

(1937) 02 BOM CK 0018

In the Bombay High Court

Case No : Letters Patent Appeal No. 21 of 1934

Musa Baba Bondre

APPELLANT

Vs

Badesaheb Fakirmahomed Bondre

RESPONDENT

Date of Decision : 11-02-1937

Acts Referred:

Citation : AIR 1938 Bom 84 : (1937) 39 BOMLR 1108 : 173 Ind. Cas. 376

Hon'ble Judges : N.J. Wadia, J; John Beaumont, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Divatia, J.—This is a plaintiff's appeal in a suit to recover possession of certain property on the ground that she was one of the donees of the suit property. The parties are Mahomedans, and the main question to be decided in this appeal is whether the deed of gift passed by one Bala in favour of the plaintiff and her brother Bawa Petkar on March 10, 1920, was valid under the Mahomedan law. There were several other points arising for decision, and the trial Court decided most of them in the plaintiff's favour. But that Court was of opinion that the deed of gift to two persons jointly of undefined shares in the gifted property, was invalid under the Mahomedan law, and even though possession was given to the donees, as has been found by the trial Court in this case, that would not validate the deed of gift, as it gave undefined portions to the donees. Therefore, on this point the trial Court decided against the plaintiff and dismissed the suit.

2. On appeal, the learned District Judge has decided only one point, namely, as to whether the gift-deed being in favour of two persons whose interests are not denned was invalid, and secondly, whether the defect could be cured by a subsequent partition among the donees. He answered the first question in the affirmative and the second in the negative. He did not therefore make any finding on the other issues as the appeal could be disposed of on this point of law alone.

3. Thus, the only question that is argued in this appeal is whether under the Mahomedan law this deed of gift is valid or not. Both the lower Courts seem to have been pressed by an early ruling of this Court in the case of Sayad Valimia Alimia v. Gulam Kadar Mohidin (1869) 6 B.H.C.R. 25 where it was held that a gift of land made by a Mahomedan was invalid if the interest of each of the donees was not defined by the gift. The judgment in that case is very short, and does not discuss any texts or authorities. It simply says that the Court below had rightly found against the plaintiff on the ground that the interest of each of the donees was not defined by the gift, and as that was so, the ground of want of possession did not arise; but even then, the possession that was given to the donees was not such as would satisfy the requirements of the Mahomedan law. There is a subsequent case, viz., Rujabai V. Ismail Ahnted (1870) 7 B.H.C.R. 27. But that does not quite touch the point in dispute here. There is, however, a recent ruling of this Court in the case of Ebrahim Alibhai Akuji Vs. Bai Asi, where this question did arise, and it has been considered extensively by Mr. Justice Tyabji. There also the gift was to two persons of joint property, and the question was whether that deed of gift was valid, and it was held that if possession of the subject-matter of the gift was transferred to the donees after the declaration and acceptance of the gift, the gift was valid as from the time of the transfer. Various texts as well as previous authorities on this point have been discussed. It appears that there is a difference of opinion in the texts with regard to this point. There is one school of thought which is represented by Abu Hanifa, according to which a deed of gift to two persons jointly with undefined shares would be invalid, whereas according to the other school represented by the two disciples, Abu Usaf and Mahomed, it would be valid provided that joint possession was given, and Mr. Justice Tyabji says that where there is a difference of opinion, where the two disciples agree, then their opinion is generally followed in preference to Abu Hanifa, and where there is a difference of opinion amongst the authorities, the Court has the power to select that one which is most in consonance with justice. Accepting that text, I think the view which he has taken, namely, that the deed of gift to two persons jointly of undefined shares in the property is good in law if it is perfected by joint possession, is correct. There is a decision of the Privy Council in the case of (1889) L.R. 16 I.A. 205 (Privy Council) which supports that view. There the gift was only to one person of an undivided share in the property, and it was held that if the gift was accompanied by possession, it would not be necessary to go into the question as to whether the gift was invalid or not under the Mahomedan law. This case has been followed by the Privy Council in the case of (1907) L.R. 35 I.A. 67 (Privy Council) though the circumstances there were somewhat different. There is a previous decision of our Court in the case of Mahomed v. Bai Cooverbai (1904) 6 Bom. L.R. 1043 where the Privy Council case of Sheikh Muhammad Mumtaz Ahmad V. Zubaida Jan has been relied upon and it has been held that a gift of undivided property would be valid if possession was given and taken under such a gift. It is unfortunate that the case of Sayad Valimia Alimia v. Gulam Kadar Mohidin has not been referred to in the case of Ebrahim v. Bai Asi, although all the other

cases and texts have been discussed. But I do not think that the case of Sayad Valimia Alimia v. Gulam Kadar Mohiddin is in real conflict with the decision of the Privy Council, because all that that case lays down is that a gift of undefined shares to two donees is invalid. It does not decide the further question as to whether it would be valid or not if possession thereof had been delivered to the donees, and therefore, it is not a decision against the view that if possession of the gifted property had been given to the donee, that gift would be valid, even though it is a gift of an undefined share either to one or more donees. Therefore, I would prefer to follow the latest decision in the case of Ebrahim v. Bai Asi, supported as it is by the decision of the Privy Council in the case of Sheikh Muhammad Mumtaz Ahmad v. Zubaida Jen, and hold that this deed of gift would be valid if possession had been given to the donees.

4. The trial Court had made a distinct finding in the plaintiff's favour on the question of possession. Unfortunately the lower appellate Court confined itself to the consideration of the point of law and gave no decision on the other matters also. It would certainly have been better if the lower appellate Court had disposed of the appeal on all the points. It has been observed by the Privy Council that a Court of Appeal should ordinarily dispose of all the matters which arise in an appeal in order to obviate the necessity of a remand, and I think it would really result in a saving of time and money to the parties if all questions arising in an appeal are disposed of by the appellate Court at one time.

5. As the appellate Court has disposed of only this point of law, it is necessary that this case should go back to the lower appellate Court for findings on the remaining points arising in the appeal.

6. I, therefore, reverse the decree of the lower appellate Court and remand the case to that Court for disposal according to law in the light of this judgment. The appellant will get his costs of this appeal from the respondent, and the costs in the two lower Courts will be costs in the cause.

7. Leave granted to Mr. Kane's client, i.e., respondent No. 1, to appeal under the Letters Patent.

8. There was) a further appeal under Clause 15 of the Letters Patent.

John Beaumont, Kt., C.J.

9. This is an appeal under the Letters Patent against a decision in second appeal of Mr. Justice Divatia. The plaintiff sued to recover possession of certain immovable property, which she claims under a deed of gift in favour of herself and her brother made on March 9, 1920. She claims subsequently to have acquired her brother's interest in the property. The terms of the gift appear to constitute joint tenancy as between herself and her brother, and the document recites delivery of possession to the donees and this was held to be proved by the trial Judge.

10. The learned Subordinate Judge, who tried the case, held against the

inclination of his own opinion, but in deference to authority, that the deed of gift was invalid on the ground that it was a gift of property to two persons without dividing it between them, which he held to be invalid according to Mahomedan law under the doctrine of musha'a. The supposed rule is stated at p. 121, paragraph 135, of Sir Dinshah Mulla's book on Mahomedan Law, 10th edn., in these terms:?

A gift of property which is capable of division to two or more persons without dividing it is invalid, but it may be rendered valid if separate possession is taken by each donee of the portion of the property given to him.

The authority supporting that proposition, and on which the trial Court relied, is the case of Say ad Valimia Alimia v. Gulam Radar Mohidin (1869) 6 B.H.C.R.25. The judgment is given very shortly by Couch C.J. He says "The Court below has correctly found against the plaintiff, on the ground that the interest of each of the donees was not defined by the gift. That being so, the ground of want of possession does not arise." He then indicated his opinion that the possession of the donees was not proved.

11. In appeal, the District Judge confirmed the decision of the trial Court, but in second appeal Mr. Justice Divatia overruled the decision of the District Judge, and this appeal is brought from Mr. Justice Divatia's decision.

12. There are authorities, later than Sayad Valimia Alimia v. Gulam Kadar Mohidin, which deal with this question. In the case of Rujabai v. Ismail Badesaheb Ahmed (1870) 7 b.h.c.r. 27 Sir Charles Sargent J. suggested that the question really turned on whether a gift of undivided property was a gift in joint tenancy or tenancy in-common. He held that as in that case the deed of gift made the donees joint tenants, it was good. The question was also discussed by the Judicial Committee of the Privy Council in the case of (1889) L.R. 16 I.A. 205 (Privy Council) . That was a case of a gift of undivided property between certain persons. But their Lordships in dealing with the rule of musha'a held that even if the gift was in its inception invalid, it was nevertheless rendered effective by possession having been taken by the donees, under it, and they say that the doctrine relating to the invalidity of gifts of musha'a is wholly unadapted to a progressive state of society, and ought to be confined within the strictest limits. If a gift which is invalid in the first instance is held to be validated by possession, the rule ceases to have any-considerable effect, because a gift, which is not completed by possession, would be an incomplete gift, and the Court never enforces an incomplete gift.

13. The question then came before Mr. Justice Tyabji in the case of Ebrahim Alibhai Akuji Vs. Bai Asi, . The learned Judge discussed the texts and authorities in some detail, but unfortunately the case of Sayad Valimia Alimia v. Gulam Kadar Mohidin was not referred to. The conclusion, which the learned Judge came to, was that at the present day in India under Mahomedan law a gift to two or more than two persons of land, whether as joint tenants or as tenants-in-

common, if completed by possession, is valid, and I think myself that that opinion is right, although it is not strictly necessary to go so far as that in the present case, which is one of joint tenancy. Mr. Justice Divatia followed the decision of Mr. Justice Tyabji, and I think that he was correct in doing so.

14. The appeal must, therefore, be dismissed with costs.