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any sanction was given under s. 69 by the Collector for a prosecution under s. 61, I do not consider it advisable to interfere further than by setting aside the conviction under s. 109 of the Penal Code and s. 62 of the Stamp Act, and directing that the fine, if realized, be refunded. It does not appear to me that Rahat Ali Khan contemplated the commission of any offence.

Conviction set aside.

APPELLATE CIVIL.

1887
January 3 & 5.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Brodhurst.

SAHIB-UN-NISSA BIBI (DEFENDANT) *v.* HAFIZA BIBI (PLAINTIFF).*

HAFIZA BIBI (PLAINTIFF) *v.* SAHIB-UN-NISSA BIBI (DEFENDANT).*

Pension—Act XXIII of 1871 *(Pension Act), s. 7—Pension for land held under grants in perpetuity—Assignment—Suit against drawer of pension to establish right to share—Limitation—Act XV of* 1877 *(Limitation Act), sch. ii, Nos.* 127, 131*—Muhammadan law—Gift—"Musha"—Undivided part—Ascertained share—Transfer of possession—Mutation of names—Delivery of title-deeds—Act VI of* 1871 *(Bengal Civil Courts Act), s.* 24.

A pension of the nature described in Act XXIII of 1871 (Pensions Act), s. 7, clause (2), was drawn by a Muhammadan, in whose name alone it was recorded in the Government registers, for himself and the other members of his family, who, up to the time of his death, received their shares from him. Shortly before he died, he executed a deed of gift in favour of his wife, which purported to assign to her the whole pension. No mutation of names was effected in the Government registers, but the deed of gift and the *sanads* in respect of which the pension had originally been granted were handed over to the donee. After the death of the donor, one of his sisters brought a suit against his widow to establish her right (i) to receive the share in the pension which she had inherited from her father and received up to her brother's death, and (ii) as heir to her brother himself, to the share which he had inherited. It was contended on her behalf that the deed of gift was in any case ineffectual as an assignment of more than the donor's own interest, and further that it was invalid even as an assignment of his own share, inasmuch as under the Pensions Act the pension could not be made the subject of gift, and under the Muhammadan law it was "*musha*" and not transferable, and actual delivery or transfer of possession was, under the same law, essential to the completion of the gift, but no such delivery or transfer had been effected. In defence it was pleaded (*inter alia*) that the suit was barred by limitation.

* Second Appeals Nos. 262 and 367 of 1886, from the decrees of F. E. Elliot, Esq., District Judge of Allahabad, dated the 29th September, 1885, confirming the decrees of Babu Abinash Chandra Banerjee, Subordinate Judge of Allahabad, dated the 8th September, 1884.

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Held that it was doubtful whether in such a case and as between such parties the Limitation Act would be applicable at all; but that, assuming it to be so, either art. 127 or art. 131 of the 2nd schedule should be applied, and, the plaintiff having received her share within twelve years, the suit was brought in time.

Held that the deed of gift was not a good assignment in law of the interest of the plaintiff, who was not a party thereto, and the defendant could take nothing more than the donor's own interest.

Held that, whatever might be the Muhammadan law apart from the Pensions Act, under s. 7 of the Act the pension or any interest in it was capable of being alienated by way of gift, the subject of the gift being not the cash, but the right to have the pension paid.

Held that there was no force in the contention that the gift became void because the right was not divided, inasmuch as in the case of a right to receive a pension the rights of the individuals who are the heirs become at once divided and separate at the death of the sole owner; and in this case the shares were definite and ascertained and required no further separation than was already effected upon the sole owner's death.

Held that the rule of the Muhammadan law as to the invalidity of gifts purporting to pass more than the donor was entitled to, was based upon the principle of *musha* or undivided part, and had no application to cases where the donor's interest itself was separate; and that even if it were the strict Muhammadan law that where a man having a definite ascertained interest in a pension, and intending at any rate to pass his interest to his wife, purported to give her more than he was entitled to, he failed to give her any interest at all, s. 24 of the Bengal Civil Courts Act (VI of 1871) did not make it obligatory to apply the strict Muhammadan law as to gifts in transactions of modern times.

Held that although, according to the Muhammadan law, possession was necessary to perfect a gift where the nature of the transaction was such that possession was possible, possession of a right to receive pension could only be given by handing over the documents of title connected with the pension, or assigning the right to receive the pension; that the gift in this case was perfect as soon as the deed was executed and handed over with the other papers to the donee; and that the mutation of names was merely a thing which would follow on the perfection of the title, and did not in itself go to make or form part of the title.

THESE were two second appeals from a decree of the District Judge of Allahabad, dated the 29th September, 1886, the appellant in one case being the defendant in the suit Sahib-un-nissa Bibi, and in the other the plaintiff Hafiza Bibi. The suit was brought by the plaintiff to establish her right to receive a share in a pension which was payable by Government, and which had originally been granted by the Kings of Delhi to the ancestors of the plaintiff's father, Waji-ullah, as an indemnity for loss sustained by the resumption of lands held under *sanads* purporting to grant them in perpetuity.

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Waji-ullah had two daughters, one of whom was the plaintiff, and two sons, named respectively Abdullah and Abdul Rahman. The defendant, Sahib-un-nissa, was Abdul Rahman's widow. After the death of Waji-ullah, the pension was drawn by his sons, and after the death of Abdullah by Abdul Rahman, in whose name it was recorded in the Government registers. On the 22nd April, 1878 Abdul Rahman executed a deed of gift in favour of his wife, the defendant, purporting to assign to her the whole pension. No mutation of names in respect of the pension was effected in favour of the defendant, but the deed of gift and the *sanads* were handed over to her. Abdul Rahman died in May, 1879, and the present suit was instituted in December, 1883.

The plaintiff alleged that, although the pension was recorded in the Government registers in the name of Abdul Rahman only, she and the other heirs of Waji-ullah used to receive their shares from him, up to the time of his death, but that since that time they had received nothing. It was contended on her behalf that the deed of gift of the 22nd April, 1878, was not only ineffectual as an assignment of the shares of the heirs of Waji-ullah other than Abdul Rahman, but was wholly invalid even as an assignment of Abdul Rahman's own share. It was urged that, under the rules of the Muhammadan law, the pension was "*musha*" and could not be made the subject of gift, and that, under the same law, actual delivery or transfer of possession was essential to the completion of the gift, and no such delivery or transfer on the part of the donor had been effected. Upon these grounds the plaintiff claimed to establish her right (i) to the share in the pension which had devolved upon her as an heir of Waji-ullah, and (ii) as heir to her brother, Abdul Rahman, in respect of the share which had devolved upon him. The defendant maintained the entire validity of the deed of gift, and alleged that Abdul Rahman had been in sole and exclusive enjoyment of the whole pension for more than twelve years, and the suit was therefore barred by limitation.

The Court of first instance (Subordinate Judge of Allahabad) found that the plaintiff had received and enjoyed her share of the pension up to the death of Abdul Rahman, and accordingly held that the suit was within time. It also held that the deed of gift of the 22nd April, 1878 was ineffectual so far as concerned the rights

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of Wajiullah's heirs other than the donor. To the extent, therefore, of declaring the plaintiff's right as one of such heirs to receive a share in the pension, the Court decreed the suit. So far, however, as concerned Abdul Rahman's own share, it held that the deed of gift was valid, that the share passed to the defendant, and that the plaintiff had no claim by inheritance in respect of that share. To this extent therefore the suit was dismissed.

Both parties appealed to the District Judge of Allahabad, who dismissed both appeals. Each preferred a second appeal to the High Court. That of the defendant was first heard and judgment upon it first given.

The Hon. Pandit *Ajudhia Nath*, Mr. *J. Simeon*, and Lala *Lalta Prasad*, for the appellant.

The Hon. *T. Conlan* and Mr. *Amiruddin*, for the respondents.

EDGE, C. J.—This is an appeal against the judgment of the Judge of Allahabad, who confirmed the decree of the Subordinate Judge. The action was one for the establishment of the plaintiff's right to receive a share in a pension which is payable by the Government, and which was originally granted by the Kings of Dehli to particular persons. A portion of the case of the defendant was that Abdul Rahman, in 1879, was in receipt of the whole pension, although only entitled to receive a portion of it; and was, *de facto*, receiving the whole of it, and that he assigned the whole to his wife. It is contended that the assignment was a good assignment in law of the interest of the plaintiff, who was not party to that assignment. I do not understand that contention. The Judge is quite right in holding that Abdul Rahman could assign nothing more than his own interest. He had no power to assign, and his assignee could take nothing more than, his interest.

As regards the statute of limitation, I feel considerable doubts whether in a case of this kind, and between parties such as are here, that statute would apply at all. This is not a sum of money which was payable by one person to another. It is merely a right of several persons to draw their respective shares of pension from the Government. It appears to me that if the statute were applicable, it would be applicable in the hands of the person who had to pay. Even if it does apply to the present parties, then of all the

articles enumerated in sch. ii of the Limitation Act, we should apply either art. 127 or art. 131, in which the period is twelve years. The Judge in his judgment has found that the plaintiff did receive her share within that time, and that finding of fact is sufficient to take this case out of the Limitation Act. For these reasons I am of opinion that the appeal should be dismissed with costs.

BRODHURST, J.—I entirely concur with the learned Chief Justice in dismissing the appeal with costs.

The appeal of the plaintiff was then heard. The grounds stated in the memorandum of appeal were as follows:—

"1. The gift of pension alleged to have been made by Abdul Rahman to his wife Sahib-un-nissa is void under the Muhammadan law—

"(*a*) Because it is a gift of '*musha*.'

"(*b*) Because there was no delivery or *seisin*.

"(*c*) Because the donor had not entirely relinquished his right in the pension.

"(*d*) Because the gift included shares which did not belong to the donor.

"2. The right to receive a pension from the Government is not transferable by gift under the Muhammadan law.

"3. The assignment of pension is void under the provisions of Act XXIII of 1871."

The Hon. *T. Conlan* and Mr. *Amiruddin*, for the appellant.

Mr. *C. H. Hill* and Pandit *Sundar Lal*, for the respondent.

EDGE, C.J.—This is an appeal from the judgment of the Judge of Allahabad, who decided that Abdul Rahman's share in the pension which had been given by the Native Government had passed to the defendant, Musammat Sahib-un-nissa Bibi.

In appeal every possible point has been taken by Mr. *Amiruddin*. He has alleged that a pension cannot be a subject of gift; he says also that the gift became void because the subject-matter of it was not divided, *i. e.*, the right to receive pension was not divided. He also says the gift was bad because Abdul Rahman

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purported to give the whole right to receive the pension when he was only entitled to receive a portion of it; and that the gift was not perfect, and was invalid according to Muhammadan law, because Abdul Rahman did not cause mutation of names in the Government register. Mr. *Amiruddin* further argued that the mutation of names was essential to the validity of the alleged gift. I think, broadly speaking, the points I have mentioned above cover all the points of law which Mr. *Amiruddin* has raised before us.

Now, to deal with them in the order I have just mentioned, it is necessary to consider whether a pension can be a subject of gift between the Muhammadans. With regard to that, we ought to see what this pension was. It was, to use the language of the words of s. 7 of the Act XXIII of 1871, "an indemnity for loss sustained by the resumption by a Native Government of lands held under *sanads* purporting to confer a right in perpetuity." It was not a pension in the ordinary acceptance of the term, but it was what was contemplated by s. 7 of the Indian Pensions Act. By that section, which enacts the law for the Muhammadans as well as the Hindus, it is enacted that "every such pension shall be capable of alienation and descent." A "gift" is an "alienation" as much as is a "sale." Therefore I am of opinion, whatever the Muhammadan law may be apart from the Pensions Act, that under that section this pension, or any interest in it, was capable of being alienated by Abdul Rahman by way of gift. I also might say that if Mr. *Amiruddin's* arguments were correct, there could be no gift of the right to take tolls at bridges and ferries. According to his contention, until the cash was payable or paid, there could be no gift of the tolls. In my judgment, it is the right to have the pension paid which was the subject of the gift in a case of this kind, and not the cash. So much, therefore, for the contention that a pension cannot be a subject-matter of gift.

The next point which Mr. *Amiruddin* takes is that the gift becomes void because the right was not divided. I really do not understand what the meaning of that is. That contention arises from confusing the case of this kind of a right to receive a pension with the case of a bale of cloth, or a piece of land, or a house. In the case of a right to receive a pension, the rights of the individuals

who are the heirs become at once divided and separate at the death of the sole owner. Thus, if there were three heirs entitled to one-third each, one becomes entitled at once to his share, namely, one-third, on the death of the ancestor, and there arises no necessity of partition in such a case. That argument fails because, as a matter of fact, in my opinion, the subject-matter of the gift was already divided.

Mr. *Amiruddin* also contends that the whole gift was void because Abdul Rahman purported to give more than he was entitled to. He has cited the *Tagore Law Lectures* for 1884, p. 84, and Macnaghten's *Principles of Muhammadan Law*, Chapter IV, in support of that contention. Mr. Amir Ali, at page 84 of his Lectures, says :—"If one should give a mansion, of which possession is taken, and a right then established in a part of it, the gift is void. And if one should give land with the crop on it, or a tree with the fruit on it, and make delivery of both, and a right should then be established in the crop or the fruit, the gift in the land or tree is void. A person makes a gift of his land with the crop on it, and cuts and delivers the crop, after which a right is established in one of them, the gift is void as to the other." Now with regard to the above cases, it has been correctly pointed out by Pandit *Sundar Lal* that the text lays down no such proposition of Muhammadan law as that contended for by Mr. *Amiruddin*. He really tries by arguing from those cases to establish a novel principle in Muhammadan law not found in the text. What seems to have been before the learned lecturer was the question of a gift vitiated by *musha*, and the cases which were cited by Mr. *Amiruddin* were merely the cases of *musha*. Therefore I consider, so far as that is concerned, they do not establish Mr. *Amiruddin's* point. He relies also upon Chapter IV of Macnaghten's *Principles of Muhammadan Law*. He refers us to the marginal note to reply No. 2 at page 200 :—"A gift of more than the owner's right is void, but a sale is void to the extent of the right." That note appears to me to be framed in very confused language, and, looking at it cursorily, one would take it as laying down that where a man gives more than he is entitled to give, the whole gift is void. The text of the question No. 2, to which this reply relates, is :—"If any one of the widows or their heirs should dispose of a portion of the land which belonged to their deceased husband, by

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gift or sale, would such sale or gift be valid to any extent?" That reply, therefore, relates to the special persons referred to in the above question, and does not lay down a general proposition of law. Then again it seems to me to be based upon the same principle as is referred to in the *Tagore Law Lectures, i.e.*, the principle of *musha* or undivided part, and not to cases like this, where the interest itself is separate. Even if it were the strict Muhammadan law that in a case such as this, where a man gives more than he is entitled to, the whole gift becomes void, there is a ruling of this High Court—*Shumsh-ool-nissa* v. *Zohra Beebee* (1), to the effect that s. 24 of the Bengal Civil Courts Act (VI of 1871) does not compel us to apply the strict Muhammadan law in cases of gifts in transactions of modern times. I should be very loth to hold in a case of this kind, in which a man having a definite ascertained interest in a pension and intending at any rate to pass his interest to his wife, purported to give her more than he was entitled to, that he failed to give her any interest at all.

The last point which Mr. *Amiruddin* contends is, that the gift was not perfected by possession. It appears to me quite clear that, according to Muhammadan law, possession is necessary to make a gift perfect, where the nature of the transaction is such that possession is possible. But how can possession be given of a right to receive pension unless it is by handing over the documents of title connected with the pension, or assigning the right to receive the pension? In this particular case it is admitted that Abdul Rahman did execute a deed of gift, assigning certainly the whole pension, but which was quite sufficient to cover his own interest. In addition, it might be mentioned that he was actually in receipt of the whole pension, and he seems to have had in his possession certain papers or *sanads* and coupons that would be presented to Government at the time of receiving the pension. He handed over to his wife the deed and the papers or *sanads*, and it appears to me that he there and then made a perfect gift, and gave a perfect title to the right to receive the pension, so far as his interest in it extended. Mr. *Amiruddin* is forced to contend, for the purposes of his case, that the gift was not perfect, as there was no mutation of names in the treasury register; and that in a case of this kind the effecting

(1) N.-W. P., H. C. Rep., 1874, p. 2.

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of a mutation of names in the registers would be equivalent to giving possession. I asked him to point out any law from which such a proposition could be inferred, and he failed to do so. The gift, it appears to me, was perfect as soon as the deed was executed and handed over with the papers to the donee. The mutation of names was merely a thing that would follow on the perfection of the title, and does not in itself in any way go to make the title or form part of the title. In my opinion Abdul Rahman did comply with all the requirements of the Muhammadan Law by making the deed and handing it over to his wife. In connection with this, I may also refer to Baillie's *Digest of Muhammadan Law*, p. 517 :— "The confusion that invalidates a gift is one that is original, not supervenient, as, for instance, when one has given the whole of a thing, and subsequently revokes a half or other undivided share of it, or a right is established to a half or other undivided share of it, the gift is not invalidated as to the remainder." In this particular case those shares were definite and ascertained, and did not require any further separation than was already effected upon the death of the sole owner.

Under these circumstances, I think the judgment of the Court below is right, and the appeal must be dismissed with costs.

BRODHURST, J.—I entirely concur with the learned Chief Justice in dismissing the appeal with costs.

Appeals dismissed.

Before Mr. Justice Straight and Mr. Justice Brodhurst.

1887 *January* 5.

KISHNA RAM (PLAINTIFF) *v.* RAKMINI SEWAK SINGH AND OTHERS (DEFENDANTS).*

Joint liability—Contribution— Joint tort-feasors—Misjoinder—Civil Procedure Code, s. 44 Rule b.

An objection to the attachment and sale of certain immoveable property, raised by one who claimed to have purchased the same at a sale in execution of a prior decree, was disallowed on the ground that, under the prior decree, the rights of one only of the present judgment-debtors had been sold and purchased by the objector. In accordance with this order, two-thirds of the property under attachment were sold; and the objector thereupon brought a regular suit for a declaration of his right as a purchaser of the whole property in execution of the prior decree. To this suit he impleaded as defendants the decree-holder and the judgment-debtors.

* Second Appeal No. 244 of 1886 from a decree of J. M. C. Steinbelt, Esq., District Judge of Azamgarh, dated the 15th September, 1885, confirming a decree of Babu Nihal Chandra, Munsif of Azamgarh, dated the 19th May, 1885.