

1916  
January, 29

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Muhammad Rafiq.

KARAM ILAHI (DEPENDANT) v. SHARF-UD-DIN (PLAINTIFF) AND NANHEY LAL AND ANOTHER (DEPENDANTS).\*

Act No. IV of 1882 (*Transfer of Property Act*), sections 123 and 129—*Gift—Validity of gift of immovable property—Muhammadan law.*

Where a Muhammadan had made a gift of immovable property which was valid according to Muhammadan law, it was held that the gift was none the less valid because the donor had executed a deed of gift purporting to convey the property to the donee, which, owing to a defect in the attestation, was invalid according to the provisions of the *Transfer of Property Act, 1882*.

THE facts of this case were as follows :—

The plaintiff sued for a declaration that certain property was not liable to be sold in execution of a decree, because it had already been the subject of a gift in favour of a third party. In support of this contention a deed of gift was produced, and one of the marginal witnesses was called to prove it. He, however, in cross-examination admitted that when he signed his name all the other parties had already signed. It was argued, therefore, that the deed was invalid. For the respondents it was contended that the donor, being a Muhammadan, was not bound by the requirements of the *Transfer of Property Act* as to the formalities necessary to a valid gift of immovable property, and that, as the transaction was valid according to Muhammadan law, it must stand and the decree of the court below in favour of the plaintiff be maintained.

Mr. C. Dillon, the Hon'ble Munshi Gokul Prasad and Maulvi Iqbal Ahmad, for the appellant.

Babu Benoy Kumar Mukerji, for the respondent.

RICHARDS, C. J., and MUHAMMAD RAFIQ, J. :—This appeal arises out of a suit brought by the plaintiff for a declaration that certain property was not liable to be sold under a decree. The plaintiff's case was that the property had already been transferred by gift. In support of this contention the plaintiff adduced in evidence a deed of gift. A witness was produced who is a marginal witness. On cross-examination, however, he admitted that when he signed his name all the other parties had already

\* Second Appeal No. 1307 of 1914, from a decree of H. E. Holme, District Judge of Aligarh, dated the 14th of July, 1914, confirming a decree of Sushil Chandra Banerji, Subordinate Judge of Aligarh, dated the 6th of May, 1913.

signed. It is contended on behalf of the defendant appellant that this deed cannot be said to be proved having regard to the provisions of section 123 of Act IV of 1882. We may mention here that the point was not taken in either the first court or in the lower appellate court. Section 123 of the Transfer of Property Act, no doubt, provides that a gift of immovable property must be effected by a registered instrument signed by the donor and attested by at least two witnesses. Section 68 of the Evidence Act provides that where a document is required by law to be attested, one at least of the attesting witnesses must be called. The argument is that there was no proof that the deed was attested by two witnesses, and that the witness called by the plaintiff in the court below cannot be regarded as an attesting witness at all inasmuch as he had not seen the donor sign. The respondent relies on the provisions of section 129 of the Transfer of Property Act, which is as follows :—" Nothing in this Chapter relates to gifts of immovable property made in contemplation of death, or shall be deemed to affect any rule of Muhammadan law, or, save as provided by section 123, any rule of Hindu or Buddhist law." It is admitted that a Muhammadan may make an oral gift provided that possession follows. It seems to us quite clear that the provisions of section 123 are inapplicable to gifts made by Muhammadans and valid according to their law. It is quite clear that the Legislature had in its mind the provisions of section 123 when enacting section 129. Section 123 is specifically referred to in section 129. The deed of gift is admissible to prove that a gift was made. This is the only point which could be or was argued in the present appeal. The appeal fails and is dismissed with costs.

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KARĀM ILĀHĪ  
v.  
SHARF-UD-  
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*Appeal dismissed.*