

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and
Mr. Justice Nánábhái Haridás.

MOGULSHA, (ORIGINAL DEFENDANT,) APPELLANT, v. MAHAMAD
SA'HEB AND OTHERS, (ORIGINAL PLAINTIFFS), RESPONDENTS.*

1887.
March 3.

Mahomedan law—Gift without delivery of possession—Hiba-bil-uwuz, or gift on stipulation—Possession necessary for such a gift—Registration not equivalent to delivery of possession so as to validate gift.

By a deed of gift duly executed and registered, a Mahomedan woman gave certain property to the plaintiff's father. The deed stated that the plaintiff's father had always protected the donor, and that she gave him the property in full confidence that he would continue to do so.

Held, that the gift, if not a simple gift, was, at any rate, a "gift on stipulation," and that such a gift, in order to be valid, required that seizin should be given to the donee.

The registration of a deed of gift between Mahomedans does not cure the want of delivery by the donor.

APPEAL from an order of G. McCorkell, Acting District Judge of Khándesh, at Dhulia.

This was a suit brought by the plaintiffs for a declaration of their right and title to certain property alleged to have been given to their father by a deed of gift executed on the 21st April, 1873, by one Sabadi. The plaintiffs alleged that the property had been in the possession and enjoyment of their father until his death; that on his death the property was taken charge of by the village authorities, who would have made it over to the plaintiffs, but for the objection of the defendant, who claimed it as his own.

The defendant denied that the plaintiffs' father ever had possession of the property, and contended (*inter alia*) that the deed of gift set up by the plaintiffs was null and void, having been obtained from Sabadi when she was incapacitated by severe illness.

The Court of first instance held the deed of gift invalid, on the grounds (1) that there had not been delivery of possession, and (2) that the gift had been made during Sabadi's illness, and accordingly dismissed the suit.

* Appeal from order, No. 46 of 1886.

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The plaintiffs appealed to the District Judge, who reversed the decree of the lower Court, and remanded the case for retrial.

From this order of remand the defendant appealed to the High Court.

Goverdhanráam Mádhavrám for the appellant.

Maneksháh Jehángirsháh for the respondent.

SARGENT, C. J. :—The District Judge has held that the alleged gift by Sabadi could not be impeached on the ground that possession had not been given to the plaintiffs' father for two reasons:—first, because the defect of non-delivery of possession would be cured by registration; and, secondly, because the instrument was not a deed of gift simply, but what is termed by the Mahomedan law a *hiba-bil-iwuz*. As to the first of these grounds, it has already been held that registration does not cure the want of delivery of possession by the donor in the case of a gift between Hindus—see *Vásudev Bhat v. Náráyan Dáji Damle*⁽¹⁾ and *Dagai Dabee v. Mothura Náth Chattopadhya*⁽²⁾—and that ruling would appear to be equally, if not more especially, applicable to gifts under the Mahomedan law. As to the instrument itself, it states that plaintiffs' father had always protected the donor, and that she gives him the property in full confidence that he will continue to do so. The instrument, therefore, if not a simple gift, is, at any rate, “a gift on stipulation,” which equally requires that seizin should be given to the donee. The distinction between this description of gift and the *hiba-bil-iwuz* is discussed in Macnaghten's Principles and Precedents of Mahomedan Law, page 219 (4th ed.). We think, therefore, that the validity of the gift will still depend upon the question whether or not possession was given to the plaintiffs' father or the plaintiffs themselves after his death; and as the District Judge has not recorded a finding on that issue, we must discharge the order of remand, and send back the case for a fresh decision, having regard to the above remarks. Costs of this appeal to abide the result.

(1) I. L. R., 7 Bom., 131.

(2) I. L. R., 9 Calc., 854.