1956 *Present :* Gratiaen, J., and Sansoni, J.

FALIL A. CAFFOOR *et al.*, Appellants, *and* M. Y. M. HAMZA *et al.*, Respondents

S. C. 280—D. C. Colombo, 5,761 P

Donation—Acceptance by unauthorised agent—Validity—Reservation of life-interest in donor—Acceptance after donor's death—Validity.

Acceptance on behalf of a donee, but without the donee's authority, renders a deed of gift inoperative.

Quaere, whether a deed of gift reserving a life-interest in the donor can be accepted by the donee after the death of the donor.

APPEAL from a judgment of the District Court, Colombo.

H. V. Perera, Q.C., with *N. Dissanayake*, for the 9th–14th defendants-appellants.

[1] *(1932) 34 N. L. R. 37.*

H. W. Jayewardene, Q.C., with *S. Sharvananda*, for the plaintiff-respondent.

No appearance for the 2nd-9th respondents.

Cur. adv. vult.

March 8, 1956. GRATIAEN, J.—

The plaintiff instituted this action on October 10th 1949 for the sale under the provisions of the Partition Ordinance of a narrow strip of land 9¼ perches in extent, depicted in the plan No. 1937 filed of record. The property which is situated in New Moor Street, Colombo, was at that time a "Takkiya" which was regularly attended by Muslims as a place of worship (except on Fridays). There was a shrine room on the site and two Muslim "saints" had been buried there with the permission of the Municipal authorities in 1930 and 1937 respectively. The 8th defendant, who claimed to be the trustee of the Takkiya, intervened in the action. After his death the 15th defendant, his successor in that office, was substituted in his place. The other intervenients are the appellants who claimed to be the legal owners of the property holding it in trust for the congregation.

The property had belonged several years ago to a Muslim lady called Natchi Umma. According to the plaintiff, she donated it (subject to a life-interest in herself and also to a fideicommissum in favour of the donee's children) to her grandson Mohamedo Usoof by P1 of 1891. No specific evidence was led as to when precisely the donor died. Mohamedo Usoof himself died on 23rd April 1945. The plaintiff claims that the property then passed to him as fideicommissary under P1 and to his brother Noor Mahaliya whose interests have since passed to the 1st to 7th defendants. The learned Judge accepted this chain of title and ordered a sale of the property under section 8 of the Partition Ordinance on that basis.

The appellants conceded that the property originally belonged to Natchi Umma, but denied that P1 operated as a valid donation *inter vivos* because it had not been accepted either by Mohamedo Usoof personally or on his behalf by any person authorised by him. Their position was that Natchi Umma continued to be the owner until she died and that the property then passed to her daughter Kando Umma (the mother of Mohamedo Usoof). According to the oral evidence, Kando Umma died in 1898, but her death certificate was produced in this Court and proves that she in fact died on 11th June 1902.

It has been clearly established that Mohamedo Usoof, asserting absolute title to her property, sold it on 1st February 1907 to Omar Lebbe Marikkar, from whom it ultimately passed in 1918 by a succession of transactions to the appellants' father. By that date the property had been dedicated (by one of the purchasers claiming absolute ownership through Mohamedo Usoof) for use as a Takkiya. The Municipal Assessment Register 9D2 proves that it has since 1918 been recognised as a Mosque.

I agree with the learned Judge's ruling that neither the purported dedication of the property for the purposes of a religious trust nor the fact that two pious Muslims have since been buried there would afford a defence to the action if in truth the legal title to the site including the shrine room and the graves now belongs to the plaintiff and his co-heirs. Indeed, the only ground on which Mr. H. V. Perera invited us to set aside the judgment under appeal was that the donation of the property to Mohamedo Usoof by P1 was inoperative for lack of acceptance. It is therefore unnecessary to discuss certain topics which seem to have excited much interest in the lower Court—for instance the question as to the particular processes by which a pious Muslim may be recognised as having attained the status of a "saint". In short, the case can be decided without causing offence to the religious feelings of the litigants. I therefore return to the point of law raised by Mr. Perera.

Mohamedo Usoof was admittedly of age at the time when the deed P1 was executed in his favour, but the deed of donation P1 purported on the face of the document to have been accepted on his behalf by his aunt Sotha Umma. There is no proof that he had authorised this lady to accept the gift or that he was even aware of the donor's intention to make it. *Prima facie* therefore the purported acceptance by Sotha Umma was insufficient to perfect the gift. *Voet* 39 : 5 : 11 and 12. There is also no direct or convincing circumstantial evidence of any subsequent acceptance of the gift by Mohamedo Usoof on his own account during the life-time of the donor.

As a general rule, acceptance after the donor's death does not operate to perfect the gift. "For the will of the donor and the donee were not at one before the donor's death, and after the death of the donor they could not be united to the prejudice of the heir, who had acquired a real right to the property concerning which the donation had not been affected." *Voet* 39 : 5 : 13. The plaintiff relies, however, on an exception to the general rule, namely, that a gift may be perfected by acceptance after the donor's death "if the execution or fulfilment of the donation has been postponed till after the donor has died." *Voet* (*ibid.*). It was argued that in the present case the donor had reserved to herself a life-interest in the property, so that the "fulfilment" of the donation was in truth postponed. It was suggested in *Lokuhamy v. Juan* [1] that if a donor reserves to himself the right to possess the property till his death, *Voet* 39 : 5 : 13 is authority in support of a valid acceptance after death. But this decision appears to have been principally based on a prior acceptance by the natural guardian of the donees who were minors, and on "other circumstances from which acceptance may fairly and reasonably be implied".

The ruling in *Lokuhamy v. Juan* [1] was followed in *Tissera v. Tissera* [2], but with respect, I think that the question calls for reconsideration in an appropriate case. When A conveys his property to B reserving a life-interest to himself, the title to the property passes immediately to B, and the enjoyment of only one of the rights incidental to full ownership is postponed. I doubt if it can fairly be said that in such a situation

[1] *(1875) Ram. Rep. 215.* [2] *(1908) 2 Weer, 36.*

there has been a postponement of the "fulfilment" of the donation. The law would therefore seem to require "a present acceptance of the dominium which the deed confers subject to the life-interest." per Wood Renton J. in *Hendrick v. Sudritarana* [1]. I shall assume, however, that it was open to Mohamedo Usoof to perfect the gift in his favour by acceptance after his grandmother died. Even then I take the view that proof of such acceptance has not been satisfactorily established.

The evidence relied on by the plaintiff indicates at best that Mohamedo Usoof first dealt with the property by executing two leases in favour of third parties in 1899 and 1901 (before his mother died) and that he later mortgaged it in 1903 (after her death). The indentures of lease and the mortgage bond have not been produced, and there is no material from which we may infer that he had expressly (or even by necessary implication) acknowledged that his title was derived from, and limited by the terms of, the deed P1. Indeed, P1 had expressly prohibited him, as fiduciary, from mortgaging the property and it would be strange indeed if one were to regard the execution of a mortgage in violation of prohibition as affording proof of acceptance of the gift subject to that very prohibition. Those transactions which took place after Mohamedo Usoof's mother had also died are not inconsistent with the hypothesis that he had leased or mortgaged the property by virtue of some other title asserted by him. Let it then be supposed that the leases executed in 1899 and 1901 took place before the death of Natchi Umma. In that event the transactions would *prima facie* contradict acceptance of the gift subject to the donor's life-interest.

The burden was on the plaintiff to establish a valid acceptance of the gift, and not on the defendant to disprove it. It must be emphasised in this connection that Mohamedo Usoof sold the property in 1907 reciting a title which was quite inconsistent with his suggested acknowledgment of the status of a mere fiduciary. *In Tissera v. Tissera* [2] by way of contrast, the donee, when dealing with the property, had expressly recited that he had acquired title by virtue of the deed of gift, and Grenier J. observed that "if there had been no acceptance of the gift on behalf of the donees or by the donees themselves there would not have been this recital in the bond."

A person seeking to establish a valid acceptance of a gift by circumstantial evidence must furnish proof from which it may fairly be inferred, on a balance of probability, that the donee was aware of the execution of the deed of gift and had accepted it subject to the terms and conditions of the grant. If, at the end of the case, the evidence on this issue is equivocal, the burden of proof is not discharged. I would therefore allow the appeal and dismiss the plaintiff's action with costs in both Courts.

SANSONI, J.—I agree.

Appeal allowed.

[1] *(1912) 3 C. A. C. 80. See also the observations of De Sampayo J. in* Nonai *v.* Appuhamy *(1919) 21 N. L. R. 165 at 169.*
[2] *(1908) 2 Weer. 36.*