

1952

*Present : Gunasekara J. and Swan J.*

L. A. SIYADORIS *et al.*, Appellants, and A. PETER  
SINGHO, Respondent

*S. C. 544—D. C. Kegalle, 6,107*

*Vendor and purchaser—Exceptio rei venditae et traditae—Scope of plea.*

The *exceptio rei venditae et traditae*, which is an equitable plea, cannot be set up by a party who relies on a pretended sale, where there was in reality no consideration and there was no transfer of possession of the property alleged to be sold or delivery of the deed.

<sup>1</sup> (1927) 28 N. L. R. 477.

## APPEAL from a judgment of the District Court, Kegalle.

*E. B. Wikramanayake, Q.C.*, with *Dodwell Gunawardene* and *L. Muttu-tantri*, for the defendants appellants.

*N. E. Weerasooria, Q.C.*, with *C. T. Olegasegarem*, for the plaintiff respondent.

*Cur. adv. vult.*

December 5, 1952. GUNASEKARA J.—

The plaintiff instituted this action on the 28th April, 1949, for a declaration of title to a one-twelfth share of two plots of land, alleging that the two defendants disputed his title to that share. The principal issue at the trial was whether the *exceptio rei venditæ et traditæ* was available to the first defendant. The district judge held that it was not, and he gave judgment declaring the plaintiff entitled to the share in question. The defendants appeal.

The second defendant, who is the father of the first, was at one time the owner of a one-sixth share of the two plots. He sold it in 1937 to the first defendant and another son named Endoris. The one-twelfth share that Endoris so acquired he sold in 1938 to Amarissa, a brother of the second defendant, and he bought it back from him in 1940. On the 16th October, 1943, he sold it to his wife by the deed P4, and on the 6th February, 1947, he bought it back from her by the deed P5. On the 20th October, 1948, he sold it to the plaintiff by the deed P6, reciting as his title the deed P5. In the meantime, however, on the 27th October, 1943,—eleven days after the sale to his wife—Endoris had executed a deed purporting to sell a one-twelfth share of these two plots of land to his brother the first defendant. At that time he had no title to any share of the property, and no title is recited in the deed. It is contended for the defendants that the title subsequently acquired by Endoris upon the deed P5 enured to the benefit of the first defendant, and that he is entitled to plead the *exceptio rei venditæ et traditæ*.

The district judge holds on the evidence that there was no consideration for the alleged conveyance to the first defendant, though the deed purports to be a deed of sale, and that the first defendant did not get possession of the property alleged to have been sold to him. He also holds that the alleged sale “has not been accompanied, followed or evidenced by acts which may be deemed equivalent to the Roman *traditio*”. The first defendant was not even able to produce the original of the deed by which he claims to have bought the share in question. He produced a copy (D1), and he explained under cross-examination that the original was in the possession of Amarissa and that Amarissa was not on good terms with him. There is no evidence that the deed was ever delivered to him.

There appears to be no sufficient ground for disturbing the learned judge’s findings of fact, and the effect of these findings is that there was in reality no sale from Endoris to the first defendant and that the transaction between them was nothing more than a pretence of a sale. “It

is not enough that the parties call the transaction a sale ; the circumstances must show that the parties in reality entered into a true contract of sale. " (*Wessels' Law of Contract in South Africa, Vol. II p. 1197* cited in *Rajah v. Nadarajah* <sup>1</sup>). Even where there has been a genuine contract the exception is available only if there has been an act " which may be deemed equivalent to the Roman *traditio* " : *Goonetilleke v. Fernando* <sup>2</sup>. It is self-evident that this exception, which is an equitable plea, cannot be set up by a party who relies on a pretended sale, where there was in reality no consideration and there was no transfer of possession of the property alleged to be sold or delivery of the deed. In my opinion the appeal should be dismissed with costs.

SWAN J.—I agree.

*Appeal dismissed.*

