

16, 1939

No. 58 of 1937.

In the Privy Council.

ON APPEAL

FROM THE SUPREME COURT OF THE ISLAND OF CEYLON

BETWEEN—SIMON CHRISTOPHER JAYAWARDENE
(Plaintiff) Appellant

AND

1. ALFRED CHRISTY JAYAWARDENE
2. DR. FREDRICK NICHOLAS JAYAWARDENE
3. GEORGE LLEWELLYN JAYAWARDENE
4. THE HONOURABLE THE ATTORNEY
GENERAL OF CEYLON

(Defendants) Respondents.

Case for the Appellant.

1. This is an appeal from a decree of the Supreme Court of the Island of Ceylon dated the 4th December 1936 setting aside a decree of the District Court of Kalutara dated the 5th July 1935 in an action wherein the Appellant was the Plaintiff and the Respondents were the Defendants.

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p. 25, l. 20
p. 20

20 2. The Appellant and the first three Respondents are the four sons of J. V. G. A. W. Jayawardene, Gate Mudaliyar, deceased (hereinafter called "the Mudaliyar") and the question which arises upon this appeal is as to the leasehold title to certain premises which were planted with rubber by the Mudaliyar after he had entered into possession thereof

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under the Crown Lease next mentioned and which now form a valuable rubber estate of about 57 acres.

The first three Respondents claim to be each entitled to a fourth share of the Mudaliyar's leasehold interest in the said premises by virtue of certain Deeds of Gift executed by the Mudaliyar whereas the Appellant claims to be entitled to the whole of the Mudaliyar's leasehold interest in the said premises by virtue of his position as sole executor and sole devisee under the last Will of the Mudaliyar.

No relief has been claimed by or against the other Respondent.

pp. 33-38 3. By Indenture No. 29 dated the 29th October 1919 the Governor 10
at that time of Ceylon on behalf of His Majesty King George V. his
heirs and successors demised to the Mudaliyar his heirs executors
administrators and permitted assigns certain Crown lands called Kajuga-
haudumulleduwa, Kajugahaudumullelanda and Galagodakela to hold in
perpetuity subject to the provisions thereafter contained yielding and
paying the rent specified in the said Indenture. The said Indenture is
p. 36 set out in full on pages 33 to 38 of the Record. Part IV. thereof con-
tained the following clause upon which this appeal mainly turns :—

p. 37, l. 42 “ 10. The Lessee and his aforewritten shall not sub-let, sell,
“ donate, mortgage, or otherwise dispose of or deal with his interest 20
“ in this Lease, or any portion thereof, without the written consent
“ of the Lessor, and every such sub-lease, sale, donation or mort-
“ gage, without such consent shall be absolutely void.”

p. 38, l. 24 Part IV. thereof contained the usual power of re-entry and forfeiture
upon non-payment of rent or breach of the Lessee's covenants or the
happening of certain other specified events.

p. 39, l. 8 4. On the 16th May 1927 the Mudaliyar wrote to the Assistant
Government Agent at Kalutara as follows :—

“ Sir,

“ I have the honour to inform you that it is my intention to 30
“ gift my rights to the lots described in Lease Bond 29 (folio 3) to
“ my four sons Alfred Christie, Frederick Nicholas, Simon Chris-
“ topher, and George Llewellyn in equal shares reserving a life
“ interest to myself and subject to the conditions therein stipulated.

“ I beg you to obtain for me the necessary permission to do
“ this.”

5. Without waiting for the necessary permission the Mudaliyar proceeded to execute four Deeds of Gift in favour of his said four sons who are the Appellant and the first three Respondents to this appeal. The Deeds in favour of the Respondents were numbered 175, 178 and 179 and dated respectively the 27th May 1927, the 28th May 1927 and the 30th May 1927. A similar Deed in favour of the Appellant and numbered 180 was executed by the Mudaliyar on the 30th May 1927.

p. 17, l. 35

pp. 39-47

pp. 39-44

pp. 45-47

10 The Deeds numbered 175 and 180 are set out in full in the Record except that, the Schedules being identical, only the Schedule to No. 175 is printed. The Deeds numbered 178 and 179 are not set out in the Record but apart from the names of the donees and the dates were identical with that numbered 180. The said Deeds dealt with various lands belonging to the Mudaliyar including the premises leased to him by the said Crown Lease of the 29th October 1919.

pp. 39-44

pp. 45-47

p. 44

p. 43, l. 28

20 Deed No. 175 contained a recital that in accordance with the covenants in the said lease the Donor had applied for and obtained the written consent of his Excellency the Governor to deal with his interests in the said Lease Deed No. 180, on the other hand, contained a recital that in accordance with the covenants in the said Lease the Donor had applied for the consent of His Excellency the Governor to deal with his interest in the said Lease.

p. 40, l. 40

As already mentioned, the latter recital was accurate, whereas the former recital was inaccurate in saying that the consent of His Excellency had been obtained.

All the said Deeds contained the following covenant :—

p. 41, l. 33

30 “ And the donor for himself his heirs executors and administrators doth hereby covenant and declare to and with the donee his heirs executors and administrators that he hath good right full power and lawful authority to donate the said premises in manner aforesaid and that he had not at any time heretofore made done or committed or been party or privy to any act deed matter or thing whatsoever whereby or by means whereof the said premises or any part thereof are or may be impeached or encumbered in title charge estate or otherwise howsoever and that he and his aforewritten shall and will at all times hereafter warrant and defend the same and every part thereof unto the donee and his aforewritten against any person or persons whatsoever and further shall and will at all times hereafter at the request and cost of the donee or his aforewritten do and execute or cause

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“ to be done and executed all such further and other acts deeds
 “ matters and things whatsoever for the further and more perfectly
 “ assuring the said premises unto the donee and his aforewritten as
 “ by him or them may be reasonably required.”

6. After the execution of the said Deeds the Assistant Government Agent replied to the Mudaliyar's letter of the 16th May 1927 and the correspondence proceeded as follows :—

p. 48, l. 9

Letter from the Assistant Government Agent dated the 27th July 1927 :—

“ Sir,

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“ I have the honour to request you to be good enough to
 “ furnish me with a draft of the proposed deed of gift for perusal, if
 “ you are willing to abide by the conditions in the succeeding
 “ paragraph.

“ 2. The deed of gift should make express provision as follows :—

“ (a) The party or parties who should continue to pay the
 “ rents and observe the Conditions in the Lease during the
 “ pendency of the life interest should be clearly mentioned in
 “ the deed of gift. It should be either the Lessee who retains
 “ the life interest or the donees, and such person or persons 20
 “ should be made liable for all defaults. If the donees are made
 “ liable none of them should be minors.

“ (b) It should also be clearly expressed in the deed of gift
 “ that after the expiry of the life interest, the four donees should
 “ be jointly and severally liable for the due payment of rent
 “ and performance of the Lessee's covenants irrespective of the
 “ shares held by them under the deed of gift.

“ (c) The donees should understand that the lease is liable
 “ to cancellation for any default.”

Letter from the Mudaliyar dated the 15th August 1927 :—

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p. 49, l. 9

“ Sir,

“ In reply to your letter L.C. 616 dated the 1st instant I have
 “ the honour to annex copy of the deed of gift No. 178 which has
 “ been already executed.

“ 2. The donees are not minors.

“ 3. If the conditions be infringed by the donor or the donees, the lease is, of course, liable to cancellation.

“ 4. I beg to tender my unreserved apology for the hasty manner in which the deed was executed—the attendant circumstances need not be explained here.”

(It does not appear from the Record what these circumstances were).

Letter from the Assistant Government Agent dated the 27th August 1927 :—

“ Sir,

10 “ With reference to your letter No, 375 dated the 15th instant
“ I have the honour to return herewith the copy of the deed of gift
“ forwarded therewith and to inform you that it does not meet with
“ the requirements contained in paragraphs 2 (a) (b) and (c) of my
“ letter No. 616 dated the 1st instant to your address.

p. 50, l. 6

“ 2. What is required is a draft of the proposed deed donating
“ your interests in Lease Indenture No. 29 to your sons on lines
“ indicated in paragraph 2 of my letter above referred to.”

Letter from the Mudaliyar dated the 4th September 1927 :—

p. 50, l. 31

“ Sir,

20 “ In reply to your letter L.C. 616 dated the 27th ultimo I have
“ the honour to state that the deed in question had been already
“ executed and the donees do not get more rights than I am entitled
“ to. A fresh deed will, I believe, be irregular and involve unneces-
“ sary expense and inconvenience. I beg leave to suggest that the
“ donees should in writing be permitted to undertake the liabilities
“ mentioned in your letter.”

Letter from the Assistant Government Agent dated the 8/9th September 1927 :—

p. 51, l. 11

“ Sir,

30 “ I have the honour to state that I regret to inform you that
“ these are requirements laid down by the Honourable Controller of
“ Revenue and that they must be embodied in the deed of gift
“ before formal Consent for the assignment can be given.”

Letter from the Mudaliyar dated the 1st November 1927 :—

p. 52, l. 8

“ Sir,

“ In acknowledging receipt of your letter No. L.C. 616 of

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“ yesterday’s date I have the honour to inform you that the deed in question will be cancelled by a Notarial document the draft of which is in the hands of Advocate for revision. When it is ready it will be submitted to you for approval.”

p. 53, l. 2

Letter from the Mudaliyar’s Advocate dated the 24th February 1928 :—

“ My dear Mudaliyar,

“ Herein enclosed please find a draft copy of the Deed of Cancellation you wanted me to do. Please send it up to the Government Agent and see whether this draft would do. As there are four deeds of gift dealing with the land leased from the Crown it requires four deeds to cancel the four deeds of Gift. The delay in this affair was due to the fact that I had to get the Deeds before I could have done anything.” 10

p. 53, l. 19

This letter together with draft Deed numbered 383 was submitted to the Assistant Government Agent by the Mudaliyar on the 26th February 1928.

p. 54, l. 18

Letter from the Assistant Government Agent dated the 8th March 1928 :—

“ 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.” 20

There is a note on the said letter of the 8th March 1928, which was presumably made by the Mudaliyar, and reads as follows :—

“ Deeds of Gift invalid, Son heir under the Will ”

7. The Crown thus treated the said donations by the Mudaliyar of his interests in the said Crown Lease as being void under the said clause 10 of Part IV. of the Lease and did not then or subsequently seek to exercise the power of re-entry and forfeiture for breach of covenant contained, as already mentioned, in Part IV. of the said Lease. 30

p. 12, l. 3
p. 55

Similarly the Mudaliyar treated the said donations as void and did not in fact execute any deed of cancellation but proceeded on the 23rd October 1928 to make his last Will and Testament by which he gave

devised and bequeathed all his property without exception to the Appellant subject to one legacy and named the Appellant his sole executor.

8. Mudaliyar remained in possession of the premises demised by the said Lease until the the 19th January 1930 when he died and thereupon the Appellant was entered in the Register of Rents of Government lands leased in perpetuity as substituted lessee of the said premises and continued in possession of the same until November 1932 during and even since which period he was and has been looked to by the Crown for rent as appears from the correspondence set out at pages 56 to 65 of the Record and from proceedings commenced against him by the Crown on the 20th November 1935 and a Decree obtained against him by the Crown on the 10th March 1937 to which he will crave leave to refer. In November 1932 however the third Respondent dispossessed the Appellant and took charge of the said premises on behalf of himself and the first and second Respondents and the third Respondent was subsequently succeeded in possession by the first Respondent on behalf of himself and the second and third Respondents. The Appellant accordingly brought the action out of which this appeal arises in order to determine the title to the said premises.
9. By amended Plaintiff filed in the District Court of Kalutara dated the 17th December 1934 the Appellant set up the said Crown lease and the said Will of the said Mudaliyar and contended that the said Deeds of Gift in favour of the first three Respondents were void because they had been executed without the written consent of the Crown and that he was accordingly entitled to the said premises under and by virtue of the said Mudaliyar's said Will both as sole devisee and also as executor, and prayed for a declaration that he was entitled thereto and for ejection therefrom of the first three Respondents. Claims for damages were also put forward in the said Plaintiff but these were afterwards abandoned.
10. By Answer filed in the District Court of Kalutara on the 26th March 1935 the first three Respondents set up the said Deeds of Gift executed by the Mudaliyar as being valid and operative and while admitting the Appellant's right to one-fourth share of the said premises claimed that the first three Respondents were each entitled to one-fourth share in the same. The said Answer further set up that the Mudaliyar had contracted and covenanted for himself his heirs executors and administrators that he had good right full power and lawful authority to donate the said premises and that the Appellant being a claimant under the deceased testator was bound by the said Contract and covenant and was estopped from questioning the title which the Mudaliyar purported to convey to the first three Respondents. The said Answer set up in

p. 11, l. 23

p. 62A

p. 12, l. 7

p. 12, l. 23

p. 13, ll. 22-36

pp. 56-65

p. 12, l. 24

p. 12, l. 25

p. 2

p. 11, l. 7

p. 5

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the alternative that in the event of the said deeds being void the Mudaliyar had no power to dispose of the said premises by Will and died intestate to that extent. The first three Respondents accordingly claimed a declaration that the Appellant and themselves were entitled each to one-fourth share of the said premises and alternatively they asked that the Appellant's claim should be dismissed except in respect of the one-eighth share falling to him upon an intestacy. They also claimed an account of the income from January 1930 until November 1932.

p. 3, l. 43

11. The Fourth Respondent was made a party to the action in order to give the Crown notice thereof, but no relief was claimed as 10
against the Crown.

p. 4, l. 1

pp. 10-11

12. On these pleadings issues were framed which are set out in full in the Record.

p. 10, l. 14

p. 11, l. 7

The action came on for trial in the District Court of Kalutara on the 22nd June 1935 and both sides waived damages of all nature, if any, due to them up to that date.

p. 10, l. 19

It was admitted by the first three Respondents that the Crown did not give the consent required by the said clause 10 of Part IV. of the said Crown lease dated the 29th October 1919.

The Appellant gave evidence on his own behalf and the first three 20
Respondents called a witness as to the value of the premises. There was no other oral evidence given.

pp. 17-19

14. Judgment was delivered by Bharucha, D.J. in the District Court of Kalutara on the 5th July 1935. By his said Judgment the District Judge held that the deeds relied on by the first three Respondents were absolutely void and that the Appellant was not precluded or estopped from repudiating or questioning the same, and that the Mudaliyar had power to deal with the said premises by his last Will and accordingly ordered a decree to be entered in the Appellant's favour with costs. Such decree was entered on the 5th July 1935 and declared that 30
the Appellant was entitled to the said premises and ordered that the first three Respondents be ejected therefrom and that the Appellant be put and placed in quiet possession thereof.

pp. 20-21

pp. 22-25

15. The first three Respondents appealed to the Supreme Court of the Island of Ceylon against the said Judgment and Decree by Petition of Appeal dated the 8th July 1935 and the grounds upon which they relied are set out in full in the said Petition.

16. The Appeal was heard in the Supreme Court of the Island of Ceylon on the 24th and 25th November 1936 and the Judgment of the Court was delivered on the 4th December 1936 by Fernando, A.P.J. By the said Judgment the Court allowed the appeal of the first three Respondents and set aside the said Decree of the District Court and dismissed the Appellant's action with costs in the Supreme Court and below and a Decree was entered accordingly on the 4th December 1936.

p. 26, l. 19

17. On the 19th January 1937 the Appellant obtained from the Supreme Court conditional leave and on the 15th March 1937 final leave to appeal to His Majesty in Council from the said Judgment and Decree of the Supreme Court dated the 4th December 1936.

p. 31, l. 1

p. 31, l. 12

18. The first point which was taken by the Respondents in the Supreme Court was that the effect of the said clause 10 in Part IV. of the said Crown Lease was to make the said Donations voidable at the instance of the Crown and not void. Fernando, A.P.J. in his Judgment in the Supreme Court referred to authorities dealing with the ordinary effect of an assignment by a tenant in breach of a covenant that he will not assign without his landlord's consent, and pointed out that both under English Law and under Roman-Dutch Law a Tenant can seek and in suitable circumstances obtain relief, from the Court against a forfeiture for non-payment of rent or breach of covenant.

p. 24, l. 15

p. 28, l. 32

p. 29, l. 7

He went on to say :—

“ Considering the principles laid down in these cases, and the authorities cited, I come to the conclusion that the effect of a clause in terms of covenant No. 10 is not of itself to effect the operation of a deed of gift like the one we are considering, but merely to provide that in appropriate circumstances, such a deed may be set aside by a Court of Law, and that appropriate steps to secure such an Order from Court must be taken by one of the parties to the Lease. The Lessor may bring an action to secure a cancellation of the Lease if he so desires, but till the lease is cancelled, the deed of gift must remain operative as between the parties.”

p. 29, l. 8

The Appellant humbly submits that any question of forfeiture for breach of covenant or of relief against such forfeiture is entirely irrelevant to the present case and that there is accordingly a fundamental confusion in the Judgment of the Supreme Court between the position as regards

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p. 18, ll. 19-24

p. 37, l. 44

the Deeds of Gift and the position as regards the Lease from the Crown. The Appellant further submits that there is no principle of law which requires any party in the present case to obtain an Order of the Court before the said Donations became void and that the cases referred to by Fernando, A.P.J. provide no authority to the contrary. The Appellant submits that the District Judge was right when he construed the words "absolutely void" in the said clause 10 as meaning absolutely void and not conditionally voidable. The construction put upon the clause by Fernando A.P.J. in substance gives no real effect to the last sentence in the clause and treats it as containing merely a bare covenant for breach of which a re-entry and forfeiture might be sought and in suitable circumstances obtained. 10

p. 54, ll. 13-15

19. Moreover even if the clause in the Crown Lease meant that every donation without the proper consent should be voidable and not void, both parties to the Lease in fact elected with sufficient clearness to avoid the donations relied upon by the first three Respondents.

p. 29, ll. 17-20

20. The second ground upon which Fernando, A.P.J. in his Judgment in the Supreme Court decided in favour of the Respondents was because—

" . . . a person in the position of the Plaintiff who is the
" executor under the Will of the Mudaliyar, and the devisee of his
" residuary estate is bound to abide by a donation made by the
" deceased and cannot vindicate the property from the donee." 20

p. 38, ll. 8-9

In support of this view the learned Judge relied upon an alleged rule that "the heir must take upon himself all acts of the person whom he succeeds." The Appellant submits that the District Judge was right in the view which he expressed on this point when he said :—

" It is argued that the Plaintiff stands in the same position as
" Mudaliyar Jayawardane and cannot repudiate or question the
" Deeds of Gift. I do not agree with this point of view. There is
" no question of estoppel. The Deeds are absolutely null and void
" in view of the clause referred to in the Crown Lease." 30

It is submitted that the Appellant cannot be barred from his rights as devisee by donations which were void ab initio, especially seeing that those donations were made upon the footing that the necessary consent to them of the Crown had been or would be obtained and it is now common ground that such consent has never been obtained and apparent

that such consent would never have been obtainable unless the terms of the donations were altered in the manner required by the Crown.

Moreover even if the Appellant "must take upon himself all costs of the person he succeeds" it is apparent that the Mudaliyar himself, after the correspondence already set forth, concurred with the Crown in treating the donations as void and that unless they had been so treated the Crown would have been driven, for its own protection, to forfeit the lease and thereby prevent the first three Respondents from in any event obtaining a title to the premises in question. The first three Respondents are seeking to reap the benefit of the donations having been treated as void at the crucial time, whilst also seeking to reap the benefit of the donations now being treated as not void.

An alternative ground relied upon by the first three Respondents in their Petition of Appeal to the Supreme Court was that the bar in the Crown lease against sub-letting, selling donating mortgaging or otherwise disposing of or dealing with interest in the lease was wide enough to bar a disposition by will so as to result in an intestacy to the extent of the premises in question. The Appellant submits that the District Judge was right in construing the words "or otherwise dispose of or deal with his interest in this lease" according to the ejusdem generis rule "as meaning acts of the same nature, in this case deeds inter vivos." This construction is reinforced by the fact that the lease was made in favour of the Mudaliyar "hereinafter called the lessee which expression shall include his heirs executors administrators and permitted assigns."

24. The Appellant submits that this appeal from the said Judgment and Decree of the Supreme Court dated the 4th December 1936 ought to be allowed and that the Decree of the District Court dated the 5th July 1935 ought to be restored for the following amongst other

REASONS :

1. Because the Donations relied upon by the first three Respondents are void.
2. Because the Donations relied upon by the first three Respondents if voidable were avoided in the lifetime

of the Mudaliyar and prior to the execution of his last will and testament.

3. Because the Appellant is not precluded from the setting up the invalidity or avoidance of the said Donations.
4. Because no Order of the Court was necessary in order to establish the invalidity or avoidance of the said Donations.
5. Because the warranty of title and covenant for further assurance in the said Deeds of Gift cannot pass title which the Mudaliyar had no power to confer. 10
6. Because the Mudaliyar had power to dispose of the premises in question by will.
7. Because the premises in question passed to the Appellant under the last will and testament of the Mudaliyar.
8. Because the said Judgment and Decree of the Supreme Court were wrong and ought to be set aside and reversed. 20
9. Because the said Judgment and Decree of the District Court of Kalutara were right and ought to be restored and affirmed.

H. I. P. HALLETT.

STEPHEN CHAPMAN.

In the Privy Council.

ON APPEAL
FROM THE SUPREME COURT OF
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BETWEEN
SIMON CHRISTOPHER
JAYAWARDENE Appellant.
and
(1) ALFRED CHRISTY
JAYAWARDENE ;
(2) DR. FREDRICK NICHOLAS
JAYAWARDENE ;
(3) GEORGE LLEWELLYN
JAYAWARDENE ;
and
(4) THE HONOURABLE THE
ATTORNEY GENERAL OF
CEYLON Respondents.

CASE FOR THE APPELLANT.

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