1935

***Present* : Macdonell C.J. and Poyser J.**

MUHSEEN *et al. v.* HABEEB *et. al.*

351—D. C. Colombo, 51,070.

Muslim law—Dowry gift—Gift in futuro*—Validity—Intention of parties—Roman-Dutch law.*

A dowry deed promising to pay something in *futuro* is valid under the Muslim Law.

Per MACDONELL C.J.—The intention of the parties so far as it may be judged by the terms of the deed seems to be that the deed should be interpreted by the ordinary law of the land.

APPEAL from a judgment by the District Judge of Colombo.

A. E. Keuneman (with him *S. A. Marikar*), for defendants, appellants.

H. V. Perera (with him *L. A. Rajapakse*), for plaintiffs, respondents.

February 20, 1935. MACDONELL C.J.—

In this case all the parties are Muslims, and in 1926 the defendants, husband and wife, executed a deed No. 999 (P 1) in favour of their daughter, the first plaintiff, and her intended husband, the second plaintiff. This deed recites that the defendants, husband and wife, are the owners of certain property in the Pettah and that a marriage has been arranged between their daughter first plaintiff and the second plaintiff, and then proceeds to say: "And whereas in consideration of the said marriage the said parties of the first part have agreed to pay the said parties of the second part a sum of Rupees Thirty (Rs. 30) per month from and out of the rent of the aforesaid premises.

"Now this agreement witnesseth: (1) That the said parties of the first part shall and will pay the said parties of the second part each and every month a sum of Rupees Thirty (Rs. 30) from and out of the rent of the aforesaid premises commencing from this date. (2) In the event of the said premises being sold and money deposited in Court it is agreed that the said parties of the second part shall be entitled to draw from the Loan Board dividend a sum of Rs. 50 per month. (3) In the event of new properties being purchased out of the funds in Court the right is hereby reserved to the parties of the second part to recover a sum of Rs. 30 per month out of the rent of such properties."

The marriage duly took place and for a time the periodical rents out of the premises were duly paid by the defendants to the first and second plaintiffs. Thereafter payment fell into arrears and the plaintiffs brought the present action against the defendants on the deed (P 1) for the arrears of these rents. The defendants contended that if any monies were due from them under this deed they were due from the rents of the properties mentioned therein and that as they the defendants had not received the rents from these properties there was nothing due from them under the deed. But the learned Judge found as a fact that the defendants did receive these rents, and his finding on that point was not challenged on appeal.

The main defence raised at the trial and on appeal by the defendants-appellants was that this deed (P 1) being a promise to pay something, the rents, not in existence at the time of the deed—a promise, that is, to pay something in *futuro*—the deed was bad by Muslim law, the law by which it must be governed seeing that all the parties thereto were

Muslims. The learned trial Judge rejected this argument, gave judgment for plaintiffs, and it is from that judgment that the present appeal is brought.

For the appellants it was argued, as it had been below, that this was a gift and bad by Muslim law as promising to give something not yet in existence. It is undoubted law that in Ceylon gifts between Muslims must be governed by Muslim law not because of anything in what we call the Muhammadan Code (*vol. I., pp. 919 et sq.*), but because by well understood custom the portion of Muslim law governing gifts has been received by the Muhammadan community in Ceylon and has been acted upon by them so as to give it by custom and usage the force of law. Now the first thing that strikes you upon reading (P 1) is that it is not a pure gift. It is something more. It is a dowry deed expressed in common form and made in consideration of an intended marriage, and if no question of Muslim law arose unquestionably binding by the ordinary law of the Island. It does not refer in terms to the Muslim gifts on or on account of a marriage known as Kaikooli or Maggar, and its terms seem to exclude both these species of gifts, Kaikooli being a gift by the parents of the bride to the bridegroom for the behoof of the bride, the bridegroom being a species of trustee thereof, and Maggar being a gift by the husband to the bride after the consummation of the marriage. Cases reported show that it is customary among Muslims in the Island to make dowry deeds without reference to either of these things, Kaikooli or Maggar; usually these dowry deeds, to judge by reported cases, contain a *fidei commissum*. But it was argued to us, and this was the strongest point for the appellants, that no reported case can be discovered where a Muslim dowry deed has been upheld wherein there was a promise to pay something not yet in existence, something *in futuro*. I do not know that this is quite correct. In the case cited to us, *Pakeer Bawa v. Hassen Lebbe*[1], the dowry deed is quoted in full and it seems to say that before the marriage the father-in-law had promised to give a certain sum of money, probably therefore something in *futuro*, to his daughter on her marriage, and that he was afterwards redeeming that promise by making a settlement of certain lands to the value of the sum promised. Putting the argument for the appellants at its strongest it would be this. There are a considerable number of cases reported dealing with the interpretation of dowry deeds among Muslims. None of these cases speak of a gift of something not yet in existence, in *futuro*. This must be taken as a clear indication that the Muslims in the Island consider themselves bound by that rule of Muslim law that gift in *futuro* are invalid and could not be enforced, and that it was with that rule in their minds that they have refrained hitherto from making dowry deeds which did contain a promise to pay something not yet in existence, in *futuro*. But this argument is valid only if the promise to give a dowry is a promise to make a gift and so to be governed by the law as to gift. This however does not seem to be correct. In *2 Ameer Ali 440* (*5th ed.*) we read "*Munaf'a* (profits accruing from land investments, business, industry, &c.) . . . . are proper subjects of dower". *Tyabji 171* (*2nd ed.*) says "The rents and profits of property . . . . may validly be

[1] *4 A. C. R. 61.*

the subject of *mahr*", *i.e.*, dower. These passages refer, certainly, to dower given or promised to the wife by the husband : does it make any difference that here it is dower given or promised by the wife's parents? There seems no reason why it should. The natural conclusion to draw is that dower, if it is a gift at all, is a gift of a special kind, governed by its own rules of which the prohibition as to giving things in *futuro* is not one.

But is the deed (P 1) to be interpreted by Muslim law at all? So far as you can judge the intention of the parties by what they have said, this deed seems a very clear declaration by the parties making it that they intended it to be interpreted by the ordinary law of the Island. If so, it would seem to be an instance of what you conclude is the inference to be drawn from the Privy Council decision in *Weerasekera v. Peries*[1] that Muslims, if they so wish, can contract out of their Muslim law altogether, and this inference is the stronger because this deed makes no reference expressly or impliedly to the only things in Muslim law as to dowry deeds which they seem to have adopted, namely, Kaikooli and Maggar. Applying what seem to be the inference from the Privy Council decision I would be inclined to say that this deed (P 1) was made under the ordinary law of the Island and not under Muslim law at all. The same result, though from a different starting point, is arrived at in the well known *dictum* of Schneider J. in *Rehiman Lebbe v. Hassan Ussan Umma*[2], "I would add that where Mussalmans or Moors in Ceylon go to a Notary and enter into a contract which is valid according to the general law prevailing in the Island there should be unequivocal evidence of an inveterate custom before such a transaction could be pronounced by a Court of law to be invalid or inoperative because of such custom. A strong presumption arises in such a case that the parties intended to be bound by their contract solemnly entered into, and that from long residence in the country they had learned to adopt the general law on the subject unless there was some definite and well reputed custom to the contrary."

In the present case there was certainly no "evidence of an inveterate custom", on the contrary the reported cases seem to show that in the matter of dowry deeds the Muslim community here has adopted the ordinary law of the Island.

If then this deed must be interpreted according to Muslim law, there is authority that the gift promised therein is valid by that law. If it must be interpreted according to the ordinary law, then it is admittedly valid.

It was also urged to us that the promises contained in this deed (P 1), those said to be in consideration of marriage, could only affect the intended husband and not the intended wife also. There might be consideration moving from the intended husband to support the promise by the parents in law to him, but there could not be consideration moving from the intended wife to support the parents' promise to her. But in the view I take of this appeal it does not seem necessary to pronounce on this argument. I am of opinion that the judgment below was right, and that this appeal should be dismissed with costs.

POYSER J.—I agree.

Appeal dismissed.

[1] *34 N. L. R. 281.* [2] *19 N. L. R. 176, at p. 185; and 3 C. W. R. 88, at p. 100.*