1940 *Present :* **Keuneman and Cannon JJ.**

CASIE CHETTY *v.* MOHAMED SALEEM *et al.*

320—D. C. Colombo, 820.

Muslim law—Deed of gift—Immediate transfer of dominium—Possession not given—Validity of gift—Law applicable.

Where a deed of gift by a Muslim manifests an intention to make an immediate transfer of the dominium to the donee, the deed is governed by the Muslim Law.

In such a case, if possession of the subject-matter of the gift is not given by the donor to the donee, the gift fails as an essential condition under the Muslim Law has not been complied with.

Sultan v. Peiris (35 N. L. R. 57) followed ; Weeresekere v. Peiris (34 N. L. R. 281) explained.

APPEAL from a judgment of the District Judge of Colombo

H. V. Perera, K.C. (with him *Tillainathan*), for plaintiff, appellant.

S. A. Marikar (with him *M. M. K. Subramaniam*), for fourth and fifth defendants, respondents.

Cur. adv. vult.

October 10, 1940. KEUNEMAN J.—

In this case the facts are as follows :—Ashiya Umma was entitled to two contiguous lots of land depicted in plan P 3. By her deed 4 D 1, of June 5, 1930, she purported by way of gift " to grant, convey, assign, transfer, set over, and assure " the premises in question to the second to fourth defendants " as a gift *inter vivos* absolute and irrevocable ". The gift was made subject to a condition, which was fully set out in the *habendum* clause, namely, " that I the said Ashiya Umma shall during my lifetime have the right to take and enjoy the rents, profits, issues, and income of the said premises ". The only question discussed in the case is the validity of this deed of gift.

Subsequently, Ashiya Umma, by her deed P 1 of August 30, 1930, purported to declare that the said deed 4 D 1 was null and void, and to revoke, cancel, annul, and make void the said deed. It was not argued in this case that the said revocation had any legal effect.

On the same day, by deed P 2, Ashiya Umma gifted to the first defendant the divided allotment of land marked " A " in plan P 3, and more fully described in the schedule to the plaint. P 2 does not contain any reservation of a life-interest in favour of the donor.

Thereafter, the first defendant mortgaged the premises donated to him, the mortgage bond was sued upon, and the premises in question were sold in execution and purchased by the plaintiff, who obtained conveyance P 4 dated July 27, 1936.

Plaintiff in this action sued for declaration of title, ejectment, and damages. In his judgment, the learned District Judge dismissed his action, and the plaintiff appeals.

As I have already indicated, the only question which arises for determination in this appeal concerns the validity of the deed 4 D 1. The parties to this deed were all Muslims, and once again the question arises as to whether Muslim law or the Roman-Dutch law is applicable in this case.

It has been strenuously argued for the appellant that the deed 4 D 1 discloses an intention on the part of the donor to make an immediate transfer of the *dominium*, but that, as possession was not given, the deed fails and is void under Muslim law. I may add that it is not in dispute that the deed purports to make an immediate transfer of the *dominium*, but reserves to the donor the right of possession. I have examined the deed and have come to the same conclusion. But Counsel for the respondents argued that, in accordance with the decision of the Privy Council in *Weerasekere v. Peiris*[1] the gift in this case must be regarded as valid.

With respect, I am of opinion that the facts in this case are different from those in the case decided by their Lordship of the Privy Council.

In the first place, in the case of *Weerasekere v. Peiris* (*supra*), the donor, in addition to reserving a life-interest, had purported to impose a *fidei commissum* on the donee. In this connection their Lordships say:—

> "It was argued on behalf of the plaintiff-appellant that where such a deed as that under consideration involves a *fidei commissum*, the law by which the document is to be construed is the Roman-Dutch Law, and that the whole of the document, and not one part of it only, is to be construed by Roman-Dutch Law; that the principles of the Mohammedan Law were to be applied only in the case of '*pure*' donations, as they were called, made by Muslims in Ceylon; in other words, to donations not involving *fidei commissa*."

With respect, I do not think that their Lordships have given their decision on this particular question argued. As will appear later, their decision appears to have been based upon a wider principle. But I think it is necessary to point out that in the present case no complication arises by an attempt on the part of the Muslim donor to create a *fidei commissum*.

The second point of differentiation between the case of *Weerasekere v. Peiris* (*supra*) and the present case is brought out in this passage of their Lordships' judgment:—

> "In their Lordships' opinion, all the terms of the deed must be taken into consideration when construing the deed, and it seems clear to their Lordships that it was never intended that the father should part with the *property in* or the possession of the premises during his lifetime, or that the son should have any *control over* or possession of the premises during his father's lifetime. In other words, it was not intended that there should be a valid gift as understood in the Mohammedan law". (I may add that the italics are mine).

It appears, that, on an interpretation of the whole deed in that case, their Lordships were of opinion, that neither *dominium* nor possession was intended to pass immediately, and that such a deed was not a valid gift as understood by the Mohammedan law. As Macdonell C.J. says in the later case of *Sultan v. Peiris*[2].

> "In the deed in *Weerasekere v. Peiris* (*supra*) . . . . there was a 'so called gift' which transferred nothing at all unless and until the donor died without having revoked the deed; until that event happened nothing could vest in the donee."

[1] *34 N. L. R. 281.*

[2] *35 N. L. R. 57.*

Macdonell C.J. contrasts this with "an immediate and irrevocable gift of the legal title, that is of the *dominium*".

Garvin J. in the same case said :—

> "The effect of their Lordships decision, as I conceive it, is that where it appears upon a construction of the deed as a whole that the intention of the donor is not to make an immediate gift, but a gift to take effect after his death, there is not such a gift as understood by the Muslim law, and the intention of the donor must if possible, be given effect to under the general law."

Garvin J. examined the language of the deed in *Weerasekere v. Peiris* (*supra*), and pointed out that the construction that it was a deed to take effect, not immediately, but on the death of the donor, was inherent in the terms of the deed.

In *Sultan v. Peiris* (*supra*), it was held that where a Muslim, by a deed of gift *inter vivos* intended to take effect immediately, reserved "the full and unfettered right of residing in any of the premises hereby gifted, and of taking and enjoying the rents and profits of all the said allotments, without interference of the said donees or either of them", such a deed was governed by the Muslim law and was not valid, because there was no delivery of possession of the subject-matter of the gift. This is a decision of four Judges, and is binding on us. In my opinion, this decision is not in conflict with the decision in *Weerasekere v. Peiris* (*supra*).

Sultan v. Peiris (*supra*) was followed in *Ponniah v. Jameel*.[1] In his judgment in the latter case Macdonnell C.J. adopts the language I have already quoted of Garvin J. in *Sultan v. Peiris* (*supra*) and adds :—

> "If I may paraphrase . . . . those words of Garvin J., I would say that the Muslim law only recognizes as gifts those gifts purporting to be made *in praesenti* from one Muslim during his life to another Muslim, and that it does not recognize—indeed knows nothing of—gifts which are to take effect, if at all, after the death of the donor."

The deed in that case *inter alia* purported to create a *fidei commissum*, but in view of the fact that the donor intended to make a valid gift *inter vivos* to take effect at once as recognized by the Muslim law, it was held that the deed was governed by the Muslim law, but failed as, under it, possession did not pass and was retained by the donor. Macdonnell C.J. emphasised that "parties can mutually stipulate that certain incidents of the contract are to be good by the law of a particular place, but the validity of the contract must be governed by the law to which they are themselves subject". He also repudiated the correctness of "the suggestion that a Muslim 'can contract himself out of the Muslim law as to gifts altogether', a notion to which currency was given by some speculations—*obiter*—in my judgment in *Sultan v. Peiris* (*supra*)".

The next case to which we have been referred is that of *Kalenderumma v. Marikar*.[2] Fernando A.J. carefully examined the decisions in *Weerasekere v. Peiris* (*supra*), *Sultan v. Peiris* (*supra*), and *Ponniah v. Jameel*

[1] *38 N. L. R. 96.*

[2] *38 N. L. R. 271.*

(*Supra*), and expressly adopted the test laid down by Garvin J. in *Sultan v. Peiris* (*supra*) as explained by Macdonell C.J. in *Ponniah v. Jameel* (*supra*). However, in setting out that principle, he used language which has led to a misconception. He said :—

> "In this case, on a construction of the deed as a whole, it is clear that the donor did not intend to part with the possession of the premises at the time of the gift, and that the deed, which is therefore not governed by Muslim law, can be given effect to under the Roman-Dutch Law."

I have pointed out that the substance of the decisions in those two cases was that where there was no intention to grant *dominium* at once, but the property was to pass at a later date, the Muslim Law had no knowledge of such a gift, but that the position was different where there was an immediate transfer of *dominium* with a reservation to the donor of the right of possession. I think that the use of the term '*possession*' rather than '*property*' or '*dominium*' by Fernando A.J. was made *per incuriam*. It is quite clear in any event that Fernando A.J. was not trying to distinguish the case of *Sultan v. Peiris* (*supra*), but on the contrary was expressly basing his decision on that case. Fernando A.J. also clearly sets out the argument addressed to him, that, in the case he was deciding, the deed disclosed an intention on the part of the donor "not to make an immediate gift, but a gift to take effect after his death".

The last case cited to us by Counsel for the respondent is that of *Kudhoos v. Joonoos*.[1] Wijeyewardene J. examined the language of the decision of their Lordships of the Privy Council in *Weerasekere v. Peiris* (*supra*). He also set out the terms of the deed in that case as follows :—

> "The deed purported to transfer the property as 'a gift *inter vivos* absolute and irrevocable' subject to—
>
> "(*a*) a reservation to the donor of the right of taking and enjoying the rents and income of the property ;
>
> "(b) a burden of *fidei commissum* ;
>
> "(*c*) a right in the donor to revoke the gift."

If I may say so, with deference, this statement does not take into account the vital distinction drawn by the Judges in *Sultan v. Peiris* (*supra*), namely, that in the deed constructed by the Privy Council, neither *dominium* nor possession was to pass immediately, but only on the death of the donor.

Wijeyewardene J. continued :—"The deed P 1 is a deed of gift between Muslims subject to a reservation of a life-interest in favour of the donor, and creating a *fidei commissum* in favour of the children of the donee. I am unable to see any indication in the deed of the donor's intention to make a gift *inter vivos* as known to the Muslim law, and I have no doubt that the donee intended to create, and did in fact create a valid *fidei commissum* as known to the Roman-Dutch law".

After mentioning the later cases of *Sultan v. Peiris* (*supra*) and *Ponniah v. Jameel* (*supra*), he continued.—"It is not possible to reconcile some of

[1] *41 N. L. R. 251.*

the views expressed in the two subsequent decisions of this Court . . . . with the ruling of the Privy Council, but I am bound to follow the decision of the Privy Council".

With respect, I am of opinion that there is no conflict between the decision in *Weerasekere v. Peiris* (*supra*) and that in *Sultan v. Peiris* (*supra*). While we are undoubtedly bound by the decision of the Privy Council in cases where that decision applies, it is equally clear that we are bound by the decision of the four Judges of the Supreme Court in cases where their decision is in point, unless and until that decision is overruled by a higher tribunal. I do not think it is open to us to canvass the correctness of the latter decision. We are accordingly constrained to hold that, in the case of Muslims, where the deed of gift manifests an intention to make an immediate transfer of the *dominium*, the Muslim law is applicable.

In such a case, if possession is not given by the donor to the donee, one of the conditions essential under the Muslim law has not been complied with, and the deed of gift is invalid.

It follows from this that the deed 4 D 1 is invalid and of no effect at law, and the respondents' claim thereunder fails. I set aside the judgment appealed against and enter judgment for the plaintiff as prayed for with costs in both Courts.

CANNON J.—I agree.

Appeal allowed.