
(1926) 01 BOM CK 0060
In the Bombay High Court
Case No : Second Appeal No. 774 of 1924

Kadarbhai Gulamhusein

APPELLANT

Vs

Nanibibi

RESPONDENT

Date of Decision : 22-01-1926

Acts Referred:

Evidence Act, 1872 — Section 114(g)

Citation : (1926) 28 BOMLR 1098

Hon'ble Judges : Marten, J;Madgavkar, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Marten, J.—This second appeal raises an interesting point of Mahomedan law, The question is, whether the deed of gift, Exhibit 55, dated January 9, 1909, by one Ismail in favour of his wife Nanibibi, defendant No, 7, is a valid gift under Mahomedan law. That in its turn depends on whether possession, actual or constructive, was given to the donee. Both the lower Courts have upheld the deed of gift, and dismissed the plaintiffs' suit, who are claiming against the deed of gift.

2. The donor died some eighteen months after the gift, viz , on June 25,1910. Although his widow, as I have already said, is a defendant to the suit, and although the defendants have expressly pleaded in their written statement that possession was delivered on the date of the deed, the widow has not gone into the witness-box, Nor has any oral evidence been called by her to testify as to any-change of possession, or to the handing over of the title deeds, or as to any application to change the names of the owners or occupiers in the Municipal books or otherwise. Accordingly, the defendants solely rely on this deed as the evidence in their favour, and have thus exposed themselves to the presumption u/s 114, illustration (g), of the Indian Evidence Act, that "evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it". In our judgment that presumption ought to be made in the present

case. We cannot regard it as any excuse that a certain purshis which was put in during the proceedings, Exhibit 40, contained a statement, which, it is alleged before us, misled the pleader in the trial Court into not calling any evidence.

3. The case, therefore, in the first instance, depends largely on the true construction of the deed of gift, and in particular on the last two lines, viz , And ray right to live in that property till life has been reserved, And you are to take possession of the said property after my death."

4. Now, the learned Judge in the lower appellate Court wholly ignored that last sentence about possession, and apparently treated the case as if the deed contained no provision as to possession at all. We are thus without any assistance from him on what is said to be one of the main points in the case. But the learned Subordinate Judge fully appreciated this point and he came to the conclusion in the earlier part of his judgment at page 7, line 51, that possession was not delivered and was not meant to be delivered, and that the allegation in the written statement that possession was delivered on the date of the deed was manifestly false and untenable. But the learned trial Judge then proceeded to deal with certain authorities, and eventually came to the conclusion, that notwithstanding his previous finding, he could hold-as he eventually did-that constructive possession was handed over to the defendants.

5. This being then the position, I will refer to the deed of gift itself. It sets out, in the first instance, the particulars of the property. It will be seen that those particulars are given in great detail, and that they purport to show that the donor is the owner of the house, and that in addition he has a one-third share in a certain privy and ota. That claim to a third share in the privy and ota, we have already dismissed in the companion Appeal No. 681 of 1924, We have found it quite untenable. Accordingly, these recitals are open to the suggestion that they were inserted with a view to creating some evidence of a title, however unfounded, to this ota and privy.

6. Then the deed proceeds that the properties-

which were at first in the possession and enjoyment of my father and after his death are at present in my possession, all those I have given you as a gift...Neither I nor my heirs, administrators nor creditors, sharers, persona having pre-emption, nor others have any right, claim, share or interest in that property. And henceforth, if any person on my behalf puts forward a right or claim and causes any hindrance, the same shall be unmaintainable under this writing. Therefore you can henceforth deal with that property as you like or raise new structures thereon or occupy yourself or cause the same to be occupied... And from today you have become the absolute owner of this property. And there is no burden or right of any other person"i due of any kind on this property. And this property is given you as a gift. And the old documents of this property and the document of agreement dated Vaishakh Shud 11th of Samvat year 1955, May 20, 1899, which has been executed and two copies of the Sanad all these

documents have been given you. And the reason of giving you this property as a gift is that you are my wife and I am your husband and that as I at present remain weak owing to sickness you are tending me and taking care of me and that I have full confidence that you will do so even afterwards and that you are following my behests and therefore I have a great affection for you, Therefore this property is given you as a gift. This deed of gift in respect thereto I have executed of my free will and accord and in sound sense and understanding and with firm mind and the same is binding, And in the fifth line counting from the top seven letters have been scored while writing and what is written above is binding. And my right to live in that property till life has been reserved. And you are to take possession of the said property after my death. And what is written above is binding.

7. Then follows the signature of the donor, and there are some six attestations and the writer's signature.

8. Now, if the deed had stopped just prior to the last two sentences beginning "And my right to live" etc, then I think there would be no doubt but that the donee would take an absolute interest, notwithstanding the references to the donor being taken care of by the donee and to the donor having full confidence that she would continue to do so, and that she was following his behests. But, on the question as to what effect the last two sentences in the deed have on the earlier portions, it seems to me that three views may be taken, Either they amount to a condition repugnant to a prior absolute gift and are, therefore, void, or, alternatively, the deed being construed as a whole it reserved an estate for life to the donor and gave at most the reversion to the donee. Or, alternatively, the donee took the entire property subject to a mere right of personal residence by the donor during his life.

9. Now, if it became necessary to do so, it would be interesting to discuss some of the authorities dealing with questions of construction like this. One case on a will came before myself and subsequently before the Appeal Court, *Gulbaji v. Rus-tomji* (1924) 27 Bom. L.R. 380. I may also refer to *Ewart v. Graham* (1859) 7 H L.C. 331 as showing that technically under English law a reservation in the strict sense of the word operates as a re-grant by the alienee, There the Lord Chancellor states (pp. 344, 845):-

The property in animals, feroe natures, while they are on the soil, belongs to the owner of the soil, and he may grant a right to others to come and take them by a grant of hunting, shooting, fowling, and so forth ; that right may be granted by the owner of the fee simple, and such a grant is a license of a profit a prendre. Substantially it may be reserved by the owner of the fee-simple when he alienates, although it is considered that, technically speaking, in such a case it is a re-grant of the right by the alienee of the fee-simple.

10. So, here, if one followed out the principles which have been adopted in English law, one might construe this deed as a grant in the first instance to the

donee absolutely, and a re-grant by her in favour of her husband of a limited right of residence during his life, But, it seems to me that, whatever construction is adopted in that respect, we have still to consider the effect of the final sentence about taking possession, In order for the deed to be valid, one has to find here that there was possession, either actual or constructive, taken by the donee. I quite follow that in a case of this sort where husband and wife are living together, and where, therefore, it may be said that the wife is already in part possession of the property, a less unequivocal act is required as exemplifying the intention of the parties than would be requisite in a case where the parties were not living together or were strangers.

11. Thus, if the husband left the house, as was the case in *Amina Bibi v. Khatija Bibi* (1864) 1 B.H.C.R. 157 the mere fact that he subsequently returned and collected the rents need not necessarily negative the presumption of possession in favour of the wife by the act of his leaving the house. On those facts one can understand the decision of the Court that when the husband returned he merely collected the rents as a manager for his wife. Similarly, in *Shaik Ibham v. Shaik Suleman* ILR (1884) 9 Bom. 146 it is said in effect that where two persons are present on the same premises, an appropriate intention may put the one out as well as the other into possession without any actual physical departure or formal entry, if the intention to transfer has been unequivocally manifested.

12. In *Mohammad Abdul Ghani v. Fakhr Jahan Begam* (1922) L.R. 49 IndAp 195 which has been much relied on, their lordships at page 209 said :-

That contention has raised a question by no means easy of solution The solution depends upon what) are the facts here and upon what is the rule of Mahomedan law applicable to those facts.

13. Then at the bottom of the page the judgment continues :-

For a valid gift inter vivos under the Mahomedan law applicable in this case, three conditions are necessary, which their Lordships consider have been correctly stated thus : " (a) manifestation of the wish to give on the part of the donor ; (b) the acceptance of the donee, either impliedly or expressly ; and (c) the taking of possession of the subject-matter of the gift by the donee, either actually or constructively." (Mahomedan Law, by Syed Ameer Ali 4th Ed., Vol. I, p. 41.)

14. In that particular case possession of part of the property was undoubtedly taken by the donee, and the Board held that the property must be regarded as one property, and that the taking possession of any part of it was constructively a taking possession of the whole. (See pp. 209-10), But here the difficulty in the way of the respondents is that there has been no taking possession of any part of the property as there was in the case cited.

15. On behalf of the respondents, reference was made to *Nawab Umjad. Ally Khan v. Mussumat Mohumdee Begum* (1867) 11 M.I.A. 517 and to *Chaudhri*

Mehdi Hasan v. Muhammad Hasan (1903) L.R. 33 IndAp 68. The former is a case of Government securities which had been transferred by a father to his son but the donor had retained the right to the accruing interest on the notes to be applied for certain purposes.

16. But that case merely shows that a benefit of a particular limited character may be rightfully reserved to the donor. As I read the case, it does not show that the possession of the shares, so far as they could be given possession of, was not given by the donor.

17. Chaudhri Mehdi Hasan v. Muhammad Hasan (1906) L.R. 33 IndAp 68 is a case on the other side of the line. There the alleged donee first set up a case that he had given consideration for the alleged deed of gift, namely, Rs. 2,000. That case broke down. Then, as pointed out in the judgment at page 75, he set up another defence quite inconsistent with the defence first set up. The judgment adds (p. 75):-

By the Mahomedan law (by which the present case is governed) a holder of property may in his lifetime give away the whole or part of his property if he complies with certain forms ; but it is incumbent upon those who seek to set up such a transaction to shew very clearly that those forms have been complied with. It may be by deed of gift simply, or by deed of gift coupled with consideration. If the former, unless accompanied by delivery of the thing given, so far as it is capable of delivery, it is invalid. If the latter (in which case delivery of possession is not necessary), actual payment of the consideration must be proved, and the bona fide intention of the donor to divest himself in present of the property, and to confer it upon the donee, must also be proved.

18. Then their lordships went into the question of possession, and came to the conclusion that the contention of the alleged donee had wholly failed. At page 80 they summarise their conclusions as follows :-

Their Lordships are of opinion that the deed which purported to be a conveyance for value was a transaction in which no consideration passed or was intended to pass ; that in executing that deed the plaintiff did not intend to give the property to the defendant except subject to a reservation of the possession and enjoyment to himself and his wife during their lives, to which the defendant pledged himself ; and that the deed was not followed by delivery of possession, but was a fictitious and benami deed and was invalid and void.

19. Then, again, in Abdul Majidkhan v. Hussainbu (1910) 22 Bom. L.R. 229 which is a decision of Mr. Justice Shah and Mr. Justice Crump, the head-note runs:-

According to Mahomedan law, there must be a delivery of possession to validate a gift. Where the donor and the donee are both present on the premises gifted away, an appropriate intention may put the one out as well as the other into possession without any actual physical departure or formal entry. But it does not follow in every case necessarily that where the two are present the possession

must be deemed to have been transferred, The question as to whether the donor intended to transfer the possession at the time of the gift must be answered with reference to the facts of each particular case.

20. Applying, then, the test adopted in the last-mentioned case, is it established here that the donor intended the donee to take possession of the property during his life time ? Frima facie the clear meaning of the last sentence in the deed is that the donee is to take possession of the entirety of the property after the death of the donor. From that, in my opinion, it follows that the fair inference is that she was not to take possession of it in the life-time of the donor. That inference is supported by the reservation by the donor of the right to live in the property during his life. In any event, those words as to possession nauat raise a very serious doubt as to what was the intention of the parties at the time. That doubt could have been solved by the evidence of the donee, if, in fact, she could testify that possession was given to her But, as she has not chosen to do so, I think the inference must be drawn against her and that, taking into consideration also the language of the deed, she has failed to prove that she took actual or constructive possession of the property.

21. There was one other authority cited to us, which I should mention. It is (1889) L.R. 16 I.A. 205 (Privy Council) and the head-note runs as follows :-

Whether a gift of undivided property (mushaa) is valid or not under Mahomedan law, possession given and taken under such gift effectually transfers the property,

A declaration by the donor in the deed of gift that possession has been given binda the heirs of the donor ; and possession once taken cannot be invalidated by any subsequent change of possession.

22. Now there, it appears, from pp. 214-6 of the judgment, which was delivered by Sir Barnes Peacock, that the lady, who was the donor, was not in actual possession of the property but was in receipt of the rents and profits, and that in the deed of gift she declared that she had made the donee possessor of all properties given by the deed. The judgment states that this was an admission by which her heir and all persona claiming through heirs were bound. From that and from other surrounding circumstances the Board came to the conclusion that possession had been given.

23. It is possible that this statement as to the effect of the ad-misaion being binding on the heirs may be too broadly stated, or may, at any rate, be subject to exceptions. But, be that as it may, as I read the present deed, we have no such recital or statement that the donee was made the possessor of the property. On the contrary, there is no statement as to possession in the body of the deed. It only states that the donee may occupy the property herself or cause the same to be occupied. But this is qualified by the final sentence which is the only one in which possession is specifically mentioned. And there the donor says that the donee is to take possession after his death. It seems to us, therefore, that Sheikh Muhummad Mumtaz Ahmad v. Zubaida Jan does not apply to the

particular case which we have to deal with.

24. Under these circumstances, in the view I take, this case depends upon its own particular facts, and especially upon the view which the Court takes of that final sentence in the deed of gift, and upon the absence of any oral evidence to explain the surrounding circumstances or to show whether possession of the property or delivery of the title deeds was ever in fact given. I think, therefore, we may arrive at our conclusion without in any way departing from the decided cases or the principles there laid down. I would, accordingly, hold that in this particular case the deed of gift is bad under Mahomedan law, and that the plaintiffs' suit ought to succeed, I would, therefore, allow this appeal, and, subject to what counsel may say, I would order that the plaintiffs' suit be decreed.

Madgavkar, J.

25. The question in this appeal is the validity of the deed of gift of 1909 by the deceased husband of defendant No. 7 in her favour. In the case of gifts among Mahomedans, delivery of possession is necessary for validity : Hedaya 482 ; Baillie 308 ; as was also laid down by their Lordships of the Privy Council in a series of decisions of which Muhammad Abdul Ghani v. Fakhr Jahan Begam (1922) ILR 44 All. 301 is the most recent.

26. Even in the case of a gift from the husband to the wife, an overt act to evidence delivery is not less necessary, on the grounds both of Mahomedan and of general jurisprudence. The former limits the power of bequest and is somewhat jealous of gifts. And it is a matter of public interest that the title should not be doubtful, so that either husband or wife can claim it afterwards as it suits their interests. As in the case of similar provisions whether of *mancipium* under the old Roman law, or of *seisin* in old English law, the essential safeguard must be maintained, but with due regard to modern conditions. The general question has been discussed by two Mahomedan Judges in *Fakir Nynar Muhamed Rowther v. Kandaswamy Kulathu Vandan* ILR (1911) Mad 120 and *Tara Prasanna Sen v. Shandi Bibi* ILR (1921) Cal. 68. It has been held by this Court in a series of decisions, such as *Amina Bibi v. Khatija Bihi* (1864) 1 B.H.C.R. 157 that in the case of a gift from the husband to a wife, given such overt act to indicate delivery of possession, the continued residence thereafter of the donor, husband or wife, would not be inconsistent with a valid gift. In the present case, no evidence of delivery of possession before or after the deed has been given. No oral evidence is called, even as to the recited delivery of the deeds. The donee herself, who is alive, has not gone into the witness-box. There is no evidence that the donor applied to the Municipality to transfer the house to the name of the donee. The whole deed itself is born under somewhat suspicious circumstances, and suggests that it might have been written really for the purpose of asserting the joint right in the *otla* and *khadki*, which has been disposed of in the other appeal.

27. The onus is on the donee : (1876) L.R. 3 I.A. 291 (Privy Council) In the present case that onus is sought to be discharged by the deed of gift itself, and certain recitals therein, without any other evidence. But, in fact, the deed of gift, so far as it relates to delivery of possession, merely states that the title deeds and the old documents of this property and the other title deeds had been delivered. On the other hand, it expressly adds at the end: "And my right to live in that property till life has been reserved. And you are to take possession of the said property after my death," Reading the document as a whole with both these recitals, it is difficult to construe it as evidence for delivery of possession : on the contrary, in my opinion, the recitals are, if anything, evidence rather that possession was not to be delivered until after the death of the husband, which took place about eighteen months later.

28. It seems to me, therefore, that the opinion of the learned Subordinate Judge, in one portion of his judgment, that "possession was not delivered and was not meant to be delivered" is perfectly correct, I am unable to understand how, considering the evidence merely on the recital that the old title deeds and sanads were handed over, he ultimately came to a different conclusion. The learned District Judge, similarly, has not gone into the question and contents himself with an expression of opinion that "constructive" possession was delivered.

29. It may well be that the present suit is a consequence of the other suit by the widow and the heirs of the donor to assert their rights in the khadki and the ota.

30. But, however that may be, I agree with my learned brother, for the reasons he has just stated, that the delivery of possession, which it is incumbent on the respondents to prove, in order to validate the gift and defeat, the present suit, has not been established.

31. The appeal must, therefore, be allowed and the decrees of the lower Court set aside.

Marten, J.

32. The question now arises as to the form our decree should take, The learned trial Judge, in setting out the pleadings in his judgment in this Suit No, 512 of 1922, did not state precisely the nature of the suit, but, on looking at paragraph 9 of the plaint, we find that the suit was brought for a declaration that the deed of gift was void, for a partition, and for handing over a three anna four pie share in the property to the plaintiffs. I have found on the Original Side some difficulty as to the proper form of a decree in partition suits. There is no settled form either in the Code or in our Original Side Rules. On the other hand, the forms are clearly settled in England, and carefully drawn forms, which have been followed for a long series of years in partition suits, will be found in Seton on Judgments, 6th Edn., Vol II, pp. 1853 and 1871, and 7th Edn , pp 178 -180).

33. The principle, on which those orders are framed, is to ensure that, before the Court sells or partitions the property, it has the rightful owners of the property

before it. Accordingly, the Chancery Judges, as a rule, will not make orders for partition unless they are satisfied by proper evidence that the parties before it are the owners of the property and that no other person has any interest in the property. Consequently, unless the case is a very simple one and the value of the property small, the ordinary practice is to direct an enquiry in Chambers as to who are the persons entitled to the property, and in what shares and proportions, and to give supplemental directions for sale in certain events. An example of this will be found in *Wood v. Gregory* (1889) 43 Ch.D. 82 where, at the trial, the Court refused to make an immediate order for sale at the request of the parties, and directed the usual enquiry in Chambers.

34. Now, in the present case, the learned trial Judge has not found who are the persons entitled to the property, and in what shares and proportions, supposing that the deed of gift is set aside. At page 7, line 20, of his judgment in Suit No. 658 of 1920, the Judge says: "It would be useful to give the pedigree as admitted by the parties, Exhibit 59, and as can be supplemented by the pleadings which are not disputed." Unfortunately, that pedigree does not set out the dates although that is one of the very points taken in para. 3 of the written statement, viz., that "the relationship shown in the plaint paragraphs 1 to 4 are true, but it is not definitely stated therein on what dates the persons died."

35. Accordingly, it is now urged by the pleader for the defence that Rahim and Rehman, plaintiffs Nos. 9 and 10, took no share in the three anna four pie share claimed in the suit, because their grandfather Sadakbhai was dead, and, consequently, Ibrahim, the ancestor of the other plaintiffs, survived Ismail, and would, therefore, take the entire property. On the other hand, the opposing pleader points to the pleadings which tend to show that Sadakbhai as well as Ibrahim survived Ismail, and that consequently plaintiffs Nos. 9 and 10 would take a share.

36. It will be clearly understood that this question does not affect the point whether the plaintiffs take the three anna four pies of the share collectively. It only affects the question as to how inter se they take that share, if at all. Accordingly, in our order we propose to leave that point open without prejudice to the question as to how the plaintiffs take this three anna four pie share inter se. Similarly, our order for partition will be without prejudice to the rights of the parties under the Partition Act or otherwise to put forward claims for the sale of the entirety or alternatively for a purchase of the shares of their opponents.

37. The order, accordingly, that we propose to make will be to the following effect. Appeal allowed. Decree of lower appellate Court set aside, Declare that the deed of gift, Exhibit 55, of January 9, 1909, is null and void under Mahomedan law and custom, and that the plaintiffs collectively are entitled to a three anna four pie share in the property. Direct a partition to be made and possession to be handed over of the said property according to the rights of the parties without prejudice to the claims of any of them to a sale of the entirety or alternatively to any claim to purchase the shares of their opponents, This order is

to be without prejudice to any question as to how the plaintiffs inter se are entitled to the three anna four pie share of the suit property. Respondents to pay the costs of the appellants throughout.