APPELLATE CIVIL.

Before Sen and Allanson, J.J.

1927.

Aug., 11.

MUSAMMAT BIBI BILKIS

v.

SHEIKH WAHID ALI.*

Muhammadan Law—Mushaa, doctrine of—whether is archaic rule of law—gift of undivided share in divisible property, whether invalid—gift, essential conditions of—divestment of possession.

A gift of an undivided share in a property which is capable of division offends against the doctrine of mushaa and is invalid under the Muhammadan law.

The doctrine of mushaa is not an archaic rule of law and, although not favoured, cannot be ignored or repudiated.

Mariam Bibi v. *Sheikh Muhammad Ibrahim* 1), *followed*. *Ameeroonissa Khatoon* v. *Abedoonissa Khatoon* (2), *Mullick Abdool Gaffoor* v. *Muleka* (3), *Muhammad Mumtaz Ahmad* v. *Zubaida Jan* (4), *Ibrahim Goolam Ariff* v. *Saiboo* (5) and *Abdul Aziz* v. *Fateh Mahomed Haji* (6), distinguished.

Transfer of possession, in the theory of the Muhammadan Law of "hiba", is not merely a form nor something merely supplying evidence of the intention to make a gift, but is expressely insisted upon as a part of the substantive law in order that that may be effectuated which is sought to be effectuated by a gift, viz., the transfer of the ownership of the property from the donor to the donee.

Where, therefore, it appeared that the donor administered and remained in joint possession of the property gifted with the donee until his death,

Held, that the gift was not perfected by a proper transfer of possession and was invalid.

*Second Appeals nos. 1511 and 1512 of 1924, from a decision of W. H. Boyce, Esq., I.C.S., District Judge of Bhagalpur, dated the 31st July, 1924, reversing a decision of Babu Rabindra Nath Ghosh, Munsif, 1st Court of Bhagalpur, dated the 24th September 1923.

(1) (1913) 28 Cal. L. J. 306.
(2) (1874-75) L. R. 2 I. A. 87.
(3) (1884) I. L. R. 10 Cal. 1112.
(4) (1889) I. L. R. 11 All. 460, P. C.
(5) (1908) I. L. R. 35 Cal. 1.
(6) (1911) I. L. R. 38 Cal. 518.

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Appeal by the plaintiff.

The facts of the case out of which these appeals arose were as follows:—Turab Ali had three sons Ahsan, Bahadur and Wahid. Bahadur predeceased Turab Ali leaving two sons Mosaheb and Jummah. It was the case of the plaintiff that immediately after the death of Bahadur Turab made an oral gift of his properties dividing them into three shares, one-third in favour of Ahsan, one-third in favour of Mosaheb and Jummah to be enjoyed in equal moieties, that is one-sixth each, and one-third in favour of Wahid, defendant second party, and the donees entered into possession and occupation of the respective shares given to them. It was found that Ahsan also predeceased Turab Ali leaving his widow Musammat Bibi Nazirun, defendant first party, and his son Elahi who married Musammat Bibi Ghafurun. Elahi left two daughters the plaintiff and one Musammat Bibi Hassina who subsequently died. The plaintiff instituted the suit praying for an adjudication that she was entitled to eleven-forty-eighths share in the properties set out in the schedule to the plaint on the basis of the oral gift above mentioned in favour of Ahsan, and praying for recovery of possession of the same after dispossessing the defendants, first, second and third parties therefrom. The defendant third party was Shaikh Deyanat Ali, grandson of Turab Ali by his daughter Nazirun. The plaintiff alleged in the plaint that ever since the oral gift above mentioned the donees, that is Ahsan, Mosaheb, Jummah and Wahid, and after the death of Ahsan his representatives, remained in joint possession of all the properties specified in the plaint until three years before the institution of the suit. Thereafter, the defendants 1 to 3 made a common cause against the plaintiff and defendant no. 4, her maternal grandfather, and refused to allow her a share of the income from the properties.

The Munsif made a decree for possession in her favour in respect of eleven-forty-eighths share of the

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properties left by Turab with the exception of 5-annas 4-pies share in one of the properties which was found by him to have been purchased by Turab after the deed of gift pleaded in the plaint.

Two appeals were preferred against the judgment and decree of the Munsif to the District Judge of Bhagalpur, one by the defendant no. 3 Shaikh Deyanat Ali, and the other by the defendant no. 4. The District Judge allowed both the appeals holding that there was an oral gift as alleged by the plaintiff but that after the gift the condition of the family was not altered. The property remained undivided and was administered first by Turab during his lifetime and after his death by Wahid. Thus the District Judge was apparently of the view that there was no divestment of the property such as is required by the Muhammadan Law. A further question was raised as to whether the gift was bad according to the rule of mushaa. The District Judge came to the conclusion that in the present case the properties which were the subject-matter of the alleged gift being capable of division, and there having been no division effected although the gift was said to have been made over a quarter of a century ago, it must be invalid and no decree could be based thereon.

S. N. Sahay, for the appellant.

K. Husnain, *S. A. Khan* and *Hasan Jan*, for the respondents.

SEN, J. (after stating the facts set out above, proceeded as follows):—The argument addressed to us in this Court has proceeded entirely on the question as to whether the gift alleged was, in the circumstances found by the Court below, invalid in view of the Muhammadan law of gifts and of "mushaa". Learned Counsel on behalf of the appellant urges that the rule of mushaa is an archaic rule and must not be applied to modern conditions. Various rulings have been placed, as also ancient texts bearing on the

question, in support of the proposition that although the rule was laid down by Abu Haniffa with great strictness his disciples and later commentators have gradually relaxed the rule in order to validate gifts which according to Abu Haniffa would have been invalid. It is also contended that the rulings relied on the support of this view show that there is a tendency, in view of the changed conditions of society in modern times, to whittle down the rule of mushaa to such an extent that it may fairly be said that the rule at present is non-existent. It is necessary, therefore, to consider the cases which have been cited and upon which much reliance has been placed. The earliest of the cases cited is that of *Ameeroonissa Khatoon* v. *Abedoonissa Khatoon* (1). In that case the subjects of gift were definite shares in certain zamindaries and such shares "were for revenue purposes distinct estates, each having a separate number in the Collector's books, and each being liable to the Government only for its own separately assessed revenue". In these circumstances their Lordships of the Judicial Committee held that the rule of Muhammadan Law as to mushaa did not apply to property of that description. The following passage from their judgment makes it clear that their Lordships clearly recognized the existence of the rule of mushaa in Muhammadan Law but in view of the fact that the properties in that particular case were such as would admit of separate enjoyment they thought that the case did not come within the operation of that rule:—

"A legal objection to the validity of these gifts was made in the High Court on the ground that the gift of mushaa, or an undivided part in property capable of partition, was, by Muhammadan Law, invalid. This point appears to have been taken for the first time in the High Court, and was argued at this bar. That a rule of this kind does exist in Muhammadan Law with regard to some subjects of gift is plain. The Hedaya gives the two reasons on

(1) (1874-75) L. R. 2 I. A. 87.

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which it is founded: First, that complete seisin being a necessary condition in cases of gift, and this being impracticable with respect to an indefinite part of a divisible thing, the condition cannot be performed; and, secondly, because it would throw a burden on the donor he had not engaged for, viz., to make a division. (See Book XXX., c. 1., vol. iii, p. 293.) Instances are given by text writers of undivided things which cannot be given, such as fruit unplucked from the tree and crops unsevered from the land. It is obvious that with regard to things of this nature separate possession cannot be given in their undivided state, and confusion might thus be created between donor and donee which the law will not allow.

In the present case the subjects of the gift are definite shares in certain zamindaries, the nature of the right in them being defined and regulated by the public Acts of the British Government. The High Court, after stating that the shares 'were for revenue purposes distinct estates, each having a separate number in the Collector's books, and each being liable to the Government only for its own separately assessed revenue' and further, that the proprietor collected a definite share of the rents from the raiyats and had a right to this definite share and no more, 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."

This view it may be mentioned is quite in accord with the opinion expressed in text-books by learned authors on the subject of Muhammadan Law. Mr. Ameer Ali in his book of Muhammadan Law (4th Ed. p. 100) says:—

"It is clear, therefore, that according to the doctrines actually in force the original strictness of the technical rule relating to mushaa has been considerably cut down.

e.g.: (a) Although a gift of property capable of division or partition to two or more persons is not valid, yet if they take possession under the authority of the donor it vests in them the right of property.

(b) Authority to take possession or placing the donees in a position to take possession is equivalent to delivery of possession.

(c) Partition by the donees themselves after possession is sufficient to validate the gift."

It must be remembered that in the present case there were none of these circumstances present. On the contrary the finding of the Court below is that after the deed of gift Turab Ali remained in joint possession until after his death and administered the properties and subsequent to his death Wahid Ali who remained joint with the rest administered the property.

Another learned author, Mr. Faiz Badruddin Tyabji, in his book on the Principles of Muhammadan Law (2nd Ed., p. 423) observes:

"the validity of a gift of 'mushaa' must be tested in the same way as of any other gift: there must be as complete a transfer of the possession of the subject of gift as the circumstances permit; and the donee is not entitled to claim anything to be done in his favour that the donor has not done: the Courts are inclined to uphold a gift of 'mushaa', i.e., of an undivided part of property, except where the omission to separate the portion of the property which is the subject of gift from the rest of it, is taken as an indication that there has been, in effect, an incomplete transfer, which the donor would have completed by partition, had he intended to complete the gift."

Another passage at page 433 throws light not only on the validity or otherwise of a gift under the law of mushaa but under the general principle as to transfer of possession under the Muhammadan Law:—

"Transfer of possession in the theory of the Muhammadan law of 'hiba' is not merely a form, nor something merely supplying evidence of the intention to make a gift. The necessity for the transfer of possession is expressly insisted upon as part of the substantive law, in order that that may be effectuated, which is sought to be effectuated by a gift, viz., the transfer of the owner of the property from the donor to the donee * * * * The law does not ask, Did the donor really intend to give the subject of gift, i.e., did he really intend to transfer the ownership of the subject of gift from himself to the donee? What the law asks is, Has the donor actually given away? or Has the ownership been actually transferred from the donor to the donee?"

In view of these principles and the principle laid down in the ruling of the Judicial Committee above

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mentioned it seems to be apparent that the present case comes properly within the rule of mushaa as it obtains in Muhammadan Law.

The next case relied upon is that of *Mullick Abdool Gaffoor* v. *Muleka* (1). In that case the point of contention was as to whether certain lands, with respect to which khas or actual possession could not be given but which being in the possession of an ijaradar could only admit of possession by collection of rents, could be the subject-matter of gift under the Muhammadan Law. It was contended by the plaintiff that such lands could not properly be made the subject-matter of gift. Garth, C.J., observed in his judgment:—"In dealing with these points we must not forget that the Muhammadan Law, to which our attention has been directed in works of very ancient authority, was promulgated many centuries ago in Bagdad and other Muhammadan countries, under a very different state of laws and society from that which now prevails in India; and that, although we do our best here in suits between Muhammadans to follow the rules of Muhammadan Law, it is often difficult to discover what those rules really were, and still more difficult to reconcile the differences which so constantly arise between the great expounders of the Muhammadan Law ordinarily current in India, namely, Abu Haniffa and his two disciples. We must endeavour, so far as we can, to ascertain the true principles upon which that law was founded and to administer it with a due regard to the rules of equity and good conscience as well as to the laws and state of society and circumstances which now prevail in this country." He then proceeded to hold that "What is usually called possession in this country is not actual or khas possession but the receipt of the rents and profits and if lands let on leases could not be made the subject of gift many thousands of gifts which have been made over and over again of zamindari properties would be invalidated." It was also found

(1) (1884) I. L. R. 10 Cal. 1112.

in that case that the properties which were the subject matter of gift were not capable of division and, therefore, the law of mushaa would not apply to them. On these grounds, the case was regarded as not coming within the operation of the ordinary rule of mushaa. But the existence of the rule was acknowledged.

Reliance is also placed on the case of *Muhammad Mumtaz Ahmad* v. *Zubaida Jan* (1). It was held in that case that the doctrine relating to the invalidity of gifts of mushaa is wholly unadapted to a progressive state of society and ought to be confined within the strictest rules. Learned Counsel for the appellant has based his argument in this Court on this dictum and has vigorously contended that the rule of mushaa should not be applied to the present case in view of the above observations of the Judicial Committee. But on referring to the judgment in that case it appears clear that the facts were entirely different from the facts of the case before us. The lady who made the gift had merely proprietary, not actual possession, of the greater portion of the property, that is she was merely in receipt of the rents and profits. The argument that the case came under the rule of mushaa was mainly based upon this fact but it appeared that " 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. Ahmad Husain, the daughter's husband, was the general manager of both mother and daughter, and would doubtless take care that the deed of gift should be carried into effect ". Upon these findings their Lordships came to the conclusion that sufficient possession had been taken on behalf of the daughter to render the gift effectual.

(1) (1889) I. L. R. 11 All. 460; P. C.

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The next case relied upon is that of *Ibrahim Goolam Ariff* v. *Saiboo* (1). In that case the property which was the subject-matter of disposition consisted of freehold land in Rangoon and shares in six companies. Their Lordships assumed the law of mushaa to apply to the succession of Muhammadans residing in Rangoon but the question that arose for determination was whether the rule of mushaa would apply to property of the nature above mentioned. The reasons for holding that it did not apply will appear from the following passage taken from the judgment of Lord Robertson :—

"What was done by Goolam Ariff was this: he (notionally) divided the property to be dealt with into 2,000 shares; he kept to himself 1,150 shares, and the remaining 850 he distributed among the persons to be benefited giving 200 shares apiece to three of them, 100 shares apiece to two of them, and 25 shares apiece to two of them. Now it is said that this gift was void, as being contrary to the doctrine of mushaa. 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 the shares, and extremely difficult 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. It was laid down in the Privy Council case of *Mumtaz Ahmad* v. *Zubaida Jan* (2) that 'the doctrine relating to the invalidity of gifts of mushaa is wholly unadapted to a progressive state of society, and ought to be confined within the strictest rules'. 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."

(1) (1908) I. L. R. 35 Cal. 1. (2) (1889) I. L. R. 11 All. 460, P. C.

It remains now to consider the case of *Abdul Aziz* v. *Fateh Mahomed Haji* (1). In that case the subject-matter of the gift which was in dispute was a 4-annas share in a kaimi raiyati holding in favour of the plaintiff who was the nephew of the donor, the donor having admitted the plaintiff to joint possession with himself and recognized the plaintiff as having been in such possession for fourteen years. It was held that in those circumstances the donor could not be allowed to say that there had been no valid gift and that the doctrine of mushaa was not applicable to such a case. The decision was based mainly on the authority of the rulings which I have already quoted and also upon one or two other decisions of the High Courts of Bombay and Allahabad. As I have already discussed the principal rulings relied upon it is unnecessary to discuss them any further. It is sufficient for the purposes of this case to observe that the facts here are entirely different from those of the cases in which either the Judicial Committee or the High Court of Calcutta have come to the conclusion that the rule of Mushaa is not applicable.

The learned Advocate for the respondent mainly relies on two cases and upon the general principles laid down by the text writers and ancient authorities on the doctrine of mushaa. The first of these cases is that of *Ranee Khujooroonissa* v. *Musammat Roushun Jehan* (2). In that case the main question under consideration was the deed of gift. It was held that " if it was simply a deed of gift without consideration, it was invalid unless accompanied by delivery of the thing given, as far as that thing was capable of delivery, or, in other words, by what is termed in the books a seizin on the part of the denee. In their Lordships' judgment there was no delivery of this kind. Even assuming that although the estate was under attachment a sufficient seizin in it remained to the donor which he could impart to the donee, still

(1) (1911) I. L. R. 38 Cal. 518. (2) (1875-76) L. R. 3 I. A. 291.

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it appears * * * that in point of fact Raja Deedar Hossein remained in receipt of the rents and profits of the property until his death. Therefore if the deed were a mere deed of gift there was not that delivery of possession which was necessary to give it effect by Muhammadan Law. A question which was touched upon, though not much argued, viz., whether the doctrine of Muhammadan Law relating to 'confusion of gifts' applied, appears not to arise, as there was no delivery of possession". Taking all the circumstances into consideration their Lordships came to the conclusion that "the transaction set up on behalf of the defendants was not a real one, that no real consideration passed, that there was no intention on the part of the Raja to part with the property at once to his son, but that both father and son were endeavouring to evade the Muhammadan Law, by representing that to be a present transfer of property which was intended only to operate after the father's death". Thus it appears that the question of mushaa was hardly considered or was necessary to be considered in that case. The decision proceeded more directly upon the question of transfer of possession necessary to complete the gift under Muhammadan Law. From that point of view it is no doubt of assistance in the present case and in view of the findings of the Court below it must follow that the gift, if any, contemplated by Turab Ali was not perfected by proper transfer of possession.

The case of *Mariam Bibee* v. *Shaikh Muhammad Ibrahim* (1) is important in view of the fact that the doctrine of mushaa was elaborately gone into from various points of view and the Court came to the conclusion that the doctrine though not favoured could not altogether be ignored or repudiated. In coming to this conclusion the High Court of Calcutta did not overlook unfavourable judicial comments made from time to time upon the principle of mushaa, nor did it

(1) (1913) 28 Cal. L. J. 306.

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ignore the weighty observation of Sir Barnes Peacock in *Muhammad Mumtaz Ahmad* v. *Zubaida Jan* (1).

Having regard to the findings of the Court below that the gift was not perfected by transfer of possession and that the properties although capable of division were never divided or sought to be divided I am compelled to come to the conclusion that the gift offends against the rule of Muhammadan Law as to mushaa and as to transfer of possession. Appeal no. 1511 of 1924 must, therefore, be dismissed with costs.

In regard to appeal no. 1512 it is quite clear that it is concluded by findings of fact on the question of benami. It is also dismissed with costs.

ALLANSON, J.—I agree.

Appeals dismissed.

APPELLATE CIVIL.

Before Sen and Allanson, J.J.

1927.

Aug., 11.

SHYAM SUNDER NAIK

v.

GOBARDHAN KAMTI.*

Bengal Tenancy Act, 1885 (*Act VIII of* 1885), *Schedule III, Article* 3, *scope of—landlord, suit for arrears of rent by—holding, sale of, in execution of decree—dispossession by auction-purchaser—tenant, suit by, for recovery of possession —Special rule of limitation, applicability of—question of representation, whether a question of fact.*

In order to make the special rule of limitation laid down in Article 3 of the third schedule to the Bengal Tenancy Act, 1885, applicable, it must be shown that it was the landlord who caused or took part in the dispossession of the tenant.

Where, therefore, a landlord institutes a rent suit and, in execution of a decree obtained in that suit, brings the holding to sale, dispossession by the purchaser does not amount to dispossession by the landlord.

*Second Appeal no. 1544 of 1926, from a decision of W. H. Boyce, Esq., I.C.S., District Judge of Darbhanga, dated the 3rd September, 1926, affirming a decision of Babu Gopal Chandra De, Munsif, 1st Court of Samastipur, dated the 25th May, 1926.

(1) (1889) I. L. R. 11 All. 460, P. C.