

1946

Present : Keuneman S.P.J. and Jayetilleke J.

NONA KUMARA, Appellant, and ABDUL CADER *et al.*,
Respondents.

293—D. C. Kegalla, 1,629.

Sale—Deed of transfer for consideration—Consideration not paid—Deed cannot, on that ground alone, be construed as deed of donation.

The plaintiff, when she was a minor, transferred certain lands to the first defendant by a deed which, on the face of it, was a transfer for consideration. She sought to have the deed declared null and void on the ground that her signature was obtained to it by undue influence, intimidation and threats. The District Judge held against the plaintiff on the questions of undue influence, intimidation and threats. He held, however, although no specific issue was raised, that the deed was a donation, and therefore null and void, merely because the transferor did not receive the consideration mentioned in the deed.

Held, that the deed which, on the face of it, was a transfer for consideration could not be held to be a donation merely because the transferor did not receive the consideration. The plaintiff's remedy was an action to recover the consideration and not to claim a cancellation of the conveyance.

A PPEAL from a judgment of the District Judge of Kegalla.

N. Nadarajah, K.C. (with him *E. B. Wikramanayake* and *C. R. Gunaratne*), for the second defendant, appellant.—The District Judge held that the deed No. 8038 of January 19, 1939 (P 6) was a donation by reason of the fact that no consideration was paid on it. He also held that the plaintiff was a minor at the time of the execution of the deed. On these grounds the Judge set aside the deed P 6.

The documents and the evidence in the case do not justify the finding of the Judge that the plaintiff was a minor at the time of execution of P 6.

Even if the plaintiff was under 21 years of age at the time of execution of P 6 she was a major by reason of Muslim Law which is the law applicable to her. Vide *Narayanan v. Saree Umma et al.*¹, *Majeed v. Paramanayagam*²; The Age of Majority Ordinance (Cap. 53) [for meaning of the expression "by operation of law" see *Lyon v. Reed and others*³ and Civil Procedure Code, section 502]; *Ameer Ali on Mohamedan Law* 4th Edition, Vol. II., p. 605; *Mulla on Mohamedan Law* 7th Edition p. 197.

P 6 is a transfer and sale. The plaintiff cannot contradict her deed. Vide *Lunaiha Umma v. Hameed*⁴; *Velan Alvan v. Ponny*⁵; Evidence Ordinance, section 92. As between third parties oral evidence may be given—*Rajah v. Nadarajah and another*⁶.

P 6 cannot be regarded as a gift or donation. (1) Plaintiff does not say so, (2) Plaintiff's case was not presented on that footing, (3) The only

¹ (1920) 21 N. L. R. 439.

² (1933) 36 N. L. R. 196.

³ (1844) 13 M & W 285 at 305-6.

⁴ (1915) 1 C. W. R. 30.

⁵ (1939) 41 N. L. R. 106.

⁶ (1943) 44 N. L. R. 470.

ground on which deed P 6 was held to be a donation was the failure of consideration. For a donation *animus donandi* must clearly be proved. See *Meyer and others v. Rudolph's Executors*¹; *Maung Koin and another v. Ma Shave La and others*². Failure of consideration does not give rise to a claim for cancellation of the deed but only to claim to sue for the unpaid consideration. See *Jayawardane v. Amerasekera*³; *Mohamedu v. Hassim*⁴; Wessells: *Law of Contract 1937 Edition, Vol. II., paras. 4875 and 4880*; Berwick: *Voet 19.1.21, p. 184*.

In *Gunasekera Hamine v. Don Baron*⁵ it has been held that a minor's donation is void and cannot be ratified. But that position seems to have been considerably modified in later cases. See *Silva v. Mohamadu*⁶; *Ahamadu Lebbe v. Amina Umma*⁷; *Shorter and Co. v. Mohamed*⁸; *Breytenback v. Frankel*⁹. The position seems to be that donation and suretyship are the only void contracts and all other contracts voidable only.

Even a void contract can be subsequently ratified. See Krause: *Voet 39.5.9, p. 21*; Sande on Restraints, p. 44, sections 88 and 90; Wessells: *Law of Contract 1937 ed. Vol. I., p. 286, para. 851*.

The Judge has held that P 6 has been ratified and that finding is correct.

L. A. Rajapakse, K.C. (with him *M. I. M. Haniffa* and *M. Abdulla*), for the plaintiff, respondent.—If the deed No. 8038 (P 6) is void it cannot be subsequently ratified. See *Gunasekera Hamine v. Don Baron (supra)*. Where a deed is a nullity no title can pass on the deed, but for greater security *restitutio in integrum* was applied for by experienced lawyers. See definition of "Void" and "Voidable" in Wille's *South African Law Dictionary*; Wilken v. Kohler¹⁰; *Harrismith Board of Executors v. Odendaal*¹¹. See also Anson on Contracts, 17th Edition, p. 10.

[JAYETILEKE J.—Voet says even a donation by a minor to his guardian can be ratified.]

Gunasekera Hamine v. Don Baron (supra) is still good law and is an authority for the proposition that such a contract cannot be ratified.

See also Wessells: *Law of Contract, Vol. I., pp. 8 and 9. (1937 ed.)*

Deed P 6 purports to be a transfer. It does not matter what the transaction is called; the whole of the surrounding circumstances must be looked into to find out the true nature of the transaction. See *Rajah v. Nadarajah*¹²; *de Silva v. de Silva*¹³. Thus facts which show that the transaction is not a sale may be proved.

Only the lease to Coonjee Moosa can be relied on to prove ratification, but a close examination shows that that deed does not ratify P 6 at all. Attestation by a witness of a signature does not mean anything more than that the signature is correct. See *Banga Chandra Dhur Biarwas v. Jagat Kishore Acharjya Chowdhuri*¹⁴. The learned Judge is clearly wrong in holding that deed No. 8038 (P 6) has been ratified.

¹ S. A. L. R. (1918) A D 70 at 76 and 78.

² L. R. (1917) Indian Appeals 236 at 242.

³ (1912) 15 N. L. R. 280 at 282.

⁴ (1913) 16 N. L. R. 368.

⁵ (1902) 5 N. L. R. 273.

⁶ (1916) 19 N. L. R. 427.

⁷ (1928) 29 N. L. R. 449.

⁸ (1937) 39 N. L. R. 113.

⁹ S. A. L. R. (1913) A. D. 390.

¹⁰ S. A. L. R. 1913 A. D. 135 at 141.

¹¹ S. A. L. R. 1923 A. D. 530 at 534.

¹² (1943) 44 N. L. R. 470 at 475.

¹³ (1937) 39 N. L. R. 169 at 171.

¹⁴ (1917) I. L. R. 44 Cal. 186 at 187.

N. Nadarajah, K.C., in reply.—A deed must be construed from the document itself. See *Perera v. Fernando*¹; *Adaicappa Chetty v. Caruppen Chetty*²; *Lunaiha Umma v. Hameed*³.

October 10, 1946. JAYETILEKE J.—

The parties to this action are Muslims. The first defendant was married to the plaintiff on November 16, 1933, and it is alleged that he was married to the second defendant on February 7, 1939. The first defendant was at the date of his marriage with the plaintiff entitled to the land which forms the subject matter of this action and to several other lands. In or about the year 1936 he got into financial difficulties and the plaintiff's father paid his debts and got him to transfer all his lands to the plaintiff by deed No. 5045 dated September 11, 1936, attested by G. C. Molligode, Notary Public (P 5). By deed No. 8038 dated January 19, 1939, attested by G. C. Molligode, Notary Public (P 6) the plaintiff retransferred all the lands to the first defendant. P 6 is on the face of it an out and out transfer in consideration of a sum of Rs. 20,000 paid by the first defendant to the plaintiff. The notary's attestation shows that the consideration was not paid in his presence but was acknowledged to have been received by the plaintiff. By deed No. 2795 dated February 17, 1939, attested by M. S. Akbar, Notary Public (2 D 18) the first defendant gifted the land which forms the subject matter of this action to the second defendant in consideration of marriage and of love and affection. In this action the plaintiff sought to have P 6 declared null and void and to have the second defendant ejected from the land described in the plaint on the ground that her signature was obtained to it by the first defendant by undue influence, intimidation and threats.

The learned District Judge held in favour of the plaintiff on the question of minority and against her on the questions of undue influence, intimidation and threats. He also held that the plaintiff did not receive the consideration mentioned in P 6. We see no reason to differ from any of these conclusions. The learned District Judge, however, declared P 6 to be null and void on the ground that it was a donation. At the argument before us Mr. Nadarajah contended that the learned District Judge was not justified in holding that P 6 was a donation in the absence of an issue and, particularly, in the absence of any evidence on the point. He further contended that even if the finding can be supported the evidence shows that P 6 was ratified by the plaintiff after she attained majority. An examination of the plaint, which was amended on three occasions, shows that no suggestion was made at any time of an original gift. Indeed the plaintiff did not in her evidence pretend that P 6 was a gift by her to her husband. It may be that the question was not raised in view of the provisions of section 92 of the Evidence Ordinance (Chapter 11).

However that may be, the plaintiff must stand or fall on the issues raised at the trial. The plaintiff's remedy is an action to recover the consideration from the first defendant and not to claim a cancellation of the conveyance. (*Vide Mohamadu v. Hussim*⁴). We do not think

¹ (1914) 17 N. L. R. 486.

² (1921) 22 N. L. R. 417.

³ (1915) 1 C. W. R. 30.

⁴ (1913) 16 N. L. R. 368.

that the trial Judge was justified in holding that P 6 was a donation merely because the plaintiff did not receive the consideration mentioned in it. Counsel for the respondent conceded that if we were of opinion that the finding of the trial Judge that P 6 is a donation is not correct the judgment could not be supported. It is therefore unnecessary for us to consider the question of ratification. For these reasons we would set aside the judgment appealed from and dismiss the plaintiff's action with costs here and in the court below.

KEUNEMAN S.P.J.—I agree.

Appeal allowed.

