[IN THE PRIVY COUNCIL]

1952 *Present*: **Lord Porter, Lord Tucker, Lord Cohen, The Right Hon. T. Rinfret (Chief Justice of Canada) and Sir Lionel Leach**

A. NAGALINGAM, Appellant, *and* A. THANABALASINGHAM *et al.* Respondents

PRIVY COUNCIL APPEAL No. 24 OF 1951

S. C. 335—D. C. Kandy, 2,308

*Donation—Minor—Acceptance—Revocation—Fideicommissum—Single and separate fideicommissa—Death of a fideicommissary—Devolution of share—*Jus accrescendi.

A gift of immovable property by a father to his minor son and accepted by a maternal uncle on the minor's behalf without appointment by lawful authority is invalid for want of lawful acceptance, the uncle not being a natural guardian.

Where, some time after the execution of a deed of gift, the donors purported to execute a deed of revocation unilaterally and, on the same day, the donee accepted from the donors a new deed of gift of the properties covered by the earlier gift, subject to new conditions—

Held, that the donee must be regarded as being a party to the revocation of the earlier deed of gift.

Where the direction in a fideicommissary deed of gift was that on the death of the *fiduciarius* the gifted property should devolve on three brothers "in equal shares", and one of the *fideicommissarii* predeceased the *fiduciarius*—

Held, that the gift was not one of a disposition of one share of the whole to each of the three brothers, but a gift of the whole to the three brothers jointly with benefit of survivorship. It followed, therefore, that the interest of the deceased brother, assuming that he had a vested interest when he died, did not devolve upon his heirs, but on his surviving brothers. *Tillekeratne v. Abeyesekere (1897) 2 N. L. R. 313*, followed.

APPEAL by special leave from a judgment of the Supreme Court. The judgment of the Supreme Court is reported in (*1948*) *50 N. L. R. 97*.

Stephen Chapman, for the plaintiff appellant.

James Comyn, for the 2nd, 3rd and 4th respondents.

Cur. adv. vult.

2——J. N. B 20706–1,590 (10/52)

October 6, 1952. [*Delivered by* SIR LIONEL LEACH]—

The appellant appeals by special leave from a judgment of the Supreme Court of Ceylon, dated the 13th October, 1948, which allowed an appeal by the second, third and fourth respondents from a decree of the District Court of Jaffna, dated the 7th March, 1947, and dismissed a cross-appeal which he had preferred.

The action out of which the appeals to the Supreme Court arose was instituted by the appellant for a declaration that certain land situate at Polikandy is the common property of himself and the first respondent and for an order for partition. The first respondent is a brother of the appellant. At the commencement of the proceedings he was the only defendant and he accepted the averments contained in the plaint. The second, third and fourth respondents are the sons of a deceased brother named Kanthavanam (or Kandavanam). They applied to be made parties and were joined as the second, third and fourth defendants respectively. It will be convenient to refer to them as the contesting respondents. They denied the validity of the claim advanced by the appellant and contended that the title to the land was in them. It had, they said, belonged to their father and had devolved on them on his death.

The District Judge held that the appellant and the first respondent were each entitled to a four-ninth share in the property and the contesting respondents jointly to the remaining one-ninth, although they had not made any such claim in the alternative. He left the parties to bear their own costs. The Supreme Court held that the contesting respondents were entitled to the land to the complete exclusion of the appellant and the first respondent, and consequently allowed their appeal with costs. The appellant asks for the restoration of the findings of the District Judge, except as regards the one-ninth share allotted to the contesting respondents. He maintains that he is entitled in full to the reliefs claimed in his plaint and to his costs throughout.

In the course of the proceedings in the District Court certain other intervenients were allowed to appear in support of a claim that a small portion of the property belonged to them, but the District Judge decided that they had no interest in the land, and they pressed the matter no further. The subject matter of the appeal is, therefore, the full parcel of land described in the schedule to the plaint.

The property was acquired in 1882 by Koolyar Arumugam, the father of the appellant and the first respondent. By his wife Walliammai, Koolyar Arumugam had four sons, the other two sons being Poopalasingham, who died without issue on the 3rd August, 1917, and Kanthavanam, the father of the contesting respondents, who died on the 15th July, 1931. Koolyar Arumugam died in 1920 and his wife in 1929.

The main question in the appeal involves the consideration of three deeds to which Koolyar Arumugam and Walliammai were parties. The first of these deeds is dated the 1st April, 1896, under which they purported to convey to Kanthavanam by way of gift the land in suit and

other parcels, subject to the reservation of certain of the produce to themselves during their lifetime. In the District Court this deed was marked as Exhibit P4. At the time of the execution of Exhibit P4 Kanthavanam was a minor. According to his death certificate he would be 11 years of age, but according to his marriage certificate he would be 18 years old. The Supreme Court accepted his age to be about 18 years, and there has been no criticism of this finding. In Ceylon the age of majority is 21 years.

Under Roman Dutch law, the law of Ceylon, a gift to be valid requires a valid acceptance. Being a minor Kandavanam did not sign Exhibit P4. It was signed by his maternal uncle Kanthar Sinnathamby, who, according to a statement in the deed, did so in acceptance of the donation for and on behalf of his nephew. The appellant contends that this did not constitute a valid acceptance and consequently no title to the property passed to Kanthavanam. In the alternative he says that it was revoked by the two later deeds. On the other hand the second, third and fourth respondents maintain that Exhibit P4 constituted a valid deed of gift, which has not been affected by any subsequent action on the part of the donors.

The second deed is dated the 6th July, 1908, and has been marked as Exhibit P5. By this deed Koolyar Arumugam and Walliammai purported to revoke Exhibit P4 and their reasons for doing are given in the following recitals :—

> " Whereas we have executed a donation deed in favour of our son Arumugam Kanthavanam of Polikandy, bearing No. 5825 dated the 1st day of April, 1896, and attested by Eramalingar Arumugam, Notary, for the undermentioned nine properties, and whereas the said Kanthavanam was then a minor and whereas his uncle Kanthar Sinnathamby of Polikandy had only accepted the said deed for and on his behalf and whereas we are possessing and using the said properties according to the said deed and whereas the said Kanthavanam had without our consent married one, among others, who is not of our caste, and whereas the wife of the said Kanthavanam and her people are our bitter enemies and ungrateful to us and whereas we think that the said Kanthavanam would during our lifetime ruin the said properties and whereas the said properties should be donated to the said Kanthavanam himself subject to *fidei commissum* and whereas the said Kanthavanam has full mind and perfect desire to accept such kind of donation."

Exhibit P5 was not signed by Kanthavanam.

Having executed Exhibit P5, Koolyar Arumugam and Walliammai proceeded on the same day to execute in favour of Kanthavanam a new deed of gift of the properties covered by Exhibit P4, subject to reservations of life interests to themselves and a *fidei commissum* for the benefit of the appellant, the first respondent and Poopalasingham. The original of this deed, which was registered, is said to have been lost, but a certified copy was put in evidence and marked Exhibit P6. It is alleged by the

appellant that the original Exhibit P6 was signed by Kanthavanam. Immediately preceding the witness clause is this statement :— " I the said Kanthavanam the donee hereof do peacefully accept this donation subject to the aforesaid findings ". It is also said that the deed was executed in duplicate. The alleged duplicate copy, purporting to bear the signature of Kanthavanam, was also put in evidence, being marked Exhibit P6A. Although the execution of Exhibits P5 and P6 by Koolyar Arumugam and Walliammai is not now in question, the contesting respondents deny that Kanthavanam signed Exhibit P6 and say that the alleged signature on Exhibit P6A is a forgery.

The learned District Judge did not deem the appellant's evidence worthy of credit, unless corroborated, but he considered that the case could be decided independently of his testimony. He held that Exhibit P4 was invalid, because the acceptance was merely the act of a maternal uncle, who had no lawful authority to act for the minor and therefore the way was open to the donors to execute Exhibits P5 and P6. He did not, however, consider the question whether there could be lawful acceptance in any other way, for instance by conduct. In holding Exhibit P4 to be invalid the District Judge relied on the judgment of the Supreme Court in *Silva v. Silva*[1], where it was held that a gift by a father to his minor son and accepted by an uncle on the minor's behalf was invalid for want of lawful acceptance, the uncle not being a natural guardian. In delivering the judgment of the Court, Grenier A.J. (Hutchinson C.J., concurring) said that according to Roman Dutch law only the father, the mother, the grandfather and the grandmother stood in the relationship of natural guardians.

A witness to the signature of Exhibit P6 was one Sinnathamby Vallipuram, who stated in evidence that Kanthavanam signed it in his presence and he identified Kanthavanam's signature on the duplicate copy Exhibit P6A. The District Judge saw no reason to disbelieve this witness. He was also impressed by the fact that Kanthavanam, although he must have known of the position, took no steps to challenge the revocation of Exhibit P4.

The District Judge's decision that the appellant and the first respondent were each entitled to a four-ninth share in the land and the contesting respondents jointly to the remaining one-ninth was based on his opinion that on the death of Poopalasingham his interest in the property devolved on his heirs. To this question their Lordships will return later. Notwithstanding that the contesting respondents had made no claim to such a share, the District Judge considered that it was his duty to examine the title of all the parties and decide the case according to the result of the examination.

The appeals to the Supreme Court were heard by Canekeratne and Dias, JJ. The judgment was delivered by Canekeratne J., Dias J. concurring. The learned Judges considered that the reputation of K. Kanthavanam, the notary who had acted in the execution of Exhibit P6, was an unsavoury one and they adversely criticised the evidence of

[1] *(1908) 11 N. L. R. 161.*

Sinnathamby Vallipuram, which the District Judge had accepted, but they did not go to the length of reversing his finding on this question. They left it open on the ground that it was unnecessary to decide whether the donee had executed Exhibit P6. They considered that for purposes of acceptance minors could be divided into two classes, infants and those who had attained puberty. One of the second class could be deemed to be capable of thinking for himself and by taking the benefit of the contract could himself accept it. In expressing this opinion the Supreme Court differed from the judgment of Layard C.J. (sitting with Moncreiff J.) in *Wellappu v. Mudalihami* [1], where the learned Chief Justice said that by the law of Ceylon persons were all either majors or minors, over or under 21 years of age, and it knew nothing of the elaborate distinctions of Roman law, which recognised three stages of non-age, " infancy ", " puberty " and " minority ".

The Supreme Court came to the conclusion that Exhibit P4 constituted a valid deed of gift because Kanthavanam had accepted it by going into possession. The Court presumed that this took place shortly after the gift was made or at least before the 30th November, 1899, the date of the institution of an action relating to one of the other parcels of land covered by Exhibit P4. In this action the plaintiffs were Koolyar Arumugam and Kanthavanam. The latter, being still a minor, appeared by his father as his next friend. Having found that the gift had been perfected in this way the Supreme Court held that Kanthavanam's title was unaffected by Exhibit P5, because this merely represented the unilateral act of the donors. It was on this footing that the appeal of the contesting respondents was allowed and the cross-appeal of the appellant was dismissed.

Their Lordships see no reason for doubting the correctness of the decision of the District Judge that the maternal uncle's acceptance of the gift on behalf of the minor was not a valid acceptance according to the law of Ceylon. The finding is supported by authority. In addition to the case of *Silva v. Silva*, on which the District Judge relied, there are two other decisions of the Supreme Court to the same effect, namely *Avichchi Chetty v. Fonseka* [2] and *Cornelis v. Dharmawardene* [3]. A maternal uncle is not a natural guardian ; in the strict sense he is not even a member of the same family. Without appointment by lawful authority Kanthar Sinnathamby could not act for Kanthavanam and it is not suggested that any such appointment existed. Therefore acceptance could only spring from Kanthavanam himself, if there was in fact acceptance.

Their Lordships do not consider that it is necessary to discuss the reasons given by the Supreme Court for holding that there was acceptance of the gift by Kanthavanam, because even if its reasons are sound (and here their Lordships express no opinion) they consider that he must be regarded as being a party to the revocation of Exhibit P4.

[1] (*1903*) *6 N. L. R. 233.*

[2] (*1905*) *3 A. C. R. 4.*

[3] (*1907*) *2 A. C. R., Supp. XIII.*

Exhibit P5 in itself obviously could not achieve revocation; Kanthavanam was not a signatory to it. Here the donors acted alone. But Exhibit P5 must be read with Exhibit P6 and if the latter document was signed by Kanthavanam there can be no doubt that he consented to Exhibit P4 being replaced by Exhibit P6.

Their Lordships are constrained to hold that Kanthavanam signed Exhibit P6. The District Judge accepted the evidence of the witness who deposed to Kanthavanam's signature and in spite of its criticism the Supreme Court did not say that he was wrong. The Judge who sees and hears the witness is in a better position to assess the value of his evidence, as the Board has had reason to point out on numerous occasions, but this does not, of course, fetter the discretion of an Appellate Court in arriving at a contrary conclusion if it considers that there are good reasons for so doing. In the present case their Lordships can find no sufficient reason for rejecting the finding of the District Judge that Exhibit P6 was accepted by Kanthavanam and that consequently it was valid in law. It follows that in their Lordships' opinion the Supreme Court erred in holding that the position was governed by Exhibit P4 alone.

There remains the question whether by reason of Exhibit P6 the contesting respondents are entitled jointly to a one-ninth share in the land, as found by the District Judge. This finding was based on the assumption that Exhibit P6 is to be read as creating a separate *fidei commissum* in favour of each of Kanthavanam's three brothers and not a single *fidei commissum* in their joint favour. The Supreme Court did not express any decided opinion, beyond indicating that it was a question of interpretation of the particular instrument whether on the death of a fidei commissary there was a *jus accrescendi* in favour of the other fidei commissaries or whether the heirs of the deceased fidei commissary acquired his interest.

The direction in Exhibit P6 was that on the death of Kanthavanam the property should, subject to the life interests reserved to the donors, devolve on the other sons " in equal shares ". There is room for argument here, but having regard to the judgment of the Board in *Tillekeratne v. Abeyesekere* [1], their Lordships hold that the gift in Exhibit P6 is not one of a disposition of one share of the whole to each of the three brothers, but a gift of the whole to the three brothers jointly with benefit of survivorship. It follows that in their Lordships' judgment Poopalasingham's interest, assuming that he had a vested interest when he died, did not devolve upon his heirs, but on his surviving brothers.

The result is that their Lordships will humbly advise Her Majesty to allow the appeal and grant the reliefs claimed by the appellant in his plaint. The appellant is entitled to his costs throughout.

Appeal allowed.

[1] *(1897) 2 N. L. R. 313.*