JUDGMENTS

Deed of Gift / *exceptio rei venditae et traditae* / Land Reform Law

SUPREME COURT

Ganegoda Appuhamillage Don Edmund Ananda Seneviratne* v. *Rohan Tissa Anthony Weeratunge

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

Decided on: 15-03-2012

Decided by: Her Ladyship Hon. Dr. S. Bandaranayake, CJ; Hon. S. I. Imam, J; Hon. R. K. S. Suresh Chandra, J

The Plaintiffs filed this action against the Defendants seeking to set aside the Administrator's Conveyance No. 3987 of 02-02-1999 attested by M. A. Ellepola (N.P.). The Defendants pleaded that the Deeds of Gift Nos. 1476 and 10332 executed by one Arthur Weeratunga on which the Plaintiffs relied to claim sole ownership of the land in question conveyed no title to the Plaintiffs because at the time the said deeds were written the said Arthur Weeratunga was a statutory lessee under the Land Reform Commission, and had no title to the land in question. It was common ground that the said land owned by the said Arthur Weeratunga had vested in the Land Reform Commission under the Land Reform Law.

The main contention at the trial was whether the said Deeds of Gift Nos. 1476 (P2) and 10332 (P4) passed title to the Plaintiffs.

The District Court by its Judgment dated 03-03-2006 held against the Defendants. The said Judgment of the District Court was affirmed by the Civil Appellate High Court by its Judgment dated 01-04-2009.

On appeal to the Supreme Court the questions which arose were whether the Deeds of Gift Nos. 1476 (P2) and 10332 (P4) were valid and effective to pass title as the said properties had vested in the Land Reform Commission at the time, and the applicability of the concept of *exceptio rei venditae et traditae*.

The said Arthur Weeratunga was a declarant under the Land Reform Law, and the lands in question were included in his declaration under section 18 of the Land Reform Law. It transpired that by 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 Land Reform Law.

The Supreme Court referred to section 20 of the Land Reform Law and considered the actual effect of the statutory determination. Her Ladyship the Chief Justice Dr. Shirani A. Bandaranayake said as follows:

"*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.*" (*vide* page 9 and 10)

The Supreme Court held that in terms of 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).

Her Ladyship the Chief Justice further held as follows:

"*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.*" (*vide* page 11)

The Supreme Court cited with approval the decision in *Jinawathie and Others* v. *Emalin Perera*, [1986] 2 Sri L. R. 121.

It was common ground that Arthur Weeratunga had not taken steps in terms of section 14 for an inter family transfer but had executed the two Deeds of Gift Nos. 1476 (P2) and 10332 (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.

The Supreme Court thus held that Arthur Weeratunga could not have validly executed the said two Deeds of Gift, and that the Plaintiffs-Respondents cannot claim any rights under the said Deeds of Gift which in terms of the provisions of the Land Reform Law are null and void.

On the question of the applicability of the doctrine of *exceptio rei venditae et traditae* the Supreme Court citing several authorities held that the doctrine has no application to a gift.

In the circumstances the Supreme Court held that the said two Deeds of Gift Nos. 1476 (P2) and 10332 (P4) could not have any validity, and are null and void.

The Supreme Court allowed the Appeal, and set aside the impugned Judgments of the District Court and the High Court of Civil Appeals.

01/06-07/2012

JUDGMENTS

EPF Act

SUPREME COURT

Kodagoda Arachchige Dayawathi* v. *D. S. Edirisinghe, Commissioner General of Labour and Others

S. C. (FR) No. 241/08

Decided on: 01-06-2009

Decided by: Her Ladyship Hon. S. Tilakawardane, J; Hon. S. N. Silva, CJ; Hon. K. Sripavan, J

The Petitioner claimed violation of her Fundamental Rights enshrined in Article 12 (1) of the Constitution. The Petitioner was a Director of a Company called "Mobistar Telecom (Private) Limited". She was arrested for alleged non-payment of EPF dues. She had been prosecuted in the Magistrate's Court of Colombo for non-payment of EPF dues but she had paid the sum due and settled the matter. She had produced a photocopy of the receipt for the said payment. Nevertheless, she was taken to the Police Station on 25th May, 2008 and remanded till 28th May, 2008. She was produced before the Magistrate's Court of Colombo on 28th May, 2008 and the Magistrate discharged her. It transpired that the EPF money was due not from her Company but from a Company called "Mosquito Coils Company (Pvt.) Ltd.".

The Supreme Court held that the irresponsible and negligent conduct of the 3rd Respondent Assistant Commissioner of Labour led to the illegal arrest and detention of the Petitioner, and that her Fundamental Rights enshrined in Article 12 (1) of the Constitution were violated.

The Supreme Court held that the 3rd Respondent has instituted action in the Magistrate's Court in terms of section 38 (2) of the Employees Provident Fund Act, No. 15 of 1958 (as amended) though the appropriate procedure for obtaining recovery of EPF contributions is to first institute action in terms of sections 17 and 38 (1) of the said Act through the District Court.

The Supreme Court also reached the following specific findings:

> "*Put simply, the 1st, 2nd and 3rd Respondents are required to institute action in accordance with section 17. However, if, and **only** if, the Commissioner is of the opinion that recovery under section 17 of the said Act is (1) **impracticable and inexpedient**, and/or (2) where the full amount due has not been recovered by seizure and sale, **only then** can recovery be made, and **only if** the Commissioner complies with the certificate issuance requirements of 38(1) and 38(2).*" (*vide* page 7)

> "*The **above three procedures** are not **alternative procedure** for **recovery**. The legislature very clearly has set out the scheme step by step as to how the Commissioner becomes entitled to use the procedures set out in section 38(2) of the said Act. The 3rd Respondent had no jurisdiction or power under the said statute to file a certificate in the Magistrate's Court in terms of section 38(2) of the EPF Act without first proceeding under section 17 and thereafter under section 38(1) of the said Act.*" (*vide* page 8)

> "*The offences under the said Employees Provident Fund Act are contained in section 34 of the said Act and the punishment for offences can be found in section 37 ...*" (*vide* page 9)

> "*In terms of **section 40** of the said Employees Provident Fund Act, where an offence under the said Act is committed by a body of persons then if such body of persons is a body corporate, every director and officer of such body corporate shall be deemed to be guilty of the offence. Therefore, it is clear that apart from the recovery procedure set out in section 17, 38(1) and 38(2) the said Act as amended the Commissioner has to institute a separate action in the relevant Magistrate's Court to punish the employer who has defaulted.*" (*vide* page 9)

02/06-07/2012

Civil Procedure Code (Chapter LVIII) / Act No. 10 of 1996 (Commercial High Court)

SUPREME COURT

Merchant Bank of Sri Lanka Limited* v. *Jatila Punyasiri Wijayawardena

S. C. Appeal No. 81/2010
SC/SPL LA 35/10
CA Revision No. 81/2006 (PHC) APN
Commercial High Court Case No. 40/09 (1)

Decided on: 15-02-2012

Decided by: His Lordship Hon. R. K. S. Suresh Chandra, J; Hon. S. Marsoof, J; Hon. C. Ekanayake, J

The Respondents made an application under section 328 of the Civil Procedure Code for restoration of possession and damages to the Commercial High Court. The Respondents were restored to possession and damages were awarded to them by Order dated 15-06-2006.

The Appellant filed an application to revise the order of the Commercial High Court in the Court of Appeal.

A preliminary objection was taken on behalf of the Respondents on the ground that the said application could not be maintained in law as a right of appeal to the Supreme Court was available to the Petitioner against the said order under section 5 of the High Court of the Provinces (Special Provision) Act, No. 10 of 1996.

The Court of Appeal held that the right of appeal from an order or judgment of the High Court exercising civil jurisdiction is exclusively to the Supreme Court, and that the right of appeal to the Supreme Court granted by Act, No. 10 of 1996 is not affected by section 329 of the Civil Procedure Code. Accordingly, the preliminary objection was upheld, and the application for revision was dismissed by the Court of Appeal by Order dated 21-01-2010.

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(Contd. from Page 8)

On appeal, the Supreme Court affirmed the order of the Court of Appeal, and the Appeal was accordingly dismissed.

The Supreme Court took the view that the provisions of sections 754(1) and (2) have not been incorporated into the said Act, No. 10 of 1996, and have been replaced by sections 5(1) and (2) of the said Act, No. 10 of 1996.

The Supreme Court further held that section 5(2) of Act, No. 10 of 1996 granted a right of appeal to the Supreme Court with leave from an order made by such a High Court under section 326 or 327 or 328 of the Civil Procedure Code, and that section 329 has no application to the right of appeal granted by section 5 of the said Act, No. 10 of 1996.

Suresh Chandra J. delivering the judgment of the Supreme Court made the following observations:

"A comparison of the provisions of Chapter LVIII of the Civil Procedure Code with Section 5 and 6 of Act No.10 of 1996 would show that the provisions of S.754(1) and (2) have not been incorporated into the said Act and have been replaced by Sections 5(1) and (2) while Sections 753(3), 753(4), 754(5) and Sections 755-760A of the Civil Procedure Code, which lay down the procedure regarding appeals, have been incorporated into the Act by S.6 by stating that such procedure shall be made as nearly as may be in accordance with the procedure prescribed by Chapter LVIII of the Civil Procedure code.

It would be seen therefore that in conferring civil jurisdiction on the High Court by Act. No.10 of 1996, that the entirety of the Civil Procedure Code has not been incorporated into the said Act and that only specific provisions of the Civil Procedure code have been incorporated into the said Act. Of particular relevance is the fact that section 329 of the civil Procedure code has not been referred to in the said Act No.10 of 1996." (*vide* pages 7 and 8)

"For the purposes of the present case, it would be necessary to consider the effect of S.329 of the Civil Procedure Code on S.5 of the High Court Act. S.329 placed a limitation on the right of appeal granted by Sections 754(1) and (2) but as far as S.5 of the Act is concerned S.329 does not place any such limitation as stated above Ss. 754(1) and (2) have not been incorporated in to the Act and have in fact been replaced by Sections 5(1) and (2) of the Act. The Appellants submit that since there is no right of appeal possible in terms of S.329 of the Civil Procedure Code that a Revision application would be possible to the Court of Appeal. In support of that contention the Petitioners submit that the maxim "Generalia Specialibus non derogant" would apply. As far as S.754 of the Civil Procedure Code is concerned this maxim would apply in proceedings before the Court of Appeal, being the same statute as S.329 takes away the right of appeal to the Court of Appeal granted by S.754. However, when section 329 of the Civil Procedure Code is viewed against S.5 of the High Court of Provinces (Special Provisions) Act No. 10 of 1996 the maxim would not apply as two different Statutes, namely the Civil Procedure Code and Act No.10 of 1996 are involved." (*vide* page 8)

03/06-07/2012

BASL ELECTIONS

An election was held for the post of President of the Bar Association of Sri Lanka (BASL) for the year 2012/2013 on the 22nd of February, 2012. Mr. Wijeyadasa Rajapakshe PC, Mr. Tirantha Walaliayadde PC and Mr. R. R. S. Thangarajah, Attorney-at-Law, contested for the post of President. Mr. Wijeyadasa Rajapakshe PC was elected President of the BASL with an overwhelming majority of 1761 votes. Mr. Wijeyadasa Rajapakshe PC received 2884 votes while Mr. Tirantha Walaliyadde received 1123 votes.

Mr. Sanjaya Gamage was elected Secretary of the BASL with an overwhelming majority of 2483 votes. Mr. Sanjaya Gamage, Attorney-at-Law, received 3023 votes while Mr. Lakshman Amarasinghe, Attorney-at-Law, received 540 votes.

POST OF PRESIDENT	ISLANDWIDE RESULT		POST OF SECRETARY	ISLANDWIDE RESULT	
Total Membership	-	10807	Total Membership	-	10807
Total ballot Papers issued	-	4169	Total ballot Papers issued	-	4142
Total Votes cast	-	4121	Total Votes cast	-	3979
Mr. Tirantha Walaliyadde, PC	-	1123	Mr. Sanjaya Gamage	-	3023
Mr. Wijeyadasa Rajapakshe, PC	-	2884	Mr. Lakshman Amarasinghe	-	540
Mr. R.R.S.Thangarajah	-	114	Mr. Gunaratne Wanninayake	-	416
Spoil Votes	-	48	Spoil Votes	-	163
Majority	-	1761	Majority	-	2483