

(1935) 12 MAD CK 0025
In the Madras High Court

Sharof Ali Abdul Ali Shat

APPELLANT

Vs

Safiaboo and Others

RESPONDENT

Date of Decision : 04-12-1935

Acts Referred:

Citation : AIR 1936 Mad 432

Hon'ble Judges : Pandrang Row, J

Bench : Division Bench

Judgement

Pandrang Row, J.—This is an appeal from the decree of the Additional Subordinate Judge of South Kanara, dated 15th September 1930, dismissing an appeal from the decree of the District Munsif of Mangalore dated 23rd January 1929, in O.S. No 549 of 1927 which was a suit for partition by one of the heirs of the late Abdul Ali Rajah Ali Shat who died on 30th January 1924. It was recited in the plaint that there was a gift-deed executed by the deceased Rajah Ali on 11th January 1924 by which he purported to give all his properties to defendants 1 and 3, that is to say, two of his heirs, and it was alleged in the plaint that this deed was void being a gift made during deathbed illness. The defendant 1 sided with the plaintiff and in fact he was the only witness on the side of the plaintiff and his case was that the deed was not valid for the reason given in the plaint. The suit was resisted only by defendant 3 so far as the validity of the deed was concerned, and it was found by both the Courts that the deed was one of gift made during the death-bed illness of the donor and was therefore invalid. It was not contended in either of the Courts below that even, if the gift was made during the death bed illness of the donor, it was valid to the extent of one-third of the properties of the donor. The case proceeded in both the Courts below on the basis that the deed was either wholly valid or wholly invalid, and the only question considered by the Courts below as regards the validity of the gift-deed Was whether it was executed during the death-bed illness of the donor. This being a question of fact, the concurrent findings of the Courts below against the contentions of defendant 3 who is the appellant in this second appeal cannot be attacked in second appeal and no attempt has been made to attack that finding.

2. The only point argued in this appeal on behalf of the appellant is that the gift-deed should have been held to be valid to the extent of one-third of the properties of the donor and reliance was placed on the decision in *Khurabed Hussaia v. Faiyaz Hussain* 1914 36 All 289, which was followed in a subsequent decision of the same High Court in *Musi Imran v. Ibne Hasan* 1933 31 ALJ 53. It has been argued on the other side at some length that this decision is not correct and is not consistent with the decisions of the same High Court in *Fahmida Khartum v. Jatri Khanum* (1908) 30 All 153 and *Amrit Bibi v. Mustafa Hussain* 1924 46 All 28, and also with the general principle that gifts made during death-bed illness are subject to the same restrictions or limits as testamentary dispositions, and reference has been made to several text books of Mohamedan Law in support of this contention. It is, however, in my opinion not necessary to decide in this appeal the question whether the decision in *Khurabed Hussaia v. Faiyaz Hussain* 1914 36 All 289 is right or not, for it is clear that, unless the appellant alleges and proves that the deceased donor was governed by the Ithura Ashari School among the Shias, he is not entitled to succeed in his contention. The plaintiff respondent's advocate asserts that the deceased belonged not to this school but to the other school among the Shias, namely, the Ismaili school. The appellant's advocate was asked specifically to state whether his contention was that the deceased belonged to the Ithma Ashari school and he was not able for want of instructions to give any answer on this point.

3. In view of the absence of any assertion on the part of the appellant at any time, and even by his advocate during the hearing of the appeal to the effect that the deceased was governed by the Ithma Ashari school, or was not governed by the Ismaili school of Shia Law and also in view of the fact that the contention that is now raised in this appeal, namely, the deed is valid to the extent of the one-third of the properties, was not raised in either of the Courts below, I am of opinion that the appeal must be decided on the basis that the deceased belonged to the Ismaili school of Shiah Law. It is clear from the extract given in Tyabji's *Principles of Mahomedan Law*, Second Edition, at pp. 787 and 788, from the *Daayam-ul-Islam* which is the most authoritative work amongst the Ismaili school that a gift made during death-bed illness by a person governed by this school of law is not valid to any extent when it is made to some of several heirs to the exclusion of other heirs. In fact on this point this school of Shia law lays down the same rule as the Hanafi law. It follows therefore that the contention raised in this appeal cannot be accepted because the school of law by which the deceased was governed was one according to which any gift made during the deathbed illness of the donor to some only of his heirs to the exclusion of his other heirs is not valid to any extent, not even to the extent of one third of his properties. It follows therefore that the decree appealed from is right and that this second appeal must fail. It is accordingly dismissed with costs.