we agree with the lower Court that in the circumstances of the case it is unlikely that the land was sold by the first appellant in good faith in pursuance of the common business of the first appellant and respondent as a married couple. The third appellant knew all the circumstances of the couple and knew that he was buying from a married man who was living separately from his wife.

In these circumstances we see no reason to interfere with the lower Court's finding that the sale did not affect the one-third interest in the land which respondent takes on divorce.

The appeal is accordingly dismissed with costs.

The decree of this Court will not be signed until respondent has paid into Court the deficient court-fee payable in the trial Court in respect of her claim to divorce.

APPELLATE CIVIL.

Before Sir Guy Rutledge, Kt., K.C., Chief Justice, and Mr. Justice Brown.

MIRZA HASHIM MISHKEE

v.

A. A. H. BINDANEEM AND ONE.*

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Mar. 12.

Shiah Mahomedan Law—Gift by way of trust must conform to law relating gifts —Gifts in futuro *when invalid—Gift to unborn person after a life interest and control over corpus, invalid.*

A Shiah Mahomedan lady purported to create a trust by a deed of gift in which she appointed a trustee who was to pay the income of the trust property to herself for life, on her death to pay the income to her husband and on his death to pay the income to her son and daughter and after their death the income was to go to their children, and on attainment of the age of 18 by the youngest grandchild, the property was to be made over outright to the grandchildren. The trustee was to get 15 per cent. of the income by way of commission during the

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settlor's life-time. The trustee was empowered to sell and transfer the corpus of the property subject to the written consent of the donor during her life-time.

Held, that the trust-deed was invalid. A gift under Mahomedan law to be valid must be a gift *in praesenti* and not *in futuro*. The fact that the gift was by way of trust did not override the Mahomedan law as to gifts. There was no gift *in praesenti* as the settlor had reserved to herself a life interest and she had not divested herself of all dominion over the corpus of the property as it could be sold with her consent.

Mirza Hashim Mishkee v. *A. A. Bindaneem*, 5 Ran. 252—*confirmed.*

Jaimabai v. *Sethna*, 34 Bom. 604; *Mahomed Shah* v. *Official Trustee of Bengal*, 36 Cal. 431; *Sadik Husain* v. *Hashim Ali*, 43 I.A. 212; *Shiraz Husain* v. *Mushaf Husain*, 24 Oudh Cases 32; *Yusuf Ali* v. *Collector of Tipperah*, 9 Cal. 138—*referred to.*

Nawab Umjad Ally v. *Mohumdee Begam*, 11 M.I.A. 517—*distinguished.*

Ameer Ali's Mahomedan Law, 4th Ed., p. 142; *Baillie's Digest of Mohammadan Law*, p. 214; *Mulla's Mohamedan Law*, 7th Ed., pp. 1191-20; *Tyabji's Mahommedan Law*, 2nd Ed., ss. 349, 449—*referred to.*

Rafi for the appellant.

N. N. Burjorjee for the respondents.

RUTLEDGE, C.J., and BROWN, J.—The point for decision in this appeal is as to the validity of a certain deed of trust under Mahomedan law.

The parties to the appeal are Shiah Mahomedans. The 2nd respondent, Sakeena Khanum, was married to one Hajee Mirza Hashim Mishkee, deceased. The properties affected by the deed of trust originally belonged to Hajee Mirza Hashim Mishkee, who transferred them to his wife by a number of gifts. The deed of trust in question was executed by Sakeena Khanum, after the gifts had been made by her husband, on the 6th of December 1904. By the deed she purports to transfer the property to the 1st respondent, Aga Abdul Hosain Bindaneem, as trustee. The terms of the trust are that the trustee shall pay the income of the property to the settlor during her life, that on her death the trustee shall pay the income to her husband, that on his death the trustee shall pay the income to Mirza Cassim Mishkee and Khatiza Bibi, the children of Sakeena Khanum, that after the death

of Mirza Cassim Mishkee and Khatiza Bibi the income is to go to their children and that on the attainment of the age of 18 by the youngest grandchild the property is to be made over outright to the grandchildren. The payment of the income to the settlor during her life is subject to a reduction of 15 per cent. to be kept by the trustee as commission.

The suit was brought by a grandchild of Sakeena Khanum who claimed that the trustee had been wasting the property and asked that the trustee be removed from the trusteeship. The case has been defended on a large number of grounds but the only point which has so far been decided is as to the validity of the trust deed. It is admitted that the decision must rest on Mahomedan law. The learned trial Judge has held the deed to be invalid because it purports to give a remainder to a child who was unborn at the time of the settlement. Great reliance is placed by the learned advocate for the appellant on passages from the Treatises on Mohammadan Law by Tyabji and Ameer Ali and from Baillie's Digest of Mohammadan Law. In section 449 of Tyabji's 2nd edition it is laid down that " The grantee of a limited interest must be in existence at the time when the grant is made ; he must be competent to own property, and must be distinctly indicated ; provided that where a succession of limited interest is created by the same grant, the grantee of the first interest alone need be in existence at the time of the grant, and if the succeeding grantees come into existence when their respective interests open out, the grants to them are valid." Ameer Ali remarks at page 142 of the 4th edition of his Treatise : " So long as the first ' taker ' is in existence at the time the gift is made, the disposition becomes operative under the Shiah law ; the subsequent donees being required to be in being only

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when the intermediate estates come to an end." And the same view is taken at page 214 of Baillie's Digest of Mohammadan Law. The learned trial Judge remarked that the texts on which these passages were founded did not deal with or contemplate the creation of a vested interest after a life estate in favour of unborn persons and came to the conclusion that the passages cited were not based on authoritative texts and were opposed to the fundamental conceptions of Mahomedan law.

He referred to the case of *Shiraj Husain and others* v. *Mushaf Husain and others* (1), in which the learned Judicial Commissioner of Oudh held that a gift according to Shiah law is a contract between the parties which therefore requires the consensus of minds requisite for a contract. There must be a proposal to make the gift and there must be an acceptance of the gift. He held that there could be no such acceptance in the case of a person who was unborn at the time the gift was made.

It has been held by their Lordships of the Privy Council that a vested remainder can be created under Mahomedan law and the question whether such vested remainder created by a deed of trust in favour of an unborn child is valid is a matter of considerable difficulty. We do not, however, think that it is necessary for us to come to any definite decision on this point in this appeal. There can be no doubt that a gift under Mahomedan law to be valid must be a gift *in praesenti* and not *in futuro*. Though it may not be necessary where a deed of trust creates a number of successive interests that every one of the donees should be ready and willing to accept the gift at once it is clear that the immediate donee must be in such a position for the gift to be valid. But in

(1) 24 Oudh Cases 32.

the present case the donor reserved to herself an interest for life. It is true that a trustee has been appointed to receive the life estate but we do not think that this can make any difference to the application of the law. In the case of *Sadik Husain Khan* v. *Hashim Ali Khan and others* (1), their Lordships of the Privy Council held as follows : " The Court of the Judicial Commissioner has held that the term ' gifts ' as here used does not include gifts in trust. Their Lordships cannot adopt such a narrow construction of the term ' gifts ' as would exclude any gift where the donor's bounty passes to his intended beneficiary through the medium of a trust, so that while a gift by A to C direct would be governed by the Mahomedan law, a gift by A to B in trust for C would be governed by some other law. So to hold would, they think, defeat the plain purpose and object of this section of the statute." The statute referred to is the Oudh Laws Act. But it is not disputed that the law to be applied in this case is the Mahomedan law. And when resort is had to the medium of a trust and the validity of the gift is called in question, the creation of a trust cannot be allowed in effect to render the general principles of Mahomedan law on the subject of the gift inoperative. We do not therefore think that the fact that the property in this case was made over to a trustee can be held in any way to alter the fact that the settlor did reserve to herself a life interest in the property. It is true that the trustee is to get 15 per cent. of the income but that is only as commission for acting as the trustee and amounts to little more than payment to him as manager. The gift in this case must in our opinion be held to be a gift reserving in the settlor a life interest in the subject-matter of the deed. A gift

(1) 43 I.A. 212 at p. 221.

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by a donor to herself is clearly no real gift at all and reservation in this deed of settlement of a life interest in the settlor results in there being no gift at all *in praesenti* but in the gift taking effect only on the settlor's death.

We have been referred on behalf of the respondents to the case of *Jainabai and another* v. *R. D. Sethna and others* (1). In that case it was held that a conveyance by a Shiah Mahomedan to himself and other trustees for himself for life, and after his death for the payment of annuities to his widow and daughter, with a proviso reserving to the settler the power to revoke the gift, was invalid. In the course of his judgment Beaman, J., remarks (at p. 610): "As a general rule of Mahomedan law, it is, I think, unquestionable that an indispensable condition precedent to a valid gift is that it should be unqualified and *in praesenti*. The books are full of prohibitions, with simple illustrations against gifts *in futuro*." At page 612, "Looking to the clear and positive principles of the Mahomedan law, I cannot believe that any gift, which is only to take effect after the death of the donor, and during his life-time is expressly declared to be revocable by him, could ever be a valid gift. The question might have been complicated had the donor died without revoking the contemplated gifts. But even so, I should still have been of opinion, that as declared in the instrument of 1902, the gifts to Jainabai and the minor plaintiff were illegal and invalid." And at page 614, "Coming back to our present case it will be seen at once that it differs in one very material point. For the first donee is the donor himself; and it is, therefore, impossible, as in the first case I put, for him to comply in any way

(1) (1910) 34 Bom. 604.

with those conditions which the Mahomedan law makes indispensable to a valid gift."

The circumstances of that case were not entirely similar to those of the present case, but it is clear that, in the learned Judge's view, a gift with a reservation of a life-interest to the donor would ordinarily be invalid under Mahomedan law. It has been objected to the authority of this case that in the same judgment *doubts are thrown on the correctness of a decision of* their Lordships of the Privy Council to the effect that a Mahomedan may create a succession of life interests. But however that may be there can be no doubt that it is essential for the validity of a gift under Mahomedan law that it shall be operative at once. According to section 349 of Tyabji's Mahomedan Law : "Where a declaration of gift purports to transfer the subject of the gift to a donee at a future time, or contingently on the happening of a future event, the gift is void." In his notes on this section the learned auther remarks : "There is however one exception to this rule. For, where the condition on which the operation of the gift is suspended is the death of the donor the disposition constitutes a particular species of gift, namely a bequest, and it may operate as such in Mahomedan law." But in the present case it is not the contention that the gift operates as a bequest which would be revocable at any time during the testator's life-time. This exception to the general rule would not make the settlement valid as a gift *inter vivos*, and that is what is claimed for the settlement here.

Mulla at pages 119 and 120 of his treatise on Mahomedan Law (seventh edition) lays down the following propositions :—

(1) A gift cannot be made of anything to be performed *in futuro* ;

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(2) A gift cannot be made to take effect on the happening of a contingency.

He also, however, states "where property is transferred by way of gift, and the donor does not reserve the dominion over the corpus of the property nor any share of dominion over the corpus, but stipulates for and obtains a right to the recurring income during his life, the gift and the stipulation are both valid." This is based on a decision of the Privy Council in the case of *Nawab Umjad Ally* v. *Mohumdee Begam* (1), and in view of the pronouncement by their Lordships it is impossible to hold that in no case could a gift be valid with reservation of the enjoyment by the donor during his life of the profits of the subject-matter of the gift. But the circumstances of *Nawab Umjad Ally*'s case were very different from those of the present case. In that case a father had made a gift of Government notes to his son. The gift was accompanied by delivery of possession and a transfer into the son's name, without any reservation of the dominion over the corpus and only a stipulation for the right to the accruing interest during the donor's life. The gift was complete from the very first, but that cannot be said in the present case. Apart from the fact that no beneficiary in the present case except the donor receives any benefit from or possession of the property during the donor's life-time, there is a distinct reservation even as to the powers of the trustee with regard to the corpus of the property. The deed of trust allows the trustee to sell and transfer the corpus of the property but only subject to the written consent of the donor during her life-time. Sakeena Khanum has not divested herself of all dominion over the corpus of the property. It was held by the High

(1) 11 Moore's Ind. Ap. 517.

Court of Calcutta in the case of *Yusuf Ali and others* v. *The Collector of Tippera* (1), that—

(1) By Mahomedan Law, a gift cannot be valid unles it is accompanied by possession ; and

(2) that it cannot be made to take effect at any definite future period.

In that case a document had been executed in the following terms : "I have executed an *ikrar* to this effect, that, so long as I live, I shall enjoy and possess the properties, and that I shall not sell or make gift to any one ; but after my death, you will be the owner, and also have a right to sell or to make a gift after my death." It was held that this was an ordinary gift of property *in futuro* and as such invalid under Mahomedan law. And in a later case of the same Court *Mahomed Shah* v. *Official Trustee of Bengal* (2), Stephen, J., held that a deed creating a life-interest in the donor was void under the Mahomedan law, though the reasons for this decision do not appear in the official report.

In our opinion the so-called deed of gift or trust in the present case does not affect any gift at all *in praesenti* but the gift can only become operative on the death of the donor. The gift cannot therefore be held to be a valid gift *inter vivos* under Mahomedan law. We therefore agree with the learned trial Judge that the deed of trust is invalid, and we dismiss this appeal. Each party to bear their own costs.

(1) (1882) 9 Cal. 138. (2) (1909) 36 Cal. 431.