APPELLATE CIVIL.

Before Mr. Justice Davies and Mr. Justice Boddam.

BAVA SAIB AND ANOTHER (DEFENDANTS), APPELLANTS,

v.

MAHOMED (PLAINTIFF), RESPONDENT.*

1896. July 14.

Muhammadan law—Hibbat—Incomplete gift.

Where a Muhammadan woman made an oral gift of a house to her nephew on the occasion of his marriage, but subsequent to the gift continued to live with him in the house:

Held, that the gift was null and void, as there was no entire relinquishment of the house by the donor and the case did not fall within the exceptions allowed by Muhammadan law.

SECOND APPEAL against the decree of E. J. Sewell, Acting District Judge of Tanjore, in appeal suit No. 418 of 1894, reversing the decree of A. Kuppuswami Ayyangar, District Munsif of Negapatam, in original suit No. 179 of 1893.

The facts of the case were as follows:—

Plaintiff sued to recover a house, of which he had been dispossessed by defendants, which was given to him at the time of his marriage as *hibbat* under the Muhammadan law by his mother's sister Beebee Sa. Beebee Sa had bought the house in 1879 from her husband Mahomed Madar, who had bought it in 1869 from one Avva Nachiar.

The first defendant pleaded that the sale by Mahomed Madar to his wife Beebee Sa was a nominal transaction to defeat Mahomed Madar's creditors, denied the gift to plaintiff by Beebee Sa, and claimed to hold the house under Golusan Beebee, third defendant, another wife of Mahomed Madar.

The second defendant is the husband of the third defendant.

The District Munsif found that the conveyance to Beebee Sa by her husband was a nominal one to defeat creditors, and that the gift by Beebee Sa was genuine, but was not valid because it was not reduced to writing and registered as required by

* Second Appeal No. 539 of 1895.

BAVA SAIB v. MAHOMED.

the Transfer of Property Act. He decreed against plaintiff who appealed.

The District Judge on appeal found that the gift was really made, that the provisions of the Transfer of Property Act did not apply (see section 129), and that the donee accepted the house and took possession, but that Beebee Sa, the donor, lived with him in the house until her death some four or five months afterwards. With reference to the rule of Muhammadan law that a gift to be valid must be accepted and accompanied by delivery of possession (MacNaughten's Principles, chapter v, clauses 2 and 4), and that if the donor continues to live in the house, the delivery of possession is not complete (MacNaughten's Precedents, chapter iv, case xxii), he held that, considering the relationship of the donor to the donee, and that she was maintaining him, the fact of her remaining in the house could not be held to detract from her entire relinquishment of the house given, and that the gift was valid according to Muhammadan law.

He also found that the sale by Mahomed Madar to the donor was a valid sale and gave a decree for the plaintiff with costs.

The defendants appealed.

Mr. *J. G. Smith* for appellants referred to *Ameeroonissa Khatoon* v. *Abedoonissa Khatoon*(1), *Mohimidin* v. *Manchershah*(2) and *Mogulsha* v. *Mahamad Saheb*(3).

Mr. *N. Subramaniem* for respondent.

JUDGMENT.—The rule of Muhammadan law in regard to *hibbat* is that the gift must not be implied. It must be express and unequivocal and the intention of the donor must be demonstrated by his entire relinquishment of the thing given, and the gift is null and void where he continues to exercise any act of ownership over it.

Where, as in this case, a house is the subject of the gift, if it continues to be occupied by the giver, there is no complete gift. (See case xxii at page 231 of MacNaughten's Precedents, 4th edition.)

The only exceptions are where the house gifted is given by a husband to a wife, or by a father or guardian to his minor child or ward (*vide* MacNaughten's Principles of Muhammadan Law,

(1) L.R., 2 I.A., 104. (2) I.L.R., 6 Bom., 662. (3) I.L.R. 11 Bom., 517.

4th edition, chapter v, page 51, and *Ameeroonissa Khatoon* v. *Abedoonissa Khatoon*(1)). In this case the donee is not shown to come within the exceptions, and we must, therefore, hold that the District Judge was wrong in finding the gift was valid.

We accordingly reverse the decree of the Lower Appellate Court and restore that of the Court of First Instance. The respondents must pay the appellant's costs in this and the lower Appellate Court.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Subramania Ayyar.

SUBBARAYA MUDALI (FIRST DEFENDANT), APPELLANT,

v.

MANIKA MUDALI AND OTHERS (PLAINTIFFS), RESPONDENTS.*

1896. March 23, 24, 27.

Suit for partition—Death of plaintiff subsequent to decree—Right of survivorship vested in defendant—Vested right of plaintiff's representative not affected.

M., a minor and only son by his next friend, sued his father and certain alienees of the family property for partition and obtained a decree. Subsequent to decree and pending appeal, the plaintiff died and M.'s mother was brought on the record as deceased plaintiff's legal representative:

Held, that as the representative of a deceased plaintiff can only prosecute the cause of action as originally framed, so the defendant can raise no other defence against him than he could have raised against the deceased plaintiff, and that a decree for partition operates as a severance of the joint ownership.

APPEAL against the decree of W. F. Grahame, District Judge of South Arcot, in original suit No. 1 of 1892.

Plaintiff sues in *formâ pauperis* by his next friend and grandfather for partition and delivery to him of his half share in the family immovable and movable properties specified in the plaint and to recover mesne profits. The suit is valued at Rs. 4,199-8-0.

The first defendant was plaintiff's father. Defendants 2 to 12 were alienees of certain portions of the family property under alienations created by the first defendant, the particulars of which were set forth in the plaint and schedules thereto.

(1) L.R., 2 I.A., 104.

* Appeal No. 63 of 1895.