1973 *Present:* **Samarakoon , C.J., Weeraratne, J. and Sharvananda, J.**

I. DE SILVA, Appellant *and* COMMISSIONER GENERAL OF INLAND REVENUE, Respondent.

S. C. 1/76 B.R.A 364

Adverse possession – Clear and unequivocal evidence – Possession hostile to real owner – Property of mother enjoyed by son – Permissive possession.

HELD :

A person who bases his title in adverse possession must show by clear and unequivocal evidence that his possession was hostile to the real owner and amounted to a denial of his title to the property claimed.

Where property belonging to the mother is held by the son the presumption will be that it is permissive possession which is not in denial of the title of the mother and is consequently not adverse to her.

Continued appropriation of the income and payment of taxes will not be sufficient to convert permissive occupation into adverse possession unless such conduct unequivocally manifests denial of the permitter's title.

Case stated for the opinion of the Court under the provisions of section 102 Inland Revenue Act No. 4 of 1963.

S. Ambalavaner with *K. I. de Silva, Miss P. Wimalasuriya* and *J. J. Rajakaruna* for the appellant.

G. P. S. de Silva, Deputy Solicitor General for the respondent.

Cur. adv. vult.

January 25, 1978. SHARVANANDA, J.

This is a case stated for the opinion of this Court under the provisions of section 102 of the Inland Revenue Act No. 4 of 1963, on an application by the executrix of the estate of the late Mrs. Ranasinghe.

The late Mrs. Ranasinghe was entitled to the entirety of Dewatawatta estate in the district of Negombo. This estate, in extent 206A 0R 25P, is depicted in Plan No. 34/31 of 30/11/31 made by the Surveyor Croos Dabrera and consists of lots 1 to 14 therein. By deed of gift **No. 4875 dated 18.9.52,** Mrs. Ranasinghe gifted to her son K. A. B. Ranasinghe lots 1 to 11, in extent 158A 2R 28P, out of the entire corpus of the said Dewatawatta estate. The lots so gifted are contiguous to each other and bounded, *inter alia*, on the east by lot 12 in the said Plan. The schedule to the said deed of gift makes it quite clear that the donor intended to convey and did convey by that deed the defined and divided portion of 158A 2R 28P out of the total extent of 206A 0R 25P. It is to be noted that there was no division on the ground separating the lots that were gifted, from the lots that were retained by the donor.

Subsequently, by deed of gift **No. 2587 dated 12.8.65**, the deceased Mrs. Ranasinghe gifted the outstanding lots 12, 13 and 14 of Dewatawatta estate also to her son K. A. B. Ranasinghe. It appears that from the time of the earlier gift, i.e. 18.9.52, the donee K. A. B. Ranasinghe was in possession of the entire Dewatawatta estate, including the portion that was not gifted to him by his mother, and appropriated the income of the entire estate and made a return of the full amount as his income to the Department of Inland Revenue and paid income tax thereon. He also paid acreage taxes on the entire estate to the local authorities and returned the market value of the whole estate as part of his wealth for wealth tax and land tax purposes and paid the taxes due thereon. It is not disputed that the income, wealth and land taxes for the years from 1951 to 1965 in respect of the entirety of Dematawatta estate had been paid by K. A. B. Ranasinghe. On the basis of these facts, it is claimed that K. A. B. Ranasinghe had by 1965 prescribed to the said lots 12, 13 and 14 and did not in law require any conveyance from his mother to confirm his ownership of the said lots.

The question that has to be determined, on this reference, is whether the deceased mother, in fact, was left with any title to the balance portion of Dewatawatta estate to convey by deed No. 2587 of 22.8.65, or had her title, prior to the disposition, been extinguished by the alleged prescriptive possession of K. A. B. Ranasinghe, the donee. If she had, she became liable to pay gift tax in terms of section 39 of the Inland Revenue Act No. 4 of 1963 and consequently income tax from the capital gains arising therefrom. If the donor had ceased to be the owner and had no title to convey by deed No. 2587, she gifted nothing and there was in fact no donation to entail gift tax. It is fundamental to the concept of donation that the donee must be enriched and the donor corresponding impoverished.

The *prime facie* liability to gift tax that the deed of gift attracted was resisted by the donor on the extraordinary ground that the donee had already prescribed to and was the owner of the property sought to be conveyed by

deed No. 2587 and that the deed was merely executed to give 'paper' title to prescriptive title. According to her, "there is no question of a gift by the mere writing of a deed as it was a recognition of the actual position that existed from 1951 onwards". In her affidavit dated 15.10.69, the assessee Mrs. Ranasinghe stated that "the deed of gift No. 4875 of 18.9.52 was executed by me in the belief that the entirety of Dewatawatta was being gifted to my son K. A. B. Ranasinghe. Thereafter it transpired that a portion of Dewatawatta estate, consisting of lots 12, 13 and 14, has not been included . . . In order to regularise the existing position brought into effect since 1952, and in order that the title to the entirety should vest in K. A. B. Ranasinghe, I executed the deed of gift No. 2587 of 1965 whereby that portion of Dewatawatta estate consisting of lots 12, 13 and 14 were gifted to K. A. B. Ranasinghe." According to her, the non-inclusion of the lots 12, 13 and 14 in the earlier deed of 1952 had taken place inadvertently and that omission was a *bona fide* mistake. This version is in the teeth of the unequivocal provisions of the deed of gift No. 4875 of 1952 and is clearly untenable, and Counsel for the assessee prudently abandoned this line of argument before the Assessor and relied entirely on the submission that at the time deed No. 2587 of 1965 was executed, the donor had lost dominium of that portion of Dematawatta estate consisting of lots 12, 13 and 14 and that the donee had become entitled thereto and that the deed was merely written to quiet the donee in his possession.

The relevant deed No. 2587 is, *ex facie*, a pure and simple deed of gift. The recital in the deed states that "the donor is under and by virtue of deed No. 2942 dated 31st March, 1939, the owner and proprietor of or otherwise well and sufficiently entitled to the land and premises fully and particularly described in the schedule (viz. lots 12, 13 and 14 containing in extent 47A 1R 36P in Plan No. 34/31 from and out of the land called Dewatawatta estate)". By the operative clause in this deed, the donor conveyed and transferred unto the donee as a gift *inter vivos* absolutely and irrevocably the said land and premises. The habendum clause provides that the donee is "to have and to hold the land and premises hereby gifted . . . and every part thereof". By another clause in the said deed, the donor covenanted with and declared to the donee that she had good right and full power to gift and assign the said land and premises and that she would always warrant and defend title. The deed records that the donee K. A. B. Ranasinghe manifested his acceptance of the donation by signing the deed. The property that was gifted was valued at Rs. 83,081/- and the *ad valorem* stamp duty of Rs.1,335/- was paid upon the instrument.

Section 129 of the Inland Revenue Act defines 'gift' as "a transfer by one person to another" of any existing movable or immovable property made voluntarily and without consideration in money or money's worth, and 'transfer of property' as "any disposition, conveyance, assignment, settlement, delivery, payment or other alienation of property".

The transaction embodied in deed No. 2587 has, *ex facie*, all the indicia and ingredients of a gift as defined above. The donor, stating that she is entitled to the property, conveys the property valued at Rs. 83,081/- to the donee without any monetary consideration and the donee, acknowledging such title in the donor, thankfully accepts the said donation. The deed is not merely an evidentiary record of a gift, but in law brings a transfer or disposition in favour of the donee into existence. A donation is a species of contract, and acceptance by the donee is essential to the constitution of a valid donation. The donation vests immediately in the donee upon his acceptance thereof, and ownership of the subject-matter of the donation passes from the donor to the donee. Thus, on the son K. A. B. Ranasinghe accepting the donation, ownership in the lots 12,13 and 14 of Dematawatta estate changed hands. The donation was made on the basis of the ownership existing in the donor. The deed militates against the contention of the parties thereto that its execution was an unnecessary exercise and served no purpose in law.

However, since section 101(9) of the Inland Revenue Act bars the application of the provisions of the Evidence Ordinance relating to the admissibility of evidence at the hearing of the appeal to the Board of Review, the exclusionary rules prescribed by sections 91 and 92 of the Evidence Ordinance do not stand in the way of the appellant's contention that the words in the deed do not mean what they say.

On the facts admitted by the Assessor, the donee claims that he has prescribed to the property by virtue of his possession from 1952 of lots 12, 13 and 14 along with the lots 1 to 11 that were conveyed to him by deed No. 4875. Mr. Ambalavarner contended that since the donee had paid income, wealth and land taxes from 1952 to 1965 and had appropriated the income from the said lots 12, 13 and 14 for the period of 1952 to 1965, the donee must be presumed to have been in adverse possession of the said lots and acquired prescriptive title thereto and that the execution of the document No. 2587 of 1965 did not in any way derogate from the prescriptive title that the donee had already acquired and that the execution of the instrument had no effect on the prescriptive title so acquired.

The principle of law is well established that a person who bases his title in adverse possession must show by clear and unequivocal evidence that his possession was hostile to the real owner and amounted to a denial of his title to the property claimed. In order to constitute adverse possession, the possession must be in denial of the title of the true owner. The acts of the person in possession should be irreconcilable with the rights of the true owner; the person in possession must claim to be so as of right as against the true owner. Where there is no hostility to or denial of the title of the true

owner, there can be no adverse possession. In deciding whether the alleged acts of the person constitute adverse possession, regard must be had to the *animus* of the person doing those acts, and this must be ascertained from the facts and circumstances of each case and the relationship of the parties. Possession which may be presumed to be adverse in the case of a stranger may not attract such a presumption, in the case of persons standing in certain social or legal relationships. The presumption represents the most likely inference that may be drawn in the context of the relationship of the parties. The Court will always attribute possession to a lawful title where that is possible. Where the possession may be either lawful or unlawful, it must be assumed, in the absence of evidence, that the possession is lawful. Thus, where property belonging to the mother is held by the son, the presumption will be that the enjoyment of the son was on behalf of and with the permission of the mother. Such permissive possession is not in denial of the title of the mother and is consequently not adverse to her. It will not enable the possession to acquire title by adverse possession. Where possession commenced with permission, it will be presumed to so continue until and unless something adverse occurred about it. The onus is on the licencee to show when and how the possession became adverse. Continued appropriation of the income and payment of taxes will not be sufficient to convert permissive possession into adverse possession, unless such conduct unequivocally manifests denial of the permitter's title. In order to discharge such onus, there must be clear and affirmative evidence of the change in the character of possession. The evidence must point to the time of commencement of adverse possession. Where the parties were not at arms length, strong evidence of a positive character is necessary to establish the change of character.

The donee K.A.B. Ranasinghe is the eldest son of the late Mrs. Ranasinghe. He was living with his mother at Katana till the end of 1952. According to him, he had been in possession of the entire estate from 1951. In the circumstances, his possession of the estate in 1951 must have commenced with the mother's permission. A very fair inference that can be drawn is that, having been given lots 1 to 12 of the estate in 1952, he continued to be in possession of the other lots, viz. lots 12, 13 and 14, also in pursuance of the original permission granted by her and not in hostility to her. The *status quo* thus continued. From the provisions of the deed of gift No. 4875 of 1952, it is quite clear that the mother, for her own reasons, did not part with and did not intend to part with title to the lots 12, 13 and 14. In that context, it is inconceivable that she would have countenanced any assertion by him of title to those lots. There is no evidence that the son overtly claimed those lots as against her. In the circumstances, continued possession of lots, 12, 13 and 14 by the son subsequent to the donation of lots 1 to 11, could not have been in denial of the title of his mother, but stemmed from the permission granted to him in 1951. It is not a case of where one enters into possession of a property belonging to another claiming

it to be his own and denying the title of the true owner. The mere fact that he appropriated the income and paid the relevant taxes does not lead to the irresistible conclusion that he held the property as his own and denied the title of his mother. There is no evidence of any hostility between the son and mother. The son paid the taxes since he had the benefit of the income. It is said that the mother did not include the aforesaid lots 12, 13 and 14 in her wealth tax returns from 1958 onwards. That circumstance does not conduce to the extinguishment of her title to the lots in issue. In my view, there is no foundation whatever for the plea that the donee had acquired prescriptive title to the lots 12, 13 and 14.

Though appellant's Counsel contended that the mother granted the deed for better manifestation of the title that the son had already acquired by prescription, it is significant that the deed does not purport to have been executed for better manifestation of title and does not support any such claim. The appellant further sought to explain the execution of deed No. 2587 by invoking in his support the principle enunciated by Garvin S. P. J. in *Silva v. de Zoyza.*[1] "What the 2nd defendant did was to take a step with a view to gathering into his hands the legal title from persons who on the facts proved in this case were under a legal obligation to vest in him the title to the land of which he was in possession and claimed to be in possession as of right. It was not an act done in acknowledgment of any right in them or either of them to the possession of this land, but an assertion of his right to be clothed with the legal title as well." To be entitled to the benefit of this principle which was applied appropriately in *Lucia Perera v. Martin Perera*[2] and *Ranhamy v. Appuhamy,*[3] possession of the party prescribing must have been possession as of right and the person who held the legal title should have been under a legal obligation to vest in the other party the title to the land of which that party was in possession. It cannot be said, on the facts of the present case, that the donee ever claimed to be in possession as of right, or that the donor was under legal obligation to convey any title to K. A. B. Ranasinghe and hence the basis for the application of the above principle is lacking.

We affirm the determination of the Board of Review and answer the question of law on which the opinion of this Court is sought against the assessee. In our view, the deed No. 2587 executed by the assessee represents a gift of lots 12, 13 and 14 to K. A. B. Ranasinghe and the assessee is liable to gift tax on the value of those lots and is also liable to pay income tax (capital gains) arising from the change of ownership in those lots. The assessee shall pay Rs. 525/- as cost of this reference to the Commissioner of Inland Revenue.

SAMARAKOON, C.J. – I agree.

WEERARATNE, J. – I agree.

Determination of Board of Review upheld.

[1](1931) 32 N.L.R. 199 at 204.
[2](1951) 53 N.L.R. 347.
[3](1945) 46 N.L.R. 279.