
(1968) 02 MAD CK 0036
In the Madras High Court

Ibrahim Bivi and Others

APPELLANT

Vs

K.M.M. Pakkir Mohideen Rowther

RESPONDENT

Date of Decision : 13-02-1968

Acts Referred:

Contract Act, 1872 — Section 11
Transfer of Property Act, 1882 — Section 7

Citation : (1969) 82 LW 221 : (1969) 1 MLJ 578

Hon'ble Judges : A. Alagiriswami, J

Bench : Division Bench

Judgement

A. Alagiriswami, J.—The question that arises for decision in this case is about the validity of the settlement deed Exhibit B-5, dated 20th December, 1937, executed by Kathija Bivi, the paternal grandmother of the defendant in this case in his favour. The defendant is the son by the first wife of one Mokideen Pichai. The first plaintiff is the second wife of Mohideen Pichai and plaintiffs 2 to 6 are her children. Kathija Bivi died on 1st December, 1949 and Mohideen Pichai in 1958. There was an earlier suit, O.S. No. 54 of 1959, filed by the defendant against the plaintiffs for partition of the family properties. That suit was decreed on 29th February, 1960, holding the settlement executed by Kathija Bivi valid. A.S. No. 146 of 1960 filed against the decree in O.S. No. 54 of 1959 was dismissed on 18th October, 1960, but the question regarding the validity of Exhibit B-5 was left open. The plaintiff filed the present suit on 14th February, 1961 claiming that there was a family arrangement on 25th December, 1961 under Exhibit A-I by which they got the defendant's 14/88 share in the suit property by paying him Rs. 700. Alternatively they claimed that the settlement Exhibit B-5 is not valid and that they were, therefore, in any case, entitled to a 74/88th share in the suit property. Both the Courts below have found that the family arrangement pleaded by the plaintiffs is not proved and that being a pure question of fact, it is not open to this Court to go behind that finding of fact. Therefore, the only question that arises is, whether the settlement deed Exhibit B-5 is not valid? There is no doubt that if it were not valid, the plaintiffs would be

entitled to a 74/88th share and the defendant only to a 14/88th share in the suit property.

2. It appears that at the time when Exhibit B-5 was executed, the defendant's father Mohideen Pichai had married the first plaintiff as the second wife and the defendant being motherless was being brought up by the grandmother and out of natural love and affection, she executed the settlement in question. It may incidentally be mentioned that soon after the execution of Exhibit B-5, Mohideen Pichai filed a suit questioning that settlement, but later withdrew it.

3. The argument on behalf of the appellants, that is the plaintiffs, is that the settlor had not parted with possession of the property and given possession to the settlee, that in any case, she was not the guardian of the settlee and therefore, she should have given possession to the defendant's father, that is, Mohideen Pichai, that Mohideen Pichai, had not assented to this settlement as shown by the suit filed by him and that therefore, the settlement would not be valid on all these grounds. In Asaf A. A. Fyzees' Outlines of Muhammadan Law, Third Edition, at page 221 it is said:

Develivery of possession is therefore an essential characteristic of the Islamic law of gifts....Therefore, the taking possession of the subject-matter of the gift by the donee, either actually or constructively is necessary to complete a gift...

Then at page 222 it is said:

First, in the case of immovable property which is in the exclusive possession of the donor, it is necessary that the donor should physically depart from the premises, and hand over the possession formally to the donee, and that the donee should accept such possession. If a person lives in a house and purports to make gift by saying to the donee " take possession " or " I have delivered possession" and no overt act of tender and acceptance of possession takes place, there is no gift....

Then at page 223 the following passage occurs:

The general principle is that possession must be handed over; to this rule there are certain qualifications and exceptions which we shall now proceed to consider. Transfer of possession is not necessary.

(1) Where the donor and the donee reside in the same house;...

(2) Where a guardian makes a gift to the ward;

(1) Residence in the same house; where the donor and the donee reside in the same house, the donor can complete the gift without physical transfer of possession; but there must be the unequivocal manifestation by the donor of an intention to transfer exclusive possession to the donee....

A muslim lady, who had brought up her nephew as her son, executed a deed of gift, in favour of the nephew, of a house in which they were both residing at the

time of the gift. The donor never departed from the house physically, nor was the house formally handed over to the donee, but the property was transferred,, and the rents were recovered in his name. It was held that the gift was valid, although there was no physical delivery of possession. *Humera Bibi v. Najm-un-Nissa* ILR (1905) All. 147, S.V.S. *Muhammad Yusuf Rowther and Another Vs. Muhammad Yusuf Rowther and Others*, . If", however, certain important steps for divesting ownership were not taken, then the Court is entitled to presume that the gift was not complete. For example, a Muslim lady and her nephew resided in a house which belonged to the lady. The lady executed a deed of gift in favour of her nephew. There was no formal delivery of possession; no mutation of names was effected; the nephew continued to live in the house with his aunt; the deed was not delivered to the nephew; the aunt continued to pay the municipal taxes. In these circumstances, it was held that there was no valid gift.

4. Dealing with the question of gifts from father to child mother to son, guardian to ward, we find the following passage : "

Where a father or mother makes a gift of immovable property to their minor child, no physical transfer of possession is necessary. The same is the rule between guardian and ward. One reason for the rule is that this would involve the absurdity of the owner of the property (parent) handing over possession to himself as guardian of the child. In *Ameeroonissa v. Absdoonissa* (1874) L.R. 2 IndAp 87, their Lordships of the Privy Council stated that " where there is, on the part of the father or other guardian, a real and bona fide intention to make a gift the law will be satisfied without change of possession, and will presume the subsequent holding of the property to be on behalf of the minor. Where for instance, the gift is made to an infant by a person other than the father or guardian, the gift is rendered complete by the seisin of the father of the infant.

The real basis of the exception is that delivery of possession is excused only when the legal guardianship of the minor vests in the donor. Thus, a gift by a grandfather to his grandson would not be within the exception where the father is alive and has not been relieved of his legal guardianship. A decision of a Privy Council makes this perfectly clear. *Musa Miya v. Kadar Bux* (1928) 54 M.L.J. 655 : L.R. 55 IndAp 171 : AIR 1928 P.C. 108....

Nor can a mother, who is not a legal guardian, accept such a gift on behalf of her minor children, from their grandfather.

In this case the settlement deed provides that by the settlement, the property has been transferred to the settlee, that the settlor and the settlee were to enjoy the property together, that as the settlee was a minor, the settlor would look after the property as the settlee's guardian till he became a major, that after the settlor's lifetime, the settlee Would enjoy the property absolutely, that during the settlor's lifetime, -neither the settlor nor the settlee was entitled to alienate the property and that if any such alienation was made, it would not be valid. Now, it is obvious that the first part of the settlement deed whereby the settlor purports

to transfer the property to the settlee indicates a clear intention to transfer the property. I think the fact that till the settlee became a major the settlor was to look after the property as guardian, would not in any way detract from that fact that the property was transferred unconditionally to the settlee. The subsequent recitals in the document that the settlee was to enjoy the property absolutely after the settlor's lifetime, would not in any way, cut down the absolute transfer earlier indicated, nor would the fact that the settlor and the settlee are said to have no right to alienate the property during the settlor's lifetime affect the transfer in any way. Though the wording of the document is a little confused, there is a clear intention to part with possession of the property immediately and the fact that the settlor and the settlee were to reside together in the property, would not in any way show that possession was not handed over. Decisions have held that where the property gifted is a house and the settlor and the settlee reside in that house, it is not necessary for the settlor formally to depart from the house in order to indicate that the settlee has been given possession of the property gifted.

5. It is, however, urged on behalf of the appellants that under Muhammadan Law only the father and the grandfather are the guardians of a minor, that the paternal grandmother is not the guardian and that therefore, as the possession of the property had not been given to the father though he was alive and the father himself had expressly repudiated the settlement-deed by filing a suit, questioning the settlement, possession cannot be said to have been given to the minor's guardian. It should, however, be remembered that under Mohammadan Law, there is no objection to a minor himself getting possession of the property and as the minor in this case resided with the settlor and the settlee had the manifestly clear intention to part with the possession of the property, the settlee should be deemed to have obtained possession. I do not think that the decision in *Musa Miya v. Kadar Bux* (1928) 54 M.L.J. 655 : L.R. 55 IndAp 171 : AIR 1928 P.C. 108 in any way is against this position. In that case a maternal grandfather was alleged to have made a gift to his grandsons. The grandsons were minors. They and their parents lived in the house of the donor. There was no mutation of names and no deed was executed, the grandfather continued to be in possession of the property and there was no evidence to show that the donor in any way intimated that he regarded himself as a trustee for his grandsons or that he was in possession of the property on their behalf. It was, therefore, held that the case did not come within the exception to the general rule and therefore, the gift was not complete in the absence of any delivery of possession or relinquishment of control over the property by the grandfather. At page 111 of the above decision, it is observed that the rule (that possession need not be given) applies to the case of a mother making a gift to her infant son whom she maintains only When the father is dead and no guardian has been provided. It was further observed as follows:

The rule applies also to the gift by any other person maintaining a child under these circumstances, i.e., when the father is dead and no guardian has been

provided. This seems to imply that when the father, who is the natural guardian of his infant children is alive and has not been deprived of his rights and powers of guardian, the above mentioned rule will not apply.

On this it is urged on behalf of the appellants that as in this case, the father was alive, the rule as to possession not having to be given, does not apply. That case it appears to me was really decided on the fact that the grand-father did not relinquish control and except a bare declaration there was nothing else to show a clear intention on the part of the donor to part with possession of the property. In *Mt. Saidunnisa v. Inam Llahi* AIR 1932 Lah. 316, it was held that no change of possession is necessary in the case of a gift by a grandfather to his minor grandson, if the father is dead, for the grandfather is then the proper person to take delivery on behalf of his grandson as his guardian. Then it was observed as follows:

But if the father is alive and has not been deprived of his rights and powers as guardian there must be a delivery of possession by the grandfather to the father as guardian of his minor son; otherwise the gift is not complete. The mere fact that the minors have always lived with their grandfather and have been brought up and maintained by him will not constitute him guardian of their property so as to dispense with delivery of possession.

This decision purported to follow the decision in *Musa Miya v. Kadar Bux* (1928) 54 M.L.J. 655 : 55 I.A. 171 : AIR 1928 P.C. 108, already referred to. In *Sana Meah v. Pillai* AIR 1933 Rang. 155, it was held as follows:

In order to perfect a gift by a Mohammadan it is necessary to make over possession of the property to the donee. If the donee is a minor then possession must be made over to a person who is the natural guardian of the minor. The exception in case of a gift by the father cannot be extended to a gift by the maternal grandfather. Delivery of possession to the mother of the minor donee is of no use.

This case also purported to follow the decision of the Privy Council earlier referred to. In *Pichakannu v. Aliyarkunju Lebba* (1963) K.L.T. 226, it was held as follows:

It is a fundamental rule of Mohammadan Law as regards gifts that the donor should divest himself completely of all ownership and dominion over the subject of the gift. It is essential to the validity of a gift that there should be a delivery of such possession as the subject of the gift is susceptible of. A gift with a reservation of possession by the donor during his lifetime is void. By reserving undisturbed his rights to be in possession and enjoyment the donor did not divest himself completely of all dominion over the properties, though in a sense he purported to associate the donees with himself, nor could such associating the donees in the matter of possession and enjoyment with him be deemed to be delivery of such possession, if at all, as the properties were susceptible of. Therefore, a stipulation that the donor and the donees shall be in joint

possession will not satisfy the requirement of delivery of possession in a gift under the Muhammadan Law. Even where the donee resides with the donor in the property, although no physical departure by the donor or formal entry by the donee is necessary, the gift has to be completed by the donor indicating a clear intention on his part to transfer possession and to divest himself of all control over the subject-matter.

It is quite clear, that by Exhibit I the donor did not divest himself completely of all dominion over the properties gifted but reserved possession and enjoyment with himself....The donees Were entitled to the properties absolutely only after the lifetime of the donor.

These decisions seem to support the appellants' contention. In *Abdul Raheman v. Mishrimal* AIR 1960 Bom. 210 it was held that where a gift by a grandfather to his minor grandsons of immovable property was made and delivery of possession was accepted on behalf of the minors not by their father who was alive, but by their mother, the gift was not complete. The decisions relied on were the decisions in *Musa Miya v. Kadar Bux* (1928) 54 M.L.J. 655 : L.R. 55 IndAp 171 : AIR 1928 P.C. 108 and *Suna Meah v. Pillai* AIR 1933 Rang. 155, already referred to.

6. But the trend of later decisions is towards the liberalisation of the rigours of the Islamic Law of Gifts. As already mentioned it has been held that where what is gifted is a house, it is not necessary for the donor formally to depart from the house in order to complete delivery of possession. It has also been held that as between the husband and wife, it is not necessary for either party to depart from the house and they could continue in possession in the same house gifted and delivery would still be complete. It has also been held as seen from the passage quoted earlier from the decision in *Musa Miya v. Kadar Bux* (1928) 54 M.L.J. 655 : L.R. 55 IndAp 171 : AIR 1928 P.C. 108, that where a guardian makes a gift to the ward and the father or the grandfather is not alive, the rule regarding the delivery of possession to the natural guardian does not apply. This trend of decisions is reflected in the decision of a Bench of this Court in *K. Veerankutty Vs. Pathummakutty Umma and Others*, . There the document under consideration recited as follow:

I have out of natural love and affection I have for Nos. 1 and 2, released or surrendered by assignment gift all my rights to the kanom reclamation, house and improvements thereon as per terms stated thereunder. But till my death I shall keep and enjoy the properties of the schedule without any munpattom or creating any mortgage or debt or alienating the same and it is settled that after my death Nos. 1 and 2 should keep the properties and enjoy the same with all rights of alienation and disposition.

It was further held as follows:

...that the recitals taken as a whole indicated an absolute divestment of all the rights of the donor in the property with liberty to keep possession and enjoy the

income from them till his death. The clauses could not be understood as creating a life estate with a vested remainder.

That the reservation to be in possession of the property and enjoy the income therefrom during the lifetime of the donor could not be understood as derogating from the earlier grant but it was only an affirmation or reservation of a subordinate right to enure for a specified period.

In that case there were two donees and the donor was the natural guardian of the first donee and it was, therefore, held that there was no necessity to deliver possession. It should be noticed that the facts of the preseat case are much stronger from the point of view of the donees than the facts in *K. Veerankutty Vs. Pathummakutty Umma and Others*, , except with regard to the fact that in this case the donor is not the natural guardian of the donee. In *S.V.S. Muhammad Yusuf Rowther and Another Vs. Muhammad Yusuf Rowther and Others*, , *Rajagopala Aiyangar, J.* took into account the relationship between the donor and the donees, as well as the fact that they were jointly residing in the premises, to hold that there was no necessity for the donor to remove himself from the premises in order that the gift may be operative. In the decision of the Supreme Court in *Valia Peedikakkandi Kutheessa Umma and Others Vs. Pathakkalan Naravanath Kumhamu and Others*, , in paragraph 11 it was held as follows:

It is only actual or constructive possession that completes the gift and registration does not cure the defect nor is a bare declaration in the deed that possession was given to a minor of any avail without the intervention of the guardian of the property unless the minor has reached the years of discretion. If the property is with the donor he must depart from it and the donee must enter upon possession... Exceptions to these strict rules which are well recognised are gifts by the wife to the husband and by the father to his minor child....Later it was held that where the donor and donee reside together an overt act only is necessary and this rule applies between husband and wife. In AIR 1932 13 (Privy Council) , it was held that even mutation of names is not necessary if the deed declares that possession is delivered and the deed is handed to the. wife. A similar extension took place in cases of gifts by a guardian to his minor Ward.... In the case of a gift to an orphan minor the rule was relaxed in this way:

If a fatherless child be under charge of his mother, and she take possession of gift made to him it is valid....The same rule also holds with respect to a stranger who has charge of the orphan"....In the case of the absence of the guardian (*Gheebut-i-Moonqutaa*) the commentators agree that in a gift by the mother her possession after gift does not render it invalid. Thus, also brother and paternal uncle in the absence of the father are included in the list of persons who can take possession on behalf a minor who is in their charge. *Durrul Mukhtar*, Vol. 4, p. 512 (Cairo Edn.).

7. In *Radd-ul-Mukhtar* it is said:

It is laid down in the Barjindi : There is a difference of opinion, where possession has been taken by one, who has it (the child) in his charge when the father is present. It is said, it is not valid and the correct opinion is that it is valid." Vol. 4, Order 513 (Cairo Edn.).

In the Bahr-al Raiq, Vol. 7, page 314 (Edn. Cairo) " The rule is not restricted to mother and stranger but means that every relation excepting the father, the grandfather and their executors is like the mother. The gift becomes complete by their taking possession if the infant is in their charge otherwise not...."

The rule about possession is relaxed in certain circumstances of which the following passage from the Hedaya P. 484 mentions some : " It is lawful for a husband to take possession of anything given to his wife, being an infant, provided she has been sent from her father's house to his; and this although the father be present; because he is held, by implication, to have resigned the management of her concerns to the husband. It is otherwise where she has not been sent from her father's house, because then the father is not held to have resigned the management of her concerns. It is also otherwise with respect to a mother or any other having charge of her; because they are not entitled to possess themselves of a gift in her behalf, unless the father be dead, or absent and his place of residence unknown; for their power is in virtue of necessity, and not from any supposed authority; and this necessity cannot exist whilst the father is present".

In paragraph 15 the conclusion was reached as follows:

These cases show that the strict rule of Mohammadan Law about giving possession to one of the state guardians of the minor is not a condition of its validity in certain cases. One such case is gift by the husband to his wife and another where there is gift to a minor who has no guardian of the property in existence.

8. The latest decision in the series is that of Ramamurti, J., in *Ayeshabi v. Saprakara Kathoonbi* ILR (1966) 1 Mad. 187 : (1966) 79 L.W. 302. In that case, the gift deed executed by a Muslim woman to her son and her minor daughter represented by the donor's son as guardian recited that, possession of the property has been delivered over to the donee. The property was a residential house in which the donor and her children and the donees were living together. It was held that every presumption should be made in favour of the validity of the gift when the conduct of the parties spread over a long interval of 23 years shows that the gift was given effect to and they have stood by it by accepting the validity of the gift and that Mohamedan Law requires evidence of handing over possession to the donee and the donee's acceptance of the gift mainly as proof of the intention of the donor to pass title to the donee, so that if this requirement is complied with, all future disputes about the truth and factum of gifts shall be avoided, and that in applying the rules of Mohamedan Law relating to the gifts, the rigour of unmeaning technicalities should not be enforced, divorced from the

realities of the particular situation in individual cases and Courts should avoid an impractical approach to the question and that there is no warrant for the contention that under Mohamedan Law, whatever may be the subject-matter of gift, and, whatever may be the circumstances, in which the gift is made, if the donee happens to be a minor, there should be delivery of possession to the guardian of the minors, and that the rule of Mohamedan Law that delivery and possession should be effected to the father as the guardian and the latter should accept the gift can have no application to a case in which the donor specifies some other person as the guardian to take possession and accept the gift on behalf of the donee, and that there is nothing in principle (in Mohammadan Law) or in the decisions which compels the view that regardless of all considerations and regardless of the father's indifferences, his wayward habits and other adverse factors, any person who desires to make a gift to the minor son could do so only by delivering the property to such a father. That decision is a complete answer to the contention of the appellants. The learned Judge referred to the decision in *Mt. Fatma, W/o. Fiaz v. Mt. Autun* AIR 1944 Sind. 195, wherein Tyabji, J. observed as follows:

There is nothing in Mohamedan law or outside it which prevents a minor from accepting a gift or taking possession of the property.... It is true that Section 11, Contract Act prevents a minor from effecting a binding contract.... While this disability renders a minor incompetent to act as a transferor, by reason of Section 7 of the Transfer of Property Act, a minor is not incapable of receiving benefits and being a transferee, as he is not a person legally disqualified to be a transferee within the meaning of Sub-section (h) of Section 6 of the Act.

9. The learned Judge also referred to the decision in *Munni Bai and Another Vs. Abdul Gani*, , where a Bench held that the donee of a gift is not precluded by minority from accepting the gift and that where the document embodying the intention of the donor to give the property in gift is delivered by the donor to the donee and accepted by him it amounts to acceptance of the gift on his part. The conclusions that flow from a Consideration of the various decisions may be stated as follows:

10. In the case of a gift of a house, it is not necessary that a donor should depart from the house in order to make the gift effective. If the donor and the donee live in the same house, that would be sufficient to show that possession has been given. The reservation by the donor of the right to reside in the house along with the donee during his lifetime does not detract from the validity of a gift. If the donee happens to be a minor and if he has attained age of discretion (in this case the donee was aged 15 and he should certainly have attained the age of discretion) he is competent to accept the gift. It is not necessary that in all case, the donor should hand over possession to the natural guardian of the minor donee. In proper circumstances, the donor can either constitute himself as the guardian or indicate some person, other than the natural guardian of the minor, as the guardian of the minor's property and hand over possession to such

guardian if circumstances are such as to justify such a course of action. All these, of course, apply only where there is a clear intention to make a gift and to deliver possession. It follows therefore, that the gift in favour of the first defendant in this case is valid and this appeal has, therefore, to be dismissed and it is, accordingly, dismissed. There will be no order as to costs. No leave.