ABUBUCKER
v.
FERNANDO

SUPREME COURT.
SHARVANANDA C. J., L. H. DE ALWIS, J., AND
H. A. G. DE SILVA, J.
S. C. APPEAL No. 13/85; C. A. No. 327/73;
D. C. KALUTARA, No. 2584/P.
MARCH 26, 1987.

Title to land–Purchase at Fiscal's sale–Failure to obtain Fiscal's conveyance–Whether title passes–Possession after sale for longer than prescriptive period–Whether prescriptive title is established–Partition action.

Donation–Acceptance–Acceptance by minor–Donation relied on to prove title–Burden of proving validity of donation by acceptance–Roman-Dutch Law of donation.

If a Fiscal's conveyance is not executed in favour of the purchaser of a land at a Fiscal's sale no title passes. If however the purchaser enters into possession after the sale and possesses the land for longer than the prescriptive period, title by prescription is established.

A donation can be accepted by a minor provided he was of sufficient understanding. Looking after the donor in his illness can be evidence of such sufficient understanding.

Under the Roman-Dutch Law a donation to be valid has to be perfected by acceptance. Acceptance can be by traditio (actual delivery) of the thing donated to the donee or there can be a clear expression of the donee's intention to receive the donation. A donation is a bilateral agreement to which there must be two consenting parties. Taking delivery of the deed and entering into actual possession of the property can be proof of acceptance though no particular form of acceptance is required. Where in a partition suit the plaintiff relies on a donation for his title, the burden of proof of his title being upon him, he must prove that the donation was valid by acceptance.

Where there was proof only of the presence of the donees at the execution of the deed but there was no expression of acceptance by the donees, possession of the land had not given to the donees and there was no evidence that the deed itself was handed over to the donees and further no other circumstances from which acceptance by the donees could be presumed, the donation is not valid.

Cases referred to:

(1) *Carolis v. Perera–(1911) 14 NLR 219.*
(2) *Mohideen Hadjiar v. Ganeshan–(1963) 65 NLR 421.*
(3) *Babaihamy v. Marcinahamy–(1908) 11 NLR 232.*
(4) *Hendrick v. Suditaratne–(1912) 3 CAC 80.*

(5) *Public Trustee v. Uduruwana-(1949) 51 NLR 193.*

(6) *Nagalingam v. Thanabalasingham-(1948) 50 NLR 97.*

(7) *Bindua v. Untty-(1910) 13 NLR 259.*

APPEAL from judgment of the Court of Appeal.

M. S. A. Hassen with *Ishan Waffa* and *S. Jayatilleke* for 4th defendant-appellant.

N. R. M. Daluwatte P.C. with *K. S. Tilakeratne* and *Miss Nandadasa* for plaintiff-respondent.

Cur. adv. vult.

May 8, 1987.

L. H. DE ALWIS, J.

The plaintiff filed this action to partition a portion of a land called Bogahawatta described in the schedule to the plaint. At the commencement of the trial he confined the action to lots A & B depicted in Plan No. 295 dated 06.07.68 made by Licensed-Surveyor, Dharmawardena, marked 'X'.

The plaintiff's case is that one Juwakeenu Perera was the original owner and he upon deed No. 5783 of 9.8.1870 (P1) gifted a half share of several portions of a land called Bogahawatte to his brother Marikku Perera and his nephew Nikulas Fernando (a son of his deceased sister Maria) subject to his life interest and reserving the balance half share of the said lands in favour of his wife Agida Fernando. Thereafter Agida Fernando died and the plaintiff avers that her 1/2 share of the lands too devolved on Marikku and Nikulas as her heirs and they thus became entitled to a 1/2 share each of the land sought to be partitioned. The plaintiff claims a 1/4 share of the lands by right of purchase upon deed No. 1360 of 23.01.1967 (P8) from the heirs of Nikulas as set out in the plaint.

The position of the 4th defendant Abubucker, is that the entirety of the land belonged to Marikku Fernando. He claims rights in the land by right of purchase on three deeds 4D3, 4D9 and 4D14 from the heirs of Marikku as set out in his statement of claim and by right of prescriptive possession. He states that the plaintiff has no interests in the corpus and prays that the action be dismissed.

The learned District Judge held that the deed of gift P1 conveyed no rights to Nikulas for two reasons. The first was that Juwakeenu the donor on P1 had purchased rights in the land at a Fiscal's sale held on

7.12.1835 by virtue of a writ issued in D.C. Kalutara case No. 502 but had not obtained a Fiscal's conveyance. In the absence of a Fiscal's conveyance Juwakeenu got no rights on the Fiscal's sale which he could have conveyed to Nikulas on P1. The other reason given by the learned District Judge was that the gift on P1 was not accepted by Nikulas on the face of the deed and consequently no rights passed to him.

It is no doubt correct that the failure to obtain a Fiscal's conveyance upon a Fiscal's sale passes no title to the purchaser. *Carolis v. Perera* (1). But as was submitted by learned counsel for the plaintiff, the learned Judge erred in failing to consider that Juwakeenu, as stated in the deed, possessed the land from the date of the Fiscal's sale in 1835 up to the time of the execution of P1 in 1870 which is a period of about 35 years. He thus acquired a prescriptive title to the land. Juwakeenu therefore had title to the land in 1870, when he executed the deed P1 in 1870.

The next question is whether Nikulas accepted the donation from Juwakeenu on P1. The District Court held that none of the donees on the face of the deed P1 accepted the gift. The Court of Appeal while coming to the same conclusion went on further to state that it appeared from the attestation clause to the deed that both parties were present at the execution of the deed and that the words "both parties" could only mean the donor and donees. On this construction of the attestation clause the Court of Appeal held that the donees were present at the execution of P1 and that P1 is a valid deed of gift, evidently on the basis that their presence was a circumstance pointing to their acceptance of the donation. It accordingly set aside the judgment of the District Court and directed that interlocutory decree be entered allotting 1/6th share to the plaintiff who had bought some of the interests of Nikulas's heirs and a 5/6 share to the 4th defendant.

It is necessary to set out the attestation clause in the deed P1. The English translation of it, made by the interpreter of the District Court, Kalutara and filed by the plaintiff along with the deed reads as follows:

"I, B. G. Perera, Notary Public, do hereby certify that the foregoing instrument was read over and explained by me the said Notary to the within-named executant in the presence of the said witnesses, the same was signed by the said executant, the witnesses and by me the said Notary in my presence and in the presence of one another all being present at the same time at Beruwala on this 9th day of August, 1870.

Which I attest.
Sgd. B. G. Perera
Notary Public."

There are several omissions in this translation including the reference to "both parties" and as such it is not an accurate translation. Since the Court of Appeal took the view that the words "both parties" appearing in the attestation clause referred to the donor and donees, I got down the document produced in the District Court and carefully read the deed which is in Sinhala. The correct translation is as follows:

"I, B. G. Perera, Notary Public, residing at Beruwala in the District of Kalutara in the Island of Sri Lanka do hereby certify that I executed the foregoing deed of gift at the residence of the Donor and after I well and truly read over and explained it to both parties above-mentioned who are known to me, in the presence of the witnesses above-mentioned who are also known to me, the Donor and the witnesses aforesaid who are known to each other placed their signature before me and in the presence of each other to three documents of this tenor on this 9th day of August, 1870.

Which I attest.
Sgd. B. G. Perera
Notary Public
Barberiya.

Seal"

It would thus appear from the attestation clause that the donees also were present at the execution of P1 as held by the Court of Appeal. There are however no words expressing acceptance of the donation by the donees in the deed P1. A point of contest raised in the case runs as follows:

(2) "Did his (Juwakeenu Perera's) interests devolve as set out in the Plaint."

The plaint stated that Juwakeenu Perera gifted a 1/2 share of his rights in the land to Marikku and Nikulas from the latter of whom the plaintiff claims rights. Being a partition action the burden lay on the plaintiff to prove that he has rights in the land he seeks to partition. It was therefore incumbent upon him to establish that P1 was a valid deed of donation which was accepted by Nikulas, although no specific issue was raised on it.

The Court of Appeal had taken the view that P1 was a valid deed of gift because the donees were present at the time of the execution of the deed.

The plaintiff under cross examination, when questioned whether there was acceptance of the deed P1, replied that the donees were minors at the time and that no one accepted the gift on their behalf. But that makes no difference to the plaintiff's case. A minor who has sufficient understanding has capacity to accept a gift. *Mohideen Hadjiar v. Ganeshan,* (2).

P1 states that the donees were looking after the donor in his illness so that the minors would have had sufficient understanding and therefore the capacity to accept the gift.

In *Babaihamy v. Marcinahamy,*(3) three of the four donees were minors. The donor signed the deed and there followed this paragraph "We the said four persons (named) do hereby declare to have accepted the above donation granted by T. Jando with the highest regards, to have entered into possession of the said land from this day. . . and we who are of proper age to sign have also signed hereto." Here followed a cross and Salman's signature in English characters and the Notary's attestation to the effect that after he had read and explained the deed to the donor and donees, in the presence of the witnesses, the same was signed "by all the proper parties" in the presence of each other. Wendt J., said–

> "At all events it is clear that all 4 donees were present at the execution of the deed and assented to its terms, setting forth that they accepted the donation and that Salman being of 'proper age to sign'. . . actually signed it. It is I think, a fair inference, from the circumstances attending the execution of the deed, that the donees whose signatures do not appear, if minors, were still old enough to understand the nature of a gift and to express their wishes to the

Notary. . . . .No case has been brought to our notice which lays down the broad proposition that a person under the age of 21 years is incapable of validly accepting a donation. Such a broad proposition would, I think, be contrary to our law. It is true a minor is incapable of binding himself to his own detriment by an onerous contract, but he can always accept an unequivocal benefit such as a donation essentially is . . . . "

In the present case the donees have not signed the deed and expressed their acceptance of the gift, nor have they taken possession of the property. The question then is whether their mere presence is a sufficient circumstance from which their acceptance of the donation can be presumed. Learned Counsel for the plaintiff however submitted that there were the other circumstances from which acceptance of P1 by the donees could be presumed. He relied heavily on the dictum of Lascelles C. J., in *Hendrick v. Suditaratne,*(4) which runs as follows–

"There is, I think, a natural presumption in all these cases that the deed is accepted. Every instinct of human nature is in favour of that presumption, and I think when a valuable gift has been offered and it is alleged it has not been accepted, some reason should be shown for the alleged non-acceptance of the deed. . . . "

In that case it was held that under the Roman-Dutch Law, no particular form is required for the acceptance of the gift and that it is in every case a question of fact whether or not there are sufficient indications of the acceptance by the donee. Learned Counsel in the present case went on to enumerate the several circumstances from which acceptance of P1 could be presumed and I shall deal with them in due course. In the case referred to, however, the deed of gift was delivered to the future husband of the donee on the occasion of the marriage along with other presents so that the inference was irresistible that the donee accepted the donation. The dictum of Lascelles C. J., must be read in the context of the facts of that case. The deed of gift was handed over to the future husband at the marriage ceremony as dowry. This was a strong circumstance of acceptance of the donation by the donee.

In Roman-Dutch Law which is applicable in the present case, a donation is regarded as a contract and no obligation arises until acceptance by the donee. *Roman-Dutch Law*–Lee, 5th Ed. Pg. 285.

In *Public Trustee v. Uduruwana*,(5) Dias J., referring to the Roman-Dutch Law said–

"A 'donation' is an agreement whereby one person called the 'donor' without being under any legal obligation so to do and without receiving or stipulating for anything in return gives or promises to give something to another, who is called a 'donee'. A donation is perfected in one of the two ways: (*a*) either by the donor expressing his intention to make the donation, followed by the actual delivery (tradition) of the thing donated to the donee; or (*b*) by the donor expressing his intention to make the gift coupled with the acceptance of the donation by the donee. Donations are perfected by tradition, or even without tradition, when the donor's intention to give and the donee's intention to receive have been clearly expressed. A donation is a bilateral agreement to which there must be two consenting parties."

In that case the donor, when he was at the point of death, stated in the presence of witnesses including the donee, that he desired to give a gift of Rs. 10,000 (by cheque) to the donee who had been his faithful servant. The donee when he heard his master express this intention to donate Rs. 10,000 to him, placed the palms of his hands together in oriental fashion and bowed low to his master saying that he thankfully accepted the donation. The two doctors attending on the dying man forbade him from writing a cheque when the cheque book was brought as they believed any exertion on his part might prove instantly fatal. In that case there was a clear expression of the donor's intention to donate verbally coupled with a clear acceptance by the donee by nods, words and signs. It was held that they were sufficient to create a valid donation.

Again in *Nagalingam v. Thanabalasingham* (6) Canekeratne J., said:

"A donor makes a gift with the intention that the thing would become the property of the donee; the offer must be accepted by him to whom it is made for the concurrence of the donor and donee must take place in order to render the donation perfect, the obligatory effect of the gift depends upon its acceptance. The donor may deliver the thing e.g., a ring or give the donee the means of immediately appropriating it e.g., delivery of the deed, or place him in actual possession of the property."

Although no particular form is required for the acceptance of a gift in Roman-Dutch Law, it is a common practice to state in the deed that the donee thankfully accepts the donation and also to obtain his signature to the deed in acknowledgement of his acceptance. This has not been done in the present case. There is in the deed only the clear expression by the donor of his intention to gift a half share of certain lands to the donees, reserving the life interest in the donor. But there is no expression of acceptance by the donees in the deed. Possession of the land was not given to the donees nor is there any evidence that the deed itself was handed over to the donees. The question now is whether there are other circumstances from which acceptance by the donees could be presumed.

In *Bindua v. Untty* (7) it was held that acceptance may be manifested in any way in which assent may be given or indicated. The question of acceptance is a question of fact, and each case has to be determined according to its own circumstances. Wood Renton, J., said:

> "It is true that the critical point of time in such a case as this, where the donation was one taking effect at once on the execution of the deed, is the date of the execution of the deed itself. But for the purpose of determining whether there was such an acceptance, we are entitled to look not only at the circumstances accompanying, but also at those subsequent to the date of the donation."

Learned Counsel for the plaintiff submitted that there are several documents of title, which indicate that the heirs of Nikulas had possession and argued that acceptance by Nikulas on P1 could be inferred for them. In land acquisition proceedings of 4.2.1929 (P10) a portion of Bogahawatte was acquired by the Government Agent of Kalutara and compensation was awarded to two claimants. Dona Angelina, one of the daughters of Marikku and Isabella Coray, the widow of Nikulas, on the basis that each was entitled to a 1/2 share of the land. But the plaintiff's evidence is that the portion of land in respect of which compensation was awarded lay to the north of the corpus sought to be partitioned. The plaintiff admitted that there were as many as nine different portions of Bogahawatte. The portion acquired by the Crown is not described by metes and bounds and there is no evidence that it was one of the four lands sought to be gifted on P1. That land therefore may well have been a different land which belonged only to Angelina and Isabella.

In the Inventory (P6) filed by the son of Isabella Coray, Warliyanu, to whom letters of administration (P5) were issued in respect of Isabella Coray's estate in D. C. Kalutara 2276/T, three portions of Bogahawatte are included therein, as items 20, 21 and 22. But here again it has not been established that these portions of Bogahawatte, which are not described by metes and bounds, are any of the lands referred to in P1. In P1, the boundaries of the four portions of Bogahawatte dealt with were not given in a schedule to the deed at the date of its execution. The boundaries were furnished by a Notary's affidavit about 19 years later when the deed came to be registered on 2.5.1889 (P4).

In the Inventory (P8) of Warliyanu's estate filed by his widow Egisthina in D. C. Kalutara 3437/T, a portion of Bogahawatte is included as item 8. But here again there is no evidence that it is one of the lands referred to in P1. In any event these documents by themselves do not constitute evidence of possession by Nikulas and his heirs.

It was submitted by learned Counsel for the Plaintiff that the learned District Judge omitted to consider deed 4D1 when he stated that Marikku's heirs have dealt with the land as though Marikku was the sole owner. On 4D1 which is deed 10 of 14.9.50, Justina Perera, one of Marikku's surviving children mentioned in the plaint, conveyed an undivided 1/7 share of a 1/2 share of a portion of Bogahawatte to Maria Perera. The Court of Appeal relied on 4D1 as supporting the position that Marikku was not entitled to the entirety of the land as claimed by the 4th Defendant in his statement of claim.

Learned Counsel for the Plaintiff also pointed out that on deed 1863 of 8.11.44(4D4) Christina Perera, a grandchild of Marikku dealt with only an undivided 5/512 share of a portion of Bogahawatte (item 3 in the Schedule). On deed 5777 of 26.12.30(4D13) Marseleena Fernando, the wife of Pelis, a son of Marikku dealt with a 1/16 of 5/8 share of Bogahawatte. Again on deed 15920 of 1.3.1915(4D7) Ana alias Anjalina, a child of Marikku also dealt with an undivided 1/2 share of a portion of Bogahawatte (item 3 of the schedule). The fact that on deeds 4D1, 4D4, 4D13 and 4D7 the successors in title to Marikku have not dealt with shares in the entirety of the land is no evidence that Nikulas and his successors in title had possession of the balance share of the land or were entitled to it.

On the other hand the earliest document produced by the 4th Defendant, relating to the land after the deed P1 of 1870, is mortgage bond No. 1926 of 17.4.1925(4D17) by which Bastian, a son of Marikku mortgaged a 1/8 share of the whole land stating that he had been in possession of the land by parental inheritance.

The inventory (4D15) filed by Anjalina on 12.9.41 in D.C. Kalutara 2032/T as Administratrix of the estate of her husband Juwan Perera who is a child of Marikku, shows that an undivided 1/7 share of a portion of Bogahawatte (item 6) is included, on the basis that Marikku was entitled to the entirety of the land.

Nikulas quite clearly got no possession of any interests in the 1/2 share of the lands gifted to him and Marikku on P1 because the gift was subject to the life interest of the donor Juwakenu Perera. Nor does the original deed appear to have been handed to Nikulas at least because what was produced by the Plaintiff was only a certified copy of P1.

With regard to the balance 1/2 share of Juwakenu Perera which devolved on his widow Agida Fernando, the Plaintiff was unable to lead reliable evidence as to who her heirs were, although at one time he claimed that they were Marikku and Nikulas. The District Judge has rejected this evidence and the Court of Appeal has taken the view that the devolution of title of the interests of Agida Fernando has not been proved and has held that there was sufficient evidence to conclude that the heirs of Marikku had possessed that share also.

The learned District Judge also held that there is no reliable evidence that the Plaintiff or any of the persons from whom he claims title had possession of any share of the land. He has accepted the evidence of 4th Defendant's witness, Catherine Fernando and has held that Marikku possessed the entirety of the the land and his heirs have dealt with the land as though Marikku was the sole owner. These findings have not been interfered with by the Court of Appeal and I affirm them.

The Plaintiff who claims interests in the corpus from the heirs of Nikulas has failed to prove that Nikulas accepted the donation of a share of the land on P1, at the execution of the deed. Nor is there evidence that Nikulas or his heirs possessed a share of it, from which a presumption of acceptance can be drawn. P1 therefore is not a valid deed of donation and no rights pass on it to Nikulas. The Plaintiff's action must therefore fail.

I set aside the judgment of the Court of Appeal and dismiss the Plaintiff's action with costs payable to the 4th Defendant–Appellant in the following manner: Rs. 105 in the District Court, Rs. 315 in the Court of Appeal and Rs. 525 in this court.

SHARVANANDA, C.J. –I agree.

H. A. G. DE SILVA, J.–I agree.

Appeal allowed.