1950 *Present:* **Dias S.P.J. and Pulle J.**

IDROOS SATHUK, Appellant, *and*
SITTIE LEYAUDEEN, *et al.*, Respondents

*S. C. 374—D. C. Colombo, 2,997*

*Muslim Law—Fideicommissum created by deed—Donation to minors—Capacity of mother to accept gift—Applicability of Roman-Dutch law—Muslim widow in Ceylon—Natural guardian of her minor children.*

(i) Where a fideicommissum is created by a deed of gift between Muslims a Muslim widow is entitled, as natural guardian, to accept the gift for and on behalf of her minor children, when they are the donees. In such a case, the validity of the acceptance has to be determined solely within the framework of the Roman-Dutch Law.

(ii) The principles of Muslim Law which do not recognise a widow as the natural guardian of her minor children are not applicable to Muslims in Ceylon. A Muslim widow is therefore entitled in Ceylon to accept a gift on behalf of her minor children.

APPEAL from a judgment of the District Court, Colombo.

By deed of gift P1 one Saffra Umma created a fideicommissum in favour of the children of the donees. The donees were the minor children of her deceased son. The gift was accepted on behalf of the donees by their mother, Fatheela Umma. The validity of this acceptance was attacked on the ground that, the parties to the deed of gift being Muslims, Fatheela Umma, as the mother of the donees, did not have the capacity to accept the gift on behalf of her children.

It was not disputed that Saffra Umma intended to create and did create a valid fideicommissum such as is recognised by the Roman-Dutch law.

*E. B. Wikramanayake, K.C.*, with *S. Canagarayer* and *M. A. M. Hussein*, for the defendant appellant.

*H. V. Perera, K.C.*, with *H. W. Jayewardene* and *G. F. Sethukavaler*, for the plaintiffs respondents.

*Cur. adv. vult.*

July 26, 1950. PULLE J.—

The appellant in this case is the defendant against whom the plaintiffs have obtained a decree declaring them entitled to the premises described in the schedule to the plaint and for ejectment and damages.

The parties are Muslims. The plaintiffs based their title on a deed of gift No. 1428 of June 28, 1927, marked P1, executed in their favour by one Saffra Umma. The defendant relied on a later deed of gift No. 1483 of February 4, 1928, marked D1, by which Saffra Umma after purporting to revoke deed No. 1428 gifted the same premises to the defendant. The only point urged in favour of the appeal was that the gift made by P1 was bad for want of a valid acceptance.

One Idroos Lebbe Marikar Mohamed Zain the son of Saffra Umma was married to Sheka Marikar Fatheela Umma. Their children are the plaintiffs of whom the first, who is the eldest, was born on January 4, 1914. At the time the deed P1 was executed, Mohamed Zain the father, was dead and the plaintiffs were minors.

By the deed of gift P1 Saffra Umma reserved to herself the right to enjoy the rents and profits of the premises during her life time and created a *fideicommissum* in favour of the children of the donees. There were other conditions and restrictions to which it is not necessary to refer for the purpose of deciding the question arising on this appeal. The gift was accepted by Fatheela Umma in the following words :—

> " And these presents further witness that I Sheka Marikar Fatheela Umma who is the mother of the said donees do hereby thankfully accept the foregoing gift for and on behalf of the said donees who are all minors ".

The validity of this acceptance was attacked on the ground that the parties to the deed of gift being Muslims, Fatheela Umma, as the mother of the donees, did not have the capacity to accept the gift on behalf of her children.

It is not disputed that Saffra Umma did not intend to make a gift such as is recognised in Muslim Law but that she did, in the words of the Privy Council in the case of *Weerasekere v. Peiris* [1], intend to create and that she did create a valid *fideicommissum* such as is recognised by the Roman-Dutch law.

Learned counsel for the appellant contends that to constitute a valid donation acceptance by the donee is essential. Where the donee is a minor it is not every person who is empowered to accept the donation on behalf of the minor. He relies on the cases of *Fernando v. Weerakoon* [2] and *Wellappu v. Mudalihami* [3]. The former case decided that a minor cannot accept a gift, until at least he attains majority and that a grandparent and parents, when not also the donors, may accept for the minor. Both cases specifically held that a father who is the donor cannot act in the dual capacity of donor and acceptor. Reliance was also placed on *Cornelis v. Dhamawardene* [4] according to which Middleton, J., held, " that the acceptance of a deed of gift made by a father in favour of his minor child by an uncle of the minor on behalf of the minor is not a valid acceptance as not having been an acceptance of a legal or conventional guardian ". The capacity of a legal or natural guardian to accept is also recognised in *Fernando et al. v. Cannangara* [5] and *Silva v. Silva* [6]. It is argued on these authorities that if Fatheela Umma did not at the time she purported to accept the gift come within the description of legal or natural guardian of her children the gift failed and that the question whether she was the natural guardian fell to be determined by the Muslim and not the general law of the land.

There is undoubtedly authority for the statement that in Muslim Law a mother is not the natural guardian. See the judgment of Mr. Ameer Ali in the Privy Council case of *Imambandi and Others v. Mutsaddi*

[1] *(1933) 34 N. L. R. 281.*
[2] *(1903) 8 N. L. R. 212.*
[3] *(1903) 6 N. L. R. 233.*
[4] *(1907) 2 A. C. R. XIII.*
[5] *(1900) 3 N. L. R. 6.*
[6] *(1909) 11 N. L. R. 161.*

*and Others*, (1917-18) Law Reports Indian Appeals 73. Great stress was laid on the following passage in Minhaj Et Talibin, p. 169 :—

> " A father is the guardian of his children during their minority. In default of the father the guardianship reverts to the father's father, and then to a testamentary executor appointed for that purpose by the father or father's father, and as a last resort to the Court, which, however, may depute some reliable person as administrator. A mother can never be guardian in her own right, but the father or father's father may so appoint her by will ".

The soundness of the argument urged on behalf of the appellant rests on the validity of two propositions :—

(1) That a transaction the efficacy of which depends on the Roman-Dutch Law ought to be split up into its component parts and the legality of each part tested in order to ascertain whether or not it is obnoxious to the personal or religious law of the parties to the transaction.

(2) That the entirety of the Muslim Law of guardianship is part of the personal or religious law applicable to Muslims in Ceylon.

The judgment of the Privy Council in *Weerasekere v. Peiris* [1] is itself a warning against dividing up a transaction, intended to be governed by one system of law, into parts and pronouncing against its validity because one part does not survive a test by the application of the personal or religious law governing the contracting parties. It is clear that under the Roman-Dutch Law upon the death of the father the mother is vested with the rights of control over the person and property of her children, in the absence of special arrangements made by the father in a testamentary disposition. In the present case there is no suggestion that any one else besides Fatheela Umma exercised, *de facto*, the rights of a guardian over her children. On the death of her husband she was appointed administratrix of his estate. Further in 1933 she was appointed by Court curator of the estate and guardian of the persons of the minors. I do not see anything intrinsically objectionable, in these circumstances, in regarding Fatheela Umma, in the Roman-Dutch Law sense, as a natural guardian entitled to accept the gift for and on behalf of her minor children.

The subject is not free from difficulty. Difficulties always arise when a single transaction falls within the orbits of different systems of law. Though not exactly in point I would quote Professor Cheshire who says in his work on Private International Law (3rd Edition) p. 259, " The desideratum of Private International Law is to reduce as far as possible the number of laws that govern the ordinary dealings of life. The ideal is that a single transaction should be governed by a single law, and though, of course, this is not completely attainable, it is at least possible and desirable in the matter of capacity ". I appreciate that guardianship is perhaps more a matter of status than of capacity

[1] *(1933) 34 N. L. R. 281.*

but even here judicial opinion does not favour the rigid application of the *lex domicilii*. Lord Greene, M.R., is quoted at p. 256 (ib.) as saying :—

> "It would be wrong to say that for all purposes the law of the domicil is necessarily conclusive as to capacity arising from status . . . . There cannot be any hard and fast rule relating to the application the law of the domicil as determining status and capacity for the purpose of transactions in this country ".

In my judgment the validity of the acceptance by Fathecla Umma has to be determined solely within the framework of the Roman-Dutch Law. If she were governed by that law, she would on the facts of the case be the natural guardian of her children and, therefore, empowered to accept the gift on their behalf

If the conclusion which I have reached is not correct, it still remains to be determined whether the principles of Muslim Law on which the appellant has relied can be regarded as part of the law applicable to Muslims in Ceylon. In the case of *Rahiman Lebbe and another v. Ussan Umma and others* [1] Schneider, A.J., said "The reported cases show that since 1862 our Courts have consistently followed the principle that it is so much and no more of the Mohammedan Law as has received the sanction of custom in Ceylon that prevails in Ceylon . . . . It is true the treatises on the Mohammedan Law generally are frequently referred to in our Courts. But this is done only to elucidate some obscure text in our written Mohammedan Law or in corroboration of evidence of local custom. I cannot find a single decision that has gone to the length of holding that apart from the prevalence of a local custom Mohammedan Law has any application in Ceylon". Ennis, J., said much to the same effect. No authority has been cited showing that a Muslim widow in Ceylon is not regarded as the natural guardian of her minor children.

Learned counsel for the plaintiffs cited the case of *In the matter of the Application of Sego Meera Lebbe Ahamadu Lebbe Marikar for a Writ of Habeas Corpus* [2] as authority for the general proposition that whatever might be the Muslim Law according to the Koran a question of guardianship has to be determined according to the general law applicable to all inhabitants of the country. In the case cited the custody of a Muslim child was claimed both by the father and the maternal grandmother, the mother being dead. It was held that there was no Muslim law in force depriving the father of his right to such custody in preference to all other persons. Dias, J., said "the Mohammedan Law on this point, as it is found in books, is mixed up with various considerations peculiar to their faith ; and in the absence of evidence to the contrary, I am inclined to uphold the right of the father as against the grandmother. It is a rule recognised by all civilised countries and consonant to natural justice". The judgment of Drieberg, J., in *Junaid v. Mohideen et al.* [3] indicates that the particular ruling that a father is preferred to a grandmother as a guardian has not been followed in numerous cases since the judgment of Wood-Renton, J., in *Wappu Marikar and Ummaniumma* [4]. The principle enunciated by Dias, J.,

[1] *(1916) 3 C. W. R. 88 at 99.*
[2] *(1889-91) 9 S. C. C. 42.*
[3] *(1933) 34 N. L. R. 141.*
[4] *(1912) 14 N. L. R. 225.*

however, remains unaffected. One point, therefore, clearly emerges from a consideration of the cases on this point that before Muslim Law could be applied there must be a *cursus curiae* in favour of applying that law. There is no *cursus curiae* of which I am aware which deprives a Muslim widow of a preferential right to the custody and guardianship of her minor children and to be in charge of their property. It would indeed be strange if a Muslim widow having the preferential right to administer her husband's estate under section 523 of the Civil Procedure Code, the title to a part of which estate would vest in her children, is not to be regarded as their natural guardian.

In the result I find that the appellant is not entitled to have recourse to Muslim Law to defeat the plaintiffs' claim that Fatheela Umma was empowered by the general law of the land to accept the gift.

For the reasons which I have stated the appellant's contention that the gift to the plaintiffs was bad for want of a valid acceptance fails.

I would dismiss the appeal with costs.

DIAS S.P.J.—I agree.

*Appeal dismissed.*

1950 *Present :* **Dias S.P.J., Nagalingam J. and Windham J.**

## *In re* BATUWANTUDAWE

IN THE MATTER OF THE APPLICATION BY UPALI BATUWANTUDAWE TO BE RE-ADMITTED AS AN ADVOCATE.

*Advocate—Name struck off the roll of Advocates—Subsequent application for reinstatement—Principles applicable on such application—Reporting to Inn of Court.*

The petitioner, whose name was struck off the roll of Advocates on the ground that he had been convicted of cheating, forgery of a valuable security, and cheating by personation, applied to the Supreme Court, after an interval of thirteen years, to be readmitted to the profession.

*Held*, that the application for reinstatement should not be allowed.

*Held further*, that when the name of a member of the English Bar, who is also an Advocate of the Supreme Court, is struck off the roll of Advocates, the fact should be reported to his Inn.

THIS was an application by the petitioner to be readmitted as an Advocate.

*E. B. Wikramanayake, K.C.*, with *B. H. Aluwihare, G. T. Samarawickreme* and *C. E. Jayewardene*, for petitioner.

*R. R. Crossette-Thambiah, K.C.*, Solicitor-General, with *H. A. Wijemanne*, Crown Counsel, for the Attorney-General.

*Cur. adv. vult.*