RAHUMATH UMMA
v
ANSER AND OTHERS

COURT OF APPEAL
DISSANAYAKE, J. AND
SOMAWANSA, J.
C.A.212/90, (F)
D.C. GALLE 23212/P
MAY 17, 2001
OCTOBER 29,2002 AND
FEBRUARY 18, 2003

Muslim Intestate Succession Ordinance, No. 10 of 1931 – section 3 – Donation – Deed of gift in consideration of love and affection – Is it revocable? –

Kandyan Law Ordinance, section 4(i) – Comparison – Findings of primary facts by trial judge – Can they be disturbed?

The original owner "L" gifted the subject matter to the 3rd defendant-appellant in 1977, and had by a deed of revocation in 1980 revoked the said deed. It was contended that as the deed of gift was executed in consideration of the love affection, succour and assistance expected of the donee – niece – it is unrevocable.

The District Court held with the plaintiff-respondent, that the deed is revoked.

On Appeal

Held:

i) With the enactment of Muslim Intestate Succession Ordinance in 1931 the law pertaining to donations and their revocation are governed by statute and it is no longer speculative but very much settled.

ii) In terms of the proviso to section 3, "..... No deed if donation shall be deemed to be irrevocable unless it is so stated in the deed....."

iii) The trial judge who had the greater advantage of hearing, seeing and observing the demeanour of the witnesses has accepted the evidence of the witnesses as to the due execution of the deed. It is well established that findings of primary facts by a trial judge who hears and sees witnesses are not to be lightly distincted on appeal.

APPEAL from the judgment of the District Court of Kegalle.

Cases referred to:

1. *Sinna Marikkar* v *K. Thangaratnam* - 57 NLR 260
2. *Fradd* v *Brown & Co. Ltd.*, - 20 NLR 282
3. *Alwis* v *Piyasena Fernando* - (1993) 1 Sri LR 320

Manohara de Silva with *Samantha de Silva* for 3rd defendant-appellant

Farook Thahir with *A.L.M. Mohamed* for plaintiff-respondent.

Cur.adv.vult

17 October, 2003

SOMAWANSA, J.

The plaintiff-respondent instituted the instant action in the 01
District Court of Kegalle to partition the land called "Mawathgoda Watte Kattiya" and "Mawathugoda Kattiya" morefully described in the schedule to the plaint.

The position taken by the plaintiff-respondent was that the original owner Mohamed Lebbe Meera Lebbe who had by deed No.

366 dated 31.03.1977 marked P1 gifted the property sought to be partitioned to the 3rd defendant-appellant had subsequently by deed of revocation No. 882 dated 21.05.1980 marked P2 revoked the said deed of gift No. 366 marked P1 and by deed of gift No. 883 dated 21.05.1980 marked P3 gifted the said property to his son the 1st defendant-respondent. That a few months later the 1st defendant-respondent by deed No. 949 dated 21.09.1980 marked P4 conveyed an undivided 20 perches out of the land sought to be partitioned to the plaintiff-respondent. Thus he claimed that he became entitled to 20 perches while the 1st defendant-respondent to the balance.

The 3rd defendant-appellant while admitting that the original owner was Mohamed Lebbe Meera Lebbe and that he by deed No. 366 marked P1 gifted the land sought to be partitioned to her took up the position that the said Meera Lebbe did not execute the deed of gift No. 822 marked P2 and that in any event the deed of gift No. 366 is not revocable under Muslim Law. In the premises, the 3rd defendant-appellant prayed that the action be dismissed and that she be declared as having acquired prescriptive title to the land in suit.

At the commencement of the trial, the parties admitted the identity of the corpus, that Meera Lebbe was the original owner of the corpus and that he by deed of gift No. 366 marked P1 gifted the corpus to the 3rd defendant-appellant. 7 points of contest were raised by the parties but the main points of contest was whether the deed of gift No. 822 marked P2 was signed by Meera Lebbe and whether the deed of gift No. 366 marked P1 was revocable under Muslim Law.

At the conclusion of the trial the learned District Judge by his judgment dated 05.07.1990 held with the plaintiff-respondent. It is from the said judgment that the present appeal has been lodged.

At the hearing of this appeal, the counsel for the 3rd defendant-appellant contended that the deed of gift No. 366 marked P1 is not revocable under the Muslim Law as the said deed of gift was executed in consideration of the love, affection, succour and assistance expected of the donee who is the niece of the donor and as the said deed falls within the category of unrevocable deeds as enumerated in the book "Outlines of Mohammedan Law" by Asaaf

A. Faisee 3rd Edition at page 257.

It appears that in Sri Lanka there had been conflicting judicial decisions on the law governing donations under the Muslim Law. In the absence of any enactment dealing with this aspect of the Muslim Law our Courts have relied mostly on the opinions expressed in text books. In construing the opinions expressed by the Muslim Jurists our Courts have found considerable difficulty. However it is to be seen that with the enactment of Muslim Intestate Succession Ordinance, No. 10 of 1931 the law pertaining to donations and their revocation are now governed by statute and it is no longer speculative but very much settled.

Declaration of law relating to donations is dealt with in section 3 of the said Ordinance, No. 10 of 1931 and the proviso reads as follows:

> 3. "For the purposes of avoiding and removing all doubts it is hereby declared that the law applicable to donations not involving usufructs and trusts, and made by Muslims domiciled in Sri Lanka or owning immovable property in Sri Lanka, shall be the Muslim law governing the sect to which the donor belongs:
>
> Provided that no deed of donation shall be deemed 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."

In the case of *Sinna Marikkar* v *K. Thangaratnam*(1)

Per Gratiaen, J.

> "The proviso to section 3 of the Muslim Intestate Succession and Wakfs Ordinance (Cap. 50) was enacted for the special purpose of relieving Judges in Ceylon of the responsibility of solving these knotty problems. The proviso expressly states:
>
> ".....no deed of donation shall be deemed to be irrevocable unless it is so stated in the deed....."
>
> The only question for decision in that appeal was whether "a gift of immovable property by a Muslim lady to her grandchildren in terms of a notarial transfer dated 11th December 1935 was irrevocable.

According to the Minhaj et Taliban (Howard's translation) page 235 "a father or any ancestor" may under the Shafei law, revoke a gift in favour of a child or other descendant, provided that the donee has not irrevocably disposed of the thing received, e.g. by selling or dedicating it. Sir Roland Wilson "suspects", however, that the term "ancestor" in this passage only includes "the true grandfather but not female ancestors or false grandparents". A Digest of Anglo-Mohammedan Law (1930 Edn.) page 430. The learned District Judge adopted this latter opinion, and held that the deed was irrevocable."

Gratiaen, J. observed -

"As the deed of gift in question was made after the proviso came into operation, it is quite unnecessary for us to determine what precisely is meant by the word "ancestor" appearing in Mr. Howard's admirable translation into English of Mr. Van den Berg's French translation of a treatise written in Arabic. The proviso is intended to remove doubts and difficulties on issues of this kind".

In that case "Mr. Kandiah argued that the Ordinance ought not to be given an interpretation which may possibly have the result of introducing a violent change in what he described as "the common law right of Muslims".

Gratiaen, J. observed -

"With respect, the Ordinance does not purport to change the general law of Ceylon. It merely limits in certain ways the extent to which recognition can reasonably be given to the personal laws of a particular section of the community. The necessity for this limitation became apparent when the Courts found it increasingly difficult to determine the true scope of certain aspects of those personal laws. The language of section 3 and its proviso are clear and unambiguous, and cannot work hardship to Muslim donors and donees who take the trouble to examine it before entering into transactions of the kind to which this action relates."

It was held -

"Under the proviso to section 3 of the Muslim Intestate Succession and Wakfs Ordinance a gift of immovable proper-

ty by a Muslim grandmother to her grandchildren is revocable unless there are words in the deed from which a renunciation of her right of revocation appears either expressly or by necessary implication".

It is submitted by counsel for the 3rd defendant-appellant that the judgment in *Sinna Marikkar* v *K. Thangaratnam* (*supra*) has been made in error. In this respect he refers to a paragraph on page 261 of that case which is as follows:

"Under Kandyan Law gifts are ordinarily revocable, but this Court has held and it is now settled law that when such gift is expressed to be irrevocable the Donor may not revoke it. I can see no reason why the principle of these decisions should not be applied for the case of gifts between Muslims. This view of law is affirmed in (the Proviso to) section 3 of the Ordinance....Ever since the Ordinance passed into Law, a Mohammedan deed of donation must be DEEMED TO BE REVOCABLE unless the contrary is so stated in the document itself."

He submits that there is a difference between the proviso to section 3 of the Muslim Intestate Succession Ordinance and the corresponding Kandyan Law Ordinance. In that -

"Whilst there is express provision in section 4(1) of the aforementioned Kandyan law to revoke a deed of gift there is no such provision in the Muslim Intestate Succession Act other than the aforementioned deeming provision.

He submits that it is therefore necessary to consider what a "deeming provision" is and the meaning of the phrase "provided that".

However I am not inclined to agree with this submission. For there is no ambiguity in the provisions spelt out in the proviso to section 3 of the Muslim Intestate Succession Ordinance, No. 10 of 1931.

As for the revocation of the deed No. 366 marked P1 the Notary Karunaratne who attested the deed of revocation No. 882 marked P2 testified to the due execution of the said deed. His evidence revealed that Meera Lebbe was residing at Galigamuwa and the said deed had been signed at his residence, that he had known

Meera Lebbe personally, that before signing the deed he spoke to Meera Lebbe and was satisfied that he was of sound memory and mental condition that he had no doubts regarding his mental capacity to execute the said deed of revocation, that as Meera Lebbe was partially paralysed his thumb impression was obtained. He rejects the suggestion that the said deed is a fraudulent deed and also that Meera Lebbe did not sign the deed. The first witness to the said deed Lal Wijeratne also gave evidence and corroborated the due execution of the said deed of revocation marked P2.

The learned District Judge who had the greater advantage of hearing, seeing and observing the demeanour of the witnesses has accepted the evidence of these two witnesses, as to the due execution of the said deed. In the case of *Fradd* v *Brown & Co. Ltd* (2) the head note reads.

> "Where the controversy is about veracity of witnesses, immense importance attaches, not only to the demeanour of the witnesses, but also to the course of the trial, and the general impression left on the mind of the Judge of first instance, who saw and noted everything that took place in regard to what was said by one or other witness. It is rare that a decision of a Judge of first instance upon a point of fact is overruled by a Court of Appeal".

In *Alwis* v *Piyasena Fernando* (3)

Per G.P.S. de Silva, C.J.

> "It is well established that findings of primary facts by a trial Judge who hears and sees witnesses are not be to lightly disturbed on appeal."

For the foregoing reasons I see no reason to interfere with the judgment of the learned District Judge. Accordingly the appeal of the 3rd defendant-appellant will stand dismissed with costs fixed at Rs. 5000/-.

The Registrar is directed to send the case record to the appropriate District Court forthwith.

DISSANAYAKE, J. - I agree.

Appeal dismissed.