

**IN THE SUPREME COURT OF THE DEMOCRATIC
SOCIALIST REPUBLIC OF SRI LANKA**

1. Irene Leticia Haththotuwa,
2. Gamage Don Mayurasinghe
Haththotuwa,
Both of No.162/10,
Rajagiriya Road,
Rajagiriya.
Plaintiffs

SC APPEAL NO: SC/APPEAL/66/2011

SC LA NO: SC/SPL/LA/210/2010

CA NO: CA/573/96 (F)

DC COLOMBO NO: 6127/ZL

Vs.

1. Warnakulasuriya Wargakkarige
Lalitha Fernando,
2. Hettiarachchige Upali Perera
Wijegunasekara, (Deceased)
Both of No.166,
Rajagiriya Road,
Rajagiriya.
Defendants

AND BETWEEN

Warnakulasuriya Wargakkarige
Lalitha Fernando,
No.166,
Rajagiriya Road,
Rajagiriya.
Defendant-Appellant

Vs.

1. Irene Leticia Haththotuwa,
2. Gamage Don Mayurasinghe
Haththotuwa,
Both of No.162/10,
Rajagiriya Road,
Rajagiriya.
Plaintiff-Respondents

AND NOW BETWEEN

1. Irene Leticia Haththotuwa,
2. Gamage Don Mayurasinghe
Haththotuwa, (Deceased)
- 2A. Nadira Yasanthi Haththotuwa,
Both of No.162/10,
Rajagiriya Road,
Rajagiriya.
Plaintiff-Respondent-Appellants

Vs.

Warnakulasuriya Wargakkarige
Lalitha Fernando,
No.166, Rajagiriya Road,
Rajagiriya.
Defendant-Appellant-Respondent

Before: P. Padman Surasena, J.
Achala Wengappuli, J.
Mahinda Samayawardhena, J.

Counsel: Priyantha Gamage for the Plaintiff-Respondent-
Appellants.
Harsha Soza, P.C., with Rajindh Perera for the
Defendant-Appellant-Respondent.

Argued on : 07.07.2021

Further written submissions:

by the Plaintiff-Respondent-Appellants on
20.07.2021.

by the Defendant-Appellant-Respondent on
20.07.2021.

Decided on: 15.10.2021

Mahinda Samayawardhena, J.

The subject matter of this action is Lot 3 in Plan No. 170 (P1). There is no dispute that by order made in the District Court Colombo Case No. 11384/MB, Lipnus Perera became the owner of this land in 1942 (1V4), and he gifted this land to his son, the

2nd defendant, by deed No. 1642 (P2) in 1969. The 2nd defendant by deed No. 3047 (P3) gifted the land to the 1st and 2nd plaintiffs in 1979. Thereafter by deed No. 2861 (P4) the 2nd defendant sold the land to the 1st defendant in 1988. The plaintiffs filed this action seeking a declaration that they are the owners of the land by deed P3 and that the subsequent deed P4 has no force or avail in law.

The 2nd defendant died soon after the institution of the action. The 1st defendant filed the answer seeking a declaration that she is the owner of the land on deed P4 which gets priority over deed P3 on the basis that P3 was registered in a wrong folio and her subsequent deed P4 was registered in the correct folio.

The District Court held with the plaintiffs. On appeal, the Court of Appeal set aside the judgment of the District Court and held with the defendant. This appeal by the plaintiffs is from the judgment of the Court of Appeal.

Learned counsel for the plaintiffs sought leave to appeal against the judgment of the Court of Appeal only on the following three questions of law:

- (a) *Have their Lordships of the Court of Appeal erred in holding that where a deed is registered in a new folio following a partition of a land, it is not necessary for the purpose of proving 'due registration' to prove that the 'new folio' in which the subsequent competing deed has been registered is a continuation of 'the folio in which the first registered instrument affecting the same land is registered'?*

(b) Have their Lordships of the Court of Appeal erred in failing to follow the decisions of the Supreme Court in Meurling v. Gimarahamy 25 NLR 500 and Diyes Singho v. Herath 64 NLR 492?

(c) Is the said judgment of the Court of Appeal untenable in law that it has selectively ignored judgments of the Supreme Court which were binding on the said court?

In broad terms, the only question to be decided in this appeal is the question of prior registration.

There is no question of the due execution of both deeds P3 and P4. Learned counsel for the plaintiffs accepts before this court that the plaintiffs' deed P3 has been registered in a wrong folio. The contention of learned counsel for the plaintiffs is that the defendant's deed P4 has also not been duly registered and therefore the plaintiffs' deed P3 shall prevail since the 2nd defendant had no right to alienate by deed P4 after the execution of deed P3. This argument is entitled to succeed if P4 has not been duly registered.

Let me now consider whether P4 has been duly registered. Section 7(1) of the Registration of Documents Ordinance, No. 23 of 1927, as amended, states that any instrument affecting land, unless it is duly registered under Chapter III of the Ordinance, shall be void against all parties claiming an adverse interest thereto on valuable consideration by virtue of any subsequent instrument which is duly registered under this Chapter.

What is “due registration” as contemplated in this section? The answer is found in section 14(1) of the Registration of Documents Ordinance. The basic principle is that any instrument affecting land shall be registered in the folio in which the first registered instrument was registered or in another folio maintained in continuation thereof with cross references connecting the folios are properly made. (*Heenappuhamy v. Charles (1973) 77 NLR 169*)

Section 14(1) reads as follows:

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 the folio in which the first registered instrument affecting the same land is registered, or in another folio (whether of the same volume or of another volume) bearing a separate number, opened in continuation thereof, cross reference being entered in the prescribed manner so as to connect the said folios.

Based on section 14(1), the argument of learned counsel for the plaintiffs is that the defendant failed to prove that her subsequent deed P4 was registered in the folio in which the first deed affecting the land was registered or in another folio opened in continuation of the said folio (in which the first deed affecting the land was registered).

I regret my inability to agree with this argument for the following reasons.

According to 1V4, the deed of Lipnus Perera was registered in folio M 433/268. Lipnus Perera amalgamated the said land of 1 rood and 8 perches with another land of 1 rood and 16.75 perches and subdivided the amalgamated land into 8 lots by Plan P1.

These new lots were registered in different new folios with cross references to the previous folio M 433/268 (1V4).

The new folio opened for Lot 3 (the subject matter of this action) is M 936/176 (1V6).

There is a cross reference in 1V6 which says "*vide M 433/268 [1V4] and 417/83 for original lands.*"

There is a cross reference in 1V4 which says "*vide M 936/175-180, 182 for Lots 4, 3, 2, 1, 6, 7, 8 after amalgamation of this land with another land.*"

It is in this new folio 1V6 that the unimpeached deed P2 and all other subsequent deeds including the defendant's deed P4 (save and except the plaintiffs' deed P3) were registered.

The plaintiffs' deed P3 was registered in a completely different folio M 1211/185 without any cross reference to folio M 433/268 (1V4) or M 936/176 (1V6).

Hence *prima facie* the new folio 1V6 is the correct folio.

The precise point made by learned counsel for the plaintiffs is that there is a reference in folio 1V4 that the said folio was brought forward from another folio, namely M 423, and since this latter folio was not produced in evidence, the defendant

failed to prove that her deed P4 was duly registered in the folio in which the first registered instrument affecting the land was registered or in another folio opened in continuation thereof as required by section 14(1). Learned counsel cites *Meurling v. Gimarahamy (1922) 25 NLR 500* and *Diyes Singho v. Herath (1962) 64 NLR 492* in support.

Section 14(1) is subject to provisos. However learned counsel for the plaintiffs does not refer to them. Proviso (a) to section 14(1) reads as follows:

[A]n 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.

It is admitted that a new folio was opened for Lot 3 after the subdivision by Plan P1. As I will explain below, this is permissible and learned counsel for the plaintiffs does not dispute it.

There is a difference between section 14(1) and the proviso (a) to section 14(1).

According to section 14(1) “*Every instrument presented for registration shall be registered...in the folio in which the first registered instrument affecting the same land is registered, or in another folio...opened in continuation thereof, cross reference being entered in the prescribed manner so as to connect the said folios.*”

But the proviso (a) to section 14(1) states that if a new folio is opened (as opposed to continuing with the earlier one), cross references shall be made “*to connect the registration with any previous registration affecting the same land*”. No doubt “any previous registration” does not encapsulate a wrong registration.

As I have already explained, the new folio 1V6 satisfies the requirement in the proviso (a) to section 14(1) by the cross reference to the previous registration M 433/268 (1V4).

In addition, the previous registration 1V4 also contains a cross reference to the new registration 1V6 thereby connecting both folios.

What is the purpose of registration? It is mainly to facilitate reference to all existing alienations or encumbrances affecting the land.

Under the proviso (a) to section 14(1), the Registrar of Lands has the discretion to open a new folio with cross references connecting the new registration with any previous registration.

A new folio is opened, for instance, when new allotments of land come into existence by way of partition, be it by way of a decree of court or amicable partition. (*Ramasamy Chetty v. Marikar* (1915) 18 NLR 503 at 505, *Karunanayake v. Gunasekara* (1962) 65 NLR 529)

When a new folio is opened without cross reference to the old folio and without a corresponding cross reference in the old folio to the new folio, it is a wrong folio. Nevertheless, it was held in *Chelliah Pillai v. Devadason* (1937) 39 NLR 68 that if proper

references are later made in the correct folio and the wrong folio connecting both, “*the new folio must be regarded as a right folio from the time the cross references are made.*”

There can be a rare situation where cross reference is not necessary for the reason that no deed affecting the land has been previously registered. This is recognised by the proviso (b) to section 14(1), which reads as follows:

[W]here 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.

The two cases strongly relied on by learned counsel for the plaintiffs, *Meurling v. Gimarahamy (1922) 25 NLR 500* and *Diyas Singho v. Herath (1962) 64 NLR 492* are clearly distinguishable from the instant case. In these two cases, there was no question of new folios being opened but the competing deeds were registered in folios maintained in continuation of the original folios. What was considered in these two cases was the applicability of section 14(1) and not the proviso (a) to section 14(1).

In point of fact, when *Meurling’s* case was decided in 1922, what was in force was the Land Registration Ordinance, No. 14 of 1891, wherein there was no corresponding section to the proviso (a) to section 14(1) of the Registration of Documents Ordinance.

In *Meurling’s* case, the deeds were registered in two different folios and the folio in which any deed was first registered was

rightly considered the correct folio. In the instant case there are no such complications.

In *Diyes Singho's* case, the plaintiff's competing subsequent deed was registered in the folio where the partition decree was registered, but that folio indicated that it had itself been brought forward from another folio which was not explained by the plaintiff who produced the subsequent deed. The partition deed was not registered in a new folio but in continuation of the earlier folio and there was no consensus that the partition decree was registered in the correct folio. Hence the applicability of the proviso (a) to section 14(1) of the Registration of Documents Ordinance was never considered. In the instant case there is no such question.

The Supreme Court in *Diyes Singho's* case made a pertinent observation at page 494: "*The question whether an instrument has been duly registered as required by the Ordinance is a mixed question of law and fact.*" It is not a pure question of law.

In the instant case it is undisputed that Lipnus Perera became the owner of the land registered in 1V4 and, after the subdivision of the land, the lot in dispute (Lot 3) was registered in the new folio 1V6 with cross references made in both 1V4 and 1V6. Lipnus Perera then gifted Lot 3 by deed P2 to the 2nd defendant and it was registered in 1V6. At the trial, the plaintiffs did not put in issue that Lipnus Perera's deed (registered in 1V4 as far back as in 1942) or the 2nd defendant's deed P2 (registered in 1V6 as far back as in 1969) was registered in a wrong folio. No such suggestion was made to the officer

from the Land Registry called to give evidence by the defendant. The only suggestion made to this witness was that there is a reference in 1V4 that it was brought forward from M 423 (which is the number of the volume; the folio number is unclear in 1V4).

Let me make two points clear: this is not a criminal case to raise some doubts and take advantage of the situation; and litigation is not a game of hide and seek.

Unless the matter (which is a question of fact or a mixed question of fact and law) is clearly and explicitly put in issue in the trial court, a party cannot pursue such matter for the first time on appeal.

In the instant case, the plaintiffs by way of issues 1-5 took up the position that by deed P3 they became the owner of the land and the subsequent alienation of the same land by the same person in favour of the defendant by deed P4 conveys no right to the latter. This position was taken up under the common law.

Whilst accepting that her deed is the subsequent deed from the same source, the defendant by way of issues 6-21 took up the position that the plaintiffs' deed was registered in the wrong folio and her deed was registered in the correct folio and therefore her deed supersedes the plaintiffs' deed. This position was taken under section 7(1) read with section 14 of the Registration of Documents Ordinance.

Thereupon the plaintiffs by way of consequential issues 22 and 23 took up the position that although the defendant's deed is

registered in the correct folio, the defendant is disentitled to the benefit of prior registration because the defendant's deed was obtained and prior registration was secured by fraud or collusion. This position was taken under section 7(2) of the Registration of Documents Ordinance, which states "*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.*" This was the focal point in the trial court but was not pursued before this court. The plaintiffs by way of consequential issues did not take up the position that the defendant's deed was registered in a wrong folio.

For the aforesaid reasons, I hold that the defendant has proved that her subsequent deed P4 was duly registered.

I also note that the first question of law before this court is on a wrong premise in that the Court of Appeal has not stated that where a deed is registered in a new folio it is not necessary to prove that the new folio is a continuation of the folio in which the first deed was registered. What the Court of Appeal has stated is "*the deed No. 2861 (P4) has been duly registered in volume M 936 folio 176 (1V6) in continuation of folio 268 in volume M 433 (1V4).*"

I answer all three questions of law in the negative and dismiss the appeal but without costs.

Judge of the Supreme Court

P. Padman Surasena, J.

I agree.

Judge of the Supreme Court

Achala Wengappuli, J.

I agree.

Judge of the Supreme Court