

(1892) 08 MAD CK 0013
In the Madras High Court

Sharifa Bibi

APPELLANT

Vs

Gulam Mahomed Dastagir Khan and Others

RESPONDENT

Date of Decision : 30-08-1892

Acts Referred:

Citation : (1893) ILR (Mad) 43

Hon'ble Judges : Wilkinson, J; Muttusami Ayyar, J

Bench : Division Bench

Judgement

Muttusami Ayyar, 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 Dharmapuri 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 Muhammadan law which governs the parties, her distributive share is 7/12 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 favour of the sons, is attested

by all the daughters, and document II, executed in favour 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 29th 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 Muhammadan 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 Muhammadan 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. As observed by the Judge, there is no proof of undue influence or misrepresentation. It is conceded by appellant's counsel that there is no direct evidence, but it is argued by him that undue influence may be presumed from the following circumstances, viz., (i) that the documents in question were executed on a sudden and in great haste, (ii) that the sons were then living with their father, (iii) that their evidence as to the state of his health on the 27th February is untrue, (iv) that the price paid to appellant's sisters for their shares is Rs. 4,000 each, whilst the value of the allotment made for the three daughters together is, according to Exhibit II, only Rs. 7,000, (v) that appellant's eldest brother was the de facto manager of the family under the general power of attorney, Exhibit A, and (vi) that appellant is a gosha lady. Our attention is drawn by respondents' pleader to the special regard which, the late mittadar had for appellant as the mother of several children, to her having lived with her husband as part of the deceased's family for several years, to the presence of her husband in the family when she attested the documents, and to her father's desire to

prevent dissensions in the family after his death. After giving my best attention to all the circumstances, I see no sufficient reason to say that either the father or the daughter acted otherwise than bond fide, the former in executing the documents and the latter in attesting document I. The arrangement evidenced by the documents was in the nature of a family arrangement made by the father with the consent of his sons and daughters in view to preserve peace in the family. It is in substance a distribution made in anticipation of death so as to avoid each of the six children having a small share in each village comprised in the father's mitta and to group the villages into two mittas, one for the benefit of the sons and the other for the benefit of the daughters. It may well be that the inequality between the estimated value of the daughters' allotment and of their legal share was waived at the time. There is no evidence as to the real value of the villages or that appellant's 1/3rd share under document II is not likely to fetch Rs. 4,000 as that of her sisters. However this may be, there is no foundation for a presumption of fraud or undue influence, whilst the circumstances point to a distribution made with the consent of all the daughters to preserve peace in the family.

3. It is also in evidence that there was no cordiality between appellant's husband and her eldest brother. Appellant's position as a gosha lady has no significance in a family arrangement made with the consent of the whole family and with the knowledge of her husband. Nor is it safe to impute maid fides to the father, because the sons made untrue statements in their evidence as to the state of his health when he executed the documents.

As regards the contention that mere attestation is not consent, the question whether it is evidence of consent or only a formal mode of authentication must depend upon the special circumstances of each case. In the case before us, there are several reasons for holding that this attestation of the heirs was regarded by all the parties concerned as evidence of consent. In the first place, the appellant refers to her connection with the arrangement in her plaint as a participation therein. Again, there is the fact that all the daughters were invited to attest document I, whilst all the sons attested document II. The appellant did not choose to explain what pressure was brought to bear upon her, what was the nature of the misrepresentation alleged to have been made, and whether she consulted her husband or not. It appears further that the stamp papers on which the

documents are engrossed were purchased on the 23rd February, and that their execution was not so unpremeditated as is alleged for appellant.

4. The next contention pressed upon us is that of respondents' pleader, viz., that the documents in question were executed by the late mittadar

when there was no apprehension of death, and that the Judge is in error in treating the gifts as deathbed gifts. The respondents' case on this point is

that their father was in good health on the 27th February, that he fell into a stream and took a chill on the 28th, and that pneumoniaset in since and

ultimately proved fatal. The evidence of their witnesses 1 to 6 and of the Sub-Registrar is relied upon in support of the contention, but there are

several circumstances which reduce the weight due to the evidence. Documents LI and M and N indicate that there was anxiety and alarm

regarding the late mittadar's health about the 16th February. Nor is it possible unless there was serious illness to account for the documents being

executed and registered on the same day and for intimation of their execution being sent at once to the mitta karnams and raiyats. Though drafts

are alleged to have been prepared some time before, yet none are produced in evidence. It was also stated that the late mittadar had desired to

make an arrangement for some months prior to his death, but postponed doing so owing to the absence of his third son at Mangalore. But no

letters said to have been written to his relatives at Mangalore are produced. Nor was any relative of his examined as a witness. Again, the evidence

neither of the Apothecary nor of the Sub-Registrar indicates with precision the day on which pneumonia supervened. Nor was there any necessity

for the father procuring the consent of all his sons and daughters if he was in good health. The story of a trip to his village in a cart on the 28th and

of his fall into a stream on his way back does not appear to be probable, when it is remembered that he was unable to attend the Sub-Registrar's

Office to register the documents on the 27th February. The probabilities of the case point to a belief in the family on the 27th February 1886 that

something serious was impending, and I am not prepared to disturb in appeal the finding of the Judge.

5. The next question which is raised for our decision is whether the gifts are valid under Muhammadan 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 *Cherachom Vittil Ayisha Kutti Umah v. Viathu Umah* 2 M.H.C.R. 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 Exhibit VIII, which is a statement relating to the road-cess due on the Nurhulli mitta given to the daughters, that appellant and her sisters signed it on the 15th 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 written between May and November 1886, the appellant applied for pecuniary aid from the first 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.

6. 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 Baillie's Muhammadan Law, p. 542, 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 raiyats 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 Ibhrum v. Shaik Suleman* ILR

9 Bom. 146 and *Mullick Abdool Guffoor v. Muleka* ILR 10 Cal. 1112. 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 raiyats in the mitta to accept

the donees as their landlords and to act thenceforward under their orders. There is also the evidence of the first respondent that appellant collected

rents from the Nurhalli mitta at least for some time, and Exhibit VIII lends some support to his evidence. The muchalkas executed by several

raiylats to the sons indicate a transfer of possession during the late mittadar's lifetime. I am, therefore, unable to attach weight to the objection that

there was no transfer of possession.

7. 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 *Sheik*

Muhammad Mumtaz Ahmad v. Zubaida Jan ILR 11 All. 460; L.R. 16 IndAp 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. Muleka*

ILR 10 Cal. 1112. The objection, therefore, that there was a joint gift to three persons must be disallowed.

8. 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.

9. 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.

10. The plaintiff-appellant is the daughter of one Syed Miyan Sahib alias Sherif Mahomed Khan Sahib, who died on the 6th March 1886 leaving a widow (sixth defendant), three sons (defendants 1 to 3), and three daughters (the plaintiff and defendants 4 and 5).

11. On the 27th February 1886, Syed Miyan executed two deeds of gift (Exhibits I and II), whereby he conveyed to his sons the whole of Reddihalli mitta with his putcat lands and his houses, shops, etc., in the town of Dharmapuri, and to his daughters his ith siaare in the mitta of Nurhalli.

12. The plaintiff seeks for a declaration that the said deeds of gift are null and void on the ground that they were made under the undue influence of defendants 1 to 3 during the last illness of the donor, that they are null and void under Muhammadan law, and that her participation therein was the result of misrepresentations dishonestly made to her by defendants 1 to 3.

13. The District Judge has found that undue influence and fraudulent misrepresentation have not been made out and that the deeds are not repugnant to Muhammadan law, and has therefore dismissed the plaintiff's suit so far as her claim to a share in the Immovable property of her father is concerned.

14. On appeal it is argued that the gifts are void because of undue influence and as contrary to the rules of Muhammadan law.

15. It is admitted that there is no direct evidence in support of the plea of undue influence, but it is contended that it was incumbent upon the defendants to show that the transaction was fair and above board, and that there are indications of undue haste and of absence of consent which

are sufficient to raise the presumption that the deeds were executed in consequence of the undue influence of the sons upon their father.

16. I do not think that the evidence raises any presumption of undue influence. The stamp paper for the deeds of gift was purchased on the 23rd

February, showing that it was then the intention of the deceased to execute the deeds. The plaintiff's second witness deposes that Syed Miyan

consulted his three daughters before the draft deeds were drawn up, and that they gave their consent, which is also evidenced by their signatures in

Exhibit I. The plaintiff herself has not come forward to deny that she gave her consent or to show under what circumstances she was induced to

sign Exhibit I. The plaintiff's husband has deposed that he was not consulted and that when asked to attest he refused, but his statement is that of

an interested witness and is entirely uncorroborated. It was not incumbent upon the donor to consult or to obtain the consent of his son-in-law, and

the fact that plaintiff's husband was present when the Sub-Registrar came to the house and raised no objection goes far to negative the present

plea of undue influence.

17. But the main contention is that the deeds are repugnant to Muhammadan law, and the following objections are taken to their validity.

18. 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.

19. 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.

20 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.

21. 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.

22. 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 carried 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.

23. 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 [Exhibit VII] announcing the transfer of ownership was sent on the 27th February to the mitta

kurnam with an order (Exhibit X-4) to make the same known to the raiyats of Reddihalli and Nurhalli, and the kurnam deposes that proclamation

was duly made by beat of tom-tom. On the following day certain raiyats executed muchalkas (Exhibit IX) in favour of defendants 1--3, the

daughters collected rent from their tenants, and submitted the road-cess statement for fasli 1295 to the Tahsildar [Exhibit VIII] on the 15th March.

24. There is no evidence to show that plaintiff's consent was the result of misrepresentation or that it was withdrawn or repudiated until this suit

was instituted in April 1888. It is argued that her letters [Exhibits B,E and F] and her conduct in leaving the house after the 10 days' ceremonies

were completed show that she withdrew her consent. I fail to find anything in her conduct or in her letters to show that she in any way repudiated

the disposition made by her father. Her leaving the house six weeks after her father's death was in all probability due to the ill-feeling which has

long existed between her husband and her eldest brother. Her letters show that she was anxious to get her daughters married, and wanted

pecuniary assistance from first defendant, and her share in her father's moveable property. Her reference to the "" directions of her deceased father

seems to me to indicate that subsequent to the execution of Exhibits I and II her father had intimated to the first defendant that he wished plaintiff,

who had a large family, and who had from the time of her marriage continued to reside in her father's house, to receive a liberal share of his

moveable property. The first defendant admits that she asked him for a house and that he promised to consult with his brothers and give her the

house in Dharmapuri as a matter of favour. The evidence given by third witness as to the admission made by second defendant which supports the

above view is more probable than the evidence of plaintiff's husband (fifth witness) on this point. 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 expressed or implied (Macnaghten, 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 first defendant had not delayed the settlement of her

claims to her father's moveable property; this suit would never have been heard of.

25. 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 in Muhammad Mumtaz Ahmad v. Zubaida Jan ILR 11 All. 460; L.R. 16 IndAp 205, 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.

26. With reference to the contention that property was included in Exhibit I, in which the donor's share was not specified, it is only necessary to

refer to Exhibit I itself and to the evidence of the defendants' fourth witness, the karnam, who deposes that, though the patta of the land was joint,

Syed Miyan had separate enjoyment of his share.

27. As to the inclusion of endowed property, I concur with the Judge that there is

no evidence of dedication. The use of the house 17 or more

years ago as a choultry (plaintiff's third witness) does not, if true, show that Syed Miyan had divested himself of his right to it.

28. The appeal, therefore, fails and is dismissed with costs.

29. The respondents have put in a memorandum of objections claiming costs. The District Judge disallowed them, because he found that

defendants had not made out their allegation that plaintiff was in possession of certain moveables. This was a good ground for ordering defendants

to pay costs on the 7/72th share of the moveables decreed, but as, to use the Judge's own words, plaintiff failed to show that she had any case at

all with regard to the Immovable property claimed, she should have been ordered to pay costs on so much of her claim as was disallowed. I would

modify the decree of the lower Court accordingly and allow the memorandum of objections with costs.