

*Special Appeal No. 473 of 1868.*

Abubekar bin Hagada Hajisaba, ... Appellant.  
 Maibibi and Sidi Saheb, ... Respondents.

1868  
 April 7.

*Muhammadan Law—Gift with condition—Award of  
 Panchayat.*

Maibibi and her son, Sidi, departing on a journey, made a conditional gift of their property to Abulekar.

On their return, Abubekar, under the award of a *panchayat*, restored their property—but, by the instrument re-conveying it, their estate was limited to a life interest, and they were restrained from alienating it.

The lower Courts held this instrument to be a deed of gift, and that the conditions attached to the gift were void by Muhammadan Law.

*Held*, on Special Appeal, that the lower Courts were wrong in so treating it, as it was in fact a compromise, the terms of which should be carried out and Maibibi and her son should be restrained from wasting or alienating the property.

This was a Special Appeal from the decision of R. West, Acting Judge of Canara, in Appeal Suit No. 83 of 1867, confirming the decree of the Munsif of Honor.

The facts of the case are briefly these—The defendants Maibibi and her son Sidi, being about to set out on a pilgrimage to Mecca, made a gift (exhibit No. 2) to the plaintiff Abubekar of their property. The deed of gift was executed only by the donors, and the conditions of it were, that on their return the plaintiff should deal with the property with their consent, and that, in the event of their deaths, he should celebrate their funerals. The defendants set out for Mecca, but, after going as far as Bombay, they returned, and the plaintiff restored the property to them on the award of a *panchayat*. The re-conveyance to the defendants was effected by a writing (exhibit No. 3) executed by both the parties, and it stated that the defendants had merely a life interest in the property, and that they should not alienate it. As the defendants were committing waste, the plaintiff sought for a decree affirming his title in succession to the defendant, Sidi, and limiting the defendants' power of dealing with it to the term of Sidi's life.

Maibibi did not appear, and the defence of Sidi was that he had intended merely to place the plaintiff in possession of the property as his agent until his return.

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The Munsif rejected the plaintiff's claim and his decision was confirmed by the Judge who delivered the following judgment :—

“The issues for decision are :—

“ 1. Was there a valid gift duly made to Abubekar ?

“ 2. Is he entitled upon the document No. 3 to a declaration of his title to the property, and of Sidi's and Maibibi's disability to deal with it to any, and to what extent, during their lives !

“On the first issue I find that the document No. 2, taken with the delivery of the property, constituted a valid gift to Abubekar. The proceedings sent for by the Munsif from the Revenue Department, and to which the Vakil of the defendant' Sidi, though repeatedly called on, did not object, contain a sufficient admission of the transaction by Sidi, and there appears to be no reason to question it. What the Munsif says of a condition vitiating of a gift does not apply here. A gift by the Muhammadan Law cannot be suspended on a condition, and here there was an actual delivery of the property to Abubekar, who appears to have been in possession for about a year before Sidi, and Maibibi returned. Whether Sidi could have enforced the condition is not of importance in this case. It is clear that he had parted with the property.

“ As to the second issue the evidence of the two Kazis Nos. 51 and 52 is in a favour of the appellant. But the case given at page 509 of Baillie's Muhammadan Law supports the conclusion of the Munsif. It is there said that if a house to given with the words ‘when thou art dead it reverts to me,’ the condition is void. It has been contended that this is a case of a contract, but the property having passed to Abubekar, it must be regarded as a gift, and the mere acceptance of the condition amounts to no more than would be implied in receiving the gift offered with a condition. ‘A gift,’ it is said, ‘cannot be limited in respect of time’ and the effect of the agreement No. 3 is so to limit it. I must find on the second issue for the respondent, and confirm the Munsif's decree with costs.

" 15th August 1868.—Abubekar applies for a review of judgment on the grounds, (1) that the proper sense of the passage at page 509 of Baillie's Muhammadan Law is that an illegal condition (only) is void in limitation of a gift ; and (2) that the decision is opposed to page 51 para 13 of Macnaghten's Muhammadan Law.

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" As to the first point, I cannot see that there has been any misconstruction. As to the second, the passage applies to a gift not yet carried out. One in which possession has been delivered cannot be revoked. I therefore reject this application."

The case was heard this day before COUCH, C. J., and NEWTON, J.

*Macpherson* (with him *Shantaram Narayan*) for the appellant :—The second gift (No. 3) was not a voluntary gift, as it was made under the award of a *panchayat* and was like a decree or order of Court, and, therefore, it should be carried out according to its terms.

The Respondents were not represented.

COUCH, C. J.—Seeing the nature of the transaction under the exhibit No. 3, we are of opinion that the Judge was wrong in treating it as a gift. It was merely a compromise, under which possession was to be given to Sidi for his life, and the arrangement might well be made without an actual gift to the defendants. It would not be equitable for Sidi to take the benefit of the Muhammadan Law and not to be bound by the terms of his agreement. We have here before us sufficient materials to pass a proper decree. We therefore reverse the decrees of the Appellate Court and of the Munsif, and decree that the plaintiff is entitled to the property claimed in the plaint on the death of the defendant Sidi, and order that the defendant Sidi be restrained from alienating or wasting the property during his lifetime.

NEWTON, J.—Concurred.

*New decree made.*