

been proved: and therefore we must hold the point to be established against the defendant. It is admitted that, if the plea of family usage fails, the heirship of the three legitimate daughters of Ghulam Ghaus Khan cannot be disputed. The result of our judgment on the whole case is that the claim of Choti Begam otherwise Nanhi Begam as wife, and of Mustabkam Khan, Naim Khan, Mukim Khan, otherwise Raffi Khan, minor sons, and of Himayat-un-nissa, minor daughter of Ghulam Ghaus Khan, under the guardianship of Mustabkam Khan, is dismissed altogether, with costs: but that the claim of Fidayat-un-nissa, Karamat-un-nissa, and Barkat-un-nissa, daughters of Ghulam Ghaus Khan, in respect of their shares, must be decreed as against the defendant, and therefore the shares of these ladies under the Muhammadan law are hereby decreed against Muhammad Ismail Khan, with costs. We are not disposed to diminish their shares because they were associated with Nanhi and her children in the litigation, as the circumstances of the case may account for the fact of this association.

Decree modified.

Before Mr. Justice Spankie and Mr. Justice Oldfield.

MUHAMMAD GULSHERE KHAN (PLAINTIFF) v. MARIAM BEGAM AND ANOTHER (DEPENDANTS).*

Muhammadan Law—Gift—"Marz-ul-maut."

According to Muhammadan law a gift by a sick person is not invalid, if at the time of such gift his sickness is of long continuance, *i.e.*, has lasted for a year, and he is in full possession of his senses, and there is no immediate apprehension of his death. *Labbi Bibi v. Bibun Bibi* (1) followed.

Held therefore, where at the time of a gift the donor had suffered from a certain sickness for more than a year, and was in full possession of his senses, and there was no immediate apprehension of his death, and he died shortly after making the gift, but whether from such sickness or from some other cause it was not possible to say, that under these circumstances the gift was not invalid according to Muhammadan law.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the High Court.

Mr. Conlan and Munshi Hanuman Prasad, for the appellant.

* First Appeal, No. 68 of 1880, from a decree of Mirza Abid Ali Beg, Subordinate Judge of Mainpuri, dated the 11th February, 1880.

(1) N.-W. P. H. C. Rep., 1874, p. 159.

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Pandit *Ajudhia Nath*, for the respondent Mariam Begam.

Shah *Asad Ali*, for the respondent Nirali Begam.

The judgment of the High Court (SPANKIE, J., and OLDFIELD, J.,) was delivered by

SPANKIE, J.—The facts of the case sufficiently appear in the judgment of the lower Court. Ghulam Nabi Khan was admittedly a respectable resident and owner of property in Kadir Ganj in the Etah district, who died childless on the 15th December, 1878. His heirs were the plaintiff and Nirali Begam, his brother and sister, and Mariam Begam his wife. But during his lifetime, and whilst ill, he executed a deed of gift on the 15th September, 1878, in respect of all his property in favour of his wife, which deed of gift was registered on the 17th September, 1878, under a power of attorney to Abdul Ghani Khan attested on the 7th September, 1878. The plaintiff avers that, when the deed was executed, Ghulam Nabi was not in his right senses, and was suffering from death illness, and the deed was invalid; and he (plaintiff) claims the entire property, asserting that, according to custom, Nirali Begam, his sister, took no share. The main point was whether the deed was executed before or during the donor's death illness, and whether he was in full possession of his senses. The judgment is not as clear as it might be on the first point. On the second the Subordinate Judge entertains no doubt that Ghulam Nabi Khan was in possession of his proper senses when he executed the deed, and that he did so in order to secure his property to his wife, and to prevent his brother obtaining any share of it. But the remaining portion of his judgment is not so clear. The contention for the wife had been that, if a man falls sick and dies within a year, the whole of that time cannot be held to be the duration of death illness, but only so much of it can be so considered that covers the increased illness until it proves fatal, and during which time death is apprehended. The Subordinate Judge, however, did not accept this view, but held the Muhammadan law to be that, when the patient dies within a year, the illness will be deemed a death illness, but when it continues for a long time, it becomes a part of his constitution, and he has no fear of death, and if the illness continues for more than a year

in this shape, then the state of that man is regarded as equal to one of health. But if the sickness again increases, and the patient dies, the period of such increased illness is the duration of the death illness. Numerous authorities are cited in the judgment, and the Subordinate Judge held the gift to be invalid by reason of its having been executed during death illness. There were, however, other points in dispute. It had been urged that a portion of the property conveyed by the gift was undefined and undivided ; and for the wife it had been contended that her dower of Rs. 60,000 had not been paid, and she was in possession of the property : the plaintiff had advised Ghulam Nabi Khan to take another wife in order to raise issue to himself which produced disagreement between her husband and herself : she demanded her dower, and an agreement to settle the matter by arbitration was drawn out ; but before the arbitration was carried out, Ghulam Nabi Khan with the plaintiff's consent and by his advice had the deed of gift executed, but plaintiff artfully contrived that no mention of the dower was made in the deed : but she took possession of all the property on her husband's death, and according to the custom of the family a childless widow succeeds to the property of her husband. The plaintiff disputed the amount of dower, which he stated to be 100 gold dinars, *i.e.*, Rs. 350, which had been paid. He also denied that there was any special custom as to childless widows in the family. The Subordinate Judge, having declared the deed of gift to be invalid, pronounced no decision on the other points in dispute. But he did not give possession to plaintiff or go into the question of amount and payment or non-payment of the dower, because there was no prayer for relief in respect of the dower, and a suit for the determination of the amount of the dower due to defendant should have been brought. All parties were dissatisfied with the decision. The plaintiff in appeal contends that the Subordinate Judge should have disposed of the question of dower : the plea had been raised by the widow, and there was no legal bar to the determination of the point : the issue had been framed and the parties had come prepared with evidence in support of their several contentions. Nirali Begam, the sister of Ghulam Nabi Khan, objected that she ought to have been made a plaintiff, as she was equally

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entitled with plaintiff to her share of the property left by Ghulam Nabi Khan, but the Subordinate Judge had not considered her application. She denies that there is evidence to prove the execution of the deed of gift or that it was ever acted upon: the lower Court should not, in cancelling the deed, have decreed more than his share to plaintiff, as she (Nirali Begam) was entitled to one-fourth share: the record shows that Ghulam Nabi Khan's widow had taken possession of the property without the consent of the lawful heirs; this is not possession in lieu of dower. Mariam Begam, the widow, objected that the donor was not suffering from death illness when he executed the gift, which was therefore valid: as the dower had not been paid and as the lower Court had found that deceased had been desirous of paying it, the Subordinate Judge should have held that the gift was made in consideration of the dower.

After giving our best attention to the evidence in this case, we find that it will be unnecessary to consider the plaintiff's appeal at any length; because, on the evidence, we have come to the conclusion that the deed of gift must be regarded as valid. The appeal does not raise the question whether any portion of the property conveyed by the gift was "*mushaa*" (undivided), and indeed there is no satisfactory evidence on record to show that it was so. As to the law relating to "*marz-ul-maut*" or "fatal disease," we have only to follow the precedent of this Court—*Labbi Bibi v. Bibun Bibi* (1)—which, up to the present time, has been our admitted authority in such cases. It is declared to be the law that persons labouring under a death sickness are incapable of making a valid gift or of disposing of their property in charity. If, however, possession has been given of the subject of the gift, it is valid to the extent of one-third of the sick man's estate. But it was pointed out that, if the law be unrestricted in its operation, it would deprive persons who are suffering from lingering diseases, but who at the same time are in full possession of their senses and free from the influences which sometimes affect those who are labouring under mortal sickness, of all power of dealing with their property. "The law therefore," the learned Judges say, "provides that, where the

(1) N.-W. P. H. C. Rep. 1874, p. 159.

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malady is of long continuance, and there is no immediate apprehension of death, a sick person may make a gift of the whole of his property. It also goes on to define what constitutes a malady of long continuance, and, as is admitted by both parties to this suit, when the sickness has lasted for a year, and there is no immediate danger of death, the incompetency to make a gift of the whole of the property" is removed. Now the law here laid down appears to us to apply in all respects to the circumstances of the case before us. As to the donor's possession of his senses at the time the deed was executed, the Subordinate Judge himself had no doubt on the evidence, and on this evidence we fully coincide with him. The plaintiff fails to establish as against the wife, or Abdul Ghani, who is the son-in-law of the brother-in-law of Ghulam Nabi Khan, any fraudulent conduct whatever in regard to the preparation, execution and registration of the deed of gift. He likewise fails to establish any collusion between the widow and Abdul Ghani in order to effect any fraudulent conveyance of the property; whatever was done was openly and publicly done. There seems to be no doubt whatever that there had been some dispute between Mariam Begam and her husband, and she had demanded her dower, and the explanation given of the disagreement appears to be very reasonable. Mariam would not patiently endure, after so many years, that another wife should be introduced into the house. There is proof that the husband and wife executed an agreement on the 30th August, 1878, in which the dispute regarding the dower is admitted; and one Muhammad Mir Khan is appointed as arbitrator to settle the matter. Muhammad Mir Khan was examined and deposed that he had been appointed arbitrator under this agreement, which had been in his possession but which was returned by him to Ghulam Nabi Khan and Mariam Begam, as they had come to an amicable arrangement. Sahibdad Khan, who signed this agreement, attested his signature. We see no reason to doubt the truth of these depositions. There is, too, the deposition of one of the witnesses for the plaintiff, Sahibdad Khan, Head Constable of Mehrara Station, which is worthy of notice on this point. This witness in the course of his evidence states that a report was made on the 26th August, 1878, by Gulshere Khan (the present plaintiff) to the effect that Ghulam Nabi Khan, his

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brother, was very ill, and not in his senses ; that he and Ghulam Nabi Khan were not on good terms ; that he did not go to him ; and that he had heard that Maulvi Abdul Ghani, who was with Ghulam Nabi Khan, had fabricated some document ; and that should he have done so he begged that it might be held invalid. Now, it is remarkable that the agreement was not executed until the 30th August, four days after this report was made, and it is certain that at the time of its execution Ghulam Nabi Khan was in his right mind ; and from the evidence of Muhammad Mir Khan and Sahibdad Khan already referred to, that there had been no concealment, and that the agreement was so far acted upon that it was deposited with the arbitrator, and only returned by him because the parties came to an arrangement between themselves and no award was required. The nature and terms of the report are such that we are led to infer that it was made by the plaintiff for his own ends, and that he did not really believe then that any fraud was in contemplation, but that he knew of the intention of Ghulam Nabi Khan to make good the dower, and that he himself as a precaution, by way of "*peshbandi*" or arrangement beforehand, wished to produce this report hereafter in proof of a fraudulent design on the part of Abdul Ghani to procure a settlement adverse to his (plaintiff's) interests. The Subordinate Judge himself accepts the conclusion that Ghulam Nabi Khan, being displeased with plaintiff and his nephew, Shere Ali Khan, executed the gift, because if he had not done so the plaintiff would have got a share of the property at his death, and this he did not wish. But as there is no reason whatever to doubt that the agreement of the 30th August was an instrument executed in good faith, it seems very reasonable to believe that the deed of gift of the 15th September, 1878, a fortnight later in date, was executed by Ghulam Nabi Khan in pursuance of an amicable arrangement with his wife, and for the purpose of putting her in possession of all the property in consideration of the dower still due to her. The property was entirely his own, and to whom should he give it more naturally under the circumstances than to his wife ? The Subordinate Judge fully admits that "the allegation of the plaintiff that Abdul Ghani secretly and by way of sharp practice got the deed of gift and the power to get it registered executed is evidently false. On the other hand, it is satis-

factorily proved that he was all along thinking of adopting measures by which his wife, the defendant, would get the property, and the plaintiff would get no share of it."

So far, then, we are agreed that Ghulam Nabi Khan was in his sound senses when he executed the deed of gift, and that it was no sudden whim which made him execute it, but that he did so in pursuance of a foregone purpose. It remains now to consider what the evidence discloses as to Ghulam Nabi Khan's state of health when he made the gift. The Subordinate Judge himself allows that his illness commenced in the end of 1874 or beginning of 1875. But he does not consider it proved that the same sickness continued till his death, or that the sickness of which he died may be called as old or advanced sickness. He thinks that the sickness of which deceased died commenced in July, 1878. The plaintiff's witnesses are called to prove that Ghulam Nabi died of an illness of about 5 or 5½ months' standing. The evidence of these witnesses is not of a reliable character. (After referring to the evidence of these witnesses and commenting thereon, the learned Judge continued): Such is the evidence upon which the plaintiff seeks to establish that the deceased was taken ill in June, 1878, and died of his illness on the 15th November following. On the other hand, Muhammad Mir Khan, the arbitrator already referred to, Raza Ali Beg, Hafiz Ali Khan, and other respectable persons depose that Ghulam Nabi Khan had been suffering from boils; that they had got well; that he fell ill again and died. The deposition of Niaz Ali shows that Ghulam Nabi had been ill in 1874 from fever and boils, which lasted a long time, and that afterwards before his death he was attacked with swelling of the hands and feet, and died. None of the evidence, either for the plaintiff or defendant, appears to us to be of such a conclusive character that, in the words of the Subordinate Judge, it would be possible to say whether Ghulam Nabi Khan died of the same illness, or whether he had recovered from it and died of other sickness, such as dropsy, fever, or inflammation of the liver, the evidence on behalf of the parties being conflicting. The Subordinate Judge then states his own conclusion:—"Taking the evidence produced on behalf of both parties simultaneously into consideration, the Court thinks that it can fairly be concluded that at first Ghulam Nabi Khan had a boil, and in consequence thereof,

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or at the same time, he was attacked by fever and his hands and feet swelled, and during a large portion of the time of his illness he suffered most from the boil, but it lessened for a time about the date of his death, and he was a little better. But it appears that the boil was outwardly and superficially cured, and the sore seemed somewhat healed up, yet inwardly its effect was present, and it was not completely cured, then the swelling and fever increased and he died, till that time he was not relieved of the original malady of the ulcer." This can hardly be regarded as a satisfactory conclusion. For ourselves we think that there is sufficient evidence to warrant the finding that for a long time past, from 1874 up to July, 1878, Ghulam Nabi Khan had been a sufferer from boils or a carbuncle, it is not possible to say which with any distinctness, and ultimately died; but that when he executed the deed of gift there was no immediate apprehension of his death; that twenty days before his death his surgeon thought that he would get well, but he did not get better, but became weaker under treatment, and finally died, but whether from the boil, or from some other supervenient disease, there is no satisfactory evidence to show. Under these circumstances we are not disposed to say that the deed of gift executed by Ghulam Nabi Khan was invalid under the Muhammadan law. We are therefore compelled to annul the decree of the lower Court and to dismiss the claim *in toto*. It is unnecessary here to consider the objections of Nirali Begam whilst those of Mariam Begam have been disposed of by the judgment. Appellant will pay his own costs and those of Mariam Begam, Nirali Begam will pay her own costs in this Court.

Decree modified.

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Before Mr. Justice Spankie and Mr. Justice Oldfield.

BHAONI (PLAINTIFF) v. MAHARAJ SINGH (DEFENDANT).*

Regulation VII of 1822—Award—Act IX of 1871 (Limitation Act), sch. ii, No. 44—Act XV of 1877 (Limitation Act), sch. ii, No. 45—Hindu Law—Succession—Custom—Illegitimate son—"Gandharv" marriage.

D died in 1860 leaving him surviving his first wife *G*, his second wife *B*, his mother *R*, and *M* his son by a woman to whom he had been married by the "gan-

* First Appeal, No. 57 of 1880, from a decree of Manvi Zain-ul-abdin, Subordinate Judge of Shahjahanpur, dated the 6th December, 1879.