

(1911) 02 CAL CK 0050
In the Calcutta High Court

Abdul Aziz

APPELLANT

Vs

Fateh Mahomed Hazi

RESPONDENT

Date of Decision : 23-02-1911

Acts Referred:

Citation : 9 Ind. Cas. 635

Hon'ble Judges : N. Chatterjea, J;Chitty, J

Bench : Division Bench

Judgement

1. 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 2-anna share in a certain taluq and a 4-anna share in a kaimi raiyati-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 2-anna share of the taluq, which was demarcated by the deed of gift and of which plaintiff had separate possession until dispossessed by defendant No. 3. As to the 4-anna share in the kaimi raiyati 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 raiyati but in that he failed. The Subordinate Judge has disallowed this portion of his claim; hence this appeal.

2. 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 raiyati-holding, and that during this defendant's absence on the Raj 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 about 14 years, during which he has ratified and acknowledged the gift, turn round and by taking advantage of an extremely

technical rule of Muhammadan Law deprive the plaintiff of what he gave him so many years ago.

3. 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 Bakhsh v. Imtiaz Begam* 2 A. 93 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 Guffore v. Muleka* 10 C. 1112. In *Emnabai v. Hajirabai* 13 B. 352 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* 35 C. 1 : 4 A.L.J. 572 : 11 C.W.N. 973 : 9 Bom. L.R. 872 : 17 M.L.J. 408 : 6 C.L.J. 695, where their Lordships declined to apply it in the case of freehold property in Rangoon. In the case of *Mumtaz Ahmad v. Zubaida* Jan 11 A. 460 : 16 I.A. 205 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 and the plaintiff's entire claim decreed with costs against defendant No. 3 both here and in the lower Appellate Court.