordinance.

Held:

- (1) The plaintiff in order to seek benefit under section 7(2) has either to establish fraud or collusion.

Whether the plaintiff had established fraud or collusion is entirely a matter for the District Judge to decide on the evidence unfolded in Court. At the end of the case for the plaintiff, if the defendants choose to keep quiet then they do so at great risk.

- (2) If fraud had to be proved on a balance of probability the failure on the part of the defendants to give evidence could be held against them.

A Civil Court when considering a charge of fraud requires a higher degree of probability than that it would require in establishing negligence.

Per Nihal Jayasinghe, J:

"Even though it is unnecessary to establish collusion beyond reasonable doubt all the items of evidence point to the fact that the registration of the deed of the plaintiff in the wrong folio was as a result of a collusive arrangement between Podisingho and the defendants."

Per Nihal Jayasinghe, J:

"In the teeth of damning evidence it was inconceivable that the defendants could have given evidence and subjected themselves to cross-examination."

Cases referred to:

1. *Lairis Appu v Kumarihamy* 64 NLR 97.
2. *Arumugam v Arumugam* 53 NLR 490.
3. *Ferdinando v Ferdinando* 23 NLR 123.
4. *Hornel v Neuburger Products Ltd.* 1957 1QB 247.
5. *Bater v Bater* 1956 3 AER 458.
6. *Ceylon Exports Ltd. v Abeysundera* 35 NLR 417.

APPEAL from the judgment of the Court of Appeal.

L.C. Seneviratne, P.C. with *Lal C. Kumarasinghe* for defendant-respondent-appellant.

Gamini Marapana, P.C. with *Navin Marapana* for the plaintiff-appellant-respondent.

Cur.adv.vult.

May 18, 2007

NIHAL JAYASINGHE, J.

Plaintiff-appellant-respondent (hereinafter referred to as the plaintiff) instituted action for a declaration of title to the land described in the first schedule to the plaint and for an enjoining order, interim injunction and the permanent injunction restraining the defendant-respondent-appellants (hereinafter referred to as defendants) from entering the said land, disputing the title and possession of the plaintiff and alienating the said land.

The defendants claimed title to the same land on deeds emanating from a common owner which they maintained were duly registered and claimed title to the said property as against the plaintiff on the basis of prior registration. The defendants further claimed damages from the plaintiff for unlawful possession of the said land and for restoration of possession. The plaintiff disputed the claim of the defendant based on prior registration by contending that the said claim is defeated on account of fraud or collusion in obtaining the subsequent instrument or securing prior registration thereof. The plaintiff relied on section 7(2) of the Registration of

Documents Ordinance. The matters that arose for determination therefore were whether -

- (1) the defendants were entitled to the benefits of prior registration of their deeds over that of the plaintiff; and
- (2) the said claim of prior registration has been defeated on account of fraud or collusion in obtaining the said instruments or securing prior registration thereof.

The learned Additional District Judge held against the plaintiff on both grounds aforesaid and dismissed the plaintiffs' action. The plaintiffs appealed to the Court of Appeal and the Court of Appeal by its judgment dated 22.03.2002 allowed the appeal and directed that judgment be entered in favour of the plaintiff-appellant as prayed for in the plaint with costs. It is against this order that this appeal has been referred to this Court.

The main issue which has to be determined by this Court is whether the plaintiff can obtain relief under section 7(2) of the Registration of Documents Ordinance.

It is admitted between parties that one Podisingho Weerasinghe was at one time the owner of the land in suit on Deed No. 2143 (P2) of 10.04.1991 attested by Pinto Moragoda, Notary Public. It is also admitted between parties that the said Weerasinghe by Deed of Transfer No. 70636(P3) of 14.05.1991 attested by Jayasekera Abeyruwan transferred the said land to the plaintiff for a consideration of Rupees One Million. It is also admitted that the said Weerasinghe thereafter on 11.07.1991 and 10.08.1991 purported to convey the same land to the 1st to 4th defendants-appellants on Deeds Nos. 13499, 13571 respectively.

The said 1st to 4th defendants on 20.08.1991 by Deed No. 624 sold the said land to one Chandrapala who on 08.11.1991 by Deed No. 704 sold the same land to the 1st to 4th defendant-appellants and the 6th appellant.

It is also admitted that as at the date of execution of Deed No. 70636 in favour of the plaintiff the deed on which the said Podisingho got title i.e. Deed 2143 (P2) had not yet been registered and that in view of the delay in registering the said deed the registration of the plaintiff's Deed No. 70636 (P3) was also held up.

As Deed No. 2143 (P2) was yet to be registered the notary who executed deed No. 70636 (P3) the said Jayasekera Abeyruwan, Notary Public specifically appended that the said Deed No. 70636 (P3) should be registered in the same folio as Deed No. 2143(P2). It has to be stated here that Deed No. 2143 (P2) dated 10.04.1991 had been tendered for registration on 12.02.1991 and registered on 25.06.1991 in folio B682/57. That Deed No. 70636 (P3) dated 14.05.1991 was tendered for registration on 23.05.1991 and registered on 27.08.1991 in folio B 683/073 with no cross reference to folio B 682/57. Deed No. 13499 on 11.07.1991 has been registered in folio 682/201 cross referenced to folio B 682/57 and Deed No. 15371 dated 10.08.1991 registered in folio 682/203 cross referenced to folio B 682/57. That Deed No. 13571 dated 10.08.1991 registered in folio B 682/203 cross referenced to folio B 682/57. Deed No. 624 dated 20.08.1991 registered on 06.11.1991 in folio B 682/57. It appears that at the time Deed No.70636 (P3) was registered Deed No. 2143 (P2) has already been registered to folio B 682/57 and despite specific instructions contained in Deed No. 70636 (P3) by the Notary Abeyruwan, it was not registered in the same folio as Deed No. 2143 (P2). However, all subsequent deeds drawn up by the original owner in favour of the defendant-appellants have been registered in the correct folio. Thus, as set out before, the question to be determined by this Court is whether the benefit of registration that has ensured to the defendant-appellants can be negated by the application of section 7(2) of the Registration of Documents Ordinance. That there was fraud or collusion in the delay and/or improper registration of Deed No. 70636 (P3).

The plaintiff in order to seek benefit under section 7(2) has either to establish fraud or collusion. In *Lairis Appu v Kumarihamy*⁽¹⁾, it was held by Lord Devlin that for the purpose of section 7 of the Registration of Documents Ordinance there must be "actual fraud in the sense of dishonesty", and that mere notice of prior registration is not enough. It was also held that "the words 'in obtaining such subsequent instrument' in section 7 of the Registration of Documents Ordinance do not exclude the case of a collusion between the transfer or and the transferee." In *Arumugam v Arumugam*⁽²⁾ the vendor having sold his share in the property had

placed the vendee in possession. Thereafter the vendor having discovered that the Deed of Sale has been registered in the wrong folio sold it to another who promptly had his deed registered in the correct folio. His Lordship held that there was collusion. Court followed a dictum of Betram C.J., in *Ferdinando v Ferdinando*⁽³⁾ where it was stated that there was collusion within the meaning of the Registration of Documents Ordinance where the evidence establishes the joining of two parties in a common trick. Gratiaen, J. stated further that

"human ingenuity is such that the categories of fraud and collusion are far too varied to permit any comprehensive definition which would fit every possible case which might arise for adjudication between competing instruments affecting land under the Registration of Documents Ordinance. The provisions of section 7(2) are by no means confined to transactions where some fiduciary relationship exists or where the subsequent purchaser to whom fraud or collusion is imputed is proved to have taken an active part in the earlier sale over which he claims priority. If any person knowing that his proposed vendor had effectively parted with his interest in a property in favour of someone who has entered into possession of the property as its lawful owner, nevertheless, and in the hope of taking advantage of some recently detected flaw in the registration of earlier deed purports to purchase from that vendor certain right in the property which have already been disposed of, he is guilty of 'collusion' within the meaning of section 7(2) of the Ordinance. The law does not grant benefit of such prior registration to transactions of this kind."

Mr. Marapana, President's Counsel in support of his submission that the defendants are guilty of both fraud and collusion argued that the notary who attested the Deed No. 70636 (P3) had clearly indicated therein that it should be registered in the same folio as the Deed No. 2143 (P2) and that the officials of the Land Registry and Podisingho Weerasinghe were aware of. He submitted further that according to the Deputy District Registrar of Land, Kurunegala Deed No. 2143 (P2) had been tendered for registration on 12.04.1991 but that due to a fault that the relevant 'Paththuwa' had

not been set out it was to be sent by the registered post to the said Weerasinghe on 20.06.1991 and mysteriously the said Weerasinghe had come to the Land Registry the very next day and had personally taken delivery of the deed which was supposed to be sent to him under registered cover, filed an appeal in the Registrar of Lands in Colombo and obtained an order in his favour and got the deed registered on 25.06.1991 in folio 682/57.

Mr. Marapana, President's Counsel adverting to the evidence of the District Deputy Registrar that when a deed is sent for registration and subsequently returned due to some flaw in it all the details regarding the said deed are entered in the folio maintained for it. It is only the relevant details about the transfer are left blank until such time the flaw is corrected and the deed sent back for registration. Mr. Marapana urged very strenuously that at the time the Deed No. 70636 (P3) was registered i.e. on 27.08.1991 in folio B 683/173 the details of the Deed P2 were already entered in the relevant folio, and there is no reason why the officials of the Land Registry could not have followed the lawful instructions on Deed No. 70636 (P3) and entered it in the same folio in which the details of P2 already were. But what the officials of the Land Registry chose to do was to register Deed No. 70636 (P3) in a different folio totally disregarding the notary's detailed instructions. There was no explanation forthcoming from the witnesses of the Land Registry as to why the express instructions given by the Notary Abeyruwan were not followed.

It is relevant at this point to advert to the evidence of one Dayananda who gave evidence before the learned District Judge. He had stated that the defendants had said to him that this land in question has already been sold to a gentleman in Minuwangoda and that they could resell the said land before the registration is effected by the purchaser from Minuwangoda. That he does not want to get involved in transactions and that he only required the money that he had advanced to Weerasinghe. Dayananda had stated in his evidence that the defendants discussed among themselves that they should get the property written in their names, in order to recover the monies they had advanced to Weerasinghe, despite the knowledge they had that the property had already been sold to the plaintiff. The learned President's Counsel went on to

submit that the conduct of the defendants cannot be considered mere notice and that there was a concerted effort on the part of the defendants to get another deed in their favour before plaintiff's deed was registered. Learned President's Counsel submitted that the conduct of the defendants and the said Podisingho clearly established beyond doubt that they acted not only fraudulently but also in collusion and has support of reasoning in both *Lairis Appu v Kumarihamy* and that of *Arumugam v Arumugam*. Mr. Marapana invited attention of Court to the fact that none of the defendants gave evidence to controvert the evidence of Dayananda or to explain their conduct.

Mr. L.C. Seneviratne, President's Counsel for the appellant submitted that it was unnecessary for the defendants to have given evidence for the reason that fraud had to be proved beyond reasonable doubt and since that has not been proven to that degree the defendants were not obliged to give evidence to contradict Dayananda's testimony.

It is my considered view that whether the plaintiff had established fraud or collusion is entirely a matter for the learned District Judge to decide on the evidence unfolded in the Court and it is not for the defendants to make that decision. At the end of the case for the plaintiff if the defendants chose to keep quiet then they do so at great risk. If as contended by Mr. Seneviratne, President's Counsel the plaintiff fell short of establishing his case then the learned District Judge who is adjudicating the issues is quite likely to hold against the plaintiff. The learned President's Counsel for the appellant conceded that if fraud had to be proved on a balance of probabilities the failure on the part of the defendants to give evidence could be held against them. The standard of proof regarding allegation of crime in civil proceedings was considered in the case of *Hornel v Neuberger Products Ltd.*⁽⁴⁾ The plaintiff in that case claimed damages for breach of warranty or alternatively for fraud. The matter for determination before Court was whether a director of the defendant company had made a fraudulent misrepresentation to the effect that the machine which was the subject matter of the sale was a reconditioned machine. If the Director did so represent, there was fraudulent misrepresentation because he knew that the machine had not been reconditioned.

The Court dismissing the claim for damages for breach of warranty on the ground that the parties did not intend the Director's statement to have contractual effect, nevertheless held that it was satisfied on a balance of probabilities but not beyond reasonable doubt that the statement was in fact made and accordingly awarded damages for fraud. On appeal it was held by the Court of Appeal that on an allegation of a crime in civil proceedings the standard of proof was on a balance of probabilities. In the case of *Bater v Bater*⁽⁵⁾ where Lord Denning observed that in civil cases the case must be proved by preponderance of probabilities but there may be degrees of probabilities within that standard. The degree depends on the subject matter. A civil court when considering a charge of fraud will naturally require for itself a higher degree of probability than that which it would require when asking if negligence is established. It does not adopt so high a degree as a criminal court, even when it is considering a charge of criminal nature. Even though mere notice of prior registration is considered insufficient to establish fraud as held in *Ceylon Exports Ltd. v Abeysondera*⁽⁶⁾ the slightest element of moral blame in addition to notice would constitute fraud. Section 7(2) has two elements, fraud or collusion. If fraud has to be established on a balance of probabilities and quite naturally standard of proof in respect of collusion shall be the same standard of proof. The conduct of Podisingho in retrieving the Deed No. 2143 from the Land Registry suggests a strong motive to commit a fraud. It is most unusual that Podisingho the owner of the land having sold the property to the defendants and having obtained the full consideration would seek to regularize a defect in the deed and waste his time to travel all the way to Colombo to obtain an order for the registration of the deed. The element of collusion can be gathered from the conduct of both Weerasinghe and the defendants. It is in evidence that the defendants along with Weerasinghe visited the Land Registry in Kurunegala many times. That they considered various options of obtaining the monies that had been advanced to the said Weerasinghe. Obtaining a conveyance of the land in their favour and reselling it to recover their money, whilst being aware that the land has already been sold to a buyer from Minuwangoda was an option that was also considered. There was an element of urgency in obtaining the defendants deeds registered before the original

buyer could effect his registration. On the facts disclosed the irresistible inference would be that Weerasinghe along with the defendants were guilty of collusion. Even though it is unnecessary to establish collusion beyond reasonable doubt all the items of evidence points to the fact that the registration of the deed of the plaintiff in the wrong folio was as a result of a collusive arrangement between Podisingho and the defendants. The defendants when they sought to have the subsequent instrument registered were aware that the plaintiff has been placed in possession by the said Weerasinghe. In the teeth of this damning evidence it was inconceivable that the defendants could have given evidence and subjected themselves to cross examination. The Court was entitled to draw the presumption under section 114 of the Evidence Ordinance.

Mr. Seneviratne the learned President's Counsel also submitted that the defendants were aware that the instruments No. 70636 (P3) has not been registered and sought to take advantage which the defendant could rightfully do. There can be no dispute on that. But the circumstances here are entirely different. The defendants having advanced money to Weerasinghe in order to recover the said sum sought to contrive a scheme which was both fraudulent and collusive. I see no reason to interfere with the judgment of the Court of Appeal. Appeal is accordingly dismissed with costs.

TILAKAWARDANE, J. - I agree.

MARSOOF, (PC) J. - I agree.

Appeal dismissed.