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These last words are as precise as can be, and in my opinion they indicate clearly that a suit for the recovery of deficiency in stamp duty cannot be entertained if the case falls within the provisions of sub-section (3) of section 44.

I allow the application, set aside the decree of the court below and dismiss the plaintiff's claim. Parties will bear their own costs in both courts.

Application allowed.

APPELLATE CIVIL.

Before Mr. Justice Dalal and Mr. Justice Pullan.

AHMADI BEGAM (PLAINTIFF) *v.* ABDUL AZIZ AND OTHERS (DEFENDANTS).*

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Muhammadan law—Gift of undivided share of joint property—Donor not in possession at time of making— "Musha."

A Muhammadan father, who was not in possession at the time, made a gift of an undivided share of joint property to his daughter, but he did all that was possible for him to do to put his daughter in the same position in which he himself was, and he and his daughter subsequently jointly sued the other co-owners of the property and obtained a decree. *Held*, that the gift was not invalid for want of the donor's possession, or by the doctrine of *musha;* and in the circumstances of the case the doctrine of *musha* did not apply, as the donor had ostensibly sold the property first at a fixed price and then absolved the debtor of the debt which was the price. *Mohamed Buksh Khan* v. *Hosseini Bibi* (1), *Mohibullah* v. *Abdul Khalik* (2) and *Shaikh Muhammad Mumtaz Ahmad* v. *Zubaida Jan* (3), referred to.

THE facts of this case were as follows:—

The plaintiff, Musammat Ahmadi Begam, sued for partition of her share of eight shops and a yard

* Second Appeal No. 1381 of 1924, from a decree of Aghor Nath Mukerji, District Judge of Bareilly, dated the 6th of August, 1924, confirming a decree of Preo Nath Ghose, Subordinate Judge of Bareilly, dated the 22nd of December, 1923.

(1) (1888) I.L.R., 15 Calc., 684. (2) (1908) I.L.R., 30 All., 250.
(3) (1889) L.R., 16 I.A., 205.

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for the collection of wood. This property belonged to her father, and the defendants are the other heirs. She claimed a share specified as 1974 out of 6502. The dispute between the parties related to a gift made by the father in his lifetime to the plaintiff of 1,000 sihams. The gift was objected to on two grounds: (1) that the father himself not having been in possession at the time, could not have given possession to the daughter, and so the gift was invalid for want of possession, and (2) that the gift was an invalid one of *musha*, i.e., an undivided share of joint property.

Both the subordinate courts upheld the contention and held the gift to be inoperative. They further declared plaintiff's title in the property in accordance with her right as an heir, ignoring the gift. The plaintiff appealed.

Dr. *Surendra Nath Sen* and Mr. *B. Mullick*, for the appellant.

Mr. *Akhtar Husain*, for the respondents.

The judgement of the Court (DALAL and PULLAN, JJ.,) after stating the facts as above, thus continued:—

The learned Judge of the lower appellate court has not quoted any ruling in support of his view. The father himself was out of possession at the time of the gift and he did all that was possible for him to do in putting his daughter in the same position in which he was. He and his daughter subsequently jointly sued the other co-owners of the property and obtained a decree. Under these circumstances want of possession at the time of the gift would not render the gift invalid. In the case of *Mohamed Buksh Khan* v. *Hosseini Bibi* (1) their Lordships observed at page 702:

(1) (1888) I.L.R., 15 Calc., 684.

"In this case it appears to their Lordships that the lady did all she could to perfect the contemplated gift and that nothing more was required from her. The gift was attended with the utmost publicity. The *hibanama* itself authorized the donees to take possession and it appears that in fact they did take possession. Their Lordships hold, under these circumstances, that there can be no objection to the gift on the ground that the donor had not been in possession and that she herself did not give possession at the time."

This ruling fully supports the claim of the plaintiff that the gift cannot fail for want of possession at the time of the gift.

There is a single Judge ruling of this Court, *Mohibullah* v. *Abdul Khalik* (1), in which the principle enunciated by their Lordships of the Privy Council in the case of *Sheikh Muhammad Mumtaz Ahmad* v. *Zubaida Jan* (2) was applied to a house. Possibly the case which was before their Lordships was one where the donor himself questioned the validity of the gift, and it may be argued that it could not be applied generally where no such question of equity arose. This is how Mr. Tyabji interprets the ruling in his book on Muhammadan Law at page 422. This Court, however, has gone further in the matter and held the gift to be valid even where it is not the donor himself who questions it. We are in agreement with that view. Mr. Ameer Ali in his Muhammadan Law has stated the principle to be that a *hiba-bil-musha*, i.e., gift of an undivided joint property is not void, but only invalid, and possession remedies the defect. Mr. Tyabji does not appear to accept that view but he has suggested a device by which the operation of the doctrine may be condoned, and that

(1) (1908) I.L.R., 30 All., 250. (2) (1889) L.R., 16 I.A., 205.

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device was adopted in the present case. At page 403 he quotes a Hanafi lawyer as laying down that a gift of a moiety of a house can validly be effected by the donor selling it first at a fixed price and then absolving the debtor of the debt which was the price. This was exactly what the plaintiff's father did, and on this ground also the doctrine of *musha* will not apply.

For these reasons we decree the appeal and declare the share of the plaintiff to be that which she claimed in her plaint. This is a preliminary decree for partition and this declaration will be sufficient. The plaintiff shall receive her costs of all courts.

Appeal allowed.

Before Mr. Justice Dalal and Mr. Justice Pullan.

1927 *January*, 21.

BADAL SINGH AND OTHERS (PLAINTIFFS) *v.* DEBI SARAN DHAR DUBE (DEFENDANT).*

Civil Procedure Code, order XXXIV, rule 6—Mortgage—Decree for sale—Sale proceedings and mortgage subsequently declared void—Refund of money to auction purchaser—Application for personal decree against mortgagor—Limitation.

A plaintiff mortgagee obtained a decree for sale, in execution of which his claim was satisfied. The mortgagor's grandson, however, thereafter obtained a decree declaring that both the mortgage and the decree and consequent sale were void as against him. The result was that the auction-purchaser applied for and obtained the return of his purchase-money. The mortgagee then applied under order XXXIV, rule 6, of the Code of Civil Procedure, for a personal decree against his mortgagor.

Held, (1) that it was competent to the mortgagee to apply under order XXXIV, rule 6, and (2) that time began to run not from the date of the decree setting aside the

* Second Appeal No. 1431 of 1924, from a decree of Radha Kishan, Subordinate Judge of Basti, dated the 21st of August, 1924, reversing a decree of Jagannath Singh, Munsif of Bansi, dated the 7th of March, 1924.