1925.

Present : Ennis A.C.J. and Dalton J.

SEYAMBO NATCHIA *v.* OSMAN.

367—D. C. Galle, 21,219.

Muhammadan law—Donation—Delivery of possession may be actual or constructive—Delivery of deed—Acceptance of deed constitutes delivery.

Under the Muhammadan law a necessary element to constitute the validity of a deed of gift is delivery of possession, actual or constructive.

Delivery of the deed amounts to constructive delivery of possession for this purpose, and where such gift is to a minor child acceptance by the father appearing on the face of the deed constitutes a delivery of the deed.

Quære, whether a Muslim dowry deed given in consideration of marriage is a deed of gift.

THIS action was brought by plaintiff against the administrator of the estate of her deceased daughter, Zohara. Plaintiff gifted to her certain lands mentioned in paragraphs 3 and 5 of the plaint by deed of gift dated November 7, 1916. She at first married one Haniffa. He died in 1917. Thereafter she married his brother, the present defendant. Zohara herself died on August 22, 1922, and defendant applied for letters of administration to her estate, and included these lands in the inventory. Plaintiff then brought the present action claiming the lands on the ground that the gift had not been completed by delivery. The learned District Judge, while holding that there was no delivery, was of opinion that the deed, being one given in consideration of marriage, did not require delivery for its validity.

Drieberg, K.C. (with him *Croos Da Brera* and *Ahlip*), for plaintiff appellant.—In the case of a Muslim gift it is essential that there should be seisin. In the present case no possession was ever given. The only exception would be premises No. 109, where plaintiff permitted her daughter and her husband to take up their residence. Even this does not amount to the delivery of possession contemplated in Muhammadan law, *vide Tyabji, p. 301*.

There is also evidence that plaintiff possessed the properties as her own even after the deed of gift. Plaintiff has mortgaged the whole of these lands in 1919, *vide* P 14. The defendant was an attesting witness thereto.

There has been no delivery of the deed even. The deed has always been with plaintiff.

[ENNIS A.C.J.—Is there no acceptance of the deed on the face of it ?]

Yes. In Muhammadan law such symbolic delivery is insufficient. There must be seisin.

The finding on possession is against the defendant. Even if there has been acceptance of the deed, there must be delivery in addition.

The learned Judge has held the deed to be one for valuable consideration. Deeds of this nature are not for valuable consideration, but deeds of gift.

Counsel cited *Mohamadu v. Marikar* [1] and *Affefudeen v. Periatamby.*[2]

E. W. Jayewardene (with him *Soertsz*), for defendant, respondent, not called upon.

June 4, 1925. ENNIS A.C.J.—

This was an action for declaration of title, and for a declaration that a certain deed of gift did not operate to convey any title in favour of the donee Zohara; and further that the property mentioned in that deed had been wrongfully included in the estate of Zohara. The learned Judge found in favour of the defendant, and the plaintiff appeals.

It appears that, by the document D1, on November 17, 1916, the plaintiff gifted to her daughter a number of properties described in paragraphs 3 and 5 of the plaint. The gift was a dowry gift. The daughter duly married, and her husband died in February, 1917. Zohara then took a second husband, who is the defendant in this case. She died on August 28, 1922, whereupon the defendant applied for administration of her estate, and included in the estate the lands gifted in 1916. Later, it appears that the defendant married Zohara's younger sister. The deed of gift D 1 was not registered, but it was accepted on behalf of Zohara by her father who duly signed as accepted. It appears that on November 7, 1919, the plaintiff dealt with all the lands gifted, by way of mortgage on the document P 14, and to that deed the first defendant was a witness. It was contended on appeal that the learned Judge had found in favour of the appellant that there had been no delivery of possession of the property and no delivery of the deed, and it was further contended that the learned Judge was wrong in holding that the deed in this case related to a transaction which took the deed out of the category of gifts. I need not deal with the learned Judge's finding in this case, because I am of opinion that the learned Judge was wrong as regards the first two findings. As to whether a transaction of this sort does not fall within the category of gifts, there seems to be some doubt, inasmuch as the previous cases in this Court have been dealt with without any such question having been raised; for instance, *Mohamadu v. Marikar* (*supra*) and *Affefudeen v. Periatamby* (*supra*).

[1] *(1919) 21 N. L. R. 84.*
[2] *(1911) 14 N. L. R. 295.*

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Seyambo Natchia v. Osman

With regard to the question as to whether there had been delivery of possession, it would seem that the ordinary rule with regard to gifts is, to make a valid gift there must, among other things, be a delivery of possession, either actual or constructive. Now it is conceded in the present appeal that the possession of the land mentioned in paragraph 5 of the plaint was in fact given to the donee who took the rents of the land, and it was further conceded as a fact that with regard to the property mentioned in paragraph 3 (*a*) of the plaint that the donee lived with her people in this house, and that the defendant on his marriage to Zohara also took up his quarters there; so that portions of the land gifted have actually been delivered into the possession of the defendant and his wife Zohara.

With regard to the question of delivery of possession, *Tyabji's Muhammadan Law, p. 301*, was cited to us, and there a sentence appears that the donor must vacate the premises gifted to enable the donee to take possession. I do not see how this has any bearing on the present case, because two of the lands gifted consist of undivided shares, and with regard to one of them, at any rate, it would seem that only an undivided one-fourth was gifted, whereas the donor, or possibly the donor and her husband possessed an undivided half share. It is difficult to see how in such circumstances the donor could be expected to vacate the property. Hence I do not concur with the conclusion that there could be no valid gift without such a vacation. On the point as to whether the deed of gift was delivered, it appears that the father of the donee accepted the deed on her behalf. It seems to me that this alone constituted a delivery of the deed, and this is borne out by the evidence of the plaintiff that her husband brought the deed after its execution from the notary's office. It would seem then that the father of Zohara actually took delivery of the deed at the time of its signature, and kept possession for some time afterwards. That being so, there has been in my opinion an actual delivery of the deed. This by itself, I view, is a constructive delivery of possession of the property, more especially when we find that portions of that property have been without question delivered to the donee. The question of the mortgage of the land by the plaintiff is not really affected by the present case. It is merely mentioned by the appellant as one of the reasons upon which to base an argument that there was no delivery of possession. In my view, in the circumstances of the case, the learned Judge has drawn a wrong conclusion from the facts; on the facts there has been a constructive delivery of possession of certain portions of the property gifted and an actual delivery of others. In the circumstances I would dismiss the appeal, with costs.

Dalton J.—I concur.

Appeal dismissed.