PRIVY COUNCIL.

FATIMA BIBI
v.
AHMED BAKSH.

P.C.*
1907
Nov. 6,
Dec. 2.

[ON appeal from the High Court at Fort William in Bengal.]

Mahomedan law—Gift—Validity of deed of gift—Marz-ul-maut—Death-illness, what constitutes—Apprehension of death—Concurrent judgments on fact—Privy Council, practice of.

The question in this case was whether a deed of gift was invalid by reason of the Mahomedan law of *marz-ul-maut*, relating to gifts made in death illness:

Held, that whether the donor was or was not under apprehension of death at the time the deed was executed was rightly treated by the Courts below as the decisive test. That was a question essentially of fact and of the weight and credibility of evidence; and there being concurrent judgments on the evidence that there was no such apprehension, the Judicial Committee declined to interfere, particularly as it appeared that the reasons given by the Courts established a large preponderance of probability in favour of the conclusion at which they had both arrived.

APPEAL from a judgment and decree (August 11th 1903) of the High Court at Calcutta, which affirmed a judgment and decree (August 20th 1900) of the Court of the Subordinate Judge at Cuttack.

The defendants were the appellants to His Majesty in Council.

The main question involved in this appeal was the validity or otherwise, under the Mahomedan Law, of a deed of gift executed on 21st May 1897 by one Dadar Baksh and his wife, Salimatunnissa, in favour of their son, the first respondent, Ahmed Baksh.

The facts are sufficiently stated in the report of the case before the High Court which will be found in I. L. R. 31 Calc. 319.

The only defence material on this appeal was that the deed of gift was invalid under the Mahomedan law so far as Dadar

* *Present*: LORD ROBERTSON, LORD COLLINS, and SIR ARTHUR WILSON.

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Baksh was concerned because it was executed by him during his death illness.

On that point both Courts below found that to make it invalid in such a case the donor must be under apprehension of death at the time of the execution of the deed; and that the evidence showed that Dadar Baksh had no such apprehension.

The Subordinate Judge on this point said—

"Thus the evidence is that the doctors did not on the 9th of May think that the patient was in danger of death, that the doctor who treated him on the 20th and 21st did not think him to be in danger of imminent death, and the deed was executed on the 21st.

"Then let us consider what Dadar himself and his relatives thought of his illness. Dadar a little after his arrival at Cuttack drove to a dispensary and walked to the dispensary room. He also drove to Doctor Bhushan's place and walked with the latter up to a certain distance. Thus the condition of his health was not such as to inspire him with apprehension of death. His wife deposed that neither he nor his relatives had apprehended death. She is the best person to depose on this point being naturally his constant companion, especially during illness. Several respectable persons who had visited Dadar during his illness were examined by defendants and not a single person was questioned about Dadar's apprehension of death. It was Nurul Huq only who deposed on this point, but I cannot place reliance on his uncorroborated testimony, especially when it is opposed to medical evidence.

"The Court, therefore, finds that at or about the time this deed was executed neither Dadar nor his friends and relatives were under apprehension of death.

"I have found before, that the doctors who gave him the certificate and treated him were not of that opinion. On the contrary they thought that recovery was probable.

"There is another little circumstance which proves that Dadar Baksh was not under apprehension of death at the time. The *kebinama* makes mention of his future heirs. Now, the idea of death can never enter the head of any man who thinks of begetting children.

"Thus from whatever side we look at the question we cannot but conclude that Dadar did not apprehend death at the time. The Court finds accordingly.

"The Mahomedan law lays down that to make a gift invalid the donor must be under apprehension of death. In this case Dadar was not under apprehension of death and therefore the deed was not invalid. True, Dadar Baksh died within seven days after the execution of the deed, but the Mahomedan law does not say that if a deed of gift is executed during illness and that illness ends fatally, the gift will be invalid. But it says that to invalidate a document executed during illness the donor must apprehend death. In this case Dadar whilst executing the deed was not only in full possession of his senses, but the gift was a foregone conclusion as proved by Babus Balaram and Bhushan Chandra.

"The finding is that the deed is not invalid on the ground that it was executed during his illness, an illness which ended fatally."

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On appeal, the High Court (RAMPINI and PARGITER JJ.) affirmed the decision of the Subordinate Judge. The judgment is reported in I. L. R. 31 Calc. 323.

On this appeal,

Jardine K.C. and *G. A. Ross*, for the appellants, contended that the High Court took an erroneous view of the rule of Mahomedan law as to *marz-ul-mout*, and the nature of the evidence required to establish it; for, according to that law it was not necessary that there should be actual proof that the donor had apprehension of death at the time of the execution of the deed of gift. It was not correct to say that when a person has apprehension of death that makes his illness a death-bed illness; all the surrounding circumstances must be taken into consideration. According to Mahomedan law, it was submitted, the increase of a disease ending in death was the only test for the determination of the question of *marz-ul-mout*, and it should have been held on the evidence that when there was such an increase (as was the case here) there was naturally an apprehension of death in the mind of the donor. It was also contended that if apprehension of death was necessary for the application of the doctrine of *marz-ul-mout* the evidence was sufficient to show that it was present in the mind of Dadar Baksh at the time of the execution of the deed. Reference was made to Baillie's Digest of Mahomedan law, 2nd Ed. (1875), Chap. VIII, page 552; Ameer Ali's Mahomedan law, Vol. I, pages 51-53; and an article in the Calcutta Law Journal Vol. I, 131 note, Appendix (e), which gave a full translation of the passage in Baillie's Digest, and showed that Mr. Ameer Ali had fallen into an error, a portion of the quotation made by him as from the Dcorr-ul-Mookhtar being the words of Mr. Baillie himself in introducing the subject. On the evidence, it was submitted, the gift was invalid.

DeGruyther, for the respondent Ahmed Baksh, contended that the Courts below had rightly held that to constitute a death illness and make the doctrine of *marz-ul-maut* applicable to the deed of gift in suit, apprehension of death in the mind of the donor at the time of its execution must be shown. Referen

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was made to *Sarabai* v. *Rabiabai*(1), and *Rashid Karmalli* v. *Sherbanoo*(2). The Courts below were concurrent on the fact that no apprehension of death existed.

Jardine K.C. replied.

The judgment of their Lordships was delivered by

Dec. 2. LORD COLLINS. The question in this case is whether a certain deed of gift made by one Moulvi Dadar Baksh, deceased, in favour of his son Sheikh Ahmed Baksh is invalid by reason of the Mahomedan law of *marz-ul-mout* relating to gifts made in death illness. The deed was executed on the 21st May 1897, and on the 27th of the same month Moulvi Dadar Baksh, the donor, died. A great number of objections to the deed were urged by the appellants (the defendants) before the Subordinate Judge, all of which were considered in great detail and overruled by him in a most elaborate judgment in favour of the respondents. That judgment was affirmed on appeal by the High Court at Fort William, and it is the concurrent judgments of these two tribunals that this Board is now called upon to overrule. The only point which the appellants have argued on this occasion was that which no doubt goes to the root of the matter, viz., whether the gift was invalid under the law of *marz-ul-mout*. The test which was treated as decisive of this point in both Courts was, was the deed of gift executed by Dadar Baksh under apprehension of death? This, which appears to their Lordships to be the right question, is essentially one of fact, and of the weight and credibility of evidence upon which a Court of review can never be in quite as good a position to form an opinion as the Court of first instance, and it would probably be enough to prevent this Board from interfering if it should appear that there was evidence such as might justify either view without any clear preponderance of probability. Their Lordships are, however, clearly of opinion that the reasons given both by the Subordinate Judge and by the High Court, which they will not repeat, establish a large preponderance

(1) (1905) I. L. R. 30 Bom. 537, 551. (2) (1907) I. L. R. 31 Bom. 264.

of probability in favour of the conclusion at which they both arrived.

Their Lordships will, therefore, humbly advise His Majesty that this appeal be dismissed.

The appellants will pay the costs of the first respondent who alone defended the appeal.

Appeal dismissed.

Solicitor for the appellants: *G. C. Farr.*

Solicitor for the first respondent: *W. W. Box.*

J. V. W.