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

In the matter of an Appeal against the judgement of the High Court of Civil Appeals of the Sabaragamuwa Province Holden at Kegalle in Appeal No. 36/2015(F).

SC Appeal 117/2017
SC /HCCA/LA No. 483/16
WP/HCCA/KEG Appeal
No. 36/2015(F)
DC Kegalle Case No. 26656/P

Rajakannagedera Senarath Wijesinghe
Parape, Rambukkana

2nd Defendant-Appellant-Appellant

Vs.

Rajakannagedera Lalith Chandana
Thusitha Kumara,
Parape, Rambukkana

Plaintiff-Respondent-Respondent

1. Manathunga Arachchilage Piyadasa
   Parape, Rambukkana.

1A. Manathunga Arachchilage Ranjith
Thilakasiri Manathunga

1B. Manathunga Arachchilage Sarath
Nandasiri Manathunga.

1C. Lalitha Sriyawathie Manathunga
All of Parape Rambukkana.

3. Rajakannagedera Premawathie
   Parape Rambukkana.

4. Manathunga Dewage Premawathie
   Parape Rambukkana.

5. Edirisinghe Dewage Edirisinghe
   Parape Rambukkana.

Defendants-Respondents-Respondents

Before	:	Jayantha Jayasuriya, PC, CJ Yasantha Kodagoda, PC, J A.H.M.D.Nawaz, J.
Counsel	:	Anuruddha Dharmaratne with Indunil Piyadasa instructed by Indika Jayaweera for 2nd Defendant-Appellant -Appellant. Dr. Sunil Cooray with Sudharshini Cooray for Plaintiff-Respondent-Respondent.
Written submissions Filed by	:	2nd Defendant-Appellant- Appellant on 08.08.2017 and 11.01.2022.
	:	Plaintiff-Respondent-Respondent on 05.02.2018 and 06.01.2022.
Argued on	:	06.08.2021, 07.10.2021 and 26.11.2021
Decided on	:	07.09.2022

Jayantha Jayasuriya, PC, CJ

The plaintiff-respondent-respondent (hereinafter called the "respondent") instituted action in the District Court of Kegalle to partition the land in extent 3 roods and 18 perches, called "Galpeelle Weralugahamulla Hena presently Watta" that was more fully described in the schedule to the plaint. Initially there were four defendants and the 5th defendant was added on the latter's application to intervene.

The respondent having pleaded the pedigree moved that the shares be allocated as set out below:

respondent - 7/216 from the land and ½ share of the two buildings and the copra hut

1st defendant – 129/216

2nd defendant - 52/216

3rd defendant - 21/216

4th defendant – 7/216 from the land and ½ share of the two buildings and the copra hut

The 2nd defendant-appellant-appellant (hereinafter referred to as the "appellant") pleaded that the shares be allocated according to the pedigree set out in his amended statement of claim dated 17 February 2006 and the land and the buildings be partitioned accordingly.

The learned District Judge in his judgment directed the partition of the land *inter alia* as follows:

respondent – ½ of the copra hut and ½ of the two boutique premises and ½ of the land upon which the copra hut and the two boutique premises falls;

appellant – undivided 87/216 shares (excluding the copra hut and the two boutique premises and the land upon which the copra hut and the two boutique premises falls);

½ share of the copra hut, ½ share of the two boutique premises and ½ share of the land upon which the copra hut and the two boutique premises falls, were left un allocated.

The appellant appealed against the said judgment. Appellant's grievance was the manner in which the two boutique premises and the copra hut was allocated by the District Court. The Civil Appellate High Court by its' judgment dated 01.09.2016, dismissed the said appeal.

Being aggrieved by the said judgment of the Civil Appellate High Court, the appellant sought leave to appeal from this Court and this Court granted leave to appeal on the following questions of law.

(i). Have the learned judges of the High Court erred in law in failing to appreciate and consider that the 2nd Defendant is entitled to ½ share of the two boutiques situated near

the Western boundary of the corpus depicted as 'C' in Preliminary Plan No 1906 dated 19.05.1998 prepared by P.M.G. Munasinghe, Licensed Surveyor?

(ii) Have the learned judges of the High Court erred in law in failing to appreciate and consider that the 2nd Defendant is the absolute owner of the copra hut situated near the Western boundary of the corpus depicted as 'D' in Preliminary Plan No 1906 dated 19.05.1998 prepared by P.M.G. Munasinghe, Licensed Surveyor?

(iii) Have the learned judges of the High Court erred in law failing to appreciate and consider that the learned trial judge erred by not granting ½ of the said boutiques and the said copra hut to the 2nd Defendant ?

The learned Counsel for the appellant submitted that the grievance of the appellant against the judgments of both the District Court and the Civil Appellate High Court is the allocation of the two boutique premises and the copra hut.

Therefore, this judgment is confined to the issues relating to the allocation of the two boutique premises and the copra hut and does not deal with the allocation of shares relating to the land excluding the two boutique premises and the copra hut.

In the preliminary plan No 1906 dated 19.05.1998 prepared by P.M.G.Munasinghe licensed surveyor the two boutique premises are depicted as house marked 'C' and the copra hut is depicted as house marked 'D'. Therefore, it is clear that the two boutique premises and the copra hut are two separate entities that are detached and could be identified separately. According to the surveyor's report, the appellant had claimed both these buildings.

The appellant's claim to one of the two boutique premises (1/2 share of the building identified as 'C' – two boutique premises) is on the basis that his parents Ukkuwa and Silindu co-owned the thatched house that existed at the time they gained title as co-owners of the land together with the thatched house situated therein, in the year 1940 and subsequently in the year 1990 his mother Silindu, transferred all her rights to the appellant. However, the learned counsel for the respondent submitted that it was Ukkuwa who improved the thatched house and converted it to the present form, which consists of two boutique premises and therefore said Ukkuwa had sole rights of the two boutique premises. Thereafter Ukkuwa in the year 1990 gifted the aforesaid

two boutique premises to the respondent and another person called Somawathie. Therefore, he contends that the respondent is entitled to ½ share of the two boutique premises and the appellant has no valid claim to the said two boutique premises.

There is no dispute on the fact that the building described as 'two boutique premises' in the preliminary plan 1906, was identified as a 'thatched house' at initial stages which was subsequently improved.

It is pertinent to observe that there is no contest between the parties relating to the devolution of rights and shares unto Ukkuwa and Silindu. There is no contradiction between the pedigrees submitted by both parties, in relation to the same. Admissions 1, 3 and 5 recorded in the District Court also confirm the same. Furthermore, parties admit that the rights of Silindu devolved on the appellant. However, the claim and the counter claim by the appellant and the respondent in relation to the two boutique premises is based on the issue whether Silindu had any right to the two boutique premises at the time she transferred her rights to the appellant, or not.

Competing claims on the copra hut situated on the land also arises due to a series of gifts and cancellation of such gifts and subsequent transfers effected by said Ukkuwa.

It was one P.G.Bandiya who had initially transferred his rights in the relevant land in extent three roods and eighteen perches together with the 'thatched house' situated therein to his daughter Silindu and son-in-law Ukkuwa by the deed bearing No.1020 dated 19 September 1940 and attested by J.P.W.Gunaseka Notary Public – the deed produced marked 2V1. Both parties concede that the 'thatched house' referred to in the said deed was later improved and is presently referred to as 'the two boutique premises'.

Silindu in the year 1987 by deed No. 53937 attested by S.G.Patikiri Arachchi, Notary Public gifted an 'undivided 1/4th share of the land in extent three roods and eighteen perches' which is more-fully described in the schedule of the said deed, to the appellant. The said deed is produced marked 2V2. However, it is pertinent to observe that the aforesaid deed 53937 does not make any reference to deed No. 1020 dated 19th September 1940 (2V1). Furthermore, in deed 53937 (2V2) it is claimed that Silindu's rights were derived from a deed that was not available at the time the deed 53937 was attested. (....දැනට ඉදිරිපිට නැති ඔප්පුවක් පිට අයිතිව නිරවුල්ව භුක්ති විඳින...) It is also important to note that there is no reference to the 'thatched house', in the said

deed. However, three years thereafter, in the year 1990 said Silindu had transferred undivided ½ share of the two boutique premises to the appellant by the deed No. 4758, attested by K.Wijesundara Notary Public on 22 October 1990. The said deed 4758 was produced marked 2V3. This deed describes Silindu's rights as rights derived from the deed No 1020 dated 19th September 1940 (2V1).

An examination of deed 53937 (2V2) reveals that no reference is made to the fact that Silindu co-owned with Ukkuwa the undivided 1/4th share of the land in extent three roods and eighteen perches, in the said deed dated 20th December 1987. Furthermore, the said deed does not make any specific reference to any building situated therein. Specific reference to "undivided ½ share of two boutique premises" is made in the deed attested three years later – deed No. 4758 dated 22 October 1990 (2V3). Silindu by the last mentioned deed 4758 (2V3) attested by K.Wijesundera Notary Public, transferred undivided ½ share of the two boutique premises to the appellant. Appellant's claim to the ½ share of the two boutique premises is based on the last mentioned deed where Silindu transfers her rights to him.

However, it is pertinent to observe that Ukkuwa, initially in the year 1981 had gifted the two boutique premises to the father of the respondent – R.G.Piyasena - by the deed 12174 dated 01 January 1981 attested by S.M.B.Jayaratne, Notary Public (which was produced P7). However, thereafter in the year 1984 Ukkuwa proceeded to cancel the last mentioned deed by the deed 13114 dated 31 October 1984, attested by S.M.B.Jayaratne, Notary Public (which was produced 2V4). Thereafter in the year 1990, one month prior to the execution of the deed 4758 (2V3) by Silindu, Ukkuwa had transferred the two boutique premises to the respondent and another person named Somawathie, by the deed no. 5326 dated 24th September 1990, attested by N.M.Jayatilake Notary Public. The said deed 5326 was produced marked P9. The Respondent's claim in relation to undivided ½ share of the two boutique premises is on the basis that it was Ukkuwa who had the sole rights to the two boutique premises and thereafter the said Ukkuwa transferred his rights to the respondent and another person named Somawathie. It was contended that Ukkuwa derives sole rights to the said two boutique premises as it was he who improved and converted the 'thatched house' into two boutique premises. On this basis it was further contended that Ukkuwa had the right to transfer the entirety of the boutique premises to the respondent and Somawathie leaving ½ share to each of them. It is the respondent's claim, that Silindu's subsequent transfer

of ½ share of the two boutique premises to the appellant by the deed 4758 (2V3) has no force of law and therefore the appellant's claim of ½ share on the boutique premises should fail.

The learned District Judge had accepted the position taken up by the respondent. The learned judge is of the view that the respondent on a balance of probability had established that Ukkuwa having improved the thatched house into two boutique premises thereafter transferred the said two boutique premises to the respondent and Somawathie. The learned trial judge further observed that Silindu had not raised any objections to the transfer of the entirety of the two boutique premises by Ukkuwa but had later on made the transfer of her rights to the appellant. On these grounds the learned trial judge held that ½ share of the boutique premises should be allocated to the respondent and balance ½ share should be left unallocated as Somawathie was not a party to the proceedings.

The learned judges of the Civil Appellate High Court are of the view that the learned trial judge had correctly analysed all material and allocated shares accordingly. Therefore, they dismissed the appeal. However, it is pertinent to observe that the learned judges of the High Court before reaching the conclusion on the allocation of shares by the learned trial judge had observed, that it is only one premises of the two boutique premises that had transferred to the respondent according to the deeds that were produced. This observation is vague and contradictory to the evidence presented at trial. The respondent's position before trial court - the position which was accepted as proved by the trial court, was that Ukkuwa who alone had sole rights to both boutique premises transferred all his such rights to the respondent and said Somawathie.

In examining the transfer of rights by Ukkuwa and Silindu in relation to the two boutique premises, the main issue that is to be considered is whether it was Ukkuwa who had sole rights to the two boutique premises in view of the improvements purported to have been made or whether Ukkuwa and Silindu continued to enjoy equal rights – ½ share each – to the said two boutique premises. In this regard it is pertinent to observe that the two boutique premises did not exist when Bandia initially transferred the land with the thatched house to Ukkuwa and Silindu in the year 1940. Reference to two boutique premises was made for the first time in the deeds 12173 (2V5) and 12174 (P7) made in the year 1981. Both parties concede that it was the 'thatched house' that was later improved and became the 'two boutique premises'. Therefore, it is clear that initially Ukkuwa and Silindu co-owned the land and the thatched house situated thereon

together with the soil underneath and improvements to the co-owned thatched house situated in the co-owned land were made at a later stage.

Under these circumstances, the main issue that has to be examined is whether both Ukkuwa and Silindu who continues to co-own the land has a co-ownership to the boutique premises situated thereon too? The learned trial judge's conclusion that Ukkuwa had sole rights when he transferred the two boutique premises first in 1981 by way of a gift and thereafter in 1990 after cancelling the said gift is on the basis that the plaintiff-respondent succeeded on a balance of probability to prove that it was Ukkuwa who effected improvements to the thatched house and converted to the two boutique premises.

In this regard it is also important to examine whether there is evidence as to who made those improvements and if so does the fact that who made those improvements to the initial thatched house becomes relevant in determining the rights of Ukkuwa and Silindu?

The respondent, an uncle of respondent namely M.D.S.Manathunga, the appellant and the third defendant-respondent-respondent who is a sister of the appellant, had testified at the trial. The respondent is a nephew of the appellant and the appellant is a son of Ukkuwa and Silindu. The respondent who was thirty eight years at the time of his testimony had said that it was his grandfather Ukkuwa who built the two boutique premises. The respondent, would have been born in the year 1973. Therefore by the time the existence of the two boutique premises was recorded in a deed for the first time in 1981, the respondent was a boy of around eight years of age. Witness Manathunga also in his examination in chief had said it was Ukkuwa who built the two boutique premises. However, the third-defendant-respondent-respondent who is a daughter of Ukkuwa and Silindu and who was born when Silindu and Ukkuwa were living in the land in question, in the examination in chief had said that both Ukkuwa and Silindu built the two boutique premises and members of the family, including the appellant and the respondent's father were living there. This witness was born in the year 1949. In the cross examination this witness had said that she '*did not see'* who built the said two boutique premises. However, she had said that it was both Ukkuwa and Silindu who made the improvements. It is also pertinent to observe that both the respondent and the uncle of respondent had not explained whether they had first hand information as to who improved the thatched house or built the two boutique premises. The learned trial judge had not elaborated the basis on which he accepts evidence presented on

behalf of the respondent that Ukkuwa built the two boutique premises, on a balance of probability. In my view the evidence is very scanty in this regard. One other factor that the learned trial judge had taken into account in reaching this conclusion is that Silindu had not raised any objections when Ukkuwa transferred the two boutique premises mentioned above. In this regard also it is pertinent to observe that there is no sufficient evidence to establish that Silindu had prior knowledge of the transfers made by Ukkuwa. Furthermore, it is pertinent to observe that the third-defendant-respondent-respondent in her evidence said that her mother Silindu did not agree with the manner in which Ukkuwa distributed the property as she was of the view that all three children should be benefitted.

It is settled law that when a person builds on a land the title of the building remains with the person who has the title to the land on which it was built.

> *"Accession was a primary mode of acquisition of property recognised by Civil Law. Exceptions were admitted in regard to movable property for cogent reason of policy, but as far as land was concerned, it was an absolute principal that structures and plantations acceded to the soil and enured to the benefit of the owner of soil. The rule whatever is built or cultivated on land becomes part of the land, was received without modification in Roman-Dutch law and applied equally to the case of a person building on his land with materials of another and to that of a person building on another's land with his own materials"* – **"The Law of Property in Sri Lanka" by G.L.Peiris, Vol I, page 29 (Third Re-print -2009).**

In **De Silva v Haramanis *et al***, 3 NLR 160 at 160, it was held that

> *"A house becomes the property of the owners of the soil on which it is built. Between the owners and the builders there may exist equities, such as a right to compensation, &c, but the ownership of a building cannot (in the ordinary case) be in another".*

I need hardly emphasize that the maxim "*omne quod inaedificator solo, solo cedit*" is now trite law. Every thing that is built on land or on another immovable property accedes to that land or immovable property and it becomes the property of the owner of the land as immovable (E. Poste, Gai Institutiones …, 4th ed.., Oxford, (1904) p.73: The Jurisprudence of Holland by Hugo Grotius 2.1.13 - Translated by R.W.Lee (1926) at Chapter X item 6, page 119.)

However, a person who builds on the land of another may have the right to compensation and the right to retention until compensation is paid. These rights depend on many factors including the status of the improver such as a *bona fide* occupier etc;. In **Hassanally v Cassim**, 61 NLR 529 at 532 Viscount Simmonds stated,

> *"the right of the improver to compensation rests on the broad principle that the true owner is not entitled to take advantage, without making compensation, of the improvements effected by one who makes them in good faith believing himself to be entitled to enjoy them whether, for a term or in perpetuity ".*

In relation to the rights of a co-owner who effects improvements with the knowledge that the property is owned in common and that he is entitled, at partition only to a share of the land, proportionate to his interest, it is observed that,

> *"the equitable rights of the improver have to be restricted appropriately, for the purpose of protection of the other co-owners' interests"* - **"The Law of Property in Sri Lanka" by G.L.Peiris, Vol I, page 46 (Third Re-print -2009).**

Further more, in **De Silva v Siyadoris *et. al*.** 14 NLR 268 at 270, it is observed that :

> *"... the co-owner who puts up a building on the common property is in a totally different position from a person who, under agreement with the owner, builds on the land of another. The co-owner in such a case acquires no title in severalty as against the other owners. One co-owner could prevent him from building on the common property without the consent of the other co-owners (Silva v. Silva, 6 NLR 22), but the building once erected accedes to the soil and becomes part of the common property. The right of the builder is limited to a claim for compensation, which he could enforce in a partition action under sections 2 and 5 of Ordinance No. 10 of 1863."*

When the case of the respondent is considered in the context of the above discussed legal principles it is clear that Ukkuwa who co-owned the land and the thatched house with Silindu does not gain the title of the two boutique premises as a sole owner excluding Silindu, even in a situation where Ukkuwa had made improvements to the thatched house. If at all, his rights to the

two boutique premises are the ½ share of the two boutique premises and a right to compensation for the improvements provided that there is evidence to the effect that he was solely responsible for the improvements.

Furthermore, in **Abideen Hadjiar v Aiysha Umma *et al*** , 68 NLR 411 the rights of an improver who made improvements to the benefit of the owner was discussed. In the said case the court held,

> *"The principle of unjust enrichment has no application where the improver effected the improvements for the benefit of the owner. The essence of a claim for compensation is that the improver expected to enjoy the benefit of the improvements for a term or in perpetuity. In this case, apart from any presumption of advancement in favour of the wife, the 2nd defendant has expressly stated that he effected the improvements in the interests of his wife and children, that is, for their benefit. He cannot put forward his claim after the death of his wife when he had no intention at the time he effected the improvements, to make any such claim against his wife.*
>
> *The 2nd defendant's position is no different even if he effected the improvements with the express or implied consent of his wife, the owner, because he did so for her benefit".* (at page 413)

The legal principle set out in **Abideen Hadjiar** (supra) in my view is equally applicable to right to compensation of an improver who is a co-owner.

In this regard, the evidence of the third-defendant-respondent-respondent who is a daughter of Ukkuwa and Silindu is also relevant. According to her, both Ukkuwa and Silindu at one stage had lived in one of the two boutique premises with their children. It is reasonable to infer that even if it was Ukkuwa who was solely responsible for improvements, Ukkuwa had made those improvements for the benefit of the co-owner, his wife Silindu, too. In the absence of any evidence that Ukkuwa made those improvements with the intention of claiming compensation from Silindu – his wife - Ukkuwa cannot have a claim for compensation against her or her successors.

When the facts of the matter under consideration are examined in the context of the legal principles discussed above, Ukkuwa could not have had rights other than for a half share of the two boutique premises when he transferred his rights by the deed 12174 (P7) in 1981 or by deed 5326 (P9) to the respondent and another person in the year 1990. Silindu's entitlement to ½ share of the land and thatched house that had accrued from the deed No 1020 dated 19th September 1940 (2V1) remained intact. The transfer of her rights to the land in 1987 by deed 53937 (2V2) and the subsequent transfer of her rights to the ½ share of the two boutique premises to the appellant by the deed No. 4758 (2V3) in the year 1990 are lawful and valid transfers. Therefore, the appellant is entitled to ½ share of the building identified as 'two boutique premises' and depicted as 'C' in Preliminary Plan No 1906 dated 19.05.1998 prepared by P.M.G. Munasinghe, Licensed Surveyor. The Respondent's entitlement to the said premises is 1/4th share only and the remaining 1/4th share has to be left un-allotted.

Therefore, the learned trial judge as well as the learned judges of the High Court had erred when they held that the appellant has no rights to the two boutique premises and allocated ½ share of the said premises to the respondent.

In view of these findings, I answer the question no. (i), on which leave was granted, in the affirmative.

I will now proceed to examine the issues pertaining to the allocation of shares relating to copra hut. The said copra hut is depicted as the house marked D in the preliminary plan No 1906 dated 19.05.1998, prepared by P.M.G.Munasinghe licensed surveyor.

The appellant's claim to the copra hut is on the premise that Ukkuwa in the year 1981 by deed of gift 12173 dated 01 January 1981 transferred his rights relating to the remaining land and buildings to the appellant, other than the two boutique premises and the land underneath the two boutique premises. The said deed 12173, attested by S.M.B.Jayaratne, Notary Public was produced marked 2V5. The appellant claims that the copra hut did not exist at the time Silindu and Ukkuwa became co-owners of the land and the thatched house in the year 1940, but was later built by Ukkuwa. It is his position that when Ukkuwa transferred buildings situated in the land excluding the two boutique premises by the aforesaid deed 12173 (2V5), the rights of Ukkuwa in relation to the said copra hut also passed on to him and remained with him. It was

further submitted, that the aforementioned claim of the appellant is further strengthened on the basis that Ukkuwa transferred his rights on the two boutique premises to the respondent's father on the same day by deed 12174 which was produced marked P7 and therefore the 'buildings' referred to in deed 12173 (2V5) is in reference to the 'copra hut'.

However, the respondent disputes this claim. The respondent's claim to the copra hut is based on the deed of transfer executed by Ukkuwa on 24 September 1990. The said deed bearing number 5326 attested by N.M.Jayathilake Notary Public was produced marked P9. Ukkuwa by this deed 5326 purported to have transferred his rights to the copra hut to the respondent and one Somawathie. It is the respondent's contention that even if it is admitted that Ukkuwa's rights to the copra hut was transferred to the appellant by a prior deed in 1981 - deed 12173 (2V5), such rights became transferred to the plaintiff respondent due to the execution of the deed of revocation 1587 dated 23 December 1990 attested by S.K.S.Dissanayake, Notary Public, on account of the operation of the doctrine *exceptio rei venditae et traditae*. The aforesaid deed 1587 was produced marked 2V6. It is the contention of the plaintiff-respondent that Ukkuwa's regaining rights to the copra hut immediately passes to the respondent and Somawathie since Ukkuwa had transferred the copra hut to the plaintiff-respondent and Somawathie at a time when he had no title.

It was further contended that the deed of trasfer bearing No 1588, attested by S.K.S.Dissanayake, Notary Public on 23 December 1990, which was produced marked 2V7, fail to pass on the rights relating to the copra hut, even though the said deed 1588 was executed on the same day as the deed of revocation.

It was also contended that all rights relating to the copra hut did immediately pass to the respondent with the execution of the deed of revocation, since the operation of the maxim *exceptio rei venditae et traditae* validated the prior deed 5326 (P9).

It is pertinent to observe that according to the evidence that transpired at the trial the copra hut had been built in the year 1961 and was used in the coconut business carried on by Ukkuwa. As it was discussed hereinbefore, both Ukkuwa and Silindu had lived with their children in one of the boutique premises and Ukkuwa was engaged in his business there. Therefore it is reasonable to infer that Ukkuwa built the copra hut to the benefit of his family. Based on the legal principles

discussed hereinbefore, title to the said copra hut would devolve on both Ukkuwa and Silindu who were the co-owners of the land, even though it was Ukkuwa who built it. It is also pertinent to observe, as it was referred to earlier in this judgment, that there is no dispute that all rights of Silindu had been transferred to the appellant.

Therefore, the appellant is entitled to the rights of Silindu on a ½ share of the copra hut.

The rights of the appellant and the respondent deriving from the rights of Ukkuwa on the balance ½ share of the copra hut needs to be determined on the nature of transactions that had taken place through four deeds referred to herein before. Those four deeds are; deed 12173(2V5), deed 5326(P9), deed 1587 (2V6) and deed 1588 (2V7). The Transfer of rights in relation to the copra hut based on these four deeds can be summarised as follows:

Ukkuwa in the year 1981 initially had transferred his rights on the copra hut to the appellant by a deed of gift and thereafter in September 1990 transferred the same rights to the respondent by a deed of transfer. Three months later Ukkuwa cancels the gift made to appellant and thereafter on the same day conveys same rights back to the appellant by executing a deed of transfer.

Accordingly, when Ukkuwa conveyed his rights to the respondent by the deed of transfer in September 1990, he did not have title to the copra hut as he had already conveyed his rights to the appellant in 1981 by the deed of gift subject to his life interest. However, he regained the title no sooner he revoked the deed of gift in December 1990 but could he have conveyed the same rights to the appellant by the deed of transfer executed the same day? Did not the rights he gained through the revocation of the gift pass on to the respondent, immediately? The deed of transfer through which Ukkuwa transferred his rights to the respondent in September 1990 (deed 5326-P9) had been properly registered in the folio 285 of volume 288, which was produced marked P1(iv). Did the respondent gain title to the copra hut by operation of law – the maxim *exceptio rei venditae et traditae?*

Claims to title based on the legal maxim *exceptio rei venditae et traditae* is recognised under the Roman Dutch law and the jurisprudence developed over the years describe the manner in which it is applicable in Sri Lanka under the common law.

In **Perera v Perera** 62 NLR 5 Privy Council held that under the said doctrine, the title passes to a vendee at the first moment of acquisition of title by vendor who did not have the right to alienate any rights at the time of alienation.

Privy Council, in **Gunatilake v Fernando** 22 NLR 385 at 390 recognising the applicability of the said doctrine further elaborated that,

> *"Under this exception 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 by the vendor, not only against the vendor, but anyone claiming under the vendor; and though delivery (traditio) was, as the title shows a part of the defence, if the purchaser has acquired possession without force or fraud, he could use the exception, though he had never received actual delivery from the vendor".*

The Privy Council in the same judgement cited with approval the following observations of the Chief Justice in the Supreme Court Decision:

> *"....**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. See Appuhamy v Appuhamy 3 S.C.C. 61, where the whole subject is lucidly explained. 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 had completed his title by securing the delivery of a deed"* (supra at 391).

However, the Supreme Court, in **Siyadoris v Peter Singho** 54 NLR 393 at 394 in deciding the applicability of this maxim held that,

> "*It is self-evident that this exception, which is an equitable plea, cannot be set up by a party who relies on a pretended sale, where there was in reality no consideration and there was no transfer of possession of the property alleged to be sold or delivery of the deed"*

In **Ponnambalam v Balasubramanium** and others [2004] BLR 125 the Supreme Court held that this legal maxim cannot be invoked when there is no delivery or possession and absence of consideration.

I will now proceed to examine the facts of the case under consideration to determine whether the respondent can succeed in invoking the maxim and claim title against the appellant.

The deed 5326 (P9), the deed through which the respondent claims title to the copra hut, was produced in court by the respondent. According to the attestation in the said deed, no consideration had passed at the time of executing the deed. It is also pertinent to note that no other evidence was presented in court that consideration had passed either prior or subsequent to the execution of the deed. Hence an issue arises as to whether the transfer by Ukkuwa to the respondent by deed 5326 (P9) is an *'actual transfer'* or a *'pretended sale'*?

However, no point of contest had been raised before the District Court focusing on this issue. On the strength of the evidence presented in court, following facts can be established. Within three months of the execution of the aforementioned deed, Ukkuwa proceeds to revoke the deed of gift through which he had already transferred his rights to the appellant in 1981, and immediately thereafter, executed a deed of transfer in favour of the appellant again transferring all rights to the land and all buildings excluding the rights to the two shop premises. The respondent in his evidence admits that it is the appellant who is in possession of the copra hut. He does not claim that he had possession at any stage. However, in my view these items of evidence are insufficient to conclude whether or not the respondent could successfully invoke the maxim *exceptio rei venditae et traditae* to his benefit.

When all these matters are taken into account, in my view there is a dearth of evidence for the court to decide whether the legal maxim *exceptio rei venditae et traditae* could be invoked to the benefit of the respondent in these proceedings.

As already observed the issue whether the respondent's claim could be substantiated with the benefit of the legal maxim under consideration has not ben raised at the trial court. If this aspect had been properly raised and a point of contest was framed, all parties would have had the opportunity to present evidence in this regard. If it had been raised it would have crystalised the issue and the required evidence could have been presented. However, neither party took the opportunity when no point of contest was raised. In my view the available evidence is insufficient to reach a finding in favour of the respondent in this regard.

When all these facts are taken together, I am of the view that the respondent cannot successfully invoke the maxim *exceptio rei venditae et traditae* to his benefit. The transfer of rights by Ukkuwa through deed 1588 (2V7) to the appellant prevails. Therefore, all rights of Ukkuwa to the copra hut vests with the appellant. Hence, rights of Silindu – as discussed hereinbefore – as well as rights of Ukkuwa, in relation to the copra hut, had been passed to the appellant and therefore he is entitled to all shares relating to the copra hut.

In view of these findings I answer the question no. (ii), on which leave was granted, in the affirmative.

Accordingly, based on my findings on questions (i) and (ii), I proceed to answer question number (iii), on which leave was granted, also in the affirmative.

Therefore, the appeal is allowed and I set aside the judgement of the learned Civil Appellate High Court dated 01 September 2016. The Judgement of the District Court dated 20th February 2015 is varied to the extent described herein below:

Allocation of Shares to the plaintiff (respondent) and second defendant (appellant):

Plaintiff	– 1/4th share of the two boutique premises and soil underneath
Second Defendant	– Undivided share of 87/216,
	1/2th share of two boutique premises and soil underneath
	All shares of copra hut and soil underneath
Shares unallocated	- 1/4th share of two boutique premises and soil underneath

Points of Contest:

Point of contest no. 7 is answered as follows :

One of the two boutique premises and the soil underneath had been conveyed to the plaintiff and Somawathie.

Point of contest no. 23 is answered as follows:

Ukkuwa's rights other than his rights to the two boutique premises had been transferred to the second defendant.

The Appeal is allowed. The Judgement of the Civil Appellate High Court is set aside and the judgment of the District Court is varied.

Chief Justice

Yasantha Kodagoda, PC. J.

I agree.

Judge of the Supreme Court

A.H.M.D.Nawaz, J.

I agree.

Judge of the Supreme Court