1937

Present : **Moseley J. and Fernando A.J.**

KANAPATHIPILLAI *v.* KASINATHER *et al.*

120—D. C. Jaffna, 10,106.

Donation—Invalid for want of acceptance—Right of third party to challenge its validity.

Where a gift is void for want of a valid acceptance the right to challenge its validity is not restricted to the donor.

APPEAL from a judgment of the District Judge of Jaffna.

N. Nadarajah (with him *G. E. Chitty*), for first and second defendants, appellants.

H. V. Perera, K.C. (with him *Tillainathan* and *T. K. Curtis*), for plaintiff, respondent.

Cur. adv. vult.

November 11, 1937. MOSELEY J.—

The first and second defendants in case No. 8,607 of the District Court Jaffna, sued the third and fourth defendants on a mortgage bond given by the latter to secure a dowry for the second defendant, their daughter. Answer was due on November 15, 1935, but an extension of time was applied for and obtained until December 16. Within the four days preceding December 16, the third and fourth defendants by a series of deeds, namely, P 2, D 2, D 3, and D 4, dated December 12, and D 5 and D 6, dated December 15, disposed of all their properties by way of donation in favour of their children. The third and fourth defendants failed to file answer on December 16, as ordered, and judgment went by default.

The mortgaged property was sold on May 30 and there remained due under the decree a sum of some Rs. 1,600. Simultaneously with the seizure of the mortgaged property another piece of land, part of which had been conveyed by the deed P 2 to the present plaintiff, was seized. The latter is a minor and he then, by his next friend, brought this suit under section 247 of the Civil Procedure Code and asked that a certain area of the land seized should be declared to belong to him and that it should be released from seizure. The answer of the first and second defendants (the judgment creditors in D. C. Jaffna, No. 8,607) was to the effect that the deed P 2 was null and void, having been executed without consideration and with the intention of defrauding them. They accordingly claimed that the deed should be set aside. They further attacked the deed on the ground that it had not been accepted by the plaintiff or, in view of his minority, by anyone on his behalf and is therefore invalid. The parties went to trial on a number of issues to two of which I shall presently refer, and the learned District Judge found generally in favour of the plaintiff for whom he gave judgment. Against that judgment the first and second defendants have appealed.

The issues to which I have just referred are as follows :—

"8. Is the donation deed in favour of the plaintiff No. 12,869, dated December 12, 1935, invalid for want of acceptance ?

9. Is it open to any person other than the donor to raise the issue that the deed is invalid for want of acceptance ? "

The learned District Judge answered issue No. 9 in the negative. An answer to issue No. 8 was therefore unnecessary. The point, although not specifically mentioned in the petition of appeal, was argued at length before us. It goes, moreover, to the root of the matter, since, if we are of opinion that the deed is invalid for want of acceptance and that the issue can be raised, as in this case it has been, by a person other than the donor, that is the end of the plaintiff's case.

In *Voet* (*bk. XXXIX., tit. 5, s. 11*) the following proposition is enunciated :—" No gifts are valid unless they are accepted by the person to whom they are made, and moreover have his approval, for on the unwilling benefits are not conferred . . . . so much so that without acceptance they are invalid . . . . thus a donation . . . . is not perfected before there is acceptance". *Voet* makes one exception in the case of a donation made by ante-nuptial contract to a bride or bridegroom.

A donation, according to Walter Pereira (*Laws of Ceylon, 2nd ed., p. 606*), by father to son *in potestate* and accepted by the son, if he has attained puberty, or, if below infancy, by some public person on his behalf, is valid.

The most recent local decision on the point is to be found in *Fernando et al. v. Alwis et al.*[1], where the question of acceptance on behalf of minors was argued at great length and a vast number of authorities were reviewed. In that case there was what appeared to be an express acceptance by two adults on behalf of the minor donees. It was held that the acceptance by one of the adults was not on behalf of the minors, and that the other adult was not a person entitled to accept on their behalf. The gift to the minors was held to be invalid for want of a valid acceptance.

It is not disputed that in the present case there is no express acceptance on behalf of the minor plaintiff. His Counsel contended that it is not necessary that acceptance should be expressed in the deed and he relied upon the case of *Senanayake et al. v. Dissanayake et al.*[2], in which Hutchinson C.J. said : " The deed does not state that the gift was accepted ; but that is not essential. It is an inevitable inference from the facts . . . . that (the donee) was in possession with the consent of the grantor . . . . "

We were also referred to the case of *the Government Agent, Southern Province v. Karolis et al.*[3], but in that case the circumstance relied upon was possession on behalf of minor donees by their parents who were not the donors. The case is therefore not in point.

It is undoubtedly a fact that circumstances may exist from which an inevitable inference of acceptance must be drawn. In the present case, however, the circumstances of possession lead to nothing since the minor donees continued to live with the parent donor as before the gift.

Counsel for the plaintiff (respondent) further argued that acceptance could be inferred from the fact that the plaintiff had brought this action to establish his right to the property, and that he had done so within a reasonable time from the execution of the deed. I think that there might be some force in the argument in the case where a donee took such action without, as in the present case, having the situation forced upon him.

I am unable to find any circumstance from which acceptance by the plaintiff can possibly be inferred, and I hold therefore on the authority of *Fernando et al. v. Alwis et al.* (*supra*) that the deed is invalid for want of acceptance.

The next point for consideration is whether it is open to any person other than the donor to challenge the validity of the deed on the ground

[1] *37 N. L. R. 201.* [2] *12 N. L. R. 1.* [3] *2 N. L. R. 72.*

of non-acceptance. Counsel for the plaintiff cited the case of *Nonai et al. v. Appuhamy et al.*[1], where de Sampayo J. held 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". It was sought by Counsel to interpret these words as meaning that the *only* effect of non-acceptance is to entitle the donor to revoke. This seems to me to be straining the meaning of the words, and to adopt that view is impossible in the light of the decision in *Fernando et el. v. Alwis et al.* (*supra*), the effect of which is that non-acceptance renders a gift invalid and not merely voidable at the will of the donor. Since a gift, for want of acceptance, is invalid, it seems to me that the right to challenge the validity is not confined to the donor.

In my view, therefore, issues No. 8 and No. 9 should be answered in the affirmative. That being so, the plaintiff must fail and it is unnecessary to consider the other aspects of the case.

I would therefore allow the appeal and set aside the judgment of the District Court. I declare the deed No. 12,869, dated December 12, 1935, (P 2) to be null and void. The appellants will have their costs here and in the Court below.

FERNANDO A.J.—I agree.

Appeal allowed.