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

In the matter of an Appeal in terms of Article 128 (2) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Karunanayaka Gurunnanselage
Somathilaka
of Illukpitiya, Getahetthta,

Plaintiff

S.C. Appeal No.17/2012
SC (HCA) LA No. .109/2011
C. A. No. C.A.460/99(F)
D.C. Avissawella No.16254/P

Vs.

1. Wilson Eheliyagoda
   of Beragala Road, Kegalle.
2. P.Piyadasa
   of Illukpitiya, Getahetthta,
3. P.Ariyadasa
   of Illukpitiya, Getahetthta,

Defendants

AND BETWEEN

1. P.Piyadasa
   of Illukpitiya, Getahetthta,
2. P.Ariyadasa
   of Illukpitiya, Getahetthta,

Defendant-Appellants

Vs.

Karunanayaka Gurunnanselage
Somathilaka

of Illukpitiya, Getaheththa,

Plaintiff-Respondent

1. Wilson Eheliyagoda
of Beragala Road, Kegalle.

Defendant-Respondent

AND NOW BETWEEN

Karunanayaka Gurunnanselage
Somathilaka
of Illukpitiya, Getaheththa, (**Deceased)**

Plaintiff-Respondent-Appellant

Karunanayaka Gurunnanselage Indrani
Karunanayaka
No.50, Rakinadeniya Road,
Illukpitiya, Getaheththa,
Substituted Plaintiff-Respondent-Appellant

Vs.

1. Wilson Eheliyagoda
of Beragala Road, Kegalle.

Defendant-Respondent-Respondent

2. P.Piyadasa
of Illukpitiya, Getaheththa,
2nd Defendant-Appellant-Respondent
3. P.Ariyadasa
of Illukpitiya, Getaheththa**,(Deceased)**
3rd Defendant-Appellant-Respondent

3A. Galabada Kankanamlage Wimalawathie
3B. Pathirannehelage Nirushika Sudharsani
3C. Pathirannehelage Anusha Subhasini
Pathirana

3D. Pathirannehelage Nadeeka Chamari Pathirana
3E. Pathirannehelage Asanka Sanjeewa Pathirana
3F. Pathirannehelage Anurudda Sanjaya Pathirana,
All of Illukpitiya, Getahetthta,
Substituted-3A-3F-Defendant-Appellant-Respondents

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BEFORE : **E.A.G.R. AMARASEKARA, J.**
ACHALA WENGAPPULI, J.
ARJUNA OBEYESEKERE, J.

COUNSEL : Lakshman Perera PC with Miss. Lakmali Fernando for the Plaintiff-Respondent-Appellant.
Amarasiri Panditharatne with Ms. Thushani Machado, & Rumy Marzook for the 2nd, and 3A-3F Defendant-Appellant-Respondents.

ARGUED ON : 10th November, 2022

DECIDED ON : 11th June, 2025

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ACHALA WENGAPPULI, J.

This appeal deals with a situation where the judgment pronounced by the District Court in favour of the substituted Plaintiff-Respondent-Appellant (hereinafter the parties would be referred to in their original status before the

trial Court) in a partition action and was subsequently set aside by the Court of Appeal and ordering a re-trial, upon an appeal preferred by the 2nd and 3rd Defendants and the questions of law that arose in those circumstances requiring determination by this Court.

The Plaintiff instituted the instant action in the District Court of *Avissawella* on 31.08.1981, seeking an order from that Court to partition a contiguous land called *Medaheenna* alias *Millagahawatta* and *Millagaha Watta,* which is in extent of about 1 Acre and 17 Perches and depicted as lot Nos. 157 and 163 of the title plan No. S 10230. The pedigree on which he relied in the said action, in support of his devolution of title, indicates that the original owners of the said land were *Weerasinghe Mudiyanselage Robert Marambe, Weerasinghe Mudiyanselage Sampy Bandara* and *Weerasinghe Mudiyanselage Somawathie,* each holding an undivided 1/3rd shares of the *corpus.* The Plaintiff therefore claims that the only defendant he named in the Plaint, *Wilson Eheliyagoda*, who derived title from his mother *Weerasinghe Mudiyanselage Somawathie* is entitled to 1/3rd share of the land, while he is entitled to the remaining 2/3rd shares, on the strength of Deeds of Transfer No.309 and 315, executed on 20.11.1974 and 26.11.1974 respectively by said *Weerasinghe Muiyanselage Robert Marambe* and *Weerasinghe Muiyanselage Sampy Bandara.*

In his Statement of Claim, *Wilson Eheliyagoda* conceded to the Plaintiff's claim of 2/3rd shares and moved Court either to dismiss the Plaint or if the partition is ordered, to allocate a 1/3rd share of the *corpus* to him. The District Court issued the commission on licensed surveyor *S.R.A. Jayasinghe* on 25.05.1983, who then reported back to Court that, upon his visit to the *corpus* on 05.01.1983, two persons, *Pathirannehelage Piyadasa* and *Pathirannehelage Ariyadasa* have objected for surveying the land. The Court thereupon issued notice on two

of them. They were subsequently added as 2nd and 3rd Defendants to the instant partition action on 07.06.1985.

When the surveyor visited the land for the purpose of the preliminary survey, the 2nd and 3rd Defendants have claimed that they are in possession of the land since 1941. They, having showed the boundaries to the surveyor during the said survey, in their amended joint Statement of Claim admitted the identity of the *corpus,* in addition to admitting the original ownership of *Weerasinghe Mudiyanselage Robert Marambe, Weerasinghe Mudiyanselage Sampy Bandara* and *Weerasinghe Mudiyanselage Somawathie,* who derived their title to the same on paternal inheritance and also by virtue of a Settlement Order. However, these two Defendants have claimed that the Plaintiff did not possess the *corpus* even for a day and whatever the title deed he relied on, in support of his claim, is a *nullity* and does not pass any title to him. They also claimed acquisition of prescriptive title by possessing the *corpus* for a period of more than ten years since coming into its possession on 10.02.1941. They further alleged that they have planted rubber on that land under permits issued by Rubber Control Department, bearing No. 139 AS 1 R 128. They also presented an alternative pedigree by claiming that *Mudiyanselage Robert Marambe, Weerasinghe Mudiyanselage Sampy Bandara* and *Weerasinghe Mudiyanselage Somawathie* have transferred all their rights in favour of *Hettiarachchilage Podi Menike* alias *Punchi Menike* by Deed of Sale No. 360, by executing the same on 10.02.1941.

Podi Menike and her husband *Pathirennehelage Brampy Singho,* have thereupon transferred their rights over the *corpus* in favour of the 2nd and 3rd Defendants by the Deed of Transfer No. 847 executed on 02.05.1976. These two Defendants specifically claim in their joint Statement of Claim that neither the Plaintiff nor the 1st Defendant *Wilson Eheliyagoda* are entitled to any share to the

corpus and only they are entitled to the *corpus* in its entirety. The only substantial relief sought from Court by the 2nd and 3rd Defendants was the dismissal of the Plaint and, in case the Court decides otherwise, they sought compensation for improvement, made by planting rubber, valued at Rs. 150,000.00.

After filing his Statement of Claim, the 1st Defendant did not appear before the District Court Nor was he represented by Counsel. Neither did he take part in the trial nor raise any Points of Contest on the position taken up by him in his Statement of Claim. Of the nine Points of Contest, on which the Plaintiff and the 2nd and 3rd Defendants have proceeded to trial, the District Court, at the conclusion of the trial, answered the Points of Contest Nos. 1 to 5 in favour of the Plaintiff after accepting the devolution of title pleaded by him. The District Court accordingly held that the Plaintiff is entitled to partition of the *corpus,* in line with the share allocation made in the Plaint. Due to the absence of 1st Defendant's participation in the trial, his 1/3rd share entitlement, in terms of the share entitlement of the Plaint, was kept unallotted.

The Points of Contest Nos. 6 to 9 were raised by the Defendant. Point of Contest No. 7 dealt with the question whether the original owners have transferred their rights to the *corpus* to *Podi Menike* by execution of the Deed of Sale No. 360 dated 10.02.1941 ("P6"), while the Point of Contest No. 9 was raised on the basis of their claim of prescription to the *corpus*. The Court, at the conclusion of its judgment had answered these two Points of Contest against the 2nd and 3rd Defendants. In relation to Point of Contest No. 7, the Court found that although the deed No. 360 had been executed prior to the deeds relied on by the Plaintiff, it did not pass any title to the transferee; whilst holding in relation to Point of Contest No. 9 that the claim of prescription had not been established by the 2nd and 3rd Defendants.

The District Court, in answering the Point of Contest No. 7 in the negative, did not accept the submissions of the 2nd to 3rd Defendants, who relied on the application of the principle in Roman Dutch Law known as *exceptio rei vinditae et traditae,* in support of their claim for title. The original Court rejected that submission, primarily on the basis that the said principle of law had no application against a recipient who received title in terms of a Settlement Order issued under the Land Settlement Ordinance, following the *dicta* of the judgment of ***Karunadasa v Abdul Hameed*** (1958) 60 NLR 352, and therefore held that the title of the land did not devolve on their predecessors in title, despite the execution of the Deed of Sale No. 360 ("P6"). The Court further stated that, in arriving at the said conclusion, it also considered the fact that the relevant Gazette notification containing the Settlement Order had been issued on 16.01.1948 and, in terms of Section 8 of the said Ordinance, all previous encumbrances over that particular parcel of land deemed is to have been extinguished. Therefore, the Court proceeded on the basis that when the two of the three original owners have transferred their respective shares over the *corpus* in favour of the Plaintiff by executing the Deeds of Transfer No. 309 and 315 in his favour, he is entitled to the 2/3rd shares claimed and held by them.

In rejecting the claim of prescription pleaded by the 2nd and 3rd Defendants and in answering the Point of Contest No. 9 as "*not proved*", the District Court was of the view that the evidence presented by them in relation to planting rubber in the land for the past 27 years did not disclose that they in fact relate to the *corpus* and therefore they failed to establish their claim over that land.

The 2nd and 3rd Defendants have appealed against the said judgment of the District Court to the Court of Appeal in CA Appeal No. 460/1999 (F). They challenged the validity of the said conclusions reached by the District Court,

particularly on the Points of Contest Nos. 7 and 9. The Court of Appeal, by its judgment dated 11.05.2011 and impugned by these proceedings, held the District Court erred in determining not to afford the benefit of the principle *of rei venditae et traditae* to the 2nd and 3rd Defendants. However, the appellate Court, after setting aside the judgment of the District Court on the premise that the evidence of the 2nd and 3rd Defendants were not properly considered by Court below in relation to their claim of acquisition of prescriptive title, decided to remit the case back to the District Court by ordering a re-trial.

Thereupon, the Plaintiff sought leave from this Court seeking to set aside the judgment of the Court of Appeal. This Court decided to hear the appeal on the following questions of law;

I. In view of the decision in 60 NLR 352 and in 47NLR 121 was the Court of Appeal wrong in coming to the decision that the learned District Judge had erred when she decided not to afford the benefit of the principle exception *rei venditae et traditae* to the 2nd and 3rd Defendants?

II. Was the Court of Appeal wrong in law in not following the decision in 60 NLR 352 and in 47 NLR 121?

III. Was the Court of Appeal wrong in coming to the conclusion that since the Respondent excepted the *corpus* in the Plaint there was no legal burden cast on the Respondent to super-impose the land described in the schedule to the Plaint and their Title Deed which was marked as ඊ¿6 of which they owned an undivided share was then the legal duty cast on the Respondent to identify the land described in the schedule to

the plaint falls within the land described in Deed පැ6 and the schedule to the Statement of Claim?

IV. Was the Court of Appeal wrong in considering the oral evidence of the Respondent in the District Court when the documentary evidence produced by the Respondent contradicted his oral evidence?

V. Has the Court of Appeal erred in Law in not considering the provisions of Section 101 of the Evidence Ordinance in relation to the burden of proof?

Learned President's Counsel for the Plaintiff contended that since his client acquired title to the *corpus* after the Settlement Order was published in the Gazette No. 9816/1948 ("P4") and, in terms of Section 8 of the Land Settlement Ordinance, he became "… *entitled to such land or to such share of or interest in the land free of all encumbrances whatsoever other than those specified in such order*". Accordingly, learned Counsel invited our attention to the fact that under the said Settlement Order published in the Gazette Lot Nos. 157 and 163 were settled on the three original owners, namely *Weerasinghe Mudiyanselage Robert Marambe, Weerasinghe Mudiyanselage Sampy Bandara* and *Weerasinghe Mudiyanselage Somawathie* who each held 1/3rd share of the *corpus* since then, until the Deeds of Transfer Nos. 309 and 315 were executed in November 1974 in favour of him. In support of the said contention, learned President's Counsel relied on the statement made by *Sansoni* J (as he then was) in ***Karunadasa v Abdul Hameed*** (*supra*, at p. 353) to the effect that "… *all rights which any other person had in this*

land were wiped out by the settlement order, including any rights which Udupihilla may have had upon his purchase from Ausadanide."

In relation to the application of the principle; *exceptio rei venditae et traditae,* learned President's Counsel contended that since any encumbrance on the *corpus* gets wiped out by the publication of the Settlement Order, the provisions of Land Settlement Ordinance made the said principle inapplicable to the instant matter and thus the deeds that were executed in favour of the Plaintiff remain valid in law and convey the title it transferred in favour of the transferee.

Learned Counsel for the 2nd and 3rd Defendants, in seeking to counter the contention of the Plaintiff, submitted to this Court that a vendor who sells his property without title but acquires the same, the said title subsequently acquired would accrue to the benefit of the purchaser and those claiming through him. He cited a long list of precedents which acted on that principle. He further contended that the facts and reasoning adopted in ***Periacaruppen Chettiar v Messrs Proprietors and Agents Ltd.***(1946) 47NLR 121, are not applicable to the determination of the instant appeal as it was held that the said principle was not available in that instance due to the reason that the relevant deeds were not registered. Similarly, learned Counsel contended that the decision of ***Karunadasa v Abdul Hameed*** (*supra*) too is not applicable to the instant appeal as the purchaser in that instance, one *Udupihilla,* was not placed in possession of the land and the relevant section of that judgment relied on by the Plaintiff was made by Court either erroneously or due to an oversight, as the judgment of ***Periacaruppen Chettiar v Messrs Proprietors and Agents Ltd*** (*ibid)* made no such pronouncement declaring that the said principle is not available to purchaser as against a vendor who obtained title under the Settlement Order.

In fulfilling the mandatory requirement imposed by Section 25(1) of the Partition Law (as amended) on the District Court, which states " … *the Court shall examine the title of each party and shall hear and receive evidence in support thereof and shall try and determine all questions of law and fact arising in that action in regard to the right, share, or interest of each party to, of, or in the land to which the action relates, …*" the original Court had examined the conflicting claims presented by the Plaintiff as well as the 2nd and 3rd Defendants, based on their respective Deeds of Transfer, executed within a space of 33 years, by the same three original owners, in favour of whom, an Order of Settlement published in the Gazette on 16.01.1948. It then considered the contention advanced by the 2nd and 3rd Defendants that, in terms of the principle of law known as *exceptio rei vendiate et traditate* along with the publication of the Settlement Order in the Gazette, the title to the *corpus* passes on to the purchaser, through whom they claimed to have derived their title.

The District Court was not convinced of the correctness of that contention in law. Instead, it opted to act on the judicial precedent of ***Karunadasa v Abdul Hameed*** (supra) and stated that the said judgment of the superior Court laid down a principle of law and " ඉහත කී සිද්ධාන්තයේ වාසිය, නිරවුල් කිරීමේ නියෝගයකින් අයිතිවාසිකම් ලැබූ දීමනාකරුවෙකුට එරෙහිව ඊට ප්‍රථමව අයිතිය ලැබූ ලැබුම්කරුවෙකුට ලබා ගත නොහැකි බව පැහැදිලිව දක්වා ඇත.." The relevant part of the said judgment of the then Supreme Court (at p. 354) reads as follows:

> " … *that the plea of exceptio rei venditae et traditae is not available to a purchaser as against a vendor who obtained a settlement order after the purchase was made*."

Although the District Court had acted solely on that pronouncement in arriving at its conclusion, learned President's Counsel for the Plaintiff, in defending the same, added the provisions contained in Section 8 of the Land

Settlement Ordinance in order to provide additional support to his contention. Learned President's Counsel in his submissions contended that, with the publication of the Settlement Order in the Gazette, the *corpus* became "*free of all encumbrances*" and as a result, all of its previous titles held by the original owners come to an end.

The Court of Appeal, in its impugned judgement, stated that it is of the view that the District Court had fallen into serious error in arriving at the said conclusion. The reasoning adopted by the appellate Court in forming that view indicates that, since the judgment of ***Rajapakse v Fernando*** (1918) 20 NLR 301 laid down the principle, where a vendor sells without title but subsequently acquires the same, that title acquired subsequently accrues to the benefit of the purchaser the moment of its subsequent acquisition by the vendor, and therefore " … *the appellants in this instance should have acquired title to the land once the original owners obtained title by settlement order that was made in terms of the Land Settlement Ordinance*." After making a reference to the judgment of ***Karunadasa v Abdul Hameed*** (supra), and continuing on this line of reasoning, the Court of Appeal has held that the "… *issue in the aforesaid case referred by the trial Judge in order to reject the applicability of the maxim exceptio rei vendiate et traditate is not exactly to the point raised in this instance. In the circumstances it is seen that the learned District Judge had not examined the facts of the respective case when she decided to deviate from the ruling in* ***Rajapakse v Fernando*** *…*".

It is in view of the said determination made by the Court of Appeal and now being impugned by the Plaintiff, this Court decided to consider the following questions of law at the very outset of its analysis, before proceeding to consider any other questions of law:

> "*In view of the decisions in 60 NLR 352 and in 47 NLR 121, was the Court of Appeal wrong in coming to the decision that the learned District Judge had erred when she decided not to afford the benefit of the principle exceptio rei vendiate et traditate to the 2nd and 3rd Defendants?*
>
> *Was the Court of Appeal wrong in law in not following the decision of 60 NLR 352 and in 47 NLR 121?*

In the circumstances, it is important at least to make a brief reference to the Roman-Dutch Law principle of *exceptio rei vendiate et traditate,* before proceeding to consider these two questions of law in detail. In its judgment of ***Gunatilleke v Fernando*** (1921) 22 NLR 385, this principle of law is described by the Privy Council after reproducing a section from the text of the ***Commentary on the Pandects***, by *Voet* (at p. 390). The said section of the text reads as follows:

> " … *the purchaser who had got possession from a vendor, who at the time had no title, could rely upon a title subsequently acquired by the vendor, not only against the vendor, but against any one claiming under the vendor; and though delivery (traditio) was, as the title shows, a part of the defence, if the purchaser had acquired possession without force or fraud, he could use the exception, though he had never received actual delivery from the vendor. Also, if he had once been in possession without force or fraud, and had since lost possession, he could recover it by the Publician action, using the exception as a replication to any defence set up by the vendor or those claiming title under him.*"

Having the scope, in relation to the applicability of the said principle of law, as set out by the Privy Council, in the back of my mind, I shall now proceed to consider the validity of the basis on which the Court of Appeal found fault with the conclusion reached by the District Court in respect of the case presented

before it by the 2nd and 3rd Defendants. If I were to put the basis on which the Court of Appeal faulted the conclusion reached by the lower Court in a more simpler manner, it could be described as that the original Court erroneously opted to follow the *dicta* of a judgment that has no direct relevance to the facts presented before it, which should have been distinguished from the instant matter, while failing to follow the *dicta* of a judgment very relevant to the issue presented before that Court and therefore binding on that Court. This exercise requires a brief reference to the factual and legal aspects that were considered in the judgments of ***Karunadasa v Abdul Hameed*** (*supra*), ***Periacaruppan Chettiar v Messrs Proprietors and Agents Ltd*** (*supra*) and ***Rajapakse v Fernando*** (*supra*).

The case of ***Karunadasa v Abdul Hameed*** (*supra*) relates to a situation where one *Ausadnaide* had transferred his rights over a particular land to one *Udupihilla* in 1938. In 1940, a Settlement Order was published in the Gazette, indicating *Ausadnaide* is entitled to 1/3rd share of the same land, who thereupon transferred that share to the Plaintiff in 1953. The defendants have claimed their right to the said land upon a transfer made in their favour by *Udupihilla* in 1949. The plaintiff instituted *rei vindicatio* action against the defendants. The issues framed before the trial Court were mainly on the effect of the Settlement Order, due registration of deeds and also on prescription. The District Court held that the 1st defendant had acquired prescriptive title to the land and also acted on the principle of *exceptio rei vendiate et traditate* to hold that the subsequent acquisition of 1/3rd share by *Ausadnaide* following Settlement Order enured to the benefit of the 1st defendant.

On appeal, *Sansoni* J, found the approach taken by the trial Court in determining the dispute was erroneous, as it is highly dangerous in a *vindicatio* action to adjudicate on an issue of prescription without first going into and

examining the documentary title of the parties. His Lordship allowed the appeal of the plaintiff on the premise that the trial Court paid no heed to the conclusive effect of the Settlement Order, following the *dicta* of the judgment of ***Periacaruppan Chettiar v Messrs Properties and Agents Ltd***. (*supra*) where it had been held " … *that the plea of exceptio rei venditae et traditae is not available to a purchaser as against a vendor who obtained a Settlement Order after the purchase was made*."

The case of ***Periacaruppan Chettiar v Messrs Properties and Agents Ltd***. (*supra*) relates to an instance where the plaintiff instituted action against the defendants on the strength of a Settlement Order made in 1933 by which his predecessor in title (one *Gunasekera*) was declared entitled to the property in dispute. The Plaintiff relied on deeds P1, P2 and P23. The 3rd defendant relied on the deed 3D4, executed by same vendor *Gunasekera* in 1928, in favour of the 1st defendant from whom he purchased the land. The Settlement Order and the deeds relied upon by the plaintiff were registered on the same folio of the Land Registry whereas the deed 3D4 of the defendant was not registered at all.

The District Court accepted the defendant's entitlement to retain the possession of the land, until they were compensated for improvements and dismissed the plaintiff's action. The plaintiff as well as by the 3rd defendant preferred appeals against the judgment of the District Court.

In delivering the judgment of Court, *Howard* CJ, dismissed both appeals. On the contention presented by the defendants that the Settlement Order should have enured in favour of the 1st defendant on deed 3D4. His Lordship was of the view that the benefit of the application of the principle of *exceptio rei venditae et traditae* is not available to the defendants on the premise that in ***Mudalihamy v Dingiri Menika*** (1927) 28 NLR 412, *Garvin* J has held the view (at p. 415), that the

application of the said " … *exception must, I think, be limited to cases in which the new title which the purchaser asserts has enured to his benefit is obtained by his vendor by the usual means by which title is derived, such as purchase, gift, or inheritance*". *Howard* CJ, in view of the said pronouncement observed that (at p. 129), " *[I]f the exceptio is limited to the cases mentioned by Garvin J and the same principle applies to land subject to a Settlement Order as to land subject to partition decree, … the exception is of no vail in the present case.*"

The case of ***Mudalihamy v Dingiri Menika*** (*supra*) deals with a situation where the first defendant sold and transferred the interests of a land in 1913, now claimed by the plaintiff. Thereafter, in a partition action instituted by a person who claimed to be the owner of the eastern half of this land, sought the partition of the whole of the land, presumably, upon the footing that the it was one and undivided land. The present first defendant was one of the defendants in that partition proceeding. The fact of the transfer made in 1913 was not brought to the notice of the Court, and when the final decree was entered, a specific allotment of land, being the equivalent of a half share of the land, was allotted to the first defendant. The plaintiff, who was not a party to the action, was completely excluded by the partition decree so entered. Thereafter the first defendant transferred her interests to the second defendant. The District Judge held that the issue on title is already concluded by the judgment in the partition case and dismissed the plaintiff's action.

In appeal, *Garvin* J affirmed the judgment of the District Court. His Lordship, in dismissing the appeal of the plaintiff, considered the application of the principle of *exceptio rei venditae et traditae* in his favour and ruled that (at p.414) " … *it is well settled law that a partition decree is conclusive against all persons whomsoever even as against a person owing an interest in the land partitioned whose*

title has by fraudulent contrivance been concealed from the Court. The effect of such a decree is to determine all pre-existing right or title and every claim to any right or title to the subject of partition." His Lordship further added that (at p. 413*)," [I] am aware of no case in which it has been held that the exceptio rei venditae et traditae is available to a purchaser who is seeking to resist his vendor or a person claiming through him upon a title declared by the final decree in a partition action. Nor has counsel been able to refer me to any authority for the proposition. The matter is res integra."*

Thus, the said *dicta* of *Sansoni* J, relied on by the trial Court, is founded on the view held by *Howard* CJ, who in turn was persuaded by the reasoning adopted by *Garvin* J, in relation to an instance where the application of the principle of *exceptio rei venditae et traditae* in a matter where the rights of the parties were already decided with finality in a partition action. It is already noted that the judgment of ***Karunadasa v Abdul Hameed*** (*supra*), was pronounced merely upon adopting the *dicta* of the judgment of ***Periacaruppan Chettiar v Messrs Proprietors and Agents Ltd*** (*supra*).

In view of these observations, a question necessarily arises in one's mind whether these two judgments could have been properly distinguished from the facts presented in relation to the instant appeal, as the Court of Appeal had expected from the trial Court and, found fault with when it did fail in that task.

The case of ***Karunadasa v Abdul Hameed*** (*supra*), indicates that the case presented before the District Court by the plaintiff was a *rei vindicatio* action but it proceeded to consider the claim of prescription presented by the defendants on the basis that they were in possession of the land in dispute, without first examining the paper title of the parties. The Supreme Court was critical of the approach adopted by the learned trial Judge, as he decided the dispute in favour of the defendants primarily on the claim of acquisition of prescriptive title. It is in

this scenario only, *Sansoni* J stated that (at p.353), "*[I]f he had directed himself correctly he would have seen that on 19th July 1949 all rights which any other persons had in this land were wiped out by the Settlement Order, including any rights Udupihilla may have had upon his purchase from Ausadanaide.*"

This is the very reason as to why I think that the learned President's Counsel for the Plaintiff invited attention of this Court to the provisions of Section 8 of the Land Settlement Ordinance which states that with the publication of the order, the land becomes "*… free of all encumbrances…*" and therefore the principle *exceptio rei venditae et traditae* would not render any assistance to the 2nd and 3rd Defendants in relation to establishing their title to the *corpus*.

But an important factor that should be noted in relation to the instant appeal is that, in the case of ***Karunadasa v Abdul Hameed*** (*supra*), the reference to the factual positions in that judgment made no indication as to the manner in which *Ausadnaide* is said to have "*transferred*" his rights to *Udupihilla,* before the publication of the Settlement Order. Although an issue was raised in relation to due registration before the trial Court, *Sansoni* J stated that (at p.353) *"[O]n the evidence, the question of due registration of the deeds relied on by the Plaintiff does not arise for consideration".* It appears that the title deeds that were put in before the trial Court as evidence in that instance, relates only to the plaintiff's case and not to that of the defendant. This seems to be an indication of the fact that the "*transfer*" made by *Ausadnaide* in favour of *Udupihilla* was either not on a notarialy executed document or even if it was, that transfer was not registered.

In the former case, *Howard* CJ observed (at p. 127) that the deed 3D4, relied on by the defendants in seeking to counter the deeds relied on by the plaintiff (P1, P3 and P23) was in fact not registered. But there was clear evidence before

Court that the Settlement Order and the three deeds of the plaintiff were registered in the same folio of the Land Registry. In addition, it was noted that the deed 3D4 is in effect a " … *transfer of the interest Gunasekere was to receive*" under the Land Settlement Ordinance and it appears to the trial Court the plaintiff is the "*bone fide purchaser for value*".

The reproduction of certain sections from the operative part of the deed 3D4 indicates that *Ausadnaide* had only "*… covenanted that soon after the publication of the final orders of settlement under the Waste Lands Ordinance by the Special Officer, to execute a conformation and ratification of the sale by a duly constituted notarial deed and also to hand over to the first defendant all title deeds*". This is indicative of the fact that there was no *traditio,* a requirement that must be fulfilled in relation to the application of the principle of *exceptio rei venditae et traditae.* Since this refers to another important area for consideration in the application of the said principle, it is necessary to revisit this aspect of the matter once more in this judgment, but may be at a later stage.

The fact of non-registration of the instrument on which a party founded its claim for the application of the principle *exceptio rei venditae et traditae,* seems to be the common denominator in the cases of ***Periacaruppan Chettiar v Messrs Proprietors and Agents Ltd*** (*supra*) and ***Karunadasa v Abdul Hameed*** (*supra*), that could be considered as the main contributory factor, which the Courts acted on, in rejecting such claims.

It is on this particular aspect, i.e., the registration of the conflicting deeds, that was considered and acted on by the Court of Appeal, when it decided to set aside the judgment of the District Court. The Court of Appeal stated, in reference to the judgment of ***Periacaruppan Chettiar v Messrs Proprietors and Agents Ltd*** (*supra*), that " … *the deed was executed by the defendant in that case had not been*

registered whereas the settlement order of 1933 and also the subsequent deeds of the respondent in that case had been duly registered. Non registration of the deed was the reason in that instance to disregard the title of the person who had a deed in his favour before the settlement order was made." It further added that " … *it is seen that the issue in the aforesaid case referred to by the trial Judge in order to reject the applicability of the maxim exceptio rei venditae et traditae, is not exactly to the point raised in this instance."* Thus, the Court of Appeal was of the view that the judgment of ***Karunadasa v Abdul Hameed*** (*supra*), which is dependent on the dicta of ***Periacaruppan Chettiar v Messrs Proprietors and Agents Ltd*** (*supra*) is distinguishable from the facts of the instant appeal and therefore the principles enunciated in it could not be applied to determine the dispute between the Plaintiff and the 2nd and 3rd Defendants.

In contrast, the judgment of ***Rajapakse v Fernando*** (*supra*) deals with a situation where the vendor (*Thomas Carry)*, who had no title at that point in time, sold a parcel of land to two others in 1909, through whom the defendant acquired title in 1915 and went into possession, as the 2nd and 3rd Defendants did in the instant appeal. The deed of 1909 was registered in folio F 68/253. The vendor subsequently obtained a Crown grant in 1912, and the property was sold in execution against him, following a Court order and was purchased in 1916 by the plaintiff's predecessor in title. But the Crown grant was registered in a different folio, without making a reference to the previous registration of the deed of 1909. The defendant's position was, under the Roman-Dutch law, the title so acquired with the Crown grant enured to his benefit, and he is entitled to defend his possession in a suit by a subsequent purchaser of the vendor's interest after the date of the said Crown grant.

Shaw J, accepted that position and stated in his judgment (at p. 306) that *"[I]n my opinion the defendant is entitled to succeed on this ground."* However, his Lordship was not so convinced of the necessity to impose a requirement of registration of the deed in order to receive the benefit of the maxim, but nonetheless held (at p. 307) that " … *in view of the express statement in Voet 21, 3, 3, it appears clear that such a purchaser could, at any rate, defend his possession at the suit of a subsequent purchaser under the plea de exceptio rei venditae et traditae*."

Ennis J, in a separate judgment, stated (at p. 307) that *"[I]t is to be observed that the property was first registered in 1909 in folio F 68/253. The subsequent Crown grant and mortgage by Carry were registered in another folio without reference to F 68/253. In* ***Fernando v Pedro Pulle****, [2 C. W. R.75]* ***Senaratne v Peiris****, [4 C.W.R.65] and* ***Peris v Perera*** *31 A.C.R.85, it was held that the earliest registration of land determines the place for subsequent registration. The plaintiff's documents have, therefore, not been duly registered*."

The plaintiff appealed to the Privy Council against the said judgment of the Supreme Court. The Privy Council, in its judgment of ***Rajapakse v Fernando*** (1920) 21 NLR 495, delivered by Lord *Moulton*, stated (at p.497);

> *"… by the Roman-Dutch law as existing in Ceylon, the English doctrine applies where a grantor has purported to grant an interest in land which he did not at the time possess, but subsequently acquires, the benefit of his subsequent acquisition goes automatically to the benefit of the earlier grantee, or, as it usually expressed "feeds the estoppel". When, therefore on the 22nd February 1912, Thomas Carry acquired from the Crown the title to the land which he had conveyed by the deed of 11th December 1909, the benefit of that title accrues to the grantees under that deed i.e., the respondent's predecessor in title."*

Returning to the facts of the matter before us, the Plaintiff had tendered the two original Deeds of Transfer Nos. 309 ("P2"), 315("P3"), a copy of the Gazette in which the Settlement Order was published ("P4"), a certified extract of the folio in which all these instruments were registered ("P1") in support of his case. He also tendered a certified photo copy of the 'second copy' of the original Deed of Sale No. 360 ("P6"), issued by the Land Registry of *Ratnapura* on 01.04.1986, through which the 2nd and 3rd Defendants have placed their claim before the trial Court, for the purpose of establishing their title to the *corpus*. The document "P1", is a certified copy of the Folio No. 85, in which the details of Settlement order, the Deeds of Transfer "P2" and "P3" were entered into. It is undisputed that the Deed of Sale No. 360 ("P6") too was registered in the Land Registry, but in the absence of any reference to the same in "P1", it could reasonably be inferred that the deed "P6" had been registered in a different folio. It is also understandable that, when "P6" was executed, there would not have been any prior registration, as the recital of that deed indicates. What the vendors have parted in "P6" is what they had " … *by right of paternal inheritance and by right of settlement upon by Crown in Settlement Proceedings in B.S.P.P. No. 712, Settlement Notice No. 1515 …"* over the *corpus.*

The purpose of the Land Settlement Ordinance was to declare any land or to any share of interest in such land in respect of which there was no claim within the time period specified by the "*settlement notice*" was tendered, to be the property of the State, which will be dealt with on account of the State (vide Section 4). The larger land within which the defined parcel of land, the *corpus* in the instant partition action is situated, was owned by the family of the original owners for generations and they correctly call their right "*by the paternal*

inheritance" over the said land, in the execution of the Deed of Sale "P6". Thus, there could not have been any prior registration, prior to "P6".

This vital factor makes the 2nd and 3rd Defendant's claim on the application of the principle of *exceptio rei venditae et traditae* a viable one and is a clear point that distinguishes the instant appeal from the application of the *dicta* of ***Periacaruppan Chettiar v Messrs Proprietors and Agents Ltd*** (*supra*), which unfortunately had escaped the attention of the trial Court.

It is important to note that the registration is the only distinguishable factor that made the *dicta* of the said judgment inapplicable. In the Full Bench decision of ***Gunatilleke v Fernando et al*** (1919) 21 NLR 257, *Bertram* CJ, whilst dealing with a similar situation held the view that (at p. 265) "*… under the Roman law no title passes upon a sale except by actual delivery to the purchaser. … This is no longer the law. Traditio, whether actual or symbolic, is no longer necessary for the consummation of a sale of immovable property, and has been replaced by the delivery of the deed … The same protection, therefore, which the Roman law gave to a person who had completed his title by possession, our own law will give to a person who has completed his title by securing the delivery of a deed*".

In the Privy Council judgment of ***Gunatilleke v Fernando*** (1921) 22 NLR 385, the validity of the said reasoning adopted by the Supreme Court was considered. Lord *Philmore,* who delivered the judgment of the Privy Council, had reproduced the pronouncement made by the Supreme Court in dealing with the appeal and endorsed it by stating (at p. 391) "*… the view of the Chief Justice, in which the other learned Judges concurred, was right.*" The Privy Council, after examination of the Roman Dutch law principles along with the commentaries on

the point, and after having noted the undesirability of viewing the Roman Dutch law principles on *exceptio rei venditae et traditae* in the light of English law principles on estoppel, went on to state that (at p. 391), *"[A] sale made by a vendor without title cannot be relied upon as against a purchaser from that vendor after he has acquired title, if and so long as the earlier sale remains in contract only; but if the earlier sale is accompanied, followed, or evidenced by certain acts which may be deemed equivalent to the Roman traditio, that sale will prevail"*. Prof *G.L. Peiris,* in his book on ***Law of Property*** (Vol. 1, at p. 143) states that "*[T]he decision by the Full Bench of the Supreme Court in* ***Gunatilleke v Fernando*** *was endorsed by the Privy Council, and can be regarded as settling the law of Ceylon on this point."*

In ***Gunatilleke v Fernando*** (supra), the Privy Council stated that (at p. 393) *"… for the Roman-Dutch law the question is what was the property purported to be conveyed; and on all principles of construction the recitals can only be looked at for the purpose of assisting the Court to arrive at the determination of the actual effect of the conveyance."* The original owners, by execution of the Deed of Sale "P6", have stated that they " … *hereby sold and conveyed or expressed or intended so to be with all and singular appurtenances thereunto belonging unto the said vendee and her heirs, executors, administrators and assigns for ever."* It is clear in that instance as to what the vendor and vendee have intended when executing the Deed of Sale "P6", as it is not a transaction which remains as a contract, but an actual sale by which the handing over of the instrument along with the possession of the land so conveyed. The attestation of the said Deed of Sale "P6" reads that " … *the consideration hereof was paid in full in my presence …*" by the vendee. The recitation of the said deed also indicates that it is an outright sale of whatever the interest the original owners had and would acquire with the publication of the Settlement Order over the *corpus.* After its execution, the Deed of Sale was delivered to the vendee and had its copy registered in the Land Registry.

There is no dispute among the parties as to the identity of the *corpus.* In fact, there is an admission to that effect and it was recorded by the trial Court at the very commencement of the trial. The surveyor, who was commissioned by Court to present a preliminary plan, was initially prevented from entering into the *corpus* by the 2nd and 3rd Defendants, who convinced him that the deeds relied on by the Plaintiff are fictitious ones. Only with the permission of the 2nd and 3rd Defendants, the surveyor completed his commission issued by the trial Court. The undisputed evidence presented before the trial Court indicate that the predecessors in title of the 2nd and 3rd Defendants have taken possession of the *corpus* simultaneously with the execution of the said Deed of Sale and were in possession of the *corpus* since then. The Plaintiff candidly admitted that he is fully aware that the *corpus* is possessed for a long time by the parents of the two Defendants. He made this admission through his own knowledge, which he gathered as a person who lived on a land that abuts the *corpus.* It is also undisputed that the parents of the 2nd and 3rd Defendants, acting under a permit issued by the Rubber Control Department, planted rubber in that land and have obtained the subsidies offered by the Government for a long period of time. The nature of the 'possession' the Plaintiff had over the *corpus* is limited to picking jack fruit from time to time. In contrast, the documents tendered by the 2nd and 3rd Defendants marked 2V1 to 2V23, indicate that the father of the two Defendants was permitted by the Rubber Controller to plant rubber on a land called *Millagahahena* in an extent of one acre commencing from the year 1943, to which he claimed ownership under the Deed of Sale No. 360 ("P6"). The last of the permits, 2V23 was issued in 1983, three years prior to institution of the partition action by the Plaintiff.

This factor indeed satisfies both the requirements, as identified by the Privy Council in the said judgment. These two requirements, as set out in that judgment (at p. 391), are stated as follows, *"[S]till the exceptio given by the Roman law required the double conditions, not only that the property should be sold, but that it should be delivered, though the delivery might in the case mentioned be presumed by a fiction; …".* The evidence before the trial Court, not only satisfies the requirement of *traditio* but in addition, also makes an important distinction with the factual position considered in ***Periacaruppan Chettiar v Messrs Proprietors and Agents Ltd*** (*supra*). *Howard* CJ, himself distinguishes the matter before their Lordship with the factual situation of ***Gunatilleke v Fernando*** (21 NLR 495 and ***Rajapakse v Fernando*** *supra,* at p. 130) by stating that "… *I do not think the principles laid down in* ***Gunatilleke v Fernando*** and ***Rajapakse v Fernando*** *apply",* as these are the instances where the principle of *exceptio rei venditae et traditae* was applied successfully to the party that pleaded its benefit.

The judgment of ***Karunadasa v Abdul Hameed*** (*supra*), is clearer on this point. After undertaking an analysis of evidence, *Sansoni* J found the conclusion reached by the trial Court on the possession of *Udupihilla* was made erroneously. His Lordship concluded (at p. 354) "*[I]n this state of the evidence it is apparent that there was no possession by Udupihilla, and the learned Judge was in error when he held the contrary*." Thus, it being one of the requirements of *traditio* which has not been satisfied, naturally the defendants who claim possession through *Udupihilla* could not succeed under the principle of *exceptio rei venditae et traditae.*

On the other hand, the factual position, as revealed in ***Rajapakse v Fernando*** (*supra*) appears to be almost identical to that of the instant appeal. *Ennis* J, in his judgment stated (at p. 304) "… *but it is to be observed that the document evidencing the original transaction in that case did not purport to convey the*

dominium, the vendor covenanting to obtain the legal title later. In the present case Carry, in 1909, purported to convey the full dominium and gave possession".

Therefore, it is my considered view what the Court of Appeal had expressed on this point is a correct pronouncement both legally and factually, and it had rightly held that the District Court erred when it opted not to follow that precedent, an authority which is binding on it, and that too without providing any reasons for taking a different view. In view of the factors referred to in the preceding paragraphs, I am in agreement with the impugned conclusion reached by the Court of Appeal and accordingly proceeds to answer the two questions of law, which I have reproduced at the commencement of this part of the judgement, in the negative.

What remains left to be considered at this point is the contention of the learned President's Counsel on the applicability of Section 8 of the Land Development Ordinance. In my view that contention should fail for the reason that the Privy Council, in the case of ***Rajapakse v Fernando*** (supra) stated (at p.497) that "… *the benefit of his subsequent acquisition goes automatically to the earlier grantee, …*" and therefore, with the application of the principle *exceptio rei venditae et traditae*, no sooner the Settlement Order is published in the Gazette, the right, title and interest of the three original owners had over the *corpus* enured in favour of the predecessors in title of the 2nd and 3rd Defendants. When the original owners, executed the Deeds of Transfer Nos. 309 and 315 in 1974, after a period 33 years since the signing of the Deed of Sale No.360 ("P6"), they had no right, title or interest remaining with them over the *corpus* which could be passed over to the Plaintiff with the execution of the Deeds of Transfer Nos. 309 and 315. As a result, these two deeds convey no right, title or interest over the *corpus* to the respective vendees. This is because, these two Deeds of Transfer

were executed in order to transfer the rights that accrued to the original owners after the publication of the Settlement Order. The reliance placed on the words "*free of all encumbrances*" by the Plaintiff would not help him in this instance to take his case any further than now, since the publication of the Settlement Order that made the three original owners declared to be entitled to 1/3rd share each "*free of all encumbrances*" means that it is free of other encumbrances that are in conflict with that published statutory entitlement. In this instance, the execution of the Deed of Sale "P6" is about the transfer of the very entitlement the three original owners had over the *corpus* and was not in respect of a right, title or interest, which is in conflict with the said entitlement, published in the Gazette, in favour of the three vendors. Therefore, in my humble opinion, in view of the foregoing, the Deed of Sale No. 360 ("P6") could not be considered as an "*encumbrance*" in terms of Section 8 of the said Ordinance.

In view of these considerations, I regret my inability to accept the contention presented by the learned President's Counsel who submitted that, with the publication of the Settlement Order in the Gazette, the *corpus* became "*free of all encumbrances*" and, as a result, all of its previous titles held by the original owners, "*came to an end*".

In arriving at the above conclusions, I have derived strong support from comparatively a recent judgment of this Court pronounced in ***Lalitha Padmini v Jayatunga*** (1999) 2 Sri L.R. 163.

This is an instance where one *Charles Appu* was the original owner of the land under dispute. He executed a conditional transfer of this land to one *Podi Appuhamy* on deed 106 of 14. 10. 57 (P7) in its entirety. The title was re-transferred to *Charles Appu* on deed 192 of 15. 05. 61 (P8). In the meantime, by D1, *Charles Appu* transferred this land to his daughter *Swarna Jayanthi* (said to be

adopted) and son-in-law *Elias Appuhamy* in 1959. After the said re-transfer, *Charles Appu* conveyed the entirety of the land once more to his wife *Charlotte* on deed 3806 of 19.07.61 (P3). *Charlotte* reserving her life interest by P1, donated her rights to her daughter *Lalitha Padmini,* the plaintiff in this case. Subsequently by P6 *Charlotte* transferred her life interest too to the plaintiff.

Thus, there are two sets of competing title deeds on which the plaintiff and defendant's wife claimed to have derived title from, as in the instant appeal. *Charles Appu* did not have title when he transferred the land to his daughter *Swarna Jayanthi*, but soon after he derived title after the re-transfer on deed No. 192 of 15.05.61 (P8) from *Podi Appuhamy,* who by execution of deed No. 3806 of 19.07.61 (P3) transferred his rights to his wife *Charlotte.*

The only question presented before Court was whether defendant's deed of title 9147 of 12.07.59 (D1) being prior in time took precedence over deed No. 3806 of 19.07.61 (P3) by which plaintiff's predecessor *Charlotte* got title from *Charles*.

Ananda Coomaraswamy J, delivering the judgment in the said appeal, was of the view that (at p. 165); *"[A]ccording to Roman Dutch Law principle of exceptio rei vendita et traditae when Podi Appuhamy transferred by P8 his right, title and interest to Charles, Charles' interest would have by operation of law devolved on Swarna Jayanthi presently the wife of Jayatunga. In that instance Charles would have had no interests to convey to his wife Charlotte and consequently Charlotte the widow could not have transferred any interests to Lalitha Padmini the plaintiff. Clearly, therefore the plaintiff's*

title does not supersede the title of the wife of the defendant and the plaintiff could not be said to have established a title superior to that claimed by the defendant's wife. Evidence on record shows Lalitha Padmini the plaintiff never got possession of this land. In those circumstances I am unable to conclude that the plaintiff had in any manner proved her title to the land by deeds nor prescribed to the land."

Moving on to another aspect in favour of the 2nd and 3rd Defendants, it has already been noted in relation to the instant appeal, that the Deed of Sale "P6" was registered soon after its execution in 1941, while the Settlement Order and the two subsequent Deeds of Transfer Nos. 309 and 315 were registered in a different folio. In ***Rajapakse v Fernando*** (supra), *Ennis* J declared (at p. 305) that "*[O]n first registration 'the property' is regarded as registered, and subsequent instruments dealing with the same property have to show the volume and folio of the register in which 'the property' has been previously registered (Section 24). This scheme is clearly meant to operate to give notice to subsequent purchasers and others of previous dealings with the property, be those dealings equitable or otherwise."* His Lordship therefore concludes that (*ibid*) "*[I]t is to be observed that the property was first registered in 1909 in folio F 68/253. The subsequent Crown grant and mortgage by Carry were registered in another folio without reference to F 68/253. In Fernando v. Pedro Pulle, 2 C. W. R.75, Senaratne v. Peiris 4 C.W.R.65 and Peris v. Perera A.C.R.85, it was held that the earliest registration of land determines the place for subsequent registration. The plaintiff's documents have, therefore, not been duly registered."*

In view of this finding, the order of re-trial made by the Court of Appeal becomes a fruitless exercise, which consume valuable time of the trial Court for the reason that, if the Plaintiff had no valid title to the *corpus,* then he is not

capable of maintaining a partition action in respect of the same. Thus, his action ought to be dismissed. This is more so, since the only substantive relief sought by the 2nd and 3rd Defendants too was the dismissal of the Plaintiff's action. Therefore, this Court sets aside the segment of the judgment of the Court of Appeal, by which it ordered that the instant matter be remitted back to the District Court for consideration of the validity of the claim of acquisition of a prescriptive title to the *corpus* by the two Defendants. I am in full agreement with the rest of the judgment and its conclusion to set aside the judgment of the District Court, delivered in favour of the Plaintiff.

The answers provided by the District Court to the points of contest Nos. 2 to 5 raised by the Plaintiff should be corrected to read them in the negative and accordingly the Plaint of the Plaintiff is hereby dismissed.

With the partition action of the Plaintiff being dismissed by this Court, I do not think that the remaining questions of law requires consideration.

Accordingly, the appeal of the Plaintiff is dismissed.

The 2nd and 3rd Defendants are entitled to the costs of this appeal.

JUDGE OF THE SUPREME COURT

ARJUNA OBEYESEKERE, J.

I agree.

JUDGE OF THE SUPREME COURT

E.A.G.R. AMARASEKARA, J.

I had the privilege of reading the judgment written by His Lordship Justice Wengappuli in its draft form. With all due respect to his Lordships views expressed therein, I prefer to write this separate Judgment. I opine that the learned District Judge was correct in deciding the title based on deeds as to the pedigree presented by the Plaintiff. My view with regard to the issue of prescriptive rights will be discussed later in this Judgment. I also hold that the learned Court of Appeal Judges erred in applying the *Exceptio Rei Vinditae Et Traditea* principle to overturn the findings of the learned District Judge as to the paper title relevant to the Corpus. I must first confess that due to my impending retirement, I do not have much time to do a detailed analysis and reasoning of the issues involved, but I think what is discussed below would be sufficient to explain my conclusion with regard to the above.

To apply the *Exceptio Rei Vinditae Et Traditea* principle, it must be shown that the vendor did not have title or had only a defeasible title at the time he conveyed his purported title to the vendee. It is true that after the Settlement Order is published the title of the declared person or the state relates back or originate from the said Settlement Order with regard to land registered in the new folio in that regard – vide Section 8 and 9 (2) of the Land Settlement Ordinance. However, the scheme contemplated by the provisions of the said ordinance does not indicate that it is meant to give title to the people who does not have title to their lands. It appears that the scheme contemplated in the said Ordinance is to decide which lands are private and to transfer them to the respective owners or their heirs while transferring State lands, including the lands for which there is no

claim or the claim is not established, to the State. In fact, the Settlement Order in favour of a person is a result of a claim made by that person to the land so published in terms of Section 4 of the said Ordinance. This itself show, that if a Settlement Order is made in favour of a person or persons, his or their claim as to the title was accepted by the Settlement officer after the inquiry contemplated in the said Ordinance

The Deed No. 360, marked P6, dated 10.02.1941, which was the deed of sale executed by the original owners prior to the Settlement Order made, which Order was made and published in favour of the original owners in 1948 by Gazette marked P4, mentions that the original owners obtain title to the land in P6 by paternal inheritance and through Crown due to settlement proceedings in BSPP 712 settlement notice No. 1575. However, there is no provision in the Land Settlement Ordinance to give or confirm title through a notice or proceedings without publishing a Settlement Order as per Section 8 of the Ordinance. Be that as it may, the original owners have stated in the said deed marked P6 that they inherited title to the undivided portions of 1 acre and 20 perches of the main land of 10 acres, 2 roods mentioned therein the said deed. One may recite in a deed that he has title to convey but in fact, without any title, but by obtaining a Settlement Order in their favour through P4 which happened as per the Ordinance after an inquiry, it is clear they were able to establish their claim before the settlement officer to obtain a Settlement Order in their favour for their share entitlement in the said 10 acre-land. Thus, there is no material to say that the original owners did not have title to the land mentioned in P6 when they executed P6 to apply *Exceptio Rei Vinditae Et Traditea* to the issue at hand in relation to P6 and V3. To apply *Exceptio Rei Vinditae Et Traditea* to say that vendors of P6 got title only after the Settlement Order was published, it must be established that the

vendors did not have title as stated in the said deed marked P6. What the Settlement Order had done at the matter at hand appears to be the settlement of title to separate pieces of lands in the said 10-acre land after considering the claims established in that regard by the claimants and vesting the other pieces of land to the State where no claims were made or established as per the scheme contained in the said Ordinance.

As per Section 8 of the Land Settlement Ordinance, once the Settlement Order is published in the gazette, it shall be judicially noticed and shall be conclusive proof as to the entitlement of such land, or to such share or interest so published free of all encumbrances whatsoever other than those specified in the Settlement Order. Further such share or interest or land vests absolutely in the State or in such person, as the case may be, to the exclusion of unspecified interest of whatsoever nature. It must be noted that such conclusiveness does not depend on the registration but comes into existence with the publication of the Settlement Order. It must also be noted that as per Section 9(2) of the Ordinance, particulars of every such settlement have to be entered in a new folio allotted to such land so settled. Any instrument, that is executed after that entry, affecting that land so settled has to be registered in the said new folio or in a continuation of the said new folio for it to be considered as duly registered. These provisions indicate after the settlement, the piece of land so settled gets a new identity independent of any bigger land that existed prior to the settlement, and any instrument registered not in the said new folio or in continuation of it, but in any other folio, including the folio where the previously existed bigger land registered, cannot be considered as registered in the proper folio for the purposes of due registration for issues relating to prior registration. Thus, the new folio which register the settlement details or its continuation becomes the correct folio for the relevant land so settled

against any other folio including the folio where any bigger land that existed prior to the settlement, out of which the settled portion of land was carved out, registered. However, no such folio where the bigger land of 10 acre was registered and its continuations have been marked through evidence to show that the deeds that the 2nd and 3rd Defendants rely on have been properly registered at all. No folio has been tendered in evidence where P6 was registered and the copy of P6 tendered in evidence and available in Judge's brief does not indicate any endorsement made by the land registry to indicate that it was ever registered. However, V3, deed No.847 executed based on the purported title obtained through P6 bears its prior registration and an endorsement by the land registry. Anyhow, there is nothing to show that it was registered in the folio where the settlement order was registered or in continuation of such folio. Hence, there was nothing to show that the 2nd and 3rd Defendants' deeds get priority over the title to lands shown in the Plaintiff's pedigree. Thus, I doubt whether there was sufficient material for the learned Court of Appeal Judges to distinguish this case at hand from the decided case mentioned therein in their Judgement based on the registration of Defendant's deeds. However, in my view, registration in the proper folio on a prior date only gives the priority. The *Exceptio Rei Vinditae Et Traditea* has nothing to with the registration. First, it must be established that the vendor did not have title at the time of the transaction and, thereafter, it must be shown that the vendor obtained title to the subject matter afterwards. If these are proved then the said principle applies and it is only then that it can be examined whether priority of registration is relevant. In the matter at hand, as discussed above, there is no sufficient material to state that the original owner did not have title when they executed P6. In fact, the Settlement Order confirms they had a claim to title and it was considered and accepted and a portion without encumbrances with absolute title was given to them after the inquiry relating to the settlement of the

main land. As explained above, for the land so settled, there cannot be any other due folio other than the one where the Settlement Order was entered and its continuations. It must also be noted that as per P6 the original owners appear to have title to an undivided share in the bigger land but with the settlement, it has become a co-ownership only for the land so settled.

In their submissions, 2nd and 3rd Defendants try to say that the notice of settlement referred to in P6 is the one related to Settlement Order, X4, but the said notice or the gazette containing it has not been tendered in evidence to take judicial notice of it. Even if it is taken as true, not making a claim based on P6 for their entitlement at the settlement inquiry make that entitlement to be vested in the State through the Settlement Order – vide Section 4(1) and 5(1) of the Ordinance. On the other hand, I doubt whether there is sufficient material to say whether it is the same entitlement of land conveyed by P6 to the Predecessor of the 2nd and 3rd Defendants that was claimed by the original owners in the settlement inquiry. What was conveyed through P6 in an undivided portion of 1 acre and 20 perches but one cannot say without sufficient evidence that the original owners did not have any other undivided share after executing P6. On the other hand, even if it is the same entitlement referred to in P6, that was claimed by the original owners in the settlement inquiry by engaging in a fraudulent act by not revealing the entitlement of the vendees in P6, there is a solution provided by law in proviso to Section 8of the Land Settlement Ordinance. The affected person can claim the land or damages. No evidence of any action filed by the 2nd and 3rd Defendants or their predecessors based on such a cause of action is available. Where law provides a remedy, one must find relief through that remedy first. Nor the 2nd and 3rd Defendants have raised any issue based on that provision during

the trial to consider remedial measures if any fraud or suppression of facts occurred during the settlement inquiry.

As per the reasons mentioned above, it is my view, that the learned District Judge was correct in refusing the chain of title of the 2nd and 3rd Defendants and the learned Court of Appeal Judges erred in deciding against the judgment of the learned District Judge as to the paper title of the Parties.

The issue of prescription has to be decided on facts. The learned District Judge appears to have refused to accept the position of the 2nd and 3rd Defendants on the basis that the Plaintiff, at one occasion had stated the Brumpi Singho, a predecessor of the Defendant, gave money to one of the original owners, Robert Bandara, which was not challenged in evidence. At pages 99 and 100 of the brief, the Plaintiff had said during cross examination that Brumpi Singho gave money for tapping rubber but has not revealed how he came to know that fact. As it appears to be a transaction between Brumpi Singho and one of the Original Owner, if it is true, one of them should have told him, thus it may be hearsay. On the other hand, at page 100, the Plaintiff has stated he does not know who tapped the rubber trees. Thus, it is questionable why Brumpi Singho gave money to Robert Bandara, one of the original owners. Even money can be paid owing to any investment agreement between Brumpi Singho and Robert Bandara, for example to grow rubber on the land belong to Brumpi Singho. In my view, said evidence is not sufficient to establish any landlord and licensee relationship. Even though it has not been mentioned in the Judgement of the learned District Judge, it appears that the Plaintiff had stated that he enjoyed fruits of two jack trees. In a village, it is natural for neighbours to enjoy fruits of a jack tree owned by some others. The Plaintiff had not claimed any trees before the surveyor. That too is not sufficient to

contrast with the long possession proved by the 2nd and 3rd Defendants even by calling witnesses from Rubber Control Department and many others to prove their possession on the basis of their purported ownership based on said P6 and V3, deed No.847, even though those deeds are of no avail due to Settlement Order. On the other hand, there are sufficient evidence to say that the 2nd and 3rd Defendants are in possession without allowing the Plaintiff to have control over the Property. There had been previous application before the High Court in that regard. It is apparent that the 2nd and 3rd Defendants and their predecessors have been in the possession of the land identified through the preliminary survey on the basis of a purported ownership based on the said P6 and V3, from the time of the execution of Deed P6 in 1941 as there is no other way to explain their presence in the land. As said before, these deeds are of no value due to the Settlement Order. No doubt, the possession based on those deeds, though of no value, is adverse to the paper title claiming through the Settlement Order along with the subsequent deeds as well as inheritance for the Plaintiff and the 1st Defendant by the Plaintiff. Thus, the Court of Appeal erred in deciding to send the case for retrial to decide on prescription. The Court of Appeal could have decided in favour of the 2nd and 3rd Defendants based on their prescriptive title. Thus, in my view, even though the learned District Judge was correct with regard to the paper title, the learned District Judge erred in deciding against the 2nd and 3rd Defendants by refusing their prescriptive title. The learned Court of Appeal Judges erred in applying *Exceptio Rei Vinditae Et Traditea* principle to overturn the learned District Judge's decision as to the paper title and also erred in deciding on prescription when there was sufficient evidence to establish that prescriptive title in favour of the 2nd and 3rd Defendant. Thus, the Questions of Law (i) and (ii) are answered in the affirmative in favour of the Appellants.

In a partition action, land has to be identified through a preliminary survey. It has been done in the matter at hand. The prescriptive claim of the Defendant is made to the said undisputed corpus of the action, and prescription is based on the possession of that identified land. Merely because the deeds relied by the 2nd and 3rd Defendants refer to an undivided portion of a larger land which now does not exists as such after the Settlement Order, that larger land need not be superimposed as far as they can prove adverse possession to the land identified through the preliminary survey. Thus, the question of law (iii) is answered in the negative as there was no need of such superimposition.

The question of law (iv) is connected to the question of law (iii) above. It is argued on behalf of the Appellant (Plaintiff) that the Respondents (2nd & 3rd Defendants) claim was for the prescription of a portion of a bigger land and they failed to prove that the assistance they received from the Rubber Control Department was for the land shown in the Preliminary Plan. As said before, as per the evidence, it is clear that even though their purported entitlement by paper title was for a part of a bigger land, they are in possession in the identified land based on that claim. However, the Court of Appeal had not made a decision on prescriptive title. Therefore, this question of law does not arise.

With regard to question of law (v), the Plaintiff – Appellant had made submissions relating to the proof of V3. It does not arise as, it is not V3 that gives title to them but prescription.

Thus, I allow the appeal with regard to the directions sought to set aside the Judgment of Court of Appeal and the Judgment of District Court but refuse to grant relief as prayed in the Plaint as the Plaint should be dismissed on the basis

of prescriptive title of the 2nd and 3rd Defendants as established by the evidence led at the trial.

Appeal is partly allowed. No costs.

JUDGE OF THE SUPREME COURT