

1926.

*Present* : Lyall Grant J. and Jayewardene A.J.

INDUWATI DISSANAYAKA *v.* DON ALLIS APPUHAMY.

29—*D. C. Ratnapura, 3,566.*

*Registration—Improvements effected in terms of a registered instrument executed by a fiduciary owner—Claim to compensation in partition suit—Liability of fideicommissary heir—Non-registration of probate—Sections 16 and 11 of Ordinance No. 14 of 1891.*

A claim to compensation for improvements, effected in terms of a registered notarial instrument was allowed in a partition suit, in respect of a property subject to a *fidei commissum* created by will. The fiduciary owner, who was liable to pay compensation, died soon after; and the fideicommissary heir repudiated her liability to pay. The probate of the will was not registered.

*Held*, that the registered notarial instrument prevailed over the unregistered will, and that, in regard to the liabilities under the instrument, the fideicommissary heir occupied no better position than that of an heir under intestacy, and was liable to pay the compensation awarded to the improver in the partition suit.

**A** PPEAL from a judgment of the District Judge of Ratnapura.

*J. S. Jayawardene*, for 4th added defendant, appellant.

*H. V. Perera*, for 1st added defendant, respondent.

July 23, 1926. LYALL GRANT J.—

This is an appeal from an interlocutory decree from the District Court of Ratnapura in the course of a partition action. The proceedings came before the Supreme Court on previous occasions, and on May 15, 1925, the Supreme Court made an order directing the District Judge to go into a certain question of compensation and to determine it in these proceedings, instead of referring the parties to a separate action.

The facts are fully set out in the judgment of Sir Thomas de Sampayo in S. C. No. 46, D. C. Ratnapura, No. 3,566.

The District Judge has now decided that the 1st added defendant is entitled to claim as against the 4th added defendant the amount of compensation decreed to him against the 2nd defendant.

The main controversy was whether a person who had entered into a certain arrangement with a co-owner, by which he built a house on the land owned in common and entered into possession, could enforce his rights in the following circumstances.

A partition action was brought and the co-owner received the share of the land upon which the house stands, with an obligation to compensate the person who had built the house. The co-owner then died, and her daughter claimed the land, not as the heir of her mother, but as a *fidei commissaria* under a previous will.

Her contention was, and is, that her mother, who was merely a *fiduciaria*, could not assign any interest in the land in such a way as to prejudice the rights of a succeeding holder under the *fidei commissary* will.

This contention seems to me in accordance with the law governing *fidei commissa* and with the general principle of law that a person cannot give more than he has. The 1st added defendant (the builder), however, points out that his title derived from the late 2nd defendant has been registered, whereas the will under which the 4th added defendant claims is not registered.

The District Judge has given effect to this argument, and it seems to us that he has rightly done so.

The provisions of section 17 of the Land Registration Ordinance of 1891 are very general and uncompromising.

The registration by an innocent person of an instrument by which for valuable consideration he acquired interests renders him secure against any person claiming an adverse interest arising by virtue of a previous instrument which has not been registered.

The probate of a will is one of the instruments which is expressly referred to in section 16 as one which will be deemed void in the event of prior registration of a deed conveying an adverse interest.

I do not think that the fact that the question has been tried in the course of a partition suit affects the question. The partition had been completed and the 2nd defendant's share had been burdened

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with the 1st added defendant's claim. The 4th added defendant comes in exactly the same position as if the 2nd added defendant had originally owned a divided share.

She comes forward as a person entitled to succeed to the sole ownership of the piece of land. It is settled law that a *fidei commissarius* is bound by a partition decree.

In these circumstances it appears that any question between her and the respondent must be decided exactly as if no partition had existed.

The appeal is dismissed, with costs.

JAYEWARDENE A.J.—

This is an action to partition a land called Tennekoon Walauwawatte Kanatte. It was held subject to a *fidei commissum* which bound the original parties to the action. One of them was the 2nd defendant, who was entitled to a one-third share. The 1st intervenient or added party, respondent, had acquired at a sale in execution the interests of one Porage Don Abraham Singho, who had built a house on the land under a notarial agreement P2 entered into between himself and the 2nd defendant in the year 1913. By interlocutory decree entered on June 10, 1921, the 1st added defendant was declared entitled to compensation for the house the execution-debtor had built, "should the co-owner who gets the portion where the house stands wish him to leave." Thereafter the 2nd defendant died, and the 4th added defendant, the present appellant, succeeded to her rights as a fideicommissary. A scheme of partition has been drawn up, and the house in question falls into the lot which it is proposed should be allotted to the appellant. The appellant contends that she is not liable to pay any compensation as she succeeds to the 2nd defendant's one-third share, not as her heir, but under the will which created the *fidei commissum*. Probate of the will has not been registered, while the notarial agreement P2 has been duly registered. In my opinion, P2 is, in effect, a lease. The grantee was to build a house on the foundation on which the grantors had already constructed, and "to possess and enjoy" the building put up on it on payment of Rs. 20 a year as ground rent. There was no limit fixed to the possession of the builder; his possession, I take it, was to last as long as the house stood. The builder was not given the right to sell the house except to the landowner, and, if any dispute was caused by the builder, the landowner was entitled to pay the former the appraised value of the building and eject him. An agreement very similar to P2 was before this Court in the case of *Mendis v. Dawoodu*,<sup>1</sup> and the builder was held to be in the position of a lessee. There too the agreement to build was entered into by certain persons

<sup>1</sup> (1920) 7 C. W. R. 172.

who held the land subject to *fidei commissum*, and this Court decided that (to quote the headnote) " a person who enters into possession of land which is subject to a *fidei commissum* and puts up buildings thereon, on an agreement with the fiduciary to pay rent for the occupation of the premises and to receive compensation for the buildings whenever the premises are required by the fiduciary, is not entitled, after the interest of the fiduciary has ceased, to claim compensation from the fideicommissary and to retain the property until the payment of such compensation." There no question of registration arose as the will was that of a testator who died in the year 1822, long before the first Registration Ordinance (No. 8 of 1863) came into operation. In the present case the will was not registered by registering the probate, and the failure to do so gives the agreement P2 priority over the *fidei commissum* created by the will. As the will under which the appellant claims is not registered, her predecessor must be regarded as having succeeded to the property by intestate succession as she was a direct descendant of the testator, in so far as it is necessary to give effect to the registered deed under which the 1st added defendant claims—that is, that as far as regards the foundation on which the house stands—the respondent's right is superior to that of the appellant, and P2 binds him. Under section 13 of the Partition Ordinance, when a property leased by a co-owner becomes the subject of a partition action and a decree for partition is entered, the lease is not extinguished but attaches to the divided portion allotted to the leasing co-owner. In this case, therefore, as the portion on which the house stands is to be allotted to appellant, the agreement will remain of full force and effect. The respondent has, however, chosen to claim compensation for the building and has not insisted on his rights under P2. He must, I think, be kept to his choice. The amount of compensation has been assessed by the Commissioner, and at the inquiry held on November 3 last, the correctness of the amount was not disputed although an issue was framed on the point.

The appeal must therefore be dismissed, with costs.

*Appeal dismissed.*

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JAYEWAR-  
DENE A.J.

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