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

1. Wilson Eheliyagoda
   Beragala Road,
   Kegalle.

   1st Defendant

2. P.Piyadasa

3. P. Ariyadasa

   Both of Illukpitiya, Getahetta.

   2nd & 3rd Defendant-Appellants

C.A. NO.460/99F

D.C.AVISSAWELLA CASE NO.16254/P

Karunanayake Gurunnanselage
Somatilake
Illukpitiya, Getahetta.

Plaintiff-Respondent

BEFORE : **SISIRA DE ABREW, J**

K.T.CHITRASIRI, J

COUNSEL : Amarasiri Panditharathne with T.Machado Attorneys-at-Law for the Defendant - Appellants

Lakshman Perera with Anoja Udawerella Attorneys-at-Law for the Plaintiff - Respondent.

ARGUED ON : **22.03.2011 & 23.03.2011**

DECIDED ON : **11th May 2011**

CHITRASIRI, J

The plaintiff-respondent (hereinafter referred to as the respondent) by his plaint dated 31st March 1981 filed action in the District Court of Avissawella to partition the land called Medahinna alias Millagahawatta which is referred to in the schedule to the plaint. Having set out his devolution of title in that plaint, respondent had stated that he is entitled to 2/3rd share of the land sought to be partitioned whilst the first defendant is entitled to the balance 1/3rd share. There was only one defendant shown in the plaint at the time it was filed. The said first defendant in his answer having accepted the devolution of title set out by the plaintiff-respondent had moved that the plaint be dismissed or in the alternative, to allot the 1/3rd share shown to him in the plaint. However, the first defendant did not participate at the trial and therefore no share was allotted to the first defendant probably due to the lack of evidence to establish the title of the defendant.

The 2nd and 3rd defendant-appellants (hereinafter referred to as the appellants) were not made parties to the plaint originally. They were made parties pursuant to a claim made by them before the Surveyor at the time of the preliminary survey. They, before the surveyor, had claimed the entirety of the land to be partitioned on the basis that they have been in possession of the land without any disturbance since the year 1941. Consequently, they were made parties to the action and were named as the 2nd and 3rd appellants.

Admittedly, both the respondent and the appellants had claimed title from the same source. They have relied upon the title of three original owners though

their names differed slightly. Hence, it is evident that there was no dispute as to the original owners of the land.

The respondent claimed title to the land on two deeds. Those being the deed bearing No. 309 executed on 20th November 1974 where 1/3rd share of the land was transferred by one of the said original owners namely Robert Marambe and the deed bearing No.315 by which another 1/3rd share of the land had been transferred by one of the other original owners namely Sampy Bandara. Accordingly, the respondent claimed 2/3rd share of the land by the aforesaid two deeds attested in the year 1974.

The appellants, in their answer had set out the way in which they were supposed to have obtained title to the land with reference to the deeds and also had claimed the land on the basis of longstanding prescriptive title. According to the appellants, the aforesaid three original owners had transferred their rights to Podimenike alias Punchimenike by deed 360 dated10.02.1941. Said Podimenike along with his husband Brampisingngo had transferred their rights to their children who are the two appellants in this case, by deed 847, dated 02.05.1976. Accordingly, the appellants had claimed title to the land sought to be partitioned by deeds as well as by prescription and had stated so in their statement of claim and moved that the plaint be dismissed.

Admittedly, in the year 1948, a Settlement Order had been made in terms of the Land Settlement Ordinance in respect of the land in question declaring that the land be settled in the names of the aforesaid three original owners. In such a situation the question arises whether the transfer effected in the year 1941 in

favour of the appellants' predecessors in title, it being a date prior to the date of the Settlement Order, is valid in law.

In this connection both parties relied upon the decision in the case of **Rajapakse v. Fernando. [20 N L R 301]** In that decision, recognizing the Roman Dutch Law doctrine ***exceptio rei venditae at traditae,*** it was held that 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 acquisition by the vendor. Therefore, the appellants in this instance should have acquired title to the land once the original owners obtained title by the settlement order that was made in terms of the Land Settlement Ordinance.

However, the learned District Judge relying upon the decision in **Karunadasa V Abdul Hameed [61 N L R 352]** had deviated from the said decision of **Rajapakse v Fernando** and had held that the plea of *exceptio rei venditae at traditae* is not available to a purchaser as against a vendor who obtained a settlement order after the purchase was made. This decision in **Karunadasa v Abdul Hameed (supra)** was made relying upon the decision in **Pericaruppan Chettiar v. Messrs. Proprietors and Agents Ltd. [47 N. L. R. 121]** The deed that was executed by the defendant in that case had not been registered whereas the settlement order of 1933 and also the subsequent deed 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.

Therefore 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 at traditae* 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 cases when she decided to deviate from the ruling in **Rajapakse V Fernando. (supra)** Therefore, it is clear that the learned District Judge had erred when she decided not to afford the benefit of the principle exception *rei venditae at traditae* to the appellants in this case.

However, it seems that the decision of the learned District Judge had been made basically on the issue of establishing the identity of the land that was claimed by the appellants. The land claimed by the appellants is referred to as a portion of a larger land of 10 acres 2 roods and 4 perches in extent whereas the respondent has claimed a land identical to the land depicted in the settlement order. Land referred to by the respondent had been identified by the Court Commissioner referring to the land specified in the settlement order. The deed relied upon by the respondent also refers to the same land with identical boundaries. Therefore, the learned trial Judge had preferred to accept the title deeds of the respondent than the deeds of the appellants who claimed an undivided share of a larger land. She also was of much concern as to the non availability of a plan to show the larger land referred to in the deeds of the appellants.

However, it is necessary to note that the learned District Judge has failed to consider the fact that an admission had been recorded at the beginning of the trial as to the land to be partitioned. It is the land depicted in the plan bearing

No. 478 made by the Licensed Surveyor S.R.A.Jayasinghe and was marked in evidence as X. As there had been an admission to that effect the evidence of all the witnesses particularly the evidence relating to the possession of the land had been elicited accepting that the land sought to be partitioned is the land referred to in the said plan marked X. In this connection the learned trial Judge in her judgment has stated:

> "එක්ස් සැලැස්මේ දක්වා ඇත්තේ 1948.01.16 වන දින මුල් අයිතිකරුවන් තුන් දෙනාට නිරවුල් වූ ඉඩම් කොටස බවට සනාථ වී ඇත. එම කොටසට අයිතිවාසිකම් එම තිදෙනාට එදින සිට ලැබී ඇති හෙයින් ඔවුන්ගේ අයිතියට ප්‍රතිවිරුද්ධ අයිතියක් මෙම 2 සහ 3 විත්තිකරුවන් හෝ ඔවුන්ගේ පෙර නිම්කරුවන් ඉදිරිපත් කල බව සාක්ෂි මගින් සනාථ වී නැති බව පැහැදිලිය"

However, second and the third appellants in their evidence have clearly described the way in which they possessed the land. They have obtained subsidiaries for the rubber plantation standing thereon. Officials from the relevant departments also have given evidence in support of this contention of the appellants. Gramasevaka of the area who had been working at all relevant times also has given uncontroverted evidence as to the possession by the appellants of the land sought to be partitioned.

Indeed, the respondent in his evidence in chief itself had admitted that the rubber plantation was never possessed by him and those trees were planted by the father of the two appellants and he was able to possess only the two jack trees standing thereon. (Vide pages 4, 5, 6 and 7 of the proceedings dated 01.08.1995 in the District Court)

In the circumstances, it seems to me that the learned District Judge had not properly evaluated the said evidence as to who was in possession of the land. Instead she had been very much mindful of the fact that the land claimed by the appellants was not properly identified by them. Had the evidence of the witnesses called by the appellants been properly considered by the learned District Judge, her decision could have been different. In fact the respondent himself in his evidence has admitted that he was not in actual possession of the land and had further said that when he tried to possess the land after the same was purchased, appellants have objected and it had led them to file action in the High Court under the Administration of Justice Law prevailed at that time.

In the circumstances, it is my considered view that justice would not be meted out if the evidence as to the possession of the appellants was not properly considered. However, for the appellants to obtain prescriptive title, the District Judge must satisfy herself as to continuous and uninterrupted possession existed adverse to the rights of the owners. Hence, it is difficult at this stage for this Court to consider evidence led before the trial judge and to conclude as to the prescriptive title of the appellants.

Therefore, I decide to send the case back to the District Court for re-trial. Such a step may facilitate the appellants to move for a commission as well, if they so desire in order to establish their position as stated in their statement of claim that the land to be partitioned is a portion of a larger land.

Accordingly, the Registrar of this Court is directed to send the case back to the relevant District Court for re-trial. Learned District Judge is directed to have a *trial de novo*. Judgment of the learned District Judge dated 23.04.1999 is set aside.

No party is entitled to the costs of this appeal.

JUDGE OF THE COURT OF APPEAL

SISIRA DE ABREW, J.

I agree.

JUDGE OF THE COURT OF APPEAL