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1932 *Present :* **Garvin S.P.J. and Maartensz A.J.**

HASHIM *v.* MOHIDEEN

145—D. C. (Inty.) Colombo, 31,077

Trust—Conveyance in trust for maintenance of minors—No gift over to donees —Absence of provision for ultimate destination of property—Resulting trust—Trusts Ordinance, No. 9 of 1917, s. 85.

Where property was gifted and conveyed by A to B to be held by the latter in trust for the grandchildren of A during their minority and subject, *inter alia*, to a life interest in A, and to the condition that B should, during the minority of the donees, recover the rents and apply them for the maintenance of the minors, after making the disbursements necessary for taxes and repairs,—

Held, that the deed did not amount to a gift to the minors but a conveyance to B in trust for them during their minority.

There being no provision for the destination of the property on the attainment of majority of the minors, the trustee must hold the property for the benefit of the author of the trust or her legal representatives.

ONE Awwa Umma conveyed property to first defendant to be held in trust for plaintiff and his brother, who were her grandchildren, during their minority, reserving to herself a right to the rents and profits. She kept the deed of gift with her. The gift was accepted for the minors by the first defendant. Thereafter Awwa Umma sold the land to the second defendant, who gifted it to the third defendant. Plaintiff after attaining majority brought this action to vindicate his title to the land. The District Judge gave judgment for the plaintiff.

H. V. Perera, for defendants, appellants.—Immediate seisin is necessary for the validity of a gift in Muslim law. Where the property is vested in a trustee for the minors seisin must be given to the trustee. Where a life interest is reserved to the donor, the trustee can get seisin only on the death of the grantor. This is not a case similar to one where a parent gifts to a child and keeps the deed with himself. Here the trustee is in a position to keep the deed. But the grantor keeps it. The subsequent deed of sale entirely ignores the deed of gift. This is a clear indication of revocation as in Kandyan law, where the sale is deliberate and on the basis that the vendor is owner.

For the effect on a gift of the reservation of a life interest see *Weerasekere v. Peiris*[1]. For the gift to be valid not merely possession but legal title must be given. A condition may then be imposed on the donee. It must be always on the donee to be observed after he gets possession. Here possession by the trustee is to commence after the death of the donor who reserves the rights to be enjoyed by her. This is a right that may be transferred. It is the reservation of a right not the imposition of a condition.

[GARVIN J.—How do you get over Ordinance No. 10 of 1931 ?]

The Ordinance was not in operation at the time of the action.

[GARVIN J.—The Ordinance declares what is the law. It is intended to remove all doubts. No other law is applicable.]

It is a change of the law. It can take effect only after the law has been changed. In India it has been held that the Muslim law applies even where the return is in the form of a trust.

[GARVIN J.—The Ordinance says that this is the only law applicable in these matters.]

The Ordinance says "shall be".

[GARVIN J.—This is not a change of the law.]

The word "applicable" merely means "relating to". It does not mean "to be applied by the Courts". The law is not a matter affecting the Court only. It is a matter that concerns private individuals as well.

[MAARTENSZ J.—"Shall" is imperative. It does not indicate futurity.]

It is imperative. But because it is imperative it necessarily implies futurity. If it was a declaratory statute the word would be "is". One must distinguish between rules of procedure which must guide the Court and rules of substantive law.

In re Corell[2] is a case of a true declaratory statute. That is not an Ordinance defining the law because in certain parts it obviously enacts new law and repeals previous Ordinances. The expression "it is declared" to make new law is not incorrect and not uncommon (*Harding v. Commissioner of Stamps, Queensland*[3]). See the Removal of Doubts Ordinance regarding Kandyan law, No. 14 of 1909. Language is employed there which is unambiguous. The proviso to section 3 changes the law even if the section merely declares the law. Section 4 does not purport to declare the law.

Even if the Ordinance applies and the case is to be governed by Roman-Dutch law the plaintiff has no title. The deed creates a trust during minority. As soon as the party attains majority there is a resulting trust in favour of the grantor (section 85, Trusts Ordinance). There is no gift over to the minors. Even if Awwa Umma had no title at the date of the transfer, the subsequent title accuring to her on the expiration of the trust will enure to the benefit of her vendees.

[1] *32 N. L. R. at 185.*

[2] *(1907) 1 Ch. 249.*

[3] *(1898) A. C. 769.*

N. E. Weerasooria (with him *E. B. Wickramanayake*), for plaintiff, respondent.—Parties have gone to trial on the basis that the gift was a gift to the children. The intention of the deed is that the first defendant, in the event of the donor's death, collects the rents for the minor's maintenance.

[GARVIN J.—This is an express conveyance to the first defendant.]

No issue was raised at the trial as to whether or not there was a gift over to the minor beneficiaries on their attaining majority. It was not pleaded in the answer. The intention of the donor was obviously to benefit her grandchildren, the beneficiaries.

February 1, 1932. GARVIN S.P.J.—

This was an action for a declaration that the plaintiff was entitled to a quarter share of the premises described in the plaint. He pleaded, and this is an admitted fact, that one Awwa Umma was the owner of the premises in question. The plaintiff and his brother are grandsons of that Awwa Umma. During her lifetime, Awwa Umma executed a deed bearing No. 4,534 and dated February 10, 1913, which relates to a half share of the premises. It is upon this deed the plaintiff bases his claim to a quarter share, presumably allocating the remaining quarter to his brother. The learned District Judge treated the deed as a gift to the plaintiff and his brother, who were then minors. Applying what appeared to him to be the correct principles of the Muslim law he held this to be a gift by a paternal ancestor to the two minors, and, therefore, one which was complete without seisin. He then proceeded to deal with the question of the reservation by the donor of the life interest to herself and expressed the opinion that this did not vitiate the gift. He next addressed himself to the question whether the deed had been revoked, and, while holding that the deed was one which might have been revoked, held that in fact it had not been revoked. Upon the basis of this finding he declared the plaintiff entitled to the share claimed by him.

Now the whole of the learned District Judge's judgment proceeds upon the assumption that this is a gift by Awwa Umma to her two grandsons. But the true effect and purpose of the deed is set out by the plaintiff in paragraph 3 of his plaint, in which he alleges that "the said Awwa Umma gifted and conveyed an undivided half share of the said premises to the first defendant to be held by the first defendant in trust for the plaintiff and the plaintiff's brother Mohamado Abdul Cader Mohamed Makeen during their minority and subject *inter alia* to a life interest in favour of the said Awwa Umma and to the condition that the first defendant should during the minority of the said donees recover the rents of the said premises and apply the same to maintenance of the said donees after making disbursements necessary for taxes and repairs". This may be taken to be a fair summary of the contents of this deed. It is clearly not a gift to her grandsons but a conveyance to the first defendant in trust for them during their minority. It is unnecessary therefore to follow the learned District Judge or to consider how far he is correct in his view as to the law applicable had this been in fact a gift by Awwa Umma to her grandsons. The only point in connection with which it might perhaps be necessary to apply

the principles of the Muslim law would be to determine whether this grant to the first defendant is a valid gift under the Muslim law, but it is unnecessary to do so for it seems to me that even if it be treated as a perfectly valid gift in trust the plaintiff must fail in this action.

Now the intention of the donor Awwa Umma is perfectly clearly and plainly expressed in her deed. She starts by stating that she "intended to grant and convey an undivided half part of the aforesaid allotment of land unto my son Mohamado Ibrahim Saibo Mohamado Mohideen (the first defendant) to hold in trust for my grandchildren Mohamado Abdul Cader Mohamado Hashim (the plaintiff) and Mohamado Abdul Cader Mohamado Makeen during their minority and subject to the terms and conditions hereinafter expressed". Then follow the words by which she grants, assigns, transfers, and sets over the shares unto the said Mohamado Mohideen "to be held by him in trust for and unto the said Mohamado Abdul Cader Mohamado Hashim and Mohamado Abdul Cader Mohamado Makeen during their minority subject to the terms and conditions hereinafter mentioned". Lastly we come to the habendum which is as follows:—"To have and to hold the said premises hereby conveyed or intended so to be . . . . unto the said Mohamado Ibrahim Saibo Mohamado Mohideen in trust and to and for the use of the said Mohamado Hashim and Mohamado Abdul Cader Mohamado Makeen, their heirs, executors, administrators, and assigns until they attain the age of majority upon and subject to the following terms and conditions that is to say: (1) That I do hereby reserve unto myself the right and privilege to enjoy the rents, issues, and profits of the said premises during my natural life. (2) That after my death the said Mohamado Ibrahim Saibo Mohamado Mohideen shall hold the same in trust for the said Mohamado Abdul Cader Mohamado Hashim and Mohamado Abdul Cader Mohamado Makeen until they attain the age of majority."

This is, therefore, beyond all question a conveyance to the first defendant in trust for the plaintiff and his brother until they attain their majority subject to the reservation to the donor of a life interest. Assuming as I have done earlier that this is a good and valid grant to the first defendant notwithstanding the reservation of a life interest and any other objections that might possibly have been raised to it, it remains for us to consider whether in terms of the trust the plaintiff who has now attained his majority is entitled, as he maintains, to a quarter share of these premises. Wherever this trust is mentioned throughout the deed it is definitely stated to be a trust for the minors during their minority. The only variation in the phraseology is in the second condition by which the trustee is told that he must hold the same in trust after the death of the donor and until the minors attain their majority. The donor does not in this deed expressly state what is to be the ultimate destination of the property. The question, therefore, for us is whether it is open to the plaintiff to contend that upon the attainment of majority by him and his brother it must devolve upon them. There is nothing in the language used by the donor or creator of this trust to indicate that such was her intention. Since something has been said in the course of the evidence as to the relations

between these parties it is quite conceivable that the sole object and purpose which this transaction was intended to serve was to assure that if Awwa Umma who had made herself responsible for the upbringing of these two minor children did not survive till they attained majority they would be provided for until they came of age.

This would seem therefore to be an instance of a devise of property in trust where the trust does not exhaust the entire corpus. Indeed, notwithstanding that the trust was limited to the rents and profits there is no provision made as to the ultimate destination of the property. In such a case it would seem to be the principle of the law (*vide* section 85 of the Trusts Ordinance, No. 9 of 1917) that the trustee must hold the property for the benefit of the author of the trust or his legal representative. The author of the trust is now dead. We are not in a position to say exactly who the heirs or the legal representative may be. The plaintiff's father admittedly was alive at the date of action. He would certainly under the circumstances be an heir. The first defendant, who is a son of Awwa Umma, would himself be an heir. There well may be other heirs but it is not for us here to determine who those heirs are or whether the plaintiff is to be entitled to take by intestate succession any fractional share of these premises. Moreover, it is contended that by reason of certain other deeds executed by Awwa Umma during her lifetime certain of the other defendants have acquired interests adverse to the heirs. Those are questions upon which we express no opinion and which must be left for determination in appropriate proceedings. It is sufficient for the determination of this case to say that the plaintiff has wholly failed to show that he is entitled to a quarter share of these premises upon the title which he pleaded and put in issue in this action. His action therefore fails, but it is agreed that the dismissal of his action which must necessarily follow this decision should not affect any right which he may have to claim as an heir of Awwa Umma to be entitled to a fractional share of these premises.

For these reasons we think that this appeal must be allowed and the plaintiff's action dismissed with costs in both Courts.

MAARTENSZ A.J.—I agree.

Appeal allowed.