

1919.

Present : De Sampayo J. and Schneider A.J.

MOHAMADU v. MARIKAR.

72—D. C. Matara, 8,300.

Muhammadan law—Donation—Delivery of possession, may be actual or constructive—Custom not to give possession to a daughter until four of five years after the birth of a child.

Under the Muhammadan law the delivery of possession for the purpose of an effective donation need not be actual, but may be constructive.

Delivery of the deed is a constructive as well as an effective delivery of possession of the lands.

*Affefudeen v. Periatamby*¹ explained.

THE facts appear from the judgment.

Bawa, K.C., for defendant, appellant.

A. St. V. Jayawardene, for plaintiff, respondent.

Cur. adv. vult.

July 7, 1919. DE SAMPAYO J.—

We dismissed this appeal at the conclusion of the argument on behalf of the defendant-appellant, and it is only necessary to state shortly our reasons for doing so. The plaintiff, as administrator of his deceased wife, Pathumma Natchia, claims a half share of the land called Udumanpulligedarawatta. Pathumma Natchia was the only daughter of the defendant, and on her marriage with the plaintiff the defendant gave her as dowry the said half share of land and certain other property mentioned in the *kaduttam*. The marriage took place on November 6, 1914, and a few days afterwards, namely, on November 13, 1914, the defendant confirmed the gift by the execution of a deed in favour of Pathumma Natchia. The defendant now pleads that possession of the property was not delivered, and was in fact withheld from her, and that no title consequently vested in her, and he relies on the decision in *Affefudeen v. Periatamby*,¹ which expounds the Muhammadan law on the subject of donations.

In my opinion the Muhammadan law, even as explained in the decision relied on, does not help the defendant in this case. For the delivery of possession for the purpose of an effective donation need not be actual, but may be constructive, and Lascelles C.J. summarized the law thus: "The principle which underlies the numerous authorities appears to be that any act by which the donor

¹ (1911) 14 N. L. R. 295.

places the donee in the position to exercise the right of property over the subject of the gift satisfies the requirements of the law as regards delivery of possession."

When the facts of this case are examined in the light of this principle, it will be found that the requirements as to delivery of possession was amply satisfied. The gift was accepted by Pathumma Natchia on the face of the deed, and after the deed had been completed, the defendant himself took the plaintiff to the notary and had the deed delivered to him. The plaintiff got the deed registered, and when it was received by him from the registrar it was put in a box of Pathumma Natchia's, and remained there till her death. No doubt the deed is now produced by the defendant, but that circumstance is easily explained. The plaintiff and Pathumma Natchia lived in defendant's house during their married life, and after Pathumma Natchia's death some unpleasantness appears to have arisen between the plaintiff and the defendant, and the plaintiff left the house, leaving behind him the box in which the deed was, and some other belongings of Pathumma Natchia. In this respect *Affefudeen v. Periatnamby* (*supra*) is distinguishable, and, in my opinion, the delivery of the deed was a constructive as well as an effective delivery of possession of the lands, for, to use the language of Lascelles, C.J., there was an act done by which the defendant placed Pathumma Natchia in a position to exercise the rights of property over the subject of the gift. The defendant says that there is a custom amongst the Muhammadans not to give possession to a daughter until four or five years after the birth of a child, which he calls the "period of probation" of the husband. There is no foundation for this assertion of a custom, and I am wholly unable to recognize such a custom. To prove this alleged custom the defendant called an expert witness, who, however, wholly failed him. For the witness, while saying that a marriage gift takes effect only after two or three years after a child is born, added that delivery of the deed was enough, and that in that case no actual possession need pass. This appears to be not only good law, but extremely good sense. In each case the question whether the donor intended to make a gift and to pass title at once is one of fact. In the present case there can be no doubt as to the defendant's intentions. If he, in accordance with a so-called custom, wished to suspend the gift, why did he execute a deed when the *kaduttam* would have served his purpose? Then, again, why should a gift to the daughter hang up during a period of probation of the son-in-law? The whole defence appears to me to be an after-thought, and to have its origin in the quarrel between the plaintiff and the defendant. It may be that the defendant continued to be in actual possession of the shares of the lands, but there is nothing extraordinary in that circumstance, inasmuch as he remained the owner of the other shares, and I think the defendant must reasonably be taken to have been in possession

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on behalf of the daughter who was all along living with him. The produce was brought into the house, and was no doubt consumed by both parties. Moreover, the gift included a share of the house, and I do not see why Pathumma Natchia, who with her husband occupied two rooms in the house, should not be regarded as having had actual possession of the share of the house. I think that Pathumma Natchia acquired good title under the deed of gift, and that the plaintiff as her administrator is entitled to judgment.

For the above reasons, I think the appeal was rightly dismissed by us.

SCHNEIDER A.J.—I agree.

Appeal dismissed.

