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

S.C Appeal No.18/2010
S.C. (HC) CA LA No.91/09
WP/HCCA/MT/02/2006(F)
D.C. Mount Lavinia No.1622/02/L

1. Gangegoda Appuhamillage Don Edmund Ananda Seneviratne of No.28, First Lane, Epitamulla Lane, Pitakotte.

2. Krishnajeena Seneviratne of No.28, First Lane, Epitamulla Lane, Pitakotte.

Defendants-Appellants-Appellants

Vs.

1. Rohan Tissa Anthony Weeratunga of No.622/9, Walauwatte, Pitakotte.

2. Tissa Indika Weeratunga of No.25/23A, Jayapura Mawatha, Baddegana Road, Pitakotte.

Plaintiffs-Respondents-Respondents

BEFORE	:	Dr. Shirani A. Bandaranayake, CJ. S.I. Imam, J. & R.K.S. Suresh Chandra, J.
COUNSEL	:	Nihal Jayamanne, PC., with Dr. Sunil Cooray and Mokshini Jayamanne for Defendants-Appellants-Appellants. Dr. Jayantha Almeida Gunaratne, PC., with Jagath Wickramanayake for Plaintiffs-Respondents-Respondents.
ARGUED ON	:	20.10.2010.
WRITTNE SUBMISSIONS TENDERED ON	:	Defendants-Appellants-Appellants : 31.01.2011. Plaintiffs-Respondents-Respondents : 10.01.2011 and 10.03.2011.
DECIDED ON	:	15.03.2012.

Dr. Shirani A. Bandaranayake, CJ

This is an appeal from the Judgment of the Civil Appellate High Court of the Western Province, holden at Mt. Lavinia dated 01-04-2009 (hereinafter referred

to as the High Court). By that Judgment the High Court had upheld the Judgment of the District Court dated 03-03-2006, which was in favour of the plaintiffs-respondents-respondents (hereinafter referred to as the plaintiffs-respondents) and dismissed the appeal of the defendants-appellants-appellants (hereinafter referred to as the defendants-appellants). The defendants came before the Supreme Court seeking leave to appeal, which was granted by this Court on the following questions:

1. Did the High Court err by holding that Arthur Weeratunga's "proprietorship" was "reaffirmed by operation of law" and that therefore conveyances made by him by way of gift by the said two deeds are valid?;

2. Did the High Court err by holding that Deeds of Gift Nos.1476 and 10332 conveyed good title in the land in question to the donees who are the two plaintiffs, although the title to the land had previously vested in the Land Reform Commission and the donor Arthur Weeratunga was only a statutory lessee under the said Commission of the said land at the time he executed those two Deeds?;

3. Did the High Court err by failing to adequately consider the language of the specific provisions of the Land Reform Law which are relevant to the facts of this case and the meaning and effect of those provisions?;

4. Did the High Court err in holding that Deeds of Gift Nos.1476 and 10332 were valid Deeds?;

5. Did the High Court err in not considering the provisions of the Land Reform Law which in effect precludes all conveyances, transfers or gifts of land vested in the Land Reform Commission by any person otherwise than as provided for by the Land Reform Law?; and

6. Did the High Court err in not considering that the Deeds of Gift Nos.1476 and 10332 were void and that as a result the *exceptio* cannot be applied to the said void Deeds.

The facts of this appeal, as submitted by the appellants, *albeit* brief, are as follows:

The 2nd defendant-appellant-appellant (hereinafter referred to as the 2nd defendant-appellant) and the 2nd plaintiff-respondent-respondent (hereinafter referred to as the 2nd plaintiff-respondent) are sister and brother, their father being one Arthur Weeratunga. The said Weeratunga had been the original owner of the land in question who had died intestate. The 1st defendant-appellant-appellant (hereinafter referred to as the 1st defendant-appellant) is the husband of the 2nd defendant-appellant and 2nd plaintiff-respondent is the father of the 1st plaintiff-respondent-respondent (hereinafter referred to as the 1st plaintiff-respondent).

The plaintiffs-respondents instituted action against defendants-appellants seeking to set aside the administrator's conveyance No.3987 dated 02-02-1999, attested by M.A. Ellepola, Notary Public. The defendants-appellants pleaded that the Deeds of Gift executed by Arthur Weeratunga, bearing Nos.1476 and 10332 on which the plaintiffs-respondents relied on for their sole ownership of the land in question conveyed no title to the plaintiffs-respondents in view of the fact that at the time of the execution of the said two deeds, Arthur Weeratunga who was

the donor had no title to the land in question, he being only the statutory lessee of the said land under the Land Reform Commission, in terms of the Land Reform Law, No. 1 of 1972.

At the said Trial several Admissions had been recorded. Accordingly, by 1955 the said Arthur Weeratunga was the lawful owner of the said land subject to the life interest of his mother, which was renounced in favour of the said Arthur Weeratunga. It was also admitted that Henrietta Weeratunga, being the wife of Arthur Weeratunga and the mother of the 2nd plaintiff-respondent and of the 2nd defendant-appellant had died in 1997 and her Estate was administered in DC Colombo Case No.4575/T. It had also been admitted that the larger land of which the land described in the schedule to the plaint is a part together with other agricultural land which were owned by the said Arthur Weeratunga, had vested in the Land Reform Commission in terms of Land Reform Law No. 1 of 1972.

The main contention at the Trial had been as to whether Arthur Weeratunga could have executed the Deeds of Gift Nos.1476 and 10332 on 07-11-1994 and 09-12-1979, respectively, when admittedly the title in the properties gifted by the said Deeds were vested absolutely in the Land Reform Commission and whether as a result the said Deeds conveyed title to the donees.

The District Court by its Judgment dated 03-03-2006, had held against the defendants-appellants, which was affirmed by the High Court by its Judgment dated 01-04-2009.

When this matter was taken for hearing, on the basis of the submissions made on behalf of the plaintiffs-respondents and the defendants-appellants, both learned President's Counsel agreed that the issues that has to be gone into by

the Supreme Court, having in mind the questions on which Leave to Appeal was granted by this Court, would be as follows:

1. validity of the Deeds of Gift Nos.1476 and 10332 dated 07-11-1974 and 09-12-1979, respectively, executed by Arthur Weeratunga as the properties in question were vested in the Land Reform Commission at that time, and

2. applicability of the concept of *exceptio rei venditae et traditae.*

Having stated the facts of the appeal and the main questions that were at issue at the hearing, let me now turn to consider the aforementioned questions.

1. **Validity of the Deeds of Gift Nos.1476 and 10332 dated 07-11-1974 and 09-12-1979, respectively, executed by Arthur Weeratunga as the properties in question were vested in the Land Reform Commission at that time.**

It was not in dispute that Arthur Weeratunga, the father of the 2nd defendant-appellant and the 2nd plaintiff-respondent, and his wife Henrietta Weeratunga had owned more than 50 Acres of agricultural land, at the time the Land Reform Law came into operation on 26-08-1972. Arthur Weeratunga had made a statutory declaration in terms of Section 18 of the said Land Reform Law and the lands in question were included in the said declaration.

The contention of the learned President's Counsel for the defendants-appellants was that the Deeds of Gift Nos.1476 and 10332 dated 07-11-1974 and 09.12.1979, respectively, were void for the reason that at the time those two

Deeds were executed by the said Arthur Weeratunga the said lands in question were vested in the Land Reform Commission. Thereby the contention was that as Arthur Weeratunga was only the statutory lessee he could not have executed the said deeds of gift.

In support of his contention, learned President's Counsel for the defendants-appellants relied on the two letters sent by the Land Reform Commission to Arthur Weeratunga in 1974 and 1976 and Section 3(2)(a) and 3(2)(b) of the said Law. It was also submitted that Arthur Weeratunga should have obtained approval from the Land Reform Commission prior to any type of alienation or transfer of his land which was vested with the Land Reform Commission in terms of Section 14 of the Land Reform Commission Law and that Arthur Weeratunga had not adhered to the said provisions stipulated in Section 14.

Land Reform Law, No.01 of 1972, came into being in August 1972, for the purpose of establishing a Land Reform Commission. The said Commission was established mainly in order to fix a ceiling on the extent of agricultural land that may be owned by persons and to provide for the vesting of such lands in extent of such ceiling in the Land Reform Commission.

It is not disputed that Arthur Weeratunga was the owner of the lands referred to in the Deed of Gift No.1476 marked as P2 dated 07-11-1974 and the Deed of Gift No.10332 marked as P4 dated 09-12-1979. Both these Deeds were executed after the enactment of the Land Reform Commission Law, No.1 of 1972.

Arthur Weeratunga, by document dated 31-10-1972 had made the Statutory Declaration under Section 18 of the Land Reform Commission Law. Thereafter by its letters dated 20-05-1974 (P3) and 23-01-1976 (P5), the Land Reform Commission had made a Statutory Determination in terms of Section 19 of the said Law. Section 19 of the Land Reform Commission Law is in Part II of the

Law, which deals with Declaration in respect of agricultural land and vesting and alienation of such land. Whilst Section 18 deals with Declaration in respect of agricultural land subject to a statutory lease, Section 19 refers to provisions applicable on the receipt by the Commissioner of a Statutory Declaration. The said Section 19 is as follows:

> "19(1) The following provisions shall apply on the receipt by the Commission of a statutory declaration made under Section 18:-
>
> (a) The Commission shall, as soon as practicable, make a determination, in this Law referred to as a "statutory determination", specifying the portion or portions of the agricultural land owned by the statutory lessee where he shall be allowed to retain. In making such determination the Commission shall take into consideration the preference or preferences, if any, expressed by such lessee in the declaration as to the portion or portions of such land that he may be allowed to retain.
>
> The Commission shall publish the statutory determination in the Gazette and shall also send a copy thereof to such lessee by registered letter through the post. Such determination shall be final and conclusive, and shall not be called in question in any court, whether by way of writ or otherwise.
>
> . . . . "

The two documents referred to above sent by the Land Reform Commission dated 20-05-1974 (P3) and 23-01-1976 (P5) clearly show that the Land Reform had made a Statutory Determination in terms of Section 19 of the said law with regard to the land in question. In fact the said letters had clearly stated that they are being sent for the purpose of Statutory Determination in terms of Section 19 of the Land Reform Law.

The question that has to be considered therefore is whether under such circumstances, the land could have been gifted to another party. In other words, it would be necessary to consider the actual effect of the Statutory Determination in terms of the Land Reform Law.

Section 20 of the Land Reform Law deals with the effect of a Statutory Determination published under Section 19 of the said Law, which reads as follows:-

> "Every statutory determination published in the Gazette under Section 19 shall come into operation on the date of such publication and the Commission shall have no right, title or interest in the agricultural land specified in the statutory determination from the date of such publication."

A plain reading of the said Section 20, clearly indicates that when a Statutory Determination is published in the Gazette in terms of Section 19, from the date of such notification is published, the Land Reform Commission shall not have any right, title or interests in the said agricultural land. Accordingly, when an agricultural land owned by a person in excess of the ceiling on the date of commencement of the Land Reform Law had been vested in the Commission, and the said land be deemed to be held by such person under a statutory

lease from the Commission, thereafter on the basis of a Statutory Declaration made by the statutory lessee, if a Statutory Determination is made, the Land Reform Commission would not have any right, title or interest from the date of the publication in the Gazette of the Statutory Determination. Therefore when the Statutory Determination is made and the Gazette Notification is published, the person in whose favour the said Determination was made would become the owner of the land stipulated in the said Statutory Determination.

This position was considered in **Jinawathie and Others v Emalin Perera** ([1986] 2 Sri L.R.121) by a Divisional Bench of this Court. In that, the objectives of the Land Reform Law and the effects of a Statutory Determination were clearly considered and it was held that,

> "Once the statutory determination is made the person in whose favour it was made becomes owner of the land specified in the determination with all the incidents of ownership."

Considering the aforementioned, it is evident that the Statutory Determination was made in favour of Arthur Weeratunga on 23-01-1976 (P5). In terms of Section 20 of the Land Reform Law, referred to earlier, thereafter Arthur Weeratunga became the owner of the land specified in the said Determination.

Learned President's Counsel for the defendants-appellants contended that making the Statutory Determination alone would not be sufficient for a person to become the owner of the land specified in the Determination, and it would be necessary for the said Determination to be published in the Gazette and this requirement is specifically stated in Section 20 of the Land Reform Law. It was further submitted that the relevant Gazette Notification in regard to the Statutory Determination dated 23-01-1976 (P5) had been published only on

24-12-1981 (P7) and that the two Deeds were executed on 07-11-1974 (P2) and 09-12-1979 (P4), well before the said Statutory Determination was published in the Gazette.

Accordingly, the question that would arise at this point is that as to whether the effective date of a Statutory Determination is to be determined on the basis of the date of the Gazette Notification.

As stated earlier, Section 20 of the Land Reform Law had stated that, every Statutory Determination published in the Gazette shall come into operation on the date of such publication. In terms of a plain reading of the said Section 20, the Statutory Determination with regard to Arthur Weeratunga would come into effect only after its publication in the Gazette dated 24-12-1981 (P7).

Learned President's Counsel for the respondent strenuously contended that the effective date where full ownership was allowed to be retained by Arthur Weeratunga was the date on which the Statutory Determination was made in terms of Section 19 of the Law by the Land Reform Commission. Therefore the contention was that such date would be 23-01-1976 (P5) where the amended Statutory Determination was issued by the said Commission. Learned President's Counsel for the respondents relied on the decision of **Jinawathie v Perera** (Supra), where it was stated that, 'once the Statutory Determination is made the person in whose favour it was made becomes owner of the land specified in the determination with all the incidents of ownership'.

Learned President's Counsel for the appellants, on the other hand strenuously contended that a Statutory Determination in terms of Section 19 of the Land Reform Law alone is not sufficient for the land in question to be transferred back to a statutory lessee. The learned President's Counsel relied on paragraphs 4,5 and 6 of the letter marked as P5 issued in terms of Section 19 of the Land

Reform Law by the Commission to said Arthur Weeratunga. The said paragraphs are as follows:

4' bvïs uekSu iusmq¾K jq miq bvï m%;sixialrK fldñIka iNdj tu jHjia:dms; ksYaph Y%S ,xld .eiÜ m;%fhys m%isoaO lrkœ ,nk w;r" tys WoaOD;hla ,shdmosxÑ ;emEf,ka Tng tjkq ,efí'

5' jHjia:dms; nÿj, kshuhka yd fldkafoais oelafjk mkf;a 15 jk j.ka;shg Tnf.a wjOdkh fhduq lrkq leue;af;ñ' fldñIka iNdfõ ukdmh wkqj jHjia:dms; noao wj,x.= lrk ;=re" by; Wmf,aLkfha olajd we;s bvï yd Tnf.a jHjia:dms; m%ldYkfha we;=,;a lr we;s bvï jHjia:dms; noaola hgf;a Tn ika;lfhys ;nd .kakd nj igyka lr.; hq;=hs'

6' jHjia:dms; ksYaph .eiÜ m;%fhys m,l, miqj muKla wjidk ksYaphka jk w;r tfia m %ldYhg m;a lsrSug fmr fuu fldñIka iNdfõ ukdmh mrsos th ixfYdaOkh l, yels njo olajkq leue;af;ñ (emphasis added).

Paragraph 6 of the said Statutory Determination issued in terms of Section 19 of the Land Reform Law, therefore clearly shows that only on the publication of such a Statutory Determination that it would become a full Determination.

In fact in **Jinawathie and Others v Emalin Perera** (Supra) the Divisional Bench of this Court had considered this aspect carefully.

It is to be borne in mind, that in **Jinawathie** (Supra) the land in question was 234 acres in extent and was co-owned by 3 parties. Whilst the plaintiffs-respondents and the 1st defendant-appellant became entitled to an undivided 1/3 share each, the balance 1/3 belonged equally to the 4th to the 6th defendants-appellants and to the wife of the 3rd defendant-appellant in that case. The 4th to the 6th defendants-appellants were all brothers and the 3rd defendant-appellant was the wife of another brother. With the consent of all of them, the 2nd defendant-appellant from January 1970 had managed the said estate for and on behalf of all the co-owners referred to above.

In **Jinawathie's** case (Supra), the plaintiff-respondent had commenced these proceedings before the District Court praying for a declaration of title to and the ejectment of the defendants-appellants from the distinct and separate extent of 50A – 0R – 21P from and out of the larger land of 234 acres in extent on the ground that the plaintiffs-respondents were entitled to the sole and exclusive possession of the said distinct and separate extent made under Section 19 of the Land Reform Law.

The Divisional Bench of the Supreme Court in **Jinawathie v Perera** (Supra), stating that when the Land Reform Commission makes a Statutory Determination under Section 19, it does so on the footing that the statutory lessee was in law the owner of such land immediately prior to 26-08-1972, held that the plaintiff-respondent's action is entitled to succeed.

In arriving at that conclusion, the Divisional Bench had carefully considered the applicability of the provisions of the Land Reform Law of 1972 and how it operates and had succinctly stated thus:

> "The object of the Land Reform Law was to impose a ceiling on land ownership restricting a person's holding to a maximum of 50 acres .
>
> Upon the coming into operation of the Land Reform Law No.1 of 1972 on 26.08.1972 all agricultural land in excess of 50 acres became vested in the Land Reform Commission in absolute title free from all encumbrances and the former owner became a statutory lessee who had to make a statutory declaration within the specified period on the prescribed form of the total extent of the agricultural land held by him as such statutory lessee. In the declaration the required particulars had to be furnished along with a plan or sketch plan. The portion which the statutory lessee would prefer to retain could also be indicated.
>
> Thereafter the Land Reform Commission makes a statutory determination specifying the portion or portions of the land which the statutory lessee is allowed to retain. **On the publication of the statutory determination in the Gazette the Commission disentitles itself to any right or**

interest in the agricultural land specified in the statutory determination from the date of such publication" (emphasis added)**.**

It is not disputed that the Statutory Determination was published in the Gazette of 24-12-1981 (P7). In view of the provisions laid down in Section 20 of the Land Reform Law as well as the decision in **Jinawathie v Perera** (Supra), it is evident that until the date of the said publication of the Gazette Notification, Arthur Weeratunga did not have title to the land in question and therefore he was not in a position to gift, sell or exchange the lands or to execute deeds for any such purpose. The only exception to this is to obtain permission from the Land Reform Commission as provided in Section 14 of the Law.

It is also not disputed that Arthur Weeratunga had not taken steps in terms of the said Section 14 of the Law, but had executed the two Deeds of Gift, marked as P2 and P4 in 1974 and 1979 respectively, to his son, Tissa Weeratunga, the 2nd plaintiff-respondent and to his grandson Rohan Weeratunga, the 1st plaintiff-respondent.

In view of the aforesaid it is quite clear that Arthur Weeratunga could not have validly executed the said two Deeds of Gift and therefore they cannot claim any rights under the said Deeds of Gift as they stand in terms of the provisions of the Land Reform Law as Deeds which are null and void.

2. **Applicability of the concept of *exceptio rei venditae et traditae.***

Learned President's Counsel for the respondents submitted that even if Arthur Weeratunga could not have executed Deeds until the said Statutory Determination was published in the Gazette, notwithstanding the above, the two Deeds which were executed by Arthur Weeratunga prior to the Gazette Notification, would remain valid, on the basis of the applicability of the principle *exceptio rei venditae et traditae.*

Learned President's Counsel for the respondents contended that the learned President's Counsel for the appellants had relied on the decisions in **Kanapathipillai v Vethanayagam** ((1963) 66 N.L.R. 49) and **Piyadasa v Piyasena** ((1967) 69 N.L.R. 332). Referring to the said decisions , learned President's Counsel for the respondents submitted that when Basnayake, C J., in **Kanapathipillai v Vethanayagam** (Supra) had held that there was no authority to support the extension of the principle of *exceptio rei venditae et traditae* to donations, which was followed by Manicavasagar, J., in **Piyadasa v Piyasena** (Supra), that the Court was clearly in error and therefore the said decisions were *per incuriam*.

The concept of *traditio* in Roman Dutch Law means delivery and according to Voet (Commentaries on the Pandects – 41.1.34)

> "Delivery which forms one of the methods of acquiring ownership under the law, is a giving from hand to hand - that is to say, a transfer of possession."

This doctrine has been accepted by our Courts as Maartensz, A J., in **Esufboy v Jeevojee** ((1931) 32 N.L.R. 356) had clearly stated that,

> "Delivery means voluntary transfer of possession from one person to another."

The Case Law clearly indicates that the concept of *exceptio rei venditae et traditae* had been used extensively in the country. For instance in **Perera v Perera** ((1956) 57 N.L.R. 440) the Supreme Court had held that the scope of this concept is not limited to cases where at the time of the original sale, the vendor had no title at all that he could convey. Again in **Perera v Kiri Honda** ((1956) 58 N.L.R. 545), Sansoni, J., had taken a similar view with regard to the said doctrine.

However, this does not mean that the doctrine could be applied to all categories of transactions, since there are instances where concept of *exceptio rei venditae et traditae* would not apply and the case law of the country clearly shows that the doctrine does not apply to a matter which deals with a donation.

In **Don Mathes v Punchi Hamy** (Wendt's Reports 122) considering the applicability of the doctrine, Clarence, J., had stated that,

> "The conveyance being merely a voluntary one, we are disposed to think that Siman's subsequently acquired title cannot be availed of by plaintiff, and that the plaintiff must take the subject-matter of the gift as it stood at the date of his conveyance."

Keuneman, J., in **Tissera v William (**(1944) 45 N.L.R. 358) had clearly stated thus:

> "Certainly, no authority has been cited to me to show that this exception [*exceptio rei venditae et traditae]* applies in the case of a donation, nor am I satisfied that a donation of this kind can be regarded as a sale."

In **Kanapathipillai v Vethanayagam** (Supra), the plaintiff had instituted action against the defendant claiming title to certain property as successor-in-title of a donee under a Deed of Gift executed on 19th November 1899 by a person who had no title to property at the time of the donation, but obtain title (by Crown Grant) a month later. The defendant claimed title by right of purchase on 15th July 1950, from the persons who were said to have inherited the land on the death of the donor. He had been in possession of the land for eight years. Basnayake, C J., had clearly stated that a gift of property by a person who is not the owner of it does not convey title to the donee even if the donor subsequently acquires title to the property. It was clearly held that the *exceptio rei venditae et traditae* does not apply to the case of a donation.

It is to be borne in mind that in deciding that the doctrine does not apply to donation, Basnayake, C J., had not just arrived as the said conclusion. In considering the matter at issue Basnayake, C J., has carefully examined the cases decided on the matter as well as the views expressed by Grotius, Schorer, Van Leeuwen as well as by Voet on the topic. In considering the said principle, Voet had clearly stated thus:

> "All things may be donated which are the subjects of commercial dealing, and which thus can be sold, hypothecated and bequeathed. This means one's own things, but not also those of others so as to have

> the effect that ownership should be at once transferred by donation to the receiver, unless the owner should agree. What was written by Pomponius, that "nothing can be donated except what becomes the property of him to whom it is donated" must be understood in that sense."

It is therefore on the basis of the said authorities that Basnayake, C J., had arrived at the conclusion that the doctrine *exceptio rei venditae et traditae* would not apply for donation.

In **Piyadasa v Piyasena** (Supra) Manicavasagar, J., had agreed with the reasoning of Basnayake, C J., that the doctrine has no application to a gift. In doing so, Manicavasagar, J., had referred to Perezius on Donation (Wickramanayake's translation) in support of his observation which stated thus:

> "A gift is said to be made when anyone grants property and at the same time delivers it with the intention that it should immediately become the property of the person receiving it."

It would therefore not be correct to say that Basnayake, C J., as well as Manicavasagar, J., had erred in deciding the question of applicability of the said doctrine to a gift and it is now well settled law that the concept of *exceptio rei venditae et traditae* has no application to a gift.

In such circumstances, the two Deeds of Gift could not have any validity and therefore both Deeds could become null and void.

For the reasons aforesaid, the questions on which leave to appeal was granted by Court are answered in the affirmative.

The appeal is allowed and the Judgment of the District Court dated 03-03-2006 and the Judgment of the High Court dated 01-04-2009 are set aside.

I make no order as to costs.

Chief Justice

S.I. Imam, J.

I agree.

Judge of the Supreme Court

R.K.S. Suresh Chandra, J.

I agree.

Judge of the Supreme Court