1976 *Present:* **Pathirana, J., Sharvananda, J., and Ratwatte, J.**

A. L. PAKIR SAIBU, Appellant, *and* P. S. KAIRUL RASIKA, Respondent

S. C. 458/68—D. C. Matara 2623/M

Evidence Ordinance—Sections 92, and 99— Applicability of Section 92 to persons not parties to the instrument and not their representatives in interest—Third party prejudiced by the ostensible nature of the instrument—third party not so prejudiced.

A person who is not a party to a document or his representative in interest is uninhibited by the prohibitory rule contained in Section 92 of the Evidence Ordinance provided such person has an interest in showing the true nature of the transaction and who is prejudiced by the ostensible nature or form of the instrument; Section 92 applies however to strangers who would not be so prejudiced.

APPEAL from a judgment of the District Court, Matara.

H. W. Jayewardene, with *J. E. P. Deraniyagala* and *Miss. S. Fernando,* for the Defendant-Appellant.

N. R. M. Daluwatta for the Plaintiff-Respondent.

Cur. adv. vult.

January 29, 1976. SHARVANANDA, J.—

The plaintiff instituted this action on 1st October, 1966, against the defendant for the recovery of a sum of Rs. 7,980 being her half share of the profits of cultivation of the field, the subject matter of this action, for the period of three years prior to the action and for continuing damages at Rs. 2,660 per year till the defendant was ejected from the premises in suit. The plaintiff is the daughter of the defendant. She claims to be entitled to the said half share on deed No. 2502 (P1) dated 11.2.52 and attested by R. G. W. Nilaweera, N.P., by which deed one Abdul Salam, the brother of the defendant, conveyed to the plaintiff and her brother the entirety of the land in suit, half share each.

The plaintiff claimed the aforesaid amount on the basis that the defendant was a tenant-cultivator of the field, the subject matter of this action, in terms of the Paddy Lands Act of 1958, or that he was in wrongful possession of the field from 1963.

The defendant filed answer disclaiming that he was ever the tenant-cultivator under the plaintiff and denying the plaintiff's title to the field in question on the ground that: (a) the

defendant's brother Salam bought the premises in question out of the profits of a partnership business with the defendant and that as Salam held the property in trust, he had no power to dispose of the premises to the plaintiff and her brother ; and (b) the deed P1 in favour of the plaintiff and her brother was executed without consideration and was in fact a deed of donation, and, as the parties are Muslims, governed by the Muslim Law, since no delivery of the possession of the property conveyed on the said deed No. 2502 (P1) was given to the plaintiff and her brother—both of whom were admittedly minors of the ages of 9 and 7 respectively at the time of the execution of the deed—the deed was void in law, and was not effective to convey any title to them.

The defendant also claimed prescriptive title to the property, but that claim could not be sustained as the plaintiff became a major only in 1964 and this action was filed in 1966.

The plaintiff, in view of the denial of the defendant, abandoned that allegation that the defendant was in occupation of the field as tenant—cultivator under the plaintiff, but raised issue (3) :

> " Has the defendant been in unlawful and forcible possession of the plaintiff's half-share from about the commencement of the cultivation season of Yala in 1963 ?

On the evidence led in the case, the District Judge answered the issue in favour of the plaintiff and entered judgment for the Plaintiff in a sum of Rs. 6,480 as damages only. The defendant has appealed from the order of the District Judge and the plaintiff has filed cross-objections.

The District Judge rejected the defendant's story that the premises were purchased out of the profits of a partnership business and that Salam, the transferor on deed P1, as such trustee, could not have disposed of the premises by P1. On the evidence on record, the District Judge was justified in holding against the defendant on this issue ; that finding was not seriously challenged in appeal.

The main attack by Counsel for the defendant-appellant was directed against the Judge's conclusion that the deed No. 2502 (P1) conveyed title to the premises to the plaintiff.

The question whether deed No. 2502 conveyed good title to the plaintiff arises on the following undisputed facts found by the trial Judge :—

The plaintiff was a minor child in 1952 when her uncle Salam transferred to her and her brother the land in question on deed P1. Ex facie, it is a sale of the property to the two minors for a consideration of Rs. 10,000, but the consideration stated in the deed was waived by the alleged vendor Salam in favour of the vendees. The defendant had been in possession of the premises from the time of the transfer, but it is not certain whether he was in such possession on behalf of the minors or not. The plaintiff attained majority only in the year 1964. Since the institution of the action, Abdul Salam, by deed No. 3026 dated 7th October, 1967, (D9) has, on the alleged basis that deed No. 2502 (P1) was in fact a deed of gift, purported to revoke the alleged donation. At the trial, Salam supported the defendant's allegation that P1 was in fact a donation. Both the defendant and his brother Salam, according to the trial Judge, " are determined to see that the plaintiff does not benefit by P1 and they are now attempting to make out that, in any event, P1 partakes of the character of a gift which Salam could, by his unilateral act, revoke. " On the basis that P1 is a deed of gift, since no consideration passed from the plaintiff to Salam and as possession, actual or constructive, of the land was not delivered to the plaintiff by Salam, the defendant contends that the deed P1 conveyed no title to the plaintiff.

The deed No. 2502 (P1) is, on the face of it, a deed of sale. Salam, as vendor, sold and transferred to the plaintiff and her brother the field in question for the consideration of Rs. 10,000. On the said deed, title to the premises passed to the plaintiff and her brother. The trial Judge has accordingly held that the plaintiff is entitled to an undivided half share of the field and that it is not open to the defendant to make out that the transaction P1 which, on the face of it is a sale, is in fact a donation and that, on the footing that it is a donation, it failed on the ground that no possession, actual or constructive, of the property was delivered to the donee.

Mr. Jayawardena, Counsel for the defendant-appellant, urged that section 92 of the Evidence Ordinance inhibits the application of that section to the parties to the instrument only and that the prohibition against contradicting, varying, adding to or substrac-

ting from the terms of the instrument does not operate against parties other than the parties to the document. He submitted that though Salam, the transferor on P1, could not have made out that the transaction evidenced by P1 was not a sale but was a donation, the defendant, who was a third party to the instrument, could have led evidence tending to show that the true nature of the transaction was different from what it was represented by the document. According to him, the provisions of section 92 apply only as between the parties to the instrument or their representatives in interest and that the defendant was not precluded from adducing evidence to show that P1 was, in fact, a donation, though ex facie it purported to be a sale. He referred to the case of *Rajah V. Nadarajah,* (44 N.L.R. 470) and also submitted that the whole transaction, in any event, failed as a sale for want of mutuality, there being no consensus between the plaintiff, who was at that time aged nine only and was unaware of the execution of the deed P1, and the alleged vendor Salam.

" It is undoubtedly the law that the consideration is an essential term in a contract of sale and that section 92 of the Evidence Ordinance debars a party to the deed of sale from adducing parol evidence to prove that the consideration for the deed was not money and therefore the deed was not a sale but represented an entirely different transaction." — *Thomas V. Fernando* (57 N.L.R. 528). " It is also the law that a deed which, on the face of it, is a transfer for a consideration cannot be held to be a donation merely because the transferor did not receive the consideration ". *Nona Kumari V. Abdul Cader* (47 N.L.R. 457).

A superficial reading of sections 92 and 99 of the Evidence Ordinance lends plausibility to Mr. Jayawardena's argument. The head-notes in the case law cited by him also tend to support his submission. But, is it competent for any third party, whether he claims or not any interest in the subject matter of the transaction embodied in the deed, to adduce oral evidence to show that the rights of the parties to it are at variance with the rights ostensibly created and declared by the instrument ? An analysis of the case law however suggests that the third party, who is uninhibited by sections 92 and 99, must be a party who has an interest in showing the true nature of the transaction, and who is prejudiced by the ostensible nature of the instrument. The prohibitory rule " cannot affect third persons who, if it were otherwise, *might be prejudiced by things recited in writings, contrary to the truth,* however contradictory it may be to the

written statements of others" (section 1149, at page 735, Vol. II of Taylor on Evidence — 12th Ed.), but precludes strangers who would not be so prejudiced. In the present case, the defendant has no rights in or claims to the property and no rights of his are defeated or affected by the recitals in the deed. Whatever be the true nature of the transaction, he does not stand to benefit by the disclosure of the truth. He has no independent interest in the property.

In the case of *Rajah v. Nadarajah* (44 N.L.R. 470), the facts were as follows : The plaintiff instituted the action to be declared entitled to one-third share of certain premises on the strength of deed P3 of 1927 in his favour from his father, the added-defendant. The 2nd defendant claimed that he was entitled to the property by virtue of a Fiscal's transfer D31 of 1929 in his favour, the property having been sold in execution against the added-defendant. There was a competition between the deed of transfer (P3) in favour of the plaintiff and the Fiscal's transfer D31 in favour of the 2nd defendant. In that context, the form given to the transaction was held not to be the governing consideration and it was open to the 2nd defendant to show that P 3 was not a sale, not only because the consideration had been shown to be false, but also because there was no mutuality between the added-defendant and the plaintiff and was merely a device by the added-defendant for putting his property beyond the reach of his creditors. P 3 could neither be regarded as a sale, nor could it be regarded as a donation as, on the facts, there was no acceptance. In order to establish the validity of his title D31, the 2nd defendant had to show the true nature of P3. In the instant case, the defendant had no proprietory interest in demonstrating that the deed No. 2502 (P1) was neither a sale nor a valid donation.

In the case of *Appuhamy v. Ukku Banda* (41 C. L. W. 43), it was held that the defendant, who was not a party to the deed D7, could prove an oral agreement in the nature of a trust in his favour for the purpose of contradicting, varying, adding to or subtracting from the terms of D7. The oral evidence was to the effect that the conveyance D7 in favour of the plaintiff by one Appuhamy was subject to the condition that the plaintiff should convey the property to the defendant on receipt of a certain sum, though there was no such clause in the instrument. One could see that the defendant would have been prejudiced by the exclusion of such oral evidence.

In the case of *Theivanapillai v. Sinnappillai* (3 C. L. Rec. 46), 'A' conveyed a property to 'B' under a verbal agreement that 'B' should reconvey the same to 'X', and 'B' subsequently refused to do so. It was held that 'X' who was not a party to the conveyance, could lead oral evidence of the agreement. One sees that 'X' had a pertinent interest in showing what were the terms of the agreement between 'A' and 'B'.

In the case of *Sellasamy v. Kaliamma* (46 N. L. R. 76), a deed of gift by the deceased father to his son, the appellant, was stated to be in consideration of natural offspring love that the deceased had towards the appellant in expectation of all necessary aid and assistance during the deceased's life time. The Privy Council held, for the purpose of deciding whether the appellant should bring such a gift into collation or hotch-potch in the distribution of his father's estate, in terms of section 35 of Chap. 57, Vol. III, on the ground that it was given on the occasion of his marriage, that the lower Court was clearly right in admitting evidence to show that the gift was made in contemplation of marriage. The intestate heirs of the deceased had a personal interest as affecting them in showing the true nature of the consideration for the gift by the deceased.

Similarly, a pre-emptor may prove against the vendor that what purports to be a mortgage or donation was in fact a sale (1927 A.I.R. Allahabad 204). Here, the pre-emptor has a personal interest in showing the real nature of the transaction. He is not bound by the apparent form in which the transaction takes place which was calculated to defeat his claim or right.

Counsel for the Defendant-Appellant relied on the case of *Bageshri Dayal v. Pancha* (28 Allahabad 473) where the proposition was stated that the plaintiff, not being a party to the transaction, was entitled to show that what purported to be a usufructuary mortgage was not in reality such, but was in fact a sale. If it was a sale, the plaintiff was entitled to one-fourth of the proceeds of the sale according to custom. Hence, it was competent for him to challenge the transaction and show the true nature of the transaction to entitle him to his share of the proceeds. He was prejudiced by the apparent nature of the transaction.

The rationale of this distinction is made manifest when the reason underlying section 92 of the Evidence Ordinance is appreciated. " When a jural act is embodied in a single memorial, all other utterances of the parties on that topic are legally

immaterial for the purpose of determining what are the terms of their act."—Wigmore on Evidence, Vol. IX, at page 76 (3rd Ed.). When the parties have deliberately put their agreement in writing, it is conclusively presumed between themselves and their privies that they intended the writing to form a full and final settlement of their intentions, and extrinsic evidence is, in general, inadmissible to contradict, vary, add to or subtract from the terms of the document, except in the cases contemplated by provisos 1-6 of section 92. The theory of the rule is that the parties have determined that a particular instrument shall be made the sole embodiment of their legal rights. Their rights must be found in that writing and nowhere else, no matter who may desire to avail himself of it. But, so far as the rights of third parties are concerned, the document has not superseded *their rights*. In that sense only it is commonly said that the parol evidence rule is binding upon only those persons who are parties to the document or their privies. "The rule will still apply to exclude extrinsic utterances *even against other parties* provided it is sought to use those utterances *for the very purpose for which the writing has superseded them as the legal act*",—Wigmore on Evidence, Vol. IX (3rd Ed.) at page 150. There is sense in this limitation of the third party who is not restrained by the provisions of sections 92 and 99 of the Evidence Ordinance. Unless a gloss of this nature is implied, the salutory provisions of section 92 can be easily circumvented by a party to a document. He can achieve indirectly through a third party what he cannot do directly. In collusion with a third party, he may checkmate section 92. In the instant case, the evidence shows that the defendant and Salam, the vendor on P1, are acting in collusion to defeat P1.

Counsel for the appellant referred to the case of *Kanapathi-pillai v. Kasinather* (39 N.L.R. 544). An examination of the facts of that case shows the operation of the principle enunciated herein. There the plaintiff was a minor. He, by his next friend, brought the suit under section 247 of the Civil Procedure Code to have a certain land seized by the defendants declared to belong to him on deed P2 and that it should be released from seizure. The 1st and 2nd defendants were judgment-creditors in D.C. Jaffna Case No. 8607 of the 3rd and 4th defendants. The deed P2 was executed by the 3rd and 4th defendants in favour of the plaintiff-minor after action No. 8607 was instituted against them by the 1st and 2nd defendants for the recovery of a certain

loan, but prior to judgment by default being entered against them. The answer of the 1st and 2nd defendants was to the effect that the deed P2 was null and void, having been executed without consideration and with the intention of defrauding them. They attacked the deed P2 on the ground that it had not been accepted by the plaintiff or (in view of his minority) by anyone on his behalf and was therefore invalid. The relevant issues that were raised were :—

(8) Is the donation deed P2 in favour of the plaintiff invalid for want of acceptance ?

(9) Is it open to any person other than the donor to raise the issue that the deed is invalid for want of acceptance ?

The Supreme Court held in appeal that the deed P2 was invalid for want of acceptance and that it was open to the 1st and 2nd defendants to canvass the validity of the deed as a deed of donation and to raise the aforesaid issues. It held that since a gift is invalid in law for want of acceptance, no title passed on the deed to the plaintiff and that as title still remained with the 3rd and 4th defendants, the judgment debtors, the property was available for execution of the judgment debt against them. The right to challenge the validity of a donation on the ground of want of acceptance is not confined to the donor. It is to be noted that unlike a sale where title passes on the execution of the deed of sale, a donation has to be accepted, according to law, in order to convey title. Non-acceptance renders a gift invalid. This case does not depart from the rule enunciated in the other cases. The plaintiff claimed on P2 his right to the property seized by the judgment-creditors and it was competent to the 1st and 2nd defendants to show that P2, which was admittedly a deed of donation, was void and conveyed no title to the plaintiff and that title continued to be in the 3rd and 4th defendants, the judgment-debtors. In the instant case, however, the deed P1 was exfacie a sale and title vested on the plaintiff on its execution. Now, the deed P1 is the sole record of the transaction between Salam and the plaintiff in this case. Section 92 prevents Salam from establishing that P1 represents a donation and not a sale. The deed P1 binds the parties. True, it cannot prejudice or supersede the rights of 3rd parties. But, the defendant has no right to or interest in the property or in the transaction P1. He is a trespasser and hence he is not prejudiced by the ostensible

form of the transaction P1. He cannot be allowed to lead parol evidence for the very purpose for which Salam, the transferor on P1, is barred by section 92. He cannot pull the chestnuts for Salam. If the defendant was claiming against Salam, or if the object of the execution of the document P1 was to defeat his rights, the provisions of section 92 will not debar him from proving that what purports to be a sale was, in fact, a donation. But, the defendant is not claiming against Salam. Independently of Salam, the transferor on P1, the defendant has nothing to gain for himself by showing the true nature of P1. No right or interest or claim of the defendant comes into competition or conflict with the right acquired by the plaintiff on P1. Hence, he too is bound by the document P1 and cannot rip open its veil. By P1, title to the property has vested in the plaintiff and her brother and the District Judge correctly answered the issue as to title in favour of the plaintiff. In view of this conclusion, the defendant's appeal fails.

The plaintiff-respondent, by her cross-objections, has complained that the District Judge has erred in not granting continuing damages or an order for ejectment. Having held that the defendant was in wrongful possession of the plaintiff's land, the District Judge should have ordered ejectment of the defendant and continuing damages till the plaintiff was restored to possession. The reason given by the Judge for withholding that relief on the ground that the plaintiff has not asked to be declared entitled to her share cannot be sustained. The District Judge has also failed to award damages for the defendant's wrongful occupation of the highland portion of the land in suit. The plaintiff claimed Rs. 500 per year as damages for the defendant's wrongful possession of such property. This appears to be a reasonable claim. The plaintiff will however be entitled to claim damages on the ground of the defendant's wrongful possession for two years only in view of section 9 of the Prescription Ordinance.

In the result, the judgment and decree of the lower Court is varied as follows : The plaintiff is entitled to an order of ejectment of the defendant and all those claiming under him from the premises in suit and the plaintiff will be quieted in peaceful possession of her share of the premises in suit. The plaintiff-respondent is also entitled to damages from the defendant in a sum of Rs. 5,320 and continuing damages at Rs. 2,660 per annum from

the date of action until the plaintiff is restored to peaceful possession of the premises described in the 2nd paragraph of the plaint. The cross-objection of the plaintiff-respondent is allowed and the appeal of the defendant-appellant is dismissed with costs.

PATHIRANA, J. — I agree.

RATWATTE, J. — I agree.

Appeal dismissed.