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decree-holder in Original Suit No. 96 of 1865 on the District Munsif's file applied to have the proceeds paid to him as the first attaching creditor, the Civil Court rejected his application. Against this order he now appeals and we are clearly of opinion that he is entitled to have his judgment debt first satisfied out of the proceeds of the sale of the Indigo vat. Section 270 of the Civil Procedure Code gives priority to the decree-holder who first causes the property to be attached, not to him who first applies for attachment. The order of the Civil Court must be reversed with costs, and it must be ordered that the balance of the Petitioner's judgment debt be first satisfied out of the proceeds of the sale of the Indigo vat before paying over any sum to the decree-holder in Original Suit No. 3 of 1864; and if any part of the proceeds of these sales has been disposed of in a manner inconsistent with the terms of this order, any balance due by either of the claimants according to the terms of the order must be levied from him and returned to the other. The matter will be one of simple account.

Appellate Jurisdiction. (a)

Special Appeal No. 229 *of* 1869.

KHADER HUSSAIN SAHIB..... { *Special Appellant. (4th Defendant.)*

HUSSAIN BEGUM SAHIBA..... { *Special Respondent. (Plaintiff.)*

The plaintiff's deceased sister in her life-time was the owner of 3½ undivided shares in a village which she mortgaged in 1846 upon the terms that the mortgagee should be put into possession and that he should credit the produce of two shares on account of the mortgage debt and should pay the mortgagor one share and a half for her maintenance. Subsequently in 1853 she made an absolute gift in writing of three of the shares to the 4th defendant and his mother. The produce of the shares was applied during the life-time of the donor after the gift just as it had been before the gift.

Held, that there was no such surrender and delivery of the property to the donee as is requisite to make a valid gift according to Mahomedan Law.

1869. *November* 29. *S.A. No.* 229 *of* 1869.

THIS was a special appeal against the decision of J. R. Cockerell, the Civil Judge of Nellore in Regular Appeal No. 107 of 1867, modifying the decree of the Court of the District Munsif of Gudur in Original Suit No. 37 of 1866.

(a) Present: Bittleston and Innes, J.J.

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The plaintiff set forth in the plaint that, out of the 15 mitta shares held by Tohera Begam in the Inam Village of Kakitalpur consisting of 60 shares, 4½ belonged to the plaintiff's elder sister, Fatta Begam Sahiba; that of these, one share was sold to C. Kistnamacharlu; that the remaining 3½ shares which she held were mortgaged to Vericharla Pedda Narayana Reddi deceased, the undivided father-in-law of the 2nd defendant, for Rupees 350 borrowed of him; that Fatta Begam Sahiba then executed a writing to him stipulating that the produce of two out of those shares, should go towards the liquidation of the debt due to him, and reserving to herself the remaining 1½ share for her maintenance; that subsequently she sold to the plaintiff half a share out of the said one and a half share for Rupees 125 due by her to the plaintiff, under a document on the 11th April 1847; that the plaintiff enjoyed that share; that the plaintiff's elder sister died about 3 years ago; that the 2nd defendant was in possession of the produce of the three shares; that the plaintiff is the only heiress of her elder sister under the provisions of the Mahomedan Law; and that though she (plaintiff) had asked the 2nd defendant, after Fatta Begam's death, to put her in possession of three shares, and to recover from her any balance that might be owing to him from her elder sister, he had not done so. Purposing to bring another suit in respect of the produce, the plaintiff brought this suit against the mortgagee, the 2nd defendant, and the cultivators, the 1st and 3rd defendants, and prayed to be put in possession of the said three shares annually assessed at a quit-rent of Rupees 15-4-7, and yielding Rupees 90 at Rupees 30 per share.

The 1st defendant stated that he was made a party to this suit to prevent him from giving evidence for the 2nd and 3rd defendants and prayed to be exonerated from liability.

The 2nd defendant stated in his written statement that the debt was not cleared off with the aid of the produce of the said three shares, nor was the plaintiff the heiress to those shares; that the said Fatta Begam's daughter, Azumut Bibi, her (Azumut Bibi's) son Khadar Hussain, and Gulam Ghouse *alias* Baba Sahib, the father-in-law of the latter, were heirs to the 3 shares which remained of the said Fatta Begam; that

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Fatta Begam during her life-time mortgaged the three shares to Narayana Reddi for Rupees 325 and executed a bond on the 15th December 1846, stipulating that the proceeds of two shares thereof should go to the liquidation of the debt; that she also executed another bond for Rupees 349-13-9, the amount found due by her on the 29th August 1849, stipulating that the proceeds of one-fourth share should go to clear it; and that Rupees 203-1-3 were due on account of the principal and interest of the two bonds, after deducting the proceeds of the said shares of the kurnum. He stated that he had no objection to relinquish the lands, if he were paid the balance due to him.

The 3rd defendant alleged in his written statement that out of the 3½ shares of Fatta Begam Sahiba, he had paid the plaintiff the proceeds of the half share according to the part apportioned to her, those of two and a quarter shares to Narayana Reddi and his heirs on his behalf, and those of the remainder to Fatta Begam Sahiba; that Azumut Bibi, the foster-daughter of Fatta Begam Sahiba and her son Khadar Hussain who obtained the three shares in the possession of Fatta Begam aforesaid under a Hibba (deed of gift) on the 10th November 1853, executed to him a bond mortgaging these shares for Rupees 60, by which amount they were indebted to him; that they were drawing a portion and crediting the remainder to the said bond; that Azumut Bibi and Fatta Begam died; that on account of their obsequies, Khadar Hussain Sahib and Gulam Ghouse Baba Sahib received from him Rupees 36-0-4, for which they executed another bond to him on the 12th February 1863, that the debt due to him had not been cleared off; and if cleared off, he had nothing whatever to do with the mortgaged three quarter share and the remaining two and a quarter shares. As he was a cultivating ryot and as such was not bound to give up the disputed land, he prayed to be exonerated from liability.

Khadar Hussain, who was subsequently admitted as the 4th defendant, stated in his written statement that the plaintiff, alleged to be the younger sister of Fatta Begam, was not her heiress according to the Mahomedan Law; that she had no concern with Fatta Begam's estate; that Fatta Begam was his undivided maternal grand-mother; that Fatta Begam

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had transferred her title in her three shares to his mother Azumut Bibi, who was then alive and to himself, in writing, on the 10th November 1853; that a portion of the proceeds of these shares was being carried by the 2nd and 3rd defendants, the mortgagees and cultivators, towards the liquidation of their debt, and the remainder appropriated by the 4th defendant for maintenance; that in the meantime, his grandmother died, and that he performed her obsequies, and continued to enjoy all her property uninterruptedly. He therefore prayed for the dismissal of the fraudulent claim brought by the plaintiff with the view of usurping his property.

The Munsif found that the adoption of the 4th defendant's mother by the plaintiff's sister did not give her any title to the property as against the plaintiff, that the 4th defendant's mother never obtained possession of the share given to her and therefore the plaintiff was entitled to recover that share, but that 4th defendant got possession of the portion given to him and that the gift to that extent was valid.

He decided that the 2nd and 3rd defendants were entitled to recover from the plaintiff and the 4th defendant such amount as may be proved by the accounts to be due to them respectively; that they should give up the lands in their cultivation at one and a half share to the plaintiff and as much to the 4th defendant; and that the 4th defendant was not entitled to obstruct the delivery to the plaintiff of the possession of the one and a half share.

The 1st defendant did not appear to be in any way liable in the suit; he was therefore exempted from it, his costs being paid by the plaintiff.

The 4th defendant appealed to the Civil Judge.

The following is taken from the judgment of the Civil Judge:—

I see no reason to question the authenticity of the hibbannamah. The mark of the plaintiff is to it in order to show that plaintiff was a consenting party; but the mark is in a suspicious place and I do not consider it genuine. I look upon the mark as an interpolation introduced to bind the plaintiff. The hibbannamah in my eyes is a deed of gift to

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which plaintiff is not a party. The sole point for decision in this suit appears to me to be the legal effect of the hibbannamah, Exhibit I.

The existence of the hibbannamah is an acknowledgment of the fact that adoption is not recognized in Mahomedan Law. The plea of 4th defendant, that he inherits through his mother as adopted daughter of the deceased, is therefore abortive.

The mortgage took place prior to the execution of the hibbannamah, Exhibit I. Therefore neither 4th defendant nor his mother ever had possession of the property. A gift without seizing is invalid.

Moreover until her death the deceased exercised ownership over the property, inasmuch as the portion of the produce set aside for her maintenance must have been received by her.

The 4th defendant specially appealed to the High Court upon the ground, among others, that the hibbannamah was valid and binding upon the plaintiff.

Rama Row, for the special appellant, (the 4th defendant.)

The Court delivered the following

JUDGMENT:—The only question raised in this case is whether the hibbannamah relied upon by the 4th defendant is valid according to Mahomedan Law, either as to the whole or any part of the property, the subject of the gift.

The material facts are that the plaintiff's deceased sister in her life-time was the owner of 3½ undivided shares in a Shrotriem village, which she mortgaged to one Narayana Reddi in 1846: that the mortgagee was then put into possession, and the terms of the mortgage were that the mortgagee should credit the produce of 2 shares on account of the mortgage debt and should pay to the mortgagor the produce of 1½ share for her maintenance; that subsequently in 1853 she made a gift in writing of 3 of the said shares to the 4th defendant and his mother. The instrument of gift is perfectly absolute in its terms, and purports to give 1½ pungu to each of the donees; but in fact the produce of the shares was applied during the life-time of the donor after

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the gift just as it had been before the gift, viz., part to the donor's creditors and part to the maintenance of the donor herself.

Under these circumstances, it seems to us that there was no such surrender and delivery of the property given to the donee as is requisite to make a valid gift according to Mahomedan Law. In order to avoid this difficulty, it was suggested that the gift should be construed as a gift only of the donor's interest, *i.e.*, as a gift of the lands subject to the mortgage, but even so construing it, it is clear that in order to make it valid, everything should be done which could be done to put the donee in possession of the thing given; and the continuing enjoyment by the donor of part of the produce after the gift shows that that was not done. It was said that if so, this would invalidate the gift only as to 1½ pungu; but we think it impossible to say that the enjoyment by the donor of so much of the produce can be applied exclusively either to the gift to the 4th defendant's mother or to the gift to the 4th defendant himself. In truth the gift was made under such circumstances that no enjoyment or possession of the thing given could be obtained by either of the donees at the time of the gift, except of that part which was reserved for the maintenance of the donor, and enjoyment and possession of that part was in fact not given. It is true that possession may be deferred to a future time without necessarily invalidating the gift, but then the possession must be obtained by the donee within the life-time of the donor, otherwise the gift fails; and in the present case during the donor's life the enjoyment of the property remained before as it did after the gift.

The 4th defendant appears to have exercised some powers of management and control over the property, but whatever he received he received only as manager for the purpose of handing it over to the donor herself or her mortgage creditors; and this fact we think makes no difference in the case. In the view we take, it is unnecessary to consider whether the gift is not also invalid on the ground of indefiniteness, the gift being of undivided shares only.

We confirm the decree of the Lower Appellate Court.