YAPA
V.
DISSANAYAKE SEDARA

COURT OF APPEAL
WIJETUNGA, J. AND ANANDACOOMARASWAMY, J.
C.A. NO. 217/80 (F)
D.C. MATARA NO. 7405/P
SEPTEMBER 8 AND 9, 1988

Partition — Identity of land — Discrepancy in extent — Donation — Acceptance of donation.

Inconsistency in extent will not affect the question of identity if the portion of land conveyed is clearly described and can be precisely ascertained.

It is not essential that acceptance of a donation on a deed of gift should appear on the face of the instrument. Such acceptance may be inferred from circumstances. Where there is no acceptance on the face of the deed and there was no evidence of delivery of the deed nor of possession of the property acceptance cannot be inferred.

In a partition suit the Court must satisfy itself that the plaintiff has made out his title.

Cases referred to:

1. *Gabriel Perera v. Agnes Perera* 43 CLW 82
2. *Senanayake v. Dissanayake* 12 NLR 1
3. *Bindu v. Untty* 13 NLR 259
4. *Nagaratnam v. Kandiah* 44 NLR 350
5. *Fernando v. Alwis* 37 NLR 201
6. *Rajah v. Nadarajah* 44 NLR 470
7. *Peiris v. Perera* 1 NLR 362
8. *Mather v. Tamotharam Pillai* 6 NLR 246

APPEAL from judgment of the District Judge of Matara.

A. A. de Silva for Plaintiff-Appellant

J.C.T. Kotelawala for 11th Defendant-Respondent.

Cur. adv. vult

March 17, 1989
WIJETUNGA, J.

The plaintiff filed this action for the partition of a land called Dunumadalagahawatte Pitakoratuwa depicted as Lots 'අ' 'ඉ' 'උ' in Plan No. 1392 A of 10.11.73 made by N. G. E. Dias, Licenced Surveyor marked 'X'. The 1st to 10th defendants were shown by the plaintiff as co-owners of the land. The 11th and 13th defendants contested the identity of the subject matter of the action as well as the claim of the plaintiff and his predecessors in title to the land in question. It is their position that the land surveyed in plan 'X' is a portion of a land called Dunumadalagahawatte belonging to them, which is depicted as lots 1—9 in plan No. 1014 of 26.5.77; made by M.A.S. Premaratne, Licenced Surveyor and produced marked 'Y'. By superimposition of plan 'X' on plan 'Y', the subject matter of the action, according to the plaintiff, is shown as lots 5 and 6 in plan 'Y'. The 11th and 13th defendants, however, claim title to this land inclusive of lots 5 and 6 in plan 'Y' and seek the dismissal of the plaintiff's action. The learned District Judge

upheld the said defendants' contention that the subject matter is part of the defendants' land and dismissed the plaintiff's action with costs. It is from this judgment that the plaintiff has appealed.

It is the contention of learned counsel for the appellant that the learned trial judge has not duly considered the evidence in this case and the chain of title which goes back to 1899. He further submits that the inconsistency in the extent of the land, which is shown in the deeds as 1 acre, but which according to plan 'X' is 1A. 1R. 2P. does not affect the plaintiff's case and should have been disregarded by the District Judge. He relies on *Gabrial Perera v. Agnes Perera* (1) for this proposition.

What was held in that case was that where in a deed, the portion of land conveyed is clearly described and can be precisely ascertained, a mere inconsistency as to the extent thereof should be treated as a mere falsa demonstratio not affecting that which is already sufficiently conveyed. But, that decision can be distinguished from the facts of the present case.

He further submits that the learned trial judge was in error in regard to the deed P1 when he came to the conclusion that there was no acceptance of the deed of gift and no proof of possession. He relies on a number of authorities which deal with the aspect of non-acceptance of the gift, to which I would refer later.

Learned counsel for the 11th defendant-respondent, on the other hand, submits that the plaintiff has failed to establish the identity of the land and the evidence of possession given on behalf of the plaintiff is totally unconvincing and that the plaintiff has not proved his title to the land as required of him in a partition suit.

On the question of acceptance of the deed of gift, the learned trial judge has held that acceptance of the gift has not been signified on the face of the deed and that there is no proof of acceptance by delivery of the deed or by possession.

The deed P1 clearly states that the donee, who was a grand child of the donor, was a minor at the time, but makes no mention of the acceptance of the gift on behalf of the minor.

In *Senanayake v. Dissanayake,* (2) it has been held that it is not essential that the acceptance of a deed of gift should appear on the face of it, but that such acceptance may be inferred from circumstances and that possession by the donee of the property donated leads to the inevitable inference that the deed of donation was accepted.

Again, in *Bindu v. Untty* (3) it has been held that acceptance may be manifested in any way in which assent may be given or indicated and that the question of acceptance is a question of fact and each case has to be determined according to its own circumstances.

In *Nagaratnam v. Kandiah* (4) where the deed contained a statement to the effect that the donor delivered possession of the property to the minors, it has been held that acceptance may be presumed.

But, none of these authorities help the appellant in the instant case as the learned trial judge has found on the facts that while acceptance of the gift has not been signified on the face of the deed, there was neither evidence of delivery of the deed nor that of possession of the property from which acceptance could be inferred. Although acceptance may be inferred from the circumstances of each case, it is all the same necessary that there should be proof of such acceptance for the validity of such a gift.

Furthermore, in *Fernando v. Alwis,* (5) it has been held that a gift to a minor donee was invalid for want of a valid acceptance.

So also, in *Rajah v. Nadarajah,* (6) it has been held that if the instrument be regarded as a donation, it would be inoperative if there has been no acceptance on behalf of the minor or delivery of the property to him.

Thus it cannot be said that the learned trial judge was in error when he came to the conclusion that there was no proof of acceptance of the gift in any of the ways in which such acceptance may be manifested.

On the question of possession, the learned trial judge having considered the testimony of the plaintiff's witnesses, has reached the conclusion that the evidence is unreliable and unconvincing. He has also drawn an adverse inference from the failure of the plaintiff to call Don Andrayas, the vendee on P. 7 and P. 12, to testify on his behalf, which evidence would have been very useful in regard to possession. I see no reason to differ from this view.

As regards the identity of the subject matter of this action, the learned trial judge, after due consideration of the evidence of the Surveyors and of the other witnesses, has come to the finding that the land depicted in plan 'X' is clearly a portion of the land of the contesting defendants, shown in plan 'Y'. This finding too is well supported.

As early as in *Peiris v. Perera* [7] Bonser C.J. expressed the view (at page 367) that "the first thing the Court has to do is to satisfy itself that the plaintiff has made out his title, for, unless he makes out his title, his action cannot be maintained; and he must prove his title strictly, as has been frequently pointed out by this Court."

Again, in *Mather v. Tamotharam Pillai,* [8] it has been held (per Layard C.J.) that a partition suit is a matter in which the Court must satisfy itself that the plaintiff has made out his title and unless he makes out his title, his suit for partition must be dismissed.

In the light of these decisions and on a consideration of the evidence led in this case, I am of the opinion that the learned trial judge was justified in reaching the conclusion that the plaintiff has failed to prove his title and consequently a decree for partition cannot be entered.

For the reasons aforesaid, I would dismiss this appeal with costs.

ANANDACOOMARASWAMY, J. — I agree.

Appeal dismissed.