

## APPELLATE CIVIL.

Before Mr. Justice Melvill, Mr. Justice Kemball and Mr. Justice Pinkney.

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August 21.

MOHINUDIN (ORIGINAL PLAINTIFF), APPELLANT, v. MANCHERSHAH  
(ORIGINAL DEFENDANT), RESPONDENT.\*

*Mahomedan law—Gift—Possession—Possession with mortgage—Sale—Minors.*

A Mahomedan lady executed a deed of gift in favour of the plaintiff, who was at the date of its execution a minor, of certain lands (including the land in dispute) of which she professed to have obtained possession under a decree against her co-parceners. The plaintiff on the strength of the deed of gift sued for a declaration of his right to the land, alleging that the donor had actually recovered possession in execution of her decree. The original and appellate Courts found that the defendant was at the date of the deed of gift in actual possession under a mortgage executed by the donor's co-parceners, and that she had failed, in executing her decree, to eject the defendant.

*Held* (KEMBALL, J., *diss.*) that at the date of the deed of gift the donor was simply the owner of property which was in possession of a mortgagee, and could not, under Mahomedan law, make a gift of it, although she could sell the same.

When the donee is a minor, possession may be had by a trustee on his behalf.

This was a second appeal from the decision of S. Hammick, Acting Assistant Judge of the district of Surat, confirming the decree of Rao Saheb Chandulal Mathuradas, Second Class Subordinate Judge of Surat.

The facts of the case, in so far as they are material for the purposes of this report, are as follows: —

The plaintiff Mohinudin sued to establish his right of proprietorship to certain lands and for a declaration that the defendant Manchershah was not entitled to attach and sell them in execution of a decree obtained by the defendant against one saheb-ul-Nissa and another person. The plaintiff alleged that the lands originally belonged to the plaintiff's father's mother Nurbibi, and that she bestowed them upon him by a deed of gift dated the 10th of February, 1877. The defendant having attached the said lands, the plaintiff had made an application to raise the attachment, but it proved unsuccessful. Hence the present suit.

\* Second Appeal, No. 461 of 1881.

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The defendant (*inter alia*) contended that, under the provisions of section 42 of the Specific Relief Act I of 1877, the suit was not maintainable; that Nurbibi had no title to the property which she pretended to give away; that the property had been mortgaged to him with possession by Saheb-ul-Nissa; that he had been in possession since 1871; that he had obtained a decree against it; that the plaintiff could not compel him to raise the attachment which he had placed in execution of that decree, and that the deed of gift was invalid according to Mahomedan law, there having been no possession accompanying the gift.

The substantive part of the deed of the gift ran as follows:—

“To Mohinudin valad Gulam M., by caste a Mahomedan, age about twenty years, inhabitant of Badekha’s Chakla in Surat. Executed by Bai Nurbibi, the widow of Tajudin, aged about ninety-five years. To wit: I give in writing this deed of gift to you as follows:—You are the son of my deceased son. Consequently I protected you, and brought you up from your infancy; and as you render me service and attend on me I give you in gift all my undermentioned property which was caused to be put into my possession by the Nazir under the order of the Assistant Judge of the Court of Surat by virtue of the decree passed in my favour, together with the profits thereof from the year 1877. And I deliver the property into your possession. Therefore you are the owner thereof in every respect. Do you, therefore, enjoy and manage the same. Therein any objection raised by my heir shall not prevail. Should they raise any, the same shall be void \* \* \* \* \*

\* \*. In Suit No. 2592 of 1872 on the file of the Court of the Subordinate Judge and No. 18 of 1875 on the file of the District Court the Assistant Judge at Surat passed a decree directing that the land belonging to my share should be given to me. The same was confirmed by the High Court in Regular Appeal No. 221 of 1876 on the 30th of August, 1876. Having executed the said decree I have taken the said property into my possession; and there remains some property of which possession is still to be taken. The remaining right under the said decree I have also given you in gift. You are, therefore, entitled to execute the said decree and take possession of the

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said property. I have made over the said decrees to you.”  
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The Court of first instance found the claim not barred, the suit having been instituted by the plaintiff within one year of the day on which the Court disallowed the plaintiff's objection to the defendant's attachment of the property in question. But that Court was of opinion that the defendant had been in continued possession of the lands ever since his mortgage in 1871. It thought that assuming that Nurbibi had received possession of the lands in execution of her decree, it was probable that she lost it as soon as she had got it, and that it was impossible to believe that Nurbibi was in possession of the property, the subject of the gift, at the date of the gift in 1877. Holding the gift invalid, it rejected the plaintiff's claim on that ground and also on the ground that Nurbibi had not wholly relinquished the lands.

In appeal the only issue tried was as to the validity of the gift. The Assistant Judge said : “ In the present case it is the possession of the donor which has been disputed. The question is one of evidence, and I find it recorded that certain lands were measured and marked out with pegs as the land which fell to Nurbibi's share under the decree gained by her against her relatives, Saheb-ul-Nissa and others. I find that there is no other act shown to have been done by her, on her behalf, which would prove that she had really taken possession of the land to hold it against all comers, and it appears that the defendant, so far from acknowledging Nurbibi's possession, protested in person against the land being measured and marked out, and he was never ejected from it. The act of measuring and marking out the land may perhaps amount to a taking possession by Nurbibi as against her relations, the defendants in her suit ; but I consider that as regards the present defendant, who was not a party in that suit, and who was in actual possession of the land at the time, the fact that Nurbibi's friends measured and marked out her share is quite inadequate to prove that defendant lost possession of the land and that Nurbibi acquired it.”

On these grounds the Appellate Court agreed with the Court of first instance in holding this deed of gift invalid.

The plaintiff appealed to the High Court.

The appeal in the High Court was heard on the 31st of July, 1882, by KEMBALL and PINHEY, JJ.

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*Nanabhai Haridas* (Government Pleader) for the appellant.— The District and Subordinate Courts were in error in thinking that actual possession was necessary to validate a gift under the Mahomedan law. In some cases it would be impossible to give physical possession. The case at pages 201 and 202 of Macnaghten's Principles of Mahomedan Law (4th ed.) lends apparent support to the view held by the lower Courts, but that this view is erroneous is shown by the reply to Case 10 at pages 207 and 208, where, according to Buhroo-rayiq, "a man makes over his outstanding debts by gift to a person who is not indebted to him, directing the donee to collect such debts and take them for his own use, this gift is valid." Power to take possession is equivalent to taking it: Baillie's Muhammadan Law, 514. The gift of a debt to any other than the debtor is lawful on a liberal construction where the donee is directed to take possession of it, and I ask for a liberal construction: Baillie's Muhammadan Law, 522. As to what may be given, there is no restriction. Anything which may be the subject of property or of contract may be the subject of gift. A bond can be given away by the conveyance of it to the donee: Elberling, pages 126 and 129, paras 270 and 272. In *Nawab Umjad Ally Khan v. Mt. Mohumdee Begum*<sup>(1)</sup> a gift, *inter vivos*, of Government promissory notes by a father to his son accompanied by a delivery of possession and transfer into the son's name, without any reservation of the dominion over the *corpus* by the donor, except a stipulation for the right to the accruing interest on the notes during the donor's life, to be applied by him to certain religious and charitable purposes, was held by the Privy Council to be a valid gift according to the Sheah school of Mahomedan law. Effect should be given to the manifest intention of the parties. Suppose a Mahomedan landlord grants a lease for twenty years, and has a reversion. He has undoubted right to give it away. The law does not necessitate his waiting for twenty years.

(1) 11 Moore's Ind. Apps, 517.

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Take the case of alienations of land revenue by Mahomedan rulers to donees of the same persuasion. No right to resume such alienations has ever been put forward on the ground of want of possession in the donor and want of seisin in the donee. The Hindu law is in this respect the same as the Mahomedan law. Directly the share of Nurbibi became defined, it became separate property, and she could give it away, especially after the demarcation of the lands by authority of the Court. It is reasonable that the same principle should be applied whether the gift is to be enforced against the co-sharers or third parties.

*Manekshah Jehangirshah, contra.*—The defendant, having been in possession of the lands claimed by the plaintiff Nurbibi, could not give possession of them to the plaintiff. Under the Mahomedan law a thing mortgaged, lent out, or sued for in the Court, cannot be the subject of gift: Elberling, page 129, para. 272; Macnaghten's Principles, pages 50, 51, 201 and 202. The case at page 201 is clearly in our favour.

*Nanabhai Haridas* in reply.—The Mahomedan law must be construed liberally. *Choses* in action cannot be delivered except by declaration, nor a work which a man writes and registers, nor an invention of which the inventor takes out a patent. It is not to be supposed that these cannot be given away. These kinds of property were not known to the Prophet, and no precise provision therefore exists. The plaintiff was a minor at the date of the gift, and, therefore, transfer of possession was not indispensable.

KEMBALL, J.—It appears that two Mahomedans by name Saheb-ul-Nissa and Abdul Rahim, the mother and uncle respectively of the plaintiff, mortgaged in 1871 a portion of the family property, of which they were tenants jointly with their relative Nurbibi, the grandmother of the plaintiff, to the defendant in this suit. Subsequently defendant obtained a decree against his mortgagors, and in satisfaction thereof proceeded to attach and sell the property mortgaged. Plaintiff applied for the removal of the attachment, alleging that the said property had belonged to his grandmother Nurbibi, who had

made a gift of it to him. His application being unsuccessful in the summary investigation which followed, plaintiff brought this suit to have it declared that the property in dispute was his, and was not liable to be attached and sold in execution of defendant's decree against Saheb-ul-Nissa and Abdul Rahim.

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It further appears that the aforesaid Nurbibi had brought a pauper suit in 1872, which, however, was registered as of 1875, for partition against Saheb-ul-Nissa and Abdul Rahim, and obtained a decree in 1876, and in execution of that decree the land mortgaged to the defendant was, as the Assistant Judge finds, "measured and marked out with pegs as the land which fell to Nurbibi's share under it." Subsequently to this, *i. e.* on the 10th February, 1877, Nurbibi executed the deed of gift on which the plaintiff bases his claim.

There is no dispute as to the above facts, but the plaintiff's claim has been thrown out in both the Courts below, on the ground that the gift was void under the provisions of the Mahomedan law, inasmuch as the donor was not herself in possession of the land in dispute, the Assistant Judge being of opinion that, though the act of measuring and marking out the land might amount to a taking possession by Nurbibi as against her relatives against whom she obtained her decree, it was quite inadequate to prove that defendant lost possession and Nurbibi acquired it.

A further ground for holding the gift bad was found in the circumstance that there had not been an entire relinquishment on the part of the donor.

Now, it is beyond dispute that to make a valid gift, under the Mahomedan law, it is requisite that there should be acceptance with seisin or taking possession; and it is no doubt an essential condition, as observed by the Assistant Judge, that the donor should be in possession of what he or she professes to give, but the question which naturally suggests itself in this case is, can a gift be valid as against one person and void as against another; in other words, was there the possession in Nurbibi requisite to complete the intention, which the words of the deed clearly import that she had, to make a complete gift and transfer of

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possession of the property in dispute as against her relatives, but not as against the mortgagee.

That Nurbibi was at one time in possession of the whole of the family property, is clear from the circumstance that the tenancy was joint, and although land being joint property cannot be bestowed by the contract of *nibah*, it is equally clear upon the authorities that immediately her share became defined, *i. e.* became a separate property, it would have been competent to her to have made a valid gift of it. That being so, *a fortiori* it was competent to her to make a gift of her share after it was separated off by metes and bounds, and reason requires that the same principle should be applied, whether the gift is to be enforced against the other co-sharers or against a third person claiming to have possession under them. None of the text books with which I am acquainted contain, so far as I am aware, any decision or reference to this point, and, moreover, assuming that no possession had been given under the decree as against any one, I know of no reason why the transfer of the decree to the plaintiff should not be valid so as to enable him, if his claim be in other respects good, to succeed upon it as against a trespasser. Having regard to the circumstances of the property, and to the fact that the decrees relating to the property were handed over with the deed of gift to the plaintiff, it would be idle to contend that there has been no livery of seisin. Possession arises from abandonment of the donor, and the Assistant Judge has quoted this passage from the *Tohfa*, page 59 of Volume 4: "The declaration of the donor that he has given possession is sufficient to denote real possession."

It is true that the Assistant Judge has found that Nurbibi interfered with the management of the property, after the declaration of giving possession, from which he concluded that there had not been an entire relinquishment by Nurbibi, but he appears to me to have left out of consideration one question of vital importance, *viz.*, the status of the plaintiff at the time of such interference: for if the plaintiff was then a minor and living under the guardianship of his grandmother, the conclusion was not justifiable. See the decision of the Judicial Committee of the

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Privy Council in *Ameerunissa Khatoon v. Abdoonissa Khatoon*(1) in which it was held that where there is on the part of a father or other guardian of a minor a real and *bona fide* intention to make a gift to the minor, the Mahomedan law will presume the subsequent holding of the property by the father or guardian to be on behalf of the minor. There is indication in the papers put in by the defendant of the plaintiff having been to a late period under the guardianship of Nurbibi, but it is necessary that there should be a distinct finding by a competent Court on the point. On the case going back therefore, an issue should be framed accordingly and evidence received. If this issue be found in favour of the plaintiff, it will still remain to be determined, whether, the gift to the plaintiff being valid, the defendant was entitled to attach and sell the property so conveyed. Why the particular portion of the family property was marked out and measured in execution of Nurbibi's decree, is not intelligible. I think this is clearly not a case of a *hiba* set up to defeat the claims of creditors. The suit for partition was instituted very shortly after the mortgage to defendant, and it was through no fault of Nurbibi apparently that three years were consumed in deciding on her claim to sue as a pauper. There is nothing to show that Nurbibi had knowledge of the mortgage. It is hardly possible that an old woman between 90 and 95, as she is stated to have been, would have been active in getting land, that had been mortgaged by her relatives, allotted to her share, and the idea of her being in league with these relatives would appear to be negatived by the fact that while her execution proceedings were pending, these same relatives allowed an award to be made against them at the instance of their mortgagee, which award was immediately filed in Court.

I would reverse the decree of the Court below, and return the case for retrial. Costs to follow the final decision.

PINHEY, J.—I am of opinion that the decree of the District Court is right, and should be confirmed.

It has been found as a fact by the District Court, and it is indeed admitted, that the defendant Manchershah has been in

(1) L. R., 2 Ind. Apps., p. 87.

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possession of the land in dispute from the time when it was mortgaged to him in 1871 up to the present time; and from this it seems to me to follow as a necessary consequence that Nurbibi was not in possession of the said land, and could not, therefore, under Mahomedan law, pass it by way of gift to the plaintiff on the 10th February, 1877, the date of the deed of gift, exhibit 30, on which plaintiff relies.

The land was mortgaged, with possession, to the defendant Manchershah in 1871 by Saheb-ul-Nissa and Abdul Rahim, the mother and uncle of the plaintiff, and defendant Manchershah has obtained a decree against the mortgagors for the recovery of the amount of his mortgage lien. Plaintiff has instituted this suit to prevent the defendant Manchershah from executing his decree against the mortgaged property, on the ground that the said property, together with other property, was assigned to the plaintiff on the 10th February, 1877, by a deed of gift executed by his grandmother Nurbibi, the mother of his father and the mother-in-law of Saheb-ul-Nissa, one of defendant Manchershah's mortgagors.

Nurbibi is described as an old-pardah woman of ninety or ninety-five on the date of the deed of gift, and she has since died. As she was a Mahomedan, it would not be strictly correct to describe her as a member of a joint undivided family, because that is a technical description applied to Hindus; but, at all events, the property of the family, to which she belonged, had never been divided into shares and allotted to the different members of the family.

Some time after the mortgagē of the property in dispute (which is only a small portion of the property that then belonged to the family) to the defendant Manchershah, Nurbibi instituted a suit against defendant's mortgagors and other members of their and her family for the recovery of her share of the family property. She did not make Manchershah a defendant in that suit. She obtained a decree awarding her share of the family property.

After obtaining her decree, Nurbibi proceeded to execute it. The decree was executed by marking or pegging out a portion of the property as her share.

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I remark, but I need not base any argument on the fact, that in allotting and marking off the share of Nurbibi, instead of marking off a portion of the property in the undisputed possession of her judgment-debtors, she or those acting for her got a portion of the property allotted to Nurbibi, which included the land previously mortgaged to Manchershah and in his possession. As Manchershah's possession has never been disturbed to this day, it is clear that Nurbibi never got possession of the land mortgaged to Manchershah, although she may have got possession of the land all round it. Nor did she file any suit against Manchershah to eject him or to get rid of his lien on the land in his possession. What she did was this. She executed to her grandson, the plaintiff, the son of one of the mortgagors and the nephew of the other, the deed of gift, exhibit 30, whereby she professed to make over to the plaintiff all she had obtained or was to obtain under her decree. And under this deed of gift plaintiff now sues to prevent Manchershah from executing his decree against the mortgaged property in his possession, or, in other words, to get possession of the land now in Manchershah's possession without paying the lien with which it is burdened. I am very strongly of opinion that the plaintiff is not entitled, under Mahomedan law, to succeed: for the land in dispute being in the possession of Manchershah and not of Nurbibi, the latter could not and did not give possession of the land in dispute to plaintiff, and that, therefore, the deed of gift is, according to Mahomedan law, invalid, and fails so far as the land in dispute is concerned, although the gift may be valid and good as to the rest of the property which it purports to convey to the plaintiff. And it is to me at all events satisfactory to find a technical rule of law subserving the justice and equity of the case: for it is clear that, apart from legal considerations, it would be a great wrong and injustice if plaintiff, who has not paid a pie for the property, were enabled to take possession of the property without paying off the charge on it put by his own mother and uncle, and to defeat the mortgage granted to defendant *bona fide* and for valuable consideration.

What I have said above disposes of the case on its merits, according to my view of it. But I should like to make one further remark on another point noticed by the District Court.

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The District Court held the gift invalid, not only because Nurbibi not having possession could not have given possession to plaintiff, but also because Nurbibi never entirely relinquished the property, as she was proved to have taken leases from tenants for a portion of the property after the deed of gift. I understand my brother Kemball to consider the taking of these leases by Nurbibi as not inconsistent with an entire relinquishment of the property, as plaintiff was at the date of the deed of gift only twenty years of age, and, therefore, legally a minor, and Nurbibi may therefore have been acting as plaintiff's guardian. It seems to me, however, that no such presumption arises, nor indeed that any such inference is probable in this case. In the first place, as plaintiff's mother was alive, she, and not Nurbibi, would be plaintiff's guardian according to Mahomedan law; and, in the second place, it is much more probable that a Mahomedan male of twenty would give leases of land than that an old pardah woman of ninety or ninety-five would undertake such a duty. And if her manager (witness 17) took the leases as agent for the owner of the property, it is much more probable that he would take the leases in the name of plaintiff if he were the owner than in the name of Nurbibi if she were not the owner and had entirely relinquished the land.

I do not, however, rest my judgment on this second point. I prefer to rest it on the first, viz., that the gift to plaintiff of the land in Manchershah's possession was invalid according to Mahomedan law, as this seems to me to meet the justice of the case.

I would confirm the decree of the District Court with costs.

KEMBALL and PINHEY, JJ., having differed in opinion, the case was referred to MELVILL, J., before whom the same pleaders appeared and argued as before.

MELVILL, J.—The instrument of gift on which the plaintiff found his claim purports to convey to the plaintiff, first, certain lands; (including the land in dispute,) of which the donor Nurbibi professes to have obtained possession under a decree against her co-parceners, and, secondly, all rights which might be recoverable under the decree, in so far as it had not been executed at the date of the gift. It is not necessary to consider what would be the effect, under the Mahomedan law, of the latter provision, because

the plaintiff is not now seeking the benefit of that provision. He does not come into Court to execute the decree, but to establish his right by suit to land, which the deed of gift alleges, and the plaintiff alleges, to have been actually recovered by Nurbibi in execution of the decree. The question, therefore, is that which has been put in issue by the Courts below, viz., whether Nurbibi had such possession as would enable her to make a valid gift according to Mahomedan law. Now, it has been found by the Courts below,—and by that finding this Court is bound,—that the defendant was, at the date of the gift, in actual possession under a mortgage executed by Nurbibi's co-parceners; and that Nurbibi, in executing her decree, failed to eject him. The possession which she obtained was only such symbolical possession as could be obtained under section 224 of Act VIII of 1859; and though such possession is, as against the defendant in the suit, equivalent to actual possession, it is of no avail against a third party—*Juggobundhu Mukerjee v. Ram Chunder* (1); *Lokessur Koer v. Purgun Roy* (2). It must, therefore, be held that at the date of the gift Nurbibi was simply the owner of property which was in possession of a mortgagee. In a recent case (Second Appeal No. 551 of 1881, decided 14th August, 1882,) it has been held that a Mahomedan so situated may sell the property; but the inference from that judgment is that he cannot make a gift of it. And this seems to be the result of the authorities. In Macnaghten's *Precedents of Gift*, Case No. 6 is very clear on the point. The case is thus stated:—

“Q. 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. By the same deed he made over to him certain other landed property of which he was possessed. 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?”

“R. The gift of a thing not in the possession of the donor during his lifetime is null and void, and the deed containing such

(1) I. L. R. 5 Calc., 584.

(2) I. L. R., 7 Calc., 418.

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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. According to the Hedaya: 'Gifts are rendered valid by the tender, acceptance and seisin. 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.*' So also is the *Surhi Viqaya*: 'A gift is perfected by complete seisin.' As the gift, therefore, is null, the claim of the donee is inadmissible, and the deed is invalid, as far as regards the lands of which the donor was never possessed. But, with respect to the other lands conveyed at the same time, the donee is entitled to them, if the donor put him into possession. If, however, the donor died, without conferring possession, the claim of the donee to them also is inadmissible."

To this case Mr. Macnaghten has subjoined the following note:—"The reason of the rule is, that seisin and delivery cannot be effected when the thing is not in the possession of the donor. It is of no consequence how the possession has been parted with, even though the proprietary right be expressly retained, or claimed, *as in the case of a pledge* or of an usurpation; but if, after the donor recover it, he put the donee in possession, it is sufficient." It was contended by Mr. Nanabhai that the plaintiff was a minor at the time of the gift, and that Mahomedan law does not require transfer of possession when the donee is a minor. But the authorities seem to go no further than this, that when the donee is a minor, possession may be had by a trustee on his behalf. They certainly do not seem to justify me in holding that a person out of possession may give to a minor what he could not give to an adult.

For these reasons I think that the decree of the District Court must be confirmed with costs.

The decree of the District Court was, in accordance with the opinion of the majority of the Judges, confirmed with costs.

*Decree confirmed.*