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Present: Schneider and Garvin JJ.

KHALID *v.* PAKEER.

239—D. C. Colombo, 383.

Muhammadan law—Gift subject to condition that donor do recover rent and pay a portion to donee—" Seizin ".

P, in pursuance of an agreement to settle upon his granddaughter Z a property by way of dowry, executed a deed of gift D 1, and provided that the donor P was at liberty during his life to recover and receive the rents and pay unto Z Rs. 40 per mensem, and in the event of P failing so to pay, Z was to recover the entire rents, and P was to forfeit the right to recover rent. Z donated the property to the plaintiff with the consent of P. In an action by the plaintiff, P contended that D 1 was inoperative under Muhammadan law to pass title to Z or to any one claiming through her, as Z had no " seizin ".

Held, that the objection was invalid, as P's possession was similar to that of a tenant under Z.

Plaintiff, who was a curator of a minor, brought an action for declaration of title with the sanction of Court. He did not get himself appointed next friend; the action was brought in the name of the curator. The defendant in his answer objected that the plaintiff was not entitled to maintain the action in his name. The plaintiff, immediately before trial, moved to get himself appointed next friend. The District Judge ordered the plaint to be taken off the file. The Supreme Court allowed the plaint to be amended by the addition of the name of the minor, and directed the curator (original plaintiff) to be appointed next friend.

THIS was an action for declaration of title, possession, and damages.

The action was commenced by the plaintiff as curator of a minor, and before he commenced the action he obtained the sanction of the District Judge. The plaintiff did not get himself appointed as next friend of the minor, nor was the action brought in the name of the minor. The defendant in his answer took the objection that the plaintiff was not entitled to maintain the action in his own name, and that the action was misconceived and not maintainable. Immediately before trial plaintiff applied for leave to put himself right by being appointed next friend.

The Acting District Judge (V. M. Fernando, Esq.) made the following order:—

Mr. Ratnam argues that the appointment of next friend is not necessary, but at the same time he presses his application. He further contends that there is no application under section 478.

I do not see that anything can be gained by insisting on a formal application under section 478. Plaintiff having instituted the action as curator, the defendant took objection to the action on that ground, and apparently expected that the action would be dismissed for that reason. The plaintiff who is now alive to his position seeks to remedy the defect by getting himself appointed next friend. To this the defendant objects.

I think the fairest way I can deal with the matter is to treat the objection of the defendant as an application under section 478, and to order the plaint to be taken off the file, plaintiff paying defendant's costs. As pointed out by the Supreme Court in *6 N. L. R. 148*, this order will not prevent the plaintiff from having the plaint restored to the file after he is appointed next friend.

The plaintiff appealed, and the Supreme Court delivered the following judgment on October 18, 1921:—

BERTRAM C.J.—

This is an appeal from an order of the District Court of Colombo, an order which turns out to be in entire accordance with a previous decision of the Full Bench of this Court. The facts are that an action was commenced by the plaintiff as curator, and that before he commenced this action he obtained the sanction of the District Judge to the plaint. The action was, however, misconceived, as it has now been settled by the case of *Gunasekera v. Abubakker* [1] that an action by a minor is not well brought if brought in the name of the curator, and that before suing the curator should obtain the authority of the Court to institute an action as the next friend of the minor and in the name of the minor. It was pointed out in the answer that the action was misconceived. But it was not till immediately before trial that the plaintiff applied for leave to put himself right by being appointed next friend of the minor. This application was also misconceived. The minor was not a party to the suit. The application, therefore, should have been to add the minor and to appoint the curator as next friend. When the application came before the Court, the Court preferred to act on the precedent of *Gunasekera v. Abubakker (supra)*.

Mr. de Silva now appeals to us not to put him to the necessity of wasting all that has been done in the action and of paying unnecessary costs, but even at this stage to allow an amendment of the plaint. With regard to the order of the District Judge, we obviously cannot say that he was wrong. Nor was the plaintiff himself correct in the procedure which he adopted. Nevertheless, the point is a purely technical one. No good end would be served by compelling the plaintiff to institute a fresh action. He was, to a certain extent, misled by the fact that the District Judge had overlooked the fact that the action was misconceived when he sanctioned the plaint. As, however, the defendant was in no way to be blamed for the series of mistakes, I think that though relief should be allowed to the plaintiff against the consequences of his mistake, it should be allowed on terms of his paying the costs of the defendant both in this Court and in the Court below. I would, therefore, set aside the order of the learned District Judge and allow the plaint to be amended by the addition of the name of the minor, and would direct the plaintiff to be appointed next friend of the minor for the purpose of the action, and

[1] *(1902) 6 N. L. R. 148.*

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that the character in which he purports to sue should be amended accordingly. The plaintiff to pay the costs of the defendant both in this Court and in respect of the day of argument in the Court below.

DE SAMPAYO J.—I agree.

When the case came up for trial after proper amendments, the District Judge (L. M. Maartensz, Esq.) gave judgment for the plaintiff.

The facts appear in the head note.

The deed in question, D 1, was as follows :—

D 1. No. 5,319.

TO ALL TO WHOM THESE PRESENTS SHALL COME.

Noordeen Ebunu Mohammed Pakeer of Slave Island in Colombo sends greetings:—

Whereas under and by virtue of deed No. 5,515 dated November 1, 1886, attested by . . . . &c., the said Noordeen Ebunu Mohammed Pakeer is seized and possessed of or otherwise well and sufficiently entitled to all that part of the garden with the two new builings standing thereon, called and known as Gorakagahawatta and in the schedule hereto particularly described:

And whereas at the treaty for the marriage of Nei Zulaikkha, daughter of Abdul Raheen Ajmacen of Slave Island in Colombo, with Tuwan Nayeen Samahon of Dawson street in Slave Island, Colombo, it has been agreed by and between the parties hereto that the said property should be settled upon the said Nei Zulaikkha as dowry, subject to the terms, conditions, and stipulations hereinafter contained:

Now know ye, and these presents witness, that the said Noordeen Ebunu Mohammed Pakeer, in pursuance of the said agreement and in consideration of the said marriage, doth hereby give, grant, convey, assign, set over, and assure unto the said Nei Zulaikkha as dowry, subject to the terms, conditions, and provisos hereinafter stipulated the land and premises described in the schedule hereto, together with all rights, privileges, easements, servitudes, advantages, and appurtenances belonging or appertaining, or usually held or enjoyed therewith, or reputed to belong or be appurtenant thereto, together with all the estate, right, title, interest, claim, and demand whatsoever of the said Noordeen Ebunu Pakeer in and to the said premises, and with all deeds, vouchers, and writings relating thereto.

To have and to hold the said premises hereby granted and conveyed or intended so to be (of the value of Rs. 15,000) unto the said Nei Zulaikkha, upon and subject to the following terms, conditions, and provisos, to wit:—

(1) That the said Nei Zulaikkha shall not sell, mortgage, lease, encumber, or otherwise alienate the said premises or any part thereof unto any person or persons whomever, and that after her demise the same shall evolve upon her descendants to be by them divided and taken in terms of the Muhammadan law of inheritance.

(2) Provided, however, that nothing herein contained shall prevent the said Nei Zulaikkha from giving the said premises or any part thereof unto any one or more of her female children as dowry.

(3) That the said Noordeen Ebunu Mohammed Pakeer may be at liberty during his lifetime to recover and receive the rents, profits, and income of the said premises hereby conveyed and pay unto the said Nei Zulaikkha the sum of the rent of the said premises, and that in the event of the said Noordeen Ebunu Mohammed Pakeer failing, refusing, or neglecting to pay unto her the said sum of Rs. 40 monthly as aforesaid, that then in such case it shall be lawful unto the said Nei Zulaikkha to recover and enjoy the whole rent of the said premises, and in such case the said Noordeen Ebunu Mohammed Pakeer shall cease or forfeit the right to recover the rents of the said premises.

E. W. Jayawardene, for defendant, appellant.

Drieberg, K.C. (with him *Cader*), for plaintiff, respondent.

February 16, 1923. SCHNEIDER J.—

This is an appeal by the defendant, who was sued by the plaintiff, a minor appearing by his next friend, claiming a declaration that he was entitled to the land which was the subject-matter of the action, and praying that the defendant be ejected therefrom, and he be awarded damages. The learned District Judge has decreed in favour of the plaintiff that he is entitled to the land, but that the defendant is entitled " to possess the said premises, subject to a payment by him of Rs. 40 a month." The facts are these : The defendant was the owner of the land in question. By the deed marked D 1 in 1916 he gifted this land to his granddaughter Nei Zulaikkha. The deed sets out that the donation was made in pursuance of an agreement that the property should be settled upon the donee as dowry. The deed is a conveyance *in presenti* of the title to the land by the defendant to Nei Zulaikkha, " subject to the terms, conditions, and provisos hereinafter stipulated." One of the provisos forbids the sale of the land by Nei Zulaikkha, and provides that after her demise the land should devolve upon her descendants in terms of the Muhammadan law of inheritance. Another proviso empowers Nei Zulaikkha to grant the whole of the land or any part of it to any one or more of her female children as dowry. Next comes the proviso which has given rise to this action. It runs as follows : " The said Noordeen Ebunu Mohammed Pakeer (defendant) may be at liberty during his life-time to recover and receive the rents, profits, and income of the said premises hereby conveyed, and pay unto the said Nei Zulaikkha the sum of Rs. 40 per month in lieu of rent of the said premises, and that in the event of the said Noordeen Ebunu Mohammed Pakeer failing, refusing, or neglecting to pay unto her the said sum of Rs. 40 monthly as aforesaid, that then in such case it shall be lawful unto the said Nei Zulaikkha to recover and enjoy the whole rent of the said premises, and in such case the said Noorden Ebunu Mohammed Pakeer shall cease or forfeit the right to recover the rents of the said premises."

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The documents in the case reveal the fact that Nei Zulaikkha after some time lived separated from her husband, who is the next friend of the minor plaintiff. In 1920 by a deed of gift, Nei Zulaikkha conveyed to the plaintiff by deed "all her right, title, and interest in and to the said land and premises, subject to the condition that the donee was not to sell, mortgage, lease, or otherwise alienate or encumber the premises," but that upon his death they were to devolve upon his children in terms of the Muhammadan law, and in the event of his leaving no issue they were to devolve on the brothers and sisters of the donor Nei Zulaikkha and their descendants. At the end of this deed occurs the following passage : "These presents further witness that Noordeen Ebunu Mohammed Pakeer (the defendant), the donor of the said premises under the said deed No. 5,391 (D 1), doth hereby consent to the foregoing gift being given and granted, subject to the terms and conditions hereinafter contained."

The defendant contested the plaintiff's claim on the ground that the deed D 1 was inoperative to pass title to the donee Nei Zulaikkha or any other person claiming through her on the ground that the Muhammadan law governed the parties, and that there must be "seizin" on the part of Nei Zulaikkha to enable her to claim title under that deed. The case of *Gunasekera v. Abubakker* (*supra*) was relied upon. It appears to me that there is no foundation for this argument. The very deed D 1 indicates the nature of the occupation of the land which the defendant had from the date of the deed D 1. The part of the deed which I have recited leaves no room for doubt, but that the defendant was only in the position of a person entitled to occupation of the premises, provided and only so long as he paid a rent of Rs. 40 to Nei Zulaikkha. I am unable from whatever point the deed be looked at to come to any other conclusion than that the defendant's rights under the deed D 1 are any larger than those I have stated them to be. There is another and a potent reason why the plaintiff should succeed. His rights under the deed of gift in his favour entitled him to judgment against the defendant who is debarred from contesting them.

For these reasons I would affirm the judgment of the lower Court, and dismiss the appeal, with costs.

GARVIN J.—I agree.

Appeal dismissed.

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