

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

B. G. Robison Gunawardena  
No. 1/38, Deepandanda Road,  
Willorawatta, Moratuwa.

**PLAINTIFF**

C.A 143/1998 (F)  
D.C Mt. Lavinia 177/92/ L

Vs.

1. Sampath Bank Limited  
D. R. Wijewardene Mawatha  
Colombo 10.
2. T. A. de Soysa  
No. 18, Old Quarry Road,  
Mount Lavinia.
3. S. D. A. Gunawardene  
No. 16, Old Quarry Road,  
Mount Lavinia..

**DEFENDANTS**

**AND NOW BETWEEN**

B. G. Robison Gunawardena  
No. 1/38, Deepandanda Road,  
Willorawatta, Moratuwa.

**PLAINTIFF-APPELLANT**

1. Sampath Bank Limited  
D. R. Wijewardene Mawatha  
Colombo 10.
2. T. A. de Soysa  
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Mount Lavinia.
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No. 16, Old Quarry Road,  
Mount Lavinia..

**DEFENDANTS-RESPONDENTS**

**BEFORE:** Anil Gooneratne J.

**COUNSEL:** S. Gurugaloda for the Plaintiff-Appellant  
P. Wickramasekera for the 2<sup>nd</sup> Defendant-Respondent

**ARGUED ON:** 22.11.2011

**DECIDED ON;** 14.02.2012

**GOONERATNE J.**

This appeal arises from an action filed in the District Court of Mt. Lavinia in a case where Plaintiff-Appellant sought a declaration of title to an undivided 2/3<sup>rd</sup> share of land described in the schedule to the plaint.

The learned District Judge dismissed the Plaintiff's action on 28.11.1997 mainly on the ground that deed P4 had been a fraudulently executed deed and it was done so to defraud the 1<sup>st</sup> Defendant Bank and as such Plaintiff would not be entitled to the benefit of prior registration. It was simply the position of the Plaintiff-Appellant that though the property in dispute was mortgaged to the 1<sup>st</sup> Defendant Bank, by deed No. 2081 of 20.10.1987, and since the mortgage deed was registered on the wrong folio, the mortgage bond was not duly registered in terms of the Registration of Documents Ordinance. Plaintiff-Appellant claim the benefit of due registration and prior registration of deed 3491 (P4) over the said Mortgage Bond.

The position of the 1<sup>st</sup> & 2<sup>nd</sup> Defendants briefly in the Original Court as pleaded was that the 3<sup>rd</sup> Defendant mortgaged the land in suit to the 1<sup>st</sup> Defendant-Respondent-Bank by Mortgage Bond 2081 and that as at 31.12.1992 a sum of Rs. 1,088,146.49 was due on the Mortgage Bond. The 1<sup>st</sup> Defendant Bank having resorted to the recovery of loans by Banks (Special Provisions) Act took steps to sell the land in dispute by adhering to all statutory steps and sold the said land by public action, and the land was purchased by the 2<sup>nd</sup> Defendant.

On the question of due registration the following matters are urged by the Appellant.

1. Land described in the schedule to the plaint is registered in the Colombo Land Registry in Division M Volume 807 Folio 227 which folio is carried over to Volume 1501 Folio 95. This Folio further carried over to Volume 1501 Folio 244 which in turn was carried over to Volume 1501 Folio 267. The Deed No. 3491 by which the Plaintiff became entitled to the land is duly registered in Division M Volume 1501 Folio 267.
2. However, the Mortgage Bond No. 2081 has been registered in Division M Volume 1579 Folio 99. This is an entirely different folio which has not been connected to any of the volumes or folios related to the land as mentioned above.
3. Plaintiff's position that Mortgage Bond No. 2081 is not duly registered whereas Deed No 3491 is duly registered in terms of the Registration of Documents Ordinance and that the Plaintiff is entitled to the benefit of due and prior registration over the said Mortgage Bond.

There is much emphasis made by the Appellant to issue Nos. 4 – 7.

the Appellant points out that court having answered issue No. 4 in the affirmative (due registration of deed 3491 (P4)) and issue No. 5 in the negative, (about Mortgage Bond 2081 being not duly registered), the trial Judge answered issue No. 6 to the effect that validity of the Mortgage Bond is not affected and as such the District Judge has erred. The following case laws are cited in the written submissions.

- (a) In *Mohamadu Sali v. isa Natchia* 15 NLR 157, it was held that a deed which was registered in the wrong folio through the negligence of the grantee was void as against a subsequent deed registered in the proper folio.
- (b) In *Paaris v. Perera* 15 NLR 148, it was held that a deed which has been registered in the wrong folio is void as against parties claiming an adverse interest on valuable consideration by virtue of a subsequent deed which has been duly registered.
- (c) In *Mariku v. Fernando* 17 NLR 481, Wood Renton C.J. held that a deed which has been registered on a wrong folio is void as against parties claiming an adverse interest on valuable consideration by virtue of a subsequent deed which has been duly registered.
- (d) In *Logus v. Lawrance* 63 NLR 377, Thambiah J held that when the Registrar opens a new folio for registering an instrument in terms of Section 15(1) of the Registration of Documents Ordinance read with Section 13(3) of the Registration of Documents Regulations, the cross references made by him connecting the new folio with the earlier one must conform strictly to the prescribed form. Where a deed is registered in the wrong folio on account of the negligence of either the Registrar or one of the parties, the document is deprived of the priority conferred on it by Section 7 of the Registration of Documents Ordinance.
- (e) In *De Silva v. Weerappa Chettiar* 43 NLR 565, Howard C.J held that where owing to the negligent entry of a registering officer, a document of title is not registered in accordance with the provisions of Section 15 (1) of the Registration of Documents Ordinance, the document is deprived of priority conferred on it by Section 7 of the Ordinance.

I have also noted the following provisions of the Registration of Documents Ordinance. Section 7(1) and Section 7(2) reads thus:

- (1) An instrument executed or made on or after the 1<sup>st</sup> day of January, 1864, 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 the 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.

Section 14 reads thus:

- (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 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:
- (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.

On the question of fraud or collusion reference is made to the case of :

*Appusingho v. Leelawathie* 60 NLR 409, court held that 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.

The learned counsel for the 1<sup>st</sup> Respondent in his submission supported the judgment of the learned District Judge and drew the attention of this court of the important provisions of the Recovery of Loans by Bank (Special Provisions) Act.

I note that ex-parte trial had been fixed against the 3<sup>rd</sup> Defendant. The learned District Judge very correctly refer to issue No. 12 regarding fraud and collusion between the Plaintiff and 3<sup>rd</sup> Defendant. The said issue reads thus:

පැමිණිලිකරු හා 3 වන විත්තිකරු හඬුවට අදාළ දේපල සම්බන්ධයෙන් මිලයට ගැනීම කෙරෙහි වංචනික හා හෝ වංක සහයෝගයෙන් ක්‍රියා කර ඇත්ද?

The trial Judge in his judgment refer to the evidence of each party. There is no dispute regarding the registration of deeds in the manner presented to court by the Plaintiff. In fact the 1<sup>st</sup> & 2<sup>nd</sup> Defendant do not

dispute such registration and in the manner urged by Plaintiff, of due registration of deed P4 and registration of the Mortgage Bond in the wrong folio. However the 1<sup>st</sup> & 2<sup>nd</sup> Defendant-Respondent emphasis fraud and collusion on the part of Plaintiff and 3<sup>rd</sup> Respondent and in that way argue that the benefit of due or prior registration would be nullified. In fact that is the point that was very correctly decided by the learned District Judge.

The learned District Judge in his judgment refer to certain items of evidence of Plaintiff and by that it is apparent that the Plaintiff's version in many respects demonstrate inconsistencies and the untruthful nature of his evidence in court. I have no hesitation in endorsing the trial Judge's views in this regard and inter alia the following may be noted.

- (a) Plaintiff and 3<sup>rd</sup> Defendants were close friends. Plaintiff only introduced the 3<sup>rd</sup> Defendant to the 1<sup>st</sup> Defendant Bank, and Plaintiff resided in a room for a period of 5 years which room of the house situated in the land in dispute. As such Plaintiff's evidence that he was unaware of the auction sale is false.
- (b) Plaintiff's evidence that he was in occupation for 5 years in the above premises as in (a) above is also false, for the reason that the address given in deed P4 and the address in the plaint which is a Moratuwa address demonstrate some doubt. As such the present action was filed by Plaintiff on behalf of 3<sup>rd</sup> Defendant to secure the premises in dispute. 3<sup>rd</sup> Defendant never filed answer and the case had been fixed ex-parte against 3<sup>rd</sup> Defendant. At page 14 of proceeding of 29.11.1994 Plaintiff admitted in his evidence under cross-examination the address to be wrong. The P4 address, Plaintiff never occupied that premises in Moratuwa as a tenant. Insertion of a Moratuwa address is wrong.



- (c) At pg. 13 of proceedings of 29.12.1994 Plaintiff admit that a sum of Rs.200,000/- mentioned in deed P4 is wrong as in his evidence he said he paid Rs. 210,000/-.
- (d) The 3<sup>rd</sup> Defendant acting in collusion with Plaintiff purported to sell 2/3<sup>rd</sup> share of the premises to Plaintiff on 5.12.1992 (Deed P4). In evidence it transpired that action was filed by 3<sup>rd</sup> Defendant in District Court of Colombo Case No. 50/92 on 8.12.1992 against the 1<sup>st</sup> Defendant to set aside the Mortgage Bond. No reference in plaint about the sale of deed P4 in the plaint filed in case No. 50/92. Plaintiff and 3<sup>rd</sup> Defendant acted collusively and fraudulently and executed deed P4. In evidence Plaintiff states that he was unaware of Case No. 50/92 prior to filing the present case. Answer in Case No. 50/92 was with Plaintiff and that he cannot understand same and gave it to his Attorney-at-Law. In cross examination Plaintiff answer to be noted .

At folio 148

ප්‍ර එම නඩුව දාන්න තිබුන දිනයට පෙර ගුණවර්ධන මහතා සම්පත් බැංකුවට විරුද්ධව දාපු නඩුව ගැන තමා දැන සිටියා?

උ දැන සිට බව පිළිගන්න වෙනවා.

- (e) Plaintiff's evidence that the land in question had been mortgaged to the 1<sup>st</sup> Defendant Bank was known to him only on 12.12.1992. That the land in dispute is to be sold was advertised and that same was to be sold by the 13<sup>th</sup> instant and that he told the auctioneer that he own the premises, but deed P4 was not shown or taken by him to the auction. The affidavit submitted to court on 29.12.1992 does not state that Plaintiff was present at the auction.

I have also incorporated the following extracts from the judgment of the learned District Judge which in fact are well supported by evidence and inferences drawn by the trial Judge.

පැ 4 දරණ ඔප්පුව ලියා දින 3 ක් ඇතුළත 3 වන විත්තිකරු විසින් 50/92/විශේෂ දරණ නඩුව පැමිණිලි කර ඇත. පැ 4 දරණ ඔප්පුවක් ලියූ බවට එම නඩුවේ සඳහන් කර නොතිබුණි. ඒ අවස්ථාව වන විට මෙම දේපල 1992.12.13 දින විකිණීමට නියම කර තිබුණ බව 3 වන විත්තිකරු දන්න බැවින් කෙසේ හෝ මෙම ඉඩම බේරා ගැනීමට මන්ද විකල් වූ අයෙකු ක්‍රියා කරන්නාක්මෙන් ක්‍රියා කර තිබුණ බව පෙනුණි. තමන් කෙරෙහි සැක ඇති නොවන පරිදි 3 වන විත්තිකරු විසින් ක්‍රියා කර තිබුණ බව පෙනුණි.

වෙන්දේසිය 13 දින පැවැත්වීමට නියමිත බව 12 වන දින පැමිණිලිකරු දැනගත් බවට පැමිණිලිකරු සාක්ෂි දී ඇත. පැමිණිලිකරුට 2/3 ක ප්‍රමාණයක් අයිතිව තිබුණේ නම් පැමිණිලිකරුට පොලිසියට පැමිණිල්ලක් කිරීමට අවස්ථාව තිබුණි. මෙම වෙන්දේසියේදී වෙන්දේසි කළ තමාගේ අයිතිය ඉදිරිපත් කිරීමට ඉඩ තිබුණි. තමන් ඒ කිසිවක් කර නොතිබුණි. පැමිණිලිකරු විසින් පත්‍රිකා බෙදූ බව කියා ඇත. එසේ වුවත් ඒ අන්දමට පැමිණිලිකරු ක්‍රියා කළ බවට විත්තියේ සාක්ෂි කරුගෙන් ප්‍රශ්න කර නොතිබුණි.

3 වන විත්තිකරු පැමිණිලිකරුගේ මතුවයක්ය. 1987 වර්ෂයේදී මෙම උගස්කරය ලිවීම සඳහා 1 වන විත්තිකරු බැංකුවට 3 වන පැමිණිලිකරු හඳුන්වා දුන්නේ පැමිණිලිකරුයි. ඊට අමතරව පැමිණිලිකරු මෙම දේපලේ කමෙරයක් අවුරුදු 5 ක පමණ කාලයක් භුක්ති වින්ද බවත් කියා ඇත. එසේ නම් මෙම වෙන්දේසිය සම්බන්ධයෙන් දැන ගෙන සිටියේ නැති බවට දී ඇති සාක්ෂි පිළිගත නොහැක.

කෙසේ වෙතත් පැමිණිලිකරු මෙම දේපලේ පදිංචිව සිටි බවට ඉදිරිපත් කරන ලද සාක්ෂියද පිළිගත නොහැක. පැ 4 දරණ ඔප්පුවේද පැමිණිල්ලේ සඳහන් කරන ලද ලිපිනය සඳහන්වීමෙන් ඒ බව පැහැදිලිවනු ඇත. මෙම නඩුව හුදෙක් 3 වන විත්තිකරු විසින් පැමිණිලිකරු ලවා පවරා මෙම ඉඩම කෙසේ හෝ බේරා ගැනීමට කරන ලද උත්සාහයක ප්‍රතිපලයක් බව පෙනුණි. ඒ අනුව පැ 4 දරණ ඔප්පුව පැමිණිලිකරු විසින් වංචා සහගතව ලියාගෙන තිබුණ එකක් බව පෙනුණි. 1 වන විත්තිකරු වංචා කිරීමේ අදහසින් පැ 4 දරණ ලේඛනය ලියාගෙන තිබුණ බව තීරණය කරමි. ඒ අනුව පැමිණිලිකරුට ලියා පදිංචි ප්‍රමුඛතාවයේ වාසිය අහිමි වන බව තීරණය කරමින් පැමිණිල්ල ගාස්තුවට යටත් කර නියමුණා කරමි.

There is evidence and material placed before the District Court that the 3<sup>rd</sup> Defendant mortgaged the property in dispute to the 1<sup>st</sup> Defendant-Respondent Bank by mortgage deed 2081 of 20.10.1987. The 3<sup>rd</sup> Defendant defaulted in the re-payment of the loan to the 1<sup>st</sup> Defendant-Respondent Bank. A sum of Rs. 1,088,146.49 was due from the 3<sup>rd</sup> Defendant. Therefore the 1<sup>st</sup> Defendant-Respondent Bank is obliged to take the statutory steps available to the Bank in terms of the Recovery of Loans by Banks (Special Provisions) Act. This statute assist Banks and lending institutions to realize money and property pledged to the Bank. Significant feature of the statute is that it gives the power to non-judicial persons such as

the Board of Directors to take decisions to sell mortgaged property in case of default. The process and procedure available in the statute is recognized and well established over the years with effect from 1990. I need not repeat the several steps taken by the Bank since a Bank official testified to all the steps before the learned District Judge. There is nothing illegal in the procedure adopted by the 1<sup>st</sup> Defendant Respondent Bank.

The evidence was led and good part of evidence transpired by Plaintiff himself from which court could gather fraud and fraudulent conduct of the 3<sup>rd</sup> Defendant, and the collusive suit filed by the Plaintiff to place obstructions indirectly to achieve the purpose of the 3<sup>rd</sup> Defendant who remained a silent party at the trial and permitted an ex-parte trial to be fixed by court. The several circumstances and the events that took place was to achieve a hidden agenda of both Plaintiff and 3<sup>rd</sup> Defendant. Courts should be very cautious and should not permit an abuse of the process.

I would refer to a line of decided cases to support the view that fraud and collusion makes an express exception and the Plaintiff-Appellant would not be entitled to priority by registration under Section 7(2) of the Registration of Documents Ordinance. Fraud and collusion would defeat priority relied upon by parties in terms of the statute. Collusion means, as the derivation of the word implies, “the jointly together of two persons or parties

in a common trick”. It carries with it the implication of something indirect and underhand. Fernando vs. Fernando 23 NLR 143 50 are the cases reported in (1934) (35 NLR 417; 38 NLR 117; 53 NLR 490.

In Lairis Appuhamy Vs. Tennekoon Kumarihamy (1963) 64 NLR 97 “The decision in the case of Appusingho vs. Leelawathie reported in (1959) 60 NLR 409 was overruled by the Privy Council on the point that the words “in obtaining such subsequent instrument in Section 7 of the above Ordinance do not exclude the case of a collusion between the transferor and the transferee.

In all the above circumstances it is apparent that 3<sup>rd</sup> Defendant and Plaintiff-Appellant worked according to a set plan and their conduct and acts suggest fraud and collusion without any reservation. Therefore I have no reason to interfere with the judgment of the District Court, I affirm the said judgment and dismiss this appeal with costs fixed at Rs. 50,000/-.

JUDGE OF THE COURT OF APPEAL