Suit No. 486 *of* 1869.

1870.
March 28.

RUJA'BA'I *et al.* ..... *Plaintiffs.*
ISMA'I'L AHMED, KHATIZA'BA'I, and FA'TMA'-BA'I ..... *Defendants.*

Muhammadan Law—Gift—Nominal Consideration—Construction—Joint Gift without discrimination of Shares—Gift to person standing in fiduciary relation to donor.

Where a conveyance between Muhammadans, though in form a deed of sale, is in reality a gift, its validity should be tested by the rules of law applicable to gifts, and not by those applicable to deeds of sale.

In determining whether a transaction is one of sale or gift the intention of the parties, rather than the form of the instrument used, should be considered.

A deed of gift, in English form, of a house to three persons as joint tenants (without discrimination of shares) is good according to Muhammadan law, as it shows an intention on the part of the donor to give the property in the *whole* house to each of the donees.

A gift by a Muhammadan in Bombay which contravenes the principles of English courts of equity with regard to gifts to persons standing in a fiduciary relation to the donors will not be upheld.

Where a Muhammadan lady conveyed to her confidential adviser and two other persons the house in which she dwelt by deed of gift which (though read over and explained to her by a clerk who acted both for the donees and her) was executed by the lady without independent professional advice, and without the advice of the heads of her caste, *it was decreed*, at the instance of her heirs after her death, that the deed should be set aside.

THE plaint in this case stated that one Rassubái, the widow of Dáud Káji bin Muhammad Káji, was possessed of a certain house in Gulám Modini Street; that on the 19th of November 1865, Rassubái appointed Ismáíl Ahmed Munshi, the first defendant, her attorney, to collect her rents and manage for her all matters of business, and to advise her confidentially, and that he so acted up to the time of her death. That during the time he so acted, on the 2nd of June 1868, he induced Rassubái to execute a conveyance of her house in Gulám Modini Street to the three defendants for a nominal sum of Rs. 10. The second defendant was the infant daughter of the first defendant, and the third defendant was the female servant of Rassubái in her lifetime. Rassubái did not, on executing the conveyance, give

1870.
RUJA'BA'I *et al.* v. ISMA'I'L AHMED *et al.*

up possession of the house, nor did she do so before her death. Rassubái died intestate in May 1869, leaving the plaintiffs her heirs.

It was prayed that the gift of the house should be declared void, and the deed given up to be cancelled; that the defendants should execute a reconveyance and give up the title-deeds of the house; and that they should be restrained from collecting the rents of it.

The defendants put in a written statement, in which they alleged that the house in Gulám Modini Street became their absolute property on the 2nd of June 1868, after which date Rassubái occupied the house not as owner, but as the tenant of the plaintiffs, under the terms of a Gujaráti lease; that Rassubái executed the deed of the 2nd of June of her own free will, and that she was not induced to do so by Ismáíl Ahmed Munshi; and that a valid gift of the premises, according to Muhammadan law, was made to them by Rassubái.

The case was heard before SARGENT, J., and was concluded on the 14th of February 1870.

Mayhew and *Starling* for the plaintiffs.

Scoble (Acting Advocate General) and *Green* for the defendants.

The issues raised were (1), whether there was a valid gift of the premises by Rassubái to the defendants according to Muhammadan law; (2), whether there was a valid sale of them according to the same law.

The deed of gift of the 2nd of June 1868 was an indenture in English form and language. It was thereby witnessed that "in consideration of the sum of Rs. 10 paid by the defendants to Rassubái, Rassubái gave and granted unto the defendants the house in question, to have and to hold the same, unto the said Ismáíl Ahmed Munshi, Khátizabái, and Fátmábái, their heirs, executors, administrators, and assigns for ever, *as joint tenants*." Then followed a covenant for further assurance. To the deed was affixed the mark of Rassubái, and it was attested by Henry S. Carter, an

English attorney, and his clerk, Pundlik Náráyan. The Gujaráti lease, referred to in the written statement, was as follows, addressed to the defendants:—"Written by Ashabái and Rassubái, the widows of Dáud Muhammad (to wit). We two persons jointly have taken by contract your house at the rate of Rs. 75 per mensem. The rent for the same is duly to accrue against us from the 3rd June 1868. This is duly written by the desire of both the báis." The marks of Rassubái and Ashabái were affixed to the instrument, which was not dated. This instrument, not being sufficiently stamped, though tendered, was not put in evidence.

How far Rassubái understood the nature of the deed of the 2nd of June 1868, and under what advice she acted when she executed it, will appear from the judgment of the Court.

Cur. adv. vult.

March 28. SARGENT, J.:—The plaintiffs in this suit, alleging that they are the heirs, according to Muhammadan law, of one Rassubái, widow, seek to set aside a deed of the 2nd of June 1868, by which the said Rassubái conveyed to the three defendants a piece of land and the house thereon, situated in Butcher Street, otherwise called Gulám Modini Street, and assessed by the Collector under No. 23, on the grounds—(1) that the consideration for the same was merely nominal and wholly inadequate, and that Rassubái was induced to execute the same by the defendant, Ismáil Ahmed Munshi, who at the time was her confidential adviser; and (2), that, treating the deed as a gift, it was invalid because neither were the defendants nor was either of them put into possession of the premises after the execution of the deed.

At the hearing, it was further contended that the deed was invalid as a gift of partible property to three persons without discrimination of their shares. [His Lordship stated the issues and proceeded.]

Now, it is not suggested by the defendants or by Ashabái, the sister of Rassubái, that the transaction between themselves and Rassubái was in substance anything else but a gift from the latter. It is said, however, that, as the deed in

1870.
RUJA'BA'I *et al.* *v.* ISMA'I'L AHMED *et al.*

question is in terms a gift for a consideration, although that consideration is the nominal sum of Rs. 10, the transaction assumed the form and character of a sale, and was no longer subject to the incidents of a gift.

Now, it is clear that the Muhammadan law contemplates the case of mutual gifts or gifts for a consideration; and that they resemble contracts of sale (in the conditions essential to their validity), and not absolute gifts. This is clear from the passages cited from Sir William Macnaghten's "Principles of Muhammadan Law," Ch. V., para. 14, and Baillie's "Digest of Muhammadan Law," p. 122, where gifts for consideration, or Hiba-bil-Iwus, as they are termed, and their incidents, are fully discussed. In the present case, however, the consideration is a merely nominal one, and the transaction on the face of it a gift merely, even if we did not know from the admissions of the defendant himself and Ashabái, his principal witness, that such was the case. It is probable that the nominal consideration was merely introduced to comply with the customary form of an English deed. If this were not so, the necessary inference from the evidence is that it was introduced in order to disguise what was an absolute gift under the form of a sale. That would be a fraud upon the law, which requires certain conditions to be fulfilled to give validity to a gift. It may be asked, perhaps, what is the quantum of consideration which will make the transaction a gift. The proper answer, I conceive, is what is stated by the Lord Justice Turner in *Townend* v. *Toker* (*a*), discussing the analogous case of a voluntary settlement: "The Court does not enter into the quantum of consideration; in effect the question is whether the transaction was one of bargain or of gift merely."

This transaction must, therefore, notwithstanding its mere outward and visible form, be treated as a gift, and its validity tested by the rules applicable to such instruments.

In the case of *Ranee Roshun* v. *Rajah Syud* (*b*), cited by Mr. Mayhew, the court dealt with a similar deed in the

(*a*) Law Rep. I. Ch. App. 446. (*b*) 5 Calc. W. Rep., Civ. R. 5, 19.

same manner. It was there said by the court "we must look to the spirit of the contract, and not to the mere words of the same," and the court came to the conclusion on the evidence that the contract was merely a colourable attempt to conceal what was in substance a gift.

The first objection taken to the gift is that it is a gift of a house to three persons without discrimination of shares. In the Hedáyá, Vol. III., p. 298, it is said, "If one man make a gift of a house to two men the deed is invalid according to Hanifá. The two disciples hold it to be valid, because, as the donor gives the whole of the house to each of the two donees, there is consequently no mixture of property." Hanifá contends that the gift is a gift of half the house to each, as proved by the fact that if one man give to two men something incapable of division, and one of them accept the same, the gift becomes valid with respect to his share. The difference between Hanifá and his disciples would, therefore, seem to turn upon the construction of the gift. In the present case the gift is by an English deed to three persons as joint tenants, thus showing a clear intention on the part of the donor to give the property in the whole house to each of the donees.

It would appear from Baillie and Elberling that the opinion of the disciples has been generally adopted. However that may be, the particular form of this gift leaves, I think, no doubt that the objection cannot prevail in the present case.

I now pass to the second objection, that possession of the house was not given to the donees in the lifetime of Rassubái. It was not disputed that possession was necessary to give validity to the gift. And it is admitted by the defendants that Rassubái returned to the house from the solicitor's office immediately after the deed was executed, and continued to live there until her death. But the defendants say that, although this was the case, she gave them constructive possession of it, by accepting a lease of the house from the first defendant.

1870.
RUJA'BA'I *et al.* *v.* ISMA'I'L AHMED *et al.*

An unstamped document, said to be the lease, was tendered in evidence. Its admission was resisted by the plaintiff, and on the defendants refusing to have it stamped and pay the penalty it was rejected. Strictly speaking, no other evidence was, I think, admissible to prove the fact of a lease having been executed. Oral evidence was, however, given without opposition on the part of the plaintiff. It is clear upon the evidence that nothing was said about a lease when the deed was executed. This is admitted by Ismáíl Ahmed. His reason is that at that time it was not intended that the ladies should remain in possession. This is contradicted by Ashabái, who says that when they went to the solicitor's office it was explained to Rassubái that she was to remain in the house during her life. It is inconsistent with the admitted fact of their returning to the house from the office, and is opposed to the probabilities of the case; for it is most improbable that Rassubái, who had lived so many years in this house, should in her old age have been willing to quit it, however much she may have been desirous that the defendants should have it at her death. The question, therefore, naturally suggests itself, "why was not the lease executed at the same time as the deed." The very peculiar form of the deed seems to me to suggest the answer. I can entertain little or no doubt that it was considered at the time that it was not necessary that possession should be taken by the donees, if the gift could be thrown into the form of a Hiba-bil-Iwus or virtually of a sale, and that the intention then was that Rassubái should continue in possession, and to enjoy the rents of the house during her life. If this were not so, why was this unusual form of gift adopted, and why was not the whole transaction completed at one and the same time? This is almost conclusive to my mind, that the idea of a lease (if there ever was one) was an afterthought, suggested probably by doubts as to the efficacy of the deed by itself. But if this were so, what reason can there be for thinking that Rassubái changed her mind and consented to give up her interest in the house during her life. Obviously none. Everything, therefore, points to this alleged lease (if there were one) having been a colourable lease. If, lastly, the evidence as to

the payment of the rent and its application be examined, it certainly does not favour the idea of a *bonâ fide* lease, but rather the contrary. (1) The house is said by Ashabái to have been rented by Rassubái and herself at Rs. 75 a month; and yet there is no evidence of more than Rs. 300 rent having been paid during almost one year under the alleged lease. (2) The municipal bills continued to be made out in the name of Rassubái up to the time of her death. (3) The first defendant says he paid the municipal taxes after the execution of the deed. But the evidence of the tax-collector shows that the municipal bills for the last half-year of 1868. were paid by Rassubái herself in July, and the first defendant, although he swore to the payment of the bills marked 4 and 6, which were paid in January and February 1869, was not even asked whether he paid the bill marked A. It is true that in the memo., from which he refreshed his memory, Rs. 60 are mentioned as having been paid for municipal bills before October, but he never swore to having paid them. (4) After the payment of the Rs. 300 was made by Rassubái, and not till then, do we find the defendant paying the municipal bills. (5) The gift and alleged lease appear to have been only known to the parties themselves, and the whole transaction was kept secret from relations and caste. On the whole of this evidence I can entertain no doubt that if there was a lease it was a colourable transaction, and that Rassubái was in possession of the house up to the time of her death.

It follows that, as possession by Muhammadan law is essential to give validity to a gift, the gift in question is void.

This is sufficient to decide the case; but I am of opinion that the plaintiff must also succeed on her last objection, namely, that the gift is void owing to the fiduciary relation subsisting between the first defendant and Rassubái. I shall assume for the moment that the gift was to the first defendant alone. It appears that the first defendant had been married to a daughter of Rassubái's sister, and that he had for five or six years—ever since the death of Rassubái's husband—acted as her man of business in the management of her property. She, and her co-widow, Ashabái, had executed

1870.
RUJA'BA'I *et al.* *v.* ISMA'I'L AHMED *et al.*

to him a power of attorney, giving him the largest possible powers in all matters relating to their property. The first defendant says: "I received rents and made payments for her. Rassubái trusted me and took my advice in business matters. I had not considerable influence over her." It is clear, then, that he filled a position of a fiduciary character as regards Rassubái, and that a confidential relation was established between them.

Under those circumstances it is plain, if the principles which govern the Court of Chancery are to be applied—and I know no reason why they should not, being founded on considerations of equity, justice, and good conscience—that the gift could not be supported unless it could be shown to the satisfaction of the court that the parties were, notwithstanding the relation, substantially, as it is termed, at arm's length. What constitutes being at arm's length is stated by Lord Justice Turner in the case of *Rhodes* v. *Bate* (*c*). He says: "I take it to be a well established principle of this court that persons standing in a confidential relation towards others cannot entitle themselves to hold benefits which those others may have conferred upon them, unless they can show to the satisfaction of the court that the persons by whom the benefits have been conferred had competent and independent advice in conferring them."

Now, the first defendant's statement is that Rassubái first spoke to him about the gift; that she gave him some papers and told him to get a deed prepared. That he, accordingly, went alone to Mr. Carter's office and gave instructions to the Parbhu clerk. It appears from the evidence of Pandlik Náráyaṇ, the Parbhu clerk, that Mr. Carter's office had never been concerned for Rassubái; but that the first defendant had been one of their clients, and that he did not see Rassubái before the day of the execution of the deed. That on the occasion of executing the deed he explained it to Rassubái, and that Rassubái understood she was making a gift of her property. It is clear from this that Rassubái had no competent and independent professional advice. That she

(*c*) Law Rep. I., Ch. App. 257.

knew she was giving the house to the three defendants will be admitted, as was the case with the plaintiff in *Rhodes* v. *Bate*. But what evidence is there of independent professional advice to neutralise the influence which the law assumes, on grounds of public policy, to be the necessary result of the confidential relation? The most that can be said is that the defendant's solicitor acts for both, or rather, to state the matter more accurately (for Mr. Carter would appear to have been called in merely to attest the execution), the Parbhu clerk of the defendant's solicitor acts for both parties. The Parbhu clerk said it was usual to act for both parties. It is well that it should be clearly known that in transactions of this nature independent advice is required, and not that of the donee's solicitor, who for the nonce constitutes himself the donor's solicitor for the purpose of taking her execution, and, it may be, reading the deed to her. But if Rassubái had no independent professional advice, still less does she seem to have had the independent advice of her relations and caste-people. The only relations whom she saw, or who knew of the transaction, were Ashabái, who stood to the first defendant in the same sort of position as herself, and Khatizábái, a child of ten years old, and daughter of the first defendant, and Fátmábái, herself one of the donees and a person of inferior position in the house. It is plain, from the evidence of Ahmed Sulemán, the head-man of the community to which Rassubái belonged, that she never consulted her caste-people. Under these circumstances it would be impossible, consistently with the principles laid down in *Rhodes* v. *Bate*, to support the gift if made to the first defendant exclusively.

Can, then, any distinction be drawn in favour of the other two defendants, between whom and Rassubái there was no fiduciary relation? It is clear that if the benefit was obtained for them by the first defendant, it must have been tainted by the channel through which it passed. The case of *Huguenin* v. *Baseley* (*d*) is a distinct authority on this point. In the present case, however, it may be said that Rassubái may well have wished to benefit Khatizá and Fátmá,

(*d*) 14 Ves. 290.

1870.

RUJA'BA'I *et al.* *v.* ISMA'I'L AHMED *et al.*

independently of any influence by the first defendant, and that the benefit did not pass, in the words of Lord C.J. Wilmot, through a polluted channel; the circumstance, however, of Khatizábái being the daughter of the first defendant and a girl of only ten years, the position of inferiority occupied by Fátmá, and the joint form of the gift, irresistibly lead to the conclusion that the entire gift was, in a considerable degree at least, due to the influence arising out of the fiduciary relation subsisting between the first defendant and Rassubái. I am of opinion, therefore, that the third objection is fatal to the entire gift.

Decree for the plaintiffs with costs.

Attorney for the plaintiffs: *Shámráv Pánḍurang.*
Attorney for the defendants: *Manisty and Hurrell.*

March 29.

Suit No. 596 *of* 1869.

JEA'UNISSA' LA'DLI BEGAM SA'HEB *et al.* ... *Plaintiffs.*
MA'NIKJI KHARSETJI ..... *Defendant.*

Limitation—Promissory Note payable, after six months, on demand—Act XIV. of 1859, *Sec.* 1., *cl.* 16.

Where a promissory note was made payable "after six months, whenever the payee should demand the same," with interest, *it was held* that the law of limitation began to run upon the expiration of six months from the date of the note.

THIS suit was brought by the plaintiffs as administratrixes of the estate and effects of Mír Jáfar Alí Khán, to recover Rs. 3,982, balance due upon a Gujaráti promissory note. The translation of the note was as follows:—

"To Sardár Mir Jáfar Alí Khán Bahádur, written by Pársi Mánikji Kharsetji Shroff, to wit: Rs. 5,000 are credited to your account at my place as written below. The particulars thereof are as follows:—

Rs. 2,500, 25th May 1858.
„ 2,000, 18th September 1858.
„ 500, 3rd November 1858.

"According to these presents I have given receipts for these Rs. 5,000, bearing the above dates. Having cancelled them, I have given this receipt for the whole. Negotiations are going on with you as to my selling or