1896.

RAMABAI v. RAYA.

It is in reference to this circumstance that the respondent, original-plaintiff, claimed alternative relief, the first prayer being for the recovery of the possession of the whole property, and the second for the recovery of an equal moiety. It is the second prayer which must, under the circumstances, be held to be the proper relief to which the respondent-plaintiff is entitled. The parties began to live separate from the time of Balkrishna's death in 1877, and the cause of action accrued when the management of the property was taken away out of respondent's hands. His plaint was filed within twelve years from that time, but in the meanwhile he became party to the amicable settlement of which he enjoyed the benefit for many years. A *bonâ fide* family arrangement is specially favoured by Courts of Equity—*Mantappa* v. *Baswuntrao*[1]—and it binds the parties and their representatives. On this ground I hold that the respondent-plaintiff is only entitled to recover a moiety of the property of Ramkrishna as his share, and the other moiety must remain with the appellant.

On these grounds I agree with Mr. Justice Parsons in the final decree. As my reasons for coming to that decision are somewhat different from his, I have deemed it necessary to state them separately at some length.

Decree varied.

(1) 14 M. I. A., 24.

APPELLATE CIVIL.

Before Sir C. Farran, Kt., Chief Justice, and Mr. Justice Hosking.

AMTUL NISSA BEGAM (ORIGINAL PLAINTIFF), APPELLANT, *v.* MIR NURUDIN HUSSEIN KHAN (ORIGINAL DEFENDANT), RESPONDENT.*

1896. *September* 29.

Mahomedan law—Gift—Mooshâa—Gift of an undivided share—Gift of future revenues of villages.

According to Mahomedan law a gift cannot be made of anything to be produced *in futuro*, although the means of its production may be in the possession of the donor. The subject of the gift must be actually in existence at the time of its donation.

* Appeal, No. 73 of 1891.

1896.

AMTUL NISSA v. MIR NURUDIN.

A Mahomedan executed a deed of gift in favour of his wife, by which he agreed to give her and her heirs in perpetuity a sum of Rs. 4,000 per annum out of his undivided share in certain jághir villages which he had inherited from his father.

Held, that the gift was invalid, as it was a gift in effect of a portion of the *future* revenues of the villages to the extent of Rs. 4,000 per annum.

THIS was an appeal from the decision of Khán Bahádur B. E. Modi, First Class Subordinate Judge of Surat.

The plaintiff Amtul Nissa Begam was the widow of Nawab Mir Kamaludin Hussein Khan, a First Class Sirdár of Baroda.

On 9th March, 1869, Nawab Mir Kamaludin executed a deed of gift in favour of his wife (the plaintiff), by which he agreed to give her in perpetuity a sum of Rs. 4,000 a year out of the income of his share of certain jághir villages, and other property which he had inherited from his father. This document was to the following effect :—

"Out of the villages, acquired as jághir by inheritance, which are situated in the Surat District, as to whatever share I have got according to the Mahomedan law in the property left by my father, out of the same I have willingly and of my own accord given to my wife Amtul Nissa Begam *alias* Mahomedi Begam for ever and continually from generation to generation, and descendant after descendant, a sum of Rs. 4,000 belonging to me and have made her the owner thereof. Whereas the management and the authority in respect thereof have been under my control from ancient times, and as I have always been paying moneys in cash to my other co-sharers, who jointly own this jághir with me, according to their respective shares, I will in like manner always pay to my wife and her descendants the money out of the income of the said property belonging to my wife as I pay to other sharers, without excuse or objection. If she should find on my part any treacherous action or remissness in payment of the amount due to her, which is ascertained and fixed, then she is fully authorized to take from me what is due to her in such a way as she may desire."

Under this deed of gift the plaintiff received the annuity of Rs. 4,000 out of the income of the jághir villages during the lifetime of her husband.

The jághir villages were joint family property and were managed by plaintiff's husband for himself and for his co-sharers till his death in March, 1885.

On the death of her husband plaintiff filed a suit for partition and to enforce her claim under the deed of gift to the annuity of Rs. 4,000 out of the revenues of jághir villages.

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The First Class Subordinate Judge of Surat decreed partition, but rejected her claim to the annuity, holding that the deed of gift was invalid under the Mahomedan law, as it was a gift of *mooshâa* or an undivided share in property capable of division.

The plaintiff appealed to the High Court.

P. M. Mehta (with him *M. M. Munshi*), for appellant (plaintiff):—The doctrine of *mooshâa* does not apply. The gift is not of an undivided share, but only a certain sum out of the annual income of his share. The doctrine of *mooshâa* ought not to be extended. It has been held by the Privy Council to be wholly unadapted to a progressive state of society, and should be confined within the strictest rules—*Shekh Muhammad* v. *Zubaida Jan*[1]. The deed of gift has been acted upon and the annuity enjoyed for nearly eighteen years without interruption. It is too late now to impeach its validity.

Ganpat Sadashiv Rao for respondent:—The gift is void, being a gift of *mooshâa*. It is a gift of a portion of the donor's share in the income of the villages. If the gift of an undivided share be invalid, a gift of a portion of such share is equally invalid. The gift is, moreover, invalid, because it is a gift of the future revenues of the villages. According to Mahomedan law a gift cannot be made of a thing to be produced in future. It must be in existence at the date of the gift—Macnaghten's Mahomedan Law, pp. 50 and 203; *Emnabai* v. *Hajirabai*[2].

FARRAN, C. J.:—The sole question in this appeal is whether the gift by the late Nawab Kamaludin of Rs. 4,000 per annum to his wife in perpetuity is valid. It was originally made while he was a minor, but was ratified when he attained his majority. The documents evidencing the gift are Exhibits 99, 100 and 101. Counsel for the appellant relies solely on the last mentioned document, so its terms only need be considered. It is dated the 9th March, 1869. The material portion of it runs thus. (His Lordship read the portion of the deed above set forth and continued:—) The boundaries and descriptions of the six villages are given at the end of the document, which is registered. The Rs. 4,000 per annum were paid to the plaintiff by her husband

(1) L. R., 16 I. A., 205. (2) I. L. R., 13 Bom., 352.

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Kamaludin while he lived. The document appears to be a gift of Rs. 4,000 annually, or, as English lawyers would term it, a covenant to pay Rs. 4,000 per annum, payable out of the declarant's interest in the six villages and out of the property which he inherited from his father. It is not contended that it is a gift in consideration of marriage or any thing other than a gift without consideration.

Now if the gift had been of Kamaludin's undivided share in the villages and in his father's estate the gift would have been bad under the ruling in *Emaabai* v. *Hajirabai*[1]. It would seem to follow *a fortiori* that a gift of an annual sum payable out of an undivided share would be invalid, but since the decision of the Privy Council in *Shekh Muhummad* v. *Zubaida Jan*[2] the application of the doctrine of *mooshâa* cannot, it is clear, be extended by analogy, and we should hesitate to base our judgment on its consequences.

On the ground, however, that this is a gift in effect of a portion of the future revenues of the villages to the extent of Rs. 4,000 per annum, we think that it is invalid according to Mahomedan law. The law is express upon that subject. A gift cannot be made of any thing to be produced *in futuro* although the means of its production may be in the possession of the donor. The subject of the gift must be actually in existence at the time of the donation—Macnaghten's Principles, Chapter V, section 5. No attempt has been made to support the validity of the document Exhibit 101 except as a gift. The finding of the Subordinate Judge on issues 2 and 15 must be confirmed and the appeal will stand dismissed with costs.

Appeal dismissed.

(1) I. L. R., 13 Bom., 352. (2) L. R., 16 I. A., 205.