power in this case. We consider that the judgment of the learned Subordinate Judge is correct.

We dismiss this appeal with costs.

Appeal dismissed.

1929

JUGUL KISHORE v. JAGMOHAN DAS.

APPELLATE CIVIL.

Before Mr. Justice Wazir Hasan and Mr. Justice Bisheshwar Nath Srivastava.

MUSAMMAT ZAHURAN AND OTHERS (DEFENDANTS-APPELLLANTS) *v.* ABDUS SALAM, PLAINTIFF AND OTHERS (DEFENDANTS-RESPONDENTS).*

1929

November, 28.

Muhammadan law—Gift of defendant's share in immoveable property by a Muhammadan—Delivery of possession on a gift by a Muhammadan, meaning of—Mushaa—*Doctrine of* mushaa, *applicability* of.

Held, that the need of seisin in a case of gift on the part of the donee is satisfied according to the nature of the possession of which the gifted property is capable. Such seisin may be either actual or constructive. *Kali Das Mullick* v. *Kanhya Lal Pandit* (1), *Mohammad Abdul Ghani* v. *Fakhar Jahan Begam* (2), *Amjad Khan Ashraf Khan* (3), and *Chaudhri Mehdi Hasan* v. *Muhammad Hasan* (4), relied on.

Where, therefore, a donor who had only a share in certain houses and shops of which she was realizing her share of profits and she executed a deed of gift evidencing her intention to make the gift and registered the deed thereby giving publicity and put the donee in possession of the gifted property the possession being of the same nature as she herself had had and finally she authorized the donee to appropriate the profits of the gifted property and to obtain a partition thereof at any time he thought fit to do so, *held*, that the gift in question was not invalid by reason of absence of delivery of possession and that such possession was given as the gift admitted.

A definite share in immoveable property, zamindari, houses or shops, is a separate estate with separate and defined rents. The rule of *mushaa* therefore which aims at prohibiting con-

*Second Civil Appeal No. 194 of 1929, against the decree of M. Mahmood Hasan, 3rd Additional District Judge of Lucknow, dated the 2nd of March, 1929, upholding the decree of M. Humayun Mirza, subordinate Judge of Lucknow, dated the 12th of April, 1928, decreeing the plaintiff's claim.

(1) (1884) L.R., 11 I.A., 218. (2) (1922) L.R., 49 I.A., 195.
(3) (1929) L.R., 56 I.A., 213. (4) (1906) L.R., 33 I.A., 68.

1929

MUSAMMAT ZAHURAN v. ABDUS SALAM.

fusion between estates gifted and not gifted is wholly inapplicable to such an estate.

Ameeroonissa Khaton v. *Abedoonissa Khaton* (1), *Ibrahim Goolam Ariff* v. *Saiboo* (2), *Mahomed Mumtaz Ahmad* v. *Zubaida Jan* (3), *Mahomed Buksh Khan* v. *Hosseini Bibi* (4), and *Amjad Khan* v. *Ashraf Khan* (5), relied on.

Where the owner of a definite share in immoveable property makes a gift of that share in favour of another person once it is held that a complete seisin is possible in respect of that share in immoveable property and the gift is not in any sense inconsistent with the intention of the donor inasmuch as he expressly authorises the separation of the gifted share from the rest of the property and also because he himself retains no interest whatsoever after the gift in any portion of the entire property, it can introduce no confusion and the doctrine of *mushaa* is wholly inapplicable to that gift.

Mr. *Ghulam Hasan*, for the appellants.

Messrs. *Raj Narain Shukla and Rauf Ahmad* for the respondents.

HASAN and SRIVASTAVA, JJ. :—This is an appeal by some of the defendants from the decree of the Third Additional District Judge of Lucknow, dated the 2nd of March, 1929, affirming the decree of the Subordinate Judge of the same place, dated the 12th of April, 1928.

The plaintiff, Abdus Salam, in the suit, out of which this appeal arises, seeks to recover possession by partition of a 1/16th share in certain immoveable property situate in the city of Lucknow. The property consists of shops and houses. His case is that the property in question belonged to one Abdur Rahim, whose estate on his death was inherited under the Hanafi Muhammadan law by his heirs, the defendants in the suit. One of such heirs was Musammat Haliman, defendant No. 9, being the widow of Abdur Rahim. Her share in the estate of her deceased husband was admittedly 1/16th. No issue was born of Musammat Haliman. On the 14th of June, 1927,

(1) (1874) L. R., 2 I. A., 97.
(2) (1907) L. R., 34 I. A., 167.
(3) (1889) L.R., 16 I A., 295.
(4) (1888) L. R., 15 I. A., 81.
(5) (1924) 2 O. W. N., 83.

1929

MUSAMMAT ZAHURAN v. ABDUS SALAM.

Hasan and Srivastava, JJ.

Musammat Haliman made a gift of her one-anna share in the estate of her husband in favour of the plaintiff, who is the son of a brother of Abdur Rahim. The gift was reduced to writing and is incorporated in a registered deed of that date. It is this gifted property and on the title resting on the gift in respect of which the relief of possession is prayed.

Musammat Haliman, the donor, supported the plaintiff's claim. Some of the defendants, however, contested it and the defence of those who contested the plaintiff's claim was that Musammat Haliman was not married to the deceased Abdur Rahim; that the gift in favour of the plaintiff being a simple gift and not *bil ewaz* required for its perfection delivery of possession by the donor to the donee and that the gift was not accompanied with such delivery. Both these defences have been negatived and the plaintiff's suit decreed in terms of the prayer contained in the plaint.

From the materials on the record of the case it appears that the plaintiff's first contention in support of the gift in question was that the transaction was a *hiba bil ewaz* and therefore did not require seisin for its completion. In the alternative he contended that if the gift were construed to be simple in its character it was accompanied with delivery of possession. Both these alternative positions have been decided by the courts below in favour of the plaintiff.

The contention in second appeal is (1) that the gift of the 14th of June, 1927, when properly construed is not a gift *bil ewaz* but is a simple gift; (2) that there was no delivery of possession by the donor to the donee, and (3) that the gift is invalid by reason of the doctrine of *mushaa'*.

After having heard arguments at great length in this appeal we have come to the conclusion that it is not necessary to decide the question as to whether the gift of the

1929

MUSAMMAT ZAHURAN v. ABDUS SALAM.

14th of June, 1927, is a *hiba bil ewaz* as the plaintiff contends that it is. Having regard to the opinion which we have formed on the other two arguments urged in appeal before us we assume for the purpose of this judgment that the gift in question is not a gift *bil ewaz* but is a simple gift. It therefore remains for us to decide as to whether this gift fails for either of the two reasons: (1) that it was not accompanied with delivery of possession, or (2) that it was vitiated by the rule of *mushaa*.

Hasan and Srivastava, JJ.

For the determination of both the above lines of contention it is necessary to appreciate accurately the nature of the property which was made the subject-matter of the gift in question. We have already stated that it consists of certain shops and houses situate in the city of Lucknow. It is not disputed that before the suit was instituted these shops and houses were accepted by the family as property exclusively belonging to Abdur Rahim. Abdur Rahim being a Hanafi Sunni Muhammadan his estate, according to the law applicable to that sect, came to be vested by right of inheritance into a large number of heirs. One of such heirs was Musammat Haliman and her share in the estate of Abdur Rahim was 1/16th. In the deed of gift which she executed in favour of the plaintiff she specifically refers to the one-anna share in the estate of her husband and the operative part of the deed states that the donor has made a gift and put the donee in proprietary possession in the same way in which the donor held the same of the specific one-anna share. It further states that the donor has no connection or right whatsoever left in the gifted property and authorises the donee to enjoy the gifted share either in coparcenary with other co-sharers or to obtain a division thereof through court (*hiba kardia aur bakhsh dia, qabza malikana hissa maohuba par misl zat khud karadia. Ab mujhko koi taalluq ya haq milkiat wa muqabizat jaedad mazkur men baqi nahin raha. Maohub eleh ko akhtiar hai ki chahe hissa maohuba ko misl sabiq mushtarika rakkhe ya baza-*

1929

MUSAMMAT ZABURAN v. ABDUS SALAM.

Hasan and Srivastava, JJ.

ria adalat taqsim kara lewe). This being the nature of the property gifted and the nature of the possession which the donor expressly herself held in the gifted property and which she handed over to the donee, the question which arises for consideration is as to whether possession of any other nature could be delivered to the donee and not having been delivered the gift fails for that reason.

In the case of *Mahomed Buksh Khan* v. *Hosseini Bibi* (1) Lord MACNAGHTEN, in delivering the judgment of their Lordships of the Judicial Committee on a question similar to the one which we are called upon to decide in this appeal, made the following observations: "The other point was that the gift was invalid because possession was not given. That subject was considered in a case which came before this Board in 1884, *Kali Das Mullick* v. *Kanhya Lal Pandit* (2). There it is stated that the principle on which the rule rests has nothing to do with feudal rules, and that the European analogy is rather to be found in the cases relating to voluntary contracts or transfers where, if the donor has not done all he could do to perfect his contemplated gift, he cannot be compelled to do more. 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 utmost publicity, the *hibanama* itself authorises the donees to take possession and it appears that in fact they did take possession." Except the fact mentioned in the last observation of their Lordships of the Judicial Committee every other act required to perfect the contemplated gift was done by the donor and nothing more was required of or could be done by her in the circumstances of this case. For some time after her husband's death the donor received the benefits of the profits of the property in recognition of her interest in her husband's estate from the manager of the family estate. This is found in clear words by the court of first instance and the lower appellate court has not

(1) (1881) L. R., 15 I. A., 81. (2) (1884) L. R., 11 I. A., 218.

1929

MUSAMMAT ZAHURAN v. ABDUS SALAM.

Hasan and Srivastava, JJ.

disagreed with that finding of fact. The donor therefore was in the very nature of things making a gift of the same benefits in favour of the donee. Physical possession of the 1/16th share in the estate of Abdur Rahim was as much impossible in her case as it was impossible in the case of the donee. Where the subject-matter of the gift is only capable of constructive possession and such possession accompanies the gift the gift must be held to be valid. This was decided by their Lordships of the Judicial Committee in the case of *Mohammad Abdul Ghani* v. *Fakhar Jahan Begam* (1). In that case possession taken of a portion of the gifted property was held to be sufficient as constructive possession in respect of the rest of the same property. Latterly in the case of *Amjad Khan* v. *Ashraf Khan* (2) their Lordships of the Judicial Committee referred to their decision in the case just now mentioned and said: "In order therefore to constitute a valid gift *inter vivos* under the Muhammadan law applicable to this case, three conditions are necessary: (1) Manifestation of the wish to give on the part of the donor. (2) The acceptance of the donee, either impliedly or expressly. (3) The taking possession of the subject-matter of the gift by the donee, either actually or constructively.

The above decisions establish without any doubt the view of law that the need of seisin in a case of gift on the part of the donee is satisfied according to the nature of the possession of which the gifted property is capable. Such seisin may be either actual or constructive. The same view of law was expressed by their Lordships of the Judicial Committee in the case of *Chaudhri Mehdi Hasan* v. *Muhammad Hasan* (3). On the question of delivery of possession in a case of a simple gift their Lordships said: "Unless accompanied by delivery of the thing so far as it is capable of delivery it is invalid." In the present case the subject-matter of the gift was not capable of being delivered in any manner other than that which the

(1) (1922) L. R., 49 I. A., 195. (2) (1929) L. R., 56 I. A., 213.
(3) (1906) L. R., 33 I. A., 68.

donor adopted. She executed a deed of gift evidencing her intention to make the gift. She registered the deed thereby giving publicity. She put the donee in possession of the gifted property, the possession being of the same nature as she herself had had and finally she authorised the donee to appropriate the profits of the gifted property and to obtain a partition thereof at any time he thought fit to do so.

Hasan and Srivastava JJ.

Before we take leave of this part of the case we would quote the following observations of their Lordships of the Judicial Committee in the case of *Sheikh Muhammad Mumtaz Ahmad* v. *Zubaida Jan* (1), which it seems to us is wholly applicable to the present case :—

> "The lady (donor) had merely proprietary not actual possession . . . that is to say, she was merely in receipt of the rents and profits. In the deed of gift she declared (an admission by which Usman as her heir and all persons claiming through him were bound) that she had made the donee possessor of all properties given by the deed; that she had abandoned all connection with them; and that the donee was to have complete control of every kind in respect thereof . . . Their Lordships have no doubt that sufficient possession was taken on behalf of the daughter to render the gift effectual."

We, therefore, hold that the gift in question is not invalid by reason of absence of delivery of possession, and that such possession was given as the gift admitted.

As already stated the second line of defence is that the gift fails by reason of *mushaa*. The doctrine of *mushaa* is stated as follows in Hedaya—see Hamilton's Hedaya, Volume III, Book XXX, Chapter I:

> "A gift of part of a thing which is capable of division is not valid unless the said part be

(1) (1889) L. R., 16 I. A., 205.

1929

MUSAMMAT ZAHURAN v. ABDUS SALAM.

Hasan and Srivastava, JJ.

> divided off and separated from the property of the donor . . . The arguments of our doctors upon this point are twofold: *First* seisin in cases of gift expressly ordained, and consequently a complete seisin is a necessary condition: but a complete seisin is impracticable with respect to an indefinite part of divisible things, as it is impossible, in such, to make seisin of the thing given without its conjunction with something that is not given; and that is a defective seisin. *Secondly*, if the gift of part of a divisible thing, without separation, were lawful it must necessarily follow that a thing is incumbent upon the giver which he has not engaged for, namely, a division which may possibly be injurious to him (whence it is that a gift is not complete and valid until it be taken possession of; since if it were valid before seisin, a thing would be incumbent upon the donor which he has not engaged for, namely, delivery)."

The first matter to be considered in this rule is the emphasis laid on 'seisin" and that element of gift is the reason of the rule. The second matter to be considered is that the rule is framed in relation to the intention of the donor as to the subject-matter of the gift. Once it is held, as we have already held, that a complete seisin is possible in respect of a share in immoveable property the first reason of the rule disappears. Nor does the gift before us is in any sense inconsistent with the intention of the donor inasmuch as she expressly authorized the separation of the gifted share from the rest of the property and also because she herself retains no interest whatsoever after the gift in any portion of the entire property. The second reason of the rule therefore also disappears

1929

MUSAMMAT ZAHURAN v. ABDUS SALAM.

Hasan and Srivastava, JJ.

and that being so we are of opinion that the rule is inapplicable. Seisin in this case, as we have already shown, is possible of the thing given without its conjunction with something that is not given, there being no interest left in the donor in the entire property outside the gifted share, nor is the donor laid under an obligation to do a thing for which she is not engaged, that is the separation of the gifted share. In the first place, she had given the authority for division as already stated. In the second place there remains no interest in her from which the gifted interest has to be separated.

Ameeroonissa Khaton v. *Abedoonissa Khaton* (1) was a case in which the question as to the validity of the gift of defined shares in certain zamindaries on the ground of *mushaa* came to be considered. Their Lordships said: "The High Court held that the rule of the Muhammadan law did not apply to property of this description. In their Lordships' opinion this view of the High Court is correct. The principle of the rule and the reasons on which it is founded do not in their judgment apply to property of the peculiar description of these definite shares in zamindaries, which are in their nature separate estates, with separate and defined rents." These observations are wholly apposite to the case before us. A definite share in immoveable property, zamindari, houses or shops, is a separate estate with separate and defined rents. The rule of *mushaa* therefore which aims at prohibiting confusion between estates gifted and not gifted is wholly inapplicable to such an estate. Again in *Ibrahim Goolam Ariff* v. *Saiboo* (2) their Lordships reiterated the observations which they had made in the case of *Mahomed Mumtaz Ahmad* v. *Zubaida Jan* (3) that "the doctrine relating to the invalidity of gifts of *mushaa*

(1) (1874) L. R., 2 I. A., 97. (2) (1907) L. R., 34 I. A., 167.
(3) (1889) L.R., 16 I A., 205.

1929

MUSAMMAT ZAHURAN v. ABDUS SALAM.

Hasan and Srivastava, JJ.

is wholly unadapted to a progressive state of society, and ought to be confined within the strictest rules." Again in the case of *Ibrahim Goolam Ariff* v. *Saiboo* (1), just now mentioned, the gift related to shares in a company and in freehold estate in the town of Rangoon consisting of houses and vacant lands. In considering the question of the validity of the gift in relation to such properties on the ground of objection of *mushaa* Lord ROBERTSON, in delivering the judgment of the Judicial Committee, said: "but the serious question is whether it applies to property of the nature described. . . In the first place, even if the duty of the courts were to construct a prohibition of gifts of undivided shares of what is divisible, which should be applicable to the conditions of modern life, it would seem impossible in the case of freehold property in a town, to carry it out. But the attitude of the law towards this doctrine of *mushaa* does not involve any such constructive application of the doctrine." His Lordship then quotes the dictum already quoted in the case of *Mumtaz Ahmad* v. *Zubaida Jan* (2) and proceeds: "Their Lordships concur in the conclusion arrived at below, that it would be inconsistent with that decision to apply a doctrine, which in its origin applied to very different subjects of property, to shares in companies and freehold property in a great commercial town." We may legitimately ask as was asked by Lord MACNAGHTEN in the case of *Mahomed Buksh Khan* v. *Hosseini Bibi* (3) what confusion can it introduce if the owner of a definite share in immoveable property makes a gift of that share in favour of another person and has himself nothing left in that property after the gift? It seems to us that the only answer that can be given to this question is in the negative.

One of us had occasion to consider this question as a member of the late court of the Judicial Commis-

(1) (1907) L.R., 34 I.A., 167. (2) (1889) L.R., 16 I.A., 207.
(3) (1888) L.R., 15 I.A., 81.

sioner of Oudh in the case of *Amjad Khan* v. *Ashraf* Khan (1) in another connection and much which we might have said in the present case on this question will be found to have been said in that case. It will serve no useful purpose to repeat here what was said there. We accordingly repel the second line of defence also.

Hasan and Srivastava, JJ.

It may be mentioned that the principle of *mushaa* was not raised in the written pleadings nor was it embodied in any issue framed by the court of first instance. It appears from the judgment of that court that when the hearing of the case had completed and arguments came to be addressed the learned Pleader for the contesting defendants raised the objection of *mushaa* against the gift in suit. The court allowed the objection to be argued but overruled it. When the defendants preferred an appeal from the decision of the court of first instance they embodied this objection in their memorandum of appeal, but at the hearing of the appeal it appears that the objection was not pressed by the learned Advocate who addressed the court on behalf of the appellants.

The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

(1) (1924) 2 O. W. N., 83.