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Aug 4.

AMINA' BIBI', wife of Muhammad Ismaél
Dalvi Plaintiff.

KHATIJA' BIBI', widow of Muhammad Ibráhim
Gujaráti,..... Defendant.

*Muhammadan Law—Hibá—Gift to Wife—Seisin and Acceptance—
Possession.*

A Muhammadan husband executes a "*hibá*" or deed of gift without consideration in favour of his wife, comprising a house in which they are residing at the time, with its furniture and two other houses. He at the same time delivers the *hibá* and the keys of the houses to his wife, quits the house of residence, leaving her in possession of the same.

Held—that the requirements of Muhammadan Law with regard to gifts without consideration, viz., acceptance and seisin on the part of the donee, and relinquishment on the part of the donor, have been complied with, though the husband shortly afterwards returns to the house, resides there with his wife till his death, and receives the rents of other parts of the property comprised in the *hibá*. The continued occupation or residence and receipt of rents are in such circumstances to be referred to the character which the donor bears of husband, and to the rights and duties connected with that character.

THE plaintiff stated that one Muhammad Ibráhim Gujaráti died intestate on the 19th day of March 1863, possessed of moveable and immoveable property within the Court's jurisdiction; that he left surviving him the defendant, his widow, and the plaintiff, his niece, his only heirs and next of kin according to Muhammadan law; that, according to Muhammadan law, the defendant was entitled to one-fourth only of her husband's estate, and the plaintiff to the residue; and that the defendant had taken possession of the whole of the intestate's estate, and was converting and applying the same to her own use, and had refused to account for the same to the plaintiff or make over her share. The relief prayed was as follows:—that accounts might be taken of the intestate's estate and effects come to the hands of the defendant, and of the debts and funeral expenses of the intestate; that the plaintiff might be declared entitled to three-fourths of the residue of the estate, and the defendant to the remaining one-fourth part, and that the same might be divided between them accordingly; and for a receiver.

The issues in the case were settled as follows:—(1) Whether the intestate, on the 18th of December 1854, by *hibá*, or deed of gift, made over the whole of his moveable and immoveable property, or either of them, to the defendant. (2) Whether, as alleged in the third para. of the plaintiff, the defendant

is entitled to only one-fourth of her deceased husband's estate, and the plaintiff to the residue thereof. (3) Whether, assuming such deed of gift as in the first issue mentioned to have been made, it was valid and operative in Muhammadan law against the plaintiff. The suit came on for hearing on the 26th of April 1864, before SAUSSE, C. J., and was heard on that day and on the 29th and 30th following.

Bayley and Dunbar for the plaintiff.

White and Marriott for the defendant.

Defendant's counsel opened the case, the burthen of proving the issues being considered to lie on the defendant. The evidence was mainly directed to proving the circumstances attending the execution by the intestate Muhammad Ibráhim Gujaráti in favour of his wife, the defendant, of a *hibá* or deed of gift in the Persian language, and dated the 18th of December 1854. The instrument appeared to have been signed by the deceased, and attested by four persons and the Moulvi, who framed the instrument from instructions given by the deceased, and three of the attesting witnesses were examined for the defendant. The property particularly described in the *hibá* consisted of a dwelling-house in Nizám-pura street, outside the Fort, of a *chál* or range of apartments adjoining the house, and of a house in Alí Umar Street, also outside the Fort. The instrument in question, having described the premises, proceeded as follows: "These two houses and the abovementioned *chál* have been acquired and bought by (and) are my the declarant's own property, and I have held them in my possession without any interruption, and (not in) partnership with any person. These two houses and the abovementioned *chál*, together with the rights appertaining and relating thereto, as well as the household furniture, I have given and made a gift of, willingly and of my own accord, in favour of my wife Khadizah, the daughter of Dada Miya Kurishi, inhabitant of Bombay, (and) who is still in the bonds of wedlock with me, the declarant. And I having given up my possession (thereof) have given them (*i.e.*, the houses and *chál*) into the possession of the abovenamed woman in whose favour the gift is made. And all the conditions respecting a gift, namely, the mutual consent and the taking of possession in every way, together with the vacating of them (*i.e.*, the houses and *chál*), &c., have been performed by me, the declarant, and the abovementioned woman in whose favour the gift is made. Therefore this is a true legal and valid

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(deed of) gift, comprising in it all its conditions and requisites, (and) excluding from it things that give rise to dissension and scruples. It is exempt from the faults which annul (a document), and (it is exempt from) what may prevent its being clearly understood. Therefore the abovementioned gift property, (*i.e.*) the two abovementioned houses and the abovementioned *chál*, together with the household furniture, together with the rights thereof, have become the property of the woman in whose favour the gift is made. In future I, the declarant, have no claim of ownership to the property by way of inheritance. Should I, the declarant, raise a claim of ownership, or should any of my heirs demand anything by way of inheritance out of the abovementioned property, then the claim, according to the law and custom, will be null and void and inadmissible. Therefore, having caused these few words to be written by way of an effective deed of gift, and having signed it in my own handwriting, and having taken the attestations of witnesses on it, I have given it to my abovementioned wife, the donee, in order that it may be a voucher in time of need." The result of the evidence of the witnesses for the defendant was that the house in Nizámpúra street was the ordinary residence of the alleged donor, Muhammad Ibráhim, and his wife, the defendant; that the *hibá* was executed in that house; and that the *chál* and house in Alí Umar Street were in the occupation of tenants paying rent for the same. It further appeared that when the alleged donor executed the *hibá* he said to his wife, "whatever property is comprised in this *hibá* I have made over or given to you," and delivered the same and some other papers to her, together with certain keys; that he thereupon quitted the house where he had executed the *hibá*, leaving his wife in possession of the same; that he had subsequently returned thither (but whether or not the same night did not appear), and had resided there with his wife till his death. It also appeared that the donor had collected the rents of the *chál* and of the house in Alí Umar Street till his death, but two of the witnesses stated that he professed to do so on behalf of his wife, the defendant.

Cur. ad. vult.

4th August 1864. SAUSSE, C.J. :—The real question in this case is whether a "*hibá*" or gift made by the intestate to his wife in 1854 is, upon his death in 1863, valid against his heirs.

The acts essential for giving validity to a *hibá* or gift according to Muhammadan law are tender, acceptance, and "seisin," but the manner in which seisin is to be effected must be considerably modified, to suit the peculiar relations recognised as existing between husband and wife in the Muhammadan community. The property of each is separate and independent of the other; either can make, and both are encouraged by law to make, gifts to the other, in order "to promote mutual affection," and so strongly is this principle inculcated that retractation of such a gift is not allowed, although in many other cases it is lawful. A wife can make to her husband a valid gift of the house in which both are residing, although it contain her separate property, and though both continue to reside in it afterwards. Upon principle I do not see why a husband should not equally be at liberty to bestow upon his wife the house in which both are living, and in which they afterwards continue to reside, provided he have power to make the gift, and do make it *boná fide*, and not in contemplation of fraud upon creditors or others. The only difficulty is to comply with the exigency of the law, which requires "seisin" or exclusive possession to be given. If a husband with full power to give executes a deed of gift, and in accordance with its provisions hands over symbolical possession of a house or property by keys, &c. and also, to mark more strongly the *bona fides* of the intention, actually goes out of the house before witnesses in order to leave it and all within it in the full and exclusive possession of his wife, I do not see what further act he could do to give effect to that gift consistently with exercising his other legal rights as a husband. The wife had at that time the power afforded to her of taking and keeping exclusive possession of the gift, and of continuing to reside in the house, but the Muhammadan law gives the husband the right, and moreover makes it his duty, to reside with his wife. If, then, such a clear expression of intention as is contained in the present *hibá*, accompanied by such an unequivocal act before witnesses, be not held to give that seisin which is required by Muhammadan law, it would amount to introducing a restriction as to the object of "gift," which is not found, so far as I have been able to learn, in any Muhammadan law-book. The husband has a general power of making a gift to his wife, but were the present *hibá* held to be invalid, it would amount to declaring that a husband shall not under any circumstances make a gift to his wife of the house in which they are at the time residing, and in which they continue to reside

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down to his death. If such a restriction be unknown to Muhammadan law, there must be some legal mode of effecting the gift of such a property of the husband's. The circumstance of possession once given being subsequently continued does not appear to be a necessary condition of a *complete seisin*, or its non-continuance to invalidate the *hibá*. See the case of *Jafier Khan v. Hubshee Beebec*, 1 S. D. A. Rep. of Bengal, p. 12, referred to in *Morley's Digest*, Title "Gift," S. 55.

The "seisin" of the Muhammadan law appears to be analogous to our livery of "seisin" as formerly existing in England, and to have been effected much in the same way as by delivery of a sod or twig of the land, or the ring or hasp of a door, in the name of "seisin." In *Coke on Littleton* 57 *a* it is laid down—"If the deed be delivered in the name of 'seisin' of the land, or if the feoffor (or donor) saith to the feoffee (or donee) take and enjoy this land according to the deed, or enter into this land and God give you joy, these words do amount to a livery of 'seisin.'"

Two passages from the *Tohfa*, Vol. IV., pp. 59 and 335, have been relied upon by the defendant to show that a delivery and acceptance of keys of a house is a sufficient seisin or giving of possession in a case of sale and purchase, and also that gifts are in that respect to be treated as sales. "The giving of the possession of immoveable property to the purchaser depends upon the words expressed by the seller conveying the meaning that (the house) has been vacated, and in handing over the keys of the house:" *Tohfa*, Vol. IV., p. 59; and "The thing of which a 'gift' has been made does not become the property (of the donee) without possession, as is the case with things that are sold, and the declaration of a donor to the effect that he has given possession is sufficient to denote (real) possession:" *ib.*, p. 335.

In the present case the deed of gift was delivered, and with it the keys of the houses and furniture mentioned in the *hibá*, which included the house in which the husband and wife were then living. No words can be stronger than those contained in this *hibá* to indicate the intention of the donor to complete the gift according to law: "and I having given up my possession have given them [the houses and *chál*] into possession of the abovementioned woman [his wife], in whose favour the gift is made, and all the conditions respecting a gift, viz.,

the mutual consent and the taking possession in every way, together with the vacating of them, have been performed by me and the abovementioned woman in whose favour the gift is made ;" and again, " In future I have no claim to the property, nor can any of my heirs demand anything out of the abovementioned property by way of inheritance."

In my opinion, the relation of husband and wife, and his legal right to reside with her and to manage her property, rebut the inference which in the case of parties standing in a different relation would arise from a continued residence in the house after the making of the *hibá*, and in the husband generally receiving the rents of the *chál* annexed to that house. It is also worthy of remark, that the husband mentioned to some tenants that he was receiving rent on account of his wife, to whom he had made a *hibá*.

This is not a case of creditors claiming against a *hibá* set up to defeat their claims, but it is that of heirs or next of kin claiming in derogation of the gift of the person through whom they claim.

It is remarkable that the accessible books upon Muhamadan law do not contain any express decision upon or reference to this point, although it must have very frequently occurred. The converse of the present case, viz., that of a gift from wife to husband, of the house in which they were at the time residing, and in which they continued to reside, is mentioned as one of the exceptions to the rule, which requires the most complete relinquishment and divestment of "all use and benefit" from the thing given, "and the surrendering it wholly to the donee."* To that extent the silence of the books may appear to afford an argument against the opinion which I have formed, and in accordance with which I feel bound to declare that the *hibá* or deed of gift executed by the intestate in 1854 is valid and binding against the plaintiff as his heir.

Upon the view I have taken of the evidence, I must direct an account. Ornaments to the amount of Rs. 5,000, the property of the intestate, are proved to have been in the possession of the defendant since his death, and they do not, in my opinion, fall within the objects of gift mentioned in the *hibá*.

Strictly speaking, it was unnecessary to decide the question of the validity of the *hibá* at this stage of the suit, but as

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* Macnaghten's Muhammadan Law, Precedents of Gifts, p. 232.

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both parties argued the point and requested my decision, I have given it. My order will be—

Declare the plaintiff entitled to an account of the intestate's estate and effects which have come to the hands of the defendants, or of any person or persons by her order or for her use, and let the usual commission issue to the Commissioner for taking Accounts to take such account, and also an account of the debts and funeral expenses of the said intestate, and let him ascertain the balance, and let proper advertisements be published for creditors and the next of kin or heirs, according to Muhammadan law, of the deceased, and let the said Commissioner in his report state who are the next of kin, and the shares and amounts to which they are respectively entitled, and upon the completion of the said report let this suit be entered in the list for further hearing, and direction, as to costs.

Special Appeal No. 555 of 1863.

Feb. 2. NA'VSA' bin BIBA' (original plaintiff)..... *Appellant.*
 RA'BA' bin BAHIRU' and another (original defendants)..... *Respondents.*

Valuation of Claim—Error affecting Merits of Case—Civ. Proc. Code, Sec. 350.

An error in the valuation of a claim is not an error, defect, or irregularity which affects the merits of the case, and an appellate court is restrained, by Sec. 350 of the Code of Civil Procedure, from ordering the reversal of a decree on account of any such error, which does not also affect the jurisdiction of the court which originally tried the suit.

THIS was a Special Appeal against the decree of W. H. Newham, Assistant Judge of Ahmednagar.

The plaintiff brought this action, in the Court of the Munsif of Simnar (laying the amount of his claim at Rs. 10, and stamping his plaint accordingly), to redeem four fields which he alleged to be his family *mirás*, which had been mortgaged to the defendants' uncle fifty or fifty-five years ago. The defendants' case was that one Rānu had mortgaged the fields in Shake 1715 (corresponding with A.D. 1793-94)