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ABDUL AZIZ v. KANTHU MALLIK.

registered proprietors, this person is entitled to the whole rent of the *taluk* within which the disputed land is situated. What the precise position might have been if there had been a contest between two persons, both of whom were registered under the Act, need not be considered on the present occasion. It is sufficient to say that the plaintiff is not entitled to succeed as against the defendant, who, relying upon section 60 of the Bengal Tenancy Act, has established that his debt has been discharged by payment of rent to the registered proprietor.

The result therefore is that the decree made by the Court below must be affirmed, and this Rule discharged, with costs. We assess the hearing fee at one gold mohur.

S. M. *Rule discharged.*

APPELLATE CIVIL

Before Mr. Justice Chitty and Mr. Justice N. R. Chatterjea.

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Feb. 23.

ABDUL AZIZ
v.
FATEH MAHOMED HAJI.*

Mahomedan Law—Gift—Mushaa.

Where the defendant made a gift of a four-anna share in a kaimi rayati holding to the plaintiff his nephew by marriage and admitted him to joint possession with himself, and recognised the plaintiff as being in such possession for 14 years:—

Held, that he could not be allowed to say that there had been no valid gift. The doctrine of *mushaa* is not applicable to such a case.

Ibrahim Goolam Ariff v. *Saiboo* (1), *Emnabai* v. *Hajirabai* (2), *Jiwan Bakhsh* v. *Imtiaz Begam* (3), *Muhammad Mumtaz Ahmad* v. *Zubaida Jan* (4) referred to.

* Appeal from Appellate Decree, No. 490 of 1909, against the decree of Jogendra Nath Bose, Subordinate Judge of Noakhali, dated Jan. 5, 1909, modifying the decree of Rash Behari Mookerjee, Munsif of Noakhali, dated May 16, 1908.

(1) (1907) I. L. R. 35 Calc. 1.
(2) (1888) I. L. R. 13 Bom. 352.
(3) (1878) I. L. R. 2 All. 93.
(4) (1889) I. L. R. 11 All. 460.

SECOND APPEAL by the plaintiff, Abdul Aziz.

The plaintiff, who is a nephew of defendant No. 3 and was brought up by him from his childhood and in whose favour a registered deed of gift was executed in Chait 1299 corresponding with April, 1893, when he was 22 years of age, by defendant No. 3 of two-anna share in a certain *taluk* and four-anna share in a kaimi rayati holding, brought this suit for the recovery of the lands, the subject-matter of the gifts. The plaintiff resided with defendant No. 3 and held separate possession of the two-anna share of the *taluk*. The plaintiff, however, never had separate possession of the four-anna share in the kaimi rayati holding, but joint possession with defendant No. 3. Defendant No. 3 resisted the suit on the ground that the plaintiff never had separate possession of the four-anna share in the kaimi rayati holding, and that the gift was not binding upon him as being a gift of *mushaa*. The Court of first instance decreed the plaintiff's suit for *khas* possession. On appeal, the learned Subordinate Judge disallowed the claim of the plaintiff with respect to the four-anna share of the kaimi rayati holding.

The plaintiff, thereupon, appealed to the High Court.

Babu Hari Bhusan Mukerjee, for the appellant. The gift is valid and is not affected by the doctrine of *mushaa*. The gift is valid, inasmuch as the plaintiff was in possession and managed the properties during the absence of defendant No. 3 on *Haj*. The decisions of the Indian High Courts and of the Privy Council lay down that the doctrine relating to the invalidity of gifts of *mushaa* is wholly unadapted to a progressive state of society and ought to be confined to the strictest rules. *Jiwan Baksh* v. *Imtiaz Begam* (1), *Mullick Abdool Guffoor* v. *Muleka* (2), *Emnabai* v. *Hajirabai* (3), *Ibrahim Goolam Ariff* v. *Saiboo* (4), *Muhammad Mumtaz Ahmad* v. *Zubaida Jan* (5) referred to.

(1) (1878) I. L. R. 2 All. 93.
(2) (1884) I. L. R. 10 Calc. 1112.
(3) (1888) I. L. R. 13 Bom. 352.
(4) (1907) I. L. R. 35 Calc. 1.
(5) (1889) I. L. R. 11 All. 460.

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Babu Baikanta Nath Das, for the respondent. The doctrine of *mushaa* does apply to a case like the present, as the rayati holding was not partitioned and separate possession given. The cases of *Ibrahim Goolam Ariff* v. *Saiboo* (1) and *Jiwan Bakst* v. *Imtiaz Begam* (2), do not apply to the facts of the present case and are distinguishable.

Cur. adv. vult.

CHITTY AND N. R. CHATTERJEA JJ. This is an appeal by the plaintiff in a suit to recover three plots of land from the defendants. The plaintiff based his title on a registered deed of gift executed by defendant No. 3 on 31st Chaitra 1299 (April 1893). By that deed defendant No. 3 gave to the plaintiff a two-anna share in a certain *taluk* and a four-anna share in a kaimi rayati holding. The plaintiff, who is a nephew by marriage of defendant No. 3, was adopted and brought up by him from childhood. He was about 22 years of age at the date of the gift. The plaintiff has always lived with defendant No. 3. No question now turns on the gift of the two-anna share of the *taluk*, which was demarcated by the deed of gift and of which plaintiff had had separate possession until dispossessed by defendant No. 3. As to the four-anna share in the kaimi rayati, defendant No. 3, contends that plaintiff never had separate possession of that portion and that the gift is not binding upon him as being a gift of *mushaa*. Plaintiff endeavoured to prove a partition of the kaimi rayati, but in that he failed. The Subordinate Judge has disallowed this portion of his claim; hence this appeal.

Although the plaintiff did not succeed in proving a partition, it is an undisputed fact that from the date of the deed of gift defendant No. 3 let him into joint possession of the rayati holding, and that during this defendant's absence on the Haj in 1311-12 the plaintiff was in possession of all his properties and managing them for him. It would, therefore, be most inequitable if this defendant could, after a lapse of

(1) (1907) I. L. R. 35 Calc. 1. (2) (1878) I. L. R. 2 All. 93.

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about 14 years, during which he has ratified and acknowledged the gift, turn round and by taking advantage of an extremely technical rule of Mahomedan law, deprive the plaintiff of what he gave him so many years ago.

We do not, however, think that he can do so. It is quite certain that the doctrine of *mushaa* in its inception was not intended to apply to such a case as this. It has been recognised by the Courts as an existing rule but has, by no means been universally applied. In the case of *Jiwan Baksh* v. *Imtiaz Begam* (1), the Allahabad High Court declined to apply the rule to a defined share in a landed estate on the ground that such a share was a separate property. The same view was taken in *Mullick Abdool Guffoor* v. *Mulcka* (2). In *Emnabai* v. *Hajirabai* (3) the Bombay High Court applied the rule to the case of a gift of a moiety of a house in Bombay, but that can hardly be said to be now the law, after the decision of the Privy Council in *Ibrahim Goolam Ariff* v. *Saiboo* (4), where their Lordships declined to apply it in the case of free hold property in Rangoon. In the case of *Mumtaz Ahmad* v. *Zubaida Jan* (5), their Lordships of the Privy Council remarked "The doctrine relating to the invalidity of gifts of *mushaa* is wholly unadapted to a progressive state of society and ought to be confined within the strictest rules." In that case it was held that possession having been given and taken the property was transferred. The same may be said in this case, defendant No. 3 having recognised the plaintiff as being in joint possession with himself for 14 years cannot now be allowed to say that there was no valid gift. We think that the appeal must be allowed, the decree of the lower Appellate Court set aside and the decree of the Court of first instance restored, and the plaintiff's entire claim decreed, with costs, in all the Courts against defendant No. 3.

Appeal allowed.

S. A. A. A.

(1) (1878) I. L. R. 2 All. 93.
(2) (1884) I. L. R. 10 Calc. 1112.
(3) (1888) I. L. R. 13 Bom. 352.
(4) (1907) I. L. R. 35 Calc. 1.
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