# APPELLATE CIVIL.

*Before Sir Richard Garth, Knight, Chief Justice, and Mr. Justice Beverley.*

1884 *July* 22.

MULLICK ABDOOL GUFFOOR AND ANOTHER (PLAINTIFFS) *v.* MULEKA AND OTHERS (DEFENDANTS.)*

*Mahomedan Law—Gift of zemindaries let out on lease, and malikana rights—Mooshaa as applied to gifts of unpartitioned and undivided lands.*

The rule of Mahomedan law that no gift can be valid unless the subject of it is in the possession of the donor at the time when the gift is made, has relation, so far as it relates to land, to cases where the donor professes to give away the *possessory interest* in the land itself, and not merely a reversionary right in it.

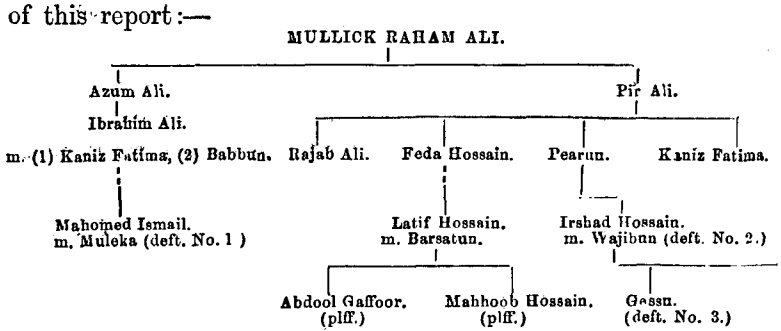
What is usually called possession in this country is not only *actual or khas possession*, but includes the receipt of the rents and profits.

There is nothing in Mahomedan law to make the gift of a zemindari, a part or the whole of which is let out on lease to tenants, invalid. Nor is there any principle by which to distinguish malikana rights from the right to receive rents or dividends upon Government securities, and gifts of such a nature may be legally conferred under the Mahomedan law.

The doctrines of Mahomedan law which lay down that a gift of an undivided share in property is invalid, because of *mooshaa* or confusion on the part of the donor; and that a gift of property to two donees without first separating or dividing their shares is bad because of *mooshaa* on the part of the donees, apply only to those subjects of gift which are capable of partition.

THE plaintiffs, the two minor sons of Latiff Hossain by their mother as their next friend, brought this suit in *forma pauperis* to recover possession of certain properties from which they had been dispossessed.

The following genealogical table will show the position of the different parties to the suit so far as is necessary for the purposes of this report:—




* Appeal from Original Decree No. 230 of 1882, against the decree of H. Beveridge, Esq., Judge of Patna, dated 20th January 1882.

The plaintiffs stated that Ibrahim Ali died in 1858, leaving him surviving Mahomed Ismail, his son, and two wives; and that, although according to Mahomedan law, the son was entitled to a 14-anna share in Ibrahim's estate, and the two wives to a 1-anna share each, yet under an arrangement to which Mahomed Ismail had consented, Babbun, who was a *nicca* wife, took as her share mouzah Mora and a *mocurrari* of mouzah Morari, and the rest of Ibrahim's estate fell to the share of Kaniz Fatima, over which she had a lien for her unpaid dower to the amount of Rs. 40,000.

They further stated that Mahomed Ismail died in 1862, leaving as his heirs his mother Kaniz Fatima, his widow Muleka, and his father's cousin Rajab Ali; and that at this time Ibrahim's estate still remained in the possession of Kaniz Fatima; that, Mussamut Pearun, a cousin of Ibrahim Ali and sister of Kaniz Fatima, died in 1876, leaving a son, Irshad Hossain; and that, Kaniz Fatima died in 1876 leaving as her heirs the plaintiffs, the grandsons of her brother Feda Hossain, and they submitted that on her death the whole of her estate vested in them.

They also contended that an allegation made by Mahomed Ishmail, defendant No. 1, in certain prior legal proceedings, to the effect that Kaniz Fatima had executed an *ikrarnama*, dated the 18th July 1873, declaring that the share in Ibrahim's estate was a 12-anna share, the remaining 4-anna share belonging to Muleka, was untrue; and asserted that Irshad Hossain had fabricated a deed of gift, dated the 25th October 1875, purporting to be executed by Kaniz Fatima, and to assign in gift all her property to her daughter-in-law, Muleka (defendant No. 1), and to Irshad Hossain, the ancestor of defendants 2 and 3; they denied the signature of Kaniz Fatima, and contended that even if it had been executed by her, the gift was invalid, inasmuch as it purported to be a gift of a joint undivided property under which the donees had never taken possession.

The property, the subject of the gift, consisted of several zemindaries, and shares in zemindaries let out to tenants; certain lakheraj properties leased out to tenants; certain malikana rights; and a considerable quantity of house property and garden lands. With regard to mouzah Morari, the *mocurrari* of which has been granted by Ibrahim Ali to Mussamut Babbun for her life, they asserted

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that, on her death, the mouzah reverted to Ibrahim Ali, and that, therefore, a 4-anna share therein passed to Kaniz Fatima, and a 12-anna share to them (the plaintiffs), and that on the death of Kaniz Fatima they became entitled to the entire 16 annas, and that the defendant No. 1 and Irshad Hossain had never been in possession of this mouzah, it having been rented to defendant No. 6 under a *dur-mocurrari* by defendants 4 and 5, the heirs of Mussamut Babbun.

They therefore brought this suit (stating that the defendants had dispossessed them on the 1st Magh 1285, F. S., from certain of these properties, and had obstructed the collection of rents from others of them on the 5th Falgoon 1285, F. S.), to have it declared that they were entitled to the estates in which Mussamut Babbun had a life interest; and for possession of the estates belonging to Kaniz Fatima as her heir-at-law, and for the cancelment of the deed of gift, dated 25th October 1875.

The defendants contended that mouzah Morari had been granted to Mussamut Babbun from generation to generation under a deed, dated the 30th August 1850; that the *ikrarnamah* of the 18th July 1873, and the deed of gift of the 25th October 1875, were both valid; and they asserted that they had been put in possession under the latter, and that the plaintiffs' suit as regards any disturbance of these documents was barred by limitation.

The Subordinate Judge found, (1) that the plaintiffs were the grandsons of Kaniz Fatima; (2) that the *ikrarnamah* and *hibanamah* were both executed by Kaniz Fatima; (3) that the defendants had been in possession under the *hiba* during the lifetime of Kaniz Fatima; (4) that the *mocurrari* granted to Mussamut Babbun was not limited to her life only; (5) that the suit was not barred as regarded the *hiba*, although it was so barred as concerned the *ikrarnamah* of 1873; (6) that the estate given by the *hiba* was an undivided estate, of which the collections were separate, and that gifts of defined shares were not liable to the objection of *mooshaa*; (7) that the *hiba* defined the share to be given to each donee, and that there being no precedent exactly in point and the Mahomedan doctors having disagreed as to whether a gift to two persons was invalid, the rule to be applied must be that of equity and good conscience, (the case not being necessarily governed by

Mahomedan law, inasmuch as s. 24 of Act VI of 1871 did not apply to gifts, and that according to that rule, there was nothing inequitable in the gift by Kaniz Fatima to her sister's son and her son's widow; he therefore dismissed the suit.

Plaintiffs appealed to the High Court.

Mr. *Twidale*, Moulvi *Mahomed Yusuf* and Babu *Saligram Singh* for the appellants.

Mr. *Twidale*.—The gift under the *hiba* is *mooshaa*, as being a gift of undivided property, the Privy Council case of *Mussamat Ameeroonissa Khatoon* v. *Mussamat Abedoonissa Khatoon* (1) is distinguishable, as the estate there was separate, and had separate collections and separate numbers. I admit that our rents are also separately collected, but the donees take the whole of the property. In vol. III, *Hamilton's Hedaya*, pp. 293, 294, 295 *Shafei* is quoted as laying down that a gift of an undivided property is invalid. *Bailie* in p. 520, 2nd Ed., says that a gift of that which does not admit of partition is invalid, even if possession is taken. In *Macnaghten's Mahomedan Law*, chap. v, s. 6, it is said that "a gift of property which is undivided and mixed with other property is void."

[GARTH, C.J.—That evidently refers to the donor retaining a portion in his own hands.]

The precedent cited at p. 199, *Macnaghten*, "of a Musalman dying leaving three wives," is an example of our case. Also see case 8 on p. 203, and the case on p. 214, question 4.

A gift of an undivided share is invalid, see *Mussamat Banoo Beebee* v. *Fukheroodeen Hosein* (2). I distinguish the Privy Council case in 23 W. R., because there they go upon the definition of the word "estate" under the Bengal Act and Regulations, and here we have no question of a revenue-paying estate.

The case of *Neermullee Bebee Chowdhrain* v. *Assudonissa Bebee* (3) decides that a gift without seizin is invalid, the villages being divided. [GARTH, C.J.—It does not appear that possession was taken.] Possession was ordered to be given, see p. 289.

As to a gift to two persons, see *Hedaya*, vol. III, Bk. XXX, p. 298, *Baillie's Mahomedan Law*, 2nd Ed., p. 524-525. The donor

(1) 23 W. R., 208. (2) 2 Select Rep., 180 (183.)

(3) 6 Select Rep., 286.

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in our case gave 8 annas to one person, and 4 annas to the other. This is invalid. See *Hedaya*, vol. 3, Bk. XXX, Ch. I, p. 295.

The case of *Mirza Kasimali* v. *Mirza Muhammad Hosen* (1) shows that between the Sunis and Sheahs there is a difference as to this point. We are Sunis, and they say such a gift is invalid.

The case of *Azeemoodin* v. *Fatima Beebee* (2) shows that a gift of a portion without division is invalid. [BEVERLEY, J.—That is a gift to only one person.] In *Baillie*, 2nd Ed., pp. 516, 529, it is laid down that if a man gives property with crops upon it and gives the land without the crops or crops without the land, it is invalid; the gift is of such a nature in our case.

Moulvi *Mohamed Yusuf* on the same side.

The title which the plaintiff seeks to enforce is that of an heir, and the defendants resist his title by setting up a title derived from the ancestor without any consideration. The Mahomedan law is opposed to an owner defeating the law of inheritance, *Ranee Khujooroonissa* v. *Enayut Hossain* (3); *Abedoonissa Khatoon* v. *Ameeroonissa Khatoon* (4.) Where an owner parts with his property without consideration the law steps in; he can only will away ⅓ of his estate, and where the heirs are poor it is not right for him to make a will at all. This also applies to gifts. See Enya, vol. III, p. 21. In our case the appellants are so poor that they sue in *formâ pauperis*, and defendant has by means of a gift done what she could not do by will. A gift is *tumleek* (the conferring of the right of ownership) over *mal* (property) without any exchange or consideration, and in order to be valid it must be perfected by possession. Under Mahomedan law there is only one way of enjoying possession, and that is by being actually in possession, *i.e.*, in *khas* possession, and therefore if your lessees are in possession you cannot be said to be in possession. You are said to be in possession if at any time that you are inclined to enter into your property no person could prevent you. Possession by a trustee or agent is possession of the owner, but possession by a usurper is not so, but as under the Mahomedan law there is no such thing as limitation, there is not therefore any necessity for a distinction between adverse possession and

(1) 5 Select Rep., 213.
(2) 1 Select Rep., 24.
(3) L. R. 3 I. A. 291.
(4) 9 W. R., 256.

possession that is not so. *Macnaghten, Mah. Law*, ch. XII. para. I.

As regards such of the gift, in the present case, as was of property let out on lease, I say that in the case of a lease, an owner is not in possession under the Mahomedan law, though he is rightfully entitled to it. I also say that *mal* or *ayn* does not include incorporeal property, and it only means property of which the owner is in possession, and mere rights cannot be said to be *mal*. See *Bailie's Mah. Law of Sale*, introductory p. xli, pp. 50 and 51 notes, whatever could be the subject matter of a sale can be the subject matter of gift. The sale of fish not yet caught is null (see *Hedaya*, vol. 2, p. 432), so is grass growing on a common (435.) Mere *rights* are not property. *Hedaya*, vol. 2, pp. 440, 441, shows that a right of way cannot be the subject of sale or gift, because it is not property. In this case some of the lands which are given are tenanted lands, and as such they cannot be the subject of gift, as the owner is not in possession, and he cannot put the donee into possession. See *Bailie's Digest*, 2nd Ed., 538; *Hedaya*, Bk. XXX, p. 291; *Macnaghten's Mah. Law*, p. 240, and p. 202 (note) case VI. p. 205. The case of *Mohinudin* v. *Manchershah* (1) show that a person cannot make a gift of property in the hands of a mortgagee. See also *Nizamuddin* v. *Zabeeda* (2); *Syad Kasum* v. *Shaista Bibee* (3).

[GARTH, C.J.—The donor can give the right to receive the rents, and that is all that purports to be conveyed in this case.]

The rents are not ear marked, how can they be the subject of gift. A person can't even make a gift of lease-hold property. There are original Arabic authorities in support of my contention, *viz.*, *Dorrul Mokhtar Book on Gift*, 635; *Tuhtawee*, vol. III. *Book on Gift*, 398, explains the last text, and clearly states that a gift of property in the hands of a lessee, is bad; *Futawa Alumgiri*, vol. IV, *Book on Gift*, chap. VI, 546; *Bailie's Digest*, 529; *Hamawi Book on Gift*, 443; *Futawa Engrawi*, vol. II, *Book on Gift*, 259; *and the marginal note to Futawa Engrawi*, vol. II, 259; and *Aynee*, a commentary on the *Kanzood Daquaiq Book on Gift*, 283.

As to the properties held by tenants on the Bhooli tenure, the "*hiba*" is invalid on two grounds: (1) because the owner had a

(1) I. L. R. 6 Bom., 650. (2) 6 N. W. P., 340. (3) 7 N. W. P., 314.

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share in the crops which the deed does not purport to give, and which therefore is not given; and (2) because on account of the ryots' share of the crops the rights of third parties were concerned in the subject of gift. As to the first ground see *Bailie's Digest*, 528; and as to the second ground see *Bailie's Digest*, 529; as to the invalidity of a gift of a thing occupied with the property of the donor, see *Inayah*, vol. IV, *Book on Gift*, 23; *Kifayah*, vol. III, *Book on Gift*, 677; *Tuhtawee*, vol. III, *Book on Gift*, 397; *Futawa Kazee Khan*, vol. IV, *chapter on Gift of Mooshaa*, 175; *Fatawa Alumgiri*, vol. IV, *Book on Gift*, 521, and Pt. II, p. 529; *Futawa Qinya*, *Book on Gift*, 215; *Futawa Engrawi*, *Book on Gift*, vol. II, 271; *Futawa Fusool Emadee*, vol. II, 757; *Futawa Engrawi*, *Book on Gift*, 263.

As to the property included in the gift, which consists of an undivided share in certain villages, such a gift is invalid on the ground of *Mooshaa*, see *Bailie's Digest*, 2nd Ed, 523 chap. II; *Dorrul Mokhtar*, *Book on Gift*, 633; *Ruddul Mokhtar*, vol. IV, *Book on Gift*, 785; *Shareh Vekaya*, *Book on Gift*, 293; *Futawa Kazee Khan*, vol. IV, *on Gift of Mooshaa*, 172, 174; *Futawa Hemadaya*, *Book on Gift*, 705. The reason for such a gift being invalid is, that the owner is not able to give possession of undivided shares to the donees.

As to the properties in which the donor had only a lessee's rights, such an interest, *viz.*, that of a ticcadar, is not *mal*, the subject of the gift was not in existence, and therefore could not be given away. (See *Tahtawi*, vol. III, p. 4).

As to the gift of the *malikana rights*, the *malikana* was not in existence at the time of the gift, it is on that ground invalid. It is not a debt due to the donor which is specially validated owing to necessity, see *Bailie's Digest*, chap. III, 532; the capacity to produce it is existent, but not the thing itself. There is no analogy between the gift of a debt and the gift of *malikana*. See as to the gift of debts, *Ruddol Mokhtar*, vol. IV, *Bk. on Gift*, *Miscellaneous*, 795; *Futwa Hemadya*, *Bk. on Gift*, 714; *Futawa Engrawi*, vol. II, *Bk. on Gift*, 258; *Futawa Engrawi*, vol. II, *Book on Gift*, p. 263.

As regards the gift of cultivated lands, the gift is bad, as in giving two bighas out of 20 bighas, the donor has specified these two

bighas by giving only the boundaries of the 20 bighas, and the subject of the gift is therefore indeterminate and undefined.

The whole gift is also bad as being made in favor of two persons. The "confusion" in such a gift is on the part of the donee; as to this, Aboo Haneefa holds it invalid, and the *Futawa* is according to this view, *Ruddool Moktar*, vol. IV, p. 780-781; *Doorull Moktar*, p. 8; and *Tahtawi*, vol. III, p. 176: whilst Mahommed says it is valid. When the donor has a share; and gives it to two persons there is confusion on both sides; as to this there is no difference of opinion. See *Bailie's Digest*, 524 and n. 525; *Hedaya*, vol. III, *Bk. on Gift*, 298; *Aiynee*, vol. IV, *Bk. on Gift*, 599; *Inayah*, vol. IV, p. 30; *Natayejolafar*, vol. III, *Bk. on Gift*, 672; *Shareh Vekaya*, *Bk. on Gift*, 292-293.

Can then such a gift as the present be rendered valid by possession? I say no, because the gift is "confused" on both sides. See *Bailie's Digest*, 523-524.

Mr. *Evans*, Mr. *Amir Ali* and Mr. *C. Gregory* for the respondents.

Mr. *Evans*.—This is the first time such objections have been taken to a gift or sale of property in the hands of ryots. As to the practice of *hibba*, it is prevalent amongst Mahomedans in order to avoid the Mahomedan law of inheritance. It is pointed out in 11 Moo. I. A., 517, that although Mahomedan law is strict with regard to the law as to wills, it is not improper to make a *hibba*. [Moulvie *Mohamed Yusuf*—That is a Sheah case.] The Sheah law makes no difference as regards seisin; at all events, any difference that there may be, was not brought to the notice of the Privy Council. As to gifts of tenanted lands being valid, see *Jaffer Khan* v. *Hubshee Beebee* (1); there the land was in possession of ryots, and the question whether the attornment by ryots to the husband was sufficient, and it was held it was; also *Nunda Singh* v. *Meer Jafier Shah* (2), a case as to the validity of the gift of a village. Also *Casim Ali* v. *Fuzund Ali* (3), where there was a gift of an undivided share to two people jointly of certain tenanted lands, and it was held a good gift. And the

(1) 1 Sel. Rep., 12. (2) 1 Sel. Rep., 5.

(3) 1 Sel. Rep., 113.

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question of *mooshaa* was not even raised in the case. See also the case of *Anundchund Rai* v. *Kishen Mohun Bunjola* (1).

The case of *Mussamat Mahtab Khatoon* v. *Mussamat Munajat Khatoon* (2), was a gift of large zemindaries, the land must have been tenanted.

In *Amina Bibi* v. *Khatija Bibi* (3), there were rented houses given; and it was there also considered that seisin by collection of rents was good seisin.

As regards the texts cited by the other side, I do not consider that they refer to the transferability of rights, of incorporeal rights; but if they do, then such views are now obsolete. *Bailee* in his Introduction to the Ed. of 1865, p. 23, points out that the law of sale has become obsolete as to certain texts.

The objections raised by the other side were not raised in the cases of *Ameeroonissa Khatoon* v. *Abedoonissa Khatoon* (4); *Muhammad Faizahmad Khan* v. *Ghulam Ahmed Khan* (5); or *Haji Mahommed Faiz Ahmed Khan* v. *Haji Golam Ahmed Khan* (6).

In *Abedoonessa's* case the Privy Council expressly say that defined collection of rents may be the subject of gift; and the Allahabad case shows that there cannot be *mooshaa* where there has been a gift of defined shares in zemindaries with separate and defined rents. Undivided property may be given to two persons, see *Bailee*, p. 33, Introd. Ed. 1865; and the case in Sol. Rep., 115 (note) I *Bailee*, p. 524, also shows that possession prevents the gift being void.

Mr. *Amir Ali* on the same side. As regards difference of opinion between Haniffa and his two disciples in some of the texts quoted, the rule to be followed is: Where there is a difference in the opinion of Haniffa and the two disciples, Haniffa's opinion is to prevail in devotional matters, and that of the disciples in worldly matters. Where the opinion of the disciples differ there the opinion which agrees with Haniffa is to be adopted. Where Haniffa's opinion differs from his two disciples, then if the difference relate to matters of justice in a worldly court of

(1) 1 Sel. Rep., 115. (note)
(2) S. D. A. of 1856, p. 750.
(3) 1 Bom. H. C., 157.
(4) L. R. 2 I. A., 87.
(5) I. L. R., 3 All., 490.
(6) L. R. 8 I. A., 25.

justice, the opinion of the two disciples will be adopted, and in other matters the opinion of the two disciples is to be adopted. See *Fatawa-i-Kazi Khan*, 1, V. A judge may, when both disciples dissent from Haniffa, decide as he thinks most just. See *Sir William Jones' Work*, vol. III, 510, and *Morley's Digest*, vol. I, p. CCLXII, Introd.

The case of *Shahazadee Hazara Begum* v. *Khaja Hossein Ali Khan* (1) shows that a *waqf* was made of a right of redemption, which is not a tangible thing; and as to gifts of *choses in action*, see *Bailie*, 531; *Hedaya*, 698. As to a gift of shares in properties, see *Kasim Husain* v. *Sharifunissa* (2). As to delivery of possession *Ranee Khujoorooniss* v. *Roushun Jehan* (3); as to the seisin of Mahomedan law see *Amina Bibi* v. *Khatija Bibi* (4).

Where a man makes a gift of a moiety of his houses to two persons, and delivers the same to both simultaneously, it is a valid gift; but if the delivery to one is before the other it would not be good, although Haniffa says it is not valid in either case, *Fatawa-i-Kazi Khan*, 282. A gift of a house to two persons is not valid according to Abu Haniffa, but the two disciples say it is valid. See *Fatawa-i Kazi Khan*. The Sheahs do not allow the invalidation of a gift by *mooshaa*, see *Shami* p. 511, where it is laid down: "If the donor or his deputy makes a division, or if the donor authorises the donee to make the division with his partner, this makes the gift complete.

Judgment was delivered by—

GARTH, C. J. (who after stating the facts, of the case, continued) The main question in the case is the validity of this deed of gift. There is no doubt that but for this deed the plaintiffs would be the heirs of Kaniz Fatima, at least to the main portion of the property. But they deny the validity of the deed on several grounds:

(1*st*) That Kaniz Fatima never executed it; (2*nd*) that if she did she was not of sound mind when she did so; and (3*rd*) that the deed is invalid by the rules of Mahomedan law.

(1) 12 W. R., 498.
(2) I. L. R, 5 All., 285.
(3) L. R. 3 I. A., 307.
(4) 1 Bom. H. C., 157 (161).

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The Judge in the Court below has found entirely in favor of the defendants. He considers, that the execution both of the *ikrarnama*, and of the deed of gift has been clearly proved, and that there is no legal objection to the validity of the deed of gift. He also finds, that the *mocurrari* to Babbun was a permanent lease, and he has dismissed the plaintiff's suit with costs.

In this Court, the main contention has been with reference to the validity of the deed of gift, and we may say at once, that we have not the least doubt as regards the execution of this deed, or as to Kaniz Fatima being perfectly well aware of what she was doing when she executed it.

We think this appears very clearly from the plaintiff's own evidence.

It is no doubt very natural for the plaintiffs, who are not in good circumstances, to struggle hard against an alienation of so large an inheritance, but on the other hand, we cannot fail to see that the probabilities are greatly in favor of the gift, because it was only likely that Kaniz Fatima, who had lived with Muleka (her daughter in-law), and Irshad Hossein on terms of affection and intimacy for many years, should do all she could to secure to them her wealth, instead of allowing it to descend to distant relations, of whom she knew little or nothing.

The question therefore in this Court, so far as this deed is concerned, has been, whether having regard to the subject-matter of the gift, and the fact of there having been no actual partition made of it at the time when the deed was executed, as between the two donees, the transaction is valid in law as against the plaintiffs.

This question has been argued before us at some length, and we are much indebted to the learned Counsel on both sides for the pains which they have taken to refer us to all the authorities upon the subject. But having heard the matter fully argued, we are satisfied that the gift is valid, and that the conclusion at which the lower Court arrived is just.

The property which is the subject of the gift consists of several zemindaries, and shares in zemindaries, let out to tenants and ryots, as such estates usually are; a good many lakheraj properties

also let out to tenants; several *malikana* rights of some value, and a variety of house property in Patna, and elsewhere, consisting of houses, sheds, roads, gardens, &c.

There is no satisfactory evidence as to how this latter property was occupied or utilized at the time when the gift was made.

The arguments on the part of the plaintiff resolve themselves into three main points:

(1*st*) That by Mahomedan law a gift cannot be made of lands which are not in the possession of the donor, nor of incorporeal properties, such as rents, malikana rights, and the like; (2*nd*) that an undivided share of a house or a zemindari cannot be made the subject of a gift; and (3*rd*) that a gift to two persons without previous division and separation is invalid.

In dealing with these points we must not forget that the Mahomedan law, to which our attention has been directed in works of very ancient authority, was promulgated many centuries ago in Bagdad, and other Mahomedan countries, under a very different state of laws and society from that which now prevails in India; and that although we do our best here in suits between Mahomedans to follow the rules of Mahomedan law, it is often difficult to discover what those rules really were, and still more difficult to reconcile the differences which so constantly arose between the great expounders of the Mahomedan law ordinarily current in India, namely, Abu Haniffa and his two disciples.

We must endeavour, so far as we can, to ascertain the true principles upon which that law was founded, and to administer it with a due regard to the rules of equity, and good conscience, as well as to the laws, and the state of society and circumstances which now prevail in this country.

Having premised thus far, we think that the first of the above points, although it has occupied some time in argument, may be very readily disposed of. In fact, it appears to us to have been already settled.

We have been referred to several authorities, and amongst others, to *Dorrul Mokhtar, Book on Gift*, p. 635, which lays down that no gift can be valid unless the subject of it is in the possession of the donor at the time when the gift is made. Thus when land is in the possession of a *usurper* (*or wrong-doer*), *or of a lessee*

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*or mortgagee, it cannot be given away;* because in these cases the donor has not possession of the thing which he purports to give.

But we think that this rule, which is undoubtedly laid down in several works of more or less authority, must, so far as it relates to land, have relation to cases where the donor professes to give away *the possessory interest* in the land itself, and not merely a reversionary right in it. Of course, an actual seisin or possession cannot be transferred, except by him who has it for the time being.

It is possible, too, that these texts may be explained by what we are informed was the law in Bagdad in early times with reference to land let on lease; we are told that an *ijara* lease, which in this country means generally a farming lease of ryoti holdings, meant, according to the law of Bagdad, a lease of the land itself or its usufruct; and that the owner of land having made such a lease, could not by law transfer his reversionary interest, so as to give the transferee a right to receive the rent from the *ijaradar*. (See *Futawa Alumgiri*, vol. III, *Book on Gifts*, p. 521.)

Whether this is the real meaning of the authorities may be doubtful; but it is certain, that such a state of the law in this country would render the transfer by gift of a zemindari and other landlord's interest simply impossible: lands here are almost always let out on leases of some kind, and there are often four or five different grades of tenants between the zemindar and the occupying ryot. What is usually called *possession* in this country, is *not actual or khas possession*, but the receipt of the rents and profits; and if lands let on lease could not be made the subject of a gift, many thousands of gifts, which have been made over and over again of zemindari properties would be invalidated. If we were disposed to agree with this novel view of Mahomedan law, (which we are not), we think we should be doing a great wrong to the Mahomedan community, by placing them under disabilities with regard to the transfer of property, which they have never hitherto experienced in this country. Such a view of the law is quite inconsistent with several cases decided by the Sudder Dewany Adawlut, (under the advice of the Kazis), and also by this

Court (see 1 Select Reports, 5, 12, and 115 note; 1 Bombay High Court Reports, 157, 16 W. R. 88, and 12 W. R. 498); and it is directly opposed to the case of *Amirunnessa* v. *Abedoonissa* (1) decided by their Lordships of the Privy Council.

In that case a gift of large zemindaries was held to be valid, although it is clear that they consisted, as such estates generally do, of tenures and interests of all kinds; no objection was then taken to the gift upon the ground that has been urged before us here, and indeed, so far as it appears, that point has now been taken for the first time.

Similarly, as regards the *malikana* rights, we are not aware of any reason, why rights of this description should not be made the subject of a gift, in the same way as rents or other incorporeal property of that nature. We have already decided that reversionary interests, carrying with them the right to receive rents, may be thus transferred; and it is clear that debts and Government notes and other *choses in action*, which give the parties entitled to them the right to receive money from the Government or third persons, may be made the subject of a gift.

A *malikana* right, is the right to receive from the Government a sum of money, which represents the *malik's* share of the profits of a revenue-paying estate, when from his declining to pay the revenue assessed by the Government, or from any other cause, his estate is taken into the *khas* possession of Government, or transferred to some other person, who is willing to pay the rate assessed. There is nothing in principle, so far as we can see, to distinguish a *malikana* right from a right to receive rents, or the dividends payable upon Government paper.

The second and third points contended for by the plaintiffs, have reference to the doctrine of *mooshaa* under the Mahomedan law. It is urged: (1) that a gift of an undivided share in any property is invalid because of *mooshaa*, or confusion, on the part of the *donor*; and (2) that a gift of property to two donees without first separating and dividing their shares is bad, because of confusion on the part of the *donees*.

(1) 23 W. R., 208.

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But it must be borne in mind that this rule applies only to those subjects of gift, which are capable of *partition*. See the *Hedaya*, vol. III, *Book on Gift*, p. 293, where the rule laid down is to the effect that—"A gift is not valid of *what admits of division* unless separated and divided." See also *Bailie's Mahomedan Law*, 2nd Ed., p. 520; *Futawa Alumgiri, Book on Gift*, p. 521; *Macnaghten's Mahomedan Law*, p. 201.

The rule, therefore, applies only to gifts of such property as is capable of division; whereas reversionary interests, or *malikana*, or other *choses in action*, are not capable of division.

It is said that one main reason for this rule, which applies only *to gifts*, and not to sales, is to protect a man's heirs against gifts made in defeasance of their rights. We were referred to certain texts which apparently favored that view, and it is also probable that another reason for the rule was to protect creditors against fraudulent gifts made by debtors, it being a well-known test of the *bona fides* of a gift, whether possession of the thing given has passed to the donee.

It has been urged upon us very strongly, that according to this rule of *mooshaa*, the gift, which was made to the defendants in this case, is wholly void, because, the gift being of lands, no partition of such lands was made; and even supposing the gift to be valid, as regards the zemindari properties which were let out on lease, it would still be invalid as regards the house property, gardens, sheds, &c., which are not shown to have been let out on lease, and which were capable therefore of actual partition.

We think, however, that this objection is not well founded, as regards any part of the property in question.

As regards the zemindaries, the estate of the donor, as we have seen, was an interest in reversion, and the property which was transferred by the gift of these zemindaries was merely that sort of estate which entitled the donees to receive the rents and profits. We find from the evidence of the defendants, (which was so clear upon this point that the Judge in the Court below desired to hear no more than that of the first two witnesses), that during Kaniz Fatima's lifetime she and Muleka were in separate collec-

tion of the rents, and that immediately upon the gift being made, the possession was transferred, in the only way in which it could be transferred, to the two donees.

The Mussumat dismissed all her servants, and from that time the tehsildars were employed and paid by the donees, and collected the rents for them. An equal division was made between them of the rents collected; and, as regards part of the property, it appears that, from the year 1281, the collections were made separately.

It is said, however, that as regards the house property no division of it has been proved, and that, for ought that appears, that property might have been in the *khas* possession of the Mussumat; But no point was made of this in the Court below. No issue was framed for the purpose of raising it, nor was there any evidence given on the part of the plaintiff, nor any cross examination of the defendant's witnesses with reference to that point; no distinction appears to have been made, (either in the Court below or even in the grounds of appeal to this Court), between the different kinds of property; and the strong probability is, that the house property which belonged to the Mussumat was let out in lease in the same way as her other properties.

We think, therefore, that we ought not to allow an objection of this kind to prevail, or even to be raised, at this stage of the case founded merely upon a conjectural distinction between these two classes of property; and even if we thought otherwise, we certainly should not give effect to such an objection without sending the case back to the Court below, to have the true state of things ascertained.

Upon the whole, therefore, as regards the deed of gift, we are of opinion that it effectually transferred to the donees the properties which were detailed in the schedule to that deed.

It now only remains to deal with mouzah Morari, which, as we have seen, was granted under a *mocurrari* lease to Mussumat Babbun by Nazir Ibrahim Ali.

The plaintiffs admit in their plaint that Mussumat Babbun executed a *dur-mocurrari* lease of this mouzah, on the 22nd of

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September 1873, to the defendant No. 6, Moulvie Fuzul Hossein, and that, in that *dur-mocurrari*, she stated the lease to be a perpetual and heritable one; whereas, the plaintiff's case is, that it was only for her life, and that as upon her death, on the 25th of October 1875, the mouzah reverted to Ibrahim Ali's heirs, the plaintiffs are entitled, as two of his heirs, to a share in that mouzah.

On the other hand, the defendant No. 6 alleges that the *mocurrari* granted to Babbun was a permanent and heritable one; and he has filed and produced the *mocurrari* lease itself, which he says was given to him by Babbun at the time when he obtained his *dur-mocurrari*.

The Court below has also found against the plaintiffs upon this point; and the only difficulty we have had upon this part of the case, arises from the somewhat loose way in which the *mocurrari* lease has been proved in the Court below.

It appears from the petition of the defendant No. 6, dated the 20th of September 1881, that he filed this *mocurrari* lease in Court; and that it was duly registered.

The deed appears to have been admitted by the Court below, and no objection has been taken in the grounds of appeal that it was improperly admitted. It has been sent up here with the record; and it has been produced and examined before us in this Court.

It is argued by the plaintiffs that this is not the real deed which was granted to Babbun; and they say, that the real deed was one for life only, but they have given no proof of this.

It is, of course, an admitted fact on both sides that there was a *mocurrari* deed of some kind duly executed by Ibrahim Ali to Babbun.

The deed which is now in evidence, was duly filed, and produced at the trial by the defendant No. 6, as being the deed given to him at the time when he obtained his *dur-mocurrari*.

The Judge has found this to be the deed which was granted by Ibrahim Ali to Babbun; and there is no doubt that this deed does confer a permanent and heritable *mocurrari*.

We see no reason to believe that the finding of the learned Judge is otherwise than correct. If he made a mistake at all, it was in receiving the deed in evidence without examining Fuzul Hossein, who appears to have been in Court, or requiring some further or other proof of its identity.

But, there is no point of this kind taken in the grounds of appeal; and if we considered that there was any weight in the objections now made by the appellants, we should certainly not give effect to them, without sending the case back to the Court below to examine Fuzul Hossein and his witnesses; because the Judge thought his case so clear as to this deed, that he told him it was unnecessary to call any witnesses.

We therefore decide the case on all points against the appellants.

The only remaining question is as to the costs.

We find, that in the Court below the defendants Burkut and Zukiran were allowed their full costs, and that Ali Hossein, who was a pleader, and who apparently had nothing to do with the case, was also allowed a separate set of costs.

The ground on which Ali Hossein was allowed these costs, was that he was said to have made an arrangement with the plaintiffs, by which the plaintiffs were enabled to carry on the suit; and part of the arrangement was, that in the event of the plaintiffs succeeding, Ali Hossein should be entitled to a share in the property.

Under these circumstances, the plaintiff desired that Ali Hossein should be made a defendant. But Ali Hossein himself disclaimed having anything to do with the arrangement, or having any share in property.

Why, under these circumstances, he should have been allowed such a large sum for costs we cannot understand, nor do we understand, why Burkut and Zukiran (who were merely made defendants, because their names were said to have been used in making the arrangement, instead of that of Ali Hossein), were also allowed their full costs, because their interests, if they had any, were precisely the same as those of Ali Hossein, and any contention which

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they might have raised, must have been in the same interest as that of Ali Hossein.

We think, that the only sum which ought reasonably to have been allowed to them, would merely be one for their first appearance in Court; instead of the fee therefore which has been allowed by the Court below, we allow only Rs. 100 to Ali Hossein, and a like sum to the other two plaintiffs.

As regards the costs of the principal defendants, we think that the defendant No. 6, whose contention was of an entirely different character from that of the others, should have his costs of the appeal proportionate to the value of his *dur-mocurrari*, and that the other defendants should get their costs upon the balance.

*Appeal dismissed.*