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Before Mr. Justice Straight and Mr. Justice Mahmood.

RAHIM BAKHSH (DEFENDANT) *v.* MUHAMMAD HASAN (PLAINTIFF).*

Muhammadan Law—Gift—Hiba-bil-iwaz—Gift made in consideration of services rendered—Donor not in possession—Possession not delivered to donee—Gift invalid.

The fundamental conception of *hiba-bil-iwaz*, or a gift for an exchange, as understood in the Muhammadan Law, is that it is a transaction made up of two separate acts of donation, *i.e.*, of mutual or reciprocal gifts of specific property between two persons, each of whom is alternately donor and donee. It does not include the case of a gift in consideration only of natural love and affection or of services or favours rendered. Nor does such a gift fall under the category of *hiba-bil-iwaz* in its improper sense of sale; but it is an ordinary gift subject to all the conditions as to validity which the Muhammadan law provides.

A gift of immoveable property not at any time in the possession of the donor, but in that of a trespasser, and consequently never delivered by the donor to the donee, is void under the Muhammadan Law. *Kasim Hossein* v. *Sharif-un-nissa* (1), *Sahib-un-nissa Bibi* v. *Hafiza Bibi* (2), and *Shaikh Ibhram* v. *Shaikh Suleman* (3) distinguished. *Mohin-ud-din* v. *Manchershah* (4), *Mullick Abdool Guffoor* v. *Maleka* (5), and *Shahazadee Hazara Begum* v. *Khaja Hossein Ali Khan* (6), referred to.

The facts of this case are stated in the judgment of the Court.

The Hon. *T. Conlan*, Lala *Lalta Prasad*, and Maulvi *Mehdi* Hasan, for the appellant.

* First Appeal No. 151 of 1887, from a decree of Maulvi Shah Ahmad-ullah Khan, Subordinate Judge of Gorakhpur, dated the 20th June, 1887.

(1) I. L. R., 5 All. 285.
(2) I. L. R., 9 All. 213.
(3) I. L. R., 9 Bom. 146.
(4) I. L. R., 6 Bom. 650.
(5) I. L. R., 10 Calc. 1112.
(6) 12 W. R., 498.

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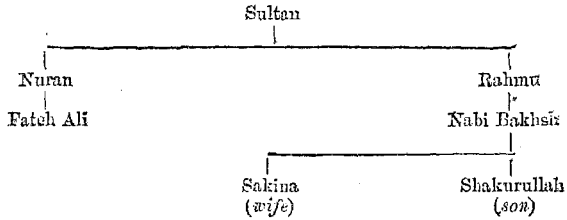
Mr. *G. E. A. Ross*, Mir *Zahur Husain*, and Munshi *Mulho Prasad*, for the respondent.

MAHMOOD, J.—The facts of this case are very simple, and the decision of the appeal rests upon the principles of the Muhammadan law of gift, which admittedly governs this case. The relative position of the persons to whom reference will be necessary is indicated by the following table :—



It is admitted that the property to which this suit relates was originally owned by Nabi Bakhsh, who died in the year 1876, leaving a widow, Musammat Sakina, and a son, Shakurullah, as his heirs under the Muhammadan law.

Shakurullah died on the 12th July, 1881, leaving his mother Musammat Sakina and Fateh Ali, who (as the pedigree shows) was his father's paternal uncle's son, and as such entitled to inherit a share in the estate of the aforesaid Shakurullah.

It appears that upon the death of Shakurullah, his mother Musammat Sakina, having a right of inheritance partly by inheritance from her husband Nabi Bakhsh and partly by inheritance from her son Shakurullah, remained in possession of the entire property up to the time of her death, which occurred on the 25th March, 1883.

Subsequently, that is, on the 4th May, 1883, the aforesaid Fateh Ali (whose name appears in the pedigree) executed a deed of gift, whereby he purported to convey all such rights of inheritance as he might have in the property to Muhammad Hasan, plaintiff-respondent.

In consequence of this deed of gift certain quarrels arose between the plaintiff and the defendant as to the mutation of names

in respect of the zamíndári portion of the property, but the plaintiff's claims were rejected by the revenue authorities on the 22nd November, 1883, and the defendant appears to have maintained his possession of the entire property, which, as before said, had come into the possession of Musammat Sakina, widow of Nabi Bakhsh and mother of Shakurullah. Fateh Ali died on the 29th August, 1884.

The present suit was instituted on the 25th September, 1886, by Muhammad Hasan, plaintiff-respondent; and in order to clear the case of possible confusion it is necessary to state that the suit rests entirely upon the deed of gift of the 4th May, 1883, and that the plaintiff claims the property as the share which the donor Fateh Ali is said to have inherited from Shakurullah and to have gifted to the plaintiff under that deed; that there is no allegation in the plaint that Fateh Ali ever obtained possession of the share which he claimed to have inherited from Shakurullah; and that therefore the plaintiff's suit will fail if the gift upon which he relies is found to be invalid under the Muhammadan Law.

The grounds of appeal and the arguments which have been addressed to us on behalf of the parties raise only two main questions for determination:—

(1) Whether the gift of the 4th May, 1883, was a *hiba-bil-iwaz*, or a gift for an exchange as understood in the Muhammadan Law, rendering delivery of possession of the gifted property unnecessary for the validity of such gift.

(2) If not, was the gift of the 4th May, 1883, valid under the Muhammadan Law in view of the circumstance that the donor Fateh Ali was never in possession of the gifted property either at the time of the gift or at the time of his death, and that, as a matter of fact, the plaintiff, donee, never obtained possession of the property which he claims under the gift?

The view of the law which I entertain upon these two questions renders it unnecessary for me either to consider the question as to the exact extent of the share which the donor Fateh Ali may have

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inherited from Shakurullah, or to decide the question of fact raised in the seventh ground of appeal relating to the house in Jafra Bazár, which is alleged by the appellant to have been built by himself. Nor is it necessary to consider the question raised by the plea that the defendant-appellant had spent a large sum of money in performing the several ceremonies of Shakurullah, and that such money was a charge upon the estate which the plaintiff was bound to pay before claiming any share in the estate.

In dealing with this case I shall confine myself to the two points above mentioned, because according to my opinion the decision upon those points will be fatal to the plaintiff's whole suit.

In considering the first of those points it is necessary to examine closely the terms of the deed of gift, dated the 4th May, 1883, executed by the deceased Fateh Ali in favour of the plaintiff-respondent Muhammad Hasan. That deed, after making certain recitals as to the manner in which the donor felt himself entitled to inherit a share in the estate of Shakurullah, goes on to say :—

"I, the executant, have now become old and weak and have no issue. Sheikh Muhammad Hasan, a near relative of mine, has all along, with cordial affection and love, rendered service to me, maintained and treated me with kindness and indulgence, and shown all sorts of favours to me. Besides the above the executant cannot attend even to the necessary management of the said share. Therefore for this reason, as also in consideration of the natural love and affection which Muhammad Hasan bears, as well as for all the past favours and indulgence shown by him, I, the executant, have, with my free will and consent, and in sound state of body and mind, without coercion or restraint, transferred and given away to Muhammad Hasan my entire share in the estate of Muhammad Shakurullah specified below, which devolves upon me as a residuary heir, together with all the zamíndári rights appertaining thereto. For my heirs have now no connection with the aforesaid share. Sheikh Muhammad Hasan is the absolute owner of the said share from this date, and he is authorized to get his name entered in the revenue department on the strength of this deed

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and take possession of the property transferred. He should spend out of his own pocket what is necessary for the purpose of bringing any suit in connection with the share. I, the executant, shall not be liable for it, nor have I any claim in respect of the share transferred. If in present or in future, any claim in respect of the said share be made under the Muhammadan law or otherwise by me or my heirs, contrary to this deed and to the transfer in favour of Sheikh Muhammad Hasan aforesaid, it will be held false and unentertainable. The value of the property transferred is Rs. 7,500. These few words have therefore been written by way of a deed of transfer that they may be of use in time of need."

In interpreting this document, the lower Court has held that "it is a deed of gift executed in exchange of services" and that "the word *iwaz* (exchange) includes service, and a gift in exchange of service cannot be revoked." Upon this ground the Court has held that "Fâteh Ali, not being in possession of the subject of gift, which had been left by Shakurullah, could not deliver the possession thereof to the plaintiff," but that this circumstance would not render the gift invalid.

I am of opinion that the learned Subordinate Judge has taken an erroneous view of the Muhammadan law in holding that the transaction of the 4th May, 1883, was a *hiba-bil-iwaz*, or gift for an exchange. The real nature of a *hiba-bil-iwaz* is fully described in Chapter VI of Book VIII on Gift in Mr. Baillie's Digest of Muhammadan Law, which is only an abbreviated reproduction of the Fatwa Alamgiri; but I need only refer to such passages as have an immediate bearing upon this case. The fundamental conception of a *hiba-bil-iwaz* in Muhammadan law is that it is a transaction made of two separate acts of donation, that is, it is a transaction made up of mutual or reciprocal gifts between two persons, each of whom is alternately the donor of one gift and the donee of the other. "The *iwaz*, or exchange, in gift, is of two kinds—one subsequent to the contract, the other stipulated for in it—." (Baillie's Digest, 2nd ed., p. 541). "When the exchanging takes place subsequent to the gift, the *iwaz* is, without any

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difference of opinion between our masters, a gift *ab initio*. So that it is valid, where gift is valid, and void where gift void, there being no difference between them except as to the dropping of the power of revocation in the case of the *iwaz*, while it is established in that of the gift. And after possession has been taken of the *iwaz*, the power to revoke drops also with respect to the gift. So that neither party can reclaim from his fellow what he has become possessed of, whether the *iwaz* were given by the donee or by a stranger, with or without his direction. All the conditions of gift are applicable to the *iwaz*; and the transaction does not come within the meaning of a contract of *mooawuzut*, or mutual exchange, either in its inception or completion".—(Baillie's Digest, p. 543).

Now, such being the rule of the Muhammadan Law the transaction of the 4th May, 1883, cannot be regarded as a *hiba-bil-iwaz*, or a gift for an exchange, unless it can be shown that the consideration for which that transaction took place was a previous gift passing from the plaintiff, the donee of the deed of the 4th May, 1883, to Fateh Ali, the donor. In other words, does the consideration mentioned in the deed of the 4th May, 1883, represent any gift made by the plaintiff to Fateh Ali on a former occasion? The answer to this question must be in the negative, because all the deed mentions as the consideration of the gift is "natural love and affection," which induced the plaintiff, donee, to render services to the donor, to maintain him and treat him "with kindness and indulgence," and to show him "all sorts of favours." This being so, the next step in the reasoning is whether such natural love and affection, services and favours, could be made the subject of gift by the plaintiff to Fateh Ali, the donor of the deed of the 4th May, 1883.

The law upon the subject is perfectly clear, for the very nature of gift under the Muhammadan Law requires that the subject thereof must be a right of property in something specific without an exchange.—(Baillie's Digest, p. 515). The Hedaya defines gift in the same sense:—"*Hiba*, in its literal sense, signifies the donation of a thing from which the donee may derive a benefit: in the language of the law, it means a transfer of property, made immediately, and

without any exchange."—(Hamilton's Hedaya, Vol. III, p. 673, Grady's Ed., p. 482). It is therefore impossible to hold that the natural affection, kindness, services and favours mentioned in the deed of the 4th May, 1883, can be regarded as a *hiba-bil-iwaz*, or a gift for an exchange, as understood in the Muhammadan Law.

There is, however, another aspect of this point to which I should like to refer, because it may have led to misapprehension of the Muhammadan Law by the learned Subordinate Judge. The term *hiba-bil-iwaz* is often misused by the Indian Muhammadans in respect of transactions which either amount to exchange or sale. Mr. Baillie has explained the matter at page 122 of his Digest in the following terms :—

"*Hiba-bil-iwaz* means, literally, gift for an exchange ; and it is of two kinds, according as the *iwaz*, or exchange, is, or is not, stipulated for at the time of the gift. In both kinds there are two distinct acts ; first, the original gift, and second, the *iwaz*, or exchange. But in the *hiba-bil-iwaz* of India, there is only one act ; the *iwaz*, or exchange, being involved in the contract of gift as its direct consideration. 'And all are agreed that if a person should say, 'I have given this to thee for so much,' it would be a sale ; for the definition of sale is an exchange of property for property, and the exchange may be effected by the word 'give' as well as by the word 'sell.' The transaction which goes by the name of *hiba-bil-iwaz* in India is, therefore, in reality not a proper *hiba-bil-iwaz* of either kind, but a sale ; and has all the incidents of the latter contract. Accordingly, possession is not required to complete the transfer of it, though absolutely necessary in gift, and, what is of great importance in India, an undivided share in property capable of division may be lawfully transferred by it; though that cannot be done by either of the forms of the true *hiba-bil-iwaz*."

Even in the light of this explanation, I cannot hold that the learned Subordinate Judge was right in holding that the transaction evidenced by the deed of the 4th May, 1883, was a *hiba-bil-iwaz* amounting to sale, there being no "exchange of property for property" in the sense of the Muhammadan Law of sale, nor "a

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transfer of ownership in exchange for a price paid or promised or part paid and part promised," within the meaning of s. 54 of the Transfer of Property Act (IV of 1882).

I have no doubt that the transaction evidenced by the deed of the 4th May, 1883, is nothing more or less than an ordinary gift under the Muhammadan Law, and that it is therefore subject to all the conditions as to validity which that law provides in respect of such gifts.

This leads me to the consideration of the second point in the case as enunciated by me, namely, whether the facts that at the time of executing the gift of the 4th May, 1883, the donor Fateh Ali was not in possession of the property which he purported to convey by gift, that he never acquired possession of such property during his life-time, and that the plaintiff, donee, has never acquired possession of the property, are circumstances which render the gift invalid under the Muhammadan Law.

The answer to the question is not fraught with any difficulty, because the rule of the Muhammadan Law upon the subject is perfectly clear. Under that law delivery of possession to the donee is a condition precedent to the validity of a gift; for, to use the language of the Hedaya, "the Prophet has said, 'A gift is not valid without seisin,' meaning that the right of property is not established in a gift until after seisin."—(Hamilton's Hedaya by Grady, p. 482.) "Tender and acceptance are necessary, because a gift is a contract, and tender and acceptance are requisite in the formation of all contracts, and seisin is necessary in order to establish a right of property in the gift, because a right of property, according to our doctors, is not established in the thing given merely by means of the contract without seisin".—(Hedaya, vol. iii, p. 291.) The same is the effect of the Fatwa Alamgiri as represented in Mr. Baillie's Digest:—"The legal effect of gift is not complete until possession is taken of the thing given, and, in this respect, a stranger and the child of the donor are on the same footing when the child is adult."—(Baillie's Digest, p. 520.) It has, indeed, never been doubted that under the Muhammadan Law of the Hanafi

school, which governs this case, actual delivery of possession of the gift of property is a condition precedent to the validity of the transfer of ownership to the donee, and, indeed, it is in consequence of the stringent requirements of that law on this point that gifts of property held in joint co-parcenership (*musha*) have been held to be invalid, because perfect and exclusive possession of joint undivided shares cannot be given to the donee—(*vide* Note No. 4 at p. 520, Baillie's Digest).

Such then being the rules of the Muhammadan Law as to the indispensability of possession by the donee, it follows, *a fortiori*, that property of which the donor himself is not in possession, and never acquired possession thereof, so as to deliver it to the donee, cannot be made the subject of a valid gift. The exact effect of the rule in respect of property which by its very nature is not capable of actual possession being delivered to the donee need not be considered, because such question does not arise in this case. Here all the property consists of immoveable property, and the donor Fateh Ali could have taken possession of his alleged share upon the death of Shakurullah from whom he claimed to inherit that share. The property was susceptible of possession, but it was in the possession of a trespasser, according to the statement in the deed of the 4th May, 1883, itself, and the case now set up by the plaintiff under that deed.

To such a state of things the rule of Muhammadan Law provides no exception from the rule as to possession being a condition precedent to the validity of a gift. Under the precedents of gifts contained in Macnaughten's work on Muhammadan Law, Case No. 6 seems to me to be closely applicable to the present case. There a person had executed a deed of gift in favour of his nephew, conferring upon him the proprietary right to certain lands of which the donor was not in possession, but to recover which he had brought an action, during the pendency of which the donor died, and the donee claimed the litigated property under the gift. It was there held that "the gift of a thing not in the possession the donor during his lifetime is null and void, and the deed con-

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taining such gift is of no effect, because, in cases of gift, seisin is a condition. Gift is rendered valid by tender, acceptance and seisin; but in gift seisin is necessary and absolutely indispensable to the establishment of proprietary right. According to the Hedaya, —'Gifts are rendered valid by tender, acceptance and seisin. The Prophet has said, a gift is not valid without seisin. So also if the thing given be pawned to or usurped by a stranger'. So also in the *Shurhi Viqaya*,—'A gift is perfected by complete seisin'. As the gift is, therefore, null, the claim of the donee is inadmissible, and the deed is invalid, as far as regards the lands of which the donor was never possessed."

Relying upon this precedent, Melvill and Pinhey, JJ., from whom Kemball, J, dissented, held that even in a case where the donor, being the owner of the property subject to the possession of a mortgagee, made a gift of his right of ownership, such gift was invalid under the Muhammadan Law for want of actual possession of the property by the donor at the time of the gift. The case is *Mohinuddin* v. *Manchershah* (1), and I may respectfully say that it probably carries the rule as to seisin too far, as is suggested by a Muhammadan lawyer, Mr. Syed Amir Ali of the Calcutta Bar, at page 70 of his Tagore Law Lectures for 1884. The question arising out of the rule of Muhammadan law as to possession being a condition precedent to the validity of a gift was fully argued and well considered by Garth, C. J., in *Mullick Abdool Guffoor* v. *Muleka* (2), who in delivering his judgment has made observations in which I concur, for they draw a clear distinction between cases where from the nature of the gifted property itself actual possession could not be given to the donee, and cases where such possession might be given to the donee or actual possession held by the donor. The principle upon which the judgment of Sir Richard Garth in the Calcutta case proceeded is scarcely consistent with the *ratio decidendi* of the Bombay ruling above cited, but it is in accord with the principle of Sir Barnes Peacock's judgment in *Shahazadee Hazara Begum* v. *Khaja Hossein Ali Khan* (3) which, though a case of

(1) I. L. R., 6 Bom. 650. (2) I. L. R., 10 Calc. 1112.
(3) 12 W. R. 498.

endowment, would, so far as the question of seisin is concerned, be governed by the same principles as questions of gift under the Muhammadan Law on that point.

It is not necessary for the purposes of this case to discuss these rulings more minutely, and it is enough to say that their general principle is that, for the validity of a gift under the Muhammadan Law, possession of the gifted property by the donor at the time of the gift, or at least at some time, so as to enable him to deliver possession of the same to the donee, and the actual delivery of such possession to the donee, are conditions precedent to the validity of gifts such as the gift evidenced by the deed executed by Fateh Ali in favour of the plaintiff on the 4th May, 1883.

The terms of that deed, however, clearly show, and it is proved and practically admitted on all hands, that in the first place no such possession ever existed in the donor Fateh Ali of the property which he intended to convey by the deed as would enable him to make a valid gift of the property; and in the next place it is equally clear, and indeed admitted, as shown by the very form of this suit, that the plaintiff donee never acquired possession of the property to which the suit relates and which he claims under the gift of the 4th May, 1883.

The matter therefore comes simply to this, that the deceased Fateh Ali, feeling himself entitled to a share of inheritance in the estate of the deceased Shakurullah, never having acquired possession of that share, executed the deed of 4th May, 1883, purporting to convey to the plaintiff such chances of success as the aforesaid Fateh Ali may have had in a litigation such as this, and, as a matter of fact, the plaintiff never obtained possession of the gifted share in pursuance of the deed of gift.

Under these conditions I am satisfied that the lower Court misapprehended the Muhammadan Law as to such gifts, and that the gift of the 4th May, 1883, was invalid owing to the absence of possession in the donor and the absence of the delivery of possession to the donee.

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The lower Court has, however, relied on two rulings of this Court, one being, *Kasim Hossein* v. *Sharifunnissa* (1), and the other *Sahibunnissa Bibi* v. *Hafiza Bibi* (2), in support of its view. So far as these rulings are concerned, I need only say that the first of these, which was a judgment of my brother Straight and Mr. Justice Oldfield, only gave effect to the ruling of the Lords of the Privy Council cited in that judgment, and which was repeated by their Lordships in *Ameeroonissa Khatoon* v. *Abadoonissa Khatoon* (3) to the effect that the rule of Muhammadan Law, that a gift of *musha* or an undivided part in property capable of partition is invalid, does not apply to definite shares of zamíndáris, which are in their nature separate estates with separate and defined rents; and that the second ruling, in which the judgment of the Court was delivered by Edge, C. J., related to a class of property of which the nature regulated by statute is vastly different from the nature of the property involved in this litigation. Again, so far as the lower Court has relied upon the Bombay ruling in *Shaik Ibhram* v. *Shaik Suleman* (4) it is enough to say that in that case possession such as the nature of the property admitted of was given to the donee, and in the case of the house the property was already in possession of the donee. All these cases are distinguishable from the present, because here the donor Fateh Ali was in no sort of possession of the share which he alleged himself to have inherited from Shakurullah, that the property was capable of being taken possession of by the aforesaid Fateh Ali, that he never obtained such possession either before or after the gift of the 4th May, 1883, and that the plaintiff donee himself never acquired such possession under the gift.

Under these circumstances I hold that the deed of gift, dated the 4th May, 1883, was invalid under the Muhammadan Law, that it therefore did not confer upon the plaintiff any such right as would entitle him to maintain an action such as this, and for these reasons I would decree this appeal, and reversing the

(1) I. L. R., 5 All. 285.
(2) I. L. R., 9 All. 213.
(3) L. R. 2 Ind. Ap. 87.
(4) I. L. R., 9 Bom. 146.

decree of the lower Court, dismiss the suit with costs in both the Courts.

STRAIGHT, J.—I am entirely of the same mind.

Appeal allowed.

Before Mr. Justice Straight and Mr. Justice Brodhurst.

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KIAM-UD-DIN AND ANOTHER (PLAINTIFFS), *v.* RAJJO AND ANOTHER (DEFENDANTS). *

Account stated—Hypothecation-bond for the amount due—Obligor preventing registration of bond by denying execution—Suit on account stated—Civil Procedure Code, s. 586—Small Cause Court suit.

For the purpose of determining whether a second appeal lies or is prohibited by s. 586 of the Civil Procedure Code, what must be looked at is not the shape in which the case comes up to the High Court, but the shape in which the suit was originally instituted in the Court of first instance.

The plaintiff sued (i) for registration of a hypothecation-bond executed by the defendant, (ii) in the alternative for recovery of the amount of the bond upon an account stated. The defendant denied execution of the bond, and that she had had any dealings or stated any account with the plaintiff. The Courts below disallowed the first claim as barred by limitation, and disallowed the second on the ground that the bond had effected a novation of the contract implied by the statement of accounts.

Held that under the circumstances of the case the plaintiff was entitled to resort to the account stated and sue thereon. *Sirdar Kuar* v. *Chandrawati* (1) distinguished.

Where two parties enter into a contract of which registration is necessary, it is essential that each should do for the other all that is requisite towards such registration.

The facts of this case are sufficiently stated in the judgment of Straight, J.

Mr. *Hamidullah*, for the appellants.

Munshi *Madho Prasad*, for the respondents.

STRAIGHT, J.—This was a suit brought by the plaintiffs for two reliefs; the first was for the registration of a bond, purporting to be a hypothecation bond executed by Musammat Rajjo Bibi, defendant, for the sum of Rs. 247-8-6; the second relief asked was,

* Second Appeal, No. 504 of 1887, from a decree of Munshi Monmohan Lal, Subordinate Judge of Azamgarh, dated the 17th December, 1886, confirming a decree of Maulvi Muhammad Amin-ud-din, Munsif of Muhammadabad, dated the 27th August, 1886.

(1) I. L. R., 4 All. 330.