1931

*Present :* **Macdonell C.J. and Garvin S.P.J.**

WEERASEKERE *v.* PEIRIS.

169—*D. C. Colombo*, 34,065.

*Muslim law—Gift subject to life interest—* Fidei commissum—*No delivery of possession actual or constructive Validity of gift—Construction of* fidei commissum.

Where a Muslim gifted to his son immovable property, reserving a life interest and the right to dispose of the property during his lifetime, and there was no delivery of possession, actual or constructive, to the donee,—

*Held*, that the gift was not a valid one under the Muslim law.

Where such a gift contained a *fidei commissum*, the validity of the gift must be determined by the Muslim law, although the construction of the *fidei-commissum* be governed by the Romance Dutch law.

THIS was an action for declaration of title to certain premises which belonged to one Arisi Marikar, who by a deed bearing No. 11,221 dated March 11, 1904, purported to give and grant five-sixths to his son, Salih Hadjiar, as a gift *inter vivos*. According to plaintiff the gift was subject to a *fidei commissum* in favour of the children of Salih Hadjiar and on the death of the latter the property devolved on his sons, Abdul Hassen and Mohamed Hassen. By deed No.1,027 of August 30, 1927, the plaintiff purchased the right, title, and interest of Abdul Hassen and Mohamed Hassen.

The defendant's case was that upon the death of Arisi Marikar in 1908 or 1909 Salih Hadjiar dealt with the premises as sole and absolute owner. He mortgaged the premises with the trustees of the last will and testament of E. J. Rodrigo in 1913. In execution against him the premises were sold in 1916 and purchased by the trustees, who entered into possession. On June 20, 1929, they conveyed the property to the defendant. It was contended on his behalf that there was no valid or operative gift made by Arisi

Marikar to Salih Hadjiar and that the latter never held the premises under the gift.

The learned District Judge held that the gift was valid and that it was subject to a *fidei commissium* and gave judgment for the plaintiff.

*Keuneman* (with him *Weerasooria*, *Rajapakse*, and *Marikar*), for defendant, appellant.—Salih Hadjiar was in possession of whole of the premises and a purchaser from him gets good title. His title became a good prescriptive title after he obtained the premises from Arisi Marikar. We must see whether there is a valid gift. Conditions for such are (1) acceptance, (2) seizin, (3) intention. Reservation of life interest precludes seizin. Clause in deed "Assign as gift *inter vivos* absolute and irrevocable" is in the operative part of instrument. The next clause reserves first the right to revoke or alternatively deal with the premises as he thinks fit. Arisi Marikar had no intention to part with the possession or the dominium. Where there is an ambiguity in deeds earlier clause holds good. First clause gives an absolute gift. "Absolute" rules out *fidei commissum*. Our contention is, whatever the interpretation is, there is no condition that fetters the gift. If it is held that there is a *fidei commissum* no seizin has been given in which case the deed is bad. There might be constructive delivery of possession but not where deed itself does not intend to give possession (*Affefudeen v. Periatamby*[1]). Reservation of life interest results in no change of status in person giving the gift. Onus is on donee to prove that possession was given (*Tyabji*, *p.* 309, *s.* 402), except in case of gift to minor son. District Judge seeks to distinguish by reference to case reported in 11 *Moore's Indian Appeals*, *Privy Council*, *p.* 547. Gift, with return not of property itself or part of it, is not incompatible with Muslim law.

Attempts by Muslims to do so will not impose *fidei commissum* on them. *Fidei commissum* is repugnant to Muslim law and cannot be imported into the law (*Abdul Gaffur v. Niza Mudin*[1]). You must first decide whether there is a donation and the question of seizin comes in.

*Bartholomeusz* (with him *Canakeratne* and *Molligoda*), for plaintiff, respondent.—The question of seizin is dealt with in *Mulla*, *8th ed.*, *pp.*, 120, 121, *s.* 139. The subject-matter of this gift is the mere title. *Mulla* distinguishes between dominium and income. The real point is what the deed as a whole intended. The simple meaning of the reservation is "you are the owner and I am to take the income". Reservation of usufruct does not affect the transfer of the dominium. (*Ameer Ali*, *vol. I.*, *pp.* 136 *and* 318.) 11 *Moore's Privy Council Appeals* 547—It is necessary to show that the donor intended to transfer. In olden days, that intention could only be indicated by delivery of possession. In these days, the execution of the deed takes the place of delivery of possession in earlier times. This is the view taken by *Tyabji*, *pp.* 384--385, *s.* 352. Ameer Ali, Tyabji, and Mulla support the view that reservation of life interest is not repugnant to the idea of a gift. The provision regarding seizin is evidentiary. Where a reversionary interest itself is gifted, it is not necessary to pass possession to donee, for what is passed is the title. Possession is necessary only when the land and all its rights are gifted (*Mulla*, *p.* 116, *s.* 128 ; *Ramanathan's Reports*,1877, *p.*88). Ameer Ali at page 136 shows, that where the intention to transfer the dominium is clear mere reservation of interest in the rents does not invalidate the gift.

The history of the case law on the subject is such that where a deed purports to create a *fidei commissum* it must be interpreted according to the Roman-Dutch law. (*Vanderstraaten's Reports*, *Affefudeen*

[1] 14 *N. L. R.* 295.

[1] 17 *Bombay* 1.

*v. Periatamby*,[1] *Meydeen v. Abubacker*,[2] *Hababu v. Silva*,[3] *Marikar v. Umma*.[4]) Where there is a *fidei commissum* which is repugnant to the Muslim law, the deed must be government by the Roman-Dutch law. Customary Muslim law is applicable only to cases of pure gifts unburdened with *fidei commissum* (23 *N. L. R.* 506). Reservation of usufruct gives rise to difficulties as to possession in Muslim law (81 *Law Times* 76 ; 82 *Law Times* 32). Deed has to be read as a whole (10 *Halsbury* 438, 449). If it is possible to reconcile two apparently conflicting paragraphs of a deed by giving some meaning then that must be done (1 *C. W. R.* 25 ; *Cooper v. Stewart*[5] ; *Cader v. Pitche*[6] ; *Sheppard on Touchstone, vol. I., p.* 77).

January 20, 1931. MACDONELL C.J.—

I have read and agree with the judgment of my brother Garvin in this case.

The deed No. 11,221 of March 4, 1904, purports to be a deed of gift from one Muhammadan to another and must be construed according to Muhammadan law, unless the fact of a *fidei commissum* being contained in the latter part of the deed displaces that law and requires that it be construed by Roman-Dutch law. (The effect of the *fidei commissum* contained in the deed, upon the law to be applied in its construction, will be considered later.) It was common cause that apart from the *fidei commissum*, the deed must be construed by Muhammadan law, so that if it was good according to that law, it would be a valid deed ; if it were not good according to that law, it would fail. Now it is clear that the Muhammadan law in this Island as to gifts requires three conditions: " manifestation of the wish to give on the part of the donor ; the acceptance of the donee, either impliedly or expressedly ; and the taking possession of the subject-matter of the gift by the donee, either actually or constructively. 1 *Ameer Ali*, 4*th ed.*, 41, cited with approval and adopted in *Affefudeen v. Periatamby* [1] and *Meydeen v. Abubacker*. [2] This passage from Amieer Ali has also been approved by the Judicial Committee in *Muhammad Abdul Ghani v. Fakkr Jahan Begum*,[3] an Indian Appeal on a question of Muhammadan law. Unless these conditions are all three present, a gift cannot be good by Muhammadan law. The party, here the plaintiff, propounding a Muhammadan deed of gift, must show that all these three conditions were fulfilled.

Now in the present case, there is no evidence whatever that there was at any time a taking possession of the subject-matter of the gift by the donee, either actually or constructively. At the time when the deed No. 11,221 was made, the land, its subject-matter, was under lease. Consequently the donee could not have taken possession unless the lessee had attorned to him, of which attornment there is no evidence. On the expiry of that lease, the donor under the deed No. 11,221 granted in 1906 another lease, and this fact is evidence of considerable strength that at that date, more than two years after the execution of the deed No. 11,221, the donor and not the donee was in possession. The earliest piece of evidence of possession on the part of the donee in the lease granted by him in July, 1909, by which time I infer that the donor was dead. (The one witness called for the plaintiff says the donor died in 1908 or 1909, which shows uncertainty as to the actual year. The one witness called for the defendant has a knowledge of the property for thirty years past and says that the donor died in 1908. The balance of evidence then is in favour of the earlier year and the finding of the learned District Judge that the donor died in 1909, is, I would respectfully submit,

[1] 14 *N. L. R.* 295.
[2] 21 *N. L. R.* 284.
[3] 24 *N. L. R.* 379.
[4] 31 *N. L. R.* 237.
[5] (1889) 14 *A. C.* 286.
[6] 19 *N. L. R.* 246.

[1] 14 *N. L. R.* 295.
[2] 21 *N. L. R.* 284.
[3] 44 *Allahabad* 301.

against the weight of the evidence.) In any event, there is no evidence whatever that the donee had possession of the subject-matter of the gift before the death of the donor.

The other evidence all points in the same direction. There is no evidence that the deed was ever handed to the donee. It was not registered, according to the pleadings, till 1908, four years, that is, after its execution. (The date of execution is not proved by evidence, one may mention.) The wording of the deed also suggests that possession was to remain in the donor.

In the by going, one may notice that the donor, after declaring the gift to be absolute and irrevocable, reserves to himself the power to cancel and revoke it. Under Muhammadan law this power to revoke a gift prior to delivery of possession seems inherent (the exeeceptions to this power do not concern the present case). See *Mulla*, 9th *ed.*, *s.* 140—" A gift may be revoked by the donor at any time before delivery of possession. The reason is that before delivery of possession there is no complete gift at all. " See also 1 *Ameer Ali*, 4th *ed.*, 151—" In the case of gifts to persons other than relatives within the prohibited degrees, previous to delivery the donor can revoke the gift of his own motion either in whole or in part. After delivery he must obtain either the consent of the donee or the decree of the Judge to validate the revocation. "

To return. The necessity of delivery of possession for the completion of a gift under Muhammadan law seems clear. In the case of *Mohamed Abdul Ghani v. Fakkr Jahan Begum* (*supra*) their Lordships of the Judicial Committee insisted on this and made this requisite, it would seem, the *ratio decidendi* of their judgment. The facts were that there had been a gift of an entire zemindari estate with the exception of certain villages and lands, specified, which were to remain in the donor's possession for her life, free of rent and without payment of Government revenue, the donor to have no power of alienation and the excluded villages and lands to go at her death to the donee ; also that the donee paid the Government revenue upon the excluded villages and lands during the donor's lifetime and that he did not effect any mutation of names on the register until after her death. The donor remained in possession, one may say, of the excluded villages and lands and drew the rents thereof during her lifetime. None the less their Lordships held that on these facts there was constructive possession of the excluded villages and lands during her lifetime by the donee. After reciting from 1 *Ameer Ali* 4th *ed.*, *p.* 41, the three conditions necessary for a valid gift *inter vivos* under Muhammadan law, namely, expression of intent to give, acceptance implied or express, and taking of possession actually, or constructively, they go on, " In their Lordships' opinion the whole zemindari property mentioned in the deed, and not part of it only, must, for the purposes of the case, be regarded as one property, the taking possession of any part of it being constructively a taking possession of the whole. In their Lordships' opinion the donee must be regarded as having been constructively in possession, although not in physical possession of the corpus of the property now in question from 1884 (the date of the gift) until 1906 (the date of the donor's death), and the gift was a valid gift ". Valid, clearly because possession, if only constructively, had been shown. Wanting this possession, the gift would not have been valid. Now the evidence in the case before us does not show that there ever was possession under the gift by the donee. Then the gift was not a valid one.

I agree with what my brother Garvin has said in his judgment as to the reservation in a Muhammedan deed of gift of a usufruct, and do not think I could profitably add anything.

It was argued to us that as certain words in the latter part of deed No. 11,221 were apt to create a *fidei commissum*, the whole deed must be construed according

to Roman-Dutch law. The learned counsel for the respondent put it thus, as I understood him : " Where a deed of gift, though between Muhammadans, creates a *fidei commissum*, then the law by which the document, not one part of it only but the whole, is to be construed is the Roman-Dutch law. Engraft a *fidei commissum* on a Muhammadan deed of gift, and Muhammadan law is ousted completely. " He argued further that it is not possible to construe one part of a document by one law and another part of it by another. Local authority, however, is against this latter contention (*Rahiman Lebbe v. Hassen Ussen Umma* [1]) That was a case of a deed between two Muhammadans, male and female, which the Court construed as an ante-nuptial contract and in so far applied to its construction Roman-Dutch law. But the deed also said that the children of the proposed marriage were to take " in shares they are entitled to according to religious law", which was held to be a clear reference to the principle of the Muhammadan law of succession under which a male takes twice as much as a female. Now, the judgments in that case were directed to demonstrating that it was open to the parties, Muhammadans although they were, to adopt the general law of the Island by making an ante-nuptial contract and that consequently that general law, the Roman-Dutch law, would apply to the contract they had made, but those judgments, as I read them, aquiesced in the provision in the deed as to the children sharing " according to religious law ". In other words, the Judges, deciding that case, applied to the document before them two systems of law : the Roman-Dutch, in so far as it was an ante-nuptial contract ; the Muhammadan, in so far as it regulated the shares of the children as beneficaries under it.

But is there in principle anything against applying one system of law to one part of or clause in a contract, and another system of law to another part or clause of the same ? See per Lord Herschell L.C. in *Hamlyn \v. Talisker Distillery*[1]—" Where a contract is entered into by parties in different places where different systems of law prevail, it is a question, as it appears to me in each case with reference to what law the parties contracted, and according to what law it was their intention that their rights either under the whole or any part of the contract should be determined. " See also the note on this case in *Dicey, Conflict of Laws, ed.* 1908, *p*, 547, *note*, " A contract may as to some of its terms be governed by the law of one country, *e.g.*, England, and as to others by the law of another country, *e.g.*, Scotland. " Such cases as *Sottomayor v. De Barros* [2] point in the same direction ; the legality of the marriage contract the parties purported to contract was tested by one system of law, that of domicil ; the sufficiency of the ceremony they had gone through in making that contract, by another, that of the *locus contractus*. Clearly, then, there is authority for holding that one system of law can be applied to one part of a contract, and another system to another part of the same.

To come back to counsel's main contention, that if a deed of gift contains a *fidei commissum* then our Courts must construe it exclusively by Roman-Dutch law although the parties thereto are Muhammadans. This contention must be analysed. Muhammadan law has force in this jurisdiction, it would seem, by virtue of the Code of 1806 (*Statutes, vol.* 1., *p.* 34) and also of custom. Per Schneider J. in *Rahiman Lebbe v. Hassan Ussan Umma*,[3] "Part of this customary law now derives sanction as Statute law, as for instance the Code of Muhammadan Laws, 1806 . . . . It has been frequently pointed out that this Code is not exhaustive. Where the Code is silent and there is no special custom on any point it has been held that the Roman-Dutch law should be resorted to as the law generally

[1] 3 *C. W. R.* 88.

[1] 1894 *A.C. at* 207. [2] 3 *P. D.* 1.
[3] 3 *C. W. R.* 99.

applicable in the absence of any special law which takes the matter out of the operation of that general law . . . . The reported cases show that since 1862 our Courts have consistently followed the principle that it is so much and no more of the Muhammadan law as has received the sanction of custom in Ceylon that prevails in Ceylon." Now it is admitted that the Muhammadan law as to donations *inter vivos* is a part of that law that has received this sanction of custom so as to be law here. Then, if you have a deed between two Muhammadans purporting to make a gift from one to the other, you are to construe it by Muhammadan law. But a *fidei commissum* is not necessarily created by donation *inter vivos*, more often it is created by testamentary disposition. In its effect, too, it differs from donation which gives to the donee all rights in the thing given, while *fidei commissum* is, or is analogous to, an English settlement ; see *Lee, Introduction to Roman-Dutch Law*, 1915 *ed., p.* 312 ; the one is an alienation, the other is a fetter on the corpus alienated, even after alienation. Suppose a deed that admittedly has to be construed by the ordinary Roman-Dutch law and suppose that deed to commence by gift *inter vivos* by A to B of certain property and later to go on to subject some or all the property so given to a *fidei commissum*, its validity as a gift must be determined by one set of tests, its validity as a *fidei commissum* by another. If it is a gift of immobilia, the deed must be examined to see if formally it fulfills the requirements of Ordinance No. 7 of 1840, and if it does not, then the deed will fail, however clear be the expression in its later clauses of the intent to create a *fidei commissum*. Suppose this test satisfactorily fulfilled, then the words purporting to make a gift must be examined ; are they sufficient for that purpose ? The words purporting to make a gift are insufficient for that purpose, then the whole deed fails, and the *fidei commissum* with it, and it will be unnecessary to examine the wordings of the supposed *fidei commissum* at all. Suppose however that the words purporting to make a gift are sufficient, then we must go on to examine the words purporting to create a *fidei commissum* and to ascertain if they do create one, we must apply quite another set of tests from those used to determine if a valid gift was created, and must ask, is there prohibition of alienation, is there clear indication of persons to benefit in succession to the fiduciaries. It is true that in interpreting a deed of gift where the property given is subjected, wholly or in part, to a *fidei commissum*, the same law, the Roman-Dutch, is applied, but the principles and rules of that law to be invoked will differ according as the question for determination is validity as gift or validity as *fidei commissum* imposed on that gift. There will be no conflict between the rules so invoked, no incovenience or ambiguity is occasioned by applying one chapter of that law to the question, validity as gift, and another chapter to the question, validity as *fidei commissum*. Nor, as I apprehend, need any incovenience or ambiguity be occasioned if, in a deed of gift with *fidei commissum* added the parties to which are Muhammadans, the Muhammadan law be applied to test its validity as gift and the Roman-Dutch law to test its validity as *fidei commissum*.

There is nothing, then, in principle or authority or on the grounds of practical convenience to prevent us applying Muhammadan law to this present deed of gift to test its validity as a gift, even though the deed do purport to contain a *fidei commissum* the validity of which must admittedly be tested by Roman-Dutch law and by that only.

But in truth the difficulty has only arisen by the unfortunate use of the phrase " pure donation " in certain decided cases, and I agree with my brother Garvin that what the Judges, using that phrase meant was thereby to distinguish donation *inter vivos* from other methods of alienation, not to hold, because a Muhammadan deed, *prima facie* to be construed

according to Muhammadan law, took into itself some feature of Roman-Dutch law, that therefore Muhammadan law ceased to apply to it.

I am of opinion then that a deed of gift which, if it had no *fidei commissum* annexed to it, would admittedly have to be construed according to Muhammadan law, must still in so far as it is a deed of gift be construed according to the same, even though one or other of its clauses does purport to create a *fidei commissum*.

I concur with my brother Garvin that the decree appealed from be reversed and that this appeal be allowed with costs here and below.

GARVIN S.P.J.—

The point for decision upon this appeal, and the only point on which argument was addressed to us, is whether the premises which are the subject-matter of this action were conveyed as to five-sixths by Ahamado Lebbe Marikar Arisi Marikar, the admitted then owner of the entire premises, by a valid and operative gift to his son Arisi Marikar Hadjiar Salih Hadjiar.

In conformity with the requirements of Ordinance No. 7 of 1840 Arisi Marikar executed a deed bearing No. 11,221 on March 11, 1904, by which he purported to give and grant five-sixths of the premises to his son, Salih Hadjiar, as a gift *inter vivos*. The plaintiff contends that the gift is subject to a *fidei commissum* in favour of the children of Salih Hadjiar and that the five-sixths share devolved on the death of Salih Hadjiar which took place on February 12, 1929, upon his sons, Abdul Hassen and Mohamed Hassen. By right of purchase upon deed No. 1,027 of August 30, 1927, of all the right, title and interest of Abdul Hassen and Mohamed Hassen, the plaintiff claims to be declared entitled to five-sixths of the premises.

Upon the death of Arisi Marikar in 1908 or 1909, Salih Hadjiar appears to have dealt with the entire premises as if he were the sole and absolute owner thereof. He mortgaged the premises to secure a loan obtained from the trustees of the last will and testament of E. J. Rodrigo in the year 1913. The premises were sold in execution against him in the year 1916, and purchased by these trustees who entered into possession thereof. On June 20, 1929, by their deed No. 3,350 they conveyed the premises upon sale to the defendant. There is no reference in any of the deeds executed by Salih Hadjiar to the deed of gift. The defendant alleges that on the death of his father, Salih entered upon the premises and possessed and enjoyed the entirety as the absolute owner thereof, and that he and those who claim under him, including the defendant, have by adverse and uninterrupted possession acquired a prescriptive title thereto. It is his case that no valid and operative gift was made by Arisi Marikar and that Salih Hadjiar never took or held the premises under any such gift. It is admitted that Arisi Marikar executed the deed bearing No. 11,221 dated March 11, 1904, and that there was an acceptance by Salih Hadjiar. The defendant contends, however, that the transaction failed and never was a complete valid and operative gift.

At the date of the execution of deed No. 11,221 the premises were subject to a lease for 3 years granted and executed by Arisi Marikar. It is impossible, therefore, that Salih Hadjiar could have been placed in actual possession. The donor might, however, if such was his intention, have introduced Salih Hadjiar to the lessees and requested them to attorn to him as the present owner. That he did not do so and did not intend to do so, may be assumed from the circumstance that at the expiry of the term of the lease referred to, Arisi Marikar as owner proceeded to grant a fresh lease for a further term of years. There is no evidence of any act by Arisi Marikar apart from the execution of the deed, done with a view to comply with the requirement of the Muhammadan law as to seizin, or as evidence of an intention to complete the gift in accordance with that law. Indeed, even

the deed does not appear to have been delivered to Salih Hadjiar. It is alleged that it was registered on February 18, 1908, but it is not said by whom, and it remains a question whether it was registered in the lifetime of Arisi Marikar. It was not registered for a period of very nearly 4 years after its execution. The original of the deed has not been produced and there is nothing to show that it ever left the custody of Arisi Marikar, who continued in possession and enjoyment of the premises through his lessees till his death.

The appellant's contention on this question of seizin is strongly supported by the language of the deed. Apart from certain difficulties of interpretation, the deed, if it be given the full effect claimed for it by counsel for the respondent, directs that Salih Hadjiar is to have and to hold the premises subject to certain conditions and restrictions of which it is only necessary here to refer to the following :—

> ". . . . that I the said Ahamado Lebbe Marikar Arisi Marikar have reserved to myself the right and power to cancel and revoke these presents and make any other deed or deeds therewith or *deal with the said premises as I shall think fit and proper during my lifetime as if this deed has not been executed*, and that I have further reserved to myself the right of taking, receiving, and enjoying the rents, profits, issues, and income of the said premises during my lifetime and after my death the same shall go to and be possessed by the said Arisi Marikar Hadjiar Mohamado Salih Hadjiar as his property provided . . . . "

Then follow words which appear to impress upon the premises a *fidei commissum* in favour of the children of Salih Hadjiar.

Arisi Marikar is thus shown to have reserved to himself a life interest or usufruct and his conduct in granting a lease of the premises when the then existing lease expired indicates his own view of the nature of the rights he had reserved as also his intention to exercise them.

The words quoted above in so far as they disclose what was in the mind of Arisi Marikar indicate that he intended to reserve to himself every right of a person vested with both the legal and the beneficial estate in the premises—the right to deal with the premises as he thought fit and proper during his lifetime "as if this deed has not been executed ".

Such being the mind and intention of Arisi Marikar, it is extremely unlikely that he did any act to comply with the requirement of seizin, and there is no evidence that he did.

It is well settled law in Ceylon that donations between Muhammadans are regulated and governed by the Muhammadan law and that mere compliance with Ordinance No. 7 of 1840 which requires every transfer or assignment of land or other immovable property to be in writing and notarially attested, such a writing being commonly known in Ceylon as a deed, does not dispense with the necessity to comply with the requirements of the Muhammadan law. The conditions required by that system of law to constitute a valid donation are (1) a manifestation of the wish to give on the part of the donor, (2) the acceptance of the donee, either express or implied, and (3) the taking possession of the subject-matter of the gift by the donee, either actual or constructive (*Affefudeen v. Periatamby*[1]).

It was urged for the respondent (1) that where a Muhammadan is found to have impressed the subject of his gift to another Muhammadan with a *fidei commissum* the Muhammadan law ceases to be applicable to the transaction which, as a whole and in all its aspects, is governed by the Roman-Dutch law, and (2) that a gift by one Muhammadan to another, where the donor reserves to himself a life interest, is not obnoxious to the Muhammadan law and is valid,

[1] 14 *N. L. R.* 295.

complete, and operative so long as the intention of the donor to vest in the donee the future beneficial interest is manifest.

The first of these contentions is based upon the judgment of Berwick D.J. in *Case No.* 59,578, *D. C. Colombo*[1]. The parties to the gift being Muhammadans, it was submitted that the restriction on the donee's right of alienation was obnoxious to the Muhammedan law and of no effect and that the property vested absolutely in the donee. While recognizing and affirming the proposition that the Muhammadan inhabitants of Ceylon are governed by their own laws and customs and that the law of the Muhammadan inhabitants, when not regulated by enactment, must be determined by usage and their laws as existing here—*vide D. C. Colombo* 55, 746[2]—that learned Judge held that the whole body of the Muhammadan law, as it existed in other countries, did not form part of the law and customs of the Muhammadan inhabitants in Ceylon. It is to be noted that both parties affirmed the validity of the gift and no question of want of seizin or any other invalidating circumstance was urged or considered.

The only question before the Court was whether a clause in the nature of a *fidei commissum* could validly be incorporated in a gift of property between Muhammadans in Ceylon. The Judge held the clause to be valid refusing to apply the law of Wakf or any rule of construction of the Muhammadan law as it obtained in India or elsewhere. The case has always been regarded as authority for the proposition that a Ceylon Muhammadan has the right to impress the subject of his gift with a *fidei commissum*. It must be admitted that there is to be found in the judgment of Berwick D.J. language which appears to travel beyond the necessities of the case, notably the words "An exception may be found in the case of pure donations . . . . ; but the case is not one of pure donation but of *fidei commissum.*" It was urged that what that learned Judge intended to say was that gifts between Muhammadans were governed by the Muhammadan law only in the case of "pure donation" meaning thereby the simple case of a gift of, a thing the possession of which is capable of being immediately transferred to the donee and not in any other case. If that is what the learned Judge meant to say, I must respectfully differ from him. The case upon which he founds himself—*D. C. Colombo*, 55,746 (*supra*), and the earlier case *D. C. Colombo*, 29,129[1],—contain no such limitation. There are two other local judgments in which the expression "pure donations" occurs. One of these is the judgment of Schneider J. in *Rahiman Lebbe et al. v. Hassan Ussan Umma et al.*[2] and the other that of Drieberg J. in *Balkis v. Perera et al.*[3] In both cases the expression is definitely traceable to the language of Berwick D.J. in *D. C. Colombo* 59,578 (*supra*) ; in neither case is there to be found any words defining or explaining the expression nor any indication that it was used in the sense for which respondent contends.

The expression "pure donation" I cannot but regard as unfortunate, though for my own part I think it must be construed and understood with reference to the law of Wakf and other branches of the Muhammadan law with which it is contrasted in the judgment of Berwick D.J. and as designed to emphasize the circumstance that the Muhammadan law of gift as part of the Muhammadan law and custom is in force in Ceylon but not every other kindred branch of the Muhammadan law such as Wakf which in a country where the Muhammadan law as a whole is in operation would necessarily impinge upon and be involved in the law relating to gifts.

Muhammadans in Ceylon are entitled to be governed in their dealing *inter se* by the Muhammadan law and custom as

[1] (1878) *Grenier. Part III.*, 28.
[2] *Vanderstraaten*, 175.
[1] *Vanderstraaten App. B.* 31. [2] 3 *C. W. R.* 88.
[3] 29 *N. L. R.* 284.

they obtained under the Government of the United Netherlands. It has been definitely ascertained that in the matter of donations the principles of the Muhammadan law form part of the law and custom in force in Ceylon. In the application of that law regard must be paid to the progressive development which it has undergone. In India, instances are to be found of the adoption into their system by Muslim communities of Hindu customs. It is not altogether surprising that in Ceylon the Muhammadans should have adopted and incorporated into their system of law the legal concept of *fidei commissum* from the law applicable to the vast majority of their fellow-inhabitants of this Island. This development has been noticed and given effect to in the judgments of this Court, the earliest instance being that of case *D. C. Colombo, 59,578 (supra).*

I can see no legal or practical difficulty in applying the principles of the Muhammadan law of gift so developed to the case of a gift of property subject to a *fidei commissum.* A fideicommissary gift under the Roman-Dutch law is a gift, and before the *fidei commissum* can operate on the subject of the gift there must be a valid and complete gift—if, for instance, the gift fails for want of acceptance the *fidei commissum* of necessity also fails. Similarly, a fideicommissary gift between Muhammadan inhabitants of Ceylon must be complete as a gift under the Muhammadan law before the *fidei commissum* impressed on the object of the gift can become operative.

The declaration by the donor and acceptance by the donee satisfy the requirements of the Muhammadan law in so far as gift is a contract ; but it is also a transfer of property, and the transfer is only complete when seizin is delivered. " The declaration and acceptance of a gift do not operate to transfer the ownership of the gift unless and until the gift is completed by transfer to the donee of such seizin or possession as the subject of the gift permits. "—*Tyabji, s.* 383, *p.* 427.

The construction of the deed—for in Ceylon every gift of immovable property must be evidenced by a writing in conformity with the requirements of Ordinance No. 7 of 1840—in its main features seldom presents any difficulty. Where it is expressed to be, or is as a matter of construction, a gift by one Muhammadan to another the question whether it is complete and operative must be determined with reference to the principles of the Muhammadan law, notwithstanding that the construction and sufficiency of any language which may appear to have been used with the intention of impressing the subject of the gift with a *fidei commissum* must be considered and governed by the Roman-Dutch law from which that legal conception was derived and adopted into their system by the Muhammadans of Ceylon.

Before proceeding to the consideration of the question whether under the Muhammadan law it is permissible for a donor to reserve to himself a life interest in the subject of the gift, it is perhaps as well to draw attention to the circumstance that in none of the reported cases in which a life interest was reserved, does it appear to have been suggested that a gift with such a reservation not being a "pure donation", the Muhammadan law is excluded and that the disposition takes effect as a valid donation under the Roman-Dutch law.

So far as I am aware, it has never been expressly considered or decided in any local case whether as between Muhammadans a gift with the reservation to the donor of a life interest in the subject of his gift may validly be made. There are a few reported cases which show that, from time to time, documents evidencing an intention to convey property by way of gift subject to the reservation of a life interest, have been executed by Muhammadans. The legality of such gifts has never been the subject of a clear decision, the grounds on which the gifts were impeached being in some cases that no seizin had been delivered, in others that it was a gift in futuro.

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With the exception of *D. C. Batticaloa*, 17,825 [1], which was the gift to a son—presumably a minor—subject to the reservation of a life interest, where the gift though impeached as a gift in futuro was sustained on the supposed exception in the case where the gift was by a donor to his own child, the reservation of a life interest by the donor has been regarded as a circumstance which militates strongly against the claim that the gift has been completed by seizin—*vide Meydeen v. Abubaker* [2], also *Marikar v. Umma* [3], whereas in the case under consideration, the donors who were the parents of the donees reserved to themselves not only a life interest but "the right and power to mortgage or transfer the said land when necessary . . . . ."

There is no indication, however, in any of those cases that it was ever submitted that it was competent under the Muhammadan law for a donor to make a gift of the legal title while reserving to himself a life interest in the subject of his gift. It would seem to be a principle of the Muhammadan law that a donor must divest himself of every interest in the thing he gives. "In the case of immovable property in the possession of the donor he must vacate it and cease after the gift to exercise any right over its subject and then must place the donee in such a position that he can take possession if he chooses. Where immovable property is in the possession of tenants he may transfer possession by requiring the tenants to attorn to the donee" or by any act the effect of which is to place the donee in a position to derive the benefit of the subject of the gift, *i.e.*, its produce or income, after the gift—*vide Tyabji, 2nd ed., ss.* 392 *and* 393, *and note* 6.

The reservation of a life interest, or usufruct which is the equivalent right as known to the Roman-Dutch law, is a real right and includes not merely a right to the perception of the fruits or to the income of a land but possession and enjoyment in the fullest sense. It is a real interest in the property.

The creation and gift of limited estates susceptible of immediate possession, *e.g.*, the right to possession and enjoyment limited to the life of the donee, are known at least to certain of the Muslim sects, so also is the reservation by Wakf of a life interest in the creator of the Wakf. But it is difficult to see how a gift of immovable property with the reservation of a life interest therein to the donor can be made consistently with the requirements of delivery of possession to the donee and a complete divesting by the donor of every interest in the subject of the gift.

Our attention was, however, drawn to two judgments of the Privy Council in cases in appeal from the Courts of India. *Umjad Ally Khan v. Mohumdee Begam* [1] and *Muhammad Abdul Ghani et al. v. Fakhr Jahan Begam.*[2] In the earlier of these two cases the subject of the gift consisted of Government promissory notes which were endorsed and delivered by the donor to the donee with the stipulation that he (the donor) was to have the right to the accruing interest. The donee accepted the gift and wrote to the proper authority requesting the payment of the interest to the donor. The judgment was that the gift was valid and there was also an indication that the condition or stipulation could be enforced as an agreement raising a trust. A passage from the *Hedaya, vol. III., bk. XXX., p.* 294, was relied on as an authority for the proposition that a "real transfer of property by a donor in his lifetime under the Muhammadan law reserving not the dominium over the corpus of the property, nor any share of dominium over the corpus, but simply stipulating for and obtaining a right to the recurring produce during his lifetime" is not an incomplete gift under the Muhammadan law. It occurs in a chapter which is concerned

[1] (1877) *Ram.* 87. [2] 21 *N. L. R.* 284.
[3] 31 *N. L. R.* 237.

[1] 11 *Moore I. A.* 517. [2] 44 *All.* 301.

with the consideration of the question whether a valid gift may be made of a share in property which belonged in its entirety to the donor. After consideration the conclusion is reached that a gift of a share of a divisible thing is obnoxious to the Hanafi law (*a*) because complete seizin is impossible of an indefinite part of a divisible thing, (*b*) because if such a gift was valid it would be incumbent on the donor to divide the property, a thing which he did not engage to do. The discussion passes to the case of indivisible property in regard to which it is objected that the donor incurs a participation in the property and to this objection the reply is vouchsafed :—" The donor is subject to a participation in a thing which is not the subject of the gift, namely, the use (of the whole indivisible article), for his gift related to the substance of the article not the use of it. " Having regard to the whole context, it is a question whether the passage means anything more than that participation in the use of the whole indivisible article is not participation in the share which was the subject of the gift, or whether it is a sufficient authority for the distinction drawn between the corpus and its produce, especially where there is every indication that in the Muhammadan law of gift the corpus and its produce are one. This distinction is the foundation for the decision that the gift in the case under consideration was not void because the donor has stipulated for a right to the produce, the two being in this view separate and distinct. In regard to the stipulation their Lordships observed that if it be regarded as an obnoxious condition then it is the condition and not the gift which is avoided but indicated that the stipulation must be enforced as an agreement raising a trust.

But the character of the property which was the subject of the gift was such that a real transfer of title was affected by the endorsement and delivery of the promissory notes. The stipulation for the right by the donor during his life to the accruing interest, whatever other effect it may have in law, was not the reservation of such a right in the thing as would adhere to it into whosoever hands the subject of the gift passed, as in the case of the reservation of a usufruct in land. An endorsee, and certainly an endorsee without notice, would take a good and valid title to the notes free of any liability to discharge the obligations, if any, undertaken by the donee to pay the interest to the donor.

It would seem, therefore, that while the judgment is a definite authority for the proposition that a gift of the corpus completed by a real transfer of the legal title and made with the intention that the beneficial ownership present or future was to vest in the donee, is not invalidated by a stipulation by the donor for the right to the profits during his lifetime, it can hardly be relied on as an authority for the submission that a gift of land with the reservation of a real right such as a usufruct for life, is possible under the Muhammadan law.

Seyed Ameer Ali in his book on Muhammadan law treats this case of *Umjad Ally Khan v. Mohumdee Begam* (*supra*) as an instance of a gift with a condition and as a further illustration gives the following :—" So also, if a person were to make a gift subject to the donee paying the donor's debts, and *place the donee in possession* of the subject-matter of the gift, the condition would be valid, " *vide vol. I. p.* 139. Faiz Tyabji deals with the case under the head *iwaz* or gift with a return and also as an agreement raising a trust—*vide s.* 352, *pp.* 383 *to* 385, *and s.* 408, *pp.* 466 *to* 472. Mulla takes substantially the same view, *s.* 139. *p.* 123.

The difficulty of reconciling with the Muhammadan law the view that the corpus and its produce are distinguishable in the case of a gift, with its requirements as to delivery of possession and with the principles governing " gifts with a return " are considered by Tyabji—*vide s.* 408, *pp.* 467 *to* 473 (2nd *ed.*).

Whatever doubts, if any, there may be as to whether in the case before us the

donor ever intended this to be a complete gift in praesenti, there can be none in regard to the rights he reserved and intended to reserve. When the subsisting lease expired Arisi Marikar executed and granted a lease for a further term and dealt with the property in all respects as if the rights he reserved were not merely to the produce but to a usufruct in and over the subject of his gift.

In the second of the two cases above referred to—*Muhammad Abdul Ghani et al. v. Fakhr Jahan Begam* (*supra*)—the subject of the gift was a zemindari with the exception of certain villages and lands in respect of which the donee reserved to herself for life the possession. It was admitted that the donee was given actual possession of the zemindari but not of the particular property in respect of which the reservation was made. Referring to this reservation as an " usufruct " their Lordships relied on *Umjad Ally Khan v. Mohumdee Begam* (*supra*) as authority for the proposition that the reservation did not make the gift void. But they affirmed the necessity of (1) a manifestation of the wish on the part of the donor, (2) acceptance of the donee, and (3) the taking of possession by the donee of the subject-matter of the gift either actually or constructively and held that the " whole zamindari property mentioned in the deed and not parts of it only must for the purpose of this case be regarded as one property " and that " the taking of possession of any part of it " was " constructively a taking of possession of the whole. " Thus the gift as a whole, including the portion in respect of which the " usufruct " was reserved, was held to have been delivered to the donee.

There is an indication that the term " usufruct " was used in the sense of an agreement raising a trust in the concluding portion of the judgment in which it is said that " if Lutfullah Khan had received before the death of Muni Bibi any of the rents or profits of the property in question (the property subject to the reservation) he would be held to have received them as trustee for Muni Bibi though the title to the corpus was in him. " Mulla deals with this case as an instance of a gift with a return or of an agreement raising a trust, *s.* 139, *p.* 132.

Now if by " usufruct " is meant a right in the nature of that for which the donor stipulated in the earlier case and which is referred to sometimes as a reservation of a right to the income or as an usufruct in the produce, this is not an authority for the proposition that the reservation of a life interest in the subject of a gift is permissible ; nor is it by any means clear that had the reservation made by the donor extended to the whole of the zemindari, their Lordships would have upheld the gift.

Whether a zemindari as a subject of property is exactly in the same position as land in the immediate possession of the donor or of tenants or lessees for a short term is a matter upon which I am by no means sure, in view of the reference in some Indian cases to a zemindari as belonging to the class of property which consists of the rights to rents. But neither of the cases referred to appears to recognize or affirm the validity of a gift of land with the reservation to the donees of a usufruct for life in the land, in the sense in which a usufruct is known to the Roman-Dutch law.

If then the reservation referred to in these judgments is in law merely a right to receive from the donee the produce or profits of the subject of the gift based on agreement and not a real right in the land, then, when such land is in the possession of the donee, it is susceptible of delivery of possession as fully as if there were no such reservation ; where the land is under lease the process of delivery of possession by a request to the lessee to attorn to the donee is also possible. The

donor must rely on the agreement or stipulation to compel the donee to discharge the obligation he has undertaken.

But where the donor has endeavoured to retain a real interest in the land by the reservation of a life interest or usufruct therein, a question may well arise as to whether the gift itself is void or whether it is the reservation alone which is void, the gift taking effect without any burden or limitation.

A feature common to both these cases is the insistence on proof of delivery of possession as essential to the validity of a gift between Muhammadans. The mere execution of a deed of conveyance of immovable property does not complete the transfer. "The necessity for the transfer of possession is expressely insisted upon as part of the substantive law in order that that may be effectuated which is sought to be effectuated by a gift, viz., the transfer of the ownership of the property from the donor to the donee." —*Tyabji, s.* 383, *p.* 433.

For the decision of the case under consideration it is sufficient to say that Arisi Marikar intended to reserve for himself a usufruct in the premises referred to in this deed and further evidenced this intention by leasing the premises and that he intended in addition to reserve to himself the right to dispose of the premises as an owner might "as if this deed had not been executed" and that there is no evidence, if it be possible that he ever intended to do so, that he completed the gift by delivery of seizin either actually or constructively.

The gift is void and of no effect.

The order of the learned District Judge is set aside and the plaintiff's action dismissed with costs both here and in the Court below.

*Appeal allowed.*