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protection of art. 134. We have had the sale deed translated and have heard arguments upon its terms, and we are unable to discern in that document any single provision or any single expression which would be applicable only to a sale of full proprietary interest. The vendor nowhere asserts that he himself possesses such full proprietary rights. Indeed there are provisions in the document granting in express words the right to inhabit, the right to let to tenants, and the right to alienate, which would be superfluous if the preceding provisions of the document had conveyed an absolute title in full. We are satisfied then that the defendants cannot claim the benefit of art. 134.

We have been invited by Mr. *Porter* to consider the question whether the matter upon which our ruling is sought did really arise in the case. We are of opinion that we should be exceeding our functions if we entered upon such an inquiry. The provisions of the Regulation are, that a certain judicial officer may ask from us a ruling on a specific point or points of law arising out of an appeal which has been heard by him and upon which he has expressed his own opinion. We have no roving commission to enter upon the merits of the case in any other respect.

Our answer to the question put to us is, that the transfer made by Raj Mal, dated the 9th of April 1883, was not a sale of proprietary rights, and can therefore only have been an assignment of the more limited rights possessed by the vendor as submortgagee. The costs of this hearing will be costs in the appeal.

APPELLATE CIVIL.

1898
December 23.

Before Mr. Justice Blair and Mr. Justice Aikman.

ANWARI BEGAM (DEFENDANT) *v.* NIZAM-UD-DIN SHAH (PLAINTIFF).*

Muhammadan law—Gift—Possession—Gift of property attached by the Collector for arrears of revenue—Act No. XIX of 1873 *(N.-W. P. Land Revenue Act), section* 154.

Held that it was possible to make a gift, which should be valid under the Muhammadan law, of property which had been attached by the Collector for

* First Appeal No. 149 of 1896 from an order of Syed Siraj-ud-din, Subordinate Judge of Agra, dated the 5th February 1896.

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arrears of revenue under section 154 of Act No. XIX of 1873. All that was necessary to a valid gift was that the donor should transfer possession of such interest as he had at the time of the gift: it was not necessary that he should transfer possession of the corpus of the property. *Mullick Abdool Guffoor* v. *Muleka* (1), *Mahomed Buksh Khan* v. *Husseini Bibi* (2), *Rahim Bakhsh* v. *Muhammad Hasan* (3), and *Mohinudin* v. *Manchershah* (4) referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Messrs. *T. Conlan* and *S. Amiruddin* and Pandit *Sundar Lal* for the appellant.

Mr. *Abdul Majid* and Maulvi *Ghulam Mujtaba* for the respondent.

BLAIR and AIKMAN, JJ.—This is an appeal arising out of a suit brought by Nizam-ud-din, a minor, through his mother and certified guardian, to set aside a deed of gift which was executed by Ghulam Jilani, the grandfather of the minor, in favour of the appellant, Anwari Begam, daughter of Ghulam Jilani, and to recover possession of one-half of the property covered by the deed, of which, it is said, the donee assumed possession on Ghulam Jilani's death. Mesne profits are also claimed. Two transferees of separate portions of the property from the donee are made defendants to the suit. One of these, Behari Lal, who purchased a portion of the property from Anwari Begam, has filed a separate appeal. The other transferee defendant was a mortgagee of another part of the property and has not appealed.

* * * * * * *

The deed, which it was sought to set aside, was executed by Ghulam Jilani on the 21st of October, 1891, and was registered by him at the office of the Sub-Registrar of Agra on the following day. The deed is printed at page 18 of the appellant's book. In it the executant sets forth that he is the absolute owner of certain property detailed in the deed, situated in the city of Agra and in certain villages of the Agra district; that "he is about seventy years of age and has now become feeble and weak, and

(1) (1884) I. L. R., 10 Calc., 1112.
(2) (1888) I. L. R., 15 Calc., 684.
(3) (1888) I. L. R., 11 All., 1.
(4) (1882) I. L. R., 6 Bom., 650.

that owing to the death of his three grown-up sons he has become much dejected, and that there is no certainty of this precarious life." The deed goes on:—"Therefore I have of my free will and without any coercion or compulsion, while in a sound state of body and mind, made a gift of the whole of my property detailed below to my daughter, Anwari Begam, and put the donee in possession of the whole of the aforesaid property. I have removed and severed my possession and proprietary connection from the said property." The deed goes on to provide that the donee shall pay the executant one hundred and twenty rupees annually for his maintenance, either in monthly or half-yearly instalments as may be convenient to the parties. Failing payment of this annual amount the donor is empowered to recover it through the Court. The property conveyed by the deed consists of a share in the village of Basaiya, in the Agra district, a share in the village of Pingri, in the Muttra district, and certain house property in the city of Agra. As stated above, the deed was executed on the 21st of October, 1891. The donor died on the 31st of August, 1892, that is upwards of ten months after the execution of the deed. Ghulam Jilani's three sons had died in their father's lifetime. Only one of them had left issue, namely, the present plaintiff. It is admitted that, failing the deed of gift, Ghulam Jilani's property would on his death have been divided equally between his grandson, the plaintiff, and his daughter, the defendant. The learned Subordinate Judge has decreed the plaintiff's claim upon grounds both of fact and law, which are impugned in this appeal. The argument urged upon us on behalf of the appellant divides itself into two main branches. The first disputes the conclusions of fact arrived at by the learned Subordinate Judge, that the donor was not of "disposing mind" at the date of executing the deed, and that he executed it under "undue influence." The second branch of the argument is a mixed one of fact and law. The Subordinate Judge has found that, as a matter of fact, possession had not in the lifetime of the donor been given to, and accepted

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by, Anwari Begam of the properties purporting to be conveyed to her in the deed of gift.

[After discussing the first of the contentions mentioned above and coming to the conclusion that there was no evidence of mental incapacity or undue influence, the judgment thus continued:—]

We come now to the second branch of the argument which impeaches the finding of the Subordinate Judge upon the question whether, in relation to the several properties purporting to be given by the deed, possession had or had not, in fact and law, been given to the donee. The property conveyed by the deed of gift consisted in the first place of shares in two villages, namely, Pingri in the Muttra district and Basaiya, in the Agra district. The property in the village of Pingri was, prior to and at the date of the deed of gift, and, for all we know, during the remainder of the lifetime of the donor held under attachment by the Collector of the district for arrears of revenue under section 154 of Act No. XIX of 1873. Upon that ground it was contended that the donor had himself no possession of this property, and was therefore, according to Muhammadan law, incapable of making a valid gift of it. The share in Pingri being thus in the hands of the Collector it was possible and legal for him, if the arrears had not up to that time been cleared by the usufruct, to retain possession of it for the maximum period of five years, from the 1st of July next after the attachment—*vide* section 156 of Act No. XIX of 1873. It is clear that, although the donor had not actual possession, the ownership of the village had not passed away from him. It was open to him at any period to pay off the arrears and regain absolute possession of the property, and in any case he could not be kept out of possession for a longer period than five years. It was strenuously argued by the learned counsel for the respondent that under the Muhammadan law a gift could not be made of a share in a village which was the subject of such attachment. The decision of this point brings us to the consideration of the question, what property can form the subject of a gift according to

Muhammadan law? In Grady's Hamilton's Hedaya, a work of considerable, but not infallible, authority on Muhammadan law, we find, at page 482 of the edition of 1870, the following definition under the title of *hiba* or gift:—"*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." Again, in Baillie's Digest of Moohummudan Law, second edition, page 515, gift is defined as "the conferring of a right of property in something specific without any exchange." It is to be noted here that the word *property* is used by these two authorities without any limitation and is conterminous with what, according to the definition which is given of *hiba* in its literal sense, may form the subject of a gift, namely, something from which the donee may derive a benefit. There is nothing, therefore, in that definition to show that a Muhammadan cannot make a valid donation of a reversionary right. In Volume I of Ameer Ali's Muhammadan Law, second edition, page 58, it is said by that learned writer that "anything over which the dominion or the right of property may be exercised, or anything which can be reduced to possession, or which exists as a specific entity, or as an enforceable right, or anything in fact which comes within the meaning of the word *mal*, may form the subject of a gift." It was admitted in argument that property can, under the Muhammadan law, be validly conferred by gift, though it be not in the actual, or what is known as *khas*, possession of the donor, as, for instance, a share in a village in the occupation of tenants or held in farm by a lessee. It was not, however, admitted that property in the possession of a usufructuary mortgagee was capable of such donation. We fail entirely to understand how any distinction can be drawn between the case of a lessee and of a usufructuary mortgagee. It is equally difficult detect any legal principle upon which a right to property held under attachment by the Collector differs from a right to property held by a lessee or usufructuary mortgagee.

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From page 31 of Baillie's Digest it appears that a valid gift may be made of a debt in favour of a person other than the debtor. In the case of *Mullick Abdool Guffoor* v. *Muleka* (1), a gift of *malikana* rights, *i.e.* the right to receive an annual allowance, was upheld. In the case of *Mahomed Buksh Khan* v. *Hosseini Bibi* (2) the Privy Council upheld a gift of property which was not at the time of the gift in the donor's possession. It was held in that case that as the donor "had done all that she could to perfect a complete gift which was attended with complete publicity, and as the donee had afterwards obtained possession, the fact that the donor had been out of possession and therefore had not delivered possession did not of itself invalidate the gift in favour of the respondent." There is a decision of the Bombay High Court in the case of *Mohinudin* v. *Manchershah* (3), in which two Judges held that the owner of property which was in the possession of a mortgagee could not, under the Muhammadan law, make a gift of it. Kemball, J., dissented from this view. With reference to this case it was remarked by Mahmood, J., in the case of *Rahim Bakhsh* v. *Muhammad Hasan* (4): —"I may respectfully say that it probably carries the rule as to seisin too far." Mr. Ameer Ali, at page 61 of the aforesaid volume, says, with reference to the case of *Mohinudin* v. *Manchershah* :—"The view taken by the majority of the Judges is founded upon an erroneous impression of Hanafi law, under which seisin is requisite for hypothecation. According to the correct view of the Hanafi doctrine on the subject, there is nothing to preclude the mortgagor from granting his equity of redemption to another."

There is no doubt that the principle of Muhammadan law is that possession is necessary to make a good gift, but the question is, possession of what? If a donor does not transfer to the donee, so far as he can, all the possession which he can transfer, the gift is not a good one. As we have said above, there is, in our

(1) (1884) I. L. R., 10 Calc., 1112.
(2) (1888) I. L. R., 15 Calc., 684.
(3) (1882) I. L. R., 6 Bom., 650.
(4) (1888) I. L. R., 11 All., 1; at p. 10.

judgment, nothing in the Muhammadan law to prevent the gift of a right to property. The donor must, so far as it is possible for him, transfer to the donee that which he gives, namely, such rights as he himself has; but this does not imply that where a right to property forms the subject of a gift, the gift will be invalid unless the donor transfers, what he himself does not possess, namely, the *corpus* of the property. He must evidence the reality of the gift by divesting himself, so far as he can, of the whole of what he gives. Now as to the village Pingri, we find that within a fortnight after the gift the donor went to Muttra, in which district the village of Pingri is situated, and stated on oath before the Assistant Collector as follows:—"I have transferred my share in the village Pingri to Musammat Anwari Begam, under a deed of gift dated the 21st of October, 1891, and have put her in possession of the said property like myself. I wish that by removal of the name of me, the donor, the name of the donee may be entered in the Government papers." The usual proclamation and inquiry followed, and it is admitted that in January, 1892, the donor's name was removed and the donee's name entered in the Government records as proprietor of the share in Pingri. The donor could not give actual possession of the share, as it was at the time held under attachment by the Collector. But it appears to us that, so far as he could, he took the steps necessary to put Anwari Begam in his shoes, and she, in point of fact, took his place.

We now come to consider the case as it relates to the giving of possession of the share in the village Basaiya. The learned counsel for the respondent laid stress upon the fact that proceedings were not taken to obtain mutation of names in respect of this share until the 14th of April, 1892. The fact, however, remains that those proceedings were taken at the instance of the donor, and in order expressly to give effect to his gift, and were completed in his lifetime. We consider that where possession is transferred by a donor to a donee in pursuance of the deed of gift previously executed, the provisions of the Muhammadan law are

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satisfied and delay is immaterial. The delay which took place was explained by the learned counsel for the appellant as to some extent referable to the fact that the deed of gift had been filed in the Muttra proceedings which did not terminate until January 1892, and there was consequently a delay in getting the document from that district for the initiation of proceedings in relation to the village in the Agra district. It is not to be forgotten that the decision of the Revenue Court in mutation proceedings is based upon a transfer of possession effected before mutation takes place. Upon the weight to be attached to the decision of the Revenue Courts in such proceedings, the following observations of the Privy Council in the case of *Muhammad Mumtaz Ahmad* v. *Zubaida Jan* (1), may be quoted:—"But the order for mutation is important as showing that no objection was made to the mutation, and that the report of the patwari, made during the lifetime of Zahur, as to the execution of the deed of gift and of the transfer of possession under it, which had been adopted by the tahsildar, was also adopted and acted upon by the Deputy Collector."

We will now consider the documentary evidence relied on by the plaintiff as showing that, *notwithstanding the deed of gift* and the assertions contained in it as to the donor having put the donee in possession of the property, the donor himself continued in possession, exercising all the rights of ownership. In the first place copies are filed of plaints and decrees in suits brought by Ghulam Jilani against tenants in the village of Basaiya for arrears of rent. All these plaints were filed on the 1st of February, 1892, and were for the recovery of the arrears of rent for the kharif instalment of the year 1299F. In them the cause of action is described as arising on dates ranging from the first to the 10th of November, that is, by far the major portion of the rent had accrued before the date of execution of the deed of gift. We note also that in all the plaints Ghulam Jilani describes himself, not as zamindar but as lambardar, and we have no

(1) (1889) I. L. R., 11 All., 460; at p. 477.

information as to the date upon which he ceased to be lambardar. Another circumstance is, that all these suits were instituted before the mutation of names had been made, at a time when Ghulam Jilani's name still appeared in the revenue record. The same observation applies to certain ejectment proceedings taken by Ghulam Jilani against tenants in Basaiya. In this connection we may quote another passage from the judgment of their Lordships of the Privy Council in the case of *Muhammad Mumtaz Ahmad* v. *Zubaida Jan*, referred to above, most of the incidents of which bear a remarkable resemblance to those of the case now before us. At page 477 of the judgment their Lordships say :—"The reasons of the Subordinate Judge in support of his finding that the donee died before she obtained possession are weak and unavailing. First, he relies upon five decrees in suits brought in the name of Himayat Fatima for rent which accrued after the date of the deed of gift, and also upon one payment of revenue made in her name on the 26th November, 1879, but the suits were commenced and the revenue paid before the mutation of names in the Collector's office, at a time when actions for rent and payment of revenue would in all probability be brought and made in the name of the person entered as the proprietor in the Collector's book." In this case also two receipts for revenue paid in the name of Ghulam Jilani are relied on. One of these for Rs. 200 is dated the 4th of May, 1892. The sum purports to have been received from Ghulam Jilani as lambardar and on account of the rabi instalment of 1291F. At the time of that payment Ghulam Jilani's name stood in the Government books as the proprietor of the share and also as lambardar. The second receipt is dated the 18th of July, 1892, and is for Rs. 24-14-3. The money purports to have been received from Ghulam Jilani, lambardar, on account of revenue, miscellaneous items. At the date of this payment mutation proceedings had terminated, Anwari Begam's name having been substituted for Ghulam Jilani's on the 23rd of June, 1892; but the receipt does not show on account of what instalment the money was paid, and from the amount of the payment and its date we have little

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doubt that it was on account of a balance due in respect of some instalment previous to the mutation of names.

Applying the criticisms of the Privy Council in the above case, we think that the above evidence does not negative the abandonment by the donor to the donee of his possession in the village of Basaiya. As to the positive evidence to prove the donee's possession of the above share in the lifetime of the donor, we attach great weight to entries in the diary of a deceased patwari, produced by his successor, one of which is dated the 28th of June, 1892. These show that the agent of the donee was on her behalf exercising proprietary rights in the village prior to the decease of the donor.

The above entries strongly corroborate the genuineness of certain leases granted by the donee's agent, on which doubts have been thrown—it appears to us on insufficient grounds—by the lower Court. We have examined these documents and are unable to agree with the opinion expressed by the learned Subordinate Judge regarding them. We find that transfer of possession of the share in Basaiya did take place in the donor's lifetime.

The third property, the subject of the deed of gift, is the house property in the city of Agra. It is contended on behalf of the respondent that a part of the property purporting to be conveyed by the deed of gift had been the subject of a suit brought by Ghulam Jilani upon the 19th of April, 1892, in which he claimed to be the owner in possession of the property sued for. We have examined all details and descriptions by metes and bounds, and a map of the house property in question, and the respondent has failed to satisfy us as to the identity of the property sued for in the plaint above mentioned with any part of the property covered by the deed of gift. A tenant of this property was called as a witness, and a number of endorsements upon the back of the lease to this tenant, purporting to be acknowledgments of receipts by the lessor of rent from him, were relied on. It is contended, and is no doubt true, that the oral statements made by the witness do not correspond therewith in relation to the amounts

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due and payable by him in respect of this house property. We think there is possibly an explanation of the discrepancy, but we find it unnecessary to arrive at a conclusion upon that matter. In our opinion, if the receipts for rent had been forgeries or interpolations for the purposes of this case, they would have purported to be signed by some person on behalf of the lessor. We are also satisfied that if the story of the witness had been a concocted story, it would have been made to coincide accurately with the documentary evidence in possession of the party who called him. We therefore find that the gift of the house property is not invalid for lack of possession by the appellant here. The result is that the appeal is allowed, the decree of the lower Court is set aside, and the plaintiff's suit is dismissed with costs. The appellant will have her costs of this appeal.

Appeal decreed.

APPELLATE CRIMINAL.

1899
January 3.

Before Sir Arthur Strachey, Kt., Chief Justice, and Mr. Justice Knox.

QUEEN-EMPRESS *v.* SONEJU AND OTHERS.*

Criminal Procedure Code, section 288—*Admissibility of evidence—Statement of approver made before committing Magistrate and afterwards retracted in the Court of Session.*

Pardon was tendered by a Magistrate to one of several persons who were being tried before him for dacoity. The pardon was accepted, and the person to whom it was tendered made a statement as a witness before the Magistrate. The case having been committed to the Court of Session, the approver in that Court totally repudiated his statement made before the Magistrate. *Held* that this repudiation did not prevent the Sessions Court from considering the evidence of the approver under the provisions of section 288 of the Code of Criminal Procedure.

IN this case twenty persons were committed for trial to the Court of the Sessions Judge of Jhansi charged with dacoity under section 395 of the Indian Penal Code. Out of these, twelve were convicted, of whom two were sentenced to transportation for life, and the remainder to rigorous imprisonment for ten years.

* Criminal Appeal No. 1059 of 1898.