

1962

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

KARUNANAYAKE and others, Appellants, and GUNASEKARA
and others, Respondents

S. C. 105/60—D. C. Matara, 20713/P

Registration of deeds—Priority of registration as between two competing deeds—Meaning of expression “folios”—Circumstances when a new folio may be opened—Registration of Documents Ordinance, ss. 7, 12, 13, 14 (1)—Registration of Documents Regulations, 12, 13, 14.

There is a difference between a continuation folio under section 14 (1) of the Registration of Documents Ordinance and a new folio opened under the proviso to that section. The discretionary power conferred on the Registrar by the proviso must be exercised only in a case where registration according to the rule laid down in the main section is not feasible, or in a case in which the entry in a new folio is proper in the special circumstances of a case, e.g., when registering a final decree of partition, or in a case where Regulation 13 (3) of the Registration of Documents Regulations is applicable.

The folio in which the first registered instrument affecting a land was registered was B49, folio 5. That registration was continued in B71, folio 6, and B90, folio 106. Deed 27D14, which was alleged to relate to the same land, was not registered in a continuation of B49, folio 5, but it was registered in B82, folio 217, which had a remark to the following effect:—“See B100/79. Entire land registered in B71/6”. There were no facts or circumstances which necessitated the commencement of a new folio for registering deed 27D14.

Held (on an issue of priority of registration as between deed 27D14 and a competing deed), that deed 27D14 was registered in the wrong folio. Further, the cross reference in that folio was not made in the prescribed manner.

APPEAL from a judgment of the District Court, Matara.

E. B. Wikramanayake, Q.C., with *H. E. P. Cooray*, for 24th Defendant-Appellant.

C. Ranganathan, with *M. Shanmugalingam*, for 27th and 28th Defendants-Appellants.

H. W. Jayewardene, Q.C., with *R. Dheeraratne*, for 22nd and 32nd Defendants-Respondents.

H. Deheragoda, Crown Counsel, for Attorney-General, who is the 23rd Defendant-Respondent.

LXV—23

2—B 16557—1,855 (2/64)

October 25, 1962. BASNAYAKE, C.J.—

This is an action for partition of a land called *Kellegahenawatte* bounded on the North by *Dumbakellekumbura*, East by *Nayidekankanamagewatte*, South by road and West by *Rukgahadeniya*, in extent 6 acres. It is common ground that—

- (a) this land is depicted in Plan No. 873 (marked X) and described as a land of 6 acres, 2 roods, 04.11 perches,
- (b) the land was possessed in three koratuwas, Western, Eastern and Southern, each of equal extent,
- (c) Aron de Silva Gunasekera and other members of his family possessed the Southern 1/3rd and enjoyed the produce thereof.

The main dispute is in regard to that Southern 1/3rd. The contest is between the 22nd defendant on the one hand and the 27th and 28th defendants on the other. The 22nd defendant claimed $\frac{1}{3}$ th of the Southern 1/3rd less the extent of 22.75 perches donated by him to the Director of Education. He also relied on deed No. 27702 dated 8th September 1937 (22D4) from B. M. Wijarama. In their joint answer the 24th, 27th and 28th defendants claimed the benefit of prior registration for their deed No. 4846 of 21st October 1940 (27D14) as against the deed on which the 22nd defendant claimed his title. After the institution of their action the 27th and 28th defendants *Ramasamy Chettiar* and *Vairawan Chettiar* sold to the 24th defendant by deed No. 6526 of 5th October 1950 (27D13) "All that right, title, interest and claim of us and the Lot or Lots that may be allotted to us in D. C. Matara Case No. 20713 or the proportionate share of money that may be allotted to us in the event of a sale being ordered in the said case."

The present appeal is by the 24th, 27th and 28th defendants. The question for decision is whether deed No. 27D14 on which the 27th and 28th defendants rely or deed Nos. 22D3 and 22D4 on which the 22nd defendant relies have priority. It is contended on behalf of the 27th and 28th defendants that the deed No. 22D4 (27702 of 8th September 1937) is void as it has not been registered under Chapter 3 of the Registration of Documents Ordinance as against deed No. 27D14 which the 24th, 27th and 28th defendants contend is duly registered. The learned District Judge held that 27D14 prevails over 22D3 and 22D4 by virtue of prior registration, but he held against them on the question of prescription and upheld the claim of the 22nd defendant to a decree in his favour on the ground of possession. Learned counsel for the 22nd defendant-respondent contends that 27D14 is not duly registered. We shall therefore examine this question first.

The provisions of law that call for consideration in a discussion of the question are sections 12, 13 and 14 of the Registration of Documents Ordinance and regulations 12, 13 and 14 of the Registration of Documents Regulations all of which are reproduced at the end of this judgment. Under section 14 (1) every instrument presented for registration must

be registered in the book allotted to the division in which the land affected by the instrument is situated and in or in continuation of the folio in which the first registered instrument affecting the same land is registered. The expression "folio" is not defined in the Ordinance. Black's Law Dictionary defines it thus :

" A leaf. In the ancient law books it was the custom to number the leaves, instead of the pages ; hence a folio would include both sides of the leaf ; or two pages. The references to these books are made by the number of the folio, the letters ' a ' and ' b ' being added to show which of the two pages is intended ; thus ' Bracton, fol. 100a. '

A large size of book, the page being obtained by rolding the sheet of paper once only in the binding. Many of the ancient law books are folios.

When used in connection with legal documents, it means a certain number of words varying from 72 to 100. "

In the Registration of Documents Ordinance the word is used in the sense of a leaf of a folio size 20 × 15. The Ordinance contemplates the commencement of the registration on a folio and when the commencing folio is full the continuation of the registration on another folio which is the continuation of the folio in which the first registration was made and it should be so stated and should not be numbered as a new folio but described as " continuation of folio No. — ", the number of the original folio should be stated as the number. A new folio bears a new number. In the case of any entry in a new folio under the proviso to section 14 (1) the prescribed cross references should be made. The prescribed cross reference is " See Vol. — fol. — for a similar property ". In the case of a continuation no cross references are needed. The necessary information is contained in the words " continuation of folio No. — " with the number of the original folio.

It would appear from the registration entries produced in the instant case that the practice of the Registrar-General is not in strict conformity with the Ordinance and that there is at present little difference between a continuation folio under section 14 (1) and a new folio opened under the proviso. If the requirements of the Ordinance had been adhered to strictly the confusion that appears to have been arisen on account of the different registration entries might have been avoided. The folio in which the first registered instrument affecting the land which is the subject-matter of this action was registered is B49, folio 5. It would appear from the documents produced in this case that B71, folio 6, and B90 folio 106 are a continuation of that registration. Deed 27D14 is not registered in a continuation of B49, folio 5, but it is registered in B82, folio 217 which has a remark to the following effect :—" See B. 100/79. Entire land registered in B. 71/6. "

The registration B82, folio 217 has been continued in B183 folio 134. It is not denied by learned counsel for the 27th and 28th defendants that B183 folio 134 is not a continuation of the folio B49 folio 5 in which the

first registered instrument affecting this land is registered. Deed 22D4 is also registered in B211/276. It contains no remarks inviting reference to any other registration. 22D4 conveys—

“ All those undivided three-fourth (3/4) part of the praveni fruit trees and of soil (save and except the planter's share of 3 plantations standing thereon) and the planter's share of the 1 & 2 plantations standing thereon of the land called Dakumkellegehena (Southern portion of Kellegehena) situated at Talalla in Wellaboda Pattu of Matara District, Southern Province and bounded on the North by the Northern Portion of Kellegehena where Jeewathhamy resided, East by Naidakankanagemawatta and Siyambalawehenewatta, South by the Road, West by Ruggahadeniya and containing in extent about four acres. ”

The competing deed 27D14 describes the land thus—

“ An undivided three-fourth (3/4th) part or share of all the paraveni trees and soil of the southern portion in extent two acres of the land called Kellegehena and of the planter's half share of the trees and the entirety of the fifteen cubits tiled house and all other buildings and everything else appertaining thereto and standing thereon situated at Talalla in the Wellaboda Pattu of the District of Matara, Southern Province of the Island of Ceylon and bounded on the North by the Northern portion of the same land belonging to Sellawaduge Don Aberan and others, East by Naide Kankanangewatte and Siyambalawehenewatte on the South by Polwattedeniya, Paluwatte and old road and on the West by Liyanagahakumbura and Rukgahadeniya and registered in the Matara District Land Registry under title B183/134 being property and premises held and possessed by the said Vendor under and by virtue of the deed of transfer bearing No. 22 dated the 9th day of April 1921 and attested by Mr. G. F. Ernst of Matara, Proctor and Notary. ”

22D4 and 27D14, in our opinion, do not convey divided interests although mention is made of a specific extent of land as if the land conveyed were a divided allotment. The opening words of the description are—
“ An undivided 3/4th part or share ”.

Learned counsel for the 27th and 28th defendants-appellants sought to shelter himself under the proviso to section 14 (1). He submitted that under that proviso an instrument might, if the Registrar thinks fit, be entered in a new folio, cross references being entered in the prescribed manner so as to connect the registration with any previous registration affecting the same land or any part thereof. As the value attached to prior registration of any instrument in the proper folio is so great (section 7) the power conferred by the proviso to section 14 (1) cannot be construed as enabling the Registrar to render nugatory the requirement that an instrument affecting a land should be registered in or in continuation of the folio in which the first registered instrument affecting the same land is registered. That provision does not vest in the Registrar an arbitrary power to enter in a new folio an instrument which can and should

be entered in the folio in which the first registered instrument affecting the same land was registered or in a continuation thereof. The words "thinks fit" confer a discretionary power which must be exercised in a case where registration according to the rule laid down in sub-section (1) of section 14 is, having regard to the facts and circumstances of the case before him, not feasible, or in a case in which the entry in a new folio is proper in the special circumstances of the case before him. A situation such as that contemplated in the proviso can arise in the registration of a final decree of partition. Regulation 13 (3) of the Registration of Documents Regulations (Vol. 1 Subsidiary Legislation, p. 547) in prescribing how the Registrar should proceed when registering a deed affecting land states that when the Registrar is doubtful as to the identity of the land he must register the later instrument on a new folio and connect the two folios by cross references thus: "See vol.—folio—for a similar property."

Learned counsel for the appellant is unable to refer us to any facts and circumstances which necessitated the commencement of a new folio for registering 27D14. Not only is 27D14 in the wrong folio but the cross references in that folio are not made in the prescribed manner. He also concedes that the folio in which the first registered instrument affecting the same land was registered is the proper folio for the registration of documents affecting that land. It is not contended that 22D4 is registered in the wrong folio. Under the circumstances 22D4 is not rendered void by the prior registration of a subsequent instrument affecting the same land. Therefore the decision of the learned District Judge has to be reversed on that point. This decision goes to the root of the case and it is not necessary to go into the other matters.

We reverse the judgment of the learned District Judge and hold that 22D4 which is a prior deed is duly registered and is not rendered void by 27D14 which is not duly registered. Subject to that decision in other respects the judgment of the learned District Judge is affirmed. The case will now go back for further proceedings.

The 24th, 27th and 28th defendants will pay the costs of appeal of the 22nd defendant.

HERAT, J.—I agree.

Case sent back for further proceedings.

REGISTRATION OF DOCUMENTS ORDINANCE

12. (1) Every Registrar shall prepare and keep the prescribed books for the registration of instruments, allotting to each book (which may be in as many volumes as necessary) a defined division of his province or district.

(2) The books for the registration of instruments established under the Land Registration Ordinance, 1891, or any enactment repealed by that Ordinance shall continue to be used, and shall be deemed to be kept under this Chapter.

13. (1) Every instrument (except a will) presented for registration shall contain embodied therein, or in a schedule annexed thereto, an accurate and clear description of the land affected thereby, its boundaries, extent, and situation

specifying the district and the village, pattu, korale, or other division of the district in which the land is situated; and in case the land is situated in any town, the name, if any, of the street in which it is situated.

(2) If the land consists of a divided portion of a land or allotment, such portion shall be clearly and accurately defined by its particular boundaries and extent.

(3) If the land consists of an undivided share in a land, the proportion which the share bears to the entire land shall be stated, and a description of the entire and shall be given as required by sub-section (1).

(4) A person desiring to register a will shall give to the Registrar a written description of the land affected thereby which shall comply with the provisions of sub-sections (1) to (3) of this section.

(5) No instrument, other than a will, which does not state the particulars required by the foregoing provisions of this section shall be registered except with the sanction of the Registrar-General, who shall give his sanction, if it is shown to his satisfaction—

- (a) that the description is sufficient to enable the land to be identified with reasonable certainty; or
- (b) that it was impracticable to insert the required particulars in the instrument.

Any person aggrieved by a decision of the Registrar-General under this sub-section may, within thirty days from the date of such decision being communicated to him, institute in any District Court having jurisdiction a suit against the Registrar-General praying for the variation or reversal of such decision.

(6) Where the description of the land affected by an instrument executed or made after the commencement of this Ordinance is not contained in a schedule to the instrument, a fee of five rupees shall be payable for the registration in addition to any other fee which may be payable :

Provided that nothing in this sub-section shall be construed so as to apply to or affect any grant or lease of Crown land made or executed after the commencement of this Ordinance.

(7) There shall be typewritten or written in ink at the head of every instrument (except a will) presented for registration a reference to the volume and folio in which some earlier instrument relating to the same land is registered if such reference is known to the notary who prepared the instrument, or, if the instrument was not prepared by a notary, if such reference is known to the person presenting the instrument for registration.

14. (1) Every instrument presented for registration shall be registered in the book allotted to the division in which the land affected by the instrument is situated and in, or in continuation of, the folio in which the first registered instrument affecting the same land is registered :

Provided that—

- (a) an instrument may, if the Registrar thinks fit, be entered in a new folio, cross references being entered in the prescribed manner so as to connect the registration with any previous registration affecting the same land or any part thereof; and
- (b) where no instrument affecting the same land has been previously registered, the instrument shall be registered in a new folio to be allotted by the Registrar.

(2) An instrument, whether registered before or after the commencement of this Ordinance, shall not be deemed to be duly registered under this Chapter unless it is registered in accordance with the foregoing provisions of this section.

(3) Every order made after the commencement of this Ordinance under section 4 of Ordinance No. 1 of 1897* entitled "An Ordinance relating to claims to Forest, Chena, Waste, and Unoccupied Lands" and embodying therein an agreement

between the Government Agent or Assistant Government Agent or the special officer appointed under section 28 of that Ordinance and the claimant shall be registered in a new folio to be allotted by the Registrar, and an instrument affecting land dealt with by the agreement and registered after registration of the order shall not be deemed to be duly registered under this Chapter unless it is registered in or in continuation of the folio in which the order is registered.

THE REGISTRATION OF DOCUMENTS REGULATIONS

12. Each Registrar shall keep in his office a series of books in Form B to be called the Land Registers, for the registration of instruments affecting land situated within his registration district. Each registration district shall, with the approval of the Registrar-General, be divided into defined divisions of convenient size, to be called registration divisions, and there shall be assigned to each such division a separate register or set of registers to be designated by a separate letter of the alphabet.

13. (1) Registration of an instrument affecting land shall be effected by entering the particulars required in Form B in the proper folio of the register kept under regulation 12 for the registration division in which the land is situated. The registrar shall sign the entry in the register and shall also endorse on the instrument the volume and folio in which registration has been effected and the place and date of registration, thus :

Registered A 5

130

Colombo, January 16, 1928.

(Signed) A.B.,
Registrar.

(N.B.—A 5 is the volume reference, and 130 the folio reference.)

(2) When two or more lands are affected by the same instrument, the volume and folio references required by paragraph (1) of this regulation shall be—

- (a) endorsed on the instrument in the order in which the lands appear in the instrument; and
- (b) entered in the margin of the instrument against the descriptions of the several lands affected.

(3) If, at the time of registration of an instrument affecting land, the Registrar finds that the description of the land affected thereby differs in any respect from the description of the same land appearing in the register by reason of the prior registration of another instrument affecting the same land, he shall, if he is satisfied as to the identity of the land, enter the later instrument in the same folio as the earlier instrument, and shall make a note of the differences in the remarks column of the entry relating to the later instrument : Provided that if he is doubtful as to the identity of the land he shall register the later instrument on a new folio, but shall connect the two folios by cross references, thus :—

“ See Vol. fol. for a similar property.”

14. When an instrument affecting land relates to a divided portion of an area of land and an earlier instrument affecting that area has been already registered, the registrar shall register the instrument relating to the divided portion in a separate folio connecting it with the entry relating to the whole area by cross references, thus :

“ Instruments relating to a portion of this property are registered in Vol. fol. ” (for the earlier instrument).

“ Instruments relating to the property of which this property is a portion are registered in Vol. fol. ” (for the later instrument).