

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

1921.

February 22.

CHANDSAHEB KASHIMSAHEB PIRJADE (ORIGINAL PLAINTIFF), APPELLANT v. GANGABAI KOM VISHNU RAGHUNATH ALIAS BALAJI AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS*.

Mahomedan law—Gift—Donor in possession of half of gifted land—Delivery of possession to donee—Other half mortgaged with possession not actually delivered to donee—Gift of the latter valid under Mahomedan law.

A Mahomedan female who owned five lands made a gift of them to the plaintiff's father. At the date of the gift, she had possession of only two lands and a moiety of the third land : these she immediately put in possession of the donee. The remaining lands had been mortgaged by her to defendants, who retained their possession under the mortgage. In a suit by the plaintiff, the defendants contended that the gift of the mortgaged land was invalid, not having been perfected by delivery of possession.

Held, overruling the contention, that the deed of gift must be looked at as a whole ; and that so viewed the gift of the equity of redemption coupled with the completed gift of the remaining lands was a valid gift in law.

SECOND appeal from the decision of Balak Ram, Assistant Judge of Satara, confirming the decree passed by J. M. Kale, Subordinate Judge at Islampur.

Suit to redeem a mortgage.

One Hajratbi owned five pieces of land bearing Survey Nos. 236, 238, 239, 243 and 230.

Of these, she mortgaged Survey Nos. 238 and 239 and the southern moiety of Survey No. 236 with possession to the grandfather of the defendants on the 28th March 1879. They remained in defendants' possession ever since.

On the 16th August 1892 Hajratbi made a gift of all the five lands to the plaintiff's father and placed him in possession of Survey Nos. 243 and 230 and the northern moiety of Survey No. 236.

* Second Appeal No. 91 of 1916.

The plaintiff filed a suit on the 27th October 1910 to redeem the mortgage.

The lower Courts were of opinion that as the gift of the mortgaged lands was not perfected by delivery of possession the gift was inoperative and dismissed the suit.

The plaintiff appealed to the High Court.

The appeal was heard on the 24th September 1917 by Batchelor and Shah JJ., when their Lordships reversed the decree, and remanded certain issues to the lower Court. The following is the judgment.

BATCHELOR, J. :—This case illustrates what in my view is one of the besetting weaknesses of the mofussil Courts in India, namely; their extreme readiness to discuss abstract points of law before they have any clear opinion as to what the facts are upon which the points of law must necessarily depend. The result in this case is unfortunate, and it is now extremely difficult for a Court of Second Appeal to say what its own order ought to be. Both Courts concentrated their vision upon the interesting question whether a Mussalman mortgagor can make a valid gift of mortgaged property which at the time of the gift is in possession of the mortgagee. But neither Court unhappily took the trouble to ascertain what the pleadings of the parties were, and neither Court appears to have even read the deed of gift upon which the whole suit is based. That deed of gift has not been proved, and it is obvious that if it is not proved, the plaintiff who relies upon it entirely for his title, is at once out of Court. According to the plaint it would appear that the plaintiff's allegation was that the mortgagee was throughout in possession of the land, the subject of the gift. But the fact seems to be otherwise, as appears from the deed of gift itself, where it is stated

1921.

CHANDSAHEB
KASHIM-
SAHEB
GANGABAI.

1921.

CHANDSAHEB
KASHIM-
SAHEB
v.
GANGABAI.

that the gift has been made of the lands described within the mentioned boundaries, and that of those lands Nos. 236, 243 and 230 have been that day given into the donee's possession, while Nos. 238 and 239 are in mortgage with Balvantrao Mangaokar. There has been no investigation in either Court as to whether these recitals in the deed of gift are correct, that is, as to whether at the time of the gift the mortgagor was in possession of any, or all, of the properties. There is much force in Mr. Tyabji's argument that the business of proving the gift and its validity lay upon the plaintiff, and that a Court of Second Appeal should now hold down the plaintiff to his pleadings. That indeed is an argument which in any ordinary case I should be quick to allow, but the present trial has been so imperfect from many points of view that I feel it is obligatory in the interests of justice that there should be remanded issues of fact in order that we may know where we stand, and what justice enjoins us to do. I would, therefore, propose that we send down to the lower Court the following issues for findings :—

- (1) Is the deed of gift relied upon by the plaintiff proved or not ?
- (2) If it is proved, was the donor in actual or constructive possession of any, or all, of the parcels of land, the subject of the gift ?
- (3) Whether the gift of all, or any, of these parcels was perfected by transfer of possession ?

In making this order we have stretched a point in favour of the plaintiff who, I think, would have no just cause of complaint if we dismissed his appeal to-day by reason only of the manner in which his suit has hitherto been conducted. We must, therefore, throw upon the plaintiff all the costs of both parties up to and inclusive of to-day's costs. Parties must be at liberty to adduce fresh evidence on these issues. Return to be made within three months.

SHAH, J. :—I agree.

1921.

 CHANDSAHEB
 KASHIM-
 SAHEB
 v.
 GANGABAI.

The findings recorded on the remanded issues were : (1) the deed of gift is proved ; (2) the donor was in actual possession of Survey Nos. 243 and 230 and the northern moiety of No. 236 ; and in constructive possession of Survey Nos. 238 and 239 and the southern moiety of No. 236 ; (3) that the gift of the former lands was perfected by transfer of possession ; but it was not so perfected as regards the mortgaged lands.

The appeal was placed for final disposal before Macleod C. J. and Shah J.

Kazi Kabiruddin with *H. B. Mandavle* for *V. S. Kothare*, for the appellant.

K. N. Koyajee, for respondents Nos. 1 and 3 to 6.

MACLEOD, C. J. :—The plaintiff brought this suit, as the son of the donee of the plaint property under a deed of gift of the 16th of August 1892, for redemption and an account of the mortgage executed by Hajratbi the donor. The suit has experienced a most unfortunate history. A preliminary issue was raised in the trial Court, whether the deed of gift relied upon by the plaintiff was such as to confer a valid title on the donee in respect of the plaint property. Following *Ismal v. Ramji*⁽¹⁾ the Court found on that issue in the negative, and that finding was affirmed in appeal.

In second appeal certain issues were sent down for trial to the lower Court on the ground that the procedure which had been adopted was wrong, and that the Court ought not to have discussed an abstract point of law without first finding on the facts of the case. We have now got the findings on the issues sent down, namely, that the deed of gift relied upon by the plaintiff has been proved ; that the donor was in actual possession of certain lands, and in constructive

⁽¹⁾ (1899) 23 Bom. 682.

1921.

CHANDSAHEB
KASHIM-
SAHEB
v.
GANGABAI.

possession of the lands in suit ; and that the gift of the former had been perfected by transfer of possession, but that the gift of the latter had not been so perfected. If the mortgaged lands had formed the only object of the gift, then the plaintiff suing as donee of the equity of redemption would not be able to prove his right to redeem the mortgagee who had been in possession, unless something more had been done than the actual execution of the deed ; and on the findings of the lower Court, confirmed by the lower appellate Court, it seems that the plaintiff was unable to prove that anything had been done with regard to the mortgaged property except the execution of the gift deed.

But another question arises whether we should not look at the gift as a whole, and not merely look at that portion of it which purported to convey to the donee the equity of redemption in the mortgaged properties. There is here a gift of five properties which are set out at page 1 in the judgment of the Second Class Subordinate Judge in remand. Certain of those properties which were in the possession of the donor were actually handed over to the donee, and our attention has not been drawn to any authority which goes to show that we are bound to split up a deed of gift, by which various properties are given, into its component parts, and consider the gift in respect of that portion of the property of which possession could be given as valid, and in respect of that portion of the property of which possession could not be given as invalid. That being the case, we see no reason why we should not consider that the principles of Mahomedan law were complied with when possession was given to the donee of the properties then in possession of the donor, and that would be sufficient to support a claim to redeem the properties which were in possession of the mortgagee. The equities of the case are all in favour of the

plaintiff, and there is no reason why we should deprive him of the right to redeem the mortgaged properties unless there is very clear authority against that being done. We think, therefore, that the decree of the lower appellate Court of the 5th of November 1914 must be set aside, and it be declared that the plaintiff is entitled to redeem. The case must go back to the trial Court to take the mortgage account. If any amount is found to be due on the mortgage, then the plaintiff will be allowed to redeem on payment of that amount. If nothing is found to be due, then that Court will lay down the terms on which the plaintiff should get possession. The plaintiff to pay the defendant's costs throughout.

Decree set aside : case remanded.

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APPELLATE CIVIL.

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DNYANU LAXUMAN GAIKWAD AND ANOTHER (ORIGINAL PLAINTIFFS),
 APPLICANTS *v.* FAKIRA WALAD EBRAM LOHAR (ORIGINAL DEFEND-
 ANT No. 4), OPPONENT³.

Transfer of Property Act (IV of 1882), section 72—Lasting improvements by mortgagee.

Though a mortgagee is entitled, apart from the provisions of section 72 of the Transfer of Property Act, to claim the value of lasting improvements, the claim will depend upon what are reasonable improvements.

A mortgagee should not be allowed to improve the property to such an extent as to deprive the mortgagor in effect of the right to redeem.

Nijalingappa v. Chanbasawa⁽¹⁾, referred to.

APPLICATION under Extraordinary Jurisdiction praying for reversal of the decree passed by W. Baker,

³Civil Extraordinary Application No. 255 of 1920.

⁽¹⁾ (1918) 43 Bom. 69.

1921.

CHANDSAHEB
 KASHIM-
 SAHEB
 v.
 GANGABAI.

1921.

February
 24.
