Before Mr. Justice Rampini and Mr. Justice Pargiter.

FATIMA BIBEE
v.
AHMAD BAKSH.*

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Aug. 4, 5, 6, 7, 14.

Mahomedan Law—Gift—Marz-ul-maut—Death-illness, what constitutes—Gift to minor son—Possession, delivery of—Hibanama—Transfer of Property Act (IV of 1882), ss. 123, 129.

According to the Mahomedan Law, three things are necessary to constitute *Marz-ul-maut* or death-illness, viz., (i) illness, (ii) expectation of fatal issue, and (iii) certain physical incapacities, which indicate the degree of the illness. The second condition cannot be presumed to exist from the existence of the first and the third, as the incapacities indicated, with perhaps the single exception of the case in which a man cannot stand up to say his prayers, are no infallible signs of death-illness.

When a malady is of long continuance and there is no immediate apprehension of death, it is not a death-illness; so that a gift made by a sick person in such circumstances, if he is in the full possession of his senses, is not invalid. Ordinarily a malady should be considered to be of long continuance, if it has lasted a year, but the limit of one year does not constitute a hard and fast rule. If, however, the illness increases to such an extent as to give rise to an apprehension of death in the mind of the donor, the increase is death-illness.

Muhammad Gulshere Khan v. *Mariam Begam*(1) and *Hassarat Bibi* v. *Golam Jaffar*(2) followed; *Labbi Beebee* v. *Bibbun Beebee*(3) referred to.

No actual delivery of possession is necessary when a parent makes a gift to a son, who is a minor.

Ameeroonnissa Khatoon v. *Abadoonnissa Khatoon*(4) followed.

APPEAL by the defendants, Fatima Bibee and others.

One Dader Baksh was the Sub-Deputy Collector of Khurda. He suffered from diabetes for years, and then got albuminuria from which he suffered for more than a year before his death. He came home to Cuttack on sick leave in the beginning of May

* Appeal from Original Decree, No. 305 of 1900, against the decree of Behary Lal Mullick, Subordinate Judge of Cuttack, dated Aug. 20, 1900.

(1) (1881) I. L. R. 3 All. 731.
(2) (1878) 3 C. W. N. 57.
(3) (1874) 6 All. H. C. 159.
(4) (1875) 15 B. L. R. 67; L. R. 2 I. A. 87.

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1897. From the 12th to the 19th of May, he was under the treatment of one Dr. Keshab Chandra for fever and other complaints. On the 20th May, he was placed under Dr. Meadows, the Civil Surgeon, for treatment. On the 21st May, he and his wife, Salimut-un-nessa, the *pro forma* defendant No. 7, jointly executed a *hibanama* or deed of gift of their properties specified therein, in favor of their son, Ahmad Baksh, the plaintiff, who was a minor. It was set out in the deed that the offer and acceptance duly took place between the grantors and the grantee's maternal uncle, Mahomed Ebrahim. Dader died on the 27th May following.

It appears that Dader left six daughters, the defendants Nos. 1 to 6; the defendants Nos. 1, 2 and 6 being married and majors, and the defendants Nos. 3, 4 and 5 being minors. After the death of Dader, the defendants Nos. 1, 2 and 6 applied through their husbands for registration of their names under Act VII. of 1876 (B.C.) in respect of certain shares of properties covered by the *hibanama*, and, in spite of the plaintiff's objection, got their names registered on the 2nd July 1898. On the 27th December 1898, the defendant No. 6, admitting that the *hibanama* was valid, executed a deed of release in the plaintiff's favor. Later on, the husband of the defendant No. 1 was, upon application, appointed by the District Judge, guardian of the defendants Nos. 3, 4 and 5, a claim to shares of the identical properties covered by the *hibanama* having also been made on their behalf.

The plaintiff thereupon brought the present suit for (i) a declaration that the *hibanama* was valid and operative according to the Mahomedan Law, (ii) establishment of right to, and recovery of possession of, the 3 annas 6 pies share of the properties, with regard to which the defendants Nos. 1 and 2 had got their names registered, and (iii) confirmation of possession of 5 annas 3 pies share of the properties claimed on behalf of the defendants Nos. 3, 4 and 5.

The defendants Nos. 1, 3, 4 and 5 filed a written statement in which various objections were raised, upon which the following issues were framed by the Subordinate Judge:

(i) Is the defendant No. 2 a minor?

(ii) Is the suit multifarious?

(iii) Is the suit undervalued?

(iv) Is the *hibanama* propounded by the plaintiff a genuine and a valid document?

(v) Is the plaintiff's allegation of possession and dispossession true?

(vi) To what relief, if any, is the plaintiff entitled?

Upon the 1st issue, the Subordinate Judge found that the defendant No. 2 was not a minor at the time of the institution of the suit. He also found that the suit was not multifarious, that the plaint was sufficiently stamped, and that the plaintiff's story of possession and dispossession was true, except as regards the property No. 6, which is a house. Upon the fourth issue, the defendants denied the genuineness of the *hibanama*, and as to its validity, they contended that it was invalid upon four grounds, viz., (i) that it was executed on the death-bed and was invalid according to Mahomedan Law, (ii) that it was not duly registered, as the certificate of registration on the back of the deed was not in the handwriting of the Sub-Registrar and did not bear the seal of his office, (iii) that it was insufficiently stamped, and (iv) that it was not accompanied by delivery of possession. The Subordinate Judge overruled these objections and decreed the suit, except as regards the property No. 6.

Moulvi Mahomed Yusoof (*Moulvi Serajul Islam* and *Babu Girish Chandra Pal* with him), for the appellants, submitted that every command of the Shera was characterised by its *illat* or reason or principle, which is a mental idea, and its *subub* or the cause or the way leading to it, which has an external and physical existence. Thus *illat* creates an obligation, of which *subub* is the external manifestation; so that *subub* is the way which one must adopt and go by to reach the command and obligation and perceive and realise it. These principles must be borne in mind in deciding what constitutes *marz-ul-maut*.

The right of heirs in *marz-ul-maut* exists, because by death the late owner ceased to have any need of property. Here absence of need is the reason, which exists not only on actual death, but a little before, when all hope of life is cut off and there is every

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fear or likelihood of death taking place. In other words, the fear of death is the *illut* for the inchoate right of heirs, which imposes prohibition upon the right of transfer. But how is the principle to be practically applied? The principle exists only in the mind—fear of death is a mental condition—there must be something external, capable of being perceived by the senses, about which there should be no chance of mistake, and which should be an infallible guide: this is the *subub*. When the *subub* is clear, it cannot be controlled by the *illut*, and the two must be read consistently. Hence in all authorities on Mahomedan Law, the *subub* or causes of *marz-ul-maut* are pointed out in detail and the manifestations, indications and signs are most clearly set out; the *illut* is also at the same time indicated.

Thus in the *Fatwai Kazee Khan*, *marz-ul-maut* is first defined from the point of view of an *illut*: see M. Yusoof's Tagore Law Lectures, Vol. III, paragraph 2919; and then the same is defined as a *subub* in the shape of physical and external manifestations: see §§ 2920—2924, 2947 of the same book. Hope or no hope, fear or no fear, what is declared to be the *subub*, cannot be controlled by absence of fear. So in Baillie's Mahomedan Law, First Edition, page 280, both the *illut* and the *subub* of *marz-ul-maut* are indicated. The external indications are conclusive and when they are laid down as such, they cannot be controlled by the doctor's opinion: see Baillie's Mahomedan Law (1st Edn.), pp. 280, 281, 543 and 544; and also Hamilton's Hedaya, Vol. I, p. 283; Vol. IV, pp. 469, 506. With reference to the last passage, it is submitted that, although as to the *illut* or the "immediate danger of death" opinion may vary, the limit of one year is a *subub*, which is conclusive of the question; and being "bedridden" is not conditional on apprehension of death, and is determined by the lexicographical and descriptive meaning of the word: see M. Yusoof's Tagore Law Lectures, Vol. III, paras. 2945, 2946.

It is submitted that it is clear from the authorities cited and the passage translated in the case of *Labbi Beebee* v. *Biblun Beebee* (1) that if the increase of illness takes place within a year, then it is a case of *marz-ul-maut*, and also if the increase takes place beyond a year, even then it is a case of *marz-ul-maut*,

(1) (1874) 6 All. H. C. 159.

whatever might be the doctor's opinion. The limit of one year is in itself conclusive on the point that a hard and fast condition is preferred to a doubtful rule depending upon a mental condition like fear.

Dr. Rashbehary Ghose, for the respondent, contended that it was absolutely necessary to constitute *marz-ul-maut* that there should be fear and apprehension of death; without such fear, there would be only *marz* and not *marz-ul-maut*. If there is increase of illness after a year, it no doubt counts for a new sickness, but this new sickness must be accompanied by apprehension of death. Mere physical symptoms or incapacity do not conclude the matter. The question of fear or apprehension of death must be decided upon evidence in each case.

Cur. adv. vult.

Aug. 14.

RAMPINI AND PARGITER JJ. This appeal arises out of a suit to establish the validity of a *hibanama*, or deed of gift, said to have been executed by one Dader Baksh and his wife Salimat-un-nessa in favour of their son Ahmad Baksh on the 21st May 1897, six days before the death of Dader Baksh.

Dader Baksh was a Sub-Deputy Collector. He suffered from diabetes for 8 or 9 years, and then albuminuria supervened in 1896. He obtained leave on medical certificate and returned to his home in Cuttack early in May 1897. He was attacked with fever about the 12th May and was treated by a Doctor named Keshab Chandra. On the 20th May, Colonel Meadows, the Civil Surgeon, was called in to treat him, and a nurse, Mrs. Anderson, was engaged on that day or the next day. On the 21st May, Dader Baksh and his wife executed a *hibanama* and it was registered by the Special Sub-Registrar on the 25th. Dader Baksh died on the morning of the 27th. He left six daughters besides his widow and son, the three eldest of whom were married.

After his death the daughters impugned the *hibanama* and claimed their legal shares in the property with the aid of Nurul Haq, who was the eldest daughter's husband, and was appointed guardian of the three minor daughters. But the second daughter, Khatima Bibee, *alias* Tahera Bibee, subsequently relinquished

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her claim. The son has instituted this suit to establish his right under the *hibanama* ; and the dispute relates to the shares which the five dissenting daughters claim. The mother Salimat-un-nessa admits the deed and supports the plaintiff's claim. He says he got possession at once of the whole of the property under the deed ; that he is in possession of the share of 5¼ annas which the three youngest daughters claimed, but has been dispossessed of the share of 3¾ annas, which the first and third daughters claimed and for which they got their names registered in the Collectorate. He asks that he may recover possession of the latter share and that his possession of the former share may be confirmed. The Subordinate Judge decreed the suit, except as regards one item, a house. The five daughters have appealed and the plaintiff has put in cross objections regarding the house.

The Subordinate Judge has stated in his judgment all the issues that have arisen and most of them are raised in this appeal. But some of them have not been argued before us. It is not necessary, then, for us to discuss these at length, and it is sufficient to state that we agree with the lower Court regarding the first three issues, that the third daughter Khodya Bibee was not a minor at the time of the institution of the suit, and that the suit is not multifarious nor under-valued. The reasons which he has given are sound and have not been controverted before us.

The principal issues are the 4th, whether the *hibanama* is a genuine and valid deed, and the 5th, whether the plaintiff's allegation of possession and dispossession is true. The former of these two issues involves many questions. Foremost among them are the defendants' contentions that the *hibanama* is forgery, and that Dader Baksh suffered so much from delirium that, if he did execute it, he did not understand what he was doing.

It is not necessary for us to discuss the evidence on the two points in any fulness, for it has been fully discussed by the Subordinate Judge and we entirely concur with his conclusion. The deed carried out what had been Dader's and his wife's intention for a long time before it was executed without any attempt at secrecy, and moreover the three eldest daughters signed it in acknowledgment that it was made with their consent. It was attested by persons of respectability and independence, and it was registered

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by the Special Sub-Registrar whose testimony altogether destroys the allegations of false fabrication and mental incapacity. The alleged difference in the signature is not material. Dader knew perfectly well what he was doing; and there is no doubt that his wife in joining in the deed understood it fully, for there is no allegation that he misled her. We find, therefore, that the *hibanama* was executed by both of them with full consciousness, understanding and deliberation.

The principal discussion under this issue has been whether the deed is valid with reference to the Mahomedan Law regarding gifts made during *marz-ul-maut* or death illness: for such gifts are declared invalid. The law on this matter has been cited from Baillie's Mahomedan Law, Book VIII, Chapter VIII, Mr. Justice Amir Ali's Mahomedan Law, second edition, Vol. I, page 53, Moulvi Mahomed Yusoof's Tagore Law Lectures, Vol. III, page 392, § 2920, and page 402, § 2946, Sir Roland Wilson's Anglo-Mahomedan Law, 1st edition, pages 233 and 234 and the authorities quoted in the case of *Labbi Beebee* v. *Bibbun Beebee*(1). In the first two works the Fatâwa-i-Alamgiri is quoted as the chief authority and has been treated as such before us. Put briefly it declares thus:—"A death-illness is one which it is highly probable will end fatally whether the sick person has taken to his bed or not; or whether in the case of a man, it disables him from rising up for necessary avocations out of the house or not, such as for instance, when he is a *faki* or lawyer, from going to the masjid or place of worship, and when he is a merchant from going to his shop; or whether in the case of a woman it does or does not disable her from necessary avocations within doors." But the illness is to be considered death-illness when a man cannot pray standing.

The passages cited in *Labbi Beebee's*(1) case mentioned above, show that the doctrine of death-illness has been qualified by a further condition, and that condition as enunciated by the Allahabad High Court in the case of *Gulshere Khan* v. *Mariam Begam*(2) is that, when the malady is of long continuance and there is no immediate apprehension of death, the illness is not a death-illness; so that a gift made by a sick person in such circumstances, if he is in the full possession of his senses, is not invalid; and it is

(1) (1874) 6 All. H. C. 159. (2) (1881) I. L. R. 3 All. 731.

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explained that the malady should be considered to be of long continuance, if it has lasted a year. The explanation of this rule (as allowed without dispute on both sides) is that such a prolongation of the illness demonstrates that it is not fatal and implies that it becomes part of the sick person's modified constitution.

There is no dispute that Dader's health failed after he suffered from albuminuria and that his illness was sufficient to entitle him to a medical certificate and six months' leave (see Exhibits VIII, XX and Q). But it is proved by the evidence and is not disputed that a man suffering from that disease may live for years, and that the disease did not constitute a death-illness in his case, if it had lasted a year. There has been some discussion whether he did suffer from it a full year before the execution of the deed. Now we agree with the observation made in the case of *Hassarat Bibi* v. *Golam Jaffar*(1) that this limit of one year does not constitute a hard-and-fast rule, and that it may mean a period of about one year. We think, however, it is clear on the evidence corroborated by the probabilities of the case, that Dader had suffered for more than a year (see Balaram Bose's deposition). There can be no doubt, therefore, that albuminuria did not constitute a death-illness in his case. This conclusion has not been seriously disputed by the learned vakil for the defendant-appellants; but he relies on a passage cited from the Fatawa-i-Shami at page 164 of *Labbi Beebee's*(2) case mentioned above, and has given us a fresh translation of it, which runs thus:—"If it (the disease) becomes old in this way, that it extends beyond a year, and no increase occurs within that (period), then he (the sick person) is (to be deemed to be) in health; but if he dies in a state of increase, whether the increase takes place before the (year's) prolongation or after it, he is (to be deemed to be) sick." The meaning of this passage is this, that if the illness increases and death then ensues, the increase is the death-illness; and both sides agree in this view. Now, it is clear from the evidence on both sides, that, although his symptoms improved on his return home, Dader did have an increase of illness about 10 days before the deed was executed; and the question arises, whether that

(1) (1898) 3 C. W. N. 57. (2) (1874) 6 All. H. C. 159.

increase constituted a death-illness. To decide this we must apply the law as stated above, regarding death-illness.

The parties contended for two different constructions of the passages cited above. These passages mention three matters (i) illness, (ii) expectation of a fatal issue, and (iii) certain physical incapacities which indicate the degree of the illness. The learned vakil for the defendants contends that the meaning of this is that, if the 1st and 3rd exist, then the 2nd must necessarily be presumed, namely, that there is an expectation of death. The learned vakil for the plaintiff contends on the other hand, that there is no such necessary presumption, that the matters of the 3rd class are only evidence; and that the Court must decide from that and the other evidence whether the second actually exists, that is, whether there is expectation of death. The latter appears to us to be the correct view: for the passage from Fatawa-i-Alamgiri distinctly states twice that the definition of death-illness is illness in which death is highly probable, whether the incapacities mentioned exist or not. These incapacities, therefore, are not infallible signs of death-illness. Only one symptom is mentioned as conclusive, namely, that the man cannot stand praying. The explanation appears to be this:— At the time when this law was laid down, little medical knowledge existed. It was necessary, however, to decide when an illness was a death-illness; and that could only be done by simple rules dealing with certain symptoms which all persons could notice and comprehend. Yet it appears from these passages that even while the lawyers suggested that certain physical incapacities indicated dangerous illness, they did not lay down positively that these incapacities are conclusive, as contended for by the learned vakil for the defendants: for it was no part of their definition of death-illness, whether the incapacities mentioned existed or not. It is only with regard to the extreme case, where a man cannot stand up to perform the primary and simple obligation of saying his prayers, that they declared the illness should be deemed a death-illness.

For these reasons we agree with the remark made in *Hassarat Bibi's*(1) case, mentioned above, that too narrow a

(1) (1898) 3 C. W. N. 57.

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view must not be taken of the doctrine of death-illness; and our view is in agreement with the way in which the doctrine is stated in that case, namely, "was the disease of such a nature or character as to induce in the person suffering the belief that death would be caused thereby, or to engender an apprehension of death?" and "was the illness such as to incapacitate him from the pursuit of his ordinary avocations, or standing up for prayers, a circumstance which might create in the mind of the sufferer an apprehension of death?"

We have thus to decide whether the increase in the illness which began about the 12th May constituted a death-illness; and we must apply the foregoing principles to that increase. The principal question, then, is whether Dader was under apprehension of death, when he executed the *hibanama*. If he had marked physical incapacities at the time, they did not necessarily imply that he must have been under such apprehension, but they are matters to be considered in deciding the question.

Now it is quite certain that each party has adjusted its evidence regarding that increase in his illness with reference to the above mentioned rules of Mahomedan Law. Thus the plaintiff's witnesses assert that the illness did not prevent Dader from undertaking his necessary avocations, and the defendants' witnesses assert that he was absolutely confined to his bed and was very seriously ill. Hence each party's evidence cannot be trusted much regarding its own case. But statements which favour the opposite party may be relied on; and the best evidence is the prescription register (Exhibit R) which was written up at the dispensary in the ordinary course of business and is unimpeachable. That register coupled with the deposition of Dr. Zorab, the Civil Surgeon, shows that Dader was treated for fever on the 14th May. His illness became more serious on the 20th May, for Dr. Meadows, the Civil Surgeon, was called in and prescribed four medicines, a stomachic tonic, a febrifuge, a sedative and an anti-thirst draught (Exhibits IX*a*, IX*b*, IX*c*). But Dr. Zorab said in his deposition "from the above prescriptions I think the doctor, who was treating the patient could not have thought he was to die within a short time.

There is nothing in the prescription to indicate he was in a critical state." Dr. Meadows prescribed again on the 21st May (see 9th entry in Exhibit R—there are mistakes in the paper-book) and only added an extra ingredient (a diaphoretic) to the stomachic tonic. He prescribed similar medicines on the 22nd and 23rd of May (see 10th and 11th entries in Exhibit R, which are printed twice in the paper-book, and the last two entries). He was not called in again and the nurse left about the 23rd May; for Nurul Haq, the principal witness on the defendant's side, says she stayed only three or four days. Dader seems, therefore, to have improved under this treatment; and Dr. Bhushan, who visited him twice on the 26th May, prescribed only Mellin's Food and a sleeping draught in the evening. Next morning Dader died. What the immediate cause of his death was is not known. No medical evidence about it has been given. Neither party has examined Dr. Keshab Chandra, who treated Dader throughout the increase of illness till his death, nor Mrs. Anderson, the nurse. Dr. Meadows is dead. We have therefore only Dr. Bhushan's testimony. He visited rarely and prescribed only on the evening of 26th May; and he did not then think that Dader would die shortly. He says he cannot say exactly what Dader died of.

All that is known then from the evidence is that Dader got fever on the 12th May and was much weakened by it, so that he had been most of his time reclining in the inner apartments upstairs for convenience. But there is no good evidence that he was incapable of standing up to say his prayers. The evidence on the defendant's side is highly exaggerated. The symptoms did not indicate that he must have been under apprehension of death. There is nothing in the medicines prescribed to show that he was in a critical condition, and there is no reason to suppose that Dr. Meadows in prescribing for him and in engaging a nurse had any further idea than that the fever required and would yield to careful treatment. There is no reason, then, to suppose that Dr. Meadows or any one else could have told Dader he was in a critical state on the 21st. The albuminuria had become chronic and required rest and change (see Exhibit XX). Fever is a common ailment. There was nothing, therefore, in his

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symptoms which should necessarily have excited in him apprehension of death. Moreover, no hurry was shown in getting the deed registered. There was nothing, therefore, to indicate that Dader was under apprehension of death on the 21st May; hence the increase of illness did not constitute a death-illness. We accordingly find that the *hibanama* is valid.

Next comes the question whether possession of property was given to the plaintiff. The evidence shows that Dader at once gave possession to the plaintiff's uncle Ebrahim on behalf of the plaintiff.

But delivery was not necessary; for according to Mahomedan Law no actual delivery of possession is necessary where a parent makes a gift to his son, who is a minor. The gift is completed by the deed and if the parent retains possession, his possession is equivalent to possession by the minor: see Baillie's Mahomedan Law, Book VIII, Chapter V; Ameer Ali's Mahomedan Law, Second Edition, Vol. I, page 103; and the Privy Council decision in *Ameeroonnissa Khatoon* v. *Abadoonnissa Khatoon* (1).

Apart from this, moreover, it is contended by the learned vakil for the plaintiff that, according to section 123 of the Transfer of Property Act, registration of the *hibanama* completed the transfer; and he refers to the remark in the case of *Hassarat Bibi* v. *Golam Jaffar*(2). In answer, the learned vakil for the defendants says that section 123 of that Act does not affect the rule of Mahomedan Law in this matter by reason of section 129. But it is not necessary for us, after the above findings, to pronounce any opinion on this point.

It is not disputed that the first and the third daughters have got possession of $3\frac{1}{2}$ annas share in the property. The dispossession therefore is manifest, and we find the issue regarding the plaintiff's possession and dispossession in his favour.

Lastly, the defendant's contention is that the registration of the *hibanama* was irregular and invalid. But this objection has not been argued before us; nor have the Subordinate Judge's reasons been controverted. We need only say that we see no reason to differ from him; and we hold that the irregularity was not material.

(1) (1875) 15 B. L. R. 67; L. R. 2 I. A. 87. (2) (1898) 3 C. W. N. 57, 2.

These are the questions that have been raised in this appeal; and there remains the cross objection by the plaintiff. One of the properties sued for is a house (item No. 6 in schedule A attached to the plaint). The eldest daughter Fatima Bibee and her husband Nurul Haq went and lived in the house after Dader's death, and the Subordinate Judge has decided that the plaintiff cannot get possession of it. The house is included in the *hibanama* and the plaintiff got possession of it from the date of that deed. When Fatima Bibee took up her residence in it, she dispossessed him, and that was before the institution of this suit. If the plaintiff had stated these facts, he might have obtained a decree for the house along with the other properties of which he said he had been dispossessed. But he did not set out these facts in his plaint and he placed the house among the properties which he said were in his possession and in which he wished his possession confirmed. We do not see, then, how we can, upon these facts, give him a decree for recovery of possession of the house in this suit.

For these reasons, we affirm the decree of the Lower Court and dismiss this appeal with costs. We also dismiss the cross appeal.

Appeal and Cross appeal dismissed.

M. N. R.