1946 *Present :* **Nagalingam A.J.**

UTHUMALEVAI *et al.*, Appellants, *and* AVVA UMMA, Respondent.

221—C. R. Kalmunai, 279.

Muslim Law—Prescription—Donation—Minor—Oral gift of immovable property by Muslim father to his minor child—Possession of property by father is possession on behalf of donee.

Where a Muslim father donates immovable property to his minor child, though not effectually by a notarial deed, possession of the property by the father is deemed to be possession by the minor.

[1] *(1897) 3 N. L. R. 5.* [2] *(1913) 16 N. L. R. 315.*

APPEAL from a judgment of the Commissioner of Requests, Kalmunai.

C. E. S. Perera, for the defendants, appellants.

C. Renganathan, for the plaintiff, respondent.

Cur. adv. vult.

November 27, 1946. NAGALINGAM A.J.—

The plaintiff instituted this action for a declaration of title to 6/11 share of an allotment of land described in the schedule to the plaint. Admittedly the land belonged to one Meera Lebbe Saibu Lebbe. He died leaving two sons and seven daughters. Two of the sons and two of the daughters conveyed their interests in the land in dispute to the plaintiff who is the wife of one of the sons, and the plaintiff on this basis prefers her claim. Her claim is resisted by the 2nd defendent who is also a daughter of Meera Lebbe Saibu Lebbe on the footing that the land in question had been donated to her by her father and that she had also acquired title by prescription. The 1st defendant is the husband of the 2nd defendant. The 2nd defendant has been unable to produce the deed of gift in her favour although she stated in her evidence that to her knowledge a deed was executed by her father in her favour and that the deed was in existence at the date of her father's death and that it had been taken possession of by the plaintiff's husband who was her elder brother and that he had not handed it over to her as a result of some ill-feeling between the parties. She further states that although attempts had been made to trace the deed she had been unsuccessful in her attempts. The learned Commissioner properly holds that there is no proof that the land was gifted to her. The 2nd defendant, however, gave testimony —and her testimony has been accepted on this point by the learned Commissioner and has not been challenged in appeal—that the father had dowried lands and residing gardens to all his daughters. The learned Commissioner further finds that Saibu Lebbe " had really set apart the land in dispute for the 2nd defendant ". The foundation for this finding is furnished by deed D 1 of 8th October, 1930, by which Saibu Lebbe gifted a portion of land immediately to the north of the land in dispute to another of his daughters, namely, one Mariankandu. In that deed of gift the donor in describing the land gives the boundary on the south as " the share of garden granted to Kulanthaiummah " who is the 2nd defendant. It would appear to have been contended before the learned Commissioner that this description at any rate furnishes a starting point for prescription as the description of the boundary clearly indicates that he had prior to the date of that gift granted the land in dispute to the 2nd defendant. The learned Commissioner in regard to this aspect of the matter holds that as the father was living on the land in dispute along with the 2nd defendant who was a minor at the date of the deed of gift to Mariankandu and therefore at the date of the gift to her as well, the 2nd defendant cannot count the period of possession by the father till his death which took place in 1937. The

learned Commissioner, however, finds that from the date of the 2nd defendant's marriage which took place about a year after her father's death she was exclusively and adversely possessing the land in dispute as her property. This view of the learned Commissioner is contested.

The parties are admittedly Muslims and the question is whether the 2nd defendant can claim the benefit of the father's possession after the date on which there is proof of signification by him of his having granted the land to the 2nd defendant. The 2nd defendant having been a minor prior to 1930, the date of the deed D 1, and there being no suggestion that either the 2nd defendant or anyone on her behalf made a purchase of the land in question from the father, the father's grant must needs have been a gift. Strictly speaking, under Muslim Law no deed of conveyance as known to us is necessary to make a donation even of real property, but in Ceylon even Muslims are bound by the Prevention of Frauds Ordinance which requires that a conveyance of immovable property should be notarially executed. But it does not follow as was argued that before prescription can commence it should be proved that a valid deed of conveyance was in fact executed. It is sufficient if it is shown that even if there was nothing more than an oral gift the donee entered upon possession of the land gifted and had adverse and exclusive user for the prescriptive period.

It is clear law that where a Muslim father donates his property to his minor child, no transmutation of possession is necessary, and the possession by the father would be regarded as possession by him on behalf of the donee. Tyabji (2nd edition, section 400) lays down the proposition thus :—

> " Where the father or grandfather (or some other person entitled to be the guardian of the property) of a minor or person of unsound mind having a real and *bona fide* intention to make a gift makes a declaration of gift in favour of the said minor or person of unsound mind and the subject of the said gift is (at the time of the declaration) in the possession of the said father or grandfather (or other guardian) or of some person on his behalf, the gift is complete without any transfer of the possession of the subject of the gift ; the declaration of gift having in law the effect of transforming the possession of the donor on his own behalf into possession on behalf of the donee as the guardian of the property of the donee."

Ameer Ali (4th edition, page 123) states the law as follows :—

> The gift is completed by the contract and it makes no difference whether the subject of the gift is in the hands of the father or in that of a depositary (on behalf of the father). When a father makes a gift of something to his infant son, the infant by virtue of the gift becomes proprietor of the same provided the thing given be at the time in the possession of the father or of any person who stands in the position of trustee for the father because the possession of the father is tantamount to the possession of the infant by virtue of the gift and the possession of the trustee is equivalent to that of the father.

This principle has been consistently followed in our Courts: *Affefudeen v. Periatamby* [1]; *Abdul Rahim v. Hamidu Lebbe et al.* [2]; *Razeeka et al. v. Mohamed Sathuck* [3].

Once, therefore, it is established that the father had donated the property to the minor, though not effectually by a notarial deed, it must necessarily follow from the authorities cited that possession by the father must be deemed to be possession of the infant, and if this be so, the infant or minor is entitled to fall back upon the period of possession by the father during her minority. Applying these principles to the facts of the present case the possession by the father from 1930 to 1937 must be regarded as possession by the 2nd defendant, and the period of that possession can legitimately be added to the period of subsequent possession by her after her father's death. The total of this period is certainly over ten years and would enable the 2nd defendant to acquire title by prescription. I therefore hold that the 2nd defendant has acquired a title by prescription to the land in dispute.

I set aside the judgment of the learned Commissioner and enter decree dismissing plaintiff's action with costs both in this Court and the Court below.

Appeal allowed.