

Present : Ennis and Schneider JJ.

1922

ELLAPATA *et al.* v. FERNANDO

109—D. C. Ratnapura, 3,781.

Last will creating fidei commissum—Probate not registered—Mortgage by daughter of testator—Registration of mortgage—Priority of mortgage in respect of intestate share of the mortgagor.

D mortgaged a half share of a land to defendant. When the property was seized in execution, the plaintiffs (who were children of D) claimed it, asserting that the will of D's father had created a *fidei commissum*, by which, on the death of D, it devolved upon the survivors. The defendant urged that as the probate was not registered, the registered mortgage took priority.

Held, that the mortgage gained priority by registration. If the defendant asserts title independently of the will, the mortgagor had title only to what she inherited from her father by intestate succession.

HE plaintiff's mother, Dona Dorothy Helen Tillekeratne Ellapata Kumarihamy, mortgaged the properties called Galwalawatta and Pelapolawatta, situated in the town of Ratnapura with the defendant by bond No. 3,287 dated October 26, 1918, to secure the payment of Rs. 1,000 borrowed by her from the defendant and interest thereon. The defendant put the bond in suit in action No. 3,609 of the District Court of Ratnapura, and obtained judgment against Dona Dorothy Helen Tillekeratne Ellapata Kumarihamy, and in execution the properties were seized by the Fiscal. The plaintiff preferred a claim to the properties. The claim was dismissed, as the plaintiffs were not in possession of the properties, and they, thereupon, brought an action to have it declared that the properties were not liable to be sold in execution of the judgment against their mother.

The case went to trial in the following issues :—

- (a) Did the last will of Don Moses Tillekeratne dated January 8, 1866, create a valid *fidei commissum* with regard to lands—
(1) Galwalawatta and (2) Pelapolawatta ?
- (b) If so, could Dona Dorothy Helen Tillekeratne Ellapata execute a valid mortgage of these lands ?
- (c) Can the plaintiffs maintain this action during the lifetime of Dona Dorothy Helen Tillekeratne Ellapata ?
- (d) Does the non-registration under sections 16 and 17 of Ordinance No. 16 of 1891 of the probate of the said last will No. 895 affecting immovable property of Don Moses Tillekeratne render it void as against the defendant's duly registered deed No. 3,287 dated October 26, 1918.

1922.
Ellapala v.
Fernando

The Acting District Judge (J. Vandenberg, Esq.) delivered the following judgment:—

The lands in dispute are situated in the town of Ratnapura, and the Supreme Court has held that the last will of Don Moses dated January 8, 1866, created a valid *fidei commissum* (see *N. L. R.*, vol. XX., p. 89).

The prohibition against alienation is in respect of these lands.

On the first issue I hold in the affirmative.

The second issue depends on the question what is the scope and effect of the title under which the lands were held by Dona Dorothy Helen Tillekeratne at the date of the mortgage granted by her to the defendant.

By the last will Don Moses Tillekeratne gave and bequeathed the lands to his wife Dona Sopia Wijeyawardene Tennekoon Walauwe Mahatmaya and children.

(1) Dona Dorothy Helen Tillekeratne and others to be held and possessed by the said wife during her natural life for herself and his children, and after her demise to devolve and descend unto the children to be held and possessed by them, their heirs, and assigns for ever, subject to the reservations and restrictions following, namely, "I will and direct that neither my said wife, nor children, nor any of them whomsoever, nor their nor any of their heirs and assigns shall, nor may on any account whatsoever, alienate, transfer, sell, mortgage, or otherwise encumber the property.

Dona Sophia Wijewardene died some time ago.

Dona Dorothy Helen Tillekeratne was expressly prohibited by the last will to mortgage the lands. But, notwithstanding this prohibition, she mortgaged the lands to the defendant upon mortgage bond No. 3,237 dated October 26, 1916 (see D 3).

The deed of mortgage (D 3) was granted in excess and violation of her rights, and is, therefore, void and invalid.

I answer the second issue in the negative.

The plaintiffs are the sons of Dona Dorothy Helen Tillekeratne, one of the fiduciaries who is still living.

The interests of the plaintiffs, the *fidei commissaries*, are expectancies of succession by survivorship.

Dona Dorothy Helen Tillekeratne was in possession of the lands not on her own account as her own property, but in trust for the plaintiffs.

In my opinion they have sufficient interest in the lands to enable them to maintain this action during the lifetime of the fiduciary.

On the third issue I hold in the affirmative.

No question of priority by registration arises, as the deed of mortgage (D 3) was invalid for the reasons I have already given, and as the parties do not claim interests in the lands under one and the same proprietor, because the plaintiffs claim interest in them from Don Moses Tillekeratne, and the defendant's interest in the mortgage bond is derived from Dona Dorothy Helen Tillekeratne.

On the fourth issue I hold in the negative.

Enter judgment for plaintiffs declaring the said mortgage bond No. 3,237 dated October 26, 1916, void and invalid, as prayed for, with costs.

Samarawickreme (with him *Canakeratne*), for defendant, appellant
H. V. Perera, for plaintiff, respondent.

July 9, 1922. ENNIS J.

1922.

*Ellapata v.
Fernando*

This was an action under section 247 of the Civil Procedure Code with regard to a half share in two lands, which had at one time formed part of the estate of Don Moses Tillekeratne. Don Moses Tillekeratne died, leaving a number of children, of whom one Dorothy Helen Ellapata mortgaged a half share of the lands to defendant. The defendant put the bond in suit in execution of a decree and seized the land. The plaintiffs, who are the children of Dorothy Helen Tillekeratne, then claimed the lands, asserting that the will of Don Moses Tillekeratne had created a *fidei commissum*, by which at the death of the mother it devolved upon the survivors. It appears that in a previous case the Supreme Court has held that the will of Don Moses Tillekeratne does create a *fidei commissum*. The learned Judge decided in favour of plaintiffs, and defendant appeals. It is urged on the appeal that inasmuch as the probate of the will of Don Moses Tillekeratne had not been registered, a fact which is admitted, the mortgage to the defendant which was registered gains priority by virtue of section 17 of the Registration Ordinance No. 14 of 1891. So far as the effect of the Registration Ordinance is concerned, we are governed by the case of *Fonseka v. Cornelis*.¹ This is, however, a matter which requires consideration in the application of the principles laid down by that case. If the defendant asserts his title independently of the will, then he can only claim to seize in execution so much of the property as belonged to Dorothy Helen Ellapata by inheritance from her father by intestate succession, and by subsequent assertion, if any, from other members of the family. From the will it is evident that Don Moses Tillekeratne had six children. We do not know how many survived at the time of his death, or how many have since died without issue, or whether any of those who may have died have left wills, so that it is impossible on the evidence recorded in the case to say what interest the defendant is entitled to seize and sell in execution of his writ. I would accordingly set aside the decree, and send the case back for further evidence and adjudication as to the share which the defendant is entitled to sell on the basis of intestate succession from Don Moses Tillekeratne and by inheritance from any of his children. All costs to abide the event.

SCHNEIDER J.—I agree.

Set aside.

¹ (1917) 20 N. L. R. 97.