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Present: Dalton and Lyall Grant JJ.

GOONETILEKE *v.* GOVERNMENT AGENT, SOUTHERN PROVINCE.

217—D. C. Galle, 114.

Registration of old deeds—Cause for non-registration—Beyond the control of the person producing it—Ordinance No. 6 of 1866, s. 7.

Where a person seeks to produce in evidence a document which has not been registered in accordance with the provisions of Ordinance No. 6 of 1866, he is bound to prove satisfactory the cause for non-registration within the time limited, and that such cause was beyond his control.

Where a Government Agent, who was the defendant in the case, called for the record and the Court complied with the request.

Held, that the action of the Government Agent was irregular and that his application should not have been allowed.

APPEAL from a judgment of the District Judge of Galle. The facts appear from the judgment.

Plaintiff, appellant, in person.

J. E. M. Obeyesekere, C. C., for Crown, respondent.

February 6, 1928. DALTON J.—

This appeal arises out of a reference to the District Court, Galle, under the provisions of section 5 of Ordinance No. 1 of 1897 (forest, chena, waste, and unoccupied lands), relating to numerous lots of land in the village of Rekadahena in the Wellaboda pattu of the Galle District. The appellants are the claimants to the land (husband and wife), and the special officer, not admitting the claim, referred it to the Court for adjudication. The claimants made the Government Agent defendant to the proceedings in their claim, notice thereof being given by the Court to the Government Agent, who appeared at the hearing without objection, the Deputy Solicitor-General appearing on his behalf. It is impossible, however, to pass over without adverse comment the attitude and action of the defendant on his receiving the first notice from the Court served upon him formally and asking him to admit or deny the averments in the claim to which our attention has been called. He replies by memorandum, returning the notice sent, points out an unimportant defect in it that the case has no number, says this is the first intimation that he has had that he is defendant, and then requests the Judge to forward the case book for his reference, a most undesirable

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precedent to set for other litigants to follow. The Judge actually appears to have complied with this request, from one who was a party to the proceedings, be it noted, and entitled as such to no more and to no less than any other litigant before the Court. The defendant returns it after examining the record and states he is no party to the proceedings, but then accepts the notice and appears as defendant. If he thought he was wrongly joined he had his remedy, but he had no right whatsoever to act as he did here, an act which shows a failure to appreciate, as a party to the proceedings, what was due by him to the Court and also what was due by the Court to parties appearing before it. If there was the least reason to think the claimants had been actually prejudiced or might be prejudiced by this act, it would in my opinion be ground for setting aside the proceedings and directing that the reference be heard afresh before another Judge. The fact that they have not been in the circumstances prejudiced is of course no justification whatsoever for the act. As has been said before, it is of fundamental importance, not only that justice be done, but be manifestly and undoubtedly seen to be done. Nothing is to be done which so much as creates a suspicion that there has been an improper interference with the course of justice. In the circumstances, however, as it would not help the claimants, and the question arising for decision being one of law only, it does not seem necessary to make such an order here or to do more than condemn the action of the defendant in making the request for the case book, and the action of the District Judge in complying with this request. If that question of law is answered, as I have come to the conclusion it must be answered, against the claimants, there is an end to the claim.

In support of the claim the claimants produce to the Court a sannas or royal grant alleged to have been issued to their ancestors by Sri Prakrama Bahu of Jayawardanapura in the year 1415. This sannas had not been registered under the provisions of Ordinance No. 6 of 1866, but it was urged for the claimants that it had already been accepted in evidence by the Government Agent at the preliminary inquiry on the claim, and that in any event the 1st claimant was the producer of the sannas to the Court, and it was utterly beyond his control to have it registered under that Ordinance prior to January 1, 1868, as he was not born at the time. He states he received it from his mother-in-law in 1895, that she is now dead, and that he does not know why she failed to have it registered. When his wife, the 2nd claimant, was born is not stated.

The defendant filed no answer, there apparently being no requirement upon him to do so (see *Settlement Officer v. Fernando*[1]), but the principal defences to the claim, so far as this appeal is concerned, were that the sannas was inadmissible for want of registration and

[1] *4 Times of Ceylon L. R. 117.*

if admissible it was not genuine. I agree with the learned Judge on his conclusion that the sannas had not already been admitted in evidence, and this conclusion was not seriously contested.

The principal question arising on this appeal is whether the 1st claimant has brought himself within the terms of the proviso to section 7 of the Ordinance. Has it been established to the satisfaction of the Court that the sannas was not registered owing to a cause which was utterly beyond the control of the 1st claimant, who is the person producing it in evidence? The trial Judge was not satisfied, but it is obvious that he was proceeding upon the basis that January 1, 1868, was the last day for registration under the Ordinance, and that claimant was not alive then. Further, the learned Judge does not seem to me to have addressed himself to the last or third part of the proviso under which the claimant seeks to come. The time limited for registration was extended from time to time by proclamation until February 1, 1875, and 1st claimant having been born in 1870 was alive at that time, although only a few years old. His position at the hearing of the reference was that so far as he is aware the sannas has never been registered, that it was utterly beyond his control to get it registered within the time limited because he was not then born, and that he is therefore relieved from the necessity of registration. He was not born at the last date for registration as set out in the Ordinance, but I think his argument would not essentially be altered by the mistake made both by him and the trial Judge as to the last date for registration. It is therefore necessary to consider whether, substituting the fact that he was only about four years old at the last date for his allegation that he was not then born, he has shown that the non-registration was due to a cause utterly beyond his control. The construction of this third part of the proviso has given me some little difficulty, but on analysis it seems to me to require that two things must be proved to the satisfaction of the Court: first, the cause for non-registration within the time limited, and secondly, that that cause was utterly beyond the control of the person producing the document. It seems to me that, having regard to what I conceive to be the ordinary meaning of the words " provided it shall be established . . . . that the same was not registered from other causes utterly beyond the control of the person producing it in evidence, " the cause itself for non-registration must be established, and it is not sufficient for the person producing it to say, " I do not know what the cause was, but whatever it was it was beyond my control because I was only four years old at the time. " I think the legislature required the cause for non-registration to be satisfactorily proved. The fact that the claimant was only four years old obviously in this case was not the cause for non-registration, for he was not a person who held the sannas

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at the time nor was he, at any time within the time limited, a person whom the Ordinance required to register or whose claim to register at that time would have been recognized. If he had been the holder under disability he would of course come within the second part of the proviso. It is true that in *Siriman v. Abeyagunawardena*[1] Burnside C.J. says it would seem that in those cases in which the party claiming under the deed was not in existence or had acquired no estate, the non-registration must be said to have been from causes utterly beyond his control, but the headnote is clearly wrong in saying that Dias J. concurred in this opinion, whilst Clarence J. expresses strong doubts as to its correctness. I have arrived at this conclusion as to the meaning to be put upon these words, having in mind that words in a statute must not be construed so as to have the effect of taking away rights which existed before the statute was passed by mere implication, but that the intention of the legislature to do so must be indicated by clear words to that effect. (*Re Cuno.*[2]) It is obvious that non-registration of a deed required to be registered by this Ordinance may result in a person being deprived of rights in property which, but for the Ordinance, would not be imperilled. This is what seems to have weighed with Browne J. in his dissenting judgment in *Attorney-General v. Kiriya.*[3] The legislature in the Ordinance was seeking to compel the registration of old deeds and other instruments of title, and to prevent the production in Courts of law of false deeds and sannas purporting to bear old dates. I have come to the conclusion that there is nothing repugnant to the purview of the Ordinance in this proviso, the legislature merely seeking therein to safeguard the rights of the holder of a deed who might at the time be oversea or under legal disability, or the rights of a person who sought subsequently to produce a non-registered deed in evidence, if he could show satisfactorily that the cause of non-registration was a cause over which he had no control. I agree, therefore, with the view expressed by Lawrie A.C.J. in *Attorney-General v. Kiriya* (*supra*) that the showing of the cause or causes for non-registration is a condition precedent to a person producing the document being allowed to have it admitted in evidence. That cause having been shown, the claimant then has to proceed further and show that it was one over which he had no control. If the person producing the document can satisfactorily show what was the cause for non-registration, it may as a general rule, I take it, follow that he will satisfy the Court that that cause was utterly beyond his control if he then goes on to show he was not alive when that cause was given effect to. But it is not sufficient for him, in my opinion, under the proviso to say that, whether there be any cause or not, it was beyond his

[1] *9 S. C. C. 102.*

[2] *43 Ch. D. 12.*

[3] *3 N. L. R. 81.*

control to effect registration because of his non-existence. That is not the case the proviso was enacted to meet, and it is not, in my opinion, a reasonable construction to place upon the words. The 1st claimant here, having failed to show any cause for non-registration, is not entitled to the benefits of the proviso.

He has asked this Court, if it is against him on this point, to consider a further matter, the question of costs. A Court is always reluctant to interfere with the exercise by a lower Court of its discretion in this matter. In dismissing the claim the learned Judge has apparently added an order as to the payment of costs by the claimant as a matter of course. There are, however, circumstances in this case which justify this Court in considering the claimant's request that he be not ordered to pay the defendant's costs. I have already referred to the attitude taken up by the defendant at the outset. It seems to me also that the correspondence of the claimants with the defendant, which has been put in, shows a somewhat unnecessarily antagonistic attitude on the part of the latter to the claim, which no doubt resulted in the claimants making charges, quite unjustifiable in the result, that records which might help them had been destroyed or were being hidden away, and that defendant was sheltering himself behind official orders. No doubt trouble, and considerable trouble, may be given on occasion by claims which an officer may think are quite unjustifiable or even false, but in this case it seems to me that the official attitude helped to increase rather than diminish suspicion in the mind of the claimants that they had a better claim than information in their possession showed. Under all the circumstances I think the proper order would have been to dismiss the claim without costs. The learned Judge's order will be varied to that extent.

As the appeal is dismissed but the order as to costs in the lower Court is varied, I would make no order as to the costs of appeal.

LYALL GRANT J.—

I have had the advantage of perusing the judgment of my brother Dalton, with which I entirely agree and I have nothing to add.

Appeal dismissed. Order as to costs varied.