# APPELLATE CIVIL.

1905
*July* 22.

*Before Sir John Stanley, Knight, Chief Justice and Mr. Justice Sir William Burkitt.*

HUMERA BIBI (PLAINTIFF) *v.* NAJM-UN-NISSA BIBI (DEFENDANT).*

*Muhammadan law—Gift—Transfer of possession—Donor and donee living in the same house the subject of the gift—Evidence.*

It is not necessary according to Muhammadan law that in all cases where a gift of immovable property is made the donor should actually and physically vacate the property the subject of the gift. Where the gift was of a house and other immovable property, and was made by registered instrument and attended by circumstances of great publicity, the fact that the donor, who was the aunt of the donee, never quitted the house, but continued to reside in it with her nephew, was held to be of no effect in the face of the clearly manifested intention of the donor to transfer possession of the house to the donee. *Shaik Ibhram* v. *Shaik Suloman* (1) followed.

THE facts of this case are fully stated in the judgment of the Court.

The Hon'ble Pandit *Sundar Lal* and Mr. *Abdul Raoof*, for the appellant.

Sir *Walter Colvin*, Mr. *Karamat Husain*, Pandit *Moti Lal Nehru* and Maulvi *Muhammad Ishaq*, for the respondent.

STANLEY, C.J. and BURKITT, J.—This appeal arises out of a suit for possession of a portion of the property comprised in a deed of gift executed by the plaintiff on the 14th of January 1888 in favour of her nephew, one Minnat-ullah, since deceased. The plaintiff, who is a childless widow, owned a considerable amount of property, partly acquired from her husband and partly self-acquired. Her case is that she supported and brought up Minnat-ullah, the son of her brother, Maulvi Khadim Husain, as her son, and that she was desirous that after her death all her property should devolve upon him; that she consulted Khadim Husain, in whom she had confidence, and that he advised her to execute a deed of gift in favour of Minnat-ullah, assuring her that she would not be put out of possession of the property during her lifetime; that, acting on this assurance and in the belief that she could not otherwise carry out her wishes, she executed a deed of gift of all her property, with the exception of three

* First appeal No. 191 of 1903, from a decree of Munshi Achal Behari, Subordinate Judge of Gorakhpur, dated the 20th of May 1903.

(1) (1884) I. L. R., 9 Bom., 146

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villages in the Gonda District. The document was duly registered and mutation of names effected in favour of Minnat-ullah, but the plaintiff says that she continued in possession as before. On the 14th of May 1901, that is, upwards of 13 years from the execution of the deed of gift, Minnat-ullah died, and thereupon the defendant, Musammat Najm-un-nissa, the widow of Minnat-ullah, applied for and obtained an order for mutation in her favour in respect of a one-fourth share in the villages the subject-matter of the gift and obtained possession of that share.

The defence is that the plaintiff executed the deed of gift of her own free will, with full knowledge of its purport and effect, out of affection for her nephew, and that she was not induced to do so by Khadim Husain, nor was any advice given to her by him on the subject, and that the deed is binding upon her. The defendant further pleaded that the claim necessarily involves the cancellation of the deed of gift and that it is barred by three years' limitation. The defendant further avers that her husband and after his death the defendant have all along been in adverse possession of the property since the date of the execution of the deed of gift, and that the plaintiff's claim is barred by 12 years' limitation.

The Court below held that Minnat-ullah got possession of the property on the execution of the deed of gift and that he retained possession and dominion over it until his death in May 1901, and that the gift was valid and irrevocable. It also found that the suit was barred by limitation.

The validity of the gift is impeached before us on the ground that there was no such absolute relinquishment by the donor of the possession of the subject-matter of the gift or of the entire of it as is necessary to constitute a complete gift under the Muhammadan law. It is said that the plaintiff continued to live in the dwelling-house in which she had been living with Minnat-ullah, and which is part of the subject-matter of the gift, and that there was no complete relinquishment of that house in favour of the donee. It was further contended that after the execution of the deed of gift the plaintiff continued to receive the entire rents and profits or part of the rents and profits of the property. It is clear that, unless the plaintiff can show

that the gift made by her was not valid according to the Muhammadan law, and that she has been in possession of the whole or part of the property comprised in that gift, her claim must fail having regard to the time which has elapsed from the date of the gift up to the date of the institution of the suit.

Before we deal with the evidence which has been given, it will be convenient to state the material parts of the deed of gift. After a recital of the title of the executant to the property and that she is in proprietary possession and enjoyment of it, there follows a statement that she has no child and that she is very much pleased with Muhammad Minnat-ullah, the son of her brother, Muhammad Khadim Husain, who from the time of her husband has been living in her house and been brought up by her as a son, and as a son has been obeying her and carrying out her orders in a way befitting a son. Then comes the operative part whereby the executant of her own free will and accord and while in a sound state of body and mind makes a gift of the property, details of which are given in the schedule, of the estimated value of one lakh of rupees, to Muhammad Minnat-ullah, and puts him into proprietary possession of it. This is followed by a statement that the donee has accepted the gift and has taken possession of all the property the subject of it. The deed was executed in autograph by the plaintiff and bears the signature of no less than 31 witnesses, which shows the publicity with which the transaction was carried out. On the 24th of January 1888 the deed was duly registered and mutation proceedings were instituted and the plaintiff's name was struck off the record and Minnat-ullah's substituted in its place. After this the Government revenue was invariably paid by Minnat-ullah in his own name. He treated the property as his own and in various partition proceedings in reference to portions of it was regarded and acted as the proprietor. In 1896 he mortgaged the whole estate to the Fyzabad Bank to secure a sum of Rs. 40,000, and again in 1899 he executed a further mortgage in favour of that bank. In the mortgages he is described as the full owner of the property.

The following is a short summary of the evidence which was given on behalf of the plaintiff appellant. She herself was

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examined by commission, and in the course of her evidence she admitted the execution of the deed of gift, and stated that after its registration her agent brought it from the office of the Sub-Registrar, and it remained in the possession of Khadim Husain, and after the mutation of names had been effected Kadim Husain gave it to her. She stated that the deed was executed at the instance of Khadim Husain, and that he assured her that she would continue during her life in possession of everything just as before. We may observe that Khadim Husain is dead. She also stated that the house in which she was being examined was comprised in the deed of gift, and that since the execution of the deed she had never given possession of it, and that all the papers relating to the villages are in her possession in that house. She further said that after the execution of the deed of gift she continued to remain in possession of the entire property as before. This evidence is in direct conflict with the evidence which she gave in the year 1888 in a case in which she was examined on interrogatories in regard to the house in question and the other property which is the subject-matter of the deed of gift. Her answers on this occasion were put in evidence by the respondents as being a flat contradiction to her evidence in this case. Her examination on interrogatories was in connection with the finding of some swords in the house, for which there was said to be no license. One of the questions put to her was :—"Have you declared Maulvi Minnat-ullah, son of Maulvi Khadim Husain, to be the owner of the whole of your property and have executed a deed of gift?" Her answer was :—"I have made Minnat-ullah, son of Maulvi Khadim Husain, the owner of the whole of my property and have executed a deed of gift." Then a further question was :—"Are you the owner of the house in which you and Khadim Husain live, or do you live in it with the permission of some other person, the owner thereof?" Answer:—"I myself was the owner of the house, but now I have given it to Minnat-ullah under a writing, and live in it with his permission." In answer to the further question "When did you execute the deed of gift in favour of Maulvi Minnat-ullah?" she stated :—"About 7 or 8 months ago," and in answer to the question "Who is now in possession of the whole of your

property ?" she stated:—"Maulvi Minnat-ullah is in possession of the whole of the property." These interrogatories were answered on the 3rd of August 1888, *i.e.* about seven months after the execution of the deed of gift. In view of them it is idle for the plaintiff now to allege that she was not perfectly well aware that she had absolutely disposed of her interest in the property the subject-matter of the deed of gift in favour of her nephew. Not merely did she execute the deed and cause mutation of names to be effected in favour of Minnat-ullah, but, as appears from the evidence, she celebrated the event with great rejoicings. A musical entertainment was given to all the neighbourhood to commemorate the succession of Minnat-ullah to the *guddi*, and the transfer of the property to Minnat-ullah was made with the greatest publicity. No doubt the plaintiff continued to be treated with great deference and respect by all the members of the family and was in a manner treated as the head of the family. Under her advice, no doubt, the business of the estate was conducted and she was in a sense regarded as the head of the house. None the less she had parted with the ownership in the most public manner and had done so of her own free will. It is idle after the lapse of 13 or 14 years for the plaintiff now to allege that she was deceived by her late brother, Khadim Husain, and wrongly induced by him to execute the deed. If Khadim Husain had been alive she would never, we think, have attempted to set up the case. A good deal of time was occupied over the evidence of a number of witnesses, of karindas and servants, patwaris and tenants, who endeavoured to show that after the gift the plaintiff remained in possession of the property as owner as before, giving directions for its management and receiving the rents. Their evidence appears to us to be valueless. Not a single receipt for rent was produced in the name of the plaintiff. Any receipt which was produced was in the name of Minnat-ullah. Even after the death of Minnat-ullah the plaintiff did not set up the case on which she now relies, but claimed to be entitled to the property as his heir. In the first instance she claimed to have mutation of names effected in her favour as his heir, but when she discovered that he was not his heir she then put forward the present case.

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Pandit *Sundar Lal* on behalf of the appellant contended that the deed of gift was not valid, there being no such transfer of possession of the house in which the parties resided as is necessary to satisfy the requirements of the Muhammadan law. His point is that the plaintiff did not at the time of the gift leave the house and remove all her belongings therefrom, but continued in occupation of it, and that so there was not such an absolute relinquishment of it as is necessary to satisfy the Muhammadan law. According to his argument, in order to perfect the gift it was necessary that the plaintiff should have abandoned possession of the house and removed all her goods and chattels from it for a time, and that not having done so the gift was imperfect. In support of this contention he referred to several passages in Macnaghten's Principles of Muhammadan Law and in Baillie's Hanafia and Ameer Ali's well-known work. We are not prepared to hold that in a case such as the present actual physical departure of the donor from a house which is the subject of a gift evidenced by a written instrument is necessary in order to complete the gift by delivery and possession. On the contrary, we think that, if the parties are present on the premises, it is sufficient that an intention on the part of the donor to transfer the possession has been unequivocally manifested. There can be no doubt in this case that such an intention was unequivocally manifested. In the document itself it is expressly stated that the plaintiff not merely made a gift of the property to Minnat-ullah, but also put him into proprietary possession of it, and a further statement that Minnat-ullah had accepted the gift and taken possession of the property. In addition to this, with the consent and at the instance of the plaintiff mutation of names was effected in favour of Minnat-ullah, and his name was substituted in the record of rights as owner, her name being erased therefrom. In the case of *Shaik Ibhram* v. *Shaik Suleman* (1) this question was considered, and it was held that for the purposes of completing a gift of immovable property by delivery and possession no formal entry or actual physical departure is necessary: it is sufficient if the donor and donee are present on the premises and an intention

(1) (1884) I. L. R., 9 Bom., 146.

on the part of the donor to transfer has been unequivocally manifested. In this case part of the subject-matter of the deed of gift was a dwelling-house in which the donor was residing at the time of the gift and continued to reside up to the time of his death, and it was held by the District Court that no relinquishment on the part of the donor and seisin on the part of the donee had ever taken place, and consequently the gift was nugatory and inoperative. This decision was reversed on appeal by West and Nanabai Haridas, JJ. In delivering the judgment of the Court, West, J., observed :—"As to the delivery of the house, the principle is to be borne in mind that when a person is present on the premises proposed to be delivered to him, a declaration of the person previously possessed puts him into possession. He occupies certain part, and this occupation becoming actual possession by the will of the parties extends to the whole which is in immediate connection with such part, where the possession is rightfully, though not where it is wrongfully, taken—*Ex parte Fletcher* (1). An appropriate intention where two are present on the same premises may put the one out of, as well as the other into, possession without any actual physical departure or formal entry, and effect is to be given as far as possible to the purpose of an owner whose intention to transfer has been unequivocally manifested." Mr. Ameer Ali, in his work on Muhammadan Law, does not express disapproval of this decision, but on the contrary accepts it as being in accordance with the law. He says of it:—"This is in accordance with the principle stated in Majmaa-al-auhar" (3rd Edition, page 71). In an earlier passage in treating of the meaning of the term *ikbaz*, or seisin, under the Muhammadan Law he says :—"It must be admitted that unless *ikbaz* (constructive or actual) can be presumed in the donee after the gift, it will not be operative. But a full consideration of the *dicta* on the subject shows that actual delivery of possession is not necessary. If the character of the possession changes, the mere retention of the subject-matter of the gift in the hands of the donor would not affect the validity of the gift" (page 64). He also points out in another passage that in considering the

(1) (1877) L. R., 5 Ch. D., 809.

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question of transmutation or delivery of possession, the relationship of the parties must be kept in view. At pp. 71, 72 is the following passage:—"The residence of the husband in a house of which he has made a gift to his wife, or the realization by him of the rents and profits of the property he has given to her, is explainable by the relationship of the donor and the donee. Similarly, if the father were to make a gift of his business to his minor son and continue to manage it for him, or an uncle were to give some property to a nephew and continue to be supported by the donee, the gift will not be invalid on that account." In the case before us the donor was aunt of the donee, and the donee had been brought up and treated by her as a son. The intention of both the donor and the donee was that the donor should continue to reside with the donee, and under the circumstances it would have been a mere empty formality for the donor to have left the house and removed therefrom all her goods and chattels for the purpose of completing the gift and then immediately to have returned to it. In the most clear and emphatic language the plaintiff divested herself of all her interest in the property the subject-matter of the gift. In the deed of gift she says that she severs her connection with it and withdraws her possession therefrom, and that she has put the donee into proprietary possession of all the property such as she enjoyed. It is also stated in the deed that the donee had accepted the gift and taken possession of all the gifted property. Mutation of names was effected in favour of the donee, and rejoicings were held over his accession to the *gaddi*. Some months afterwards the plaintiff on oath deposed that she had no interest in the property, but had entirely made it over to her nephew, and that she was living in the dwelling-house with his permission. Having regard to these facts and circumstances, we are unable to hold that there is any force in the argument of the plaintiff's learned advocate that the gift was not a complete and perfect gift. The decision on this question determines this appeal. The evidence satisfactorily establishes that not merely was an absolute gift made by the plaintiff to her nephew Minnat-ullah, but that under that gift he obtained possession of the subject-matter of it, acted as the proprietor, raised money

on the security of it, and was treated by the family, including the plaintiff herself, as its absolute owner.

For these reasons we see no reason to differ from the Court below in the view at which it arrived, and therefore dismiss the appeal with costs.

*Appeal dismissed.*

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*Before Mr. Justice Banerji.*

KALLAN KHAN AND OTHERS (PLAINTIFFS) *v.* MARDAN KHAN AND OTHERS (DEFENDANTS).*

*Act No. IV of* 1882 *(Transfer of Property Act), section* 60—*Mortgage—Effect of mortgagee purchasing part of the property mortgaged—Redemption.*

Where a mortgagee acquires a part of the mortgaged property, and thus a fusion takes place of the rights of the mortgagee and the mortgagor in the same person, the indivisible character of the mortgage is broken up, and one of several mortgagors may in such a case redeem his own share only on payment of a proportionate part of the mortgage money, but he cannot compel the mortgagee to allow him to redeem the shares of other persons, in which he is not interested. *Kuray Mal* v. *Puran Mal* (1) followed. *Lachmi Narain* v. *Muhammad Yusuf* (2) referred to. *Mora Joshi* v. *Ramchandra Dinkar Joshi* (3) distinguished.

THIS was a suit for redemption of mortgage brought under the following circumstances. The mortgage was made by one Shahab-ud-din on the 10th of May 1872 in favour of Ali Muhammad Khan, the predecessor in title of defendants Nos. 1 to 8. Subsequently a portion of the mortgaged property was purchased by the mortgagee, and again another portion of the mortgaged property was purchased by Kallan Khan and others from the heirs of the mortgagor. These purchasers then sued for redemption claiming a right to redeem not only the property which they had purchased, but also the remainder of the mortgaged property. The mortgagee resisted the claim on the ground, amongst others, that the plaintiffs were not entitled to redeem a larger share than that which they had purchased. The Court of first instance (Munsif of Sambhal) accepted this contention and made a decree in the plaintiffs favour for

* Second Appeal No 314 of 1904, from a decree of Pandit Giraj Kishore Dat, Subordinate Judge of Moradabad, dated the 6th of January 1904, confirming a decree of Pandit Mohan Lal Sandal, Munsif of Sambhal, dated the 23rd of July 1903.

(1) (1879) I. L. R., 2 All., 565. (2) (1894) I. L. R., 17 All., 63.
(3) (1890) I. L. R., 15 Bom., 24.