

that the deed of *waqf* was executed with the intent to defeat or delay the creditors. In this view of the case it is not necessary for us to express any opinion as regards the question whether the deed of *waqf* is or is not a transfer within the meaning of the Transfer of Property Act.

For the reasons given above, we allow the appeal, set aside the decision of the lower court and dismiss the plaintiff's suit with costs. No arguments were addressed in support of the cross-objections. They are accordingly dismissed. No order as to costs in respect of them.

Appeal allowed.

APPELLATE CIVIL.

*Before Mr. Justice Muhammad Raza and Mr. Justice
A. G. P. Pullan.*

1930
October, 14.

**KHALIQ BUX AND OTHERS (DEFENDANTS-APPELLANTS) v.
MAHABIR PRASAD (PLAINTIFF) AND OTHERS (DEFENDANTS-RESPONDENTS).***

Muhammadan law—Gift—Gift by a Muhammadan parent in favour of a minor child, essential elements of—Delivery of possession, whether necessary—Second appeal—Finding of fact—Legal effect of a proved fact, whether a question of law.

Held, that it is true that the findings of fact must be accepted in second appeal, but the proper legal effect of a proved fact is essentially a question of law. *Nafar Chandra Pal v. Shakur* (1), followed. *Wali Mohammad v. Mohammad Bakhsh* (2), referred to.

Held further, that in the case of a gift by a parent to a minor child no acceptance is necessary; the gift is completed by the contract, and it makes no difference whether the subject of the gift is in the father's hand or in that of depositary. Nor is transmutation of possession necessary, for the possession of the parent is tantamount to that of the child.

*Second Civil Appeal No. 9 of 1930, against the decree of Pandit Shyam Manohar Nath Shargha, Additional District Judge of Lucknow, dated the 9th of September, 1929, reversing the decree of M. Humayun Mirza, Subordinate Judge of Lucknow, dated the 8th of August, 1928.

(1) (1913) L.R., 45 I.A., 183,

(2) (1929) L.R., 57 I.A., 86.

1930

KHALIQ
BUX
v.
MAHABIR
PRASAD.

Ameerunnissa Khatoon and others v. Abedunnissa Khatoon and others (1), and Fatima Bibee v. Ahmad Bakhsh (2), relied on.

Messrs. *Ali Zaheer* and *Ghulam Imam*, for the appellants.

Mr. *Haider Husain*, for the respondents.

RAZA and PULLAN, JJ. :—This is an appeal from a decree of the third Additional District Judge, Lucknow, dated the 9th of September, 1929, setting aside a decree of the Subordinate Judge, Lucknow, dated the 8th of August, 1928.

The dispute in this case relates to two houses which were owned and possessed originally by one Dr. Maula Bakhsh of Lucknow. He and one of his sons (defendant No. 1) mortgaged the houses without possession to Mahabir Prasad plaintiff by a registered deed of the 3rd of May, 1921. Maula Bakhsh died on the 24th of June, 1924. The defendants Nos. 2 and 4 to 8 are the other sons and daughters of Maula Bakhsh deceased. The defendant No. 3 is his daughter's son. The plaintiff brought the present suit to recover Rs. 2,196-8-0 by sale of the mortgaged property.

The claim was resisted by the defendants Nos. 4 to 6 principally. They challenged the mortgage in suit on the ground that Maula Bakhsh could not execute the mortgage validly in favour of the plaintiff after he had already gifted the property to them by the deed of the 30th of April, 1920. They raised some other points also in defence but we are not concerned with them in the present appeal.

The learned Subordinate Judge of Lucknow dismissed the plaintiff's suit. He held that the gift set up by the contesting defendants was a valid gift, that it was followed by delivery of possession, that it was completed as required by law and that the mortgage in suit was therefore invalid and could not be enforced in respect of the property in suit.

The plaintiff appealed and his appeal was allowed by the learned Additional District Judge of Lucknow.

(1) (1875) L.R., 2 I.A., 87 (104). (2) (1903) I.L.R., 31 Cal., 319.

It was contended before the learned Judge that the gift relied on by the contesting defendants was only a paper transaction and that it was incomplete and ineffectual for want of delivery of possession. The learned Judge did not accept the plaintiff's contention that the gift in question was only a paper transaction as alleged by him. He found that the deed of gift was never intended to be a mere paper transaction. He held that the donor had a real and *bona fide* intention to make the gift and that the deed of revocation which was executed by Maula Bakhsh on the 11th of March, 1921 was invalid. It was conceded on behalf of the plaintiff before the learned Judge that if the gift had taken effect the revocation must be held to be futile. Though the learned Judge decided all these points in favour of the contesting defendants, but he rejected their defence on the ground that there was no delivery of possession and so the gift was invalid under the Muhammadan law. Having thus held the deed of gift to be invalid, the learned Judge found that the mortgage in suit in favour of the plaintiff was valid and enforceable. He therefore decreed the plaintiff's claim.

The only point for determination in this appeal is whether the gift set up by the contesting defendants is invalid for want of delivery of possession. The learned Judge has thus summed up his finding on the point under consideration :—

“I find that there is no satisfactory evidence that possession was delivered by Maula Bakhsh in pursuance of the gift to complete it. The fact appears to have been that nobody thought that delivery of possession was necessary to Mujibullah who had been constituted guardian of the minor donee by the deed of gift. Maula Bakhsh and thereafter his sons Karim Bakhsh and others went on managing the property and paying taxes and making repairs in utter

1930

 SHAHIQ
 BUX
 v.
 MAHABIR
 PRASAD.

*Raza and
 Pullan, J.*

1930

KHALIQ
BOX
MAHABER
PRASAD.

Raza and
Pullan, JJ.

disregard of the disposition in favour of defendants Nos. 4 to 6 by the gift of the 30th April, 1920, and they on occasions even lived in the gifted houses as owners and not as tenants. Management of the sons' and daughters' gifted properties was first of all attempted by Mujitullah in May, 1923."

It is true that the findings of fact must be accepted in second appeal, but it should be borne in mind that the proper legal effect of a proved fact is essentially a question of law as observed by their Lordships of the Privy Council in the case of *Nafar Chandra Pal v. Shakur* (1), referred to in the case of *Wali Mohammad v. Mohammad Bakhsh* (2). The finding of the learned Judge is to the effect that possession of the property was not really taken by Mujitullah or delivered to him, after the execution of the deed of gift and that Maula Bakhsh donor himself remained in possession of the property and looked after the management of the same. Now the question arises whether transmutation of possession was necessary in the case of the gift under consideration. If this question is answered in the negative, it is clear that the mortgage in suit relied on by the plaintiff must be held to be invalid, as Maula Bakhsh was not competent to execute the mortgage after he had already executed the deed of gift in favour of his minor sons, the contesting defendants. We think the learned Judge has approached the case from a wrong standpoint. In the case of a gift by a parent to a minor child no acceptance is necessary; the gift is completed by the contract and it makes no difference whether the subject of the gift is in the father's hands or in that of a depository. Nor is transmutation of possession necessary, for the possession of the parent is tantamount to that of the child. As pointed out by their Lordships of the Privy Council in the case of *Ameeroonissa Khatoon and others v. Abedoonissa Khatoon and*

(1) (1918) L.R., 45 I.A., 183.

(2) (1929) L.R., 57 I.A., 86.

others (1), "Nor do their Lordships doubt that where there is, on the part of a father or other guardian, a real and *bona fide* intention to make a gift, the law will be satisfied without change of possession, and will presume the subsequent holding of the property to be on behalf of the minor." This ruling of their Lordships of the Privy Council was followed by their Lordships of the Calcutta High Court in the case of *Fatima Bibee v. Ahmad Bakhsh* (2). The case before us is in no way affected by the fact that the guardian obtained possession even for a short time after the execution of the gift. The gift was complete and must be respected. Even if he did not take possession of the property as the guardian of the minors, that circumstance does not affect the rights of the donees as possession remained with their father Maula Bakhsh, who was their legal guardian under the Muhammadan law. He must be held to have been holding the property on behalf of his minor sons. It is neither alleged nor shown that they were in any way separate from him.

The result is that we allow this appeal and setting aside the decree of the lower appellate court restore the decree of the first court. The appellants will get their costs from the contesting respondents in all the courts.

Appeal allowed.

APPELLATE CIVIL.

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

TIRATHPATHI, MUSAMMAT AND ANOTHER (DEFENDANTS-APPELLANTS) v. RANJIT SINGH AND ANOTHER (PLAINTIFFS) AND OTHERS, (DEFENDANTS-RESPONDENTS).*

Rewaj-e-am—Custom—Entry of a custom in a rewaj-e-am, evidentiary value of—Evidence Act (I of 1872), section 108—Person not heard of for forty years—Death, presumption of—Burden of proof, shifting of.

Rewaj-e-am is a public record prepared by a public officer in discharge of his duties, and under Government rules; it

*First Civil Appeal No. 136 of 1929, against the decree of Pandit Kishen Lal Kaul, Additional Subordinate Judge of Fyzabad, dated the 4th of October, 1929, decreeing the plaintiffs' suit.

(1) (1875) L.R., 2 I.A., 87 (104). (2) (1903) I.L.R., 31 Cal., 319.

1930

KHALIQ
BUN
v.

MAHABIR
PRASAD.

*Raza and
Pullan, J.J.*

1930
October, 14.