1941 *Present :* **Moseley S.P.J. and Keuneman J.**

ABDUL CAFOOR *v.* PACKIR SAIBO.

*3—D. C. Badulla, 6,636.*

*Muslim law—Donation—Right of possession postponed—Gift invalid.*

Where a deed of gift by a Muslim provided *inter alia* as follows :—

(1) That the said M. N. (the donor) shall and will have the full, free and undisturbed use, occupation and enjoyment of the said land and premises hereby gifted and granted as aforesaid during the time of her natural life without any let or hindrance whatever from or by the said M. A. K. (the donee), his heirs, executors, administrators and assigns.

(2) That after the death of the said M. N. the said M. A. K. and his aforewritten shall be at liberty to enter into and to take possession of the said land and premises.

*Held*, that the deed of gift must be construed according to the principles of the Muslim law and that as immediate possession did not pass to the donee, the gift was inoperative.

*Casie Chetty v. Mohamed Saleem* (42 *N. L. R.* 41) followed.

APPEAL from a judgment of the District Judge of Badulla.

*N. E. Weerasooria, K.C.* (with him *E. A. P. Wijeyeratne*), for appellant.

*H. V. Perera, K.C.* (with him *S. J. V. Chelvanayagam* and *M. I. M. Haniffa*), for respondents and added respondents.

*Cur. adv. vult.*

May 23, 1941. MOSELEY S.P.J.—

This was an action for declaration of title to certain property which, it is agreed, was on April 21, 1904, owned by one Meynoon Natchia. On that date she executed a deed of gift, P 1, in favour of the appellant. On June 21, 1934, she revoked P 1, and on the same date executed deeds by virtue of which the respondents ultimately came into possession of the property. Hence this action which hinges on the validity or otherwise of the deed P 1, the relevant portions of which are set out hereunder :—

> "Whereas the said Lewena Constable Meynoon Natchia has agreed with her adopted son Srail Lebbe Marikar Abdul Kaffoor aforesaid to gift, grant, assign, transfer, set over and assure unto him the said Srail Lebbe Marikar Abdul Kaffoor the land, tenement and premises hereafter in the schedule hereto more particularly described subject however to a primary mortgage thereof in favour of the late Mrs. Edith Bartholomuesz of Badulla under a bond bearing No. 2859 dated August 6, 1898, attested by the said B. L. Potger of Badulla, Notary Public.

Now this indenture witnesseth that in pursuance of the said agreement and in consideration of the natural love and affection which she the said Lewena Constable Meynoon Natchia, has and bears unto her said adopted son, Srail Lebbe Marikar Abdul Kaffoor aforesaid, she the said Lewena Constable Meynoon Natchia doth hereby give, grant, assign, transfer, set over and assure by way of gift the land and premises hereinafter more particularly described with their and every of their appurtenances unto him the said Srail Lebbe Marikar Abdul Kaffoor, his heirs, executors, administrators and assigns.

To have and to hold the said land and premises with their and every of their appurtenances unto him the said Srail Lebbe Marikar Abdul Kaffoor, his heirs, executors, administrators and assigns for ever, subject however to the following covenants, conditions, and reservations herein set forth and contained, namely :—

(1) That the said Lewena Constable Meynoon Natchia shall and will have the full free and undisturbed use, occupation and enjoyment of the said land, premises and of the buildings standing thereon, hereby gifted and granted as aforesaid, during the term of her natural life without any let or hindrance whatsoever from or by the said Srail Lebbe Marikar Abdul Kaffoor, his heirs, executors, administrators and assigns.

(2) That after the death of the said Lewena Constable Meynoon Natchia he the said Srail Lebbe Marikar Abdul Kaffoor and his aforewritten shall be at liberty to enter into and to take possession of the said land and premises.

(3) That the said Lewena Constable Meynoon Natchia doth hereby bind herself that she shall not nor will at any time hereafter revoke, cancel, annul or make void the gift hereby made as aforesaid on any reason or pretext whatsoever.

And the said Srail Lebbe Marikar Abdul Kaffoor doth hereby thankfully accept and receive the above gift under and subject to the terms and restrictions herein before set forth and contained."

The parties to the deed are Muslims and the question for decision is whether it is to be construed according to the principles of Muslim law or those of Roman-Dutch law. I may say at once that it is common ground that the appellant never entered into possession. The respondent's case is that the deed is governed by Muslim law and that, since possession was not given, the deed is inoperative. For the appellant it is contended that the reservation of a life interest to the donor, the stipulation that the donee is entitled to possession after the death of the donor, and the covenant not to revoke the deed point to the intention of the parties to contract under Roman-Dutch law, in which case the deed is operative in favour of the appellant. The latter relies in particular upon the clause in the deed which expressly postpones possession. No such clause, it is contended, appears in any deed which has been the subject of consideration by the Privy Council or by this Court, and we are invited to infer therefrom an expression of intention on the part of the donor to enter into a contract apart from the Muslim law.

On behalf of the respondents it is argued that Muslim law applies *prima facie* to a deed entered into by Muslims, and that the matter is placed beyond doubt when, as in the case of the deed before us, title passes with the execution of the deed. We have had brought to our notice all the authorities relating to the construction of such deeds from *Weerasekere v. Peiris* [1] to *Casie Chetty v. Mohamed Seleem et al.* [2]. In the last-mentioned case Keuneman J. after a careful review of the authorities to which I have referred and in particular of *Weerasekere v. Peiris* (*supra*) and *Sultan v. Peiris* [3], between which he was of opinion that there was no conflict, felt "constrained to hold that in the case of Muslims, where the deed of gift manifests an intention to make an immediate transfer of the dominium, the Muslim law is applicable. In such a case, if possession is not given by the donor to the donee, one of the conditions essential under Muslim law has not been complied with and the deed of gift is invalid".

At a somewhat late stage in the argument Counsel for the appellant sought to show that the immediate passing of dominium is a circumstance which is common to all gifts made *inter vivos* and should not therefore be vested with the significance which it has been sought to attach to it. He drew our attention to the case of *Waas v. Perera et al.* [4]. The deed there under consideration contained a covenant not to alter or change the gift and provided that possession should pass after the death of the grantor. Drieberg J. remarking on the frequency of such donations, held that there was "abundant authority that they are donations *inter vivos*, and as such

[1] *34 N. L. R. 281.*
[2] *42 N. L. R. 41.*
[3] *35 N. L. R. 57.*
[4] *32 N. L. R. 69.*

*the subject of the gift* vests at once in the donee and it is only the *delivery of the property* which is postponed to a later date, and the consequence is that the property is transmitted to the donee's heirs if the donee happens to die before the donor ".

The decision in that case was followed in *Fernando et al. v. Soysa*[1] in which Ennis A. C. J., after considering a passage from *Maasdorp, Vol. III., page 99,* which is based upon *Voet (Bk. 39, Tit. 5, para. 3)* observed that " it appears from *Voet* that a donation *inter vivos* vests at once in the donee ". It will be observed that in *Waas v. Perera (supra)* Drieberg J. elaborates this quotation from *Voet* and describes " *the subject of the gift* " as vesting immediately in the donee. In *Uduma Levvai v. Mayatin Vava et al.*[2], Grenier A. J. referring to the recognition by Roman-Dutch law of donations *inter vivos* which are to take effect after the death of the donor said, " the gift is a present, one taking effect immediately on due acceptance by the donee, but the possession of the thing donated is postponed till the death of the donor ".

It seems to me that the point for our decision is, what precisely does pass in the case of such a donation when possession is postponed. It is abundantly clear from the authorities cited that whatever passes is sufficient to enure to the benefit of the donee's heirs if the donee should predecease the donor, but Counsel for the respondents contends that it is not the *title* which passes, but merely a *spes.* It will be observed that in none of the authorities quoted is it said that in the case of a donation *inter vivos* it is the " title " or " dominium " which passes. In fact in the passage from *Voet (Bk. 39, Tit 5, para. 4)* the point under consideration was not the passing of the dominium in the subject-matter of the gift, but the technical distinction between *donationes inter vivos* and *donationes mortis causa. Maasdorp,* however, in a passage on the same page quoted by Ennis A. C. J. in *Fernando et al. v. Soysa (supra)* sets out the position as follows :—

> " When the donation has not been completed by transfer or delivery, but has, nevertheless, been accepted by the donee, the latter will have a right of action against the donor to compel him to specific performance of his agreement."

He draws a sharp contrast between the position in such a case and that in which donation is completed by delivery in which case the effect will be to pass " the ownership in the subject-matter of the donation " to the donee. In support of the proposition he relies upon *Voet (Bk. 39, Tit. 5, para. 19)* in which the learned commentator, speaks of the passing of the " dominium ".

It seems to me therefore that in this respect the argument of Counsel for the respondents is well supported and that where a donation *inter vivos* has not been completed by transfer or delivery, what passes is merely a right to enforce a contract.

A reference to the deed before us the pertinent portions of which are set out above indicates, in my view, the immediate transfer of the dominium in the property, a view which was held by the learned District Judge.

[1] *21 N. L. R. 114.* [2] *10 N. L. R. 347.*

Following the view expressed by Keuneman J. in *Casie Chetty v. Mohamed Saleem et al.* (*supra*) I think that the District Judge was right in holding that the deed P 1 should be construed according to Muslim law. The failure, therefore, of the appellant to obtain possession renders the deed inoperative.

I would therefore dismiss the appeal with costs.

KEUNEMAN J.—I agree.

*Appeal dismissed.*