Present : Lascelles C.J. and Middleton J. *June 13, 1911*

AFFEFUDEEN *v.* PERIATAMBY.

116 *and* 117—*D. C. Galle*, 9,979.

Muhammadan law—Donation—Acceptance and delivery of possession necessary for validity.

Donations between Muhammadans are regulated by the Muhammadan law.

According to Muhammadan law a donation, whether intended to take effect at once or at some future period, is invalid unless delivery be made by the donor of the subject-matter of the gift.

The conditions required by Muhammadan 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 impliedly or expressly ; and (3) the taking possession of the subject-matter of the gift by the donee, either actually or constructively.

No acceptance is necessary in the case of a gift by a father to his minor child.

Actual possession is not necessary ; constructive delivery is sufficient.

THE facts are fully set out in the judgment of Middleton J.

Bawa, for the defendant, appellant.—Ordinance No. 7 of 1840, section 2, does not contain the entire law as to donations of lands. All that the section enacts is that there can be no valid donation of a land without a notarial deed ; but it does not say that it is the only requisite. We must look to the various systems of laws to find out what are essential to constitute a valid donation, *e.g.*, acceptance is necessary under the Roman-Dutch law, but it is not necessary under the Kandyan law.

There was no valid acceptance of the gift. Counsel referred to *Silva v. Silva*,[1] *Babaihamy v. Marcinahamy*,[2] *Muttupillai v. Velupillai*,[3] *Wellappu v. Mudalihamy*,[4] *Jayasekera v. Wanigaratna*,[5] *Ahamadu Lebbe v. Adam Bawa*,[6] *Dingiri Menika v. Dingiri Menika et al.*[7]

Where the parties to a deed of gift are Muhammadans, there ought to be delivery of possession in addition to acceptance. The Muhammadan Code of 1806 does not contain all the laws governing the Muhammadans. Counsel referred to *Cassim v. Periatamby* ;[8] *Vanderstraaten's Reports, p.* 9, *Appendix B. p. xxxi.*

[1] *(1908) 11 N. L. R. 161.*
[2] *(1908) 11 N. L. R. 232.*
[3] *(1909) 4 Bal. 110 ; 2 Cur. L. R. 73.*
[4] *(1903) 6 N. L. R. 233 (at page 235).*
[5] *(1909) 12 N. L. R. 364.*
[6] *(1907) 3 A. C. R. 1.*
[7] *(1906) 9 N. L. R. 131.*
[8] *(1896) 2 N. L. R. 200.*

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Sampayo, K.C., for the plaintiff, respondent.—Muhammadan law nowhere requires an acceptance in any prescribed form. Kadija Umma was present at the execution and signed the deed. That was sufficient acceptance. Even a minor can accept. *Babaihamy v. Marcinahamy*,[1] 1 *Nathan* 159.

No acceptance is necessary in the case of a gift by a father to his minor child. *Ameer Ali, p.* 102.

It has not been decided in Ceylon that delivery is necessary. Under the Muhammadan law it is not necessary that there should be actual delivery ; constructive delivery is enough to satisfy the law. Even if delivery is necessary in Ceylon, there has been constructive delivery and possession here. Counsel cited *Amirunnissa v. Abedunnissa* ;[2] *Ameer Ali, pp.* 94, 95, 97 ; *Hedaya, vol. III., p.* 6.

Bawa, in reply.—Where there is evidence of a clear intention to give, then delivery by father to minor is not necessary ; the intention does not appear here ; the passage from *Ameer Ali, p.* 94 *et. seq.*, does not therefore apply. Counsel referred to *Vanderstraaten's Reports, p.* 175.

June 13, 1911. LASCELLES C.J.—

The plaintiff's title in this case depends upon the validity of a deed executed on June 8, 1899, by which the first defendant, Rasa Maricar Periya Tamby, purported to donate the property in dispute to his daughter Kadija Umma. The deed in question, after reciting that a marriage was contemplated between Kadija Umma and one Hamim Ismail, witnessed that the donor, the first defendant, gave the lands in question to his daughter Kadija Umma, " her heirs, &c., as a gift or donation *inter vivos*, absolute and inalienable, " and that Kadija Umma " doth hereby thankfully accept the gift hereby made in manner aforesaid."

The deed is impeached by the appellant principally on the ground that it is deficient in the elements of delivery of possession and acceptance, which are essential under Muhammadan law to the validity of a donation. The appellant also sets up prescriptive title.

In District Court, Colombo, No. 12,129,[3] a Bench of three Judges confirmed a judgment of the District Court, to the effect that, according to the customs of the Muhammadans in Ceylon, a donation, whether intended to take effect at once or at some future period, is invalid unless delivery be made by the donor of the subject-matter of the gift. This case is an authority which is binding on us for the proposition that donations between Muhammadans are regulated by the Muhammadan law ; but in order to ascertain what is meant by the " delivery " of the subject-matter of the gift, it is necessary to have recourse to the text books on Muhammadan law.

[1] *(1908) 11 N. L. R. 232.* [2] *L. R. 2 Indian Appeals 87.*
[3] *Vanderstraaten's Reports, Appendix B, p. xxxi.*

The conditions required by Muhammadan law to constitute a valid donation are stated by *Ameer Ali* (*p.* 40) to be (1) a manifestation of the wish to give on the part of the donor ; (2) the acceptance of the donee, either impliedly or expressly ; and (3) the taking possession of the subject-matter of the gift by the donee, either actually or constructively. Dealing first with the question of possession, it is well settled that actual possession is not necessary ; many cases are cited in the text books where constructive delivery is sufficient, as when there is, on the part of a father or other guardian, a real and *bona fide* intention to make a gift, the law will be satisfied without change of possession, and will presume the subsequent holding of the property to be on behalf of the minor donee (*Amirunnissa v. Abedunnissa*[1]) ; or where a husband making a gift to his wife made over the keys to his wife, left the house for a few days, and then returned to the house and lived there (*Ameer Ali, p.* 97). The principle which underlies the numerous authorities appears to be that any act by which the donor places the donee in the position to exercise the right of property over the subject of the gift satisfies the requirements of the law as regards delivery of possession.

In this case there is the usual conflict of testimony on the question whether there was any delivery of possession by the donor to the donee. It is admitted by both sides that the first defendant looked after and managed the property. The plaintiff, Kadija's second husband, states that the first defendant gave them, *i.e.*, his wife and himself, the produce of the land comprised in the gift. The first defendant, on the other hand, denies that he gave any produce or income to the plaintiff, or that he delivered possession of the property either to the first or to the second husband of his daughter. If his story be true, he had no intention, at the time when he executed the deed, of giving immediate possession to his daughter. " Sons-in-law, " he sapiently observed, " cannot be allowed to take possession of the dowry at once. They must be given a trial, so I remained in possession—when they separated after six months I still kept it. "

The story of the first defendant is corroborated in a very striking manner by the fact that he retained the deed of donation and produced it himself at the trial. I have little doubt but that the evidence of the first defendant—which in itself is probable enough—is true on this point, and that he advisedly postponed making any delivery of the property until the merits of his son-in-law had been proved. The marriage did not turn out well, and the donation was never completed by delivery. On this evidence I am satisfied that, adopting the most liberal view of the delivery of possession which is required to constitute a Muhammadan donation, there was no delivery of possession, actual or constructive, on the occasion of the execution of the deed of gift. This finding disposes of the appeal, but in view of the elaborate arguments addressed to us by counsel

[1] *L. R. 2 Indian Appeals 87.*

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on this subject, I cannot pass unnoticed the question whether there was a valid acceptance of the gift. It follows from the decision in District Court, Colombo, No. 12,129, to which I have referred before that in the case of donations between Muhammadans the question whether the gift was duly accepted must be determined by Muhammadan law, for it is inconceivable that the validity of one and the same gift as regards delivery should be determined by Muhammadan law, but as regards the donee's acceptance by the Roman-Dutch law.

Applying the Muhammadan law, it seems to me that the donation cannot be impeached for want of acceptance by the donee. If Kadija Umma was a minor, the question of acceptance would not arise at all, as no acceptance is necessary in the case of a gift by a father to his minor child (*Ameer Ali, p.* 102). If, however, Kadija Umma was of full age, it seems clear to me that the requirements of the Muhammadan law as regards acceptance have been complied with. I can imagine no more formal or unequivocal signification of acceptance than that made by Kadija Umma in the deed of donation, which was explained to her by the notary before she executed it. But in view of my finding that the donation purported to be made by the deed of June 8, 1899, was not accompanied by delivery, I am of opinion that that deed did not operate as a valid donation. The appeal therefore must be allowed, and the action dismissed with costs here and in the Court below.

MIDDLETON J.—

This was an action to vindicate title to certain property set out in the schedule to the plaint, which the first defendant by deed of gift No. 498, dated June 8, 1899, had granted to his daughter Kadija Umma as dowry in contemplation of her marriage with one Hamim Ismail. To the deed of gift Kadija Umma formally appended her acceptance by mark duly witnessed. Her marriage with Hamim Ismail having after a few months been dissolved, Kadija Umma married the plaintiff and subsequently died, when the plaintiff was appointed administrator of her estate, and now claims the property in question as forming part of the estate of his deceased wife, alleging also a title thereto by prescription in the deceased. The first defendant, admitting only the bare execution of the deed, denied that it conveyed any property to Kadija Umma, inasmuch as it was not properly accepted on her behalf as a minor; and denied that she ever entered into possession of the property, and alleged a transfer to the second defendant after action brought, who in his answer pleaded a lease of some of the land to the third defendant and a sale of the same land to the fourth defendant, wife of the fifth defendant.

Before the trial it was admitted that the plaintiff was the second husband of the first defendant's daughter; that in 1899 first defendant

gifted the property to her in contemplation of her marriage with her first husband ; that they were mutually separated according to Muhammadan law eighteen months later ; that Kadija Umma married plaintiff in 1903 and died in 1906 ; that plaintiff is her administrator ; that Kadija Umma lived in her father's house during both marriages and died there ; that her father, the first defendant, looked after the property and managed it all along ; that it was put into the inventory of her estate in the testamentary case to which first defendant objected ; and that Kadija Umma had herself leased other properties.

The District Judge gave judgment for the plaintiff, and the defendants have appealed, the first defendant's case being No. 116 and the third, fourth, and fifth defendants' No. 117. The case of the latter entirely depends on our decision in the former case.

At the argument before us the dowry deed in question was produced from the custody of the first defendant, and there can be little doubt that it had been in his custody since its execution. The first question we have to consider is whether, as contended by Mr. Bawa, the laws and customs peculiar to the Muhammadans of Ceylon must be held by us as binding on people of that religion in Ceylon beyond the extent to which they are embodied in the so-called Code of Muhammadan Laws published on August 5, 1806.

The decision in District Court, Colombo, 29,129, in which the judgment of Lawson, District Judge, subsequently Puisne Justice of this Court, received the imprimatur of this Court (*Appendix B, p. xxxi, Vanderstraaten's Reports*), and which was followed in District Court, Colombo, 55,746 (*p.* 175 *Vanderstraaten's Reports*), definitely recognizes the application of Muhammadan law in a case of this kind, and is binding on us.

The application of Muhammadan law to a case of this kind is consistent with the ruling of this Court, applying the Roman-Dutch law of acceptance to the case of gifts of immovable property formulated by notarial conveyance in conformity with Ordinance No. 7 of 1840. To constitute a gift according to Muhammadan law there must be tender, acceptance, and seisin or exclusive possession. (*Hedaya, vol. III., book XXI., ch.* 1.)

The facts as proved are that the deed recited a gift absolute and irrevocable of lands to Kadija Umma, the daughter of the donor the first defendant, in consideration of a marriage to be shortly solemnized, duly accepted by Kadija Umma, a girl of about nineteen at the date of the deed, the acceptance being signed by mark by her. The deed always remained in the custody of the donor.

The District Judge found that the first defendant had not proved that he possessed adversely to the plaintiff or his deceased wife, so as to give first defendant a title by prescription, but he infers that he thinks first defendant had the continued management of the property, and I think on the evidence that is so, and that first

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defendant always had the control and management of the property, and, in fact, remained in possession after the date of the deed and up to the present. The question then is, if the deceased daughter ever had constructive possession of the property through her father. Was there, as *Ameer Ali* (*vol. I., ch.*, 2, *p.* 95) says, a real *bona fide* intention to make a gift, so that the subsequent holding by the first defendant must be considered to be on behalf of his minor daughter ? See also *Abedunnissa Khatom v. Ameerunnissa Khatom.*[1]

The evidence of the first defendant, the father, and his retention of the deed of conveyance, negative this, and there is no further evidence to support it. In my opinion, therefore, no delivery of possession occurred, either express or implied.

The question of acceptance, which I think must also be necessarily decided according to Muhammadan law, does not in reality arise.

In the case of a gift by a father to a minor, no acceptance is necessary. (*Ameer Ali, vol. I.*, 102 ; *Hedaya* 484.) If she was not a minor her acceptance is unequivocal.

The Shâfî doctrine on the subject, which I believe is generally applicable to Muhammadan law as administered and applied in Ceylon, is that the proprietorship of the object given is only transferred when the donee takes actual possession of the subject of the gift with the donor's consent. (*Ameer Ali, Muhammadan Law, VI.*, 149.) This is rather stronger in favour of the appellant than the general doctrine.

I think that the appeal should be allowed, and the action dismissed with costs in both Courts.

Appeal allowed.

[1] *L. R. 2 Indian Appeals 87.*