

(1926) 05 MAD CK 0016
In the Madras High Court

Ajagar Hazar Saheb and Others

APPELLANT

Vs

Chedalavada Annammah and Others

RESPONDENT

Date of Decision : 04-05-1926

Acts Referred:

Citation : AIR 1927 Mad 572

Hon'ble Judges : Devadoss, J

Bench : Division Bench

Judgement

Devadoss, J.—The first point raised by Mr. Chenchiah for the appellants is that the plaintiff had parted with her right to the property under Ex. II and, therefore, she had no right to bring the suit. This point was not specifically raised in the first Court but was raised in a way in the grounds of appeal to the lower appellate Court. The learned District Judge held that the appellants were not entitled to raise this point in appeal as they did not put forward this case in the lower Court. The defendants did not rely upon want of title in the plaintiff in their defence to the suit. During the examination of the witnesses this point was brought out and the plaintiff was asked whether she had executed Ex. II to which she replied she did and that it did not take effect. It is not proper for the appellants now to raise this contention at this stage, for that would depend upon facts which should have been proved in the Court of first instance. Granting that Ex. II was executed by the plaintiff with the intention to convey title, yet, inasmuch as she continued to be in possession of the property till 1914 when she complained of trespass by the Defendants Nos. 1 to 3 in this suit, it cannot be said that the suit is unsustainable, for she is entitled to bring the suit merely on a possessory title and the Defendants Nos. 1 to 3 who were only trespassers could not plead the title of the true owner and the other defendants are persons who obstructed the delivery of possession and, therefore, I hold that the suit is not incompetent by virtue of the execution of Ex. II. The plaintiff's contention, no doubt, was that it was a nominal transaction and was never given effect to. Defendant's own witness D. W. No. 2 says that the document was not acted upon. I, therefore, disallow this contention.

2. The next point urged is that Ex. B, the deed under which the plaintiff got a gift of the property from a Muhammadan, was only a deed of management and, therefore, the plaintiff is not entitled to the property. From the recitals in Ex. B it is quite clear that the donor did intend that the donee should have full title to the property and that the property should be hers and not the donor's. Under Ex. B the donor stipulated that the donee should protect him during his lifetime and maintain him and the recital in the document is that she is to have absolute right over the property subject to her maintaining him. This contention is not seriously pressed and it is not sustainable.

3. The most important contention in the case is that a gift under the Muhammadan Law is always revocable and that the donor in this case revoked the gift by a document Ex. IV nearly 8 years after the date of Ex. B. A very elaborate and learned argument was addressed to me on this point by Mr. Chenchiah. The principle deducible from the authorities is that if the gift is one made by a Muhammadan on account of natural love and affection he may revoke it. But, where the gift is burdened with something to be done by the donee, and if the donee does that which is required by the donor to be done, the gift becomes irrevocable. In this case the donee was asked to pay off the debts and look after the donor and maintain him and the evidence is that at least for 10 or 12 years the plaintiffs looked after him attending to his creature comforts and maintaining him. It is also in evidence that she was able to pay off his debts. In these circumstances, the question is whether the gift is revocable or irrevocable. Mr. Ameer Ali in his book on Muhammadan Law, Vol. I, page 165, discusses the question and observes:

Where the condition has not that effect, where it forms in fact, the consideration for the grant and the gift is made on the express stipulation that the donee should do something or abstain from doing something or should give something in return for the gift, the contract is valid in its entirety. For example, if A were to convey B a property in consideration of B maintaining him during his lifetime or paying him, and after his death to his heirs, a fixed allowance, there is absolutely nothing illegal in the contract as the condition does not make the contract nugatory; and if the grantee obtains possession of the property upon that contract, the grantor or his heirs would have the right to enforce the performance of the covenant relating to the consideration against the grantee and all persons deriving title under him.

4. In this case the grantor purported to cancel the gift by a document Ex. III, dated 21st April 1908. In that, he did not specifically complain that he was not maintained, and by another document, dated 30th September 1908, he cancelled the so-called cancellation deed, and by Ex. IV, dated 3rd August 1912, he purported finally to cancel the gift deed. The question is, did the plaintiff act up to the terms of the gift deed Ex. B? If so the gift became irrevocable and the donor was not justified after the donee had fulfilled her part of the contract in revoking the gift made by him in consideration of the donee looking after him

and attending to his creature comforts and maintaining him. In this view, I do not think it necessary to consider in detail the various cases quoted by Mr. Chenchiah as well as by Mr. Somayya.

5. With regard to payment of debts the contention of Mr. Chenchiah is that they were paid out of the property gifted to the plaintiff. Whether that was so or not and whether as contended by Mr. Somayya the plaintiff put in her own funds for the purpose of discharging the debts is immaterial, she was asked to discharge the debts and she did what she was required to do. It is immaterial wherefrom the fund came, for it was not stipulated that she should pay the debts out of her separate property.

6. With regard to the general power of a Muhammadan to revoke a gift, Beaman, J., in *Casamally Jairajbhoy v. Currimbhoy Ebrahim* [1912] 36 Bom. 214 observes:

It is true that this general rule like everything else in the Muhammadan Law which has yet come under my analysis, is open to innumerable exceptions many of which appear to conflict in principle with the main rule.

7. And fulfilment of one of the terms of the gift deed by the donee brings the case within one of the exceptions to the general rule: see *Abirjan Bewa v. Sheikh Kabil* [1920] 54 I. C. 542.

8. It is urged by Mr. Somayya that when the gift is made by a Muhammadan to a follower of another persuasion, the Muhammadan Law relating to gifts is not applicable to such a case, and he relies upon a passage in Mr. Tyabji's book on *Principles of Muhammadan Law*, Section 354 at page 388. There the learned writer lays down:

Where a Mussalman makes a gift to a donee who is governed by a law of property other than Muhammadan Law the subject of gift . . . may not continue to be subject to the incidents of Muhammadan Law after the completion of the gift.

9. He relies upon three cases in support of this position; if the learned author meant to say that the moment a Muhammadan makes a gift to a non-Muhammadan the ordinary principles governing gifts by Muhammadans do not apply to such a gift, I am not prepared to hold that the authorities relied upon by him do support him. After the gift takes effect and the donee gets possession of the property given, the law that governs the devolution of the property would be the personal law of the donee, but I am not prepared to hold at this stage that the mere fact that the donee is a person belonging to a different persuasion, by itself, is sufficient to take the gift out of the ordinary incidents of the Muhammadan Law relating to gifts.

10. The next contention urged by Mr. Chenchiah is that no possession was given in this case and, therefore, the gift did not become a valid gift. No doubt, under the Muhammadan Law delivery of possession is necessary in order to make a gift valid. In this case the evidence is that the plaintiff was living with the donor for a

number of years and she was, no doubt, his mistress. She was a married woman with children and she evidently forsook her husband and children and lived with a Muhammadan who was an old man in consideration of his giving something to her and after she lived with him for a number of years he made a gift of his property to her. After making the gift he, no doubt, lived with her in the house. Mr. Chenchiah's argument is that inasmuch as he lived with her, it must be held that he did not deliver possession to her. We have to see what the intention of the donor is. From Ex. B it is quite clear that he divested himself of all his property and that he wanted to be maintained by the plaintiff. That being so, can it be reasonably contended that his mere living in the house meant that she had no possession of the house? When a man makes a gift of property to a near relation who is living with him the mere fact that he happens to live with him after the gift is made is not a sufficient circumstance to hold that possession did not pass. Each case would depend upon its circumstances. If the intention of the donor is clear that the donee should have possession of the property, the mere fact that the donor happens to live after the date of the gift with the donee in the house which is the subject of the gift would not by itself entitle the Court to hold that possession had not passed and that possession remained with the donor. As I have said, from the facts of this case and from the nature of Ex. B, and from the subsequent documents to which the donor was a party such as Exs. III and F, possession of the house as well as other properties was given to the plaintiff and she continued to be in possession and pattah for the lands was transferred in her name. From the evidence it is clear that she collected and took the produce to the house. In this view of the facts it is not necessary to consider in detail the cases quoted on both sides.

11. Mr. Chenchiah relies upon *Bava Saib v. Mahomed* [1898] 19 Mad. 343 and *Vahazullah Sahib v. B. Nagayya* [1907] 30 Mad. 519 as supporting his contention. In *Bava Saib v. Mahomed* [1898] 19 Mad. 343 the gift was by a woman to her nephew and it was held that the mere fact that a gift was made by a registered instrument would not make it valid. In *Kandath Veetil Bava v. Musoliam Veetil Pakrukutti* [1907] 30 Mad. 305 a Muhammadan mother gave to her daughter house and lands and put her in possession of the lands and got the name changed in the register. It was held that the mere fact that the mother continued to reside with her daughter was not sufficient to constitute a non-delivery of possession so as to invalidate the gift. In *Mandi Mathar Saheb Vs. Hossain Saheb and Others*, it was held that the question whether there has been a complete delivery or not in a particular case is a question of fact to be determined with regard to the intention and contract of the parties and the nature of the property concerned in each case. It is not necessary in every case that the donor should formally depart from the premises which is the subject of the gift and that there should be a formal entry on the part of the donee. In *Alla Pichai Tharaganar v. Mahomed Moideen* [1914] 15 M. L. T. 216 it was held the mere fact that the donor happened to live in the house which was the subject of the gift would not be sufficient to make the possession of the house that of the

donor.

12. The next contention is that there cannot be a gift of the equity of redemption, as for a valid gift by a Muhammadan there must be actual and physical delivery of possession of the property which is the subject of the gift. A mortgagor out of possession cannot deliver possession to the donee. In this case only two items (1 and 2) were in the possession of the donor. With regard to possession of these two items, it is urged that it was not possible for the donor to give possession because the mortgagee was in possession and, therefore, the gift did not take effect with regard to them. In *Fakir Nynar Mahamed Rowther v. Kandasawmy Kulathu Vandan* [1912] 35 Mad. 120 *Abdur Rahim, J.*, observes at page 130 (35M):

It is, however, to be observed that so far as the text already referred to is concerned, its requirement would be satisfied if such possession is given to the donee as the nature of the subject of the gift admits of.

13. Where the estate is gifted by a Muhammadan and it is not possible to give physical possession, if the donee is allowed to collect the rents and profits, that would be sufficient delivery of possession under the Muhammadan Law. It was held by the Privy Council in *Muhammad Mumtaz Ahmad v. Zubaida Jan* [1889] 11 All. 460 that the land in the possession of the tenants could be the subject of a valid gift and all that is required by the donor in order to perfect the gift is to give such possession as the property is capable of. If the property is in the possession of tenants and if the donee is unable to receive the rents and profits of the property even then the gift would be good; and in the case of a mortgage when the term expires or when the time for redemption accrues, if the property is redeemed by the donee I think that would be sufficient in order to validate the gift under the Muhammadan Law. In this case there is evidence that the plaintiff redeemed the property before 1908.

14. In *Tara Prasanna Sen v. Shaudi Bibi A. I. R.* 1922 Cal. 422 a Muhammadan mortgaged some of the lands to a third person putting the mortgagee in possession, and while the mortgagee was in possession he made an oral gift to a person and got that person's name recorded in the Settlement Record, and also put him in physical possession of one of the properties, namely, the homestead. A Bench of the Calcutta High Court held that the gift was valid in law and that in order to properly appreciate the judicial idea of gift as conceived by Muhammadan jurists, it is to be borne in mind that the gift is considered a class of contract, but as it is a voluntary contract without consideration, it is not enforceable unless accompanied by possession in which case the devolution or transfer of right to the property becomes complete. By possession in connexion with the law of gift is meant such possession as the nature of the subject of the gift is capable of.

15. A further argument is put forward by Mr. Somayya to meet this contention, namely, that when one of several items is delivered the whole gift becomes valid.

The answer to that by Mr. Chenchiah is that the Court must distinguish between that portion of the gift which is valid and the portion of the gift which cannot be valid under Muhammadan Law. But in all these cases the Court should take such a view as would be consonant with the condition and state of society existing. Where a person makes gift of certain items some of which he cannot at once deliver into the hands of the donee, it would not be right to hold that the whole gift is invalid or that portion of gift relating to the property which could not be delivered into the hands of the donee is invalid. It would be against the clear intention of the donor to declare that a portion of the gift is invalid when he intended that the whole of it should be valid. I think this is the principle of the recent decisions of the Bombay High Court in Chandsaheb Kashimsaheb v. Gangabai Vishnu A. I. R. 1921 Bom. 248 where it was held that the deed of gift must be looked at as a whole, and that so viewed the gift of the equity of redemption coupled with the completed gift of the remaining lands was a valid gift in law. In that case a Muhamadan female who owned five lands made a gift of them to the plaintiff's father. At the date of the gift she had possession of only two lands and a moiety of the third land. These were immediately put in possession of the donee. The remaining lands had been mortgaged by her to the defendants who retained their possession under the mortgage. The same view was held in Mohammad Abdul Ghani Khan v. Fakir Jahan Begam A. I. R. 1921 P. C. 281 In Hashimbi Yakubsahib Beg v. Ajmatti Maktumsaheb A. I. R. 1924 Bom. 410 the donee got possession of one item through the mortgagee after the donor's death. But he was given possession of the other items of property on the date or soon after the date of the gift. It was held that the gift of all the items is valid including that over which there was a mortgage at the time of the gift and which was redeemed after the donor's death. In this case the redemption was in the lifetime of the donor and I think the principle of these decisions is applicable to the present case and, therefore, this contention on behalf of the appellants must fail.

16. In the result the appeal fails and is dismissed with costs.