1965 *Present :* **Tambiah, J., and Alles, J.**

HASEENA UMMA, Appellant, and **JAMALDEEN** and another, Respondents

S. C. 162162-D. C. Kandy, 5,6111 A

Fideicommissary deed of gift-Muslim parties-Applicability of Roman-Dutch law- Donee a minor-Acceptance by donee's mother-Validity of acceptance by donor's agent-Muslim Intestate Succession Ordinance, No. 10 of 1931, ss. 3, 4.

A fideicommissary deed of gift executed by a Muslim on 13th December 1945 in favour of his consanguine sister, who was a minor, was accepted by the donee's mother in the presence of the notary and the donor. The trial Judge took the view that since there was no valid acceptance of the deed according to the Muslim law, the donor could have validly revoked the deed.

Held, that the fidei commissum was, by virtue of section 4 of the Muslim Intestate Succession Ordinance No. 10 of 1931, governed by the Roman-Dutch law. Accordingly, the acceptance of the deed of gift was valid. Although the mandate did not appear on the face of the deed, it was clear that the donor gave a mandate to the donee's mother to accept the deed, since both were present and the latter accepted the deed of gift on behalf of the minor.

APPEAL from a judgment of the District Court, Kandy.

H. W. Jayewardene, Q.C., with S. S. Basnayake, I. S. de Silva and B. SEliyatamby, for plaintiff-appellant and for plaintiff-respondent in cross-appeal.

Vernon Jonklaas, with M. T. M. Sivardeen, for 2nd defendant-respondent and for 2nd defendant-appellant in cross-appeal.

Cur. adv. vult.

January 27, 1965. **TAMBIAH, J.-**

The plaintiff-appellant sued the 1st defendant-respondent and prayed for a declaration of title to a portion of land marked lot 1 (B) in plan 368 dated 14th November 1945, filed of record, and claimed ejectment.

Decree was entered against the 1st defendant-respondent on the 28th January 1960. When the Fiscal went to execute the writ of ejectment, he was resisted by the 2nd defendant-respondent. Thereupon proceedings were instituted under section 325 of the Civil Procedure Code and an order was made that the petition of the 2nd defendant-respondent should be registered as a plaint. His petition was accordingly numbered L 5611A

The plaintiff-appellant claimed title to the land on deed of gift No. 5326, dated 13th December 1945, marked PI, in the course of the proceedings. The 2nd defendant-respondent claimed that the said deed had been revoked by deed 2D1 of 4th March, 1960, by Mohammed Sameem, the donor on PI, and the latter transferred the same by deed 2D2 of 4th March 1960 to the 2nd defendant-respondent.

The parties are Muslims. The learned District Judge had taken the view that since there was no valid acceptance of the deed PI according to the Muslim Law, the donor, Sameem, could have validly revoked the said deed and transferred the same by 2D2 to the 2nd defendant-respondent. The deed PI creates a fideicommissum and this matter was not seriously contested in appeal. It was a deed of gift by Mohammed Sameem to his consanguine sister, the plaintiff, and this deed was accepted by the plaintiff's mother.

The first question for decision is whether the Roman Dutch Law or the Muslim Law applies to the transaction evidenced by deed of donation, PI. A controversy raged as to whether the Roman Dutch Law or the Muslim Law applied when a Muslim creates a usufruct or a fideicommissum while gifting an immovable property. The better opinion was that a Muslim was free to contract under the general law and create a usufruct or fideicommissum, which are concepts unknown to the Muslim Law. (vide Aliya Marikar Abuthahir v. Aliya Marikar Mohammed Sally[1 (1942) 43 N.L.R. 193].) In such a case the Roman Dutch Law applies to the exclusion of the Muslim Law.

In deeds of donation creating fideicommissum or usufruct, the extent to which the Muslim Law applies when one considers the personal capacity of a minor, on whose behalf acceptance is made, was not clear before Ordinance 10 of 1931 was passed. In Noorul Muheetha v. Sittie Leyaudeen [. 2 (1953) 54 N.L.R. 271] the Privy Council took the view that in a deed of gift between Muslims, where the donees were minors, the law governing the acceptance of the deed of gift was the Muslim Law, as received in Ceylon, although the deed creates a fideicommissum. It was held in that case that a widowed mother could accept such a deed. But their Lordships in the course of their judgment observed as follows (vide Noorul Muheetha v. Sittie Leyaudeen et al.) [3 (1953, 54 N.L.R. 271.]:

" They would, however, observe that the authorities as to the extent to which and the form in which general Muslim Law has been received into Ceylon seem very conflicting and they would venture to hope that the question of resolving by legislation the doubts which this conflict of authorities must create may receive early attention."

Intestate Succession Ordinance 10 of 1931. The relevant portion of section 3 of this Ordinance enacts-

" For the purpose of avoiding and removing all doubts it is hereby declared that the law applicable to donations not involving fidei-commissa, usufructs and trusts, made by Muslims domiciled in Ceylon, or owning immovable property in Ceylon, shall be the Muslim Law governing the sect to which the donor belongs."

Section 4 of the same enactment states-

" It is hereby further declared that the principles of law prevailing in the Maritime provinces shall apply to all donations, other than those to which the Muslim Law is made applicable by section 3."

In view of these clear provisions any deed of donation executed by a Muslim, after Ordinance 10 of 1931 came into force, which creates a fideicommissum or usufruct, is clearly governed by the Roman Dutch Law, which is the law applicable in the Maritime provinces. Therefore, the

incidents of the deed of donation PI are governed by the Roman Dutch Law.

The second question for decision is whether under the Roman Dutch Law, the deed of donation PI is valid. In deed PI, Cader Saibo Jameela Umma, the mother of thedonee accepted the gift on behalf of her minor daughter and signed the deed in the presence of the notary and the donor. The notary in his attestation states that both the donor and the mother of the donee signed in his presence. The plaintiff has stated in the course of her evidence that one Habeebu Mohammed was married to Jameela Umma and another woman. Plaintiff is the daughter of Jameela Umma, and the donor on the deed PI, Sameem, is the son of Habeebu Mohammed byanother wife. Muslims in Ceylon could have four wives. Habeebu Mohammed was atfirst content with two wives. Thereafter Habeebu Mohammed deserted his two wivesand lived with a Sinhalese woman by whom he had a child.

Sameem appears to have provided for his sister, the plaintiff, by the deed of donation PI, which was accepted by the plaintiff's mother. In these circumstances, there can be no question that Sameem authorised the plaintiff's mother Jameela Umma to accept the deed on behalf of the plaintiff, who was a minor at that time. There was litigation between the plaintiff and Sameem. Plaintiff sued Sameem and obtained decree. When she tried to get possession ofthe property, Sameem revoked the deed of donation PI and transferred the land tohis son in order to prevent the plaintiff from obtaining the fruits of her litigation.

In Francisco v. Costa [1 (1889) 8 S.C. G. 189] Mr. Justice Dias said : " The law favours the acceptance of a gift in the case of minors." This dictum was cited with approval by Bonser C.J. in The Government Agent, Southern Province v. Karolis et al.[. " (1896) 2 N.L.R. 72at 73.]. Acceptance need not even appear on the face of the deed (ibid.), Senanayake v. Dissanayake [3 (1908) 12 N.L.R. 1.].

Voet in dealing with the topic of donation states as follows (vide Voet XXXIX.5.12, Gane's translation):

" Then again it is by no means opposed to the principles of the Civil Law foracceptance to be made by an agent equipped with a mandate, so often as the donation is being completed by genuine or fictitious delivery, since ownership and possession can be acquired even through agents."

The other Roman Dutch writers support this view (vide The Institutions of SouthAfrican Law by Maarsdorp, Vol. 3 ; Law of Obligations 4th Edition, p. 108). Acceptance can be made even by an unauthorised person provided such acceptance is afterwards ratified by the donee in the life time of the donor (ibid).

In the instant case, although the mandate does not appear on the face of the deed, it is clear that Sameem gave a mandate to the plaintiff's mother to accept the deed of donation PI, since both were present and the latter accepted the deed of gift on behalf of the plaintiff who was a minor at that time.

The counsel for the respondent contended that the rule that a person could give a mandate to a person, other than a natural guardian, to accept the deed of gift on behalf of a minor is only confined to the case of a donation between father and child. But he cited no authority to support his contention. Voet, however, places no such restriction.

For these reasons I hold that deed of gift PI was a valid deed of donation and that it had been duly accepted. Under the Roman Dutch Law a donation cannot berevoked excepting on specified grounds set out by the Roman Dutch authorities. Deed of donation PI had not been revoked on any

of the grounds known to the Roman Dutch Law. Therefore, the revocation of deed PI by deed 2D1 has no effect in law and the 2nd defendant has no title. For these reasons I set aside the learned District Judge's order of 28th February, 1962 dismissing the plaintiff's action and enter judgment for the plaintiff-appellant and order that the defendants be ejected and the appellant be placed in possession of the land which is the subject matter of this action.

The plaintiff-appellant is entitled to the costs of inquiry and costs of appeal. In view of my findings the 2nd respondent's cross-appeal is dismissed without costs.

ALLES, J.-I agree.

Appeal allowed.
Gross-appeal dismissed.

- End -