APPELLATE JURISDICTION (*a*)

Regular Appeal No. 94 *of* 1870.

NABOB AMIRUDDAULA MUHAMMAD KAKYA HUSSAIN KHAN BÁHÁDUR AMIR JUNG VARU, JAGHIRDÁR of VIRUTHALABATHI } *Appellant.*

NATERI SRINIVÁSA CHARLU and 5 others.... *Respondents.*

Plaintiff during his son's minority gave certain property to him and on the delivery of possession got from him a document stipulating—(1), That he would not alienate ; (2), That at his death the property should return to the father This document was deposited with the father and not heard of until the property was taken in execution for the son's debts many years after the gift. *Held*, that by Muhammadan Law as well as by the general principles of law, such a restriction on alienation, especially after the gift had become complete long before, is absolutely invalid.

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THIS was a Regular Appeal against the decision of C. G. Plumer, the Acting Civil Judge of Chittur, in Original Suit No. 48 of 1869.

The suit was brought to establish plaintiff's right to cawnies 9-6-12 of nanja, punja and poramboke lands with bungalows, wells, and fruit trees attached, after cancellation of the sale of the said property by order of the Court, and to direct defendant to pay plaintiff further produce and costs.

The plaint set forth that plaintiff allowed his son Nazim Jung to enjoy the aforesaid property for 20 years until his death in November 1868 ; that at his death plaintiff resumed the possession of the property and enjoyed it until its attachment ; that 1st defendant illegally caused the attachment of the said property in satisfaction of a decree obtained by him in the High Court against 2nd defendant ; that the defendants 3—6 purchased different portions of the aforesaid property : that 2nd defendant had no right to the property ; that he was not the legal heir of Nazim Jung, but merely his illegitimate son by a maidservant.

The 1st defendant alleged in his written statement that the debt the 2nd defendant agreed to pay was the same debt that was due by his deceased father Samsamuddaula Nazim Jung to the 1st defendant, and that the promissory note had been executed by the 2nd defendant with the permission and consent of the said Nazim Jung ; that the possession of the

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lands in dispute was never obtained by the plaintiff after the death of the said Nazim Jung ; that the plaintiff's statement that he had been for more than 20 years out of the possession of the lands, showed that the suit was barred by the Act of Limitations ; that letters of administration were with the consent of the 2nd defendant granted to the plaintiff, who in consequence had under his management the lands in dispute ; that the plaintiff had in the petition presented by him and the 2nd defendant to the High Court at Madras on the 3rd December 1868, for the purpose of obtaining letters of administration, fully admitted the fact of the 2nd defendant being the son of the said Nazim Jung ; that the plaintiff having by the execution of a hibbah made over to his son the lands in dispute, his present claim for the recovery of the same could not stand good in law, and that the plaintiff's claim should be dismissed with costs, and he be directed to pay his (defendant's) costs.

The 2nd defendant alleged that the property in dispute was obtained by his father by virtue of a hibbah and purchase ; that his father having been indebted to the 1st defendant, directed him (2nd defendant) to execute a bond; he accordingly executed to the 1st defendant a note of hand on which he (the 1st defendant) obtained a decree in No. 61 of 1859, HighCourt's file ; that he was not liable for that judgment debt, which ought to be recovered by means of the property belonging to his father ; that the plaintiff had no right whatever to interfere in case of the same being made available for the payment of his father's debt ; and that the property had not at any time been in the plaintiff's possession ; that the plaintiff by a petition to the High Court fully admitted the fact of this defendant being publicly known as the son of Nazim Jung.

Plaintiff grounded his claim to the property on the fact that in the hibbanáma, by which 2nd defendant admitted in his written statement that Nazim Jung obtained possession of the property in dispute, and which was executed by plaintiff to Nazim Jung (his son), a power of resumption of the property was reserved to plaintiff on the death of Nazim Jung.

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The plaintiff, however, failed to produce this hibbanáma or to account for its non-production, and the Civil Judge dismissed his suit under Sec. 148 of the Civil Procedure Code.

The plaintiff appealed.

The appeal was first heard on the 10th March 1871, when the High Court referred the following issue to the Civil Court—Whether the gift to plaintiff's son contained a power of resumption ?

At the trial of this issue the plaintiff filed a karárnáma (A) executed by plaintiff's son to plaintiff which contained the following "you have out of your paternal affection towards me granted the same (*certain houses and lands*) to me for the specific purpose of supporting myself and the koran readers, &c. The said garden and land are your property ; I will not sell it to anybody nor shall I make a gift of it to any one. Should I depart this life, the said property shall go and revert to you, and so it is not my property."

The Civil Judge found that the gift to plaintiff's son was accompanied by an agreement that in the event of his death the property should revert to the plaintiff.

Upon the return of this finding the case came on again for hearing on the 14th August.

Venkatapathi Rau, for the appellant, the plaintiff.

Ranyaiha Nayudu, for the 3rd, and *Rama Rau* for the 4th and 6th respondents, the defendants.

The following judgment was delivered by

HOLLOWAY, J.—On the issue referred the Civil Judge has found that the collateral agreement A was executed by the deceased donee. Undoubtedly there are very suspicious points connected with the plaintiff's case, but with a full view of the whole of them, although with some hesitation, the Civil Judge has come to the conclusion that the evidence of plaintiff ought not to be discredited We could not came to a different conclusion whatever doubts we might feel.

It remains then to consider its effect in point of law. The facts are that the plaintiff during his son's minority

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gave this property to him. By Muhammadan Law that gift was complete without delivery (Baillie I, 529). It became the son's from the date of the first transaction. By that law if possession had not been delivered, there would have been a right to take it, or during his minority any member of his family could have done so for him (530). I refer to these principles, not as binding, but as an index to the intent of the parties. Then on the delivery of possession the father gets from his son this document stipulating :—

1. That he will not alienate.

2. That at his death the property shall return to the father.

This document is deposited with the father and not heard of until the property is taken in execution for the son's debts.

According to the general principles of law such a restriction on alienation, especially after the gift had become complete long before, would have been absolutley invalid. It is so also by Muhammadan Law. Such a condition annexed to a gift is absolutely void (Baillie, 537), because repugnant to the principle of the transaction upon which it is sought to engraft it. It must be void *a fortiori* as a mere contract following long after a complete gift. I entertain no doubt ought to be applied. Nothing could be more inequitable than to allow the visible means of a man, to whom credit has been given, to be narrowed by a secret contract with the person who has given the debtor the opportunity of appearing as owner. It is only necessary to add that by Muhammadan Law the quality of irrevocability will be attached to the gift (524).

I am of opinion that the principles of jurisprudence, with which the rules of Muhammadan Law are here accordant, forbid our giving effect to this document. The Original Suit ought to be dismissed and with costs.

KINDERSLEY, J —I concur in this judgment.