1932 [IN THE PRIVY COUNCIL.]

Present : **Lord Tomlin, Lord Thankerton, and Sir Lancelot Sanderson.**

WEERASEKERA *v.* PEIRIS.

Fidei commissum—*Muslim gift to his son—Reservation of right to enjoy the rents and profits and of right to revoke—No intention to make a gift under Muslim law—Roman-Dutch law applicable.*

Where a deed of gift by a Muslim to his son contained the following conditions :—

"To have and to hold the said premises unto the said Arisie Marikar, his heirs, executors, administrators, and assigns for ever subject to the conditions and restrictions hereinafter mentioned, that is to say, that I, the said Ahamado Lebbe Marikar, have reserved to myself the right and power to cancel and revoke these presents and to 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 had 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 Arisie Marikar as his property, provided, however, that the said Arisie Marikar shall not sell, mortgage, gift, exchange, or otherwise dispose of or alienate the said premises or any part thereof and further he shall not be at liberty to encumber the rents, profits, income, or issues of the said premises or suffer or allow or subject the said premises or the rents, profits, issues, and income thereof to be seized, attached, or sold by any writ of execution for any debt, dues, default or undertaking of the said Arisie Marikar, that he shall not lease the said premises for any term exceeding three years at a time. Provided, however, that the said donee can make gifts to his daughters in their marriage but not to any other. Provided, however, that after the death of the said donee the said property shall devolve on his children as their absolute property and I do hereof for myself, my heirs, &c., covenant and promise and agree to and with the said Arisie Marikar that the said premises hereby gifted are free from encumbrance, &c. . . . .

"And I, the said donee, do hereby thankfully accept the above gift made to me in the foregoing deed subject to the conditions therein set forth,"—

Held, that the donor created a valid *fidei commissum* such as is recognized by the Roman-Dutch law and that the donor did not intend to make such a gift as is recognized under the Muslim law which necessitates the donee taking possession of the subject-matter of the gift during the lifetime of the donor.

APPEAL from a judgment of the Supreme Court.[1]

December 9, 1932. Delivered by SIR LANCELOT SANDERSON—

This is an appeal by Don Charles Weerasekere, who was the plaintiff in the suit, against a decree of the Supreme Court of the Island of Ceylon, dated January 20, 1931, whereby an order of the District Court of Colombo, dated July 15, 1930, was set aside and the plaintiff's action was dismissed.

[1] *32 N. L. R. 176.*

The suit was brought by the plaintiff against the defendant, Hettige Don John Peiris, claiming that certain immovable property situated within the Municipality and District of Colombo, and described in the schedule of the plaint, should be partitioned in terms of the Partition Ordinance No. 10 of 1863, and for such other and further relief as to the Court should seem meet.

The claim was based upon a deed, dated March 11, 1904, executed by Ahamadoe Lebbe Marikar Arisie Marikar Hadjiar (hereinafter called the "father") and his son, Arisie M. H. M. S. Hadjiar (hereinafter called "the son"), who were Mohammedans of the Shafi sect and resident in the Crown Colony of Ceylon. The deed refers to five-sixths of the property in question.

By the said deed the father purported to give, grant, assign, and transfer the five-sixths share of the said premises to the son as a gift *inter vivos*. The plaintiff alleged that the gift was subject to a *fidei commissum* in favour of the children of the son and that the five-sixths share upon the death of the son, which took place on February 12, 1929, devolved upon his sons, Abdul Hassein and Mohammed Hassein. By a deed dated August 30, 1927, the plaintiff purchased all the right, title, and interest of Abdul Hassein and Mohammed Hassein, and by reason thereof he claimed to be entitled to the five-sixths share of the said premises.

The father died in 1908 or 1909, and on his death the son 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 will of one E. J. Rodrigo in the year 1913.

The premises were sold in execution of a mortgage decree obtained against him in 1916, and the said trustees, having purchased the said premises, entered into possession thereof.

In June, 1929, the said trustees sold the said premises to the defendant, who went into and remained in possession thereof up to and at the time of the action, which was instituted on August 16, 1929.

The defendant's case was that no valid and operative gift was made by the father to the son by the deed of March 11, 1904, and that the son never took possession or held the said premises under the alleged gift.

The defendant further alleged that the son, on the death of his father, entered upon the premises and enjoyed the same as absolute owner, and that he and those claiming under him, including the defendant, had acquired a title by adverse and uninterrupted possession.

The District Judge who tried the action decided in favour of the plaintiff and held that the deed of March 11, 1904, created a valid *fidei commissum*, and that the five-sixths share was conveyed by the father to the son, subject to the restrictions set out in the deed. The District Judge further held that the possession of the defendant and his predecessors could not create a title by prescription against the children of the son, who did not die until 1929.

He therefore made a decree in favour of the plaintiff in respect of the five-sixths share of the premises.

No reliance was placed in this appeal upon the title of the defendant alleged to have been created by reason of adverse possession, and the arguments on both sides were directed to the construction and effect of the deed of March 11, 1904.

The defendant appealed to the Supreme Court of Ceylon, and the learned Judges of that Court held that the alleged gift by the father to the son was void and of no effect. They decided that Mohammedan law must be applied to the deed of March 11, 1904, for the purpose of testing the validity of the gift *inter vivos*, and that inasmuch as the son did not take possession of the property during the lifetime of his father, there was no valid and complete gift according to Mohammedan law. They therefore allowed the appeal and dismissed the plaintiff's action. The plaintiff has appealed against this decision to His Majesty in Council.

The dates of the material facts are as follows:—In 1886 the father acquired the premises in question. In January, 1903, he executed a lease of the premises for three years from February 1, 1903, in favour of a certain lessee, who went into possession thereof. On March 11, 1904, the deed hereinbefore referred to was executed by the father and the son.

In June, 1906, the father granted another lease of the premises for three years from July 1, 1906, to another lessee, who went into possession thereof. In February, 1908, the 1904 deed was registered. In 1908 or 1909 the father died. In May, 1909, the son granted a lease of the premises for three years from July 1, 1909. On April 30, 1913, the son mortgaged the premises to the above-mentioned trustees, who obtained a decree against him. The property was sold by order of Court, and purchased by the trustees in 1916. On August 30, 1927, Abdul Hassein and Mohammed Hassein sold their right, title, and interest in the premises to the plaintiff. On February 12, 1929, the son died. On June 26, 1929, the defendant purchased the premises from the said trustees, and on August 16, 1929, the plaintiff instituted his suit against the defendant.

The terms of the deed of March 11, 1904, upon which this appeal depends, are as follows:—

"Know all men by these presents that I, Ahamadoe Lebbe Marikar Arisie Marikar Hadjiar of New Moor street in Colombo, for and in consideration of the natural love and affection which I have and bear unto my son Arisie Marikar Hadjiar Mohamado Salih Hadjiar of Colpetty and for divers other good causes and considerations me hereunto specially moving do hereby give, grant, assign, transfer, set over and assure unto the said Arisie Marikar Hadjiar Mohamado Salih Hadjiar, his heirs, executors, administrators, and assigns as a gift *inter vivos* absolute and irrevocable the land and premises described in the schedule hereto (of the value of Rupees Two thousand Five hundred) together with all my right, title, interest, claim and demand whatsoever in, to, upon or out of the same which said premises have been held and possessed by me under and by virtue of the title deed bearing No. 2208 dated 28th December, 1886, attested by James Perera, Notary Public, described in the schedule which is annexed hereto.

"To have and to hold the said premises with all and singular the appurtenances thereunto belonging or used or enjoyed therewith or known as part and parcel thereof unto him the said Arisie Marikar

Hadjiar Mohamado Salih Hadjiar, his heirs, executors, administrators and assigns for ever subject to the conditions and restrictions hereinafter mentioned, that is to say: that I, the said Ahamadoe Lebbe Marikar Arisie Marikar Hadjiar, 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 had 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 Arisie Marikar Hadjiar Mohamado Salih Hadjiar as his property, provided, however, that the said Arisie Marikar Hadjiar Mohamado Salih Hadjiar shall not sell, mortgage, gift, exchange or otherwise dispose or alienate the said premises or any part thereof and further that he shall not be at liberty to encumber the rents, profits, income or issues of the said premises or suffer, allow or subject the said premises or the rents, profits, issues and income thereof to be seized, attached or sold by any writ of execution for any debt, dues, default or undertaking of the said Arisie Marikar Hadjiar Mohamado Salih Hadjiar, that he shall not lease the said premises for any term exceeding three years at a time nor execute any subsequent leases before the expiration of the lease then in existence for the said premises. Provided however that the said donee can make gifts to his daughters in their marriages but not to any other. Provided, however, that after the death of the said donee the said property shall devolve on his children as their absolute property and I do hereby for myself, my heirs, executors and administrators covenant, promise and agree to and with the said Arisie Marikar Hadjiar Mohamado Salih Hadjiar, his heirs, executors, administrators and assigns that the said premises hereby gifted are free from any incumbrance and that I and my aforewritten shall and will at all times hereafter warrant and defend the same unto him and his aforewritten against any person or persons whomsoever.

"And I the said donee to hereby thankfully accept the above gift made to me in the foregoing deed subject to the conditions therein set forth.

"In witness whereof we the said Ahamadoe Lebbe Marikar Arisie Marikar Hadjiar and Arisie Marikar Hadjiar Mohamado Salih Hadjiar do hereunto and to two others of the same tenor and date as these presents set our hands at Colombo on this Eleventh day of March A.D. One thousand Nine hundred and Four."

The learned Judges of the Supreme Court held that on the true construction of the deed the first part thereof was intended to create a gift *inter vivos*, that Mohammedan law must be applied thereto, and that by such law three conditions were necessary for a valid gift *inter vivos*, viz., expression by the donor of intent to give, acceptance by the donee express or implied, and the taking possession of the subject-matter of the gift actually or constructively by the donee. They further held that the premises in question were subject to a lease at the time of the deed of 1904, and that there was no evidence that the donee had possession either actual or constructive, during the lifetime of the father. They

therefore came to the conclusion that as the deed purported to create a gift *inter vivos* between Mohammedans, it was void under Mohammedan law.

It was argued on behalf of the plaintiff-appellant that where such a deed as that under consideration involves a *fidei commissum,* the law by which the document is to be construed is the Roman-Dutch law, and that the whole of the document, and not one part of it only, is to be construed by Roman-Dutch law ; that the principles of the Mohammedan law were to be applied only in the case of " pure " donations, as they were called, made by Muslims in Ceylon ; in other words, to donations not involving *fidei Commissa.*

"The Common law of Ceylon is the Roman-Dutch law as it obtained in the Netherlands about the commencement of the last century," see *Karonchimamy v. Angohamy,*[1] in which case Moncrieff A.C.J., in giving judgment in the year 1904, quoted a passage to this effect from Mr. Pereira's " Laws of Ceylon," 1904 edition.

Mr. Pereira, in his 1913 edition, while not doubting the law obtaining in Ceylon, has some hesitation in accepting the designation " Common Law ", as being correct.

There is no doubt, however, that the law adopted by the British Government in Ceylon in 1799 was practically the law which obtained in the Netherlands at the beginning of the last century. Under that law donations involving *fidei commissa* are well known and recognized as valid transactions.

The question therefore which arises in this appeal, in their Lordships' opinion, depends upon the construction of the deed of March 11, 1904.

It is true that in the first part of the deed the father purported to give, grant, assign, transfer, set over and assure to the son as a gift *inter vivos* absolute and irrevocable the land and premises. But in the habendum or second part of the deed it is made clear that the son was to hold the premises subject to the conditions and restrictions thereinafter mentioned, and the last paragraph in the deed shows that the son accepted the so-called gift subject to the conditions set forth in the deed.

The conditions and restrictions mentioned in the deed are quite inconsistent with a valid gift *inter vivos* according to the Mohammedan law. For, by the deed, the father reserved to himself the right to cancel and revoke the so-called gift, as if the deed had not been executed, and to deal with the premises as he thought fit ; he reserved to himself the rents and profits of the premises during his lifetime, and it was only after his death that the premises were to go to and be possessed by the son.

In their Lordships' opinion, all the terms of the deed must be taken into consideration when construing the deed, and it seems clear to their Lordships that it was never intended that the father should part with the property in or the possession of the premises during his lifetime, or that the son should have any control over or possession of the premises during his father's lifetime. In other words, it was not intended that there should be a valid gift as understood in the Mohammedan law.

The deed further provided (among other things) that after the father's death, the son should not sell, mortgage or alienate the premises or any

[1] *8 Ceylon N. L. R. 1 at p. 8.*

part thereof, that his powers of leasing the premises should be limited to granting leases for three years, and that apart from gifts which the son might make to his daughters on their marriage, the premises upon the death of the son should devolve upon the children of the son as their absolute property.

It was not disputed that the last-mentioned provisions constituted a *fidei commissum* according to Roman-Dutch law, but, as already stated, it was contended, on behalf of the respondent, that inasmuch as the terms of the first part of the deed purported to constitute a gift *inter vivos* between Muslims, the Mohammedan law must be applied thereto, and as possession of the premises was not taken by the son during the father's life, the gift was invalid and the *fidei commissum,* which was based on it, also failed.

Their Lordships are not able to adopt this contention of the respondent, and upon the true construction of the deed, having regard to all its terms, they are of opinion that the father did not intend to make to the son such a gift *inter vivos* as is recognized in Mohammedan law as necessitating the donee taking possession of the subject-matter during the lifetime of the donor, but that the father intended to create and that he did create a valid *fidei commissum* such as is recognized by the Roman-Dutch law.

Their Lordships' attention was drawn to Ordinance No. 10 of 1931, which is entitled "An ordinance to define the law relating to Muslim intestate succession, donations, and charitable trusts or *wakfs,*" and in particular to clauses 3 and 4 thereof—which are as follows :—

> "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 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.
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> "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."

Their Lordships do not base their decision upon the provisions of the said Ordinance, because in their opinion the Ordinance cannot govern the present case, as it did not come into effect until June 17, 1931, and it cannot be said to be retrospective in effect.

Their Lordships' conclusion, as intimated above, is based upon their opinion as to the true construction and effect of the deed of 1904 and the law then applicable thereto.

For the above-mentioned reasons their Lordships are of opinion that the appeal should be allowed, the decree of the Supreme Court of Ceylon dated January 20, 1931, should be set aside, and the order of the District Judge of July 15, 1930, should be restored. The respondent must pay to the appellant his costs of this appeal, and of the appeal to the Supreme Court, and their Lordships will humbly advise His Majesty accordingly.

Appeal allowed.