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RAJA  
GOKALDAS  
MILIS,  
*In re.*

The 2nd question is also unintelligible and unnecessary. It will be simpler for us to state our answer to the reference in the following form :—

This Court is of opinion that the Company were entitled in making their returns for the year 1922-23 on the basis of their income, profits and gains for the year ending 30th June 1921, to deduct an allowance for obsolescence under section 10 (2) (vii).

The Company will be entitled to their costs of the reference.

Costs to be taxed as on the Original Side scale.

*Answers Accordingly.*

J. G. R.

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## APPELLATE CIVIL.

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1924.

February 1.

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

HASHIMBI KOM YAKUBSAHEB BEG NURAJA INAMDAR (ORIGINAL PLAINTIFF), APPELLANT *v.* AJAMATBI KOM MAKTUMSAHEB KALE INAMDAR, AND OTHERS (ORIGINAL DEFENDANTS NOS. 2, 3 AND 6), RESPONDENTS\*.

*Gift—Possession of part of property delivered—Part of property in possession of mortgagee at donor's death—Condition as to transfer of possession deemed satisfied.*

Where possession of a part of the property given by way of gift was transferred to the donee, and as regards the rest, the donee in fact got possession from the mortgagee after the donor's death in pursuance of the gift, the gift as a whole should be accepted as satisfying the essential condition as to the transfer of possession in pursuance of the gift.

SECOND appeal against the decision of G. Davis, Assistant Judge of Bijapur, reversing the decree passed by B. G. Kadkol, Subordinate Judge of Muddebihal.

\* Second Appeal No. 666 of 1922.

Suit to recover possession.

The land in suit originally belonged to one Kamal Beg, father of plaintiff Hashimbi. In 1898 Kamal Beg had mortgaged the land to one Venkangowda, and, under the terms of the mortgage, the mortgagee was to remain in possession for twenty years.

On the 23rd November 1899 Kamal Beg gave the plaintiff land and a house in gift to plaintiff. The plaintiff took immediate possession of the house. She could not get possession of land as mortgagee Venkangowda died on 27th November 1899. She, however, brought a suit in 1907 against the lessees to recover possession of land. That suit was compromised and an award decree was passed. This decree provided that plaintiff should get possession of the land at the end of 1920-21. Later on parties again arrived at an amicable settlement and the lessee gave up the land to the plaintiff at the end of 1916-17. The plaintiff's possession was, however, obstructed by the other heirs of Kamal Beg and, therefore, she was compelled to file the present suit.

The Subordinate Judge held that the gift was valid observing as follows:—

“According to Mohomedan law possession of property given in gift must be given to the donee to make the gift complete and valid. In the present case the land had been leased by Kamalbeg for 20 years in 1898 to one Venkangowda and was in the possession of Venkangowda. It is alleged by plaintiff (Exhibit 44) that Venkangowda was sent for by Kamalbeg and told to give the land to plaintiff. No actual possession could then be given as the land was in the possession of the lessees; but everything was done that was required to be done to transfer the right of the donor in the land. Under Mohomedan law a gift of property in the possession of tenants is valid provided the tenant attorned to the donee (vide I. L. R. 9 Bombay, page 146 at page 150). The case in I. L. R. 23 Bombay 682 is not applicable as that was a case when a mortgagee was in possession and even then an earlier Privy Council case has been cited *Mokomed Buksh v. Hosseini Bibi*, 15 I. A., pages 81-85; in this

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last case the Privy Council held the gift to be valid because the donee subsequently recovered possession. In the present case also the donee has subsequently recovered possession from Venkangowda. In 1907 plaintiff sued the lessees to recover possession. The matter was compromised and an award decree was passed (Exhibit 19). This decree provided that plaintiff should get possession at the end of 1920-21. Later on the parties again arrived at an amicable settlement and the lessee gave up the land to plaintiff at the end of 1916-17 (vide entry in the Record of Rights, Exhibit 48) and statement of the lessee before the village officers, Exhibit 45, on the strength of which the entry was made in the Record of Rights."

On appeal the District Judge held that the gift was invalid on the ground that there was no transfer of possession of the land.

The plaintiff appealed to the High Court.

*H. B. Gumaste*, for the appellant.

*A. G. Desai*, for the respondents.

SHAH, J.:—The question in this second appeal relates to the validity of the gift made by Kamalbeg in favour of his daughter Hashimbi, who is the plaintiff.

The facts relating to the gift are not in dispute now. On 23rd November 1899, Kamalbeg made a gift of a house and certain Inam land described in the deed of gift which is registered. The recitals in the deed relating to possession thereof are as follows :—

"At present the said land has been leased out to another person for cultivation. On the expiration of the term of the lease you should take the same into your possession and carry on Vahivat thereof. The house is this day delivered into your possession for Vahivat."

The land which is referred to as having been given in lease was at the date of the gift in possession of Venkangowda on terms, which are stated in an award between the plaintiff and Venkangowda's representative as follows :—

"Before this gift was made the plaintiff's father had on the 27th of April 1898 mortgaged this land for Rs. 800 on conditions that the mortgagee should be in possession of the land for twenty years and that he should make improvements in the land (Kird). Malgowda is in possession of the land up till today

on this agreement. The defendant should show the improvements as stipulated within twenty years and plaintiff should pay the amount of Rs. 800 and get back the land. Thus has the deceased Kamalbeg agreed in writing. The defendant is accordingly in enjoyment of the land for these nine years."

A decree was passed in terms of the award according to which the present plaintiff was to get possession at the end of the period of twenty years in 1920-21 without paying any amount, and the sum advanced by the mortgagee Venkangouda to Kamalbeg was to be treated as satisfied at the end of that period. By a later compromise the plaintiff in fact got possession of the land in 1916 from the mortgagee. But the other heirs of Kamalbeg obstructed her possession, and ultimately the present suit was filed on 19th November 1918 by her against the other heirs of Kamalbeg. The trial Court held that the gift was valid: but the lower appellate Court held it to be invalid on the ground that there was no transfer of possession of the land.

In the appeal before us it is urged that the gift is valid. It seems to me that this argument must be accepted. It is stated in the plaint and not challenged in the pleadings nor disputed before us that the donee got possession of the house under the deed of gift. To that extent the gift is valid and has apparently been given effect to. As regards the land it is clear that it was in the possession of Venkangouda as a mortgagee at the date of the gift. No immediate transfer of possession to the donee was possible. It does not appear that anything was done to give intimation to the mortgagee at the time of the gift. But the fact remains that in a subsequent litigation between the donee and the mortgagee's heir, the donee got possession. No doubt the donor had died long before the donee got possession from the mortgagee under a compromise. The true position of Venkangouda under the so-called lease was that of a mortgagee. The litigation

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between Hashimbi and Venkangouda's heir which was settled by an award made by the arbitrators shows that the gift was treated as valid between them.

It is true that the donor did not do anything beyond executing the deed of gift so far as the land was concerned. That was possibly due to the fact that Venkangouda died in four days from the date of the gift. But we have the fact that the possession of the house was transferred under the deed: and nothing further by way of transferring possession of the equity of redemption was apparently possible under the circumstances. The gift would, therefore, be valid. The *ratio decidendi* in *Chandsaheb Kashimsaheb v. Ganga-bai*<sup>(1)</sup> would *a fortiori* apply to this case. But it is argued on behalf of the respondent that the gift of the equity of redemption is invalid according to Mahomedan law and reliance is placed upon the decision in *Mohinudin v. Manchershah*<sup>(2)</sup> and *Ismal v. Ramji*<sup>(3)</sup>.

The decision in *Mohinudin v. Manchershah*<sup>(2)</sup> has been criticised by Mahmood J. in *Rahim Bakhsh v. Muhammad Hasan*<sup>(4)</sup>; and on the facts of that particular case it is difficult to say that the general proposition that there could be no gift of an equity of redemption was decided. In the later case of *Ismal v. Ramji*<sup>(3)</sup>, the gift was revoked by the donor before any possession of the land could be taken and it is not easy to say how far that circumstance influenced the judgment in any way.

There is a very useful criticism of those decisions in Wilson's Anglo Mahomedan Digest, p. 327 (5th Edition); and the view taken in the Bombay cases has been criticised by other writers on Mahomedan law.

(1) (1921) 45 Bom. 1296.

(3) (1899) 23 Bom. 682.

(2) (1882) 6 Bom. 650.

(4) (1888) 11. All. 1.

When the simple question arises as to whether the equity of redemption, when the property is in the possession of the mortgagee, could form the subject-matter of a valid gift according to Mahomedan law, these decisions would require to be carefully considered probably by a Full Bench. But on the facts such as we have in this case, viz., that the possession of a part of the property given by way of gift was transferred to the donee, and that as regards the rest, the donee in fact got possession from the mortgagee after the donor's death in pursuance of the gift, I feel clear that the gift as a whole should be accepted as satisfying the essential condition as to the transfer of possession in pursuance of the gift.

The decree of the lower appellate Court should be reversed and that of the trial Court restored with costs here and in the lower appellate Court on the defendants.

MACLEOD, C. J. :—I agree.

*Decree reversed.*

J. G. R.

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## CRIMINAL APPELLATE.

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

SOMABHAI VALLAVBHAI (ORIGINAL APPLICANT), APPELLANT *v.* ADIT-BHAI PARSHOTAM AND OTHERS (ORIGINAL OPPONENTS), RESPONDENTS\*.

1924.

*February 27.*

*Criminal Procedure Code ( Act V of 1898 ), sections 476, 476B, 480—  
Direction to prosecute set aside by lower appellate Court—No appeal lies to High Court—High Court will not ordinarily interfere in revision—Form of order.*

\* Criminal Appeal No. 128 of 1924.

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