1959 *Present :* **Sansoni, J., and H. N. G. Fernando, J.**

S. A. KANAPATHIPILLAI, Appellant, *and* A. SUBRAMANIAM *et al.*, Respondents

S. C. 544—D. C. Jaffna, 424/L

Donation—Recital that donee should settle a mortgage of the gifted property—Valuable consideration.

Prescription—Laches—" Acquiescence "—" Estoppel ".

(i) A person gifted two lands to his son " for and in consideration of love and affection ". The deed of donation contained a recital that the lands donated, which were of the value of Rs. 2,500, were subject to a mortgage debt of Rs. 1,500 and interest which was to be paid and settled by the donee.

Held, that the deed could not be regarded as a transfer for valuable consideration.

(ii) When a person refrains from seeking redress when a violation of his rights, of which he did not know at the time, is brought to his notice, his laches constitutes a form of acquiescence, which, however, would not deprive him of his rights unless prescriptive title is proved against him in terms of the Prescription Ordinance. Accordingly, when A conveys to B property which belongs to C, who subsequently comes to know of the transaction, C would not lose title to the property unless B can prove prescriptive title to it.

[1] *(1885) 15 Q. B. D. 54 at 58.*

APPEAL from a judgment of the District Court, Jaffna.

C. Ranganathan, with *E. B. Vannitamby*, for plaintiff-appellant.

No appearance for defendant-respondent.

Cur. adv. vult.

February 13, 1959. SANSONI, J.—

The plaintiff in this action obtained a money decree in case No. M. S. 582 against the 1st defendant on 11th September 1956. In execution of that decree he seized 1/10 share of the land called Kiluvanai described in the schedule to the plaint. The 2nd defendant claimed the land, and as his claim was upheld the plaintiff has filed this action to have it declared that he was entitled to seize and sell the 1/10 share.

The entire land was purchased by Kandappar Arumugam on deed P 2 of 1912 during the subsistence of his marriage with his wife Kathiresapillai. The land thereupon became thediathettam of Arumugam and Kathiresapillai, and each of them became entitled to 1/2 share. A portion of the land was given as dowry to their daughter, and Arumugam purported to gift the remaining portion (described in the schedule to the plaint) to their son Velupillai by deed P 4 of 1930. There can be no doubt that Arumugam was entitled to donate only his 1/2 share, and I need only refer on this point to the case of *Mattayer v. Kanapathipillai* [1].

The plaintiff's case is that when Kathiresapillai died in 1940 she was still entitled to 1/2 share which devolved on her five children, the 1st defendant (one of her sons) thereby becoming entitled to 1/10 share which the plaintiff claimed he was entitled to seize and sell. The 2nd defendant pleaded that Velupillai, the donee on deed P 4, sold the entire land to his brother Paramu on deed D 2 of 1937, and that the latter on deed D 1 of 1956 sold it to him. He claimed the entire land upon this title. He further pleaded (1) that the plaintiff's decree was obtained fraudulently and collusively, (2) that the deed P 4 was in fact a transfer for valuable consideration, (3) that he had acquired a prescriptive title to the land, and (4) that Kathiresapillai acquiesced in the conveyance of the land to Velupillai.

After trial the learned District Judge held (1) that the plaintiff's decree was neither fraudulent nor collusive, (2) that deed P 4 was not a simple donation but was in reality a transfer for valuable consideration because it stipulated that Velupillai should settle a mortgage which had been created over the land, (3) that the 2nd defendant had acquired a prescriptive title, and (4) that Kathiresapillai had acquiesced in the donation P 4. He dismissed the plaintiff's action on these grounds.

[1] *(1928) 29 N. L. R. 301.*

By the deed P 4 Arumugam gave the land in dispute and another land by way of donation to Velupillai " for and in consideration of the love and affection " he had for his son, reciting as his title the deed P 2. The deed of donation contains a recital that the two lands donated, which were of the value of Rs. 2,500/, were subject to a mortgage debt of Rs. 1,500/ and interest which was to be paid and settled by the donee. It seems to me that the donor was making it clear in the deed that the gift was subject to an encumbrance, and that it was the duty of the donee to free the lands of that encumbrance. Undoubtedly the donor would benefit to that extent, but I am unable to say that the consideration for the donation was anything except love and affection, which is the consideration recited in the deed. I therefore do not regard the deed as a transfer for valuable consideration.

Inasmuch as the deed P 4 was effective to transfer only an undivided 1/2 share of the land to Velupillai, Kathiresapillai remained a co-owner of a 1/2 share until her death in 1940. The learned Judge has held that Kathiresapillai and Velupillai were in possession of the land until Kathiresapillai's death in 1940, and that thereafter Velupillai possessed the land. But Paramu who claims to speak to such possession was out of the Island till 1947. His evidence of possession is therefore hearsay. In any event, the question remains whether even if Kathiresapillai and Velupillai were in possession it was not as co-owners. It must be remembered that till Kathiresapillai's death title to 1/2 share was in her. It matters not that she was aware of the donation P 4 so long as she had possession of her share. Thereafter that share devolved on her five children, of whom Velupillai, Paramu and the 1st defendant were three. It was not open to Velupillai or Paramu by any secret intention to change the character of his possession as that of a co-heir to that of one possessing adversely. Proof that the 1st defendant was made aware of the deeds in their favour and that they were possessing adversely to him has not been adduced in this case. Seeing that Paramu and Velupillai were co-heirs of the 1st defendant, cogent evidence of adverse possession and ouster would be necessary before prescription could begin to run in their favour against the 1st defendant.

On the question of Kathiresapillai's acquiescence in the conveyance to her son Velupillai, the learned Judge has found in favour of the 2nd defendant on the ground that the deed P 4 is referred to in a mortgage bond P 5 executed in 1932 by Kathiresapillai and Velupillai. By P 5 they mortgaged two lands, but neither of them is the land in dispute. Velupillai has mentioned the deed P 4 as his title to one of the mortgaged lands, and the learned Judge has on this ground held that Kathiresapillai regarded Velupillai as the sole owner of the land in dispute. Apart from the fact that the land in dispute was not mortgaged by the deed P 5, even if the reference to the deed P 4 be regarded as an admission by Kathiresapillai of Velupillai's right to the entirety of the land in dispute, she or her heir the 2nd defendant does not thereby lose any rights in the land.

" The term ' acquiescence ' is used in two senses. In its proper legal sense it implies that a person abstains from interfering while a violation of his legal rights is in progress. In another sense it implies that he refrains from seeking redress when a violation of his rights, of which he did not know at the time, is brought to his notice " (13 Halsbury—Hailsham Edition—page 208). In the former sense acquiescence operates by way of estoppel, and in the latter sense it is an element in laches.

Now the issues dealing with acquiescence are :

(11) Did Kathiresapillai acquiesce in the conveyance of this land in favour of her son Velupillai ?

(12) If so, can any of the other children of Kathiresapillai claim any share of this land ?

There is no evidence at all that Kathiresapillai stood by and knowingly permitted the donation P 4 to be executed in favour of Velupillai. Therefore these issues can only relate to Kathiresapillai's acquiescence in the donation after she had come to know of its execution. Even then the 1st defendant's share will not be lost to him unless the 2nd defendant can prove prescriptive title to it. " The defence of laches, however, is only allowed when there is no statutory bar. If there is a statutory bar, operating expressly or by way of analogy, the plaintiff is entitled to the full statutory period before his claim becomes unenforceable" (page 112).

Another matter referred to in the judgment is that Kathiresapillai was aware of the transfer D 2 by Velupillai to Paramu. It is not clear from the finding in the judgment whether she has been held to be aware that the transfer was to be made, or only that it had been made. If it is the latter, then again her knowledge would not deprive her of her rights for the reasons given in the passage just quoted. If it is the former, then if the requisite proof had been adduced she and her successors in title might have been estopped from disputing the title of Paramu and the 2nd defendant ; but there is no plea of estoppel, and the issues relating to acquiescence are confined to the conveyance P 4 only. There is no plea, nor issue, of estoppel relating to the transfer D 2.

The learned Judge finally held that the transfer to Paramu was for valuable consideration to a bona fide purchaser. A finding on such a matter can only be made after it has been put in issue. There is no issue which calls for or justifies such a finding, and therefore the question does not arise.

On the issues as framed it seems to me that the 1st defendant's title to 1/10 share must be upheld and I would therefore set aside the judgment appealed against and give judgment for the plaintiff as prayed for with costs in both Courts.

H. N. G. FERNANDO, J.—I agree.

Appeal allowed