APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Nánábhái Haridás.

1884
September 9.

SHAIK IBHRA'M (ORIGINAL DEFENDANT), APPELLANT, *v.* SHAIK SULEMA'N AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS*.

Mahomedan law—Gift—Possession—Delivery—Donee in physical possession prior to gift—Formal delivery, entry or departure—Manifest intention of donor to transfer.

For the purposes of completing a gift of immoveable property by delivery and possession, no formal entry or actual physical departure is necessary; it is sufficient if the donor and donee are present on the premises, and an intention on the part of the donor to transfer has been unequivocally manifested.

Semble—A gift by a sick person is not invalid if at the time he made it he was in full possession of his senses, and there was no immediate apprehension of death.

Muhammad Gulshere v. *Mariam Begam* referred to.

THIS was a second appeal from the decision of R. F. Mactier, District Judge of Sátára, confirming the decree of the Joint Subordinate Judge at the same place.

One Rasoolbhoy died, leaving him surviving three sons, *viz.*, Sulemán, Fakir Mahomed and Sultán. Sulemán died first, and after him Fakir Mahomed died, the former leaving behind him a widow and a son, and the latter his childless widow only. Lastly, Sultán died on the 21st July, 1876, without any heirs.

By a deed of gift duly executed and registered, dated the 4th of June, 1876, Sultán gave to the defendant Shaik Ibhrám some lands and his dwelling-house, the subject-matter of dispute. In it Sultán says that "as my wife is dead, and as I have no issue, Ibhrám has done and will do service for me as son, and I, therefore, give the property to him."

The plaintiffs were the son and widows of Sulemán and Fakir Mahomed respectively. They sued the defendant to recover possession of lands, survey Nos. 40 and 58, situated in the village of Niley, in the Sátára District, and a house situate in the city of Sátára, and alleged that they were the undivided ancestral property of their ancestor Rasoolbhoy, who died leaving behind

*Second Appeal, No. 444 of 1883.

(1) I. L. R., 3 All., 731.

him the three sons above named, who also died one after another, in commensality; that they were entitled to the said property after the death of Sultán; that the defendant took wrongful possession thereof, setting up his title to the property under a deed of gift alleged to have been passed in his favour by Sultán, who had no authority to do so. They submitted that the alleged gift was nugatory and inoperative, being a gift of ancestral property and being unaccompanied with immediate possession.

In his written statement the defendant denied that Sultán was a member of an undivided family, or that the property was acquired in co-parcenership. He alleged that it had been acquired by Sultán alone, and that Sultán being his half-brother lawfully gave it to him.

The Joint Subordinate Judge of Sátára found the gift proved. He, hoewver, held the gift to be void, and he allowed the claim of the plaintiffs with the following remarks :—

"The deed of gift is dated June 4th, 1876. The donor died on the 21st of July the same year. It has been brought out by the evidence of the parties that, about six months prior to his death, Sultán was suffering from black leprosy, and died in his house of the same disease. Under the Mahomedan law a deed of gift, executed at a time when the grantor was labouring under a sickness from which he never recovered, cannot operate, save as a will, and no such death-bed gift is valid beyond one-third of the clear residue of the estate. But even to the extent of one-third it cannot operate, unless possession is given. Under the Mahomedan law acceptance and seizin on the part of the donee are as necessary as relinquishment on the part of the donor. It appears satisfactorily, from the evidence of the defendant's own witnesses and that of the plaintiffs, that Sultán lived in his house till his death, and no delivery of possession was made so as to make the gift valid. The best way for delivery of possession was to give *rájináma* before the revenue officers, and have the defendant's name entered in his stead; but the land, it appears, still stands in the name of the deceased. Again, an attempt has been made to prove the delivery of possession of the lands by examining two witnesses, but I am not inclined to put

1884

SHAIK IBHRÁM v. SHAIK SULEMÁN.

any reliance on them. The other witness states that Sultán told him to give rent to the defendant at Niley, but in his cross-examination he states that Sultán did not receive rent for a year, or a year and a half, before his death. He again states that Sultán did not go to the village to collect rent for four or five months before his death. The deed of gift was made about six weeks before his death, and Sultán could not go to the village to inform the witness of his gift. Under these circumstances, I feel myself bound to hold that no relinquishment on the part of the donor and seizin on the part of the donee had ever taken place, and, consequently, the gift becomes nugatory and inoperative.

"The defendant is not, as alleged, brother or half-brother of Sultán. Hence, in the absence of any other preferable heir, the plaintiffs, as brother's son and widows, are entitled to succeed. For these reasons I decree the claim, and award the possession of the premises to the plaintiffs."

From this decision the defendant appealed to the District Judge at Sátára, who confirmed the decree of the Court of first instance.

The defendant appealed to the High Court.

Ghanashám Nilkanth Nádkarni for the appellant.—The gift to the appellant was a valid gift. Everything was done to give possession. The donee was already in physical possession of the house in question. The title-deeds of the property, the subject of the gift, were put into the possession of the donee, and even the deed of gift was registered. No formal delivery or declaration was necessary. Where a person has physical detention of a thing, a declaration that he is the owner of it is equivalent to delivery of possession—*Bái Kushál* v. *Lakhma Mána*[1]; *Ameeroonissa* v. *Abedoonissa*[2]; *Santaya Mangarasaya* v. *Náráyan Shánbhog*[3]; *Kuverbái* v. *Mir Alamkhán*[4]; *Jaro Bebee* v. *Ghásirám*[5]; *Prince Sulemán* v. *Dárab Ali Khán*[6]. Where there is clear intention to give, no particular form is necessary—*Mahomed* v. *Ahmed*[7];

(1) I. L. R., 7 Bom., 452.
(2) L. R., 2 Ind. Ap., 87.
(3) Printed Judgments for 1883, p. 20.
(4) I. L. R., 7 Bom., 170.
(5) 3 Calc. Rep., 247.
(6) L. R., 8 Ind. Ap., 177.
(7) 25, W. R., 121.

Mancherji Sorábji v. *Kongseoo*[1]. The present gift may be looked upon as *hebabelivaz,* or a gift for consideration. Past and future service rendered and to be rendered to the donor is the consideration here. In such a case seizin by donee is not necessary—Macnaghten's Mahomedan Law, 150, sec 52. There was complete relinquishment necessary to constitute a complete gift—Macnaghten, 50, sec. 8. After the gift to the appellant the donor did not exercise any act of ownership. A gift is not resumable where the donee is a relative of the donor, and consideration is received, and the appellant here was related to the donor as his half-brother, and rendered the donor services: see Macnaghten, sec. 30, p. 435, case 11. Though the donor was ill, the gift is valid, as the illness from which he was suffering was a chronic illness—*Muhammad Gulshere Khán* v. *Mariam Begam*[2]. The donor was in his senses, and there was no expectation or apprehension of death, so as to render it invalid.

Gangárám B. Rele for respondents.—The alleged gift was an incomplete gift. Under the Mahomedan law to make a gift perfect at the time of the gift actual delivery of possession of the property and entire relinquishment on the part of the donor are necessary—Macnaghten 50, sec. 2. There must also be exclusive possession of the donee—Macnaghten, p. 435, precedents 15, 16, 17; *Ibid.*, 231, case 22; Macnaghten, pp. 234, 336. Delivery of the thing given, so far as it admits of delivery, is necessary to make a gift valid: see *Khagooroonissa* v. *Rowshan Jehan*[3]. Here the gift was a death-bed gift, and made in expectation of death. The donor died shortly afterwards. It should be considered as a legacy, and a legacy may not exceed one-third of the property. In the case of *Bái Kushál* v. *Lakhmá*[4] there was prior possession, but no such possession was found in the present case. In *Ameeroonissa* v. *Abedoonissa*[5] the donor was a guardian of the donee.

WEST, J.—The Subordinate Judge in this case was wrong in refusing to take the evidence of the two witnesses tendered by the defendant Ibhrám, while the hearing of the case for the

(1) 6 Bom. H. C. Rep., 59, O. C. J.
(2) I. L. R., 3 All., 731.
(3) I. L. R., 2 Calc., 184.
(4) I. L. R., 7 Bom., 452.
(5) L. R., 2 Ind, Ap., 87.

1884

SHAIK IBHRÁM v. SHAIK SULEMÁN.

defence was still proceeding. It was not for the Subordinate Judge to pronounce, without hearing the witnesses, whether their testimony would be useful or not. If it had turned out that they had nothing of importance to say, and that the public time had been wasted in their examination, the Subordinate Judge could have thrown the costs needlessly incurred upon the defendant, but he ought not to have taken the conduct of the defendant's case and the production of evidence out of his hands and those of his pleader.

In discussing the evidence of the witnesses, the Courts below have mistaken, in some instances, what was really stated. Thus the Subordinate Judge says, the witnesses prove that the deceased Sultán was a sufferer from leprosy, though in their vague and inconsistent descriptions none of them seems to depose that Sultán was afflicted with this disease. Again, the District Judge says that the witness No. 28 deposes that Sultán did not go to Niley for seven or eight months before he died. What the witness really says is that Sultán did not go there to collect rent or assessment. The testimony must be carefully reconsidered along with that of the two witnesses whom the Subordinate Judge formerly rejected, should Ibhrám still desire to examine them.

As to the law of the case the Courts below are to bear in mind that when land is occupied by tenants, a request to them to attorn to the donee is the only possession that the donor can give of the land in order to complete a proposed gift. Such a possession would, according to the case of *Khajoorconissa* v. *Rowshun Jehan*[1], be sufficient. As to the delivery of the house, the principle is to be borne in mind, that when a person is present on the premises proposed to be delivered to him, a declaration of the person previously possessed puts him into possession[2]. He occupies certain part, and this occupation becoming actual possession by the will of the parties, extends to the whole which is in immediate connection with such part where the possession is rightfully, though not where it is wrongfully taken—*Ex parte Fletcher*[3]. An appropriate intention where two are present on the same pre-

(1) I. L. R., 2 Calc., 184, 197. (2) Domat C. L., I., 863.
(3) L. R., 5 C. D., 809.

1884

SHAIK IBHRÁM v. SHAIK SULEMÁN.

mises may put the one out as well as the other into possession without any actual physical departure or formal entry, and effect is to be given, as far as possible, to the purpose of an owner, whose intention to transfer has been unequivocally manifested.

On the subject of the alleged illness of the donor Sultán as affecting the validity of the donation, reference may be made to *Muhammad Gulshere* v. *Mariam Begam*(1). The appreciation of the evidence on this subject is a matter for the lower Courts, as is also the effect of the testimony as to Sultán's handing over the *sanad*, title-deed, and receipt book to Ibhrám when he gave or attempted to give him the house at Sátára and the other property in dispute.

We reverse the decree of the District Court, and remand the cause for re-trial and a fresh adjudication with reference to the foregoing observations. Costs to follow the final decision.

Decree reversed and case remanded.

(1) I. L. R., 3 All., 731.

APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Nánábhái Haridás.

1884

September 15.

RA'JA'RA'M BHAGWAT, APPLICANT, *v.* JIBA'I, WIDOW OF KHA'N MAHOMED, DECEASED, OPPONENT.*

Practice—Procedure—Parties—Civil Procedure Code (Act XIV of 1882*), Secs.* 368, 369 *and* 372*—Death of a respondent pending appeal—Right of assignee of his interest to be substituted in his place.*

At an auction sale held in execution of a decree passed against one Ganpat Anandráv, certain property put up for sale was purchased by one Khán Mahomed, the husband of the opponent.

Subsequently Krishnaráv Anandráv, the brother of Ganpat Anandráv, brought a suit against the opponent to establish his right to the property purchased by the opponent's husband. On the 17th February, 1882, he obtained a decree declaring that he (Krishnaráv Anandráv) was entitled to a half share of the property in dispute, and an order was made that he should have joint possession with the opponent of one moiety of the property.

* Civil Application, No. 193 of 1884.