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December, 5.

Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

FAZL AHMAD AND ANOTHER (DEFENDANTS) *v.* RAHIM BIBI (PLAINTIFF) AND QAMR-UN-NISSA BIBI AND OTHERS (DEFENDANTS).*

Muhammadan law—Gift made during his last illness, by a son to his mother— Marz-ul-maut—*Application of doctrine.*

On a question of the application of the doctrine of *marz-ul-maut* to a disposition of property made by a Muhammadan during his last illness, if the transaction is a sale the doctrine would not apply at all; if the transaction is a waqf, it would be valid to the extent of one-third; while if it is a gift, it would not be valid at all.

In the case before the Court the particular transaction was held on the facts to be really a gift to one of the heirs (the mother of the donor) and therefore invalid, although in form it purported to be a sale.

THIS appeal arose out of a suit for possession of certain shares in the estate of a deceased Muhammadan, Manzur Ahmad. The deceased had died childless, leaving as his heirs his uncle Fazl Ahmad, his mother Musammat Rahim Bibi, and two widows, Musammat Qamr-un-nissa and Musammat Jilani Begam, the latter being a daughter of Fazl Ahmad. Shortly before his death, and during his last illness, which was of some duration, Manzur Ahmad, who was a man of considerable means, transferred to his mother Musammat Rahim Bibi two villages valued at a about a lakh each and a sum in cash amounting to Rs. 85,000 odd. After the death of Manzur Ahmad, there was litigation in the Revenue Court as to mutation of names with respect of the two villages referred to above, and Fazl Ahmad succeeded in getting his name recorded as one of the heirs of Manzur Ahmad, and was appointed lambardar. Thereafter the present suit was filed by Musammat Rahim Bibi to recover possession of the two villages, Bithaura Kalan and Amkhera, which had been transferred to her by Manzur Ahmad; and Fazl Ahmad filed another suit claiming his share of the cash given to Rahim Bibi by Manzur Ahmad on his death-bed. In the suit brought by Rahim Bibi the Subordinate Judge decreed the plaintiff's claim for possession and mesne profits.

The defendants thereupon appealed to the High Court.

Mr. *B. E. O'Conor*, the Hon'ble Sir *Sundar Lal* and Dr. *S. M. Sulaiman*, for the appellants.

* First Appeal No. 21 of 1916, from a decree of Gauri Shankar, Subordinate Judge of Pilibhit, dated the 4th of January, 1916.

The Hon'ble Dr. *Tej Bahadur Sapru*, Babu *Preo Nath Banerji* and Maulvi *Iqbal Ahmad*, for the respondents.

RICHARDS, C. J., and BANERJI, J.:—This and the connected appeals arise out of two suits which related to certain property, movable and immovable, which belonged to one Manzur Ahmad, who died on the 2nd of September, 1912. Manzur Ahmad, although he had been married (four times, it is stated) never had any children. His heirs were, first, Fazl Ahmad (his paternal uncle), secondly, his mother Musammat Rahim Bibi, and thirdly his two widows Musammat Qamr-un-nissa and Musammat Jilani Begam. Under the Muhammadan Law of Inheritance, Fazl Ahmad would have been entitled to 10 *sihams* out of 24, Rahim Bibi to 8 *sihams*, and the two widows to 6 *sihams* between them. Fazl Ahmad was not only uncle to the deceased, but he was also the father of Musammat Jilani Begam, his youngest wife. Before his death Manzur Ahmad was possessed of a considerable amount of property. He had deposited in the house of Lala Khub Chand (banker) the sum of Rs. 16,876. He had also in cash in his house the sum of Rs. 8,500 and 4,000 sovereigns, (equal to Rs. 60,000) which was buried in a house which was occupied by Jilani Begam. He had also Rs. 58,000 on fixed deposit with the Allahabad Bank. Besides this cash, the deceased was possessed of some house property and a considerable amount of zamindari property, including two villages called Mauza Bithaura Kalan and Mauza Amkhera. These two villages were worth about two lakhs of rupees. The property of the deceased was worth probably between 5 and 6 lakhs (if jewellery, ornaments etc., be included).

Very shortly before his death Manzur Ahmad had transferred the two last mentioned villages to his mother Musammat Rahim Bibi. He had also given her the 4,000 sovereigns. He caused the Rs. 16,876 deposited with Lala Khub Chand to be transferred to her name. The Rs. 8,500 in cash had also been brought to the house of Lala Khub Chand and placed to the credit of Musammat Rahim Bibi. It thus appears that the deceased transferred, very shortly before his death, property and money to the extent of Rs. 2,85,376.

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After the death of Manzur Ahmad there was litigation in the Revenue Court as to mutation of names with regard to the two villages to which we have referred, with the result that Fazl Ahmad succeeded in having his name recorded as one of the heirs of Manzur Ahmad, and he was appointed lambardar. This suit was thereupon instituted in the Civil Court and Musammat Rahim Bibi claims against the other heirs that she is entitled to the villages by virtue of the deed, dated the 29th of August, 1912. In the other suit Fazl Ahmad is plaintiff and seeks therein (amongst other things) his share of the four thousand sovereigns, of Rs. 16,876 and of Rs. 8,500.

The defendants in the suit brought by Rahim Bibi pleaded (1) that Manzur Ahmad was so ill that he knew nothing about the transfer at all, (2) that if he was capable of understanding the transaction it was in truth and fact a gift, and that the gift, being to an heir, was invalid having regard to the Muhammadan law of *marz-ul-maut*. Rahim Bibi answered these pleas by contending (1) that the transaction was not a gift, but a sale, in which case *marz-ul-maut* did not apply, (2) that having regard to the nature of the illness, which was long protracted, the doctrine of *marz-ul-maut* did not apply, and (3) that even if the doctrine of *marz-ul-maut* did apply, the transaction was a waqf and was valid to the extent of one-third of the entire property of Manzur Ahmad. In answer to the suit brought by Fazl Ahmad, Rahim Bibi pleaded that the gift of the money was valid because *marz-ul-maut* did not apply and that the money was transferred not as a gift but in discharge of a debt due by the deceased to her.

Both suits were tried together upon the same evidence. We have come to the conclusion, for reasons which we shall state later on, that the transfers of the villages and of the money etc., to Rahim Bibi were in truth and in fact gifts to Rahim Bibi, made by the deceased because he wished to benefit her more than his other heirs. In this view of the case the all-important issue is whether or not the illness of Manzur Ahmad was such as to render the gifts void according to the rule of Muhammadan law that gifts made in *marz-ul-maut* are invalid. Rahim Bibi has, since Manzur Ahmad's death, attempted to make a waqf of the property

(perhaps more or less illusory) and she has given away most of the money to her own relatives who are not heirs of Manzur Ahmad. We may mention here that the learned counsel for Fazl Ahmad in the appeal before us abandoned the contention that the deceased did not know and understand what he was doing when he made the transfer, and learned counsel laid no stress on the evidence of Fazl Ahmad or his witnesses.

[Here their Lordships discussed the evidence and proceeded as follows.]

During all this time and when the deceased died he was staying in the house of Ala-ud-din. In the same house also lived Wisal-ud-din, a nephew of Rahim Bibi, that is to say, the son of her deceased brother. Wisal-ud-din and his brothers are the persons in whose favour Rahim Bibi has since parted with the greater part of her property, and they were not heirs of Manzur Ahmad.

As already stated, while the deceased was staying in this house he had sent to Dhundri to have the four thousand sovereigns dug up from the house of Jilani Bibi in order that they might be re-buried in the house of his mother Rahim Bibi. Directions were also given to bring the Rs. 8,500 to Khub Chand, banker. The latter money duly reached Khub Chand, but the sovereigns after being dug up were stolen, (half were afterwards recovered). This happened about the 20th of August, or a little later. On the 29th of August the deceased executed a deed of transfer in favour of his mother Rahim Bibi in the following form—"I, while in a sound state of body and mind, have absolutely sold of my own free will the entire 20 biswas zamindari property in Mauza Bithaura Kalan, pargana and district Pilibhit, and the entire 20 biswa zamindari property in Mauza Amkhera, including the hamlets called Zahurganj, Manzurganj, Samaria, and Makruli, pargana Richa, tahsil Baheri, district Bareilly, and with all the appurtenances and interests appertaining thereto, without the exception of any right or share, to my mother, Musammat Rahim Bibi, wife of Sheikh Zahur Ahmad, Sheikh, resident of Mauza Dhundri, pargana Jahanabad, district Pilibhit, for two lakhs of rupees, half of which is one lakh of rupees, and made over the possession of both the properties sold

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to the vendee. Now neither I nor any of my representatives have any right in the above mentioned properties sold. Out of the entire sale consideration I have received Rs. 10,000 in cash, and have left Rs. 1,90,000 with the vendee with my directions, in order that she may spend it with her own authority and at her own discretion for good purposes, for the benefit of my soul in the next world. Hence I executed this document as a sale-deed giving authority in respect of the sum held in deposit for charity, on a stamp paper of Rs. 2,000 under article 23, and on a stamp paper of Rs. 15 under article 7, schedule I, Act II of 1889, so that it may serve as evidence."

Registration was duly effected and the deed has the following endorsement.—"Let it be known that the executant is ill and he submitted a certificate of his illness given by the Assistant Civil Surgeon, Pilibhit, who is now Civil Surgeon in charge of Pilibhit with his application for issue of a commission which is in the office."

The certificate is as follows:—"I came to dress Sheikh Manzur Ahmad of Dhundri at the time when the deed was presented and execution admitted by him before the Sub-Registrar. I found his mental faculties unimpaired, and he answered to every question referring to the deed quite correctly."

The deed was registered between 5 and 6 o'clock in the evening on the 29th of August, 1912. This certificate was given by Dr. Chatterji at 5-30 in the evening. At 9-30 in the morning of the same day Dr. Chatterji had given another certificate as follows:—

"Certified that I examined Sheikh Manzur Ahmad, zamindar of Dhundri, this morning at the request of the Sub-Divisional Magistrate and found his mental faculties not affected yet, although his general condition is extremely weak."

It is pretty clear that the Sub-Registrar had some hesitation in registering the deed, having regard to the condition of the deceased, and, notwithstanding the explanation which Dr. Chatterji gave when giving his evidence, we think that his first certificate shows that the deceased's condition was very critical on the morning of the 29th of August. The certificate was given in English and Dr. Chatterji understands English. The words

"found his mental faculties not affected *yet*," are significant. Immediately after the execution of the deed men were sent off post haste to make collections at the two villages and to apply for mutation of names. It was not the time of year at which collections are made, and the collections which were in fact made were more or less of a formal character: obviously the intention was to show that the deed had been acted upon and possession taken. Certainly these steps were taken with the least possible delay.

[After discussing the evidence their Lordships proceeded as follows:—]

The conclusion that we have come to is that the illness of Manzur Ahmad all along rapidly progressed and increased between June, and the 2nd of September, when he died, and that it cannot possibly be said that he suffered from a lingering disease. There is no very satisfactory evidence when consumption commenced, but, even if we assume that the seeds of the disease were present for some time, the progress of the disease was rapid between June and the 2nd of September. We believe Dr. Chatterji when he says that when Manzur Ahmad left him on the 7th of August, the deceased was under the apprehension of death, and if this view be correct, nothing which subsequently happened was at all likely to lessen that apprehension. The sufferings of the deceased continued steadily to increase. The evidence of Rahim Bibi herself shows that the deceased apprehended death and that she was frequently trying to console him and remove his apprehension. We think that the two certificates which Dr. Chatterji gave show that those about Manzur Ahmad believed that he was going to die, and that this apprehension was shared by the Sub-Registrar. That those who were about him (near relatives of Rahim Bibi) believed he was going to die is also shown by the very great haste there was in sending off men to make the collections at the two villages and filing an application for mutation of names on the 30th of August. What other people thought who were daily seeing the deceased is not without some bearing on what the deceased was likely to think himself. The learned Judge referring to the evidence of Abdul Aziz, a witness for Fazl Ahmad, says that the deceased told the witness that he was better and that *as soon* as he would recover he would

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show him the villages that required water. This is not quite what the witness said. Witness said that the deceased said "if he recovered." The learned advocate for Rahim Bibi admitted that if there was a rapid increase in the disease about the time when the "gift" was made, and if the deceased was under apprehension of the near approach of death, the rule of *marz-ul-maut* would apply, even though the deceased had been suffering from consumption for more than a year before he made the gift. In our opinion the illness of the deceased was not a lingering disease, and he was under the apprehension of near approaching death, and if the transfers of the money and of the land ought to be regarded as "gifts" to Rahim Bibi, they were void under the Muhammadan law as having been made when the donor was suffering from his death-illness. The doctrine of *marz-ul-maut* is founded on the Koran, which ordains that *the heirs must inherit*. Even though our sympathies may be to some extent more with Rahim Bibi, the affectionate mother of the deceased, we are bound to administer the law.

The next question we propose to deal with is what was the real nature of the transaction. If the transaction was a sale, the doctrine of *marz-ul-maut* does not apply. If the transaction was the creation of a waqf by the deceased, the transaction would be good to the extent of one-third of the entire estate of the deceased. If it was a gift to Rahim Bibi one of the heirs, it was altogether void. On the face of it the deed is a sale deed. But it is abundantly clear that Rahim Bibi had nothing like two lakhs of rupees wherewith to purchase the property.

[Their Lordships, after discussing the evidence further, proceeded as follows :—]

As to the question of waqf.

The deed does not say that the villages were to be held as waqf property. If the deceased wanted to dedicate the villages, there is no reason why he should not have expressly dedicated them, as he did the property in 1916, on the occasion of his previous illness. If he did not think he was going to die, he might have named himself as *mutawalli*, as he did in 1909, or he might have named his mother *mutawalli*. The deed only says that Rs. 1,90,000 of the price (which was not and could not

be paid) was to be applied for charitable purposes at the discretion of his mother. Looking at the evidence of Ala-ud-din, of Rahim Bibi herself, the condition of the donor and the surrounding circumstances we have come to the conclusion that the handing over of the sovereigns and the transfer of the Rs. 8,500, Rs. 16,876 and the two villages were in truth simply gifts made by the deceased to his mother and the provision in the deed that Rs. 1,90,000 should be applied in charity at the discretion of Rahim Bibi was a somewhat ingenious device to give the transaction the appearance of a sale so as to evade the Muhammadan law, which forbids a Musalman in his death-illness to make a gift to one heir at the expense of the others.

[Their Lordships again dealt with the evidence and observed:—]

On both sides, there was, as the learned Judge says, a considerable amount of hard swearing. Fazl Ahmad not only alleged, but stated in his evidence that the deceased did not even know the contents of the deed. While we think that the deceased was in a very weak condition when he executed the deed, we agree with the court below that he understood what he was doing.

[Here the evidence was discussed.]

We have come to the conclusion that this appeal must be allowed. But to mark our strong disapproval of some of the evidence adduced on behalf of Fazl Ahmad we disallow all costs of witnesses in the court below. The order of the Court is that the appeal is allowed, the decree of the court below is set aside and the claim of Rahim Bibi is dismissed with costs in both courts, save as mentioned above.

We direct the Receiver to prepare and bring in as soon as reasonably possible a final account with a view to his being discharged.

Appeal allowed.