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

6. Ahamed Abdul Zackeriya (Deceased)
7. Ahamed Mohamed Mathloob (Deceased)

6A & 7A. Mohamed Hassanul Muzanna

13. Abdul Raheem Noor Safiya
14. Abdul Raheem Raheem Ummul Ashra

All of Kurunduwatte, Gintota.

6A, 7A, 13th & 14th DEFENDANT-APPELLANTS

C.A. Case No.1190/2000 (F)

D.C. Galle Case No.11012/P

-Vs-

Mohamed Kadija Beebi

of Kurunduwatte, Gintota.

PLAINTIFF-RESPONDENT

a) Muhammadu Thasim Muhammadu Nasurdeen
b) Fathuma Ruvina
c) Mohamed Asam
d) Fathumma Ruzna
e) Ahamed Hisham

No. 353/19, Hilur Masjid Road,

Welipitimodera, Gintota.

Substituted a, b, c, d, & e PLAINTIFF-RESPONDENTS

1. A.C.M. Kareem
2. Abdul Hassen Ummul Maraliya
3. Mohamed Junaid Badur Nisa

4. Mohamed Junaid Najumun Nisa
5. Abdul Raheem Mohamed Zaheer
8. Hussain Marikar Mohamed Junaidu (Deceased)
8A. Mohamed Junaid Mohamed Nizam
9. A.H.A. Caffar
10. A.Z.M. Liyaddeen
11. Pathuma Hanoon
12. Mohamed Junaid Fouzun Nisa

All of Kurunduwatte, Gintota.

1st to 5th, 8A to 12th DEFENDANT-RESPONDENTS

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

COUNSEL : Sandamal Rajapakshe with Janaka Ratnayake for the Defendant-Appellants

Dr. Sunil Coorey with Sudharshani Coorey and A.W. Diana Stephnie Rodrigo for the Substituted Plaintiff-Respondents and 3rd, 4th and 8A Defendant-Respondents

Decided on : 30.07.2019

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

The issue that arises in this appeal is whether there is evidence of acceptance of a deed of gift executed as far back as the 19th century and subsequent possession on the part of the donee. This became the bone of contention because it is through the deed of gift that the Plaintiff-Respondent in this partition action derived title and the Appellants in the case contend that their devolution prevails over as a result of the invalidity of the deed of gift. Admittedly Muslim Law applies in regard to the deed of gift and this issue raised for the first time in appeal remains to be disposed of by reference to Muslim law.

Let me first deal with the facts in the case which pertain to the land located in *Gintota, Galle.* The facts are so intricate that they have to be understood having regard to the pleadings and pedigrees that the parties filed. Though the facts assume importance and I would set them down, the appeal was argued by Mr. Sandamal Rajapakse the learned Counsel for the 6th and 7th Defendant-Appellants on the single point-Is the Muslim dowry deed which was known as *Kaduttham* in olden times and which was produced in the case, valid in Muslim Law?

**Factual Matrix**

The Plaintiff-Respondent (hereinafter sometimes referred to as "the Plaintiff") instituted this action to partition a land called "*Lot A of Sellamarrikkar Thottam*" which is in extent of 1 Rood and 30 Perches. The Plaintiff pleaded the following pedigree-one half share of the land was owned at one time by 3 persons namely Alia Marrikkar Mohamed Thahir, Alia Marrikkar Mohamed and Alia Marrikkar Ayesha Umma. These 3 persons transferred the one half share of the land to 2 persons namely, Abdul Rahuman Mohamed and Abdul Rahuman Ahamed. Abdul Rahuman Ahamed transferred his 1/4th share to Abdul Rahuman Mohamed. Thus, Abdul Rahuman Mohamed became the owner of one half share of the land to be partitioned. Later by a deed of gift, Abdul Rahuman Mohamed gifted the same to his daughter who was the Plaintiff in this case namely Mohamed Kadija Beebi.

A commission was issued to one Dayananda Weerasekara Licensed Surveyor who depicted the said land in Plan No.2906 dated 27th, 28th and 30th of October 1990. The corpus was depicted as **A1, A2, A3** and **A4** in Plan No.2906.

The 3rd, 4th and 8 Defendants filed a joint statement of claim and pleaded the following:-

They admitted the fact that the land depicted as A1, **A2**, A3 and **A4** in Plan No.2906 is the land to be partitioned in the action. They also stated that at one time, one half share of the land was owned by Pathumma Nachchiya (one of the children of the original owner) and out of this ½ share, 1/4th share was transferred by Pathumma Nachchiya to Mohamadu by Deed No.4120 dated 18.05.1945 and consequently the 3rd and 4th

Defendant-Respondents became the owners of that 1/4th share jointly. Then with respect to the other 1/4th share, Pathumma Nachchiya transferred the same to Abdul Kafoor Pathumma Hanoon by Deed No.4100 dated 25.04.1945. Consequently, 1/3 shares of the ¼ share was owned by the 1st Defendant and 2/3 shares of 1/4th share was owned by the 8th Defendant.

These Defendants also contended that the 1st Defendant transferred his share to the 8th Defendant and thereby the 8th Defendant became the owner of ¼ share of the land. Thus eventually the 3rd, 4th, and 8th Defendants claimed one-half share of Abdul Rahuman Pathumma Nachchiya. In other words the 3rd and 4th Defendants got 1/4th of one-half share of Rahuman Pathumma Nachchiya, whilst the 8th Defendant became entitled to the remaining 1/4th of Rahuman Pathumma Nachchiya.

The 6th and 7th Defendant-Appellants also filed a statement of claim and their pedigree began with the original owner of the land called Asana Marrikkar Abdul Rahuman. He had 4 children according to the pedigree namely, *i)* **Abdul Azeez** *ii)* **Ahamed** *iii)* **Pathuma Nachchiya** *iv)* **Kadija Umma.** Upon the death of the original owner Asana Marrikkar Abdul Rahuman, the devolution of the rights of Asana Marrikkar Abdul Rahuman would be governed by the law of intestate succession under Muslim Law and the parties agreed that Muslim Law would be the governing law for this partition action. Accordingly the 2 sons obtained 2/6 shares each and the daughters inherited 1/6 shares each.

According to the 6th and 7th Defendants, after the death of the original owner Asana Marrikkar Abdul Rahuman, his 4 children became the owners of the entire land to be partitioned in the action. However, according to their statement of claim, Abdul Azeez died issueless and left no heirs. Therefore, his 2/6 share devolved on the other 3 remaining siblings. As per the said statement of claim of the 6th and 7th Defendants, after Ahamed's death (the 2nd son of the original owner) his wife and his four children obtained rights to 2/6 shares.

The two children of Ahamed from among his 4 children are Zackeriya the 6th Defendant and Mathloob the 7th Defendant who are the appellants in the case. However by a Deed of Transfer 4105 dated 31.08.1964, all the heirs of Rukiya Beebi (one of the deceased sisters of the 6th and 7th Defendants) and the mother of the 6th and 7th Defendants, the 7th Defendant himself and one of the sisters of the 6th and 7th Defendants, transferred all their rights to the 6th Defendant. By a Deed of Transfer No.2431 dated 10.04.1990, the 6th Defendant transferred all his rights to the 7th Defendant and the 7th Defendant became entitled to the said share. Apart from the ownership from their title deeds, these Defendants also claimed prescriptive rights to the entire land.

In the midst of all this intricate and labyrinthine devolutions that could only be understood with reference to the pleadings and the pedigrees filed in the case, the appeal *though* revolves around a dowry deed marked as **P4** that raises the question I set out at the beginning of this judgment. Was there acceptance of the ***Kadutham*** by the donee?

**Abdul Azees**-a son of the original owner **Abdul Rahuman**, by way of a dowry deed known in times of yore as ***Kadutham*** bearing No.24 and dated 22.06.1894 donated among many other heirlooms to his beloved sister **Kadeeja Umma** an undivided 2/6th share of the land called Sellamarikkar Thottam, situated in Welipity, Modara. It is this deed of gift that was challenged in this Court as a conveyance that did not transfer the said 2/6 share because the donee Kadeeja Umma had not, to all intents and purposes, signed this deed to signify her acceptance. If this is true, the Plaintiff, the 3rd, 4th and 8th Defendants would not derive their interests. If the *Kadutham* is invalid for want of acceptance by Kadeeja Umma, then the 6th and 7th Defendant-Appellants are bound to succeed to their shares.

The learned Additional District Judge of *Galle* accepted the validity of the *Kadutham* and pronounced his judgment dated 03.11.2011 in favour of the Plaintiff-Respondent, 3rd, 4th and 8A Defendant-Respondents.

In their statement of claim, the 6th and 7th Defendants claimed the interest of Abdul Azeez but it was the contention of the Plaintiff that Abdul Azeez's interest had long been transferred to Kadeeja Umma through the dowry deed known as ***Kadutham.***

Dr C.G. Weeramantry (later Judge and Vice President of the International Court of Justice) in his magnum opus *The Law of Contracts* Vol-1 page 170 alludes to a *Kadutham* thus:-

> "A *kadutham* (a Muslim dowry deed) reciting a gift of property, although a non-notarial document and therefore inadmissible as a document of title, may be received in evidence to prove an overt act and a change in the character of possession on which to base a title by prescription-***Nachchia v. Nachchia*** (1909) 1 Cur.L.R 77; ***Ibrahim v. Rahiman*** (1906) 1 Matara 175; ***Umma v. Abdulla*** (1912) 2 Matara 114.

The use of *Kadutham* was quite widespread and unique to the nuptial settlement of Muslim marriages in days gone by particularly during the 1880s. It has since fallen into desuetude and its treatment in most of the textbooks is sparse. Its legal validity as a non-notarial document was reiterated in the aforesaid cases and Dr. M.S. Jaldeen in his well known work *The Muslim Law of Succession & Waqf Law in Sri Lanka* makes reference to the simple requirements of Muslim law, if a gift were to be made:-

> *"In Muslim law a gift could be made orally as well as in writing. No attestation is necessary. The requirement of registration has not been the practice. The more important aspect of donation in Muslim law is that the gift has to be accepted by the donee. In fact the offer and acceptance according to Minhaj, should be in explicit terms. If the donor is a parent or guardian and the donee is a child or ward there need not be..... Therefore in Muslim law a gift is valid if all three elements are present, i.e the declaration or tender, acceptance and transfer of possession."*

It was during the course of the evidence of the Plaintiff's husband Nasoordeen that the *Kadutham* in favour of **P4** was led in evidence. This gift of property was from the brother Abdul Azeez to his sister Kadeeja Umma on the occasion of her marriage on 22.06.1894.

By way of this *Kadutham*, Abdul Azeez gifted an undivided 2/6th share of the land called Sellamarrikkar Thottam to his sister Kadija Umma.

The learned Counsel for the 6th and 7th Defendant-Appellants argued that this *Kadutham* **(P4)** is invalid in Muslim Law because the ingredients necessary to constitute a gift under Muslim Law were not satisfied.

According to the argument of the learned counsel, the donee of this *Kadutham*, Kadija Umma did not signify the acceptance of the gift by affixing her signature on the *Kadutham*. The learned counsel for the Appellants argued that a gift in Muslim Law has to be accepted by the donee and since the bride has not accepted the gift, the gift would automatically become invalid.

I had occasion to discuss the constitution of a valid gift in Muslim Law in C.A. Case No.470/1996 (F) & 470/1996 (F)(A) (D.C. Kalutara Case No.5203/P CA minutes of 31.08.2018) and in the course of the judgment I pointed out that gifts known as *Hibath* contains the following characteristics.

1. The manifestation of the wish to give.
2. The acceptance by the donee expressly or impliedly.
3. The taking of immediate possession of the subject-matter of the gift.

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 judgment confirms acceptance as a fundamental requirement for there to be a valid gift.

However, one finds that it was only the bridegroom who had placed his signature and accepted the *Kadutham*. In the course of the argument, this Court posed the question whether the bridegroom could have accepted the *Kadutham* on behalf of the bride.

Mr. Sandamal Rajapakse, the learned Counsel for the 6th and 7th Defendant-Appellants brought to the notice of the Court that this important question of Muslim Law that

figured prominently in this case was not addressed by the learned Additional District Judge of *Galle* in his judgment dated 03.11.2000.

Ms. Sudharshani Coorey who appeared for the Plaintiff-Respondent and 3rd, 4th, and 8A Defendant-Respondents stated that the only question that was answered by the learned Additional District Judge was in relation to the non-compliance of the *Kadutham* with the imperative requirements of Section 2 of the Prevention of Frauds Ordinance and the learned Counsel pointed out that the question of non-compliance has been adequately dealt with by the learned Additional District Judge in his judgment wherein he stated that when **P4** *(Kadutham)* and **P5** (its English translation) were produced in Court, it was admitted without any objections. Thus, Ms. Sudharshani Coorey, the learned counsel for the Plaintiff-Respondent, 3rd, 4th and 8A Respondents argued that the said *Kadutham* had become admissible evidence against the 6th and the 7th Defendant-Appellants. She further argued that the invalidity of the *Kadutham* was never an issue in the Court *a quo*.

But in any event, there is evidence that the bride Kadija Umma had not signed the *Kadutham* and therefore it becomes a question of law for this Court to consider whether it constituted a valid gift in Muslim Law.

As is apparent, the *Kadutham* is dated 22.06.1894 and as such this Court is confronted with a 19th century deed of gift. The executor of this *Kadutham* Abdul Azeez was long dead when the trial came about in 1996 and none of the witnesses to the attestation of this document were alive when this document was produced in the trial.

As correctly submitted by Ms. Sudharshani Coorey, this document will attract the operation of Section 90 of the Evidence Ordinance and moreover the 6th and 7th Defendant-Appellants had not objected to, nor did they allow the marking of the document subject to proof.

The applicability of Section 90 of the Evidence Ordinance in relation to a deed in a partition suit surfaced to the fore in C.A. 1247/2000 (C.A. minutes of 28.06.2018) and I had occasion to comment on the provision thus:-

*".....The principle underlying Section 90 is that if a document, 30 years old or more, is produced from proper custody and is, on its face, free from suspicion, the court may presume that it has been signed or written by a person whose signatures it bears or in whose handwriting it purports to be. The ground of the rule is the great difficulty, indeed in many cases, the impossibility of proving the handwriting, execution and attestation of documents in the ordinary way after a lapse of many years.*

*Another ground is the circumstances of age, or long existence of the document, together with its place of custody, its unsuspicious appearance, and perhaps other circumstances, suffice, in combination, as evidence to be submitted to Court.*

*Proof of custody is required as a condition of admissibility to afford the court reasonable assurance of the genuineness of the document as being what it purports to be.*

*Section 90 does away, ordinarily, with the necessity of proving those documents, for documents 30 years old are said to prove themselves, that is, no witnesses need, unless the court so requires, be called to prove their execution or attestation.*

*This section does away with the strict rules of proof enforceable in the case of private documents by giving rise to a presumption of genuineness with regard to documents more than 30 years old....."*

But the question remains whether the bridegroom could have signed the deed in order to signify the acceptance on behalf of his bride. When I peruse the English translation of the *Kadutham* **(P5)**, I find the word '*assigned*' appearing just after the word '*signed*' opposite the name of the bridegroom. It is arguable that the husband was assigned the task of affixing his signature on behalf of his bride, having regard to the fact that a woman of Islamic faith, cloistered or otherwise in the 19th century would have hardly ventured out to sign a *Kadutham* in front of men particularly on a day her betrothal *(Nikah)* was taking place. There is also the probability that the gift may have been assigned to the bridegroom.

Quite germane to this aspect of the matter, Ms. Coorey pointed out that even in the trial court, the Plaintiff never came forward to give evidence and instead it was her husband who took the witness stand. Her argument was that time and tide had marched on since 1894 but notwithstanding the march of times, in the trial that began in 1996, the Plaintiff *Kadija Beebi* never put her best foot forward to testify.

In my view the Indian case which I have cited above ***Kulu Beg Afzal Beg v. Gulzar Beg Lal Beg***, AIR 1946 NAG 357 validates an implied acceptance and the bridegroom's signature must be treated as an acceptance of the deed of gift on behalf of the bride, given the times of yore in which the *Kadutham* came to be executed. I have said that the use of the word "*assigned*" in the *Kadutham* may mean two things. Either the bridegroom was assigned the task of accepting the gift on behalf of his bride or the gifted land was assigned to the bridegroom.

Otherwise why should the word "*assigned*" appear beside the name of the bridegroom? In Black's Law Dictionary (Tenth Edition, 2014), Assignment has been defined to be a transfer of rights or property. In other words an assignment is a transfer or making over to another of the whole of any property, real or personal. So when this word is used in the *Kadutham* opposite the signature of the bridegroom, it is intentional and connotes an assignment of the dower to the bridegroom, which he had accepted by appending his signature to the *Kadutham* on 22.06.1894. I must acknowledge that the assignment is as non-notarial as the gift itself. But despite the informality *Kadutham* was recognized in this country and informality of these documents arises because a gift (*Hiba*) does not require formalities.

Though a Muslim woman is a feme sole, there is nothing in Muslim law that prevents a *Kadutham* being assigned to her husband. In the circumstances I hold that the gift was validly accepted and on the question of whether the 2nd requirement of a valid gift namely the donees went into possession, evidence is rife for their possession to be inferred from attendant and concomitant circumstances.

In fact the learned Additional District Judge has himself come to the conclusion that the Plaintiff who traces her title to the donee Kadeeja Umma had obtained her prescriptive rights on the land and it is singularly pertinent to point out that the 6th and 7th Defendant Appellants have failed to prove possession on their part nor have they adduced any evidence of possession on the part of their predecessors in title.

One has only to look at the report of the surveyor who conducted the preliminary survey to gather the extensive possession that the Plaintiff, the 1st Defendant (the predecessor in title of the 8th Defendant) and 4th Defendant. Only those who had long standing interests in the land had claimed before the surveyor and the 6th and 7th Defendants were nowhere there near the surveyor to assert any rights to the land. Neither the 13th nor the 14th Defendant was present at the survey. Some of the improvements on the land are so old that it is no wonder that the learned Additional District Judge came to the right conclusion that the Plaintiff had prescribed to the land. The prescriptive rights would not have been possible, had Kadeeja Umma and her husband not gone into possession.

The finding of the learned Additional District Judge that the Appellants had not prescribed to the land is flawless having regard to the fact that they were conspicuous by their absence from the preliminary survey and there is want of evidence at the trial of any prescriptive title accruing to them.

In the circumstances I would perforce affirm the judgment of the court *a quo* dated 03.11.2000 and proceed to dismiss this appeal.

JUDGE OF THE COURT OF APPEAL