

1958

Present: Basnayake, C.J., and Pulle, J.

APPUSINGHO, Appellant, and LEELAWATHIE and others,
Respondents

S. C. 688—D. C. Tangalle, L/393.

Registration of Documents Ordinance—Prior registration—Section 7 (2)—Fraud or collusion.

The expression "fraud" in section 7 (2) of the Registration of Documents Ordinance is used in the sense of actual fraud and not equitable fraud. Mere notice of a prior unregistered instrument is not of itself sufficient evidence of fraud for the purpose of the section.

The collusion contemplated in section 7 (2) of the Registration of Documents Ordinance must be between persons other than the transferor who combine to obtain the subsequent instrument.

A sold a land to B on 17th May, 1952. On 3rd November, 1952, A sold the same land to C. B's deed was not registered, whereas C's deed was duly registered. The question for decision was whether the priority of C was defeated by fraud or collusion in obtaining the subsequent deed. The evidence showed nothing more than that a Proctor's clerk to whom C had entrusted the task of obtaining the transfer from A knew of the previous sale of the land to B and that he had searched the relevant register and discovered that the deed in favour of the plaintiff was not registered.

Held, that the evidence did not establish fraud or collusion within the meaning of those expressions in section 7 (2) of the Registration of Documents Ordinance.

APPPEAL from a judgment of the District Court, Tangalle.

H. V. Perera, Q.C., with *N. E. Weerasooria, Q.C.*, and *W. D. Gunasekera*, for Plaintiff-Appellant.

E. A. G. de Silva, for 1st Defendant-Respondent.

Cecil de S. Wijeratne, for 3rd Defendant-Respondent.

Cur. adv. vult.

November 13, 1958. BASNAYAKE, C.J.—

The only question that arises for decision on this appeal is whether the priority of the person claiming under deed No. 3,848 of 3rd November 1952 attested by K. G. D. de Silva, Notary Public, is defeated by fraud or collusion in obtaining it.

The learned District Judge has found that the evidence does not establish fraud or collusion in obtaining deed No. 3,848. This appeal is from that decision.

Briefly the material facts are as follows: Hettitantrige Chandrasiri Wimalasuriya the 2nd defendant (hereinafter referred to as Chandrasiri) in the present action was the owner of the land described in the second Schedule to the plaint. By deed No. 90 of 17th May 1952 attested by N. M. A. W. Wickremasuriya, Notary Public, (P2), Chandrasiri sold the land to the appellant reserving to himself the right to get a retransfer of the land within a period of five years on the payment of the consideration of Rs. 5,000 with interest at the rate of 15% per annum. On 15th July 1952 by deed No. 95 of that date (P3) the appellant purchased for a sum of Rs. 5,000 the right to obtain a retransfer of the land reserved in favour of Chandrasiri. On 3rd November 1952 Chandrasiri executed deed No. 3,848 (P9; 1D7) of that date conveying the same land to the 1st defendant, also reserving the right to obtain a retransfer of the land within six months.

It was conceded both here and below that the 1st defendant's deed was duly registered and that the appellant's deeds were not; but learned counsel argued that the priority of the 1st defendant was defeated by fraud or collusion in obtaining the subsequent deed.

The fraud or collusion in obtaining deed No. 3,848 the appellant contends is fraud or collusion of the 3rd defendant, who lent his good offices to the 1st defendant in connexion with the transaction. The plaintiff joined him as a party to this action. The learned District Judge held that he had been wrongly joined. Chandrasiri was not called as a witness by either the plaintiff or the 1st defendant. The learned District Judge has held that the 3rd defendant was aware of the deeds P2 and P3 in favour of the appellant and that they were not duly registered and that he must have come to know of the existence of P2 and P3 from Chandrasiri. The 3rd defendant denied that Chandrasiri informed him of the existence of the deeds. The learned Judge has also found that it was the 3rd defendant who gave the notary the particulars necessary for writing the deeds, that it was the 3rd defendant who searched the land registers for prior encumbrances, and that in the course of his search he could not have failed to discover that deeds P2 and P3 were not duly registered. On these findings the questions that arise for consideration are—

- (a) whether there is fraud or collusion on the part of the 3rd defendant, and
- (b) if so, whether fraud or collusion on his part is fraud or collusion in obtaining the deed within the contemplation of sub-section (2) of section 7 of the Registration of Documents Ordinance (hereinafter referred to as the Ordinance).

The material sub-sections of that section read—

“(1) An instrument executed or made on or after the first day of January, eighteen hundred and sixty-four, whether before or after the commencement of this Ordinance shall, unless it is duly registered under this Chapter, or, if the land has come within the operation of the Land Registration Ordinance, 1877, in the books mentioned in

section 26 of that Ordinance, be void as against all parties claiming an adverse interest thereto on valuable consideration by virtue of any subsequent instrument which is duly registered under this Chapter, or, if the land has come within the operation of the Land Registration Ordinance, 1877, in the books mentioned in section 26 of that Ordinance.

“(2) But fraud or collusion in obtaining such subsequent instrument, or in securing the prior registration thereof shall defeat the priority of the person claiming thereunder.”

To answer these questions it is necessary to construe the above quoted provisions and ascertain the meaning of the words “fraud or collusion in obtaining such subsequent instrument or in securing the prior registration thereof”. In the absence of anything in the context to the contrary the words of a statute must be given their ordinary meaning. For the purpose of ascertaining the ordinary meaning it is permissible to consult authoritative dictionaries. The Shorter Oxford Dictionary defines “fraud” as—

“1. The quality of being deceitful. Now rare; 2. Criminal deception; the using of false representations to obtain an unjust advantage or to injure the right or interests of another (M. E.); 3. An act or instance of deception, a dishonest trick (M. E.); 4. A fraudulent contrivance; in mod. colloq. use, a spurious or deceptive thing.”

The word “collusion” is defined in the same Dictionary as—

“Secret agreement or understanding for purposes of trickery or fraud; underhand scheming or working with another; deceit, fraud, trickery.”

According to Sweet’s Law Dictionary—

“Fraud is used in many senses, but the point common to all of them is pecuniary advantage gained by unfair means. Actual fraud is where one person causes pecuniary injury to another by intentionally misrepresenting or concealing a material fact which from their mutual position he was bound to explain or disclose. This kind of fraud is also sometimes called ‘personal’ or ‘moral’ as opposed to ‘legal’ or ‘constructive’ fraud.”

In the same dictionary “collusion” is defined thus :

“Collusion is where two persons, apparently in a hostile position, or having conflicting interests, by arrangement do some act in order to injure a third person or deceive a Court.”

Tomlins’ Law Dictionary defines “fraud” thus :

“Deceit in grants and conveyances of lands, and bargains and sales of goods etc. to the damage of another person; which may be either by suppression of the truth, or suggestion of falsehood.”

and "collusion" as follows:—

"Is a deceitful agreement or contract between two or more persons, for one to bring an action against the other, to some evil purpose, as to defraud a third person of his right. This collusion is either apparent, when it shows itself on the face of the act; or, which is more common, it is secret, when done in the dark, or covered over with a show of honesty."

Byrne's Law Dictionary defines "fraud" thus:

"Fraud is used in many senses, but the point common to all of them is that pecuniary advantage is gained by unfair means. Actual fraud is where one person causes pecuniary injury to another by intentionally misrepresenting or concealing a material fact which from their mutual position he was bound to explain or disclose. This kind of fraud is also sometimes called 'personal' or 'moral' as opposed to 'legal' or 'constructive' fraud."

It is not necessary to burden this judgment with Wharton's definition of fraud; but his definition of collusion should, I think, be reproduced. He defines it as—

"An agreement or compact between two or more persons to do some act in order to prejudice a third person, or for some improper purpose."

In this connexion it would be useful to refer to Story's discussion of the topic of "fraud" in his Equity Jurisprudence. He says (s. 186 Equity Jurisprudence)—

"It is not easy to give a definition of fraud in the extensive signification in which that term is used in courts of equity; and it has been said that these courts have, very wisely, never laid down, as a general proposition, what shall constitute fraud, or any general rule, beyond which they will not go upon the ground of fraud, lest other means of avoiding the equity of the courts should be found out."

Story quotes Labeo's definition of fraud as—

"Any cunning, deception, or artifice, used to circumvent, cheat, or deceive another—*Dolum Malum esse omnem calliditatem, fallaciam, machinationem ad circumveniendum, fallendum, decipiendum, alterum, adhibitam.*"

Story adds that this definition is, beyond doubt, sufficiently descriptive of what may be called positive, actual fraud, where there is an intention to commit a cheat or deceit upon another to his injury, and he goes on to say—

"But it can hardly be said to include the large class of implied or constructive frauds, which are within the remedial jurisdiction of a court of equity. Fraud, indeed, in the sense of a court of equity, properly includes all acts, omissions, and concealments which involve

a breach of legal or equitable duty, trust, or confidence, justly reposed and are injurious to another, or by which an undue and unconscientious advantage is taken of another."

It is settled law that the expression "fraud" is used in section 7 (2) in the sense of actual fraud and not equitable fraud. *Abeysondera v. Ceylon Exports Ltd.*, (Privy Council)¹. Having regard to the definitions of actual fraud cited above "fraud in obtaining such subsequent instrument" may be defined as obtaining the subsequent instrument by any cunning, deception, artifice, or trick or by any intentional misrepresentation or concealment of material facts which from their mutual position the transferee was bound to explain or disclose to the transferor. The expression "collusion" in the context of "collusion in obtaining such subsequent instrument" presents some difficulty in construction. Sweet's definition suggests that collusion can be said to exist only where two persons, apparently in a hostile position, or having conflicting interests, by arrangement do some act in order to injure a third person. The words "in obtaining such subsequent instrument" exclude the case of a collusion between transferor and transferee, because the transferor cannot be said to be a party to obtaining the subsequent instrument; but to granting or giving it. The "collusion" must therefore be between persons other than the transferor who combine to obtain the subsequent instrument. The definition in the Oxford Dictionary and Wharton's Law Lexicon appears to suit the context better than those of Sweet and Tomlins. The expression may therefore be defined as an agreement, understanding or compact between two or more persons to obtain the subsequent instrument by practising an artifice, a trick, fraud or deceit or by resorting to some underhand or improper scheme or device.

It is also settled law that mere notice of a prior unregistered instrument is not of itself sufficient evidence of fraud for the purposes of the section (*ibid*). It has also been held by this Court in the case of *Siripina v. Tikira*² and affirmed in the subsequent case of *Aserappa v. Weeratinga*³ that the mere purchase of land with the knowledge that the vendor had previously sold to a third person, who had not yet registered his conveyance, does not amount to fraud.

Several decisions of this Court were cited by both sides. It is not necessary to refer to them all. I have referred above to the most authoritative of them. According to those decisions actual fraud on the part of the person obtaining the deed must be proved. If the person obtaining the deed acts through an agent duly authorised for the purpose he must suffer if his agent obtains the deed by fraud.

Before I part with this judgment I wish to refer to two Privy Council decisions not cited at the argument. In the case of *Assets Company Ltd.*

¹ (1936) 38 N. L. R. 117.

² (1878) 1 S. C. C. 84.

³ (1911) 14 N. L. R. 417—3 Judges.

*v. Mere Roibi*¹, Lord Lindley in deciding a question of registration of documents under the corresponding New Zealand Act said—

“.....by fraud in these Acts is meant actual fraud, i.e., dishonesty of some sort, not what is called constructive or equitable fraud—an unfortunate expression and one very apt to mislead, but often used, for want of a better term, to denote transactions having consequences in equity similar to those which flow from fraud. Further, it appears to their Lordships that the fraud which must be proved in order to invalidate the title of a registered purchaser for value, whether he buys from a prior registered owner or from a person claiming under a title certified under the Native Land Acts, must be brought home to the person, whose registered title is impeached or to his agents. Fraud by persons from whom he claims does not affect him unless knowledge of it is brought home to him or his agents. The mere fact that he might have found out fraud if he had been more vigilant, and had made further inquiries which he omitted to make, does not of itself prove fraud on his part. But if it be shewn that his suspicions were aroused, and that he abstained from making inquiries for fear of learning the truth, the case is very different, and fraud may be properly ascribed to him. A person who presents for registration a document which is forged or has been fraudulently or improperly obtained is not guilty of fraud if he honestly believes it to be a genuine document which can be properly acted upon.”

In the later case of *Waimiha Sawmilling Co. Ltd. v. Waione Timber Co. Ltd.*² Lord Buckmaster observed at p. 273—

“It is not, however, necessary or wise to give abstract illustrations of what may constitute fraud in hypothetical conditions, for each case must depend upon its own circumstances. The act must be dishonest, and dishonesty must not be assumed solely by reason of knowledge of an unregistered interest.”

The plaintiff's evidence does not establish anything more than that the 3rd defendant a Proctor's clerk to whom the 1st defendant had entrusted the task of obtaining the conditional transfer from the 2nd defendant knew of the previous sale of the land to the plaintiff and that he had searched the relevant land register and discovered that the deed in favour of the plaintiff was not registered. This evidence does not establish fraud or collusion within the meaning of those expressions in section 7 (2) on the part of the 3rd defendant.

The appeal is dismissed with costs.

PULLE, J.—I agree.

Appeal dismissed.

¹ (1905) A. C. 176 at 210.

² (1840-1932) N. Z. Privy Council Cases, p. 267.