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[238] APPELLATE CIVIL.

Before Mr. Justice M. Melvill and Mr. Justice Kemball.

GULAM JAFAR (*Original Plaintiff*), *Appellant v.* MASLUDIN AND OTHERS (*Original Defendants*), *Respondents.**

MASULDIN AND OTHERS (*Original Defendants*), *Appellants v.* GULAM JAFAR (*Original Plaintiff*), *Respondent.*†

[30th August, 1880.]

Mahomedan law—Gift—Possession—Hanifia Code—Imamia Code.

A Mahomedan bequeathed his property to his two nephews, Gulam Rasul, and Gulam Ali, as joint tenants. Gulam Ali died, leaving a widow and a daughter, who continued to be joint tenants with Gulam Rasul; but the latter continued in exclusive possession of the property, subject to any claim which they might establish to a share in or a charge upon it. Gulam Rasul, by a written instrument, made a gift of that property to his younger son, the father of the defendants, disinheriting his elder son, the plaintiff.

Held that the gift was valid, and that the doctrine of the Hanifia, though not of the Imamia Code, that the gift of a share in undivided property, which admits of partition is certainly invalid, or, at least, forbidden, has no application to the gift of property so circumstanced.

THESE were cross appeals against the decision of Rao Bahadur Mukundrai Manirai, Subordinate Judge (First Class) of Ahmedabad.

The facts of the case fully appear from the judgment of the High Court.

Jefferson, Bhaishankar and *Dinshah*, for the original plaintiff.

Nanabhai Haridas, Government Pleader, for the original defendants.

JUDGMENT.

M. MELVILL, J.—The suit, out of which these appeals arise, was brought by the plaintiff, *in forma pauperis*, to recover from his brother, Gulam Mohidin, one-half of the estate which had descended from their father, Gulam Rasul. The property was alleged to consist of the three villages of Charal, Hirapur, and Rasulpur, a number of houses and shops, and personal property of divers descriptions.

The defence was that the plaintiff had been disinherited by his father, Gulam Rasul, and that by virtue of two deeds, one of sale and the other of gift, executed by Gulam Rasul on the 23rd and [239] 25th August, 1862, the defendant Gulam Mohidin was entitled to the whole of his father's property, and had been since the date of the said deeds in possession of the same.

The Subordinate Judge disallowed the claim, except in respect of an house, in which he awarded a half share to the plaintiffs, on the ground that, although the house was included in the deed of gift, Gulam Rasul had never parted with the possession of it, and, consequently, the gift was, to that extent, invalid under Mahomedan law. The deed of sale the Subordinate Judge found to be inoperative, inasmuch as no consideration had passed; but the deed of gift subsequently executed was, in the opinion of the Subordinate Judge, sufficient to pass the whole property of Gulam Rasul, with the exception of the house already mentioned.

* Appeal No. 13 of 1880. † Appeal No. 16 of 1880.

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Both parties have appealed against the Subordinate Judge's decision, —the plaintiff, on account of the rejection of the greater portion of his claim, and the sons of Gulam Mohidin, in regard to the award of a half share in one house to the plaintiff. The hearing of the appeals and examination of the evidence has occupied the Court for several days.

A great portion of the argument on behalf of the appellant was employed with the object of showing that the gift made by Gulam Rasul to his son, Gulam Mohidin was null and void, because it was a gift of *musha*, or a share in joint and undivided property. It was contended that the whole, or a greater part, of the property in dispute was bequeathed by Amrula to his nephews, Gulam Rasul and Gulam Ali, as joint tenants; that the tenancy was not severed at the date of Gulam Ali's death, but that, in effect, it continued between Gulam Rasul and the widow and daughter of Gulam Ali down to the date of the gift, which it was argued, was consequently invalid, as having been made without the consent of Gulam Ali's said heirs. According to the doctrines of the Hanifia, though not of the Imamia Code the gift of a share in undivided property, which admits of partition is certainly invalid, or, at least, forbidden. But we fail to see how the doctrine can be applied in the present case; for it is certain that at the time of the gift, Gulam Ali's widow and daughter were not in possession jointly with Gulam Rasul of the property which [240] was the subject of the gift. Gulam Rasul had always admitted that they were entitled by inheritance to some portion of Gulam Ali's share in the estate; and in 1850 he had made an arrangement for handing over to them certain houses, which he considered to represent their share in the estate. They were put in possession of these houses; and though they were not satisfied whith this arrangement, and subsequently brought actions, and obtained decrees for an annuity to be charged upon the estate, it is certain from their plaints in those suits that from the year 1854 they had been entirely excluded from all possession of the estate which formed the subject of the gift to Gulam Mohidin. Gulam Rasul, therefore, was, at the date of the gift, in exclusive possession of this estate, subject to any claim which Gulam Ali's heirs might establish to, a share in, or a charge upon, it. It appears to us that there is nothing in Mahomedan Law to invalidate the gift of property so circumstanced. In Baillie's Digest of Mahomedan Law, Hanifia, page 517, it is stated that the confusion that invalidates a gift is one that is original, not supervenient; as, for instance when one has given the whole of a thing, and subsequently revokes a half or other undivided share of it, or a right is established to a half or other undivided share of it, the gift is not invalidated as to the remainder. The doctrine of *musha* is discussed by the Judicial Committee in *Ameeroonnissa Khatoon* v. *Abadoonissa Khatoon* (1). Two reasons are given for the rule: first, that complete seisin being a necessary condition in cases of gift, and this being impracticable with respect to an indefinite part of a divisible thing, the condition cannot be performed; and, secondly, that the gift of an undivided share would throw a burden on the donor he had not engaged for, *viz.*, to make a division. Neither of these reasons has any operation in the present case.

Even if we were of opinion that the legal objection of indefiniteness was applicable, it would still be open to the defendants to rely on a title created by length of possession; and if it appeared that they and their father had held exclusive possession since the date of the gift in 1862, we

(1) 15 B. L. R. 67.

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do not see how it would be open to Gulam Rasul, or to any one claiming under him, to dispossess the [241] defendants after twelve years from that date. The real and only question, therefore, as regards the gift, is whether there was delivery of seisin to the donee; and it is not necessary for us to come to any conclusion on the question whether the property, or any part of it, was held by Gulam Rasul and Gulam Ali in joint tenancy.

The defendant, as we have said, relied upon two deeds—one (Ex. 40) being a deed of sale, the other (Ex. 41) a deed of gift. The former purported to convey to Gulam Mohidin, in consideration of a sum of Rs. 35,000, the village of Charal, six houses, and four shops. The latter bestows upon Gulam Mohidin the village of Hirapur and Rasulpur, and all the moveable and immoveable property of Gulam Rasul.

We fully concur in the opinion of the Subordinate Judge that no consideration passed in respect of Ex. No. 40, and that the sale, as a sale, was a pure fiction. But we do not agree with him in thinking that the property, of which Ex. No. 40 purported to be a conveyance, can be held to have been transferred, notwithstanding the defect in the sale, by virtue of the subsequent gift of "all the moveable and immoveable property" of Gulam Rasul. It seems clear that the deed of gift was not intended to supersede the deed of sale, or to take any effect upon the property included in the latter. Both deeds, though executed on different dates, were attested at the same time, and were registered together, nearly two months after their execution. The specification of property contained in them also indicates that they were intended to take effect together; and subsequent declarations, both of Gulam Rasul and Gulam Mohidin, show that they were always treated by them as being both operative. The property mentioned in Ex. No. 40 cannot, therefore be affected by the general term used in Ex. No. 41, which must be understood as meaning only such moveable and immoveable property as had not already been disposed of by Gulam Rasul. It follows that, if it had been necessary for the defendant to establish the validity of Ex. No. 40 as a deed of sale, he would, to that extent, have failed in his defence, and the plaintiff would be entitled to share in the property specified in that document. It was however sufficient for the defendant to prove that there had been a [242] *bona fide* transfer of that property, though not for a consideration, from Gulam Rasul to himself, and that ever since the date of such transfer he had been in possession of the property. For, if he succeeded in establishing this, then, inasmuch as such transfer took place in 1862, and the present suit was not brought till 1876, proof of such possession would constitute sufficient evidence of title.

The only question, therefore, which has to be decided, as regards the whole of the property, is whether there was a *bona fide* intention on the part of Gulam Rasul to divest himself *in præsenti* of the property, and whether there was such a delivery of possession as will satisfy the requirements of Mahomedan law. The burden of proof on this issue lay upon the defendant: for, inasmuch as the transactions in question were opposed to the policy of Mahomedan law, it is incumbent upon the party, who sets them up, to show very clearly that the forms of the Mahomedan law, whereby its policy is defeated, have been strictly complied with: *Khajooroonissa* v. *Rowshan Jekan* (1).

After a careful consideration of the evidence on the record, and of some other papers in the records of other suits to which we have thought

(1) 2 C. 184.

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it desirable to refer, we have come to the conclusion that the defendant has established by sufficient proof that there was a *bona fide* transfer to him, and delivery of possession, of the greater part of Gulam Rasul's estate, and that he has been in possession as owner since 1862. The Subordinate Judge has in his judgment reviewed the evidence bearing upon this point, and it is not necessary for us to repeat what he has said, nor to add to it more than a few general observations. It is evident that Gulam Rasul had been for years actuated by an earnest desire to disinherit the plaintiff, and that he was determined to do every thing in his power to effect that object. For some years previously to the transactions of 1862, he had associated the defendant Gulam Mohidin with himself in the management of his estate and the conveyance of the villages of Hirapur and Rasulpur was taken in Gulam Mohidin's name as well as his own. This circumstance by itself would not in this country, as in England, raise a [243] presumption of an advancement in favour of the son (1); but taken in connection with the other circumstances in the case, it tends to show what was Gulam Rasul's intention. Immediately upon the execution of the deeds of sale and gift, the management of the estate was carried on in the name of Gulam Mohidin alone. All accounts in the joint name of Gulam Rasul and Gulam Mohidin were closed, and fresh accounts opened in the name of Gulam Mohidin.

[His Lordship proceeded to comment upon the evidence, and then continued:—]

On a careful consideration of the whole case, we have come to the conclusion that the requirements of the Mahomedan law regarding gifts were fully complied with in regard to all the property specified in the deed of gift, Ex. No. 41, with the exception of a small amount of personal property; and that although Ex. No. 40 cannot operate as a sale, yet that, with the exception of the second house mentioned in the plaint, the defendant Gulam Mohidin had, at the date of the institution of the present suit, been in possession, as owner, for more than twelve years, of all the property specified in that deed, and that, consequently, he had acquired a good title to the same.

The house to which we have referred, was admittedly in Gulam Rasul's possession down to the date of his death. The evidence that he gave symbolical possession of this house to Gulam Mohidin by delivery of the key, is very weak; and there is no evidence that Gulam Rasul ever vacated the house for a single hour. We think, therefore, that the Subordinate Judge was right in considering that, in respect of this house, there was no such delivery of seisin as the Mahomedan law requires, and that the plaintiff is entitled to a share by inheritance in this house. There is nothing to show that there were any debts of Gulam Rasul for which the plaintiff can be made liable in respect of this share.

There can be no doubt that, besides the house already mentioned, Gulam Rasul must have retained a certain amount of furniture and domestic utensils. From the evidence of witness [244] No. 144 we may perhaps fairly fix the value of such articles at Rs. 480, and allow to the plaintiff his share in this amount. There is also a sum of Rs. 1,031-13-3, awarded as costs to Gulam Rasul in suit No. 141 of 1868, which has been already referred to. This sum must be considered as having been recovered for Gulam Rasul's estates, and the plaintiff is entitled to share in it as one of Gulam Rasul's heirs.

(1) *Gopeekrist* v. *Gungapersad*, 6 M. I. A. 53.
Moulvi Syed Azhar Ali v. *Bibi Altaf Fatima*, 13 M. I. A. 232=4 B. L. R. I.

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It is admitted by the plaintiff's pleader that the Subordinate Judge was in error in holding that the plaintiff, as heir of Gulam Rasul, would be entitled to claim one-half of his property. As Gulam Rasul left a widow and three sons, the plaintiff, who now claims as heir of Gulam Rasul only, would be entitled to one-third of seven-eighths, or to seven twenty-fourths of any property liable to division.

We, accordingly, amend the Subordinate Judge's decree, and award to the plaintiff seven twenty-fourths of the second house mentioned in the plaint; and the sum of Rs. 140, as his share of Gulam Rasul's moveable property. We also award to him Rs. 301 out of the costs in suit No. 141 of 1868, which are now in deposit in the Subordinate Judge's Court.

The parties will bear their own costs of these appeals; but the plaintiff must pay the Court fees which would have been paid by him if he had not been permitted to appeal as a pauper.

It would be well if the parties were to agree to the payment by the defendant's sons to the plaintiff of such sum of money as is equivalent to the share in the house awarded to the latter. Should they fail to do so, and should it be found impracticable to partition the said house, without destroying its convenience as a dwelling-house, the house should be sold, and seven twenty-fourths of the purchase-money, after deducting the costs of the sale, should be paid to the plaintiff.

Decree amended.

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[245] APPELLATE CIVIL.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, and Mr. Justice F. D. Melvill.

ANANDRAV CHIMUJI AVATI, (*Plaintiff*) *v.* THAKARCHAND, (*Defendant*).* [7th September, 1880.]

The Civil Procedure Code (Act X of 1877), s. 230—Decree—Application for execution—Limitation.

On the 1st June 1880, several decree-holders applied to the Subordinate Civil Court of Parner for execution of their decrees. They had taken out execution several times previously, the date of their last preceding applications being 1st June 1877. The Subordinate Judge was of opinion that the applications were barred under the last clause of s. 230 of the Civil Procedure Code, Act X of 1877. On his referring the cases to the High Court.

Held that the applications were not barred, inasmuch as the previous applications for execution had not been made under s. 230 of Act X of 1877, that Act not being then in force.

[F., 9 C. L. R. 297 (299).]

ON the 1st June, 1880, the decree-holders in this and nine other cases applied to the Court of the Second Class Subordinate Judge of Parner, in the district of Ahmednagar, for execution of their decrees. They had taken out execution several times previously, the date of their last preceding applications being the 1st June, 1877. The Subordinate Judge (Rao Saheb N. G. Phadke) was of opinion that the present applications were barred under the last clause of s. 230 of the Civil Procedure Code, Act X of 1877. He, however, referred the cases to the High Court under s. 617 of that Act.

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* Civil Reference, No. 7 of 1880.