1948 *Present :* **Canekeratne and Gratiaen JJ.**

SARAUMMA, Appellant, *and* MAINONA *et al.*, Respondents

S. C. 423—D. C. Kandy, 1,527

Muslim law—Gift by father to daughter—Revocability—Muslim Intestate Succession and Wakfs Ordinance (Cap. 50)—Proviso to section 3.

Where by a deed executed in 1941 a Muslim of the Shafei sect granted by way of gift certain property to his daughter and subsequently revoked the gift—

Held, that there was nothing in the first part of the proviso to section 3 of the Muslim Intestate Succession and Wakfs Ordinance (Cap. 50) to show that the power of revocation inherent in such a case has been modified or varied.

APPEAL from a judgment of the District Judge, Kandy.

H. W. Tambiah, with *M. A. M. Hussein*, for the plaintiff appellant.

No appearance for the defendants respondents.

Cur. adv. vult.

September 23, 1948. CANEKERATNE J.—

This is an appeal by the plaintiff from a judgment dismissing her claim to an undivided two-ninth shares of a land. By deed P 5 dated August 20, 1941, one Slema Lebbe granted by way of gift these shares to his daughter the plaintiff, the deed of gift is in Sinhalese and has been attested by a notary practising in the Sinhalese language in a Kandyan district, and like the deed referred to in the case of *Cader v. Pitche* [1], P 5 in some respects resembles a Kandyan deed of gift. The father by deed 3 D 1 dated March 2, 1942, revoked the gift in favour of the plaintiff, and by deed 3 D 2 sold those shares to the third and fourth defendants-respondents. The learned Judge held that the effect of the proviso to section 3 of Cap. 50 of the Ceylon Legislative Enactments is to make every gift revocable unless it is stated in the deed that it is irrevocable.

Mr. Tambiah contended firstly that deed P 5 was irrevocable and secondly, that it could not be revoked except in the course of judicial proceedings. As there was no appearance for the respondents and we have had no assistance on their behalf it is not desirable to say anything more than what is required for the decision of the present case.

The parties to the action are Sunni Muhammadans of the Shafei sect to which most Muhammadans who are natives of Ceylon belong. The other principal sects of the Sunni school are the Hanafis, Malikis and

[1] *(1916) 19 N. L. R. 246.*

Hanbalis. Two of the conditions necessary for the validity of a gift, according to the Hanafi Law, are (1) acceptance, expressed or implied, subject to exceptions in the case of a gift to a minor son, &c., (2) seisin by the donee of the subject of the gift, i.e., if the property is not already in the hands of the donee. Seisin might be actual or constructive[1]. Actual delivery of possession is not absolutely necessary. If the character of the possession changes, the mere retention of the subject-matter of the gift in the hands of the donor, would not affect the validity of the gift. A gift of immovable property in the occupation of tenants will be complete either by the delivery of the title deeds or by requisition to the tenants to attorn to the donee[1]. According to the Hanafi Law, a donor could revoke a valid gift (i.e., one which has been completed by delivery of the property to the donee) whether he has or has not reserved to himself the power to revoke it, except in two cases (e.g., between husband and wife, and a gift to a blood relation within the prohibited degrees). Except in these cases the power of revocation seems to be inherent in the donor of every gift. The power may come to an end in one of six ways. It may, however, be necessary to take proceedings before the Kazee or Judge[2]. According to the Shafeis, no gift (except such as have been made by parents to their children) can be revoked, whether change of possession has taken place or not[3].

Minhaj et Talibin, a Manual of Mahammadan Law according to the school of Shafei by probably En Nawawi (Howard's translation) treats of gifts in Book 24. " A practice has been introduced by the Sonna, by which parents, at any rate when not of notorious misconduct, may by gift *inter vivos* distribute their property equally amongst their children, without distinction of sex ; others, however, maintain that the provision of the law of the distribution of property upon succession cannot be set aside in this way. A father or any ancestor may revoke a gift made in favour of a child or other descendant, provided that the donee has not irrevocably disposed of the thing received " (pp. 234, 235).

Ameer Ali states thus : " A father has the right of revoking a gift made by him to his children, provided the donee has not irrecoverably disposed of the object received. So also other ascendants with respect to gifts made to grand-children and their descendants "[4].

Mr. Tambiah in attempting to limit the power to a gift to a son referred to an extract in Wilson's Muhammadan Law (4th Ed.) p. 441. This is a passage from the Hedaya, but it must be remembered that the Hedaya contains a discussion on moral philosophy and theology : in the course of the discussion it refers to the rules which are observed as law but the whole discussion is from the Hanafi standpoint. " ' It is lawful for a donor to retract the gift he may have made to a stranger '. Shafei maintains that this is not lawful ; because the Prophet has said— ' let not a donor retract his gift ; but let a father, if he please, retract a gift he may have made to his son ' ; and also, because retractation is the very opposite to

[1] *Ameer Ali, Muhammadan Law (4th Ed.), Vol. I, 113, 114. See 14 N. L. R. 295 ; 26 N. L. R. 446, p. 448.*
[2] *Ameer Ali, 151, 155.*
[3] *Ameer Ali, 149.*
[4] *Ameer Ali, op. cit. p. 190. In Chapter 6 he treats of the Shafei Law.*

conveyance . . . . . It is otherwise with respect to a gift made by a father to a son, because (according to his tenets) the conveyance of property from a father to the son can never be complete ; for it is a rule with him that the father has a power over the property of his son. The arguments of our doctors on this point are two-fold. First, the Prophet has said . . . . . With respect to the tradition of the Prophet quoted by Shafei the meaning of it is that the donor is not himself empowered to retract his gift, as this must be done by decree of the Kazee, with the consent of the donee—excepting in the case of a father, who is himself competent to retract a gift to his son, when he wants it for the main tenance of the son ; and this is metaphorically called a retractation "[1].

Wilson quotes this passage, and adds, after this sentence (for it is a rule with him that the father has a power over the property of his son) " this is a very remarkable statement, of which I have not been able to find any confirmation in the Minhaj ". No such words are to be found in Book 24 of Howard's translation. It would also appear that the words at the end of the passage (" this must be done by a decree of the Kazee " &c.) seem to be the comment made by Ali Ibn Abu Bakr (the author of the Hedaya), these are not to be found in Book 24 of Howard's translation. The case of *Cader v. Pitche* (*supra*) decided that a father can revoke a donation to his son without the decree of a court of law. The same view was taken in *Mohideen v. Mohideen*[2]. In a case referred to in Mac Naghten's Muhammadan Law (Precedents of Gifts 202) the right of a father to revoke a gift to the sons of a daughter was recognised, there was however another reason given for the gift being void ; it may be assumed that the parties belonged to the Shafei sect. The Minhaj does not confine the right of revocation to a gift made to a son only. The text writers Ameer Ali and Wilson—so too Tyabji Muhammadan Law (2nd Ed.) section 423, p. 486—do not place a limitation on the father's right and I can see no reason for doing so. Had the question of revocation of deed P 5 to be decided according to the Muhammadan Law of Ceylon, unaffected by anything in Ordinance No. 10 of 1931, the revocation would have been valid.

Gifts made by Muhammadans in Ceylon could formerly, broadly speaking, be divided into two classes—(i) those where the property passed to the donee absolutely, i.e., subject to no condition, where the intention was to make the donee the proprietor of the property and give him the right, title and interest of the donor, (ii) those where the donee held the property subject to conditions, as in the case of fideicommissary provisions, &c. The former class was often referred to as " pure donations "[3]. Thus the validity of gifts which were thought to be, or fell, within the former class was determined by the Muhammadan Law—the earliest cases are those in *Vanderstraaten's Reports 176* and App. B., XXXI.[4]. Later cases are found at p. 295 of *14 N. L. R.*, p. 284 of *21*

[1] *Wilson, Muhammadan Law (6th ed.), p. 430.*

[2] *(1923) 2 T. L. R. 92.*

[3] *The expression is first found in the case referred to under note 10. It is repeated in 19 N. L. R. 175.*

[4] *The decision in the Appendix is the judgment of the District Judge, the case was sent back for a re-trial on certain points. See the decision on these on page XXXV.*

N. L. R. " For the same reason the rules of construction and validity and effect of such conditions as also indeed the construction, &c., of deeds and wills generally including entails and *fidei commissa* must be governed by the ordinary law of the country because this part of the Muhammadan system of jurisprudence has never become part of the law of Ceylon. An exception may be found in the case of pure donations as to which see the decisions in Colombo D. C. 55,746 and 29,129 " [1]—the former case is the one reported on page 175 of Vanderstraaten's Reports, the latter on page XXXI of Appendix B. Resort was had to the general law of Ceylon, and not to the Muhammadan Law, to test the validity of deeds falling within the former class [2]. A long series of decisions ranging from about 1873 to 1927 had held that it was competent to Muhammadans in Ceylon to take advantage of the general law of the Island and enter into transactions valid according to that law. In *Weerasekere v. Peiris* [3] this Court adopted a different view ; it held that where a deed of gift contained a fideicommissary provision, the validity of the gift must first be determined by Muhammadan Law, although the validity and perhaps the construction of the *fidei commissum* is governed by the Roman-Dutch law. At the argument before the Privy Council, the appellant contended that the whole transaction, that is the validity of the gift and the *fidei commissum*, was governed by the Roman-Dutch Law [4], the respondent that a *fidei commissum* between Muhammadans in Ceylon must be complete as a gift under Muhammadan law before the *fidei commissum* becomes operative [5]. The judgment of this Court was set aside by the Privy Council [6]. The essential question for decision was whether the disposition made by the father was invalid as a gift according to the Muhammadan Law or valid as a *fidei commissum* under the Roman-Dutch Law. It was not intended that there should be a valid gift as understood by the Muhammadan Law. It was intended then " *ut res magis valeat quam pereat* " that there should be a valid *fidei commissum* [7].

A Select Committee of the Legislative Council, which was appointed in September, 1926, made on October 26, 1928, a report to the Council on the law of testate and intestate succession, donations and trusts. A draft bill was annexed to the Report and the bill was published in the official *Gazette* of March 1, 1929, Part II, p. 178 [8]. The expression " pure donation " is found in the Report of the Select Committee and in clause 4 of the draft bill. The bill has been very much changed in the process of becoming law [8]—the discussion of the bill in the committee

[1] *Passage from the judgment of the District Judge. This Court affirmed the judgment " for the reasons given by the District Judge ". Grenier, 1873, Vol. 2, p. 28 at p. 30.*

[2] *One of the earliest reported cases where the general law of Ceylon was applied to test the validity of a deed creating a* fideicommissum, *is to be found in Grenier, 1873, Vol. 2, p. 28.*

[3] *(1931) 32 N. L. R. 176.*

[4] *(1933) A. C. 191, 192.*

[5] *Lord Tomlin, as reported in* Times of Ceylon *of 24th November, 1932: " Until you confront me with a distinct authority, I should be reluctant to accede to what I think an absurdity, namely, that you should test the validity of one part of a transfer by one law and another by another."*

[6] *(1932) 34 N. L. R. 281.*

[7] *The language used by a writer in L.Q.R. Vol. XLIX, p. 326.*

[8] *(1932) 34 N. L. R. 57 ; 1 C. L. W. 274.*

stage of the Council commenced about November 25, 1930, it was then postponed and taken up in the beginning of the following year. On February 4, 1931, the words " to donations not involving *fidei commissum* . . . . " were introduced in lieu of the words " to pure donations " in clause 4, the clause so amended was passed on the same day, it is now section 3 of the Ordinance. Was this due to the decision of this Court in *Weerasekere's case*, which was delivered on January 20, 1931 ? The Ordinance No. 10 of 1931, came into force on June 17, 1931.

Section 3 of Chapter 50, omitting words not material to this case, reads thus :

" For the purposes of avoiding and removing all doubts it is hereby declared that the law applicable to donations not involving *fidei commissa*, ... 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 ."

Sections though framed as provisos upon preceding sections, may contain matter which is in substance a fresh enactment, adding to and not merely qualifying what goes before. A proviso, in the strict sense, is a qualification upon what precedes it : this proviso is not really a qualification upon the preceding clause. It operates rather by way of an addition to the clause which precedes it. The first part of the proviso states " no deed of donation shall be deemed to be irrevocable . . . . . ". Does the expression " shall be deemed " mean that some deeds which were not actually revocable according to the Muhammadan Law shall hereafter be revocable ? Was it used to artificially enlarge the class of deeds that could be revoked ? In the case of persons of the Hanafi sect the Hanafi Law is made applicable by the enacting part of the section, of those of the Shafei sect the Shafei Law ; a gift to a cousin is not irrevocable according to the former system [1], a gift to a child by a father, according to the latter. The second part refers to possession. Delivery of possession need not be actual [2] but may be constructive. In *Mohamadu v. Marikar* [3], the delivery of the deed was taken " as a constructive and an effective delivery of possession of the lands " ; the deed of gift that came up for consideration in *Sultan v. Peiris* [4], executed on August 15, 1913, refers to the handing of the deed of gift to the donees for the purpose " of vesting the legal title to the premises " [4]. Similarly the deed of gift mentioned in *Ponniah v. Jameel* [5], deed executed on September 4, 1924, refers to handing " over this deed to the said . . . as a token of the transfer of possession " [5]. Did the legislature know

[1] *Ameer Ali, op. cit. 150.*

[2] *Ameer Ali, Muhammadan Law (4th Ed.), vol. I, 113, 114. See 14 N. L. R. 295 ; 26 N. L. R. 446, p. 448.*

[3] *(1919) 21 N. L. R. 84 ; also (1925) 26 N. L. R. 446.*

[4] *(1933) 35 N. L. R. 57 at p. 62. The deed in question was executed on August 15, 1913.*

[5] *(1936) 38 N. L. R. 96 at pp. 99 and 101. Deed states that it was "so done in accordance with the decision of the Supreme Court".*

that there were Muhammadans who took the view that delivery of the deed affords evidence of delivery of possession and did it intend to lay it down as a rule or a *prima facie* rule ? Was it also influenced by the view of the general law ? Donation was a contract according to the Roman-Dutch Law and acceptance of the gift by or on behalf of the donee was thus necessary. Acceptance of a gift may be effected in many ways. It may be presumed from the physical acceptance of the deed of gift [1].

There is nothing in the first part of the proviso to section 3 to show that the power of revocation inherent in a case like this has been modified or varied.

The appeal is dismissed.

GRATIAEN J.—I agree.

Appeal dismissed.