IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

C.A. No. 866/2000 (F)

D.C. Kurunegala Case No. 5030/L

Mohamed Nilaudeen of
Paragahadeniya, Hettiyawala, Weuda.

PLAINTIFF

-Vs-

1 **Mohammed Sameen Mohammed Rasleem,**
No.56, Paragahadeniya, Weuda.

2 **Sadukeen Mohammed Mujeem,**
No.56, Paragahadeniya, Weuda.

3 **Samsudeen Zahira Banu,**
Paragahadeniya, Weuda.
DEFENDANTS

AND NOW BETWEEN

Mohamed Nilaudeen of
Paragahadeniya, Hettiyawala, Weuda. *(deceased)*
PLAINTIFF-APPELLANT

1A. Mohammadu Zaheer,
No.135 A, Hettiyawela, Paragahadeniya, Weuda.
SUBSTITUTED-1A PLAINTIFF-APPELLANT

-Vs-

1 **Mohammed Sameen Mohammed Rasleem,**
No.56, Paragahadeniya, Weuda.

2 **Sadukeen Mohammed Mujeem,**
No.56, Paragahadeniya, Weuda.

3 **Samsudeen Zahira Banu,**
Paragahadeniya, Weuda.
1ST , 2ND , AND 3RD DEFENDANT-RESPONDENTS

BEFORE : A.H.M.D. Nawaz, J.

COUNSEL : Harith De Mel for Substituted 1A Plaintiff Appellant.

Chula Bandara for the 1st Defendant Respondent.

Decided on : 04.09.2018

A.H.M.D. Nawaz, J.

This case raises the interesting inter-play between Muslim law and Roman Dutch law in regard to donations. The pivotal issue in this case is whether a Muslim mother's deed of gift bearing No.544 and dated 16.09.1986 which was executed in favour of her son is governed by Muslim law or Roman Dutch law- the residuary law of this country. The answer to this question leads one to the oft-quoted question for all times. Is a decree of court essential to revoke the aforesaid deed of gift or Is a unilateral revocation of the deed of gift by the mother sufficient to eventuate in the revocation of deed? As vital as these issues are, it is apposite to traverse the facts.

The Plaintiff-Appellant (the donee son who is hereinafter sometimes referred to as "the Plaintiff") received the gift of a land from his donor-mother on 16.09.1986 when she executed a deed of donation bearing No.544 (**P1**) and attested by Notary Public A.I.M. Anver. It has to be noted that **P1** recites itself as an irrevocable deed of gift subject to

the life interest of the donor. The recitations in the deed of gift date 16.09.1986 merit recapitulation.

"NOW KNOW YE AND THESE PRESENTS WITNESS that the said donor in pursuance of the said agreement and in consideration of the natural love and affection I bear unto my beloved son Mohammed Samoon Mohamed Nilemdeen....do hereby grant, convey, set over and assure unto him the said Donee his heirs, executors, administrators and assigns as a gift or donation inter vivos absolute and irrevocable..."

"TO HAVE AND TO HOLD the said premises hereby granted and conveyed unto the said Donee and his afore written subject to the condition that the Donor herself shall have the right to possess and enjoy the profits of the land and premises hereby donated during her life-time"

Thus whilst the deed of donation executed by a Muslim mother to her son recites in the main that it is irrevocable, it reserves to the donor during her life-time the right to possess and enjoy the profits of the land and premises.

When a Muslim donor combines in his/her deed of donation irrevocability and life-interest, is that deed governed by Muslim law or Roman Dutch law the common law of the country? Presently I will return to this question but not before I have alluded to the dispute that has found its way to this Court from the District Court of *Kurunegala.*

Five years after the deed of donation, it would appear that the donor mother had a change of heart and she seems to have veered towards another son of hers-as a result she revoked the deed of gift by her deed bearing No.2833 and dated 27.03.1989 (**P2**), despite the fact that it was irrevocable on the face of it. Thereafter she transferred the land by a deed of sale to her younger son (Mohamed Sameen Mohamed Raslim 1st Defendant) bearing No.2859 and dated 27.04.1989 (**P3**). Five years later, the 1st defendant transferred it to the 2nd Defendant (**P4**) by a deed bearing No.181 and dated 16.05.1994.

The Plaintiff's assertion was that the deed of revocation (**P2**) was invalid and therefore the subsequent conveyances (**P3** and **P4**) have all become null and void *ipso facto*. This was the case presented by the Plaintiff in his plaint dated 26.04.1996,

As opposed to this version, the Defendants contended that the deed of gift (**P1**) in favour of the Plaintiff was invalid in law because a deed of gift under the Muslim law could not be given subject to conditions. In other words it could not be encumbered with a life interest.

It is indisputably true that under the Muslim law a deed of gift cannot be given subject to conditions as stated. Azaf A.A.Fyzee defines Gift in his celebrated *Outlines of Muhammadan Law* (Fifth Edition, 2008) thus:

> *"a man may lawfully make a gift of his property to another during his lifetime; all he may give it away to someone after his death by will. The first is called a disposition inter vivos; the second a testamentary disposition. Muslim law permits both kinds of transfers; but while a disposition inter vivos is unfettered as to quantum, a testamentary disposition is limited to one third of the net estate. Muslim law allows a man to give away the whole of his property during his lifetime; but only one third of it can be bequeathed by will."*

The three essentials of a gift (*Hiba*) are: (i) declaration of the gift by the donor; (ii) acceptance of the gift by the done; (iii) delivery of possession. The Privy Council has adopted and approved of a passage in Ameer Ali which lays down the three conditions necessary for a valid gift -see Syed Ameer Ali Mahommedan Law Vol 1, Calcutta 1912 page 41. They are '(1) manifestation of the wish to give on the part of the donor . (2) the acceptance of the donee, either impliedly or expressly . (3) The taking possession of the subject matter of the gift by the donee, either actually or constructively -see the Privy Council decisions of ***Mohammad Abdul Ghani*** v ***Fakhr Jahan Begum*** (1922) 49 IA 195; ***Amjad Khan v Ashraf Khan*** (1929) 56 IA 213.

So under Muslim Law three things are necessary to an effective donation: an intention to give, an acceptance by the donee, and a *seisin* of the property by the donee. In the present case the deed of donation (**P1**) itself shows that there was no intention to make an absolute gift. It expressly says that the donee is not to possess the property until after the death of the donors, so that no question of seisin, constructive or otherwise, can arise under this deed, as the deed itself in its terms does not give the property absolutely. The Muslim law requires that there should be a clear intention to give the property absolutely. The reservation in this case of a life interest for the donor does not vest the donee with an immediate *seisin* of the property and therefore this is not a gift (*hiba*) known to Muslim law. The donor reserved to herself a usufruct of the subject matter so that she would have the use, benefit, produce or profits. A

In fact a Muslim is not prevented from making a valid gift under the common law (Roman Dutch law) subject to conditions, if he so desires. Sections 3 and 4 of the Muslim Intestate Succession Ordinance No.10 of 1931 makes it patently clear. This legislation on Muslim law contains only four sections.

Section 3 states as follows:-

> *"For the purposes of avoiding and removing all doubts it is hereby declared that the law applicable to donations not involving usufructs and trusts, and made by Muslims domiciled in Sri Lanka or owning immovable property in Sri Lanka, shall be the Muslim law governing the sect to which the donor belongs:*
>
> *Provided that no deed of donation shall be deemed to be irrevocable unless it is so stated in the deed, and the delivery of the deed to the donee shall be accepted as evidence of delivery of possession of the movable or the immovable property donated by the deed."*

According to the terms couched in the section an important principle emanates *"that the donations made by Muslims not involving usufructs or trusts are governed by Muslim law".*

So section 3 applies only to donations made by a Muslim not involving usufructs or trusts. This provision conveys the principle that a Muslim, although governed by Muslim law, is still free to make a gift involving usufruct or trust governed under the common law. This position is further clarified by Section 4 of this Ordinance which states as follows:-

> *"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."*

At the outset I posed an initial question which is pivotal to the resolution of the issue before me. The donor being a Muslim made a donation of her land but reserved a usufruct till her life time. Section 4 puts it beyond any doubt. The law prevailing in the Maritime provinces shall apply to all such donations, other than the donations made under Section 3, made by a Muslim. If he chooses to make a donation under Section 3, then the law applicable is Muslim law. But it is open to him to make a donation under Section 4 as well if he so desires and in those circumstances the law applicable is not Muslim law but law of the Maritime Provinces which is indeed Roman Dutch Law. In ***Kiry Menika v Kiry Menika*** (1855) Ramanathan (1843-1855) 62 where the application of the Roman Dutch Law of possessory remedies was discussed , the Supreme Court held: "....As the Kandyan Law is silent on such right of possession, the Maritime law (namely the Roman Dutch Law) should now be the law for the determination of such matter or question in the Kandyan provinces under the 5th Clause of Ordinance No 5 of 1852."

Sections 3 and 4 of the Muslim Intestate Ordinance which deal with donations make it as plain as pikestaff that a Muslim may make a gift under the Muslim law in terms of Section 3, whilst under Section 4 he can make a gift under the common law. In the former case a gift is made without conditions and in the latter case he can reserve or impose any condition such as usufruct or life interest etc. This principle has been

authoritatively laid down by the Supreme Court in ***Haseena Umma v. Jemaldeen*** 68 N.L.R 300.

In this case it was held:-

> *"...that when a Muslim creates usufruct or fidei commissum while gifting an immovable property, the law applicable would be the common law the Roman Dutch law, by virtue of section 4 of the Muslim Intestate Succession Ordinance".*

In this case the Supreme Court also followed the earlier judgment in ***Aliya Marikkar Aboo Thahir v. Aliya Marikkar Modammed Saly*** 43 N.L.R 193.

In ***Aliya Marikkar*** (supra) a Muslim executed a deed of gift in favour of his sons, reserving to himself and his wife, if she survives him the right to take, enjoy and receive the rents and profits of the property gifted, during their lifetime. He also reserved to himself the right to revoke and cancel the gift at his will and pleasure. The gift was also subject to a *fidei commissum* in favour of the donee's children. The donee and the donor's wife accepted the gift.

The Supreme Court held:

> *"that the deed created a valid fidei commissum and was a valid gift under the general law although between Muslims"*

In this case the Supreme Court followed the Privy Council judgment in ***Weerasekara v. Peiris*** 43 N.L.R 281.

In this case a deed of gift was made by a Muslim subject to his right to revoke the gift and subject to his life interest. He had also created a *fidei commissum* imposing restrictions on alienations.

Held- *"that the donor created a valid fidei commissum such as is recognized by the Roman Dutch law and that the donor did not intend to make such a gift as is recognized under the Muslim law which necessitates the donee taking possession of the subject matter of the gift during the lifetime of the donor"*

All these cases demonstrate that a Muslim may make a deed of gift reserving a life interest or usufruct and even creating a *fidei commissum* or trust and even reserving his right to revoke the gift or irrevocable, valid under the common law. If he so wishes he can make a gift without any of these conditions a pure and simple gift valid under the Muslim law. In the proviso to Section 3 of the Muslim Intestate Succession Ordinance it is stated as follows:-

"Provided that no deed of donation shall be deemed to be irrevocable unless it is so stated in the deed...."

These proviso makes it clear that a Muslim donor can make a gift irrevocable but he make a gift irrevocable only if the deed declares itself to be irrevocable.

In the case before me the donor Ismail Lebbe Pathuma gifted the corpus to the Plaintiff by her Deed bearing No.544 of 1986. 09.16 (P1) subject to her life interest, and irrevocable. The defendants contended that this deed was invalid in Muslim law. The foregoing authorities fortify the position that **P1** was a valid gift under the Roman Dutch Law.

Therefore the donor cannot revoke it on her own without an order of court. But in this case donor revoked it by her Deed No.2833 of 1989. **(P2)** which is invalid in law. Because there was no court sanction for its validity.

An irrevocable Deed of Gift in Roman Dutch Law cannot be revoked by a unilateral Deed of Cancellation and it can only the revoked by an Order of Court upon well known grounds for revocation. I went into a survey of all the authorities and Roman Dutch Law

jurists in ***Franklin Fernando v Anacletus Fernando and Others*** (2015) 1 Sri.LR 1 and distilled some well known principles on revocation in that precedent. In fact long before ***Franklin Fernando*** (supra), our Courts have dealt with the question of whether a decree of court was necessary for invalidation of deeds of gifts through Courts.

In the case of **Kanpathipillai vs. Kannachy 13 N. L. R 166** where a Deed of Gift was executed in favour of the Plaintiff without reserving the right to revoke the deed and subsequently the Donor revoked the Deed of Gift by way of a Deed of Cancellation and transferred the premises so gifted in favour of a 3rd party having knowledge of the Deed of Gift *Grenier* J. declared as follows at page 166.

> *" It seems .to me that the first defendant had no right, so long as the deed of gift was in force, to have either executed a deed of revocation, or following upon that, a deed of conveyance.....my own opinion is that the registration of what I consider a useless document by the second defendant gave him no priority over the deed of gift so long as that deed remained unrevoked by a decree of Court.."*

In the case of ***Krishnasamy v Thillaiyampalam*** **59 N.L.R 265** Basnayake C.J stated the following at page 267.

> *"....An examination of Perezius's statement (Praelectiones Codicis Justiniani, Book VIII, Tit. LVI, Sees. 4, 5 and 7 Wikramanayake's translation) does not show that he was so dogmatic as all that. He says :*
>
> *".....The causes of ingratitude are five in number, namely, if the donee outrageously insults the donor, or lays impious hands on him, or squanders his property or plots against his life or is unwilling to fulfil the pact which was annexed to the gift ... a gift cannot be set aside for any other cause, both because d. I. ult. when it enumerates these five causes adds* ***that gifts can be invalidated for these causes alone if they are proved in a court of law...***"

This is what the decree of Justinian says: :

"We decree, in general, that all donations made in conformity with law shall be valid and irrevocable, and if he who receives the donation is not found to be guilty of ingratitude towards the donor.....

"But only for causes of this kind, where they have been regularly proved in court by indisputable evidence, do we permit donations made to such persons be revoked....

"We, however, decree that this provision shall only apply to the persons originally interested, as permission is not granted to the heirs of the donor to file complaints upon such grounds ; for if he who suffered these indignities remains silent, his silence should always continue, and his posterity ought not to be allowed to institute legal proceedings, either against the individual alleged to be ungrateful, or his heirs."

"Given on the fifteenth of the Kalends of April, during the Consulate of Lampadius and Orestes, 530. " (Code of Justinian, Bk. VIII, Tit. LVI, s. 10) Scott's translation, Vol. 14, p. 349.)"

In the case of ***Mahawewa vs. Mahawewa*** SC. Appeal. No. 64/ 2008 , Thilakawardene J. at page 4 states that:

"..the Law on Donation and the Revocation of Gift in Sri Lanka is governed by Roman Dutch Law under which a Gift once donated can be revoked on grounds of gross ingratitude by the Donee to the Donor. The Donor may initiate court proceedings to cancel the gift so donated."

This legal proposition was also articulated by Gamini Amarathunga J. in ***Ariyawathi Meemaduwa vs. Jeewani Bodika Meemaduwa*** SC Appeal. No. 68/ 2010 as follows;

" A deed of Gift is absolute and irrevocable. That is the rule. However, the law has recognized certain exceptions to the rule of irrevocability. A party applying to Court to invoke the exceptions in his favor has to satisfy the court, by cogent evidence, that the court would be justified in invoking the exceptions in favour of the party applying the same."

In this case the donor never instituted any proceedings in court to revoke the Deed of Gift, leave alone establish any exceptional grounds on which an absolute Deed of Gift may be revoked. In the circumstances the mere execution of **P2** does not entail the revocation of **P1**.

Therefore, I take the view that the Donor of the Deed **P1** should have sought the assistance of Court in order to invalidate **P1**.

Since **P1** the Deed of Gift in favor of the Plaintiff remains a valid donation under the Roman Dutch Law, the Donor could not have validly transferred the subject matter to the 1st Defendant and as Prof G.L.Peiris in the *Law of Property in Sri Lanka* volume I states at page 140 that the General Rule is that the transferor should be the owner at the time delivery is made.

Accordingly, I take the view that the Plaintiff is entitled to a declaration that **P2** the Deed of Cancellation is null and void and in the circumstances **P3**, the Deed of Transfer and **P4** the Deed of Gift Donating a portion of the subject matter on the strength of the title purportedly acquired by the 1st Defendant by way of **P2** should also be declared null and void.

As such the Plaintiff is entitled to the relief prayed for in the amended plaint and as such I proceed to set aside the judgement dated 19 September 2000 of the District Court of *Kurunegala* and allow the appeal.

JUDGE OF THE COURT OF APPEAL