

APPELLATE CIVIL.

Before Bhide and Tapp JJ.

ABDUL AHAD KHAN AND OTHERS (DEFENDANTS)

Appellants

versus

AHMAD NAWAZ KHAN AND OTHERS (PLAINTIFFS)

Respondents.

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Civil Appeal No. 1900 of 1925.

*Muhammadan Law — Gift — during “ death illness ”
(marz-ul-maut)—impeachment of— burden of proof.*

Held, that the following conditions have to be satisfied before a gift can be declared to be invalid owing to its having been made in “ *marz-ul-maut* :”

(1) that the donor was suffering at the time of the disposition from a disease which was the immediate cause of his death; (2) that the disease was such as to engender in him the apprehension of death; and (3) that the illness incapacitated him from the pursuit of his ordinary avocations and prevented him from saying his prayers while standing.

Rashid-ud-Din v. Nazir-ud-Din (1), followed.

Sarabai v. Rabiabai (2), *Fatima Bibee v. Ahmad Bakhsh* (3), and *Rashid v. Sherbanoo* (4), referred to.

And, that the plaintiffs, upon whom the *onus* lay to prove beyond doubt that these conditions were fulfilled, and who were themselves responsible for the delay in instituting the suit till eight years after the date of the gift impeached by them, could not plead that as an excuse for failing to discharge that burden.

First appeal from the decree of Lala Devi Dayal Dhawan, Senior Subordinate Judge, Multan, dated the 20th June 1925, decreeing the plaintiffs' suit.

(1) 1929 A. I. R. (Lah.) 721.

(3) (1903) I. L. R. 31 Cal. 319.

(2) (1906) I. L. R. 30 Bom. 537.

(4) (1907) I. L. R. 31 Bom. 284.

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MEHR CHAND MAHAJAN, and D. R. MAHAJAN, for
Appellants.

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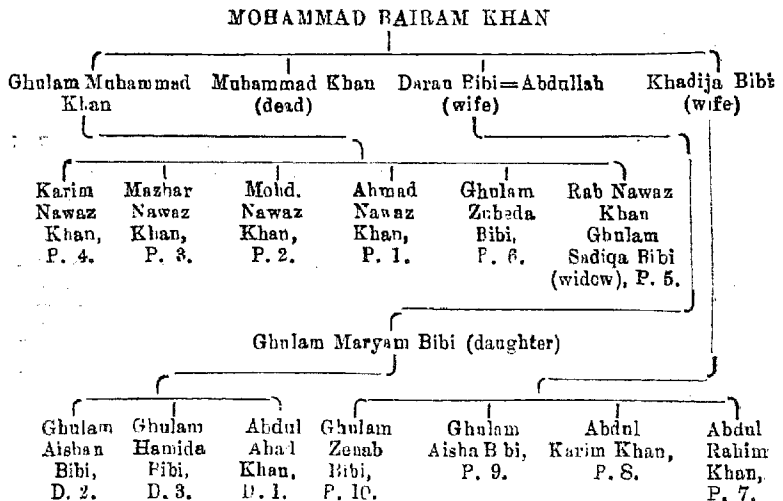
GHULAM MOHY-UD-DIN and MOHSIN SHAH, for

AHMAD NAWAZ Respondents.

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BHIDE J.—The pedigree-table of the parties concerned in this case is as follows:—



The plaintiffs sued for possession of a share in certain lands and houses as the heirs of *Mussammât Daran Bibi*. Defendants, on the other hand, claimed to be in possession on the strength of a registered deed of gift executed by *Mussammât Daran Bibi* in favour of her daughter, *Mussammât Ghulam Maryam Bibi*, on the 30th October 1916. [The learned Senior Subordinate Judge has decreed the suit in plaintiffs' favour on the finding that the gift in question was invalid under the Muhammadan Law, having been executed by *Mussammât Daran Bibi* in favour of one heir to the exclusion of others, in her last illness (*Marz-ul-maut*). [The defendants have appealed from this decision.

The sole point debated before us in this appeal was whether the gift in question was executed by *Mussammât Daran Bibi* in her 'death illness' (*Marz-ul-maut*) as understood in Muhammadan Law. The principles of law on the point are well settled and were recently considered in a Division Bench judgment of this Court reported as *Rashid-ud-Din v. Nazir-ud-Din*, (1) in which a number of previous authorities are quoted.

The following conditions have to be satisfied before a gift can be declared to be invalid owing to its having been made in '*Marz-ul-maut*' [*cf. Sarabai v. Rabiabai* (2), *Fatima Bibee v. Ahmad Bakhsh* (3), *Rashid v. Sherbanoo* (4)].

(1) that the donor was suffering at the time of the disposition from a disease which was the immediate cause of his death; (2) that the disease was such as to engender in him the apprehension of death; (3) that the illness incapacitated him from the pursuit of his ordinary avocations and prevented him from saying his prayers while standing.

The *onus* lay on the plaintiffs to prove beyond doubt that these conditions were fulfilled in the present case, but the evidence produced seems to my mind wholly inadequate. The plaintiffs have relied chiefly on the evidence of a *Hakim*, two women of the menial class, and one of the attesting witnesses to the deed of gift. The *Hakim* (P. W. 1) says that the deceased was suffering from diarrhoea, and that he treated her for about 8 or 10 days from about 1st or 2nd day of *Moharram*. The menial women (P. Ws.

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2 and 3), on the other hand, state that the deceased was taken ill on the *Bakr-id*, that is, about three weeks earlier. *Mussammat Ghulam Bibi* (P. 2) tries to make out that *Mussammat Daran Bibi* was 'unconscious' at the time of the execution of the deed. This is clearly helied by the other evidence and the execution of the deed was not even challenged before us. *Abdul Majid* (P. 4), one of the attesting witnesses to the deed, stated that the deceased was ill for 20 or 25 days, but he never saw her personally during the illness. He is no doubt a relation of the parties, but he seems to be more closely related to the plaintiffs. The learned counsel for the plaintiffs urged that the vagueness of the evidence was due to the fact that the evidence was given many years after the gift, but the plaintiffs were themselves responsible for the delay in instituting the suit and cannot plead this as an excuse.

The learned Senior Subordinate Judge has relied chiefly on the evidence of Miss Shaw, a doctor who was brought to examine the deceased at the time of the execution of the deed and certified that she was in a fit condition to execute the document. But the evidence of this witness seems to me to go really against the plaintiffs. She stated that the deceased was suffering from some illness, but it was apparently not serious as she could not even say definitely whether it was diarrhoea or some other illness. She deposes further that she did not think that the deceased was likely to die and she certified that she was in her right senses and was capable of making her will (*vide* certificate D/X). (The deceased was no doubt old (about 70) and died some 8 or 9 days later, but it seems clear from the evidence of this witness that at the time of her visit, the deceased was not suffering from any illness

likely to cause any reasonable apprehension of death. The learned Senior Subordinate Judge has remarked that the use of the word 'will' by this witness suggests that death was apprehended. But this witness has probably misunderstood the vernacular expression used. The certificate was given on the very day on which the deed of gift was executed and there is no good reason to think that at first the intention was to execute a will and subsequently that intention was changed and a deed of gift was executed.

It appears from the contents of the deed of gift that the deceased's husband, Abdullah Khan, had not been on good terms with her for many years and had deserted her. She was living in her parents' house and it was only natural for her to gift her property in favour of her daughter who had rendered services to her. It is significant that Abdullah Khan, who was one of the heirs of the deceased, although he was not on good terms with the deceased did not care to challenge the gift. The plaintiffs also instituted the present suit some 8 years after the gift and no satisfactory explanation of this delay has been given.

The learned counsel for the plaintiffs referred to the rulings of the Punjab Chief Court referred to in the judgment of the learned Subordinate Judge and certain other authorities, but I do not think it will serve any useful purpose to discuss the facts of those cases. Each case has to be decided on its own facts. After carefully considering the evidence on the record it seems to me that the plaintiffs have failed to establish that the necessary conditions as regards '*Marz-ul-maut*' stated already were fulfilled in the

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present case. I would, therefore, accept this appeal and dismiss the plaintiffs' suit with costs throughout.

TAPP J.

[TAPP J.—I concur.

Appeal accepted.

N. F. E.

APPELLATE CIVIL.

Before Bhide and Tapp JJ.

TIRATH RAM AND OTHERS (PLAINTIFFS) Appellants:

versus

MST. NIHAL DEVI (DEFENDANT) Respondent.

Civil Appeal No. 51 of 1927.

Jurisdiction—Civil or Revenue—Punjab Land Revenue Act, XVII of 1887, sections 117, 158—Widow's application for partition—objected to by collateral—on ground that widow only entitled to maintenance—Order of Revenue Officer to file a suit before him—not complied with—partition carried out—Suit by objector, in Civil Court for declaration—whether competent.

On the death of one Kirpa Ram his one-fifth share in ancestral land was mutated in favour of his widow, the defendant-respondent. She filed an application for partition before the Revenue authorities which was resisted by her husband's brothers and his nephew, the plaintiffs-appellants. They were directed by the Revenue Officer to file a suit in his Court and on their failing to do so the partition was carried out. The plaintiffs brought the present suit for a declaration that the widow of K. R., being entitled only to maintenance, could not claim partition. The lower Appellate Court dismissed the suit on the ground that plaintiffs having failed to bring a suit in the Court of the Revenue Officer as directed by him, the present suit in a Civil Court was not competent.

Held, that under section 117 of the Punjab Land Revenue Act, two courses were open to the Revenue Officer, *viz.* (1) to defer further action till the question

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