

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

Seinul Abdeen Marikkar Mohamed Ramees,
No.43, Masjid Road,
Aluthgama.

18th DEFENDANT-APPELLANT

C.A. Case No.470/1996 (F)
470/1996 (F) (A)

D.C. Kalutara Case No.52 B/P

Seinul Abdeen Mohamed Faheem,
No.39, Kadenyawatta Road,
Dharga Town.

20th DEFENDANT-APPELLANT

-Vs-

Abdul Azeez Marikkar Mohamed Masood
(Deceased)

PLAINTIFF

Mohamed Masood Mohamed Ali Sabri,
No.51/3, Masjid Road,
Seenawatta, Aluthgama,

Substituted-PLAINTIFF-RESPONDENT

AND

1. Mohamed Lebbe Juwariath Umma
2. Mohamed Lebbe Abdul Sameem

And 17 others

DEFENDANT-RESPONDENTS

BEFORE : A.H.M.D. Nawaz, J.
Counsel : Sanjeewa Dissanayake for 18th Defendant-Appellant
Hemasiri Vithanachi for 20th Defendant-Appellant
Thilan Liyanage for the Substituted Plaintiff-Respondent
Gazzaly Hussein for 5(A), 8th, 12th and 16th Defendant-Respondents
Decided on : 31.08.2018

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

The Plaintiff-Respondent instituted this action in the District Court of *Kalutara* to have the corpus described in the schedule, partitioned among the co-owners named therein as Defendants.

The trial proceeded on 26 issues which are contained at pages 157, 158, 159, 160, 161, 162, 163, 164 and 284 in the appeal brief. The issues of the 18th Defendant-Appellant are at pages 159.

At the trial the 18th Defendant-Appellant gave evidence which is found at pages 275 to 305 in the brief. The Counsel for the 5th and 6th Defendants in the course of cross examining the 18th Defendant-Appellant raised two issues (25.I, 25.II), which are at page 284 of the brief. The issues are;

- a. Has the Donee, named in Deed No.4703 dated 30.08.1855 (18V I) accepted the deed according to law?
- b. If it is not so, does the 18th Defendant derive rights?

Both these two were answered by the learned District Judge of *Kalutara* in the negative in the judgment he delivered on 05.12.1995, which is contained at pages 307 at 329 in the brief.

Being aggrieved by the said judgment, the 18th Defendant has preferred this appeal seeking the reliefs set out in the Petitioner of appeal.

When this matter was taken up for argument before this Court, it was agreed among the parties to confine the argument as to whether document marked 18V1, the alleged deed of gift (at pages 513 to 515 in the appeal brief) is valid enough to convey title in terms of the Muslim Law. All counsel addressed Court on this question of law and have since filed written submissions on the question of law.

The learned trial Judge had come to the finding that in view of the fact that the donee in the alleged deed of gift, had not accepted the gift, no right or title devolved upon the 18th Defendant, who is claiming rights under the said deed. The question of law has to be answered having regard to Muslim law since donations among Muslims are governed by Muslim Intestate Succession Ordinance No 10 of 1931.

Section 3 of the Ordinance 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.”

So it is the substantive Muslim law that will prevail with regard to the question that has arisen before this Court- Did the Donee, named in Deed No.4703 dated 30.08.1855 (18V1) accept the donation? Is acceptance of a gift mandatory in Muslim Law?

The Muslim Law distinguishes two kinds of gifts (properly so called) by the terms *sudakah* and *hiba*. Both are voluntary transfers of property without consideration; in the former the motive is to acquire religious merit, in the latter affection towards the donee, (Wilson's Anglo-Mohammedan Law, 6th Ed., p.323). Gifts are rendered valid by tender or intention, acceptance, and seizin or possession" (*Hedaya* p.482). The donee of a thing acquires no right over it, unless he actually takes possession. This important condition is found in an express saying of the Holy Prophet (p.b.u.h.), that "a gift is not valid unless possessed". (*Baillie Digest of Mohammedan Law* p.508).

Conditions necessary for a Donation to be valid under Muslim Law

Under the Muslim Law, for a gift to be valid, there must prevail three conditions. The three conditions necessary to constitute a valid donation, *inter vivos*, under the Muhammadan Law are;

- (1) manifestation of the wish or intention to give on the part of the donor,
- (2) the acceptance by the donee either impliedly or expressly, and
- (3) the taking of possession of the subject matter of the gift by the donee either actually or constructively (1 *Ameer Ali* 4th Ed., p 41 see *Affefudeen vs. Periatamby* (1911) 14 N.L.R 295. Unless these three conditions are present, a gift cannot be good according to the Muhammedan law-see *Casie Chetty v Mohamed Saleem* 42 N.L.R 41; *Sultan v Peiris* 35 N.L.R 57; *Weerasekera v Peiris* 34 N.L.R 281 (P.C).

In the case of *Kulu Beg Afzal Beg v. Gulzar Beg Lal Beg*, AIR 1946 NAG 357 it was held: "once the donor upholds the gift and the donee accepts it, it is a valid gift, and a stranger cannot question its validity on the grounds of want of delivery of possession". This Indian judgment is also indicative of the mandatory requirement of acceptance as a fundamental requirement for there to be a valid gift.

The impugned deed of gift is found at pages 513 to 515 of the brief. It is quite manifest upon the perusal of the deed that the donee had not accepted the said gift.

The judgment of learned trial Judge proceeds on the basis that the gift had not been accepted and on the strength of authorities cited above it is correct both in law and on facts.

In the circumstances I would affirm the judgment dated 15.12.1995 entered by the learned trial Judge of *Kalutara* and dismiss the appeal of the 18th Defendant-Appellant and 20th Defendant-Appellant.

JUDGE OF THE COURT OF APPEAL