Privy Council Appeal No. 58 *of* 1937

Simon Christopher Jayawardene - - - - *Appellant*

v.

Alfred Christy Jayawardene and others - - - *Respondents*

FROM

THE SUPREME COURT OF THE ISLAND OF CEYLON

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 24TH FEBRUARY, 1939

Present at the Hearing :

LORD ALNESS
LORD ROMER
LORD PORTER

[*Delivered by* LORD PORTER]

The appellant in this action, who was also the plaintiff, is one of the sons of the late J. V. G. A. W. Jayawardene, Gate Mudaliyar. The first three respondents are also his sons.

The deceased man was apparently a considerable land-owner in the Island of Ceylon, and amongst his other properties was tenant under the Crown by an indenture No. 29 executed on the 29th October, 1919, and on the 23rd February, 1920, by the respective parties, of a certain allotment of Crown land called Kajugahaudumulleduwa, Kajugahaudumullelanda and Galagodakele in Maggon Badda, Kalutara Totamune and Eladuwa Village, Iddagoda Pattu, Pasdun Korale West, Kalutara District, Western Province.

The lease was entered into by the Governor of Ceylon on behalf of the Crown as lessor on the one part and by the deceased man as lessee (an expression which was stated to include his heirs, executors, administrators and permitted assigns) of the other part.

The estate was to be held in perpetuity subject to the covenants and general provisions contained in the lease.

The covenants contained provisions for clearing and planting, paying rent, and the non-erection of buildings on the land. The tenth covenant must be set out in full. It read: —

> " The Lessee and his aforewritten shall not sub-let, sell, donate, mortgage, or otherwise dispose of or deal with his interest in this Lease, or any portion thereof, without the written consent of the Lessor, and every such sub-lease, sale, donation, or mortgage, without such consent, shall be absolutely void."

The second general provision was also important, and is as follows:—

> "That if any rent hereby reserved shall remain unpaid and in arrear for the space of more than one year after the time hereby appointed for payment thereof, whether the same shall have been lawfully demanded or not, or if any breach shall be committed by the Lessee of any of the Covenants herein on the Lessee's part contained, or if the Lessee shall abandon or cease to cultivate the said land in manner provided in Part IV of this lease, or if the Lessee shall become bankrupt or compound with his creditors or if the said land or the interests of the Lessee or his aforewritten be sold in execution of a decree against him or his aforewritten, then, and in any of the said cases, this demise and the privileges hereby reserved, together with these presents, shall forthwith cease and determine, and the Lessor, his agent or agents, may thereupon enter into and upon the said land and premises, or any part thereof in the name of the whole, and the same have, re-possess and enjoy as in his former estate, and the said land and premises shall forthwith revert to the Crown, without any claim on the part of the Lessee or his aforewritten against the Lessor for compensation on account of any improvements or otherwise howsoever."

The deceased man took possession under the lease and continued in possession until his death on the 19th January, 1930.

Meanwhile, in May, 1927, he was for some reason anxious to make a deed of gift of the whole or at any rate a large portion of his properties to his four sons in equal shares, and amongst those properties he desired to include the Crown lease.

Accordingly he wrote on the 16th May, 1927, to the Assistant Government Agent asking that permission to assign might be granted. Without waiting for the permission to be obtained, however, he executed four deeds of gift between the 27th and 30th May, 1927, giving one quarter of his estates to each of his four sons. Each donation was subject to his own life estate and to each was attached a *fidei commissum*. These deeds included the Government lease amongst the properties given, and were in identical terms save in one matter. That in favour of the second respondent recited that his father had applied for and obtained the written consent of the Governor, whereas the other three recited only that he had applied for such consent.

The Government Agent did not reply until the 27th July, 1927, when he asked to be furnished with a draft of the proposed deed and laid down certain conditions upon which alone permission would be granted. He ended by saying that the donee should understand that the lease was liable to cancellation for any default. The deceased man did not comply with the Government requirements but endeavoured without success to persuade the Government authorities that the deed was in order. When he failed in this attempt, he caused four deeds of cancellation to be prepared and apparently a draft copy was sent to the Government Agent. Finally on the 8th March, 1928, the

Agent returned the draft copy and wrote in the following terms:—

"Sir,

I have the honour to return the draft deed of cancellation and to inform you that the deed of gift already executed of your own accord is invalid by reason of Government Consent not having been given thereto. If you are legally advised that cancellation is necessary no question of obtaining Government Consent arises.

I am, Sir,

Your obedient Servant,

(Signed) E. T. DYSON,

Assistant Government Agent."

The deeds were never in fact cancelled, but at the bottom of this letter is to be found the words, "Deed of Gift invalid. Son heir under the Will," but there is no evidence as to the hand by which these words were penned, and their Lordships can derive no assistance from them.

On the 23rd October, however, of the same year, the deceased man made his will, leaving all his property, save for a gift of Rs.3,000 to his grand-daughter, to the appellant, whom he also appointed his executor.

After the death of his father the appellant's name was entered in the Register of Rents of Government lands leased in perpetuity, as substituted lessee, and he entered into and remained in possession of the property in dispute until November, 1932, when the third defendant dispossessed him. Later on the first defendant entered into possession. Both the third and first defendants are said by the appellant to have entered into possession on behalf of the three defendants and not on his behalf. It appears from the appellant's evidence that whilst he was in possession he paid the Government rent, but that after he was dispossessed he could not pay the entire rent and the respondents made certain payments, but there is no evidence that the Government accepted them as tenants. Indeed the payments were credited in the Government books to the account of the appellant as substituted lessee.

The respondents did not give evidence. Whether the appellant accepted the deed of gift or not, is not clear—probably he did, as he said in cross-examination, "I got a gift of a one-fourth share of this land. I was present when all the gifts were made. I signed as a witness to deed No. 178." This last-mentioned deed was that giving a one-fourth share to one of his brothers.

The plaintiff having been dispossessed in this way brought the present action against the first three respondents claiming a declaration of title, that the three respondents be ejected and the appellant quieted in possession, damages, and an injunction. Inasmuch as the premises were held on a lease from the Crown, he made the fourth respondent a party to the action, but claimed no relief against him.

His case was that no consent had been given to the disposition of the estate and that the purported gift passed no property either to himself or any of his brothers, because

by the terms of clause 10 of the lease any disposition of the property without the consent of the Crown was absolutely void.

In answer the first three respondents pleaded the four gifts which they said were subject in each case to a *fidei commissum* in favour of their children, or, in default, in favour of the lawful heirs of each of the donees; acknowledged that the appellant was entitled to a one-fourth share; pleaded the covenant in the deeds of gift by the donor that he had full authority to donate the estates thereby given and would warrant and defend the same to the donees; and pleaded that the appellant, as claiming under the deceased testator, was bound by that covenant and was estopped thereby from questioning their title.

Alternatively they said that by reason of clause 10 of the lease the testator had no power to dispose of the property by will.

At the trial of the action both parties agreed to waive damages of all nature (if any) due to them up to the hearing, leaving the substantial issue whether the property passed by the deeds of gift or whether at any rate the appellant was estopped from denying that it had.

The District Judge who heard the case in the first instance gave judgment in favour of the appellant, but was reversed by the Supreme Court by judgment dated the 4th December, 1936.

The appellant has appealed against this decree to His Majesty in Council.

The Crown took no part in either of the Courts in Ceylon, but have attended their Lordships' Board in order to preserve their rights in case it should be held that the appellant was in the wrong and in order to give any assistance which they were able.

These being the facts, the first question to be determined is whether the purported deeds of gift of this land pass any property or not. The answer to this question depends upon the terms and effect of clause 10 of the lease.

It is not necessary in construing the clause to determine precisely the limits of the acts prohibited by each word of the clause. Admittedly the gifts to the sons were donations. No written consent to a donation was obtained and donations are prohibited without the written consent of the lessor. Without such consent the clause declares every donation to be absolutely void.

In a series of cases where a lease has been granted upon the terms that if certain conditions are not fulfilled or are broken it shall be "void" or "utterly void" or "null and void to all intents and purposes," it has been held that upon a failure by the tenant to fulfil the conditions, the leases are not *ipso facto* void but are only voidable at the option of the lessor. The principle is explained in *Davenport* v. *Reg.*, (1877) 3 App. Cas. 115, and the cases quoted therein in reference to English law, and a similar principle is to be found in

Roman Dutch law. See *Fernando* v. *Fernando,* (1916) 19 N.L.R. 193, and *Silva* v. *Mohamudu,* (1916) 19 N.L.R. 426, in Ceylon, and *Breytenbach* v. *Frankel,* (1913) S.L.R. App. Div. 390, in South Africa. It is to be observed that in those cases it is the lease which is declared to be void, not, as in the present case, the assignment of the lease, but their Lordships, without expressing any opinion upon the question, will assume that these decisions are applicable to the latter as to the former class of case.

Even if this assumption be made, it is clear that in the present case the lessor never by word or act assented to or acknowledged the donations. On the contrary, as appears by the letter of the 8th March, 1928, the Government claimed that the donations were invalid.

Some misapprehension appears to have arisen in the Supreme Court as to the effect of this letter. That Court seems to have thought that despite the terms of the communication the Government by their subsequent acts affirmed the lease. In this they were mistaken. The Government affirmed the lease because of—not in spite of—their refusal to acknowledge the donations. If the donations were invalid there was no breach of condition because there had been no dealing with the land contrary to the terms of clause 10. If, on the other hand, the donations had been valid, notwithstanding the lessor's refusal to give its written consent, then there would have been a breach of condition such as might entitle the lessor to avoid the lease. Indeed the Government were represented at the hearing before their Lordships for the express purpose of contending in case the donations were held valid, that the right which they claimed to possess of forfeiting the lease was unaffected.

In their Lordships' view the lessee had validly contracted that any donation made by him was at least voidable by the Crown, the Crown had avoided the attempted donations, and those donations being void did not operate as a valid assignment of the tenant's interest in the lease and therefore there has been no forfeiture. See *Doe* v. *Powell,* (1826) 5 B. & C. 308.

If the lease remained in force and the attempted donations of the lessee were void, the tenant retained his full interest and was capable of disposing of that interest by will to whom he pleased, subject to two questions:—

(1) Did clause 10 prohibit the tenant from disposing of the lease by will?

(2) Whatever the position between the Crown and the lessee, could the appellant as executor of his father repudiate his father's gifts which had never been cancelled?

(1) Had the lease been granted to the testator *simpliciter,* the difficult and doubtful question whether a devise would have been a "disposal of" or "dealing with" his interest in the lease would have arisen. Even if the true view be that a devise is not a breach of a covenant not to *assign*—see *Crusoe d Blencowe* v. *Bugby,* (1771) 3 Wils. K.B. 234—it

does not follow that it may not be a breach of a covenant not to *dispose of* or *deal with* the lease. Their Lordships, however, do not find it necessary to express any opinion on this matter.

The lease was not granted to the testator alone. It was granted to the lessee, and that expression is defined to include his heirs, executors, administrators, and permitted assigns. An executor is therefore in terms one of the lessees, and is just as much entitled to hold the lease as is a permitted assign.

The true view, as their Lordships think, is expressed by Bayley J. in *Doe* v. *Bevan,* (1815) 3 M. & S. 353. That was a case in which the lease passed to the trustee in bankruptcy of the tenant, and it was contended that though the lease might pass to the trustee without a breach of the covenant not to assign, yet there was a breach if they in their turn assigned for the benefit of the estate. To this argument Bayley J. replied:—

> "Shall the assignees have capacity to take it and yet not dispose of it? Shall they take it only for their own benefit, or be obliged to retain it in their hands to the prejudice of the creditors for whose benefit the law originally cast it upon them? Undoubtedly that can never be."

So an executor takes not for himself, but for the devisee under the will which appoints him executor, and the passing of the property through the executor to the devisee is no breach of covenant not to assign. If it were not so the naming of an executor as included in the expression "lessee" would be meaningless, since his function is to transfer the lease to some devisee even if that devisee be himself.

Their Lordships would further point out that if, as the respondents contended, "void" in clause 10 means "voidable," then even had a devise of the estate been a breach of the condition, the Crown who have entered the appellant's name as substituted tenant and accepted rent, and who before their Lordships disclaimed any desire to interfere with his tenancy, have, if they could, waived the alleged forfeiture.

(2) If, as their Lordships think, the attempted donation was void as against or avoided by the Crown, no estate in the land could pass to the donees. The testator had not at the time of the donation any right to dispose of the land as he purported to do. Indeed permission to do so was expressly refused. Nor has the appellant now any right to dispose of it except with the requisite consent. The only rights, if any, which the donees could claim, would be some right by way of estoppel.

Their Lordships find no evidence in the record on which an estoppel could be based. Save that the first three respondents apparently accepted the donations, they neither acted upon any representation nor altered their position to their prejudice. Nor, indeed, did their father make any representation. All that he did was to purport to make

a donation of a lease—a donation which by the terms of that lease he could not make, and in making which he recited the lease itself.

All of the three respondents had express notice from the wording of their respective donations that consent to assign had to be obtained and it appeared from two of the donations that it had not yet been obtained. The third, namely, No. 175, did contain a recital that that consent had been obtained, but the donee Frederick Nicholas Jayawardene was not called as a witness and gave no evidence that he had been misled by the recital.

Nor does the fact that a *fidei commissum* was attached to each of the deeds of gift affect the result. It is true that a *fidei commissum* properly constituted and accepted cannot be revoked—see *Soysa* v. *Mohideen,* (1914) 17 N.L.R. 279—and it is no doubt also true that a solemnly executed and duly registered instrument must stand until set aside by a competent Court; see *Breytenbach* v. *Frankel* (u.s.). It was accordingly contended in the Courts in Ceylon on behalf of the respondents that the donations being solemnly executed could not be set aside, or at best could only be set aside by an application to the Court in an action for *vindicatio* or *restitutio in integrum*—in Ceylon the exact form of action would not matter. See *Silva* v. *Mohamudu* (u.s.) *per* Ennis J. at p. 428.

So far as any of the property included in the donations was at the testator's disposal the argument may have force, but even if the donations are valid gifts, the question, so far as this lease is concerned, is not whether the donations are valid, but what property passes under them. In their Lordships' opinion, whatever may be the case as regards the other property, the leasehold estate, the subject matter of the present action, could not, for the reasons given, pass to the donees.

The case differs from those in which a minor purports to grant a lease or to sell land during his minority as in *Silva* v. *Mohamudu,* (u.s.) and *Breytenbach* v. *Frankel,* (u.s.). In the latter, the lease or sale is not void *ab initio*—it is voidable at the option of the minor or perhaps, as Ennis J. expresses it, it does not bind the minor unless he ratifies it expressly or impliedly on attaining his majority. But in such cases the affirmance or avoidance of the lease or sale depends on the minor's action after he attains his majority and in such a case he may well be compelled to apply to the Court to have the lease or sale set aside before he can effectively dispose of his interest in the property to someone else if indeed he retains any right to deal with it at all. Where, however, the lease has, as in the present case, been disposed of contrary to the terms contained in it, and that disposition is void or has been avoided by a landlord, there is, in their Lordships' view, no room for the application of such a doctrine, even in the case of a sale or other disposition for value, much less where the disposition is a gift.

In the cases quoted the option to affirm or avoid was the option of the minor himself. Had the right in the present case to avoid or affirm rested with the appellant or even with his father, this case might have had some analogy to those. But in this case the option is with the Crown, the appellant has no choice in the matter, and there seems no reason for holding that he must bring an action in order to make the Crown's election effective.

For the same reason the statement by Voet in Vol. 1, Lib. VI, Tit. 1, section 17 as quoted by the Supreme Court, that " the seller cannot himself vindicate property belonging to another, which has been sold by him, on the ground that he is not the owner even if he subsequently becomes the owner or is heir to the true owner ", is not applicable to the present case.

Even though one accepts the view of the Supreme Court that the principle upon which the rule is founded is that no one ought to gainsay his own act, or (one may add) the act of his predecessor in title, yet the appellant has never gainsaid his father's act. It was the Crown who gainsaid it, and the appellant cannot hold the lease for those whose title the Crown has refused to recognise.

For these reasons their Lordships will humbly advise His Majesty that the appeal be allowed, the decree and judgment of the Supreme Court set aside and the judgment of the District Judge restored. The first three respondents must pay the appellant's costs of the hearing in the Supreme Court and before their Lordships' Board.

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DELIVERED BY LORD PORTER

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