BERTIE FERNANDO AND OTHERS

v.

MISSIE FERNANDO AND OTHERS

COURT OF APPEAL.
B. E. DE SILVA, J. AND DHEERARATNE, J.
C.A. 339/76 – D.C. COLOMBO 13116.
MARCH 18, 1985.

Deed of Gift–Non-acceptance–Revocation of gift by deed of rectification–Burden of proof–Evidence Ordinance, section 101 (illustration (b)).

The burden of proving acceptance of a deed of gift is on the party claiming under it. Where there has been no valid acceptance of a deed of gift, the donor is perfectly entitled to revoke it even unilaterally and make another disposition.

Cases referred to:

(1) *Falil A. Caffoor v. M. Y. M. Hamza (1956) 58 NLR 33.*

(2) *Nonai v. Appuhamy (1919) 21 NLR 165.*

APPEAL from the District Court of Colombo.

P. A. D. Samarasekera, P.C. with *N. R. M. Daluwatte, P.C.* and *L. de Silva* for 5th, 6th, 7th and 8th defendant-appellants.

J. W. Subasinghe, P.C. with *Miss E. N. P. Edirisinghe* for 1st to 4th defendant-respondents.

Cur. adv. vult.

May 17, 1985.

DHEERARATNE, J.

The plaintiffs filed this action on 23.5.1971, to partition premises bearing Assessment numbers 84 and 86, School Lane, Bambalapitiya, depicted in plan C 1039 made by Mr. C. C. Kumaraswamy, Licensed Surveyor.

The owner of the premises, at one time, was admittedly, one Miguel Fernando, who was married to one Selestina. According to the plaintiffs, Miguel by deed of gift No. 162 of 7.2.1935 (P3), gifted the corpus to his three children, Missie the 1st plaintiff, Joslin the 1st defendant and Sadiris the 5th defendant, subject to a fidei commissum, in favour of the children of the donees. By P3, the 1st plaintiff and the 1st defendant get one fourth share each, while the 5th defendant gets the balance half share of the corpus. 2nd to 5th plaintiffs are the children of the 1st plaintiff, 2nd to 4th defendants are the children of the 1st defendant and 6th to 8th defendants are the children of the 5th defendant, and are fidei commissaries in terms of P3. The life interest of Miguel and Selestina in the property, were reserved by this deed. Of the donees, only the 1st defendant and the 5th defendant signed P3 accepting the gift.The 1st plaintiff was not present at the execution of the deed but her mother Selestina signed accepting the gift on behalf of herself and on behalf of the 1st plaintiff. It was on this deed, that the plaintiffs claimed one fourth share of the corpus.

The contesting 5A to 8th defendants filed their statement of claim on 22.11.1972, denying that any interest passed to the plaintiffs on P3, for want of lawful acceptance of the gift by the 1st plaintiff. The

contesting defendants further alleged that Miguel had rectified P3 subsequently, by executing another deed of gift No. 164 of 3.12.1935 (6D1), by which deed no interests in the corpus had been gifted to the 1st plaintiff.

Deed of gift 6D1 recites–

"And whereas the said Pattiyage Seletina Fernando, who, purported to accept the said deed of gift for the said Thappulige Missie Fernando was not requested (and) not authorised to accept the said gift by the said Thappulige Missie Fernando and the same is therefore void and of no effect.

And whereas the said donor, the said Thappulige Miguel Fernando, is now desirous of rectifying the said deed of gift by declaring that the aforesaid land and premises should be held by way of gift, solely by his son Thappulige Sadiris Fernando and his daughter the said Thappulige Joslin Fernando, in equal shares, subject to the terms and conditions containing in the aforesaid deed of gift No. 163 dated 7.2.1935 and omitting therefrom the said Thappulige Missie Fernando as donee therein."

Besides Miguel, Selestina, Sadiris and Joslin were signatories to this deed 6D1

Thus, the main question for determination at the trial was, which of the two deeds P3 and 6D1, was valid. Missie the 1st plaintiff gave evidence for the plaintiffs, while the 5th defendant's widow Damayanthie, who had joined the family after P3 was executed, gave evidence on behalf of 5A to 8th defendants. The learned trial judge took the view that P3 validly conveyed title to the plaintiffs and further, that the donee of P3, could not have 'ex parte' revoked the gift, by executing 6D1. It is from this judgment that the 5 (*a*) to 8th defendants have preferred this appeal.

It was contended before us, on behalf of the appellants, that the learned trial judge misdirected himself, on the question of the burden of proof in the case and further that he had proceeded on the assumption that P3 is a valid deed. The learned trial judge has stated:

"The deed No. 163 appears to be expressly a valid deed of gift. It is stated therein, that, on behalf of the 1st plaintiff, her mother Selestina Fernando has accepted the gift. Selestina Fernando has also stated in deed No. 164, that she had signed for the acceptance of the gift on the earlier deed. In view of this, I feel the burden of proof to say that there was no valid acceptance of the gift, rests on the 6th to 8th defendants."

In terms of section 101 of the Evidence Ordinance, whoever desires any court to give judgment as to any legal right or liability dependant on the existence of any facts which he asserts, must prove that these facts exist. Particularly, illustration (*b*) to that section reads:

> "A desires a court to give judgment that he is entitled to a certain land in the possession of B, by reason of facts he asserts and which E denies to be true. A must prove the existence of those facts."

Our attention was drawn to the judgment in *Falil A. Caffoor v. M. Y. M. Hamza* (1) wherein Gratiaen, J. at page 36 stated:

> "the burden was on the plaintiff to establish a valid acceptance of the gift, and not on the defendant to disprove it."

Therefore, it appears to me, that the learned counsel for the appellants is correct in his submission, that the burden of proof in establishing the acceptance of the deed of gift P3, was on the plaintiffs.

It was also contended before us, that the learned trial judge was in error, when he stated, that according to the 1st plaintiff's testimony, her mother was authorised to accept the gift on her behalf, at the time P3 was executed. Although the 1st plaintiff has averred so in the plaint, her evidence on this crucial point does not lend support to this finding of the learned trial judge.

The 1st plaintiff's only evidence on this matter was as follows–

"Q – Did you tell your mother what has to be done in regard to this land?

A – No, it was my father who said.

Q – What did father say?

A – He asked my mother to sign on my behalf. He told that it was not necessary that I should come. I was at that time in delicate health, and was unable to go. That is why he said so."

The 1st plaintiff got married in 1928 and at the time of the execution of P3, she was about 38 years old. From the time of the marriage she was living at Moratuwa. Her parents, brother and sister

lived in Colombo, in the house situated in the corpus. The alleged conversation referred to above, regarding the execution of P3, took place when the 1st plaintiff's parents visited her at Moratuwa. Miguel died in 1937 and Selestina in 1942. According to the 1st plaintiff, she was completely ignorant of 6D1 till about 1970, when she was told by her sister that she has no title to the corpus. This revelation took place, on the 1st plaintiff questioning her sister of an alleged attempt to sell the corpus.

To evaluate this evidence of the 1st plaintiff, regarding execution of P3, it would be relevant to refer to her evidence on her relationship with the parents. According to her, there was no ill feeling between her and her parents and not even between her and her brother and sister. The 1st plaintiff stated –

> "My mother and father are honest people, my parents are not the type who will act against me. They treated other children and me equally. They had no necessity whatsoever to act against me. My father treated all three of us alike. So was my mother."

No explanation came from the 1st plaintiff regarding the conduct of the parents in executing 6D1, which conduct, seems strange, indeed, from the point of view, of such an affectionate relationship. It appears to me, in these circumstances, that on the question of acceptance of the gift, more reliance could be placed on the clear and unambiguous statement contained in the recital of 6D1, executed 10 months after the execution of P3, rather than on the vague and equivocal evidence given by the 1st plaintiff, after nearly 39 years had elapsed. The probability is that, the 1st plaintiff gave no authority to her mother, to accept the gift. No evidence came from the 1st plaintiff that P3 was accepted by her in any other manner recognized by law, for example, by way of entering into possession of the property. Once the burden of proof in the case is correctly placed on the plaintiffs, it seems to me that the conclusion I have arrived at, becomes inescapable.

The conduct of the parties, after execution of P1, also lends supports to the view I have taken. The 1st plaintiff never attempted to exercise any semblance of a proprietary right in the corpus since 1935. Joslin, the 1st defendant by deed 179 of 13.3.1939, produced marked 1D2, sold her interests in the corpus to Sadiris the 5th defendant. Sadiris by deeds 5D1 of 13.2.1939, 5D2 of 4.7.1940 and 5D3 of 29.9.1941 mortgaged the entire corpus to

various parties, without recognising the rights of any other person. Thereafter, Sadiris by deed 596 (1D3) of 1.6.1957, resold to the 1st defendant an extent of 10.5 perches with reference to a plan, and those parties are in divided possession of the corpus. On the portion purchased by the 1st defendant, she has erected a new upstair building, apparently without any protest from the 1st plaintiff. The 5th defendant had made various alterations and improvements to the old house standing in the corpus, also without any protest from the 1st plaintiff.

Once the gift P3 fails for want of acceptance on behalf of the 1st plaintiff, the next question for consideration would be the validity of 6D1. "Where the acceptance has not followed, the donor is at liberty to change his bare intention." – Censura Forensis – 1–4–12–16 (Laws of Ceylon by Walter Perera). On the authority of *Nona v. Appuhamy* (2) the effect of non-acceptance is to enable the donor to revoke the gift and to make any other disposition. I am of the view, that once gift P3 failed for want of proper acceptance by the 1st plaintiff, the donor was perfectly entitled to revoke the gift made earlier, even unilaterally. This would make way for the validity of 6D1, and consequently, the plaintiffs would get no title to the corpus

An alternative argument was advanced to us by both the learned counsel for the appellants and by learned counsel for the 1st to 4th defendant-respondents, on the basis of prescriptive rights of parties, in the event of our holding that there was a valid acceptance of P3 by the 1st plaintiff. In view of the finding I have arrived at, it would be unnecessary to address my mind to that question

The appeal is therefore allowed and the plaintiffs' action is dismissed with costs. The plaintiff-respondents will pay a sum of Rs. 525 to the defendant-appellants as costs of this appeal.

B. E. DE SILVA, J. – I agree.

Appeal allowed.