the Lower Court, I remand the case for redecision. The respondent may pay the costs incurred in this Court by the applicant. The other costs shall abide the result.

BHIDE J.—I concur.

N. F. E.

Revision accepted.

APPELLATE CIVIL.

Before Mr. Justice Addison and Mr. Justice Tek Chand.

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Dec. 22.

FAYYAZ-UD-DIN (PLAINTIFF) Appellant

versus

KUTAB-UD-DIN (DEFENDANT) Respondent.

Civil Appeal No. 1123 of 1923.

Indian Contract Act, IX of 1872, section 16—Undue influence—Gift in favour of agent—burden of proof—Pardanashin—meaning of—Muhammadan Law—Hanifi School—Alienation by gift—'Musha'—share in a business—validity of.

Held, that a woman belonging to a family of barbers, keeping a *hamam* (Turkish bath) in the town of Delhi, and not living in a state of seclusion, was not a *pardanashin*, whose transactions were to be set aside, simply because she did not have independent advice at the time.

For the purposes of this rule a '*pardanashin*' means a woman of rank who lives in seclusion, shut in the *zenana*, having no communication except from behind the *parda* with any male persons save a few privileged relations or dependents.

Buzloor Ruheem v. *Shumsoonnissa Begum* (1), *Kamawati* v. *Digbijai Singh* (2), *Sajjad Hussain* v. *Wazir Ali Khan* (3), *Mariam Bibi* v. *Sheikh Mohammad Ibrahim* (4) per Mukarjee J. and *Satis Chandra Ghosh* v. *Kali Dasi* (5), referred to.

Held further, that where such a woman was intelligent, and, while in fairly good health and capable of comprehend-

(1) (1867) 11 Moo. I. A. 551 (P. C.). (3) (1912) I.L.R. 34 All. 453 (P.C.).
(2) (1921) I. L. R. 43 All. 525 (P. C.). (4) (1918) 28 Cal. L. J. 306, 367.
(5) (1921) 34 Cal. L. J. 529.

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ing the full significance of her acts, had executed a deed of gift of her own free will and accord, and out of natural love and affection, in favour of her only living male descendant, the fact that the donee was her general agent and thus stood to her in a fiduciary relationship, was insufficient in itself to raise the presumption that undue influence had actually been used. In such a case the *onus* lies upon the person contesting the deed to prove that the donee had *in fact* used his position to obtain unfair advantage to himself and so as to cause injury to the person relying upon his authority or aid.

Kali Bakhsh Singh v. *Ram Gopal Singh* (1), and *Poosathurai* v. *Kannappa Chettiar* (2), referred to.

Held also, that although according to the *Hanifi* School of Muhammadan Law the gift of an undivided share (*Mushá*) of property which is in its nature divisible or forms part of a thing capable of physical partition or division is invalid ; that doctrine is inapplicable where the subject of the gift forms part of a thing that is incapable of division, or is of such a nature that some kind of benefit or advantage can be derived from it only so long as it is undivided, and cannot be derived from it after division, as *e.g.* a share in the business of a Turkish bath.

Tyabji's Muhammadan Law, second edition, page 416, and Baillie's Digest of Muhammadan Law, volume I, page 412, referred to.

The doctrine relating to the invalidity of gifts of *Mushá* is wholly unadapted to a progressive state of society and ought to be confined within the strictest limits.

Mohammad Mumtaz Ahmad v. *Zubaida Jan* (3,) followed.

Ibrahim Ghoolam Arif v. *Saiboo* (4), referred to.

First appeal from the decree of Diwan *Som Nath, Senior Subordinate Judge, Delhi, dated the 15th March 1923, dismissing the plaintiff's suit.*

(1) (1914) I.L.R. 36 All. 81 (P.C.).
(2) (1920) I.L.R. 43 Mad. 546 (P.C.).
(3) (1889) I.L.R. 11 All. 461, 475 (P.C.).
(4) (1908) I.L.R. 35 Cal. 1 (P.C.).

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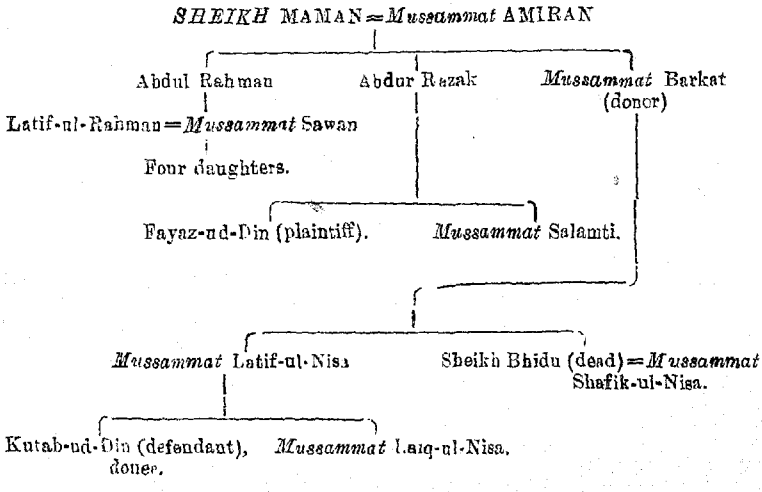
MOTI SAGAR and ABDUL RASHID, for Appellant.

KISHAN DAYAL, BHAGWAT DAYAL and BISHAN NARAIN, for Respondent.

JUDGMENT.

TEK CHAND J. TEK CHAND J.—This judgment will dispose of First Appeals No. 1123 of 1923 and No. 445 of 1924, the parties to which are the same persons.

In order to understand the facts of the case, it is necessary to refer to the following pedigree-table :—



Abdul Rahman owned a *hamam* known as the "Imperial Turkish Bath" and considerable immovable property at Delhi. He was succeeded by his son Latif-ul-Rahman, who died sonless in 1911 leaving four daughters. By various transactions, the particulars of which are not material for our present purposes, *Sheikh* Bidhu, who was the sister's son of Abdul Rahman, became the owner of 23/24 share in the Imperial Turkish Bath (the remaining 1/24 being owned by Fayaz-ud-Din, plaintiff) and immovable property in *Chhatta Jan Nisar Khan* and *Pahar Gunj*, and there is now no dispute between the parties as to his title. On the 24th July, 1927, Bidhu executed a

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will bequeathing his property to his mother, *Mussammat* Barkat and his wife, *Mussammat* Shafik-ul-Nisa. To the former he devised $11\frac{1}{2}/24$ share in the *hamam* and immovable property in *Pahar Gunj* consisting of eight shops, three *balakhanas* and a *katra*. Bidhu died on the 19th September, 1917, and the legatees took possession of his property in accordance with the terms of his will. On the 1st of October, 1917, *Mussammat* Barkat executed a *mukhtarnama* in favour of her daughter's son (Kutab-ud-Din, defendant), appointing him her general agent and also specifically authorising him to manage the *hamam*. On the same day she executed another document gifting to him the immovable property in *Pahar Gunj*. This gift-deed is attested among others by *Mussammat* Amiran, grandmother of the plaintiff, and one Feroze-ud-Din who is related to him by marriage. Both these documents were presented by *Mussammat* Barkat for registration before *Rai Sahib* Bala Parshad, Sub-Registrar (P. W. 4), in his office on the 3rd of October, 1917, in the presence of Fayyaz-ud-Din, plaintiff, who identified the executant *Mussammat* Barkat and affixed his signatures just below the Sub-Registrar's endorsement. About ten months later, on the 3rd of August, 1918, *Mussammat* Barkat executed another deed whereby she gifted her $11\frac{1}{2}/24$ share in the *hamam* to Kutab-ud-Din.

Mussammat Barkat died on the 13th December, 1920, and Fayyaz-ud-Din, plaintiff, who, as will be seen from the pedigree-table, is her brother's son, instituted a suit against Kutab-ud-Din to contest the gift by *Mussammat* Barkat, dated 3rd of August, 1918, in respect of $11\frac{1}{2}/24$ share in the *hamam*, alleging that it was invalid (*a*) as having been made by an old woman of impaired intellect, who was without

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independent advice, and was under the undue influence of the donee, and (*b*) because the gifted property was an undivided share (*Musha*) of the *hamam* and as such incapable of being the subject of a gift under Muhammadan Law. The defendant denied the allegations as to the mental incapacity of *Mussammat* Barkat or the exercise of undue influence, and urged that the prohibition against gifts of *Musha* did not apply to the *hamam* in question. He also pleaded that the plaintiff was estopped by his conduct from challenging the gift. The suit was tried by *Dewan* Som Nath, Senior Subordinate Judge, Delhi, who found all the issues in favour of the defendant and dismissed the suit on the 15th March, 1923.

While this suit was pending, the plaintiff, on the 17th August, 1921, instituted another suit against Kutab-ud-Din, defendant, to contest the gift by *Mussammat* Barkat, dated the 1st of October, 1917, in respect of the immovable property in *Pahar Gunj*. The allegations relating to the mental incapacity of *Mussammat* Barkat and the exercise of undue influence were repeated. For some unexplained reason this suit was not heard by the same Subordinate Judge who was dealing with the first case, but was made over to *Bhagat* Jagan Nath, Junior Subordinate Judge, for trial. A number of issues were raised in this case, of which the only one material for the purposes of this appeal is No. 4 :—

"Did the defendant obtain the deed from *Mussammat* Barkat by undue influence?"

In view of the fact that the plaintiff was present at the time of the registration of the document in question the *onus* of this issue was placed upon him. The Subordinate Judge found against the plaintiff on this point and dismissed the suit on the 16th of

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January, 1924. Against this decree the plaintiff has preferred First Appeal No. 445 of 1924.

I shall first take up Civil Appeal No. 1123 of 1923. Mr. Moti Sagar for the appellant has strenuously contended that the gift was induced by the defendant by undue influence exercised by him over a helpless *pardanashin* old woman, to whom he stood in a fiduciary relation as her *Mukhtar-i-am*. After examining the record and considering the arguments of the learned counsel I am of opinion that the finding of the lower Court on this point is correct. In the first place the evidence produced in the case does not justify the assumption that *Mussammat* Barkat was a *pardanashin* in the sense in which that expression is used in the rulings relied upon by Mr. Moti Sagar. As pointed out in the leading case of *Buzloor Ruheem* versus *Shumsoonnissa Begum* (1), a *pardanashin* is a 'woman of rank' who lives in seclusion, 'shut in the *zenana*,' having 'no communication except from behind the *parda* or screen with any male persons save a few privileged relations or dependents.' See also *Kamawati* versus *Digbijai Singh* (2), *Sajjad Hussain* versus *Wazir Ali Khan* (3) and the exhaustive review of the case law on the subject by Mukarjee J. in *Mariam Bibi* versus Sheikh *Mohammad Ibrahim* (4) and *Satis Chandra Ghosh* versus *Kali Dasi* (5). This description does not obviously apply to a woman belonging to a family of barbers, keeping a *hamam* in the town of Delhi, whose females do not live in a state of seclusion. This was practically conceded by Mr. Moti Sagar but he laid stress on the statements of some of the witnesses produced by the defendant

(1) (1867) 11 Moo. I. A. 551 (P. C.). (3) (1912) I.L.R. 34 All. 455 (P. C.).
(2) (1921) I.L.R. 43 All. 525 (P.C.). (4) (1918) 28 Cal. L. J. 306, 367.
(5) (1921) 34 Cal. L. J. 529.

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who had described *Mussammat* Barkat as a *purdanashin*. There is no doubt, however, that these witnesses used this expression loosely and not in the sense in which it is used in the rulings cited.

Again the transaction cannot be set aside simply because it has not been proved that the donor had no independent advice at the time of executing the document. It may now be taken as settled law that there is no such absolute and inflexible rule as is contended for by the appellant's learned counsel. As pointed out by Lord Shaw in the well-known case of *Kali Bakhsh Singh and others* versus *Ram Gopal Singh and others* (1) the "possession or absence of independent advice is a fact to be taken into consideration and well weighed on a review of the whole of the circumstances relevant to the issue of whether the grantor thoroughly comprehended, and deliberately and of her own free will carried out, the transaction; and if, upon such a review of the facts—which include the nature of the thing done, and the training and habit of mind of the grantor, as well as the proximate circumstances affecting the execution—the conclusion is reached that the obtaining of independent advice would not really have made any difference in the result, then the deed ought to stand."

This being the test let us apply it to the circumstances of this case. That *Mussammat* Barkat was not a woman of weak intellect or impaired mental faculties and had executed the document in question of her own free will and accord and out of the natural love and affection which she bore towards the defendant, who was her only living male descendant, is fully borne out by the evidence of the scribe Ashraf Ali (D. W. 1) and *Rai Sahib* Dr. Hari Ram (D. W. 2),

(1) (1914) I. L. R. 36 All. 81 (P. C.).

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Mohammad Ismail (D. W. 3) and Aziz Bakhsh (D. W. 4), all of whom had attested the will. Their evidence has been carefully analysed by the learned Subordinate Judge and I do not think it necessary to discuss it in detail here. It is sufficient to say that I am in full agreement with his estimate of it. I also agree with the learned Judge in regarding the evidence of Dr. Hari Ram as particularly valuable, as he attested the deed after carefully examining the executant. Then there is the testimony of Mughal Jan (D. W. 7), Mohammad Sadiq (D. W. 8) and Nasir-ud-Din (D. W. 10) and plaintiff's own father-in-law Siraj-ud-Din (P. W. 4), who have all deposed that *Mussammat* Barkat was an intelligent woman, in fairly good health and quite capable of comprehending the full significance of her acts. It is also noteworthy that one of the attesting witnesses to this deed is Bulaqi (P. W. 7), who is the maternal uncle of the plaintiff. Though he is now siding with the plaintiff, it is beyond doubt that he would not have attested the document, if the transaction had been open to objection in any way. The evidence produced by the plaintiff in rebuttal is worthless and has been rightly rejected by the lower Court. Siri Ram (D. W. 1) on whose testimony the counsel for the appellant has laid great stress, is a dismissed servant of the defendant and is at present in the service of the plaintiff. Some of the witnesses are closely related to the plaintiff and there is no doubt that the others have given evidence from corrupt motives.

Again the gift in question appears to have been a perfectly natural one. As stated already, the donee was the only living male descendant of the donor. There is evidence on the record that she was particularly attached to him. There is also the fact that

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the plaintiff was not on friendly terms with the donor or her son *Sheikh* Bidhu, and his wife Shafik-ul-Nisa, he having litigation with all of them. Moreover, the plaintiff is a drunkard, according to his own showing, and is otherwise not a person of desirable character. The evidence further indicates that the plaintiff himself had accepted the gift as valid. There are several documents on the record (see pages 118 to 129) in which while acknowledging receipt of his 1/24 share of the income of the *hamam*, he has described the donee (defendant) as a "managing proprietor," "co-partner," or "proprietor."

Counsel has stressed the point that the donee was the general agent of the donor and stood to her in a fiduciary relation. But this circumstance alone cannot invalidate the transaction. As laid down by their Lordships of the Privy Council in *Poosathurai* versus *Kannappa Chettiar and others* (1), "to treat undue influence as having been established by proof of the relations of the parties having been such that the one naturally relied upon the other for advice and the other was in a position to dominate the will of the first in giving it is erroneous. That merely proves influence. But both by the Law of India and the Law of England more than mere influence must be established so as to render it, in the language of the law, 'undue.' It must be established that the person in a position of domination has used that position to obtain unfair advantage for himself and so as to cause injury to the person relying upon his authority or aid." Such proof is wholly lacking in this case and there are no indications that any unfair advantage was taken by the donee or that the transaction was improper in any way. For all these reasons I agree with

(1) (1920) I. L. R. 43 Mad. 546 (P. C.).

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the lower Court in holding that the document in question was executed by *Mussammat* Barkat of her own free will and accord.

Mr. Moti Sagar did not lay much stress upon the other contention which was raised by his client in the Court below that the gift was contrary to the provisions of Muhammadan Law. According to the *Hanifi* School the gift of an undivided share (*Musha'*) of property which is in its nature divisible or forms part of a thing capable of physical partition or division is invalid. It is conceded that the doctrine is inapplicable where the subject of the gift forms part of a thing that is incapable of division, or is of such a nature that some kind of benefit or advantage can be derived from it only so long as it is undivided, which cannot be derived from it after division (Tyabji's Muhammadan Law, second edition, page 416, and Baillie's Digest of Muhammadan Law, Vol. 1, page 412). It is obvious that a flourishing business like that of the Imperial Turkish Bath could only be successfully run as a going concern, and if an attempt had been made to divide it by metes and bounds, the bulk of the custom would have ruined one another by mutual competition. Moreover, the rules against the gift of *Musha* laid down by *Abu Hanifi* are of a highly technical nature, and were considerably relaxed even in the days of his disciples Abu Yusaf and Imam Muhammad and also by the later doctors of the *Hanifi* School. So far as British India is concerned it has been authoritatively laid down by their Lordships of the Privy Council in *Muhammad Mumtaz Ahmad and others* versus *Zubaida Jan and others* (1) that "the doctrine relating to the invalidity of gifts of *Musha'* is wholly unadapted to a progressive state of society and ought to

(1) (1889) I. L. R. 11 All. 461, 475 (P. C.).

be confined within the strictest limits." It has accordingly been held that the gift of undivided shares in freehold property in a large commercial town by an Indian Muhammadan is valid, *Ibrahim Ghoolam Ariff* versus *Saiboo* (1). The gift in question is therefore not invalid either because of the exercise of undue influence or of the provisions of Muhammadan Law and must be upheld. I would accordingly dismiss Civil Appeal No. 1123 of 1923 with costs.

As regards the other appeal (Civil Appeal 445 of 1924) which arises out of the suit to contest the gift dated 1st October, 1917, in respect of the immovable property in *Pahar Gunj*, the only point for determination is whether it was executed under undue influence. Mr. Moti Sagar has argued that the *onus* of issue No. 4, which related to this matter, was wrongly placed upon the plaintiff. This question is, however, of no practical importance now, as all the available evidence has been placed on the record by the parties and even if the *onus* lay upon the defendant, he has, in my opinion, succeeded in discharging it. As stated above the gift in question was attested by *Mussammat* Amiran, the grandmother of the plaintiff and by Firoze Din who is related to the plaintiff by marriage, his wife being the sister of the plaintiff's wife and his daughter having been married to the plaintiff's son. At the time of registration the plaintiff himself appeared before the Sub-Registrar and identified the executant. These facts strongly militate against the theory of undue influence having been exercised by the defendant over the donor. In addition to the evidence which is common to the two suits and which has been discussed already, we have the testimony of Dr. A. K. Bose (D. W. 2) who has deposed

(1) (1908) I. L. R. 35 Cal. 1 (P. C.).

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that he paid profesional visits to *Mussammat* Barkat when she was ill after the death of Bidhu and that he found her in the full possession of her senses. The scribe Kishan Narain (D. W. 5) has sworn that he wrote the gift as well as the power of attorney at the instance of *Mussammat* Barkat to whom the contents were properly explained in the presence of several persons including the plaintiff and that she affixed her thumb-mark on the deed quite willingly. It is not necessary to pursue the matter further as the learned counsel for the plaintiff-appellant frankly admitted that the evidence in this case was much weaker than that in the other and that if we are not inclined to accept his contentions in that case, this suit must necessarily fail.

In my opinion the conclusion arrived at by the lower Court is correct and its decision must be upheld. I would accordingly dismiss this appeal also, and with costs.

ADDISON J.

ADDISON J.—I agree.

N. F. E.

Appeals dismissed.