

1955 Present: K. D. de Silva, J., and H. N. G. Fernando, J.

AHAYANI UMMA, Appellant, and K. S. KAMALDEEN,  
Respondent

*S. C. 562—D. C. Kandy, 3,899/L*

*Donation—Clause therein conferring benefit on a third party—Acceptance—Applicability of law relating to a contract creating a stipulation in favour of a third party.*

A gift of immovable property by A to B subject to the life interests of A and C is, so far as C is concerned, a contract creating a stipulation in favour of a third party (C). The benefit of the stipulation (life interest) in C's favour may be accepted by C after the death of A.

**A**PPPEAL from a judgment of the District Court, Kandy.

*H. W. Tambiah*, with *H. L. de Silva*, for the defendant appellant.

*N. D. M. Samarakoon*, for the plaintiff respondent.

*Cur. adv. vult.*

December 8, 1955. DE SILVA, J.—

K. S. Kamaldeen the plaintiff respondent instituted this action against Ahayani Umma the defendant appellant for a declaration that he is entitled to a life interest in the premises No. 2/9, Slaughter House Road, Kandy, and for the ejectment of the defendant and for damages. The learned Additional District Judge entered judgment in favour of the plaintiff. This appeal is from that judgment.

It was averred in the plaint that Maimoon Umma who was admittedly the sole owner of the premises in question, gifted by deed P1 dated 2nd November, 1950, a half share of the same to one Loithen subject to a life interest in favour of the plaintiff and that she gifted the balance half share by deed P2 of the same date to the defendant also subject to a life interest in favour of the plaintiff. The plaintiff was the 2nd husband

of Maimoon Umma while the defendant is the daughter of Maimoon Umma by her first husband. The plaintiff alleged that on or about 13th September, 1952, the defendant entered into forcible occupation of the premises and continued to be in wrongful possession of the same. The defendant in her answer denied that the half share conveyed to her on deed P2 was subject to the life interest in favour of the plaintiff. The only witness called at the trial was Mr. Jaimon, Proctor and Notary, who attested the deeds P1 and P2. Although there is no evidence that Maimoon Umma is now dead the trial appears to have proceeded on the footing that she died prior to 13th September, 1952, the date on which the defendant is alleged to have taken wrongful possession of the premises.

The decision of this case depends on the interpretation of deed P2. The relevant part of this deed reads:—" I Maimoon Umma in consideration of natural love and affection which I bear unto . . . Ahiyam Umma . . . give grant, convey, transfer, set over and assure unto the said donee her heirs executors . . . by way of gift absolute and irrevocable the houses and premises fully described and set out in the schedule hereto . . . to have and to hold the said houses and premises hereby gifted and conveyed with the rights and all appurtenances unto the said donee and her aforesaid absolutely forever subject to the condition, mortgage, lease etc. Subject to the further condition that I the donor do hereby reserve my life interest in and to the houses and premises hereby conveyed." By this deed eight properties were gifted and they are described in the schedule. At the end of this schedule referring to properties 6, 7 and 8 it is stated as follows:—" Which said houses and premises marked Nos. 6, 7 and 8 in the above schedule held by me the above donor upon the above said deed No. 5393 dated 11th May, 1889, subject however to a life interest in favour of Cader Saibo Kamaldeen of No. 6, Slaughter House Road, Kandy."

Admittedly the property No. 7 in P2 is identical with premises No. 2/9, the subject matter of this action. It was contended on behalf of the appellant that the reference to the life interest in favour of the plaintiff at the end of the schedule on P2 was a mere recital which is in conflict with the habendum clause in the deed and that it should therefore be ignored. By the habendum clause, it was argued, the property was donated absolutely without subject to any restriction to the defendant. Mr. Jaimon, the Notary who attested the deed stated that he did not insert the reservation of the life interest in favour of the plaintiff in the habendum clause because five of the eight properties dealt with on the deed were not subject to a life interest in favour of the plaintiff. I am unable to agree with the argument that there is a conflict between the operative part of this deed and its recitals. What has been donated to the defendant are the properties described in the schedule. The schedule itself says that the lands Nos. 6, 7 and 8 are subject to the life interest of the plaintiff. Therefore the defendant cannot now claim those lands free of that life interest. It was argued by the Counsel for the appellant that if the deed P2 created a life interest in the lands, 6, 7 and 8 in favour of the plaintiff then it is a donation which is void by reason of non-acceptance by the plaintiff. It is true that although the plaintiff

has signed P2 as a witness he did not sign it accepting this life interest. I do not think that P2 is a deed of donation in favour of the plaintiff. It only contains a stipulation for the benefit of the plaintiff. Such a stipulation in favour of a third party can be validly created. Pothier states:—"What concerns the interest of a third person may also be 'in modo'; that is to say, that although I cannot directly stipulate what concerns the interest of a third person, nevertheless, I may alienate my own property with the charge, that the person to whom I give it shall do something which concerns the interest of a third person. For instance, though I cannot stipulate in my own name directly that you shall make a present to James of Meerman's Thesaurus, I may effectually give you a sum of money or other thing subject to the charge of making such a present."<sup>1</sup> But before the third party could sue upon such a stipulation he should have accepted it. This principle was followed by Garvin S. P. J. in *Jinadasa v. Silva*.<sup>2</sup> The facts in that case were as follows:—P conveyed certain properties to S subject to the agreement that S was to reconvey the property to P or, failing him, to his brother-in-law Jinadasa if called upon to do so by P or Jinadasa at any time within five years from the date of the conveyance on payment of a certain sum of money by P or Jinadasa. P died without exercising his right to obtain a reconveyance. Thereupon Jinadasa sued S to obtain the rights secured to him by the stipulation. Garvin S. P. J. stated in that case, "The question which has been raised and argued before us is this: the stipulation being one which was made in favour of a third party is it actionable by or at the instance of a third party? That such an agreement may be validly made between the parties to a contract such as this, is, I think, beyond question for the Roman-Dutch-law authorities to which reference has been made in the course of these arguments and which are collected in the case of *McCulloch v. Fernwood Estate Ltd.*<sup>3</sup> are overwhelmingly in favour of the contention that not only is such an agreement valid but that when accepted by a third party whom it is desired to benefit by the stipulation it is actionable by the third party and at its instance." In the instant case the defendant accepted the donation subject to the life interest in favour of the plaintiff in three of the lands gifted. It is implicit in that acceptance an agreement to permit the plaintiff to possess the three lands during his lifetime. The defendant is not entitled to resile from that undertaking. The only question is whether the plaintiff has accepted the stipulation made for his benefit in the deed P2. There is no evidence that during the lifetime of Maimoon Umma the plaintiff accepted this stipulation. The right to possess these premises accrued to him only after the death of the donor as she reserved to herself the life interest. Even in the case of a donation the acceptance can be made after the death of the donor if the fulfilment of the donation is postponed to after the donor's death; (Maasdorp's Institutes of South African Law—4th Edition, Page 109). There is no reason why this principle should not be adopted in the case of stipulations in favour of third parties. The plaintiff has stated in

<sup>1</sup> *Pothier on Obligations* Section 71.<sup>2</sup> (1932) 34 N. L. R. 314.<sup>3</sup> S. A. L. R. 1920 App. Div. 204.

the plaint that he was in possession of the premises in question. That would indicate that he accepted the benefits of the stipulation. Apart from that the fact that he instituted this action to enforce his rights is also indicative of his acceptance.

Accordingly I would dismiss the appeal with costs.

FERNANDO, J.—I agree.

*Appeal dismissed.*

