

## APPELLATE CIVIL.

*Before Mr. Justice Kemball and Mr. Justice Pinley.*

KUVARBAI, WIDOW OF BOMANJI (ORIGINAL PLAINTIFF), APPELLANT,  
v. MIR ALAM KHAN (ORIGINAL DEFENDANT), RESPONDENT.\*

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January 22.

*Mahomedan law—Deed of gift—Will—Estoppel—Declaration of heirship—  
Validity of declaration.*

The plaintiff sued the defendant to recover a sum of money by attachment and sale of certain property in the legal possession of the defendant. Both the plaintiff and the defendant professed to derive their title by virtue of a document which the Court found was invalid according to Mahomedan law.

*Held* that the defendant was not estopped from denying its validity, and the Court was not bound to hold that the document, as between the parties, was valid. The defendant being in possession it was for the plaintiff to establish her right to attach and sell the property by showing superior title in herself, whatever might be the rights of the defendant.

*Held* also that a document to the following effect was a deed of gift and not a will:—

"I have no children. Therefore my own brother, Mir Hemdoola *alias* Chotay Saheb, in his life-time placed in my lap his infant son, Mir Ruhulla, of his own free will and accord. From that day, having taken the said Mir Saheb into my family, I adopted him as my son. Consequently he is being brought up entirely by me, and he alone is also my heir. And I have appointed him the owner of all my goods and property. \* \* \* I have made over the same to the possession of the said Mir Saheb. \* \* \* I have a share in the goods and property of my husband, Mir Afzaloodin Khan Saheb, the Nawab of Surat. The owner thereof also is the same Mir Saheb. Therefore in my life-time should this property come into my hands, I will also deliver the same into the possession of the said Mir Saheb. Because the said Mir Saheb being the heir of all my goods and property, I have constituted him the possessor thereof by virtue of ownership. He is, therefore, the owner. And after me, should this property be divided, then the said Mir Saheb is the owner and absolutely entitled to receive my portion by the aforesaid right, by the right of ownership of my share, from the Court of His Honour the Agent. No one shall oppose him."

*Held*, further, that even if the direction in the above document as to making the grantee of the document the owner of the grantor's share in her husband's property be regarded as a declaration of title, such declaration had, according to Mahomedan law, no validity to create a proprietary right in the said share after the grantor's death.

THIS was an appeal against the decree of G. M. Macpherson, Judge of the district of Surat.

\* Regular Appeal, No. 87 of 1881.

The facts, in so far as they are material, were as follows :—

The plaintiff, Kuvarbai, sued to establish her right to recover by attachment of one-third of the one-anna share of the property of the last Nawab of Surat belonging to his widow, Padshah Begam, the amount of a debt due on two mortgage, bonds, dated respectively the 6th of December, 1863, and 20th May, 1864, executed in favour of the plaintiff's husband, Bomanji, by one Mir Ruhulla whom Padshah Begam had adopted as her son, and whom she had constituted her heir. The property sought to be attached had been lying, on behalf of the rightful owner, in the hands of the Agent to the Governor of Bombay at Surat, whose name was at first entered as a defendant on the record, but was expunged by an order of the High Court. On the application of the plaintiff's husband, and in execution of a decree which he had obtained on his first bond, the property was placed under attachment by the First Class Subordinate Judge at Surat, but the attachment was raised at the instance of the defendant, Mir Alam Khan.

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The defendant answered (*inter alia*) that Bomanji's bonds as well as his decree against Mir Ruhulla were fraudulent ; that on the 20th of August, 1864, Ruhulla transferred all his right in the property in question by a deed of sale to one Ratilal, who again on the 1st of October, 1864, transferred his rights to the defendant ; and that doubts having arisen as to Ruhulla's rights, a litigation ensued between the defendant and Ruhulla as well as his father, who was Padshah Begam's brother ; and the High Court by a decree made with consent of the parties on the 30th of June, 1875, confirmed the defendant's right to one-third of Padshah Begam's property inherited by her from her husband, the Nawab of Surat. The defendant further contended that the plaintiff's claim must stand or fall according as a certain document passed by Padshah Begam to Ruhulla was valid or invalid ; that Padshah Begam was not in possession of the property when she passed the document, and, therefore, whether regarded as a will or a deed of gift, it was invalid, and the plaintiff's claim must be rejected.

The District Judge (Mr. H. M. Birdwood) who heard the suit rejected the claim. On appeal by the plaintiff the High Court

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(Westropp, C. J., and Melvill, J.,) on the 21st of June, 1880, remanded the case for a new trial with the following amongst other observations :—

“ We are of opinion that it is not only open to Mir Alam Khan to deny that the property attached belonged to the judgment-debtor, Mir Ruhulla, but also to allege that the decree has been obtained by fraud and collusion between Bomanji and Mir Ruhulla, and that the mortgage upon which the award was made was antedated and fraudulently executed for the purpose of defeating the assignment by Mir Ruhulla to Ratilal and the assignment by Ratilal to Mir Alam Khan. These allegations have not been dealt with by the District Judge, but on the re-trial they should be carefully investigated and determined by the District Judge. The burden of proof of these allegations will be on Mir Alam Khan.

“ The plaintiff has omitted to produce and prove in this suit the alleged assignment, or gift, or will of the 23rd of December, 1859, by Padshah Begam to Mir Ruhulla, and the plaintiff has not given any reason for its non-production such as would justify resort to secondary evidence.

“ The document alleged to be such assignment, gift, or will happens to be amongst the records of the Court in Regular Appeals 33 and 34 of 1874, and we think that the safest course for us to pursue will be to remand this cause for re-trial and to permit the plaintiff to produce and prove, if she can, that document. It will be for the District Judge to consider whether it is proved, and if so, whether it, having regard to the circumstances under which it was executed, and especially to the fact that Padshah Begam was a Mahomedan, was valid in the whole, or in part, or at all, and also as to whether or not she had possession of the property now sued for and alleged to be assigned by her, and, if not, what was the effect of such want of possession by her. The proof of the said assignment and the extent, if any, of its validity are issues the burden of which lies on the plaintiff.”

On re-trial before the District Judge (Mr. G. M. Macpherson) the plaintiff produced the document alluded to above. The material part of it was as follows :—

“ I have no children. Therefore my own brother, Mir Hemdoola *alias* Chotay Saheb, in his life-time placed in my lap his infant son, Mir Ruhulla, of his own free will and accord. From that day, having taken the said Mir Saheb into my family, I adopted him as my son. Consequently he is being brought up entirely by me, and he alone is also my heir. And I have appointed him the owner of all my goods and property. \* \* \* I have made over the same to the possession of the said Mir Saheb \* \* \* I have a share in the goods and property of my husband, Mir Afzaloodin Khan Saheb, the Nawab of Surat. The owner thereof also is the same Mir Saheb. Therefore in my life-time should this property come into my hands, I will also deliver the same into the possession of the said Mir Saheb. Because, the said Mir Saheb being the heir of all my goods and property, I have constituted him the possessor thereof by virtue of ownership. He is, therefore, the owner. And after me, should this property be divided, then the said Mir Saheb is the owner, and absolutely entitled to receive my portion by the aforesaid right, by the right of ownership of my share, from the Court of His Honour the Agent. No one shall oppose him.”

The execution of this document Mr. Macpherson on re-trial held to be most clearly proved. As to its nature he recorded the following judgment :—

“ The plaintiff’s pleader admits that if it is a deed of gift this is fatal to his claim. Mr. Birdwood’s decision in Suit No. 16 of 1872 is recorded in this case, and contains an account of the disputes as to the property of the late Nawab of Surat, and refers to Act XVIII of 1848 as to the administration of his estate. I need not enter at length into this matter. Padshah Begam, as the Nawab’s widow, was entitled to a share of his property. She executed the document in dispute (No. 163) on 23rd December, 1859. She died in 1861. She had nominal possession of some of the Nawab’s property when she executed this deed, but she had not possession in the sense which would allow her to give it away. It was not then known what property would fall to her share. She had possession by sufferance of the Agent, and not as owner. It was not till 1871 that the distribution of the pro-

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perty was effected, and that it was known what fell to her share, *i. e.* till about ten years after her death. Now, the Mahomedan law is extremely strict as to the necessity of possession of property which is the object of a gift. 'A gift cannot be made to depend on a contingency. Acceptance and seizin, on the part of the donee, are as necessary as relinquishment on the part of the donor.'

"The gift of property which is undivided and mixed with other property is null and void, unless it be defined previously to delivery.' Now, in this case it was quite uncertain what would fall to Padshah Begam's share, and, therefore, she could not make a present of what might thereafter be found due to her. Therefore, if this deed is a deed of gift, it is illegal, and in ordinary circumstances invalid. 'A gift on a death-bed is viewed in the light of a legacy, and cannot take effect for more than a third of the property.' But in this case Padshah Begam cannot be said to have made a death-bed gift. She did not die till 1861, and executed the deed in 1859; and though she talks of being ill and old, and doubtful of life, there is nothing to show that she was then decidedly ill, and, moreover, she lived till 1861. Mr. Birdwood held this document to be a will, following the decision of the Madras High Court, Vol. 2, pp. 350, &c. But this document differs materially from the one before the Madras High Court. In the Madras case the person executing the document held to be a will declared himself during his life-time a trustee of the income. The care of the property he still kept in his own hands. It was held that the words as to his not knowing when he would die 'override the whole of the rest of the document, which is, moreover, quite consistent with the intent to execute a will, but wholly inconsistent with the notion of an irrevocable deed.' In this case all these conditions are wanting, and the circumstances are exactly the reverse. Padshah Begam declares over and over again that Mir Ruhulla is at the time put in possession of what she gives him, and if she gets her husband's property it will in like manner be taken by him, as he is owner of all she has. She makes him owner of all she has or ever may have. \* \* \* This is clearly a deed of gift, and as such admittedly was invalid. But I do not think that the general rule can be applied to this case.

In this case I think that both parties are bound to admit the validity of the deed, and that neither party is at liberty to deny it. The defendant has no right to the property in dispute, save what he derived from Mir Ruhulla, whose right depends on this document. Mir Ruhulla sold his right to Ratilal, which right was transferred by sale to the defendant. Therefore, his right depends on the gift to Ruhulla, and he who holds by virtue of that gift cannot say that the gift was invalid or illegal. It is true that he holds under a decree of the High Court as between himself and Mir Ruhulla's father, which decree was passed by consent of parties in appeal from the decision passed by Mr. Birdwood in the case above referred to, in which Mir Alam Khan was the plaintiff. In that case he sued for property his right to which depended on the gift by Padshah Begam to Mir Ruhulla ; a third of it, that now at stake, was awarded, and both the parties appealed. By consent the original decree was upheld. But admittedly Mir Alam Khan had no right to the property, save what depended on the deed he now wishes to be declared invalid. I consider that he cannot do so, and that whatever defects there were as to possession, &c., cannot be relied on by him."

The District Judge, however, held that although the original mortgage by Mir Ruhulla to the plaintiff's husband, Bomanji, was not fraudulent, the proceedings which followed, *viz.*, the reference to arbitration and the order filing the award, were fraudulent. That Bomanji cheated Ruhulla and fraudulently induced him to agree to the arbitration and the filing of the award, and intended to cheat Mir Alam Khan thereby, and therefore these proceedings could not affect Mir Alam Khan. The District Judge, therefore, again rejected the plaintiff's claim.

The plaintiff appealed to the High Court.

*Nanabhai Haridas*, Government Pleader, for the appellant.—The District Judge was in error in holding the document passed by Padshah Begam to Mir Ruhulla to be a deed of gift. It is a will, and it was not necessary that she should have had possession of the property which she intended to bequeath to her adopted heir. But supposing that she intended to part with present possession of some of her property, she did not intend to do so with

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respect to the property now in dispute ; for with regard to her share in her husband's property she says : " And after me, should this property be divided, then the said Mir Saheb is the owner and absolutely entitled to receive my portion." This stamps the document with the character of a will, for it is undoubtedly in contemplation of death, and the bequest is directed to take effect after her death. It is at least a declaration, and takes effect as such—Macnaghten's Principles and Precedents of Mahomedan Law, Case II, p. 242 ; *Mahomed Altaf Ali Khan v. Ahmed Buksh and others* (1) ; and *Prince Suleman Kadr v. Darab Ali Khan* (2). The finding of the Judge as to collusion between the plaintiff's husband and Mir Ruhulla is opposed to the evidence in the case. He having found that the original mortgage by Mir Ruhulla to Bomanji was genuine and not effected with the object of defeating the assignments to Ratilal or the defendant, a decree should have been made in favour of the plaintiff.

*Shantaram Narayan* for the respondent.—The document passed by Padshah Begam was a gift. The Begam made Mir Ruhulla the owner of her property from the date of this document. When she speaks of Mir Ruhulla taking her husband's share after her death, she says he is to do that by virtue of the right of ownership which he has acquired. But the Judge is wrong in holding that the defendant cannot contest its nature. The defendant being in possession it was for the plaintiff to prove her superior title. Not only has she no superior title, but such as she has, was acquired by a fraudulent mortgage followed by a collusive arbitration and decree.

KEMBALL, J.—Two points arise in this case as it now presents itself before us : first as to the validity of the assignment of the property in dispute by Padshah Begam to Mir Ruhulla which it was for the plaintiff to establish ; and, second, (assuming that the property had validly passed to Mir Ruhulla) as to the *mala fides* of the quasi consent decree obtained by Bomanji, the husband of the plaintiff, against Mir Ruhulla, the burden of proof being on the defendant.

The first question turns on whether the document just refered

(1) 25 Calc., W. R., 121 P. C.

(2) L. R., 8 Ind. Ap., 117.

to was a deed of gift or a will, for it was conceded in the Court below and admitted here (on the authority of a case recently decided in this Court) that if it was a deed of gift, then plaintiff's case must of necessity fail. The District Judge has found that the document was a deed of gift, and "as such admittedly was invalid"; but he refused to apply the general rule to the case, as defendant had no right to the property in dispute, save what he derived from Mir Ruhulla, whose right depended on the said document, and he went on to consider the second question which he found in favour of defendant and against the plaintiff. But we are unable to concur with the Judge that, as between the parties, he was bound to hold the document in question to be valid. The attachment having been raised at the instance of the defendant, and the defendant being, as the Judge has found, in possession of the property, it was for the plaintiff to establish her right to attach and sell the property, and she could only do so by affirmatively proving that there had been a valid assignment to her judgment-debtor, Mir Ruhulla, whatever might be the rights of defendant.

As to the validity of the document it is contended on behalf of the plaintiff, appellant, that even if it be a deed of gift as regards the rest of the property, still as to this particular property or "*matruka*" it was a will, the assignment under paragraph 4 being clearly intended, if such property had not been reduced into possession during her life-time, to take effect after her death. We agree, however, with the District Judge in thinking that the deed in question was a deed of gift, the obvious intention of Padshah Begam when executing it having been to make Mir Ruhulla presently absolute owner of all her property which she then had or might thereafter have in possession; and we also think that, if paragraph 4 of the said deed, which, looking at its wording, cannot be taken as evidencing in any sense of the term a bequest, is to be regarded as a declaration of Mir Ruhulla's title to this portion of her property, such a declaration had no validity as to the creation of a proprietary right after her death—see Case 54, p. 125, Macnaghten's Principles and Precedents of Mahomedan Law, which is on all fours with the present. We have been referred to Case II at p. 242 of the same work, but the intent and

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meaning of the declaration there were wholly different to those of the declaration in this case. Two cases—*Mahomed Altaf Ali Khan v. Ahmed Buksh and others* (1) and *Prince Suleman Kadr v. Darab Ali Khan*(2)—were also cited to us, but in them the disposition of the property in dispute was clearly intended to have effect only after the death of the owner.

In this view of the case it is unnecessary to determine whether the defendant has succeeded in establishing clearly the fraud and collusion between the plaintiff's husband and Mir Ruhulla in the matter of the decree obtained against the latter; but as the District Judge has discussed and decided on the evidence on this point, and the matter has been argued at length here, we think it necessary to observe, having regard to the circumstances set forth in full in the lower Court's judgment, and to the fact, not noticed therein, that Bomanji kept no accounts or record of his money dealings, though the mortgage to him was avowedly in respect of previous money dealings, that it is to our mind difficult to separate the mortgage transaction which the Judge says is not shown to have been fraudulently executed from the decree which he was clearly of opinion had been obtained by fraud and collusion between Bomanji and Mir Ruhulla for the purpose of defeating the claim of Ratilal. Mir Ruhulla himself says that the deed of sale to Ratilal was before the mortgage to Bomanji; and though the Judge refuses to believe Mir Ruhulla on this point, it is not clear why Bomanji and Mir Ruhulla should try to give to a transaction, which was fair and above board, the corroboration of a sham decree. With these remarks we confirm the decree of the lower Court with costs.

*Decree confirmed.*

(1) 25 Calc. W. R., 121, P. C.

(2) L. R., 8 Ind. Ap. 117,