

(1892) 08 MAD CK 0006
In the Madras High Court

Sharifa Bibi alias Beeju Bibi	APPELLANT
Vs	
Gulam Mahomed Dastagir Khan Sahib and Others	RESPONDENT

Date of Decision : 30-08-1892

Acts Referred:

Citation : (1893) 3 MLJ 14

Hon'ble Judges : Wilkinson, J; Muthusami Aiyar, J

Bench : Full Bench

Judgement

Muthusami Aiyar, J.—This appeal relates to the immovable property left by appellant's father, named Sheriff Mahomed Khan Sahib alias

Syed Miyan Sahib, a Mittadar at Dharampuri in the District of Salem. He died on the 6th March 1886, leaving him surviving a widow, three sons

and three daughters including the appellant. Under the Mahomedan law which governs the parties, her distributive share is $7\frac{7}{2}$ th part, but on the

27th February 1886, her father prepared two schedules of his immovable properties valued at Rs. 20,000 and 7,000 respectively and gave the

one to his three sons and the other to his three daughters by documents I and II. Document I which was executed in favor of the sons is attested by

all the daughters and document II executed in favor of the daughters is attested by all the sons. They purport to have been executed in order to

prevent disputes among the sons and daughters after the death of the Mittadar who was at the time of their execution between 60 and 70 years of

age. The widow to whom no share is given does not appear to have taken exception to the gifts, and the appellant's two sisters sold what was

given them under document II to their brothers for Rs. 4,000 each on the 29th April 1887 and the 2,9th June 1887 respectively. For several years

previous to his death the late Mittadar had been suffering from chronic asthma, and about the end of February, pneumonia supervened and proved fatal in the course of a week. The appellant's case is that the distribution made by her father is illegal and does not bind her. She impugns documents I and II on four grounds, viz., (i) that consent given thereto was procured by undue influence and misrepresentation, (ii) that her consent during her father's life-time has no legal effect, (iii) that the gifts made by him were made during his last illness and they could take effect only as death-bed gifts and (iv) that as such, they are repugnant to the rules of Mahomedan law. As regards undue influence and, fraud, the judge found that they were not proved. He found, however, that the gifts were made during the late Mittadar's death-illness. He was also of opinion that although under the Mahomedan law consent given by an heir to a death-bed gift was liable to be annulled after the donor's death, yet appellant did not revoke her consent within a reasonable time. He considered further that objections taken on appellant's behalf on the ground of Mushaa or confusion of the subject of gift and for alleged want of seizin were not tenable and in the result he disallowed appellant's claim so far as it related to immovable property. Hence this appeal.

2. The learned judge found that there was no undue influence and that the gifts were made in apprehension of death, during the donor's death-illness and proceeded as follows:

3. The next question which is raised for our decision is whether the gifts are valid under Mahomedan law. It is first urged that the consent necessary to validate death-bed gifts is consent given by the heirs after the donor's death, and that the consent given during his life has no legal effect. It is no doubt true that the consent of the heirs is intended to operate as a renunciation and that the right renounced must be a vested right, but it does not follow that the consent given during the donor's life and not annulled after his death and before possession is taken is not equally efficacious. The opinion of the judge is in accordance with the Hedaya in which it is stated, "Their (heirs) consent during the life-time of the testator is not regarded, for this is an assent previous to the establishment of their right ; they are, therefore, at liberty to annul it on the death of the testator. It is otherwise where the consent is given after the event, for as this is an assent subsequent to

the establishment of their right they are not at liberty to annul it.

The principle seems to be this, that the consent given during the donor's life is imperfect because the right of the heirs is then inchoate and it

becomes perfect when it is not revoked after the inchoate right becomes a vested interest. In *Kutti Umah v. Biathu Umah* 2 M. H. C. E 350 there

was no assent to the bequest after the testator's death, and there was a positive assertion that the assent was refused. In the case before us, it is

clear from Exh. VIII which is a statement relating to the road-cess due on the Nurhalli Mitta given to the daughters, that appellant and her sisters

signed it on the 10th March. This conduct is inconsistent with an intention on their part to repudiate the gift. Again, the evidence does not disclose

any repudiation during the forty days for which the ceremonies of the deceased Mittadar appear to have continued. Again, in the letters D to G

4. written between May and November 1886, the appellant applied for pecuniary aid from 1st respondent in connection with the marriage of some

of her children. She also alluded to promises made to give her Rs. 5,000 in cash, a house and some cattle and to provide funds for the marriages of

her children. But there is no evidence in support of such promises: nor is there anything to show that she revoked her assent to the arrangement

made by her father and intimated her intention to insist upon her legal share.

5. The next objection is that the gifts are bad because there was no transfer of possession. I agree with the Learned Counsel for appellant that as

observed in Bailie's Mahomedan Law, page 542, that a gift by a sick person is not a legacy for the purpose of regarding it as complete without

transfer of possession but that it is a gift of contract necessarily subject to all the conditions of gift. I may, however, add that when land is occupied

by tenants or ryots as in a Zamindari or Mitta, a request to them to attorn to the donee is a sufficient delivery to complete the gift and a formal entry

on the land is not indispensable, the principle being that the intention to transfer possession and to divest himself of all control over the subject of

the gift must be unequivocally manifested by some overt act done towards the execution of such intention. See *Shaik Ibham v. Shaik Suleman* I.

L. R 9 B 146 and I. L. R 10 C 1 112. In the case before us the sons have been in possession of the properties mentioned in document I from the

date of its execution. Document VII proves a direction by the late Mittadar to all

the ryots in the Mitta to accept the donees as their landlords and to act thenceforward under their orders. There is also the evidence of the 1st respondent that appellant collected rents from the Nurhalli Mitta at least for some time, and Exh. VIII lends some support to his evidence. The muchilkas executed by several ryots to the sons indicate a transfer of possession during the late Mittadar's life-time. I am therefore unable to attach weight to the objection that there was no transfer of possession.

6. The next objection taken on appeal is that of Mushaa or confusion as regards the subject of gift. It is true that there were two joint gifts in this case, one to the three sons and the other to the three daughters without discrimination of their shares. It is stated however by Baillie that although Mushaa in this form renders a gift invalid according to Abboo Huneefa, yet according to both his disciples the gift is valid and that the opinion of the latter prevails against that of the former in temporal matters. The doctrine of Mushaa has also been considered by the Privy Council in *Sheikh Muhammad Mumtaz Ahmad v. Zubaida Jan L. R 16 I. A 205*, and their lordships observe that "the doctrine of Mushaa is wholly unadapted to a progressive state of society and ought to be confined within the strictest rules ;" see also *Mullick Abdool Guffoor v. Muleha I. L. R 10 C 112*. The objection, therefore, that there was a joint gift to three persons must be disallowed.

7. Another objection is that the donor held some of his lands under joint pattas with others, and that there is Mushaa regarding them. But the evidence shows that the late Mittadar had separate possession of those lands. The next objection is that a house set apart for travellers is included in the properties given to the sons. But, as observed by the judge, there is no evidence of dedication. Nor do I think that the objection vitiates the gift of the other properties.

8. I am, therefore, of opinion that the appeal cannot be supported and must be dismissed with costs. As regards the memorandum of objections, I also think that costs ought to have been assessed in proportion to so much of the appellant's claim as was allowed and disallowed. I would allow the memorandum of objections with costs and modify the decree as stated above.

Wilkinson, J.

9. ***** The main contention is that the deeds are repugnant to Mahomedan

law, and the following objections are taken to their validity.

10. First, it is argued the gift being a death-bed gift must be viewed in the light of a legacy and cannot take effect for more than a third of the property.

11. The judge has found that the donor was labouring under a fatal disease at the time he made the disposition in question and that he made the disposition in apprehension of a fatal issue to his sickness. He therefore held that the disposition was invalid as a gift but that, as the heirs gave their consent to it, it operated as a will and was valid and binding on plaintiff.

12. It was contended by the respondents that the finding of the judge as to the nature of the gift could not be sustained and that the deceased was not at the time when he executed Exhibits I and II suffering from the disease of which he died.

13. There is evidence to show that the deceased who had long suffered from asthma died of pneumonia brought on by a chill caught on the 28th February. The judge conceded that the cause of death was pneumonia but discredited the evidence as to the cause of the attack and I think rightly.

If the accident which brought on the chill had really happened on the 28th February, better evidence than that adduced would have been

forthcoming. The deceased was an influential Mittadar with many friends who could not but have been aware of an accident, if any had happened

to him, which caused his death within a week ; yet not one has come forward as a witness.

14. I was at first inclined to doubt whether there was sufficient evidence to make out the requisites of a death-bed gift, in other words, whether at

the time when he executed the deeds of gift the donor was under an immediate apprehension of death. But on further consideration I think the

judge was right. The documents themselves show that the executant was under the apprehension of death and the despatch of the Takid and

proclamation the same day is evidence that the donor was anxious that the disposition should be earned out at once. His anxiety was no doubt

prompted by the state of his health which, according to the evidence, was such that he must have known that it was highly probable that death

would be result of his illness.

15. The gift then being a death-bed gift is not valid unless the heirs gave their

assent and possession was taken. I have no doubt that possession was transferred to the donees. A proclamation [Exh. VII] announcing the transfer of ownership was sent on the 27th February to the Mitta karnam with an order [Exh. X4] to make the same known to the ryots of Reddihalli and Nurhalli and the karnam deposes that proclamation was duly made by beat of tom-tom. On the following day certain ryots executed muchilkas [Exh. IX] in favor of defendants 1 to 3, the daughters collected rent from their tenants, and submitted the road-cess statement for Fasli 1295 to the Tahsildar (VIII) on the 15th March.

16. After discussing the evidence as to undue influence as regards consent of plaintiff the learned judge proceeds:

I think therefore that the Lower Court was right in holding that plaintiff never repudiated her consent. The consent necessary to validate a legacy may be express or implied (Macnaughten, page 245). In this case the plaintiff gave her express consent prior to the death of the testator, and her subsequent assent may fairly be implied from her acquiescence in the arrangement for over two years. There can be very little doubt that if the 1st defendant had not delayed the settlement of her claims to her father's movable property this suit would never have been heard of.

17. It is then contended that the gift or legacy is void inasmuch as the particular share of each donee is not specified. This point is concluded by the decision of the Privy Council, (Muhammad Mumtaz Ahmad v. Zubaida Jan I. L. R 11 A 460) that possession taken under an invalid gift of Mushaa transfers the property. I have already found that possession was given. The donor divested himself of all right in the property and the gift was complete.

18. With reference to the contention that property was included in Exh. I in which the donor's share was not specified it is only necessary to refer to Exh. I itself and to the evidence of the defendant's 4th witness, the karnam, who deposes that though the patta of the land was joint, Syed Mujan had separate enjoyment of his share.