

(1920) 06 CAL CK 0049
In the Calcutta High Court

Samsul Nehar Bibi

APPELLANT

Vs

Moulvi Mohiud-din-Ahmad and Others

RESPONDENT

Date of Decision : 03-06-1920

Acts Referred:

Citation : AIR 1921 Cal 225 : 59 Ind. Cas. 355

Hon'ble Judges : Asutosh Mookerjee, Acting C.J.; Ernest Fletcher, J

Bench : Division Bench

Judgement

Asutosh Mookerjee, Acting C.J.

1. These are two appeals by the two defendants in a suit for recovery of joint possession of land and for partition after such recovery.
2. The title of the plaintiff is based upon a gift from the true owner, dated the 7th September 1915. It has been found that, at the time when the gift was made, the owner was not in possession as he had been dispossessed by the first defendant who held adversely to him. The question for consideration is, whether, in these circum-stances, the plaintiff acquired a good title under the Muhammadan Law.
3. The Subordinate Judge has held that as the proprietor could transfer only an actionable claim, the gift of that actionable claim was valid because possession of the claim in question could not actually be transferred; in other words, that under such a gift the plaintiff has become entitled to recover the property in the same way as the original owner might have done. In our opinion, this conclusion is based upon an erroneous view of the Muhammadan Law on the subject.
4. The rule of the Muhammadan Law on the subject of gifts of property out of possession is well-settled. Where the subject of gift being some kind of incorporeal property or an actionable claim, is not susceptible of physical possession, the gift may be completed by any appropriate method of transferring all the control that the subject-matter admits of. But the ownership of tangible property, of which the donor claims to be entitled to the actual present

possession, cannot be transferred by way of gift, unless and until the donor obtains and delivers possession, or enables the donee to obtain possession. The decision of the Subordinate Judge is initiated by an assumption which is fundamentally erroneous, namely, that what was transferred was an actionable claim. What the proprietor intended to transfer was his right, title and interest in an Immovable property which was the subject-matter of a dispute. The ownership of this tangible property could be transferred, provided the owner was in actual present possession at the time when the gift was made. As he was not in such possession, he had to obtain and deliver possession; in other words, he should have instituted a suit, recovered the property from the adverse possession, and thereafter made a gift in favour of the donee. This is clear from a precedent which is to be found in Macnaghten's Muhammadan Law, page 201, case VI. The question there put was as follows: A person executed a deed of gift in favour of his nephew, conferring upon him the proprietary right to certain lands, of which he (the donor) was not in possession, but to recover which he had brought an action, then pending, against his wife. By the same deed he made over to him certain other landed property of which he was possessed. About a month after executing the deed, the donor died, and the donee in virtue of the gift, lays claim to the litigated property, was there a valid gift? The answer was in these terms: "The gift of a thing not in the possession of the donor during his lifetime is null and void, and the deed containing such gift is of no effect because in cases of gift seizin is a condition. Gift is rendered valid by tender, acceptance and seizin, but in gift, seizin is necessary and absolutely indispensable to the establishment of proprietary right. According to the Hidaya-- Gifts are rendered valid by tender, acceptance and seizin. The Prophet has said, a gift is not valid without seizin. So also, if the thing given be pawned to or usurped by a stranger." That is exactly the case now before us so also in *Shurti Vigaya*: "A gift is perfected by complete seizin. As the gift, therefore, is null, the claim of the donee is inadmissible, and the deed is invalid, as far as regards the lands of which the donor was never possessed. But, with respect to the other lands conveyed at the same time, the donee is entitled to them, if the donor put him into possession. If, however, the donor died, without conferring possession, the claim of the donee to them also is inadmissible." This precedent was followed by Mr. Justice Mahmood in the case of *Rahim, Bakhsh v. Muhammad Hasan* (1888) 1 A.W.C. 266 : 13 Ind. Jur. 152 : 6 Ind. Dec. (N.S.) 429.

5. Reliance was placed in the Court below upon the decision of the Judicial Committee in the case of *Mahomed Buksh Khan v. Hosseini Bibi* 15 C. 634 (P.C.) : 15 I.A. 81 : 12 Ind. Jur. 291 : 5 Sar. P.C.J. 175 : 7 Ind. Dec. (N.S.) 1040. That case, however, is clearly distinguishable and is, in fact, based upon the case in Macnaghten's Muhammadan Law, at page 207. In the case before the Judicial Committee the mother had, within sixteen days after her daughter's death, executed and registered a deed of gift, transferring her share of the inheritance to that daughter's infant children and authorising them to take possession by their father as guardian (which could be done, and apparently was done, without

any judicial decree) and it was held that the gift was not vitiated by the fact of the donor herself not having had actual possession of the share at the date of execution.

6. Reference was also made to the decision in *Ismul v. Ramji Sambhaji* 23 B. 682 : 1 Bom. L.R. 177 : 12 Ind. Dec. (N.S.) 456 which is an authority for the proposition that, under the Muhammadan Law, a registered deed of gift is not valid if it is never perfected by possession. The Muhammadan Law requires that the donor should be in actual or at least constructive possession and that he should give actual or at least constructive possession to the donee. This case is of no assistance to the respondent. In the case before us the donor was not in actual possession nor could he be said to be in constructive possession, as the first defendant who was in actual possession held adversely to him, in other words, he was neither himself in possession nor in possession through another, his possession was neither actual nor constructive. In our opinion, it is plain that the gift was not perfected by delivery of possession, and the plaintiff has not enforceable title.

7. The result is, that these appeals are allowed and the suit is dismissed with costs in all the Courts.

Fletcher, J.

8. I agree.