1957 *Present:* Basnayake, C.J., and Pulle, J.

MOHIDEEN and others, Appellants, *and* SULAIMAN and others, Respondents

S. C. 340/L—D. C. Colombo, 6,238/F

Muslim Law—Sale of land—Applicability of Roman-Dutch Law—Fideicommissum—*Sale of contingent interest—Validity—Muslim Marriage and Divorce Act, No. 13 of 1951, s. 99 (1) and (2)—Muslim Intestate Succession and Wakfs Ordinance, No. 10 of 1931, ss. 2, 3, 4.*

A contract of sale of immovable property between Muslims is governed by the general law, viz., the Roman-Dutch Law and the legislation applicable to such a transaction.

Where, in a sale of land between Muslims, the property sold was subject to a *fideicommissum* and the joint vendors were the *fiduciarius* and the *fideicommissarii*—

Held, that the sale was not a transaction to which the Muslim Law applied, but one which was governed by the Roman-Dutch Law. Under the Roman-Dutch Law it is open to all those who have interests in a *fideicommissum* to alienate the fideicommissary property, whereupon the burden of *fideicommissum* is ended.

Quaere, whether donations among Muslims during the time of the Dutch in Ceylon were governed by Muslim Law.

APPEAL from a judgment of the District Court, Colombo.

H. V. Perera, Q.C., with *Mrs. F. R. Dias*, for 2nd, 4th, 5th and 6th Defendant-Appellants.

N. E. Weerasooria, Q.C., with *A. C. Nadarajah* and *M. S. M. Nazeem*, for Plaintiff-Respondents.

A. C. Nadarajah, with *C. Chellappah*, for 1st Defendant-Respondent.

Cur. adv. vult.

September 4, 1957. BASNAYAKE, C.J.—

This is an action for partition of Lot B in Plan No. 2,379 dated 5th February 1921 made by H. G. Dias, Licensed Surveyor.

It is common ground that one Abdul Rahman the original owner of premises bearing assessment No. 23 St. Sebastian Street, Colombo, by his Last Will dated 10th November 1899 (Exhibit P1) donated the land in equal shares to his brothers Sulaiman Lebbe Hamidu (hereinafter referred to as Hamidu) and Sulaiman Lebbe Mohideen (hereinafter referred to as Mohideen) subject to the condition that they "shall not sell, mortgage, alienate or in any way encumber the said premises or the rents,

profits or income arising thereof but shall only possess and enjoy the same during their natural lives and after their death the same shall devolve on their respective heirs and descendants."

The land was on 2nd March 1920 partitioned in action No. 50879 in the District Court of Colombo, Hamidu being allotted Lot A in Plan No. 2379 dated 5.2.21 made by H. G. Dias, Surveyor, and Mohideen Lot B. Mohideen, his wife, and his two sons by deed No. 3190 of 5th March 1943 attested by N. M. Zaheen, Notary Public (Exhibit 2D1), sold Lot B to the 2nd defendant who gifted an undivided 1/3 share of the lot to his wife Ayisha Umma the 4th defendant and the remaining undivided 2/3 to his two sons, the 5th and 6th defendants, subject to a life interest in favour of his wife. The 2nd defendant is the guardian *ad litem* of the 5th and 6th defendants. Mohideen died in August 1945 leaving two sons Mohamed Sulaiman and Mohamed Atha, the 1st defendant. Mohamed Sulaiman died in 1947 leaving two sons, the 1st and 2nd plaintiffs. The 3rd defendant is the tenant of the 2nd defendant, from whom he has obtained a lease of Lot B.

It is admitted by all the parties that the instrument P1 creates a good and valid *fidei commissum*. It is also not disputed that if the Roman-Dutch Law applies Mohideen, his wife and children were entitled to execute the transfer in favour of the 2nd defendant and thereby pass a title unfettered by the *fidei commissum*. But it was urged by the plaintiffs and the 1st defendant that the law that applies is the Muslim Law and that under that law the sale is void.

The learned trial Judge has upheld the contention that the only manner in which Mohideen and his sons could have transferred any right in Lot B during Mohideen's lifetime was by a sale under the Entail and Settlement Ordinance. He also held that in any event the deed executed by the two sons of Mohideen conveyed no title under the Muslim Law to the 2nd defendant.

Learned counsel for the appellant contends that this is a contract of sale between Mohideen, his two sons, and the 2nd defendant and that the law which governs it is Roman-Dutch Law and that under that law it is open to all those who have an interest in regard to the *fidei commissum* to alienate the property whereupon the burden of *fidei commissum* is ended. (*See* Voet, Book XXXVI, Title I, Sections 62 and 65.)

It is therefore necessary to ascertain in the first place whether the Muslim Law governs the sale of Lot B. In the absence of any express provision in the law to the contrary the common law of the land would ordinarily apply to the transaction. A person who claims that a law other than the common law applies must prove it. In the instant case admittedly the parties are Muslims. In certain matters the law provides that Muslims shall be governed by the special law applicable to them. Even during he time of the Dutch Government in matters of succession, inheritance, narriage and divorce they were governed by their special laws. These laws vere collected in a volume entitled *Byzondere Wetten aangaande Mooren f Mohammedanen en andere inlandsche natien* (Special Laws relating to

Moors or Mohammedans and other native races)—(see De Vos's Mohammedan Law, page 2). The application of these laws was saved by the Proclamation of 23rd September 1799 which provides as follows :—

" Whereas it is His Majesty's gracious Command that for the present and during His Majesty's will and pleasure the temporary Administration of Justice and Police in the Settlements of the Island of Ceylon, now in His Majesty's Dominion, and in the Territories and Dependencies thereof, should, as nearly as circumstances will permit, be exercised by us, in conformity to the Laws and Institutions that subsisted under the ancient Government of the United Provinces, subject to such deviations in consequence of sudden and unforeseen emergencies, or to such expedients and useful alterations, as may render a departure therefrom either absolutely necessary and unavoidable, or evidently beneficial and desirable . . . .

" We, therefore, in obedience to His Majesty's Commands, do hereby publish and declare, that the Administration of Justice and Police in the said Settlements and Territories in the Island of Ceylon, with their Dependencies, shall be henceforth and during His Majesty's Pleasure exercised by all Courts of Judicature, Civil and Criminal, Magistrates, and Ministerial Officers, according to the Laws and Institutions that subsisted under the ancient Government of the United Provinces, subject to such deviations and alterations by any of the respective powers and authorities hereinbefore mentioned, and to such other deviations and alterations as we shall by these presents, or by any future Proclamation, and in pursuance of the authorities confided to us, deem it proper and beneficial for the purposes of Justice to ordain and publish, or which shall or may hereafter be by lawful Authority ordained and published. "

When the authority under which the Proclamation of 1799 was issued was repealed by the Royal Charter of 1801, Clause XXXII of that Charter continued the saving clause in respect of the customary laws of the Muslims and expressly extended it to the customary laws of the Sinhalese. The relevant clause reads :—

" And provided also, that in the Cases of Cingalese or Mussulman Natives, their Inheritance and Succession to Lands, Rents, and Goods, and all Matters of Contract and Dealing between Party and Party, shall be determined in the Case of Cingalese, by the Laws and Usages of the Cingalese, or in the case of Mussulmans, by the Laws and Usages of the Mussulmans, and where one of the Parties shall be a Cingalese or Mussulman, by the Laws and Usages of the defendant. "

On 5th August 1806 the Chief Justice submitted to the Governor in Council a " Code of Mahomedan Laws observed by the Moors in the Province of Colombo, and acknowledged by the Head Moormen of the District to be adapted to the present usages of the Cast ". It was published by Order of the Governor. The Code was entitled " Special Laws Concerning Maurs or Mahomedans " arranged under two titles, the first entitled " Relating to Matters of Succession, Right of Inheritances, and

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other Incidents occasioned by Death " and the second " Concerning Matrimonial Affairs ". Although De Vos in his monograph on Mohammedan Laws says that the Code of 1806 is " no other than a translation, from the Dutch into English, of the Byzondere Wetten ", the statement appearing at the end of the Code seems to indicate that it was a compilation made independently. The statement runs thus :—

> " In this manner we the Marcair Arbitrators Priests and Inhabitants have according to our knowledge and having consulted with the learned High Priests, have stated the foregoing Articles as agreeable to the Laws and Customs for to be observed, and have confirmed the same with our Signatures at Colombo the 1st of August 1806. "
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> (Twenty names are appended)

The Code at first applied to the " Province of Colombo " only, but was later extended to the rest of the Island by section 10 of Ordinance No. 5 of 1852 which enacted as follows :—

> " The Code of Mahomedan Laws, entitled ' Special Laws concerning Maurs or Mahomedans' promulgated on the 5th day of August 1806, and ordered to be observed throughout the whole of the province of Colombo, shall extend and be applied to the like cases, matters and things between Mahomedans residing within the Kandyan Provinces, and in other parts of this Colony, unless in any case other provision is or shall be made by any Ordinance now in force in this Colony or hereafter to be enacted. "

In extending the Code to the rest of the Island this Ordinance gave it the force of an enactment of the Legislature. Thereafter the Code is dealt with as if it were a legislative instrument. Ordinance No. 8 of 1886 which provides for the registration of the Marriages of persons professing the Mohammedan faith expressly repealed a portion of the Code by enacting that " So much of the Code of Mohammedan Laws of 1806 as is inconsistent with this Ordinance is hereby repealed. "

The Muslim Marriage and Divorce Registration Ordinance No. 27 of 1929, which replaced the Mohammedan Marriage Registration Ordinance No. 8 of 1886, by section 48 repealed the second title of the Code from section 64 to section 102 (first paragraph) inclusive, subject to the proviso in that section. The Ordinance of 1929 was itself repealed by the Muslim Marriage and Divorce Act No. 13 of 1951, which contains the following provision :—

> " 99 (1). For the avoidance of doubt, it is hereby declared that the repeal of sections 64 to 101 and of the first paragraph of section 102 of the Mohammedan Code of 1806, by the Muslim Marriage and Divorce Registration Ordinance, 1929, or the repeal of that Ordinance by this Act, does not affect the Muslim Law of marriage and divorce, and the rights of Muslims thereunder.
>
> " (2) It is hereby further declared that in all matters relating to any Muslim marriage or divorce, the status and the mutual rights and obligations of the parties shall be determined according to the Muslim law governing the sect to which the parties belong. "

The whole of the "Muslim law governing the sect to which the parties belong" in regard to "status and the mutual rights and obligations of the parties" is for the first time in the history of the legislation on this subject introduced by sub-section (2) of section 99. What is Muslim law and where is one to find it is not stated. Until the Act of 1951 there was no indication in the legislation that there was any Muslim Law obtaining in Ceylon outside the Code or the Ordinance governing Marriage Registration.

While the legislative measures I have referred to above dealt with inheritance and marriage it was not till 1931 that a comprehensive enactment providing for Muslim Testate and Intestate Succession and Donations, and Muslim Charitable Trusts or Wakfs was passed in the form of the Muslim Intestate Succession and Wakfs Ordinance, No. 10 of 1931. The sections of that Ordinance material to the present discussion are the following :—

"2. It is hereby declared that the law applicable to the intestacy of any deceased Muslim who at the time of his death was domiciled in the Island or was the owner of any immovable property in the Island shall be the Muslim law governing the sect to which such deceased Muslim belonged.

"3. For the purposes of avoiding and removing all doubts it is hereby declared that the law applicable to donations not involving *fidei commissa*, usufructs and trusts, and made by Muslims domiciled in the Island or owning immovable property in the Island, shall be the Muslim law governing the sect to which the donor belongs.

"Provided that no deed of donation shall be deemd to be irrevocable unless it is so stated in the deed, and the delivery of the deed to the donee shall be accepted as evidence of delivery of possession of the movable or the immovable property donated by the deed.

"4. It is hereby further declared that the principles of law prevailing in the maritime provinces shall apply to all donations, other than those to which the Muslim law is made applicable by section 3."

It would appear therefore that in the case of Muslims their special laws govern the following matters :—Marriage, Divorce, Status and Mutual Rights and Obligations of the Parties to a Marriage or Divorce, Intestate Succession, and Donations of Immovable Property not involving *fidei commissa*, Usufructs and Trusts. It should be noted that the Legislature has not extended the application of Muslim Law to contracts of sale and that donations involving *fidei commissa* are excluded from the scope of the Muslim Law and the Roman Dutch Law is declared applicable to them. A contract of sale of land between Muslims is therefore governed by the general law—the Roman-Dutch Law and the legislation applicable to such a transaction. The sale by Mohideen, his wife and two sons to the 2nd defendant, is therefore not a transaction to which the Muslim Law applies, but one which is governed by the Roman-Dutch Law. The appellant is therefore entitled to succeed.

I cannot leave this judgment without referring to D. C. Colombo Case No. 29129, Vanderstraaten's Reports, Appendix B, p. xxxi, which appears to be the sheet anchor of all the subsequent decisions on the subject of

Muslim donations, as learned counsel for the respondent called in aid those decisions. The decisions of this Court commencing with that case which hold that donations among Muslims are governed by Muslim Law proceed on the assumption that under the Dutch the Muslims were governed by their special laws in the matter of donations. I say with respect that I have not been able to find any justification for that assumption.

The Judgment of the District Judge Lawson in D. C. Colombo Case No. 29129 delivered in 1862, which according to Middleton J. (see *Affefudeen v. Periatamby* [1]) received the imprimatur of this Court, does not cite any authority in support of the view that donations among Muslims during the time of the Dutch were governed by Muslim Law. Ordinance No. 5 of 1835, which is relied on by the District Judge, does not seem to me to support his view. That Ordinance is designed to save from repeal the laws preserved by the Proclamation of 23rd September 1799. The relevant saving words of that Ordinance are —

> " the Administration of Justice and Police within the Settlements then under the British Dominion and known by the designation of the Maritime Provinces should be exercised by all Courts of Judicature, Civil and Criminal, according to the laws and institutions that subsisted under the ancient Government of the United Provinces ; which laws and institutions it is hereby declared still are and shall henceforth continue to be binding and administered through the said Maritime Provinces and their Dependencies, subject nevertheless to such deviations and alterations as have been or shall hereafter be by lawful authority ordained. "

I have examined the Judgment of this Court in the case but find therein nothing in support of the view that when the British succeeded the Dutch in the Island the Muslim Law of Donations prevailed. It would appear from the Judgment of this Court that the custom governing donations among Muslims was treated not as a matter of law but as a question of fact. The evidence taken after the case was remitted by this Court for the purpose of recording evidence of custom relating to donations among Muslims discloses a sharp conflict of opinion among the experts called on either side. Custom being a matter subject to change, the Dutch and after them the British acted wisely in collecting in the form of a Code the customary law then subsisting so that years afterwards there would be no difficulty in ascertaining the customary law governing the Muslims under the Dutch and at the time the British succeeded them. The enactments referred to in this Judgment gave the force of law not to the customs obtaining among the Muslims at any given time but only to those obtaining at the time of the British occupation. Customs which have since come into existence do not obtain force of law by virtue of the legislation referred to earlier in the Judgment. On the other hand it would appear from the introduction to the Byzondere Wetten which is translated in De Vos's Mohammedan Law that under the Dutch, Muslim Law applied only in regard to succession, inheritance, marriage, and divorce.

[1] *(1911) 14 N. L. R. 295 at 299.*

The question of the law applicable to donations among Muslims has now been set at rest by section 3 of the Muslim Intestate and Wakfs Ordinance, No. 10 of 1931. The decisions of this Court on the law applicable to donations among Muslims on which learned counsel for the respondent relied afford no authority for the extension of the Muslim Law beyond the limits provided by statute.

I accordingly allow the appeal and set aside the judgment of the learned District Judge and make order dismissing the action of the plaintiffs with costs both here and in the Court below. The plaintiffs and the 1st defendant will pay the costs in equal shares to the 2nd, 4th, 5th and 6th defendants.

PULLE, J.—

I agree with my Lord, the Chief Justice, that this appeal should be allowed with the consequences indicated by him.

The deed 2D1 is a conveyance on sale and I agree that the law by which the validity of this transaction should be judged is the Roman-Dutch law and not the religious law governing Muslims. There is no material on which I can hold that a principle of the religious law, if any, which renders void the sale of a contingent interest must be given effect to by the Courts of this country, as having been received and accepted as part of our laws.

Appeal allowed.