1936 *Present :* **Moseley J. and Fernando A.J.**

KALENDERUMMA *v.* MARIKAR *et al.*

151—D. C. Batticaloa, 7,907.

Donation—Gift by Muslims—No intention to part with possession—Roman-Dutch law applicable.

Where a Muslim deed of gift was expressed in the following terms : We the said donors, reserving both of our life-interest to the thus described property shall possess and enjoy the produce thereof till our life-time, shall live thereon and make a perfect use of the same. In consideration of the love and affection we bear towards our children and for their shares lawfully becoming entitled to by way of children's rights, and for diverse other reasons, we do hereby donate, convey, and set over unto

[1] *17 Allahabad 174.*

them the paddy land, &c. . . . . and these five persons shall accept in common and possess and enjoy the same according to their pleasure, for ever, subject to the life-interest of both of us, and we the donors and each and every one of us shall have the right to possess and enjoy the produce of the properties till our lifetime. In testimony of having written this deed we the donors do donate unto them and I, for myself and on behalf of the other four minors, have accepted this donation with gratitude and delight.

***Held,* the donor did not intend to part with the possession of the premises at the time of gift and that the deed, not being governed by the Muslim law, should be given effect to under the Roman-Dutch law.**

***Weerasekere v. Peiris* (34 N. L. R. 281), *Sultan v. Peiris* (35 N. L. R. 57), *Ponniah v. Jamal et al.* (37 N. L. R. 96) referred to.**

APPEAL from a judgment of the District Judge of Batticaloa.

In this action the question at issue was whether the deed of donation No. 870 was a valid one. The deed was executed by one Avoovacker Ussenalevvaii and his wife in favour of their children, the parties being Muslims. The material portion of the deed is given in the headnote. The learned District Judge held that the deed was not valid under the Muslim law.

H. V. Perera (with him *G. E. Chitty*), for defendants, appellants. The donors had no intention to make a gift as known to the Muslim law. The language of the deed shows that there was no absolute gift. Even before the grant is made the donors reserve to themselves a life-interest. This suggests that property and possession was to pass after the death of the donors. The Privy Council has in the case of *Weerasekere v. Peiris*[1] laid down the principles which should govern Muslim deeds of gift. It was there pointed out that all the terms of the deed must be taken into consideration when construing it and where the donor never intended to part with the property in or the possession of the premises during his lifetime or that the donee should have any control over or possession of the premises it must be assumed that a valid gift as understood in the Muslim law was not intended. These principles are of general application and cannot be limited to cases where there is a *fidei commissum* created. The interpretation put upon the decision of the Privy Council by the Full Court in *Sultan v. Peiris*[2] is not correct. Such an interpretation is not binding. No principle has been laid down by the Full Court. The Chief Justice goes upon one ground and Garvin J. upon another. The Chief Justice insists on the requirement that all the terms of the deed should be examined to see if it shows an intention to make such a gift *inter vivos* as is recognized by Muslim law. Garvin J. said that if the intention was to make a gift to take effect after the donor's death it is bad under the Muslim law and the intention of the donor must be given effect to under the general law. In any event the present deed is not on all fours with the deed interpreted in *Sultan v. Peiris* (*supra*). The policy of the law is to give effect to a deed.

Croos da Brera, for plaintiffs, respondents.—The judgment of the Privy Council should be limited to the particular deed considered there. That deed created a *fidei commissum*, reserved a usufruct and postponed vesting.

[1] (1932) 34 N. L. R. 281.

[2] (1933) 35 N. L. R. 57.

In *Sultan v. Peiris* (*supra*) the principles laid down in *Weerasekere v. Peiris* (*supra*) have been explained by the Full Court. It was there held that a deed of gift *inter vivos* intended to take effect immediately and reserving life-interest was not valid under the Muslim law on the ground that delivery of possession was not given. Macdonell C.J. said that to constitute a valid gift three essentials were necessary, viz., expression of intention to give, expression of intention to accept, and delivery of possession. He emphasized the fact that in *Weerasekere v. Peiris* the donor intended to create a valid *fidei commissum* as recognized by the Roman-Dutch law and not a gift *inter vivos* as known to Muslim law. Garvin J. pointed out that where the intention is not to make an immediate gift but one to take effect after death there is not such a gift as understood by the Muslim law and the intention must be given effect to under the general law. He added that the Privy Council excluded the Muslim law because the donor intended to create a *fidei commissum* by a donation to take effect after his death. *Sultan v. Peiris* has been followed in a judgment in 379—D. C. Colombo, No. 27.

The deed under consideration is in no way different from that considered by the full Court. It is a gift *inter vivos* to take effect immediately. Such gifts are customary and known to the Muslims. The gift is however defeated by the failure to give possession. There is no intention to make the gift to take effect after the death of the donor and therefore does not come within the meaning of the judgment in *Weerasekere v. Peiris.* Deeds reserving life-interest have been held to be bad. (Vide *Meyadeen v. Abubakker*[1] and *Marcar v. Umma*[2].) The decision in *Sultan v. Peiris* is binding. Not to follow it would be to unsettle the law. If any doubts are entertained the question should be referred to a fuller Court.

H. V. Perera, in reply.

October 15, 1936. FERNANDO A.J.—

At the trial in this action, the learned District Judge heard arguments with regard to the first issue only, apparently on the footing that a decision of the first issue would dispose of the action. That issue was in these terms, "is the deed of donation No. 870 a valid one?" The deed itself appears to be in Tamil, and a translation of it has been filed. According to the translation, the terms of the deed which are material to this argument are as follows:—"Avoovacker Ussenalevvaii and wife A A do execute deed of donation unto our children in the manner following." Then come the boundaries and description of four lands. The deed then continues, "We the said donors, reserving both of our life-interest to the thus described property shall possess and enjoy the produce thereof till our lifetime, shall live therein and make a perfect use of the same. In consideration of the love and affection we bear towards our aforesaid children, and for their shares lawfully becoming entitled to by way of children's rights, and for diverse other reasons, we do hereby donate, convey, and set over unto them the paddy land into five equal shares, the one-fifth of the eastern side to Mera Levvaii, the next one-fifth share to U. Avoovacker . . . . and also the properties described in second, third, fourth paragraphs hereof, and these five persons shall accept in

[1] (*1919*) *21 N. L. R. 284.*

[2] (*1929*) *31 N. L. R. 237.*

common and possess and enjoy the same according to their pleasure, for ever, subject to the life-interest of both of us, and we the donors, and each and every one of us shall have the right to possess and enjoy the produce of the properties all our lifetime. Thus consenting we annex the aforesaid deed with this, and we declare that these properties at present are free from all encumbrances. In testimony of having written this deed, we the donors do donate unto them and I, U. Meeralevvaii, for myself and on behalf of the other four minors have accepted this donation with gratitude and delight."

The donors and donees are admittedly Muslims, and the question raised is whether the deed of gift is valid in law. The rules applicable in construing deeds of gift between Muslims were considered by the Privy Council in *Weerasekere v Peiris*[1] and the deed of donation in that case was a deed by which a father purported to donate a land to his son, as a gift *inter vivos* absolute and irrevocable. But in the *habendum* it was made clear that the son was to hold the premises subject to the conditions and restrictions thereinafter mentioned, which included the right of the father to cancel and revoke the gift, and a reservation in his favour of the rents and profits during his lifetime. The deed made it clear that the premises were to go, and be possessed by the son only after his father's death. Their Lordships then proceeded to state that all the terms of the deed must be taken into consideration when construing the deed, and that it was clear that it was never intended that the father should part with the property or the possession of the premises during his life-time. For these reasons their Lordships came to the conclusion that it was not intended that there should be a valid gift as understood in the Muslim law under which three conditions were necessary for a valid gift *inter vivos*, namely, and expression by the donor of intent to give, acceptance by the donee, and the taking possession of the subject-matter actually or constructively by the donee.

The deed which was considered by the Privy Council in that case also provided that after the father's death, the son should not sell, mortgage, or alienate the premises and the same should on his death, subject to certain conditions, devolve upon the children of the son, and their Lordships proceeded to state that "it was not disputed that the last mentioned provisions constituted a *fidei commissum* according to the Roman-Dutch law", and on the true construction of the deed, their Lordships proceeded to hold that "the father intended to create, and did create a *fidei commissum* such as is recognized by the Roman-Dutch law." Among the reasons set out in that judgment is the statement that the Common law of Ceylon is the Roman-Dutch law as it obtained in the Netherlands about the commencement of the last century. The deed of gift was held to be operative, and full effect was given to that deed.

The decision of the Privy Council was considered by a Bench of four Judges of this Court in *Sultan v. Peiris*[2]. Macdonell C.J. in that case thought that having regard to all the terms of the deed with which he was dealing in *Sultan v. Peiris*, that deed was clearly distinguishable from that under consideration in the Privy Council judgment, and came to the

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

[2] *(1933) 35 N. L. R. 57.*

conclusion that the donor did intend to make a gift *inter vivos* as is recognized in Muslim law, with possession passing to the donee. He then thought that the principles which were implied in *Weerasekere v. Peiris* (*supra*) were that a Muslim in a deed of gift could manifest an intention to make that gift outside Muslim law altogether, and therefore to make it under the Roman-Dutch law, and that one of the ways of doing so was to create by his deal a valid *fidei commissum*; in other words, "if he manifested a sufficiently clear intention, he can contract himself out of the Muslim law, as to gifts altogether." Garvin J. who also delivered a judgment in *Sultan v. Peiris* (*supra*) thought that the effect of the Privy Council judgment was that "where it appears upon the 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". He repeats this in a later passage when he says, "The Muslim law is excluded not because the donor wished to exclude it, but because he did not intend to part with the property, or the possession of the premises, and did not therefore intend to and did not purport to make such a gift as is understood by the Muslim law. Such donation not being a gift as understood by the Muslim law of gift as it obtains in Ceylon, there is nothing to prevent the donation being given the effect intended under the Roman-Dutch law." The other two Judges who constituted the Bench before whom *Sultan v. Peiris* was argued, agreed with the judgment of Macdonell C.J.

The question appears to have come up again before Macdonell C.J. and Poyser J. in *Ponniah v. Jamal et al.*[1] Referring to the case of *Sultan v. Peiris* (*supra*) Macdonell C.J. sets out the probable reason why the other two Judges concurred specifically with his own judgment. "Garvin J.", he says, "left the Island on leave before his own judgment was ready to be delivered, and there was a doubt whether a judgment delivered by a Judge on leave would be valid; the concurrence of the other Judges enabled a judgment to be delivered which was that of the majority of the Court, and of which the successful party could at once take advantage." He then proceeds to adopt the answer given by Garvin J. in *Sultan v. Peiris* as to the scope of the judgment of the Privy Council in *Weerasekere v. Peiris*, and quotes from the judgment of Garvin J. the passage which I have already quoted above, "The effect of their Lordships' decision as I conceive it is that where it appears upon the 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."

In *Ponniah v. Jamal et al.* (*supra*), the two Judges who heard the case came to the conclusion that the gift there was intended to be a gift under the Muslim law, and it failed because the possession was retained by the donor. Counsel for the appellant in this case argued that the deed of gift in question here was one upon the construction of which as a whole, it would be clear that the intention of the donor was not to make an immediate gift, but a gift to take effect after his death, and he referred

[1] *37 N. L. R. 96.*

to the following portions of the deed. Before the words " we do hereby, &c." occur the passage " We the donors reserving our life-interest, shall possess and enjoy the produce thereof, shall live therein and make a perfect use of the same, and we do hereby donate the same unto our children for their shares to which they may become entitled by way of children's rights (that is to say, after our death), and these five persons shall accept in common and possess subject to the life-interest of both of us, and until the lifetime of the last surviving person of us."

In Ponniah v. Jamal et al (*supra*), Macdonell C.J. stated that the handing of the deed over to the donee as a token of the transfer of possession of the said properties constituted a transfer of the *dominium* and also an act purporting to transfer possession. There are no such words in this deed, and the recital with regard to the title deeds to the property is merely, " We annex the aforesaid deeds with this ", and there is nothing to show that even the deed of gift itself was intended to be delivered to the donees. Garvin J. in *Sultan v. Peiris* (*supra*) puts the position in these words " Delivery of possession may be constructive, but must be real in the sense that it is intended that the donee should have the full possession and control of the subject of the gift so that he may enjoy the benefits derivable from it. Such transfer of possession is essential to the transfer of ownership of the property from the donor to the donee without which there can be no gift ". He then cites a passage from Tyabji, " the necessity for the transfer of possession is expressly insisted upon as part of the substantive law in order that that may be effectuated which is sought to be effectuated by a gift, namely, the transfer of the ownership of the property from the donor to the donee.

In *Sultan v. Peiris* (*supra*), Macdonell C.J. came to the conclusion that the donor did intend to make a gift *inter vivos* as is recognized in Muslim law for certain reasons which are set out in page 73 of the judgment. " The deed ", he says, " purports to make a gift *inter vivos*, absolute and irrevocable, and purports to vest in the donees the legal title by handing the deeds and the connected deeds to them." The donor imposes a penalty on either of the donees who abandons the Islamic faith, or marries a widow or a divorced woman. There was a clause in the deed stating that the donor handed over the deed and connected deeds by way of vesting legal title. None of these features appear in the present deed, so that if this is one of the tests to be applied in spite of the later judgment in 379—D. C. Colombo, 27, still this deed is clearly not one which was intended to be a gift under the Muslim law.

The learned District Judge disposed very shortly of the question before him and purported to follow the judgment in *Sultan v. Peiris* (*supra*), apparently because his attention was not called to the fact that before applying the test as to whether a deed is valid or invalid, it is necessary where the donor and donee are both Muslims, to ascertain on a full construction of the deed whether the donor did or did not intend to make a valid gift *inter vivos* under the Muslim law. I would adopt the test laid down by Garvin J., in that case which was expressly adopted by Macdonell C.J. in the latter case, and applying this case I would hold that 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 gift, and that the deed which is therefore not governed by the Muslim law, can be given effect to under the Roman-Dutch law.

I would accordingly set aside the order made by the learned District Judge, and hold that the deed of donation No. 870 is a valid donation the effect of which will have to be considered under the Roman-Dutch law, and I would order the case to be sent back to the District Court for the trial of the other issues. The plaintiffs-respondents will pay to the defendants-appellants the costs of the proceedings of January 15, 1935, and of this appeal. The other costs of the action will be costs in the cause.

MOSELEY J.—I agree.

Appeal allowed.