SIRIWARDENE

v.

WIRAWANATHAN

COURT OF APPEAL
WEERASURIYA, J.
DISSANAYAKE, J.
C.A.339/94 (F)
D.C. MT. LAVANIA 1966/L
APRIL 26, 2000
JUNE 14, 2000

Rei Vindicatio - Deed of Gift - Donee a Minor accepting the gift - Validity - Can a Minor accept a gift on her behalf.

Held :

(i) The Plaintiff Respondent was 12 years of age at the time of the execution of the deed of gift, the Notary in the attestation clause made explicit reference to the fact that he had duly read over and explained the contents of the deed to the donee and thereafter she has placed her signature.

(ii) The proposition that acceptance by a minor, does not contribute valid acceptance cannot affect, the validity of a deed of gift. It is competent for a minor to accept a donation in his favour inasmuch as he is benefitted thereby.

'For the purpose of acceptance minors may be divided into two classes viz (i) those of tender years-children and (ii) those who have sufficient intelligence. One who may be said to be a child is taken to lack all material capacity or power to form a decision and so can enter into no transaction' whatsoever. One of the 2nd class is deemed capable of thinking for himself has *intellectus* but since he is yet inexperienced and likely to act rashly, necessary auctoritas of his guardian must generally be interposed to make the transaction absolutely binding. Such a minor however can take the benefit of a contract and thus he can himself accept a gift.'

Appeal from the Judgment of the District Court of Mt. Lavinia.

Cases referred to :

(1) *Nagalingam vs. Thanabalasingham* - 50 NLR 97 at 98.

(2) *Nagalingam vs. Thanabalasingham* - 54 NLR 121 (PC).

(3) *Babathamy vs. Harelnahamy* - 11 NLR 223.

(4) *Mohideen Hadjier vs. Ganeshan* - 65 NLR 421 at 424.

(5) *Nonat vs. Appuhamy* - 21 NLR 165 at 168.

(6) *Bertie Fernando vs. Missie Fernando* - 1986 1 SLR 211.

N.R.M. Daluwatte P.C., with Vidura Gunaratne for Defendant Appellant.

P.A.D. Sanarasekera, P.C., with Keerthi Sri Gunawardena for Plaintiff - Respondent.

Cur. adv. vult.

November 01, 2000

WEERASURIYA, J.

The plaintiff-respondent by her plaint dated 16.06.1989, instituted action against the defendant - appellant, seeking a declaration of title to the land and premises described in the schedule to the plaint, ejectment of the defendant - appellant therefrom and damages.

The defendant-appellant whilst denying averments in the plaint prayed for dismissal of the action. This case proceeded to trial on 12 issues, and at the conclusion of the case, learned District Judge by his judgement dated 16.06.1994, entered judgment for the plaintiff-respondent. It is from the aforesaid judgment that this appeal has been preferred.

At the hearing of this appeal, learned President's Counsel appearing for the defendant-appellant contended that learned District Judge had misdirected himself in arriving at the following findings.

(a) That the legal title to the property in suit is vested in the plaintiff-respondent; and

(b) That the defendant-appellant has failed to establish prescriptive rights to the premises in suit.

The case of the plaintiff-respondent was that by deed of gift bearing No. 64 dated 11.11.1943, attested by A.V.P. Joseph,

marked P1, her father David Gunaratnam Joseph gifted this property to her, reserving life interest. This deed of gift had been duly registered as evidenced by the certified copy of the encumbrance sheet marked P3. The deed disclosed that the plaintiff-respondent had accepted the said gift. However, at the time of the aforesaid gift, the plaintiff-respondent was a minor being 12 years of age. The question that arises for determination is whether there was a valid acceptance of the deed by the plaintiff-respondent.

Learned President's Counsel for the defendant-appellant contended that a minor cannot in law accept a gift on her behalf.

The Roman Dutch Law provides that to constitute a valid donation, inter alia, there must be acceptance of the gift.

In *Nagalingam vs. Thanabalasingham*[1] at 98 Canakaratne J. observed that for the purpose of acceptance, minors may be divided into two classes viz., those who are of tender years, who may be termed children and those who have sufficient intelligence.

He further observed as follows :-

"One who may be said to be a child is taken to lack all material capacity or power to form a decision and so can enter into no transaction whatsoever, his guardian whether natural or appointed acts for him without consulting him and with complete authority. Such a child can hardly accept a gift. One of the second class is deemed capable of thinking for himself, has intellectus but since he is yet inexperienced and likely to act rashly, the necessary auctoritas of his guardian must generally be interposed to make the transaction absolutely binding. Such a minor however can take the benefit of a contract and thus he can himself accept a gift."

It is to be noted that in the appeal to the Privy Council from the decision in the above case, the question whether a minor

can himself accept a gift was left undecided by the Privy Council (Vide *Nagalingam vs. Thanabalasingham*[2].)

In the case of *Babathamy vs. Mareinahamy*[3] it was held that it is competent for a minor to accept a donation in his favour inasmuch as he is benefitted thereby. This principle was quoted with approval and followed in the case of *Mohideen Hadjiar vs. Ganesham*[4].

In the instant case, it was revealed that plaintiff-respondent was 12 years of age at the time of the execution of the deed of gift marked P1 and she had accepted the gift as evident from the deed. It is noteworthy that the Notary in the attestation clause had made explicit reference to the fact that he had duly read over and explained the contents of the deed to the donee and thereafter she had placed her signature.

The proposition that acceptance by a minor does not constitute valid acceptance, in any event, cannot affect the validity of a deed of gift. It was observed by De Sampayo J. in the case of *Nonahamy vs. Appuhamy*[5] at 168 that the effect of non-acceptance of a gift by a donee is to entitle the donor to revoke the gift and make any other disposition of the property.

In the case of *Bertie Fernando vs. Missie Fernando*[6] it was laid down that where there has been no valid acceptance of a deed of a gift, the donor is perfectly entitled to revoke it ever unilaterally and make another disposition.

In the circumstances, it seems to me that it is not justifiable to hold that no title would flow from the deed of gift marked P1.

The defendant-appellant sought to set up a plea of prescription in respect of the property in suit. It is necessary to set down the following facts in discussing this issue.

(1) That the husband of the defendant-appellant came to the premises in suit as a tenant under John Joseph.

(2) That upon his death, the defendant-appellant accepted Mrs. K.S. Joseph as her landlord.

(3) That by letter dated 21.09.1977 marked P5, defendant-appellant had intimated her willingness to attorn to the plaintiff-respondent as her landlord.

(4) That by letter dated 23.02.1977 marked P7, Mrs. S.K. Joseph had informed the defendant-appellant to attorn to the plaintiff-respondent, as her landlord.

(5) That in case No. 809/RE, the defendant-appellant had admitted tenancy under the plaintiff-respondent.

(6) That in the affidavit dated 02.10.1983 to the Commissioner of National Housing, the defendant-appellant admitted that she was the tenant under the plaintiff-respondent.

On the above material, it was manifestly clear that defendant-appellant cannot plead prescriptive possession to the property described in the schedule to the plaint. The equitable doctrine that a person cannot approbate and reprobate would appear to preclude the defendant-appellant from taking such a position.

For the above reasons, it seems to me that there is no merit in this appeal. Therefore, I proceed to dismiss this appeal with costs.

DISSANAYAKE, J. - I agree.

Appeal dismissed.