# NANAYAKKARA
# V.
# JAYASOORIYA AND ANOTHER

COURT OF APPEAL
JAMEEL, J. AND ABEYWIRA, J.
C. A. 349 — 350/79 (F).
D. C. CHILAW 19493/L
APRIL 27 AND 28 AND JULY 01, 1987

*Land Development Ordinance (LDO) — Protected holding — Section 162 (1) of the LDO — Effect of non-compliance with Section 162 (1) — Attestation Clause — Jus retentionis — Allegans contraria non est audiendus — Exceptio rei venditae et traditae — Exceptio doli.*

The plaintiff (1st respondent) Jayasooriya obtained the land in suit from the Crown on a permit issued under the Land Development Ordinance (LDO). The land was a protected holding. To transfer such a land compliance was necessary with S. 162 (1) which stipulated prior obtaining of the Government Agent's (G.A.'s) written consent, attaching of the consent to the Deed and specific reference to the G.A.'s consent in the Notary's attestation. Under S. 162 (2) non-compliance made the deed of transfer null and void for all purposes. The plaintiff being in arrears in respect of monthly rentals agreed by notarial deed with the 1st defendant-appellant Nanayakkara to transfer the land to the latter in return for the latter settling the arrears, paying some extra money to the plaintiff and being placed in possession. The 1st defendant paid Rs. 16,496/- as arrears. Against an advance of Rs. 14,750/- the plaintiff transferred two acres of his residing land to the 1st defendant by way of security according to the plaintiff. Some time before obtaining the G.A.'s consent the plaintiff retook possession. The Police had to intervene and the 1st defendant got back possession. The plaintiff then obtained the G.A.'s consent and executed the impugned transfer. Giving credit for the arrears of rentals paid by the 1st defendant the plaintiff received in all Rs. 22,206/- from 1st defendant but there was confusion as to the amounts received *vis-a-vis* the recitals re consideration in the Deeds. Nanayakkara the 1st defendant transferred the land to Dharmasena the 2nd defendant-respondent.

The plaintiff contended his deed of transfer to Jayasooriya was null and void because the Notary who attested had not made special reference to it in the attestation.

**Held**

(1) The absence of the special reference to the G.A.'s consent in the attestation of the Notary was a non-compliance with S. 162 (1) of the LDO and therefore the Deed of Transfer was null and void under section 162 (2) for all purposes. Paper title was therefore in the plaintiff.

A reference to the G.A.'s consent in the recitals of the body of the deed and the Notary's signature at the end of the body of the deed cannot be treated as compliance. The reference must be in the **attestation clause**.

(2) The plaintiff had received Rs. 22,206/- from the 1st defendant and therefore the latter being a **bona fide** possessor is entitled to a *jus retentionis* until this amount is paid back. As the Deed of Transfer is null and void for all purposes the 1st defendant cannot rely on the maxim *allegans contraria non est audiendus* to prevent plaintiff from impugning his own deed. Nor will the pleas of *exceptio rei venditae et traditae* or *exceptio doli* avail the 1st defendant because the plaintiff had good title and the title never left him in view of S. 162 (2) of the Land Development Ordinance.

**Cases referred to:**

(1) *Hudson v. Parker* 163 ER 148

(2) *Emis v. Singho* CAC 66

(3) *Ismail v. Ismail* 22 NLR 476

(4) *R. Dharmawansa v. R. M. Ukku Banda* 60 NLR 350

(5) *Tissera v. Williams* 45 NLR 358

(6) *Tillekeratne v. De Silva* 49 NLR 25

**APPEALS** from judgment of the District Judge of Chilaw.

*Dr. H. W. Jayewardene Q.C.* with *Miss Guniyangoda* for the 1st Defendant-Appellant in C.A. 349/79 (F) and Respondent-Respondent in C.A. 350/79 (F).

*Nimal Senanayake, P.C.* with *A. B. Dissanayake* for 2nd Defendant-Respondent in C.A. 349/79 (F) and 2nd Appellant in C.A. 350/79 (F).

*K. S. Tillekeratne* for Plaintiff-Respondent in both appeals.

*Cur. adv. vult*

August 07, 1987.
**JAMEEL, J.**

At the outset it was agreed that both appeals should and would be argued together and that one judgment would suffice in both appeals.

The Plaintiff-Respondent had obtained this land in suit from the crown on a permit issued under the Land Development Ordinance. He had to pay an annual rent of Rs. 1,828/50 to the crown. The land was a **Protected holding** within the meaning of section 2 of the Land Development Ordinance. As such, any disposition of this land required the prior written consent of the Government Agent.

Till such time as he, the plaintiff, could obtain such a consent and then effect a transfer to the 1st Defendant, he agreed to hand over possession of the corpus to the 1st Defendant. This was done in terms of a notarially executed deed No: 344 of 23.2.1965 attested by K. H. A. Fernando N. P. and now marked 'P4'. A significant feature of this deed is that the Notary attests that no part of the consideration of Rs. 10,000/- passed in his presence. According to the Plaintiff this arrangement was made because he had fallen into arrears to the tune of about Rs. 16,000/- and the 1st Defendant had agreed to pay off this sum and also pay him something extra. According to the letter 'P2', the 1st Defendant had offered him Rs. 30,000/-. According to 'P4' the Plaintiff had to obtain the requisite written consent of the Government Agent and thereon he was to execute a transfer to the 1st Defendant on being paid Rs. 10,000/-. The 1st Defendant had undertaken to pay current rents to the state till the transfer was effected. The permit in question has been produced marked 'P1' and the 1st Defendant's information copy of the consent granted for the transfer to him of the corpus is dated 30.9.1965 and is marked '1D1'. While granting the permission asked for the parties have been requested by '1D1' to pay up all arrears and to send a draft of the transfer deed to the Government Agent for approval. It is common ground that the 1st Defendant had paid Rs. 16,496/-. This is by way of arrears.

The Plaintiff's position is that pending the completion of this transaction he had asked the 1st Defendant for an advance of

Rs. 15,000/-, and that at the request of the 1st Defendant he had transferred to the 1st Defendant as a security against such an advance two (2) acres from his residing land. This was on Deed 'P3' of 26.2.1965. That is just three (3) days after entering into the agreement 'P4'. Although the Plaintiff made out in his evidence that this Deed 'P3' was executed in trust and as a security for the advance, the notary (in fact all the deeds produced in evidence in this case are attested by one and the same notary, and who is, presumably, the 1st Defendant's notary) in his attestation says that the full consideration, that is, Rs. 14,750/- was paid in his presence. Sometime prior to the receipt of the consent '1D1', the Plaintiff had felt uncertain about the 1st Defendant and had forcibly retaken possession of the corpus. This took both parties to the police station where, according to the Plaintiff he had agreed to restore the 1st Defendant to possession on the 1st Defendant agreeing to increase the consideration on 'P4' from Rs. 10,000/- to Rs. 20,000/-.

The evidence does not reveal as to whether the final deed of transfer had been sent in draft form for approval to the Government Agent. However, the deed 'P6' was executed on 30.12.1965 by the same notary. It is this deed which the Plaintiff challenges as being of no effect and invalid because it contravenes Section 162 of the Land Development Ordinance.

The Plaintiff stated in evidence that he received only Rs. 3,000/- at the execution of 'P6', but the notary attests that the full consideration of Rs. 20,000/- was acknowledged to have been received. To complete the narrative of deed transactions, the Plaintiff had to get back the two (2) acres he had transferred to the 1st Defendant on the deed 'P3'. Although the 1st Defendant had by his letter 'P5' agreed to return this land without payment, it appears from the attestation of the notary that the full Rs. 12,000/- was paid by the Plaintiff to the 1st Defendant in order to obtain the return of his land by the Deed 'P7'. Thus, according to the Plaintiff he has received in cash Rs. 5,750/- (Rs. 3,000/- at the execution of 'P6' and Rs. 2,750/- the difference between the considerations on 'P7' and 'P3') and transferred to the 1st Defendant in lieu thereof his

rights in A17-R3-P37 crown allotment which he had held on 'P1'. That is of course besides the Rs. 16,456/- which had been paid by the 1st Defendant in liquidation of the arrears of rent. This totals to Rs. 22,206/- as the overall benefit derived by the Plaintiff on this transaction. Although this is Rs. 7,794/- less than the Rs. 30,000/- promised on the letter 'P2' it is Rs. 2,204/- more than the consideration stipulated for on the deed of transfer 'P6'. In this context, it is significant to note that the sum claimed by the Plaintiff in the Issues 15-17 is Rs. 12,000/- as balance purchase price in case he is forced to grant a fresh deed to the 1st Defendant.

Neither of the Defendants gave evidence at the trial. The 2nd Defendant was brought into the case because the 1st Defendant had transferred the corpus to the 2nd Defendant, after this case had been instituted, on deed No: 1618 ('P8') of 21.12.1975 attested by the very same notary Mr. Fernando. The 2nd Defendant is now said to be in possession of the corpus.

The evidence of the Plaintiff with regard to the cash and other benefits he has received are not in accord with the attestations in the deeds 'P3' and 'P6'. The Plaintiff was also unable to explain why he had claimed Rs. 25,908/- from the 1st Defendant in the letter of demand '1D2' nor does the evidence show as to why this was restricted to Rs. 12,000/- in the Issues 15-17 framed at the trial. The figure Rs. 25,908/- however, could be made up from Rs. 10,000/- being the difference between the amounts on 'P2' and 'P6', Rs. 12,000/- being the amount he had to pay on 'P7' in spite of 'P5' and the Rs. 3,908/- mentioned in letter 'P9'.

Another contention of the Plaintiff was that the 1st Defendant and thereafter the 2nd Defendnat have been possessing the land and enjoying its produce and income. However, as the Plaintiff had had the benefit of and the use of the money, at least Rs. 22,000/-, for almost the same period and as he had voluntarily parted with possession he cannot be heard to claim the value of the produce and income from the land without setting off the interest that is accruable on the money that he had received. Dr. Jayewardene's further argument that the Plaintiff cannot claim damages as he has not brought into court whatever sum he admits to have received is not without merit.

The main contest at the trial centred around the validity of the deed 'P6', and more particularly as to whether it passes title to the 1st Defendant. If it did not, then the 2nd Defendant would not have received any title on deed 'P8'.

The contest raised by the Plaintiff is that his own Deed 'P6' to the 1st Defendant is null and void, because the notary who attested it had not made special reference to the written consent of the Government Agent, as required by SECTION 162 (1) of the Land Development Ordinance, as this corpus is a 'PROTECTED HOLDING'. This non-compliance makes the deed 'NULL AND VOID FOR ALL PURPOSES' in terms of SECTION 162 (2) of this Ordinance.

Dr. Jayewardene conceded that as at the time of the deed 'P6' the corpus in this case was a protected holding within the meaning of the Land Development Ordinance. He also brought it to our notice that, that concept of a protected holding is no longer in vogue, as the law has since been amended by Act No. 16 of 1969, which introduced a new section, namely, **Section 162** in substitution of the old one. However, we are concerned only with the old section in this case. According to the old Section 162, a transfer of a protected holding is valid only if done with the written consent of the Government Agent first had and obtained. (**Vide**:—Section 2 L.D.O.). In terms of SECTION 162 (1), no **Notary** shall attest any deed operating as a disposition of a protected holding unless:—

(a) The written consent of the G.A. shall have been previously obtained, and

(b) Such written consent is attached to the deed, and,

(c) Such document of consent shall be specifically referred to by the **Notary in the Attestation of such deed.**

SECTION 162 (2) provides that a deed executed or attested in contravention of the provisions of SUBSECTION (1) shall be null and void **for all purposes.**

In fact, the Government Agent had granted written permission on 30.9.1965, **Vide**:— '1D1'. That was prior to deed 'P6'. He has made a request in '1D1' that the draft deed should be sent to him for approval. There is no evidence either way with regard to the submission of such a draft to him. However, in the body of 'P6', it is stated that the written consent of the G.A. is attached to the original of 'P6'. That forms part of the recital of that deed. Thus, two (2) of the conditions in SECTION 162 (1) may be said to have been complied with. The question remains as to the 3rd, namely, has the notary made special reference to this written consent in his attestation? It is manifest that there is no reference to it, in 'P6', in that part of the deed which is generally described as the **'Attestation Clause'**.

Dr. Jayewardene contended that we should give the words 'In the attestation of the deed' a much wider meaning than what is attributed to the words, 'The Attestation Clause' in a deed.

This argument is to the effect that 'Attestation', is 'TO BEAR WITNESS'. That is to say, that when the notary signs at the end of the body of a deed, just below the signatures of the executants he in fact attests to the signatures of the executants and the witnesses. Dr. Jayewardene contended that this signature acted further as an attestation of all the recitals in the deed. I am unable to accept that contention for, some deeds have a wide range of recitals dealing with dates of death, agreements arrived at, incidents that have occurred in the past and even incidents that may have occurred outside the Island. The notary cannot vouch for all these matters leastwise to their accuracy and or their authenticity. It is only the executants who can speak to them. Even the attesting witness may not be aware of those facts, yet, they also sign at the bottom of the body of the deed. The 'WITNESS CLAUSE' is a pointer to this, for it reads 'IN WITNESS WHEREOF THE SAID ASSIGNOR AND ASSIGNED DO HEREUNTO AND TO TWO OTHERS OF THE SAME TENOR AND DATE AS THESE PRESENTS SET THEIR HANDS. . . . . .

(**Vide**:— 'P6'). The executants witness their hand to the contents of the deed and the witnesses and the notary sign in attestation of the fact that the signatures of the executants were placed in their presence, all being present at the same time, and further

that this was done after the deed was read by or read over to and explained to the executants by the notary. *Hudson v. Parker* (1).

Mere reference to the existence of the prior written consent of the G.A. in the body of the deed without attaching it to the deed itself will not be in due compliance with Section 162 (1), nor would the deed be valid had the G.A.'s consent been obtained after the execution of the deed. The section does not make it a part of the duty of the notary to obtain the written consent of the G.A. All that the notary has to do is to ensure that such a consent has in fact been given and if so to attach it to the deed and to make special reference to it in his attestation. Had the law sought to cast on the notary the duty of satisfying himself as to the authenticity of the sanction granted by the G.A., then it would and could have been said so in plain and simple language. The reference to this sanction in the body of the deed and the fact of it being attached to the deed will only prevent the executants from thereafter denying its existence and of it being so attached, respectively. In this case it will prevent the Plaintiff from pleading adversely as to its authenticity. The notary's signature at the bottom of the body of the deed will not bind him to any of these warranties or stipulations. Indeed he is not expected to do so. Reference in the recitals will not, to my mind, amount to the special reference in the attestation called for by Section 162 (1) and will not absolve him from the need to do so if the notary desires to save his deed from the rigours of Subsection (2). That Subsection avoids a deed for non-compliance and that too for all purposes whatsoever.

The relevant sections of the Notaries Ordinance throws some light on the meaning of the word ATTESTATION.

**Rule 12 to Section 29 States:—**

That the notary shall **sign** the deed after the executants and the witnesses have placed their signatures—all being present at the same time. These are two significant points of note, namely:-

(a) That he is then required only to sign and not to SEAL, and

(b) That he cannot attest the deed until these signatures have been appended to the deed by the executants, the witnesses and himself.

**Rule 13-16:—**

Deals with some incidental matters.

**Rule 17:—**

Requires the notary to enter in words the day; month and year and place of execution and then to sign the deed.

**Rule 19:—**

'Without delay thereafter to authenticate or attest all that was executed or acknowledged before him.'

The rules require him to SIGN AND SEAL his attestation—Non-sealing of the deed at this stage has been **held**:— to be an invalid attestation. (2 N.L.R. 187).

The notary must sign the deed twice. Once at the end of the body of the deed, (and that too after the executants and the witnesses have approved and have appended their signatures to the deed) and again after the attestation, when he is required to affix his seal to the deed. That brings to a close the process of making out a deed. The scheme outlined in these rules is that there is to be a separate attestation, and which should be in FORM 'E' in Schedule 1.1. VIDE:— RULE 20. Further, it shall contain a declaration of all that happened and name those who were present to sign the deed. It should repeat the recording of the fact of the signatures having been placed in the presence of each other all being present at the same time. It shall record the day; month and year and place of attestation. It shall also record the payments made and/or the acknowledgements given and from whom to whom and what erasures, alterations or interpolations have been made in the body of the deed, with specific details as to whether those occurred in the original or duplicate of the deed. The value and number of the stamps affixed should be

delineated. The attestation must also repeat the legend of the deed's contents having been read over and duly explained to the executants. The notary has to vouch for all this and he is licensed to comply with and fulfill all these statutory duties. His attestation, is his record and affirmation of all this. It is to this that Section 162 (1) adds the further duty to make special reference to the consent granted by the G.A. and which written consent he has affixed to or annexed to the deed. The notary who attested 'P6' failed to comply with this. It is significant that this very same notary complied with this special requirement when he attested 'P8'. The consent document referred to in 'P8' is not the consent document referred to in 'P6'. However, the attestation in 'P6' does not carry a clause similar to that in 'P8'. This makes 'P6' NULL AND VOID FOR ALL PURPOSES'. Accordingly, no title passes on deed 'P8' from the 1st Defendant to the 2nd Defendant, nor on 'P6' from the Plaintiff to the 1st Defendant. Accordingly, paper title remains in the Plaintiff.

I am unable to agree with the contention of the Plaintiff that all this time the possession of the 1st Defendant had been unlawful. Nor with the consequential submission that the Plaintiff is entitled to claim damages from the date of 'P6', namely, from 20.12.1965. Plaint has been filed on 11.2.1975. That is to say, just a few days before the completion of 10 years of possession by the 1st Defendant.

Till plaint was filed the Defendants possessed on the basis of a lawful deal transacted with the Plaintiff. The Plaintiff himself had put the 1st Defendant in possession and had done all that he had undertaken to do in terms of the agreement 'P4'. He had obtained the necessary sanction from the G.A. and then granted the deed 'P6', wherein he has held out to the authenticity of the written sanction which the notary annexed to the deed which was given to the 1st Defendant. There is therefore no room to doubt that the Plaintiff himself intended to part with his rights in the corpus to the 1st Defendant and in order to implement that intention he granted the deed 'P6' and that at that time he verily believed that he had so parted with his title to the 1st Defendant. There is nothing to indicate that, as at the time, the Plaintiff believed that or even contemplated that the Defendant's

possession was unlawful or illegal. There was no act or omission on the part of the Plaintiff nor on the part of the Defendants, which could have or did or does make this deed 'P6' invalid. The situation in this case is not similar to that of an unaccepted deed of gift. It is the act of the, or rather the omission of the 1st Defendant's notarial adviser that has rendered this deed void.

By the deed 'P4' the Plaintiff agreed to execute "A proper conveyance for conveying and assuring all that said allotment of land called DAMBAWE MOOKALANA unto the said WIJAYASIRI NANAYAKKARA. . . . . free from all encumbrances. . . . . ." This he agreed to do at the request, cost and charge of the 1st Defendant. It now transpires that the deed he gave, 'P6', is invalid. It is clear that a deed of rectification will not suffice. Can the 1st Defendant, now, ask the Plaintiff to execute another valid deed? Is the right to obtain a second deed prescribed? The answer is, no doubt, in the affirmative. This question was answered in the case of *Emis v Singho* (2) which dictum has been quoted with approval in *Ismail v. Ismail*(3).

On the Plaintiff's own showing he has received Rs. 22,206/- from the 1st Defendant and should he be declared entitled to the land and its possession he must, of necessity return that money before he can regain possession. The Defendants are entitled to the *jus retentionis* until that amount is paid to them. However, according to the attestations on 'P6', 'P3' and 'P7' the Plaintiff has received Rs. 22,750/- which together with the money paid to the G.A. as arrears totals Rs. 39,206/-. The Learned District Judge has accepted the evidence of the Plaintiff and accordingly, the Defendants can resist the claim for restoration of possession till at least the Rs. 22,206/- is paid to them.

Learned President's Counsel for the 2nd Defendant raised another objection to the grant of any relief to the Plaintiff. This argument was based on the maxim *allegans contraria non est audiendus*.

The case of *R. Dharmawansa v. R. M. Ukku Banda* (4) was one in which some lay donors had dedicated immovable property to the Buddhist Sangha and had subsequently sued for its return on

the footing that they had, had no title to the land at the time of the dedication. They had placed the priest in possession. They now sought recovery of possession after they obtained a lease of the land from the crown. This was resisted and using the maxim referred to above, the Plaintiff was not allowed to retract from his earlier stipulation that they were the owners of the land.

The case of *Tissera v. Williams* (5) was the case of a donor who sought to reclaim a land on the ground that title had not been in him at the time of the donation. On the ground that title had subsequently come to the donor, the District Court entered judgment for the donee utilising the plea of *exceptio rei venditae et traditae*. In appeal the Supreme Court stated that this exception did not apply but nevertheless confirmed the judgment and dismissed the Plaintiff's action adopting the *exceptio doli*. This notwithstanding that plea was not taken in the lower court.

In the instant case however, the Plaintiff had good title and now seeks a declaration that title never left him, in spite of his deed 'P6'. Even in such a case the vendee or the donee as the case may be can well avail of this equitable plea of *exceptio doli*.

**VOET XXI-3,2 (Bewrick-1902 Ed: Pg: 544)** states:—

> "While the purchaser possesses the thing and the same persons who are liable to be sued by him bring an action to evict the property from him, he may repel the vendor and other like persons by the *exceptio rei venditae et traditae* or by the *exceptio doli*."

In *Tissera's case* (supra) the Supreme Court used this exception notwithstanding that it had not been raised in the lower court. It is well settled law that no plea, except on a pure question of law, can be taken in appeal unless it was raised in the court below. *Tillekeratne v. De Silva* (6). In the instant case, as in *Tillekeratne's case*, all material needed to found such a plea is already on record. No further evidence is required, nor possible as the whole claim of the Plaintiff rests on the simple, and no doubt from his point of view fortuitous circumstance, of the notary's

omission. In all the circumstances of this case the Plaintiff cannot repel either this plea nor the prohibition against derogating from his earlier stipulations.

Mr. Tillekeratne urged that there was no *'doli'* on the part of this Plaintiff as he had had title when he sold the land to the 1st Defendant, and that it had been done without fraud or deceit. The *exceptio* is concerned with the dishonesty displayed when the person who made the sale or the gift, himself tries to get back the property and evict the vendee from possession. We are unable to agree with Mr. Tillekeratne's further submission that since the Defendant had raised a claim in reconvention he had defeated the very purpose of this exception. The claim in reconvention is for improvements made while in **bona fide** possession after purchase and is only an additional relief to which a Defendant is entitled when sued in eviction.

For the reasons, we set aside the judgment of the Learned District Judge and dismiss the Plaintiff's action with costs.

**ABEYWIRA, J.** — *I agree*

*Judgment of the District Judge set aside and Plaintiff's action dismissed.*