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

In the matter of an application for leave to appeal under and in terms of the article 128 of the Constitution of the Democratic Socialistic Republic of Sri Lanka read with Section 5 C of the High Court of the Provinces (special Provisions) act No. 19 of 1990 as amended by Act No. 54 of 2006.

SC Appeal No. 42/2010

SC (HCCA) LA 328/2009

HCCA Matara Appeal No.240/2004(F)

DC Tangalle Case No.2503/L

Visenthi Baduge Piyasiri,

Peoples' Bank,

Mutiyangana Branch, Badulla

Plaintiff

Vs.

Dissanayaka Mudiyanselage

Gunarathna Banda,

No.71, Tangalle Road, Beliatta

Defendant

AND

Dissanayaka Mudiyanselage

Gunarathna Banda,

No.71, Tangalle Road, Beliatta

Defendant-Appellant

Visenthi Baduge Piyasiri,
Peoples' Bank,
Mutiyangana Branch, Badulla

Plaintiff-Respondent

AND NOW

Visenthi Baduge Piyasiri,
Peoples' Bank,
Mutiyangana Branch, Badulla

Plaintiff-Respondent-Petitioner

Vs.

Dissanayaka Mudiyanselage
Gunarathna Banda,
No.71, Tangalle Road, Beliatta

Defendant-Appellant-Respondent

Before: L.T. B Dehideniya, J.
Murdu N.B Fernando, PC, J.
A.A.U Wengappuli, J.

Counsels: Dr. Wijedasa Rajapakshe PC with Gamini Hettiarachchi for the Plaintiff-Respondent- Appellant
W. Dayaratne PC with Ms. R. Jayawardena for the Defendant -Appellant-Respondent

Argued on: 09.02.2021
Decided on: 17.06.2022

L.T.B. Dehideniya, J.

Plaintiff-Respondent-Appellant (hereinafter sometime referred to as the Appellant) instituted an action in the District Court of Tangalle by plaint dated 05.02.1996, seeking for a declaration of title and ejectment of the Defendant-Appellant-Respondent (hereinafter sometime referred to as the Respondent) from the land called "Kahagalagodella/Bogahahena", morefully described in the schedule to the Plaint. The Appellant's argument is that the Respondent was in unlawful and forcible occupation in the said land.

The Appellant submits that Peter Silva who was the original owner of the land in question died intestate leaving as his heirs his wife Vineetha Ediriweera Jayasuriya (Appellant's Aunt) and the daughter A.P Baby Champa Matilda (Respondent's Wife), who gifted the said land to the Appellant by deed No.645 dated 28.09.1973 attested by H.S De Silva Notary Public (marked as **P-1**). Thereafter, Vineetha Jayasuriya and Baby Champa Matilda revoked the said gift by deed of revocation No.710 dated 18.09.1976 attested by Charles Wirittamulla Notary Public (marked as **P-2**), with the consent of the Appellant. However, upon receiving information from the Bank that the aforesaid deed of gift No.645 is an irrevocable gift and therefore the said revocation is not valid, the Appellant gifted the entire property to Vinitha Jayasuriya by the deed No.970 dated 19.05.1977 (marked as **P-3**). The Appellant further submits that thereafter, the property had been divided into three blocks and transferred the lot No. 2 and 3A to the Appellant by deed No.08 dated 12.08.1977 and deed No.3774 (marked as **P-4** and **P-5**) and gifted lot 3 by the deed No.3775 (marked as **P-6**) to Baby Champa Matilda, who later transferred the said rights by the deed No.4598 dated 27.10.1984 (marked as **P-7**) to the Appellant. Accordingly, the Appellant argues that he is the absolute owner of the property in question.

The Respondent, who was the husband of Baby Champa Matilda submits that Baby Champa Matilda did not transfer her rights to the Appellant by deed No.4598. The Respondent's position is that the said deed is a fraudulent document.The Respondent further denied the rights of the Appellant and claimed that since the deed of gift No.645 was cancelled by the deed of revocation No.710, the Appellant is not entitled to transfer his rights to Vinitha Jayasuriya by the deed No.970.

Having considered the aforementioned evidence, the Learned District Judge entered the judgement in favour of the Appellant holding that an irrevocable deed of gift cannot be revoked by a deed of revocation and the deed of gift executed by the Appellant (marked as **P-3**) is a valid gift and thereafter the Appellant got title from deeds **P-4** to **P-7**. Being aggrieved by the said judgement, the Respondent tendered an appeal there from to the Civil Appellate High Court of Southern Province holden at Matara. Civil Appellate High Court held that as Vinitha Jayasuriya and Baby Champa Matilda had revoked the deed of gift No.645 with the consent of the Appellant by the deed of revocation No.710 (marked as **P-2**), the deed of gift No.970 does not transfer any rights/title.Therefore, the High Court set aside the judgement of the District Court and held that the deeds produced marked **P-3** to **P-7** are null and void and further held that Baby Champa Matilda has never transferred her rights to the Appellant by the deed No.4598 (marked as **P-7**). It is from the aforesaid judgement that this appeal is preferred.

This Court granted leave to appeal on the following questions of law;

1) Have their Ladyships' Judges misconstrued the law relating to revocation of deed of gifts?
2) Have their Ladyships' Judges disregarded the fact that said deed of gift No.645 had been made with the consent of all the parties concerned?

3) Is their Ladyships' Judges' judgment contrary to the Principles relating to ownership of an immovable property?
4) Have their Ladyships' Judges failed to consider that the Respondent was estopped in law from disputing the title of the Appellant?
5) Have their Ladyships' Judges misdirected or misguided when they held that ownership of the Respondent was established in proceedings initialed under section 66 of the Primary Court Procedure Act?
6) Have their Ladyships' Judges failed to appreciate the fact that in his judgement the learned trial Judge has come the most appropriate conclusion after evaluation of evidence and considering applicable legal principles?

The Appellant's case is based upon the ground that the Judges of the Civil Appellate High Court have come to the erroneous conclusion that deed No.970 (marked as **P-3**) and all the subsequent deeds after the deed of revocation No. 710 (marked as **P-2**) do not have any legal validity and therefore no title has been transferred to the Appellant. When considering the legal context of the issue before this court and the evidence tendered by both parties, it appears that by the deed of revocation No. 710 dated 18.09.1976 attested by Charles Wirittamulla Notary Public, the donor (Vineetha Jayasuriya and Baby Champa Matilda) has revoked the deed of gift No. 645 and the Appellant has consented to the same.

In the eyes of the law it is competent for the donor to reserve to himself the right to revocation of a deed of gift.

A similar view was expressed in the case of ***Stephen v. Hettiarachchi and Another*** [2002] 3 Sri L.R 39 at p.43 per Weerasuriya J.

"Although ordinarily a deed of gift is irrevocable by the donor nevertheless it is competent for the donor to reserve to himself the right of revocation in which event the donor can by executing a subsequent deed of revocation.."

The legal question of whether a donor can revoke a deed of gift with the express consent of the donee. This can be decided upon examining the expressed intention of the parties. In the case of ***Jinaratana Thero v. Somananda Thero*** (1946) 32 C.L.W. 11 it was held that in construing a deed, the expressed intention of the parties must be discovered.

In ***Rathnayake Mudiyanselage Jayathilaka v. R.M. Siriwardena of Ihalagama*** (S.C. Appeal No. 221/2012, decided on 19.12.2019) at p.8 per E. A. G. R. Amarasekara J,

"The afore quoted legal texts, decisions and authorities indicate that when interpreting a deed, a court has to;

• Find the expressed intention of the parties,

• Find such intention through the meaning of the words used in the deed while considering the whole document to ascertain the true meaning of its several clauses. Sometimes the very form of the document may help in ascertaining the intention…"

When considering the present application, by the deed of revocation No.710, the both Appellant and the donor has expressed their valid consent to revoke the deed of gift No.645.

Deed of revocation No.710 marked as **P-2**, at p. 1-2;

"..තවද එම ත්‍යාග දීමනාව නිසා අප දෙපාර්ශවය කෙරෙහි තිබූ ඥාතීත්වයට හා එකිනෙක පක්ෂයක් කෙරෙහි අප තුළ තිබූ ස්වභාවික ආදරකරුණාවටද දැනට මහත් බාධා ඇති වී

තිබෙන බැවින් තවදුරටත් එම තත්වය ඇති නොවීම සඳහා එම ත්‍යාගය අප දෙපාර්ශවයේ සමගියෙන් අවලංගු කර ගැනීමට අදහස් කරගෙන ඊට එකඟ වූ බැව් අප මෙයින් ප්‍රකාශ කරමු.”

Under the law, a deed of gift is irrevocable unless donor reserves the right to revoke the gift. This legal concept gives a right to the donee that he can retain the title without any disturbance from the donor. If the donee, the person who receives the gift, is willing to return the gift to the donor, the person who gave the gift, donor, need not to reserve the right to revoke. The donee can give consent to revoke the gift. In the present case also, the deed is an irrevocable deed, but the donee consented for the revocation. Therefore, the deed of revocation No.710 (marked as **P-2**) becomes a valid deed and the deed of gift No.645 (marked as **P-1**) was revoked.

With the deed of revocation the title to the land in question repassed to the original owners, namely; Vineetha Jayasuriya and Baby Champa Matilda. After the deed No. 710 (marked as **P-2**) has been executed, no title remains on donee. Therefore, the deed of gift No. 970 (marked **P-3**), which was executed after the deed of revocation marked as **P-2,** will not transfer any right/title to the donee of the deed of gift No. 970 (marked **P-3**), Vineetha Jayasuriya.

Deed of gift No.970 marked as **P-3**, at p. 1

“…විසෙන්ති බදුගේ පියසිරි වන මට වර්ෂ 1973 ක් වූ සැප්තැම්බර් මස 28 වන දින එච්.එස්. ද සිල්වා ප්‍රසිද්ධ නොතාරිස් මහත්මයා විසින් සහතික කළ අංක 645 දරණ තෑගි ඔප්පුව පිට අයිතිව නිරවුල්ව භුක්ති විඳගෙන එන මෙහි පහත උපලේඛනයෙහි විස්තර කරනු ලබන දේපළ සහ ඊට අයිති සියලු දේත්…”

However, as per the aforesaid discussion, since the deed of revocation No.710 is valid, the Appellant (donor) has no title at the time of execution of deed No.970. Therefore, the Appellant

did not have a legal right to execute the said deed No.970 and consequently the said deed does not convey any rights before the law.

It is a well-established legal principle under the Roman Dutch common law *"exceptio rei venditae et traditae"* provides that where a vendor/transferor sells without title but subsequently acquires one, this title adds to the benefit of the purchaser and those claiming through him. In the case of ***Nicholas De Silva v. Shaik Ali*** (1895) 1 NLR 228 at. p 238 Withers J. explained that, if 'A' sells for value and delivers to me a land which does not at the time belong to him; if he acquires it afterwards and brings an action to re-vindicate it, I may defeat him by saying, "But you sold and delivered it to me." I may plead "sale and delivery" with equal effect against the true proprietor who, inheriting the land from my vendor, seeks to re-vindicate it, and this plea is available to those to whom I sell for value and their assigns.

Nevertheless, the law identifies several instances where *exceptio rei venditae et traditae* is not applicable; which includes cases of gifts.

In the case of ***Tissera v. William*** (1944) 45 NLR 358, Keuneman J. held with observing the Voet's Commentaries: Book XXXIX-Title 5;

> *"...Counsel for the appellant argued that under this issue the Commissioner has utilized the exceptio rei venditae et traditae, and that this exception is not applicable to the case of a donation. Certainly no authority has been cited to me to show that this exception applies in the case of a donation, nor am I satisfied that a donation of this kind can be regarded as a sale.*
>
> *Voet (XXXIX 5, 10) dealing with donations states as follows: - ....in case of doubt "the presumption should not be in favour of a donation, secondly because a*

donation is stricti juris and on that account should receive a stricter construction so as to burden the donor as little as possible.." [emphasis added]

Therefore, as the deed No.970 is a deed of gift, it is apparent to this Court that the principle of *exceptio rei venditae et traditae* cannot be applied in the present application.

The Appellant submits that even if the title of the land in question was repassed to its original owners Vineetha Jayasuriya and Baby Champa Matilda by the deed of revocation No.710, said Vineetha Jayasuriya and Baby Champa Matilda had a legal right to transfer their undivided shares to the Appellant by four deeds of transfer respectively deed No.08 (marked as **P-4**), deed No.3774 (marked as **P-5**), deed No.3775 (marked as **P-6**) and deed No.4598 (marked as **P-7**). The Appellant's contention is that whether the deed of gift No.970 is valid or invalid it makes no difference with regard to the devolution of title and the Appellant has become the absolute owner of the property.

When carefully examining the aforesaid transfer deeds (marked as **P-4**, **P-5** and **P-6**) it appears that what was transferred by the transferee is the title that she received upon the said deed of gift No.970.

Deed of transfer No.08 marked as **P-4**, at p.2

> "**ඉහත කී උපලේඛනය නම්:-**
>
> 1977 ක් වූ මැයි මස 19 වන දින චාල්ස් විරිත්තමුල්ල නොතාරිස් මහතා සහතික කරන ලද <u>අංක 970 දරණ තෑගි ඔප්පුව</u> අනුව අයිතිව නිරවුල්ව භුක්තිවිඳගෙන එන**..**"

Deed of transfer No.3774 marked as **P-5**, at p.1

"බෙලිඅත්තේ පදිවි විනීතා එදිරිවීර ජයසූරිය වන මම මට මෙහි උපලේඛනයෙහි අංක 1 ට සඳහන් දේපල මෙම කන්තෝරුවේදි සහතික කළ අංක 3396 දරණ ඔප්පුව පිටද අංක 2 ට සඳහන් දේපල මෙම කන්තෝරුවේදි සහතික කළ අංක 970 සහ 1977.05.19 දින දරණ ඔප්පුව පිට අයිති පහත උපලේඛනයෙහි සඳහන් දේපල.."

Deed of transfer No.377**5** marked as **P-6**, at p.1

"බෙලිඅත්තේ පදිවි විනීතා එදිරිවීර ජයසූරිය වන මම මට මෙ මෙම කන්තෝරුවේදි සහතික කළ අංක 970 සහ 1977.05.19 දින දරණ ඔප්පුව පිට අයිති පහත උපලේඛනයෙහි සඳහන් දේපල.."

Therefore, since the deed of revocation No.710 is valid and the deed of gift No.970 does not transfer any rights/title, consequently aforementioned three deeds of transfer marked as **P-4, P-5** and **P-6** does not convey any rights before the law.

The Appellant, further submits that title rights of Baby Matilda's undivided share was transferred to the Appellant by the deed of transfer No.4598 dated 27.10.1984 (marked as **P-7**). According to the recitals of the said deed, it was stated that Baby Matilda was transferring the rights she received from transfer deed No.3775 which does not convey any rights as for the reasons discussed above.

Deed of transfer No.4598 marked as **P-7,** p.1

"බෙලිඅත්තේ පදිංචි අලුත් පටබැදිගේ බේබි මැටිල්ඩා හෙවත් චම්පා මැටිල්ඩා වන මම මට මෙම කන්තෝරුවේදී සහතික කළ අංක 3775 සහ 1983.8.20 ඔප්පුව පිට අයිති මෙහි පහත උප ලේඛනයෙහි විස්තර කරනු ලබන දේපළ.."

Therefore it is clear to this Court that the deed of transfer No.4598 also does not convey any rights before the law.

The Appellant submits that the Learned High Court Judges have misguided when they held that the ownership of the Respondent was established in proceedings initiated under Section 66 of the Primary Court Procedure Act. The Respondent argues that nowhere in judgement, the Learned High Court Judges have stated that the Respondent has established his ownership to the property in question in the Primary Court Proceedings.

Section 66 of the Primary Courts Procedure Act which deals with inquiries into disputes affecting land, where a breach of the peace is threatened or is likely. In the case of ***Rajamanthri Gedera Somalatha v. Wajira Kanthi Rathnasinghe*** **(**SC Appeal 33/2013, SC minutes dated 07.11.2019) Justice Vijith K. Malalgoda PC. cited with approval of the well-known decision of ***Ramalingam v. Thangarajah*** (1982) 2 Sri L.R 693 where it was held that a matter under section 66 of the Primary Court Procedure Act is not a civil action and the object is to prevent a breach of peace, not to decide any question of title or right to possession of the parties to the land. Accordingly, based on the Order made by the Magistrate's Court under the section 66 application, it cannot be justified one's possession or title rights to a land. Therefore, it is apparent that Section 66 of the Primary Court Procedure Act cannot be applied to the present application.

By considering above circumstances, I answer the questions of law as follows,

1) No
2) No
3) No
4) No
5) No
6) No

Therefore, I dismiss the appeal. Parties to bear their own costs.

Judge of the Supreme Court

Murdu N.B Fernando PC, J.

I agree.

Judge of the Supreme Court

A.A.U Wengappuli J.

I agree.

Judge of the Supreme Court