1963 *Present :* **Basnayake, C.J., and Abeyesundere, J.**

S. KANAPATHIPILLAI, Appellant, *and*
E. VETHANAYAGAM, Respondent

S. C. 31/1961—D. C. Batticaloa, 1487/L

Donation—Gift of another person's property—Subsequent acquisition of title by donor—Validity of gift—Exceptio rei venditae et traditae—Exceptio doli.

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. The *exceptio rei venditae et traditae* does not apply to the case of a donation.

Plaintiff 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 the property at the time of the donation but obtained 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.

Held, that the defendant was entitled to succeed. The plaintiff could not claim that the donee became the owner of the property on the issue of the Crown Grant to the donor after the deed of donation had been executed. Neither the *exceptio rei venditae et traditae* nor the *exceptio doli* was applicable in the present case.

APPEAL from a judgment of the District Court, Batticaloa.

H. W. Jayewardene, Q.C., with *S. C. Crossette-Thambiah* and *N. R. M. Daluwatte*, for Defendant-Appellant.

C. Ranganathan, for Plaintiff-Respondent.

September 17, 1963. BASNAYAKE, C.J.—

The plaintiff Eliyathamby Vethanayagam instituted this action against Sinnathamby Kanapathipillai on the footing that Kasupathy Parigari Clerk Sinnathamby (hereinafter referred to as Sinnathamby) was the owner of garden bearing lot No. 76572 which is depicted in plan No. 2476 in extent 1 acre 2 roods and 28 perches, and that he donated it to his wife Kathiramalai Sinnathangam (hereinafter referred to as Sinnathangam) by deed No. 3769 dated 19th November 1899 attested by K. Kandapody, Notary Public. He also pleaded that on her death intestate leaving property below the value of Rs. 1,000/- her only sister Kathiramalai Annammai became her sole heir. He claims his rights through Annammai.

The defendant admitted that Sinnathamby became the owner and possessed the land referred to in the plaint by virtue of Crown Grant No. 12524 of 18th December 1899, but he denied that Sinnathangam

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was the wife of Sinnathamby. He also denied that Kathiramalai Annammai was her only sister and sole heir. He maintained that the deed of gift did not have the effect of conveying the ownership of the land as it was executed before Sinnathamby received the Crown Grant. The defendant claimed that by deed No. 13388 dated 15th July 1950 (D2) attested by P. V. Kandiah, Notary Public, he purchased the land from the persons to whom the land came by inheritance on the death of Sinnathamby. The defendant has duly registered that deed and he claims that that deed prevails over all other deeds by virtue of prior and proper registration. He also claims that he was entitled to a decree by virtue of section 3 of the Prescription Ordinance. Admittedly the defendant is in possession and has cleared the jungle, fenced the land and planted it with coconut trees.

On the date of the trial it was conceded by the plaintiff that the land in dispute was cleared by and whatever improvements effected thereon had been effected by the defendant; and that in the event of the plaintiff succeeding, the defendant would be entitled to compensation in regard to such clearing up of the land and the improvements thereto. It was agreed, of consent, that the amount of compensation payable by the plaintiff to the defendant in respect of such improvements would be decided upon by Mr. Tissaverasinge (Surveyor), the Commissioner appointed by Court.

Learned counsel for the appellant submitted that the judgment of the earned District Judge was wrong on the following grounds :—

(*a*) The donation was made at a time when Sinnathamby was not the owner.

(*b*) It is not established that Annammai was the sole heir of Sinnathangam.

(*c*) The defendant being admittedly in possession of the land, the plaintiff has failed to discharge the burden imposed on him by section 110 of the Evidence Ordinance.

Learned counsel submitted that Sinnathamby had not received the Crown Grant at the time he executed the deed of gift, and that Sinnathangam did not become the owner of the land on the issue of the Crown Grant to Sinnathamby. Learned counsel for the respondent relying on the cases of *Gunatilleke v. Fernando*[1] and *Tissera v. William*[2] maintained that on the issue of the Crown Grant the ownership vested in Sinnathangam. The former case deals with the sale of land by a person who is not the owner and not with the case of a donation by such a person. The latter case deals with a donee who is in possession of property gifted to him by a donor who is not the owner of it. In the course of his judgment Keuneman J. observed :

[1] *(1921) 22 N. L. R. 385 (P. C.).* [2] *(1944) 45 N. L. R. 358.*

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

But on the authority of a citation from Perezius on Donations[1] he held that the *exceptio doli mali* was available even in the case of donations. As against that are the following observations of Clarence J. in the case of *Don Mathes v. Punchi Hamy*[2]:—

"But 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."

In the quotation cited by Keuneman J., Perezius does not say that the property of another can be donated. He says—

"Nor can the property of another be effectually gifted inasmuch as it can be recovered and the ownership therefore is not acquired by him to whom the gift was made."

and then he proceeds to state a special case in which the *exceptio doli mali* would lie in the following words:—

"Moreover the title given by the gift of another's property is useful in affording an opportunity of acquiring by *usucapio*, concerning which see 1, 2 & 3 ff. *Pro donato. The gift alone, however, has not this effect* but the continued possession through him to whom the gift was made together with *bona fides* which has the effect of adding the ownership through the negligence of the true owner."

Grotius also takes the view that another's property may not be donated. This is what he says according to Maasdorp's translation—

"1. Donation or gift is a promise whereby a person, without being bound to another, out of liberality binds himself to give that other something belonging to himself without receiving anything from him in return or stipulating for anything for his own benefit."

After explaining what he means by "without being bound" he goes on to say—

"5. We say *belonging to himself*, for although the sale of another's property may be valid, as will be shown hereafter, the same rule has not been sanctioned by the law with respect to donations, and consequently the donor is not bound to warrant the property given." (Maasdorp's Grotius, p. 203–204).

[1] *Book VIII, Tit. LIV, Ch. 14.* [2] *Wendt's Reports, p. 122.*

Schorer's note on this topic is—

> " For the rest it must be observed that warranty against eviction is due also in other contracts based upon valuable consideration, but not on those which are gratuitous (*causæ lucrativæ*), such as donation, for a donor is not liable for eviction unless he has acted fraudulently or has given an express warranty against eviction ;" (*ibid.* p. 596).

Van Leeuwen expresses the same view—

> " All things can be the subjects of gifts which are matters of trade and can be subjected to our ownership, both corporeal and incorporeal." (Van Leeuwen—Barber's translation, p. 89).

The Latin is more expressive—

> " *Donari non potest, nisi quod ejus fit, cui donatur.*"

Voet too states that donations can be given of one's own property only—

> " 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."
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> (Voet Bk. XXXIX Tit. 5 sec. 10—Gane Vol. 6, p. 93).

The authorities are all against the plaintiff-respondent and his claim, that Sinnathangam became the owner on the issue of the Crown Grant, is not entitled to succeed.

Now as to the second ground there is no evidence that Annammai was the sole heir of Sinnathangam. In cross-examination the plaintiff stated : " I do not know about Sinnathamby or his family. I bought this land for Rs. 100/–". The plaintiff and his vendor are strangers and he is unable to establish that his vendor was the legal owner. He called as his witness the Village Headman of Ninthavoor who stated that he knew the land referred to, that the defendant was in possession of it, that he had fenced it and planted with coconuts, and that he had done so for the previous eight years. The defendant gave evidence of the devolution of this land to him as narrated in his answer, but it would appear that even his evidence is hearsay and does not satisfy the requirements of section 32 of the Evidence Ordinance. Section 32 (5) reads—

> " When the statement relates to the existence of any relationship by blood, marriage, or adoption between persons as to whose relationship by blood, marriage, or adoption the person making the statement had special means of knowledge, and when the statement was made before the question in dispute was raised."

There is nothing to show that the defendant had special means of knowledge of the relationships he deposed to. In regard to the third ground of learned counsel for the appellant, section 110 of the Evidence Ordinance reads—

> " When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner."

Admittedly the defendant is and has been in possession of the land in dispute for the last eight years, and under section 110 of the Evidence Ordinance the burden is on the plaintiff to prove that the defendant is not the owner. The plaintiff has not succeeded in doing so. The plaintiff in his evidence says nothing about Sinnathangam or her family. Therefore the statement in the plaint that Kathiramalai Sinnathangam died intestate leaving property to the value of Rs. 1,000/– and leaving behind her only sister Kathiramalai Annammai as the sole heir is not established. The failure to establish that fact is fatal to his case. It is claimed that he purchased this land from the person who was the owner, which too he has failed to establish. In our opinion the appellant is entitled to succeed. We therefore allow the appeal and dismiss the plaintiff's action.

We declare that the appellant is entitled to the costs both here and below.

ABEYESUNDERE, J.—I agree.

Appeal allowed.