Privy Council Appeal No. 38 *of* 1951

Noorul Muheetha - - - - - - - - - - *Appellant*

v.

Sittie Rafeeka Leyaudeen and Others - - - - *Respondents*

FROM

THE SUPREME COURT OF CEYLON

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 12TH JANUARY, 1953

Present at the Hearing:

VISCOUNT SIMON
LORD MORTON OF HENRYTON
LORD COHEN
SIR LIONEL LEACH

[*Delivered by* SIR LIONEL LEACH]

The parties in this case are Mahomedans residing in Ceylon. The appeal raises a question of considerable difficulty, namely whether Roman-Dutch law or Muslim law governs, in the matter of acceptance, a gift of immoveable property made by a Mahomedan in favour of minors, there being embodied in the deed conveying the property a *fidei commissum* for the benefit of the donees' children. A *fidei commissum* is well known in Roman-Dutch law, which is the basis of the law of Ceylon, but it is completely alien to Muslim jurisprudence.

The deed with which the appeal is concerned was executed by Saffra Umma, the paternal grandmother of the respondents, on 28th June, 1927. The donor was the widow of one Meera Lebbe Marikar Idroos Lebbe Marikar. There were two sons of the marriage, Idroos Lebbe Marikar Mahomed Sathuk, the defendant in the action which has given rise to the appeal, and Idroos Lebbe Marikar Mahomed Zain, the father of the respondents, who died before the execution of the deed. By it the donor conveyed certain immoveable property in Colombo to the respondents in equal shares, subject to the reservation of a life interest to herself, with a *fidei commissum* for the benefit of the children of the donees on the death of their parents. All the donees were then minors. Their mother, Fatheela Umma, purported to accept the gift on their behalf in these 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 deed also contained this statement:—

> "And the said Idroos Lebbe Marikar Mohamed Sathuk who is the paternal uncle of the said donees doth hereby renounce all and every right interest or claim whatsoever which he may or shall have in respect of the said premises hereby gifted adverse to them and in the event of any question arising as to the validity of these presents by reason of the said Donees not being put into possession of the said premises according to law the said Idroos Lebbe Marikar Mohamed Sathuk hereby agrees not to take any objection whatsoever to his advantage or take any other steps whatsoever detrimental to the interests of the said Donees in respect of the premises hereby conveyed."

It is common ground that this clause does not operate to estop the defendant from asserting title to the property. The deed was signed by the donor, the defendant and the minors' mother and was certified by a notary public. It is accepted that it embodies a *fidei commissum* as known to Roman-Dutch law.

On the 4th February, 1928, Saffra Umma executed a document by which she purported to revoke the deed of gift executed by her in favour of the respondents and to grant the property to the defendant for his life and after his death to his son Mohamed Sathuk Mohamed Huzain. On the 6th December, 1929, Suffra Umma died and upon her death the defendant went into possession of the property.

On the 27th September, 1942, the respondents, who then were all of full age, instituted in the District Court of Colombo the action for a declaration that they are entitled to the property and for a decree for possession. By a judgment dated the 31st May, 1945, the District Judge granted the reliefs sought by the respondents. The defendant appealed to the Supreme Court, but during its pendency he died, and his widow, the appellant before their Lordships, was substituted in his place.

At the trial the defendant conceded that in as much as the deed of the 28th June, 1927, created a *fidei commissum* it was governed by Roman-Dutch law, but he contended that there had been no valid acceptance, because the parties to the deed were Mahomedans, and under Muslim law a mother was not recognized as a natural guardian of her children in matters concerning property. He also maintained that there had been a valid revocation of the deed of gift. The District Judge decided against the defendant on both the points. He held that once it was admitted that the deed created a *fidei commissum* the transaction as a whole must conform to the requirements of Roman-Dutch law, and under that law a widowed mother could validly accept a gift on behalf of her minor children. He rejected the second contention on the ground that the deed did not reserve to the donor a right of revocation.

In the Supreme Court the only argument advanced in support of the appeal was that the deed of gift was bad for want of an acceptance valid under Muslim law. The Court (Dias, S.P.J. and Pulle J.), in agreement with the District Judge, held that the question of validity had to be determined solely within the frame of the Roman-Dutch law and under that law the respondents' mother had authority to accept the gift on their behalf. The learned judges considered that even if this conclusion were wrong the defendant was not entitled to succeed as it had not been shown that according to Muslim law as administered in Ceylon a Muslim widow could not be deemed to be the guardian of her minor children. They were of the opinion that before the principle of Muslim law on which the appellant relied could be applied there must be a *cursus curiae* in favour of its application in Ceylon. The result was that the appeal was dismissed on the ground that the defendant was 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.

In the course of his judgment (with which Dias, S.P.J. agreed) Pulle J., referred to the judgment of the Board in *Weerasekera* v. *Peiris* (1933 A.C. 190). In that case a Mahomedan resident in Ceylon executed a deed purporting to give to his son immovable property in Colombo. The gift was subject to conditions which were inconsistent with a gift recognized by Muslim law, but it created a *fidei commissum* as known to Roman-Dutch law. It was held that the gift was not invalid on the ground that possession had not been given to the donee as required by Muslim law. In delivering the judgment of the Board Sir Lancelot Sanderson said:—

> "It was not disputed that the last mentioned provisions constituted a *fidei commissum* according to Roman-Dutch law, but, as already stated, it was contended, on behalf of the respondent, that inasmuch as the terms of the first part of the deed purported to constitute

a gift inter vivos between Muslims, Mahomedan law must be applied thereto, and as possession of the premises was not taken by the son during the father's life, the gift was invalid and the *fidei commissum*, which was based on it, also failed.

Their Lordships are not able to adopt this contention of the respondent and upon the true construction of the deed, having regard to all its terms, they are of opinion that the father did not intend to make to the son such a gift inter vivos as is recognized in Mahomedan law as necessitating the donee taking possession of the subject-matter during the lifetime of the donor, but that the father intended to create and that he did create a valid *fidei commissum* such as is recognized by the Roman-Dutch law."

Their Lordships respectfully agree with these observations but do not find them of assistance in the decision of the present case. In *Weerasekera* v. *Peiris* (*supra*) the Board were considering the effect of the deed and held that it was to be construed and take effect in accordance with Roman-Dutch law. They were not concerned with the very different question whether a person purporting to accept a gift of immovable property on behalf of infant donees had in fact authority so to do. Their Lordships are prepared to accept that the donor, under the deed of the 28th June, 1927, intended that Roman-Dutch law should apply in determining who could accept the benefaction on behalf of her grandchildren, but their Lordships are unable to agree that the intention of the donor is a relevant factor in determining the authority of the mother. If an agent purports to accept a gift on behalf of a principal, his authority depends not on anything contained in the deed of gift but on the validity of the instrument or act alleged to confer the authority. So the question of a mother's authority to accept a gift on behalf of her infant children must depend not on the intention of some other party to the deed of gift but on the proper law applicable under the law of Ceylon in determining the capacity of infants and the authority of guardians to enter into binding agreements on their behalf. There is no suggestion in the present case that the transaction was not for the benefit of the infants, but if the argument advanced on behalf of the respondents, that the intention of the donor was relevant, were to prevail, it is obvious that an infant might be deprived of the protection which the law as to guardianship was intended to give him or her, and might be saddled with a burdensome property involving him or her in heavy liabilities.

The respondents relied on the decision of the Supreme Court of Ceylon in *Abdul Rahiman* v. *Ussan Umma* (19 N.L.R. 175). In that case the question at issue was whether an ante nuptial contract regulating succession to property entered into between Mahomedans in Ceylon was valid. The Court upheld its validity notwithstanding that it was " a document foreign to the principles of Mahomedan law ". In the course of his judgment Ennis J. when referring to a document creating a *fidei commissum* said " it would seem that the Mahomedans in Ceylon have adopted and followed the general law of Ceylon in executing these documents ". This case however carries the matter no further than the decision of this Board already cited: the mind of the Court was not directed to the question of the authority of a person purporting to execute the contract on behalf of one of the parties thereto. What then is the law applicable in determining the authority of the mother to accept the gift on behalf of her infant children? If Roman-Dutch law were applicable, it is plain that as she was not the donor, she would have the requisite authority ; (see e.g. *Fernando* v. *Weerakoon* 6 N.L.R. 212 ; *Silva* v. *Silva* XI N.L.R. 161). But their Lordships are of opinion that Roman-Dutch law is not applicable. The authorities establish that Mahomedans in Ceylon are governed by their own personal law as, to quote the proclamation of 23rd September, 1799, it " subsisted under the ancient Government of the United Provinces " except of course so far as the same may have been altered by statutory enactment.

There remains for consideration what is the law applicable in Ceylon to the question who is the natural guardian of the property of a Mahomedan infant? There is no doubt that under Muslim law, as

administered in India and laid down in the text books written by Indian authorities on the subject, a mother is not a person who has inherent authority as a guardian of the property of her infant children, but it is by no means clear that this provision of Muslim law has found acceptance in Ceylon. The learned trial judge expressed no opinion on the point and had their Lordships to reach a conclusion on the matter without assistance from a court in Ceylon they might have felt considerable hesitation in holding that the general rule of Muslim law was not applicable. The point was however argued in the Supreme Court who reached the conclusion that under the Muslim law as received in Ceylon, and in the circumstances of the particular case, the mother had the necessary authority to accept the gift. Their Lordships are not prepared to dissent from this conclusion. 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.

For the reasons above stated their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellant must pay the costs of the appeal.

(17420) Wt. 8096—1 100 1/53 D.L.-Pl/3

In the Privy Council

NOORUL MUHEETHA

v.

SITTIE RAFEEKA LEYAUDEEN AND OTHERS

DELIVERED BY SIR LIONEL LEACH

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