

GL 102

4, 1953

No. 38 of 1951.

In the Privy Council.

UNIVERSITY OF LONDON
W.C.1.

- 9 FEB 1954

ON APPEAL

FROM THE SUPREME COURT OF THE ISLAND OF CEYLON. *UNFINISHED*
LEGAL STUDIES

33499

BETWEEN

NOORUL MUHEETHA

*Substituted
Defendant-Appellant*

AND

Mrs. SITTIE RAFEEKA LEYAUDEEN

10 MOHAMED AWFER

MOHAMED LAFIR

Mrs. SITTIE SAMEENA AZVER and

AYNUL NASEERA

Plaintiffs-Respondents

Case for the Appellant.

1. This is an appeal from the judgment and decree of the Supreme Court of the Island of Ceylon dated the 26th July 1950, dismissing the Appellant's appeal against the judgment and decree of the District Court of Colombo dated the 31st May 1945 whereby the trial Judge of the said District Court (Samarakoon, A.D.J.) granted the Respondents a declaration
20 that they were entitled to certain premises at 57 Messenger Street Colombo and ordered that the Defendant be ejected from the said premises that the Plaintiffs be restored to possession of the same that the Defendant should pay to the Plaintiffs damages at the rate of Rs.350/- per annum restricted to two years prior to the date of the action and damages at the same rate thereafter until the Plaintiffs were restored to possession, and that the Defendant should pay the Plaintiffs' costs of the action.

2. The parties are Muslims. The premises in dispute were the property of Suffra Umma, the widow of Meera Lebbe Marikar Idroos Lebbe Marikar. Her eldest son Idroos Lebbe Marikar Mahomed Sathuck was
30 the original defendant in these proceedings. Her second son Idroos Lebbe Marikar Mahomed Zain was the father of the Respondents.

pp. 39-42.

3. On the 28th June, 1927, Saffra Umma entered into a deed of gift whereby she purported to give and grant the said premises to the Respondents with the reservation of a life interest to herself. The said deed included the following passages :—

p. 39, l. 41.

“ To have and to hold the said premises hereby conveyed or expressed so to be with the appurtenances thereof which are of the value of Rupees Five Thousand unto them the said Sittie Rafeeka, Mohamed Awfer, Mohamed Laafir, Sittie Sameena and Aynul Faseera their heirs and executors and administrators in equal shares subject to the terms conditions reservations and restrictions 10 following that is to say that she the said Saffra Umma doth hereby reserve to herself the right to recover receive and enjoy the rents profits and income of the said premises during her lifetime and after her death the same shall devolve upon the said Donees who shall not sell mortgage or otherwise alienate the said premises or any part thereof nor lease the same for any period exceeding three years at a time and after the death of each of them the share of such of them so dying shall devolve upon his or her surviving child or children according to Mohammedan Law.”

* * * * *

p. 40, l. 15.

“ Provided always that in the event of the said Donees or any 20 of them attaining his or her marriageable age no marriage shall be contracted or effected without the approval and consent of the Donor (if she be living) or in her absence the said Idroos Lebbe Marikar Mohamed Sathuk being first obtained as he is the Wali under the Muslim Law.”

* * * * *

p. 40, l. 28.

“ And the said Idroos Lebbe Marikar Mohamed Sathuk who is the paternal uncle of the said Donee 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 30 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.

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. 40

In witness whereof the said Saffra Umma Idroos Lebbe Marikar Mohamed Sathuk and the said Sheka Marikar Fatheela Umma have hereunto and to two others of the same tenor and date set their respective hands at Colombo on this 27th day of May One thousand Nine hundred and twenty-seven.”

4. On the 4th February 1948 Saffra Umma entered a further deed of gift whereby she revoked the said deed of gift dated the 27th May 1927, and gave and granted the said premises to her elder son the said Idroos Lebbe Marikar Mahomed Sathuck for his life and after his death to his son Mahomed Sathuck Mohamed Huzain. pp. 43-5.

5. Saffra Umma died on the 6th December 1929. On the 31st May 1933 Sheka Marikar Fatheela Umma was appointed curator of the estate and guardian of the persons of the Respondents. p. 46.
p. 47.

6. By a plaint dated the 27th September 1943 the Respondents
10 instituted—

THE PRESENT SUIT

pp. 7-8.

against the said Idroos Lebbe Marikar Mahomed Sathuk pleading (*inter alia*) that he had no manner of right or title to the said premises but had been since the 6th December 1929, in wrongful and unlawful possession of the same denying the Plaintiffs' right thereto and had caused the Plaintiffs loss and damage of Rs.450 per annum. They prayed for the relief which was ultimately granted by the trial judge, as set out in paragraph 1 hereof.

7. By his Answer dated the 3rd February 1944, the Defendant
20 denied that the deed of 28th June 1927 (No. 1428) was valid or effective to pass to the Plaintiffs Saffra Umma's right, title and interest in and to the premises. He further pleaded that by the deed of 4th February 1928 (No. 1483) Saffra Umma gave the said premises to him and that he had ever since been in lawful possession. p. 11.

8. The following issues were framed :—

(1) Was Deed No. 1428 of 28.6.1927-Pl valid and effective
to pass to the Plaintiffs right title and interest in the premises
forming the subject matter of this action ? p. 16.

30 (2) If so, are the Plaintiffs entitled to be declared owners of the said premises as against the Defendant ?

(3) Has the Defendant been in wrongful possession of the said premises since 6.12.1929 ?

(4) If so, what damages are the Plaintiffs entitled to ? (Damages agreed upon at Rs.350/- per annum, restricted in the case of all the Plaintiffs to two years prior to date of action and damages suffered thereafter).

(5) Was the said Deed No. 1428 duly accepted by or on behalf of the donees ?

(6) If not, have the Plaintiffs any title to the land in dispute ?

40 (7) Was the said Deed No. 1428 expressly revoked by the donor Suffra Umma by her subsequent Deed of Gift No. 1483 of 4.2.1928 ?

(8) If so, have the Plaintiffs any title to the land in dispute ?

(9) Is there a misjoinder of causes of action ?

(10) If so, can the Plaintiffs maintain this action ?

p. 14, l. 32. 9. The only witness called was the second Respondent whose evidence included the following passage :—

“ The Deed of Gift P1 has been accepted by my mother on our behalf.”

Cross-examined : “ Before 6.12.1929 my grandmother was in possession of the land in dispute. Neither I nor my brothers and sisters who are the plaintiffs in this action had possession of this property prior to that date.”

Q.—“ You know that your grandmother executed Deed of Gift 1483 of 4.2.1928 in favour of your uncle the defendant ? ” 10

A.—“ I have heard of it.”

Re-examined : “ During my grandmother’s lifetime she did not send us the income from these premises.”

p. 15, l. 1. 10. The Defendant’s advocate put in evidence the Deed of 4th February 1928 (No. 1483).

p. 17, l. 4.
p. 1. 11. The learned trial judge held that once it was admitted that the deed of 28th June 1927, created a fidei commissum the transaction as a whole must conform to the requirements of Roman-Dutch law, under which the surviving parent could accept a gift on behalf of the minor children. He held therefore that the acceptance by the mother on behalf 20 of the minor children was a valid acceptance. He further held that, since the said deed was governed by Roman-Dutch law, and since the said deed contained no reservation of the right to revoke, the earlier gift remained valid despite the revocation contained in the later deed of 4th February 1928. He therefore gave judgment as aforesaid in favour of the Respondents. A decree was passed accordingly.

p. 17, l. 33.
pp. 18-19.

12. The Defendant’s grounds of appeal to the Supreme Court of the Island of Ceylon included the following :—

“ (c) It is submitted that Deed P1 fails for want of due and proper acceptance under Muslim Law. 30

p. 22. “ (D) It is further submitted that it was open to Saffra Umma the donor, during her lifetime and before delivery of premises passed on to the donors in P1 to revoke the said Gift and donate the premises in question to the Defendant-Appellant.”

p. 5, l. 32.
pp. 48-9. 13. In or about January 1946 Idroos Lebbe Matikar Mohamed Sathuk, the original Defendant, died. On the 17th June 1948, letters of administration were granted to his widow, the present Respondent, who on the 23rd August 1948 was substituted for the original Defendant.

p. 24, l. 30.
p. 25, l. 23. 14. The principal judgment in the Supreme Court was delivered by Pulle, J., who held that there was ample authority for the statement 40 that in Muslim law a mother was not the natural guardian but that in the circumstances of this case, he did not see anything objectionable in regarding

Fatheela Umma, in the Roman-Dutch Law sense, as a natural guardian entitled to accept the Gift for and on behalf of her minor children. His judgment included the following passage :—

“ I appreciate that guardianship is perhaps more a matter of status than of capacity but even here judicial opinion does not favour the rigid application of the *lex domicilii*. Lord Greene, M.R., is quoted at p. 256 (ib) as saying :—

10 “ It would be wrong to say that for all purposes of the law pp. 25-6.
of the domicile is necessarily conclusive as to capacity arising from status . . . There cannot be any hard and fast rule relating to the application the law of the domicile as determining status and capacity for the purpose of transactions in this country.”

“ In my judgment the validity of the acceptance by Fatheela Umma has to be determined solely within the framework of the Roman-Dutch Law. If she were governed by that law, she would on the facts of the case be the natural guardian of her children and, therefore, empowered to accept the Gift on their behalf.”

20 The learned Judge considered whether the principles of Muslim law on which the Appellant relied could be regarded as part of the law applicable to Muslims in Ceylon. His judgment included the following further passages :—

“ No authority has been cited showing that a Muslim widow pp. 26, ll. 19-20.
in Ceylon is not regarded as the natural guardian of her minor children.

30 “ One point, therefore, clearly emerges from a consideration pp. 26-7.
of the cases on this point that before Muslim Law could be applied there must a *cursus curiæ* in favour of applying that law. There is no *cursus curiæ* of which I am aware which deprives a Muslim widow of a preferential right to the custody and guardianship of her minor children and to be in charge of their property. It would indeed be strange if a muslim widow having the preferential right to administer her husband's estate under Section 523 of the Civil Procedure Code, the title to a part of which estate would vest in her children, is not to be regarded as their natural guardian. In the result I find that the Appellant is not entitled to have recourse to Muslim Law to defeat the Plaintiffs' claim that Fatheela Umma was empowered by the federal law of land to accept the gift.

40 “ For the reasons which I have stated the Appellant's contention that the Gift to the Plaintiffs was bad for want of a valid acceptance pp. 27, l. 10.
fails.

“ I would dismiss the appeal with costs.”

Dias, S.P.J., agreed. A decree was passed accordingly dismissing the pp. 27, l. 15.
appeal with costs. p. 27.

15. Conditional leave to appeal to His Majesty in Council was p. 29.
granted on the 25th August 1950, and final leave on the 17th October 1950. p. 32.

16. The Appellant humbly submits that this appeal should be allowed and the judgments and decrees of the Courts below set aside and that the Respondents claim should be dismissed with costs throughout for the following amongst other

REASONS.

- (1) BECAUSE it is clear from express terms of the deed of 28th June, 1927, that it was executed under Muslim Law and its execution is therefore governed by Muslim Law and not Roman-Dutch Law.
- (2) BECAUSE under Muslim Law a mother cannot be the guardian of her child and therefore Suffra Umma's gift to her grandchildren failed for want of a valid acceptance. 10
- (3) BECAUSE even if there was a valid acceptance the gift failed for want of transfer of possession.
- (4) BECAUSE even if the gift and the acceptance were valid Suffra Umma had the right under Muslim Law to revoke such gift at any time before her death and she did in fact revoke it.
- (5) BECAUSE the Supreme Court erred in holding that before Muslim Law could be applied in Ceylon there must be a *cursus curiæ* in favour of applying that law. 20
- (6) BECAUSE even if the execution of the said deed is governed by Roman-Dutch Law the gift failed for want of valid acceptance.

C. S. REWCASTLE.

DINGLE FOOT.

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BETWEEN

NOORUL MUHEETHA - *Appellant*

AND

**Mrs. SITTEE RAFEEKA
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Case for the Appellant

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