APPELLATE CIVIL.

Before Sir Charles Sargent, Kt. Chief Justice, and Mr. Justice Melvill.

ADAMKHAN (ORIGINAL PLAINTIFF), APPELLANT, *v.* ALARAKHI (ORIGIANL DEFENDANT), RESPONDENT.*

1882
August 14.

Mahomedan law—Sale—Possession.

A sale among Mahomedans, unlike a sale between Hindus, is valid as against a third party, even though the vendor was not at the time of the sale in possession of the property sold.

THIS was a second appeal from the decision of J. W. Walker, Judge of the district of Thana, reversing the decree of the Subordinate Judge of Panvel.

The plaintiff as well as the defendant were Mahomedans. The former sued the latter to obtain from him possession of a house, alleging that he had purchased it from one Mahomed Karim. The defendant answered that Mahomed Karim was not in possession of the house at the date of the alleged sale. The Subordinate Judge allowed the claim. The District Judge reversed that decree, holding that, under the Mahomedan as well as the Hindu law, possession was necessary for this validity of the sale. The plaintiff thereupon appealed to the High Court.

Pandurang Balibhadra for the appellant.—The District Judge erred in applying the Hindu law rule to Mahomedans. Want of possession in the vendor does not, according to Mahomedan law, render a sale of the immoveable property invalid: *Mt. Shurfun* v. *Sheikh Gholam Mohummud* (1); *Sheikh Gholam Mohummud* v. *Sheikh Ruhum Ali* (2); *Seetaram Raee* v. *Munohur Raee* (3); *Mahomed Noor Buksh* v. *Budunchund Bebee* (4).

Manekshah Jehangirshah for the respondent.—The Bengal cases refer to sales of rights or to suits by purchasers against vendors. The rule of the Mahomedan law is the same as the rule of the Hindu law: Macnaghten's Mahomedan Law, 201.

MELVILL, J.—The only question raised in this appeal is whether the District Judge was right in applying to a sale between

*Second Appeal, No. 551 of 1881.

(1) Calc. S. D. Rep. for 1848, p. 448.
(2) *Ibid* p. 450.
(3) Calc. S. D. Rep. for 1848, p. 505.
(4) *Ibid* for 1852, p. 885.

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Mahomedans the same rule (*Bai Suraj* v. *Dalpatram* (1) which has been held to govern sales between Hindus, viz., that a bill of sale executed by a person who is not in possession cannot operate as a present conveyance, nor enable the purchaser to sue in ejectment.

The decision of this Court as to the effect of a sale of this nature made by a Hindu is based upon the observations of the Judicial Committee in *Rajah Sahib Perhlad Sein* v. *Baboo Budhoo Sing* (2) and *Ranee Bhobosoondree* v. *Issurchunder Dutt* (3). Their Lordships say: "It is not easy to see what principle of an English Court of Equity, supposing such to be properly applicable to the case, would support the conclusions to which the Judges of the Sadar Court have come upon the facts before them. They seem to have ruled that the effect of the execution of a bill of sale by a Hindu vendor is, to use the phraseology of English law, to pass an estate irrespectively of actual delivery of possession; giving to the instrument the effect of a conveyance operating by the Statute of Uses. Whether such a construction would be warranted in any case, is, in their Lordships' opinion, very questionable. It is certainly not supported by the two cases cited in the judgment under review, in both of which actual possession seems to have passed from the vendor to the purchaser. To support it, the execution of the bill of sale must be treated as a constructive transfer of possession. But how can there be any such transfer, actual or constructive, upon a contract under which the vendor sells that of which he has not possession, and to which he may never establish a title? The bill of sale in such a case can only be evidence of a contract to be performed *in futuro*, and upon the happening of a contingency; of which the purchaser may claim a specific performance if he comes into Court, showing that he has himself done all that he was bound to do." Here the principle laid down by the Judicial Committee seems clearly to be this, that as in England, before the passing of the Statute of Uses, a feoffment without livery of seisin was not effectual to pass the estate, so under Hindu law transfer of possession is essential to the creation of a valid title in the purchaser as

(1) I.L.R., 6 Bom. 380, F. B. (2) 12 Moore's Ind. Apps., 275, 307. (3) 11 Beng. L. R., 36.

against a third party, although a sale without such transfer is valid in the sense that it gives to the purchaser a right to sue the vendor for specific performance of the contract. The Hindu law upon this subject is elaborately discussed, and the conclusion arrived at by the Judicial Committee is enforced, by Mr. Justice West in *Lalubhai* v. *Bai Amrit*(1).

The question now before us is whether by Mahomedan law, equally with Hindu law, transfer of possession is necessary to pass an estate. The authorities all seem to state in general terms that seisin is necessary to the validity of a gift, but is not an essential condition of a sale. In Macnaghten's Principles, Chapter IV, Case 15, this is put very clearly: "Seisin is requisite to the validity of a gift, and the gift cannot be said to be established until the parties shall have made seisin, but the property conferred remains, as formerly, at the disposal of the donor." A gift, therefore, without seisin, not only does not pass the estate, but cannot even be enforced by the donee against the donor. Then the law officer goes on to say: "Authorities extracted from the Commentary of Chulpee: 'I have given to you this slave for this garment of yours or for one thousand dirms.'" To which proposal the person addressed assents. This is a contract of sale, both as it regards the condition and the effect, agreeably to the doctrine maintained in the *Kifaya*, and universally in other authorities. So also in the *Shurhi Viqaya*: "A contract of sale is established by conferring a right to one thing in lieu of another." So also in the *Hedaya*: The expressions "I have given you this for that," or "take it for so much" have the same signification as the terms "I have sold or purchased from you." So also in the *Viqaya*: "Where these exist, the sale is complete." By these are meant declaration and acceptance, and when these are found to exist, the sale is binding, from which it follows that seisin is not a condition, and where these do not exist, the sale is not binding."

In this passage it is not perfectly clear whether, when it is said that a binding sale is effected by declaration and acceptance, without transfer of possession, it is meant that the sale is binding as

(1) I.L.R., 2 Bom., 299.

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against third parties, and not merely as between the vendor and purchaser. But as a contrast is drawn between a gift and a sale, and as in the case of a gift it is said that, without seisin, "the property remains, as formerly, at the disposal of the donor," it is a fair inference that, in the case of a sale, the property passes without seisin. In the Appendix, among the principles of Decision applicable to Sales, (Nos. 8 and 18), Mr. Macnaghten refers to certain decisions of the Bengal Sadar Adalat as showing that "the want of possession in the person of the seller does not vitiate the sale of immoveable property." We have referred to the cases cited, and find that they are either suits by the purchaser against the vendor, or cases in which the vendor only professed to sell his right of entry; so that they do not give us any great assistance. But in Case 11 of the Precedents of Sale, the case is put of an absolute sale by a mortgagor's widow of property in the mortgagee's possession, and the answer is: "Such sale is legally valid, but its operation is suspended on the pleasure of the conditional purchaser," *i. e.* the mortgagee. "He may give it effect if he pleases, but he cannot annul it. It depends also on the pleasure of the absolute purchaser. If he pleases, he may wait till the expiration of the term, or he may immediately return to the conditional purchaser the money borrowed from him, having recourse, if necessary, to a judicial decision to set aside the conditional sale; because the effect of a conditional sale and a pledge are legally the same; and if a pawner sell a pledge without the permission of the pawnee, the sale is valid, but the effect of the sale is suspended on the pleasure of the pawnee. The purchaser also is at liberty to wait until the redemption of the pledge, or to cause its redemption by an appeal to a judicial tribunal." This is a clear authority for the validity of a sale by a Mahomedan of mortgaged property of which he is not in possession. In Case No. 6 of the Precedents of Gifts, the question is as follows:—"A person executed a deed of gift in favour of his nephew, conferring upon him the proprietary right to certain lands, of which he (the donor) was not in possession, but to recover which he had brought an action, then pending, against his wife * * * * * *. About a month after executing the deed, the donor died, and the donee, in virtue of the gift, lays

claim to the litigated property. Under these circumstances, is his claim, under the deed, allowable ?" To this the answer is : "The gift of a thing not in the possession of the donor during his life-time is null and void, and the deed containing such gift is of no effect, because, in cases of gift, seisin is a condition; gift is rendered valid by tender, acceptance, and seisin; but in gift seisin is necessary and absolutely indispensable to the establishment of proprietary right * * * * * *. The Prophet has said, a gift is not valid without seisin. So also if the thing given be pawned to, or usurped by, a stranger." But, as we have just seen, the sale of a pawn is valid ; and the argument in the last quotation is based so exclusively upon the necessity of seisin to the validity of a gift, that the only inference is that, if the question had related to a sale, the answer would have been that the sale was valid, even against a usurper, inasmuch as seisin is not necessary to the completion of a sale. And this is stated in so many words by Mr. Neil Baillie in his work on the Mahomedan Law of Sale. At page 150 he says : "When usurped property is sold to another person than the usurper, the sale is in suspense ; if the usurpation be acknowledged by him, the sale is complete and binding on the usurper ; and though denied by him, the result is the same, provided the rightful owner has evidence : if he have no evidence, and [? or] the thing sold perishes before it can be delivered, the sale is dissolved." The last words are not very clear ; but the meaning of the whole passage seems to be that a sale by the owner of property in the possession of a trespasser is valid, and that the purchaser may establish his claim if he can : but if he is unable to do so, he may treat the sale as cancelled, and may recover the purchase-money.

These authorities justify us in holding that a sale among Mahomedans is valid as against a third party, even though the vendor was not at the time of the sale in possession of the property sold. We must, therefore, reverse the decree of the District Judge, and remand the case for a decision as to the plaintiff's title. Costs to follow the final decision.

Decree reversed.