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

Gamagedara Jayarathna
of Nugaliyadda, Talatuoya.
PLAINTIFF

C.A. Case No. 671/1997 (F)
D.C. Kandy Case No. 12838/P

-Vs-

1. Gamagedara Karunawathie
2. Gamagedara Ranbanda
3. W.H.M. Senevirathna Banda
4. O.K.W. Wilbert
5. Karunarathna

All at Nugaliyadda, Talatuoya.
DEFENDANTS

AND NOW

Gamagedara Jayarathna
of Nugaliyadda, Talatuoya.
PLAINTIFF-APPELLANT

-Vs-

1. Gamagedara Karunawathie
2. Gamagedara Ranbanda
3. W.H.M. Senevirathna Banda
5. Karunarathna

All at Nugaliyadda, Talatuoya.
1st to 3rd and 5th DEFENDANT-RESPONDENTS

BEFORE	:	A.H.M.D. Nawaz, J.
COUNSEL	:	W.D. Weeraratne for the Plaintiff-Appellant Gamini Hettiarachchi with Sithara Abeywardena for the 4A Defendant-Respondent
Decided on	:	19.06.2018

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

This is a partition action in which the learned District Judge of *Kandy* allotted 10/60th share of the subject-matter to the Plaintiff-Appellant (hereinafter sometimes referred to as "the Plaintiff") at the conclusion of the trial, though he had claimed 29/46th share in his plaint. The reduction of the share of the Plaintiff is traceable to the finding that the learned District Judge has reached at the conclusion of the trial that the 3rd and 4th Defendant-Respondents who had not been assigned any shares in the plaint should also be allotted 5/60th and 30/60th shares.

The principal complaint of the Plaintiff at the hearing of this appeal was that the learned District Judge of Kandy erroneously applied the Roman Dutch law (RDL) principle of *exceptio rei venditae et traditae* to parties who were admittedly Kandyans. The thrust of the argument of the learned Counsel for the Plaintiff-Appellant was that *exceptio rei venditae et traditae* does not apply to parties who are admitted to be governed by Kandyan law. No doubt an admission was recorded at the trial that the parties were subject to Kandyan law. Hence the argument that the RDL principle has no place in Kandyan law.

I must state at the very outset that the learned District Judge of the *Kandy* applied the Roman Dutch law principle of *exceptio rei venditae et traditae* in the allotment of shares to the 4th Defendant-Respondent which has led to the reduction of the shares of the Plaintiff. In order to understand the applicability and application of the Roman Dutch

law principle which the learned District Judge has found for the 4th Defendant-Respondent, a look at the transactions that are material becomes apposite.

Initially Gamagedera Kirihamy and Athugal Pedi Gedera Silindu (the grandmother of the Plaintiff) were admitted to be the joint owners of the property. It so happened that Gamagedera Kirihamy and Athugal Pedi Gedera Silindu made a gift of an undivided 14/15th share of the subject-matter to Manikrala, Ranbanda (the 2nd Defendant) and Mudiyanse by a Deed of Gift bearing No.15201 and dated 22.05.1950. Having thus divested her title, Silindu however transferred a non-existent half share to the 4th Defendant-Respondent by way of Deed of Transfer bearing No.14083 and dated 29.06.1961. Obviously there was no title in her to effect this transfer but she did effect this transfer in 1961.

Six years later after the aforesaid transfer, Silindu reacquired her title by revoking the previous gift made in 1950. In other words she effected the revocation on 15.11.1967 by a Deed of Revocation bearing No.14890. It is this reacquisition of title which the learned District Judge found vested title in the 4th Defendant-Respondent. This occurred through the application of the RDL principle *exceptio rei venditae et traditae*. For the reasons set out below I take the view that the learned District Judge of *Kandy* was quite right in applying this principle in respect of Silindu's transfer to 4th Defendant-Respondent.

Subsequent Acquisition of Title

Silindu the grandmother of the Plaintiff revoked the gift subsequently by the Deed of Revocation bearing No.15201 and dated 22.05.1950.

The general principle is that the vendor must have ownership of the thing he wishes to sell. But the Roman-Dutch Law recognizes the vendor's position in a suit where he had acquired title subsequently. This principle is known as *de exceptione rei venditae et traditae (the plea of "sold and delivered")* in Roman-Dutch Law-See Voet in book XXI (21), title 3. The Roman Dutch Law as laid down by Voet appears as above (Voet 21.3) in T. Berwick's translation of Johannes Voet in a treatise entitled A CONTRIBUTION TO AN ENGLISH

TRANSLATION OF VOET's COMMENTARY ON THE PANDECTS and the following extracts are from *Berwick's Translation* at pp 542 *et seq.*:-

> "Section 1-Since on the confirmation of the right of an alienator (which was defective at the time of the alienation) the originally defective right of the alienee becomes confirmed from the very moment that the vendor acquired the *dominium*; and therefore the *dominium*, from that time annexed to the original purchaser, could not be taken away from him without his own act or consent; hence he has the right of suing his vendor or a third party-possessor on account of the loss of his possession, and of defeating his opponent's plea by the replication of ownership."
>
> "Section 2-But if the purchaser still possesses the thing, and the same persons that are liable to be sued (by him) in respect of its eviction bring an action to evict the property from him, it is in his discretion, whether he will suffer eviction and afterwards, when it has been taken from him. sue the successful party by the action *ex stipulatio in duplum*, or by the action *exempto* for the *id qodintrest* (damages), or whether he will prefer to keep the property and repel his vendor and other like persons seeking to evict him either by the *exceptio rei venditae et traditae* or by the *exceptio doli.*"
>
> "Section 3-This plea may be opposed, not only to the original vendor, but to all those who claiming under him endeavour to evict a thing from the first purchaser; such as those to whom the vendor has again alienated the same thing, whether by an onerous or lucrative title after he became owner (*i.e.*, after he acquired the dominium which he did not have when he first sold it)."

It was these RDL principles that the learned Counsel for the Plaintiff-Appellant argued did not apply to those admittedly governed by Kandyan law.

On a perusal of the cases decided by the Supreme Court on the question of the applicability of this principle, undoubtedly it would be seen that there was a fluctuation

of views of the judges in favour of and against it. There were conflicting decisions and in ***Rajapaksa v. Fernando*** (1918) 20 N.L.R. 301, the Supreme Court (Ennis, J. and Shaw, J.) held that Ordinance No. 7 of 1840 did not apply to estates vesting by operation of law and that consequently there was nothing in that Ordinance to limit the application of the principle of the Roman-Dutch Law. It has to be remembered that Ordinance No. 7 of 1840 was the first ever Prevention of Frauds Ordinance in the country which was followed by Ordinances No. 16 of 1852, 11 of 1896 and 60 of 1947. In fact Ordinance No. 7 of 1840 provided that "No sale, purchase, transfer, assignment, or mortgage of land.....and no promise, bargain, contract, or agreement for effecting such object should be of force or avail in law unless in writing."

Both learned Judges (Ennis, J. and Shaw, J.) authoring two separate judgments stated therein that this is clearly an enumeration of personal transactions, and does not include in its scope transmission of property by operation of law...*see* Ennis, J. at page 304 and Shaw, J. at page 307. Ennis, J. explained it lucidly at page 304:-

> "It seems to me that the English law doctrine, that where A without title sells to B, and A subsequently acquires title, the title enures to the benefit of B; and the Roman-Dutch law doctrine in similar circumstances of "confirmation" (*Voet 21, 3, 1*) is such a transmission".

The upshot of the reasoning is that that the subsequent title enures to the benefit of B, without a further deed from the vendor.

The decision was appealed against to the Privy Council and the decision is reported as ***Rajapakse v. Fernando*** (1920) 21 N.L.R 495. Lord Moulton delivering the opinion of the Privy Council (with Viscount Haldane and Lord Parmoor concurring) agreed with the judgment of the Supreme Court *(supra)* and quite pertinently observed at p.497:-

> ".....their Lordships are of opinion that by the Roman-Dutch law as existing in Ceylon the English doctrine applies that where a grantor has purported to grant an interest in land which he did not at the time possess, but subsequently

acquires, the benefit of his subsequent acquisition goes automatically to the benefit of the earlier grantee, or, as it is usually expressed, "feeds the estoppel."

One could see from this decision one of several modes though which English law was introduced into this country. Judges ventured to apply English law on the premise that the relevant Roman-Dutch principle was no different from the English law principle. Sometimes purporting to apply Roman-Dutch law, judges in fact applied English law.

The decisions of the Supreme Court and Privy Council in ***Rajapakse v. Fernando*** *(supra)* are instances of introduction of English law otherwise than through legislation. That is how our legal system became a proud heir to the gladsome jurisprudence of both English law and Roman-Dutch law and it is richer for this mixed confluence.

The above principle was again extensively discussed by a Full Bench in the case of ***Gunatilleke v. Fernando*** (1919)21 N.L.R. 257, where Bertram C.J. went into the history of the earlier conflicting judgments, and the Full Court held that this principle of the Roman-Dutch Law-

(a) Is not abrogated by Ordinance No.7 of 1840.

(b) Is not available only as a defence, but can also be made the foundation of the action.

(c) Is not, in the latter case, limited to actions brought for the recovery of a lost possession.

Harking back to the equitable principle of feeding the estoppel-the equitable principle which says that if a person promises more than what he can perform, he must fulfil the promise when he secures the ability to do so, Bertram C.J., also held that the Roman-Dutch law is in accord with the English law on the subject that a person who sells property is estopped from disputing the title of his vendee, and that when he subsequently acquires a title, that title passes to his vendee.

> "As it is put in the leading case of ***Doe v. Oliver*** (2 *Smith's Leading Cases*, 11th Edition, 724), "the interest when it accrues feeds the estoppel....."

Ennis, J. and De Sampayo, J. (the other members of the Full Bench) wrote two different judgments affirming the principle. It has to be remembered that the gladsome principle proceeds on the basis that a vendee can plead *exceptio rei venditae et traditae* not only against the vendor but also against his successor in title.

Is not this principle applicable in Kandyan Law?

The learned Counsel for the Plaintiff-Appellant contended that the Roman-Dutch principle of *exceptio rei venditae et traditae* has no place in Kandyan law. I was not referred to, nor have I been able to find any case in which the principle was disapplied in regard to Kandyans who having sold property without title subsequently reacquired title. This argument brought to the fore the status of Roman-Dutch law as the common law or residuary law in this country.

In Ceylon the continuance of the Roman-Dutch Law was guaranteed by the Proclamation of Governor Francis North of September 23, 1799, which declared that the administration of justice and police should be henceforth and during His Majesty's pleasure exercised by all Courts of judicature, civil and criminal, 'according to the laws and institutions that subsisted under the ancient government of the United Provinces', subject to such deviations and alterations as have been or shall be by lawful authority ordained and published.

The Charter of Justice of 1833 and the Ordinance No.5 of 1835 which repealed the Proclamation of 1799 expressly retained that part of it which provided that justice should be administered according to the laws and institutions that were established under the ancient Government of the United Provinces subject to deviations by lawful authority.

This Ordinance also significantly goes on to declare, in terms of even more categorical than those of the Proclamation of 1799, that those laws and institutions "still are and shall henceforth continue to be binding and administered throughout the Maritime Provinces and their dependencies" subject to the aforesaid deviations and alterations.

Thus, the Roman-Dutch Law was firmly enthroned as the common law of this country subject to such deviations as might be legislatively ordained.

The central part of the island did not pass under British rule until 1815, but the Dutch Law as applied to this region was extended to Kandyan Provinces by Ordinance No.5 of 1852. This Ordinance extends to the Kandyan Provinces certain specified branches of the law of the Maritime Provinces, and further enacts that if the Kandyan Law is silent on any matter the law of the Maritime Provinces is to be applied. Section 5 of Ordinance No.5 of 1852 provided that in all cases where there was no Kandyan law or custom applicable to any question arising within the Kandyan Provinces the Court should have recourse to the law of the Maritime Provinces. In fact in ***Samarasinghe v. Samarasinghe*** (1989) 2 Sri L.R. 180 the Court of Appeal described the Roman-Dutch law as 'the common law of the country applicable to the low country Sinhalese and others not governed by their own special laws.'-*see* p.183.

Thus the Roman-Dutch law on *fidei commissa* and gifts have been applied to dispositions of property by persons governed by Kandyan law or Muslim law. Alluding to the judgment of De Sampayo, J. in ***Assistant Government Agent, Kandy v. Kalu Banda*** (1921) 23 N.L.R 26, O.S.M. Seneviratne. J, in the case of ***Ratnayake v. Bandara*** (1986) 1 Sri L.R. 245 at p 248 stated thus:-

> "This case sets out clearly the position when a person subject to the Kandyan Law executes a deed of gift, subject to certain conditions and restrictions which deed is a valid deed in Kandyan law, such an instance will be identified by the term or concept known to Roman-Dutch Law as *fidei commissum* "as a convenient expression" because there is no legal concept known to Kandyan Law as *fidei commissum.*"

In the case of ***Menika v. Banda*** 5 N.L.R. 207 Jayawardene A.J held as follows:-

> "The deed of gift, although it creates a *fidei commissum*, is valid under the Kandyan Law. Although we may resort to the Roman-Dutch law to ascertain whether the deed creates a valid *fidei commissum or not...*"

All these precedents show that Roman-Dutch law continues to be the common law or residuary law in this country when personal laws are silent and this eloquence of the

Roman-Dutch law is evidenced in the case of *exceptio rei venditae et traditae* as the doctrine can be grafted on to persons governed by Kandyan Law.

In the circumstances the learned District Judge of *Kandy* arrived at the correct finding and I see no reason to interfere with the judgment dated 27.06.1997. The judgment is affirmed and I proceed to dismiss the appeal.

JUDGE OF THE COURT OF APPEAL